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BANNING OR RESTRICTING MOSQUES IN
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INTRODUCTION

Europe is nowadays a multicultural continent where different cultures and religions coexist. Since religion is connected with law, politics, morals and culture, the existence of more than one religions in a certain state or area is *per se* an indication of multiculturalism. The traditional European pagan and Judaeo-Christian religions, that used to be followed by the vast majority of Europeans, coexist lately with different religions and dogmas imported into Europe from other continents (mainly from Asia and Africa) through immigration and conversion. The evolution of new religions in a certain area usually causes friction with other religions and dogmas. This is the case in Europe, especially when Islam is concerned.

Islam is the fastest evolving religion in Europe. Although it is a known religion in Europe since the Middle Ages, it spread so quickly during the second half of the 20th century that nowadays, Muslim populations range between 4 and 10 per cent in most European countries and are constantly growing. A characteristic of the Muslim communities in European states is that they vary in terms of origin and history. One can find various paths, movements and sects of Islam in Europe, such as the Shia, the Sunni, the Alevi, and the Salafi.

The evolution of Islam has caused debate on the place of religion in the secular public sphere and controversies on issues such as the wearing of the Muslim

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niqab in France and *burqa* in Belgium, the banning of minaret construction in Switzerland and the Netherlands², female genital mutilation and the application of Islamic law (Shariah). One of these issues, the erection of Muslim mosques, is still a controversial political and legal issue in many European countries, including Greece and Switzerland.

Although the erection and function of places of worship is regulated by international law and the domestic legislation of states, various political parties and religious groups make efforts to exploit the issue of mosques, specifically, for political and religious reasons, by issuing announcements and declarations, or by demonstrating and lobbying in favor or against the erection and function of mosques.

This controversy has recently become very vivid in Greece and Switzerland. The two countries have witnessed fierce resistance against the erection of minarets and mosques by civil society (religious and cultural associations, political parties etc.). Despite the fact that the issue seems to have been regulated by legal means, the controversy has not come to an end. The legal discourse focuses on the authority of governments to take restrictive measures against the erection of mosques, which are considered by citizens as a means of spreading Islam in Europe. Governments are in agony to keep the balance between their obligation to safeguard the exercise of human rights by all people and to maintain societal peace by avoiding the radicalization of groups that do not agree with the erection of mosques. For this reason it is worth looking into the legal measures and political decisions taken by the Greek and the Swiss government in order to handle the issue, under a critical eye.

The paper will analyze both international and domestic law in a comparative way, focusing not only on the “law in the books” but also on the “living law” in Greece and Switzerland. I shall try to answer the question as to whether lawful limitations of the right to erect mosques can be imposed in the aforementioned

² Murphy Karen (2013), *State Security Regimes and the Right to Freedom of Religion and Belief: Changes in Europe since 2001*, Routledge: London, p. 229.

countries. Analysis will be placed in the context of the right to erect and function places of worship, as a sub-right of the freedom to manifest one's of religion. This freedom is theoretically granted to millions of Muslims living in secular and democratic European states, such as Greece and Switzerland, in the same conditions as the adherents of other religions. But is reality consistent with theory in the concrete cases?

INTERNATIONAL LAW ON RELIGIOUS FREEDOM

According to international law, human rights are rights that apply uniformly and with equal force throughout the world to all human beings, regardless of their sex, race, religion etc. Consequently, universality is an essential characteristic of human rights legally recognized by international instruments³. Reality, nevertheless, shows that human rights are not equally applied in every state. For example, although the UN Conference in Vienna (1993) reconfirmed the validity of the universality of human rights, universality still faces critique from different sides, mainly because of its alleged western origin⁴. Many scholars challenge the universality of internationally recognized human rights by claiming that it is relative, because of the cultural diversities among states⁵. According to the doctrine of the so-called relativity of human rights, in the application of human rights, in concrete situations, allowance should be made for particularities that attend cultural, ethnic, or religious varieties⁶.

³ e.g. the Universal Declaration of Human Rights (1948), the International Covenant of Civil and Political Rights (1966), the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Convention on Human Rights (1969), the African Charter on Human and Peoples' Rights (1981).

⁴ Kirchschräger Peter (2011), "The Universality of Human Rights" in: *The EWC Statement Series*, 1st Issue 2011, The European Wergeland Centre: Oslo, p. 23.

⁵ e.g. Donnelly Jack (2007), "The Relative Universality of Human Rights", *Human Rights Quarterly*, Vol. 29, No 2, pp. 281-306.

⁶ van der Vyver Johan D., "The Relationship of Freedom of Religion or Belief Norms to Other Human Rights" in: Lindholm Tore, Durham W. Cole, Jr. & Tahzib-Lie G. Bahia (2004), *Facilitating freedom of Religion or Belief: A Deskbook*, Martinus Nijoff Publishers: Leiden, p. 89.

Peter Kirchschräger⁷ maintains that, regarding the universality of human rights, religions, cultures, traditions, world-views and beliefs benefit indirectly from the human right to freedom of religions and belief. Freedom of religion and belief enables and enhances the authentic practice of an individual and so the peaceful coexistence of religions, cultures, traditions and world-views and the dialogue between them. In this view, the universality of freedom of religion should be considered as absolute and indisputable and will be considered as such in the analysis that follows.

Freedom of religion or belief is considered as a fundamental human right in Greece and Switzerland hence it is recognized and protected by international and domestic law. Regarding international instruments protecting freedom of religion, both Greece and Switzerland have signed and ratified the *Universal Declaration of Human Rights* (1948)⁸, the *International Convention on Civil and Political Rights* (1966)⁹, and the *Convention for the Protection of Human Rights and Fundamental Freedoms* (1950), usually referred as the *European Convention on Human Rights*¹⁰, which entered into force in Greece and Switzerland in 28 November 1974.

There are further international human rights instruments recognizing the freedom of religion, such as the *Convention Relating to the Status of Refugees* (1951)¹¹ the *UN Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion or Belief* (1981)¹² and the *Council of Europe*

⁷ Kirchschräger Peter, *ibid.* p. 24.

⁸ The full text of the *Universal Declaration of Human Rights* – hereinafter “UDHR” – was accessed at: <http://www.un.org/en/documents/udhr/>.

⁹ The full text of the *International Covenant on Civil and Political Rights* – hereinafter “UDHR” – was accessed at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

¹⁰ The full text of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* – hereinafter “ECHR” – was accessed at: http://www.echr.coe.int/Documents/Convention_ENG.pdf.

¹¹ The full text of the *Convention Relating to the Status of Refugees* was accessed at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx>. The freedom of refugees to practice their religion and the freedom as regards the religious education of their children are recognized in Art. 4.

¹² The full text of the *UN Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion or Belief* was accessed at: <http://www.un.org/documents/>

Framework Convention for the Protection of National Minorities (1995)¹³, but the paper will focus on the three main international instruments applied in Greece and Switzerland (UDHR, ICCPR and ECHR). More specifically, freedom of religion is recognized in Art. 18 of the UDHR¹⁴, Art. 18 of the ICCPR¹⁵, and Art. 9 and 14 of the ECHR¹⁶.

It could be argued that, among those international instruments, the UDHR is not binding, but since UN member states have decided to take separate and joint action to promote universal respect for human rights, the equality component of Art. 55 and 56 of the UN Charter¹⁷ clarifies that discriminations based on religion are

[ga/res/36/a36r055.htm](http://www.unhcr.org/refugees/res/36/a36r055.htm). The freedom of religion and the freedom to manifest one's religion are recognized in Art. 1 and 6.

¹³ The full text of the *CoE Framework Convention for the Protection of National Minorities* was accessed at: <http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm>. The freedom of religion and the freedom to manifest one's religion are recognized in Art. 5, 7 and 8. Art. 4 prohibits discriminations based on religion, Art. 9 recognizes the freedom of expression and Art. 12 recognizes the rights to education, including religious education.

¹⁴ Art. 18 of the UDHR: *"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance"*.

¹⁵ Art. 18 of the ICCPR: *"1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions"*.

¹⁶ Art. 9 of the ECHR: *"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others"*.

Art. 14 of the ECHR: *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination of any kind on any ground such as [...] religion [...]"*.

¹⁷ Art. 55 of the UN Charter: *"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: higher*

prohibited by international law¹⁸. The ICCPR and the ECHR on the other hand, are binding instruments for state-parties to it. States like Greece and Switzerland that have ratified the ICCPR and the ECHR have undertaken the responsibility to secure and guarantee to everyone within their jurisdiction - not only their nationals - the fundamental civil and political rights defined in the Conventions, including the freedom of thought, conscience and religion.

Freedom of religion or belief includes two closely related but, nevertheless, clearly distinguishable entitlements: i) the freedom to adopt a religion or belief of one's own choice, including the freedom to adopt no religion or belief, which is the internal aspect of the freedom, and ii) the freedom to manifest that religion or belief in worship, observance, practice and teaching, which is the external aspect of the freedom¹⁹. As far as the right to manifest one's religion is concerned, the division lays in Art. 18(1) of the ICCPR and Art. 9(2) of the ECHR which list four particular forms of manifestation: i) worship, ii) teaching, iii) practice, and iv) observance²⁰.

The erection and function of mosques is linked to the freedom to manifest one's religion, since mosques are places of worship, observance of religious rituals and also teaching of the Shariah. Islam is practiced both inside and outside mosques, according to the interpretation of the term "practice of religion" adopted by Javier Martínez-Torrón and Rafael Navarro-Valls²¹, who define it as "the right of the person to live according to the prohibitions and dictates of its religion" and imply that "the

standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

Art. 56 of the UN Charter: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55".

¹⁸ van der Vyver Johan D., *ibid.* p. 88.

¹⁹ van der Vyver Johan D., *ibid.* p. 121.

²⁰ Evans D. Malcolm (2009), *Manual on the Wearing of Religious Symbols in Public Areas*, Council of Europe Publishing: Strasbourg, p. 12.

²¹ Javier Martínez-Torrón & Rafael Navarro-Valls, in: Lindholm Tore, Durham W. Cole, Jr. & Tahzib-Lie G. Bahia (2004), *Facilitating freedom of Religion or Belief: A Deskbook*, Martinus Nijhoff Publishers: Leiden, pp. 228-229.

term does not include each and every act motivated or influenced by religion or belief”.

THE GREEK AND SWISS DOMESTIC LAW ON RELIGIOUS FREEDOM

Additionally to the provisions of international human rights instruments, states are bound by their own domestic laws regulating freedom of religion or belief. Sometimes there might be a difference or even conflict between norms of domestic and international law, due to the model of relationship between state and church or religion followed by each state. In any case, according to a general principle of public international law, states cannot refrain from fulfilling their international obligations by invoking legal provisions of their domestic law. Hence, a state may be liable at the international level for the failure of its legal system to protect human rights implementation²².

