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Religious Minorities and Sexual Diversity: The Holistic Approach

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RÉSUMÉ

L'article propose une réflexion sur la relation entre la notion de minorité religieuse et les droits LGBT dans le droit international et européen. Cette contamination progressive est analysée suivant trois étapes : l'exclusion, l'inclusion et l'approche holistique. Partant de l'exclusion originelle des droits LGBT et des droits des minorités des droits humains, l'émergence de la diversité sexuelle dans le statut juridique des minorités religieuses est d'abord tracée grâce à la nouvelle formule « minorité sexuelle » puis par l'approche holistique des Nations unies à la liberté de religion ou de conviction.

ABSTRACT

This article aims to investigate the relation between the religious minority status and LGBT rights in international and European law. Three phases are singled out: exclusion, inclusion and holistic experimentation. As sexual and human minority rights were originally not counted among fundamental freedoms, the gradual inclusion of sexual diversity is observed first with a focus on the new concept of “sexual minority” and then in the United Nations’ holistic approach to freedom of religion or belief (FoRB).

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INTRODUCTION

In its 2010 report on “Minority Rights: International Standards and Guidance for Implementation”, the United Nations High Commissioner for Human Rights of United Nations highlighted new questions pertaining to the definition of minorities and the protection of minority rights. The expert first asked whether “persons with disabilities, persons belonging to certain political groups or persons with a particular sexual orientation or identity (lesbian, gay, bisexual, transgender or intersexual persons)” fell within the remit of the international notion of minority. Secondly, the High Commissioner generally recalled that “the United Nations Minorities Declaration is devoted to national, ethnic, religious and linguistic minorities”. In light of this, the text added that it “is also important to combat multiple discrimination and to address situations where a person belonging to a national or ethnic, religious and linguistic minority is also discriminated against on other grounds such as gender, disability or sexual orientation”.¹ Based on the latter statement, minorities and LGBTI² people intersect in two different respects: a group of homosexual, bisexual, transgender or intersexual persons can be designated as a minority in international law in addition to the traditional four models protected by international law (national, ethnic, religious and linguistic); minority rights may be implemented to protect LGBT people from multiple discrimination. Recently, the European Union (EU) has endorsed this approach through the European Commission’s “LGBTIQ Equality Strategy 2020-2025”.³ Amid this EU effort to protect LGBTIQ rights, LGBTIQ people who “come from ethnic or religious minority background” are described as more vulnerable to discrimination. LGBTIQ persons who are part of religious minority groups are accordingly a target group of the European Union’s agenda for the protection of LGBTIQ rights. In more general terms, in 2016, the Council of Europe stressed the necessity to mention LGBTI people in the framework of minorities only “when the specific needs of certain minorities need an extra focus of emphasis

1. UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *Minority Rights: International Standards and Guidance for Implementation* (HR/PUB/10/3/2010), 2010, p. 3.

2. In international and European law, LGBTI is an acronym referring to subjects who identify or are defined as lesbian, gay, bisexual, trans (transgender, transsexual) and intersex. The terms LGBT minus the reference to intersexual people, and LGBTIQ, which includes queer people, are also used.

3. EUROPEAN COMMISSION, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Union of Equality: LGBTIQ Equality Strategy 2020-2025*, 12 Nov. 2020, p. 4.

in policies”.⁴ Overall, a synergy⁵ has emerged regarding the approaches to sexual diversity and religion-related matters between international and European bodies. Also, and as will be discussed later, this synergy has led to new challenges to the traditional legal definition of religious minorities in international and European law.

Based on this introductory overview, starting from the original exclusion of minority rights and LGBT rights from human rights, my hypothesis is that the recent gradual recognition of LGBT rights has had an impact on the traditional definition and the legal status of religious minorities through the protection of the right of freedom of conscience and religion of homosexual persons.⁶ To explore this issue, I propose an analysis divided into three chronological sections retracing the contamination between sexual diversity⁷ and religion in minority rights.

1. EXCLUSION (1948-1977)

The dynamic of exclusion of sexual diversity and minority rights from the remit of fundamental rights can be traced from 1948 to 1977, a period characterized by different trajectories for human rights and religious minority rights.

In 1948 and 1950, the legal codification process of human rights at the international and European level did not include any explicit provision mentioning religious minority and rights linked to sexual diversity.

The Universal Declaration of Human Rights guarantees only the freedom of conscience or religion (Art. 18 UDHR) and the principle of non-discrimination on grounds of sex (Art. 2 UDHR). Overall, these provisions were also endorsed by the Council of Europe in the draft European Convention

4. COUNCIL OF EUROPE, *Compendium of Good Practices on Local and Regional Level Policies to Combat Discrimination on the Grounds of Sexual Orientation and Gender Identity*, June 2016, p. 11.

5. On the notion of synergy in legal sources and policies relating to minority rights, see K. HENRARD and R. DUNBAR (eds.), *Synergies in Minority Protection. European and International Law Perspectives*, Cambridge, Cambridge University Press, 2008.

