

# **Universal Rights in a World of Diversity**

*The Case of Religious Freedom*

*The Pontifical Academy of Social Sciences Acta 17*

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*The Proceedings  
of the 17<sup>th</sup> Plenary Session on*

# **Universal Rights in a World of Diversity**

*The Case of Religious Freedom*

*29 April-3 May 2011*

*Edited by*

Mary Ann Glendon  
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VATICAN CITY 2012

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The opinions expressed with absolute freedom during the presentation of the papers of this meeting, although published by the Academy, represent only the points of view of the participants and not those of the Academy.

ISBN 978-88-86726-28-3

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THE PONTIFICAL ACADEMY OF SOCIAL SCIENCES • VATICAN CITY



The Second Vatican Council, recognizing and making its own an essential principle of the modern State with the Decree on Religious Freedom, has recovered the deepest patrimony of the Church. By so doing she can be conscious of being in full harmony with the teaching of Jesus himself (cf. *Mt* 22: 21), as well as with the Church of the martyrs of all time. The ancient Church naturally prayed for the emperors and political leaders out of duty (cf. *ITm* 2: 2); but while she prayed for the emperors, she refused to worship them and thereby clearly rejected the religion of the State.

The martyrs of the early Church died for their faith in that God who was revealed in Jesus Christ, and for this very reason they also died for freedom of conscience and the freedom to profess one's own faith – a profession that no State can impose but which, instead, can only be claimed with God's grace in freedom of conscience. A missionary Church known for proclaiming her message to all peoples must necessarily work for the freedom of the faith. She desires to transmit the gift of the truth that exists for one and all.

At the same time, she assures peoples and their Governments that she does not wish to destroy their identity and culture by doing so, but to give them, on the contrary, a response which, in their innermost depths, they are waiting for – a response with which the multiplicity of cultures is not lost but instead unity between men and women increases and thus also peace between peoples.

(Benedict XVI, *Address to the Curia*, 22 December 2005)







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# Message of His Holiness Benedict XVI to H.E. Prof. Mary Ann Glendon, President of the Pontifical Academy of Social Sciences, on the occasion of the 17<sup>th</sup> Plenary Session

*To Her Excellency Professor Mary Ann Glendon, President of the Pontifical Academy of Social Sciences*

I am pleased to greet you and the members of the Pontifical Academy of Social Sciences as you hold your seventeenth plenary session on the theme of *Universal Rights in a World of Diversity: the Case of Religious Freedom*.

As I have observed on various occasions, the roots of the West's Christian culture remain deep; it was that culture which gave life and space to religious freedom and continues to nourish the constitutionally guaranteed freedom of religion and freedom of worship that many peoples enjoy today. Due in no small part to their systematic denial by atheistic regimes of the twentieth century, these freedoms were acknowledged and enshrined by the international community in the United Nations' Universal Declaration of Human Rights. Today these basic human rights are again under threat from attitudes and ideologies which would impede free religious expression. Consequently, the challenge to defend and promote the right to freedom of religion and freedom of worship must be taken up once more in our days. For this reason, I am grateful to the Academy for its contribution to this debate.

Deeply inscribed in our human nature are a yearning for truth and meaning and an openness to the transcendent; we are prompted by our nature to pursue questions of the greatest importance to our existence. Many centuries ago, Tertullian coined the term *libertas religionis* (cf. *Apologeticum*, 24:6). He emphasized that God must be worshipped freely, and that it is in the nature of religion not to admit coercion, "*nec religionis est cogere religionem*" (*Ad Scapulam*, 2:2). Since man enjoys the capacity for a free personal choice in truth, and since God expects of man a free response to his call, the right to religious freedom should be viewed as innate to the fundamental dignity of every human person, in keeping with the innate openness of the human heart to God. In fact, authentic freedom of religion will permit the human person to attain fulfilment and will thus contribute to the common good of society.

Aware of the developments in culture and society, the Second Vatican Council proposed a renewed anthropological foundation to religious freedom. The Council Fathers stated that all people are “impelled by nature and also bound by our moral obligation to seek the truth, especially religious truth” (*Dignitatis Humanae*, 2). The truth sets us free (cf. *Jn* 8:32), and it is this same truth that must be sought and assumed freely. The Council was careful to clarify that this freedom is a right which each person enjoys naturally and which therefore ought also to be protected and fostered by civil law.

Of course, every state has a sovereign right to promulgate its own legislation and will express different attitudes to religion in law. So it is that there are some states which allow broad religious freedom in our understanding of the term, while others restrict it for a variety of reasons, including mistrust for religion itself. The Holy See continues to appeal for the recognition of the fundamental human right to religious freedom on the part of all states, and calls on them to respect, and if need be protect, religious minorities who, though bound by a different faith from the majority around them, aspire to live with their fellow citizens peacefully and to participate fully in the civil and political life of the nation, to the benefit of all.

Finally, let me express my sincere hope that your expertise in the fields of law, political science, sociology and economics will converge in these days to bring about fresh insights on this important question and thus bear much fruit now and into the future. During this holy season, I invoke upon you an abundance of Easter joy and peace, and I willingly impart to you, to Bishop Sánchez Sorondo and to all the members of the Academy my Apostolic Blessing.

*From the Vatican, 29 April 2011*

# Universal Rights in a World of Diversity

## The Case of Religious Freedom

### *Report of the President 2011*

The Seventeenth Plenary Session of the Pontifical Academy of Social Sciences will always be especially memorable for its coincidence with the beatification of our beloved founder, Pope John Paul II, which took place appropriately on Divine Mercy Sunday which also happened to be the Feast of St. Joseph the Worker.

This year's Plenary was the first of two meetings designed to assist the Church in her preparation for the forthcoming 50<sup>th</sup> anniversary of the historic 1963 encyclical *Pacem in Terris*. The Academy deemed it opportune to devote the first of these Plenaries to that encyclical's much-noted engagement with the modern human rights project, and, in the light of current events, we decided to focus on *religious freedom* as emblematic both of the aspirations and the dilemmas of the universal human rights idea.

When we informed Pope Benedict XVI of that decision last summer, we were delighted to receive his immediate encouragement, and we were further heartened when the Pope himself made religious freedom a central theme of his remarks on numerous occasions in the months leading up to our meeting.<sup>1</sup>

The Academicians were aided in their exploration of the problem of "Universal Rights in a World of Diversity" by an extraordinary group of distinguished experts from diverse disciplines and regions of the world. A highlight of the meeting was the Pope's message in which he reminded us that religious freedom goes to the very heart of what it means to be human. "A yearning for truth and meaning and an openness to the transcendent", he said, are "deeply inscribed in human nature".<sup>2</sup> We were also honored by the participation of Cardinal Tarcisio Bertone, Secretary of State of the Holy See, who spoke on "Pontifical Diplomacy and Freedom of Religion",

<sup>1</sup> Pope Benedict XVI, Address to Council of Europe Delegation, September 8, 2010; Address to the Roman Curia, December 20, 2010; World Day of Peace Message, January 1, 2011; Address to the Diplomatic Corps, January 10, 2011.

<sup>2</sup> Pope Benedict XVI, Message to the Pontifical Academy of Social Sciences, April 29, 2011.

and Cardinal Kurt Koch, President of the Pontifical Council for Promoting Christian Unity, who spoke on “Ecumenism and Religious Freedom”.

It is impossible to summarize the rich harvest from the Plenary in the compass of this Report, but many of the highlights are covered in the attached Statement (pp. 651-64) that was issued to the press at the close of our meeting.

The 2011 Plenary was also noteworthy for the success of the new meeting format adopted in response to many suggestions and comments made by the members in last year’s closed session. The move to shorter presentations with more time for discussion met with universal approval, and many constructive suggestions for further improvements were received and noted.

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### **Future Meetings**

*2012.* In our Eighteenth Plenary Session, to be held April 27 through May 1, 2012, we will continue our reflections on the themes of *Pacem in Terris* in the light of the dramatic cultural, social, political and economic changes of the past half-century. Professor Hittinger will serve as coordinator of the program on “The Global Quest for Tranquility of Order: *Pacem in Terris*, Fifty Years Later”. The program proposal, prepared by Professor Hittinger in consultation with Professors Matlary and Possenti, has been circulated with a Call for Papers from the members.

*2013 and Beyond.* Looking ahead, and in view of the importance of advance planning, all members are urged to think deeply about promising topics for future programs, and to communicate their thoughts (ideally in the form of a detailed proposal) to the President and the Council. We invite you especially to think of how we may most appropriately commemorate the 20<sup>th</sup> anniversary in 2014 of our founding by Blessed John Paul II.

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### **Revival of the Committee System**

When the Academy was launched in 1994 under the presidency of our dear colleague Edmond Malinvaud, four interdisciplinary committees were established to propose and organize activities in fields where it was thought that Catholic Social Thought could benefit from the contributions of the social sciences. The Academy’s concentration on human work, democracy, globalization, and inter-generational solidarity produced memorable Plenaries and precious publications on those subjects. Now, as we approach our 20<sup>th</sup> anniversary, it is time to think about how we wish to move forward. As

an initial step, the members were requested in this year's Closed Session to meet informally according to the four disciplines mentioned in our statutes with a view toward forming four committees that can generate proposals for topics, activities, and new members, as well as ideas for increasing the "echo" of our work. Members whose disciplines overlap with the statutory four should feel to join the group closest to their interests. By the time of next year's meeting the Council expects to formalize this system with the senior active member in each of the four fields acting as chairperson.

### **Other Academy News**

*New Website.* Please take a look at the Academy's fine new website ([www.pass.va](http://www.pass.va)) and, while you are there, please check your biographical material and let the staff know if it needs to be updated. Since the website is constantly updated, please refer to it for news on members (including our new ones who are not yet in our Yearbook), programmes and publications. The latter are available for free download as e-books.

*New Book on the Casina.* As we all know and appreciate, the Academy's home in the Casina Pio IV, nestled in the Vatican Gardens, is a Renaissance architectural jewel, restored to its full beauty between 2000 and 2003. In November 2010, the headquarters that we share with the Academy of Sciences was the scene of the presentation of a new, lavishly illustrated volume on the history, art, and architecture of the Casina, published in Italian by the prestigious Umberto Allemandi. The book, "La Casina Pio IV in Vaticano", contains, among other treasures, two essays by our Chancellor Marcelo Sánchez Sorondo on the history and present-day function of the academies. An English language translation is planned.

*Academicians representing Holy See in Peru.* Following a consolidated tradition inaugurated in other Latin American countries such as Mexico, Colombia, Chile and Argentina, the month of March 2011 found three members of the Academy in Lima, Peru, in response to an invitation that Peruvian President Alan García Pérez had addressed to Cardinal Bertone. We were honored that the Cardinal Secretary of State turned to our Academy to supply three speakers for this conference on "Peace, Security, and Development in Latin America". Luis Ernesto Derbez Bautista spoke on arms limitation in Latin America; José Raga on the arms trade and the war on poverty; and our Chancellor Bishop Sánchez Sorondo, looking ahead to our next Plenary, presented his reflections from the perspective of truth, justice, charity and liberty on "*Pacem in Terris* after 50 Years."

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## Membership

Over the past year, two of our members were called to high public service that will restrict their ability to participate in Academy activities. Wilfrido Villacorta was appointed by the Philippine Congress to be that country's Ambassador to the Association of Southeast Asian Nations (ASEAN) and Angelika Nußberger was appointed a judge on the European Court of Human Rights. While we will miss their presence at our meetings, we congratulate The Philippines and the ECHR on having recognized the talents of our esteemed colleagues.

With the absence of Professors Villacorta and Nußberger, the need to replenish our membership becomes ever more acute. Members are earnestly requested, therefore, to send their *well-documented* nominations of promising candidates to the Chancellor so that they can be evaluated by our Committee on new members. Please keep in mind our need for members who are not only well-qualified, but who are able and willing to participate actively in our work.

Finally, it is with great pleasure that I record here the appointment by Pope Benedict XVI of a new member of the Academy, the distinguished demographer Professor Gerard François Dumont, who is well-known to the members for his contribution to our Plenary on "Vanishing Youth: Solidarity with Children and Young People in an Age of Turbulence". We look forward to many years of fruitful collaboration with him.

■ MARY ANN GLENDON

# Introduction

The Seventeenth Plenary Session of the Pontifical Academy of Social Sciences is the first of two Plenaries to be dedicated to the analysis of developments affecting areas of Catholic Social Teaching that are likely to come under review as the Church prepares for the 50th anniversary of *Pacem in Terris*. In that historic 1963 encyclical, Pope John XXIII meditated on the requirements of the universal common good in an increasingly interdependent world where new patterns of relations among peoples and states were emerging. Addressing himself “to all men of good will”, he spoke approvingly of the post-World-War II human rights project, even adopting the language of human rights.

Since that time, as Pope Benedict XVI has noted, “Human rights are increasingly being presented as the common language and ethical substratum of international relations” (*Address to the United Nations*, 2008). The Church, for her part, has deepened her engagement with the human rights project, supporting its aspirations for the protection of human freedom and dignity, while calling attention to developments that threaten the realization of those ideals. In 1979, Pope John Paul II praised the Universal Declaration of Human Rights as “a real milestone on the path of the moral progress of humanity” (*Address to the United Nations*, 1979, 7), yet in 1998 he warned of “certain shadows... consisting in the reservations being expressed in relation to two essential characteristics of the very idea of human rights: their universality and their indivisibility” (*World Day of Peace*, 1998, 3). Pope Benedict XVI took the occasion of the Declaration’s 60th anniversary to credit its framers with having enabled “different cultures, juridical expressions and institutional models to converge around a fundamental nucleus of values and hence of rights”, but expressed concern about the growing tendency to deny its universality “in the name of different cultural, political, social and even religious outlooks”.

The time seems opportune, therefore, for the Academy to examine the current challenges to the ambitious modern human rights project and to explore the principal schemes that have been developed or proposed to overcome those challenges. In the 2011 Plenary, we will do so by focusing on religious freedom as a case in point.

Religious freedom claims the Academy’s attention not only because it is central to Catholic thought, but because the dilemmas and controversies in that area are illustrative of the current crisis of the entire human rights project.

Explaining the Church’s wholehearted affirmation of the right to religious freedom in the Second Vatican Council, the Council Fathers said that

all people are “impelled by nature and also bound by a moral obligation to seek the truth, especially religious truth”, but that human beings “cannot discharge these obligations in a manner in keeping with their own nature unless they enjoy immunity from external coercion as well as psychological freedom” (*Dignitatis Humanae*, 2). The close relation of religious freedom to other basic rights was emphasized by Pope John Paul II. The right to religious liberty, he said, “is so closely linked to the other fundamental rights, that it can rightly be argued that respect for religious freedom is, as it were, a touchstone for the observance of the other fundamental rights.... The State’s respect for the right to freedom of religion is a sign of respect for the other fundamental human rights, in that it is an implicit recognition of the existence of an order which transcends the political dimension of existence” (*Address to the Diplomatic Corps*, 1989).

Today, nearly every nation in the world is officially committed to freedom of religion as a fundamental human right. Yet, as Pope Benedict XVI has observed, “those who expected that with this fundamental ‘yes’ to the modern era all tensions would be dispelled and that the ‘openness towards the world’ accordingly achieved would transform everything into pure harmony, had underestimated the inner tensions as well as the contradictions inherent in the modern epoch. They had underestimated the perilous frailty of human nature which has been a threat to human progress in all the periods of history and in every historical constellation. These dangers, with the new possibilities and new power of man over matter and over himself, did not disappear but instead acquired new dimensions: a look at the history of the present day shows this clearly” (*Address to the Curia*, December 22, 2005).

As even a cursory survey of the contemporary landscape reveals, the religious liberty of individuals, families, associations and institutions is under growing threat from many different directions. Flagrant violations abound. Tensions are mounting between the claim of universality and the diversity of practices and interpretations. Religious freedom is often attacked in the name of other rights and values. There is increasing conflict and confusion about the relations among the various bodies responsible for implementing human rights at local, national, and supranational levels. The problem of fostering habits of respect and tolerance for the religions of others remains acute. And religion continues to be used by some as a pretext for violence.

The Academy will begin its exploration of the topic with a series of presentations on the uneasy progress of the concept of religious freedom: its gradual acceptance in religious and political settings; and the persistent lack of consensus on its meaning, foundations, and relation to other rights. These introductory sessions will be followed by overviews of the varied

cultural and political contexts for religious freedom issues, provided by experts on religion and society; the distribution of religions in the world today; and the current state of religious freedom worldwide.

The second day of the Plenary will be devoted to the principal contemporary challenges to religious freedom, and to models for addressing those challenges. In the morning session, speakers will examine the problem of how a universal right to freedom of religion can be understood in the light of manifest differences among religions, cultures, nations, schools of interpretation, formulations of rights, and modes of implementation. The presenters will deal with, *inter alia*, the challenges posed by claims of “new rights”, by militant secularism, and by religions that lack internal resources for religious tolerance. The proceedings will then take a more practical turn as speakers from diverse regions and cultures discuss what can be learned from the experiences of various societies in dealing with their principal trouble spots. The second day will conclude with a panel discussion of the key question of whether there can be a legitimate pluralism in forms of freedom, and if so what is its scope and what are its limits.

On the third day, the Plenary will turn to the relation between religious freedom and public authorities. *Pacem in Terris* states that “One of the fundamental duties of our government... is the suitable and adequate superintendence and co-ordination of men’s respective rights in society. This must be done in such a way that the exercise of their own rights by certain citizens does not obstruct other citizens in the exercise of theirs” (62). Speakers will reflect upon the great variety of attempts to solve that problem within various political systems. They will seek to identify successful models of tolerance and accommodation. They will explore such questions as: What should be the limits of tolerance and accommodation? What models are available for determining the scope and limits of freedom to practice one’s religion, the freedom of religious institutions to govern themselves, and managing conflicts between freedom of religion and other rights?

Looking toward the continuation in 2012 of its studies on themes of *Pacem in Terris*, the Academy will devote the final day of the Plenary to religious freedom as a global project. Already in 1963, Pope John XXIII called attention to the fact that, with increasing interdependence, “each country’s social progress, order, security and peace are necessarily linked with the social progress, order, security and peace of every other country” (130). Invoking the principle of subsidiarity, he called for the creation of a global environment “in which the public authorities of each nation, its citizens and intermediate groups, can carry out their tasks, fulfil their duties and claim their rights with greater security” (141).

Today, where human rights are concerned, there is intense debate about what such an environment should look like. What should be the relationships among the various institutions and entities engaged in protecting human rights – at local, national, regional, and international levels? Accordingly, topics on the fourth day of the Plenary will include presentations on the role of institutions like the UN with world-wide scope, and a presentation on Europe as a museum of the tensions between human rights ideas and the various mechanisms for their implementation at the national, regional, and international levels. The Plenary will conclude with a series of presentations on the great challenge of creating a culture of respect for freedom of religion. Speakers on this topic will consider the roles of education and the media, the lessons that may be drawn from practical experiences, and the responsibilities of religions themselves in promoting peaceful interfaith relations.

■ MARY ANN GLENDON

# Programme

FRIDAY, 29 APRIL 2011

## RELIGIOUS FREEDOM: HISTORICITY AND UNIVERSALITY

*The right to freedom of religion is so closely linked to the other fundamental rights, that it can rightly be argued that respect for religious freedom is, as it were, a touchstone for the observance of the other fundamental rights.... The State's respect for the right to freedom of religion is a sign of respect for the other fundamental human rights, in that it is an implicit recognition of the existence of an order which transcends the political dimension of existence (Pope John Paul II, Address to the Diplomatic Corps, 1989).*

*Every human being has the right to honor God according to the dictates of an upright conscience, and the right to profess his religion privately and publicly (Pope John XXIII, *Pacem in Terris*, 14).*

*Every generation has the responsibility of engaging anew in the arduous search for the right way to order human affairs (Pope Benedict XVI, *Spe Salvi*, 25).*

9:00 *Welcome and Introduction to the Meeting* **President Prof. Mary Ann Glendon**

### I. RELIGIOUS FREEDOM: ITS EVOLUTION, JUSTIFICATIONS, FOUNDATIONS

Chair: **Prof. Vittorio Possenti**

9:30 1. *La liberté religieuse. Théologie et doctrine sociale*

**H.E. Msgr. Roland Minnerath**

10:00 2. *Political Pluralism and Religious Liberty: The Teaching of Dignitatis Humanae*

**Prof. Russell Hittinger**

10:30 3. *Religious Freedom and the Common Good*

**Prof. Otfried Höffe**

11:00 Coffee break

11:30 Panel discussion among the speakers, followed by a general discussion

13:00 Lunch at the Casina Pio IV

### II. SIGNS OF THE TIMES

Chair: **Prof. Pedro Morandé**

14:30 1. *Modernity: Religious Trends*

**Prof. Nicos Mouzelis**

15:00 2. *The Demography of Religions and their Distribution in the World*

**Prof. Wolfgang Lutz**

15:30 3. *Religious Freedom in the World Today: Paradox and Promise*

**Prof. Allen Hertzke**

16:00 4. *Difficile liberté religieuse*

**Prof. Jean Greisch**

16:30 Coffee break

17:00 Panel discussion among the speakers, followed by a general discussion

18:00 Chairpersons' summaries

**Prof. Vittorio Possenti, Prof. Pedro Morandé**

18:30 Departure from the Casina Pio IV by bus to attend the gospel concert at Villa Aurora

19:00 Concert followed by dinner

22:00 Bus leaves Villa Aurora to take participants back to the Domus Sanctae Marthae and Hotel Columbus

**SATURDAY, 30 APRIL 2011****III. EXPERIENCES**Chair: **Prof. Luis Ernesto Derbez Bautista****1. What can be learned from the experiences of various societies in dealing with their principal trouble spots? Can there be a legitimate pluralism in modes of protecting religions and their freedom?**9:00 1. China: *Politics and Religion in China*  
**Prof. Hsin-chi Kuan**9:30 2. Africa: *Experiences in Freedom of Religion in the African Context*  
**Prof. Abdullahi An-Na'im**10:00 3. North Africa: **Prof. Habib C. Malik**

10:30 Coffee break

11:00 4. India: *What Can be Learned from the Indian Experience?*  
**Justice Ruma Pal**11:30 5. Latin America: *What can be Learned from the Experience of Religious Freedom in Latin America?*  
**Prof. Pedro Morandé**12:00 6. Canada, South Africa: *What can be Learned from the Experiences of Various Societies in Dealing with their Principle Trouble-Spots?*  
**Prof. Iain Benson**

12:30 Panel discussion among the speakers

13:00 Lunch at the Casina Pio IV

**III. EXPERIENCES (cont'd)**Chair: **Prof. Janne H. Matlary****2. Europe as a museum of the tensions between human rights ideas and the various mechanisms for their implementation at the national, regional, and international level****a) National case studies: concentrating on the status quo and the current developments**15:00 1. Germany: *Religionsfreiheit in Deutschland - Alte und neue fragen*  
**Prof. Hans Maier**15:30 2. France: *La liberté religieuse et le principe de laïcité en France*  
**Prof. Michel Fromont**16:00 3. Italy: **Prof. Rocco Buttiglione****b) European Convention on Human Rights**16:30 *Freedom of Religion in the European Convention on Human Rights under the Influence of Different European Traditions*  
**Prof. Javier Martínez-Torrón**

17:00 Coffee break

**c) Common discussion on the European experiences**

17:30 Panel discussion among the national rapporteurs and Prof. Javier Martínez-Torrón

18:00 Open discussion on the European experiences

**3. A worldwide view**18:30 Comparative overview: **Prof. Cole Durham**

19:00 General discussion

20:00 Chairpersons' summaries

**Prof. Luis Ernesto Derbez Bautista, Prof. Janne H. Matlary**

20:30 Dinner at the Casina Pio IV

**SUNDAY, 1 MAY 2011**

- 10:00 Holy Mass in St Peter's Square for the Beatification of H.H. Pope John Paul II, presided over by H.H. Pope Benedict XVI
- 13:00 Lunch at the Casina Pio IV
- 19:00 Dinner at the Casina Pio IV

**MONDAY, 2 MAY 2011****IV. RELIGIOUS FREEDOM, CIVIL SOCIETY AND THE STATE**Chair: **Prof. Russell Hittinger**

*One of the principal duties of any government, moreover, is the suitable and adequate superintendence and co-ordination of men's respective rights in society. This must be done in such a way 1) that the exercise of their rights by certain citizens does not obstruct other citizens in the exercise of theirs; 2) that the individual, standing upon his own rights, does not impede others in the performance of their duties; 3) that the rights of all be effectively safeguarded, and completely restored if they have been violated (47) (Pope John XXIII, *Pacem in Terris*, 62).*

**1. Legal and related questions**

- 9:00 1. *Law as Precondition for Religious Freedom*  
**Prof. Christoph Engel**
- 9:30 2. *What is or should be the role of religiously informed moral viewpoints in public discourse (especially where hotly contested issues are concerned)?*  
**Prof. Vittorio Possenti**
- 10:00 3. *The Challenges of "New Rights" and Militant Secularism*  
**Prof. Marta Cartabia**
- 10:30 4. *Fundamentalist and Other Obstacles to Religious Toleration*  
**Dr. Malise Ruthven**
- 11:00 Coffee break
- 11:30 Panel discussion among the speakers, followed by a general discussion
- 12:30 Lunch at the Casina Pio IV

**IV. RELIGIOUS FREEDOM, CIVIL SOCIETY AND THE STATE (cont'd)**Chair: **Prof. Partha S. Dasgupta****2. Creating an atmosphere of openness and respect**

- 14:30 1. *What can the social sciences teach us about the relationships among cultural identity, religious identity, and religious freedom?*  
**Prof. Roberto Cipriani**
- 15:00 2. *What Role does Education Play in Promoting Religious Freedom?*  
**H.E. Msgr. Jean-Louis Brugues**
- 15:30 3. *Ante la nueva revolución de las comunicaciones*  
**Prof. Mariano Grondona**
- 16:00 Panel discussion among the speakers, followed by a general discussion
- 16:30 Coffee break

**V. RELIGIOUS FREEDOM IN THE GLOBALIZED WORLD**

*What are, and what should be, the relationships among the various institutions and entities engaged in protecting religious freedom – local, national, regional, international? What should be the role and responsibilities of religions themselves in promoting peaceful interfaith relations? What is, and what should be, the dialectic among these entities?*

**1. The transnational and international world**

- 17:00 *How can a universal right to freedom of religion be understood in the light of manifest differences among religions, cultures, nations, schools of interpretation, formulations of rights, and modes of implementing them?*  
**Prof. Hans Zacher**





- 17:30 General discussion  
 18:30 Chairpersons' summaries  
**Prof. Russell Hittinger, Prof. Partha S. Dasgupta**  
 19:00 Closed Session for Academicians  
 20:30 Dinner at the Casina Pio IV

**TUESDAY, 3 MAY 2011**

Chair: **Prof. Herbert Schambeck**

- 9:00 1. *'The Apple of God's Eye' and Religious Freedom*  
**Prof. Marcello Pera**  
 9:30 2. *State and Nation: Church, Mosque and Synagogue – On Religious Freedom and Religious Symbols in Public Places*  
**Prof. Joseph Weiler**  
 10:00 Coffee break  
 10:30 **Papal Audience**  
 13:00 Lunch at the Casina Pio IV  
 14:30 *The Protection of Freedom of Religion Within the Institutional System of the United Nations*  
**Prof. Christian Walter**  
 15:30 General discussion

**2. The Catholic Church in the transnational and international world**

- 16:00 *Pontifical Diplomacy and Freedom of Religion*  
**H.Em. Cardinal Tarcisio Bertone**  
 16:30 *Concordats as Instruments for Implementing Freedom of Religion*  
**Prof. Ombretta Fumagalli**  
 17:00 Coffee break  
 17:30 *Ecumenism and Freedom of Religion*  
**H.Em. Cardinal Kurt Koch**  
 18:00 General discussion  
 19:00 Chairperson's summary  
**Prof. Herbert Schambeck**  
 19:30 *Closing Remarks*  
**President Prof. Mary Ann Glendon**  
 20:00 Dinner at the Casina Pio IV

**WEDNESDAY, 4 MAY 2011**

- 9:30-12:30 Council Meeting  
 12:30 Press Conference at the Holy See Press Office

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# Scientific Papers

- ▶ I. RELIGIOUS FREEDOM:  
ITS EVOLUTION, JUSTIFICATIONS, FOUNDATIONS

# LA LIBERTÉ RELIGIEUSE.

## THÉOLOGIE ET DOCTRINE SOCIALE

■ ROLAND MINNERATH

Le droit civil à la liberté religieuse est un droit humain fondamental qui relève de la loi naturelle. L'Eglise considère que ce droit est enraciné dans la nature de la personne et qu'il est antérieur à toute disposition de droit positif. Le fondement théologique de ce droit est la doctrine de la création selon laquelle l'être humain a été créé libre de se tourner vers Dieu ou de s'en détourner. Dieu n'admet pas d'être adoré sous la contrainte, disait déjà Tertullien, à la fin du IIe siècle. Cette liberté doit être garantie à tout homme par la législation et respectée effectivement par les administrations publiques et le comportement de tous les citoyens.

Le discours sur la liberté de religion n'était pas à l'ordre du jour aussi longtemps que les sociétés se disaient chrétiennes et que la religion en constituait le ciment. Cependant, même durant les périodes d'osmose entre Eglise et l'Etat, l'Eglise avait toujours maintenu le principe de la liberté de la personne de choisir la vraie foi. Ce qui était réprimé, c'était l'abandon de la vraie foi.

### Religion ou lien social?

Le principe selon lequel toute personne doit pouvoir se déterminer libre de toute contrainte en matière de religion suppose une conception précise de l'homme et des rapports entre société et religion. La plupart des sociétés ont été ou sont encore fondées sur la religion, et il est inconcevable que les individus se désolidarisent de ce lien constitutif du vivre ensemble. Le christianisme en introduisant avec Tertullien la notion de *libertas religionis*, a amorcé une dynamique qui s'est soldée par la vision occidentale de l'Etat séculier et de la personne libre de ses choix religieux. Pour que la liberté religieuse soit possible, il faut que la religion soit comprise dans son acception chrétienne. La religion ne doit pas s'identifier avec une culture, une sagesse, un système de droit particulier. Le lien social fondamental ne pouvant plus être une religion unique, mais la liberté de religion, sur quelle base commune fonder la société?

La réponse définitive n'a toujours pas été trouvée. Le "pacte social" peut-il résulter de la seule volonté des individus, sans être enraciné dans un ordre qui lui est antérieur et qui le fonde? Le XX<sup>e</sup> siècle a connu deux types de régimes totalitaires persécuteurs de la religion et de toute liberté individuelle. Des Etats ont été tentés de remplacer la religion dominante par un lien sé-

culier fondé sur le rejet de la religion dans l'espace social. Les Etats libéraux ont marginalisé la religion en la reléguant dans la vie privée et en n'offrant comme alternative que des idéologies relativistes et utilitaristes, créant un immense vide que les extrémismes de toutes sortes comblent sans difficulté. On s'aperçoit maintenant de la ruine des sociétés qui se sont coupées de leurs propres racines religieuses. Le dilemme n'est donc pas le retour à l'Etat confessionnel, mais à l'invention d'un ordre constitutionnel fondé sur la loi naturelle qui exige la liberté de religion.

La "religion" telle que l'entend le christianisme respecte l'autonomie de l'ordre naturel et de l'ordre temporel. Elle illumine l'ordre éthique naturel, mais ne lui retire pas sa consistance. Il y a donc cohérence entre, d'une part, la "religion" qui est acte de foi libre et personnel et, d'autre part, la laïcité de l'Etat qui n'a pas à imposer ou à empêcher une foi religieuse, mais à promouvoir le bien commun, qui répond aux exigences de la nature humaine.

## Histoire

On sait qu'entre le IV<sup>e</sup> et le XVIII<sup>e</sup> siècle, les Etats chrétiens étaient tous officiellement confessionnels et persécutaient les dissidents religieux. La constitution américaine en son premier amendement a été le premier texte fondant la non confessionnalité de l'Etat en même temps que la liberté de religion. Au XIX<sup>e</sup> siècle, le Magistère catholique ne s'est approché qu'avec réticence de la liberté individuelle de conscience et de religion. Le *Syllabus* de Pie IX (1864) la condamnait encore, en ayant dans sa ligne de mire la prétention de l'individu, dans sa subjectivité, de déterminer ce qui est vrai ou faux.

Pour l'Eglise catholique, le concile Vatican II a été le moment d'un changement de paradigme dans l'élaboration doctrinale des relations Eglise – Etat et de la liberté civile en matière de religion. Vatican II passe à cette nouvelle approche sans renier les principes défendus précédemment. Ce qui avait changé, c'était le contexte des Etats d'après guerre. Ils se disaient Etats de droit, avaient signé la *Déclaration universelle des droits de l'homme* (1948) et les *Pactes* (1966) subséquents. Ils autolimitaient leurs compétences. L'Etat se mettait au service des droits de la personne, y compris en matière de liberté de conscience, de pensée, d'expression, d'association et de religion. Ainsi était délimité le domaine dans lequel ni l'Etat, ni la société ni les tierces personnes ne devaient s'opposer au libre choix des individus.

Le concile a inscrit la liberté de religion dans la nature humaine. Dès lors étaient sauvés l'objectivité de la vérité et la structure de la personne créée libre en vue de la vérité. L'encyclique *Pacem in terris* (1963) avait déjà présenté les droits inaliénables de la personne comme découlant de l'ordre naturel créé par Dieu. L'Encyclique, après avoir rappelé l'ordre inscrit par le Créateur au

plus intime des coeurs (PT 5), parle des droits et des devoirs de la personne, qui découlent ensemble et immédiatement de sa nature (PT 9). Or la doctrine de la nature renvoie à celle de la création. Si l'homme a des droits inhérents à son être même, c'est que le Créateur les y a inscrits. Pour pouvoir les réaliser, la société entière doit procurer à la personne ce qui est nécessaire à son perfectionnement. La pensée catholique raisonne en termes d'ordre objectif, de nature et de bien commun.

## La personne

La Déclaration conciliaire sur la liberté religieuse *Dignitatis humanae* place au premier plan la personne avec son droit inaliénable de se déterminer librement en matière de religion, la religion étant comprise comme recherche et adhésion à la vérité sur Dieu. La démarche religieuse devant se faire sans contrainte extérieure, l'Etat est privé de toute compétence propre en matière religieuse. Il ne doit ni empêcher ni forcer les choix des citoyens en ce domaine. Il doit, en revanche, veiller à ce que tous les citoyens puissent exercer leur droit fondamental à la liberté de conscience et de religion, dans le respect des lois.

## L'Eglise

Jusqu'à Vatican II, l'Eglise catholique revendiquait seulement des droits corporatifs dans et par rapport à l'Etat. A l'Etat le domaine du profane, du séculier, du temporel, à l'Eglise celui du religieux et des fins dernières. Maintenant la dimension corporative et institutionnelle de la liberté religieuse tire ses droits des droits de la personne. Le concile considère que lorsque les droits de la personne sont correctement respectés en matière religieuse, la liberté de l'Eglise comme communauté organisée est correctement respectée. "Il y a donc bon accord entre la liberté de l'Eglise et cette liberté religieuse qui, pour tous les hommes et toutes les communautés, doit être reconnue comme un droit et sanctionnée juridiquement". Mais il reste que "la liberté de l'Eglise est le principe fondamental dans les relations de l'Eglise avec la société civile" (*Dignitatis humanae*, 13).

Le principe de la liberté de l'Eglise est encore affirmé dans *Gaudium et spes* 76, 3: "Sur le terrain qui leur est propre, la communauté politique et l'Eglise sont indépendantes l'une de l'autre et autonomes. Mais toutes deux, quoique à des titres divers, sont au service de la vocation personnelle et sociale des mêmes hommes. Elles exerceront d'autant plus efficacement ce service pour le bien de tous qu'elles rechercheront davantage entre elles une saine coopération, en tenant également compte des circonstances de temps et de lieu". Autonomie et coopération adaptée sont les deux principes indissociables. Ils



impliquent de la part de l'Etat une laïcité ouverte, une disponibilité à permettre au fait religieux de jouer son rôle dans la société dans le respect des lois.

La liberté corporative de l'Eglise s'entend non seulement de son indépendance par rapport aux Pouvoirs séculiers, mais aussi dans son autonomie d'organisation interne qui couvre tous les aspects de sa mission. *Dignitatis humanae* passe en revue les dimensions communautaires de la liberté religieuse: assurer le culte public, enseigner, entretenir des institutions de perfectionnement religieux, communiquer avec d'autres communautés, construire des édifices religieux, acquérir et gérer des biens, avoir accès à tous les médias, proposer un enseignement social, se réunir librement, "constituer des associations éducatives, culturelles, caritatives et sociales" (DH 4).

## **L'Etat**

La thèse classique maintenait le principe de la confessionnalité catholique de l'Etat lorsque la société était majoritairement de tradition catholique. Les autres cultes devaient être tolérés, en vue du bien commun. Devant le fait nouveau de l'Etat de droit et du pluralisme religieux des sociétés modernes, il apparaît que le devoir de l'Etat envers Dieu et le bien commun est de se mettre au service de l'ordre naturel, qui l'oblige à observer une attitude d'égalité justice envers tous les hommes qui s'engagent dans une démarche religieuse authentique (cf. DH 1). L'Etat ne peut discriminer ses citoyens en fonction de leurs appartenances religieuses.

Si l'Etat n'est plus censé être confessionnel, il n'est pas délié pour autant de l'éthique naturelle qui le fonde. Il est tenu de conformer sa législation au droit naturel, c'est-à-dire à ne pas franchir la ligne qui protège l'humanité de l'homme. La société ne peut se donner des normes arbitraires. Celles-ci doivent être fondées dans la nature des êtres humains. L'Etat est au service du bien commun de tous les citoyens, qui comporte la promotion de tous les biens nécessaires à leur perfectionnement, y compris la liberté de suivre leur conscience en matière religieuse (DH 6). Au nom du bien commun, ancré dans l'ordre moral objectif, l'Etat a la charge propre de faire respecter les droits de tous (DH 7).

L'Etat doit créer les conditions de l'exercice effectif de la liberté religieuse. Celui-ci ne peut être soumis qu'à des limitations extrinsèques pour lesquelles l'Etat a une compétence propre, à savoir la protection de l'ordre, de la sécurité et de la moralité publique ainsi que la protection des droits des tiers.

## **Difficultés**

Pourquoi jusqu'au milieu du XX<sup>e</sup> siècle, l'Eglise s'est-elle montrée réticente devant la question des droits de l'homme modernes et le droit à la liberté re-

ligieuse en particulier? Cette réticence résidait d'abord dans l'incompatibilité entre la doctrine catholique de la liberté humaine et les présupposés anthropologiques des libertés modernes, conçues en termes de droits subjectifs sans référence à un ordre objectif de moralité et de vérité. Or la *Déclaration universelle* de 1948 rattache les droits à la dignité inhérente à toute personne humaine et se rapproche de la pensée sociale de l'Eglise qui fonde les droits de l'homme et donc la liberté de religion sur la nature humaine créée par Dieu.

La conception courante ramène la foi religieuse à une opinion privée. Elle tend à considérer que toutes les croyances religieuses et toutes les opinions se valent, qu'elles ont droit à la liberté d'expression en tant que croyances. En effet, dans la logique des droits subjectifs, toute l'attention va au sujet qui jouit de certaines libertés. Or la *Déclaration Dignitatis humanae* fonde le droit à la liberté religieuse sur la nature de la personne et non sur le contenu de ses croyances ni sur la part de vérité que peuvent professer les religions non chrétiennes. L'Eglise condamne toujours le relativisme et l'indifférentisme en matière de religion. La liberté de religion est justifiée par l'existence même de la vérité vers laquelle les hommes doivent pouvoir se diriger librement.