Roman Podogrigora²³ draws the distinction between two extreme and other mainstream models of relationship between state and church. The one extreme is “countries where ecclesiastical power is inseparably linked with state power and is foundational to its structure”. In this case, power is exercised through legislation and legal procedures dictated by the norms of the dominant religious community, such as the Shariah in the Islamic countries. The other extreme is “countries that do not recognize religion as an important part of social life and even have a negative attitude towards it”, such as the communist states. Mainstream models are those providing for the separation between state and church, in which all religious associations are treated equally and both church and state avoid interference in

²² Ahdar Rex & Leigh Ian (2005), *Religious Freedom in the Liberal States*, Oxford University Press: New York, p. 177.

²³ Roman Podogrigora, “Freedom of Religion and Belief and Discretionary State Approval of Religious Activity” in: Lindholm Tore, Durham W. Cole, Jr. & Tahzib-Lie G. Bahia (2004), *Facilitating freedom of Religion or Belief: A Deskbook*, Martinus Nijhoff Publishers: Leiden, pp. 429-430. See also: Javier Martínez-Torrón & Rafael Navarro-Valls, *ibid.* p. 236.

each other's affairs, and those where states formally recognize the equality of churches but where, in fact, the system favors one religion²⁴.

The relationship between state and religion is depicted primarily in the Constitutions and on a secondary basis in the legislation adopted by each state.

1. CONSTITUTIONAL LAW

The protection of religious freedom is a paramount public interest and not merely a private interest of individuals and groups. Governments are not obliged to respect and protect religious freedom because they consider the convictions of their citizens to be correct or convenient. They are obliged to protect the freedom to believe and to act accordingly because this freedom constitutes an essential element of a democratic system²⁵. Both the Greek and the Swiss Constitution contain provisions for the protection of the freedom of religion, which are very similar.

Freedom of religion has been guaranteed in Switzerland since the revised Swiss Constitution of 1874 (Art. 49). The current Swiss Constitution²⁶ came into force in 1999. In the preamble it reads that the Constitution was adopted "*in the name of the Almighty God!*". Furthermore, according to Art. 15 of the SC, "*1. Freedom of religion and conscience is guaranteed. 2. Every person has the right to choose freely their religion or their philosophical convictions, and to profess them alone or in community with others. 3. Every person has the right to join or to belong to a religious community, and to follow religious teachings. 4. No person may be forced to join or belong to a religious community, to participate in a religious act, or to follow religious teachings*". The aforementioned provisions are totally compatible with the

²⁴ For different models of relationship between state and church followed by certain states see: Nowak Manfred & Vospernik Tanja Lindholm, "Permissible Permissions on Freedom of Religion or Belief" in: Tore, Durham W. Cole, Jr. & Tahzib-Lie G. Bahia (2004), *Facilitating freedom of Religion or Belief: A Deskbook*, Martinus Nijoff Publishers: Leiden, p. 160 (with reference to Greece), Javier Martínez-Torrón & Rafael Navarro-Valls, *ibid.* p. 216-217 (with reference to Greece, England and Scandinavian countries), Roman Podogrigora, *ibid.* p. 430-433 (with reference to Italy, Finland, Germany, Denmark, Argentina, Mongolia, Russia, Kazakhsstan, Belgium, Portugal etc)

²⁵ Javier Martínez-Torrón & Rafael Navarro-Valls, *ibid.* p. 235.

²⁶ Hereinafter "SC".

provisions of the UDHR, the ICCPR and the ECHR. It is remarkable that the Swiss Constitution mentions God without connecting the reference with a certain religion or belief. In this way, the Swiss Constitution declares the religious neutrality of the Swiss Confederation and promotes the peaceful coexistence of all religions.

The current Greek Constitution²⁷ came into force in 1974 and its regulations on religious freedom have not been modified up to now. Freedom of religion is recognized in Art. 13 of the GC as follows: *“1. Freedom of religious conscience is inviolable. The enjoyment of civil rights and liberties does not depend on the individual's religious beliefs. 2. All known religions shall be free and their rites of worship shall be performed unhindered and under the protection of the law. The practice of rites of worship is not allowed to offend public order or the good usages. Proselytism is prohibited. 3. The ministers of all known religions shall be subject to the same supervision by the State and to the same obligations toward it as those of the prevailing religion. 4. No person shall be exempt from discharging his obligations to the State or may refuse to comply with the laws by reason of his religious convictions. 5. No oath shall be imposed or administered except as specified by law and in the form determined by law”*. It is clear that the Greek Constitution safeguards the freedom of religion as a freedom of religious belief and freedom of worship. According to one opinion, the term “worship” used in it should be substituted by the term “exercise of religion” which contains also religious education and missionary²⁸. In fact, the Greek Constitution seems to regulate the freedom to manifest one’s religion in Art. 13(2) more narrowly than the ICCPR and the ECHR do, since it recognizes and safeguards only “worship” which is one of the four means of manifesting one’s religion or belief listed in the ICCPR and the ECHR.

Although the aforementioned article declares the equality of religions in the Greek territory, in the preamble of the Greek Constitution one reads the phrase *“In the name of the Holy and Consubstantial and Indivisible Trinity”*. Despite the fact that

²⁷ Hereinafter “GC”.

²⁸ Dagtoglou P.D. (1991), *Constitutional Law: Individual Rights*, Vol. A’, Ant. N. Sakkoulas Publishers: Athens, p. 368 (in Greek).

the preamble lacks operative effect, it is problematic at least in the sense that it signals symbolic preferment²⁹. In fact the preamble refers directly to the Greek Orthodox Christian religion, constituting a breach of the religious neutrality of the state. Moreover, Art. 3 of the GC³⁰ contradicts Art. 13(2) of the GC by recognizing the Eastern Orthodox Church of Christ (also known as the Greek Orthodox Church) as “the prevailing religion in Greece” and draws a distinction among the “prevailing religion”, the “known religions” mentioned in Art. 13(2) of the GC and the “unknown religions” the existence of which is implied in the same article. The term “known religion” has long ago been interpreted by the Greek Supreme Administrative Court, which defines as “known” every religion with professed doctrines, worship, organization and objectives³¹. Moreover, according to P.D. Dagtoglou³², every religion is presumed as known unless its hidden character or the opposition of its worship to the public order or morality is proven by the state authorities.

The distinction appears neither in the Swiss Constitution nor in international instruments (e.g. UDHR, ECHR) and renders Greece one of the few European countries with a state religion³³. This is an indication of violation of the religious neutrality and impartiality of Greece³⁴ and an explanation for the number of the freedom of religion cases decided so far by the ECtHR against Greece. A different

²⁹ Roman Podogrigora, *ibid.* p. 432.

³⁰ Art. 3 of the Greek Constitution of 1974: “1. *The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodal canons and sacred traditions. It is autocephalous and is administered by the Holy Synod of serving Bishops and the Permanent Holy Synod originating thereof and assembled as specified by the Statutory Charter of the Church in compliance with the provisions of the Patriarchal Tome of June 29, 1850 and the Synodal Act of September 4, 1928.* 2. *The ecclesiastical regime existing in certain districts of the State shall not be deemed contrary to the provisions of the preceding paragraph.* 3. *The text of the Holy Scripture shall be maintained unaltered. Official translation of the text into any other form of language, without prior sanction by the Autocephalous Church of Greece and the Great Church of Christ in Constantinople, is prohibited”.*

³¹ Greek Supreme Administrative Court (Council of State), No 2105-2106/1975.

³² Dagtoglou P.D., *ibid.* p. 380.

³³ For example: i) the Church of Greece is largely exempt from taxes, compared to other religious organizations, ii) the Greek Orthodox ministers are paid salaries and pensions by the State, iii) proselytism is prohibited to all except for the Church of Greece.

³⁴ Dagtoglou P.D., *ibid.* p. 378.

opinion has been expressed by Chr. Sgouritsas³⁵ who maintained that the characterization of the Eastern Greek Orthodox Church of Christ in the Greek Constitution as “the prevailing religion in Greece” does not mean that its position, compared to the position of all the other religions, is privileged regarding religious freedom, and the fact that every known religion is free does not mean that religious freedom is not equally and absolutely recognized for all religions.

The establishment of a state church or the special recognition of a certain religion by the Constitution is not a unique phenomenon in Greece. For example, the Evangelical-Lutheran Church used to be the state church in Sweden until 2000, when the earlier state-church system was abolished and new relations between the state and the church were established. Nowadays the former state church of Sweden is a “registered religious community” as any other registered church or religious community in Sweden. The only difference is that the Church of Sweden is registered through a decision by the Parliament, while other churches or religious communities that want to register must apply for it.

Although some European countries still follow the same pattern of Constitutional recognition of the major traditional churches, the ECtHR does not regard it as a violation of the ECHR, as long as this privileged relationship does not produce significant discriminatory impact on individuals or unjustified harm to the freedom to act that the rest of the groups and individuals must enjoy in religious matters³⁶.

2. LEGISLATION ON THE RECOGNITION AND SUPERVISION OF RELIGIOUS COMMUNITIES

States are bound to guarantee the efficient protection of religious freedom of human beings acting either individually or in community. As far as the freedom to

³⁵ Sgouritsas Chr. (1954), “The Freedom of Worship and its Constitutional Restrictions”, *Gazette of Greek Lawyers*, p. 362 (in Greek).

³⁶ Javier Martínez-Torrón & Rafael Navarro-Valls, *ibid.* p. 216.

manifest one's religion is concerned, it is well known that some religious rituals can only be exercised not by single individuals but by religious communities and, usually, this kind of manifestation presupposes the existence of places of worship, such as mosques for Muslims. Places of worship are usually owned by churches or other religious organizations having legal personality. In this light, research on the relationship between states and churches, namely on the legislation regulating the recognition and supervision of churches and religious communities by states, is directly linked to the exercise of the freedom to manifest religion through the use of places of worship.

According to Roman Podogrigora³⁷, in a modern administrative state, the interactions of religious and state institutions involve countless, often low-level, approvals, licenses, permits and other governmental decisions that can severely complicate the life of religious communities. Such decisions include *inter alia* determinations of whether a religious community will be registered or recognized and enabled to acquire legal personality, tax status determinations, visa approval for travel of religious personnel, approvals in connection with educational institutions, the issuance of licenses for priests etc.