6. P. JOHNSON and R. M. VANDERBECK, *Law, Religion and Homosexuality*, Abingdon-New York, Routledge, 2014.

7. In this regard, see this recent, important and extensive example of investigation of the notion of “sexual diversity” in scholarship: M. J. BOSIA, S. M. McEVOY and M. RAHMAN (eds.), *The Oxford Handbook of Global LGBT and Sexual Diversity Politics*, Oxford, Oxford University Press, 2020.

of Human Rights which, similarly, protects them within Article 9 and 14 ECHR (freedom of conscience or religion and non-discrimination protection, respectively).

Although the reasons for these two gaps differ, it is evident that, initially, religious minorities and gays did not fit the model of inviolable rights picked in Geneva. In particular, the notion of religious minority emerged from debates at the UN level on the opportunity to include human rights within the text of the UDHR⁸.

Yet, in the UDHR, the concept of sexual orientation is excluded from the principle of non-discrimination in Article 2 (albeit indirectly); it is implicitly defined and shaped in reference to the heterosexual models cited regarding the right to marry and to found a family in Article 16.

It emerged from the debate at the United Nations Committee in charge of processing the Universal Declaration, the term “sex” used in Article 2 on the principle of non-discrimination referred to men and women.⁹ Discrimination based on sex did not apply to homosexual or transsexual people. In that context, as well as in Article 14 of the European Convention, sex means male and female and does not take sexual orientation into account.

Mirroring a definition of marriage that excluded same-sex partners, human rights solely acknowledged the heterosexual model at the global and regional level. The analysis of Article 16 in the Universal Declaration and Article 12 of the European Convention of Human Rights support this assumption. Article 16 states that “men and women of full age [...] have the right to marry and to found a family”. Article 12 used a similar phrasing, reading: “Men and women of marriageable age have the right to marry and to found a family”. These wordings adhere to the Western religious tradition of marriage, as exemplified by canon law, and recognize the legal notion of family as a fundamental right for men and women. The influence of Western values on the draft Article 12 was pointed out by representatives of Islamic states during the elaboration of the Universal Declaration. Jamil Baroody, a Saudi

8. In my book on the concept of religious minority in international and European law, I have shown that initially, the United Nations found the inclusion of minority rights in human rights problematic due to the difficulty of encapsulating the concept of ethnic, linguistic and religious minority in a specific universal provision. See D. FERRARI, *Il concetto di minoranza religiosa dal diritto internazionale al diritto europeo. Genesi, sviluppo e circolazione*, Bologna, Il Mulino, 2019, p. 64 ff.

9. See, for example, WORKING GROUP ON THE DECLARATION ON HUMAN RIGHTS, *Summary record of the 2nd meeting* (E/CN.4/AC.2/SR.2), 5 Dec. 1947, p. 2-3.

Arabian delegate noted that “authors of the draft declaration had for the most part taken into consideration only the standards recognized by Western civilization and had ignored more ancient civilizations”.¹⁰ As a result, in a way that also ignored Islamic traditions about family, gender diversity between two partners in a monogamous relationship was the condition to enjoy and claim protections of Articles 12 and 16.

Let us now to consider the trajectory of minority rights. In 1966, the UN introduced the phrase “ethnic, religious or linguistic minorities” in Article 27 of the International Covenant on Civil and Political Rights.¹¹

Overall, Article 27 affords specific FoRB¹² guarantees to the members of religious minorities and, like to the UDHR text, it also protects the personal quality of sex through the non-discrimination principle. Although this provision protects people as members of a group sharing a pattern of cultural, religious and/or linguistic values, it does not contain any specific reference to sexual diversity.

Article 23, par. 2 features the same expression used by the ECHR to recognize and defend “the right of men and women of marriageable age to marry and to found a family”. The inclusion of minority rights in human rights preserved the heterosexual model as a key factor in the definition of family and marriage, but not necessary the monogamous model, as it emerged during the process of interpretation of Article 27. Regarding the interpretation of religious minority rights, the frame of reference is the 1977 “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.¹³ In this extensive document, the paragraph on the celebration of religious marriage is particularly significant.¹⁴ The broad definition of marriage and family underlined by the expert in the context of religious minority traditions reflects

10. UNITED NATIONS GENERAL ASSEMBLY. THIRD COMMITTEE (A/C.3/SR.125), *Draft international declaration of human rights* (CE/800), 9 Nov. 1948, p. 370.

11. The text of Article 27 provides 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”.

12. For an extensive analysis of the linguistic genesis, mobilization and translation of the “FoRB” concept, see M. VENTURA, “The Formula ‘Freedom of Religion or Belief’ in the Laboratory of the European Union”, *Studia z Prawa Wyznaniowego*, n° 23, 2021, p. 7-53.

13. F. CAPORTORTI, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* (ST/HR(05)/H852/no. 5, 1979), New York, 1979.

14. *Ibid.*, § 398 ff., p. 70 ff.

different variations on the conventional union between men and women. Whether these relationships are monogamous or polygamous depends on the minority considered. As Capotorti underlines, upon state recognition of the variety of religious traditions on marriage, the right to marry will apply to different kinds of unions.

For example, in Ghana “three types of marriage are recognized: those performed under the statutory marriage ordinance, those conducted according to customary law and those conducted under Islamic law”.¹⁵

However, considering that Capotorti’s first draft and interpretation of religious minority rights does not include any mention of “sexual diversity”, the challenge is now to consider which provisions have contemplated this wording. This will be the subject of the next section.

