# Which Law for Which Religion?
## Ethnographic Enquiries into the Limits of State Law vis-à-vis Lived Religion

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## Introduction

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Contrary to those who predicted, or perhaps even hoped, that with growing secularisation in "Western" societies, the various religions and beliefs would gradually fade away, it seems that in reality things are moving in the opposite direction. On the one hand, the rise of secularisation continues apace, with more and more significant segments of society, especially in Europe, no longer identifying with any religion or calling themselves atheists. But at the same time, religion[2] continues to play a role and in some cases is even increasing in significance as an identity marker.[3] Concomitantly, lived religion finds expression in an increasingly fragmented – and more diversified – form. In Europe, the relatively large waves of migration from outside Europe since the Second World War, initially economic but progressively of a more humanitarian form, explains why Islam is the second largest religion in many European countries today. One must also take into consideration the resurgence of other traditional religions that had till now been ignored or considered marginal or negligible from a sociological point of view: Buddhism, Shintoism, Sufism, the Armenian church, Mormonism (The Church of Jesus Christ of Latter-day Saints) and Jehovah's Witnesses, to name but a few, each of which represents a distinctive set of beliefs. Each claims, with varying degrees of intensity, the right to practice their religion freely. And then there are those systems of belief which are sometimes considered hybrids, such as the Rastafarians, or parodies such as the Pastafarians,[4] or suspect, such as the Church of Scientology.

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[1] I would like to express my deepest gratitude to Dr Monica Sandor, freelance editor with the Department of Law and Anthropology, Max Planck Institute for Social Anthropology, for her careful work on the language editing of this paper at its various stages, and who made a number of most useful comments to a previous version of the text.

[2] We will use the term "religion" here in its generic sense, that is, to include all forms of belief – whether cults or historically recognised religious communities, more or less institutionalised cosmological philosophies of life followed by larger or smaller groups or communities. Ancestor worship, various rituals, popular beliefs, etc. can thus also be considered "religions".

[3] See among others: Davie, Religion in Britain. A Persistent Paradox, 2015.

[4] This movement was founded in the United States mainly in order to denounce religious dogma and creationism. It has spread widely and is present in many countries today. Its adherents wear colanders on their heads, venerate pirates and assert that the universe was created by a flying spaghetti monster. The colander is the traditional head covering. New Zealand officially recognised this "church" and authorised it to preside at marriages.

This "fragmentation" of lived religion, the great diversification of its forms of expression and the multiplicity of its origins – in some cases ancient, in others much more recent and/or syncretistic – have in the past few years been the subject of a wide range of highly relevant studies, which we can only applaud without being able here to go into a discussion of the deeper causes of this fragmentation or how best to understand its evolution.[5] What is of particular interest for the purposes of this contribution is the question of how state law accommodates this reality of an extremely diversified lived religion, which means that law, too, must now take account of traditions and beliefs that to date have been ignored or fact only inadequately or weakly protected. [6]

In practice, the expectation is that in the face of this new reality, the freedom to practice and express the belief of one's choice as guaranteed both in international and in the domestic law of the vast majority of democratic countries (often enshrined in their constitution) offers the necessary legal headroom to accommodate the situation.[7] This means that it is up to the competent authorities in the countries concerned (whether judicial, administrative or legislative) to apply correctly the obligation to respect each individual's freedom to believe – or not to believe – and to belong to one or other religious or philosophical community based on those beliefs. The aforementioned authorities are required, whenever a specific case of protection of religious freedom arises, to ensure that they do not place any limits on that freedom other than what is justifiable in a democratic society; any such limits, where necessary, must also be proportionate to the objective they are intended to serve. Legal practice, however, shows how difficult it is on a case by case basis to find the right balance between protecting a fundamental freedom and the constraints that may legitimately be imposed on it.[8] This quest for balance is all the more difficult given that religion and its protection are very sensitive questions, and often highly politicised.[9] What is more, it is not unusual for the judicial authorities to have to fill the gaps in a legislation that is incomplete or not adapted to the situation on the ground, which in turn places the judges in the spotlight. They find themselves being reproached in some cases for being too protective of religion, in other cases for not being protective enough. In the face of this situation, one may well ask whether state law, as it stands, has the tools needed to address the new religious and philosophical diversity as it unfolds before our eyes in a contemporary era that had been expected to become more and more non-religious.

A vast number of studies in recent years have been devoted to the topic of law and religion in democratic societies, closely examining the question of whether the legal frameworks inherited from the past, designed to protect religions from discrimination

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[5] See among others: Margry, European Religious Fragmentation and the Rise of Civil Religion, in: Kockel/Craith/Frykman (eds.), A Companion to the Anthropology of Europe, 2012, 275–294.

[6] See among others: Mancini & Rosenfeld (eds.), Constitutional Secularism in an Age of Religious Revival, 2014; Fox, Political Secularism, Religion and the State. A Time Series Analysis of Worldwide Data, 2015.

[7] See among others: Scolnicov, The Right to Religious Freedom in International Law: Between Group Rights and Individual Rights, 2012.

[8] See among others: Bharma, The Challenges of Justice in Plural Societies. Constitutionalism and Pluralism, 2011; see also: Mancini & Rosenfeld (eds), Constitutional Secularism in an Age of Religious Revival, 2014, 2014; Knights, Freedom of Religion, Minorities and the Law, 2007; Evans, The Evolution of Religious freedom in International Law: Present State and Perspectives, in: Flauss (ed.), La protection internationale de la liberté religieuse/International Protection of Religious Freedom, 2012, 15–56.

[9] See among others: Gülifer (ed.), Islam and Public Controversy in Europe, 2013.

or to ensure equitable participation in social life, are still suited to the recent changes in religious reality.[10] At the risk of oversimplifying the fine analyses of dozens of authors who have considered the question and in some cases offered alternative formulae, we can see two major trends emerging: *on the one hand* are those authors who suggest that we should abandon the idea that religion requires special protection. They argue that other fundamental freedoms, such as freedom of thought and expression, or freedom of association, are sufficient to guarantee equal treatment of all forms of belief, whether political, philosophical or other. This first tendency in a sense involves striking religious freedom from the list of fundamental freedoms and thus the concomitant obligation for others (state authorities as well as private individuals) to take particular account of it.

*On the other hand*, there are those who call for an updating of existing protections in order to make it possible for new religious and other convictions which have hitherto not enjoyed particular protection to benefit from the same advantages as those granted to long-established religions. These advantages were either enshrined in the constitution or developed over time, often initially in case law, and subsequently incorporated into legislation. In sum, the second tendency highlights the anachronism of maintaining the status quo of existing protections, which are still often reserved to majority religions or at least ones that have been established for some time in a given country,[11] while other religions and beliefs are left to one side on the expectation that one can rely perfectly well on the range of existing freedoms as a basis for protection, to be invoked on a case by case basis, if needed.

This article does not seek to take a position in favour of one or other of these trends, but does endeavour to contribute to the debate by providing specific illustrations of the difficulties faced in practice today by a diverse range of communities worldwide. The case studies are spread over three geographical areas: Europe, the United States and Australia, each group under study seeking to recognize the right to live out and express religion in its own way. The objective of this article is twofold: on the one hand, to demonstrate the necessity of including, in the quest for viable solutions, sufficient empirical data that reflect the reality on the ground and point to the importance of what is at stake for the communities in question. On the other hand, by including in one contribution a number of very different cases, we aim to offer a threefold demonstration, first that the accommodation of religious freedom in law remains very topical today; second, that for solutions to be sustainable, one needs to take account of the particularities of the context; and third, that in some cases accommodation calls into question the balance achieved over time between a state and the religions present on its territory and that cannot easily be shaken.

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[10] Just to name a few here: *Dierkens & Schreiber* (eds.), Laïcité et sécularisation dans l'Union européenne, 2006; *Lambert*, Le rôle dévolu à la religion par les Européens, Sociétés contemporaines 37 (2000), 11–33; *D'Costa et al.* (eds.), Religion in a Liberal State, 2013; *Bader*, Secularism or Democracy? Associational governance of religious identity, 2007; *Berg-Soerensen* (ed.), Contesting Secularism: comparative perspectives, 2013; *Robbers* (ed.), State and Church in the European Union, 2005; *Foblets/Yanasmayan/Alidadi* (eds.), Belief, Law and Politics. What Future for a Secular Europe?, 2014; *Martinez-Torron/Durham* (eds.), Religion and the Secular State: national reports/La religion et l'Etat laïque: rapports nationaux, 2015.

[11] One such form of protection is typically financial support. See among others: Messner (ed.), Public Funding of Religions in Europe, 2015.

The selection of cases presented here is somewhat eclectic, since the illustrations come from the empirical work conducted within the research programme of the Law and Anthropology Department of the Max Planck Institute for Social Anthropology in Halle, Germany.[12] The researchers affiliated with that department share a keen interest in the ethnographic approach to legal questions. Each of them has taken on the task of enriching the legal analysis of a given topic with data gathered either in the course of an extended period of fieldwork among the communities in question, or by means of lengthy interviews with actors directly concerned by the problem under study, supplemented by an in-depth familiarity with the existing literature on the subject, not limited to legal doctrine.

The work of six researchers has been included. The first four are directly concerned with the question of accommodating aspects of lived religion within the law of a state, while the last two are less closely linked to religious questions but contribute elements of analysis that are nonetheless relevant to the problem and that can be extrapolated by analogy to certain situations experienced by communities who, by choice or force of circumstance, find themselves living out their religion or belief on the margins of, or even in tension with a state's positive law.

The first case study, contributed by *Elizabeth Steyn*, illustrates the way in which a state (in her case, the United States) seeks to avoid the difficulties of providing adequate legal protection in a specific situation faced by an indigenous community. The community being studied is on the verge of being forced off its ancestral lands, where it continues to practice its rituals, because these lands will soon be flooded in order to raise an enormous dam. The fact that this particular community does not figure on the Federal Recognized Tribes List effectively strips it of any means of defence in the light of this situation. The technique of state recognition of a community as a condition for being able to exercise certain rights is one that is often lamented but is at the same time a tried and tested legal means of enabling a state to retain control over its policy of supporting (or refusing to support) particular communities, whether religious or other.[13]

The second illustration comes out of the exploratory fieldwork of *Katayoun Alidadi* between December 2015 and March 2016, which explores how, in the United States, people who decide no longer to identify with any religious community recreate a social network of their own organised in a way that is very similar to that of local churches, allowing non-believers to meet and discuss with each other how they can continue to be involved in civil society without the need for ties to any religious belief. The interviews indicate that these people have deliberately chosen to detach themselves from all forms of religion, without expecting the state to grant any particular advantage linked to that choice. They prefer to avoid conflicts with the authorities and are satisfied for now with the freedom and protection guaranteed to every citizen and/or civil society association: freedom of association, a tax regime, building permits, etc. In the same spirit of avoiding confrontation, they prefer to call themselves "secular" rather than "atheist". They thus avoid any unnecessary confrontation. The illustration contributed by *Alidadi* is not unique to the people she had the opportunity to interview; other studies have similarly indicated that people belonging to a religious or philosophical minority often prefer to remain silent about their convictions in order to spare themselves potential conflict. The question arises, however, whether this discreet behaviour, which saves the authorities

[12] http://www.eth.mpg.de
[13] See among others: Sandberg, Law and Religion, 2011.

and society as a whole having to worry about minorities' freedom of belief (religious or otherwise) and its protection, is compatible with the right to respect for religious freedom, including the right of each person to live in accordance with his or her beliefs and to express them. A minority that avoids open conflict with the surrounding society in a sense allows the latter to ignore the presence of minorities among its ranks. But is ignoring a group not in some cases equivalent to a subtle form of oppression?

The alternative is actively to search for solutions that allow optimal management of the relations between states and religions by putting in place accommodations of various types. The aim of the latter is to achieve compromises that in some cases will involve granting an exemption to a minority while in others drawing up a regulation that, while taking into consideration the legal framework in place, also takes account of the particular needs in a given situation: legislation authorising ritual slaughter of animals, conscientious objection to military service, dispensation from the obligation to work on a group's religious holidays, and management of public cemeteries in a way that allows for differences in funeral customs, are all illustrations of what is known as reasonable accommodation. The latter makes it possible, without infringing on positive law, to render that law more flexible toward the needs of a group or a person; practice shows that these needs are, for the most part, those of religious minorities.[14]

The third illustration offered here refers precisely to a recent experiment in accommodation that was dictated by religion. But it also shows how difficult it is to find the right balance between validating the conditions needed to respect the rights of religious minorities while also guaranteeing the values – which themselves are changing – of the majority society. In his contribution, *Jonathan Bernaerts* focuses on the compromise solution adopted by German legislators in December 2012 in the form of a civil law that allows Jewish and Muslim communities in Germany to continue to practice the circumcision of young boys for religious reasons. A certain number of conditions set out in the law have to be met, however, in order to be allowed to continue this practice. The law came on the heels of the well-known controversy that had resulted from the ruling, earlier that year, of a judge in Cologne that this practice was in contravention of German law. The law that was finally passed by the German parliament is a textbook example of reasonable accommodation in law of specific religious practices. In this case, the German law instituted a compromise between, on the one hand, the need to respect the religious freedom of a little boy's parents – namely, that the parents are entitled to educate their children in the religion of their choice – and on the other hand, the legal prohibition against any violation of bodily integrity of minors. I have discussed this law elsewhere, indicating that underlying this debate is a growing concern within the majority society for the rights of the child, and in particular for his personal self-determination and the protection of his physical integrity.[15] It is this same sensitivity that explains why some have been particularly critical of the legislative compromise, finding it unacceptable because, in their view, it does not make sufficiently explicit the prohibition against causing a child any physical harm unless required for therapeutic reasons. It is along

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[14] See among others: Gaudreault-DesBiens (ed.), Le droit, la religion et le "raisonnable", 2009; more recently: Hendrickx & Blanpain (eds.), Reasonable Accommodation in the Modern Workplace. Potential and Limits of the Integrative Logics of Labour Law, 2016.

[15] Foblets, The Body as Identity Marker. Circumcision of Boys Caught between Contrasting Views on the Best Interests of the Child, in: Jänterä-Ja (ed.), The child's interests in conflict. The intersections between society, family, faith and culture, Cambridge, 2016, 125–162.

these lines that practising physicians in Germany have criticised this law vehemently since it entered into force. As a result, they have refused to accept the compromise. They prefer in a sense to ignore the accommodation; some go so far as to refuse to carry out circumcisions for religious purposes.

We find the same attitude of resistance to making any concessions that would benefit a religious minority in the fourth illustration, provided by *Mareike Riedel*. In her study, a Jewish community living in Sydney, Australia, was refused authorisation by local authorities to delineate the boundaries of a symbolic space using a wire or line suspended at a certain height (the *eruv*). The purpose of such a demarcation is to allow all members of the Jewish community to be free to move within this space on the Sabbath without infringing on the religious prohibition against leaving the domestic realm on that day. Since to do so entailed an occupation – even if ritual and peaceful – of the public highway (in this case, the street), the cooperation of the local authorities was requested. It was refused. The underlying fear on the part of those opposing the *eruv* was that making such a concession would attract members of other Jewish communities in the city to move to that neighbourhood (thus encouraging "the propensity to develop into a religious enclave"). The community ultimately resolved the issue in a more pragmatic manner, obtaining permission from the (private) owner of the poles along the public streets to use them to suspend their demarcation line. The official refusal was thus circumvented by an ingenuity that was both simple and effective, namely, a private solution.

These illustrations clearly show that the future of the path of reasonable accommodation is not guaranteed. It is evident that not everyone is in favour. First, because the accommodation often exceeds the minimum requirement for meeting a state's international obligations; second, because it obviously runs counter to the tendency mentioned above, which argues for a reduction rather than an extension of the number of exemptions granted to religions, whether majority or minority faiths. And finally, in Europe, the invocation of a state's "margin of appreciation" often means that it is not possible to *compel* public authorities to adopt a policy of accommodation in cases where the latter consider there is a well founded fear that the equilibrium in the relations between religion and the state might be upset. In France, for example, the principle of state secularism (*la laïcité*) in the strict sense poses an obstacle to a transformation of the law in the direction of greater flexibility vis-à-vis lived religion.[16] Things appear differently depending on the national contexts and historical relations between a state and whatever touches on the religious within its borders.

As mentioned above, the last two illustrations are less directly linked to religion as such, but they contribute analytical points that may prove relevant when it comes to assessing the protective potential of state law for religious minorities.

The contribution of *Kalindi Kokal* is based on a long field study period spent in the state of Maharashtra, India, where she immersed herself in the daily life of a community of fishers and focused in particular on the way in which these communities handle their conflicts internally, far from state law. She borrows from the American sociologist *Bill Felstiner* the observation that the way in which a community, large or small, seeks to resolve inevitable conflicts among its members should be understood as the reflection of a culture, its values and rules as well as its history and its economic, political and social organisation. *Kokal* confirms this observation through what she has been able to

[16] Weil (ed), Politiques de la laïcité au XXe siècle, 2007.

observe on the ground, in particular via her description of the multiple roles she saw played out by "barefoot lawyers", independent lawyers who serve as attorneys, mediators, advisors and, if necessary, adjudicators. She shows how a community entrusts to them their quest for justice in concrete cases and for the most part accepts their wisdom without recourse to the positive law of the state or its institutions.