Europe has a longstanding tradition of favoritism towards certain churches through privileged collaborations between states and certain churches, in the form of hidden confessionality of the state, or in the form of state churches. For example, the Roman Catholic Church is still an established church, or is afforded special constitutional recognition, in Liechtenstein, Malta and Monaco. The Evangelical Lutheran Church is an established church in Denmark, Iceland and Norway. The Eastern Orthodox Church of Christ is singled out as the "prevailing religion" in Greece, as already mentioned, and the "traditional religion" of Bulgaria. The Church of England is the established church in England and the Presbyterian Church enjoys the same status in Scotland³⁸. States may also recognize and grant certain privileges to religious organizations through alternative methods, such as by making

³⁷ Roman Podogrigora, *ibid.* 425-426.

³⁸ van der Vyver Johan D., *ibid.* pp. 105-106.

agreements between state and religious organizations or by passing distinct laws directed at specific religious associations³⁹. Such collaborations have been considered contrary to the ECHR if they produce, as a side effect, significant discriminatory impact on or unjustified harm to individuals and religious groups compared to churches enjoying a privileged collaboration with states⁴⁰.

Usually, domestic legislation regulates the registration and operation of religious institutions. The rights of churches that are implicit in religious freedom (i.e. the right to have legal recognition by the state, to own religious places of worship, to freely disseminate their doctrines etc.) have long ago been specified in the Council of Europe Parliamentary Assembly Recommendation 1086 (1988) on the situation of the church and freedom of religion in Eastern Europe⁴¹. In this context, states should respect and protect the right to existence and sovereignty of religious institutions, which covers: i) the right of registration of religious institutions, ii) the right to sphere sovereignty of religious institutions⁴², iii) the right of self-determination of religious communities and iv) the right to equal protection and non-discrimination.

Research on the domestic legislation regulating the registration and supervision of churches, religious organizations and communities in Greece and Switzerland reveals different answers to the issue in each state.

³⁹ Roman Podogrigora, *ibid.* p. 431.

⁴⁰ Javier Martínez-Torrón & Rafael Navarro-Valls, *ibid.* p. 216. In *Canea Catholic Church v. Greece* the ECtHR recognized that the Greek state violated Art. 6(1) and 14 of the ECHR due to its discriminatory treatment of the applicant compared to the treatment of the Greek Orthodox Church and the Jewish Community. The latter are recognized by the Greek state as public entities while the applicant had no legal personality, according to the Greek courts. The ECtHR held that the discrimination against the Canea Catholic Church regarding its access to justice had no objective and reasonable justification.

⁴¹ Javier Martínez-Torrón & Rafael Navarro-Valls, *ibid.* pp. 212-213. See also: Conseil de l' Europe/Cour Européenne des Droits de l' Homme (2011), *Aperçu de la jurisprudence de la Cour en matière de liberté de religion*, pp. 14-15.

⁴² The notion of sphere sovereignty of religious institutions designates the range of competencies of the church over against those of the state and finds expression in various forms in many Constitutions of the world (e.g. in Singapore, Italy, the Czech Republic, Romania, Ireland). Under this notion, churches and religious communities are recognized with the right to administer their internal affairs according to their statutes, independently from state organs but without violating state law.

According to Art. 72 of the SC regulating the relationship between church and state: “1. The regulation of the relationship between the church and the state is the responsibility of the Cantons. 2. The Confederation and the Cantons may within the scope of their powers take measures to preserve public peace between the members of different religious communities [...]”.

In line with Art 72 of the SC, the Swiss Confederation has no official state religion, though most of the Cantons (except Geneva and Neuchâtel) recognize official churches, which are either the Catholic Church or the (Protestant) Swiss Reformed Church. These churches, and in some Cantons also the Old Catholic Church and Jewish congregations, are financed by official taxation of adherents. It is remarkable that an old popular vote held in March 1981 on the complete separation of church and state was clearly opposed to such a change, with only 21.1% voting in support. Although some churches are considered as official churches of the Cantons, all religious institutions in Switzerland are private entities.

Islam is not an official religion in any Canton, but Muslims exercise the right of assembly, recognized by Art. 23 of the SC, by establishing associations, which represent their communities in cantonal and federal authorities. Next to the historical Catholic and Protestant Christian institutions functioning in Switzerland, many Swiss Muslim organizations have been established since 1980⁴³ as private entities by the evolving, through immigration and conversion, Muslim minorities.

Contrary to the Swiss system, the Greek legislation recognizes some religious organizations, communities and minorities as public entities. As mentioned before, the Greek Orthodox Church is considered as the “prevailing religion in Greece” according to the Greek Constitution and is a public entity. The Jewish communities

⁴³ The *Gemeinschaft islamischer Organisationen der Schweiz* was formed in Zürich in 1989. Numerous organizations were formed during the 1990s and the 2000s, including: *Organisation Muslime und Musliminnen der Schweiz* (1994), *Basler Muslim Kommission* (1997), *Vereinigung Islamischer Organisationen Zürich* (1997), *Koordination Islamischer Organisationen Schweiz* (2000), *Vereinigung islamischer Organisationen des Kantons Luzern* (2002), *Dachverband islamischer Gemeinden der Ostschweiz und des Fürstentums Liechtenstein* (2003), *Föderation Islamischer Dachorganisationen in der Schweiz* (2006) and *Islamischer Zentralrat Schweiz* (2009).

have also been granted legal personality as public entities. Islam has been recognized indirectly through the recognition of the Muslim minority, composed by populations of Turkish, Pomak and Roma origin living in Thrace, according to Art. 45 of the Treaty of Lausanne⁴⁴ signed by Greece in 1923. According to the legislation issued following the Treaty of Lausanne provisions, nowadays Muftis are civil servants appointed by the Greek state. They have judicial and administrative jurisdiction on civil law cases of Muslims, such as marriages, divorces and wills⁴⁵. All the other known religions, such as the Catholic Church of Greece and the Church of Jehovah's Witnesses, are private entities, while religions that are not considered as "known", are not granted any kind of state recognition.

In the past, the ECtHR has issued decisions against Greece for violating freedom of religion, namely the right to equal protection and non-discrimination, by not granting legal personality to certain religions. In *Canea Catholic Church v. Greece*⁴⁶ the ECtHR held that every religious denomination has the right not only to be accepted as existing *de facto* but also to be granted legal personality under conditions that are fair and similar to those applied to other denominations. It also recognized that discrimination existed against the Canea Catholic Church in the light of the different treatment accorded to the Greek Orthodox Church and to the Jewish communities, which are granted legal personality and standing to sue without having to follow the civil formalities common to all associations⁴⁷.

Last but not least, the Greek state supervises the ministers of the prevailing and all the known religions through the Ministry of Education and Religious Affairs. According to Art. 13(3) of the GC, "*The ministers of all known religions shall be*

⁴⁴ The full text of the *Treaty of Lausanne* was accessed at: http://www.eurel.info/IMG/pdf/gr_traite_lausanne-2.pdf.

⁴⁵ Law 1920/1991 (Official Gazette A' 11/1991), Law 3536/2007, Art. 36-40 (Official Gazette A' 42/2007). For details on the jurisdiction of Muftis in Greece see: Velivasaki Eleni (2013), *Operating Religious Minority Legal Orders in Greece and the UK: A Comparison of the Mufti Office of Komotini and the Islamic Shari'a Council of London*, University of Lucerne/Center for Comparative Constitutional Law and Religion - Working Papers Series (WP 04/13).

⁴⁶ *Canea Catholic Church v. Greece*, 27 EHRR 329 (1999) (ECtHR 1997-VIII, 16 December 1997).

⁴⁷ Javier Martínez-Torrón & Rafael Navarro-Valls, *ibid.* p. 219.

subject to the same supervision by the State and to the same obligations toward it as those of the prevailing religion". The Greek Constitution mentions nothing about the religions and beliefs that are not known. Supervising the ministers of all known religions may amount to a violation of the right to sphere sovereignty of religious institutions by states, if not exercised properly.

LIMITATIONS IN THE MANIFESTATION OF ONE'S RELIGION WITH A FOCUS ON THE ERECTION AND FUNCTION OF MOSQUES

Religious freedom is not unrestricted. On the one hand, freedom to adopt or change religion is considered by almost all commentators as absolute, since it is extremely difficult and time-consuming to affect the internal dimension of thought, conscience, religion or belief⁴⁸ and widely accepted that regulation of beliefs is beyond the role of state, which has jurisdiction only over actions⁴⁹. On the other hand, freedom to manifest one's religion or beliefs can be lawfully limited⁵⁰ under certain circumstances, prescribed by international and domestic law, since manifesting is linked to actions. A restriction should always be based on law, not on policy, in order to be permissible.

Human rights recognized under international law, including religious freedom, may be restricted by governments by means of, *inter alia*, reservations, declarations of interpretation, derogation (in emergency situations), deprivation in case of abuse, or specific limitation clauses⁵¹. Limitations may also be imposed by

⁴⁸ The parents' human right to ensure religious and moral education of their children in conformity with their own convictions can be regarded as a limitation of the *forum internum* of religious freedom. Religious indoctrination or brainwashing can also be regarded as an exceptional restriction of the *forum internum* of religious freedom.

⁴⁹ Ahdar Rex & Leigh Ian, *ibid.* p. 160.

⁵⁰ Nowak Manfred & Vospernik Tanja, *ibid.* p. 148, Murphy Karen, *ibid.* p. 31, van der Vyver Johan D., *ibid.* p. 123, Conseil de l' Europe/Cour Européenne des Droits de l' Homme, *ibid.* p. 7.

⁵¹ Nowak Manfred & Vospernik Tanja, *ibid.* p. 148.

domestic law. According to Dimitrios Tsatsos⁵², “limitation of a fundamental right is every governmental action which prohibits or restricts the exercise of the freedom contained in the constitutionally defined frame of protection”.

International human rights instruments describe the conditions under which restrictions on the freedom to manifest one’s religion or belief are allowed. Specifically, according to Art. 29(2) of the UDHR: *“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”*. Art. 18(3) of the ICCPR has a similar wording: *“Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”*, and so does Art. 9(2) of the ECHR which reads: *“Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”*.

The Greek and the Swiss Constitution, following the provisions of the aforementioned international instruments, also regulate the way that constitutional rights, including freedom of religion, can be lawfully restricted as follows:

Art. 36 of the SC reads: *“1. Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal act [...]. 2. Restrictions on fundamental rights must be justified in the public interest or for the protection of the fundamental rights of others. 3. Any restrictions on fundamental rights must be proportionate. 4. The essence of fundamental rights is sacrosanct”*. In this wording, Art. 36 of the SC introduces a limitation of fundamental rights, including freedom of religion, if they conflict with public interest or if they encroach

⁵² Tsatsos Dimitrios (1988), *Constitutional Law, Vol. C: Fundamental Rights, 1. General Part*, Ant. N. Sakkoulas Publishers: Athens, pp. 233-234 (in Greek).

upon the basic rights of others. It is remarkable that in addition to the principle of necessity, the Swiss Constitution mentions the principle of proportionality of restrictions.