2. INCLUSION

In international and European arenas, the gradual inclusion of sexual diversity in the legal status of religious minority can be traced from 1985 to 2013.

While several different paths were taken, the first step within international documents was the recognition of the term “religious minority” as such.

Overall, until 2000,¹⁶ no legal source contains any explicit phrasing on sexual orientation.

Still, in 1985, Jules Deschênes was appointed by a United Nations Sub-Commission to produce a new study on the legal notion of minorities. He was the first ever to take gays into account in disputes linked to the international definition of minorities.¹⁷ In the process of defining the term minority, the expert noted that “a reader in Somerset expressed his disagreement”.¹⁸ Arguing that that person was probably “unfamiliar with the limitations of article 27”, Deschênes writes that he criticized its definition for

15. *Ibid.*, § 382, p. 67.

16. In particular, the first legal sources to mention the phrase “sexual orientation” with respect to the non-discrimination principle were the European Charter of Human Rights (Art. 21) and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

17. J. DESCHÊNES, *Proposal concerning a definition of the term “minority”* (UN Doc E/CN.4/Sub.2/1985/31), 14 May 1985.

18. *Ibid.*, § 19, p. 5.

being too narrow, and as such incapable to protect “blacks in South Africa, women in the United Kingdom and gays”.¹⁹ Deschênes admitted that blacks in South Africa were relevant to his study. As far as women and gays were concerned, however, he found that: “It is difficult to see how they could be included in ethnic, religious or linguistic minorities”²⁰. Even though the expert chose not to include “gays” in the definition of “minority”, this was the first time that gays were mentioned in connection with Article 27.

Once this avenue was opened, the UN gradually changed its approach and moved towards increasing overlap between human rights and LGBT rights.

In international law, the decision on *Toonen v. Australia*²¹ was a turning point. The ruling led to a new vision of human rights as guarantees that do not admit discrimination on sexual orientation, thus also deepening their relation with minority rights.

This has happened in two ways: (1) LGBT people have been considered, like ethnic, linguistic, national and religious minorities, as minority groups in reference to the heterosexual majority; (2) the application of the principle of non-discrimination on grounds of religion and sexual orientation to minorities has been redefined.

Regarding the first point, whether LGBTI people can be referred to as minorities is an open question that is the subject of an institutional debate between the UN and the EU. In 2010 the Office of the High Commissioner for Human Rights underlined this challenge with respect to the definition of minorities. It implicitly concluded that the notion of national, ethnic, religious and linguistic minorities cannot work apply to all LGBTI people, but only to those belonging to minorities protected by the UN.²² Following this suggestion, the traditional distinction among, *inter alia*, religious minorities and LGBTI people can be overcome, when these groups intersect.

Moving now to the European Union, a group of experts appointed by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs to conduct a study about minority rights described issues linked to homosexuality and sexual orientation as “human rights of minorities” in the

19. *Ibid.*

20. *Ibid.*

21. HUMAN RIGHTS COMMITTEE, *Toonen v. Australia*, Communication No. 488/1992 (U.N. Doc CCPR/C/50/D/488/1992), 31 March 1994.

22. UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *Minority Rights: International Standards and Guidance for Implementation*, *op. cit.*, p. 3.

case law of the European Court of Human Rights²³. Under that interpretation, LGBT people appear to be considered as minorities regardless of the intersection, *inter alia*, with religious minorities.

In different and more vague terms, in 2020 the relation between minorities, religion and LGBT rights has been framed by the Special Rapporteur on Freedom of Religion or Belief using the phrase “sexual minorities”. Recalling actions promoted by the Office on Genocide Prevention and the Responsibility to Protect in the agenda to prevent incitement of violence for religious leaders, the expert used this wording without further specifications.²⁴ In these documents, women, girls and sexual minorities (LGBT+ persons) are represented as vulnerable groups to be protected by engaging with religious leaders. Neither source, however, defines the meaning of “sexual minorities”. On this account, in my understanding the origin of the term can be traced back to the “Study on the legal and social problems of sexual minorities” prepared in 1986 by Mr. Fernand-Laurent.²⁵ In this document, commissioned by the Economic and Social Council²⁶ for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the French ambassador used the new wording of “sexual minorities” to describe the condition of homosexuals and transsexuals. Beyond the conclusions reached by the expert to explain the phenomenon of homosexuality in the world,²⁷ for the first time the notion of minority was used as a model to outline a specific legal category for homosexuality and transsexuality.

Following the author’s point of view, sexual minorities are “groups of persons who are, implicitly or explicitly, protesting against the established order, who refuse to play the role assigned to them as men or women and who, when possible, set up groups to demand the satisfaction of their particular needs and to help one another. This definition covers male and female homosexuals (lesbians), who set themselves apart by having a relationship

23. EUROPEAN PARLIAMENT’S COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS, *Towards a comprehensive EU protection system for minorities*, August 2017, p. 65.

24. SPECIAL RAPPORTEUR ON FREEDOM OF RELIGION OR BELIEF, *Report of the Special Rapporteur on freedom of religion or belief and gender equality* (A/HRC/43/48), C. Initiatives to promote respect and protect the right to equality and non-discrimination while upholding freedom of religion or belief, 27 Febr. 2020, § 58, p. 13.

