

Migration and Religious Freedom

*Essays on the interaction
between religious duty
and migration law*

Carolus Grütters &
Dario Džananović (eds.)



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edited by
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Centre for Migration Law
Jean Monnet Centre of Excellence

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Preface

About the authors

Graziano Battistella

is the director of the Scalabrini Migration Center in the Philippines. He was previously with the Center for Migration Studies in New York and dean of studies at the Scalabrini International Migration Institute in Rome. He has a background in political science and ethics. In 1992, he founded the quarterly Asian and Pacific Migration Journal (APMJ). He has published extensively on Asian migration, the human rights of migrants and migration policies.

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Dario Džananović

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conflict in the context of migration. That is, how are these conflicts between state law and religious obligation resolved?

Carolus Grütters

is senior researcher at the Centre for Migration Law of the Faculty of Law of Radboud University in the Netherlands. After his graduation (Law at Leiden University) he did research at Radboud University on simulation models in the area of asylum law. He holds a doctoral degree awarded by Radboud University in the area of Law as well as Management Sciences. His research focuses on asylum law, distribution of asylum flows, regularisations and policy guidelines on migration. He is editor-in-chief of the Newsletter on European Migration Issues (NEMIS) and the Newsletter on European Asylum Issues (NEAIS).

Elsbeth Guild

is Jean Monnet Professor *ad personam* at Radboud University in Nijmegen, the Netherlands, as well as at Queen Mary, University of London (UK). She is also partner at the London law firm, Kingsley Napley. She has published widely in the field of European free movement of persons, asylum and immigration. Professor Guild provides regular advice to the European Parliament, the European Commission, the Council of Europe and other European and international organizations (such as the UNHCR) on free movement of persons, migration and asylum. Professor Guild is also co-editor of the European Journal of Migration and of the book series Immigration and Asylum Law and Policy in Europe (published by Brill | Martinus Nijhoff).

Rev. Craig B. Mousin

has been the University Ombudsperson at DePaul University (Chicago, USA) since 2001. He received his B.S. *cum laude* from Johns Hopkins University, his J.D. with honors from the University of Illinois, and his M. Div. from Chicago Theological Seminary. He joined DePaul's College of Law faculty in 1990, and served as the Executive Director of the Center for Church/State Studies until 2003, and co-director from 2004-2007. In 1984, he founded and directed the Midwest Immigrant Rights Center, which has since become the National Immigrant Justice Center. Rev. Mousin was ordained by the United Church of Christ in 1989 at Wellington Avenue U.C.C.

Dolores Morondo Taramundi

is currently Head of Research at the Human Rights Institute of the University of Deusto (Bilbao, Spain). She has taught Human Rights and Legal Philosophy for several years at the University of Urbino (Italy) and acted as an independent expert for human rights projects of the European Commission. Her main topics

of research and publication include human rights, antidiscrimination law, intersectionality and vulnerable groups. She is currently working on issues of human rights research methods and on complex forms of inequality.

Jim Murdoch

joined the School of Law of the University of Glasgow after qualifying as a solicitor. He read law as an undergraduate at Glasgow and has an LLM from the University of California at Berkeley. He was Head of the School of Law between 1996 and 2000. He has taught at the universities of Mainz, Freiburg, Hamburg and Paris Ouest, and was a *professeur stagiaire* with the Directorate of Human Rights of the Council of Europe in France. He is a regular participant in Council of Europe seminar programme visits to Central and East European states and has developed a particular interest in non-judicial human rights enforcement mechanisms. In March 2012, he was awarded the *Pro Merito* medal of the Council of Europe. The medal is the highest distinction granted by the Secretary General to individuals (or organisations) in recognition of their commitment to the Council of Europe's values and work.

Federica Sona

is an affiliated researcher at the Laboratory of Fundamental Rights (Turin, Italy) and at the Max Plank Institute for Social Anthropology. She holds a PhD in Law (London); PhD in Law and Society (Milan, Italy); MA ICLS (London, UK); PSC ICM (London, UK); Laurea in Law (Turin, Italy). Her main expertise regards Western Islām and horizontal/vertical kinship relationships. She is currently completing a manuscript on Muslim prospective parents reoccurring to fertility treatments in Italy. She is also working on the (non-)recognition of Islamic/Muslim marriages and divorces in Common Law and Civil Law jurisdictions.

