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The Legal Treatment of Religious Dissent in Western Europe: A Comparative View

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This article examines the legal treatment of religious dissent from a comparative perspective, by focusing on the legal evolution from intolerance to toleration, and from toleration to emancipation in France, Italy, Norway and the United Kingdom. Historically, in Europe, only people professing the official religion were regarded as full members of the political community. Those who professed another religion were expelled, persecuted, discriminated or – in the best cases – merely tolerated. Over the course of the nineteenth and twentieth centuries, in different degrees and forms according to the country concerned, European states started separating citizenship from religious belonging – a fundamental step in the process of secularisation of law in Europe. This development led to the emancipation of religious dissenters through the recognition of both the principle of equality of all citizens before the law, regardless of one's religion or belief, and the individual right to freedom of religion and belief.

Keywords: religious dissent, tolerance, right to religion and belief, comparative law, Europe

HISTORICAL INTRODUCTION: INTOLERANCE, TOLERATION AND EMANCIPATION

Historically, in Europe, only people professing the official religion of the state were regarded as full members of the political community. Those who professed another religion were expelled, persecuted, discriminated or – in the best cases – tolerated. As noted by Rainer Forst,

> The term 'toleration' – from the Latin *tolerare*: to put up with, countenance or suffer – generally refers to the conditional acceptance of or non-interference with beliefs, actions or practices that one considers to be wrong but still

1 This article is the revised version of a paper presented at the Annual Meeting of the American Society of Comparative Law, Boston University School of Law, 15–16 October 2020. Rossella Bottoni wrote the historical introduction and the sections on France, Italy and Norway. Her research has been carried out in the context of the PRIN Project (2017) 'From legal pluralism to the intercultural state: personal law, exceptions to general rules and imperative limits in the European legal space' (2017). Cristiana Cianitto wrote the section on the UK and the concluding remarks.

> 'tolerable', such that they should not be prohibited or constrained. There are many contexts in which we speak of a person or an institution as being tolerant: parents tolerate certain behavior of their children, a friend tolerates the weaknesses of another, a monarch tolerates dissent, a church tolerates homosexuality, a state tolerates a minority religion, a society tolerates deviant behavior.[2]

In this sense, tolerance is usually regarded as a virtue. However, the expression 'religious toleration' has historically had a negative connotation – both for those who promoted the more advanced notion of religious freedom and for those who would have preferred not to tolerate but had to do so for political reasons. As Lynn Hunt has put it,

> Tolerance was the other side of the coin of intolerance; when intolerance of religious heresy could not be enforced, tolerance was reluctantly authorized by state authorities. Tolerance was therefore originally based on the inability to enforce religious conformity rather than on the acceptance of religious difference.[3]

In the early modern era, Europe was ravaged by wars of religion. The peace of Augsburg of 1555 allowed German princes to choose either Catholicism or Protestantism as the religion of their domain and required the emigration of the dissenting residents, that is, those who did not profess that religion and did not want to convert. According to the principle *cuius regio, eius religio* ('whose realm, his religion'), the sovereign could choose his religion and his subjects had to adopt the same religion. This principle was related to the ideal of religious unity, which all European states sought to achieve. Protestants were expelled from Catholic states; Catholics were expelled from Protestant states; Jews were expelled by the Catholic monarchs Ferdinand of Aragon and Isabella of Castile.

However, the ideal of religious unity was never fully achieved. Even before the Reformation, a number of European states tolerated Jewish communities. Generally speaking, religious toleration was characterised by an evolution from a de facto situation to a legal institution. Toleration found a legal basis when dissenting communities were granted a contract, of limited duration, prescribing a number of duties and concessions. It goes without saying that those contracts were not signed for humanitarian reasons. Their German name is especially revealing of their real nature: *Schutzgeld* literally means protection

2 R Forst, 'Toleration' in E N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2017), <https://plato.stanford.edu/entries/toleration>, accessed 22 July 2021.