25. J. FERNAND-LAURENT, *Note by the Secretary-General transmitting the study on sexual minorities* (E/CN.4/Sub.2/1988/31 14(a)), 13 June 1988.

26. ECONOMIC AND SOCIAL COUNCIL, Resolution 1983/30, para 8, 26 May 1983.

27. The expert still subscribed to a negative and stereotypical vision of homosexuality as a “deviance”; see J. FERNAND-LAURENT, *Note by the Secretary-General transmitting the study on sexual minorities*, *op. cit.*, § 21, p. 4.

with a partner of the same sex. It also includes transsexuals, who refuse the legal sex assigned to them. They will henceforth be included in the notion of sexual minorities".²⁸ As argued in the following paragraphs of the study, sexual minorities bridge a number of social actors (religious institutions²⁹ and the gay movement³⁰) and institutions (United Nations, Council of Europe³¹, national states³²). And this helps underline a controversial dynamic whereby the gay movement strives for liberation and challenges the heterosexual family model prevailing in human rights. Depending on the cases, religious institutions may defend the tradition of marriage or tolerate homosexuality, in which case some gay believers can reconcile with their faith. Some of the questions arising from this analysis were entrusted by the expert to the Sub-Commission on Prevention of Discrimination and Protection of Minorities.³³

Moving from the new notion of "sexual minorities" and shifting to the second point about non-discrimination, the Sub-Commission on Prevention of Discrimination and Protection of Minorities began to deal with gay rights. Since 1994, in documents by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, gays have been increasingly considered within the framework of human rights, a process backed by LGBT groups. In 1994, a representative of the International Lesbian and Gay Association denounced violations of gay rights regarding the right of residence and movement.³⁴ Where homosexuality was initially tackled as a stand-alone issue by minority rights experts, international institutions gradually came to consider it in relation to the principle of non-discrimination as well.

Before 2010³⁵ and then in 2013, UN institutions underlined a new narrative approach to minority rights. This agenda was devised to promote policies suited to detecting multiple discrimination based on the intersection between sexual orientation and a minority status. This new trend was emphasized by the Secretary General in 2013:

28. *Ibid.*, § 12, p. 3.

29. *Ibid.*, *Position of religious authorities*, p. 8.

30. *Ibid.*, C. *The "gay" movement*, p. 12.

31. *Ibid.*, D. *Homosexuality and regional organizations and the United Nations*, p. 15.

32. *Ibid.*, *Homosexuality and the Law*, p. 10.

33. *Ibid.*, § 99-103, p. 28-29.

34. SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, *Summary Record of the 15th meeting* (E/CN.4/Sub.2/1993/SR.15), 2 August 1994, p. 8 ff.

35. UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *Minority Rights: International Standards and Guidance for Implementation*, *op. cit.*

“While this Guidance Note and the Declaration on Minority Rights focus on the rights of persons belonging to ‘national or ethnic, religious and linguistic’ minorities, there are persons belonging to other groups that are regularly in a non-dominant position and merit specific UN attention from the perspective of non-discrimination and other human rights standards, including, for example, stateless persons, migrants, victims of forced displacement, persons with disabilities, people living with HIV and lesbian, gay, bisexual, or transgender (LGBT) persons. Their concerns also frequently involve multiple discrimination, including where a person belonging to a national, ethnic, religious or linguistic minority is also discriminated against on other grounds such as disability or sexual orientation”.³⁶

Accordingly, in 2017, the Special Rapporteur on minority issues observed “that certain groups within minority such as [...] lesbian, gay, bisexual and transgender persons experience unique challenges and multiple and intersectional forms of discrimination emanating from their status as members of minorities and their specific condition or situation”.³⁷ In the specific context of religious minorities, the intersectional criterion, as an instrument to interpret the non-discrimination principle, is the key factor for shifting from the traditional definition of religious discrimination to the more up-to-date intersectional model, where discrimination finds its genesis in the overlap between religion and sexual orientation.³⁸ From the vantage point of this new legal reasoning, an intersectional approach allows religion and homosexuality to be read as two interrelated risk factors, hence filling the gaps of conventional anti-discrimination law. This approach is liable to bring new dynamics of oppression to the attention of legal scholars and professionals. That a woman could be discriminated against not just because she is either Muslim or lesbian, but both, is a useful case in point. In other words, and borrowing from Kimberlé Crenshaw,³⁹ this kind of discrimination can be encapsulated by the image a woman who stands in the middle of a road

36. UNITED NATIONS. SECRETARY GENERAL, *Guidance note of the Secretary General on racial discrimination and protection of minorities*, March 2013, § 9.

37. SPECIAL RAPPORTEUR ON MINORITY ISSUES, *Report of the Special Rapporteur on minority issues* (A/HRC/34/53), 9 January 2017, p. 14.

38. On the notion of intersectional discrimination, see K. CRENSHAW, «Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine. Feminist Theory and Antiracist Politics», *The University of Chicago Legal Forum*, vol. 1989, no. 1, 1989, p. 139-167.