The lessons to be learned from the detailed empirical data *Kalindi Kokal* gathered point beyond the particular context in which she was working. There is widespread suspicion today among legal professionals about any self-regulation of conflicts within minority communities, especially religious ones, out of a concern that such practices erode the principle of the rule of (state) law. They tend to be sceptical about religious arbitration, in particular,[17] operating under a blanket assumption that religions are oppressive, especially of women and sometimes of children, and thus ill-equipped to resolve certain conflicts within their own community. In their view, in the name of respect for human rights, state monism ought to prevail over legal pluralism. That is certainly the case in the area of family law. To understand this thorny issue correctly, it is essential to encourage more researchers to carry out the kind of detailed research done by *Kalindi Kokal*. Ethnographic fieldwork demands patience and a talent for empathy and is probably the only way to dispel certain prejudices and show how, in practice, justice is administered in many communities around the world apart from state law, whether on principle or simply due to circumstances (communities that are fairly isolated, itinerant communities, etc.). It is striking to note that in Europe, for example, very little is known about the ways in which small religious communities as well as more substantial but minority ones settle disputes, and what role, if any, is played by referring to religion. With the exception of some studies that have examined this question seriously,[18] there is a lack of research in this area. Indirectly, this absence of reliable data sustains a climate of suspicion of anything to do with religious minorities and their dispute resolution mechanisms.

Finally, there is the illustration offered by *Petra Burai*. She concentrates on one particular practice, referred to in Hungarian as *hálapénz*, which refers to the money – which can be substantial – given by a patient to his or her treating physician or other health care worker to express gratitude. From the outside, one would be tempted to see it as a practice that borders on corruption. How can we be sure that underlying this elegant notion of "gratitude" there are not less subtle forms of blackmail (priority or care being reserved to those who have the financial means) or a less than orthodox method of selection? Hungarian lawmakers are currently trying to eradicate this practice by criminalizing it. But *Petra Burai* shows that, in the short term, such a policy has little chance of achieving the intended result. In evidence of this, she has investigated the perceptions of such a practice: is it in fact controversial among those who, when the occasion arises, practice it when they receive medical treatment? She has gathered a number of most interesting testimonies that indicate that the practice is less controversial than one might think. On the contrary, it is part of a logic of social cohesion not unlike what in anthropology is called "reciprocity", a term borrowed from the work of *Claude Lévi-Strauss*, who, in turn, was inspired by the writings of *Max Weber* and *Georg Simmel* to

[17] Korteweg & Selby (eds.), Debating Sharia. Islam, Gender Politics and Family Law Arbitration, 2012.

[18] See among others: *Bano*, An exploratory study of Shariah councils in England with respect to Family Law, Ministry of Justice/University of Reading, 2012.

designate a social logic of spontaneous regulation: a society is in a sense the totality of reciprocal interactions.[19] Reciprocity is, in its own way, a normative logic profoundly rooted in the minds of those who practice it. It gives them a sense of belonging, and anyone who refuses to participate in this logic of reciprocal action excludes it. The reason why this practice is so tenacious is thus understandable, and it is foreseeable that the will of the government to ban it will not suffice to make it disappear. The comparison may sound risky here, but *Petra Burai* ventures to make it nonetheless. The logic of reciprocal action is so deeply characteristic of belonging to a group or a community that *Lévi-Strauss* regarded it as a universal principle of regulation of social relations.

This probably explains the ineffectiveness today of policies that, in the name of human rights, seek to intervene in the lives of religious communities, either by banning certain practices or by refusing to allow them to enjoy certain privileges.[20] The need to belong and to remain part of the interactions with the members of one's religious community prevails over the concern to align with a policy imposed from outside, whether the imposition comes from a legislature or a court. In the end, it is this need that dictates the behaviour of an individual, and not state policy. The illustration that *Petra Burai* provides is not linked to religious belief as such, but concerns a social practice that is deeply rooted in the mentality of Hungarians. It can nevertheless serve to illustrate what is also and perhaps more emphatically the case with religious practices. Examples abound of practices linked to a religion or belief that are maintained despite any policies put in place.[21] Another illustration that is the subject of an ongoing research project in the department by *Markus Klank*[22] is the situation of the community known as the "Zwölf Stämme" (Twelve Tribes) in Germany. Due to serious concern on the part of German authorities that its pedagogical principles were not aligned with German law, the children were forcibly taken away from their parents. This community ultimately decided in 2015 to leave the country and settle in Austria.[23]

The non-recognition by state law of a particular community or the refusal by the authorities to register it on the list of beneficiaries of certain benefits, the decision of certain people not to rely on state law for anything, cases where accommodation has been refused or strongly criticised, the lack of confidence by certain state authorities in the capacity of communities to resolve their own conflicts internally and, lastly, the tenacity of certain practices as a result of internalised norms of reciprocity that prevail over other priorities and values that a legislature or court might wish to impose, are but

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[19] See Hénaff, Lévi-Strauss et le principe de la réciprocité, European Journal of Sociology/Archives Européennes de Sociologie/Europäisches Archiv für Soziologie 2 (2008), 315–321.

[20] For a comparative analysis, see among others: Eltayeb, A Human Rights Approach to Combating Religious Persecution, 2001.

[21] For illustrations, see among others: Akthar, Unregistered Muslim Marriages: an emerging culture of celebrating rites and conceding rights, in: Miles et al. (eds), Marriage Rites and Rights, 2015, 167–192; Moors, Unregistered Islamic Marriages: Anxieties about Sexuality and Islam in the Netherlands, in: Berger (ed), Applying Shari'a in the West: Facts, Fears and the Future of Islamic Rules on Family Relations in the West, 2013, 141–164; Brems (ed), The Experiences of Face Veil Wearers in Europe and the Law, 2014.

[22] Markus Klank examines the legal autonomy of religious groups in Germany. His research also includes the situation of the community of the "Zwölf Stämme" and how they act within the legal framework. Very much to his regret however, due to a prolonged convalescence, Markus Klank was unable to contribute to this collective article.

[23] "Rechtsstreit wegen Züchtigung: 'Zwölf Stämme' ziehen aus Deutschland weg", Spiegel Online, 4 September 2015.

a few examples that clearly illustrate the limits of state law when it comes to ensuring the place of religion in the widest sense (including the right not to believe) in contemporary society.

In the rest of this article, each of the six illustrations just mentioned will be discussed in greater detail, followed by a conclusion that draws some lessons from the cases studied.

## Structural Limits of the Law: At the Intersection of State Sovereignty and Sacred Indigenous Sites

*Elizabeth Steyn*

### I. Introduction

On the third anniversary of 9/11 the United States was engaged in a spiritual war of a different kind. 11 September 2004 marked the second day of *Tuna Leliit Chonas – Hu'p Chona*,[24] the first Winnemem Wintu war dance to be performed (in public)[25] since the "last dance" of the Wintu in 1887 at the Baird Fish Hatchery.[26] As in 1887, it took place against the backdrop of the Sacramento River watershed and the ongoing destruction of Wintu sacred sites.[27] At stake this time was the proposed raising of Shasta Dam and the potential flooding of the last remaining Winnemem Wintu holy places.[28]

### II. Brief description of ethnographic context

The Winnemem Wintu band is named for the McLeod, or "middle river". [29] The McLeod River is one of the Sacramento River watershed's main northern tributaries.[30] The Winnemem, therefore, consider themselves to be the guardians of the river.[31] They

[24] Garrett, Drowned Memories, Archaeologies 6, no. 2 (2010), 346 (348).

[25] Ngo, Loss of Sacred Spaces, MA Thesis Department of Geography California State University 2010, 61–62; Sacred Land Film Project, Winnemem Wintu Tribal Timeline, www.sacredland.org/PDFs/Wintu_Timeline.pdf (last accessed 7 August 2016).

[26] See Hoveman, The Wintu People of the McLeod River, in: Hoveman, Journey to Justice, 2002, 18 (52–54); Garrett, Archaeologies 6, no. 2 (2010), 349.

[27] Thus, LaPena remarks, "With the loss and destruction of each sanctuary on the land, a little more of our heritage as Wintu and our cultural legacy was hidden away from each succeeding generation, so that in this millennium we Wintu are faced with a crucial issue of whether we have the right to claim our existence as 'Indians' with a valid history and culture." LaPena, Introduction, in: Hoveman, Journey to Justice, 2002, 15.

[28] See Garrett, Archaeologies 6, no. 2 (2010), 349; Ngo, Loss of Sacred Spaces, 2010, 60–61.

[29] Ngo, Loss of Sacred Spaces, 2010, 108. The "Winnemem Wintu" is also referred to in literature as the "Winemem Wintu" or the "'middle river' or McCloud River, band of Wintu": see Editor's note in Hoveman, Journey to Justice, 2002, 6.

[30] Hoveman, Journey to Justice, 2002, 19.

[31] Ibid., 21; Ngo, Loss of Sacred Spaces, 2010, 108.

are a Wintu community. "Wintu" or "northern Wintun" refers to peoples native to the upper Sacramento Valley foothills.[32] The Wintu occupied an area consisting of nine regions, all identified regionally by names marking their locations.[33] In the case of the Winnemem, "winemem" referred to the "middle water" region.[34] For the past 40 years the Winnemem Wintu have lived on privately bought land in a village called *Kerikmet*, near Redding, close to the Shasta Dam.[35]

It is worthwhile pointing out in passing that the Winnemem Wintu's status as successors of the "Wintu from the McLeod River" is disputed by another group, the (equally federally unrecognized) "Wintu Tribe".[36] The details of their dispute are beyond the scope of this article, though it should be noted that the Winnemem Wintu is no recently formed tribe: their current Chief and Spiritual Leader, Caleen Sisk-Franco, formally took over leadership from her predecessor, Florence Jones, in 1995.[37] Florence had, in turn, led the Winnemem Wintu through 62 stormy years, including the successful opposition of a ski lodge development on their holiest mountain, Mount Shasta,[38] between 1987–1999.[39] This type of inter-tribal dispute is symptomatic of American Indian law's insistence on categorizing Native American communities into federally recognized (and non-recognized) "Indian tribes" and then awarding benefits according to "Indian tribe" status: it creates a climate fertile for division and competition.

## III. The *limits* of state law in this particular context

The Winnemem Wintu have since 2001 actively opposed proposals to raise Shasta Dam by a further 18 feet on the basis that doing so would flood their last remaining sacred sites — and that the ensuing loss of their ability to conduct their traditional ceremonies would entail cultural annihilation for their tribe.[40] The band already lost over 90% of their traditional tribal lands and sacred sites with the construction of Shasta Dam as the keystone element of the Central Valley Project in the mid-1940s.[41] They received neither compensation nor the promised replacement lands.[42] The limits of state law here lie in its inability to help them avoid their looming loss when faced with the prospect of renewed construction on Shasta Dam.

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[32] Hoveman, Journey to Justice, 2002, 19.

[33] Ibid., 18; Garrett, Archaeologies 6, no. 2 (2010), 352; Dallman et al., Political Ecology of Emotion and Sacred Space, Emotion, Space and Society 6 (2013), 33, 36.

[34] Hoveman, Journey to Justice, 2002, 19.

[35] Garrett, Archaeologies 6, no. 2 (2010), 348, 352.

[36] See Hoveman, Acknowledgements, in: Hoveman, Journey to Justice, 2002, 11 (12); Lalouche, Preface, ibid., 9.

[37] Sacred Land Film Project, Winnemem Wintu Tribal Timeline (Fn. 25).

[38] Garrett, Archaeologies 6, no. 2 (2010), 360.

[39] Sacred Land Film Project, Winnemem Wintu Tribal Timeline (Fn. 25).

[40] See Garrett, Archaeologies 6, no. 2 (2010), 349; Ngo, Loss of Sacred Spaces, 2010, 60; Dallman et al., Emotion, Space and Society 6 (2013), 38.

[41] Ngo, Loss of Sacred Spaces, 2010, 60; Dallman et al., Emotion, Space and Society 6 (2013), 38. See Garrett, Archaeologies 6, no. 2 (2010), 350–351 on major dam construction in the American West during the Big Dam Era and its impacts on the Native American landscape.

[42] Ngo, Loss of Sacred Spaces, 2010, 33, 109–110; Dallman et al., Emotion, Space and Society 6 (2013), 38.

### 1. A brief illustration of these limits

The land surrounding (and under) Shasta Dam's reservoir, Shasta Lake,[43] makes up the Winnemem Wintu tribal lands on the river and thus contains their traditional practice areas and sacred sites.[44] It is now deemed to constitute mostly US Forest Service (USFS) land.[45] The Winnemem presently continue to practice their cultural and religious ceremonies there on the basis of a use permit first obtained under the American Indian Religious Freedom Act ("AIRFA")[46] in 1978,[47] and subsequently developed through Memoranda of Understanding and Agreement signed with the USFS in the 1980s,[48] as well as additional permits and private easements obtained in 1995 from private lumber companies – facilitated by USFS – for purposes of accessing sacred sites on private lands.[49]

They are not a federally recognized tribe, a matter that the tribe members attribute to clerical oversight on the basis that they have had previous dealings with the federal government.[50] This has meant that they were excluded from the environmental and cultural impact assessment studies performed by the Bureau of Reclamation on the raising of Shasta Dam,[51] since they do not qualify for the religious protections afforded by legislation such as AIRFA, the RFRA,[52] RLIUPA[53] or Executive Order 13007;[54] for the cultural protections offered by NAGPRA,[55] ARPA,[56] and NHPA;[57] or for the environmental protections of NEPA.[58] They do not qualify because these Acts all extend their protections to "Indian tribes", and "Indian tribe" is widely interpreted to mean a federally rec-

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[43] The archaeologist Garrett, Archaeologies 6, no. 2 (2010), 354, takes issue with this euphemistically named reservoir on the basis that that "giv[es] it an illusion of permanence which clouds public understanding of this flooded landscape and makes the Winnemem appear to be asking to practice traditions in areas which have always have been underwater."

[44] Ibid., 348; Ngo, Loss of Sacred Spaces, 2010, 60; Dallman et al., Emotion, Space and Society 6 (2013), 38.

[45] See Sacred Land Film Project, Winnemem Wintu Tribal Timeline (Fn. 25); Ngo, Loss of Sacred Spaces, 110; Dallman et al., Emotion, Space and Society 6 (2013), 36.

[46] American Indian Religious Freedom Act of 1978, as amended (AIRFA) [Public Law No. 95–341, 92 Stat. 469 (Aug. 11, 1978) codified at 42 USC § 1996.

[47] Sacred Land Film Project, Winnemem Wintu Tribal Timeline (Fn. 25).

[48] These were "developed for the protection of tribal gathering places, ceremonial sites and sacred places", ibid.

[49] Ibid.

[50] Dallman et al., Emotion, Space and Society 6 (2013), 30.

[51] Garrett, Archaeologies 6, no. 2 (2010), 361.

[52] Religious Freedom Restoration Act [RFRA] (2000), 42 USC §§ 2000bb–1 – 2000bb–4.

[53] Religious Use of Public Institutionalized Lands [RLIUPA] (2000), 41 USC § 2000cc, et seq.

[54] Executive Order 13007, 61 Fed Reg. 26771 (24 May 1996) – Indian Sacred Sites.

[55] Native American Graves Protection and Repatriation Act (1990) [NAGPRA], 18 USC § 1170, 25 USC §§ 3001–3013. Thus, in Bonnichsen v. United States, 217 F Supp 2d 1116 (D. Or. 2002), Wanapam Band was held to be an improper claimant because it lacked federal recognition as a tribe.

[56] Archaeological Resources Protection Act of 1979, as amended [Public Law No. 96–95; 16 USC § 470aa–mm].

[57] National Historic Preservation Act [NHPA], 16 USC § 470.

[58] National Environmental Protection Act [NEPA], 42 USC § 4332 (C).

ognized Indian tribe.[59] They furthermore cannot seek judicial review of the Bureau of Reclamation's resulting decision to proceed with the project under the Administrative Procedures Act,[60] since they do not as a federally unrecognized tribe have standing for claims founded on the provisions of Acts that take the federally recognized tribe as their base unit.[61] Neither can they rely on the freedom of religion guarantee in the US Constitution,[62] due to the precedent in *Lyng*.[63] In that case the US Supreme Court treated a sacred site protection claim as a matter where property law prevails over any sacred site protection offered to Native American claimants by measures such as AIRFA.[64]

The observant reader will have noticed that the Winnemem Wintu were granted a right of use permit under AIRFA in order to access the land in question and yet they are a federally non-recognized tribe. This apparent contradiction is clarified – if not satisfactorily explained – when one considers that, although the permit was first issued to them in 1978 and that the federal government awarded them federal benefits in the form of Indian Health Service as a recognized California tribe until 1985,[65] their name did not appear on the Federally Recognized Tribes List that has been updated and published by the Secretary of the Interior (DOI) on an annual basis since 1994.[66] This public list builds on the formal federal recognition procedure for Indian tribes that was established by the Bureau of Indian Affairs of the DOI as an administrative process in 1978.[67] Prior to the inception of the list, a tribal group's federal existence had depended on the existence of treaty relations or another formal political act acknowledging the tribal status of such group, such as a statute or a ratified agreement.[68] Because the Winnemem Wintu's name does not appear on this list they are not considered to constitute a federally recognized tribe.[69]

There are further contradictions. Although the Bureau of Indian Affairs of the Department of the Interior put a halt to their health services in 1985,[70] 1986 saw the

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[59] "Indian tribe" has no standard, static, all-encompassing, all-purpose definition: Cohen, Federal Indian Law in Newton, 5th ed. 2012, 130–131. Nonetheless, the above can generally be said to have resulted from the combination of the prescribed administrative process for federal recognition and the list. See ibid. at 131.