3 L Hunt, *The Enlightenment and the Origins of Religious Toleration* (Amsterdam, 2011), p 7.

(*Schutz*) in exchange for money (*Geld*). In some cases, dissenting communities were invited to settle in a given territory because of their abilities and skills. This was particularly the case for Jews. The Medici family, who ruled over first Florence and then Tuscany, invited Jews expelled from Spain and Portugal to settle in Livorno, in order to develop its harbour and to make it the centre of thriving commercial routes. In return, the Pope allowed the establishment of a Jewish community in Ancona, whose harbour would not have been able otherwise to sustain the competition with Livorno.[4]

In any case, religious toleration was a concession, not a right. This difference was stressed by Mirabeau in 1789: 'The most unlimited liberty of religion is in my eyes a right so sacred that to express it by the word "toleration" seems to me itself a sort of tyranny, since the authority which tolerates might also not tolerate.'[5] He might have had the historical treatment of Huguenots in mind. Henry IV's Edict of Nantes of 1598 (formally an act of 'pacification' to put an end to the French civil war, and not of 'toleration') aimed to ensure the peaceful co-existence of Catholics and Huguenots, but it was revoked by Louis XIV in 1685.

Even when they were tolerated, dissenters were not granted the same rights as those professing the majority religion. Dissenters had a limited legal capability and were subject to a number of prohibitions and limitations. For example, Jews were prohibited from taking public office or attending public schools; from exercising liberal professions; from marrying, inheriting from and testifying against members of the majority religion; and from owning immovable property. They could not manifest their religion in public and their synagogues could not have the outward appearance of places of worship. They could reside only in certain cities and, after the establishment of the first ghetto in Venice in 1516, only in a specific neighbourhood, which could be left only during the day. They experienced inferior penal protection and their crimes were punished in a more severe way. For example, the Kingdom of Sardinia prohibited the killing of a Jew but it did not prescribe any punishment; on the other hand, the punishment for blasphemy committed by a Jew was the death penalty.[6] The conception of religious minorities as dissenting communities can still be traced in old legal texts such as the Danish Constitution of 1849. Under Article 69, still in force, 'Rules for religious bodies dissenting from the Established Church (*Folkekirke*) shall be laid down by statute.'[7]

Religious toleration was relegated to the realm of history in the age of emancipation. In 1827, Lord Stanhope said: 'The time was when toleration was craved

4 F Ruffini, *Relazioni tra stato e chiesa. Lineamenti storici e sistematici* (Bologna, 1974), pp 49–50.
5 Quoted by J B Bury, *A History of Freedom of Thought* (New York, 1913), pp 111–112.
6 Ruffini, *Relazioni tra stato e chiesa*, pp 60–63.
7 Official English translation at <https://www.thedanishparliament.dk/en/democracy/the-constitutional-act-of-denmark>, accessed 22 July 2021.

by dissenters as a boon; it is now demanded as a right; but a time will come when it will be spurned as an insult.'[8] In fact, over the course of the nineteenth century, in different degrees and forms according to the country concerned, European states started separating citizenship from religion. This separation has been a fundamental step in the process of secularisation of law in Europe.[9] The emancipation of dissenters was accomplished through the recognition of both the principle of equality of all citizens before the law, regardless of one's religion or belief, and the individual right to freedom of religion and belief.[10]

FRANCE: THE 1789 REVOLUTION

On 26 August 1789, the Constituent Assembly of France proclaimed the Declaration of the Rights of Man and of the Citizen, which, for the first time in France and in Europe, recognised the right to freedom of religion or belief. The above-mentioned Edict of Nantes only applied to Huguenots, whereas the Declaration applied to everybody, including the Jews. Under Article 10, no one could be disturbed on account of their opinions, even religious ones. Article 11 defined free communication of ideas and of opinions as 'one of the most precious rights of man'.[11] These rights not only covered religion but also beliefs, including atheism and agnosticism. In fact, there were many freethinkers in the political class of France and other European countries of the time, unlike the USA.