39. *Ibid.* and B.G. BELLO, *Diritto e genere visti dal margine: spunti per un dibattito sull'approccio intersezionale al diritto antidiscriminatorio in Italia*, in G. MANIACI, G. PINO e A. SCHIAVELLO (eds.), «Le discriminazioni di genere nel diritto italiano» [monografica], *Diritto e questioni pubbliche*, 15/2, 2015, p. 141-171.

intersection and gets hit from multiple directions simultaneously. It goes without saying that such a woman will incur more damage than one injured by the impact of a single discriminatory attack coming from only one direction. The EU Agency for Fundamental Rights has applied the intersectional criterion to a statistical study on the experience of discrimination by LGBTI people in Member States, North Macedonia and Serbia.⁴⁰ When asked “In the country where you live, do you consider yourself to be part of any of the following, other than being LGBTI?”, 5% of the LGBT survey respondents considered themselves affiliated to a religious minority.⁴¹ Moving on from this perspective, my hypothesis is that the right for LGBTI people not to suffer discrimination on the basis of their belonging to a religious minority may pose new challenges inside and/or outside the group.⁴²

Inside the group, the religious freedom of LGBTI people can be protected from discrimination by the bond that links them with religious minorities. In these terms, international institutions cannot, for example, deny individuals the guarantees provided by Article 27 of the International Covenant, because the minority does not recognize them as members on the basis of discrimination founded on sexual orientation. In the same perspective, rights claimed by members of religious minorities, which take the form of manifestations of homophobic theological positions, will not be guaranteed by international institutions.

Outside the group, the dialectic between religious majorities and religious minorities will be considered contrary to the rights of religious minorities, when discriminated treatment against minorities is based not only on professed doctrine, but also on sexual orientation.

3. HOLISTIC EXPERIMENTATION

As has emerged in the previous section, the inclusion of sexual diversity in the religious minority status has been motivated by an increase in the risk of discrimination for people who are both members of a religious minority and LGBTI. While under that legal approach, membership in a religious minority

40. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *A long way to go for LGBTI equality. Technical report*, 2020.

41. *Ibid.*, p. 50.

42. See my book on the definition of religious minority in international and European law: D. FERRARI, *Il concetto di minoranza religiosa dal diritto internazionale al diritto europeo*, *op. cit.*, p. 209.

is the criterion for having minority rights apply to protection of sexual diversity, the holistic approach goes beyond this by representing human rights as a system of communicating vessels.⁴³ As part of the emphasis of international institutions on the indivisibility, interdependence and inter-relatedness of human rights,⁴⁴ the relation between sexual diversity and religion is mobilized.

The most meaningful example of the “holistic convergence” of sexual diversity and religion was offered by the United Nations Conference on FoRB and sexuality of 2016.⁴⁵ During the meeting, the holistic approach was used as a methodology to harmonize FoRB and sexuality. In the following, the contents and outcomes of the conference are analyzed in terms, first, of language, and second, of the challenges that arose in the implementation of that approach to religious minority rights.

On the linguistic level, the transition from the inclusive model to the holistic model produces a discursive convergence between sexuality, religion and minorities into the phrase “religious diversity, sexual diversity and sexual minorities”. As highlighted in the conference summary, if “human rights and respect for diversity are inextricably linked [...], in some contexts, religious diversity and sexuality are not always perceived as harmonious”. This language of the conference summary illustrates a new meaning of sexuality, used in a broad sense, and associated with the new term of “religious diversity”.⁴⁶ In the definition of sexuality as a dynamic “experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships”,⁴⁷ the phrase “sexual and gender minorities” is used in connection to the terms and acronyms “queer, LGBT, LGBTI, LGBTIQI,

43. In the holistic approach to human rights, all rights contribute to guaranteeing human dignity and social justice. See A. BELDEN FIELDS, « Human Rights as a Holistic Concept », *Human Rights Quarterly*, vol. 14, n. 1, 1992, p. 1-20; A. BELDEN FIELDS, *Rethinking Human Rights for the New Millennium*, New York, Palgrave Macmillan, 2003, p. 73 ff.; G. MAC-NAUGHTON, « Decent Work for All: A Holistic Human Rights Approach », *American University International Law Review*, vol. 26, no. 2, 2011, p. 441-483.

44. In fact, as the UN underlines: « All human rights are universal, indivisible and interrelated and interdependent »; see *Vienna Declaration and Programme of Action (A/CONF.157/24)*, Part I, chap. III, sect. I, § 5, 1993.

45. *Conference Summary: Freedom of religion and belief and Sexuality* : <https://www.ohchr.org/Documents/Issues/Religion/FORBAndSexuality.pdf> [accessed 23 February 2022].

46. On the last three quotes, *Ibid.*, p. 5 ff.

47. This is based on a working definition by the World Health Organization (WHO): WORLD HEALTH ORGANIZATION, *Defining sexual health: report of a technical consultation on sexual health*, 28-31 January 2002, 2006: https://www.who.int/reproductivehealth/publications/sexual_health/defining_sexual_health.pdf [accessed 23 February 2022].