La *Déclaration Dignitatis humanae* a retenu l'attention des milieux politiques et de l'opinion publique, qui n'y ont vu que l'accent mis sur le droit individuel à la liberté religieuse. Pour un grand nombre de commentateurs, l'Eglise s'est purement et simplement alignée sur la modernité, en acquiesçant à l'indifférentisme et au subjectivisme.

En se fondant sur *Dignitatis humanae*, certains fidèles ont revendiqué un droit à la liberté religieuse à l'intérieur même de l'Eglise. La liberté de religion est un droit dans l'ordre social et civil, qui comporte le droit de sortir d'une communauté de foi si l'on est en désaccord avec elle, mais pas de changer la foi professée par cette communauté.

Dans la doctrine traditionnelle, la limitation de l'exercice de la liberté religieuse se fait selon le critère du bien commun. Ce critère a été maintenu, mais il est nommé à côté de celui de l'ordre public (DH 7). L'ordre public est un critère externe à la religion elle-même et peut se prêter à des interprétations arbitraires. En fait, le droit international ne retient que le concept d'ordre public qui est plus restrictif que le concept moral de bien commun. Il est donc urgent que les constitutions et les lois précisent les conditions précises dans lesquelles un Etat de droit peut limiter l'exercice de la liberté religieuse.

## Questions

1. Pour Vatican II la religion est affaire de choix personnel. Elle doit pouvoir s'exercer dans le cadre d'un Etat qui ne professe pas de doctrine de caractère religieux confessionnel, mais reste fondé sur la loi naturelle. Or, dans

les sociétés humaines, les rapports entre foi personnelle, religion constituée, société civile et Etat, religion et droit varient à l'infini.

2. La liberté religieuse a été pensée en fonction de l'Etat de droit occidental d'après 1945, avec la présupposition que les religions offrent toutes la même structure que le christianisme qui appelle la laïcité de l'Etat. Or, la plupart des Etats islamiques, hindouistes ou bouddhistes restent inféodés à une religion et ne laissent que peu de liberté aux minorités religieuses en leur sein. Il n'y a pas de liberté de religion dans ces contextes parce que la religion y est comprise autrement que dans le christianisme. En particulier, l'islam politique a renouvelé dans la *Déclaration des droits de l'homme en islam*, signée au Caire en 1990, sa conviction séculaire d'être une communauté à la fois religieuse et politique, détentrice de la vérité définitive et exclusive. L'islam, pas plus que les systèmes de droit extrême-orientaux, ne raisonne en termes de droits subjectifs de la personne.
3. Dans le monde occidental postmoderne, le tissu anthropologique sur lequel a été greffée la notion de liberté religieuse s'effrite, au profit d'une allergie à toute proposition de vérité. La liberté en vue de la vérité n'a plus d'appui dans les mentalités et dans les institutions. L'anthropologie de Vatican II et sa vision optimiste du rapport entre religion et société sont partout battues en brèche.
4. La liberté religieuse promue par l'Eglise catholique suppose que les Etats n'imposent pas une option religieuse confessionnelle ou une option antireligieuse, et qu'ils ne tentent pas d'établir une religion séculière de substitution. Le pari est que le lien social dans les sociétés pluralistes doit être fondé sur la liberté de religion.

La conception chrétienne de la "religio" a exigé la "libertas religionis" qui à son tour a appelé la laïcité de l'Etat. Les partisans de la liberté dans le monde peuvent remercier le christianisme des premiers siècles d'avoir dissocié la religion du pouvoir pour permettre à l'un et à l'autre de définir sa nature et sa finalité sur son propre terrain. La dignité de la personne est le fondement et de la liberté de religion et de l'éthique sociale naturelle qui exige que cette liberté puisse s'exercer.

# POLITICAL PLURALISM AND RELIGIOUS LIBERTY: THE TEACHING OF *DIGNITATIS HUMANAЕ*

■ F. RUSSELL HITTINGER

## Introduction

I begin with a simple observation that might seem to be a truism. *Dignitatis humanae* is document about religious liberty. Religious liberty is seen first and foremost from an anthropological and moral perspective, enriched by revealed theology. It is not seen chiefly from the standpoint of the state, nor even from the standpoint of canonical law.

In this paper I consider the implications of this simple point. I begin by showing why it proved difficult for the Second Vatican Council to pull together this little document without becoming mired in so many philosophical, theological, and jurisprudential details that the effort would have been useless. After briefly considering the structure and summarizing its teaching, I show how *DH* can comport with many kinds of constitutional regimes. I conclude on a point that is almost as simple as where I began. *DH* does not impose a unitary model of regime for the relationship between religion-society-state. Hence, the title of my paper: *Political Pluralism and Religious Liberty*.

## At the Council

In his opening allocution to the Council, Pope John XXIII twice raised the subject of religious liberty. He took note of the absence of many bishops who were imprisoned or otherwise impeded by their governments from attending. He also admonished ‘the prophets of gloom’ by pointing out that ‘these new conditions of modern life have at least the advantage of having eliminated those innumerable obstacles by which, at one time, the sons of this world impeded the free action of the Church’. ‘In fact’, he continued, ‘it suffices to leaf even cursorily through the pages of ecclesiastical history to note clearly how the Ecumenical Councils themselves ... were often held to the accompaniment of most serious difficulties and sufferings because of the undue interference of civil authorities’.<sup>1</sup>

<sup>1</sup> *Gaudet mater* (October 11, 1962), *Sacrosanctum Oecumenicum Concilium Vatican II, Constitutiones, Decreta, Declarationes* (Vatican City: Libreria Editrice Vaticana, 1993), 860.

Pope John was not referring to ancient history. The First Vatican Council was conducted under the cloud of threats by some European governments to intervene, or at any rate to make life difficult for bishops who chose to vote in favor of papal jurisdiction and infallibility.<sup>2</sup> The more senior bishops assembled in 1962 would have remembered that at the papal conclave of 1903 the Emperor of Austria effectively exercised the so-called *ius exclusivae*, the right of vetoing a papal candidate.

The Pope's rather pointed comments were less about religious liberty in general than they were about the relationship between the Church and temporal governments. But he soon indicated that the time was opportune to step back from the conventional and somewhat narrow rubric of church-state relations and to contemplate things from a broader point of view. The time was opportune for many reasons. For the first time since the 18<sup>th</sup> century Rome enjoyed cordial relations with the western states. Not, of course, in the east, where some 55 million Catholics were under Communist regimes, and not with regard to all of the political parties in the west. But, on the whole, the post-war recovery had changed the climate of church-state relations without anyone needing to issue formal statements to that effect. Pope John aptly said in his allocution that 'history is the teacher of life'.

Was it necessary to rehearse ecclesiastical public law in a combative spirit?

For another thing, during the long pontificate of Pius XII magisterial thought on religious liberty seemed to evolve. Without saying that the Church was ready to abjure or relinquish political privileges in certain states, Pius maintained that the Church preferred to act within society *in profundità*, suggesting that an honest liberty would suffice for evangelization of society.<sup>3</sup> He was the first pope to use the term *sana laicità* of the state.<sup>4</sup> He searchingly pondered the grounds on which international agreements could secure religious pluralism even in predominantly Catholic countries.<sup>5</sup> These Pian lines of thought seemed to bring liberty and society into the foreground. Furthermore, even before the Council, it was well known that religious liberty also involved ecumenical relations with non-Catholic Christians, inter-religious dialogue with Jews, and with other non-Christians, as well as dialogue with non-believers. These represent what can be called a dialogical rather than juridical challenges.

<sup>2</sup> *Pastor aeternus* (1870).

<sup>3</sup> Consistory Allocution of 20 Feb 1946, AAS 38 (1946), 143.

<sup>4</sup> '[T]he legitimate healthy laicity of the State is one of the principles of Catholic doctrine'. *Alla vostra filiale*, March 23, 1958, AAS 50 (1958), 220.

<sup>5</sup> *Ci riesce*, Dec. 6, 1953, AAS 45 (1953), 794ff.

Interestingly, it was along this latter front that the move was made directly toward the subject of religious liberty during the first session of the Council (11 October to 8 December 1962). Only eleven days after his opening allocution, Pope John raised the Secretariat for the Promotion of Christian Unity to the same rank as the Council Commissions, thus empowering it to submit schemata. In the preparatory phase to the first session, two draft texts on the Church (*Scheme Constitutionis de Ecclesia*) included a chapter entitled ‘On the Relations Between Church and State’. Had the issue remained in that context, it would have been considered solely in the light of ecclesiastical public law. Now, having been empowered to submit schemata, Cardinal Bea’s Secretariat produced a document that was first entitled ‘Freedom of Cult’, and a few months later, ‘On Religious Freedom’.<sup>6</sup>

Second, in December of 1962, shortly after learning from his physicians that he had a terminal cancer, Pope John instructed Msgr. Pietro Pavan of the Lateran to draft a new encyclical, which would be called *Pacem in terris*. The drafting committee understood that one sentence in particular would have a direct effect on the schemata being drawn by the commissioners – ‘Also among man’s rights is that of being able to worship God in accordance with the right dictates of his own conscience, and to profess his religion both in private and in public’.<sup>7</sup> (§14) But, in order to allow the Council to exercise its full deliberative weight, these sentences on religious liberty were carefully, even somewhat ambiguously, written.

Published on Maundy Thursday, Pope John christened *Pacem in terris* his ‘Easter gift’.<sup>8</sup> It was also called his ‘last will and testament’, because he died on 3 June 1963. For our purposes, it was his own, indirect schema for a number of issues that would come before the second session of the Council (29 September to 4 December 1963), including religious liberty.

### Instructive difficulties

Yet the process of creating a document on religious liberty turned out to be very difficult. The secular and religious media reported that the dif-

<sup>6</sup> As it turned out, the Secretariat prepared and presented three documents in addition to *Dignitatis humanae: Unitatis redintegratio* (ecumenism), *Nostra aetate* (non-Christian religions), and *Dei Verbum* (Divine Revelation), which was done in cooperation with the Doctrinal Commission.

<sup>7</sup> In fact, the right of religious conscience received more internal discussion and debate than any other theme of the encyclical during its drafting process. Alberto Melloni, *Pacem in terris: Storia dell’ultima enciclica di Papa Giovanni* (Roma: GLF, Editori Laterza, 2010), ad passim, and the appendices.

<sup>8</sup> Message of 12 April 1963, AAS 55 [1963], p. 400.

difficulties were caused by intransigent cardinals and bishops who wished only to affirm the already standing ecclesiastical public law on church-state relations. The chief difficulties however were much more mundane. They inhered in the subject matter of religious liberty.

We have already noted that from the preparatory stage to the second session of the Council religious liberty was considered from more than one point of view: (1) under 'relations between church and state', (2) under 'ecumenism', specifically in terms 'freedom of cult', (3) under Pope John's broad historical picture, (4) under the category of human or natural rights introduced by *Pacem in terris*, (5) and, finally, in November 1963, under the more general rubric of 'religious freedom', but still as a sub-section in a proposed decree on ecumenism.

A year later, in November 1964, after more than four hundred suggestions and emendations, a draft was presented as an independent document with the title 'Declaration on Religious Freedom or on the Right of the Person and of Communities to Freedom in Matters Religious'.<sup>9</sup> The text, now having swollen to twice its original size, was fraught with historical, legal, political, philosophical and theological issues.

Ordinarily, a declaration would be a shorter and more concise statement.<sup>10</sup> Not surprisingly, further discussion was deferred to the next session of the Council.

During the drafting process, some bishops worried about the strictly philosophical questions (e.g. the precise meaning of conscience, and drawing proper distinctions between its subjective and objective conditions); some bishops worried about practical items (e.g. the effect of the Declaration on concordatory states); others worried about ideologies (e.g. indifferentism and laicism); still others about how to interrelate canonical, international, and natural rights. On the extremes, some wished for the document to clearly and decisively rehearse and to settle the broken history of church-state relationships going back over several centuries.

<sup>9</sup> As it first stood as §§25–31 in the schema on ecumenism, the text was called *Declaratio prior* to distinguish the theme of religious liberty from *Declaratio altera* dealing with Jews and non-Christians. Later in this session, as it became an independent document, it was called *Textus emandatus*.

<sup>10</sup> *Dignitatis humanae* is a *declaratio*, which differs from a *constitutio* and a *decretum*. Constitutions and decrees have binding force upon the whole Church. A declaration, on the other hand, is reserved for matters and persons who are not under the public law of the Church. Hence, the document on non-Christian religions (*Nostra aetate*, 1965) is also called a *declaratio*.

Gradually, by trial and error, the Commission and the conciliar bishops realized that the Declaration could not do all of these things. It could not convey the entire complexity of the subject. But this did not indicate an intellectual or moral deficiency so much as a healthy respect for the subject matter.

In the final session of the Council, the text underwent four major revisions, incorporating more than two hundred suggestions. An initial vote yielded a large number of *placet juxta modum* votes (agree with modifications). Several hundred more corrections were introduced. By the time of the final vote in December 1965, more than two thousand suggested corrections (*modi*) had been considered. On December 7, 1965, Pope Paul VI promulgated the Declaration on Religious Liberty.<sup>11</sup>

Compared with the great conciliar constitutions (for example, *Lumen gentium* and *Gaudium et spes*), where the Council broadly spoke its mind and supplied exceedingly rich contexts for taking stock of things, *Dignitatis humanae* is very short, terse, and anything but loquacious.<sup>12</sup> Its restraint however should not be interpreted as a mere compromise.

The better interpretation is that the Commission and the Council achieved a ‘middle position’ between the wide array of conceptual issues on the one hand and the details of particular institutions, policies, and diplomatic tactics on the other. *Dignitatis humanae* leaves both poles intact. It begins with the dignity of the human person and is content to indicate the lines which connect this dignity toward both poles. *DH* declares a principle, draws only a few conclusions for the juridical and political orders. Otherwise, it allows the whole subject of religious liberty room to breathe.

### The text and teaching

*DH* begins on the historical note sounded by Pope John XXIII. ‘A sense of the dignity of the human person has been impressing itself and more deeply on the consciousness of contemporary man, and the demand is increasingly made that men should act on their own judgment, enjoying and making use of a responsible freedom, not driven by coercion but motivated by a sense of duty. The demand is likewise made that constitutional limits

<sup>11</sup> There were more *non placet* votes registered for *Dignitatis humanae* than for any other document the council approved by the council. The final tally: *placet* 2308, *non placet* 70.

<sup>12</sup> Compare *DH* to a recent American Supreme Court decision on religious displays in the public square. The whole bevy of opinions in *McCreary County v. ACLU* (27 June 2005) consists of some 25,000 words, and even then a reasonable person could be in doubt about both the principles and their application. *DH* in the Latin typical contains less the 4500 words.



should be set to the powers of government, in order that there may be no encroachment on the rightful freedom of the person and of associations. This demand for freedom in human society chiefly regards the quest for the values proper to the human spirit. It regards, in the first place, the free exercise of religion *in society*.<sup>13</sup> (§1)

Noting very briefly that the Declaration ‘leaves untouched traditional Catholic doctrine on the moral duty of men and societies toward the true religion and toward the one Church of Christ’, and that it ‘intends to develop the doctrine of recent popes on the inviolable rights of the human person and the constitutional order of society’,<sup>14</sup> the Council resists the temptation either to give a grand narrative of the whole story or to bite on every interesting question that could be brought to the subject.<sup>15</sup>

Once we respect the boundaries of the document, especially its silences, the teaching can be rather quickly summarized.

Under the heading of religious liberty ‘in general’ [*ratio generalis*] (§§2–8), *DH* treats human dignity according to the natural law, but also as the demands of human dignity have become ‘more fully known to human reason through centuries of experience’ (§8):

- The right of religious liberty is grounded in human dignity. The human person has the capacity and the moral obligation to pursue

<sup>13</sup> The term *in societatem* recurs throughout *DH*. Religious liberty is not exercised exclusively in the face of the state, but more generally in the public square. The term marks off *DH*’s position from the old shibboleth ‘a free church in a free state’.

<sup>14</sup> The addition of ‘and societies’ was meant to rule out any indifferentism or individualism in the notion of the duty. This is confirmed by Jérôme Hamer, peritus for the Secretariat of Christian Unity. *Il s’agit ici de tous les groupes sociaux depuis les plus modestes et les plus spontanés jusqu’aux nations et aux États, en passant par tous les intermédiaires: syndicats, associations, culturelles, universités*... Jérôme Hamer, ‘Historique du texte de la Déclaration’. *La liberté religieuse*, Unam Sanctam, vol. 60, Sous la direction de J. Hamer et Y. Congar (Paris: Éditions du Cerf, 1967) 99–100. This is neatly summarized in the *Catechism of the Catholic Church*, §2105.

<sup>15</sup> The Commission’s relator, Bishop Emiel-Josef De Smedt, commenting on §1 of *DH*, explained that the document’s relation to past popes is ‘a matter for future theological and historical studies to bring to light more fully’ [*in futuris studiis theologicis et historicis haec materia in plena luce ponenda erit*]. The present document, he says, does not cancel Leo XIII’s position on the moral duties of public authority; rather, it highlights the complementary duty of the same authority: namely, the exigencies of the dignity of the human person. ‘The special object of our Declaration is to clarify the second part of the doctrine of recent Supreme Pontiffs – that dealing with the rights and duties which emerge from a consideration of the dignity of the human person’. Thus need to add the word *recentiorum*, ‘recent’ popes. ASVol. IV, Part VI, p. 719. Congregatio Generalis CLXIV, 19 Nov. 1965. *Acta Synodalia Sacrosancti Concilii Oecumenici Vaticani Secundi*. Rome, (Vatican City: Typis polyglottis Vaticanis, 6 vols. 1970–1978).

- truth and to adhere to it once it is found. The moral obligation can be satisfied only by free intellectual and volitional acts.<sup>16</sup> (§2)
- Religious acts have the additional dimension of being ordered to God, and therefore transcend the order of terrestrial and temporal affairs. (§3) Injury is done both to the human person and to order established by God if the free exercise of religion in society is denied.
  - The right of religious liberty includes the social nature of the human person. The social dimension covers a broad range of actions: mutual assistance of inquiry, communication, instruction, and dialogue. (§3) The social dimension especially includes the family and religious communities who rightfully enjoy their internal solidarity and authority. (§§4,5)
  - Both dimensions, the actions of the person and religious communities, require constitutional protection as a civil right. (§2) Constitutional protection of freedom of worship is not enough. (§15)
  - Government should show favor upon and assist the exercise of religious liberty (§§3,5), but it would transgress its power to direct or impede [to take over] religious acts.
  - In certain circumstances, special recognition in a constitution may be given to one religious community, provided that the rights of others be protected. (§6)
  - Government has a special duty to curtail abuses in the name of public order, but such measures must conform to the objective moral order. (§7)
  - Care of the right of religious liberty<sup>17</sup> belongs to the whole citizenry, social groups, the Church and other religious communities in the manner appropriate to each. (§6). Beyond the immediate issues of law and public order the ‘usages of society’ are presumed to be uses of freedom in their full range. (§7)

The second part, ‘in the light of Revelation’ [*libertas religiosa sub luce Revelationis*] (§§9–15), treats human dignity as it pertains to the conduct of Christians, and the institution and doctrine of the Catholic Church:

<sup>16</sup> Therefore it is a strong right. Freedom to seek and adhere to the truth can neither be taken nor relinquished. *DH* does not explicitly use the term, but this looks like an inalienable right. An act of conscience, for example, cannot be out-sourced without ceasing to be an act of conscience.

<sup>17</sup> Notice that the more traditional term *cura religionis* which once fell on the shoulders of Catholic sovereigns has become *cura iuris ad libertatem religiosam*, now shared by everyone according to a principle of subsidiarity.

- The dignity of assenting to the truth and of making a free response to the Word is an intrinsic part of the Gospel, therefore Christians ought to respect religious liberty all the more conscientiously. (§9)
- The work of Christ is not one of wrath or political force, but of rousing faith in humility, patience, and love. (§11) It is the prerogative of God, not of temporal authorities, to sort out the cockles from wheat. The disciple, therefore, is forbidden both to ask for and to ‘use means that are incompatible with the spirit of the Gospel’. (§14)
- The freedom of the Church ‘is the fundamental principle in what concerns the relationships between the Church and governments and the whole civil order’.<sup>18</sup> (§13)
- The Church claims freedom as a spiritual authority established by Christ, upon rests the duty to preach the Gospel to all men. (§13)
- ‘At the same time, the Christian faithful, in common with all other men, possess the civil right not to be hindered in leading their lives in accordance with their consciences. Therefore, a harmony exists between the freedom of the Church and the religious freedom which is to be recognized as the right of all men and communities and sanctioned by constitutional law’. (§13)
- The liberty of the Church therefore includes the individual and corporate liberties outlined in the first part of *DH* (*ratio generalis*) as well as the specific ‘independence’ of her mandate by Christ spelled out in the second part (*sub luce Revelationis*).<sup>19</sup>

### Liberty and pluralism

Three dimensions of pluralism are presupposed in the document and in light of what it calls ‘recent papal teaching’.

First, and most importantly, *DH* presupposes that church, state, and society are distinct spheres. Society does not ‘belong’ to either the state or the church. The individual who possesses the right of religious liberty has plural memberships which cannot be reduced to one another. Second, *DH* presupposes that there is more than one legitimate form of government. Neither the doctrine nor the discipline of the Church require a unitary model

<sup>18</sup> Preeminently, the Church’s freedom is not the *cura religionis* or the *cura iuris* but the care for the salvation of men, *quantum salus hominum curanda requiratur*. (*DH*, §13)

<sup>19</sup> ‘The civil right is grounded in human dignity, not only as it is understood at the historical and philosophical plane, but also in the light of what the Church understands about herself’. John Paul II, *Redemptor hominis* (1979), §12.

of what must count as a political constitution. Leo XIII, Pius XII, and John XXIII insisted that the people enjoy the right to adopt a suitable form of government.<sup>20</sup> This liberty is held to be a natural right in *Pacem in terris*.<sup>21</sup> Third, because religious liberty includes the right of social communication and social formations, the document assumes social pluralism.

This last assumption deserves one more distinction. It is a *fact* that in many countries we find a plurality of beliefs, confessions, religious organizations which themselves exist alongside a plurality of beliefs and associations of those who hold no religion. The right of religious liberty applies precisely to those facts. On the other hand, even if there were a common religion, a principled pluralism would still obtain. It ensues upon man's social nature. This principle is recognized canonically within the society of the Church, and it obtains even more broadly in society as envisaged by *DH*.<sup>22</sup>

Although *DH* has a few important things to say about the responsibility of the state, *DH* does not develop the right of religious liberty from the standpoint of the state. By the 'standpoint of the state' I mean the typical horizon orienting state officials and their lawyers: the preservation of sovereignty, management of conflicts and interests according to the rule of law, and construction of jurisprudential theories and arts to guide laws, policies, and adjudication of cases. *DH* says virtually nothing about the various kinds or 'forms' of states.<sup>23</sup> It says almost nothing about 'establishment' of religion.<sup>24</sup>

<sup>20</sup> Leo XIII: it is not 'of itself wrong to prefer a democratic form of government' [*Libertas* (June 20, 1888), *Acta* 8:245]; it is not for the prudence of the Church 'to decide which is the best amongst many diverse forms of government and the civil institutions' [*Sapientia* (Jan. 10, 1890), *Acto* 10:28]. 'in the order of speculative ideas, Catholics, like all other citizens, are free to prefer one form of government to another precisely because no one of these social forms is, in itself, opposed to the principles of sound reason nor to the maxims of Christian doctrine' [*Au milieu* (Feb. 16, 1892), *Acta* 12:28-29].

<sup>21</sup> 'The fact that authority comes from God does not mean that men have no power to choose those who are to rule the State, or to decide upon the type of government they want, and determine the procedure and limitations of rulers in the exercise of their authority. Hence the above teaching is consonant with any genuinely democratic form of government'. *Pacem in terris* (April 11, 1963), AAS 55:271.

<sup>22</sup> Baptized Catholics, for example, enjoy a right to establish and direct associations which serve a charitable or pious purpose, to hold meetings, and to pursue their purposes by common effort. CIC (1983), Can. 215.

<sup>23</sup> The only reference is at §15 where *DH* laments the fact that certain *regimina* (regimes) protect freedom of religious worship but otherwise aim to deter and to make life difficult for those who would profess a religion.

<sup>24</sup> The only reference is at §6 where *DH* notes the 'peculiar circumstances' obtaining among 'peoples' where special civil recognition is given to one religious community.

And it refrains altogether from using labels drawn from political ideology, such as ‘the laicist state’, ‘the Catholic state’, ‘the neutralist state’.

Even so, there are implications for the organization and conduct of governments at least regarding the ‘module’ specific to religious liberty. For the purpose of displaying these implications, and from the point of view internal to the document, I include five figures. These figures will help us to see (in a sketchy and initial manner) that while *DH* rules out some religion-state regimes, it does not require a unitary model for rest.

These figures are my own adaptations of W. Cole Durham’s chart depicting the continuum of religious liberty.<sup>25</sup> Durham devised the chart for the purpose of his work in comparative law. That is not my aim here, for I am only trying to establish that there are and can be plural, legitimate religion-state regimes. With the proviso that his terminology does not exactly match that of *DH*, the chart is useful for initially mapping *DH*’s teaching onto a spectrum of religion-state regime.

**Figure 1** (see p. 677)

Along the upper and lower figure we see two parallel tracks. The upper track represents a spectrum of positions which have been, or might be, adopted by governments embracing a strong or weak version of *cura religionis*. ‘Care of religion’ is a term of art in Catholic history. It means that the sovereign bears a responsibility and a right to care for, to protect, and to promote a religion. Beginning at the neck (to the right), ‘care of religion’ can run from sanctified kingship which is virtually sacramental in nature, to strong establishments in the early modern period, to rather weak endorsements.

The lower track represents a spectrum of positions of governments which abjure ‘care of religion’. But, of course, they cannot help but ‘care *about* religion’. Beginning at the neck (to the right), the positions can run from a totalitarian state that represses religion, to secularist regimes which regulate religion wherever it overlaps in society with the dominion of government.

Both tracks begin and end in the same place, albeit for different reasons. The parallel tracks at the extreme neck effectively cancel the distinction between society, church, and state. There is no right of the human person to move within or between these integrated facets of a single membership and jurisdiction. At the other end are arrayed converging positions which give optimal room for that distinction.

<sup>25</sup> W. Cole Durham, Jr., ‘Perspectives on Religious Liberty: A Comparative Framework’, *Religious Human Rights in Global Perspective*, Eds. Johan D. van der Vyver and John Witte, Jr. (Martnus Nihoff, 1996), 23.

**Figure 2** (see p. 678)

The second figure fills out some of the more familiar, restrictive positions at the neck of the figure. DH's opposition to those at the far extreme are self-evident. Religious actions and memberships are prescribed or proscribed with the sanction of criminal law. Citizenship is tightly integrated with religious membership, or lack thereof. In the middle portion of the figure, important sectors of religious liberty are left to the superintendence of the state – again, for different reasons.

Early modern establishments in Europe, for example, instituted monopolies for certain churches. But because the monopolies are creatures of the sovereign, his prerogative prevails both as to the temporal governance of the church and the exceptions and immunities which provide some toleration for other religions. Thus arose various ministerial offices to regulate the monopoly and to develop policy regarding other religious groups. A minority religion, for example, might be permitted the name of an assembly but not a church; permitted to worship but not to use steeples or bells.

The parallel would be secularist regimes which protect freedom of thought and worship, yet retain the prerogative to regulate religion insofar as it touches upon the public sphere. On the view that legal personality is exclusively a creature of the state, and that the state must never use its law to empower specifically religious institutions, legal personality might be denied altogether or refashioned to describe the religious group in neutral terms. For example, a monastery is given legal berth as an association of pottery makers. Here, the ministerial offices, often with the same name as the ministries of the confessional regimes, have the function of protecting the secularity of the state.

**Figure 3** (see p. 679)

They are ruled-out for two kinds of reasons, corresponding to the two parts of the document. First, according to the natural right delineated as religious liberty 'in general' (§§2-8). Second, according to the Church's understanding of itself 'in light of revelation' (§§9-15). The theological opposition pertains especially to the upper scope of the figure. Here, the 'care of religion' does not comport with the Church as instituted by Christ in a corporate body distinct from, and independent of the state. Confessional regimes in the middle represent what John XXIII was referring to in his opening allocution to the Second Vatican Council, when he said that however well-intentioned the princely care of the Church amounted to undue interference.

But the spectrum of positions along both parts of Figure 3 can be understood without special reference to the Catholic Church. Insofar as they

attack, obscure, or impede the individual right of religious liberty, the rights of families, and the rights of religious bodies and associations they are excluded by the *ratio generalis* of the document.

Whatever was the historical provenance of these restrictive or outright repressive regimes, *DH* would count them as dead-ends in view of the principles of religious liberty. In countries historically shaped in Latin Christianity, the establishments have eroded by the slow grind of modern history.<sup>26</sup> But established religions and puppet churches continue to exist in significant regions of the non-Christian world. Moreover, the handy device of government ministries to control religion is used assiduously in some countries.<sup>27</sup>

**Figure 4** (see p. 680)

The fourth figure depicts a rather broad spectrum of positions which are ‘live’ options. While some may be more agreeable, and while others may be perilously close to ‘dead ends’, none are absolutely ruled out. Here we enter the great ‘middle’, which can be characterized as a gamut of positions and institutional arrangements of peoples who seriously subscribe to a principle of religious liberty.

These arrangements are legitimately debatable, and choice of one or another ultimately will depend upon prudence. By prudence, I mean both prudence in devising constitutions suitable to a particular people, prudence of interpretation, and the prudence of particular laws and policies.

Taken as a whole, and in light of surrounding magisterial and conciliar documents, *DH* should be located in the frontier where Professor Durham’s chart puts cooperation and accommodation. We can call it a proactive concordia. Individual believers and religious groups have the right to communicate the value of their doctrine in what concerns the organization of society

<sup>26</sup> The obsolescence, for example, of the regime in the Wallis & Futuna Islands, in Oceania, where, until recently, failure to attend mass was punishable by the fine of a pig. Until 1970, the Catholic bishop held the title ‘co-prince’ of the kingdom. *World Christian Encyclopedia. A comparative study of churches and religions in the modern world, AD 1900–2000*, David B. Barrett ed. (Nairobi and Oxford: Oxford University Press, 1982), 749.

<sup>27</sup> As of 1980, there were still forty such ministries worldwide. *Ibid.*, map 3, at 866. Perhaps the most interesting example is the Indonesian Ministry of Religious Affairs. It is a case study of how a quasi-executive organ of the state can monitor, control, regulate religious matters, large and small. Virtually every position sketched in figure two is in evidence, willy nilly, in the activities of the Indonesian ministry. See the United States Dept. of State, *2009 Report on International Religious Freedom – Indonesia* (Oct. 26, 2009).

without presuming to impair the proper function of government or the rights of other citizens (§4); government should create conditions fostering religious life so that society may benefit from the moral capital (§6); government ought to take account of the religious life of citizens and show it favor, but not presume to command or inhibit it (§3). Harmony, moreover, is not determined exclusively by church and government, but more broadly by the ‘usages of society’ which are to be uses of freedom in their full range (§7).

If we strike the term ‘proactive concordia’, and adopt instead the slightly (but importantly) different term ‘accommodation’, we are still within the orbit of *DH*. For accommodation also suggests a principle of generosity. When government enters social territory already occupied by the religious actions, customs, and institutions of a society it will accommodate them *without pretending to identify religion and the state*. We can consider a broad range of issues: burdens of religious conscience, religious rights of families with regard to mandatory education (§6), provision for chaplaincies in the military, as well as the moral and religious sensibilities of health care practitioners and religious institutions devoted to works of mercy. Within American constitutional law, for example, accommodations can be mandatory or merely permissive. Yet the spirit of accommodation is fairly simple: Do no harm. That is to say, avoid unnecessary disruptions of society, and moderate potential conflict between religion and government by deferring whenever possible to ordered liberty compatible with the common good.<sup>28</sup>

Cooperation and accommodation do not represent the exact terminology of *DH*, but it seems to me that they do not misrepresent it either. Each is compatible with what Pius XII and Benedict XVI mean by ‘healthy secularism’.<sup>29</sup> Religion is not inside the state nor is the state inside religion.

<sup>28</sup> *DH* is silent on the issue of direct funding of religion by the state, and for good reason. First, neither of these positions which we have characterized as cooperation and accommodation entail state funding. Second, funding is a vexed issue that defies easy pronouncements from on high. Third, funding is usually determined by many factors other than religion.

<sup>29</sup> ‘The Agreement, which contributed largely to the delineation of that healthy laicism which denotes the Italian State and its juridical ordering, has evidenced the two supreme principles which are called to preside over the relations between Church and political community: that of the distinction of realms and of collaboration. A collaboration motivated by the fact that, as Vatican Council II taught, between both, namely the Church and the political community ‘even if with different title, are at the service of the personal and social vocation of the same human persons’ (Constitution ‘*Gaudium et Spes*’, No. 76). Benedict XVI, letter to the President of Italy, Giorgio Napolitano, on the occasion of the 150<sup>th</sup> anniversary of Italy’s political unity. Delivered by Cardinal Tarcisio



Each is at service of the same human person, and ordinary persons are at liberty to be of service to their polities, societies, and religions.

Figure 4 displays still other positions.

*Gaudium et spes* asserts: ‘The Church, by reason of her role and competence, is not identified in any way with the political community nor bound to any political system. She is at once a sign and a safeguard of the transcendent character of the human person’. The Church, it continues, ‘does not place her trust in the privileges offered by civil authority. She will even give up the exercise of certain rights which have been legitimately acquired, if it becomes clear that their use will cast doubt on the sincerity of her witness or that new ways of life demand new methods’. (§76)

Privileges are not required, but they are not absolutely forbidden by the Council. *DH* §6 refers to the ‘peculiar circumstances’ in which one religion is given special recognition in the constitutional order. Importantly, *DH* does not limit the ‘peculiar’ circumstances to the Catholic Church, but to any church or religion. It is not incompatible with religious liberty, provided that the rights of all citizens and religious communities to religious liberty is ‘recognized and made effective in practice’.

What does this rather terse sentence cover? It covers what Professor Durham labels ‘endorsements’ of the kind which comport with equal treatment in every other respect. The continuum of such endorsements cannot be neatly captured by a single term. There are strong endorsements which, in reality, are weak establishments. We can think of national religions in the U.K. and some Scandinavian countries, and on the Catholic side in Malta and Monaco. We can also think of concordatory regimes which are not accompanied by a state or official religion, such as in Italy, Poland, and Ireland. For its part, Italy has reached agreements with no fewer than six different religious groups and is negotiating yet another six.<sup>30</sup> Endorsements can also include constitutional preambles recognizing the religious convictions of the people or the majority of the people.

Depending on the circumstances, these endorsements might be imprudent on the side of either the government or the particular religion. They

Bertone (March 16, 2011). Healthy versus hostile secularity was explicitly discussed by the drafting committee of *DH*. See Bishop de Smedt’s relation #5 entitled *De character laicali sed non laicistico potestatis publicae*, where he distinguished *État laïque* and *État laïcisé*. Congregatio Generalis LXXXVI, 23 Sept. 1964. AS Vol. III, Part II, 352 ff.

<sup>30</sup> Andrea Pin, ‘Public Schools, The Italian Crucifix, And The European Court Of Human Rights: The Italian Separation Of Church And State’, *Emory International Law Journal*, Vol. 25 (forthcoming).

can be forbidden by the constitution of a particular people. The U.S. Constitution gives Congress no power to have a national religion in the fashion of England. They can be forbidden on the side of a particular religion or church. Old order Mennonites have theological reasons to eschew identification with Caesar. But for all of that, endorsements are not in principle ruled out by *DH*.

Nor are constitutional regimes which avow some version of ‘separation’ of church (religion) and state. *DH* does not use the term, and for good reasons. Its history is troubled.<sup>31</sup> And just as so-called endorsement regimes would have difficulty determining whether they are in some extenuated sense establishing a religion, quite normal states who avow separation are notoriously unable to give a crisp definition of what ‘separation’ means. Suppose that separation means that the state is constitutionally forbidden either to endorse or to confess a religion, to become entangled in the affairs of religion, to have religious tests for holding of civil offices, and to fund religion any direct way, which means funding for no other reason than on the merits of religion. This kind of regime is not ruled out by *DH*, which is content to allow a free citizenry to identify with religion without needing to commandeer the organs or monies of government.

A general, standing law ‘neutral’ on its face regarding religion may inadvertently impair some aspect of religious life – perhaps in rather important aspects related to the burdens of conscience. These consequences are controversial apart from anything laid down by *DH*. So-called separationist regimes are capable of protecting religious liberty along a broad continuum, including the ability of citizens at law to lodge complaints about inadvertent insensitivity.

Within this ‘great middle’ much of the work will depend upon prudence.<sup>32</sup>

The right to religious liberty can of itself be neither unlimited nor limited only by a ‘public order’ conceived in a positivist or naturalist manner. The ‘due limits’ which are inherent in it must be determined for each social situation by political prudence, according to the requirements of the common good, and ratified by the civil authority in accordance with ‘legal principles which are in conformity with the objective moral order’. CCC 2109

<sup>31</sup> Which is why the word did not gain entrance into the U.S. Constitution or the first ten amendments. In fact, the word was not used by the Supreme Court as a normative term of art until 1947.

<sup>32</sup> As Pope John XXIII counseled, creating political and juridical institutions which protect human rights in domestic constitutions and in international law needs ‘the queen of all the virtues’. *Pacem* §§160-162.

Problems emerge within the ‘great middle’ where the figure begins to tail off toward the more restrictive regimes. *DH* would have government mindful of the fact that persons are multi-dimensional: citizens, believers or non-believers, and members of societies other than the state. Where government emphasizes one so heavily that the others fade from view the person can be put at war with himself.

I give one example from the side of separationism because it is a disputed issue in our own time. When the state looks upon persons *only* as citizens, and strives to form the body politic in its various dimensions exclusively according to that point of view, it can be a species of what Pope Paul VI and John Paul II call ‘negative confessionalism’.<sup>33</sup>

Pope Benedict XVI suggests that it is the flip side to confessional monopoly.<sup>34</sup> Although important aspects of religious liberty might remain legally intact, the state acts as though it has priority access to society. As Benedict recently remarked, it is a ‘sophisticated form of hostility to religion’ precisely because it may stop well short of legal persecution.<sup>35</sup>

We are grappling here with a vice that is the obverse of a liberal virtue. Liberal societies take pride in fostering in society a robust practice of truth freely pursued and communicated. But insofar as religious reasons, and even natural law reasons, in public debate are discouraged as contrary to the letter and spirit of a democratic society, and insofar as citizens who avow such reasons are menaced by the verdict of being bad citizens, ‘life is in fact made very difficult’ for religious believers. The specifically ‘religious’ dimension of the right to religious liberty is endangered.

Negative confessionalism must be distinguished from what Professor Durham calls the ‘inadvertent insensitivity’ of regimes which separate religion and the state. A law that is *prima facie* ‘neutral’ with regard to religion can make the burdens of religious conscience more difficult to bear. But the very rubric ‘neutral’ means that it is not a pretense for marginalizing religion.

## Conclusion

Peoples who have a serious commitment to religious liberty cannot be fit into a single model governing the relationship between state, religion,

<sup>33</sup> *Confessionalismo negativo*, see Paul VI, Address to the Diplomatic Corps, 14 January 1978: AAS 70 [1978] 170; Message of John Paul II To The Secretary General Of The United Nations, To His Excellency Dr. Kurt Waldheim, Secretary-General of the United Nations Organization, Dec. 2, 1978.

<sup>34</sup> Address to Members of the Diplomatic Corps (Jan. 10, 2011).