Art. 25 of the GC reads: *“1. Human rights of all, as individuals and as members of society, and the principle of the social state of law are guaranteed by the State. All state organs are obliged to ensure their unhindered and effective exercise. These rights apply to equivalent relations between private individuals. Restrictions of any kind that, according to the Constitution, can be imposed on those rights must be provided either directly by the Constitution or by law, if there is prejudice in favor of this and respect the principle of proportionality [...]. 3. The abuse of rights is not permitted [...].”* Regarding restrictions on the freedom of religion, Art 13(3) of the GC provides that *“[...] The practice of rites of worship is not allowed to offend public order or the good usages”*. The Greek Constitution introduces a general limitation in the application of human rights, when they are exercised abusively, and specific limitations on the freedom to manifest one’s religion, when manifestation offends public order or the so-called “good usages”. Alike the Swiss Constitution, the Greek Constitution also couples the principle of necessity of restrictions with proportionality.

The conditions that an administrative or judicial decision must meet in order to lawfully restrict the freedom to manifest one’s religion have been analyzed by the ECtHR, which has often stressed that “the freedom of thought, conscience and religion in one of the foundations of a democratic society” and the necessity of any restriction will depend upon whether it fulfills a number of requirements.

The overall conditions, in cases that a state decides to restrict the freedom to manifest one’s religion or beliefs, are the following: i) the restriction must pursue a legitimate aim, as set out in Art. 9(2), those being the maintenance of public safety, the protection of public order, health or morals and the protection of the rights and freedoms of others; ii) the nature of the interference must be proportionate to the legitimate aim which is being pursued, and responding to a “pressing social need”,

since it is this which will determine whether the interference could be considered as “necessary”; iii) the state must justify its interference on the individual’s freedom, according to Art. 9(2) of the ECHR, especially by proving that the restrictive measures are “necessary in a democratic society”⁵³. In this case, the burden of proof with regard to the necessity of a restrictive measure is a responsibility of the state.

The aforementioned conditions were reconfirmed in *Manoussakis v. Greece*⁵⁴. The ECtHR further held that Art. 9 of the ECHR sets forth three tests for determining whether government action impermissibly interferes with the freedom of religion or belief. Government action must not violate any of these tests in order to be legitimate. First, limitations must be “prescribed by law”. Second, limitations must have a “legitimate aim”, specifically “in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”. Third, limitations must be “necessary in a democratic society”. The phrase “in a democratic society” is not contained in the similar provision of the ICCPR. The above tests have been adopted by most scholars⁵⁵.

Regarding the latter condition, it is beyond any doubt that a restriction is “prescribed by law” when the law is adequately accessible to citizens, who are able to have an indication of what is adequate in the circumstances⁵⁶. The law must be formulated with sufficient precision to enable the citizens to regulate their conduct. In other words, any limitations must be stated in general and objective terms in accordance with the characteristics of the law, as distinct in a sense from individual and concrete legal decisions resulting from decrees of courts or administrative acts. The authorities responsible for issuing laws or regulations that control the manifestations of religion, namely the executive branch, must act only within the

⁵³ Javier Martínez-Torrón & Rafael Navarro-Valls, *ibid.* p. 229.

⁵⁴ *Manoussakis and Others v. Greece*, 23 EHRR 387 (1997), (ECtHR 1996-A, No 59/1995/ 565/651, 26 September 1996).

⁵⁵ e.g. Nowak Manfred & Vospernik Tanja, *ibid.* p. 150.

⁵⁶ *The Sunday Times v. United Kingdom*, 2 EHRR 245 (1979), (ECtHR 1979-1980, Judgment, 26 April 1979).

scope of the authority prescribed to them by law. The condition of necessity has thoroughly been interpreted by the case law of the ECtHR⁵⁷.

Johan van der Vyver⁵⁸ categorizes in a slightly different manner the limitations on the freedom to manifest one's religion or beliefs as following: i) limitations inherent in the concept of the right being protected, ii) limitations determined by the rights and freedoms of others and iii) limitations in the general interest. He maintains that in order to lawfully apply limitations to the external acts of manifestation of one's religion or beliefs, the limitations must be i) *prescribed* by law and ii) *necessary* to protect public safety, order, health or morals, or the fundamental rights of others.

Despite the list of permissible restrictions contained in Art. 9 of the ECHR, the ECtHR hinted on several occasions that this is not necessarily a definite list and interpreted Art. 9 in a way that provides protection to interests, which lay beyond this "illustrative list"⁵⁹. Nevertheless, when limitations are necessary, particularly in multi-religious societies, they must not be of a nature "as to sacrifice minorities on the altar of the majority, but to ensure a greater measure of freedom for society as a whole"⁶⁰.

In the following parts of the paper, a short analysis of the specific restrictions provided by international and domestic law and other issues linked to the implementation of these restrictions will be provided. Of the restrictions listed in Art. 29(2) of the UDHR, Art. 18(3) of the ICCPR and Art. 9(2) of the ECHR, "public morals" and the "fundamental rights and freedoms of others" are among the most interesting in relation to the freedom of religion or belief⁶¹.

⁵⁷ In *Handyside v. United Kingdom* the ECtHR, regarding the the right of states to interfere in human rights, interpreted the word "*necessary*" as the existence of a "*pressing social need*".

⁵⁸ van der Vyver Johan D., *ibid.* pp. 116, 122.

⁵⁹ Evans D. Malcolm, *ibid.* p. 12.

⁶⁰ Evans D. Malcolm, *ibid.* p. 17-18, Murphy Karen, *ibid.* p. 31, Nowak Manfred & Vospernik Tanja, *ibid.* p. 150, Ahdar Rex & Leigh Ian, *ibid.* p. 162.

⁶¹ Murphy Karen (2013), *State Security Regimes and the Right to Freedom of Religion and Belief: Changes in Europe since 2001*, Routledge: London, p. 33.

1. PUBLIC SAFETY

Public safety is considered as a legitimate legal basis for restricting the freedom to manifest one's religion or beliefs according to Art. 18(3) of the ICCPR and Art. 9(2) of the ECHR. According to Art. 36 of the SC, restrictions on fundamental rights - *inter alia* the freedom to manifest one's religion or beliefs - must be justified in the public interest. It can be argued that the term "public interest" includes public safety. The Greek Constitution does not list public safety among the grounds for restricting religious freedom but one can claim that public safety is contained in the notion of public order.

The main purpose of the "public safety" clause is to allow restrictions on the public manifestation of religion (e.g. worship in public places, religious assemblies), if a specific danger arises which threatens the safety of people or property. This danger may arise when hostile religious groups or even hostile sects of the same religion are in violent confrontation⁶². Regarding the function of Muslim mosques, such confrontation may occur between different sects that use the same place of worship (e.g. Sunni and Shia). Restrictive measures to be taken by the state should be strictly necessary and proportional to protect public safety. Examples of lawful administrative measures are the prohibition or dissolution of religious assemblies and, in extreme cases, the prohibition of particularly dangerous religious groups.

Prohibiting the function of a certain mosque may be necessary and proportionate for the maintenance of public safety, when violent actions have occurred due to its function; but, if a given mosque is used by more than one religious community, the total prohibition of its function due to the threat against public safety stemming from one community is a disproportionate measure to the rest of the communities using it. Moreover, the prohibition of the function of all mosques in an area or state is disproportionate, especially when it is a preemptive measure for maintaining public safety. The public safety clause is applied to

⁶² Nowak Manfred & Vospernik Tanja, *ibid.* pp. 150-151.

manifestations of religion or beliefs that threaten the safety of third persons and not the safety of the adherent of a religion that follows a dangerous practice. Penal prosecution of perpetrators of crimes remains an obligation of the state and religion cannot be an excuse for committing crimes.

2. PUBLIC ORDER

Public order *stricto sensu* is considered as a legitimate legal basis for restricting the freedom to manifest one's religion or beliefs according to Art. 18(3) of the ICCPR, Art. 9(2) of the ECHR and Art 13(3) of the GC. The Swiss Constitution does not make a special reference to the public order clause, but the terms "public interest" and "public peace" mentioned in Art. 36 and Art. 72(2) of the SC respectively, may include public safety which is a narrower term. The public order clause aims at fostering reciprocal tolerance between different religious groups⁶³.

Controversies that threaten the public order within a state may occur from actions and dissent in public places emanating from religious differences, involving phenomena such as street evangelism, hate speech, religious processions and demonstrations. In these situations restrictions on free speech in the name of public order can operate either to censor religious expression or, indeed, to protect the opportunity for it to take place⁶⁴. Performance of cultic or missionary activities or religious processions on public ground may also be limited. The emphasis of public order regulations is on keeping the peace in a society, so public order should be narrowly interpreted to mean the prevention of public disorder. The prohibition of minarets in Switzerland interdicts the Muslim ministries from addressing religious speech to the public, including non-Muslims. This restrictive measure could be regarded as necessary and proportionate, if it was proven that the address of religious speech to the public contained hate speech, which is a threat to public order.

⁶³ Javier Martínez-Torrón & Rafael Navarro-Valls, *ibid.* p. 221.

⁶⁴ Ahdar Rex & Leigh Ian, *ibid.* p. 374.

Public order regulations may oblige religious communities to be registered as legal entities and to comply with general rules regulating public meetings or the establishment of public places of worship⁶⁵. For example, Art. 11 of the GC regulates the freedom of assembly, including public religious assemblies, providing that public armed assemblies are prohibited and that public assemblies that may cause danger to the public order may be prohibited. Regarding the issue of erection of Mosques, the rules of town planning legislation and environmental legislation should be followed, since they are part of the public order norms. The violation of these rules can threaten societal peace and cause disorder. Town planning legislation and environmental legislation can also form the legal basis for restricting or limiting the building of religious buildings but not for totally banning it. In this case, the same legislation may be used for the religious buildings of all religions. If such regulations are used in a discriminatory manner against certain religious groups, this may amount to a violation of freedom of religion.

Public order *lato sensu*, interpreted as the public order of a liberal democratic state, may also be endangered by institutions that aim at setting a political system incompatible to democracy. This was the main issue in *Refah Partisi v. Turkey*⁶⁶, in which the ECtHR dealt mainly with the freedom of association. The ECtHR concluded that the dissolution of a political party with Islamic orientation was justified on the basis of a “pressing social need” and declared that the establishment of Sharia as a political regime is not compatible with the fundamental principles of democracy as expressed in the ECHR. The ECtHR judgement has been strongly criticized by scholars as incorrect⁶⁷. The criticism focuses on the incidental assessment and inappropriate critique of Islam by the ECtHR. Nevertheless, in the light of the *Refah* judgement, restrictions and even dissolution of Islamic organizations that threaten the public order are legitimate. If these organizations use certain mosques for propaganda

⁶⁵ *Manoussakis and Others v. Greece*, 23 EHRR 387 (1997) (ECtHR 1996-IV, 26 September 1996).