[60] Administrative Procedures Act[APA], Public Law No. 89–554 § 1, 80 Stat 378, 5 USC § 551 (1966).

[61] See Cohen, Federal Indian Law in Newton, 5th ed. 2012, 181–182.

[62] First Amendment (1791) to the United States Constitution (1787): Free Exercise Clause.

[63] Lyng v. Northwest Indian Cemetery Protective Association, 485 US 439, 108 S Ct 1319, 99 L Ed 534 (1988).

[64] The Lyng court held that AIRFA is a mere expression of policy preference that does not create judicially enforceable rights.

[65] But cf. Cohen, Federal Indian Law in Newton, 5th ed. 2012, 135: California tribes were treated differently insofar as health care was concerned due to the historical inequity relating to the Senate's refusal to ratify the 18 treaties concluded in 1851.

[66] In terms of the Federally Recognized Tribes List Act of 1994, 25 USC §§ 479a, 479a-1.

[67] 25 CFR Part 83. Both substantive and procedural concerns have been raised with regards to this administrative process followed. Substantive concerns include uneven standards of proof, unequal treatment of different groups, bias against particular groups and the influence of "unwritten, improper policy considerations": Cohen, Federal Indian Law in Newton, 5th ed. 2012, 159. Procedural concerns comprise issues such as high costs, long delays and inconsistent results.

[68] Ibid., 140.

[69] Garrett, Archaeologies 6, no. 2 (2010), 352.

[70] Sacred Land Film Project, Winnemem Wintu Tribal Timeline (Fn. 25); Garrett, Archaeologies 6, no. 2 (2010), 352.

issue of a Fish and Wildlife permit to the Winnemem Wintu Chief and Spiritual Leader, *Caleen Sisk-Franco*, that has enabled her to hold and carry eagle feathers.[71] This is paradoxical, for the 1940 Bald and Golden Eagle Protection Act (BGEPA)[72] exemption regulations[73] unequivocally restrict the granting of permits for the possession of eagle feathers to members of federally recognized Indian tribes.[74] The Winnemem Wintu thus argue that the federal government has implicitly recognized them in that it has had dealings with them over the years.

At this point the notion of "Indian tribe" as utilized in federal American Indian law needs to be circumscribed further. It does not mean that a tribe exists,[75] but rather that there is a government-to-government relationship between the tribe and the US.[76] It is also the source of the federal trust responsibility towards the tribe.[77] Federal recognition of a tribe establishes tribal status for federal purposes such as health services, and recognition of tribal sovereignty in matters such as child welfare, gaming and the environment.[78] Federal and tribal understandings of the concept "Indian tribe" do not necessarily mesh[79] – an "Indian tribe" can for federal purposes be a purely legal entity, or a mere fragment of a previously unified larger group, or it can even be made up of different tribes occupying the same reservation.[80]

### 2. Analysis and interpretations of the limits of the law in the ethnographic context

The Winnemem Wintu's argument of implicit recognition presupposes good faith on the part of the federal government, i.e. the argument goes that if they can show that the federal government had had previous dealings with them, it follows automatically that the government must now recognize them as a tribe. This is not the case.[81] Federal recognition is a political and constitutive act[82] that grants the tribe and its members access to "a panoply of benefits and services."[83] *Cohen's* "Federal Indian Law" aptly summarizes the conflicting value structures underlying federal and tribal conceptions of tribal status in the following terms:

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[71] Ibid.

[72] 16 USC § 668a.

[73] 50 CFR § 22.22.

[74] Cohen, Federal Indian Law in Newton, 5th ed. 2012, 971. Also see United States v. Wilgus, 638 F3d 1274 (10th Cir. 2011). In United States v. Hardman, 297 F3d 1116, 1132 (10th Cir. 2002) the Court questioned the federal government's authority to restrict permits in this way, but did not question the fact that they were so restricted.

[75] Anderson et al, American Indian Law, 3rd ed. 2015, 135–136.

[76] Cohen, Federal Indian Law in Newton, 5th ed. 2012, 134; Anderson et al, American Indian Law, 3rd ed. 2015, 251.

[77] See Cohen, Federal Indian Law in Newton, 5th ed. 2012, 134 note 19.

[78] Ibid., 131; Anderson et al, American Indian Law, 3rd ed. 2015, 1.

[79] Ibid., 251; Cohen, Federal Indian Law in Newton, 5th ed. 2012, 130.

[80] Ibid., 133. Thus, for instance, the federally recognized Redding Rancheria "comprises the descendants of selected families of the Wintu, Pit River, and Yana tribes": Lalouche in: Hoveman, Journey to Justice, 2002, 9.

[81] See Anderson et al, American Indian Law, 3rd ed. 2015, 252.

[82] Cohen, Federal Indian Law in Newton, 5th ed. 2012, 134.

[83] HR Rep No 103–781, 103rd Cong. 2d Sess, 1994, 3, cited in Cohen, Federal Indian Law in Newton, 5th ed. 2012, 134.

> "This legal status cannot, of course, deny historical or cultural evidence about tribal existence; nevertheless, this evidence has no legal significance in the context of federally recognized political and legal existence."[84]

Since it is a political act, no court has yet overturned a congressional or executive determination of tribal status,[85] and the "arbitrariness" standard proposed by the US Supreme Court in *United States v. Sandoval*[86] only ventures to suggest that Congress cannot define tribal status so as to create a tribe out of a completely disparate group of individuals – there certainly has been no suggestion of any obligation towards federal recognition.[87]

It is clear, therefore, that the fact that the Winnemem Wintu's must forcibly rely on federal recognition as a gateway to qualify for protecting their sacred sites under the religious, cultural or environmental laws of the United States effectively means that they have no remedy at all. There is accordingly a serious structural deficiency in the US law pertaining to the protection of sacred Indigenous sites *insofar as that protection is predicated on entry barriers that exclude more than half of all self-identified Native American people.*[88] While the US Government may claim that it is sovereign in its internal actions, this clearly cannot be said to constitute effective protection of sacred Indigenous sites. We find ourselves, thus, at the limits of the law.

## IV. Possible solutions to address

Should the US Government be serious in its desire to protect sacred Indigenous sites but be loath to extend its existing recognition of Indian tribes – a very debatable proposition, but one beyond the scope of the present discussion – the most evident way to do so would be to decouple the definition of "Indian tribe" in the measures intended to protect Native American religions (AIRFA, RFRA, RLIUPA, NAGPRA, Executive Order 13007) from the Federally Recognized Tribes List.[89]

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[84] Ibid., 135–136.

[85] Ibid., 138.

[86] United States v. Sandoval, 231 US 28, 46 (1913).

[87] See Cohen, Cohen, Federal Indian Law in Newton, 5th ed. 2012, 138–139.

[88] In the 2010 census, 5.2 million individuals indicated that they were American Indian/Alaska Native (1.7% of the population), either alone or in combination with some other race. Of this group, 2.9 million (0.9%) claimed American Indian/Alaska Native as sole descent. Yet, as of 2005, only around 2 million individuals were officially enrolled in a federally recognized American Indian tribe or an Alaska Native village: Anderson et al, American Indian Law, 3rd ed. 2015, 6–7.

[89] I am not implying with this piece that obtaining access to these statutory measures equates to effective protection: there are further structural problems, as the Oak Flat saga attests. My point is simply that by ab initio excluding more than half of America's Native American population, the legislation has no chance at all of being effective. On Oak Flat, see House Bill HR 2811 and S 2442, Save Oak Flat Bill, 114th Cong. 1st Sess. 2015 and Indianz.com, Bill Repeals Land Swap for Mine on Sacred Apache Site in Arizona, 19 June 2015,1: www.indianz.com/News/2015/017902.asp (last accessed 7 August 2016).

# The Limits of State Law in an Organized Secular-Humanist Community in the Southern Bible Belt: Model Behaviour Shaping Restraint Law Use

*Katayoun Alidadi*

## I. Introduction: Searching for "Nones"

The potentials and limits of the law face-off in the case of an emergent secular-humanist[90] community started four years ago in a large and diverse metropolis in the American Bible Belt. I conducted fieldwork between December 2015 to March 2016 in this "community grounded in reason rather than revelation, celebrating the human experience as opposed to any deity" (which I will refer to as "Haven"). While my research focused on Haven, the first well-known organisation of its kind and one which has become a 'model' of a formally established secular-humanist organisation, the mushrooming of social capital-building[91] communities of nonbelievers has occurred in other cities in and out of the American Bible Belt in just the last few years. Indeed, the "Haven model" – which itself draws heavily on the organisational principles of US Protestant churches[92] but maintains distinct features – has sparked considerable public and media interest to the extent that at the time of writing about a dozen other groups in different US and Canadian cities have set up or are in the process of setting up a similarly modelled organisation.[93] Some of these organisations are affiliated "branches" of Haven, adopting the template, motto and logo, while adding their particular emphasis. In this sense, emergent atheist *community and social capital-building*[94] efforts form the background momentum for my observations.

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[90] Instead of an elaborate exploration of the various affiliated terms – secular, freethinker, agnostic – I have left respondents the freedom to develop their own labels (even if they objected to labelling themselves); secular and humanist were the two most popular labels but to lesser extent atheism and freethought was also used, the latter in the repeated moto "freethought is not really free" at "passing the hat time".

[91] See Putnam, Bowling Alone: the Collapse and Revival of American Community, 2000, 18. In Bowling Alone, Putnam lamented the civic decline brought about by disengagement in both secular and religious social capital-building communities, and proposes ways to reverse the trend. Organisations such as Haven could be seen as part of the "burgeoning civic vitality", in particular since they are highly participatory and have considerable externalities (e.g., benefiting non-members through volunteer work).

[92] And perhaps for that reason too it is sometimes referred to – in a tongue-in-cheek fashion – as an "Atheist Church".

[93] These developments were shared by the Director – a formed pastor of a Lutheran Church – as well as elaborately detailed on social media (particularly Facebook). But as said, this section will draw on my direct experience with Haven, in particular the Sunday meetings I attended, the volunteer work I engaged with together with Haven members, the informal lunches I shared with Haven members and the dozen in-depth interviews I conducted with selected members over the course of my fieldwork.

[94] This new community-building separates itself from traditional atheist meetings (e.g., meet-ups or atheist conventions) in (1) its regularity of convening (every Sunday and various mid-week events), (2) its purpose, which is multi-dimensional and goes beyond the intellectual to include the emotional and social (but not spiritual) (3) its local embeddedness. In addition, the participatory nature (e.g., members delivering the main talk and community moments) greatly facilitates the social capital-building exer-

The so-called "nones"[95] are the fastest-growing and highly internally diverse "religious" group in the US.[96] My initial interest in exploring nonbelief as an element of diversity and an underexplored subject of accommodation had to do with my personal experiences when relocating to a metropolitan Southern US city. I was struck by the sheer number and architectural dominance of churches, from a kaleidoscope of (non)denominations, including the phenomenon of mega-churches.[97] A colossal 170-foot (50 meter) white cross along a major freeway taking drivers through the city's downtown area offers a poignant and penetrating image of the Christian majority faith, dwarfing in its shadow the urban surroundings. Less prominent but nonetheless visibly demonstrating the city's religious diversity and appreciation of faith traditions are the various mosques and synagogues, temples and gurdwaras, which one can detect when driving on the freeway or city streets (needless to say, this is a driving city).

What was also striking (but hardly surprising) was the effect of apparent widespread religiosity on social time, space and resources. The particular chronotopes, from people's colloquialisms (the many "bless you's" and "thank God's" being just the beginning), common family practices (saying thanks before meals) and conversational inquiries (such as "what is your church (or religion)?") and repeated invitations to attend church events and activities (Easter egg hunts, plays, Halloween events) which form the heart of the general social life of the city seemed to generate the beat and spirit of the city. This made me, coming from a highly secularized European place, feel welcome yet very much out of place. From my neighbourly contacts and exploratory interviews with practicing Muslims, mainly veiled Pakistani women, religious intolerance towards Muslims was not an issue of wide concern: these women insisted that they and their families felt very included in the country and city and that they even received very positive social responses towards their visible faith (apart from a few incidents which were downplayed). "We are all people of faith so that aids understanding" was my take-away. I wondered how this social setting, strengthened by America's God-centered "civil religion"[98] and recent legal developments (e.g. the

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cise, building bonds amongst the members and bridges towards other communities (e.g., through volunteer work or member calls to join forces in social justice causes).

[95] Pew Research Center, America's Changing Religious Landscape (report), May 2015. About 23% of the US population is a "none" according to the Pew Research Center (up from 16% in 2007), i.e. listing "no particular religion" when asked for their religious affiliation. In comparison, only 5.9% of respondents identified with religions other than Christianity in 2014 (up from 4.7% in 2007).

[96] Atheists/humanists and agnostics are a subgroup of the 'nones' (many unaffiliated Americans nonetheless believe in a god or supreme being). In that sense, nones are recruiting material for organisations such as Haven as well as traditional churches. See White, The Rise of the Nones: Understanding and Reaching the Religiously Unaffiliated, 2014 (White, a megachurch pastor, develops strategies for churches to reel in – a segment of – the "unchurched"). The share of "nones" who say they are atheist or agnostic is growing, however. See Pew Research Center, America's Changing Religious Landscape (report), May 2015, 14 (31% of the nones in 2014 as against 25% in 2007).

[97] The largest megachurch in the US, on a campus with an imposing building with seating capacity for 16,000, is just minutes away from where Haven Sunday meetings are held.

[98] The term refers to the implicit religious values of a nation, a sort of national "folk religion". See Bellah, Civil Religion, America, Journal of the American Academy of Arts and Sciences 96, no. 1 (1967), 1–21. It may be considered a paradox that religious freedom is part of the American civil religion, but since this is a theist civil religion (with a particular way of justifying religious liberty), it at least symbolises a level of exclusion towards nontheists.

Hobby Lobby case[99]) would be stigmatizing and excluding, in symbolic or real terms, towards *nonbelieving* Americans.

Having lived in other areas of the US, where being a non-believer would not be much of an issue, although perhaps frowned upon in certain social settings, it struck me that to interview atheist Americans about their experiences with law and society in their particular setting would reveal interesting dynamics of religion or belief and the inclusionary/exclusionary mechanism at work, and in that sense would address the very limits of the law in protecting people irrespective of religion or belief. In addition, a number of "legal relics of the past" have stayed on the books in the State despite their arguably unconstitutional nature,[100] in particular a State constitutional provision which bars nonbelievers from running for public office, bolstered this hypothesis. To test this, I needed to find respondents who (a) were willing to talk, (b) had interesting experiences or perspectives to share and (c) found the law to be relevant to their own personal, family, professional or social endeavors. Since nonbelieving "nones" are said to have largely stayed unaffiliated, my focus would be on individuals. That proved more challenging than expected: a number of people who had been referred to me as interesting respondents preferred not to talk, often saying they were too busy even after initially agreeing to meet. This was discouraging but to some extent motivated me to persevere, since the hesitations to talk openly about disbelief itself could be seen as a coping mechanism adopted by persons with hideable stigmatized characteristics.[101] Then I found Haven.

## II. Ethnographic Setting: a Picture of Haven

Sunday meetings (the main ethnographic context) at Haven are an emotional, intellectual, communal, culinary and often humorous experience (they are not spiritual or at least do not purport to be). People start trickling into the venue – a rented conference room for most of my fieldwork, currently a dance hall with mirror-plastered walls – around 10 am, greeted for the most part by the same familiar faces, coffee, drinks and (sweet) treats (starting the morning with a tasting of Rob's legendary double baked

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[99] U.S. Supreme Court, Burwell v. Hobby Lobby Stores, Inc., 573 U.S.__ (2014) (held that a closely-held corporation was exempt from a requirement to provide insurance coverage under the Patient Protection and Afforcable Care Act because certain forms of contraception ran counter to the religious beliefs of the owners).

[100] The requirement that a public official recognize the existence of a Supreme Being violates Article 6 of the US Constitution, applicable to the State via the 14th Amendment ("No religious test shall ever be required as a qualification to any office or public trust under the United States.") Yet, nonbelieving politicians are very rare and face particular challenges. A recent dispute erupted in the Arizona State House when a secular humanist (Democrat Juan Jose Mendez) was denied the opening address since fellow lawmakers maintained that opening sessions must invoke a "higher power". See *Wing*, Arizona Republicans Offended That Atheist Colleague Prayed For Them Without Invoking God, Huffington Post, 4 March 2016.