In revolutionary France, the recognition of the right to freedom of religion or belief was not accompanied immediately by the recognition of the principle of equality before the law, regardless of one's religion or belief. Political rights were granted to Protestants only a few months after the Declaration, on 24 December 1789;[12] to Portuguese, Spanish and Avignonese Jews on 28 January 1790; to everybody (including Ashkenazi Jews) on 27 September 1791.[13] The Constitution approved on 3 September 1791 enshrined the principle of all citizens' eligibility for public office as a natural and civil right.[14]

8 Quoted by C S Longacre, *The Church in Politics* (Hagerstown, MD, 1927), p 101.
9 See R Remond, *Religion et société en Europe. La sécularisation aux XIXe et XXe siècles* (Paris, 2001).
10 See R Bottoni, *Diritto e fattore religioso nello spazio europeo* (Turin, 2019).
11 Official English translation at <https://www.elysee.fr/en/french-presidency/the-declaration-of-the-rights-of-man-and-of-the-citizen>, accessed 22 July 2021.
12 A J Mayer, 'The perils of emancipation: Protestants and Jews', (1995) 90 *Archives de Sciences Sociales des Religions* 5–37 at 8.
13 J-M Chouraqui, 'Les communautés juives face au processus de l'Émancipation: des stratégies centrifuges (1789) au modèle centralisé (1808)', (2003) 14 *Rives méditerranéennes* 39–48, <https://doi.org/10.4000/rives.407>, accessed 15 September 2021.
14 Text in original language at <https://www.conseil-constitutionnel.fr/les-constitutions-dans-l-histoire-/constitution-de-1791>, accessed 22 July 2021.

ITALY: IN THE FOOTSTEPS OF FRANCE (WITH SOME DIFFERENCES)

The principles of the 1789 Revolution, the spread of which was eased by French military enterprises all over Europe, heavily influenced legal and political developments in the nineteenth-century Italian peninsula. Whereas France recognised first the right to freedom of religion or belief and then the principle of equality, in the Kingdom of Sardinia – which led the process of Italian unification – the opposite happened. This territory was characterised by the presence of two historical minorities: the Waldensians and the Jews. The principle of equality was recognised in 1848, the year of the revolutionary wave which affected the largest part of Europe. As in France, this principle was recognised progressively, first for Protestants and only later for Jews. A decree of 17 February 1848 emancipated the Waldensians:

> Taking into consideration the loyalty and good character of the Waldensian population … The Waldensians shall be entitled to enjoy all the civil and political rights of our subjects, to attend public schools as well as universities and to obtain academic grades.[15]

On 4 March the King of Sardinia granted the so-called Albertine Statute, which served as the Constitution of the Kingdom of Italy, proclaimed in 1861, until the establishment of the Italian Republic. Under Article 24, 'All the inhabitants of the Kingdom, whatever their rank or title, shall enjoy equality before the law. All shall equally enjoy civil and political rights and be eligible to civil and military office, except as otherwise provided by law.'[16] Nevertheless, this clause was interpreted as excluding Jews. Thus, two decrees were approved in order to (partially) emancipate them. By virtue of a decree of 29 March Jews were entitled to enjoy civil (but not political) rights and to obtain academic grades.[17] On 15 April they were admitted to the military service (but not to posts in the civil service).[18]

Finally, the law of 19 June (known as the 'Sineo law', after its proponent) was approved, with the express 'aim of removing all doubts about the legal and political

15 English translation in G P Romagnani, 'Italian Protestants', in R Liedtke, S Wendehorst (eds), *The Emancipation of Catholics, Jews and Protestants: minorities and the nation-state in nineteenth-century Europe* (Manchester, 1999), p 155.

16 English translation in S M Lindsay and L S Rowe (trans), 'Constitution of the Kingdom of Italy translated and supplied with an historical introduction and notes', (1894) 5 Suppl 9 *Supplement to the Annals of the American Academy of Political and Social Sciences* 1–44 at 30.

17 'The Kingdom's Jews shall be entitled to all civil rights and the freedom to obtain academic grades beginning from the date of this decree, nothing having changed concerning the exercise of their religion, and the schools directed by them.' Author's translation; original text at <http://www.dircost.unito.it/root_subalp/docs/1848/1848-688.pdf>, accessed 22 July 2021. See R Calimani, *Storia degli ebrei italiani*, vol 3 (Milan, 2015).