⁶⁶ *Refah Partisi (The Welfare Party) and Others v. Turkey*, App. Nos 41340/98, 41342/98 and 41344/98, ECtHR Grand Chamber, 13 Feb. 2003.

⁶⁷ Boyle Kevin (2004), “Human Rights, Religion and Democracy: The Refah Party Case”, *Essex Human Rights Review*, Vol. 1, No 1, pp. 1-16, Schilling David (2004), “European Islamophobia and Turkey - Refah Partisi (The Welfare Party) v. Turkey”, 26 *Loy. L.A. Int'l & Comp. L. Rev.*, pp. 501-515.

against democracy, then the state can prohibit the function of these particular mosques.

Last but not least, the possible application of the Islamic law in European states may be problematic for public order. The issue of Shariah is probably the most critical point of interaction between Muslims and the European environment⁶⁸. Although Islamic legal norms were applied in some places in Europe from the Middle Ages until the end of the Ottoman Empire, nowadays they are formally applied only in Greece to the Muslims of Turkish, Pomak and Roma origin in the region of Western Thrace, due to international treaties signed in the 1920's. Nowadays, the efforts to introduce or impose Shariah to a liberal democratic state under the mantle of freedom to manifest one's religion can be contrary to the public order and for this reason the aforementioned freedom may be subject to restrictions. For example, the Quran (Sura 6:151) prohibits capital punishment "except by way of justice and law"⁶⁹. One of the exceptions that justify the taking of life, according to Islamic law, is the crime of treason/apostasy defined as converting from Islam and joining the enemy in fighting against the Muslim community. The freedom to adopt or change religion (i.e conversion), is recognized as an absolute freedom by international human rights instruments and by the Constitutions of Western countries. For this reason, liberal democratic states, such as Greece and Switzerland, cannot impose any penal sanctions to persons that convert from one religion to another or chose not to adopt a religion at all. Instead, they are obliged to safeguard their freedom to convert to any religion by stopping any external interference that tries to limit this freedom. But Muslims challenge the view that there is a right to convert from Islam to another religion⁷⁰. The propagation of such provisions of Shariah is contrary to the public order of secular states and at the same time, may amount to the crime of hate speech against non-Muslims or even to incitement to commit homicide against

⁶⁸ Nielsen S. Jørgen, "Islam and Secular Values in Europe: from Canon to Chaos", in: Cumper Peter & Lewis Tom (eds.) (2012), *Religion, Rights and Secular Society*, Edward Elgar Publishing Ltd: Cheltenham, pp. 273.

⁶⁹ Nathan N. Clemens (2009), *The Changing Face of Religion and Human Rights: A Personal Reflection*, Martinus Nijoff Publishers: Leiden, p. 128.

⁷⁰ Nowak Manfred & Vospernik Tanja, *ibid.* p. 149.

Muslims that converted to other religions. Hence, this may lead to restrictions in the function of mosques where such religious indoctrination takes place. The issue of Islamic law and public order is complicated due to the fact that Islam is not a mere religion but a complete legal, political, financial and social system that governs all the aspects of life of its adherents⁷¹.

3. PUBLIC HEALTH

Public health is considered as a legitimate legal basis for restricting the freedom to manifest one's religion or beliefs according to Art. 18(3) of the ICCPR and Art. 9(2) of the ECHR. As mentioned before, Art. 36 of the SC contains the "public interest" clause, which may include public health as a narrower clause. The Greek Constitution does not refer to public health but this omission may be attributed to the more general reference to public order.

Limitations permitted on the ground of public health are intended, primarily, to allow state intervention to prevent epidemic or other diseases and to ensure due hygienic conditions⁷². For example, limitations may be applied if the manifestation of a specific religion engages in activities, which are harmful to the health of its members and possibly others as well (e.g. female genital mutilation in some Muslim communities). A common practice in many religions, including Islam, is the slaughter and sacrifice of animals, usually sheep. Ritual slaughter is prohibited in Switzerland as conflicting with Swiss animal laws. The possible illegal ritual slaughter of animals in a mosque could be a justification for imposing administrative and penal sanctions,

⁷¹ A proof that Islam is a legal and political system and that Islamic law prevails any other legal norms for Muslims is the *Cairo Declaration on Human Rights in Islam* adopted in 1990 by the Member States of the Organization of the Islamic Conference, which includes the declarations that "All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shariah" (Art. 24) and that "The Islamic Shariah is the only source of reference for the explanation or clarification of any of the articles of this Declaration" (Art. 25). Such declarations are considered invalid according to public international law but they are living law for Islamic states. The full text of the *Cairo Declaration on Human Rights in Islam* was accessed at: <http://www.arabhumanrights.org/publications/regional/islamic/cairo-declaration-islam-93e.pdf>.

⁷² Nowak Manfred & Vospernik Tanja, *ibid.* p. 157, Javier Martínez-Torrón & Rafael Navarro-Valls, *ibid.* p. 221.

based on the domestic animal law or public health regulations, which may include the prohibition of function of a facility, in this case of a mosque.

4. PUBLIC MORALS

Public morals are considered as a legitimate legal basis for restricting the freedom to manifest one's religion or beliefs according to Art. 18(3) of the ICCPR and Art. 9(2) of the ECHR. The Greek Constitution refers to the "good usages" (Art. 5(1) and 13 of the GC) as a clause for limitation of religious freedom, which are equivalent to public morals, while the Swiss Constitution refers to the "public interest" clause (Art. 36 of the SC), which is doubtful if it includes public morals, since both terms are widely interpreted and not easily comparable.

Public morals are very difficult to define. They are the least clear and most controversial of all legitimate grounds for justifying restrictions on the freedom to manifest one's religion or belief. They derive from many social, cultural, philosophical and legal traditions and no uniform - universal or regional - standard of morals exist. This causes difficulties when balancing religious values with moral values (e.g. Muslim polygamy)⁷³.

The appeal to public morality may lead to unjustified restrictions of the freedom to manifest one's religion or beliefs, alone or in community with others, especially to minority groups that do not adopt the moral norms of the majority. The justification based in public morals is difficult to be reviewed by courts.

5. THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF OTHERS

The protection of fundamental rights and freedoms of others is considered as a legal basis for restricting the freedom to manifest one's religion or beliefs according to Art. 18(3) of the ICCPR, Art. 9(2) of the ECHR⁷⁴ and Art. 36(2) of the SC. There are two relevant provisions in the Greek Constitution: Art. 5(1) reads that "*All persons shall have the right to develop freely their personality and to participate in the social,*

⁷³ Nowak Manfred & Vospernik Tanja, *ibid.* p. 159.

⁷⁴ Ahdar Rex & Leigh Ian, *ibid.* p. 162.

economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution and the good usages” and Art. 25(3) prohibits the “*abuse of rights*”, a practice that is reasonably considered as harmful to the rights and freedoms of others⁷⁵.

According to the aforementioned provisions, individuals and religious or belief communities are expected to act in a way which respects the structures and systems of pluralist democracy, is properly respectful of the rights and freedoms of others and honors the particular obligation to show proper respect for the objects of religious veneration of others⁷⁶.

The individual and religious communities are the beneficiaries of this constitutional and human right and not their guarantor. Thus whilst it is the responsibility of the state to ensure the full enjoyment of rights and freedoms to all who are subject to their jurisdiction, the responsibilities of the individual are chiefly to ensure that in their enjoyment of these right and freedoms they do not abuse the freedom which they are offered. The legitimacy of the various limitations on the manifestation of the freedom of religion or belief may ultimately all be traced back to an assessment of whether or not there is a case of abuse of freedom⁷⁷.

Freedom to manifest one’s religion or beliefs may interact - either coexist or be in conflict - with several other rights and freedoms, such as the rights to life, liberty, integrity, privacy, property, health, education, equality, the freedom of expression, the prohibition of slavery and torture as well as the rights of minorities. The aforementioned clause comes into effect when there are conflicting rights and freedoms of people and leads to a limitation of the enjoyment of these rights and freedoms by the one or both parties, in order to maintain peaceful coexistence within society. When states have to deal with conflicting fundamental rights of citizens, they should always act under the general principle that all fundamental

⁷⁵ Tsatsos Dimitrios, *ibid.* pp. 236-237.

⁷⁶ Evans D. Malcolm, *ibid.* p. 58.

⁷⁷ Evans D. Malcolm, *ibid.* p. 57.

rights are of the same value but at the same time balance the conflicting rights before imposing limitations⁷⁸.

For example, in *Murphy v. Ireland*⁷⁹ the ECtHR sanctioned a ban on a religious radio advertisement. The ban was in accordance with Irish law, which provides that “No advertisement shall be broadcast which is directed towards any religious or political end”⁸⁰. Within the context of assessing whether the interference (the ban of advertisement) with the applicant’s right to freedom of expression pursued a legitimate aim, the ECtHR once more elaborated on the notion of respect for other people’s beliefs⁸¹. Comparing the judgment on the religious radio advertisement with the manifestation of Islam in mosques, one may claim that a radio advertisement with religious content resembles the public worship by Muslim ministers on minarets. Addressing directly the public through the minaret resembles a radio advertisement and maybe has stronger effect than it, because one can switch off the radio but cannot avoid the public speech through minarets. In this light, the banning of minarets in Switzerland may be justified, because public worship may conflict with the freedom of others to avoid proselytism or the right to free development of their personality, which includes the liberty not to interact with any religion.

Moreover, if the manifestation of one’s religion or belief threatens these rights, for example when it engages hate speech or blasphemy towards adherents of other religions and dogmas, it can legitimately be restricted⁸². Jeroen Temperman maintains that protecting the right of Jews to be protected from religious hatred is surely a legitimate ground for limiting someone’s freedom of expression⁸³.

⁷⁸ Tsatsos Dimitrios, *ibid.* p. 265.

⁷⁹ *Murphy v. Ireland*, No. 44179/98, ECtHR 2003-XII, para. 8.

⁸⁰ Sect. 10, para. 3 of the Irish Radio and Television Act 1988.

⁸¹ *Murphy v. Ireland*, paras. 63-64.

⁸² Ahdar Rex & Leigh Ian, *ibid.* p. 155.

⁸³ Jeroen Temperman, “Protection against Religious Hatred under the United Nations ICCRP and the European Convention System”, in: Ferrari Silvio & Cristofori Rinaldo (eds.) (2010), *Law and Religion in the 21st Century: Relations between States and Religious Communities*, Ashgate: Farnham, pp. 221-222.

Nevertheless, the harm caused or threatened to be caused to the rights and freedoms of others should be serious. If there is no serious threat but only a minor inconvenience this may imply a duty of the state and citizens to permit such practice by accommodating it⁸⁴.