<sup>35</sup> Message for the Celebration of the World Day of Peace (Jan. 1, 2011), §13.

and society. Even a single domestic polity can find itself gravitating toward different positions within Figure 4 (p. 670), depending on the issue under dispute, how public opinion influences the behavior of legislatures and courts, and many other factors. In the brief course of a single generation, the law of the U.S. has embraced every position in Figure 4, except endorsement and hostile confessionalism.<sup>36</sup>

Remnants of the positions which we have called ‘dead ends’ (Figure 3, p. 669) pose a different problem. If the principle of religious liberty is neither recognized nor instantiated, then we cannot start in the middle and then make fine adjustments. Rather, we can make only ad hoc agreements for some small measure of toleration or engage in broad philosophical and moral discussion about the principle of religious liberty.

<sup>36</sup> While these are outside the tent of jurisprudence, many believe that they are not.

# RELIGIONSFREIHEIT UND GEMEINWOHL

■ OTFRIED HÖFFE

## 1. Ein sperriges Thema

„Religionsfreiheit und Gemeinwohl“ – für die Rechts- und Staatsphilosophie ist das Thema sperrig. Selbstverständlich kennt sie beide Begriffe: Die Religionsfreiheit bildet einen selbstverständlichen Bestandteil der Menschenrechte, die wiederum ideengeschichtlich den Rang einer Zivilreligion der Moderne erlangt haben und in politischer Hinsicht zum Kernbestand der liberalen Demokratie gehören. Und der Begriff des Gemeinwohls, auf Griechisch: *to koiné sympheron* und im Lateinischen: *bonum commune*, ist für einen Kirchenvater der politischen Philosophie, Aristoteles, sogar das Schibboleth, das legitime von illegitimer Herrschaft unterscheidet (*Politik* III 6, 1279a17–20). Auf diese Weise hat das Gemeinwohl den Rang eines normativen Leitbegriffs. Später wird es aber von diesem Rang durch die Gerechtigkeit verdrängt, die auch den Leitbegriff für die Legitimation der Menschenrechte bildet. Aristoteles erklärt zwar im Rahmen seiner Freundschafts-Abhandlung, gerecht sei, was dem gemeinsamen Nutzen dient (*Nikomachische Ethik* VIII 11, 1160a13f.). Der Begriff des Gemeinwohls läßt aber zwei Bedeutungen zu. Entweder meint man das, was der Gesamtheit der Betroffenen, oder was jedem einzelnen zugute kommt. Man versteht es also entweder kollektiv oder distributiv.

Im ersten Verständnis, im Gemeinwohl als Sozial- oder Kollektivwohl, entspricht es der Ethik des Utilitarismus. Gegen sie richtet sich aber jenes distributive Verständnis von Gemeinwohl, das dem zweiteiligen Gerechtigkeitseinwand gegen den Utilitarismus entspricht, sowohl der Konfliktthese als auch der Prioritätsthese. Erstens kann es nämlich zwischen dem Kollektivwohl und einer Gerechtigkeitsforderung zum Konflikt kommen. Beispielsweise mag es in einer Extremsituation, etwa bei einer kollektiven Hysterie, als hilfreich erscheinen, einen Unschuldigen zu bestrafen, was der Gerechtigkeit widerspricht. Zweitens beansprucht in der Konfliktsituation die Gerechtigkeit den Vorrang vor dem Kollektivwohl. Nun gehören die Menschenrechte zum distributiven oder Gerechtigkeitsverständnis des Gemeinwohles, weshalb man, um die Zweideutigkeit im Begriff des Gemeinwohls zu vermeiden, dabei besser direkt mit der Gerechtigkeit operiert.

Freilich gibt es einige Dinge, bei denen die Differenz von kollektivem und distributivem Verständnis entfallen dürfte. Dazu gehört eine segensreiche Folge der Gerechtigkeit, die aus der Devise bekannt ist: *opus iustitiae*

pax. Vom Frieden, der hier als Werk oder Frucht der Gerechtigkeit bezeichnet wird, darf man sagen, daß er dem Gemeinwohl sowohl im distributiven als auch kollektiven Sinn dient, mithin jedem einzelnen und zugleich der Gesamtheit zugute kommt.

Wie verhält es sich aber bei der Religionsfreiheit? Die Frage nach ihrem Verhältnis zum Gemeinwohl ist für mich neu, die folgende Überlegung daher ein sehr vorläufiger Versuch. Er beginnt mit einer Vorab-Erinnerung: daß der Begriff vielseitig und vieldeutig ist. Denn beide Bestandteile, „Religion“ und „Freiheit“, folglich auch deren Verbindung nehmen im Verlauf der Zeit und in verschiedenen Kulturen eine unterschiedliche Bedeutung an. Zur Bestimmung des Verhältnisses wähle ich als Leitfaden die mit der Religionsfreiheit zusammenhängende Haltung der Toleranz (vgl. auch Höffe 2004, dort weitere Literatur). Sie hilft meinem Interesse, das Thema der Religionsfreiheit über das vorherrschende rechtlich-politische Verständnis hinaus auszuweiten.

## 2. Rechtlich und sozial

Ursprünglich bedeutet Toleranz das Dulden oder Ertragen nicht von jemandem, sondern von etwas. Als eine Art von passiver Tapferkeit bezeichnet es die Leidensfähigkeit angesichts unangenehmer Widerfahrnisse: das geduldige Ertragen von Übeln wie Schmerzen, Folter oder Schicksalsschlägen. Später, jetzt im religiösen Bereich, bedeutet die Toleranz nicht mehr das Ertragen eigener Widerfahrnisse, sondern die Duldung fremder Religionen oder Bekenntnisse. Aus einer Haltung gegen sich wird eine Haltung gegen andere; die ursprünglich individuelle und eudämonistische Tugend wandelt sich zu einer sozialetischen und moralischen Einstellung.

Diese Einstellung tritt in zwei Stufen auf. Die Elementar-, eigentlich nur Vorstufe, die passive Toleranz, begnügt sich mit einer nicht selten verächtlichen Duldung des Andersdenkenden und Anderslebenden. Die Steigerung, die aktive und authentische, wahre Toleranz läßt das nur unwillige Gelten- und Gewährenlassen des Fremden weit hinter sich. Sie bejaht das Lebensrecht des anderen, ihre Freiheit, auch ihren Entfaltungswillen, aus freien Stücken. Rechtlich verfaßte Gemeinwesen sind im schwächeren, passiven Verständnis tolerant, wenn sie keine Religion, keine Konfession, aber auch keine Leugnung alles Religiösen, *pars pro toto*: keinen Atheismus verbieten, sie also eine minimale, negative Religionsfreiheit zulassen. Sie sind im stärkeren, aktiven Verständnis tolerant, wenn sie zu einer positiven Religionsfreiheit übergehen und den Religionsgemeinschaften etwa äußere Sicherheit und geistliche Entfaltungsfreiheit sowie eine Organisationsfreiheit gewähren. Letztere muß aber nicht zu einem öffentlich-rechtlichen Status führen.

Toleranz und Religionsfreiheit kommen nun beiden Seiten des Gemeinwohls zugute. Denn sie dienen sowohl kollektiv dem öffentlichen Frieden als auch distributiv dem Interesse jedes Religionsmitgliedes, seine Religionsausübung ohne äußere, namentlich ohne rechtliche Beeinträchtigung vorzunehmen.

Der Frage, ob bei der Religionsausübung Konflikte entstehen können, gehe ich heute nicht nach. Ich gebe nur den Hinweis, daß die Frage zwei Aspekte hat: Der Konflikt entsteht entweder auf der Ebene der Regeln oder auf der der Einzelfälle. Während die Entscheidung über Einzelfälle Gerichten oder äquivalenten Instanzen obliegt, gilt auf der Regelebene die Regel zweiter Stufe, also der Grundsatz: Regeln des kollektiven Gemeinwohl dürfen nicht zulasten von Regeln des distributiven Gemeinwohls aufgestellt werden.

Zurück zum Gedankengang: Toleranz und Religionsfreiheit sind nicht lediglich von seiten einer Rechtsordnung gefragt. Es gibt sie auch auf Seiten einer Gesellschaft. Die über die rechtliche Toleranz und rechtliche Religionsfreiheit hinausreichende soziale Toleranz und Religionsfreiheit verzichtet auf jeden Konformitätsdruck und erlaubt auch in religiöser Hinsicht selbst exzentrische, etwa gegen die Religion verächtliche Lebensweisen, vorausgesetzt, diese sind gewaltfrei, besser noch: friedfertig. Denn der wechselseitige Respekt gefällt sich nicht in einem zynischen Nihilismus, der schlechthin alles gelten läßt, sowohl Lebensweisen, mit denen man sich persönlich zugrunde richtet, als auch Handlungen oder Gesetze, die andere krasserm Unrecht unterwerfen, sowohl Gesellschaftsverhältnisse, die großen Bevölkerungsteilen, etwa Andersgläubigen oder Atheisten, gleiche Chancen verwehren, als auch Kulturen, ebenso Religion, die keine anderen Kulturen oder Religionen neben sich dulden. Kein Feigenblatt, hinter dem sich eine moralische Indifferenz verbirgt, gründet eine authentische Toleranz ebenso wie eine authentische soziale Religionsfreiheit im Bewußtsein des eigenen Wertes, in Selbstschätzung bzw. im Selbstwertgefühl, sogar in Selbstachtung. Ob es Individuen, Gemeinwesen oder Kulturen bzw. Gesellschaften sind – wer Toleranz und Religionsfreiheit pflegt, sieht im anderen keinen Gegner oder gar Feind, den er gewaltsam bekehren oder aber ebenso gewaltsam überwinden müßte. Statt dessen sucht er ein Miteinander auf der Grundlage von Ebenbürtigkeit und Verständigung.

Bei der erweiterten Form von Toleranz und Religionsfreiheit, bei ihrer sozialen Gestalt, verhält es sich nicht anders als bei der rechtlich-politischen Gestalt: Sie dient sowohl der kollektiven als auch der distributiven Seite des Gemeinwohls. Denn einerseits steigert der öffentliche Friede seine Grund- und Elementarstufe, das Verbot von Gewalt, zu einer Vollendungsstufe, einem Aufblühen dank wechselseitiger Wertschätzung. Andererseits erleichtert und verbessert diese Wertschätzung die persönliche Religionsausübung: Man muß sich seiner Religion weder schämen noch sie verstecken.

### 3. Pluralismus und Toleranz / Religionsfreiheit

Seit der Bedeutungsverschiebung vom Ertragen von Widerfahrnissen zum Erdulden von Andersartigkeit hängen Toleranz und Religionsfreiheit auf eine qualifizierte Weise mit Pluralismus, auch Relativismus zusammen. Wo ein religiöser Pluralismus fehlt oder aber ein absoluter Relativismus herrscht, sind beide nicht gefragt. Gehören zum Beispiel alle Menschen aus freier Zustimmung derselben Religion und Konfession an, so braucht es weder religiöse Toleranz noch Religionsfreiheit. Ebenso wenig sind sie dort gefragt, wo vollkommene Beliebbarkeit und vollständige Gleich-Gültigkeit herrscht. Sie verlieren ihre Anwendungsbedingung, wo alle Ansichten und Lebensformen als gleichermaßen gültig gelten. Ihre Duldung des Anderen setzt nämlich nicht bloß ein Anderssein voraus, sondern auch daß einem das eigene Anderssein wichtig, das fremde aber zunächst anstößig ist. Tolerant ist nicht, wer eine aufgeklärte oder abgeklärte Indifferenz pflegt, sondern nur, wer jemanden in seinen Ansichten und Bekenntnissen, in seiner Weltanschauung oder Lebensweise erträgt, obwohl diese den eigenen widersprechen, wer also im Gegensatz zur Gleichgültigkeit und Indifferenz Zumutungen erfährt, sie im Gegensatz zur Intoleranz aber aushält.

Empirisch gesehen, verlangt der Pluralismus allein noch nicht nach Toleranz. Ist die Gegenseite schwach, kann man sie unterdrücken, bei mangelnden Skrupeln sogar ausrotten. Und sollte der Pluralismus, normativ betrachtet, ungerechtfertigt sein, müßte man ihn eher bekämpfen als dulden. Daher stellt sich die Frage der Rechtfertigung; diese ist auf verschiedene Weise möglich.

Eine erste, pragmatische Rechtfertigung des Pluralismus fällt leicht. Wer Vielfalt zuläßt, fördert, was einer Gesellschaft, die Homogenität, vielleicht sogar Uniformität erzwingt, verwehrt ist: auf der kollektiven Seite des Gemeinwohls ein reibungsärmeres Zusammenleben und auf der distributiven Seite einen größeren Reichtum an menschlicher Selbstverwirklichung.

Nach einem weiteren, ebenfalls pragmatischen Grund, jetzt auf das politische Gemeinwesen bezogen, hat der Staat hinsichtlich seiner Leitaufgaben Gerechtigkeit und Freiheit keinen direkten Zugriff auf die Wahrheit. Er muß daher deren nähere Bestimmung dem freien Spiel der gesellschaftlichen und politischen Kräfte überlassen. Auch das staatsrechtliche Prinzip der Subsidiarität (vgl. Höffe 1996, Kap. 10) und in anderer Weise die Sozialtheorie der relativ selbständigen (Sub-)Systeme wie Wirtschaft, Wissenschaft, Technik, Kultur, Recht und Politik, also die Systemtheorie, rechtfertigen einen Pluralismus. Eine mehr als nur pragmatische, eine moralische Rechtfertigung beruft sich auf ein grundlegendes Gerechtigkeitsprinzip, das gleiche Recht aller auf die Freiheit, ihr Leben in eigener Verantwortung zu führen.



Die genannten Gründe rechtfertigen freilich keinen absoluten Pluralismus. Im Gegenteil bedürfen auch pluralistische Gesellschaften einer zumindest rechtlich-politischen Einheit, die sich wiederum an aus jenen Gemeinsamkeiten wie Sprache, Kultur, Geschichte und Recht speist, die verhindern, daß aus Gegnern Feinde und aus der Konkurrenz ein (Bürger-) Krieg wird. Die politisch wichtigste Gemeinsamkeit, das Recht, gründet ihrerseits in gemeinsamen Verbindlichkeiten, namentlich den Freiheitsrechten, einschließlich der Religionsfreiheit als Bedingung gegenseitiger Anerkennung.

#### 4. Ein Blick in die Geschichte

Geistesgeschichtlich gesehen entzündet sich der Gedanke der Toleranz am religiösen Pluralismus. Dessen Anfänge reichen bis in die Antike zurück. Deren Gemeinwesen hatten zwar zunächst ihre je eigenen Gottheiten, die aber später teilweise über die Landesgrenzen hinweg verehrt werden oder deren Verehrung etwa durch Kaufleute in andere Länder mitgenommen wird. Ein weiterer religiöser Pluralismus kommt in Griechenland in dem Moment auf, in dem die philosophische Religionskritik (seit dem Vorsokratiker Xenophanes) die überlieferte, polytheistische Volksreligion aus moralischen Gründen und aus Kritik an einem Anthropomorphismus verwirft und ihr einen monotheistischen Gottesbegriff entgegensetzt.

Der religiöse Pluralismus führt nicht notwendigerweise zu Streit. Im Reich Alexanders des Großen beispielsweise, davor in Persien unter Kyros lebt eine Fülle von Religionen und Konfessionen im wesentlichen friedlich nebeneinander. Auch das vorchristliche Rom erlaubt den besiegten Völkern, ihre eigenen Kulte auszuüben, sogar sie zu verbreiten. Und der Monotheismus des Christentums ist in seiner Frühzeit nur eine von vielen, teils philosophischen, teils religiösen Sinnangeboten und Weltanschauungen.

Polytheistische Religionen tun sich übrigens mit der Duldung anderer Überzeugungen leicht: Der griechische Götterhimmel integriert ältere, einheimische Gottheiten; später verschmelzen römische Gottheiten mit griechischen, Jupiter beispielsweise mit Zeus, Minerva mit Athena. Unter Kaiser Hadrian wird in Rom sogar ein ausdrücklich allen Göttern geweihtes Heiligtum, das Pantheon, erbaut.

Diese vormonotheistische, in gewisser Weise naive, vielleicht sogar natürliche Toleranz dürfte mit dem geringen Wahrheitsanspruch polytheistischer Religionen zusammenhängen. Ohnehin enthalten sie als Poly-Theismus, als Viel-Götterei, schon in sich einen Pluralismus. Gelegentlich kommt eine Rückversicherung hinzu: In einem germanischen Fürstengrab hielt das Skelett eine Münze im Gebiß, also jenen Obulus, der nach griechischer Tradition

als Fährgeld nötig war, um den Acheron, den Fluß der Unterwelt, zu überqueren. In einer Art Pascalscher Wette hielt es der germanische Fürst für möglich, daß in der Unterwelt nicht die germanischen, sondern die (ihm über Rom bekannten) griechischen Götter herrschen, weshalb er sich zur Vorsicht eine Münze mitgeben ließ.

Viele halten die Toleranz für eine Erfindung der Neuzeit. Tatsächlich gibt es nicht bloß die genannten weit älteren Beispiele von Toleranz. Ein wichtiges Prinzip wird auch schon eineinhalb Jahrtausende vor der Neuzeit aufgestellt. Im Gegensatz zur altorientalischen Verquickung von Religion, Gesellschaft und Staat deutet die neutestamentliche Forderung „Gebt dem Kaiser, was des Kaisers, und Gott was Gottes ist“ (Mt 22, 21) eine Entquikkung an. Die davon mitinspirierten ersten Toleranzgesetze stammen vom Beginn des 4. Jahrhunderts, und das berühmte Toleranzdelikt von Mailand macht schon im Jahr 313 das entscheidende Element rechtsverbindlich: Wegen der klaren Unterscheidung von Staat und Religion steht es jedem frei zu glauben, was er will, weshalb weltliche Strafen für Religionsdelikte verboten werden.

Knapp ein Jahrhundert später erweitert der Kirchenlehrer Augustinus dieses öffentlich-rechtliche Prinzip um einen sozialetischen, allerdings nur instrumentalen Imperativ. Um den Zusammenhalt der Kirche zu sichern, rät er zur Toleranz: gegen sündige Mitchristen, gegen Juden und gegen Prostituierte; denn gegenüber der Nichttoleranz sei sie das kleinere Übel (*Epistola ad catholicos de secta donatistarum*, 9 und 44, 11). Das rasche Aufkommen von Spaltungen und Abweichungen (Häresien) aber jagt ihm und anderen Bischöfen einen derartigen Schrecken ein, daß sie bald in altorientalische Verhältnisse zurückfallen und die Religion eng an die Politik binden. Nicht selten lassen sie den Übertritt zu einem fremden Kult sogar wie ein Kapitalverbrechen bestrafen. Und der zweite große Kirchenlehrer, Thomas von Aquin, fordert zwar, die Riten der Heiden und Juden zu dulden (vgl. schon Abaelards *Gespräch zwischen einem Philosophen, einem Juden und einem Christen*), gegen Häretiker verlangt aber auch er die Todesstrafe. Sein verkürztes Verständnis von Freiheit des Glaubens hält nämlich dessen Annahme für freiwillig, den schon angenommenen Glauben beizubehalten, sei dagegen – man muß fragen: in welcher Hinsicht? – notwendig (*Summa theologiae* IIa-IIae, quaestio 10, Art. 8).

Trotz dieser „Rückfälle“ wird die Toleranzforderung nicht erst im Zeitalter der Aufklärung, sondern schon drei Jahrhunderte vorher erhoben. Dabei kommt eine neuartige Religionsfreiheit ins Spiel. Sie ist nicht mehr interreligiöser oder interkonfessioneller, sondern intrareligiöser und intrakonfessioneller Natur:

Der Philosoph, Theologe und Kirchenpolitiker Nikolaus von Kues plädiert für eine bloß im Kerndogma *eine*, in den Ausdrucksformen dagegen pluralistische Religion (u.a. in *De pace fidei*, 1453). Wenn die Religion selber, wenn auch „nur“ in ihren Ausdrucksformen, pluralistisch ist, so dient die Religionsfreiheit erneut beiden Seiten des Gemeinwohls. Während in Deutschland die Reformation beginnt, setzt sich der Erfinder einer neuen Gattung politischen Denkens und spätere Märtyrer für seinen katholischen Glauben, Thomas Morus, für Religionsfreiheit ein. Auf seiner Insel *Utopia* seien deshalb verschiedene religiöse Anschauungen, selbst Naturreligionen zu erlauben, weil man nicht wisse, „ob nicht Gott selbst verschiedenartige und vielfache Verehrung wünsche“. Die Fortsetzung spricht für eine Religionsfreiheit im zumindest distributiven Verständnis des Gemeinwohls: Man wisse nicht, ob nicht Gott „dem einen diese, dem andern jene Religion einbebe“. Die Anerkennung dieser Pluralität dient aber fraglos sowohl dem gesellschaftlichen als auch interreligiösen Frieden, mithin dem kollektiven Gemeinwohl. Außerdem, sagt Morus, würde eine wahre Religion, selbst wenn es sie gäbe, im Kampf mit Waffen nicht notwendigerweise obsiegen; eher werde „die innere Kraft der Wahrheit“ sich schließlich einmal von selbst durchsetzen (Morus 1516/1992, 186 f.).

Der Reformator Martin Luther bekräftigt theologisch die neutestamentliche Trennung von Staat und Religion, bricht aber kirchenpolitisch wieder mit einigen Toleranzforderungen. Erinnerung man sich an Morus' andere Einstellung, so ist der verbreiteten Ansicht zu widersprechen, die Toleranz sei ein protestantisches, die Intoleranz aber ein katholisches Erbe. Luther greift in seiner Lehre der zwei Reiche bzw. Regimenter „natürlich“ den neutestamentlichen Grundsatz der Entquickung auf, trennt das weltliche Regiment, den Staat, vom geistlichen Regiment, der Kirche, und erlaubt nur jenem das Schwert als Inbegriff der weltlichen Gewalt, während die durch das Evangelium begründete Herrschaft „durch das Wort und ohne Schwert“ auszuüben sei (*Confessio Augustana*, Art. 28). Trotzdem verlangt der Reformator, sowohl Juden als auch die (Wieder-)Täufer zu verfolgen; er verwirft Toleranz gegen Katholiken und nennt deren Beharren wider besseren Wissens auf falschen Glaubensvorstellungen „fürsätzliche Tyrannei“ (1541, 317).

Um der Toleranz samt Religionsfreiheit erneut zum Sieg zu verhelfen, müssen die Theologen einige Einsichten wiedergewinnen, etwa den pragmatischen Gedanke, daß man in der Regel „verirrte Seelen“ eher in Milde als mit Gewalt zurückgewinnt, ferner die theologische Erinnerung, daß der Geist des Neuen Testaments in Geduld und Liebe besteht. Dazu zählt auch die Einsicht, daß nicht nur die Annahme des Glaubens, sondern auch das Beibehalten, die Treue, ein Akt der Freiheit darstellt, weshalb Zwang nutzlos

ist, da er bestenfalls zu einem vorgetäuschten, nicht wirklichen Glauben führt. Schließlich wird anerkannt, daß selbst im Fall eines irrenden Gewissens zwar nicht der Irrtum, wohl aber der Mensch als verantwortliche Persönlichkeit Achtung verdient: Die entsprechende Toleranz und Religionsfreiheit ziehen einen scharfen Schnitt zwischen der Person und ihren Überzeugungen.

Auf der anderen, staatlichen Seite hält eine Gruppe frankophoner Intellektueller, die sogenannten Politiques, die Politische Stabilität und den Frieden für politisch wichtiger als alle religiösen Unterschiede. Um den selbstzerstörerischen Krieg der Konfessionen zu beenden, setzt der Kanzler von Frankreich, Michel de l'Hospital, schon im Jahre 1561 auf einer Versammlung der Generalstände die Verfassung des Staates gegen die Religion ab und erklärt, daß auch Menschen, die exkommuniziert sind, Bürger bleiben.

Die zahlreichen Toleranzedikte seit der Mitte des sechzehnten Jahrhunderts werden allerdings häufig bloß widerstrebend erlassen. Eine Ausnahme bildet für längere Zeit Brandenburg-Preußen; Kurfürst Friedrich Wilhelm macht als erster europäischer Staatschef die Toleranz zu einem Kernelement des öffentlichen Rechts. Daß sich am Ende die Religionsfreiheit weithin durchsetzt, ist der Anerkennung des Gemeinwohls zu verdanken, sowohl der negativen Seite, der Gefährdung seitens religiöser Kriege und Bürgerkriege, als auch der positiven Seite, der Beförderung von Wirtschaft und Wissenschaft. Intoleranz gefährdet die freie Entfaltung von Handel und Gewerbe, auch von Wissenschaft und Kunst, während tolerante Staaten wie Brandenburg-Preußen wirtschaftlich und kulturell aufblühen. Schon das aufgeklärte Selbstinteresse spricht also zugunsten von Toleranz.

Die intellektuell entscheidende Rolle spielt jedoch die europäische Aufklärung, die hier mit Grotius, Pufendorf und der (Jesuiten-)Schule von Salamanca beginnt, da sie das Recht unabhängig von Religion und Theologie begründen (z.B. Grotius, *De jure belli ac pacis*, prol. 11; Pufendorf, *De jure naturae et gentium*, I 1 und 6). Die Meinungs-, Gewissens- und Religionsfreiheit, die am Ende gegen die Reste an dogmatischer und politischer Intoleranz eingefordert wird, rechtfertigt man mit drei sich ergänzenden Strategien; sie alle setzen der Staatsmacht enge Grenzen:

Die erste, religiöse Strategie hält zum Beispiel wie Voltaire (*Traité sur la Tolérance* 1763, bes. Kap. 14) die Glaubensfreiheit für vereinbar mit den christlichen Geboten. In der Tat hat sie neutestamentliche Grundlagen, etwa das Prinzip der Gegenseitigkeit und das Liebesgebot, ferner die Bergpredigt, das Gleichnis vom Unkraut unter dem Weizen (Mt. 13, 24–30, 36–43), vor allem aber Jesu Verhalten, zur Nachfolge nicht zu zwingen, sondern einzuladen, sichtbar in seiner großmütigen Haltung gegen Sünder (Mk 2, 15–17; Lk 7, 36–50; Joh 8, 3–11). Schließlich darf man an Paulus' Mahnung zu ge-

gegenseitigem Ertragen erinnern (Kol 3, 12 f.; 1Kor 4, 12; 2Kor 11, 1; Gal 5, 13–15; s. auch 1Kor 8, 12 und Gal 3, 28).

Die zweite, staatstheoretische Strategie entläßt etwa mit Hobbes' *Behemoth* (1668, 1. Dialog) den Staat aus seiner angeblichen Pflicht gegen Religion, Kirche und die Individuen. Als eine weltliche Schutzeinrichtung habe er lediglich den Auftrag, Leib und Leben, Freiheit und Eigentum seiner Bürger zu sichern, so daß die Religion aus seiner hoheitlichen Zuständigkeit herausfällt. Freilich – ist zu ergänzen – müssen Kirche und Staat nicht beziehungslos nebeneinander stehen. Denn selbst bei einer Religion, für die wie beim Christentum das entscheidende Gemeinwesen, das Reich Gottes, nicht von dieser Welt ist, hegt eine Kirche Erwartungen, sogar Zumutungen an den Staat. Zu Recht verlangt sie dreierlei: für sich als Institution – und als gerechte Kirche auch für alle anderen Religionsgemeinschaften – die Religionsfreiheit; für ihre Mitglieder und für alle Bürger die Glaubens- und Gewissensfreiheit; und für das Gemeinwesen die Verpflichtung auf Gerechtigkeit und Frieden in Anerkennung der Würde jedes Menschen. Aus diesem Grund haben (aufgeklärte) Religionsgemeinschaften eine besondere Affinität zur liberalen Demokratie bzw. zum demokratischen Rechts- und Verfassungsstaat.

Auf der anderen Seite darf der Staat von den Religionsgemeinschaften erwarten, daß sie sich auf die geistlichen Dinge konzentrieren und vor allem die Freiheit, die sie vom Staat verlangen, die Freiheit des Ein- und Austritts, auch ihren Mitgliedern gewähren; darüber müssen sie Andersgläubigen in Respekt und Toleranz begegnen. Wenn man schon diese Forderung für eine Säkularisierung hält, so ist es jenes Minimum, das jeder Religion zuzumuten ist, zumal es deren religiösen Kern, im Fall des Islam dessen kompromißlosen Monotheismus, nicht tangiert.

Gering sind die legitimen wechselseitigen Erwartungen also nicht. Entscheidend ist aber, daß aus Sicht des Staates jeder, wie Friedrich der Große sagt (Büsching 1788, 118), nach seiner Façon selig werden darf. Ein liberaler Staat verzichtet daher auf Wahrheitsansprüche jeder, nicht nur religiöser, sondern auch wissenschaftlicher oder ästhetischer Art. Die Kirchen wiederum sind freiwillige Vereinigungen religiös Gleichgesinnter, die nach der Weisung Jesu an Petrus: „Stecke dein Schwert in die Scheide“ (Mt 26, 52; vgl. Lk 22, 49–51) auf jede Befugnis zu weltlicher Herrschaft verzichten.

Der Gläubige darf zwar das politische Gemeinwesen auf eine göttliche Anordnung zurückführen (für das Christentum Röm 13, 1–7, für den Islam Sure 3, 110 und 4, 59; für Aussprüche des Propheten siehe Lewis 1981, 222 ff.). Er darf aber weder vom Gemeinwesen verlangen, daß es selber sich für göttlich gestiftet hält und seine Amtsträger „von Gottes Gnaden“ herrschen, noch darf er gar das Gemeinwesen exklusiv mit einer bestimmten Religionsgemeinschaft

identifizieren. Selbst wenn ein Staat eher einen christlichen, ein anderer eher einen muslimischen oder einen hinduistischen ... Hintergrund hat, muß er den anderen Religionsgemeinschaften sowohl die persönliche als auch die korporative Religionsfreiheit gewähren. Sofern Religionsgemeinschaften abweichende Ansichten, Häresien, mit Ausschluß ahnden, darf diese Exkommunikation keinerlei „bürgerliche“, weltlich-staatliche Folgen haben. Vor allem dürfen die Religionsgemeinschaften kein Apostasie-Verbot, also ein Verbot, vom angestammten Glauben abzufallen, mit weltlichen Strafen erzwingen. Im übrigen haben sie selber dagegen verstoßen: sowohl die Christen als auch die Muslime oder die Buddhisten, als sie durch eine Mission der „Heiden“ nach und nach zu global verbreiteten, zu Weltreligionen wurden.

Umgekehrt steht es dem Staat nicht an, sich mit weltlicher Gewalt in Glaubensfragen einzumischen. Unnötigerweise setzt selbst eine Magna Charta der Toleranz, John Lockes berühmter Toleranzbrief, der politischen Toleranz Grenzen (1685/86): Gegen Atheisten habe der Staat keine Toleranzpflicht, will sie die Grundlage von Recht und Moral, Gott, nicht anerkennen, und gegen Katholiken, weil sie sich angeblich der weltlichen Autorität eines fremden Staates, des Vatikan, unterwerfen, so daß die Gefahr des Hochverrats bestehe. Marylands *Act Concerning Religion* (1649) hatte dagegen schon 40 Jahre vorher selbst die „verhaßteste aller Religionen“, die katholische, in den Toleranzvertrag eingeschlossen, jedoch verlangt, zumindest an Jesus Christus zu glauben. Nur Roger Williams, der Gründer von Rhode Island, formuliert von Anfang an die vollständige Gewissensfreiheit.

Eine dritte, personale Rechtfertigungsstrategie der Aufklärung geht vom einzelnen aus. Um seiner personalen Integrität willen hat er nicht bloß eine Befugnis, sondern sogar eine Verpflichtung („obligation“), nach seinem (aufgeklärten) Gewissen zu handeln. Nur dort, wo der gesellschaftliche Friede bedroht und der Bürger beispielsweise zur Meinung verleitet wird, er brauche den staatlichen Gesetzen nicht zu gehorchen, müssen, endet die Gewissensfreiheit.

Der philosophische Höhe-, aber auch Wendepunkt der europäischen Aufklärung, Immanuel Kant, nennt den Fürsten aufgeklärt, der es für seine Pflicht hält, „in Religionsdingen den Menschen nichts vorzuschreiben, sondern ihnen darin volle Freiheit zu lassen“, so daß er „selbst den hochmütigen Namen der *Toleranz* von sich ablehnt“ (*Was ist Aufklärung?*, VIII 40; zu Kants Text s. Höffe 2010). Ob aus religiösen Gründen, aus rechtliche Gründen oder wegen der personalen Integrität jedes Menschen – wer den Begriff des Gewissens ernst nimmt, muß es nach Kant jedem frei lassen, „sich in allem, was Gewissensangelegenheiten ist, seiner eigenen Vernunft zu bedienen“ (*Was ist Aufklärung?*, VIII 40).

Die drei Rechtfertigungsstrategien lassen sich noch um Argumente ergänzen, die der Rechtfertigung des Pluralismus entsprechen. Zum Beispiel sagt die Erfahrung, daß es, angefangen mit den Bedürfnissen und Interessen über Talente und den Geschmack bis zur Herkunft und die Einschätzung der gesellschaftlichen und politischen Umstände immer Unterschiede gibt. Auch ist niemand gegen Irrtümer, Vorurteile und Fehler gefeit, so daß die freie Auseinandersetzung die bessere Chance zur Wahrheit bietet als das dogmatische Beharren auf der einmal gebildeten Überzeugung. Dazu kommt ein Wissen um den Reichtum an Möglichkeiten der Selbstverwirklichung und die perspektivistische Befangenheit jeder konkreten Gestalt.

Derartige Argumente rechtfertigen Toleranz und Religionsfreiheit schon aus dem aufgeklärten Selbstinteresse. Die Klugheit lehrt, daß Intoleranz die den persönlichen und beruflichen Lebensraum einschränkt und die freie Entfaltung von Handel und Gewerbe, auch von Wissenschaft und Kunst gefährdet. Tolerante Personen können sich dagegen kreativ entfalten, tolerante Gemeinwesen blühen sowohl wirtschaftlich als auch kulturell auf. Die entsprechende nur „prudentielle Toleranz“ schließt allerdings Individuen oder Gruppen, die keinen nennenswerten Beitrag zum Wohlergehen leisten, von der Toleranz aus.

Umfassender und grundlegender als die prudentielle Legitimation ist die Rechtfertigung aus der unantastbaren Menschenwürde. Sie erklärt jeden zu einer freien und ebenbürtigen Person, ausgestattet mit dem Recht, eigene Überzeugungen zu bilden und ihnen gemäß zu leben. Vorausgesetzt ist freilich, daß man nicht dasselbe Recht aller anderen beeinträchtigt. Hier beugen sich Toleranz und die Religionsfreiheit dem Rechts- und Gerechtigkeitsinn; sie endet dort, wo Freiheit und Würde anderer verletzt werden.

Die Rechtfertigung aus der Freiheit und Würde jedes Menschen enthält also auch ein Maß für die Toleranz und ein Kriterium für ihre Grenzen. Mit der Forderung, die der interkulturell anerkannten Goldenen Regel entspringt, daß niemandem eine Freiheit erlaubt sein, die allen anderen nicht ebenso erlaubt ist, reicht die Toleranz nicht, wie der Kritiker Herbert Marcuse (1966) befürchtet, einer Verfestigung der gegebenen Verhältnisse die Hand. Noch weniger läßt sie sich auf das eigene oder fremde Erdulden von Unrecht ein. Dort, wo der Schutz der Freiheit und der Menschenwürde es notwendig machen, wird sie abgelöst von Anklage, Kritik und Protest: Als ein rechtsmoralisches, in die Gerechtigkeit begründetes Prinzip begegnen die Toleranz und die Religionsfreiheit dem Intoleranten mit Intoleranz. Zugleich zeichnet sich ein Bewertungskriterium ab: Ein Gemeinwesen und eine Kultur verdienen um so mehr Achtung, als sie die vom Gerechtigkeitsprinzip der gleichen Freiheit begründeten Menschenrechte und als eines ihrer Kernelemente, die Religionsfreiheit, achtet.

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## II. SIGNS OF THE TIMES

# MODERNITY: RELIGIOUS TRENDS

■ NICOS MOUZELIS

By conceptualising modernity in sociostructural rather than cultural terms, I will try (a) to show how modernity's sociostructural features are linked to religious developments – particularly in the anglosaxon world; (b) to examine critically the ongoing secularization debate in the social sciences. Modernity can be seen as the type of social organization which became dominant in the west after the English industrial revolution and the French revolution. It entails three broad structural traits which render modern society unique – unique in the sense that the above characteristics, in their combination, are not to be found in any pre-modern social formation. These characteristics are:

- The demise of segmental localism and the mobilisation/inclusion of a whole population into the national centre/nation state;
- The overall differentiation of institutional spheres;
- The spread of individualization from the elite to the non elite level.

## 1. Massive inclusion into the national centre: The process of religious rationalization

A) Employing Durkheimian terminology, one can argue that pre-modern, traditional communities had a non-differentiated, segmental social organization. In this respect they were self-sufficient, relatively autonomous vis-à-vis more inclusive social units. In the west, this localist self-containment/autonomy was first undermined by the absolutist model of governance which took its more developed form in Louis XIV's France.<sup>1</sup> Given technological develop-

<sup>1</sup> The French monarchy and its administration, as it was finally shaped under Louis XIV, was the prototype of European absolutist rule, a model imitated all over Europe. Up to the seventeenth century the French nobility managed to maintain some of its political functions by exercising constitutional opposition to the crown through the Estates General, and the local parliaments. But the Bourbons, unlike the English Kings, gradually managed to reduce its local power. The provincial governing positions ceased to be the hereditary fiefs of the nobility and the autonomy of the local parliaments was destroyed, their powers being regulated by the Royal Council. The famous intendants, the crown representatives to the provinces, first appeared in the sixteenth century. With their powers extended by Richelieu, they gradually managed to weaken aristocratic self-government till they became the effective masters of all local affairs. See Clark 1969: 176-97.

ments in the military sphere and inter-state competition at the time, the absolutist model, although challenged in seventeenth-century England, spread widely in continental Europe,<sup>2</sup> thus paving the way for the large-scale dominance of the nation-state in the nineteenth and twentieth centuries. This, in combination with the dominance of industrial capitalism<sup>3</sup> at about the same period, led to the gradual decline of segmental localism and the unprecedented large-scale mobilization and inclusion<sup>4</sup> of the population into the wider economic, political, social, and cultural arenas of the nation-state. This ‘drawing-in’ process can be thought of as a vast shift of human and non-human resources from the periphery to the national centre. From an actor/agency perspective it can (following Marx and Weber) be conceptualized as a process of concentration at the top of not only the means of economic production, but also those of violence/domination, as well as those of influence or cultural production. As the local economic producers, political potentates, and virtuosi of particularistic rituals and narratives were losing control and/or ownership of their means of economic, political and cultural production, there emerged not only a concentration of power in the hands of national elites, but also a shift in people’s identifications and attachments from the local communities to the symbols and ideologies of what B. Anderson has called the ‘imagined community’ of the nation-state (Anderson 1974).

What made this massive process of drawing into the centre possible was initially the extraordinary expansion of the state’s administrative and surveillance mechanisms. In fact, the nation-state, by using newly developed bureaucratic and military technologies managed to penetrate into the periphery to a degree unknown to any pre-modern, pre-industrial social formation, however complex or despotic.<sup>5</sup>

<sup>2</sup> For the spread of the absolutist state, see Anderson 1974.

<sup>3</sup> For the great transformative power of industrial capital, see Dobb 1968.

<sup>4</sup> Inclusion in this context does not necessarily entail the notion of empowerment of the population at large. Inclusion can take both autonomous and heteronomous forms. See below footnote eleven.