18 'The Kingdom's Jews shall be admitted to the military services according to binding laws and regulations'. Original text at <http://www.dircost.unito.it/root_subalp/docs/1848/1848-700.pdf>, accessed 22 July 2021.

capacity of citizens who do not profess the Catholic religion'. It stipulated that 'the difference of religion constitutes no exception to the enjoyment of civil and political rights and to the admission to civil and military posts'.[19] The Sineo law was in force until 1948, but a repugnant derogation was introduced by the racial laws of 1938–1945.[20] In 1948 the Republican Constitution entered into force. Article 3 of the Constitution has since guaranteed all citizens' formal and substantive equality.[21]

No clause of the Albertine Statute recognised the right to religious freedom. Article 1 reiterated instead that the existing religious denominations other than the Catholic, Apostolic and Roman religion were tolerated according to the law. The recognition of the Waldensians' and Jews' formal equality did not abrogate all existing prohibitions concerning religious life. The Waldensians were allowed to celebrate worship only in 15 temples and the Jews in 23 synagogues, which had been authorised. All public manifestations and in particular proselytism were prohibited.[22] Although these restrictions were later lifted by administrative practice, the right to freedom of religion (but not to belief[23]) was formally recognised for the first time by Article 19 of the Republican Constitution.

NORWAY: THE LAST COUNTRY IN WESTERN EUROPE TO EMANCIPATE RELIGIOUS DISSENTERS

Norway adopted a constitution as early as 1814. It is still in force, although it has been significantly amended over the course of time.[24] Regarding the regulation of religion, changes have concerned three main areas: the legal status of

19 Author's translation; original text at <http://www.dircost.unito.it/root_subalp/docs/1848/1848-735.pdf>, accessed 22 July 2021.

20 List (in Italian) at <https://www.governo.it/sites/governo.it/files/leggi_antiebraiche_38_43.pdf>, accessed 22 July 2021. Italian citizens of 'Jewish race' were prohibited inter alia from marry a person of 'another race', from performing military service, from fostering a child or giving care to incompetent persons not belonging to the 'Jewish race', from owning or managing a firm with over 100 employees, from employing a citizen of 'Aryan race' as a servant, from attending a public or private school attended by citizens of 'Aryan race', from teaching in public schools and universities and from working as a notary or a journalist. Further, Jews could not be employed by the civil and military administration of the state, the provinces, the municipalities and other public entities, by the Fascist Party or by insurance private companies.

21 '§1. All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. §2. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.' Official English translation at <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>, accessed 22 July 2021.

22 F Spano, 'La "rivoluzione discreta": a centosessant'anni dalle Lettere Patenti', (2008) 2 *Quaderni di diritto e politica ecclesiastica* 1–13 at 2.

23 On the legal treatment of atheists, agnostics, sceptics and the unconcerned, see R Bottoni and C Cianitto, 'Is non–religion a religion? The Italian legal experience', paper presented at the international conference 'Formatting non-religion in late modern society: institutional and legal perspectives', organised by EUREL and the University of Oslo, 26–27 September 2018.

24 All amendments can be traced in <https://grunnloven.lovdata.no> (only in original language), accessed 22 July 2021.

Evangelical Lutheranism and its relationship with the monarch; the principle of religious freedom; and the principle of equality.

The Evangelical Lutheran Church was established in 1537, when Norway was still part of the Kingdom of Denmark. Under Article 2 of the original text of the Constitution (which entered into force in 1814), 'The Evangelical-Lutheran Religion shall remain the public religion of the State'. The Constitution further prescribed that 'The King shall always have professed and actually profess the Evangelical-Lutheran Religion, which he shall maintain and protect', and that 'The king orders all public church and divine services, all meetings and assemblies concerning matters of religion and sees to it that all teachers of religion shall follow the prescribed norms'.[25] These provisions meant that the King of Norway, like other European monarchs, had to profess the official religion of the state and was entitled inter alia to *ius protectionis* (the right/duty to protect the Church), *ius inspectionis* (the right to supervise overall ecclesiastical life, such as meetings, processions and publication of books) and *ius reformandi* (the right/duty to protect the unity of faith and to combat religious dissent).