Roberto Scarciglia

is Full Professor of Comparative Law, University of Trieste Italy, and Associate Member of International Academy of Comparative Law (IACL), Paris (France). He wrote many articles and some books on legal pluralism, comparative methodology, comparative law and history and global law. His most recent books are: *Islamic Symbols in European Courts*, edited with Werner Menski (Kluwer, 2014); *Metodi e comparazione giuridica* (Cedam, 2016); and *Pluralism and Religious Diversity: A Methodological Approach*, edited with Werner Menski (Kluwer, 2017).

Amaya Valcarcel

is a Spanish refugee lawyer who has worked as a Protection Officer with the UNHCR in Spain and in Kakuma refugee camp, Northern Kenya, between 1995 and 1997. In 1998, she joined the Jesuit Refugee Service (JRS) as Policy Coordinator. While working at JRS, she lectured on Refugee Law and between 2002 and 2003, she was the Coordinator of the Master's Degree on Humanitarian Aid and Development Cooperation at the Pontifical University of Comillas, Spain. She worked between 2003 and 2005 at the Arrupe Center for People with a Disability in Cambodia. Between 2006 and 2008 she was the Secretary General of the Spanish Commission for Refugees. In 2009, she again joined the Jesuit Refugee Service, where she works at present as International Advocacy Officer.

Derk Venema

is a philosopher and legal scholar (Leiden University). He wrote a PhD dissertation on the Dutch judiciary during the Nazi occupation (Radboud University Nijmegen 2007). Currently, he is assistant professor in law at Radboud University and professional ethics instructor for the Dutch judiciary training centre. He publishes on law's relations to war, ethics, language, literature, evolution, political transition and fundamental rights.

Lisbeth Zornig Andersen

is founder of the *House of Zornig*, aiming at improving the state of society's most socially vulnerable citizens. She is president of the think tank Social Innovations Forum, former Children's *Ombudmand* in Denmark, former CEO of Specialists employing people with Asperger's syndrome as IT testers and founder of the Children's IT foundation that provides computers for all Danish children in care. She graduated from the University of Copenhagen with a Masters of Economics, specializing in game theory. In 2011, she published her childhood biography *Zornig - Anger is my middle name*, which became a best-seller. In 2014, she won the radio award of the year for her portrait programs in *Zornigs Zone* on Radio 24syv. In 2015, she won the TV award of the year for the series *The burned children* on Danish TV2. Also in 2015, she published the debate book *Social commando soldiers* about children who not just survived a difficult childhood, but made it to the top.

Chapter 1 Introduction

Carolus Grütters & Elspeth Guild

1.1 Background

In Pope Francis' first address to the European Parliament in Strasbourg in November 2014, he deplored the EU's treatment of migrants. "We cannot allow the Mediterranean to become a vast graveyard", Pope Francis said, in reference to the thousands of migrants who drown as they seek to reach Southern Europe from North Africa and the Middle East.

The first trip which Pope Francis took (July 2013) was to the island of Lampedusa, the landing place of many migrants and refugees arriving in Europe after dangerous sea trips from North Africa. He met with refugees and migrants there and sought first hand experiences of people who have suffered these difficult trips and the ambivalent reception on arrival. The Pope also praised (Lutheran) Sweden in particular for its open-door policy for refugees and its acceptance of the largest number of Syrian refugees over the period of the civil war there juxtaposing the treatment of refugees in that mainly protestant country against the less generous reception of refugees of a number of primarily Catholic countries in Europe. "Sweden opens its borders, organizes language classes, gives economic assistance, and offers paths to join society", Pope Francis said.¹

This challenge by the head of the Catholic Church to the legitimacy of the EU's border and immigration management project represents a substantial policy move at the top of the Catholic Church regarding the normative obligation of European policy makers, border guards and people to accept and respect the human dignity of non-citizens (asylum seekers, refugees, migrant workers and other migrants) both in law and practice. It is incumbent on scholars to examine this issue from the perspective of the role of churches in assisting migrants and refugees and framing the ethical imperatives of our times.

All kinds of churches, i.e. religious bodies, have played a very important role in the assistance and social insertion of migrants in Europe over the past decades. During the years of labour migration from Southern Europe to Northern Europe, churches were a central institution in providing a mechanism for migrants and refugees to find ways to understand their new environments and realise their human potential in their new homes. These churches have been central in promoting good interfaith relations, social insertion of newcomers and equality.

¹ Report of Vatican Radio 15 February 2014.