<sup>5</sup> For the development of such technologies which enhanced the ‘infrastructural powers’ of the state, see M. Mann 1995. It is worth mentioning here that the motor force from pre-modernity to the creation of the nation state had initially less an economic and more an administrative/political character. Given the 17<sup>th</sup> century scientific revolution and the subsequent development of formidable military and organizational technologies we see, particularly during the Napoleonic period, the creation of mass armies. Mass armies require resources which only a highly ‘penetrative’ state apparatus could extract from its subjects. These developments preceded the dominance of industrial capitalism in the late 19<sup>th</sup> century (Tilly 1975). To put it in terms of our definition of modernity, mass inclusion into the political arena preceded the mass inclusion into the national economic sphere.

B) Inclusion into the centre and the concentration of the means of economic, political and cultural production at the top meant that the pre-modern *dualism* between a traditional, non differentiated periphery and a differentiated centre was attenuated. In the religious sphere the pre-modern dualism was between an elite and a folk, popular religiosity. The former was characterised by scripturalism, a focus on sacred texts and their ‘correct’ interpretation and by an internal coherence/rationality of theological doctrine. Popular religiosity on the other hand was less ‘pure’, since communal and religious traditions were inextricably linked together – Christian religious beliefs coexisting with superstitions and magical or pagan ideas and practices. With modernization the above religious divide was attenuated as elements of the official doctrine spread ‘downwards’.<sup>6</sup>

More specifically, if we focus on pre-industrial Christian Europe, in the rural areas a hybrid situation prevailed. Christian dogmas and rituals coming from above were coexisting with non-Christian ones, the latter emanating from communal/village pagan traditions and from beliefs in magical codes, spirits, demons etc. Gradually the latter beliefs and practices were marginalised and church organizations penetrated the rural periphery, exercising a more direct influence on both local clergy and laity. The attenuation of the chasm between official and popular religiosity meant a *homogenization* of the religious sphere proper. Given that homogenization processes had on the whole a top → bottom direction, it did not necessarily lead to decreasing inequalities – rather the opposite occurred. For the homogenizing process tends to enhance the control that religious elites have over the laity. If in modernity we see a concentration of the means of production, domination and violence at the national centre, the same can be said about the ‘means of religious influence or indoctrination’. Elites at the centre are more capable of imposing religious ‘orthodoxy’ to those at the periphery.

Growing homogenization tends to increase power inequalities between religious elites and non elites; at the same time it also increases *religious rationalization*. Following Max Weber, religious rationalization not only entails successful attempts at spreading the official doctrine downwards – eliminating thus elements that are magical or foreign to that doctrine; it may also entail rendering the church’s belief system (via for instance more flexible interpretation of sacred texts) more consistent internally or more compatible with scientific developments (Weber 1978: 538ff).

<sup>6</sup> For the chasm between elite and popular religiosity in several religious traditions, see Sharot 2001.

However, if religious rationalization entails the elimination of magical elements from the ecclesiastical space, one should stress that rationalizing tendencies in late modernity can go hand in hand with ‘derationalizing’ ones. The latter tendencies may refer, for instance, to the type of hybridity which consists in combining church membership and attendance with beliefs and practices incompatible or foreign to the official dogma – such as Buddhist meditation techniques, beliefs in reincarnation etc. Therefore the pre-modern, traditional hybridity entailing a mixture of Christian and superstitious/magical elements is replaced in globalised modernity by a post-modern hybridity entailing a mixture of elements derived from various religious traditions. It may also entail the revival of magic, this time in a de-traditionalized social context.

At this point, it is necessary to examine briefly the distinction between religion and magic. The distinction is not of course clear-cut, but in ideal typical terms it is possible to differentiate the magical from the religious logic. For Marcel Mauss (1972) for instance magical practices tend to be more secretive and esoteric. The magician, in order to maintain his/her secret knowledge does not perform publicly, s/he is usually not related to any organization; s/he is self-employed, basing her/his authority less on a bureaucratic/organizational position and more on charisma and on extraordinary occult powers. Weber on the other hand stresses more the fact that magic is less oriented to the worship or contemplation of the divine and more to its use for achieving specific results: ‘Whoever possesses the requisite charisma for employing the proper means is stronger even than the god, whom he can compel to do his will. In these cases, religious behaviour is not worship of the God but rather coercion of the God, and invocation is not prayers but rather the exercise of magical formulae’ (1978: 422).

The analytic distinction between the magical and the religious, despite its fuzziness, is important to make here because the former via innumerable publications, the mass media and the internet, has ceased to characterise the activities of illiterate peasants or of a small number of initiates. As the shelves of major bookshops the world over testify, the global market for books on witchcraft, occultism, astrology and related themes is huge and growing in geometrical fashion. Perhaps nothing indicates better the global, late modern interest in the magical than the Harry Potter books which have been translated in more than a hundred languages and have sold millions of copies. Of course the interest in magicians, sorcerers and witches does not mean an active participation in or exercise of magical/occult practices. But, at least indirectly, it clearly indicates a marked trend towards the ‘remagicalization’ of the world. In the light of the above, one can argue that, on the one hand modernity’s

inclusionary processes have weakened the chasm between elite and popular religiosity, eliminating thus the magical/superstitious elements of the traditional, local communal culture – thus leading to religious rationalization. On the other hand, however, particularly in the non-institutionalized religious space of late modernity the magical reappears and acquires global dimensions, strengthening thus derationalization processes.

A last point about modernity's inclusionary processes. The spreading of elite elements 'downwards' does not only entail the trend towards religious rationalization. For if secularity (in the form of indifference to religion, agnosticism or atheism) was in pre-modern times limited among philosophers and a small fraction of the educated classes, with the advent of modernity secular orientations are also spreading downwards among people in all walks of life. This brings us to an examination of the secularization debate.

## **2. Top-down differentiation of institutional spheres: The issue of secularization**

A) Moving to the second sociostructural feature of modernity, the decline of localism and the massive mobilization/inclusion into the national centre was not merely a quantitative move from the small to the large. In systemic terms, the drawing in process took place in a context of rapid and thorough differentiation as institutional spheres (economic, political, social, religious, cultural) started portraying their own logic, their own reproductive technologies, their own historical trajectories.

Structural-functional differentiation is not, of course, unique to modernity. Complex pre-industrial social formations such as empires also portray a considerable degree of differentiation (Eisenstadt 1963). But as Marx (1964) and others have pointed out, in such societies this process was limited to the top. The differentiated parts or subsystems of the centre were superimposed on the non-differentiated, segmentally organised peripheries. This means that the degree of penetration of the centralized economic, political, and cultural apparatuses is both very weak and highly uneven (Mann 1986). It is only in modernity that differentiation took a top-down character. It reached, in other terms, society's social base.

B) The above processes had an important impact in the religious sphere. Growing social differentiation meant that religion had a lesser direct impact on the other institutional spheres – educational, recreational, professional, artistic etc. This *interinstitutional* secularization occurred gradually and had neither a linear nor a unidirectional character. For, on the one hand there was a weakening of the overall integrative role that the church was exercising in pre-modern times, but on the other hand, in late modernity there

was a process of a new involvement of the church in the political or public sphere (i.e. a process of dedifferentiation), as the clearcut distinction between 'God' and 'Caesar' was often blurred. For instance, the critique of liberal protestant religious elites in the United Kingdom against neo-liberal, thacherite social policies undermined the strict differentiation between the religious and the public sphere. And this is more so in the case of liberation theology and the dynamic political involvement of catholic priests in several Latin American countries. And equally striking, as an example of dedifferentiation between the religious and the political, is the growth of the evangelical right in the USA.<sup>7</sup> Finally the ethno-religious features of orthodox churches in eastern and southern Europe (e.g. Poland and Greece) shows if not dedifferentiation, a patriotic/nationalist resistance to the differentiation between church and polity.

All the above cases of interinstitutional desecularization/dedifferentiation however disprove the linear version of the secularization thesis but not the non linear, 'general evolution' one. At least as far as Christianity is concerned, the *overall* loss of direct control of the churches over other institutional spheres, as a general trend, is both dominant and irreversible. The crucial, society-wide integrative role of religion, its deep intrusion in all social spheres that we see in most pre-modern situations has disappeared for good – at least in the West.<sup>8</sup>

C) If in interinstitutional terms (i.e. in terms of the relationship between the religious and society's other institutional spheres) secularization as a long term process is evident, the same does not apply when we focus on developments within the religious sphere itself. Here the secularization thesis is much weaker. The strength and vitality of various denominations in

<sup>7</sup> These cases of the churches' political involvement indicate a reversal of the privatization trend which characterised the early postwar period (see Martin 2011: 23-4).

<sup>8</sup> The situation is quite different in the Islamic world. Here not only the non differentiation between polity and religion is fully legitised by the Qur'an, but also the partial secularization that occurred during the shah period in Iran was reversed by a revolution which led to a theocracy. Present day Iran is of course modern – in the sense that the core sociostructural features of modernity are present. In fact we see in the contemporary Iranian society the demise of segmental localism, state penetration of the periphery and massive inclusion into the national centre, as well as overall individualization. But the integration of the differentiated spheres is achieved in a levelling rather than balancing fashion; the religious logic penetrates and reduces the autonomy of most other institutional spheres (educational, recreational, professional etc.). Therefore in the Iranian case we do not have *substantive* but *formal* differentiation or dedifferentiation (see Mouzelis 2008: 15-1).

the USA, the rapid growth of the so-called new religious movements, the proliferation of religious informal groups or networks loosely linked to established churches and the phenomenal dynamism of Pentecostalism both in the first and third world (Martin 2005: 26-43) – all the above indicate a weakening of *intra-institutional* secularization. They indicate clearly that intra-institutional secularity is not a constitutive element of late modernity. Modern social structures are compatible with both secularity and non secularity. In other terms, further industrialization/modernization in the first and third world, contra Bryan Wilson (1966, 1982, 2001), does not necessarily lead to secularization within the religious sphere. In many cases the opposite prevails. At present the reaction to the logocentrism and to the faith in scientific and technological ‘progress’ that the 18<sup>th</sup> century enlightenment culture propagated, render atheism and particularly the militant atheism of the R. Dawkins type, rather ineffective.

Steve Bruce, in a recent attempt (2011) to defend the secularization thesis (both the inter- and intra-institutional one) considers religious liberalization as secularization. According to Bruce, once the medieval church was fragmented, there were steps towards secularity. This was true about the Reformation and even more so about the religious revival of the seventies. Given the latter’s hostility to organizational authority and its focus on individual choice, the new religious phenomena are fragile, they are bound to decline and to lead to further secularization.

However, if secularization is defined in such an all-inclusive manner, one saves the theory but at the price of reducing it to obviousness. Against Bruce’s thesis one can argue that the move from the non fragmented, traditional medieval Catholicism to the Reformation is not a step towards secularity, but towards a different type of religiosity. And the same is true about the move, following Charles Taylor’s typology (see below), from the denominational/‘mobilisation’ to the ‘expressivist’ postsecular model. That the latter, particularly when it refers to nonchurched believers, is less institutionalised, more fragile, does not mean that it is bound to fizzle out, to lead to total religious indifference or atheism.

Steve Bruce referring to Parsons’ theory of religious development, argues that ‘freedom from entanglements with secular power allowed churches to concentrate on their core task and thus become what Talcott Parsons called “a more specialised agency”, their removal from the centre of public life reduced their contact with, and relevance for, the general population’ (2011: 35-6). Now it is true of course that in terms of the differentiation between the religious from the other social spheres (i.e. in interinstitutional terms) religion, with some exceptions, has been removed ‘from the centre



of public life'. But this does not entail, in intra-institutional terms, a weakening of faith. Bruce takes seriously into account only the part of Parsonian theory which stresses the differentiation between religion and the public sphere. But he does not take into account that for the American theorist differentiation entails both the relative shrinking of the church's influence in relation to other social spheres and a certain religious deepening among believers. To take two extreme cases, the automatic, taken for granted attitude of the traditional peasant towards the church is not more 'religious' than that of today's nonchurched believers. The beliefs of the latter may be more fragile, but one can argue that, at the same time, they are more 'authentic' in the sense that they entail a continuous turning inwards, an internal process of exploration which is absent in the former case. Therefore 'fragility' is not necessarily the last step before full secularization.

As far as future developments are concerned, I think that in addition to the rapid global growth of Evangelical and Pentecostal Christianity, nonchurched religiosity – given growing individualization (see below) – has a great growth potential, particularly among the young. Bruce's idea that the young generation, through socialisation, adopt their parents' secular values (2011: 69–71) does not take into account intergenerational conflict – a phenomenon particularly marked from the counter-cultural sixties up to the present. After all, the reaction to enlightenment's faith in instrumental reason is not limited to the restricted circles of postsecular theologians and philosophers; postsecularity is also spreading downwards. I believe that this reaction, as well as the turn to an ultra-individualistic form of religiosity, is here to stay.

D) A different type of critique of the secularization thesis is developed by the distinguished British sociologist David Martin. In his more recent works (2005, 2011), he has developed a general theory of secularization. He has argued, quite convincingly, against a linear view of the secularization process. Equally convincingly he claimed that the only secularising process which is in the long term irreversible is the one linked to social differentiation.

With this as a background, he has put forward the interesting idea that, from a macro-historical point of view, rather than growing secularization or desecularisation, what we see in the west is a constant dialectic between the secular and the non-secular. Within the religious sphere there are periods of intense religious flourishing which at some point is weakening leading to secularising tendencies. In turn the latter tendencies are undermined by a new religious revival. Thus there is a tension between 'spirit' and 'nature', between a transforming Christian vision of peace and compassion and the realities of power and violence. As the spirit (divine grace) pene-

trates the ‘world’, at some point the vision’s initial élan is diminished and the religious thrust recoils.<sup>9</sup> As for the character of the recoil, it is affected by the cost that each religious drive entails: ‘Crucially I argue that instead of regarding secularization as once-for-all unilateral process, one might rather think in terms of successive Christianizations followed or accompanied by recoils. Each Christianization is a salient of faith driven into the secular from a different angle, each pays a characteristic cost which affects the character of the recoil, and each undergoes a partial collapse into some version of “nature”’ (Martin 2005: 3).

David Martin considers his secularization–desecularization dialectic as a general theory which applies at least in the Christian world, from the late antiquity up to the present. This broad scope however raises serious difficulties. When he refers for instance to the early Catholic Christianization entailing the ‘conversion of monarchs (and so of peoples)’ (2005: 3), he does not take seriously into account that secularity (in the forms of atheism, agnosticism, total indifference to religious matters etc.), during the first centuries of the church’s history was limited to the elite level. Secularity in other terms was, during this early period, an exception. The bulk of the population was religious in a variety of ways, Christian, non-Christian or mixtures of both. As I have already argued, it is only with the dominance of modernity in the 19<sup>th</sup> century that the secular as well as the religious (in its non pagan, elite form) spreads to the social base. In early Christianity as well as in the Middle Ages the major dynamic was less between the secular and the religious and more between different types of religiosity: between Christian and pagan religiosity, between eastern and western Christianity, between official versions of the Christian doctrine and a huge variety of ‘heresies’ etc. Although David Martin does not specify when the move of the monarch type of Catholic Christianization recoils or what form the recoil takes, it certainly did not take the secular form – since secularity, to repeat, was in pre-modernity restricted at the elite level.

In the light of the above I would argue that Martin’s theory makes more sense if it is applied much later, in the period (from the 19<sup>th</sup> century onwards) when the three social structural features of western modernity were becoming dominant. It is during this period that massive inclusion into the national centre, top-down differentiation and widespread individualization created a relatively differentiated, autonomous religious sphere within which

<sup>9</sup> The spirit–nature or the vision–power dialectic reminds one of Weber’s charisma–routinization dialectic (Weber 1978: 246–54). The routinization or bureaucratization of charisma is analogous to the ‘naturalization’ or institutionalization of the vision.

the chasm between official and popular religiosity receded – thus leading to the spread of elite religious elements downwards while at the same time secularity spread from intellectuals, philosophers and the educated classes to the popular strata. It is within this new ‘spreading downwards’ context that it is useful to examine the dialectic between secularization and desecularization. One sees this dialectic, as Martin points out, in the various religious ‘awakenings’ in the United States – awakenings leading to religious expansion followed by ‘recoiling’.

It should be stressed however that the recoiling of the Christian spirit may lead to ‘nature’ and/or domination; but, it may also lead to non-Christian religious traditions and subcultures. If the former can be viewed from a ‘spirit-nature’ or secularization-desecularization dialectic, the latter refers to a different type of dialectic – dialectic between Christian and non-Christian beliefs, or between different types of religious hybridities. In late modernity the turning away from the Christian faith and the consequent developments of the new religious movements or of the New Age spiritualities cannot be dismissed as trivial and as bound to disappear. Given modernity’s widespread individualization (see below), despite the lack of solid institutional supports and rituals, the new spirituality and the à la carte construction of one’s religious voyage is here to stay – even to grow. A general theory of secularization should explore the conditions under which the decline or recoiling of the Christian faith leads to secularity and those under which it leads to non-Christian or hybrid religious forms.

Another type of dialectic which is particularly important today is the liberal vs conservative one. As is well known, the counter culture of the sixties<sup>10</sup> and the new spiritualities which followed have led to a subjectivist, expressivist religiosity which stresses less attachment to sacred texts, dogmas and organizational authority and more ‘heart work’, direct experience of the divine and, more generally, the existential dimension of religious life. The rapid growth of the latter type of religious subculture has created severe tensions within the established churches between those who accepted and tried to introduce the new, liberal spirituality into the ecclesiastical order, and those conservative forces which reacted to the liberalising tendencies of sections of the clergy and laity. The extreme reaction to church liberalization occurred in the United States where the evangelical right tried to expand its message of ‘return to the fundamentals’ – a return to be achieved by media control and the creation of powerful lobbies in Congress (Am-

<sup>10</sup> On the counter-culture of the sixties and the reaction to it, see Tipton 1982.

merman 1994: 43ff).<sup>11</sup> Furthermore, the liberal-conservative religious conflict entered more forcefully the public sphere as ethical problems such as in vitro fertilization, abortion, euthanasia etc. became issues of popular concern. This brings us to the third sociostructural feature of modernity, that of overall individualization.

### 3. Overall individualization: The new spiritualities

A) As Giddens has pointed out, in traditional social orders, codes of 'formulaic truth' delineate rigidly an individual's space of decision-making. From mundane decisions concerning marriage, family size and everyday conduct, to those concerning ultimate existential problems of life or death, tradition provides recipes for action that individuals adhere to as a matter of course. In early modernity, on the other hand, traditional certainties are replaced by 'collectivist' ones. Progressivism (the Enlightenment faith in the unlimited perfectability of human beings and of social orders based on science and technical rationality), the bureaucracies of the nation-state imposing 'internal pacification' and exercising all-pervasive surveillance, collective class organization, universal welfare providing all with a minimum of security against 'external' and non-manufactured risks – all these mechanisms operate in early modernity in a manner quite similar to tradition in pre-modern contexts. They provide social members with a meaning in life and with clear guidelines or rules that drastically reduce the social spaces where decisions have to be made.

In late, globalised modernity, however, both traditional and collectivist certainties decline or disappear. Such basic developments as the globalization of financial markets and services, instant electronic communication and, more generally, the drastic 'compression of time and space' have led to 'de-traditionalization'. Via such processes as disembodiment, increases in medi-

<sup>11</sup> The liberal-authoritarian dialectic relates to modernity's inclusionary feature. In a general way, the mass inclusion into the national centre can take both autonomous and heteronomous forms. In the former case civil, political, socioeconomic and cultural rights spread downwards (e.g. 19<sup>th</sup> century England), whereas in the latter case people are 'brought in' in an authoritarian manner, without the granting of rights (e.g. 19<sup>th</sup> century Prussia). One can argue that analogous processes have occurred in the differentiated religious sphere. One can identify, on the one hand, an open, liberal inclusionary process which stresses a flexible, symbolic interpretation of the bible, gender equality, genuine respect of other religious traditions etc. On the other hand, there is an authoritarian, inclusionary mode which discourages choice and demands strict compliance to dogmas and ethical rules.

ated experience, pluralization of the life-worlds, and the emergence of contingent knowledge, detraditionalization creates a situation where routines lose their meaningfulness and their unquestioned moral authority. It creates a situation where individuals can resort to neither traditional truths nor collectivist certainties when making decisions in their everyday lives. Deprived of traditional or collectivist guidance, they must, in other words, deal with 'empty spaces'. From whether or not to marry and have children, to what life-style to adopt and what type of identity to form (even what type of physical make-up to aim for via dietary regimes, aesthetic surgery, etc.) – in all these areas the individual has to be highly reflexive, and must construct 'his/her own biography' (Giddens 1994).

One can argue of course that highly reflexive modes of existence can be found on the elite level in several pre-modern, complex societies. It is, however, only in late modernity that, given massive inclusion into the centre and top-down differentiation, subjects on the non elite level are called, under conditions of detraditionalization, to create their own rules, to create 'a life of their own' (Beck and Beck-Gernsheim 2003).

B) In the religious sphere now, the above bring us from Wilson's and Bruce's secularization thesis and Martin's secularization-desecularization dialectic to Charles Taylor's views on the secular age and beyond. The Catholic philosopher's magisterial analysis (2007) is partly based on the construction of a threefold typology. The first ideal typical model, the *ancien regime* or *paleo-Durkheimian* one is not clearly differentiated from the traditional local community. Within it the faithful do not choose – in the sense that they accept unquestionably the church's dogmas and ritual practices and are church members from birth to death. The second *neo-Durkheimian* or mobilisation model has its origins in the Reformation and refers to a situation where established churches adopt practices which focus less on dogma and strict rituals and more on a flexible, liberal framework. Particularly in the flourishing American denominations, the idea of choice becomes dominant, i.e. the idea that no church, no denomination has the monopoly of truth and that therefore the faithful have the right to explore and to choose. The third *expressivist* model, having its roots in 19<sup>th</sup> century romanticism, has developed in a spectacular manner among the youth from the seventies onwards. I will focus on the latter model since it is directly relevant to modernity's feature of widespread individualization.

Charles Taylor calls the complex of values underlying the above model *expressive individualism*. Expressive individualism reacts against dogmas and the authority of hierarchically organised religious elites. Religious truth cannot be found in sacramental mysteries, ex cathedra theological discourses or sacred

texts. The authentic search for the divine is based on unmediated experience, on a turning inwards in an attempt to approach the divine existentially, in a manner resembling more the way of the mystic rather than that of the assiduous follower of rules and beliefs emanating from priestly authority.

Expressive individualism can be found both within the established churches and outside them. In the former case one sees a growing flexibility, a tolerance of diverging religious views<sup>12</sup> as well as a more general 'liberalization' of beliefs and practices. As far as the space outside the well established religious organizations, this is occupied by the so-called new religious movements which may be Christian or may be oriented to other religious traditions (Glock and Bellah 1976; Robbins 1988). It is also occupied by fluid informal groups and networks which are usually loosely connected to more stable Christian denominations or congregations. Finally within this extra-ecclesiastical space one finds 'seekers' who are in a constant search, a continuous quest moving from one religion network or guru to another, often eclectically choosing elements from a variety of religious traditions both Christian and non-Christian.<sup>13</sup> Therefore in this particular case, in an attempt to achieve 'authenticity' (Taylor 2002: 83), the subject constructs a religious path of her/his own; to paraphrase Giddens' terminology, s/he constructs her/his own 'religious biography' (Giddens 1994). It is here of course that the individualizing, expressivist features of modernity reach their zenith.

According to Taylor this type of ultra-subjectivistic, privatised religiosity can often lead to a trivialization of the religious life, to a situation where the picking and choosing from the global spiritual supermarket leads to an arid hybridity. On the other hand however he thinks that not all 'New Age' type of developments can or should be dismissed in a facile manner. Some of these developments indicate young people's genuine search for a meaning in life that the globalised, consumerist, mediatised world cannot provide.

Assessing the present condition, the Catholic philosopher posits two ways of leading a meaningful existence: 'exclusive humanism' and 'transcendental flourishing'. Exclusive humanism can lead to an immanent, non religious spirituality via the universalization of moral codes, the concern with

<sup>12</sup> This growing tolerance relates of course to the marked relativization of religious belief that globalisation has brought about. Globalised modernity brings religious traditions closer to each other and this leads to hybrid forms of religiosity (Robertson 1989 and Beyer 1994).

<sup>13</sup> For accounts of the 'new spirituality', see Roof 2001, Fuller 2001, Herrick 2003, Heelas and Woodhead 2005, Heelas 2008, Wuthnow 1998, Tipton 1983, Glock and Bellah 1976, Beckford and Luckman 1989, Robbins 1988, Carrete and King 2005.

nature, the struggles against world poverty etc. However this type of humanism disconnects human beings from the cosmos and the mysteries of human existence. It leads to an 'immanent flourishing', which is more limiting than the religious, transcendental spirituality of the Christian believer. Both however, according to Taylor, should be respected (2007: 618ff).

What I would like to add to the above is that between the secular, exclusive humanism and the transcendental flourishing there is a type of flourishing which is difficult to classify as secular or non secular, a type of flourishing which is in the interface between secularity and non secularity. This refers to the notion of the 'indwelling God'.

C) This is the view of those who believe that there is no God outside the human being, that the divine resides within us. God is entirely or exclusively indwelling. To put it differently, spiritual flourishing occurs when we discover and develop the internal to the subject 'divine spark'. Here as well there is infinity, but it is an 'immanent infinity' – an infinity referring to the depths and mysteries of the human soul. From this anthropocentric point of view to believe in an external deity leads to spiritual heteronomy, to an alienating type of religiosity. As Don Cupitt puts it 'unless religiousness is truly autonomous and subjective it is not religiously commendable. Piety cannot in any way be validated from the outside. Religious activity must be purely disinterested and therefore cannot depend upon any external facts such as an objective God or life after death. Furthermore, spiritual autonomy must not on any account be prejudiced, because there is no salvation without it. So it is spiritual vulgarity and immaturity to demand an extra religious reality of God' (1980: 10).<sup>14</sup>

In the light of the above, if the religious entails a belief in an external to the individual divinity, belief in an exclusively 'internal' God comes very near to secularity – but it is not exactly secular since secularity entails unbelief, agnosticism or indifference in religious matters. If negative theology, in its western or eastern/orthodox version, considers that the divine, in its essence is external but unknowable, secular theology of the Don Cupitt or the J. Robinson (1963) type transforms external unknownability into the 'internal' knownability of an exclusively indwelling deity. Needless to say

<sup>14</sup> Continuing his argument, Cupitt affirms that 'there can be for us nothing but the worlds that are constituted for us by our own language and activities. All meaning and truth and value are man-made and could not be otherwise' (1984: 20). The fact however that our language constitutes the reality we know cannot lead to the conclusion that there are no other realities. The reality of the mystic for instance is one that emerges when linguistic categories are suspended.

the 'indwelling God' theme is not limited in the restricted circle of secular theologians. As the secular and the non secular, so the in-between theme has spread widely from the level of religious elites to the popular level. Heelas who called this trend *immanent spirituality* or *humanistic expressivism*, argues that a major feature of several New Age spiritualities is that God is not an external to the human being but a higher part of the self (Heelas and Woodhead 2005: 71ff; Heelas 2008: 55-8).

D) Another typical case situated between the secular and the non secular is that of the so called 'spiritual seeker'. As Charles Taylor and many other observers have pointed out, expressive religiosity can take the form of a seeker's continuous spiritual quest, a seeker who rejects the dogmas, rituals and the bureaucratic authority of established churches and opts for an individualistic, continuous religious exploration. Such a spiritual exploration can be of two kinds. In the first case the seeker tries to explore the religious sphere in a proactive manner. She or he becomes familiar with the sacred texts and moral codes of various religions in an attempt to find elements which make sense to him/her, which meet her/his spiritual needs. In other terms here we have the case of the subject who in an activist, decisionistic manner selects from the innumerable choices that the global religious market offers in order to construct his/her own unique, tailored made religious journey.<sup>15</sup>

The other type of seeker, the one that interest us here, explores the spiritual space not in an energetic, voluntaristic, cataphatic manner but apophatically. Apophatic in Greek means negative or negatory. In eastern orthodox theology apophatism entails two basic elements. First that the divine, in its *essence* is totally transcendental and therefore unknowable, whereas in its *energies* it is approachable in a personal, direct, non mediated manner. Second, the way to come near the divine energies is by getting rid of all passions, all calculations, all thoughts or even images. In this way the apophatically oriented subject achieves *kenosis* (emptying out), s/he creates an internal void or rather becomes an 'empty vessel' ready to receive God's energies or grace.<sup>16</sup>

Whereas apophatism in the eastern orthodox tradition entails a belief in an external but unknowable (in its essence) God, there is a type of

<sup>15</sup> This is the type of reflexivity that Giddens analyses when he refers to the process of reflexive modernization in post-traditional orders (Giddens 1994). See, on this point, Mouzelis 1999: 84-7. For those who 'believe without belonging', see Davie 1994.

<sup>16</sup> Apophatic theology, which has common elements with the western negative theology, was closely but not entirely linked with hesychasm (*hesichia* meaning quietness), a spiritual movement that acquired importance in the late Byzantine period. Its major representative was St. Gregory Palamas (Meyendorff 1974).



seeker who brackets so to speak the problem of God's existence. She or he tries, through contemplation and various meditation techniques, to get rid of all thoughts, including beliefs in the existence of a divine force. Therefore in this case the seeker does not construct a 'religious path of one's own'; rather s/he deconstructs habitual ways of acting and thinking, since the latter constitute obstacles to his/her self-realization. From this perspective the adoption of any type of belief system is anti-spiritual. It is an obstacle in the attempt to achieve an empty space within which how to live and what to do emerges spontaneously from within. In this way the 'tyranny of choices' is overcome. What to do in any specific situation does not entail thinking, it rather entails not thinking.

Perhaps the spiritual leader who has developed most this type of faithless spirituality is J. Krishnamurti. For the Indian sage thinking and being are antithetical processes, the more one thinks the more one is getting away from the spiritual mode of being. Not only mundane thinking, ruminations or calculations but even believing in a transcendental reality or in an after life takes one away from genuine spirituality in the here and now. Belief of any kind is not only irrelevant but it also constitutes a serious obstacle to the spiritual quest. For spirituality is a 'pathless way'. It basically entails constantly observing what goes on inside the self in a wordless, conceptless, detached manner. When one comes near to this type of condition, the dualism between the observer and the observed disappears. What emerges is a limitless compassion vis a vis the self, the other and nature (1978, 1985). This type of 'agnostic' spirituality which comes very near Zen Buddhism cannot be called religious since it does not entail a belief in a transcendental or external to the subject divine reality. On the other hand it is not covered by Taylor's exclusive humanism. As with the 'indwelling God' it lies in the in-between between the secular and the non secular.

Finally it should be stressed that the distinction between cataphatic and apophatic spirituality is an ideal type one. In actual situations, the orientations of both types of seeker contain both cataphatic and apophatic elements. According to the type of search, however, one of the two is dominant.

### **Concluding remarks**

I have tried to examine the linkages between late modern religious developments and the three sociostructural features of modernity – the massive inclusion into the centre, top-down social differentiation and widespread individualization.

(i) As far as modernity's *inclusionary processes* are concerned, these lead to both secularization and desecularization. They also allow for both reli-

gious rationalization and derationalization. What is common to all four processes and what are constitutive elements of modernity, is the massive mobilisation/inclusion into the centre, which, in the religious sphere, led to the attenuation of the dualism between religious centre and religious periphery. This meant that not only elements of the official religiosity 'spread downwards', but also that secularity as well has spread from cultural elites to the population at large. From this point of view, a central task of the sociology of religion is to examine how the four processes (secularization, desecularization, rationalization and derationalization) are dialectically linked to each other.

(ii) In terms of modernity's *social differentiation processes*, in the Christian west inter-institutional secularization (given modernity's top-down differentiation) is quite irreversible. The separation between church and state is not of course watertight. Religious elites enter the public sphere in their attempt to influence social policies. There are also attempts of more direct interventions into the political sphere by the evangelical right in the United States, by radical priests in Latin America and by other religious activists. But despite the above, religion has ceased irreversibly to be an overall regulator of social life. On the other hand, in intra-institutional terms, i.e. within the differentiated religious sphere proper, one sees in late modernity a process of desecularization or religious revival. Particularly in the Anglo-Saxon world, the values underlying C. Taylor's expressivist model have, in varying degrees, penetrated most non fundamentalist established churches. The latter, in an attempt to 'move with the times', have become more liberal both in theological and political terms. Theologically there is less emphasis on the dogmatic dimension (i.e. the search for the 'correct' belief system) and more on the expressive and existential dimension of religiosity. Politically the orientations of the so-called 'progressive milieu' (concern for world poverty, inequalities and environmental deterioration, focus on gay rights and women's empowerment) are appealing to spiritually oriented people inside and outside the established churches.<sup>17</sup> This liberal wave has of course generated a variety of reactions. Conservatives try to go 'against the times' opposing the 'sexual revolution', gay and women priests, women's right to abortion etc.

(iii) Moving to *widespread individualization*, the third major sociostructural feature of modernity, as far as religiosity is concerned, it enhances the non institutionalised, extra-ecclesiastical space of the new religious movements or cults and the informal groups and religious networks – whether

<sup>17</sup> On the 'progressive milieu' notion, see Lynch 2007.

the latter are linked to established churches or not. It also leads to the multiplication of individual 'seekers' who, when cataphatically oriented, in a highly selective manner try to construct a religious 'path of their own'. When apophatically oriented, they are less interested in the variety of belief systems that the global spiritual supermarket offers and more to meditative practices. The latter are either used for therapeutic purposes or, less superficially, for the creation of an internal space, a void which is a precondition for the spontaneous emergence of a spiritual mode of relating to the self, the other and the divine. Although non-churched spirituality has not replaced established religiosity, there is no doubt that the so called 'cultic' or 'holistic' or 'progressive' milieu grows very fast indeed (Heelas 2008). As to Pentecostalism, the other rapidly ascending global religious force, it also has elective affinities with widespread individualization – both in terms of its marked expressivity and in terms of its similarities with the protestant ethic, with its emphasis, particularly in the Third World, on hard work, strict moral standards and individual economic success.

I close by stressing once more that the three sociostructural features of modernity allow both secular and non secular modes of existence. Given this, the relation between the two will be shaped in the future not only by structural but also by a variety of conjunctural developments – economic or ecological crises, scientific discoveries, the future of Islamic fundamentalism etc. From this point of view neither the idea of a long-term secularization within the religious sphere, nor the idea of a secularization–desecularization dialectic help us to foresee the future linkages between the secular and the non secular.

As far as modernity is concerned, what is certain is that given the demise of segmental localism, the massive inclusion into the centre, top-down differentiation and overall individualization, choice is a key element for understanding the present and future religious landscape. In matters religious, choice ceases to be the privilege or 'burden' of the few, it spreads downwards. In other terms, it is not only religious elites, intellectuals or philosophers who ponder the meaning of life and the pros and cons of a secular or non secular mode of existence. Religious affiliation ceases to be taken for granted; it is an issue which concerns people in all social strata. After all, in existential and religious matters, generalised choice, real or imagined, is what modernity is all about.

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# THE DEMOGRAPHY OF RELIGIONS AND THEIR CHANGING DISTRIBUTION IN THE WORLD

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## 1. The demographic approach and religion

Demography studies the changing size and composition of a population in a quantitative way. A population (Greek: ‘demos’) is usually defined as comprising all the people in a given territory or political entity (from a city to a province to a nation to the world population). A population defined in such a way can only change through three forces: births, deaths and migration. These are called the three fundamental components of demographic change. Since the intensity of these forces differs greatly by age and gender, most demographic studies stratify the populations by these two basic demographic dimensions. This structure by age and gender is well illustrated through population pyramids which plot women on the right and men on the left side, sorted by age (as an example, see Figure 1, p. 681).

Demographic models can also project populations for several decades into the future. This high predictive power in demography – as compared to many other social and economic issues – is due to the fact that the human life span is 70–80 years in most parts of the world and, if we know, e.g., the number of 10-year-old girls today, we have a good basis for projecting the number of 70-year-old women 60 years into the future. We only have to adjust for assumed future mortality and migration rates. To project the size of cohorts that have not yet been born today, we also must make assumptions about future fertility rates. Hence, to forecast total population size we need to make assumptions about likely future trends in age- and gender-specific birth, death and migration rates. This is where a substantive assess-

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ment of the drivers of the demographic components needs to enter the analysis. Since these future trends are uncertain, one cannot make point forecasts with high certainty. One has to specify alternative scenarios which cover what is interpreted as a plausible range or specify probabilistic population projections which give quantitative uncertainty ranges for the resulting demographic variables.

To illustrate these demographic uncertainties, Figure 1 (see p. 681) gives a probabilistic population pyramid for the population of Europe in 2050. It shows that for those cohorts who are already born and who are not yet subject to the major uncertainty about the future of mortality at very high age, the uncertainty is rather minor. For the very high ages assessed uncertainty increases significantly due to a major scientific debate: While one group of scientists thinks that Europe is already close to the maximum life expectancy possible for humans, others believe that – if there is a maximum – it may be above 115–120 years. But the biggest uncertainty concerns the number of children and young adults who are not yet born today and whose number depends on future birth rates.

But populations can and should be stratified by other characteristics of humans than just age and gender. Traditionally, demographers have also distinguished by marital status, place of residence, citizenship, educational attainment level and ethnicity. Religious affiliation is another characteristic that has been included in the censuses of many countries. In some countries, however, it is not considered appropriate for the state to ask about membership in religious organizations. But for many of these countries, information is provided by representative surveys which did ask the question. It should be noted that even in countries where religious affiliation is included in the formal government census, the information is based on a personal statement given by the respondent and is not verified. For this reason the census information often does not fully correspond with the records of the religious organizations. In the past censuses of Austria, for instance, more people stated that they are Roman Catholic than the registers of the church showed. This may include people who have left the church because they did not want to pay church tax or who otherwise feel attachment to the church without being a member in a formal sense. Also in past years in most countries, the proportion of persons who refuse to answer the question about religious affiliation has been increasing.

When it comes to the question of demographic modeling of the changing distribution of the religious composition of a population, differentials in fertility, mortality and migration also need to be considered. Recently, the number and proportion of Muslims in many European countries has

been increasing quite rapidly. This is, in the first instance, a consequence of the fact that many immigrants to Europe have been Muslims, either from Turkey or from Northern Africa. But it is also due to the fact that in most countries, Muslim women had significantly higher birth rates. As we will discuss in the concluding section, there are reasons to assume that these higher birth rates are not directly a consequence of the religious affiliation and the associated traditions, but rather reflect the fact that these immigrant populations have on average lower levels of education and for this reason have higher birth rates. The second generation of immigrants tends to be better educated and shows birth rates which are much closer to those of the non-immigrant population. But independently of the reasons for these differential growth rates, it is a fact that currently the proportions of the religions that are associated with immigrant populations are on an increasing trajectory. This can also be observed with respect to the Orthodox church, e.g., in Austria due to significant Serbian immigration. This immigration factor is also pronounced in the USA, where Latin American immigration enhances the proportion of Roman Catholics, or in Canada and Australia, where Asian religions are becoming more prominent.

Beyond the question of purely formal membership in a specific church or religious group, in many respects the more interesting question concerns the intensity of participation in the religious activities, or simply the question of how important religion is for the life of the people. These kinds of questions have been asked in many surveys and the results show that in many respects, the behavioral differentials (even in terms of birth rates) between the sub-groups of different religious intensity or orientation within one formal religious denomination are stronger than the differences between the denominations. But from a statistical and demographic perspective these kinds of differentials are more difficult to capture because they are not only hard to measure but also tend to be less stable over the life course of individuals.