The advancement of the process of secularisation and the strengthening of the multicultural and multireligious character of society led to the 2012 reform of the constitution.[26] The clauses on the king's *ius protectionis* and competence in religious matters were repealed: under Article 4, 'The King shall at all times profess the Evangelical-Lutheran religion' but he no longer has to maintain and protect it. Furthermore, Article 16 stipulates inter alia that 'The Church of Norway, an Evangelical Lutheran church, will remain the National Church (*folkekirke*) of Norway'. There is no longer a relationship with the state; the link has been established with the people.

The second major change has been the recognition of the principle of religious freedom. The first draft of the Norwegian Constitution proclaimed it. This clause was then dropped because unity of faith was regarded as a necessary element of union in the new nation-state.[27] Article 2 of the original text of 1814 stipulated that 'The inhabitants who profess the said religion [Evangelical Lutheranism] are bound to educate their children in the same. Jesuits and Monastic orders shall not be tolerated. Jews are furthermore excluded from the Kingdom.'[28] The exclusion clauses of Jews and monastic orders were

25 Article 15 of the original text of May 1814 (Article 4 after the November 1814 amendment); Article 16 of the original text of May 1814.

26 See D Thorkildsen, 'The role of the Church in contemporary Norway: changed relations between state and church', (2012) 25:2 *Kirchliche Zeitgeschichte* 272–292.

27 V Hoel, *Faith, Fatherland and the Norwegian Seaman* (Hilversum, 2016), p 59.

28 Jesuits and monastic orders epitomised the most negative ideological and institutional aspects associated with the Roman Catholic Church, against which the Reformation was directed. However, it should be noted that in the nineteenth century even Catholic countries adopted anticlerical measures against them. For example, on 25 August 1848 the Kingdom of Sardinia suppressed the Society of

abrogated respectively in 1851 and 1857. The attempts to abrogate the exclusion clause of Jesuits in 1895 and 1925 failed. In 1952, when Norway ratified the European Convention on Human Rights, the exclusion clause of Jesuits was still in force. Norway was the only member state of the Council of Europe to enter a reservation on Article 9 (freedom of thought, belief and religion), so that Article 2 of the Constitution could not be regarded as an illegitimate limitation to the rights protected by Article 9. Only in 1956 was this clause abrogated and the reservation withdrawn. The right to freedom of religion (but not to belief, as in Italy) was expressly recognised in 1964. According to the new clause added to Article 2, section 1, 'All inhabitants of the realm shall have the right to free exercise of their religion.'

The clause on the religious upbringing of children was abrogated in 2012 and substituted by a new one, which reads: 'Our values will remain our Christian and humanistic heritage.' This provision fits into the pattern of what Silvio Ferrari has called state selective co-operation with religious denominations. Co-operation with social groups – including religious denominations – is a typical feature of democratic European states: the state co-operates with religious denominations just as it does with other social groups. However, European states do not co-operate with all religious denominations in the same way. The more a religious denomination is regarded as having values shared by the (majority of) society, the higher its chances of co-operating with the state.[29] In Norway, following the constitutional reform of 2012, the exclusivist reference to Evangelical Lutheranism was replaced by a more inclusive recognition of the Christian and humanist heritage. Nevertheless, Article 2 excludes all other religions, including two of the most important religious minorities: Judaism and Islam. This difference is partly counterbalanced by a clause added to Article 16 in 2012, according to which all religious and beliefs communities may receive financial support – a non-selective form of collaboration: 'The Church of Norway ... will remain the National Church of Norway and will as such be supported by the State ... All religious and belief communities shall be supported on equal terms.'