[101] This is not to say that atheists see themselves as "stigmatised" per se (in my experience an explicit stigmatisation discourse is heard at the pulpit of Christian churches in the same city, even if in the normative majority and deriving considerable social and professional advantage from their affiliation). However, atheists/humanists do adopt 'neutralizing strategies', for instance when they are asked to define themselves will often shy away from the term 'atheist' so as to avoid the negative connotations they have also grown to internalize. Many of my respondents said they prefer 'humanist' or 'secular' to denote their beliefs as this allowed them to explain their position as opposed to 'scare people off'.

chocolate biscotti has become somewhat of a ritual). Families with children are welcomed and children are supervised and entertained with toys[102] by a number of volunteers in the directly adjacent room. People (some with pets – regulars being a grey curly-haired poodle and Romeo, a purple-diapered male cockatoo) find an empty seat facing the podium (non-elevated) and engage in casual conversation.

The formal meeting starts with live music, often a single musician on the guitar or a musical duo entertaining the crowd of about 60 people with (folk, bluegrass, blues-style) music, intermittent stories, and life lessons in the form of jokes (musicians are the only people remunerated for their services). Next, the director or another regular takes the floor and announces the "community moment", a brief talk on the speaker's topic of choice – anything from an engaging personal experience and insight (not necessarily related to nonbelief or religion) to sharing an idea, debate, or book. A coffee break then follows before the crowd is called back to listen to the main talk: a 20-minute presentation by a member or an invited guest followed by Q&A on a range of topics (Haven members like to call these "TED talks" and they are often very thought-provoking and well-presented). Past talks have included how to "come out" as an atheist in a Muslim community, how to spot bad science reporting, how to improve physical and mental health, how a nonbeliever can sensibly and sensitively talk to Christians about Jesus (i.e. without "looking like a jerk"), or how domestic violence has evolved and how members can be part of the solution. This segment is closed off with more live music, during which the "hat is passed" (often accompanied by an announcement about the need for – sustained – donations to support existing activities but particularly to expand operations by renting a full-time venue). A "joke moment" (one of my favourites: "I joined a support group for procrastinators, but we still have not met"), various announcements and a call to continue the conversation over lunch at a local restaurant conclude the formal meeting (the banner with the core values – "people are more important than beliefs" – "human hands solve human problems" – "be accepting and be accepted"– is taken down; email lists, leaflets and other objects are removed by Haven volunteers; the videographer and musician(s) collect and store their equipment, etc.). The lunch draws about one-fourth of the people and offers a further moment for rapport-building, light conversation and activity planning (I found the talks often provided the most insight and crucial insider information). One Haven member meets his wife, who has been attending a church service. Most return home or proceed with their day after the lunch, while the most invested (male) members continue the "fellowship" at a nearby pool hall; this group would also meet mid-week for dinner and join other members at volunteer or social events. I often took the opportunity to sit down with whomever I had struck up an interesting conversation with for an in-depth, hour-and-a-half interview.

Haven does not have formal membership rolls but the Sunday meetings draw 50 to 70 people (growing steadily), familiar faces, regulars as well as new faces; the online reach is much wider: several hundred people had signed up for the email-list; the group maintains a website and an active social media presence; the "TED talks" and other segments can be viewed on YouTube. While the membership is intergenerational, gender and ethnically diverse, it hardly reflects the city's *racial* or socio-economic diversity, which is considerable. In particular, Haven – which does not have active recruiting

[102] Unlike religious child care, there was no 'program' or curriculum in place at Haven at the time of my fieldwork; about a dozen children engaged in free play or board games.

mechanisms but has mainly grown through word of mouth and self-selection aided by media reports, an updated website and social media – has not drawn a proportionate[103] African-American membership.[104] The presence of Asians and ex-Muslims, on the other hand, is prominent.

As a social organisation, Haven and its members invest in bonding activities as well as in bridging exercises, reaching out to the wider community, e.g. with blood drives or planting trees at a nature center. In this sense, the organisation can be considered to generate considerable social capital while positively contributing to the social image of nonbelievers.[105] The label "atheist" is, to put it mildly, hardly a badge of honour in the American South.[106] While Haven is still in an explorative phase, dealing with new developments and events as it goes, creating new rituals, its key goal is hardly religion-bashing (some "lighthearted ridiculing" of religion not excluded). I consider its key goal to consider how "humanist principles", valuing reason and science above revelation and tradition, impacts or should impact everyday life for people with diverse beliefs (some members are atheists, a small minority would consider themselves spiritual or even believing in a God but finding no appeal in organised religious life). Coming out as a "nonbeliever", however difficult and stigmatizing at times, is one thing; *mainstreaming* nonbelief in one's everyday life (e.g. social encounters, parenting, news consumption, philanthropy, health) in "one of the most religiously observant countries in the contemporary world"[107] is another considerable challenge. Yet, the members also have considerable tools at their disposal; they are generally highly educated and of above average middle-class, socio-economic status, with many having achieved considerable professional success (some contributing generously to Haven).[108]

The collective concerns that are addressed within the confines of the Haven community are issues the individual members have been dealing with for years: they want to do volunteer work and make a difference, they don't think people should only fend for themselves, they have always sought not to be seen "as a jerk" when talking about Jesus to a committed Christian, and they have often considered it not worthwhile to litigate

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[103] Haven leaders recognize this, but they point to particular challenges for African-Americans to leave their church. In addition, African Americans (the most religious ethnic group), even if nonbelieving, may find it hard to desert their tight-knit, Church-centered community. See the work of African American humanism and religion scholar, Anthony Pinn, e.g., Pinn, The End of God-Talk: An African-American Humanist Theology, 2012.

[104] At one particular Sunday meeting, where an estimated 60 people were attending, there was one African-American woman, and this became painfully obvious because the "community moment talk" was on fighting our own bigotry (the presenter, an active member, said his father was a bigot and that he himself had to remind himself of the dangers in particular of prejudice towards blacks). He concluded his talk with a general apology to "whomever he may have treated as less worthy"; the African-American woman (engaged with a white man) came up and gave him a hug, amidst applause from the crowd.

[105] In particular since religious involvement is strongly correlated with civil involvement (incl. voting) volunteering and philanthropy. Putnam, Bowling Alone: the Collapse and Revival of American Community, 2000, 67.

[106] This was recognized by many of my respondents, who preferred other terms because of the stigma but also because it did not necessarily convey accurately their worldview; they found their own reasons to attack the label. (signalling a neutralizing strategy to counter stigma).

[107] Putnam, Bowling Alone: the Collapse and Revival of American Community, 2000, 65.

[108] E.g. on his birthday, showing how much the Haven community meant to him, one member announced he would match the "pass the hat" donations (several thousand dollars).

when they knew they were in the right and even had the resources to do so. The value and appeal of Haven to many members is that the search for cultural alternatives (e.g. what to say instead of "bless you" when someone sneezes) is now collectivized; Haven offers a safe haven for discussion amongst people with some shared beliefs as to how to deal with certain challenges, questioning cultural customs by using intellectual, non-emotional or tradition-based modes of argument, how they cannot just survive but also "thrive with authenticity" as atheists in the Bible Belt.

## III. The Limits and Potentials of the Law

Now, turning to the law: how does (official) law play in this modern American setting? Does Haven (in the board of directors) and the members feel law is relevant, adequate or partial to their needs and position as *minorities* (do they even regard themselves as such)? Do they have particular aims to redress grievances, such as the will to remove the textual religious test still enshrined in the State Constitution or to improve better employment discrimination protection for non-believing workers? Do they consider their voices heard and taken seriously on the political arena?

Before I discuss this, a caveat is in order. While I initially embarked on the fieldwork seeking answers to question like these, I soon realized the leading (and fascinating) story was one of community-building and social capital,[109] rather than a story of the law. But law remains a necessary background and (in this case) *facilitator*; without the existence of legal protection and a threshold level of social acceptance, the successful project described above would not be possible. While some members considered the American system skewed in favour of religion and saw nonbelievers as stigmatized (one respondent maintained it was easier to be gay than to be atheist in this setting; others did not agree), others (prominently ex-Muslims) found social acceptance very, well, acceptable. Clearly, Haven could not exist back home in Saudi Arabia, one (still largely closeted) ex-Muslim Saudi man confided. The perspective was thus relative in this diverse group. Overall, the law has facilitated the everyday realities that nonbelievers have faced in the context of a virtue-laden religiosity but religious liberty-valuing America. It is the law that provides the framework for incorporation of nonprofits, tax-exempt status and the principle of non-discrimination on the basis of religion. It is civil rights law which strengthens nonbelieving workers' position; a mainstream employer asking an applicant whether he believes in the Second Coming is overstepping the line. Both parties know this. This is so despite the fact that legal protection is rarely mobilized; litigation is more often (un)consciously avoided and other, less confrontational but effective, individual solutions are sought.

A nonbelieving physical therapist, who did *not* believe in the Second Coming, did not confront the employer or consider litigating ("it's not worth it"). The same goes for another example: when a landlord pulled out of promising negotiations with Haven when he realized the organisation that wanted to rent its premises was atheist (and this

[109] Creating "networks of reciprocity". See Putnam, Bowling Alone: the Collapse and Revival of American Community, 2000, 81. As Putnam writes, creating such durable network requires time and considerable investment (e.g. 90); the particular societal position of secular humanists in the Southern Bible Belt may explain why nonbelieving individuals commit to a collective project and channel their social and communal efforts in an organisation such as Haven.

could affect other tenants), no legal avenues were pursued (despite the fact that at least one lawyer sits on the board of Haven). The search simply continued.

But it should be stated that non-use of official law – from avoidance of framing obstacles as legal disputes to non-mobilization of law in clearer examples – by Haven and its members in such instances does not imply alienation from the legal system.[110] The frustration created by the contemporary social reality regarding atheists is moderated by the knowledge of the existence of the law; the mere potential (but confrontational) relief of the law offers solace, so that we cannot maintain that the protective nature of the law is irrelevant or obsolete. In many ways, the organisation and its members are embedded in the legal fabric of the city, the state and the country, and benefits are derived from the law. Haven is a fully-formed nonprofit which benefits from the same tax-exempt status as churches and religious organisations (this is so despite the fact that tax-exempt status for churches is disputed as offering too much support to religion in the US). The law (in abstract) is viewed with exceptional legitimacy, although its political bases and connotations are recognized and some criticized. Legal protections are not utilized to the maximum extent as that is not seen as a productive way to improve their own social situation and that of people in their position. The counter-productive risks associated with mobilizing the law are deeply taken into account, and this often leads to dumping of legal rights. However, having those rights is significant to these individuals as it strengthens their sense of fairness while remembering their particular isolated position. But social status, income, ethnic dominance and community all mean that this is not a stereotypical vulnerable group.

In particular, individual members have been able to maneuver the intricacies of the modern workplace by various coping mechanisms: (1) choosing majors, industries and businesses where religion is tuned out explicitly or implicitly; (2) finding ways out of the countries or locales where their non-belief put them in risk of stigmatization, exclusion or even bodily harm; and (3) by searching for commonalities outside of religion or belief when in religious settings while channeling deeply held convictions (e.g. that there cannot reasonably be a god/gods) and worldviews (that one should approach everything with reason, including newsgathering and personal health). Now, with emergent 'safe havens' for freethinkers such as Haven, they can add the social capital derived from their community involvement.

Certainly, some laws are outdated and do not reflect the changing circumstances, including the prominent rise of the "nones". Yet the law is continuously playing catch up; debates on the limits of reasonable accommodations and exemptions to "neutral laws" which place special burdens on religionists (e.g. the Kim Davis case[111]) are influenced by the changing religious composition in the US. The example of US State constitutions with religious tests for public office is an obvious example.[112] Yet, this has drawn very limited advocacy; many of my respondents were not even aware of their existence and even those who were saw other issues as more important, including social

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[110] Conversely, one can see high rates of litigation as a "sign of decay in the nation's social fabric". See Greenhouse, Yngvesson and Engel, Law and Community in Three American Towns, 1994. See also Greenhouse, Praying for Justice: Faith, Order and Community in an American Town, 1986 (illustrating how the Baptist people of "Hopewell" derived their self-restraint towards legal mobilization from their religious convictions).

[111] See Binder and Lewin, Clerk in Kentucky Chooses Jail over Deal on Same-Sex Marriage, The New York Times 3 Sept. 2015.

[112] At least seven US State Constitutions include such provision.

justice causes which did not necessarily touch on their nonbelieving status (e.g. LGBT equality). Perhaps those causes are considered more useful to join; the law has undoubtedly made progress in areas where humanists join the social justice movement, but a number of distinct "separation of church and state" causes have surprisingly gained much less traction. In part, this may be explained by a conscious strategy to exhibit non-evangelizing, "model behaviour" as people who are "good without God",[113] including in settings where religion or religionists are encountered. This self-restrained 'pick your fights' strategy often implies the non-mobilization of law when the direct goal is one's own status and benefit. But from the perspective of the emergent community model, the restraint and ambivalence toward law use is mainly shaped by the model citizen ideal. As nonbelievers, there is an uphill battle to show one is not without a moral compass, and which way best to show this than by certain worthy behaviours?

In sum, nonbelievers are certainly underrepresented in American politics and the public sphere,[114] and are confronted with some outdated laws and potentials for improvement of legal protection in real and symbol terms. However, the self-adopted strategy of model citizen, to show in a non-evangelical way that people can be good without God, by members individually and Haven collectively alike, brings about particular self-imposed agent limitations. In their search for their non-law centered approach, the members are now able to add the considerable benefit of collectivity, a cohesive identity[115] and social capital. Whether such movements can discredit or at least unpack the long association of atheism/nonbelief with immorality will depend on various factors, including the development of bridging tools to convey the links between worldviews, morals and actions.

## The German legislative response to the circumcision of male children

*Jonathan Bernaerts*

Over the course of the last few decades, circumcision of male children has received increasing attention, turning the once unquestioned practice into a thorny issue. The debate has taken on various forms in different countries worldwide and has divided academics across several fields as well as non-academics. This division has prompted the law to face its own limits as to how it reconciles different interests and rights, while adjudicating and legislating on the practice of circumcision of male children.

In Germany, for example, the so-called Cologne judgment[116] caused fierce debate on the issue, which, while somewhat diminished by the response of the legislature, is nonetheless on-going. The goal here is not to present or discuss in full detail the positions on

[113] This is the slogan of the American Humanist Association. See: www.americanhumanist.org

[114] A striking example was the awkward encounter between CCN reporter Wolf Blitzer and an atheist woman who was asked in the aftermath of an Oklahoma tornado if she 'thanked God'; See Alexandra Petri, "Wolf Blitzer's awkward atheist encounter", Washington Post, 24 May 2013.

[115] See Cimino and Smith, Atheist Awakening: secular activism and community in America, 2014.

[116] LG Köln, NJW 2012, 2128.

male circumcision (in Germany), but rather to show some of the intricacies of accommodating minority practices, both in terms of the legislative response and its implementation.

## I. The Cologne judgment

Prior to the Cologne judgment, there was already some case law[117] and jurisprudence[118] in Germany concerning the non-therapeutic circumcisions of male children. However, the Cologne Regional Court (*Landgericht Köln*) gave the debate a new dimension when it delivered its judgement on 7 May 2012. It found that the non-therapeutic circumcision of a four-year-old Muslim boy amounted to bodily harm (§ 223 of the German Penal Code) and that therefore the parents of the boy could not give consent to an act that causes bodily harm.[119] Although the *Landgericht Köln* did not ban circumcision in Germany, it did spark an ethical, legal and medical debate on the circumcision of male children.

Moreover, it created legal uncertainty for the parties involved, including the children, parents and circumcisers. On the one hand, several professional medical associations responded to this uncertainty by advising their members not to perform non-therapeutic circumcisions so as to avoid criminal liability. On the other hand, religious communities felt that their religious lives were impaired in Germany, a feeling they expressed in strong terms.[120]

This legal uncertainty was accompanied by broader political implications, magnified by the attention the judgment attracted outside Germany.[121] The UN Human Rights Committee, for example, questioned "whether religiously motivated circumcision of boys is prohibited in [Germany]."[122]

The Cologne judgment thus prompted questions as to the legality of young boys' circumcision, necessitating *a* clear legislative response that would restore the necessary legal certainty.

## II. Road to the new law

In response to this situation, the German Parliament called on the Federal Government to propose a draft law, which would "ensure that a medically skilled circumcision of boys without unnecessary pain is permissible as a matter of principle."[123] This call

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[117] LG Frankenthal, MedR 2005, 243; OLG Frankfurt, NJW 2007, 3580.

[118] See among others: *Putzke*, Die strafrechtliche Relevanz der Beschneidung von Knaben. Zugleich ein Beitrag über die Grenzen der Einwilligung in Fällen der Personensorge, FS Herzberg, 2008, 669.

[119] LG Köln, NJW 2012, 2128.

[120] For an overview, see Foblets in: Jänterä-Ja (ed.), The child's interests in conflict. The intersections between society, family, faith and culture, Cambridge, 2016, 130–131.

[121] See Germann/Wackernagel, The Circumcision Debate from a German Constitutional Perspective, Oxford Journal of Law and Religion 2015, 443 (Fn. 10).