## 2. Current global distribution of religions

While for many parts of the world the information about religious affiliation is available from censuses and surveys, for other parts of the world there is little reliable information. Several estimates for relative and absolute composition of religion in the world exist. The *World Christian Encyclopedia* (Barrett *et al.* 2001) suggests that in 2010, Christianity constitutes 33.2 percent of the world population, Islam 22.4 percent, Buddhism 6.8 percent, and Hinduism 13.7 percent. They also estimate that a hundred years ago in 1910 Christianity was at 34.8 percent, Islam 12.6 percent, Buddhism 7.8 percent and Hinduism



12.7 percent. Appendix Table A1 (see p. 102) gives the overall estimated distribution of religion in the world at the country level in 2010 (Johnson and Grim 2008). Figure 2 (see p. 681) gives estimates of the changing size in absolute numbers of the major religious groups at the global level from 1900 to 2000. Figure 3 (see p. 682) gives projections to 2050 as derived from Barrett *et al.* (2001). These very crude estimates are based mainly on national level projections of the total populations of countries.

Figure 4 (see p. 682) takes a closer look at the world region that probably experienced the greatest change in its religious composition over the course of the 20<sup>th</sup> century: Sub-Saharan Africa. Here the proportion of Christians is estimated to have increased from around 9 percent in 1900 to just below 60 percent today. This coincided with a decline in traditional African religions which fell from 76 percent in 1900 to only 13 percent today. But again there is a serious question of categorization and how the various forms of syncretism are being classified in these studies.

### 3. Detailed scenarios for the future religious composition

In this section we will present two examples of recent, more sophisticated multi-state projections of the religious composition at the national level. These multi-state studies not only extrapolate proportions of certain religious groups as part of the total national population, but they explicitly consider the population dynamics as described above with different fertility, mortality and migration rates for different religious groups as well as the possibility to move from one religious category to another.

#### 3.1. The example of Spain

The first example of Spain is taken from Stonawski *et al.* (2010) and subdivides the religious categories into two intensity levels: Highly Religious and Moderately Religious. The distinction between the two groups are based on self-assessed religiosity estimated by age, sex and religious denomination using data from European Social Surveys 2002–2008 (IV waves) [11-scale question: *Regardless of whether you belong to a particular religion, how religious would you say you are?*, recoded: 5–10 ‘Highly Religious’, 0–4 ‘Moderately Religious’]. Religious intensity for migrants is assumed to be the same as in country of origin. Data on religious intensity comes from the Gallup WorldView survey<sup>3</sup> [2-scale question (Yes/No): *Is religion an important part of your life?*].

<sup>3</sup> [www.gallup.com/se/126848/worldview.aspx](http://www.gallup.com/se/126848/worldview.aspx).

The study first estimates the age–sex distribution of the base population by religious denomination and intensity. Then it takes into account fertility differentials between individuals of different groups and assumes that religiosity and denomination is transmitted from mother to child. Migration is also included in the analysis, where religion and religiosity are approximated based on the country of origin.

Figure 5 (see p. 683) shows the religious composition of the Spanish population and that of the migrant population. Figures 6 and 7 (see pp. 683–4) show the age and gender distributions for 2004 and the projected distributions for 2020 in the form of an age pyramid, with the color indicating the religious category.

Table 1 shows the different fertility rates that underlie these projections (Total Fertility Rate / TFR = mean number of children per woman). Assuming that the children fall into the same religious category as their mothers, both fertility and migration tend to lead to an increase in the share of the actively religious since the more religious tend to have higher fertility, regardless of their affiliation, and immigrants tend to be more religious than the native population. Although fertility differentials and immigration may raise the share of the more religious, they are important mechanisms that are likely to lead to a less religious population. Those without religion have a younger age structure. Population momentum implies that they will gradually grow due to cohort replacement, where the older actively religious die out. Furthermore, changing religious categories results in a substantial net growth in the population share without religion, as secularization is far more common than switching between religious groups or from no religion to a religious group.

If fertility differentials and migration were to continue as of today, the share of those who are highly religious will first decline from a level of 58

<b>Active Catholic</b>	<b>1.84</b>
<b>Non-active Catholic</b>	<b>1.44</b>
<b>Protestant and others</b>	<b>1.53</b>
<b>Muslim</b>	<b>1.76</b>
<b>Buddhist/Hindu</b>	<b>1.53</b>
<b>None</b>	<b>1.00</b>

**Table 1.** Total Fertility Rates (mean number of children per woman) for different religious categories, Spain, 2004. Source: Stonawski *et al.* (2010).

percent in 2005 to 54 percent in 2035, and from then onwards, in spite of losses through conversion, would rise to more than 55 percent in 2050. On the other extreme, if all groups have the same fertility, there would be a continued decline in the share of highly religious people in Spain to 47 percent in 2050. The other scenarios resulted in intermediate outcomes.

According to these scenarios, Roman Catholics in Spain will remain in the majority over the projection period although their share would diminish from 78 percent to 60–67 percent, depending on the scenario. Migration is especially detrimental to Roman Catholics whose share in the migrant population has been declining. Quite the opposite, the Protestant group is benefiting from the migration; its share rises to almost 8 percent by 2050 with all parameters remaining constant as in the starting year. In 2005, less than 2 percent of the Spanish population was Muslim. According to the stable scenario, the Muslim proportion would increase to 8 percent in 2050. In case of fertility convergence, the share of Muslims would be between 4.5 percent and 5.5 percent depending on the speed of the fertility decline. The share of other groups, such as Hindu/Buddhist, would remain very low, below one percent over the projection period. The population share without religion is likely to experience a growth in all scenarios, particularly when there is no migration and fertility differentials diminish or disappear. In the case where there is no migration and fertility is equal across all groups, the share of *None* increases from 18 percent to 31 percent during 2005–2050. However, if current trends of migration and fertility differentials were to continue, their share is likely to increase to only 23 percent by 2050.

### 3.2. *The example of the USA*

Another recent study applies a similar demographic multi-state model to projecting the future religious composition of the United States of America. Figure 8 (see p. 98) gives the shares of the different religious groups for the starting year 2003. Table 2 presents estimated variation in fertility levels. Unlike the above-described calculations for Spain, this study does not distinguish between different degrees of being actively involved in religion, but it is more detailed on the classification of the different Protestant groups in the US.

As Figure 9 (see p. 98) illustrates, almost half of the current immigrants to the US are Roman Catholics with the fast majority of them being Hispanics (35 percent of total migrants). As shown in Table 2, Hispanic immigrants have by far the highest birth rates of all Christian groups in the US. This results in a significant increase in the overall proportion of Hispanic Catholics in the US (according to the constant rates scenario as presented in Figure 10, see p. 99) from less than 10 percent today to almost 18 percent of the total popu-

Religion	TFR
Muslims (MUS)	2.84
Hispanic Catholics (CHI)	2.75
Black Protestants (PBL)	2.35
Fundamentalist Protestants excluding Blacks (PFU)	2.13
Non-Hispanic Catholics (CAT)	2.11
Moderate Protestants excluding Blacks (PMO)	2.01
Liberal Protestants excluding Blacks (PLI)	1.84
Hindu/Buddhist (HBU)	1.73
No religion (NOR)	1.66
Others (OTH)	1.64
Jews (JEW)	1.43
U.S. population average	2.08

Table 2. Total Fertility Rate (TFR) by religion, 2003. Source: Skirbekk *et al.* (2010).

lation in 2043 – almost equal in size to the group of religiously unaffiliated persons. Together with the Catholic non-Hispanic population, which is on a declining trajectory, the total Roman Catholic population in the US is likely to increase to around one-third of the entire US population over the coming three decades.

#### 4. Conclusions: the role of education for convergence among religions and religious tolerance

A growing body of literature deals with education, along with age and gender, as a basic demographic dimension. In a way, this helps to add the ‘quality’ dimension to the analysis of demographic change. It has been argued that education will be at the heart of 21<sup>st</sup> century demography (Lutz 2010). Whether this will be true or not, there is no doubt that the level of educational attainment is a key factor in determining the behavior of people in all societies. Based on newly reconstructed data for educational attainment distributions by age and gender for almost all countries in the world, a series of new studies has shown the overriding role of education in issues ranging from health and mortality to economic growth to the transition of societies to modern democracy (Lutz *et al.* 2010, 2008b, 2003, 2001, 1997). Here we will address the question to what extent education matters for the behavioral convergence among members of different religions and even for the spread of tolerance and religious freedom.

In the previous sections we discussed the fact that members of different religions tend to have different levels of fertility and this is an important

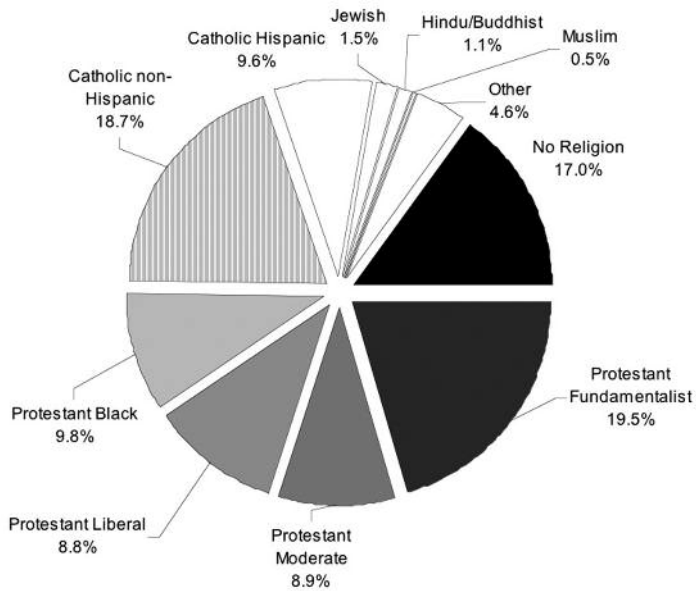


Figure 8. Share of the 2003 population by religious affiliation. Source: Skirbekk *et al.* (2010).

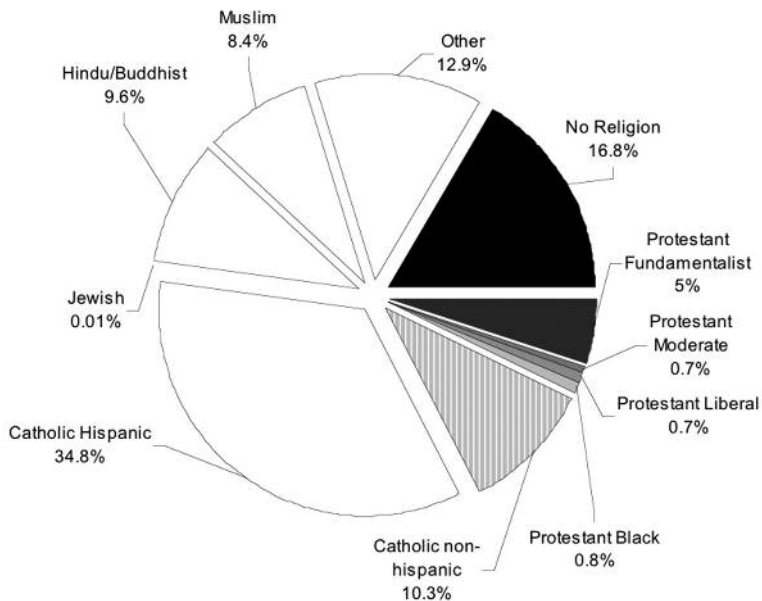


Figure 9. Religious composition of recent migrants to the USA. Source: Skirbekk *et al.* (2010).

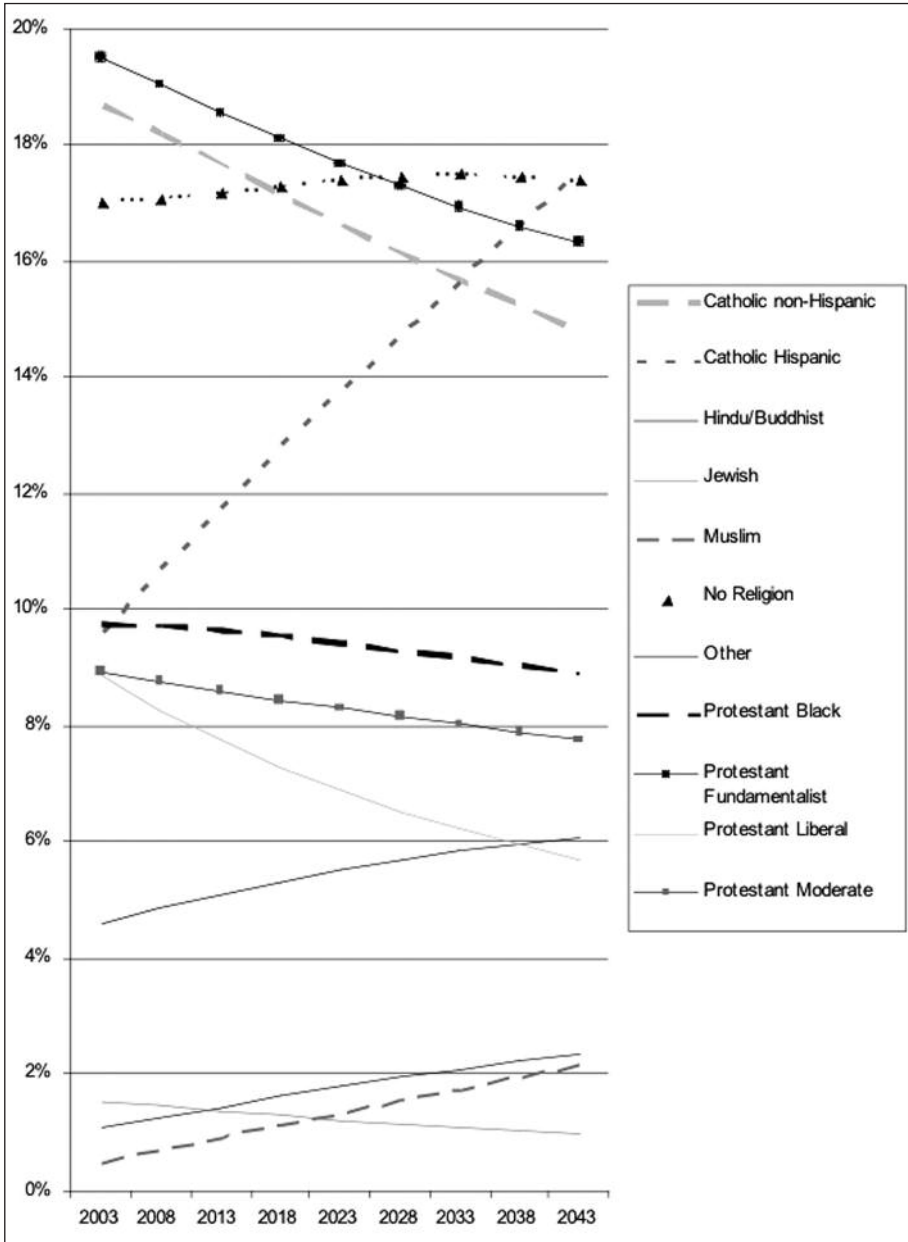


Figure 10. Projections of the share of the total US population for 11 religious categories according to a scenario that keeps current conditions (fertility and migration) constant. Source: Skirbekk *et al.* (2010).

factor in causing different religions to grow at different speeds. The level of fertility is not only the most important driver of differential population growth but also a very sensitive indicator of social, economic and even cultural change. For this reason it is very interesting in the context of studying differentials among religions to analyze the religion-specific data with respect to the level of education. Table 3 gives these data for the case of India, where we distinguish between the three main religions Hinduism, Islam and Christianity. At the aggregate level – across all ages and education categories – the well-known pattern appears that Muslims have the highest fertility and Christians the lowest, with the difference being more than one child on average. Hindus have an intermediate position. But when the pattern is differentiated by the level of education of the woman, a very different pattern appears: Within each religion more highly educated women have significantly lower fertility than less educated women. For women with at least secondary education (high in the Table 3) the difference between Muslim and Christian women practically disappears. And Hindu women in the high education category have even lower fertility than Christian women in that category. The change by level of education is even more dramatic with respect to the age pattern of fertility. Uneducated teenage Hindu women have the highest fertility rate (16 percent have one birth per year) while highly educated Christian teenage women have the lowest rate (0.2 have one birth per year). In other words, education makes the difference and Muslim fertility is mostly higher than Christian because Christian women are on average better educated.

Age	Hindu			Muslim			Christian		
	Low	Medium	High	Low	Medium	High	Low	Medium	High
15-19	159.7	74.1	17.4	126.3	80.1	18.9	122	44.7	2.2
20-24	246.6	211.1	113.3	274.8	203.8	136.9	193.6	169.1	86.7
25-29	144.6	113.7	137.5	197.1	145.3	149.6	126.4	140.3	174.1
30-34	65.1	36.7	66.5	110.2	75.3	100.8	79	54.7	104.7
35-39	25.9	12.8	17	60.1	14	19.6	42	24.5	29.1
40-44	7.7	1.3	0.3	24.5	1	0	25.8	6.8	7.9
45-49	3.3	0	0	11.9	0	0	5.3	0	0
TFR	3.26	2.25	1.76	4.02	2.60	2.13	2.97	2.20	2.02
TFR	2.59			3.4			2.34		

**Table 3.** Age-specific fertility rates and Total Fertility Rates (TFR) in India by religion and level of education. Source: Demographic and Health Survey 2005.<sup>4</sup> Births 36 months before survey.

<sup>4</sup> [www.measuredhs.com](http://www.measuredhs.com).

Figure 11 (see. p. 685) shows the relationship among the average level of female education and the level of fertility for all countries with Muslim-majority populations. The picture is very pervasive: The higher the level of female education, the lower the level of fertility. This convergence of fertility rates with a higher level of education also fits well with the data that we have about the increasing assimilation of demographic behavior among second generation immigrants in Europe.

The importance of education as the key driver of human behavior goes far beyond the above-described impact on fertility. Throughout the world better educated people have better health, live longer, have higher incomes, are more resilient to natural disasters and are better integrated into new societies should they be migrants. At the individual level better-educated people have better lives by almost any criterion. At the societal level there are many ways in which a better average education of the population contributes to social progress and economic growth. The distribution of the entire population by their level of educational attainment is probably the single most important predictor of the progress of a population in terms of socio-economic and civilisatory progress. This is also likely to matter greatly for religious tolerance and religious freedom. In a recent study Lutz *et al.* (2010) showed through econometric analyses of time series of more than 120 countries around the world that education of broad segments of the population (and in particular high proportions of women with at least junior secondary education) are a key driver of the transition of countries towards modern free democracies.

Such an econometric study still needs to be done with respect to the effects of increasing education – irrespective of the majority religion in the country – on religious freedom. But for the time being, the findings with respect to the transition to democracy are very encouraging and it is a plausible working hypothesis that the pattern with respect to religious freedom in societies is not much different. But there clearly is a need for more studies on religion and religious freedom using demographic approaches of the sort outlined in this paper.

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## APPENDIX

Data on religion, estimates from 2010. Source: Johnson and Grim (2008).

Country	Catholic	Protestant	Jew	Muslim	Hindu/Budd	Other	None
Afghanistan	0.000	0.000	0.000	0.998	0.001	0.002	0.000
Aland Islands	0.000	1.000	0.000	0.000	0.000	0.000	0.000
Albania	0.151	0.003	0.000	0.637	0.000	0.161	0.048
Algeria	0.000	0.000	0.000	0.979	0.000	0.002	0.019
American Samoa	0.223	0.623	0.000	0.000	0.003	0.143	0.007
Andorra	0.883	0.002	0.003	0.009	0.004	0.039	0.060
Angola	0.613	0.291	0.000	0.006	0.000	0.078	0.012
Anguilla	0.063	0.786	0.002	0.006	0.004	0.100	0.039
Antigua and Barbuda	0.101	0.694	0.000	0.006	0.002	0.180	0.018
Argentina	0.859	0.060	0.012	0.020	0.001	0.007	0.042
Armenia	0.079	0.009	0.000	0.023	0.000	0.766	0.123
Aruba	0.791	0.102	0.002	0.004	0.002	0.082	0.018

Australia	0.260	0.295	0.005	0.022	0.032	0.204	0.182
Austria	0.687	0.040	0.001	0.048	0.002	0.068	0.154
Azerbaijan	0.000	0.001	0.003	0.883	0.000	0.031	0.082
Bahamas	0.149	0.751	0.001	0.000	0.000	0.042	0.057
Bahrain	0.057	0.015	0.001	0.837	0.064	0.022	0.004
Bangladesh	0.002	0.001	0.000	0.887	0.101	0.008	0.001
Barbados	0.037	0.625	0.000	0.009	0.004	0.302	0.023
Belarus	0.109	0.023	0.003	0.003	0.000	0.606	0.256
Belgium	0.737	0.013	0.003	0.036	0.003	0.060	0.148
Belize	0.660	0.253	0.010	0.005	0.025	0.040	0.008
Benin	0.221	0.078	0.000	0.255	0.000	0.443	0.002
Bermuda	0.145	0.532	0.000	0.001	0.005	0.252	0.065
Bhutan	0.002	0.003	0.000	0.010	0.932	0.051	0.001
Bolivia	0.812	0.107	0.000	0.000	0.001	0.059	0.021
Bosnia and Herzegovina	0.119	0.001	0.000	0.554	0.000	0.287	0.038
Botswana	0.046	0.108	0.000	0.003	0.002	0.839	0.002
Brazil	0.724	0.157	0.001	0.001	0.003	0.086	0.028
Brunei Darussalam	0.073	0.027	0.000	0.568	0.102	0.218	0.012
Bulgaria	0.010	0.019	0.000	0.121	0.000	0.811	0.039
Burkina Faso	0.112	0.097	0.000	0.516	0.000	0.269	0.007
Burundi	0.612	0.220	0.000	0.015	0.001	0.151	0.001
Cambodia	0.002	0.018	0.000	0.023	0.850	0.081	0.026
Cameroon	0.244	0.201	0.000	0.198	0.000	0.351	0.006
Canada	0.412	0.120	0.013	0.017	0.023	0.261	0.153
Cape Verde	0.873	0.031	0.000	0.029	0.000	0.057	0.010
Cayman Islands	0.087	0.407	0.014	0.002	0.002	0.436	0.051
Central African Republic	0.200	0.150	0.000	0.150	0.000	0.493	0.007
Chad	0.076	0.107	0.000	0.574	0.000	0.242	0.001
Chile	0.700	0.027	0.001	0.004	0.000	0.167	0.100
China	0.011	0.019	0.000	0.016	0.143	0.428	0.383
Christmas Island	0.100	0.107	0.000	0.194	0.141	0.302	0.156
Cocos (Keeling) Islands	0.067	0.146	0.000	0.657	0.000	0.071	0.060
Colombia	0.913	0.028	0.000	0.001	0.000	0.036	0.022
Comoros	0.002	0.002	0.000	0.983	0.000	0.011	0.001
Congo, Republic of	0.620	0.127	0.000	0.015	0.000	0.205	0.033
Congo, The D. Rep. of the	0.516	0.218	0.000	0.011	0.002	0.249	0.004
Cook Islands	0.232	0.699	0.000	0.000	0.000	0.051	0.018
Costa Rica	0.868	0.100	0.001	0.000	0.000	0.011	0.020
Cote d'Ivoire	0.000	0.000	0.000	0.311	0.001	0.685	0.004
Croatia	0.803	0.009	0.000	0.024	0.000	0.105	0.058
Cuba	0.554	0.039	0.000	0.001	0.003	0.174	0.229
Cyprus	0.018	0.012	0.000	0.004	0.010	0.901	0.055
Czech Republic	0.326	0.026	0.001	0.000	0.001	0.211	0.436
Denmark	0.007	0.822	0.001	0.040	0.002	0.028	0.100
Djibouti	0.009	0.001	0.000	0.970	0.000	0.007	0.012

Dominica	0.621	0.321	0.000	0.002	0.002	0.048	0.006
Dominican Republic	0.842	0.077	0.000	0.000	0.000	0.054	0.027
Ecuador	0.910	0.039	0.000	0.000	0.001	0.033	0.017
Egypt	0.004	0.007	0.000	0.873	0.000	0.111	0.005
El Salvador	0.812	0.118	0.000	0.000	0.000	0.051	0.018
Equatorial Guinea	0.844	0.046	0.000	0.041	0.000	0.018	0.050
Eritrea	0.032	0.012	0.000	0.494	0.000	0.432	0.030
Estonia	0.005	0.180	0.001	0.003	0.001	0.543	0.267
Ethiopia	0.007	0.161	0.000	0.340	0.000	0.490	0.002
Falkland Islands (Malvinas)	0.213	0.465	0.000	0.000	0.003	0.189	0.130
Faroe Islands	0.003	0.958	0.000	0.000	0.000	0.022	0.017
Fiji	0.113	0.480	0.000	0.061	0.296	0.038	0.011
Finland	0.002	0.847	0.000	0.005	0.001	0.051	0.094
France	0.666	0.020	0.010	0.084	0.008	0.009	0.203
French Guiana	0.774	0.052	0.001	0.009	0.015	0.115	0.035
French Polynesia	0.396	0.381	0.001	0.000	0.001	0.170	0.051
Gabon	0.575	0.124	0.000	0.043	0.000	0.249	0.009
Gambia	0.026	0.007	0.000	0.859	0.000	0.101	0.006
Georgia	0.010	0.003	0.003	0.104	0.000	0.844	0.036
Germany	0.311	0.313	0.003	0.045	0.002	0.082	0.244
Ghana	0.121	0.264	0.000	0.193	0.000	0.418	0.003
Gibraltar	0.776	0.079	0.018	0.046	0.017	0.036	0.027
Greece	0.013	0.002	0.000	0.042	0.002	0.913	0.027
Greenland	0.002	0.674	0.000	0.000	0.000	0.295	0.028
Grenada	0.527	0.379	0.000	0.003	0.007	0.074	0.010
Guadeloupe	0.885	0.074	0.000	0.004	0.005	0.008	0.024
Guam	0.767	0.150	0.000	0.000	0.011	0.054	0.018
Guatemala	0.812	0.161	0.000	0.000	0.000	0.012	0.014
Guinea	0.028	0.009	0.000	0.697	0.001	0.263	0.002
Guinea-Bissau	0.076	0.012	0.000	0.428	0.000	0.471	0.013
Guyana	0.120	0.338	0.000	0.081	0.318	0.123	0.020
Haiti	0.724	0.159	0.000	0.000	0.000	0.099	0.018
Holy See (Vatican City State)	0.981	0.000	0.000	0.000	0.000	0.019	0.000
Honduras	0.800	0.130	0.000	0.001	0.001	0.056	0.012
Hungary	0.604	0.247	0.010	0.003	0.000	0.024	0.112
Iceland	0.023	0.854	0.000	0.001	0.004	0.090	0.028
India	0.018	0.017	0.000	0.139	0.736	0.076	0.014
Indonesia	0.028	0.071	0.000	0.784	0.028	0.074	0.015
Iran	0.000	0.000	0.000	0.986	0.000	0.009	0.004
Iraq	0.008	0.000	0.000	0.974	0.000	0.012	0.006
Ireland	0.788	0.031	0.000	0.007	0.001	0.131	0.041
Isle of Man	0.094	0.559	0.001	0.002	0.002	0.189	0.153
Israel	0.017	0.002	0.729	0.191	0.004	0.009	0.048
Italy	0.803	0.005	0.001	0.025	0.000	0.002	0.164
Jamaica	0.040	0.412	0.000	0.001	0.006	0.498	0.043

Japan	0.004	0.005	0.000	0.001	0.558	0.299	0.132
Jordan	0.005	0.003	0.000	0.939	0.000	0.023	0.030
Kazakhstan	0.012	0.003	0.000	0.518	0.001	0.122	0.344
Kenya	0.226	0.401	0.000	0.070	0.005	0.297	0.001
Kiribati	0.547	0.422	0.000	0.000	0.000	0.025	0.006
Korea, D. People's Rep.	0.002	0.001	0.000	0.000	0.015	0.269	0.713
Korea, Republic of	0.101	0.207	0.000	0.002	0.151	0.523	0.016
Kuwait	0.075	0.003	0.000	0.864	0.035	0.015	0.007
Kyrgyzstan	0.000	0.004	0.000	0.721	0.005	0.059	0.211
Lao People's D. Rep.	0.009	0.022	0.000	0.001	0.539	0.388	0.042
Latvia	0.192	0.132	0.004	0.003	0.001	0.374	0.294
Lebanon	0.272	0.005	0.001	0.597	0.021	0.063	0.042
Lesotho	0.482	0.240	0.000	0.000	0.001	0.275	0.002
Liberia	0.053	0.140	0.000	0.161	0.000	0.629	0.017
Libyan Arab Jamahiriya	0.014	0.001	0.000	0.967	0.004	0.012	0.002
Liechtenstein	0.735	0.091	0.001	0.064	0.000	0.070	0.040
Lithuania	0.791	0.012	0.001	0.002	0.000	0.088	0.105
Luxembourg	0.884	0.016	0.002	0.010	0.000	0.007	0.082
Macedonia	0.009	0.005	0.000	0.289	0.000	0.630	0.067
Madagascar	0.228	0.306	0.000	0.021	0.001	0.440	0.004
Malawi	0.256	0.293	0.000	0.132	0.002	0.314	0.003
Malaysia	0.045	0.035	0.000	0.570	0.114	0.231	0.005
Maldives	0.003	0.001	0.000	0.984	0.010	0.001	0.001
Mali	0.020	0.007	0.000	0.869	0.000	0.103	0.001
Malta	0.930	0.005	0.000	0.003	0.000	0.045	0.017
Marshall Islands	0.075	0.876	0.000	0.000	0.000	0.035	0.015
Martinique	0.885	0.081	0.000	0.002	0.003	0.008	0.022
Mauritania	0.001	0.000	0.000	0.991	0.000	0.007	0.001
Mauritius	0.251	0.084	0.000	0.168	0.432	0.037	0.027
Mayotte	0.004	0.002	0.000	0.988	0.000	0.004	0.002
Mexico	0.893	0.039	0.001	0.001	0.000	0.038	0.027
Micronesia, Fed. State of	0.551	0.394	0.000	0.000	0.005	0.043	0.008
Moldova	0.006	0.024	0.008	0.004	0.000	0.931	0.027
Monaco	0.823	0.030	0.017	0.005	0.000	0.011	0.114
Mongolia	0.000	0.007	0.000	0.044	0.250	0.352	0.346
Montserrat	0.067	0.817	0.000	0.000	0.001	0.085	0.030
Morocco	0.001	0.000	0.000	0.988	0.000	0.001	0.010
Mozambique	0.225	0.130	0.000	0.165	0.002	0.473	0.005
Myanmar	0.013	0.054	0.000	0.038	0.756	0.134	0.005
Namibia	0.213	0.626	0.001	0.004	0.000	0.138	0.018
Nauru	0.278	0.470	0.000	0.000	0.014	0.200	0.038
Nepal	0.000	0.007	0.000	0.044	0.797	0.149	0.003
Netherlands	0.291	0.186	0.002	0.064	0.019	0.176	0.262
Netherlands Antilles	0.764	0.173	0.003	0.002	0.007	0.018	0.033
New Caledonia	0.508	0.149	0.000	0.028	0.007	0.199	0.108

New Zealand	0.100	0.334	0.001	0.009	0.044	0.281	0.231
Nicaragua	0.792	0.168	0.000	0.000	0.001	0.022	0.017
Niger	0.001	0.001	0.000	0.926	0.000	0.071	0.001
Nigeria	0.133	0.286	0.000	0.457	0.000	0.121	0.003
Niue	0.100	0.627	0.000	0.000	0.000	0.252	0.021
Norfolk Island	0.114	0.505	0.000	0.000	0.000	0.230	0.151
Norway	0.013	0.871	0.000	0.031	0.007	0.034	0.043
Oman	0.027	0.003	0.000	0.886	0.059	0.022	0.002
Pakistan	0.007	0.012	0.000	0.963	0.013	0.005	0.001
Palau	0.415	0.308	0.000	0.000	0.009	0.241	0.027
Palestinian Territories	0.004	0.002	0.116	0.807	0.000	0.013	0.058
Panama	0.673	0.150	0.001	0.007	0.008	0.116	0.044
Papua New Guinea	0.283	0.642	0.000	0.000	0.002	0.067	0.006
Paraguay	0.869	0.040	0.000	0.000	0.003	0.067	0.021
Peru	0.892	0.074	0.000	0.000	0.002	0.018	0.014
Philippines	0.775	0.053	0.000	0.064	0.001	0.097	0.009
Pitcairn Island	0.000	0.920	0.000	0.000	0.000	0.000	0.080
Poland	0.916	0.004	0.000	0.000	0.000	0.044	0.035
Portugal	0.856	0.012	0.000	0.002	0.006	0.034	0.089
Puerto Rico	0.706	0.156	0.001	0.000	0.001	0.112	0.024
Qatar	0.070	0.011	0.000	0.863	0.026	0.015	0.015
Reunion Island	0.801	0.058	0.000	0.042	0.047	0.031	0.021
Romania	0.089	0.090	0.000	0.004	0.000	0.809	0.008
Russian Federation	0.006	0.009	0.001	0.110	0.004	0.813	0.057
Rwanda	0.457	0.303	0.000	0.053	0.000	0.185	0.002
Saint Helena	0.016	0.775	0.000	0.000	0.000	0.156	0.053
Saint Kitts and Nevis	0.097	0.773	0.000	0.003	0.015	0.096	0.016
Saint Lucia	0.698	0.262	0.000	0.004	0.009	0.023	0.004
Saint Pierre and Miquelon	0.927	0.011	0.000	0.002	0.000	0.019	0.042
Saint Vincent and the Grenadines	0.066	0.632	0.000	0.017	0.038	0.217	0.030
Samoa	0.187	0.596	0.000	0.000	0.000	0.209	0.007
San Marino	0.885	0.000	0.000	0.000	0.000	0.043	0.071
Sao Tome and Principe	0.849	0.036	0.000	0.000	0.000	0.101	0.014
Saudi Arabia	0.038	0.002	0.000	0.929	0.015	0.009	0.007
Senegal	0.046	0.001	0.000	0.879	0.000	0.070	0.004
Serbia	0.049	0.012	0.000	0.069	0.000	0.745	0.124
Seychelles	0.812	0.103	0.000	0.002	0.006	0.052	0.025
Sierra Leone	0.037	0.057	0.000	0.474	0.001	0.416	0.015
Singapore	0.050	0.058	0.000	0.186	0.188	0.469	0.048
Slovak Republic	0.745	0.095	0.000	0.000	0.000	0.015	0.145
Slovenia	0.811	0.015	0.000	0.018	0.000	0.081	0.074
Solomon Islands	0.198	0.737	0.000	0.003	0.003	0.055	0.003
Somalia	0.000	0.000	0.000	0.986	0.000	0.013	0.001
South Africa	0.066	0.260	0.002	0.025	0.026	0.588	0.034

Spain	0.903	0.003	0.001	0.014	0.000	0.001	0.078
Sri Lanka	0.072	0.013	0.000	0.096	0.811	0.003	0.005
Sudan	0.081	0.082	0.000	0.714	0.000	0.111	0.011
Suriname	0.310	0.179	0.002	0.159	0.211	0.094	0.045
Svalbard and Jan Mayen I.	0.000	0.337	0.000	0.000	0.013	0.261	0.389
Swaziland	0.048	0.124	0.000	0.006	0.001	0.808	0.012
Sweden	0.013	0.649	0.002	0.027	0.006	0.005	0.299
Switzerland	0.434	0.331	0.002	0.041	0.007	0.059	0.126
Syrian Arab Republic	0.022	0.002	0.000	0.928	0.000	0.028	0.020
Taiwan	0.013	0.017	0.000	0.004	0.265	0.656	0.044
Tajikistan	0.000	0.001	0.000	0.850	0.001	0.015	0.133
Tanzania	0.273	0.260	0.000	0.316	0.009	0.139	0.003
Thailand	0.005	0.004	0.000	0.063	0.867	0.042	0.019
Timor	0.802	0.041	0.000	0.041	0.002	0.109	0.004
Togo	0.233	0.112	0.000	0.197	0.000	0.455	0.003
Tokelau	0.308	0.617	0.000	0.000	0.000	0.058	0.017
Tonga	0.140	0.462	0.000	0.000	0.002	0.391	0.005
Trinidad and Tobago	0.286	0.267	0.000	0.072	0.247	0.104	0.023
Tunisia	0.002	0.000	0.000	0.995	0.000	0.000	0.002
Turkey	0.000	0.000	0.000	0.974	0.001	0.005	0.020
Turkmenistan	0.000	0.001	0.001	0.886	0.000	0.015	0.097
Turks and Caicos Islands	0.025	0.512	0.000	0.000	0.000	0.425	0.038
Tuvalu	0.013	0.889	0.000	0.001	0.002	0.059	0.037
Uganda	0.403	0.409	0.000	0.114	0.008	0.061	0.005
Ukraine	0.103	0.019	0.004	0.021	0.001	0.720	0.132
United Arab Emirates	0.098	0.005	0.000	0.760	0.088	0.037	0.012
United Kingdom	0.091	0.489	0.005	0.027	0.013	0.233	0.142
United States	0.224	0.191	0.016	0.016	0.015	0.418	0.120
Uruguay	0.609	0.029	0.012	0.000	0.000	0.004	0.345
Uzbekistan	0.000	0.001	0.002	0.848	0.002	0.014	0.134
Vanuatu	0.147	0.788	0.000	0.000	0.002	0.056	0.007
Venezuela	0.856	0.045	0.002	0.003	0.001	0.067	0.025
Vietnam	0.073	0.014	0.000	0.002	0.486	0.231	0.195
Virgin Islands, U.S.	0.269	0.490	0.003	0.001	0.004	0.194	0.039
Wallis and Futuna Islands	0.953	0.008	0.000	0.000	0.000	0.033	0.006
Western Sahara	0.000	0.000	0.000	0.994	0.000	0.002	0.004
Yemen	0.000	0.000	0.000	0.991	0.006	0.002	0.001
Zambia	0.308	0.352	0.000	0.010	0.002	0.326	0.002
Zimbabwe	0.100	0.205	0.001	0.008	0.002	0.672	0.013
Kosovo	0.033	0.001	0.000	0.899	0.000	0.052	0.015
Montenegro	0.041	0.018	0.000	0.158	0.000	0.735	0.048

Table A1. Proportion of population belonging to the listed religions, all countries.

# RELIGIOUS FREEDOM IN THE WORLD TODAY: PARADOX AND PROMISE

■ ALLEN D. HERTZKE

Consider a profound paradox of our age: at the very time that the value of religious freedom is becoming manifest, the international consensus behind it is weakening, assaulted by authoritarian regimes, attacked by theocratic movements, violated by aggressive secular policies, and undermined by growing elite hostility or ignorance. Indeed, not only do we see widespread violations around the world, but looming threats in the West that jeopardize previous gains.

Behind this sobering picture, however, lies promise. We are witnessing an historic convergence of empirical evidence and events on-the-ground that corroborate a key ontological reality: humans are spiritual creatures who thrive best and most harmoniously when they enjoy the freedom to express their fundamental dignity. Religious liberty is crucial to thriving societies and peace.

This reality produces a strategic opportunity for policy makers, religious authorities, and civil society leaders groping for remedies to the destabilizing religious strife afflicting the globe. In the place of counterproductive measures of repression – often the default impulse – enlightened strategies that protect the freedom of conscience and religious practice offer the best means of navigating the crucible of the 21<sup>st</sup> Century: living with our differences in a shrinking world.

This paper is based in part on research conducted for the John Templeton Foundation, which entailed an extended immersion in the global networks of scholarship and advocacy on religious freedom. That endeavor was launched by a symposium I organized for Templeton in Istanbul in 2009, titled ‘Constituting the Future: Religious Liberty, Law and Flourishing Societies’. A forthcoming book by the same title features multidisciplinary chapters by eminent scholars and practitioners from around the world.<sup>1</sup> I also produced for Templeton a strategic plan and donor guidebook, drawing upon scholarly research, government reports, international briefings, hear-

<sup>1</sup> Allen D. Hertzke, editor, *Constituting the Future: Religious Liberty, Law, and Flourishing Societies*, under review.

ings, and interviews with scholars, human rights advocates, policy makers, NGO directors, foundation leaders, and religious authorities.