SOGI, SOGIE, homosexuality, homosexual, and others”.⁴⁸ This shows an awareness of the complexity of sexuality, which is no longer limited to a specific kind of sexual orientation (heterosexuality) or relationship (marriage) in the human rights framework. This discussion resurfaces in parts of the where “sexual diversity” is analyzed in different religious traditions.⁴⁹ At the same time, the phrases “religious diversity” and “belief diversity” (which refer to different components of the UN’s agenda of protection and promotion of human rights)⁵⁰ are used as part of a “human rights approach to religion”.⁵¹ The main goal is “not promoting religions in themselves or religious values, but empowering human beings in that sphere – in that broad sphere of religious diversity, belief diversity, convictions, but also practices”.⁵² This enhances the inclusiveness of the guarantees linked to the FoRB, highlighting how, as in the definition of sexual diversity in human rights, these protections do not correspond to specific identities, but to a diversity of spiritual or philosophical choices.

As for the challenges underlined during the conference, in general terms, protecting sexual diversity in religion requires questioning sacred traditions, texts and religious leaders. The new “holistic agenda” aims at overcoming the traditional clash between religions and sexual minorities through practical solutions, involving religious actors in the process.

Under an approach aimed at promoting a new awareness on religion and sexual rights, “the idea of the Conference was to overcome the misperception of an abstract normative dichotomy and to identify possible synergies between commitments on behalf of freedom of religion or belief and rights for LGBTI persons by for instance encouraging innovative theological interpretations of religious sources and traditions”.⁵³ This new approach intersects with the legal status of religious minority according to two different trajectories: first, through the application of the holistic protection of religious diversity and sexual diversity to Muslim groups; second, because sexual minorities

48. *Conference Summary: Freedom of religion and belief and Sexuality*, op. cit., p. 5.

49. *Ibid.*, see, for example, concerning sexual diversity within Buddhism, p. 8.

50. See, *inter alia*, HIGH COMMISSIONER FOR HUMAN RIGHTS, RACISM, RACIAL DISCRIMINATION, *Xenophobia and all forms of Discrimination, Combating defamation of religions as a means to promote human rights, social harmony and religious and cultural diversity* (E/CN.4/2003/17), 27 January 2003, § 4, p. 4; SPECIAL RAPPORTEUR ON FREEDOM OF RELIGION OR BELIEF, *Report of the Special Rapporteur on freedom of religion or belief*, Heiner Bielefeldt (A/HRC/16/53), 15 Dec. 2010, § 39, p. 12.

51. *Conference Summary: Freedom of religion and belief and Sexuality*, op. cit., p. 14.

52. *Ibid.*

53. *Ibid.*, p. 6.

and religious minorities can be vulnerable groups targeted by international protection.

First, the holistic protection of religious diversity and sexual diversity shows the connection between religious freedom and other human rights and can also serve to address the conflict between religious freedom and LGBT rights. This is an increasingly relevant challenge not just for Muslim communities, but also for the Catholic Church in the Western world⁵⁴.

To achieve the goal of involving Muslim groups into the debate on respecting sexual diversity, it is necessary to consider the impact of the different kinds of discrimination experienced by LGBT people (homophobia) and Muslim populations (islamophobia). Muslim groups are often negatively judged in Western states that use the respect of LGBT rights as an “integration test” for religious communities.⁵⁵ The act of enlisting Muslim groups in the debate about LGBT people should not be perceived as a form of Islamophobia, a means to judge Muslim traditions using Western values as a benchmark. Based on an awareness of different kinds of discrimination, the holistic dialogue between institutional actors and Muslim communities may pave the way for a new mutual understanding to “recogniz[e] Islamic traditions and contributions to gender and sexual diversity”.⁵⁶ This is also particularly crucial for the visibility of sexual minorities within Muslim communities. As illustrated during the conference, in fact, “it is also important to make visible the existence of various queer Muslims, and as a result, Muslims’ sexual diversity [...]”.⁵⁷ The sentence evidences an interesting overlap between queer people and religious minorities in society. In fact, a queer Muslim group can simultaneously be a religious minority and a sexual minority within (and outside) a religious community.

54. Regarding the Catholic Church, the magisterium of Pope Ratzinger saw the publication of theological texts against sexual diversity. This was a time when the Catholic Church arguably framed its rejection of sexual diversity as a manifestation of freedom of religion, thus pointing to the limitations of the holistic approach. The Church might have perceived involvement in an institutional dialogue to reconcile FoRB and LGBT rights as a strategy to impose sexual diversity and, consequently, as a kind of religious discrimination. On the perception of the obligation to respect LGBT rights as a form of religious discrimination, see A. DONALD and E. HOWARD, «The right to freedom of religion or belief and its intersection with other rights», January 2015: https://www.ilga-europe.org/sites/default/files/Attachments/the_right_to_freedom_of_religion_or_belief_and_its_intersection_with_other_rights__0.pdf [accessed 23 February, 2022].

55. *Ibid.*, p. 9.

56. *Ibid.*

57. *Ibid.*

Secondly, mapping the case law of the European supranational courts, the conference participants underlined that religious minorities and LGBT people share a risk of persecution and as such are target groups protected under asylum law.⁵⁸ According with this suggestion and acknowledging the different kinds of persecution singled out by the Court of Justice and the European Court of Human Rights, religious minority rights and “sexuality rights”,⁵⁹ on the one hand and freedom of religion, on the other, can be represented as conflicting rights. This clash poses a significant challenge for the holistic approach, as, for instance, religious legitimization of persecution in a given state could be considered as the implementation of the principle of freedom of religion of the dominant group above other human rights.