[122] Human Rights Committee, List of issues to be taken up in connection with the consideration of the sixth periodic report of Germany (CCPR/C/DEU/6) adopted by the Human Rights Committee at its 105th session, 9–27.7.2012, 21.08.2012, CCPR/C/DEU/Q/6, para. 18.

[123] BT, StenBer, 189. Sitzung, 19.07.2012, Plenarprotokoll 17/189, 22829–22839.

referred to the legal uncertainty the Cologne judgment had created, which was seen as necessitating statutory clarification by the German Parliament, in particular to allow "our Jewish and Muslim fellow citizens to freely exercise their religion."[124]

The German Ethics Council (*Deutscher Ethikrat*)[125] recommended four minimum requirements for the statutory regulation on male circumcision, namely: fully informed consent by the legal guardians; qualified pain management; a skilful carrying out of the practice; and, the recognition of a development-dependent veto right for the affected boy.[126]

On the basis of these recommendations, the Federal Ministry for Justice launched a discussion paper, *Circumcision of Boys – Cornerstones for Regulation*.[127] Not only did the paper provoke political discussion which led to a counter proposal,[128] but several medical associations voiced their criticism. Among them, the German Association for Paediatric Surgery (*Deutsche Gesellschaft für Kinderchirurgie*, DGKCH), which had welcomed the Cologne judgment as the "principal observation of the unlawfulness of non-therapeutic circumcision of boys who are unable to consent",[129] was very critical of the six-month period in which circumcisions by non-doctors were allowed.[130] The German Academy for Paediatric and Adolescent Medicine (*Deutsche Akademie für Kinder- und Jugendmedizin*, DAKJ) stated that a circumcision without effective anaesthetics should be rejected; in their view the anaesthetic creams which are usually utilized by non-doctor circumcisers are less effective than narcotics or local anaesthetics through injection.[131] The German Association of Children and Youth Doctors (*Berufsverband der Kinder und Jugendärzte*, BVKJ) had already stressed, even before the discussion paper was issued, that the best interests of the child and its bodily integrity should be paramount in the discussion, and pointed out the responsibilities States Par-

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[124] BT-Drs. 17/10331, 1–2.

[125] The German Ethics Council is an independent council of experts pursuing, *inter alia*, questions of ethics, medicine and law. One of its duties is to prepare opinions and recommendations for political and legislative action. See, Gesetz zur Einrichtung des Deutschen Ethikrats, 16. 7. 2007, BGBI. 1385, § 2, (1), 2.

[126] Deutscher Ethikrat, Press Release 9/2012, 23.12.2012.

[127] Bundesministerium der Justiz, Beschneidung von Jungen – Eckpunkte einer Regelung, 24.9. 2012.

[128] BT-Drs. 17/11430.

[129] Deutsche Gesellschaft für Kinderchirurgie, zu dem Urteil des Landgerichts Köln (zur Rechtswidrigkeit der medizinisch nicht indizierten Zirkumzision bei nicht einwilligungsfähigen Knaben) vom 7.5.2012, 4.7.2012, http://www.dgkch.de/index.php/menu_dgkch_home/menu_pressestelle/26-pressemitteilung-2012-04.

[130] Deutsche Gesellschaft für Kinderchirurgie, Beschneidung und Kinderrechte nicht bagatellisieren Kinderchirurgen positionieren sich zu Gesetzentwurf, 10, 2012, http://www.dgkch.de/index.php/menu_dgkch_home/menu_pressestelle/33-pressemitteilung-2012-10.

[131] "Eine Beschneidung ohne wirksame Analgesie, gleichviel in welchem Alter, ist daher strikt abzulehnen. (…) Ein Problem besteht darin, dass die in der Regel nicht-ärztlichen Beschneider weder Narkosen noch Lokalanästhesien mittels Injektion durchführen dürfen. Es bleiben dann nur anästhesierende Salben, die jedoch weniger wirksam sind." See Deutsche Akademie für Kinder- und Jugendmedizin e.V, Stellungnahme zur Beschneidung von minderjährigen Jungen Kommission für ethische Fragen der DAKJ, http://dakj.de/media/stellungnahmen/ethische-fragen/2012_Stellungnahme_Beschneidung.pdf .

ties have under Article 24 of the UN Convention on the Rights of the Child with regard to harmful practices.[132]

Notwithstanding the diversity of opinions, voiced at various stages of the legislative process,[133] the German Parliament adopted the Government's draft bill on 12 December 2012. The bill is now enshrined in § 1631d of the German Civil Code.[134] Section 1631d I clarified that the care of children includes the right to consent to non-therapeutic circumcision of a male child, who is not capable of reasoning and forming its own judgment, if carried out in accordance with the rules of medical practice and so long as it does not jeopardise the best interests of the child. Under § 1631d II circumcision can also be performed by a religious circumciser within the first six months after birth. The religious circumciser must be trained and comparably qualified to a physician and the circumcision must be performed in compliance with conditions set out in § 1631d I.

Four preconditions for valid parental consent must be satisfied: the circumcision should be carried out skilfully; with effective pain treatment; the parents should be fully (medically)[135] informed; and, the wishes of the child should be considered.[136]

The German legislature thus responded to the Cologne judgment with a special law indicating the conditions to be met to legally perform a non-therapeutic circumcision of male children. As such, it sought to create legal certainty, which was highlighted at several stages of the legislative processes as one of the goals of the legislation.[137] The jurisprudence, however, is divided as to whether the law really achieves the envisaged legal certainty, given the vague wording adopted by the law.[138]

The process of passing this legislation included broad consultation. In the end, however, these consultations did not lead to drastic changes to the proposed provisions. For example, the wording of all the provisions in the discussion paper is identical to the final wording in the adopted law. Thereafter, the predictable happened: after the law passed: the debate continued. Several legal scholars were very critical of the new law, referring to international human rights as well as German constitutional, criminal and family law provisions.[139] Others have commented that German history turned the legal and ethical

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[132] Berufsverband der Kinder- und Jugendärzte, Rituelle Beschneidungen bei Minderjährigen – Kinder- und Jugendärzte fordern: Allein das Recht eines Kindes auf körperliche Unversehrtheit zählt, 17.7.2012, http://www.bvkj.de/bvkj-news/pressemitteilungen/news/article/rituelle-beschneidungen-bei-minderjaehrigen-kinder-und-jugendaerzte-fordern-allein-das-recht-ein/

[133] See among others: Deutscher Bundestag, Religionsgemeinschaften stützen Regierungsentwurf, http://www.bundestag.de/dokumente/textarchiv/2012/41521899_kw48_pa_recht/209942 (last accessed 11 April 2016).

[134] Gesetz über den Umfang der Personensorge und die Rechte des männlichen Kindes bei einer Beschneidung, BGBl. 2012, I, 2749–2750.

[135] Peschel-Gutzeit, Die neue Regelung zur Beschneidung des männlichen Kindes: Kritischer Überblick und erste Reaktionen der Rechtsprechung, NJW 2013, 3617.

[136] See BT-Drs. 17/11295, 17–18.

[137] See among others: BT-Drs. 17/11295, 1.

[138] See among others: Peschel-Gutzeit, NJW 2013, 3617.

[139] See among others: Merkel/Putzke, After Cologne: male circumcision and the law. Parental right, religious liberty or criminal assault? Journal of Medical Ethics, 39, no. 7 (2013), 444–449. For an opposite view see among others: Germann/Wackernagel, Oxford Journal of Law and Religion 2015, 442.

problem of male circumcision immediately into a historical-political one, and consequently such commentators see the law as the realisation of a political imperative.[140]

Apart from the debate among legal scholars, there is very little case law shedding light on the judicial interpretation of the law. To our knowledge, so far only two cases involving circumcision have been brought before the German Constitutional Court since the law entered into force.[141] Yet the Court has not decided on the merits of § 1631d of the German Civil Code. On 30 August 2013, a lower court, the Court of Appeal (*Oberlandesgericht)* of Hamm, heard a dispute between divorced parents on the circumcision of their six-year-old boy.[142] The Court stated that, in principle, the mother could give consent to the non-therapeutic circumcision under § 1631d I of the German Civil Code, but it ruled that in this case the consent was not valid. The Court found that the operation and the child's wishes were not discussed with the child, in accordance with his age and maturity, and that the mother had not been properly informed herself.[143] Furthermore, the Court warned of the psychological harm the six-year-old boy would face, in particular because his mother would not be present during the procedure.[144]

## III. Shortcomings of the law

This contribution focuses one particular issue initiated by the Cologne judgment, namely the issue of effective pain relief. In its attempt to regulate the necessary conditions for the circumcision of male children, the legislature was drawn into the domain of medical expertise on the meaning of, and methods for, effective pain relief. In this regard, the law appears to fail in two respects, the first regarding the legislature's conceptualization of "effective pain relief" and the second its practical implementation. Both shortcomings have been raised by various medical associations who oppose the non-therapeutic circumcision of male children.

A first shortcoming is the wording with regard to pain relief. As mentioned above, the legislative materials clarify § 1631d by indicating *inter alia* the precondition of "effective pain treatment" (*effektive Schmerzbehandlung*) for valid parental consent. It is further specified that "appropriate and effective anaesthetisation" (*angemessene und wirkungsvolle Betäubung*) in the individual case should be used.[145] They refer specifically to the use of anaesthetic creams,[146] thereby suggesting that these constitute effective pain relief. According to the legislature,[147] this wording is in line with the wordings of the German Parliament's "without unnecessary pain" (*ohne unnötige Schmerzen*),[148] the German Ethics Council's "qualified pain relief" (*qualifizierte Schmerzbehand-*

[140] Aurenque/Wiesing, German law on circumcision and its debate: how an ethical and legal issue turned political, Bioethics 2015, 209–210; Merkel/Putzke, Journal of Medical Ethics, 39, no. 7 (2013), 448.

[141] See BVerfG, FamRZ 2013, 530–531, 685.

[142] OLG Hamm, NJW 2013, 3662.

[143] Ibid., 3663.

[144] Ibid., 3664.

[145] BT-Drs. 17/11295, 17.

[146] BT-Drs. 17/11295, 8.

[147] See, BT-Drs. 17/11295, 17–18.

[148] BT-Drs. 17/10331, 1–2.

*lung*),[149] and the German Association for the Study of Pain's "adequate pain relief" (*adäquate Schmerzbehandlung*).[150] However, a member of the opposition in the German Parliament, Diana Golze, argued during the parliamentary debate that the wording "effective pain relief" in the draft bill does not meet the standard of "qualified pain relief" recommended by the German Ethical Council.[151]

The point of discussion is whether the use of mere local anaesthetics, such as an anaesthetic cream, offers effective and sufficient pain relief. Several medical associations are of the opinion that anaesthetic creams are less effective than narcotics or local anaesthetics through injection[152] and that for non-physician circumcisers it is not possible to "carry out a circumcision without pain, because they cannot use [effective] anaesthetics."[153] However, full pain relief under general anaesthetics, i.e. involving an anaesthetist, would interfere further with religious circumcisions and thus the current legislation.

The extent to which the dissatisfaction of some medical associations with the standard of pain relief enshrined in the new law should be considered a shortcoming on part of the legislature depends on the weight one attaches to the different aims set for the new law as well as to the principle of personal autonomy and the respect due to this principle, as well as to the bodily integrity of the child more specifically. Consequently, the analytical lens and normative position one adopts determine whether, and to what extent, one sees shortcomings in the German legislative response to the circumcision of children.

A shortcoming one easily notices even without taking a normative position with regard to the law concerns the way the legislature draws on a medical concept to establish one of the criteria included in the preconditions for valid parental consent, namely the use of effective pain relief. The legislature's interpretation of this medical concept, however, does not match what medical experts deem appropriate. Their concept of effective pain relief drastically differs from the way the law suggests balancing the different interests and rights at stake.

In 2013, a year after the adoption of the law, representatives of seven medical and other associations renewed their criticism of the law, phrasing their comments in broader terms than just addressing the issue of "effective pain relief".[154] In their view,

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[149] Deutscher Ethikrat, Press Release 9/2012, 23.12.2012.

[150] The German Association for the Study of Pain makes reference to the "effective pain treatment" that the American Association of Pediatrics (AAP) recommended in 1999. See, Deutsche Schmerzgesellschaft e.V., Beschneidung von Jungen: Eingriff nur mit adäquater Schmerzbehandlung durchführen! http://www.dgss.org/uploads/media/Beschneidung_von_Jungen_-_Stellungnahme_Deutsche_Schmerzgesellschaft.pdf (last accessed 11 April 2016). The AAP found that analgesia is safe and effective (with subcutaneous ring block as the most effective) in reducing the procedural pain. See AAP Task Force on Circumcision, Circumcision Policy Statement, Pediatrics, 103, no. 3 (1999), 686–693.

[151] See BT, StenBer, 213. Sitzung, 12.12.2012, Plenarprotokoll 17/213, 26079.

[152] See among others: Deutsche Akademie für Kinder- und Jugendmedizin e.V, Stellungnahme zur Beschneidung von minderjährigen Jungen Kommission für ethische Fragen der DAKJ, 2 (http://dakj.de/media/stellungnahmen/ethische-fragen/2012_Stellungnahme_Beschneidung.pdf).

[153] Fricke, Beschneidungsgesetz: Ärzte fordern das Aus, ÄrzteZeitung 13.12.2013, http://www.aerztezeitung.de/politik_gesellschaft/gp_specials/beschneidung/article/851999/beschneidungsgesetz-aerzte-fordern.html.

[154] Ibid.

the law had not improved the situation of newborns, infants and small children[155] and consequently they called for the law to be repealed.[156] Their opposition is illustrative of the views of several European medical associations opposing infant male circumcision.[157]

The concrete impact of this opposing position can be illustrated through the statement of a director of paediatric surgery at a German hospital. The statement goes back to 2015: by his estimate, he persuaded no fewer than three quarters of the parents he had seen to rethink circumcision.[158] As a result, only 11 circumcisions were performed in the first quarter of 2015, compared to 70 during the corresponding period the previous year.[159] Several medical practitioners state that they are opposed to circumcision of male children, and therefore they refuse to perform these operations.[160] Other medical practitioners argue that doctors still readily perform the operation, for example out of their own or their hospital's financial motives[161] or on the basis of inaccurate medical diagnoses.[162] Consequently, statistics on the occurrence of male children's circumcision after the adoption of the law in 2012 do not offer an unequivocal and comprehensive picture of its implementation in daily practice, and that is true both for surgeons and religious circumcisers.

The question thus remains open as to how this law is implemented in practice. The lack of support by some medical professionals seems to direct parents to religious circumcision under § 1631d II and thus to an "effective pain relief" limited, at best, to the use of anaesthetic creams. Especially for these circumcisions, the current implementation of § 1631d and its precondition regarding the "use of effective pain relief" remain unclear.[163] Although the current law was preferred to a complete ban on a "religious basic need" that might possibly have led to unregulated practices that do not meet the

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[155] Ärzteblatt, Ärzte kritisieren Auswirkungen des Beschneidungsgesetzes, 12.12.2013, http://www.aerzteblatt.de/nachrichten/56909.

[156] Fricke, ÄrzteZeitung 13.12.2013, http://www.aerztezeitung.de/politik_gesellschaft/gp_specials/beschneidung/article/851999/beschneidungsgesetz-aerzte-fordern.html.

[157] Frisch et al., Cultural Bias in the AAP's 2012 Technical Report and Policy Statement on Male Circumcision, Pediatrics, 131, no. 4, 2013, 796–800.

[158] Hermsen, Beschneidung bringt Kinderärzte in Gewissenskonflikte, 18.7.2015, http://www.derwesten.de/region/essener-elisabeth-krankenhaus-weigert-sich-beschneidungen-vorzunehmen-page2-id10875242.html.

[159] Ibid. To the author's knowledge, there are no quantitative studies on the prevalence of, or the use of, anaesthetics for infant male circumcision in Germany since the adoption of the law in 2012.

[160] I have interviewed several medical practitioners on the current practice with regard to circumcision of male children. These interviews, part of a wider research project, are just some preliminary findings, which are not representative of the views of medical practitioners in Germany. This ongoing research is exploratory and aims at a better understanding of the current practice.

[161] Ibid. Compare Deutsche Gesellschaft für Kinderchirurgie, Presseerklärung der Deutschen Gesellschaft für Kinderchirurgie zum Artikel "Guter Schnitt" in der Frankfurter Allgemeinen Sonntagszeitung am 20.10.2013, http://www.dgkch.de/index.php/menu_dgkch_home/menu_pressestelle/107-pressemitteilung-2013-10.

[162] Ibid. See also Kuperschmid, Beschneidung – in erster Linie ein medizinisches Problem, Zeitschrift des Berufsverbandes der Kinder- und Jugendärzte, 2014, 382–383.

[163] Deutsche Akademie für Kinder- und Jugendmedizin e.V, Stellungnahme zur Beschneidung von minderjährigen Jungen Kommission für ethische Fragen der DAKJ, 2 (http://dakj.de/media/stellungnahmen/ethische-fragen/2012_Stellungnahme_Beschneidung.pdf).

standards of, and even pose dangers to, the bodily integrity of the affected boys,[164] the impact of the law is yet to be measured. There is thus a need to see how this law, whether seen as an accommodation,[165] a generated exception[166] or the confirmation of constitutional principles after an unconstitutional judgment[167], is implemented in daily practice, thus going further than merely analysing statistics.