One of the insights I gained from this project is the positive synergy between scholarly research, public policy, and advocacy. Scholars developed the case for religious freedom as a universal human right, policy makers built the international legal regime to uphold it, and advocates press for accountability and document violations. That documentation, in turn, informs path-breaking scholarship, which can influence further public policy initiatives.

We see an illustration of this synergy in the movement to make the promotion of religious freedom an aim of American foreign policy. Diverse religious advocacy groups pressed for congressional passage of the International Religious Freedom Act of 1998. Though not implemented robustly by American officials, the law erected a vast and transparent reporting infrastructure on the status of religious freedom around the world, which advocacy groups routinely critique and amend. That annual reporting by the State Department provided a new resource for scholarly investigation and inspired innovative techniques for systematically measuring restrictions on religion around the world. As we will see, the Pew Forum on Religion and Public Life applied this new methodology to produce the landmark report, 'Global Restrictions on Religion'. The findings of that report buoy global advocacy efforts, inform research on the correlations of religious freedom to other human goods, and feed into policy deliberations.

In order to appreciate the paradox and promise of the age, we must grasp how a growing empirical record validates ancient wisdom and international law on the ontological roots of, and justification for, religious freedom.

### **Ontological origins and empirical value of religious freedom**

In contrast to claims that religious liberty is a Western construct, its threads 'weave their way back to ancient Sumeria, Persia, China, and Africa'.<sup>2</sup> Indeed, some 2,500 years ago, as recorded in both Hebrew Scriptures and Persian documentation, Cyrus the Great established a broad regime of religious tolerance, which included restoring freedom for Jewish exiles and allowing them to return to their homeland. In diverse sacred texts we learn that homage to the divine cannot be coerced, that, in the words of the Qur'an, 'there is no compulsion in religion'. Religious freedom is recognized in international law

<sup>2</sup> Sandra L. Bunn-Livingstone, 'A Historical Analysis: International Religious Freedom 1998-2008', Paper presented at the Pew Charitable Trusts Conference, April 30-May 2, 2008.



as a universal human right and firmly embedded as a fundamental freedom in UN declarations, international treaties, customary law, and national constitutions.<sup>3</sup> The foundational statement, Article 18 of the *Universal Declaration of Human Rights*, adopted by the United Nations in 1948, provides the clearest articulation of this recognition:

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.

As implied by this declaration, religious freedom is a potent human right that simultaneously encompasses the freedom of conscience and association, the right to own property, to publicly worship, publish, speak, petition government, and raise children according to family desires.

The freedom to practice religion is virtually a universal aspiration. In the 2007 Pew Global Attitudes Survey over 90 percent of respondents in every region on earth indicated that it was important to them to live in a country where they can practice religion freely (only 2 percent saying it wasn't important at all).<sup>4</sup>

Religious liberty, consequently, is not merely a desirable thing granted by the state. It is a universal inherent right and aspiration. But why? As we see from the discussion below, the answer lies in the ontology of human life and the concrete relationships that flow from it. This, in fact, was the theme of Pope Benedict's message to the world on January 1, 2011. 'Religious freedom expresses what is unique about the human person', he proclaimed. To deny this right or 'eclipse the public role of religion' is fundamentally unjust and stifles 'the growth of the authentic and lasting peace of the whole human family'.<sup>5</sup>

At the most basic level all people want to be treated with respect and consideration. Variations of the golden rule – to treat others as we would wish to be treated – are found in virtually every major religion and many

<sup>3</sup> These include the U.N. Charter, the International Covenant on Civil and Political Rights, the Helsinki Accords, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>4</sup> Pew Global Attitudes Project, October 4, 2007, <http://pewglobal.org/reports/pdf/258topline.pdf>.

<sup>5</sup> 'Message of His Holiness Pope Benedict XVI for the Celebration of the World Day of Peace', January 1, 2011.

philosophical traditions (such as Confucianism). This trait of common humanity – potentially recognizable by people of all faiths or no faith – can provide a justification for religious liberty understood as the freedom to live in accord with one's conscience or belief.<sup>6</sup>

More specifically, the *Universal Declaration* hints at how certain human traits explicitly justify religious freedom as inherent. That landmark declaration anchored universal rights in the 'inherent dignity' and 'worth of the human person', and in the 'equal and inalienable rights of all members of the human family' who are 'endowed with reason and conscience'. In addition, Article 18 emphasizes the relational aspect of human life, that people must be free 'in community with others' to manifest their faith or beliefs.

*Equal worth, dignity, reason, conscience, and community* – these traits of common humanity provide the clues to the right, and scope, of religious liberty. Let us explore them.

In a number of religious traditions the dignity and worth of persons is rooted in their transcendent origins. In Jewish and Christian traditions people are 'made in the image and likeness of God' and thus endowed with a surpassing dignity, which mandates respect for their integrity and conscience. Presciently, the Vatican II statement on religious liberty, *Dignitatis Humanae*, explicitly anchored religious freedom in 'the very dignity of the human person'. A rich Islamic scholarship also grounds universal human rights in the divinely-ordained 'inviolability' of persons, who are created free and with rights so they can fulfill their duties toward God.<sup>7</sup> This understanding was widely shared by the American founders, who declared that people are 'endowed by their creator' with inalienable rights.

Human reason, that unique capacity, propels an innate quest by people everywhere to understand ultimate truths about their purpose, meaning, and destiny. At a fundamental level this suggests that they should be free to explore such timeless questions – whether religious in nature or rooted in some other ultimate concern. As Pope Benedict put it, religious freedom should be understood 'not merely as immunity from coercion, but more fundamentally as an ability to order one's own choices in accordance with truth'.

The freedom to explore ultimate questions must extend to the skeptic or searcher. Indeed, a number of religious thinkers – from Roger Williams

<sup>6</sup> Kevin Hassan, *The Right to Be Wrong* (San Francisco: Encounter Books, 2005).

<sup>7</sup> Recep Senturk, 'Human Rights in Islamic Jurisprudence: Why Should All Human Beings Be Inviolable?', in *Constituting the Future*, edited by Allen D. Hertzke, forthcoming.

<sup>8</sup> Abdolkarim Soroush, *Reason, Freedom, and Democracy in Islam*, especially Chapter 9 (Oxford University Press, 2000).

in the 17<sup>th</sup> Century to Abdolkarim Soroush<sup>8</sup> in the 21<sup>st</sup> – make the case that coercion of the non-believer is not only sinful but counterproductive, because it suggests that the religious message is not persuasive on its own.

This brings us to the next dimension of human endowment: conscience, the human sense of right and wrong. Conscience can be ‘a demanding mentor’, compelling us at times to rise above what may seem as our own self-interest.<sup>9</sup> Respect for ‘mandates of conscience’, therefore, vitally animated a number of formative thinkers of religious liberty and continues to motivate its champions today.

This insight is too often lost in contemporary debates over religion. Religious freedom is not merely a nice thing tolerated by the state. Rather, as Cardinal Newman put it, conscience ‘has rights because it has duties’.<sup>10</sup> Thus one of the most compelling justifications for religious liberty is the freedom of conscience, the freedom to fulfill obligations – especially sacred duties – which flow from an authority higher than the state.

To be sure, conscience can be malformed or distorted, but people everywhere recognize the essential human trait of – and laud persons for – ‘good conscience’. And when people are denied this freedom they experience it as a powerful violation – something that prevents them from fulfilling their quintessentially human quest for meaning and purpose on earth. A key measure of a free society, therefore, is the extent to which people are not forced to choose between sacred duties and citizenship privileges.

Finally, religion is relational, and true freedom of faith must protect the right of people to gather in communities of belief for mutual expression and succor. Indeed, religious communities are historically and ontologically ‘prior’ to the modern state and their autonomy deserves protection from overreaching political authorities.<sup>11</sup>

This communal aspiration serves as a powerful motivator, as family life and social networks have deep roots in collective religious experience. Surveying a growing body of scientific research – from evolutionary biology, neurology, and psychology – Stephen Post finds evidence for a powerful spiritual or religious inclination that naturally manifests itself in communal life. Hence, a good society is one in which persons can express their innate transcendent inclinations in public domains.<sup>12</sup>

<sup>9</sup> Hassan, *The Right to be Wrong*.

<sup>10</sup> John Henry Newman, ‘Letter to the Duke of Norfolk’, as cited by Charles J. Chappin in *Render Unto Caesar* (New York: Doubleday 2008), p. 148.

<sup>11</sup> David Novak, *In Defense of Religious Liberty* (Wilmington, DE: ISI Books, 2009).

<sup>12</sup> Stephen G. Post, *Human Nature and the Freedom of Public Religious Expression* (Notre Dame, Indiana: Notre Dame University Press, 2003).

Religious groups, consequently, should enjoy the right to build houses of worship, own property, determine their own doctrines, train clergy, establish and run schools, and engage in peaceful evangelization – persuading others to join them and accept new truth claims. Like other institutions of civil society, religious communities and institutions have the right to engage in public policy debates and petition government officials on behalf of their religious principles. In the words of David Novak, religious communities must be able to bring their ‘moral wisdom to the world’.<sup>13</sup>

This seemingly straightforward norm of democratic life collides with influential legal doctrines that view religious justifications for public policy as illegitimate and dangerous because they invoke divisive ‘comprehensive doctrines’ that not all citizens share.<sup>14</sup> As Tom Farr suggests, this argument violates the very equality mandated by liberal democracy.<sup>15</sup> To suggest that religiously-based claims are illegitimate or a threat to liberal systems shows a lack of faith in the marketplace of ideas and a truncated notion of democratic life.<sup>16</sup>

The international importance of religious freedom flows from the dramatic resurgence of faith around the globe. Contrary to the predictions of secularization theorists, religion not only thrives in the modern world but increasingly manifests itself in intense public commitments, making this, in a sense, ‘God’s Century’.<sup>17</sup>

Moreover, if modernity does not produce secularization, it does propel and diffuse religious pluralism. Given the rich diversity of human experience and culture, the default condition of religion, as Peter Berger suggests, is plurality, both among and within religions. By shrinking the world, globalization plunges people of diverse religious backgrounds into intense contact with one another, requiring religionists to negotiate their beliefs with seemingly alien or competing faiths.<sup>18</sup> This makes nurturing articles of peace all the more vital.

<sup>13</sup> David Novak, *In Defense of Religious Liberty*, 2009

<sup>14</sup> John Rawls developed the notion of ‘public reason’ first in his book *A Theory of Justice* (Cambridge: Harvard University Press, 1971) but articulated more fully his argument against ‘comprehensive doctrines’ in *Political Liberalism* (New York: Columbia University Press, 1996).

<sup>15</sup> Tom Farr, *World of Faith and Freedom* (New York: Oxford University Press, 2008).

<sup>16</sup> Alfred Stepan, ‘The Twin Tolerations’, in *World Religions and Democracy*, Larry Diamond, Marc F. Plattner, and Philip J. Costopoulos, eds. (Baltimore: Johns Hopkins Press, 2005).

<sup>17</sup> Monica Duffy Toft, Daniel Philpott, and Timothy Samuel Shah, *God’s Century: Resurgent Religion and Global Politics* (New York: W.W. Norton, 2011).

<sup>18</sup> Peter Berger and Anton Zijderveld, *In Praise of Doubt* (New York: HarperOne, 2010).

## Empirical validation

That people have a fundamental right to the freedom of conscience and belief is *one of the great ideas in human history*. It is a central measure of free society and bulwark of democratic governance.

What is stunning is the way empirical research mounts to validate this normative ideal by showing the contribution of religious freedom to other human goods. Propositions about such linkages have been advanced for centuries. But for the first time in human history we have the documentary record and the capacity to apply rigorous scientific methods to test such propositions.

What this initial research shows are strong correlations between religious freedom and the longevity of democracy, civil and political liberty, press autonomy, women's status, economic development, health outcomes, societal peace, and regional stability. Chart 1 (see p. 686) illustrates the strength and range of such correlations, which suggests that religious freedom is an integral part of the 'bundled commodity' of human freedom.<sup>19</sup> Remove it and the others tend to unravel.

These statistical relationships invite work by scholars to develop explanatory theories. The link between religious liberty and economic development, for example, makes sense because societies that protect freedom of belief and conscience tend to operate with greater transparency and less corruption. Deregulated religious markets, moreover, can contribute to an enterprising ethos and climate so vital to economic progress.<sup>20</sup> Tim and Rebecca Shah suggest further that the economic value of 'spiritual capital' can operate for the very poor by enabling them to exercise agency and develop supportive communities.<sup>21</sup>

Sociologists Brian Grim and Roger Finke are pioneering leaders in this endeavor to explain the contribution of religious freedom to human flourishing. In their book, *The Price of Freedom Denied*, Grim and Finke probe the timeless question of why religious liberty matters. Their answer is theoretically elegant and empirically powerful: when religious freedoms increase, inter-religious conflict declines, grievances lessen, and persecution

<sup>19</sup> Brian J. Grim, 'Religious Freedom: Good for What Ails Us?', *The Review of Faith and International Affairs*, Summer 2008.

<sup>20</sup> Brian J. Grim, 'God's Economy: Religious Freedom and Socioeconomic Well-Being', and Theodore Malloch, 'Free to Choose: Economics and Religion', both in *Religious Freedom in the World*, Paul Marshall, ed. (Lanham: MD: Rowman & Littlefield, 2008).

<sup>21</sup> Tim Shah and Rebecca Shah, 'Spiritual Capital and Economic Enterprise', Oxford Centre for Religion & Public Life, [www.ocrpl.org/?p=13](http://www.ocrpl.org/?p=13).

wanes. On the other hand, as government restrictions increase – often at the behest of dominant religious groups – so does violent persecution, inter-religious hostilities, and regional strife. Thus their theory explains the interaction between societal pressures, government laws, and peace.

The theory also provides real guidance to policy makers because it shows why their common inclination to control religion is counterproductive. Government restrictions on religion, Fink and Stark show, trigger social hostility among religious groups, which produces more pressure for government restrictions and further religious strife. This ‘religious violence cycle’ is illustrated in the new book *God’s Century*, by Monica Toft, Daniel Philpott, and Timothy Shaw.<sup>22</sup> Drawing upon international relations scholarship, these authors show that regime attempts to repress religion induce the very militancy such efforts purport to prevent.

But the vicious ‘religious violence cycle’, Grim and Finke contend, can be broken. When governments relax restrictions on religion and treat all groups equally, greater societal tolerance and civility ensue, leading to positive cycles where groups channel energies and competition in civil society pursuits.<sup>23</sup> Such a culture, in turn, buoys democratic governance and unleashes economic enterprise.

This empirical theory points toward ancient religious wisdom. In a pivotal passage in the Qur’an on religious pluralism, Surah 5.48 records that Allah could have created one people with one faith but instead created many peoples so that they could ‘vie one with another in virtue’.<sup>24</sup>

In sum, empirically-derived theories suggest that restrictive laws and repressive societal practices produce persecution and conflict, undermine democracy and civil liberties, and contribute to terrorism and international conflict. Thus, contrary to claims by foreign policy ‘realists’ that promotion of human rights interferes with the pursuit of the national interest, this scholarship illuminates the importance of an international regime that respects the freedom of conscience and belief. As Tom Farr puts it, the promotion of re-

<sup>22</sup> Monica Duffy Toft, Daniel Philpott, and Timothy Samuel Shah, *God’s Century: Resurgent Religion and Global Politics* (New York: W.W. Norton, 2011).

<sup>23</sup> Brian J. Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century* (New York: Cambridge University Press, 2011); Brian J. Grim and Roger Finke, ‘Religious Persecution in Cross-National Context: Clashing Civilizations or Regulate Religious Economies?’, *American Sociological Review*, 72 (August 2007): 633–658.

<sup>24</sup> *My Mercy Encompasses All: The Koran’s Teachings on Compassion, Peace & Love*, Gathered & Introduced by Reza Shah-Kazemi (Shoemaker Hoard, 2007).

ligious freedom is not only a humanitarian cause; it is vital to global security. It can help drain the swamps from which terror networks emerge. It can lessen regional tensions and international strife.<sup>25</sup> And more broadly, as Os Guinness observes, guaranteeing freedom of belief and conscience will help societies navigate a world of difference without violence and repression.<sup>26</sup>

There are, in short, compelling reasons to see religious liberty as a fundamental and universal human right. *Justice demands it. Violations disrupt the social order.*

But, critics charge, religions can use their freedom to influence state authorities and seize unfair prerogatives. Responding to this critique, scholars are probing conditions that prevent this deleterious dynamic.

In a systematic inquiry into the institutional requirements of democracy, Columbia University professor Alfred Stepan developed a compelling thesis about the relationship between religion and the state he terms the ‘twin tolerations’. Liberal democracy, he shows, depends on a reciprocal bargain between the institutions of religion and the institutions of the state. The state protects and thus ‘tolerates’ the freedom of religious institutions to operate in civil society; those religious institutions, in turn, refrain from using the powers of the state to enhance their prerogatives and thus agree to ‘tolerate’ (not squelch) competitors.<sup>27</sup>

Taking the twin tolerations as his point of departure, Daniel Philpott developed a cogent theory of the link between religion-state relations, theology, and democracy. Democracy is best anchored where religion and state are differentiated, not fused, and where the ‘political theology’ of religious communities eschews constitutional privileges or coercive state enforcement of doctrine.<sup>28</sup>

To illustrate his theory, Philpott points to the dramatic impact of theological changes in the Catholic Church. For most of its history, the Church enjoyed prerogatives of state establishment and opposed religious pluralism, which made Catholicism a net drag on democratization. That posture was challenged by such Catholic intellectuals as Jacques Maritain and John Courtney Murray, who made the case for the compatibility – even necessity

<sup>25</sup> Thomas F. Farr, *World of Faith and Freedom: Why International Religious Liberty is Vital to American National Security* (New York: Oxford University Press, 2008).

<sup>26</sup> Os Guinness, *The Case for Civility* (San Francisco: HarperOne 2008).

<sup>27</sup> Alfred Stepan, ‘The Twin Tolerations’, in *World Religions and Democracy*, Larry Diamond, Marc F. Plattner, and Philip J. Costopoulos, eds. (Baltimore: Johns Hopkins Press, 2005).

<sup>28</sup> Daniel Philpott, ‘Explaining the Political Ambivalence of Religion’, *American Political Science Review* 3, 2007 (505-525).

– of freedom to authentic faith. That idea was ultimately embraced by the Church’s ‘Declaration of Religious Liberty’ at the Second Vatican Council, which suggested that free pursuit of spiritual truth was anchored in the ‘sublime dignity’ of humanity. *Dignitatis Humanae* stands as one of the pivotal documents of the 20<sup>th</sup> Century because when the Church stopped relying on temporal power to pursue its spiritual mission it was freed to challenge the legitimacy of authoritarian regimes, and with a few exceptions it did just that. Indeed, like a great ocean liner that turns slowly but with tremendous force in its new direction, the Church became the principal engine of democracy in the last quarter of the 20<sup>th</sup> Century. As extensively documented by scholars, the last great wave of democratization on earth was largely Catholic. Beginning in 1974, it swept away authoritarian regimes in the Iberian peninsula, Latin America, Eastern Europe, and the Philippines, leaving all but a few Catholic countries in democratic hands.<sup>29</sup>

This account suggests why liberalization and democratization in Muslim-majority nations – so fateful to global peace and security – hinge on the development and diffusion of theological insights into the Islamic wellsprings of freedom of conscience and belief. And just as Catholic intellectuals laid the groundwork for the Church’s theological transformation, a number of Islamic thinkers – Abdullahi An-Nai’m, Abdolkarim Soroush, Recep Senturk, Abdullah Saeed, Abdelwahab El Effendi, Asma Afsaruddin, and others – are doing the same today.<sup>30</sup>

<sup>29</sup> Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991).

<sup>30</sup> Abdullahi An-Na’im and Abdelwahab El-Affendi argue against the idea of an Islamic state where political authority enforces Shari’a law, and they make the case that contemporary Islamists have grafted onto Islamic jurisprudence a modern ideology of the absolutist state that is antithetical to classical Islamic tradition. Iranian intellectual Abdolkarim Soroush makes a powerful Islamic case for soul-freedom, arguing that state coercion in faith corrupts both the state and religion. Abdullah Saeed similarly develops the theological case against state enforcement of apostasy laws. Turkish scholar Recep Senturk, as noted in the text, documents an Islamic understanding of the inviolability of persons as grounding universal human rights. Asma Afsaruddin has developed Islamic interpretations that support religious pluralism, women’s rights, and religious freedom. See Abdullahi An-Na’im, *Islam and the Secular State: Negotiating the Future of Shari’a* (Boston: Harvard University Press, 2008); Abdelwahab El-Affendi, *Who Needs An Islamic State?* (London: Malaysia Think Tank, 2008); Abdolkarim Soroush, *Reason, Freedom, and Democracy in Islam* (New York: Oxford University Press, 2000); Abdullah Saeed, *Freedom of Religion, Apostasy and Islam*, (Aldershot, England: Ashgate Publishing, 2004); Recep Senturk, ‘Human Rights in Islamic Jurisprudence: Why Should All Human Beings be Inviolable?’, in *Constituting the Future*, edited by Allen D. Hertzke, forthcoming; Asma



## The status of global religious freedom

Despite considerable progress since the passage of the *Universal Declaration*, only a minority of people on earth enjoys the kind of religious freedom called for in international covenants. According to the Pew Forum, some 70 percent of the world's 6.8 billion people live in countries with high restrictions on religion.<sup>31</sup> Religious believers in many places suffer discrimination, intimidation, arrest, torture, and martyrdom. Religious communities face burdensome restrictions on their ability to build houses of worship or schools, see their property shuttered by authorities or destroyed by mob violence, and find themselves stigmatized in state media or by dominant societal groups.

This repression undermines the prospects for greater freedom and democracy. After three decades of solid progress, democratic freedom in the world reached a high point in 1998. It then stagnated and, ominously, has declined for five years in a row to the present, the longest decline in the 40-year history of Freedom House reporting.<sup>32</sup> Religious repression and strife are among the key contributors to this trend, in effect acting as a drag on global progress.

While most modern democracies generally protect religious practice, emerging trends threaten the freedom of religious persons and communities. If unchecked, these threats will not only narrow the zone of religious freedom in the West but will undermine its ability to promote and model best practices to other nations.

We have two complementary sources of information on the global status of religious rights: 1) reports by national governments, international agencies, and human rights groups on country conditions; and 2) a massive project launched by the Pew Forum to systematically code and measure the degree of restrictions in each country on earth by drawing upon the documentation provided by such reports. This section summarizes some of the key findings of the Pew Forum report with illustrations from pertinent reports and studies.

To what extent do governments and social groups impinge on the practice of religion? To answer that question the Pew Forum on Religion and

Afsaruddin, 'Making the Case for Religious Freedom within the Islamic Tradition', in *Faith & International Affairs*, Summer 2008; Asma Afsaruddin, 'Absolutism vs. Pluralism in Islam Today', in *Faith & International Affairs*, Winter 2008.

<sup>31</sup> 'Global Restrictions on Religion', Pew Forum on Religion and Public Life, December 2009.

<sup>32</sup> 'Freedom in the World 2011 Survey', Freedom House, Washington DC, 2011 ([www.freedomhouse.org](http://www.freedomhouse.org)).

Public Life – in partnership with the John Templeton Foundation – provides the first systematic quantitative measurement of the status of religion in different countries around the world. Its report, ‘Global Restrictions on Religion’, was released in December of 2009 (<http://pewforum.org/Government/Global-Restrictions-on-Religion.aspx>). The online report includes a narrative overview, country breakdowns by degree of restrictions, regional patterns, and detailed raw data on the coding of individual countries so scholars can determine exactly how a particular country received the score it did. The Pew team will continue to do this coding to record longitudinal trends in future reports.

The endeavor is directed by Brian Grim, who developed a unique methodology for coding restrictions on religion. Rather than attempting to measure some indefinable ‘quantity of freedom’, this method instead systematically codes observable *restrictions* to create a verifiable index, which can be compared cross-nationally, replicated over time, correlated for causal explanations, and plumbed for normative conclusions.

A brief explanation on this methodology is helpful to appreciate the rigor, value, and meaning of the country measures.

The Pew Forum team reviews 16 widely cited sources, including all country constitutions and reports by the United Nations, the United States, the United Kingdom, the European Union, and a host of reputable international NGOs. These reports become the factual basis for recording various restrictions on religion.

A rigorous coding protocol is then employed to provide comparable measures on two dimensions: 1) government restrictions on religion; and 2) social hostilities by groups against religious individuals and communities. This division emerged from initial research by Brian Grim and others, which found that the on-the-ground status of religious practice was indeed determined by these two interrelated, but distinct factors. Chart 2 (see p. 687) illustrates how both governments and societal groups can impinge on the practice of religion, in this case through harassment or intimidation of religious groups. While government and social restrictions often move in tandem, the shaded areas contain a number of different countries, illustrating how we need both indicators to fully capture infringements on religious freedom.

To code the degree of restrictions, the Pew team identified 20 indicators of government restrictions and 13 indicators of societal hostilities. Double-blind coders then recorded whether each indicator was present in a country.

For government restrictions the following were the kind of indicators coded: Does the constitution or basic law substantially contradict the con-

cept of religious freedom? Does any level of government interfere with worship or other religious practice? Was there harassment or intimidation of religious groups? Did the national government display physical violence toward minority religious groups? Does any level of government ban any religious group? Do all religious groups receive the same level of government access and privileges? Were there instances where the national government attempted to eliminate an entire religious group's presence in the country? Does any level of government use force toward religious groups that results in individuals being killed, abused, imprisoned, or forced from their homes? As we can see, the coding captured real restrictions, with increasingly severe restrictions given more indicators and thus more weight.

For social hostilities the following were the kind of indicators coded: Where there crimes, malicious acts or violence motivated by religious hatred or bias? Was there mob violence related to religion? Were religion-related terrorist groups active in the country? Did violence result from tensions between religious groups? Did religious groups themselves attempt to prevent other religious groups from being able to operate? Did individuals use violence or threat of violence to enforce religious norms? Again, we see the tangible reality captured by the coding.

After ensuring that the coding met rigorous standards for validity and reliability, a summary index measure was determined for every country on each of the two dimensions. That index is based on a 0–10 scale (with 0 registering no restrictions and 10 the maximum possible restrictions). The final report included index measures for 198 countries and independent territories on both dimensions. Chart 3 (see p. 688) lists the countries with the highest index scores on government restrictions and social hostilities.

The report grouped nations into the following categories on each of the two dimensions: *very high restrictions* (the highest 5% of the countries' index scores), *high restrictions* (the next 15%), *moderate restrictions* (the next 20%), and *low restrictions* (the bottom 60%). This grouping was determined on the basis of the range within each category, so that the bottom 60% of the nations clustered within a range roughly equal to the top 5%, or the next 15%. We learn from this clustering that the nations with high or very high restrictions really do stand apart from the rest; this is a meaningful indicator.

A key finding of the report is that the top fifth of the countries with high or very high restrictions (on each dimension) contain a disproportionate share of the world's population. Thus 57% of the world's population lives in nations with high or very high government restrictions and 46% live in societies with high or very high social hostilities. Chart 4 (see p. 689) combines these to produce a summary of the global picture.

As we see, about a third of the nations on earth (64 countries) have high or very high restrictions on religion, either through government action or social hostilities, or both. On the positive side, this suggests that two-thirds of the countries have achieved a modicum of religious freedom through protective laws and positive societal norms. But because the restrictive nations include some of the most populous, encompassing some 70% of the world's population, the study illustrates the enormous gulf between the promise of Universal Declaration and the reality on the ground for many.

While this finding is sobering, the analysis suggests the potential for a huge global impact with improvements in the two most populous nations, China and India. Because China has very high government restrictions (7.7) but low social hostilities (1.6), relaxing state restrictions on religion would produce an immediate and measurable gain. India's very high score on social hostilities (8.8), on the other hand, would be reduced by aggressive government actions that protect religious minorities from mob violence.

Still, even that momentous change would leave huge room for improvement. With respect to government actions, in two-thirds of the countries some level of government interfered with worship. In nearly half of the countries members of religious groups were killed, abused, imprisoned, or displaced by some level of government. In more than 80% of the countries governments clearly discriminated against one or more religious groups. With respect to social hostilities, in 70% of the countries crimes or malicious acts were committed against religious people. In more than half of the countries religious groups attempted to prevent others from operating.<sup>33</sup>

Charts 5 and 6 summarize government restrictions and social hostilities by region, with a median score and range depicted. As we see, the Middle East-North Africa has the highest scores for both government restrictions and social hostilities, five times that of the Americas, with Asia-Pacific the next highest on government restrictions. All the rest of the regions have low median indexes, but the ranges are wide for the Asia-Pacific and Africa. The Americas are low on both (see Charts 5 and 6, pp. 690-1).

The wide variation within regions reveals important underlying patterns. Below we see the highest and lowest scores in the Middle East-North African region. The contrasting cases of Saudi Arabia and Qatar illustrate how countries in the same region with similar ethnic and religious make up can take diverging paths.

<sup>33</sup> Brian Grim, 'Restrictions on Religion in the World: Measures and Implications', in *Constituting the Future*, Allen D. Hertzke, editor, forthcoming.

	Government Restriction Index	Social Hostilities Index
Saudi Arabia	8.4	6.8
Qatar	3.9	<1

Saudi Arabia is the only country in the world to register very high restrictions on both dimensions. There the Wahhabi sect of Islam, which insists on the imposition of fundamentalist Shari'a and denounces nonbelievers in virulent fashion, is the state-recognized religion and all other faiths, including many Muslim branches, are either banned or heavily restricted. This repression provokes inter-religious hostilities, especially between Sunni and Shia, and accedes to the vigilante activities of the Muttawa, or religious police, creating a chilling environment for freedom generally.

What accounts for the enormous gap with Gulf neighbor Qatar, a kindred country with 90% Sunni population? Unlike Saudi Arabia, which intensified its concessions to fundamentalist theocrats from the 1980s onward, Qatar took a different path toward religion. Leaders there gradually relaxed restrictions on the practices of religious minorities, creating a social environment far more conducive to inter-religious peace and Muslim reform. Intriguingly, the process was facilitated by an American Ambassador, Joseph Ghougassian, a Catholic whose relationship of mutual respect with Islamic authorities helped lead to the lifting of the ban on non-Islamic worship and ultimately the opening of Christian churches for the first time in 14 centuries.<sup>34</sup>

Just as the theory by Grim and Finke would suggest, Saudi policies fuel a 'religious violence cycle' of enmity among religious communities and state repression, while Qatar's policies not only minimize strife among Sunnis and Shias but helped unleash a positive cycle of foreign investment, reform of family law, improvement in women's status, and the flowering of universities.

We also see important variation in other regions. In terms of government restrictions Russia stands out in Europe, with an index of 6.0, compared to France at 3.4 and Poland at 1.0. French *laïcité* policies and anti-sect initiatives impose a number of restrictions on religion, which explains its significantly higher index than Poland.

<sup>34</sup> Joseph Ghougassian, *The Knight and the Falcon: The Coming of Christianity in Qatar* (Escondido, CA: Lukas & Sons, 2008). The first of a series of Christian churches to open in Doha was St. Mary's Catholic Church, which celebrated Easter in 2008, the first for a Christian church since the 7<sup>th</sup> Century.

One of the important findings of the Pew Forum report is the strong, though not universal, relationship between government restrictions and social hostilities, as we see in Charts 7 and 8 (pp. 692–3). Just as theorized by Grim and Finke, high government restrictions track with high social hostilities. Notable exceptions are the communist remnant countries of China and Vietnam, which restrict religion but tend to have low to moderate social hostilities, and Bangladesh, which has moderate government restrictions but very high social hostilities.

Of the 25 most populous countries only two, Japan and Brazil, score low on both measures. The United States registers in the moderate range on social hostilities because of frequent religious-based hate crimes. Among democracies Israel has some of the higher scores, 4.5 on government restrictions (owing in part to privileges for the Orthodox) and 7.2 on social hostilities (see Charts 7 and 8, pp. 692–3).

### **Discussion of government restrictions**

As Jonathan Fox documents, over three-quarters of the governments on earth are involved in some way in regulating religion, extending privileges to favored faiths, or establishing a state religion. Such involvement ranges across a wide continuum of possibilities – from banning all faiths to mandating an exclusive state religion, from intrusive and inequitable regulation to modest requirements applied uniformly.<sup>35</sup>

At one extreme, religions are simply outlawed and believers face fines, imprisonment, or even death for attempting to practice their faith. In North Korea all independent religious practice is illegal. The Orwellian regime requires destitute people to venerate Kim Il Sung and Kim Jong Il, who are presented as god-like figures. Any traditional religious observance, or the suspicion of it, can send whole families into labor camps, torture, or death. North Korean refugees, who are exploited in China, face harsh treatment when repatriated, especially if they are suspected of being Christians. Ironically, because North Korea is the most closed society on earth, the Pew team did not have the access to the same objectively-reported indicators of repression, so it was the only country excluded from the Pew Forum coding.

Other governments fuse the state with a dominant religion and harshly repress minority faiths. Especially in Muslim majority nations, militant Islamists have pressured authorities to enact harsh versions of Shari'a that dis-

<sup>35</sup> Jonathan Fox, *A World Survey of Religion and the State* (New York: Cambridge University Press, 2010).

criminate against religious minorities and Muslim dissenters or impose severe penalties for conversion. Other countries stop short of outright bans but violently repress non-approved religions, such as Bahá'ís in Iran.

Some regimes, especially the communist remnant, attempt to channel religion into state-sanctioned forms. China has created state-run forms of Christianity, Buddhism and Islam, and represses all other expressions. Independent Protestants and Catholics (of so-called house churches) have suffered property destruction, confiscatory fines and arrest. Muslim Uyghurs of western China endure violent repression akin to that meted out to Tibetan Buddhists. And thousands of practitioners of the meditation sect Falun Gong have been arrested and some killed in Chinese custody.

Authoritarian governments attempt to control the influence of religion by 'suppressing it, regulating it, prohibiting it, and manipulating it to their own advantage'.<sup>36</sup> In some cases, like Burma, this means harsh repression of virtually all religious communities. In other cases, as in Central Asia, authoritarian regimes employ national security justifications to control expressions of religion, and violent raids on Muslim religious communities are common.

Less extreme but more widespread is government refusal to grant legal status to particular religious communities, making it difficult or impossible for them to own property, enter into contracts, publish materials, run seminaries, or operate schools. Onerous or vague registration requirements result in arbitrary rulings by local authorities or shifting bureaucratic hurdles to the operation of religious organizations. Such hurdles can be demoralizing and enervating for religious communities, as enormous energy and time must be expended for the simplest of tasks, such as getting a permit to build or repair a church building. This is illustrated by Chart 9 (p. 694). While governments often justify registration requirements as reasonable, we see that in many cases such laws clearly discriminate against some religious groups (see Chart 9, p. 694).

We see instances, such as Turkey, where a secular government even regulates theological teachings, pays Sunni religious leaders, and requires millions of Alevis to worship in Sunni Mosques. This, in addition to restrictions on Christian religious practice, results in its high index on government restrictions (6.4).

Laws against the freedom to change one's religion represent an increasing problem. We see this with anti-conversion laws in India and Sri Lanka, or laws against apostasy in some Muslim nations. Even where conversion from

<sup>36</sup> Samuel Huntington, 'Religious Persecution and Religious Relevance in Today's World', in *The influence of Faith: Religious Groups and U.S. Foreign Policy*, Elliot Abrams, ed. (Lanham, MD: Rowman & Littlefield, 2001), p. 58.

Islam is nominally allowed, as in some Malaysian states, legal obstacles to it are formidable. While such laws are often promoted as a means of protecting people from abusive proselytizing, the impact is a stigmatization of particular groups or individuals.

This catalogue of violations should not result in fatalism, because broad improvement has been made in some regions, most notably in Latin America. And in some countries, such as Vietnam, improvement over the last decade was clearly nudged by the efforts of religious NGOs and the American government.

### **Discussion of social hostilities**

Societal repression or hostile acts deeply infringe on the free exercise of religion. Job discrimination against minorities, ostracism, intimidation, and mob violence by dominant groups afflict a number of societies, including some with relatively low level of legal restrictions. Such intimidation often serves as a means of extra-legal control.

Such repression is often fed by state action. When a regime declares certain religious groups dangerous or passes anti-conversion laws, it invites abuse by mobs or even score settling by neighbors with impunity.

This dynamic helps explain the high social hostilities score on India (8.8), where the rise of extreme Hindu nationalism spurred societal repression and attacks against Muslims, Christians, and Sikhs. A key lever for Hindu nationalists is an anti-conversion movement that invites mob violence against religious and ethnic minorities deemed a threat. As Angela Wu has documented, the anti-conversion law passed in the State of Orissa served as the pretext for militant Hindu chauvinists to attack vulnerable Christian communities and tribal people with impunity in 2008. Precisely as the 'religious violence cycle' suggests, the state's law, which implied that conversion is an act 'imposed' by one person on another, invited violence against Christians falsely accused of such conversions. Then, after hundreds of homes were destroyed and thousands displaced, the government's response was to call for more aggressive anti-conversion enforcement, not prosecution of mob leaders or teaching that violence is an unacceptable response to religious competition. This state action sanctions a chilling repression of millions of vulnerable religious minorities, tribal people, and Dalits (untouchables), thus undermining authentic democracy in what will soon become the most populous nation on earth.<sup>37</sup>

<sup>37</sup> Angela Wu, 'The Lever of Law in Religious Advocacy', in *Constituting the Future*, edited by Allen Hertzke, forthcoming.



In a number of Muslim nations, especially those under pressure by militant Islamists, charges of apostasy or blasphemy often incite violent local mobs. In some cases such charges are employed merely by individuals to settle scores, but the devastating results send an intimidating message to religious minorities and Muslims who may dissent from the dominant local understanding of the faith.

Here Pakistan's high index on social hostilities (8.4) is instructive. After seizing power in a coup in 1977, General Zia ul-Haq consolidated rule through a social engineering program purportedly to Islamize the country but which also sought to legitimate the mujahedin fighting in Afghanistan. In a rejection of the pluralist democratic vision of Pakistan's founder Al Jinnah, the infamous blasphemy was enacted, Ahmadiyya were declared non-Muslims and banned from holding conferences, publishing, and travel, and women's rights undermined.<sup>38</sup> None of these measures was democratically enacted, but once in place they invite vigilante violence against religious minorities and Muslims who advocate reform, thus perpetuating repression and retarding democratization. Under the cloak of enforcing Islamic law vigilantes have killed Ahmadis, Shiites, and Christians accused of blasphemy. Judges, politicians, and religious leaders who challenged the blasphemy law have been assassinated. In sum, state actions undertaken by a dictator continue to fuel social hostilities that threaten the fabric of the nation.

Violent societal repression is also found in nations with severe inter-religious strife. Nigeria has laws protecting religious freedom, but the enjoyment of that right is undercut by clashes between Christians and Muslims. Numerous churches and mosques have been burned in the course of violent attacks and reprisals, and many people killed. The recent election of President Goodluck Jonathan, a Christian, sparked Muslim riots and attacks against churches in northern Nigeria. This sectarian divide explains wide gap between Nigeria, with a social hostilities score of 5.8, versus Namibia at 1.2 and Botswana and Mozambique at less than 1.

### **The weakening of international norms**

To appreciate how religious freedom might be advanced, it is helpful to examine broad global forces that are challenging international norms on religious rights. Former United Nations Rapporteur on Freedom of Religion and Belief, Asma Jahangir, commented that the international covenant on religious freedom might not pass if proposed today. This captures some-

<sup>38</sup> Saroop Ijaz, 'The Real Blasphemy', *Los Angeles Times*, January 5, 2011.

thing of the emerging challenges to religious freedom. In a number of ways the normative consensus embodied in the *Universal Declaration* is weakening at the very time that it should be growing. This flows from a variety of converging forces, from secularization to theocratic movements, from identity politics to authoritarian pushback.