The principle of equality is the third area where major constitutional amendments have been approved over time. As of 1814, 'In the offices of the state must only be employed those Norwegian citizens who profess the Evangelical Lutheran religion, have sworn obedience to the Constitution and the King, [and] speak the language of the country.'[30] The Dissenter Law of 1845 allowed

Jesus and expelled all of its foreign members. On Norway's hostility to Jesuits, see B T Oftestad, 'Norway and the Jesuit order: a history of anti-Catholicism', in Y M Werner and J Harvard (eds), *European Anti-Catholicism in a Comparative and Transnational Perspective* (Leiden, 2013), pp 209–222.

29 S Ferrari, 'Religion and religious communities in the EU legal system', (2015) 17:1 *Insight Turkey* 63–78 at 71–72.

30 Article 93 of the original text of May 1814 (Article 92 after the November 1814 amendment).

those who had attained the age of 19 years (lowered to 15 in 1891) to leave the Evangelical Lutheran Church, under penalty of losing the right to be employed in public offices.[31] Thus, the principle of equality had to be sacrificed to enjoy a limited religious freedom. Following the 1878 constitutional amendment, only those who professed the Evangelical Lutheran religion could be members of the King's Council (later, Council of State, consisting of the prime minister and other ministers) and hold the office of judge (Article 92, section 4)–thus removing this requirement for the other categories of public officials. In 1892, this obligation was also repealed for judges. According to the constitutional amendment of 1919, 'More than half the number of Members of the Council of State shall profess the official religion of the state' (Article 12, section 2), and 'Members of the Council of State who do not profess the official religion of the state shall not take part in proceedings on matters which concern the state Church' (Article 27, section 2). Both clauses were repealed in 2012, but only in 2014–in the context of the most significant constitutional reform since 1814, aimed at adding a number of new provisions on human rights–was equality before law formally recognised.[32] Article 98 finally stipulates that 'All people are equal under the law.'

THE UK: FROM A 'QUALIFIED' TOLERATION TO THE PRINCIPLE OF EQUALITY

The Anglican Reformation was a turning point in British history for the birth of the concept of toleration. It is well known that King Henry VIII created the Anglican Church as a political project to detach England from the influence of the Pope rather than as a product of a religious revolution.[33] This particular origin of the Church of England–and generally of Anglicanism–can also explain why, in the aftermath of the English Reformation, Catholics were subject to many restrictions: the aim was to avoid having a Catholic sovereign back on the English throne and reintroducing Catholicism as the dominant religion in the reign. After the reign of Elizabeth I, the nation experienced a period of economic flourishing and sociopolitical ferment that led to the Cromwellian Commonwealth. On the religious side, the seventeenth century saw the emergence of many nonconformists (or free church people).[34] The term

31 F Hale, 'The development of religious freedom in Norway', (1981) 23:1 *Journal of Church and State* 47–68 at 52, 55–56.

32 See T M Øie and H Bull, 'Fundamental rights and fundamental law: the 2014 revision of the Norwegian Constitution', in G Selvik et al (eds), *The Art of Judicial Reasoning: Festschrift in Honour of Carl Baudenbacher* (Berlin, 2019), pp 33–50.

33 For a short history of the birth of the Church of England, see M Hill, *Ecclesiastical Law* (fourth edition, Oxford, 2018), pp 7–10.

34 See J Seed, 'History and narrative identity: religious dissent and the politics of memory in eighteenth-century England', (2005) 44:1 *Journal of British Studies* 46–63.

'nonconformist', first used during the period of the Restoration of the monarchy in England, referred to anybody who was not in full communion with the Anglican Church: that is, either 'orthodox' Protestant (or non-Trinitarian) or Quaker.

Soon after the Reformation, even if not officially, non-Anglicans (other than Roman Catholics) were largely able to practise their rites without state interference. However, following the Commonwealth, the Test Act 1673 strictly imposed Anglicanism on all those who held public office and thus on all non-Anglicans, including nonconformists, while de facto restricting Catholics' and Jews' civil and political rights. Anyone who wanted to hold public office was required to receive Holy Communion according to the rites of the Church of England.[35] No Catholic ('Papist') could sit in Parliament or hold public office. The Act of Settlement 1701 marked the definitive expulsion of Catholics from public life.[36] The situation of other non-Anglicans – such as non-Trinitarian Protestants, Jews and Quakers – was far from ideal. Many Quakers moved to the New World, giving a fundamental contribution to the religious development of the colonies there.[37]