Regarding the conflict between freedom of religion and religious minority rights, for example, a case of religious persecution concerning the Muslim Ahmadiyya community in Pakistan,⁶⁰ where the Court of Justice clarified the notion of religious persecution in the light of the interpretation of Directive 2004/83/EC,⁶¹ evidences the existence of competitive understandings of freedom of religion between international and national courts. The violation of rights of this Muslim minority is the consequence of a legal system where the notion of freedom of religion, protected by Article 20 of the Constitution, is bound with the obligation to respect Islam, defined as the state religion by Article 2 of the Constitution.⁶² In this example, freedom of religion based on the majority faith works violates religious minority rights, which happens when, as in the case of the Ahmadiyya community, religious diversity is deemed incompatible with the tradition of the predominant religion.

In cases of persecution based on sexual orientation, violations of LGBT rights can be grounded in religion.⁶³ The context of international protection, beyond the arguments evoked in the document, evidences a strong opposition to the holistic approach to sexuality and religion, as sexual diversity is often rejected in the name of freedom of religion.

58. *Conference Summary: Freedom of religion and belief and Sexuality*, *op. cit.*, p. 7.

59. *Ibid.*

60. ECJ, 5 Sept. 2012, C-71/11 and C-99/11, *Bundesrepublik Deutschland v Y. Z.*

61. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

62. T. MAHMUD, « Freedom of Religion & Religious Minorities in Pakistan: A Study of Judicial Practice », *Fordham International Law Journal*, Vol. 19, 1995, p. 40-100; U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, *The Right to Freedom of Religion & Belief: An Analysis of Muslim Countries*, New York, Library of Congress, 2005, p. 12 ff.

63. EUROPEAN ASYLUM SUPPORT OFFICE, *Researching the situation of lesbian, gay, and bisexual persons (LGB) in countries of origin*, 2015, p. 22.

In addition to cases of conflict between FoRB and religious minority rights and between FoRB and LGBT rights, even greater challenges to the holistic approach arise when attempts to enforce religious rules target groups who are deemed to clash with minority tradition because they are LGBT. In this case, persecution takes root at the intersection between sexual diversity and religion and is practiced by a religious minority against its members. As the Expert on protection against violence and discrimination based on sexual orientation and gender identity of the United Nations has observed, in general terms, “‘conversion therapies’ [...] to change an individual’s sexual orientation [...] are practiced not only by some health-care professionals but also by clergy members or spiritual advisers in the context of religious practice”.⁶⁴ Some Christian minorities, among many other examples, coerce LGBT people into changing their sexual orientation⁶⁵, arguing that this a condition to re-establish a new kinship with God and the religious community. In this case, the violation of LGBT rights may also involve severe violations of religious minority rights. In fact, as the UN High Commissioner for Refugees pointed out in 2012 “where an individual is viewed as not conforming to the teachings of a particular religion on account of his or her sexual orientation or gender identity and is subjected to serious harm or punishment as a consequence, he or she may have a well-founded fear of persecution for reasons of religion”.⁶⁶

CONCLUSION

In this article, I have proposed: a) a recapitulation of the legal language used to address religious minorities and sexual diversity from 1947 to the present day; b) an investigation into the gradual introduction of between LGBTQI rights and overlap with the protection of religious minorities from their initial exclusion to the holistic model; c) an attempt to reconstruct the innovative role played by religious actors within the holistic approach; d) a

64. *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity* (A/HRC/38/43), 11 May 2018, § 47, p. 11.

65. T. ERZEN, *Straight to Jesus: Sexual and Christian Conversions in the Ex-Gay Movement*, Oakland, University of California Press, 2006.

66. 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* (HCR/GIP/12/09), 23 Oct. 2012, § 42, p. 11.

summation of the challenges linked to the definition of religious minorities and FoRB with respect to the protection and promotion of LGBTQI rights. In the process, I have evidenced the complexity of the relation between sexual diversity and religious minorities in the human rights framework.

Based on this analysis, the main challenges to conventional legal minority rights protection devices seem to relate to three key aspects: first, the lack of binding legal sources on LGBTQI rights; second, the ambiguities in the legal definition of “minority”; and third, the fact that the different strategies of FoRB protection do not always cover religious claims by LGBTQ actors.

Firstly, while many documents endorse terms such as “LGBT, LGBTQ or LGBTQI rights”, in international and European law, even today, there are no specific binding sources of protection. Notwithstanding this, the European Union includes “sexual orientation” among the forbidden grounds of discrimination under Article 21 of the European Charter of Human Rights. Also, Article 10, l. d), of the Directive 2011/95/UE concerning the refugee status prohibits discrimination based on sex. The protection of LGBTQI rights is clearly the outcome of various institutional exegeses of other human rights, such as those of religious minorities. International and European institutions have moved beyond the longstanding exclusion of LGBTQI people from human rights by elaborating new legal categories in the areas of non-discrimination, international protection, religious minority rights or human rights in general.