A number of orders and denominations within the churches have been particularly active in Europe over the past 20 years in the field of migration. The Jesuit Refugee Service is perhaps the best-known example with its Charter which stresses that it accompanies refugees and forced migrants serving them as companions and advocating their cause. However, it is not the only religious body, which is engaged with the support of migrants and refugees. Such actions not only often come into tension with state policies and national, regional or federal laws but also supra-national legislation and programmes designed to manage migration by keeping some people out and allowing only some other citizens in. This challenge takes the form of a normative position that all people are deserving of dignity and that divisions on the basis of citizenship are suspect. The legitimacy of national and supranational or federal migration and border policies is questioned through many of these activities – and not just in Europe or the United States of America.

1.2 Problem of priority

There are three main ways in which churches act which privilege people over immigration and border laws.

The first is in respect of arrival. In the context of the irregular arrivals of people on small boats in the Mediterranean, many of the press releases and accounts of the saving of life include details that when the boats got into difficulties, someone on board had a mobile phone and the number of a priest in Italy to whom the distress call was sent and from there the priest alerted the authorities to the need for a search and rescue operation. In the process of embarking on a dangerous trip in inadequate conditions, the migrants and refugees leave the North African coast with knowledge that there is someone, a priest, who will dare to raise the alarm when and if they run into trouble. The challenge to EU law here is both direct in bringing international humanitarian law into a picture which EU border guards prefer to configure as a border control matter and indirect in that by assisting the irregular entry of non-EU citizens, the priest puts himself potentially in the category of persons who may be facilitating ‘illegal’ entry (as the EU documents describe such action) and thus potentially committing a criminal act.²

The second way concerns reception. In Europe, churches take an important role in providing reception facilities and shelter for destitute non-EU citizens arriving in the country. In some cases, this reception provision is supported by the state with funding being channelled through religious institutions to assist people. In this capacity of providing reception to migrants, churches or municipalities often find themselves in a position of some friction with certain parts of immigration authorities which have a policy of trying to starve foreigners into

2 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence.

leaving the state – a rather unsavoury formulation of policy but one in currency today. Some churches have taken a central role in challenging the deprivation of new arrivals of reception facilities, food, housing and medical treatment. Not only through direct provisions albeit in contrast to state policies but also through supporting legal challenges such as the very important case from the European Committee on Social Rights interpreting the European Social Charter as prohibiting the destitution of people on the basis of their immigration status or manner of arrival in the state.³

The third way in which churches provide support to irregularly present migrants (and often asylum seekers whose applications have been refused) engages an even more immediate challenge to state authority: the use of church asylum to protect persons at risk of expulsion from state authorities. In many instances, a Church becomes the sole or last intervener on behalf of irregularly present migrants who are facing coercive action by state authorities.⁴ In the USA, a comparable approach is known as ‘sanctuary city’ in which a city limits its cooperation with the federal government to enforce immigration law.

The normative framework of migration and border control has been much influenced by the application of human rights law. Some commentators have even gone so far as to see human rights as a ‘new belief system’. However, while access to lawyers willing to argue human rights cases became the norm in many states in the 1980s, 1990s and early 2000s, the diminution in funding of legal aid has resulted in the exclusion of many migrants from legal advice (let alone legal advice and assistance of a high quality). The role of human rights as a mechanism to reframe the normative issues of non-citizens lives has become more limited in the 2010s. This may have created new dynamics for churches in respect of the humanity of migrants. The question, then, becomes which framework – state or faith – has priority and why.

1.3 This book

On 9 and 10 February 2017, experts from various backgrounds joined in a seminar *Migration and Religion* organized by the Centre for Migration Law, Jean Monnet Centre of Excellence at Radboud University, Nijmegen the Netherlands. During this seminar, the focus was on the intersection of migration, law and religion. We hoped to identify which arguments play a role in the discussions where state law and religious norms conflict in the context of

3 European Committee of Social Rights, 1 July 2014, Complaint 90/2013, *Conference of European Churches v. the Netherlands*.

4 For example, the work of the Jesuit Refugee Service together with a change in the judicial authority reviewing immigration detention in Germany has resulted in the sharp reduction of non-citizens kept in detention with a view to removal from the country and a possible closure of several detention facilities for foreigners.

migration. In this book, we have included the most important contributions to this seminar thematically organised around four topics:

- (1) Religious Social Thought,
- (2) Application of religious freedom
- (3) Comparative analysis of religious freedom laws,
and
- (4) Practitioners' views.