## IV. Concluding remarks

The question remains as to how the German legislature could meet the criticism of medical associations. If one follows their position, a legislative change seems to be required. This would likely entail annulling § 1631d II and even changing § 1631d I, so as to include the consent of the child, which for medical associations does not necessarily need to be at the age of majority.[168] The solution envisaged by some medical associations, which is in line with the Cologne judgment, currently appears to be unlikely given the effect that such a change would have on religious circumcisions and considering that a proposal along these lines was not accepted in the Federal Parliament.[169]

At the moment, detailed empirical data on how the law is implemented, in particular by religious circumcisers, are lacking. Such data – both quantitative and qualitative data concerning the circumcision of male children in Germany after 2012 – would make it possible to proceed to a more in-depth examination of the above-mentioned shortcomings of the law. This needs to go hand in hand with a critical examination of the latest medical insights when it comes to the circumcision of male children, its potential therapeutic or curative value and how to minimize the pain that comes with the surgery. Both empirical components have the potential to contribute to a reconciliation of the diverging positions on this thorny issue.

# The St Ives *eruv* controversy: religious spaces and secular law in Australia

*Mareike Riedel*

This case study is concerned with the establishment of a Jewish religious structure called an *eruv* in the north of Sydney, which was met with fierce opposition by local residents. As a result of this opposition, the law of the state was unable to propose an acceptable compromise, and this for two reasons: the lack of a robust protection of reli-

[164] BT-Drs. 17/11295, 9.

[165] Foblets (Fn. ***), 161.

[166] Enders in: Nolte/Poscher/Wolter, Die Verfassung als Aufgabe von Wissenschaft, Praxis und Öffentlichkeit. Freundesgabe für Bernhard Schlink zum 70. Geburtstag. 2014, 291–308.

[167] Germann/Wackernagel, Oxford Journal of Law and Religion 2015, 467.

[168] For example, the German Association of Children and Youth Doctors stated that non-therapeutic circumcisions should, at the earliest, be carried out after the child has attained the necessary capacity to consent (Fn. ***).

[169] See BT-Drs. 17/11430.

gious freedom in Australian law and the entanglement of the planning process with local politics.

## I. A virtual Jewish territory: the *eruv* practice

An *eruv* is a symbolic space that facilitates the observance of Shabbat. During the Jewish day of rest Orthodox Jews are not allowed to carry, push or pull objects outside of the domestic realm. This includes the use of a wheelchair or a pram and even the carrying of a baby, of food or keys. The prohibition often affects already vulnerable members of the community like young mothers or elderly people that find themselves tied to their homes, unable to attend synagogue or to see relatives and friends. The rabbinical invention of the *eruv* overcomes these restrictions.[170] An *eruv* extends the private space virtually into the public sphere, thereby enabling the transport of objects outside the house. Usually, the imagined boundaries of an *eruv* rely on already existing demarcation lines such as railway tracks, walls, or creeks. Remaining gaps in the symbolic *eruv* walls are closed with fishing line or wire attached to poles.

*Eruvin* exist in many urban centres around the world in countries such as the United States, Canada, the United Kingdom, South Africa, and Australia.[171] Many of these *eruvin* remain unnoticed and without any controversy for decades, but more recently their establishment has become subject to legal disputes often framed in the language of religious freedom.[172] Indeed, the *eruv* raises questions about the visibility of religion in the public space and the limits of religious practice. But the reasons for *eruv* controversies are more complex than that: local politics, changing demographics, and internal divisions within Judaism unfold in these conflicts.

## II. An "ugly eyesore": the planning conflict over the *eruv*

St Ives is a leafy suburb in the upper north shore of Sydney at the edge of a national park. It is home to Sydney's second largest Jewish community after Bondi, with around 12.4 percent of residents identifying as Jewish.[173] Of these, 300 are estimated to be Orthodox. In the middle of the years 2000 the idea of an *eruv* for St Ives was put forward. Both local planning laws and Jewish law[174] require obtaining planning permission

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[170] On the the rabbinical background of the eruv laws: Fonrobert, Diaspora Cartography: On the Rabbinic Background of Contemporary Ritual Eruv Practice, IMAGES 5, no. 1 (2011); 14–25.

[171] For an incomplete yet comprehensive list see Vincent and Warf, Eruvim: Talmudic Places in a Postmodern World, Transactions of the Institute of British Geographers 27, no. 1 (2002), 30–51.

[172] In fact, many medieval cities had eruvin like 13th century Cologne, see Perry, Imaginary Space Meets Actual Space in Thirteenth-Century Cologne: Eliezer Ben Joel and the Eruv, IMAGES 5, no. 1 (2011), 26–36. Conflicts over eruvin are also not a new phenomenon . See for an account of an eruv conflict in the Prussian municipality of Bromberg in the 19th century: Schlör, Das Ich der Stadt: Debatten über Judentum und Urbanität 1822–1938, Jüdische Religion, Geschichte und Kultur 1 (2005), 11–15.

[173] The most common responses in the 2011 census for St Ives were Anglican 22.4%, Catholic 19.3%, No Religion 19.1%, Judaism 12.4% and Uniting Church 5.6%, see Australian Bureau of Statistics, St Ives (Statistical Area Level 2) People – Religious Affiliation, http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/121031410?opendocument&navpos=220#cultural (last accessed 28 April 2016).

from local authorities. In St Ives three development applications were dismissed, and it was the fourth and final application that initiated a heated debate.

The local council of Ku-ring-gai to which St Ives belongs received five petitions from local residents, two in support of the *eruv* (with a total of 678 signatures) and three opposing the *eruv* (with a total of 1423 signatures). The objecting petitions were particularly concerned with the purportedly negative visual impact of the *eruv* and highly overstated the *eruv's* appearance. The structure was portrayed as "ugly," "intrusive", as affecting detrimentally the amenity of the area, and as "an eyesore." One petition claimed that the construction of an *eruv* would make property in the area less marketable to the wider society – an argument that is also often invoked against refugee shelters or juvenile homes. More than one petition was worried about the "negative social consequences" of the *eruv* that would have the "propensity to develop into a religious enclave." What all of the objections had in common was the fear of an unwanted social change that the *eruv* would bring to the neighbourhood.

Yet, it would be too easy to explain opposition to the *eruv* as merely motivated by anti-Semitism or religious intolerance. As in many other *eruv* controversies, other Jews were among the opponents. One St Ives resident, a Jewish holocaust survivor, feared that the *eruv* would create a ghetto in the neighbourhood: "As a fellow Jew I say – practice your religion by all means but this should not include placing demands or physical intrusions on others whom you live in peace amongst."[175] In another recent *eruv* controversy in the Westhamptons[176] a group called JPOE (Jewish People Opposing the Eruv) belonged to the most vocal objectors, claiming that the *eruv* is a coercive practice.[177] For them the *eruv* symbolises an attempt to impose Orthodoxy on their neighbourhood. The *eruv* is thus not only a conflict over the limits of a minority religious practice, but it also brings to light an internal Jewish debate about Judaism's proper response to modernity and the role of ancient traditions.[178]

In St Ives the local council ultimately rejected the development application to construct the *eruv*. Deputy Mayor *Jennifer Anderson* said:

> "The majority of residents objected to the proposed *eruv*, with many residents concerned with the negative impact the visual clutter from the additional poles and wires would have on the streetscape. This was the major concern and not religious or racial views."[179]

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[174] This concerns the symbolic renting of the space from non-Jews, often for the notional sum of one dollar. See on the Talmudic rules: Fonrobert, The Political Symbolism of the Eruv, Jewish Social Studies 11, no. 3 (2005).

[175] Michelmore, Court to decide on religious structure, ABC Sydney, 19 March 2012.

[176] For a discussion of the case: Fonrobert, Installations of Jewish Law in Public Urban Space: An American Eruv Controversy, Chicago-Kent Law Review 90, no. 1 (2015).

[177] http://www.jpoewhb.com/litigation/legal-update/

[178] This aspect is explored in more detail by Davina Cooper in her analysis of the Barnet eruv conflict, see Cooper, Talmudic territory? Space, law, and modernist discourse, Journal of Law and Society 23, no. 4 (1996), 529–548.

[179] Quoted in: Levi, St Ives Eruv Turned Down by Council, The Australian Jewish News, 25 August 2011.

## III. Religious Spaces and Secular Law

The attempts of religious groups to dedicate and use space for religious purposes are the moments when planning law and religious freedom intersect. Neutral on the surface, the planning process in fact often disadvantages minority religions.[180] Planning provisions such as "visual amenity" may provide "fertile ground"[181] for intolerance and discrimination, making planning laws prone, like in St Ives, to the power games of local politics.

But the *eruv* also points to the shortcomings of Australia's peculiar approach to the protection of religious freedom, which is "largely political and *ad hoc*"[182]. Unlike many other liberal democracies, the Australian Constitution lacks a bill of rights. Its religion clause[183] (Section 116) is interpreted rather narrowly as a limitation of government power and less as a right. Moreover, fundamental rights are also not comprehensively protected in state and territory legislation, with the exception of the Australian Capital Territory and Victoria, both of which have human rights acts. However, Australia has signed international human rights treaties that oblige it to protect the right to religious freedom.[184] Although these conventions are not directly enforceable in Australian courts, they provide a benchmark against which Australian compliance with its obligations can be measured. At the very least, planning applicants can legitimately expect that their right to religious freedom will be taken into account by local authorities.[185]

To be sure, the protection of religious practice, under which the construction of an *eruv* can be subsumed, is not without limitation.[186] It can be legitimately restricted if it conflicts with the rights of others. Opponents often claim that the *eruv* infringes upon their right to freedom *from* religion. This question was addressed by Superior Court of Quebec in a case where the municipality of Outremont dismantled an *eruv*, claiming that it would impose a religious enclave on other residents.[187] The Court did not agree and stated that, on the contrary, the municipality is obligated to accommodate the religious needs of the community of Orthodox Jews.[188]

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[180] See for the case of Australia e.g. Villaroman, 'Not in My Backyard': The Local Planning Process in Australia and Its Impact on Minority Places of Worship, Religion and Human Rights 7, no. 3 (2012), 215–239.

[181] Villaroman, Treading on Sacred Grounds: Places of Worship, Local Planning and Religious Freedom in Australia, 2015, 173.

[182] Evans, Religion as Politics Not Law: The Religion Clauses in the Australian Constitution, Religion, State & Society 36, no. 3 (2008), 282–302, 284.

[183] Section 116 of the Australian Constitution, which is modelled on the US American First Amendment religion clauses, reads: "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

[184] Such as the International Covenant on Civil and Political Rights that protects the right to freedom of religion in article 18.

[185] Minister for Immigration & Ethnic Affairs v Teoh (1995) 183 CLR 273. The legitimate expectations doctrine continues to be used in Australian law although later decisions were more restrictive.

[186] On the protection of the making, acquiring and using of necessary articles and materials related to rites and customs of a religion see Villaroman, Places of Worship: Understanding the Structural Aspect of Religious Freedom, Journal of Law, Religion and State 3, no. 3 (2014), 295–97.

[187] Rosenberg v. Outremont (City), [2001] R.J.Q. 1556 (S.C.) at paras. 18 and 19.

[188] Ibid., para 47 and 55; see also Stoker, Drawing the Line: Hasidic Jews, Eruvim, and the Public Space of Outremont, Quebec, History of Religions 43, no. 1 (2003), 18–49.

Since Orthodox Jews make use of public space for the *eruv*, the interesting question emerges as to whether an *eruv* is an unlawful public endorsement of religion. In the United States the Third Circuit Court of Appeal had to decide if a proposed *eruv* in Tenafly, New Jersey, violates the Establishment Clause which prohibits Congress from making any law respecting an establishment of religion. In its decision the Court emphasised the inconspicuous nature of the *eruv* and concluded that the establishment of an *eruv* does not "have the effect of advancing religion because no reasonable observer would perceive an endorsement of religion"[189].

However, in the particular case of the St Ives *eruv* state law did not provide an adequate solution. A subsequent appeal to the New South Wales Land and Environment Court by the *eruv* group was dismissed because the Court partially lacked jurisdiction.[190] However, in the first instance the Court had noted that the visual impact of the *eruv* would indeed be marginal.[191] Surprisingly, in 2015 local media reported[192] that the *eruv* had nevertheless become functional. It had been redesigned to require no additional structures on public land and to rely solely on existing poles owned by the power company Ausgrid.[193]

## IV. Conclusion: the Limits of Australian State Law

The St Ives *eruv* teaches an insightful lesson about the role of state law in multi-religious societies. It reveals the pitfalls of Australia's reliance on political actors for the protection of the right to religious freedom. While this approach may often prove successful, it has clear limitations. [194] At a local level, religious minorities run the risk of being marginalised when local council members give in to pressure from the majority. Moreover, the lack of legislative human rights protection at a state level in New South Wales or a constitutionally-entrenched bill of rights presents a legal void in an already patchy system for the protection of religious freedom – a void through which the *eruv* fell. The public expression of religious difference in the urban space remains a contested issue even in states such as Australia that embrace multiculturalism as official policy. Difference, be it religious or cultural, is still a matter that many prefer to relegate to the private sphere.

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[189] Tenafly Residents Association Inc. v. the Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002). Gautsche, Neutral Discrimination – Selective Enforcement of Religiously Neutral Laws and the First Amendment, Touro Law Review 30, no. 4 (2014), 975–983; Heiden, Fences and Neighbors, Law and Literature 17, no. 2 (2005), 225–248; Greenbaum, First Amendment Inversions: Tenafly Eruv Ass'n v. Borough of Tenafly, 155 F. Supp. 2d 142 (D. N. J. 2001), The Yale Law Journal 111, no. 7 (2002), 1861–1867; for an ethnographic account of the controversy see Lees, Jewish Space in Suburbia: Interpreting the Eruv Conflict in Tenafly, New Jersey, Contemporary Jewry 27, no. 1 (2007).

[190] The Northern Eruv Incorporated v Ku-ring-gai Council [2012] NSWLEC 249 (30 November 2012).

[191] The Northern Eruv v Ku-ring-gai Council [2012] NSWLEC 1058 (16 March 2012) at para. 54.

[192] Theodosiou, Jewish Group Attaches Plastic Conduits to Power Poles Forming 20km Eruv around St Ives, North Shore Times, 7 April 2015.

[193] Narunsky, St Ives Gets Its Eruv, The Australian Jewish News, 28 May 2015.

[194] Evans, Religion, State & Society 36, no. 3 (2008), 298–9.

# Limitless at the Limits: Grassroot responses to the limits of State Law

*Kalindi Kokal*

## I. Introduction

This contribution to the chapter is a result of fieldwork carried out in a fishermen's community in the coastal of village of Gonjhé located in the state of Maharashtra in Western India.

India is a socially, economically, culturally, religiously and linguistically diverse country. Consequently, state law, in spite of the ambitious regimes towards its implementation, falls short of being accessed for several reasons, including the challenge posed by legal language, the physical distance of state courts and police stations from the location of dispute and the expenditure of time and money that remains inevitably tied up with litigation.

People in Gonjhé have a variety of forums that they can access: the state courts and police station under state law, while in the non-state arena there are panchayats, local strongmen and priest magicians.[195] Institutional plurality results in competition within these different types of forums in the pursuit of retention of power, but also of legitimacy. Competition resulting from institutional plurality has resulted in non-state forums evolving and, in a sense, also addressing the limitations of state law. This piece describes the role of barefoot lawyers, a set of niche actors who arise as a community's response to the limitations of state law, namely, the challenges posed by legal language, the distance of state institutions from the location of dispute and the expenditure of time and money involved in using those institutions.

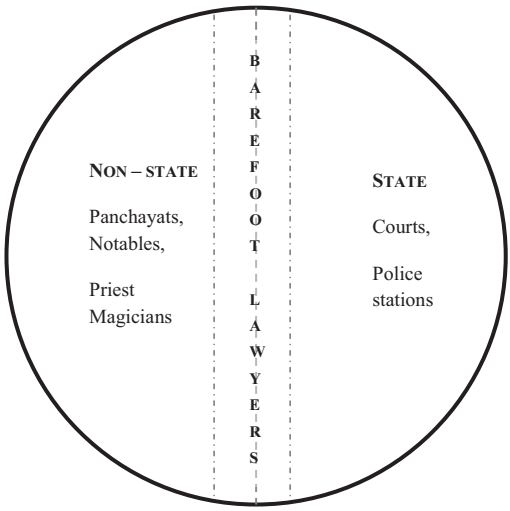
As awareness of state law increases through media such as television, the newspapers and hearsay experiences of other community members, a number of disputants in Gonjhé are becoming increasingly ready to explore the value of their bargaining position and the scope of pursuing their dispute within the framework of state law and state forums.[196] But the complexity of legal language and the time, cost and perseverance that a court case demands makes people cautious in treading into the territory of the state machinery. Barefoot lawyers emerge as a response to exactly this gap, as they serve as niche actors not only advising but also representing parties and taking a lead in (the negotiations within) the realm of settlements that are the fate of many court cases in

[195] Ghurye, The Mahadev Kolis, Bombay: Popular Book Depot, 1957.