The turning point for a large proportion of nonconformists was the Toleration Act 1689, which changed the life of Protestant dissenters. This Act granted freedom of worship to all Trinitarian Protestants and Quakers – thus excluding Unitarians and, it goes without saying, Catholics and Jews – under the condition of pronouncing the oath of allegiance to the king, although in a simplified version.[38] In Scotland, where the Scottish Episcopal Church (an Anglican Church) was disestablished in 1689, the Presbyterian Church was established as the Church of Scotland. This legal status was solemnised by the Act of Union 1707.

These historical developments in Britain established a framework of 'qualified' toleration, which was not influenced by the French Enlightenment and Revolution. The idea of tolerating (most of) those outside the official Anglican Church marked a particular approach to the modern concept of equality, which gradually led to the recognition of civil and political rights for all. Of

35 In Scotland, this test was in force as early as 1567.

36 Act of Settlement 1701: 'That all and every Person and Persons that then were or afterwards should be reconciled to or shall hold Communion with the See or Church of Rome or should profess the Popish Religion … should be excluded and are by that Act made for ever [incapable] to inherit possess or enjoy the Crown and Government of this Realm and Ireland and the Dominions thereunto belonging or any part of the same or to have use or exercise any regal Power Authority or Jurisdiction within the same[…]'.

37 The episode of the Mayflower, which travelled from Plymouth to North America in 1620 taking the Quakers to the New (and supposedly free) World, is probably the most famous of all emigrations.

38 Toleration Act 1689: '17. Provided always … that neither this act, nor any clause, article, or thing herein contained, shall extend or be construed to extend to give any ease, benefit or advantage to any papist or popish recusant whatsoever, or any person that shall deny in his preaching or writing the doctrine of the blessed Trinity, as it is declared in the aforesaid articles of religion.'

course, in that period there was no understanding of freedom of religion in the contemporary meaning but, little by little, non-Anglicans obtained a better legal position. A milestone in that path was Lord Hardwicke's Act of 1753, which allowed Jews and Quakers to marry according to their own rites.[39]

An important sign of the emergence of the modern principle of equality was the Roman Catholic Relief Act 1829, which permitted members of the Roman Catholic Church to sit in Parliament at Westminster and to hold public office without having to resort to the religious conformity test. In 1833 a similar measure concerning the Jewish community was passed. Shortly afterwards, the Marriage Act 1836 introduced civil marriage on a registrar's certificate for those who did not want an Anglican religious service. This marked the abandonment of the concept of mere toleration: non-Anglican religious belonging, although not fully recognised as a positive characteristic, was no longer treated as a sign of possible antisocial behaviour or disloyalty to the nation. The Religious Disabilities Act 1846 abolished the remaining restrictions on Roman Catholics. Anglicanism, being the established religion, preserved its privileged position, but at least religious diversity started being accepted.[40]

From the mid-nineteenth century, during the social changes brought about by the Industrial Revolution, the principle of equality was slowly but progressively affirmed in the common law and in the UK's unwritten Constitution. But it was only in the twentieth century that the law started treating religion as an individual characteristic to be promoted.[41]

It is possible to distinguish two categories of dissenting communities in this assessment of toleration in the UK: on the one hand, Catholics and Jews; on the other, all the rest. In fact, Catholics suffered far worse treatment because of the historical context of the birth of the established Church and the conflict between the monarch and the Pope. Jews, meanwhile, suffered from segregation, which was common to all Jewish communities throughout Europe. By contrast, other dissenters were granted a certain degree of toleration, though not always equality. It was only after the emancipation of Catholics and Jews in the nineteenth century that the approach changed from considering non-Anglicans as dissenters to treating them as equal citizens.

39 Jews were definitively emancipated in 1833. For the debate on the emancipation of Jews in the nineteenth-century United Kingdom, see P Pinsker, 'English opinion and Jewish emancipation (1830–1860)', (1952) 14:1 *Jewish Social Studies* 51–94; U R Q Henriques, 'The Jewish emancipation controversy in nineteenth-century Britain', (1968) 40 *Past & Present* 126–146.