The issue of what is harmful to the rights and freedoms of others has been analyzed by Ahdar Rex and Leigh Ian. Physical harm might seem to be a clear case, but even here questions can be raised over whether transient degrees of physical discomfort should constitute an absolute bar. Moreover, the state may claim the right to interfere on the basis of less readily identifiable forms of societal or other harm arising, for example, from the wearing by Muslim schoolgirls of the *hijab* or the *jilbab* in state schools, or by religious motivated animal sacrifice or slaughter. There are also issues of proportionality between the importance of a certain manifestation of one's religion and the cost of this manifestation for society. The harm to another person, or society, may in some cases be a minor inconvenience when weighed against an acute crisis of conscience for the religious claimant⁸⁵. In this case, the state should balance the conflicting interests and freedoms before deciding which one to restrict. Another issue that should be taken into consideration is that many aspects of religious liberty are recognized to be communal and, consequently, to uphold the individual's rights may amount to restriction of a whole group's rights.

6. INTERNATIONAL PEACE AND SECURITY

Another occasion, where limitations can be lawfully applied in the exercise of religious freedom, is for maintaining international peace and security, which is the main aim of the UN. According to Art. 29(3) of the UDHR: "*These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations*". This provision is formulated in more detail in Art. 20(2) ICCPR which reads: "*Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*". The ratio of these provisions, which form a legal basis for imposing limitations to the manifestation of

⁸⁴ Ahdar Rex & Leigh Ian, *ibid.* p. 155.

⁸⁵ Ahdar Rex & Leigh Ian, *ibid.* p. 163.

one's religion, is not safeguarding the internal peace and security of a state, served by the public safety and public order clauses, but the maintenance of peace and security in the international environment. In this light, governments are obliged to prohibit any manifestation of religion or belief which amounts to propaganda for war or advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence⁸⁶. Particularly, governments that have ratified the International Criminal Court Statute⁸⁷, including Switzerland and Greece, are obliged to prohibit manifestation of religion that incite people to commit genocide⁸⁸ or crimes against humanity⁸⁹, since international crimes are considered as a major threat to international peace and security. Limitations upon the right to freedom of religion imposed in order to prevent such breaches are legitimate and not discriminatory⁹⁰.

At this point, a question arises on whether, under certain circumstances, more limitations than those analyzed in the previous sections can lawfully be imposed on the freedom to manifest one's religion. These circumstances include wars, national emergencies, mobilization etc.

⁸⁶ Nowak Manfred & Vospernik Tanja, *ibid.* p. 165, Murphy Karen, *ibid.* p. 32.

⁸⁷ The full text of the ICC Statute is published at: http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

⁸⁸ Art. 6 of the ICC Statute entitled "Genocide": "*For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group".

⁸⁹ Art. 7 of the ICC Statute entitled "crimes against humanity": "*1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...] (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; [...]*".

⁹⁰ Murphy Karen, *ibid.* p. 32.

According to the literature⁹¹, freedom of thought, conscience and religion cannot be suspended in times of national emergency, it is thus a non-derogable right. It is worth mentioning that international human rights instruments and both the Greek and the Swiss Constitution prohibit the suspension of the freedom of religion even in circumstances like war, public emergency and mobilization.

Art. 4 of the ICCPR⁹² provides that no derogation from the relevant articles recognizing freedom of religion can be made even in time of public emergency threatening the life of a nation. On the contrary, Art. 15 of the ECHR⁹³ does not list freedom of religion among the non-derogable rights “in times of war or other public emergencies threatening the life of the nation” and, thus, permits states to derogate from their obligations under Art. 9, but only “to the extent strictly required by the exigencies of the situation”⁹⁴. This can make no difference in practice, according to Manfred Nowak and Tanja Vospernik, because all parties to the ECHR are also parties

⁹¹ van der Vyver Johan D., *ibid.* p. 122, Nowak Manfred & Vospernik Tanja, *ibid.* p. 148.

⁹² Art. 4 of the ICCPR: “1. *In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.* 2. *No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.* 3. *Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation”.*

⁹³ Art. 15 of the ECHR: “1. *In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.* 2. *No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.* 3. *Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed”.*

⁹⁴ Evans D. Malcolm, *ibid.* p. 17.

to the ICCPR, and are obliged to abide with the stricter and more protective provisions of the latter concerning freedom of religion⁹⁵.

Art. 48(1) of the GC⁹⁶ contains a similar provision to the ICCPR in case of war or mobilization owing to external dangers or to an imminent threat to national security, and if an armed movement to overthrow the democratic regime occurs. On the contrary, Art. 36 of the SC⁹⁷, alike Art. 15 of the ECHR, provides that restriction on fundamental rights can be applied in cases of serious and immediate danger where no other course of action is possible without excluding limitations of the freedom of religion. Although the Greek Constitution prohibits restrictions on the freedom of religion even in case of emergency (war, mobilization, coup etc), restrictions on the freedom to manifest one's religion can be imposed indirectly, through restrictions on the right to assemble, which can be lawfully restricted in such cases.

Consequently, a state of emergency *per se* cannot be a justification for imposing restrictions to the freedom to manifest one's religion in Greece and Switzerland. Restrictions in the freedom of religion can be lawfully imposed in times of emergency in the same conditions that must be met in peaceful times.

THE CURRENT SITUATION IN GREECE & SWITZERLAND REGARDING MOSQUES

As mentioned before, immigration has raised the size of Muslim population in most European countries, including Greece and Switzerland. Although the erection of new mosques has recently become a matter of controversy and publicity, many

⁹⁵ Nowak Manfred & Vospernik Tanja, *ibid.* p. 148.

⁹⁶ Art. 48(1) of the GC: *"In case of war or mobilization owing to external dangers or to an imminent threat to national security, and if an armed movement to overthrow the democratic regime occurs, the Parliament by decision taken on a proposal from the Government implements throughout the State or in part, the law on the state of siege, forms extraordinary courts and suspends the validity of the whole or part of the provisions of Art. 5(4), 6, 8, 9, 11, 12(1) to (4), 14, 19, 22(3), 23, 96(4), and 97 [...]"*.

⁹⁷ Art. 36 of the SC: *"1. Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal act. The foregoing does not apply in cases of serious and immediate danger where no other course of action is possible"*.

seem to ignore that mosques existed lawfully in both states for a very long time. The actual need for more mosques that would cover the needs of larger Muslim populations led to the erection and function of new mosques or at least to the use of other buildings for praying.

The ECtHR has recognized the right of religious groups to possess and manage their own places of worship and meeting. This right implies the right to freely attend religious ceremonies in these places, while unjustified restriction of free access to places of worship constitutes a violation of Art. 9 of the ECHR, since it prevents people from manifesting their religion either alone or in community with others. For example, in *Cyprus v. Turkey*⁹⁸ the ECtHR held that restrictions imposed by the so-called “TRNC” on the access of Greek Cypriots living in the Karpas area of northern Cyprus to the Apostolos Andreas Monastery as well as on their ability to travel outside their villages to attend religious ceremonies constitute a violation of Art. 9 of the ECHR. Moreover, in the same case the ECtHR held that restrictions of movement and access to places of worship constitute a discrimination amounting to degrading treatment in violation of Art. 3 of the ECHR⁹⁹. The judgment of the ECtHR referred to the UN Secretary-General's progress reports of 10 December 1995 on the humanitarian review carried out by UNFICYP in 1994-95 concerning the living conditions of Karpas Greek Cypriots, the so-called “Karpas Brief”, which recognizes that restrictions on a community's freedom of access to places of worship weigh heavily on their enjoyment of the right to practice their religion.

In this light, a state policy of totally banning certain places of worship constitutes *a fortiori* a violation of the freedom to manifest one's religion, if such places are needed according to the rituals and doctrines of the religion and no lawful reasons for banning them exist. Nevertheless, in most cases, state approval is a prerequisite for the erection and function of places of worship. As Roman

⁹⁸ *Cyprus v. Turkey* (App. No. 25781/94, ECtHR. Judgment, 10 May 2001).

⁹⁹ Art. 3 of the ECHR: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

Podogrigora¹⁰⁰ maintains, in modern democratic states, the interaction between religious and state institutions involves approvals, licenses, permits and other governmental decisions such as land use permits authorizing the use of specific locations for building worship facilities and the authorization of public worship. Among these issues is the construction of mosques that was dealt with in different manner by Greece and Switzerland.

1. GREECE: THE “ISLAMIC MOSQUE OF ATHENS” CONTROVERSY

The mosques operating in Greece can be divided in two categories: i) mosques operating legally for many decades in Western Thrace, the north-eastern part of Greece where a Muslim minority recognized by international conventions lives, and ii) mosques operating in other major cities as cultural monuments or museums. There are also several places of worship for Muslims operating illegally all over Greece, due to the difficulties of obtaining permissions of that kind and because most Muslim immigrants in Greece are illegal/undocumented. Nevertheless, the need for mosques is present and must be covered if the Greece state wants to abide to its international obligations.

The Greek legislation on the erection and function of places of worship (churches, chapels etc) is distinct for the Greek Orthodox Church as opposed to all other “known” religions, although it is more or less similar. For religious buildings belonging to any known religion, including Muslim mosques, the relevant legislation dates back to the 1930’s. Law 1363/1938¹⁰¹, which was amended by Law 1369/1938¹⁰², Law 1672/1939¹⁰³, Decree of 20 May 1939¹⁰⁴ and Law 3467/2006¹⁰⁵ regulate the way that religious freedom is exercised according to the Greek Constitution, including the prerequisites for erecting religious buildings.

¹⁰⁰ Roman Podogrigora, *ibid.* pp. 425-426.

¹⁰¹ Official Gazette A’ 305/1938.

¹⁰² Official Gazette A’ 317/1938.

¹⁰³ Official Gazette A’ 123/1939.

¹⁰⁴ Official Gazette A’ 220/1939.

¹⁰⁵ Official Gazette A’ 128/2006.

In the past, Greece has been criticized many times for repressing the freedom to manifest one's religion mainly because of its complicated and severe administrative and penal legislation on places of worship. According to the ECtHR decision in *Manoussakis and Others v. Greece*¹⁰⁶, the Greek legislation prescribes that, for a public place of worship to be established, civil authorities must first grant explicit permission. The alleged aim of the legislation is to ensure that the place is not run by secret sects, that there is no danger to public order or morals, and that the place of worship will not be a cover for acts of proselytism, which is explicitly forbidden by the Greek Constitution. The ECtHR concluded that the Greek legislation granted an excessive discretion to Greek authorities and that there were not sufficient guarantees to ensure an objective decision on the permit, among other reasons because representatives of the Greek Orthodox Church intervened in the decision-making process¹⁰⁷. Despite the ECtHR decision in *Manoussakis*, the Greek courts continued to issue decisions - mainly judging administrative law and criminal law cases of citizens operating places of worship without state permission - which were based on the relevant administrative laws on the erection of religious buildings, though containing dissenting opinions by judges¹⁰⁸. These decisions were strongly criticized by scholars¹⁰⁹.