[196] The television has reached even the remote corners of India today. Soap operas and the news are watched most popularly in Gonjhé and in Uttarakhand. While the news is understandably a source of information about the law, even soap operas touch upon themes of women's rights, succession, crime and environmental issues. For example, in Julun Yeti Reshim Gathi, a Marathi family drama that was watched by my host family in Gonjhé every evening, a senior couple was shown to be considering divorce. There were episodes where each of the characters met with lawyers and learnt about how the court would respond to their case; they also attempted counselling and mediation, which in the end was successful and the couple decided to live together again. While the message (delivered from how the incident ended) was one part of it, these episodes were definitely contributing to raising general awareness about what one can expect from lawyers and state courts in instances of divorce and from the facilities of mediation, conciliation and counselling that the state machinery encourages and offers.

India. As *Felstiner*[197] highlighted, "The dispute processing practices prevailing in any particular society are a product of its values, its psychological imperatives, its history and its economic, political and social organisation." Barefoot lawyers, in the manner they operate, encompass exactly this reality.

The services of barefoot lawyers are almost always used by disputants who intend to pursue or must respond to a pursuit of a dispute in the state machinery. Barefoot lawyers operate entirely outside the state machinery and their unique selling point (USP) lies in their knowledge and familiarity with the state machinery, even as they remain embedded in and therefore appreciative of community values, reciprocities and the power dynamics.




Barefoot lawyers are constantly operating on the borders of state and non-state law, revealing how it is possible, at the limits of these laws, for creative settlements actually to occur.

Vishnu Pavshe in Gonjhé is one such barefoot lawyer. His career entailed being a fisherman in his youth, working in the loading department of a local fishing company, driving a tempo tempo- traveller (mini-van) and brokering land deals. Simultaneously, he has contested more than two court cases that his political opponents had filed in the local talukā court, continued to engage in politics, got elected to the post of chairman of the local Fisherman's Credit Society for two years in a row and also acted as president of the Tanta Mukta Gaav Samiti (Dispute Free Village Committee) – a state supported initiative – for a year thereafter. Vishnu's experience as a litigant in court and his continuous engagement with politics not only familiarised him with the state machinery of dispute settlement but also with court staff, local police officials and lawyers. Vishnu is well versed with the state law as well. Pursuing his own case in court taught him about

[197] Felstiner, Influences of Social Organization on Dispute Processing, Law & Society Review, 1974, no. 1, 63.

the Indian Penal Code and his recent interest in brokering land deals has acquainted him with the Maharashtra land laws and The Transfer of Property Act 1882. The non-state forum village-based dispute settlement machinery of Gonjhé was never new to Vishnu and, being president of the state-supported Dispute Free Village Committee, he learnt to recognise the advantages and limits of both state and non-state mechanisms and how they could be manoeuvred to benefit individual disputants and regulate power structures within the community. As a result, Vishnu is a popular focal point for people who seek advice as they negotiate a dispute in the state and non-state arenas. He acts as advisor, mediator and attorney depending on the capacity in which the disputant approached him.

With the help of three case studies I will proceed to show how barefoot lawyers like Vishnu play different roles on the boundaries of the state and non-state arenas.

## II. As Mediator and Attorney

This first case study involves two Muslim men from Gonjhé – Iqbal Patel and Faizal. In a dispute between them, Vishnu's help was sought on Faizal's behalf. Faizal and Iqbal Patel's son had got into an argument that led to a physical fight with Faizal attempting to hit Iqbal's son with a cricket bat. During the fight, there was a vigorous exchange of verbal abuse which involved Faizal verbally abusing Iqbal's deceased wife, which Iqbal claimed amounted to an insult to his *izzat* or honour. This provoked Iqbal to pursue this dispute aggressively in order to teach "Faizal a lesson". Vishnu did not know Faizal directly; however, Mubeen – a notable and Azad from whom Faizal had sought help, decided to consult and involve Vishnu in the matter, which was by this time proceeding from the police station to the magistrate's court. Vishnu may also have been selected by Mubeen to initiate negotiations with Iqbal because Vishnu knew Iqbal very well and they had a history of favourable relations and mutual obligations. Vishnu's primary role in this dispute settlement was to convince Iqbal to withdraw the police complaint and ensure that this matter did not come before the magistrate. At the same time, if the negotiation was not successful and the matter did end up in court, Vishnu's connections in the lawyer's fraternity would also help Faizal secure a good lawyer.

As it transpired, Vishnu attempted very hard to convince Iqbal to withdraw his complaint – first in the compound of the police station and then in the parking lot in the court premises. Playing on his personal knowledge of Iqbal, he said: "Mubeen told me that you were involved in the matter. I have known you for so many years. You are a patient and peaceful man. I wondered what got you to the police station. It was only because I knew you were here that I agreed to come." But when Iqbal raised the issue of his honour having been insulted, Vishnu was in a position to gauge that this settlement would be difficult to negotiate, as the court case would be a part of Iqbal's effort to restore his *izzat* and consequently his credibility within his community. As predicted, the settlement did not go through and Vishnu could not succeed in convincing Iqbal. While Faizal would have to appear in court on the appointed day, Vishnu through his connections requested a good criminal lawyer to intervene as a reasonable cost on behalf of Faizal. Additionally, he volunteered to stand as guarantor to bail Faizal out in case it was decided that he should be retained in police custody. Vishnu's knowledge of the legal system and his experience with it is in itself very reassuring for those who seek his help. "I will make sure to pull you out it …This will not go on for more than six months," Vishnu reassured Faizal, as we left the court premises.

## III. As Attorney and Advisor

The second case study is a matrimonial dispute between Alka and her husband Deepak. Alka was already pursuing a criminal case against her husband under section 326 of the Indian Penal Code 1860 for "having caused grievous hurt". Alka and Deepak however continued to reside together, and instances of domestic violence would often bring Alka to the police station. Vishnu became involved in this dispute when Deepak filed a police complaint against Vasant, with whom Deepak alleged Alka was having an extra-marital affair. Vishnu came with Vasant to the police station in this regard. Vasant was scared to go to the police station alone and therefore asked Vishnu to accompany him. At the police station, Vishnu met Alka, who related the incident that had provoked Deepak to file the complaint against Vasant. Vishnu and the police officer knew each other and the police officer suggested that he would not pursue the complaint, provided Vishnu agreed to intervene and arrive at a settlement between the husband and Vasant. It seemed from the police officer's narrative that both Alka and Deepak were frequent visitors at the police station, often coming to file complaints and cross complaints. To put off the police from pursuing any investigations against Vasant, Vishnu arranged to meet with the lawyers representing Alka and Deepak, respectively, in their court case. During a settlement, barefoot lawyers become crucial players. For the lawyers, a person like Vishnu is important because of his intricate knowledge of the contexts in which such disputes occurred as well as of the background of the parties – Alka's, Deepak's and Vasant's social reputations and relations. All this matters in order to negotiate a realistic settlement. At the same time, for Alka and Vasant, Vishnu's presence was not only reassuring but important to help them understand the status of the court case and the "legal" requirements they may have to fulfil in the event of a settlement of a case, already pending in court. This intervention by Vishnu, which had only begun with the aim of putting off the policeman from pursuing investigations against Vasant, ultimately ended up with Alka requesting Vishnu to help her sort out her matrimonial dispute. Alka wanted to separate from Deepak provided she was assured that their son would get his share in Deepak's property. It was decided that Vishnu would advise, guide and help her through this process, which would amongst other things involve community-based negotiations, police intervention and possibly another instance of litigation as well.

## IV. As Advisor and Mediator

In this third and last case study, Vishnu had been involved as part of his obligation that arose from being a member of the same kinship network as the disputants, one of whom – a lady called Kunda – had sought his help. In this dispute, too, Kunda was already pursuing a criminal case against her brother-in-law and his wife in the local talukā court. Vishnu had been involved as advisor to Kunda and mediator at the community level since the very beginning of this dispute. For the purpose of this paper, I describe only one instance in the dispute that elaborates the role of Vishnu. Kunda arrived at Vishnu's house one afternoon, after she had got into an argument with her sister-in-law (the one she had filed a case against). This sister-in-law was also Kunda's neighbour and therefore despite the court case, they very often interacted with each other; some interactions – like this one – sometimes resulted in arguments and fights. Kunda's sister-in-law in a fit of rage had slapped and spat on Kunda and accused her of

practicing witchcraft. Insulted and enraged, Kunda arrived at Vishnu's doorstep to seek advice on what she should do and he advised her to go to the police station straight away. Kunda did not seem sure about going alone and stated that she did not even have any money on her. On requesting Vishnu to accompany her to the police station, Vishnu refused, but advised Kunda to remain firm and stand her ground. "And what do you need money for. There is no need for money to make a complaint. Tell them Vishnu Pavshe has sent you. Tell them whatever you told me and in this manner itself. And don't worry, I am with you. Whatever happens I will handle it," said Vishnu. On Kunda and her mother's arrival at the police station, they found that the head constable was absent and the deputy constable showed no inclination to take down the complaint. Kunda promptly returned to Vishnu's home to explain the situation. Picking up his mobile phone, Vishnu quickly called the deputy constable at the police station and said: "Hey, that witchcraft issue in Kunda's matter has come up again. What do we do? I have sent her to the Police Station, but the big boss is in Mumbai. Why don't you take down her complaint? Come on, do something for the lady. She is a good woman. See what you can do to help her and give her justice. What time should I tell her to come?" Vishnu arranged that Kunda would have to return to the police station at 4 pm and the constable would take down her complaint and look into the matter.

Two days later, the policeman summoned both parties to appear before him. This time Kunda and her mother were accompanied by Vishnu, while Kunda's brother-in-law and wife (the opponents) had brought along a local notable. Not all notables are barefoot lawyers, however all barefoot lawyers are definitely notables. Notables are active mediators in the non-state arena, whereas barefoot lawyers, as we see here, are also active in the non-state arena, but their role is more clearly at the limits between the state and non-state arenas. At the police station that day, in the presence of Vishnu and the other notable, the police officer questioned and cross-examined the parties about the dispute so as to find out the real intention of whether they "actually wanted to pursue the dispute" or were using the police complaint merely to threaten the opponents. Ultimately, after much discussion between the parties which also involved the venting of much frustration, Kunda decided that she wanted to withdraw the police complaint. Outside the police station, Kunda, her mother and the other notable joined Vishnu in his car for a ride back to the village. The notable acknowledged that the dispute between Kunda and her brother-in-law's family was persistent and needed to be sorted out once and for all. They agreed that they would wait until the next monsoons, when everybody is on a break from fishing, and gather at the kinship level to bring this dispute to an end. Vishnu, of course, would join in as mediator but clearly on Kunda's behalf.

These illustrations show the different roles a barefoot lawyer plays in handling disputes. The common factor in all three disputes was that all three matters had already entered the territory of the state machinery for dispute settlement. Additionally, the barefoot lawyer's services were used because of his connections within the state machinery and his knowledge of its processes. The challenges that pursuing a dispute in a state forum entails can be overcome, if not completely then at least partially, with the help of a barefoot lawyer. For instance, in the third matter, both at the time of going to the police station and while returning, Kunda could get a ride with Vishnu in his car. Additionally, Vishnu's familiarity with the police officers ensured a quick handling of her complaint. In the first case, Faizal could easily secure a good lawyer at a reasonable cost because Vishnu agreed to put in a word. And in the second matter, Vishnu's presence helped Alka understand how the criminal case resulting from her police complaint was expected to proceed. A lot of time, energy and creativity are involved in explaining

in "layman's language" the intricacies of legal procedure to a litigant, for which most lawyers do not have sufficient time. As a result, litigants like Alka are only aware of the days on which the matter appears in court, but understand very little of how it is proceeding the rest of the time, why it may have been adjourned and what they could expect of it. And all of this for not a single penny – totally free of charge!

Barefoot lawyers like Vishnu are active in several village communities. Barefoot lawyers usually have, in addition to their experience in dabbling with the state machinery, a powerful position within the community – sometimes both politically and socially. They are crucial players within the power networks of a community, and this makes their function in dispute settlement a part of their web of reciprocities. The limits of state law and its systems, challenges in accessing it as well as ensuring its implementation, are definitely factors that have led to barefoot lawyers becoming active. While on one hand, lawyers and judges perceive the existence of such actors as a clear indication of the failure of the state machinery's outreach, barefoot lawyers as we see from the above case studies also come to play a key role in setting state law in motion at the non-state level.

## On the Limits of Health and Law: Informal Payments in Hungary

*Petra Burai*

### I. The Relevance of Informal Payments in Hungarian Society

For the majority of Hungarians, engagement with the health care system mostly depends on the phenomenon called *hálapénz* (meaning literally "gratitude money") or *paraszolvencia* (from the Greek and Latin "parasolventia" meaning "things that help to solve other things" as well as "the ability to pay beside").[198] Defined broadly, the term *hálapénz* denotes an informal payment given to a doctor or health sector employee for their services by the patients or someone on behalf of them in addition to the professional's formal and regular honoraria paid by the state. As such, *hálapénz* includes numerous forms of informal payments given

"to individual and institutional providers, in kind or in cash, that are made outside official payment channels or are purchases meant to be covered by the health care system. This encompasses 'envelope' payments to physicians and 'contributions' to hospitals as well as the value of medical supplies purchased by patients and drugs obtained from private pharmacies but intended to be part of government-financed health care services."[199]

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[198] For the linguistic origins of the terms see "A paraszolvencia hungarikum", Nyelv és Tudomány. 12 July 2012. (Available at: http://www.nyest.hu/hirek/mi-az-a-paraszolvencia).

[199] Lewis, Governance and Corruption in Public Health Care Systems. Center for Global Development Working Paper No. 78, 2006, http://ssrn.com/abstract=984046, p. 26.

If analysed under *Claude Lévi-Strauss*'s anthropological typology of means of exchange, *hálapénz* payments are rather restricted and closed exchanges involving two partners in which money or gifts are given for actual or anticipated services.[200]

Defined narrowly, as phrased by the Code of Ethics of the Hungarian Medical Chamber,

> "gratitude money or gratitude service is any kind of advantage or allowance that is given to the doctor by the patient or his/her relatives *subsequently,* without being requested, if that would not influence the quality of the care in any way. Expressing gratitude can only be *voluntary*".[201]

Under the conditions set by its narrow definition, *hálapénz* is only one type of the "under-the-table" transactions between patients and other parties – mostly their relatives – and doctors and other health care workers. If the conditions of the narrow definition are fulfilled, the payments are widely perceived as exempt from the legal consequences, though in practice the boundaries between the crime of bribery and informal payments are often blurred. Informal payments can have a serious impact on the implementation of human rights by hindering the fundamental right of access to health care and resulting in unlawful discrimination among patients.[202] Furthermore, by paying *hálapénz* all parties concerned can violate their obligation enshrined in Act CLIV of 1997 on health, according to which each individual shall respect the rights of others to the promotion and protection of their health, and to the prevention of disease and restoration of health.[203]

In the case of post-Socialist countries, such as Hungary, anthropological research has already shown that corruption – being a relatively new concept – is often applied to customs and social practices that people do not percieve to be corrupt.[204] If informal payments are an inherent part of social interactions, legal sanctions often become imponderable.[205] In an environment dominated by informal payments, corruption can flourish because such a public health care system operates on the basis of distorted competition in which everyone seeks access to "quality" treatment and guaranteed positive results. Informal payments might endanger physical integrity, however, if medical employees hoping for more *hálapénz* are eager to "overtreat" patients, often to the detriment of the patient. However, what is perceived as corrupt by the parties involved and the level of tolerance shown towards it is very much context dependent. Consequently, courts face

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[200] Claude Lévi-Strauss has made a significant differentiation between the methods of restricted and generalized exchanges. According to his typology "alongside and beyond exchange in its restricted sense, i.e., involving only two partners, there may be imagined, and there exists, a cycle which is less immediately discernible, precisely because it involves a more complex structure. It is to this that we give the name 'generalized exchange'." Lévi-Strauss, The Elementary Structures of Kinship, 1949, 1969, 233.

[201] Point II.15. (1) of the Code of Ethics of the Hungarian Medical Chamber as adopted 24 September 2011 and in force from 1 January 2012 (emphasis added).

[202] Article XV and XX (1) and (2) and of the Fundamental Law of Hungary (Adopted on 18 April 2011 by the National Assembly).

[203] Section 5 (2) of Act CLIV of 1997 on Health.

[204] See *Werner*, Gifts, bribes, and development in post-Soviet Kazakhstan. Human Organization 59, 1 (2000), 11–22 and *Rivkin-Fish*, Bribes, gifts and unofficial payments: Rethinking corruption in post-Soviet Russian health care, in: Haller (ed.), Corruption: Anthropological Perspectives, 2005, 47–64.

[205] Rose-Ackerman, Corruption: Greed, Culture and the State. Yale Law Journal Online 120, 125 (2010), 125–140, 128.

a serious challenge when they apply strict criminal legislation and impose sanctions on ever conflicting and fluctuating moral provisions.