40 The crimes of blasphemy and of blasphemous libel against the Christian faith – according to the teaching of the Church of England as enshrined in the *Book of Common Prayer* – were definitively abolished only in 2008.

41 See, for example, the Arbitration Act 1996, which provided for state recognition of the Jewish Bet Din as an arbitral tribunal and consequently of its decisions, and the Human Rights Act 1998, which enshrined the rights recognised by the European Convention on Human Rights and expressly introduced them in the British legal system.

CONCLUDING REMARKS

In the past in Europe religious minorities did not enjoy the same legal treatment as the majority religion, but discrimination against them was not meted out equally. Some were treated worse than others. The distinction between 'more acceptable' and '*non grata*' communities in each of the examined countries is deeply rooted in each country's particular national context. There is only one religious minority which was persecuted and discriminated against virtually everywhere: the Jewish community. In Norway and Italy, Jews were regarded as a problem apart, as a community which could not be integrated but had to be controlled, segregated and, in some cases, exploited for economic reasons. Only when the principle of equality was finally recognised as applying to all human beings after the French Revolution, were Jews gradually granted equal protection and emancipated. Nevertheless, this recognition did not prevent reversals, such as the introduction of racial laws in Italy between 1938 and 1945.

The legal status of minority Christian denominations was generally better. Leaving aside the dramatic religious conflict immediately after the Reformation, dissenters were afforded better legal treatment according to a sense of historical reconciliation based on the notion of *etsi deus non daretur* ('as if God did not exist'). Where the influence of the Reformation was stronger, the temporal sphere became more and more separated from the spiritual one, and the legal treatment of Christian dissenters improved over time.[42] There were exceptions, such as Catholics in the UK or Jesuits in Norway, but such resistance was due more to historical and political reasons than to theological or purely religious ones.

In the UK, the eighteenth-century concept of toleration shaped the modern notion of equality. However, it is possible to identify a similar process as that in other European countries. Even if, as discussed, religious toleration generally has a somewhat negative meaning, it was the starting point for the recognition of civil rights regardless of one's religious belonging, which was a milestone in the process of recognising the human being (that is, *any* human being) as an autonomous holder of rights.

The idea of toleration, as a way to manage diversity between religions, was present in Thomas Aquinas' writing and it was developed in Locke's theory of toleration. The latter held that faith may not be imposed on anybody because it is a matter deeply rooted in the human being's conscience and is not related to civil and political rights; state and church have to be separate and independent from each other.[43] In France in the seventeenth and eighteenth

42 On the roots of the modern concept of freedom of religion in the Lutheran doctrine, see J Witte Jr, 'Law, religion and human rights: an historical perspective', (1998) 26:2 *Journal of Religious Ethics* 257–262; H Berman, *Law and Revolution: the formation of the Western legal tradition* (Cambridge, MA, 1985).

43 J Locke, *A Letter Concerning Toleration* (Gouda, 1689), p 6.

centuries, Voltaire and Bayle developed this concept, which may be summarised in the motto: 'Do unto others as you would have them do unto you.'[44] Toleration was thus linked to the notion of individual freedom, which was definitively affirmed during the American and French revolutions, and formalised in the 1789 French Declaration and in the 1791 American Consitution. In this sense, the Westphalian order of seventeenth-century Europe provided the base and nourished the emerging notion of religious difference as a positive factor, planting the seed of equality to which the French Enlightenment and Revolution gave fresh water, and it determined the future evolution of the concept of individual freedom and in particular of religious freedom. Toleration for few people gradually turned into equality and freedom of religion or belief as fundamental rights for every human being.[45]

44 Voltaire, *Traité sur la tolérance* (Geneva, 1763). On the thought of Pierre Bayle, see R Forst, 'Pierre Bayle's reflexive theory of toleration', (2008) 48 *Nomos* 78–113.

45 On this transformation process, see H Brunkhorst, *Critical Theory of Legal Revolutions: evolutionary perspectives* (New York, 2014).