In light of this, it would appear that the absence of specific legally binding sources on LGBT rights (as well as on the FoRB/sexuality intersection) is the reason why the protection of these rights still falls within the scope of the “religious minority” category.

Nevertheless, it is worth noting that the inclusion of LGBT rights in this *old* category might however pose *new* challenges both at the national and international level.

It can be said that there is a lack of consensus among states as how to develop international or European law specific standards on sexual rights. For instance, some Members states of the United Nations, such as Iran (or Hungary in the European Union) not only have criminalized homosexuality⁶⁷

67. In particular, in Iran, Islamic law considers same-sex relationships as a crime punishable by the death penalty; see M. YADEGARFARD, «How are Iranian Gay Men Coping with Systematic Suppression Under Islamic Law? A Qualitative Study», *Sexuality & Culture*, Vol. 23, 2019, p. 1250-1273.

but have also adopted discriminatory laws in the name of their religious traditions.⁶⁸

In cases such as these, religious minority rights are far from being a sufficient guarantee for LGBT individuals, to the extent that they do not comply with international standards.

Secondly, the United Nations uses the word “minority” to refer to LGBTQI people in several ways. The term originated from the expression “sexual minorities” in 1986 and later intersected with the notion of “religious minority”. When UN expert introduced the notion of sexual minority in 1986, at that time homosexuality was still perceived as a “deviance”. It was only more recently that the meaning of this term was changed to include and protect LGBTQI people from human rights discrimination. At the same time, LGBTQI people affiliated with religious minorities have to toe the line between risking discrimination on religious grounds and harassment due to their sexual orientation or gender identity.

In this latter case, the meaning of religious minority extends to cover LGBTQI people belonging to religious *communities*, thereby protecting them from the risk of multiple or intersectional discrimination. Moving from this premise, beyond the overlap with religious minorities, the question of the characterization of LGBTQI people as a new kind of minority⁶⁹ protected under international law remains open.

Thirdly, freedom of religion has been invoked by the United Nations developed not simply in the classical sense of protection, but also as a democratic process involving religious actors to promote reflections on sexuality. It thus represents a new laboratory to further explore the relation between human rights and diversity. Religious actors within their communities and in interreligious dialogue between faiths are also part of this effort. For example,

68. The Hungarian government has recently declared its intention to introduce a constitutional amendment to defend the so-called “Christian values”. The amendment states that “Hungary protects children’s right to identify as the sex they were born with, and ensures their upbringing based on our national self-identification and Christian culture”.

69. Marco Ventura has presented three cases of “new religious minorities” at the European Academy of Religion. See the (unpublished) paper on «New majorities and minorities The impact of/on religion or belief» presented in the panel on «Freedom to Believe or not to Believe. New Directions of Belief. The Religious Pluralism in Europe», Bologna, 21 June 2017. About the notion of “new minorities”, see also R. MEDDA WINDISCHER, C. BOULTER, T.H. MALLOY (eds), *Extending Protection to Migrant Populations in Europe. Old and New Minorities*, London, Routledge, 2020 and D. FERRARI, “New and old religious minorities in international law”, *Religion*, n° 12, 2021, p. 1-19.

recently, 370 religious leaders from 35 countries representing 10 religions have signed a declaration for the de-criminalization of LGBT+ people and the introduction of a global ban on conversion practices. Among the signatories of the declaration, there are many religious minority leaders and, in particular, more than 60 rabbis, and senior Muslims, Sikhs, Hindus and Buddhists.⁷⁰ At the same time, the idea that FoRB opens a possibility of negotiation with religious leaders to reconcile religious traditions with LGBTQI rights could become problematic. In fact, redefining sexuality and religion in relation to human rights' diversity regimes is unacceptable for those religious leaders that see their own traditions as absolutely non-negotiable truth or dogma. In this kind of situation, the holistic laboratory is doomed to failure: participation in the holistic agenda is democratic and free and international bodies cannot force religious actors to get involved.

Having explored these challenges, we can now conclude by considering some methodological approaches for sketching out new legal definitions of religious minority rights.

As such, it is submitted that a "holistic approach" to sexual diversity might substantially overcome the shortcomings of traditional strategies for the promotion and protection of religious minority rights. It is therefore worth careful consideration. Whereas the promotion and protection of religious minorities used to be mainly entrusted to international institutions, now, following a holistic approach, the inclusion of sexual diversity within the category "religious minority" should be the outcome of a democratic dialogue with religious minority actors.

Ultimately, the challenge of advancing LGBT rights within the religious minority category rests on the capacity of international institutions to persuade religious actors that the democratic construction of a new awareness about sexual diversity and FoRB is an opportunity, even as some religious figures want to use religious freedom to defend critical positions on homosexuality. Without critical positions, in fact, international institutions will not be able to overcome the limitations and ambiguities of the holistic approach; additionally, supporting comparison between different positions can represent the first step towards real change.

70. See H. SHERWOOD, «Senior faith leaders call for global decriminalisation of LGBT+ people», *The Guardian*, 16. Dec. 2020: <https://www.theguardian.com/world/2020/dec/16/senior-faith-leaders-call-for-global-decriminalisation-of-lgbt-people> [accessed 23 February 2022].