## II. The Legal Assumption of Informal Payments

Informal payments fall within the scope of the Criminal Code of 2012 and its regulations concerning bribery punishing "any person who requests or receives an unlawful advantage in connection with his activities" for being "guilty of a felony punishable by imprisonment not exceeding three years".[206] The Criminal Code imposes sanctions on anyone who accepts the unlawful advantage before *or after* medical treatment, even if professional duties are not in fact violated. It is important to note that before the adoption of the Criminal Code, such stringent regulation had applied only to those doctors who – acting in their official capacity – were entitled to take measures independently and decided about, for example, transferring patients to specialized medical facilities or confirming their eligibility for disability pension.[207] The Criminal Code allows the reduction of the penalty without limitation if the perpetrator confesses the act to the authorities firsthand and reveals the circumstances of the criminal act.[208] At the same time, Act CXVII of 1995 on personal income tax explicitly declares *hálapénz* to be taxable income, but neither defines how the term shall be understood under the law, nor deals with the criminal liability if – in a highly unlikely scenario – a medical employee happened to declare any income from it.[209] Nevertheless, all medical workers who do not declare their income from *hálapénz* are continually committing tax fraud (or, according to the wording of the Criminal Code of 2012, budget fraud).[210] The Labour Code (also adopted in 2012) declares that

> "employees may not accept and may not lay claim to any remuneration from third parties in connection with their activities performed with the employment relationship without the employer's prior consent".[211]

In relation to *hálapénz* the regulation can mean that if the employer permits gratitude rewards to be paid in the hospital's organisational and operational rules, for example, the medical employee is exempted from criminal charges as the advantage given is not

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[206] Section 291 (1) of Act C of 2012 on the Criminal Code.

[207] Section 292 (1) of Act C of 2012 on the Criminal Code and Ádám, Az orvosi hálapénz Magyarországon, 1986, 188.

[208] Section 290 (5) of Act C of 2012 on the Criminal Code.

[209] Point 7.2. of Appendix 1 to Act CXVII of 1995 on Personal income tax.

[210] According to Section 396 (1) of Act C of 2012 on the Criminal Code "any person who a) induces a person to hold or continue to hold a false belief, or suppresses known facts in connection with any budget payment obligation or with any funds paid or payable from the budget, or makes a false statement to this extent; b) unlawfully claims any advantage made available in connection with budget payment obligations; or c) uses funds paid or payable from the budget for purposes other than those authorized; and thereby causes financial loss to one or more budgets, is guilty of misdemeanor punishable by imprisonment not exceeding two years".

[211] Section 52 (2) of Act I of 2012 on the Labour Code.

unlawful. Nevertheless, such applicability of the exemption is highly debated among legal scholars and practitioners.[212]

## III. The Myth of Balanced Reciprocity

In my research I examined the limitations of the law regarding informal payments through the experiences of elderly Hungarians and their life experiences connected to health care as well as their attitudes towards the relevant legal regulations and the competent authorities. The in-depth interviews encompassed the lives of the research participants and their personal strategies of coping, thus painting a unique picture of several decades of political and legal history at the same time. In the respondents' case, the deliberations and decisions regarding informal payments have been made in very closed, often secretive relationships based on opaque information about tariffs and influenced by often conflicting expectations and moral codes. Some of the restricted exchanges evidently encompassed putatively altruistic "general reciprocity" as well as reciprocation of equivalent value, i.e., "balanced reciprocity".[213] Nevertheless, under the guise of "gratitude", personal strategies also included pressure, coercion, or manipulation by both patients and medical workers. Thus the exchanges did not always result in evident reciprocal satisfaction. In fact, only a minority of the parties involved were able to acquire or offer definite satisfaction, as there was no obvious outcome for any treatment. In *hálapénz* transactions, the form and value of the exchangable goods are highly subjective, being transformed over time and by social change. Furthermore, if patients and physicians have maintained their relationship for several years or decades, informal payments were only completed after a longer period of time. Such delayed reciprocity has also been problematic as far as the legal adjudication of *hálapénz* was concerned, because as time went by statutes of limitations expired, while laws were amended and did not apply anymore.

As mentioned beforehand, policy makers and legislators have reacted to *hálapénz* by either passively tolerating the practice, or by enacting narrowly applicable, yet hotly debated legal exemptions on the assumption that such informal payments are balanced and honest exchanges between mutually satisfied partners in equal positions. The term "gratitude" (*hála*) has had the connotation of getting healed in a harmonious and, most importantly, balanced coexistence and interdependence. The myth of reciprocal satisfaction has legitimized the payment of *hálapénz* as a self-evident attribute of organic solidarity, social cohesion and economic cooperation in the health care system.[214] By contrast, the testimonies of the respondents and the relevant judicial case law showed that the threshold between morally acceptable and legally punishable has been shifting from case to case and court to court, depending largely on the testimonies of third party witnesses who did not participate in the actual restricted exchanges.

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[212] According to a recent decision on principles of the Hungarian Supreme Court (Curia), the provision laid down in the Labour Code might only be relevant to disputes under employment law and disciplinary procedures. See "Tájékoztató a Bhar.III.6/2015. számú büntetőügyben hozott, az orvosi hálapénzhez kapcsolódó elvi jelentőségű döntésről", 27 August 2015, http://www.lb.hu/hu/sajto/tajekoztato-bhariii62015-szamu-buntetougyben-hozott-az-orvosi-halapenzhez-kapcsolodo-elvi.

[213] Sahlins, On the Sociology of Primitive Exchange, in: Michael Banton (ed.), The Relevance of Models for Social Anthropology, 1965, 139–236, 148.

Importantly, the respondents have not seen informal payments as an infringement of their rights regarding health care. Instead, they have regarded *hálapénz* as a way to strengthen their position in the doctor-patient relationship, gain control and influence decisions related to them.[215] The respondents have even strengthened the restrictive nature of the exchange by voluntarily excluding law enforcement authorities from these matters. In that sense, on the surface, the solution to accept *hálapénz* under certain circumstances as a social custom reinforces and fullfills the already existing demand for self-initiative and balanced reciprocity. However, there are obvious risks of building a legal principle on the myth of satisfactory reciprocity. Assuming that each gratitude payment follows a similar routine and fits into the same pattern, namely given either before or after the treatment, either voluntary or forced does not reflect the complexity of social reality. Transforming a schematic and often illusory view of social expectations and practices into legal practice can have the effect of trading in (the anticipated) short-term results of restricted transactions for the chance to develop more generalized transactions. Generalized transactions involve more actors and imply more solidarity for others (both patients and medical workers) outside the scope of the restriced transactions. They are also the products of longer-term legal or policy initatives with delayed outcome. Therefore more sophisticated management and procedural methods can fall short, becoming less appealing than giving and taking *hálapénz* silently recognized by the state. Maintaining "the policy of banned in principle but permitted in practice" and upholding "the discrepancy between the 'de jure' and 'de facto' situation" bolsters the borderline position of each healing process between legality and corruption.[216]

Informal payments are preferred primarily for their short-term, foreseeable advantages, handled within flexible conditions upon mutually known and enforceable rules. Such circumstances raise the level of social tolerance significantly, and hence the state and the relevant laws must be able to prove themselves and their benefits compared to the ones offered by *hálapénz*. At the same time, anti-corruption laws can turn into much resisted "anti-corruptionism", since in the current situation society has much to lose if personal agency and the promise of success by paying *hálapénz* is taken away abruptly. Law can only succeed via a gradual process. First and foremost, it should provide the most evident and tangible measures that promote social co-operation. Social co-operation means that the general living conditions, education, social and health services, or merely the "chance to get by", must balance giving up the opportunities that corruption opens. If the potential stakeholders (1) do not consider the social and individual rewards

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[214] I define "organic solidarity" following Émile Durkheim's argumentation regarding the interdependence that is the consequence of the specialization of work and the complementarities between people in modern industrial societies: "Around their purely professional functions will be grouped others which at present are exercised by the communes and private associations. Among these are functions of mutual assistance which, in order to be entirely fulfilled, assume between helpers and helped feelings of solidarity as well as a certain homogeneity of intellect and morals, such as that readily engendered by the exercise of the same profession." Emile Durkheim, The Division of Labor in Society, 1893. As published in: Grusky/Szelényi (eds.), Inequality: Classic Readings in Race, Class, & Gender, 2006, 55–63, 61.

[215] Hungarian health care professionals have already warned that hálapénz might function as "social capital" regarding the access to medical services. See Kovácsy, Hálapénz: nehéz versenyezni a csodaszerrel. hvg.hu, 24 May 2012. (Available at: http://hvg.hu/gazdasag/20120524_kovacsy_zsombor_korrupcio).

[216] Gaal/Belli/McKee/Szócska, Informal Payments for Health Care: Definitions, Distinctions, and Dilemmas. Journal of Health Politics, Policy and Law 31, 2 (2006), 251–292, 267.

of the measures beneficial enough to make them "buy in", and (2) do not trust the government and its bodies designated to carry out the regulations, they will continue to put their trust instead in the restricted exchanges beyond state control and under their (at least presumed) influence. Such state efforts require accurate and attentive planning by lawmakers regarding the gains and losses of society on the whole and closing the gaps between those who benefit from corruption and those who cannot or will not.

## Conclusion

*Marie-Claire Foblets*

Freedom of religion and belief is certainly a fundamental liberty, but it is also a delicate one to protect. When it comes to implementing it in daily life, its protection often gives rise to strong emotions. In the event of requests made by new religious or philosophical minorities, in particular, it is not unusual for their claims to be seen by the majority society as usurping a right that is not theirs. Their invocation of protection for their religious freedom is seen as disrupting the economy of relations between the state and the majority religion(s) that have long been present in the country.[217] Claims by minority religions are interpreted as a provocation or even as a stratagem to obtain advantages or privileges and thus to compete with the religions that already enjoy protection under state law. This reaction on the part of majority society is not, of course, universal, but it is too frequent not to be seen as a clear tendency to hurl opprobrium on anything that would remind us that freedom of religion is not a right enjoyed by the majority alone, but has been inherited from the past primarily as a way to protect minorities.

The six situations analysed in this article, and in particular the first four, clearly indicate how difficult it is in practice to recognise the principle of accommodation, even in the case of requests that can hardly be considered exorbitant. In the first case, the state avoids the difficulty of having to consider an accommodation simply by depriving a community of the status (recognition as a federal tribe) that would allow it to assert a right to protection of its religious liberty. In the second instance, a community simply renounces any expectation from the state authorities, preferring to avoid conflicts. In the third case, regarding the circumcision of small boys for religious reasons, the accommodation approved by the German legislature has met with virulent criticism on the part of the medical profession. The latter considers that the text of the law as formulated will not prevent certain circumcisions from being accompanied by physical pain for the child. From the perspective of contemporary medicine this is unacceptable, especially since it could easily be prevented. As a consequence, some doctors simply refuse to carry out circumcision for religious reasons. The accommodation in this case has yielded the opposite effect from what was intended, and one may predict that the practice will likely continue but in circumstances disapproved by doctors. The fourth case shows the reluctance of a local population to allow a religious minority to use public space in its own, in this case ritual, fashion on the Sabbath. And many other illustrations could be adduced.

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[217] Gülifer (ed.), Islam and Public Controversy in Europe, 2013.

One characteristic shared by the first four case studies included here is the minority status of the communities whose religious practice (or non-religious in the case of non-believers in the United States) awakens controversy or is likely to do so. In each of the cases described, we are dealing with communities who do not quite measure up when it comes to decision-making power on which their cause hinges, and so they are in a sense at the mercy of the powers that be to gain recognition for their right to practice their religion or belief as they see fit. The role of human rights protection is precisely to ensure that minorities are not dependent on the good will of the majority society and that they can rely on the protection offered to them by the legal framework put in place by that majority (i.e., human rights) to achieve a result that every competent authority be required to justify any limits or restrictions it may impose on a person or community. This is also an aspect of democracy, in which minorities not (yet) represented in a state's governing bodies should be able to have their voice heard by those in power, and be assured that they can rely on legal protection of their fundamental freedoms. In practice, however, as the illustrations here show, this is still far from being assured.

In Europe, if a complaint by a religious minority succeeds in reaching the European Court of Human Rights in Strasbourg, it is not unusual for that Court to resort to the technique of the "margin of appreciation", in a sense sending the complaint back to the judicial authorities of the country in question. The Court considers that in some cases the object of the complaint is so distinctive to the (legal and political) context of the country concerned that it is at the domestic level that the solution must be found.[218] A paradoxical effect of frequent recourse to the margin of appreciation is that minorities' cases are sent back, as it were, to square one: the Court deems that the solution must come from an effort by local authorities (or national ones, as the case may be), even if this means that the minorities whose situation is problematic will have to wait as long

[218] As is illustrated in the case of the 2010 French law "(…) prohibiting the concealment of one's face in public spaces" – better known under the name the burqa ban. The ban was submitted for examination to the ECtHR on the initiative of a practising Muslim woman living in France (ECtHR 1 July 2014, S.A.S. v. France, App. No. 43835/11). In a long-expected judgment the Court held that prohibiting the concealment of a person's face in public does not violate the European Convention on Human Rights. With regard to the question whether the ban was proportionate to its aim, the Court (Grand Chamber) acknowledged that the blanket ban is broad, carries the possibility of criminal sanctions, primarily affects Muslim women and could potentially result in the isolation and restriction of the autonomy of women who choose to wear a veil over their face. At the same time however, it reasoned that the ban only restricts certain types of clothing, was not explicitly motivated by the religious significance of full-face veils, and that the penalty for a violation is relatively minor (paras. 151–152). In the opinion of the judges, the blanket ban is ultimately not so blanket, and if in effect it turns out to restrict some individuals' freedom to manifest their religion or belief, the ban being a choice of (French) society calls for a wide margin of appreciation (paras. 153–155). The latter reasoning has raised serious concerns on the part of some critics, regarding precisely the kind of democratic process that has led to the ban. To Saïla Ouald Chaib and Lourdes Peroni " (…) Once the Court signalled a concern over Islamophobic remarks made during the preceding debates, it should have been more careful in its scrutiny or even followed its own approach in the group vulnerability case law – i.e., narrowing the margin of appreciation because the prohibition affects a group vulnerable to prejudice and stereotyping", Ouald Chaib & Peroni, S.A.S. v. France: Missed Opportunity to do Full Justice to Women Wearing a Face Veil, https://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed.

as it takes for a satisfactory legal solution to be found, or may have to engage in fresh proceedings in order to have their voice heard.[219]

The future is hard to predict. Will the role of minority religions and beliefs continue to grow or, on the contrary, will the tensions accompanying pluralism of religion and/or belief in contemporary democratic societies dissipate over time? It could be that, as some see it, in a world where discrimination remains common currency especially against certain minorities,[220] religion becomes a refuge, offering an identity marker that is invoked and even accentuated in order to express, indirectly, the refusal to accept a situation of exclusion. If this should turn out to be the role certain minorities will give to religion, then we are obviously going in the wrong direction, for it means diverting attention from the deeper causes of the recourse to religion and its protection, in order to be able to tackle, at the right time and place, the various forms of discrimination and exclusion of which minorities in particular can be victims. Much has been written about this elsewhere, so we are in no sense the first to recall that the primary role of law in the context of a pluralist society is not to institutionalise all forms of specific protection, whether of religious or philosophical majorities or minorities, but the law must be there to ensure that everyone, regardless of their religion or belief, feels fully recognised and in a position to participate in social life according to his/her personal abilities and talents and not as a function of their religious or philosophical identity. Only then will religious freedom and its protection in the context of a democratic society find its full significance.

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[219] Another illustration is the much-debated Lautsi case (ECtHR judgment of 18 March 2011, App. No. 30814/06, Lautsi v. Italy). It concerns the question whether crucifixes can be allowed in classrooms of public schools. The court played the card of the (in this case Italian) majority religion, leaving it to the Italian authorities to determine how best to balance the interests at stake between mainstream society (and its Catholic electorate) and minority views (in this case, a non-believer). The Court granted that, "by prescribing the presence of crucifixes in State school classrooms – a sign which, whether or not it is accorded in addition a secular symbolic value, undoubtedly refers to Christianity – the regulations confer on the country's majority religion preponderant visibility in the school environment." It added however that "a crucifix on a wall is an essentially passive symbol and (...) cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities". See smong others: Temperman (ed.), The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public Classroom, 2012; Weiler, Lautsi: Crucifix in the classroom redux, http://www.ejiltalk.org/lautsi-crucifix-in-the-classroom-redux/; Mancini, The crucifix rage: supranational constitutionalism and counter-majoritarian difficulty, EuConst 6, 2010, 6–27; Panara, Lautsi v. Italy: The display of religious symbols by the State, European Public Law 17 (2011), 139–168; G. Andreescu & L. Andreescu, The European Court of Human Rights Lautsi Decision: Context, contents, consequences, Journal for the Study of Religions and Ideologies 9, 2010, 47–74; Annicchino, Winning the battle and losing the war: The Lautsi case and the holy alliance between American conservative evangelicals, the Russian Orthodox Church and the Vatican to reshape European identity, Religion and Human Rights (special issue), vol. 6 (2011), no. 3, 213–219; Zucca, A comment on Lautsi, www.ejiltalk.org/a-comment-on-lautsi/.

[220] See, among others: Interim report A/69/261 (2014) of the Special UN Rapporteur on freedom of religion and belief (Focus: Tackling religious intolerance and discrimination in the workplace).