The first theme, *Religious Social Thought*, is examined first by Graziano Battistella. In chapter 2, he outlines the historical foundations of Catholic Social Thought on the issue of migration and the repeated attention to date. He also underlines that Churches recognize the tension between *love for migrants* and *love thy neighbour*. Subsequently, Jorge Castillo Guerra provides a closer look (chapter 3) at the current views of the Vatican held by Pope Francis, who offers the view that the Church is without borders or boundaries. Migration is not a 'mere ethical issue' but rather a 'faith issue'. The third contribution on this theme (chapter 4) is by Myron Cherry who presents the views of Talmudic law on migration and concludes that 'Talmudic law regards immigration policy as circumstantial and transactional'. Thus, illustrating a balance between the rights and duties of a stranger, i.e. the migrant, and society. Although these three narratives seem to represent equivalent ideas, there are differences as to what is given priority.

The second theme, *Application of religious freedom to migration laws*, is developed by Rev. Craig Mousin (chapter 5), who demonstrates that courts (in the United States of America) still fail to address international law under the International Religious Freedom Act. He concludes that the government shows a lack of sensitivity to national laws, cultures and practice that silence religious belief and practice. Subsequently, Federica Sona (chapter 6) elaborates the Italian case. She focuses on the right of Muslim migrants to contract a valid marriage in Italy with civil and religious effects. Along with national legislation and religious rules, the EU directive on family reunification is dealt with. Dolores Morondo Taramundi (chapter 7) goes one step further and investigates how to break the law. More in particular, she discusses cases of infringement of legislation stemming from the Facilitation Directive.

The third theme, religious freedom laws, is first dealt with by Jim Murdoch (chapter 8). He shows that jurisprudence of the ECtHR on Article 9 ECHR acknowledges the principle that diversity matters and that there may well be a need for limits to the freedom of, among others, religious belief. However, he proceeds in arguing that Article 9 is not necessary to protect freedom of thought, conscience and belief in light of case law developments on Article 14 ECHR. He suggests that discounting any element of the exercise of religious belief in favour of the application of the principle that cases are better determined by the

simple question of which side better advances pluralism, tolerance and broad-mindedness. The second contribution in this part (chapter 9) comes from Roberto Scarciglia who discusses the legal problems related to the exercise of freedom of religion and immigration at the level of comparative administrative law. Specifically, he focuses on freedom of religion in places of immigration detention.

The fourth part of the book contains some practical experiences of offering help. Almaya Valcarcel (chapter 10) describes the hospitality offered by the Jesuit Refugee Service. The JRS has developed a *Welcome Network*, a programme for individuals and families to welcome refugees into their homes. The practical problems one runs into by 'just' offering help is exposed (chapter 11) by Lisbeth Zornig Andersen. She tells the story of how helping others brought her in (legal) problems in Denmark. Quite depressing is her conclusion that after a Danish District Court punished her for helping refugees, no higher Court came to her aid. The Danish Court of Appeal upheld the verdict of the district Court. Subsequently the Danish Supreme Court declared her case inadmissible: too little importance. Even the European Court of Human Rights did not want to touch it: inadmissible. Lastly, Derk Venema (chapter 12) illustrates the problematic character of freedom of religion describing the Church of the Flying Spaghetti Monster. Interestingly, the principle characteristic of a religion does not seem to be sincerity but seriousness.

In the concluding remarks in the postface of this book (chapter 13), Elspeth Guild expresses the competing viewpoints that have emerged from several papers regarding the propriety of assisting migrants. She does so by reference to two biblical passages: Romans 13, which commands submission to governing (worldly) authority, and Matthew 25, which commands people to help strangers or migrants.

We hope this book will clear up the arguments used in the discussions on the important issue on migration and religion.

Migration and Religious Freedom

Essays on the interaction between religious duty and migration law

Carolus Grütters & Dario Džananovic (eds.)

On 9 and 10 February 2017, experts from various backgrounds joined in a seminar organized by the Centre for Migration Law, Jean Monnet Centre of Excellence at Radboud University, Nijmegen in the Netherlands. The seminar focused on issues culminating at the intersection of migration, law and religion.

We aimed to identify the arguments that drive the discussion in situations presenting a conflict of state law and religious norms in the context of migration. Or, in biblical terms, is there an inherent conflict between *Romans 13* (submission to governing authorities) and *Matthew 25* (love the stranger), and if so, how is this conflict addressed?

In this book, we have included the key contributions to the seminar, thematically organized around four topics: (1) Religious Social Thought; (2) Application of religious freedom; (3) Comparative analysis of religious freedom laws; and (4) Practitioners' views.

We hope this book will crystallize the arguments and drive further discussion on the important issues resulting from the interplay of migration, law and religion.



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