The complicated administrative procedure for issuing permits for the erection of places of worship of known religions, which included the intervention of the Greek Orthodox Church, was described in Art. 1 of Law 1363/1938 (as amended by Art. 1 of Law 1672/1939)¹¹⁰, Art. 41 of Law 1369/1938¹¹¹ and Art. 1 of the Decree of 20 May

¹⁰⁶ *Manoussakis and Others v. Greece*, 23 EHRR 387 (1997) (ECtHR 1996-IV, 26 September 1996).

¹⁰⁷ Javier Martínez-Torrón & Rafael Navarro-Valls, *ibid.* pp. 222-223.

¹⁰⁸ e.g. the Greek Supreme Court (Full) case No. 20/2011.

¹⁰⁹ e.g. Anthopoulos Ch. (2001) "Comments on the Greek Supreme Administrative Court (5th Dept.) decision No 2308/2000", *Révue Hellénique des Droits de l' Homme*, Vol. 9/2001, pp. 185-193 (in Greek), Zografos Ioannis (2002), «Comments on the Greek Supreme Court (Full) case No 20/2001», *Penal Justice*, Issue 4/2002, pp. 364-365 (in Greek), Manoledakis Ioannis & Poulis Georgios (2002), "Erection of Church or Place of Worship without Permission (after the Greek Supreme Court (Full) case No 20/2001)", *Penal Justice*, Issue 4/2002, pp. 409-411 (in Greek),

¹¹⁰ Art. 1 of Law 1363/1938, as amended by Art. 1 of Law 1672/1939: "For the construction or function of a church of any dogma the permission of the local recognized ecclesiastical authority and of the Ministry of Religious Affairs and National Education, according to the special provisions of a Decree

1939¹¹². After many convicting decisions of the ECtHR against Greece on this issue, Law 3467/2006¹¹³ was issued, which in Art. 27 provides that: *“For the institution, erection or function of a church or chapel of any dogma or religion, except for the Orthodox Church of Greece, the permit or opinion of the local ecclesiastic authority of the Orthodox Church of Greece is not required. Any other provision that regulates in a different way the same issue is cancelled [Art. 1 of Law 1363/1938 (Official Gazette A’ 305/1938), as amended by art. 1 of Law 1672/1939 (Official Gazette A’ 123/1939), Art. 41 of Law 1369/1938 (Official Gazette A’ 317/1938)]. The application for granting permission to institute, erect or function a church or chapel of any dogma or religion, except for the Orthodox Church of Greece, is submitted directly to the*

that will be issued after a proposition of the Minister of Religious Affairs and National Education, is a prerequisite. After the issuing of the aforementioned Decree, churches and chapels constructed or functioning without following its prescriptions or established and functioning in houses, warehouses or any other building or shelter transformed (into churches or chapels) are closed and sealed by the local Authorities that prohibit their function, and those that erected or operated them are punished by a penalty of 5.000 drachmas and incarceration from 2 to 6 months that cannot be transformed to money penalty [...]”.

¹¹¹ Art. 41 of Law 1369/1938: *“1. For the erection of any church of any dogma the permit of the competent local Bishop and the approval of the Ministry of Religious Affairs and National Education is required. 2. Every attempt to erect a church contrary to the aforementioned provision is stopped by the police and the perpetrators are punished by imprisonment and the church under construction is demolished by the police after order of the local Bishop”.*

¹¹² Art. 1 of the Decree of 20 May 1939: *“1. For the issuance of the permission prescribed in Art. 1(1) of Law 1672/1939 for the erection and function of churches not subject to the prescriptions of the legislation on the churches and priests of the Orthodox Church of Greece the following are demanded: a) Application of at least 50 families more or less neighboring the one to the other and living in an area which is in a big distance from an existing church of the same religion, if the fulfillment of religious obligations is hampered by the distance of the existing church of the same religion. The limitation of 50 families is not applied in villages. b) The application is submitted by the families to the local ecclesiastical authority, signed by the leaders of the families and containing the address of their houses. The signatures are ratified by the local police station, which, after conducting due control on the site, certifies that the reasons prescribed in the previous sentence for the justified issuing of a permission truly exist [...] c) The local police authority expresses a justified opinion on the application and then forwards it and its opinion to the Ministry of Religious Affairs and National Education, which can accept or withdraw it, if it decides that there are no true reasons requiring the erection or function of a new church or that the provisions of the present law were not met [...]. 3. For issuing a permit for the erection or function of a chapel or place of religious meeting the prescriptions of paragraph 1 sentence a and b of the present law are not applicable and the decision on whether actual reasons for issuing the permit exist is left to the Ministry of Religious Affairs and National Education. For that interested people submit an application to the Ministry of Religious Affairs and National Education through their religious leader, signed and ratified by the Mayor of the President of the Village. The house addresses of the applicants are written on the application [...]”.*

¹¹³ Official Gazette A’ 128/2006.

Ministry of National Education and Religious Affairs and not to the local ecclesiastic authority. Any other provision that regulates in a different way the same issue is cancelled [Art. 1 of Decree of 20 May 1939 (Official Gazette A' 220/1939)]". Due to this amendment of the legislation on the erection and function of places of worship, religious institutions can be granted relevant permits by directly applying to the Ministry of Education and Religious Affairs without being obliged to ask previously for a permit or opinion of the local ecclesiastic authority of the Orthodox Church of Greece¹¹⁴, which was a violation of equality of religions. Still the administrative procedure remains complicated, but can be followed by any Muslim community that would like to establish a place of worship in Greece.

As far as the concrete issue of the erection of a mosque in Athens is concerned, the public debate started in the context of the Athens 2004 Olympic Games. Proposals were expressed for the erection of a mosque that would be used, at first, by Muslims that would come to Greece for the Olympic Games and, secondly, after the end of the Olympic Games, by the Muslim immigrants living in the area.

The Greek government has long ago declared its will to erect a mosque in Athens but it has been criticized by Muslims and human rights activists for proceeding very slowly towards this aim. According to Law 3512/2006¹¹⁵ entitled "Islamic Mosque of Athens", as amended by Law 4014/2011¹¹⁶, the Greek government established a private entity supervised by the Minister of National Education and Religious Affairs named "Islamic Mosque of Athens Administrative Committee" aiming at administering and preserving the Islamic mosque to be erected in Athens. The law provides that the mosque will be erected in public land, the erection will be funded by the state and the state will grant the free use of the mosque to the "Islamic Mosque of Athens Administrative Committee" for the religious needs of the various Muslim communities living in the region of Attica,

¹¹⁴ Opinions of the Legal Council of State No 320/2004 (Full) and No 121/2008 (5th Dept.).

¹¹⁵ Official Gazette A' 265/2006.

¹¹⁶ Official Gazette A' 209/2011.

mainly immigrants from Asia (Middle East, India, Pakistan, Afghanistan, Bangladesh etc) and Africa.

The mosque has not yet been erected and the public debate continues. Some political parties are in favor of erecting a mosque while other political parties and non-Muslim religious organizations are against it. In order to temporarily cover the religious needs of Muslims living in Athens, the Municipality of Athens provides them with public places (stadiums, squares,... etc.) in order to pray during the most important Islamic feasts.

Recently the government, in a decision prescribed in Law 3512/2006, as amended by Law 4014/2011, which has been criticized as positive discrimination in favor of Islam, designated the public area, namely a facility of the Hellenic Navy, where the mosque will be built. Citizens continue to rally against the construction of the mosque and the case was brought in front of the Supreme Administrative Court due to a joint application of a bishop, a university professor, two officers of the Hellenic Navy and a cultural association. The Supreme Administrative Court overruled the application for suspending the implementation of the governmental decisions but the case is still pending, since the court must issue a final judgment on the main application for cancelling the governmental decisions¹¹⁷. Meanwhile, the procedure towards the construction of the mosque advances and in November 2013, a consortium of construction companies was selected by public tender to construct the mosque, which is scheduled to be completed by April 2014.

2. SWITZERLAND: THE MINARETS CONTROVERSY

The issue of banning minarets in Switzerland received publicity worldwide in 2009. Before that, no vivid public conversation took place on the existence of certain mosques in Switzerland. Two Swiss mosques predate 1980, the Ahmadiyya mosque in Zurich, built in 1963 and also boasting the first minaret built in Switzerland, and a

¹¹⁷ The application filed at the Supreme Administrative Court by the Bishop of Piraeus and Others against the Greek state for cancelling the Joint Ministerial Decision of 7 November 2011 issued by the Minister of Infrastructure, Transport & Networks and the Minister of Education & Religious Affairs is published at: <http://www.impantokratoros.gr/83FB760C.el.aspx>

Saudi-financed mosque in Geneva, built in 1978. More mosques and prayer rooms were built recently due to the rapid increase of the Muslim population in Switzerland, mainly consisted of immigrants from the Balkans and Turkey, a fact that created the need for more Muslim places of worship. Four Swiss mosques have minarets, including the Zurich and Geneva mosques already mentioned. The remaining two are a mosque in Winterthur and a mosque in Wangen bei Olten, belonging to the local Turkish cultural association, which was constructed in 2009 after several years of political and legal disputes. The minaret in this mosque is a plastic construction placed on the roof of the Turkish cultural association. Similar disputes arose in Bern in 2007, when the City Council rejected plans to build one of the largest Islamic cultural centers in Europe.

Due to the controversy that took place for the minaret in Wangen bei Olten, in 2009 a popular vote was held after a popular initiative of the Swiss People's Party, which passed with 53,4% of voters (only four cantons voted against), introducing a prohibition on the construction of new minarets but not affecting the existing minarets¹¹⁸. According to the result of the popular vote on 29 November 2009, the Swiss Constitution was amended by the addition of a 3rd paragraph to art. 72 reading that *"The construction of minarets is prohibited"*.

Muslims claiming that they were victims of the amendment of the Constitution addressed the issue to the domestic courts of Switzerland. In 21 January 2010 the Swiss Federal Court issued a decision on the issue, concerning the compatibility of Art. 72(3) of the SC with the ECHR. It maintained that the Swiss courts would be able to review the compatibility with the ECHR of any future refusal to allow the construction of a minaret.