Secularization of elite culture in the West can be a powerful force chipping away at the norms and legal foundations of religious freedom, as Cole Durham has observed.<sup>39</sup> If religion is seen as passé, benighted, or inherently intolerant – by judges, policy makers, or public administrators – the defense of religious rights will likely be anemic. Even where such secularization does not produce overt hostility, it can induce indifference. If there is nothing *special* about faith commitments, why be concerned with the autonomy of religious institutions or the conscience rights of believers? Why treat a zoning request by a church any different from a business? Or see a transcendent duty as distinct from a lifestyle choice? A corollary to secularization is a relativism that questions the validity of ‘exclusivist’ religious truth claims, even the right to make them. Thus the fundamental right to peacefully persuade others of one’s conception of truth becomes illegitimate ‘proselytizing’ if it involves religion but not other commitments.

This tendency seems to flow strongly through Western Europe, where secularism is seen as the tide of historical progress and the counterpoint to ‘superstitious’ religion. In this environment the idea of protecting the freedom of religion to ‘flourish’ seems counter to enlightened evolution. When combined with a tradition of state paternalism that sees the need to protect people from ‘psychological’ pressures of sectarian movements, this leads nations to pass anti-cult laws or impose bureaucratic hurdles to religious institution-building. France and Belgium, for example, list hundreds of religions as ‘dangerous’ or ‘harmful’ sects, including a number of Protestant groups, African Pentecostals, Zen Buddhists, Hasidic Jews, and even the YMCA.<sup>40</sup> The problem with such laws is two-fold: 1) they directly infringe on the rights of religious minorities, and 2) they undercut international normative standards. Chinese communist officials, for example, can claim that their restrictions on ‘cults’ are no different from those in ‘free’ Europe.

<sup>39</sup> W. Cole Durham, Jr., Matthew K. Richards, and Donlu Thayer, ‘The Status and Threats to International Law on Religious Liberty’, in *Constituting the Future*, Allen D. Hertzke, editor, forthcoming.

<sup>40</sup> Report by the Institute on Religion and Public Policy, June 23, 2008, [newsletter@religionandpolicy.org](mailto:newsletter@religionandpolicy.org).

A related trend is the emergence of competing rights and equality norms that often trump religious claims, in part because traditional faith is often seen as being in opposition to abortion access, gender equality, and gay rights. Laws against discrimination on the basis of gender or sexual orientation thus provide grounds to limit the autonomy of religious institutions deemed insufficiently enlightened on these matters.

In this new legal regime conscience protection becomes a critical religious struggle, as Gerard Bradley has documented.<sup>41</sup> In the field of health care, for example, religious providers are coming under new pressure to provide services that violate their religious tenets. In the civil society arena, laws on non-discrimination in employment on the basis of sexual orientation and provisions to extend marriage rights to same-sex couples are being applied against religious institutions, schools, charities, and service vendors without provision for conscience exemption. In the United States this has already forced Catholic charities to close adoption agencies because state authorities did not provide an exemption from the requirement that they place children with same-sex couples, in violation of church teachings on sacramental marriage. Not only does this state action diminish religious community engagement, it undercuts the vision of civil society previously embedded in international covenants.

Changing views about the value of religious rights are also leading to vague notions of 'tolerance' as a substitute for robust protection of religious free exercise. The Organization for Security and Cooperation in Europe (OSCE), for example, now officially combats 'intolerance' instead of overt religious discrimination. Not only does such a policy dilute norms embedded in prior international covenants, it feeds into the false perception that anti-defamation efforts – defined as opposition to Islamophobia, xenophobia, intolerance, and the like – equal the protection of religious liberty. This results in predictable confusion, as mere criticism of another religion becomes equated with the actual denial of religious rights while egregious persecution receives short shrift.

Another threat to the norm of religious freedom involves the criminalization of expression under the guise of promoting tolerance. This can involve sanctioning 'defamation' (which restive Muslim communities press) or overbroad interpretations of 'hate speech' (which some gay advocates de-

<sup>41</sup> Gerard V. Bradley, 'Emerging Challenges to Religious Freedom in American and Other English-Speaking Countries', in *Constituting the Future*, Allen Hertzke, editor, forthcoming.

mand). In Western Europe individuals have been prosecuted for merely criticizing certain Islamic practices or interpretations or for preaching about homosexuality.

On the international stage the Organization of Islamic Countries (OIC) has aggressively sought to enshrine anti-defamation as a legal norm and mandate that U.N. agencies police expressions that defame religion. Sold as a defense of faith, it actually represents a grave threat to freedom of speech, inquiry, and belief, as a number of NGO leaders have testified.<sup>42</sup> The ambiguity of ‘defamation’ empowers the state or dominant religious communities to suppress the religious freedom of individuals. If one believes in another religion that contradicts Islam, one has ‘defamed’ it. If Muslim wishes to discuss the tenets of Islam with another Muslim, but this discussion is not in accordance with the school of Islam which the majority or the state embraces, this too is ‘defamation’. When a Shi’a disagrees with a Sunni, a Sufi with a Salafist, an Ismaili or Ahmadi with a Wahhabi, all can be charged with defamation. One can see how chilling this action is for religious freedom of Muslims and non-Muslims alike, for it invites abuse by the state and vigilante violence.

Globalization is a powerful force that knits together the world in ways that necessitate modalities of peaceful coexistence among people of diverse beliefs. But globalization also introduces a vortex of bewildering economic and cultural change that can spark exclusivist or fundamentalist reactions.<sup>43</sup> It produces enormous wealth but can exaggerate disparities between rich and poor, undermine local economies, disrupt village cultures, and subvert transmission of faith-based moral norms. Millions of people are drawn into teeming cities in the developing world, often bereft of barest necessities and community institutions. Under these conditions resurgent religious communities may provide the main source of social integration and identity. Globalization also means a shrinking world in which people of diverse religious backgrounds come into intense contact with one another – ‘cheek to jowl’ – requiring religionists to negotiate their beliefs with seemingly alien or competing faiths. While this contact need not result in what Huntington describes as a ‘clash of civilizations’, it can produce defensiveness, suspicion, and inter-religious strife.

<sup>42</sup> Sandra Bunn-Livingstone, ‘A Historical Analysis: International Religious Freedom 1998–2008’, p. 35.

<sup>43</sup> Martin E. Marty and R. Scott Appleby, editors, *Fundamentalisms Comprehended* (Chicago: University of Chicago Press, 1995). One of several volumes from *The Fundamentalism Project* at the University of Chicago.

One response to the reality of pluralism is religious chauvinism. Hindu nationalists, who claim that only Hindus can be true Indians, would marginalize Muslims, Christians, Sikhs, and even Dalits. In Sri Lanka, similarly, Buddhist nationalists target Hindus with repression and anti-conversion laws. In Nigeria, Christians have sometimes responded to the implementation of Islamic Shari'a by embracing fundamentalist forms of their own faith and meeting violence with reprisals. In Russia and elsewhere the Orthodox Church has sought help from the state in squelching competitors.

While all religious communities spawn chauvinist movements, the most momentous expression of militancy flows from unique circumstances affecting global Islam. It may seem paradoxical, but the Islamic world is experiencing massive resurgence and population growth at the same time it faces crisis and inner turmoil. This produces the combustible mixture from which radical Islamist movements and terror networks have sprung. Today a virtual civil war is occurring within Islam – a struggle for the soul of the faith between militant Islamists who seek to construct repressive theocracies rooted in the medieval past and reformers who seek to reclaim the best of their heritage and join the mainstream of economic and political life on the global stage.<sup>44</sup>

The principal threat to religious liberty thus flows from militants who either capture power, press regimes to enact extreme Shari'a (including death for apostasy and blasphemy), or engage in violence and intimidation against religious minorities or Muslims who don't share their vision. Beginning in 1979 with the Iranian Shi'ite Revolution, which resulted in brutal treatment of Bahá'ís and other minorities, waves of repressive movements have washed over parts of the Islamic world. Militants provoked civil wars in Sudan, imposed Taliban rule in Afghanistan, sparked violent conflict in Nigeria, and slaughtered thousands of civilians from Algeria to Indonesia.

While radicals or theocrats represent a small minority in almost all Muslim nations, they have 'influence disproportionate to their numbers'.<sup>45</sup> One advantage is money. Vast Saudi oil wealth exported the Wahhabi version of Islam, which calls for the imposition of fundamentalist Shari'a and denounces non-believers in virulent fashion. Whether intended or not, this funding has pro-

<sup>44</sup> Akbar S. Ahmed, *Islam Under Siege* (Cambridge, UK: Polity Press, 2003); Bassam Tibi, *The Challenge of Fundamentalism: Political Islam and the New World Disorder* (Berkeley: University of California Press, 1998); Bernard Lewis, *The Crisis of Islam: Holy War and Unholy Terror* (New York: Random House, 2003).

<sup>45</sup> Angel Rabasa, Cheryl Benard, Lowell H. Schwartz, and Peter Sickle, *Building Moderate Muslim Networks* (Santa Monica, CA: Rand Corporation, 2007), pp 1–2.

moted the growth of extremism throughout the Islamic world. A second advantage of radicals was organization, as the atrophy of civil society in authoritarian states left the mosque the only avenue for organized dissent. Finally, radicals have been successful to varying degrees in ‘intimidating, marginalizing, or silencing tolerant or reform-minded Muslims’.<sup>46</sup>

Despite these threats, a strategic opportunity presents itself. Most importantly, the vast majority of the world’s Muslims reject Islamic radicalism, in part because of its fruits. Militant theocrats, for example, not only create strife when they seek political power but cannot govern effectively when they attain it. Thus they are losing allegiance as they fail to deliver economic progress, civil peace, and uncorrupt politics. The Iranian regime has lost its legitimacy, Sudan is dysfunctional, and many Muslims recoil at the slaughter of innocents by Al Qaeda and the Taliban. The late Abdurrahman Wahid, former prime minister of Indonesia, argued that those who seek a peaceful and tolerant understanding of Islam, in fact, enjoy enormous ‘latent’ potential.<sup>47</sup> The Arab Spring of 2011 may in part represent the flowering of this impulse.

Geopolitical forces and calculations of national interest can exert enormous influence over the fate of religious freedom. Saudi Arabia’s power to manipulate the global oil market, for example, has led the American government to waive sanctions in response to its poor record on religious freedom, while Pakistan’s centrality to the war on terrorism leads officials to soft-pedal the plight of its religious minorities.

Authoritarian regimes, especially, find it convenient to invoke ‘national security’ imperatives to repress independent religious civil society actors. But we see this proclivity in a variety of regimes. Overbroad interpretations of national security in Russia, for example, serve as a pretext to harass minority sects that threaten the monopoly of dominant religious groups but pose no security threat to the state.

The role of geopolitical forces can lead to resignation about the efficacy of human rights initiatives. Why promote religious freedom, the argument goes, when its fate is wrapped up in vast and formidable tides? But the historical record belies fatalism or pinched understandings of realpolitik. During the Cold War the Helsinki accords opened cracks in totalitarian states and planted seeds of transparency and rule of law that ultimately led to the

<sup>46</sup> Angel Rabasa, Cheryl Benard, Lowell H. Schwartz, & Peter Sickle, *Building Moderate Muslim Networks*, pp 1–2.

<sup>47</sup> Abdurrahman Wahid, ‘Right Islam vs. Wrong Islam: Muslims and non-Muslims Must Unite to Defeat the Wahhabi Ideology’, *The Wall Street Journal*, December 30, 2005.

downfall of the Soviet Empire and the greatest expansion of religious freedom in the modern era.

### **Implications and future directions**

Because the case for religious freedom is so compelling, both for believers and the good of societies, public and private organizations should support complementary initiatives to generate knowledge, diffuse ideas, and fortify advocacy. Such initiatives of research, diffusion, and advocacy would aim to influence practices, laws, attitudes, and high level intellectual discourse conducive to greater religious liberty and tolerance. The aim, in part, would be to alter the mental architecture of policy makers, academics, and religious leaders so that protecting the ‘freedom of religion and conscience’ becomes the pivotal tool for living with our differences in a global arena of intense religious commitments. The dignity of belief and conscience links the fate of disparate people and societies everywhere.

In a *Guidebook for Donors* produced for the Templeton Foundation, I developed a model of change to illustrate both the profound challenges to, and the potential huge payoff of, advances in religious freedom.

The first diagram, *Theory of Change for Effecting Advances in Religious Freedom*, provides a high-level view of conditions calling for change and the enduring impacts desired. It provides a brief sketch of the linkages between resources for change, strategies, initiatives, and outcomes. The conditions calling for change convey the formidable challenges that confront us, while the ultimate impacts illustrate the manifold benefits of positive change for religion, society, and global governance (see Diagram 1, p. 695).

The second diagram, the *Religious Liberty Model of Transformation*, provides the detail contained in the middle cells of the preceding diagram. The column on the left side depicts the latent resources that can be activated for genuine transformation. These resources are mutually reinforcing, but certain things, such as sacrificial leadership by religious leaders, cannot be predicted, only facilitated. The rest of the model is intended to illustrate the synergistic dynamism of strategies and initiatives as means of achieving enduring outcomes (see Diagram 2, p. 696).

Because religious freedom stands on a precarious knife edge in many parts of the world, a coordinated program of research, diffusion of ideas, and advocacy – at this propitious moment – offers the potential for enduring global progress. It can tilt the balance in favor of greater spiritual freedom and human dignity. It can deepen our knowledge of fundamental human aspirations and re-awaken the norm of religious liberty as a fundamental human right.

## Summary

Historic opportunity and unique peril mark our era, and the quest for religious freedom lies at the center of this strategic moment. The idea of religious liberty is one of the great innovations in global history, yet it needs reaffirmation and re-articulation in each age and culture. Today this task could not be more pressing. In a world of resurgent religion, cultivating and protecting freedom of conscience and belief is the best means of enabling societies to live with religious differences civilly instead of violently.

Paradoxically, at the very time that this wisdom is becoming manifest, religious freedom is under siege. It is hostage to secular states and theocratic regimes, to inertial bureaucracies and social repression, to academic indifference and elite hostility. Comfortable religious communities take it for granted; dominant faiths sacrifice it for the corrupting sword of the state.

Without clarity about the universal human aspiration for meaning and belonging at the heart of religion, we will see counter-productive cycles of repression, conflict and violence, and further repression.

Initiatives to defend religious liberty can model a way to break this cycle. Through enhanced thinking and action political leaders, religious authorities, academics, and citizens can discover self-reinforcing positive dynamics of greater autonomy of conscience, mutual respect, and peace.



# DIFFICILE LIBERTÉ RELIGIEUSE

■ JEAN GREISCH

Le philosophe peut-il mêler sa voix à celles des spécialistes des sciences sociales?

Dans un mémorable passage du *Théétète*, Socrate décrit le philosophe comme un “piéton de l’air” qui est la risée de tout le monde. On peut craindre que si les sciences sociales avaient déjà été inventées à l’époque, leurs représentants auraient ri le plus fort!

Heureusement, Kant est là pour venir à la rescousse en rappelant l’intérêt “cosmopolitique” de la philosophie. En tant qu’il est “citoyen du monde”, le philosophe ne saurait se désintéresser du “grand jeu de la vie”, auquel nous participons tous, tantôt activement tantôt passivement.

Un aspect non négligeable de ce grand jeu concerne la manière dont, partout dans le monde, des hommes et des femmes militent pour que soit reconnu leur droit, qui est aussi celui des autres, d’exercer librement leur foi religieuse.

Les réflexions qui suivent veulent contribuer à combler une lacune troublante des travaux contemporains en philosophie de la religion: autant la question de la liberté religieuse et de ses conditions a joué un rôle crucial dans tous les textes fondateurs de cette discipline qui a vu le jour pendant la période charnière qui va de *La religion dans les limites de la simple raison* (1793) de Kant jusqu’aux *Leçons sur la philosophie de la religion* que Hegel donnera régulièrement à l’université de Berlin à partir de 1820, autant tout se passe comme si ce problème ne préoccupait plus guère les philosophes de la religion d’aujourd’hui.

Que la liberté ne soit pas un simple *parergon* d’une réflexion philosophique sur le phénomène religieux dans la diversité de ses manifestations, peut être montré en partant de chacun des grands textes qui s’inscrivent dans le sillage de la déclaration sur laquelle s’ouvre la préface de la première édition de *La religion dans les limites de la simple raison* (1793): “Dans la mesure où elle se fonde sur le concept de l’homme, comme être libre et se s’obligeant par cela même par sa raison à des lois inconditionnées, la morale n’a pas besoin ni de l’Idée d’un Être différent qui le dépasse afin qu’il connaisse son devoir, ni d’un autre motif que la loi elle-même pour qu’il l’observe (...) Mais, bien que la morale n’ait nul besoin pour son usage propre d’une quelconque représentation d’une fin qui devrait précéder la détermination du vouloir, il se peut toutefois qu’elle possède une nécessaire relation à une

fin semblable, non certes comme à un fondement, mais plutôt comme aux conséquences nécessaires des maximes, prises en conformité avec les lois”.<sup>1</sup>

Kant, Fichte, Schleiermacher et Hegel déclineront chacun ce thème fondamental selon leur génie propre. On n’oubliera pas non plus le rôle important que cette question a joué dans les grands débats publics qui agitaient l’intelligentsia européenne à l’époque du “Crépuscule des Lumières”: la “querelle du panthéisme”, la “querelle de l’athéisme”, la querelle autour de la “Révolution française”, “la querelle sur les choses divines et leur Révélation”.<sup>2</sup>

Comment expliquer le silence étonnant qui s’est installé depuis lors?

La réponse la plus massive serait de dire qu’aujourd’hui l’affaire est entendue et le problème résolu – du moins dans le champ intellectuel. Certains ajouteront probablement que, dans les sociétés démocratiques occidentales ou occidentalises, “où les religions ont perdu de leur rayonnement et font partie de l’ordre privé comme les préférences esthétiques et les goûts culinaires”,<sup>3</sup> le prosélytisme religieux ne représente plus de réel danger: *De gustibus religiosus non est disputandum!*

Mais n’est-ce pas là aller bien vite en besogne, en fermant les yeux sur les nombreuses manifestations de violence religieuse ou antireligieuse qui font l’actualité des médias? Aussi longtemps qu’une femme ou un homme peuvent être mis à mort pour cause de “blasphème”, ou de conversion, ou être taxés de fou ou d’aliéné mental à cause de leurs convictions, on ne peut pas dire que le problème soit réglé pratiquement.

Un observateur attentif des évolutions récentes des sociétés occidentales ne manquera pas d’y déceler les signes inquiétants de certaines dérives identitaires, comme, par exemple, le malencontreux débat sur la laïcité qui s’est tenu le 5 avril dernier à Paris, envenimé par une cascade de déclarations intempestives décrivant l’action du Président de la République française pour obtenir l’accord de l’ONU sur l’intervention en Libye comme une “croisade”, ou résumant la lutte contre l’immigration par une étrange tautologie, pleine de sous-entendus à l’encontre des fidèles musulmans: “*Les Français veulent que la France reste la France*”.

Si, de toute évidence, le problème est loin d’être réglé sur le terrain de la pratique, l’affaire est-elle entendue sur le plan conceptuel et théorique? Ce n’est pas sûr non plus!

<sup>1</sup> Emmanuel Kant, “La religion dans les limites de la simple raison”, trad. Alexis Philonenko: Kant, *Œuvres philosophiques III*, Paris, Ed. de la Pléiade, 1968, p. 15-16.

<sup>2</sup> Pierre-Henri Tavoillot, *Le Crépuscule des Lumières. Les documents de la “querelle du panthéisme” (1780-1789)*, Paris, Ed. du Cerf, 1995.

<sup>3</sup> Emmanuel Levinas, *Difficile liberté. Essais sur le judaïsme*, Paris, livre de poche, 1976, p. 155.

Il y a, au contraire, tout lieu de rouvrir un dossier auquel la déclaration conciliaire *Dignitatis humanae*, promulguée le 7 décembre 1975 à Saint Pierre par le Pape Paul VI avait jadis fait accomplir un pas de géant, dont nous sommes loin d'avoir mesuré toute la portée: "Toujours plus nombreux sont ceux qui revendiquent pour l'homme la possibilité d'agir en vertu de ses propres options et en toute libre responsabilité; non pas sous la pression d'une contrainte, mais guidé par la conscience de son devoir. De même requièrent-ils que soit juridiquement délimité l'exercice de l'autorité des pouvoirs publics, afin que le champ d'une honorable liberté, qu'il s'agisse des personnes ou des associations, ne soit pas trop étroitement circonscrit. Cette exigence de liberté dans la société humaine regarde principalement les biens spirituels de l'homme, et, au premier chef, ce qui concerne le libre exercice de la religion dans la société".

Quand je relis ces lignes sur lesquelles s'ouvre la Déclaration, je suis frappé par deux choses. D'abord l'optimisme des Pères conciliaires qui s'exprime dans le "toujours plus nombreux". S'il faut en croire le *Pew Forum on Religion and Public Life*, édité en décembre 2009 par Brian Grim, aujourd'hui encore, environ 70% de la population mondiale vivent dans des pays où la liberté religieuse est soumise à de fortes restrictions, voire inexistante.

La seconde expression énigmatique est "le champ d'une honorable liberté", ce qui suggère qu'il peut y avoir également des libertés qui ne sont ni honorables, ni responsables.

C'est ce champ d'une "honorable liberté" que je me propose d'arpenter à nouveaux frais en compagnie de deux philosophes qui furent et restent pour moi des "maîtres": Paul Ricœur et Emmanuel Levinas. Même si, ni l'un ni l'autre, ne nous a laissé d'ouvrage libellé "philosophie de la religion", on trouve dans leurs écrits bien des éléments qui permettent de rompre le silence évoqué ci-dessus et de développer une herméneutique de la liberté religieuse qui soit à la hauteur des défis de notre temps.

"La parole est mon royaume et je n'en ai pas honte", écrivait Ricœur dans *Histoire et vérité*, à une époque où le chantage à l'engagement et à la militance était sur toutes les lèvres. Je dirai pareillement, pour caractériser la manière dont j'aborderai notre sujet: "Les concepts, c'est ma boîte à outils, et je n'en ai pas honte", en précisant qu'il s'agira d'une approche herméneutique comparable à celle qui faisait l'objet du Colloque Castelli qui s'est tenu à Rome du 7 au 12 janvier 1968 sur le thème "Herméneutique de la liberté religieuse", et auquel ont participé plusieurs de mes maîtres en philosophie.

Contrairement à ce qu'on pourrait penser, le lexème "herméneutique" n'a pas une fonction purement décorative dans les réflexions qui vont suivre. Il s'agit au contraire de prendre acte du fait fondamental qu'une réflexion

sur le concept de liberté religieuse ne peut pas faire abstraction de la manière dont les religions se comprennent elles-mêmes, ce qui signifie, par le fait même, qu'on est également en droit de leur demander de quel genre de liberté elles sont capables, et comment elles la mettent en pratique.

Comme je viens de l'indiquer, ma réflexion se développera en dialogue avec Ricœur et Levinas. Ce sera donc aussi, en partie du moins, un dialogue "judéo-chrétien". Du point de vue conceptuel, il gravitera autour de deux formules qui, l'une et l'autre, nous permettent de mieux "cadrer" l'idée même de liberté religieuse: "liberté *selon l'espérance*" et "liberté *selon l'élection*" que je prolongerai, *in fine*, par une brève approche de la "liberté *selon la vérité*".

### 1. La liberté religieuse comme "liberté selon l'espérance" (Paul Ricœur)

Le poète Paul Celan déclare que chacun de ses poèmes s'écrit à partir d'une date précise. Même s'il n'est pas sûr que les questionnements philosophiques se laissent dater aussi précisément, les Actes du Colloque romain sur l'herméneutique de la liberté religieuse représentent, en ce qui me concerne, un jalon décisif.

Cela vaut en particulier pour la conférence de Paul Ricœur "La liberté selon l'espérance", reprise ultérieurement dans *Le conflit des interprétations*.<sup>4</sup> Le terme "herméneutique" dans le titre de ce Colloque romain signifie ni plus, ni moins que le fait que "le concept de liberté religieuse peut être abordé de plusieurs manières et à plusieurs niveaux".<sup>5</sup> Si nous ne sommes pas capables de déchiffrer la multiplicité des figures qui jalonnent "l'aventure entière de la liberté", il est fort à parier que nous échouerons également à "donner un sens concevable à l'expression 'liberté religieuse'"!<sup>6</sup>

Ricœur nous invite à distinguer trois problèmes, qui requièrent chacun une analyse particulière: 1. celui de la *liberté de l'acte de foi* (aspect psychologique et anthropologique); 2. celui du "droit de professer une religion déterminée" (aspect politique) – Ricœur s'empresse d'ajouter: "la liberté qu'on revendique pour elle est d'autant plus légitime que la religion n'en est pas le bénéficiaire exclusif"! – 3. enfin, et en un sens, c'est le problème le plus dé-

<sup>4</sup> Paul Ricœur, "La liberté selon l'espérance" in: *Le conflit des interprétations. Essais d'herméneutique*, Paris, Ed. du Seuil, 1969, p. 393-415. (texte paru initialement sous le titre: "Approche philosophique du concept de liberté religieuse" in: Enrico Castelli, *L'herméneutique de la liberté religieuse* (Actes du Congrès international, Rome, janvier 1968), *Archivio di Filosofia*, 38, 1968, et Paris, Aubier, 1968, p. 215-234.

<sup>5</sup> *Ibid.*, p. 393.

<sup>6</sup> *Ibid.*, p. 415.

cisif: celui d'une interrogation sur "la *qualité de liberté qui appartient au phénomène religieux comme tel*".<sup>7</sup>

Cette troisième forme de liberté requiert une "herméneutique" au sens défini plus haut, c'est-à-dire une interprétation qui se greffe sur la manière dont la religion se comprend elle-même, compréhension qui, aux yeux de Ricœur, a sa source dans la proclamation du kérygme. Autant dire que cette interprétation n'est pas étrangère à ce que l'apôtre Paul appelle la "*parrhêsia*" chrétienne, ni à la parole du Christ johannique: "La vérité vous rendra libres" (Jn 8, 32).

La manière dont Ricœur s'évertue à montrer comment la qualité proprement religieuse de la liberté récapitule les deux autres niveaux, constitue à elle seule une contribution importante à ce qu'il appellera ultérieurement une "herméneutique philosophique de l'espérance",<sup>8</sup> qui se déploie sous l'égide de la question kantienne: "Que m'est-il permis d'espérer?".

Une seule formule, aussi dense que laconique, résume le pari herméneutique fondamental qui sous-tend toute cette argumentation et qui donne tout son poids à la formule "liberté selon l'espérance": "*une herméneutique de la liberté religieuse est une interprétation de la liberté conforme à l'interprétation de la résurrection en termes de promesse et d'espérance*".<sup>9</sup>

Parole de philosophe, ou de théologien et, qui plus est, d'un théologien qui a médité le grand traité de Luther, paru en 1520: *Von der Freiheit eines Christenmenschen?*, se demanderont certains, à juste titre.

"Noyau kérygmatic" de la liberté, leur répond Ricœur, en se réclamant de l'expression kierkegaardienne de "passion pour le possible".<sup>10</sup> Cette passion se laisse rapporter, selon une logique de la récapitulation, aussi bien au plan anthropologique, en y voyant la mise en œuvre d'une "imagination créatrice du possible" qu'au niveau éthico-moral, en reconnaissant dans la Loi (ou mieux, exprimé en langage biblique: le Commandement) "la face éthique de la promesse", ce qui veut dire en même temps que *promissio et missio* ("l'envoi") sont inséparables. Comprise de cette façon, la liberté selon l'espérance ne peut s'énoncer que paradoxalement à travers le double jeu catégorial du "en dépit de" – "en dépit de la mort" ("Mort, où donc est ta victoire?") – et du joyeux "combien plus" de la grâce, que Paul célèbre dans l'Épître aux Romains.

<sup>7</sup> *Ibid.*, p. 393.

<sup>8</sup> Paul Ricœur, "Une herméneutique philosophique de l'espérance" in: *Lectures 3. Aux frontières de la philosophie*, Paris, Ed. du Seuil, 1994, p. 19-40.

<sup>9</sup> Paul Ricœur, *Le conflit des interprétations*, p. 397.

<sup>10</sup> *Ibid.*, p. 398.

Ce qui, jusqu'ici, se présente comme l'herméneutique d'une certaine conception de la liberté qui a sa source dans les textes fondateurs de la foi chrétienne, est-il susceptible d'une approximation philosophique? Sans doute n'y a-t-il guère d'harmonie préétablie entre les contraintes de l'exercice du penser philosophique et le kérygme chrétien. En ce sens, l'approximation philosophique de cette liberté selon l'espérance ne peut être que l'expression d'un "penser libre"<sup>11</sup> et en même temps respectueux des données du kérygme.

Il est significatif que Ricœur cherche cette approximation du côté d'un des grands textes fondateurs de la philosophie de la religion: *La religion dans les limites de la simple raison* de Kant, justement, parce que, à ses yeux, aucun autre philosophe n'a plus exclusivement défini la religion en référence à la seule question: "Que m'est-il permis d'espérer?"<sup>12</sup> Une seule thèse ramasse cette relecture, qui est en réalité bien plus que cela: "Une philosophie des limites, qui est en même temps une exigence pratique de totalisation, voilà (...) le répondant philosophique du kérygme de l'espérance, l'approximation philosophique la plus serrée de la liberté selon l'espérance".<sup>13</sup>

Ici n'est pas le lieu d'analyser en détail la manière dont Ricœur décèle successivement dans la Dialectique de la raison pure et la Dialectique de la raison pratique de Kant, en particulier dans la doctrine kantienne des postulats, ce qu'il appelle des "structures d'accueil" permettant de penser en termes philosophiques quelque chose comme une "liberté selon l'espérance".<sup>14</sup> J'en retiendra un seul point, décisif pour les réflexions qui vont suivre: la liberté postulée de Kant est "bien la liberté selon l'espérance",<sup>15</sup> c'est-à-dire le vœu d'une "manière d'exister libre parmi les libertés".

Ce postulat est-il un simple "vœu pieux", un rêve de tendresse irréalisable dans ce monde de brutes qui est le nôtre?

Ne nous précipitons pas vers une réponse hâtive. Mieux vaut méditer au préalable un autre paradoxe kantien: le fait que le porche d'entrée de sa philosophie de la religion soit son "Essai sur le mal radical". Pour Ricœur, qui n'a cessé de méditer ce texte tout au long de son itinéraire philosophique, cela veut dire que "la problématique du mal nous contraint de lier", aussi étroitement que possible, "la réalité effective de la liberté à une régénération qui est le contenu même de l'espérance".<sup>16</sup>

<sup>11</sup> *Ibid.*, p. 402.

<sup>12</sup> *Ibid.*, p. 408.

<sup>13</sup> *Ibid.*, p. 403.

<sup>14</sup> *Ibid.*, p. 406s.

<sup>15</sup> *Ibid.*, p. 410.

<sup>16</sup> *Ibid.*, p. 412.

La déclaration de Kant, dans ses *Conjectures sur les débuts de l'histoire humaine*, d'après laquelle "l'histoire de la liberté commence par le Mal",<sup>17</sup> s'applique également à l'histoire de la liberté religieuse. Les combats pour la liberté, y compris pour la liberté religieuse, se déroulent sur l'arrière-plan sombre d'une violence protéiforme qui peut venir du dehors, mais également sourdre du dedans de la religion elle-même.

## 2. La liberté selon l'élection (Emmanuel Levinas)

Je ferai un second pas dans ces réflexions philosophiques sur le concept de liberté religieuse en compagnie d'un philosophe nous lance un second défi. Il s'agit d'Emmanuel Levinas, plus précisément de son célèbre recueil d'essais sur le judaïsme, qui "témoignent d'un judaïsme reçu à partir d'une tradition vivante et alimentée par la réflexion sur des textes sévères plus vivants que la vie",<sup>18</sup> paru en 1963 sous le titre aussi énigmatique que suggestif de "difficile liberté".

La note préliminaire à la troisième édition du livre s'achève sur une phrase lourde de sens: "Bien des choses ont changé dans le monde et les mœurs tels qu'ils se promettaient, au lendemain de la Libération, pendant des années. Mais la liberté n'est pas devenue plus facile".

Il me semble que cette déclaration se laisse également appliquer, *mutatis mutandis*, au problème de la liberté religieuse dans le monde d'aujourd'hui. Dans ces essais de Levinas, nous rencontrons bien des éléments qui peuvent nourrir une réflexion sur la manière de formuler le problème de la liberté religieuse aujourd'hui, en évitant de n'y voir qu'une liberté de fous plus ou moins infantile.

Demandons-nous d'abord en quoi consiste la difficulté, ou plutôt les difficultés, dès lors qu'il s'agit du problème de la liberté religieuse. De même que Ricœur distinguait plusieurs approches de la liberté religieuse, nous pouvons distinguer plusieurs ordres de difficulté.

"Mais tout ce qui est beau est difficile autant que rare": c'est sur cette déclaration célèbre que Spinoza achevait le cinquième livre de son *Ethique* qui traite précisément de la liberté. Concernant notre problème, on pourrait dire: "Tout ce qui est grave est difficile autant que rare"! La gravité particulière des réflexions philosophiques tient du fait que pour Levinas, dont toute la pensée est une réaction à l'horreur nazie, à ses origines et à ses

<sup>17</sup> Emmanuel Kant, *Conjectures*, trad. Piobetta dans: *La philosophie de l'histoire*, Paris, Denoël-Gonthier, coll. Médiations, 1976, p. 119.

<sup>18</sup> Emmanuel Levinas, *Difficile liberté*, p. 9.

conséquences néfastes, “le mal est infiniment profond, sa texture est épaisse et inextricable”, à tel point que “ses forteresses inexpugnables subsistent au cœur d’une civilisation raffinée et dans les âmes conquises par la grâce”.<sup>19</sup>

1. Une liberté qui se voile les yeux devant les multiples formes de violence en nous et autour de nous, n’est qu’une illusion des “belles âmes” qui, quelque nombreuses qu’elles soient, ne sont d’aucun secours pour ceux qui ont compris que “toute action où l’on agit comme si on était seul à agir” comme si le reste de l’univers n’était là que pour recevoir l’action, est violente, tout comme est violente “toute action que nous subissons sans en être en tous points les collaborateurs”.<sup>20</sup>

2. “Occident”, écrit Levinas, justement dans une étude sur “Le cas Spinoza”, “signifie liberté de l’esprit. Toutes ses vertus et quelques-uns de ses vices”.<sup>21</sup> Précisément parce que cette “liberté de l’esprit” est notre bien le plus précieux, que nul n’a le droit de nous ravir, nous avons le devoir d’en interroger la ou les vertus, sans oublier, ce qu’on fait volontiers, “quelques-uns de ses vices”!

L’une de ces vertus se nomme assurément “tolérance”, comme le savent aussi bien Ricœur<sup>22</sup> que Levinas<sup>23</sup> qui se sont chacun interrogés sur le sens de cette notion qui, elle aussi, est peut-être plus difficile que ceux qui l’accommodent à toutes les sauces, ne veulent bien l’admettre.

Aux yeux de Levinas, rares sont ceux qui ont “remarqué que l’idée d’élection d’Israël qui semble contredire l’idée de l’universalité, est en réalité le fondement de la tolérance”, parce que “la certitude de l’emprise de l’absolu sur l’homme – ou religion – ne se mue pas en expansion impérialiste qui dévore tous ceux qui l’adorent”, car elle “brûle vers l’intérieur, comme une exigence infinie à l’égard de soi, comme une infinie responsabilité”.<sup>24</sup>

3. En cette matière aussi, “liberté” et “libération” sont des termes inséparables. Celui qui n’a jamais fait l’expérience de la libération, disait André Malraux, ne sait pas non plus de quoi il parle quand il emploie le mot de “liberté”. Levinas ne dit au fond rien d’autre quand il écrit que “la liberté de l’homme est celle d’un affranchi se souvenant de sa servitude solidaire de tous les asservis”.<sup>25</sup>

<sup>19</sup> *Ibid.*, p. 46.

<sup>20</sup> *Ibid.*, p. 18.

<sup>21</sup> *Ibid.*, p. 46.

<sup>22</sup> Paul Ricœur, “Tolérance, intolérance, intolérable” in: *Lectures 1. Autour du politique*, Paris, Ed. du Seuil, 1991, p. 294-311.

<sup>23</sup> Par exemple: “Religion et tolérance” in: *Difficile liberté*, p. 241-244.

<sup>24</sup> *Ibid.*, p. 244.

<sup>25</sup> *Ibid.*, p. 215.



4. L'adjectif "difficile" se laisse également appliquer au travail de compréhension auquel nous confronte le concept même de liberté. Il devient encore plus difficile si – pour reprendre une magnifique expression de Descartes dans une lettre à Marin Mersenne –, je prends conscience du fait que j'ai beau disposer de certitudes fortes, cela ne me garantit pas pour autant "si je pourrai le persuader aux autres".<sup>26</sup>

5. La difficulté tient enfin au fait que la liberté politique et la liberté intérieure, pour être distinctes, ne cessent de renvoyer l'une à l'autre.

"Raison et langage sont extérieurs à la violence. L'ordre spirituel, c'est eux"! Et si la morale doit véritablement exclure la violence, il faut qu'un lien profond rattache raison, langage et morale. Et si la religion coïncide avec la vie spirituelle, il faut qu'elle soit essentiellement éthique".<sup>27</sup> L'éthique, telle que la comprend Levinas, c'est le "rapport face à face où autrui compte comme interlocuteur avant même d'être connu".<sup>28</sup> Sans la capacité de se regarder face à face, pas de salut pour la liberté religieuse! Car "seule la vision du visage où s'articule le "Tu ne tueras point", constitue l'essence de la morale.

Pour Levinas aussi, ses réflexions sur la difficile liberté marquent un tournant historique décisif, parce que "l'expérience hitlérienne a été pour bien des juifs le contact fraternel des personnes chrétiennes qui leur ont apporté tout leur cœur, c'est-à-dire ont risqué tout pour eux".<sup>29</sup>

Mais il importe aussi de prêter attention à la déclaration immédiatement suivante: "Dieu merci, nous n'allons pas prêcher de suspectes croisades pour 'se serrer les coudes entre croyants', pour s'unir 'entre spiritualistes' contre le matérialisme montant!"<sup>30</sup> Comme cette phrase nous semble lointaine, aujourd'hui où bien des hommes politiques en responsabilité, utilisent sans vergogne le langage des "croisades", en oubliant le lien entre la spiritualité et le geste de nourrir!

D'une manière extraordinairement tonifiante, les essais de Levinas nous entraînent au-delà du pathétique (titre de la première partie) au risque de nous ennuyer, parce qu'ils nous confrontent à nouveaux frais à "l'ennuyeuse morale". Elle cesse d'être ennuyeuse, au plus tard quand on reconnaît que "toutes les situations où l'humanité reconnaît son cheminement religieux

<sup>26</sup> Lettre à Mersenne du 15 avril 1630 in: René Descartes, *Œuvres*, Edition de la Pléiade, p. 933.

<sup>27</sup> *Ibid.*, p. 183.

<sup>28</sup> *Ibid.*, p. 153.

<sup>29</sup> *Ibid.*, p. 10.

<sup>30</sup> *Ibid.*, p. 10.

trouvent dans les rapports éthiques leur signification spirituelle, c'est-à-dire leur vérité pour adultes".<sup>31</sup>

"Vérité pour adultes": on ne saurait surestimer le poids de cette formule, qui fait signe vers une "religion pour adultes" (titre d'un exposé de Levinas, fait en 1957 à l'Abbaye de Tioumliline au Maroc sur le thème: "Une religion d'adultes") et donc aussi vers une "liberté pour adultes"!