The case was finally brought in front of the ECtHR against Switzerland by several applicants, namely three associations and a foundation whose activities have the Muslim religion in common (*The League of Muslims of Switzerland and Others v.*

¹¹⁸ Information retrieved from: http://en.wikipedia.org/wiki/Minaret_controversy_in_Switzerland

Switzerland case) and a private individual belonging to the Muslim faith who worked for a foundation active in matters concerning Islamic issues and in the relation between Islam and non-Islamic states (*Quadiri v. Switzerland* case), all of them claiming that the prohibition of the erection of mosques violates their freedom to manifest their religion, recognized in Art 9(1) of the ECHR, and is discriminatory against Muslims, a practice denounced by Art. 14 of the ECHR providing that “*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination of any kind on any ground such as [...] religion [...]*”. Both applications were overruled by the ECtHR as inadmissible for formal reasons (incompatible *ratione personae*), namely because neither of the applicants managed to prove that they were a victim of the constitutional provision.

The campaign and the result of the popular vote faced criticism from some governments and scholars, mainly implying that the Swiss electorate was increasingly shifting towards the far-right. Commentators, especially in German media, argued that the prohibition of minarets constitutes a breach of religious freedom.

What is remarkable in the case of the minaret ban is that the restriction referred not to the whole mosque as a place of worship but only to a part of it, the minaret, which is usually a separate building next or attached to the mosque playing a specific role. According to the “core/peripherals beliefs and practices distinction” analyzed by Ahdar Rex & Leigh Ian¹¹⁹, in order to test the necessity and proportionality of the certain restriction that may be justified for the protection of the rights and freedoms of others or any other legitimate aim prescribed by international or domestic law, one should first research on the role that minarets play in Islam. Is the use of minarets “central”, “intimately linked”, part of the “core” of the manifestation of Islam, or is it a “peripheral”, “non-essential” element of this religion? Can the need and freedom of Muslims to manifest Islam be covered by mosques without minarets? Defenders of minarets hold that minarets are a

¹¹⁹ Ahdar Rex & Leigh Ian, *ibid.* p. 168.

distinctive architecture feature of mosques and essential for religious purposes. Opponents of minarets hold that minarets are a symbol of political supremacy and power of Islam that is why Muslims built minarets in any place they conquered. The question can be answered if one investigates the history and use of minarets. Minarets are slim towers rising from mosques, from which the *adhan* (call for prayer) may be called. Early mosques did not have minarets and the *adhan* was called from any high point near the mosque, so it can be implied that minarets are non-essential elements of Islam. Moreover, nowadays that microphones and speakers are used for the call for prayer, there is no real need for minarets. Concluding, reality has shown that the ban of minarets in Switzerland did not eventually cancel the ability of Muslims to manifest their religious freedom in mosques without minarets.

CONCLUSIONS

Greece and Switzerland are considered as liberal, secular, pluralistic, democratic states, applying the principles of equality and neutrality in the same way for all religions. This obligation derives from their domestic law and the international human rights instruments signed and ratified by them, which recognize freedom of religion as a fundamental human right. Freedom of religion includes the freedom to manifest one's religion through worship, observance, practice and teaching, which in turn includes the freedom to erect and function places of worship.

Islam is without doubt a religion operating legally in Greece and Switzerland, though enjoying a different legal status. Despite the different way that Islam is recognized in Greece and Switzerland, and the fact that it is not the prevailing or official or traditional religion in either state, it has been granted legal personality. For this reason Muslim communities and individuals are entitled to the full spectrum of religious freedom, hence they have the right to erect and function mosques.

The freedom to erect and function mosques is not absolute. It can be limited under certain conditions. In order to be considered as justified and legitimate, any limitation should be prescribed by law, if necessary to protect public safety, order,

health, or morals or the fundamental rights and freedoms of others and must be proportional.

States should not discriminate against Islam among other religions when they apply restrictions affecting it. Limitations imposed to Muslims cannot be different from limitations imposed to adherents of other religions, because a different practice by the state towards them would be discriminatory and, thus, prohibited.

Moreover, limitations cannot be imposed preemptively. There must be an existing threat to the public safety, order, health, or morals or the fundamental rights and freedoms of others or to international peace and security. An imminent or hypothetical threat cannot be a legal basis for a judicial or administrative decision prohibiting the erection or function of a mosque. Restrictive judicial and administrative measures should apply to real situations. The test of proportionality of the restrictive measures to the aim pursued and to the harm caused to certain individuals or religious groups cannot be applied in hypothetical situations.

A general banning of mosques could not be easily justified and based in law. Limitations such as the prohibition of function of a mosque, if lawful reasons exist, should be applied only *in concreto* and never generally. For example, if a practice threatening the public order is followed in a mosque (e.g. religious indoctrination inciting to war), this could be the legal basis for sealing the specific mosque but not for sealing all the mosques in a region or in a country, since not all mosques operate in the same ways and there are serious differences among Islamic sects. For example, according to Nielsen S. Jørgen¹²⁰, the European Salafi groups abjure violence contrary to other Muslim groups that occasionally slip over the line into violent activism.

Moreover, lawful limitations should not be used as an excuse for cancelling the freedom to erect and function mosques. For example, the application of town

¹²⁰ Nielsen S. Jørgen, *ibid.* p. 282.

planning and environmental legislation can be the legal basis for prohibiting the erection of a mosque in a certain neighbor of a city but cannot be the legal basis for prohibiting the erection of a mosque in an administrative region or in the whole territory of a country.

In many cases restraints upon freedom of religion emanate not from governmental action or will but from pressure within society. This is the case in Switzerland and Greece. Many individuals and organizations in Greece object to the erection of mosques for historical and emotional reasons, because Islam is connected with the Ottoman occupation of Greece. In other European countries reactions occur by citizens and organizations that see Islam “conquering” Europe not violently, through holy war, but peacefully, through immigration. Arguments of this kind may be based on politics, tradition and history but are not supported by the current law and so they cannot form a legal basis for banning mosques.

The Greek government decided and proceeds to the erection of a mosque in Athens, despite the reaction of individuals and organizations. One could say that the Greek government acts contrary to the public opinion, but when the safeguarding of human rights is concerned public opinion is not a good advisor for the government or a legitimate base for restricting freedoms of minorities. On the other hand, the Swiss government was obliged by the Swiss people through the popular vote of 2009, an institution of direct democracy, to ban minarets. The popular vote was a legitimate way, according to Swiss law, to express the will of the majority which, in that case, led to the restriction of a freedom of the Muslim minority, despite the reactions of the international community. Both these examples prove the difficulty of governments to balance conflicting interests in an effort to safeguard the peaceful coexistence of religions and the secularism of state, especially when fundamental freedoms of minorities are in danger.

Comparing the two paradigms, of Greece and Switzerland, one can recognize the different manners that the issue was settled in each country. On the one hand, the issue was settled in Greece through a governmental initiative. The government,

up to now, imposed its will to the unwilling to accept the erection of a mosque Greek Church and people, following a top-down approach of the issue. The judicial authorities are now the only state organ that can cancel the governmental decisions on the erection of a mosque in Athens. On the other hand, Swiss citizens used the authority provided to them by the Swiss Constitution to conduct a popular vote and in this way they managed to force the Swiss Federal Government to ban the erection of minarets through an amendment to the Constitution. The Swiss courts accepted this bottom-up approach by not declaring the amendment of the Swiss Constitution as a violation of religious freedom. The ECtHR rejected the relevant applications submitted by Swiss Muslim institutions and individuals against Switzerland for formal reasons. Nevertheless, no one can foresee what the outcome will be, if a new application is filed with the ECtHR for the same issue but based on different facts.

Ironically, despite the different approach followed in each case the result is the same. Swiss citizens managed to ban minarets in a lawful way and new mosques will operate without minarets. The Greek government also managed to program the erection of a mosque in Athens but, according to the architectural plans, the Islamic Mosque of Athens will have no minarets and will not be visible by people passing by the area. This can be conceived as a political decision aiming at avoiding more severe reactions and political cost.

The banning of minarets in Switzerland may not be a severe restriction cancelling the ability of Muslims to manifest their religion but it is a precedent that could lead to more limitations to every religion. In the future, similar limitations could be imposed by the majority, through popular vote, to any other religion or dogma. What will be the case if Muslims become the majority in Switzerland in the future? A new popular vote could allow minarets and ban places of worship of every other religion. The ban of minarets could endanger freedom of religion in the long run. The Swiss case shows that, despite their international and domestic legal recognition, fundamental human rights may be under attack by states or by groups that take advantage of their power, even when it derives from democratic institutions, at any time. Human rights are shifting both in theory and in practice.

But, while legal theory prohibits the lowering of the level of protection, none can guarantee that in reality human rights will shift towards a higher rather than a lower level of protection of human beings.

The Greek legislation on the Islamic Mosque of Athens can also prove problematic. Though EU law allows for positive discriminations in favor of minorities and the Greek government may claim that it follows international legal standards, in fact the decisions of the Greek government are discriminatory towards the rest of the known religions operating in Greece. Up to 2006, except from the Greek Orthodox Church, no other religious institution was granted special privileges, such as the free and exclusive use of a certain part of public land. The planned construction of a mosque by the Greek state and the grant of its use for free to the Muslim communities of Athens can be considered not as a mere aid to Muslims for the exercise of their right to manifest their religion, but as a privilege granted exclusively to a certain religion, since no other “known” religion has been treated in the same manner by the Greek state. In this light, Islam is more privileged than the rest of the “known” religions operating in Greece.

The practice followed by the Greek government may be characterized as a breach of the neutral secular character of the state in favor of Islam. As a result, any other religious community can demand similar privileged treatment by the Greek state, such as to be granted the free use of places of worship erected in public land with state funding, which is the case of the Islamic Mosque of Athens. If the state denies, then the denial would be a direct discrimination based on religion.

Problems might also occur in the treatment of different Muslim communities by the Greek state. The Islamic Mosque of Athens will be used by more than one Muslim communities that may have doctrinal differences (e.g. Sunni and Shia Muslims) or a different interpretation and manifest of their religious beliefs (e.g. Neo-Wahhabi and Neo-Salafi Muslim). In case that a Muslim community uses the Islamic Mosque of Athens in a way that can justify judicial or administrative

restriction of the freedom of religion, these restrictions (e.g. the suspension of the function of the mosque) would affect the rest communities that use the mosque.

Concluding, it is clear that a total ban of mosques, that would mean the total ban of Islam, is not permitted according to the current law. The freedom to manifest one's religion or belief can be limited under certain conditions but not cancelled by the judicial and administrative authorities in Greece and Switzerland, since both states claim to be ethno-culturally and religiously neutral and foster pluralism, despite the fact that in some cases their action violates these principles.

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ABBREVIATIONS

CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GC	Greek Constitution
ICCPR	International Covenant on Civil and Political Rights
SC	Swiss Constitution
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNFICYP	United Nations Force In Cyprus
“TRNC”	“Turkish Republic of Northern Cyprus”