Quelle est cette "liberté pour adultes"? C'est une liberté qui accepte que "l'autonomie humaine repose sur une suprême hétéronomie".<sup>32</sup> Mais c'est une hétéronomie – tel est le paradoxe auquel nous confronte la pensée levinasienne – qui ne nous maintient pas sous tutelle, comme le craignaient les philosophes des Lumières, en y voyant la suprême menace contre l'autonomie, l'obstacle majeur à l'émancipation, mais qui, au contraire, nous rend libres, libres pour la responsabilité.

Tout comme les penseurs des Lumières, mais pour d'autres raisons, Levinas se méfie des formes aliénantes de l'hétéronomie. La ligne de partage la plus décisive – ligne de partage *religieuse* justement – ne passe pas entre l'autonomie et l'hétéronomie, mais entre le *Sacré* et le *Saint*. "Pour le judaïsme, le but de l'éducation consiste à instituer un rapport entre l'homme et la sainteté de Dieu et à maintenir l'homme dans ce rapport".<sup>33</sup>

Levinas n'a cessé de multiplier les mises en garde contre les pièges du numineux, en soulignant que la sainteté de Dieu doit être comprise "dans un sens qui tranche sur la signification numineuse de ce terme".<sup>34</sup> A ses yeux, la liberté ne peut exister que dans un monde désensorcelé, libéré de toutes les formes de l'idolâtrie.

Ici nous entrevoyons une difficulté redoutable: l'idolâtre est-il capable de liberté? En aucun cas, d'après Levinas, parce que "le sacré qui m'enveloppe et me transporte est violence".<sup>35</sup> Il en tire une conclusion paradoxale: pour l'idolâtre, qui vénère le sacré, le monothéisme "n'est qu'athéisme"! "L'affirmation rigoureuse de l'indépendance humaine, de sa présence intelligente à une réalité intelligible, la destruction du concept numineux du sacré, comportent le risque de l'athéisme".<sup>36</sup>

On comprend alors mieux l'enjeu de la question formulée par Jean-Luc Marion au mois dernier, lors d'une séance académique qui s'est tenu en

<sup>31</sup> *Ibid.*, p. 15.

<sup>32</sup> *Ibid.*, p. 25.

<sup>33</sup> *Ibid.*, p. 28.

<sup>34</sup> *Ibid.*, p. 28.

<sup>35</sup> *Ibid.*, p. 29.

<sup>36</sup> *Ibid.*, p. 30.

Sorbonne le vendredi 25 mars 2011 dans le cadre du “Parvis des Gentils” : “De quel Dieu sommes-nous les athées?”.

Levinas place la barre très haut, sans doute trop haut aux yeux de certains, quand il déclare que “l’athéisme vaut mieux que la piété vouée aux dieux mythiques”<sup>37</sup> et quand il se demande “si l’esprit occidental, si la philosophie, n’est pas en dernière analyse la position d’une humanité qui accepte le risque de l’athéisme, qu’il faut courir, mais surmonter, rançon de sa majorité”.<sup>38</sup>

De quel “athéisme” s’agit-il ici? Certainement pas d’un athéisme qui consisterait à dire: “Dieu n’existe pas, je ne l’ai pas rencontré”! C’est plutôt ce que, dans *Totalité et infini*, Levinas désigne comme “athéisme de la volonté”, autrement dit un “athéisme” qui fonde la relation à Dieu sur l’acceptation de la séparation qui nous interdit toute relation fusionnelle à Dieu, à l’instar du “sentiment océanique” dont parlait autrefois Romain Rolland. D’après Levinas, “il y a sur la voie qui mène au Dieu unique un relais sans Dieu. Le vrai monothéisme se doit de répondre aux exigences légitimes de l’athéisme. Un Dieu d’adulte se manifeste précisément par le vide du ciel enfantin”.<sup>39</sup>

A la fin de la conférence radiophonique: “Aimer la Thora plus que Dieu”, Levinas précise que, pour lui, cela ne veut dire rien de plus, mais aussi rien de moins qu’“accéder à un Dieu personnel contre lequel on peut se révolter, c’est-à-dire pour qui on peut mourir”. Etrange “c’est-à-dire” qui allie un “humanisme intégral et austère” (appelé ailleurs “humanisme de l’autre homme”<sup>40</sup>) “à une difficile adoration”,<sup>41</sup> difficile parce qu’elle seule nous protège “contre la folie d’un contact direct avec le Sacré sans la médiation de raisons”!<sup>42</sup>

Comprise à la lumière de ces présupposés, la liberté se confond avec une tâche éthique précise: intégrer si profondément la conscience de la justice et de l’injustice à la conscience de soi (y compris, bien sûr, la conscience de soi religieuse!) au point de les rendre inséparables, parce que “la conscience de soi se surprend inévitablement au sein d’une conscience morale”, c’est-à-dire une conscience qui découvre, à sa surprise, “qu’atruui n’est pas une *réédition du moi*”,<sup>43</sup> un simple *alter ego*. Il est autre d’une altérité “qui n’est

<sup>37</sup> *Ibid.*, p. 31.

<sup>38</sup> *Ibid.*, p. 34.

<sup>39</sup> *Ibid.*, p. 203.

<sup>40</sup> Emmanuel Levinas, *Humanisme de l’autre homme*, Montpellier, Fata Morgana, 1972.

<sup>41</sup> *Difficile liberté*, p. 206.

<sup>42</sup> *Ibid.*, p. 204.

<sup>43</sup> *Ibid.*, p. 31.

pas allergique”, dans la mesure où la conscience morale “ouvre l’au-delà”, en faisant signe vers l’altérité infinie du Tout autre.

La relation éthique ainsi comprise “est antérieure à l’opposition des libertés, à la guerre qui, d’après Hegel, inaugure l’histoire”. La religion, si elle est vivante, et si elle se transmet, comme se transmet la vie, produit tout, sauf des clones!

A supposer qu’on puisse encore parler à ce sujet d’une “lutte pour la reconnaissance”, cette lutte ne saurait consister en la guerre sans merci entre un oppresseur et un opprimé. D’où la question cruciale de savoir sous quelles conditions l’exercice de la liberté, y compris de la liberté religieuse, au lieu d’aboutir à un champ de bataille sanglant, voire s’achever en guerre d’extermination, peut se transformer en parcours de la reconnaissance de soi-même et des autres.

“Celui-là seul peut reconnaître le visage d’autrui qui a su imposer une règle sévère à sa propre nature”, affirme Levinas. Autant il se méfie des “sacrements” qui, à ses yeux, conservent encore de troubles connivences avec le sacré qu’il abhorre, autant il fait l’éloge de la “loi rituelle” – au point d’intituler l’une de ses études: “Aimer la Thora plus que Dieu”. Il attire ainsi notre attention sur l’aspect rituel et cultuel de la liberté religieuse. C’est en ce sens qu’il interprète également la parole du prophète Balaam: “Voyez! ce peuple se lève comme un léopard, il se dresse comme un lion!” (*Nb* 23, 24).

Quand les léopards se lèvent et les lions se mettent à rugir – même si ce sont des rugissements aussi doux que ceux du Dalai Lama – les puissants de la terre frémissent. Il est d’autant plus important de se rappeler que “le mal n’est pas un principe mystique que l’on peut effacer par un rite, il est une offense que l’homme fait à l’homme”.<sup>45</sup> Levinas va même jusqu’à écrire que “le monde où le pardon est tout-puissant devient inhumain”.<sup>46</sup> Pas de chantage au pardon – cela aussi est un signe d’une religion adulte, qui s’applique parfaitement au problème des abus de pédophilie. “Doctrines sévères” certes, mais qui ne mènent point à l’inhumanité du désespoir.<sup>47</sup>

“Une religion est universelle quand elle est ouverte à tous”<sup>48</sup> et non quand tout le monde y adhère. La conception “égalitariste” de l’universalité – celle de la “pensée unique” –, demande à être corrigée par un “supplément d’âme”, qui est un supplément de responsabilité. Le thème de la

<sup>44</sup> *Ibid.*, p. 31.

<sup>45</sup> *Ibid.*, p. 37.

<sup>46</sup> *Ibid.*, p. 37.

<sup>47</sup> *Ibid.*, p. 37.

<sup>48</sup> *Ibid.*, p. 39.

liberté rencontre ici la catégorie biblique de l'élection, dessinant la figure de ce qu'on pourrait appeler une "liberté élective". Liberté "élective", non parce que je l'aurais choisie, mais parce que je suis élu pour la responsabilité, "obligé à l'égard d'autrui" et, par le fait même, "infiniment plus exigeant à l'égard de moi-même qu'à l'égard des autres".<sup>49</sup>

Levinas parle d'un "particularisme qui conditionne l'universalité"<sup>50</sup> au lieu de la restreindre. Celui qui est élu pour la responsabilité n'est pas moins libre que celui qui ne jure que par l'autonomie; mais il est libre autrement, libre d'une liberté qui rime avec responsabilité.

L'"humanisme de l'autre homme", auquel Levinas a consacré l'un de ses livres, parie sur le fait que "la première relation de l'homme avec l'être passe à travers son rapport avec l'homme",<sup>51</sup> parce que "le monde devient intelligible devant un visage humain et non pas (...) par les maisons, les temples et les ponts".<sup>52</sup> Affirmer cela, ne signifie évidemment pas que nous puissions nous dispenser de construire des maisons, des temples et des ponts, ni d'interroger le sens humain et peut-être plus qu'humain de chacune de ces constructions.

Le "grand philosophe contemporain qui résume un aspect important de l'Occident" que Levinas brocarde au passage, sans le nommer, est évidemment Heidegger. Si l'on veut prendre la pleine mesure de la distance qui est prise ici, on peut se rapporter à l'étude "Heidegger, Gagarine et nous" qu'on trouve dans la Section "Distances" du même recueil.<sup>53</sup>

Que vient faire Youri Gagarine dans cette galère? Tel que nous le présente Levinas, c'est le premier homme qui, du haut de sa galère appelée "Spoutnik", contemple cet autre astronef sur lequel nous sommes tous embarqués: la Planète bleue qui, si nous n'y faisons pas attention, se transformera bientôt en une poubelle cosmique nauséabonde et inhabitable.

Que la technique – ce que Heidegger appelle le "Dispositif" (*Gestell*) – "risque de faire éclater la planète",<sup>54</sup> Levinas le sait aussi bien que Heidegger, même si, contrairement à celui-ci, il ne s'empresse pas de convoquer le vers de Hölderlin, dans la première strophe de l'hymne Patmos: "*Wo aber Gefahr ist, wächst / Das Rettende auch*".

Apparemment, ces réflexions sur le regard décentré du premier astronaute de l'humanité nous ont éloigné complètement de notre sujet. En réa-

<sup>49</sup> *Ibid.*, p. 39.

<sup>50</sup> *Ibid.*, p. 39.

<sup>51</sup> *Ibid.*, p. 40.

<sup>52</sup> *Ibid.*, p. 41.

<sup>53</sup> *Ibid.*, p. 323-328.

<sup>54</sup> *Ibid.*, p. 323.

lité, la manière dont Levinas interprète ce décentrement nous y ramène en droite ligne. Ce que “voit” Gagarine, ou plutôt: ce qu’il aurait du voir, d’après Levinas, ce sont les limites de “l’Enracinement” et des valeurs “identitaires” qui s’y rattachent, peu importe que ce soient des racines “religieuses”, “laïques”, voir “athées”.

On ferait preuve d’une grande naïveté, si l’on croyait que l’enracinement est une valeur exclusivement religieuse, en oubliant que l’alternative croyant-non-croyant n’est pas “aussi simple que pharmacien-non-pharmacien”!<sup>55</sup>

Ce que Levinas nomme “enracinement” relève plus de la superstition que de la religion, telle qu’il l’entend. Et c’est cette superstition-là qui demande à être “désensorcelée”, y compris dans ses variantes laïques et athées. Ce que Levinas veut désensorceler, ce sont les “génies du lieu” qui ne sont pas tous, loin s’en faut, des *divinités* tutélaires!

Mais ici nous guette un possible malentendu. Ce serait de croire que le salut vient du déracinement. Cela reviendrait à oublier que les arbres bibliques – l’arbre de vie de la Genèse, qu’on retrouve également dans l’Apocalypse, les cèdres du Liban et le chêne de Mambré sous lequel Abraham offre l’hospitalité à trois visiteurs étrangers – ont de puissantes racines!

Un arbre qui craint le déracinement n’est pas un arbre bien portant. A quoi reconnaît-on la santé d’un arbre? Bien des textes évangéliques nous suggèrent une réponse: au fait qu’il s’intéresse plus à ses fruits qu’à ses racines. Au lieu de s’obstiner à vouloir transformer la ligne de partage fluctuante entre autochtones et étrangers en un mur infranchissable – à Lampedusa, Jérusalem, au Mexique ou ailleurs – la “difficile liberté” consiste à porter un regard décentré sur soi-même, ce qui revient à “apercevoir les hommes en dehors de la situation où ils sont campés”, en “laissant luire le visage humain dans sa nudité”.<sup>56</sup>

Là où cela se produit, on découvre que ce que Joseph de Maistre appelait naguère la “chaleur bienfaisante des préjugés”, loin d’être une force, est une faiblesse coupable, la faiblesse de l’oiseau qui se blottit dans son nid, parce qu’il n’ose pas encore déployer ses ailes.

“Difficile liberté”: on mesure mieux le poids de cette liberté si, avec Levinas, on interprète le thème du *homo viator*, cher à Gabriel Marcel, comme la condition d’un exilé qui reconnaît que “ce qui compte par-dessus tout, c’est d’avoir quitté le Lieu”.<sup>57</sup> Encore ne faut-il pas se tromper de comptabilité, comme le font peut-être certains chantres de la postmodernité chez qui le “sans identité”

<sup>55</sup> *Ibid.*, p. 167.

<sup>56</sup> *Ibid.*, p. 325.

<sup>57</sup> *Ibid.*, p. 326.

se transforme en posture esthétique, ou, pour l'exprimer plus vulgairement, en "frime". Ce n'est évidemment pas dans cette direction que nous entraîne Levinas dans le chapitre aussi bref qu'incisif intitulé: "Sans identité"<sup>58</sup> sur lequel s'achève *Humanisme de l'autre homme*. Ces pages rejoignent l'interprétation talmudique du tamarin qu'Abraham plante à Baar-Cheba: "Nourriture, boisson, Logis", "trois choses nécessaires à l'homme et que l'homme offre à l'homme"<sup>59</sup> quand il découvre "l'homme dans la nudité de son visage".<sup>60</sup>

Peut-être est-il prudent de préciser "que l'homme *peut librement* offrir à l'homme", car ce genre d'offrande ne va jamais de soi. Ici nous découvrons un autre aspect de la "liberté selon l'élection": elle rime avec hospitalité. Plus importante que la capacité de dire: "Ici je suis chez moi, et je suis libre de faire ce que je veux", est la capacité de dire: "Ma maison est ouverte à tous, et d'abord à l'étranger, à la veuve, au pauvre et à l'orphelin". Plus important, non seulement parce qu'il y va d'une certaine conception de l'éthique, mais aussi de la liberté, de la religion et, finalement, de l'ipséité même du sujet, autrement dit, de la découverte qu'en "la responsabilité pour l'autre homme réside mon unicité même".<sup>61</sup>

En ajoutant que cette "conscience d'une assignation irrécusable dont vit l'éthique et par laquelle l'universalité de la fin poursuivie implique la solitude, la mise à part du responsable",<sup>62</sup> Levinas donne toute sa gravité, je serais presque tenté de dire: toute sa sévérité, à l'idée religieuse d'élection. Mais cette sévérité, comme celle des textes religieux "plus sévères que la vie", dont il fut un lecteur et commentateur assidu, n'a de sens que si l'on parvient à montrer qu'elle est au service de la vie.

Cette affirmation, qui pourrait être la conclusion de cette étude, n'est pas sans rapport avec l'hommage que Levinas rend à un certain athéisme, celui d'un Léon Brunschvicg par exemple qui, d'après Levinas, était "plus proche de Dieu Un que les expériences mystiques et les horreurs du sacré dans le prétendu renouveau religieux de nos contemporains",<sup>63</sup> en parti-

<sup>58</sup> *Humanisme de l'autre homme*, p. 83-101. La citation du Talmud de Babylone: "Si je ne répons pas de moi, qui répondra de moi? Mais si je ne répons que de moi – suis-je encore moi?" (Traité Aboth 6 a) que Levinas place en exergue de ces pages, pourrait tout aussi bien être un fil d'Ariane pour nos propres réflexions sur la "difficile liberté religieuse".

<sup>59</sup> *Difficile liberté*, p. 326.

<sup>60</sup> *Ibid.*, p. 328.

<sup>61</sup> *Ibid.*, p. 46.

<sup>62</sup> *Ibid.*, p. 46.

<sup>63</sup> *Ibid.*, p. 71.

culier quand il déclarait que “Dieu est Dieu, pour celui-là seul qui surmonte la tentation de le dégrader afin de l’employer à son service”.<sup>64</sup>

Ce propos met en pleine lumière la difficulté de penser – et surtout de vivre – ce qu’on pourrait appeler une “liberté religieusement libre”, libre non seulement extérieurement, parce qu’elle est tolérée au lieu d’être persécutée, mais aussi intérieurement libre, parce qu’elle a compris quel usage elle doit faire de sa liberté, en ayant une conscience réfléchie et critique de ses mésusages, qui ont pour nom: fanatisme, prosélytisme, exaltation.

Souhaitons que ce que Levinas dit des juifs: “Les juifs ne veulent pas être des possédés, mais des responsables”,<sup>65</sup> puisse également valoir des autres religions!

Le mot de la fin de cette seconde série de réflexions appartient évidemment à Levinas lui-même. Je l’emprunte à l’un de ses nombreux articles sur Paul Claudel, où l’admiration pour le génie du poète se double d’une invincible méfiance: “L’Histoire Sainte n’est pas l’interprétation d’une pièce à thèse, fût-elle transcendante, mais l’articulation par la liberté d’une vie réelle”.<sup>66</sup>

### 3. La liberté “selon la vérité”

Pour conclure, je me risquerai à une troisième approximation herméneutique du concept de liberté religieuse laquelle, si je devais la développer, engagerait un dialogue et un débat approfondi avec Michel Henry.

Si la religion n’est pas une simple affaire de goût qui ne se discute pas, cela tient au fait que les religions élèvent des prétentions à la vérité, ce qui nous donne également le droit de les interroger sur leur rapport à cette vérité. Sous quelles conditions devient-il une source de liberté?

Tôt ou tard, une réflexion sur la liberté religieuse nous confronte à l’énigmatique parole du Christ, déjà citée: “La vérité vous rendra libres”.

Nous la rencontrons dans l’Evangile de Jean dans une controverse qui porte sur les vrais fils d’Abraham, le père de la foi. L’instant est solennel, car Jésus vient de prononcer une parole vertigineuse: “Quand vous aurez élevé le Fils de l’homme, vous connaîtrez que *Je suis*”. (Jn 8, 28). Le “connaître” dont il est question ici est un “reconnaître”. Tout l’Evangile de Jean peut en effet être lu comme un immense “parcours de la reconnaissance” dans tous les sens du mot que Ricoeur dégage dans le dernier ouvrage publié de son vivant. La vérité dont Jésus parle quelques versets plus loin: “et vous

<sup>64</sup> *Ibid.*, p. 74.

<sup>65</sup> *Ibid.*, p. 83.

<sup>66</sup> *Ibid.*, p. 173.



connaîtrez la vérité et la vérité vous rendra libres” (*Jn* 8, 32), est libératrice, pour autant quelle va de pair avec ce travail de reconnaissance.

Par le fait même, nous sommes obligés de nous demander quel genre de vérité a cet étrange pouvoir de nous rendre libres. Ce n’est certainement pas la vérité propositionnelle de l’énoncé canonique qu’on trouve dans tous les manuels de Logique anglo-saxons: “*The cat is on the mat*”, “Le chat est sur le paillason”!

Serait-ce l’alètheia grecque, que Heidegger traduit par “*Unverborgenheit*”? Il est permis d’en douter.

Mais peut-être y a-t-il encore une autre vérité, libératrice. C’est celle que Saint Augustin a entrevu dans un célèbre passage du Livre X des *Confessions*, où il distingue *veritas lucens et veritas redarguens*, la vérité qui brille et qui attire par son éclat même, et la vérité qui vient nous mettre en question. Augustin nous y confronte au paradoxe d’une vérité qui provoque le rejet et qui enfante la haine. “Ils aiment la vérité quand elle brille, ils la haïssent quand elle les accuse [*amant eam lucentem, oderunt eam redarguentem*], car ne voulant pas être trompés et voulant tromper, ils l’aiment quand elle se signale, elle, et la haïssent quand elle les signale, eux [*amant eam cum se ipsa indicat, et oderunt eam, cum eos ipsos indicat*]”.<sup>67</sup> Epreuve de feu qui, pour celui qui la traverse, engendre ce qu’aucune vérité propositionnelle ne saura nous donner: la “joie née de la vérité”!

A l’intérieur du “parcours de la reconnaissance” johannique, cette promesse d’une vérité libératrice entre en résonance avec deux autres énoncés “alètheiologiques” remarquables, prononcés chacun dans le cadre d’un entretien non moins remarquable.

Le premier, dont les philosophes de la religion se sont emparés souvent avec précipitation, se rencontre dans le dialogue de Jésus avec la Samaritaine: “Mais l’heure vient – et c’est maintenant – où les véritables adorateurs adoreront le Père en esprit et vérité (...) Dieu est esprit, et ceux qui adorent, c’est en esprit et en vérité qu’ils doivent adorer” (*Jn* 4, 23).

<sup>67</sup> *Confessions* X 23, 34, BA. L’importance de cette distinction n’a pas échappé à Heidegger, comme le montre son cours cours: *Phänomenologie des religiösen Lebens*, Ga 60, p. 192–204. On notera en particulier la paraphrase quelque peu dramatique de la distinction augustinienne: “Or, ils la haïssent, lorsqu’elle les assaille [*wenn sie ihnen auf den Leib rückt*, ce qu’on pourrait également rendre par: ‘lorsqu’elle les prend à bras le corps’]. Si elle les aborde eux-mêmes et les ébranle, mettant en question leur propre facticité et existence, mieux vaut baisser les yeux quand il en est encore temps, pour se gargariser de litanies répétées en chœur dont on est son propre metteur en scène”. (Ga 60, 201).

<sup>68</sup> Maître Eckhart, *Predigt* 26, 10–12.

A chaque fois que je lis ce “et c’est maintenant”, je frémis, comme le faisait Maître Eckhart à son époque,<sup>68</sup> car j’y entends, tout comme la Samaritaine, un *tua res agitur*.

Le second énoncé est prononcé au chapitre 3, qui relate l’entretien nocturne de Jésus avec Nicodème: “Mais celui qui fait la vérité vient à la lumière, afin qu’il soit manifeste que ses œuvres sont faites en Dieu” (*Jn 3, 21*; cf. *1 Jn 1, 6*).

Ces trois formules johanniques nous font entrevoir trois visages inséparables de la liberté religieuse, comprise de l’intérieur: une *liberté libératrice* qui nous rend *libres d’adorer Dieu en esprit et en vérité*, mais qui exige aussi de *faire la vérité*, au lieu de se contenter d’en parler.

“Articulation par la liberté d’une vie réelle”, disait Levinas. C’est bien de cette articulation là qu’il s’agit également dans les trois visages de la liberté que je viens d’évoquer. Avec Michel Henry – mais ce serait là le sujet d’un autre article – on peut alors se demander si les trois énoncés “aléthéologiques” ne font pas secrètement signe vers une autre formule triadique, qui est l’un des sommets du “parcours de la reconnaissance” que nous sommes libres d’effectuer en compagnie de l’Évangéliste Jean: “Je suis la Voie, la Vérité et la Vie” (*Jn 14, 16*).

La *Voie*: elle vient à la rencontre des itinérants qui se reconnaissent faire partie d’une humanité itinérante; la *Vérité*: c’est en nous interrogeant et en nous interpellant qu’elle nous libère; la *Vie*: elle rend les vivants que nous sommes véritablement vivants.

### III. EXPERIENCES

1. What can be learned from the experiences of various societies in dealing with their principal trouble spots? Can there be a legitimate pluralism in modes of protecting religions and their freedom?

# RELIGION AND POLITICS IN CHINA

■ HSIN-CHI KUAN

## Introduction

The state of religious freedom in China could be compared to a glass of water. It was completely empty thirty years ago. Now, it is partially filled. The trouble lies in government restrictions rather than social hostilities. In a report by the PEW Forum on Religion & Public Life, China ranked 4<sup>th</sup> after Saudi Arabia, Iran and Uzbekistan on the list of countries with very high government restrictions on religion, with an index of 7.7. This high index was given 'primarily because of its restrictions on Buddhism in Tibet, its ban on the Falun Gong movement throughout the country, its strict controls of the practice of religion among Uighur Muslims and its pressure on religious groups that are not registered by the government, including Christians who worship in private homes'.<sup>1</sup> Apart from the suppression of religion, however, there are other versions of the story: recognition and tolerance, containment and guidance. In the reform era, the government has come to recognize that religion will neither fade out as a result of modernization nor can it be eliminated by the state. What remains to be done is to tolerate, contain and guide it. Religious practices are tolerated as long as they are not perceived as posing a threat to the ruling regime and established institutions such as education system. Therefore, the state's grip on popular, diffuse religions<sup>2</sup> – those categorized as superstitions – has been relatively loose, as compared to its firm control of the five recognized religions. The five recognized religions have organized institutions that could conceivably compete with the ruling party for authority over the people. Thus, the government spares no efforts to invent legislative and administrative means to contain their development within a specified mode and domain of operation.<sup>3</sup> Religion is expected to operate largely in the private

<sup>1</sup> <http://pewforum.org/Government/Global-Restrictions-on-Religion.aspx>, 'Global Restrictions on Religion', Full report of 7 December 2009, accessed on 10 May 2011. Quoted from page 13 of 72.

<sup>2</sup> Falun Gong is a popular religion but very well organized. Therefore, the present statement does not apply to it.

<sup>3</sup> Since 1982, the National People's Congress and the State Council respectively have promulgated close to a hundred laws and regulations on religion. In addition, there are policy documents and guidelines enacted by the People's Congresses and governments

sphere. If it is to be drawn into the public realm, religion is required to act under the guidance of the Chinese Communist Party in relation to defined objectives, such as making a contribution to the country's economic development, charitable projects and poverty alleviation works.

In short, the state of religion-state relations in China today is complex. Its specific manifestations cannot be fully understood without reference to various contexts and levels of analysis. In the following pages, we will look at those contexts, past and present policies, and the responses of selected religious bodies<sup>4</sup> to the changing environment.

### The contextual framework of analysis

Social outcomes are shaped by contexts, actors and actions. Among the contexts relevant to our concern, three are most important: historical, political and social.<sup>5</sup>

Taking the historical perspective,<sup>6</sup> today's state of religion-politics relations can be regarded as repressive of deep-seated traditions,<sup>7</sup> where faiths and beliefs were subjected to patronage, restriction or suppression, depending on the circumstances. In ancient China, the concept of religion as defined today – an institutionalized domain of thinking and practice concerned with the sacred or the supernatural – did not exist. Rather, a traditional idea of the cosmos encompassed all kinds of faiths and beliefs. When Buddhism as the first major religion was imported,<sup>8</sup> it brought into China the institution of a celibate priesthood with a system of doctrines,

at the sub-national levels. For a general picture and major problems, please consult Zhuo Xinping, 'Religion and rule of Law in China Today', *Brigham Young University Law Review*, Vol. 2009, Issue 3 (2009), pp. 519-527.

<sup>4</sup> Uighur Islam and Tibetan Buddhism are excluded from this analysis due to the complexity of issues involved and the limitation of space here to do justice to them.

<sup>5</sup> I choose to treat 'the cultural' implicitly in these three contexts.

<sup>6</sup> Important contributions to this perspective are provided by Anthony C. Yu, 'On State and Religion in China: A Brief Historical Reflection', *Religion East and West*, Vol. 3 (June 2003), pp. 1-20. A response to this article by Henry Rosemount Jr. follows on pp. 21-26; C.K. Yang, *Religion in Chinese Society: A Study of Contemporary Social Functions of Religion and Some of Their Historical Factors*, Berkeley: University of California Press, 1967.

<sup>7</sup> For such an interpretation, see for instance Richard Madsen, 'The Upsurge of Religion in China', *Journal of Democracy*, Vol. 21, No. 4 (October 2010), pp. 64-66.

<sup>8</sup> Buddhism was imported two thousand years ago, Islam introduced in the seventh century, Catholic Christianity too but intermittently at first until the Opium War in 1840, and Protestant Christianity in the early nineteenth century.

something very alien to the tradition of popular beliefs which were diffuse. As more religions were imported or emerged domestically, all religions co-existed peacefully and in general, none of them played any significant role in public life.<sup>9</sup> The state of China was secular and had no consistent policy of religion. Modes of state action ranged from patronage, through control/regulation, to prohibition from time to time, and even within the tenure of the same administration. There were times when an emperor or empress became a believer in or sympathizer with a particular religion. The result was imperial patronage, with a grant of land and/or title. At other times, when a religion was taken as a threat to the state's interest or to the social/cultural order, it was outlawed. More often, the state controlled or regulated the practice of religions by restricting activities in terms of sites and target audiences. These different modes of action can be evident within the same administration. For instance, the Kangxi emperor of the Qing dynasty (1644–1911) was initially tolerant of the spread of Catholicism by the Jesuit missionaries in return for the latter's contributions to China in astronomy, machinery for gun manufacture, and diplomacy (the Jesuits even ran the Imperial Observatory). However, the policy of tolerance, which was officially anchored in the Edict of 1692, could not survive the Chinese rites controversy within the Church. Pope Clement XI issued the 19 March 1715 *Ex illa Die* to officially condemn the Chinese rites, which was reiterated in 1742 by Benedict's *Ex quo singulari*. In 1721, the Kangxi emperor responded with a decree to ban Christian missions in China. With this small example, we can conclude that the main characteristic of imperial policy towards religions was pragmatic with an ideological residue of monarchical tutelage over cultural/spiritual matters in society. Pragmatism was oriented towards functional goals, as defined by the ruler. The ideological residue was based on the idea of the 'Mandate of Heaven'. The emperor had the responsibility to mediate between Heaven and Earth, the authority to distinguish between 'true teaching' and 'deviant teaching' and the obligation to keep social activities in a harmonious order.

If this historical-cultural legacy matters, it suggests that 'the state' today remains the master of all human affairs whereas 'religion' can only follow.

<sup>9</sup> If we regard Confucianism as a religion, the statement here must be radically changed. Confucianism had become a kind of official ideology of China since the Han dynasty and later institutionalized into the state examination system as a vehicle to recruit the ruling elite. In recent years, the revival of Confucianism and efforts to promote it as a religion were encouraged by the government, perhaps as an indigenous contender to Christianity in the service of the people's spiritual needs.

This seems incontestable because the political regime is still authoritarian as in the past. There are however important differences in the political regime between the past and the present. While emperors in old China were absolutists, the reach of imperial power was limited in scope and exercised in a laissez-faire manner. Communist rulers in modern China were once totalitarian reaching deep into the people's daily life with an anti-theist zeal of social revolution. The Chinese regime today is authoritarian but more interventionist than with its predecessors. All in all, the changing nature of the political regime goes a long way to explain for the different patterns of religion-politics relations since 1949. Today, the vogue of explanation knows different but related versions. The first understands the current context as one of pragmatism. Religious policy is no longer shaped by Marxism-Leninism, but by the practical objectives of the ruling Chinese Communist Party. The primary goal is indeed maintenance of political power. Wang Zuo'an, Deputy Director-General of the State Administration for Religious Affairs, was quoted to have said it clearly. 'If the Chinese Communist Party were to impose its atheism on everyone and persecute religious believers, that would only serve to drive 100 million people to an antagonistic position. Such hypothetical practice, which would virtually undermine its very own foundation of governance, is unimaginable'.<sup>10</sup> Apart from the power motive, pragmatism towards religion is necessitated by the grand political strategy of 'development above all' as once advocated by the supreme leader Deng Xiaoping. Deng had argued that 'a cat, be it white or black, is a good one so long as it catches mice'. Such a 'White Cat, Black Cat' strategy underlines the political exchange between religion and politics in present-day China where religious bodies support government projects in infrastructural development, social services, charities etc. in return for officials' favour with respect to religious activities, in particular officially un-sanctioned ones. In such an exchange, the political authority does not truly embrace religious freedom out of conviction. It is just that religion has become 'useful opium' for officials to score in political performance.<sup>11</sup> For better or for worse, religions are now accepted by the rulers as representing positive values and contributing to the development of the economy and

<sup>10</sup> Kim-Kwong Chan and Eric R. Carlson, *Religious Freedom in China: Policy, Administration, and Regulation. A Research Handbook*, Santa Barbara, California: Institute for the Study of American Religion 2005, p. ix.

<sup>11</sup> See 'Religion in China: When opium can be benign', *The Economist*, 1 Feb. 2007; also Fredrik Fällman, 'Useful Opium? "Adapted religion" and "harmony" in contemporary China', *Journal of Contemporary China*, Vol. 19, Issue 67 (2010), pp. 949-969.

to maintaining a ‘harmonious society’ (*hexie shehui*). As a result, religions have acquired a relatively-speaking freer space for autonomous development and presence in public life.

In interpreting religion–politics relations, one could look to an even broader context, that is China’s historic drive to achieve modernity and modernization since more than a century ago. The basic arguments run as follows. Both religion and the state are interested in modernity. They get entangled with each other in a complicated process of ‘making’ the modern state and modern religion.<sup>12</sup> The different patterns of religion–politics relations thus represent the results of hard bargaining that has taken place over time between religious and political actors over the ideational as well as practical issues relating modernization. More elaboration is in order.

The pursuit of modernity in fact predated the Communist seizure of power. In the imperial days of the nineteenth century, young reformist elites were attracted to Western ideas – nationalism, Enlightenment, scientism, evolutionism, and Marxism – as intellectual resources for their modernization projects. They ended up with atheist or anti-theist attitudes towards religion, taking it as a barrier to China’s pursuit of modernity. Already in the 1920s, the Republican government initiated radical measures to reform religions as an integrated part of building a modern nation-state. Zealous reformists of local Nationalist Party (the Kuomintang) branches launched the ‘smashing superstition movement’ and the ‘convert temples to schools movement’.<sup>13</sup>

The Communist rulers are no less zealous in anti-theist modernization projects, attempting initially to eradicate religion altogether. After the founding of the People’s Republic, religious freedom as a fundamental human right had no space at all on the political agenda, given the revolutionary ethos of the regime and the anti-Communist climate of the Cold War.

While the Communist state-building project had worked to almost completely eliminate space for religion in the first three decades, the same

<sup>12</sup> This line of interpretation is best represented by *Making Religion, Making the State: The Politics of Religion in Modern China*, eds. Yoshiko Ashiwa & David L. Wank, Stanford, Calif.: Stanford University Press, 2009. Daoism is not sufficiently represented in this book. For a supplement, see Jennifer Lemche, *The Greening of Chinese Daoism: Modernity, Bureaucracy and Ecology in Contemporary Chinese Religion*, M.A. Thesis, Queen’s University, Canada, June 2010. Download from the following site on 19 February 2011: <http://qspace.library.queensu.ca/bitstream/1974/6035/1/The%20Greening%20of%20Chinese%20Daoism.pdf>

<sup>13</sup> For details please consult Yoshiko Ashiwa, ‘Positioning Religion in Modernity: State and Buddhism in China’, in Yoshiko Ashiwa and David L. Wank, eds., *Making Religion, Making the State...*, *ibid.* pp. 43–73.



project recently took a radical turn to accommodate a more pragmatic and functionally-oriented strategy in dealing with religion, as a result of an erosion of the official ideology and changes in the state-society relations. In other words, one can speak of two phases in this modern-state building project. It has involved a remarkable transition from a period characterized by an ideology-laden and zero-tolerance stance towards religion to a period of pragmatic and accommodation, albeit with significant exceptions. In looking at the history of religion-politics relations, we can see how modernization and modernity have been malleable terms. In the socialist era, modernity referred to a Communist utopia while in the reform era, modernity is measured in terms of China's status as a 'Rising Power'. Modernization, which would deliver China to modernity, initially involved a radical social revolution. Now, the state simultaneously promotes capitalism, socialism, developmentalism, Neo-Confucianism, religion, in short, 'anything goes'. With regard to religion-politics relations, what remains still constant is the power asymmetry in favour of the state, more precisely speaking the ruling Party. Hence, the two interpretations of the political context, unambiguous primacy of ruling power and malleable modernity for China, are actually inter-related.

While the first two contextual interpretations focus on the influence of the state over religion, the project of modernity implicitly assigns an increasingly significant role to society as an actor in weaving religion-politics relations. This brings us to the last plausible framework for explaining the relationship between religion and politics, i.e. the social context or a context of civil society.

There are rather constant social features that have inhibited the capacity of religion to withstand the state's intervention with religious practices. First is the atheist nature of the Chinese society. Specifically, the overwhelming majority of the Chinese people does not have or believe in any religion (please see Table 1 below).<sup>14</sup> As a result, no religion can be dominant and by implication influential in shaping national policies on religious matters.

Secondly however, the strength of religion varies from one locality to another, in terms of critical mass of concentration, degree of integration

<sup>14</sup> Findings from Study on *Political Culture and Participation in Three Chinese Societies 1991-1993* and *Asian (Democracy) Barometer, Wave I and Wave II*. The Barometer's official website is [www.asianbarometer.org](http://www.asianbarometer.org). The population of post-1949 China is 582 million in 1953 and 1.008 billion for 1982, 1.200 billion for 1990, and 1.3 billion for 2009 respectively.

	1993	2002	2007-8
None	88.4	87.9	82.1
Buddhism	7.8	8.0	11.1
Protestantism	1.0	1.6	2.7
Islam	1.0	1.0	0.4
Daoism	.4	.4	1.0
Catholics	.5	.5	.3
Others	.3	.2	.4
No Answer	.7	.3	2.0
Total	100.1	99.9	100.0
Sample N	2945	3183	5098

**Table 1.** Survey Question: ‘What is your faith?’.

with the local culture, role in the organization of community life, and ties with other social groups and organizations. Such variations partly explain why the same religion has different experiences with the state in different localities. The more important point is that concentration of religious influence in a certain locality can affect the rules of the game such that the local government concerned may have to be more accommodating. In spite of the atheist nature of the Chinese society in general, the local context is of immediate relevance and critically important for understanding the realities of religious freedom on the ground. A local perspective thus enables scholars to better understand state policy in practice, a perspective that reveals how policy is not at all unified. At least, there are local legislations on religion that may differ from each other and deviate from their national counterpart.<sup>15</sup> The U.S. Bureau of Democracy, Human Rights, and Labor reported last year that some local governments had legalized certain reli-

<sup>15</sup> See United States Congressional-Executive Commission on China, *China's national and local regulations on religion: recent developments in legislation and implementation: roundtable before the Congressional-Executive Commission on China, One Hundred Ninth Congress, second session, November*, Washington: U.S. G.P.O., 2007.

gions and practices in addition to the five nationally recognized religions.<sup>16</sup>

Thirdly, some religions are inseparable from issues of ethnic minorities, such as Buddhism in Tibet and Islam in Xinjiang. Ethnicity in turn may be bound up with problems of national self-determination that furthermore generates implications of international politics.

The societal context is the result of a dynamic process. It is in a constant state of flux. In the first three decades under Communist rule, the Chinese society was wrecked by totalitarian practices, as in the case of the barrack-styled People's Communes, or by anarchist practices, as seen during the Great Proletarian Cultural Revolution (1966-1976), a jungle war of all against all. After the third plenum of the eleventh Party Congress in 1978, the state started to gradually retreat from its control of society. Chinese society has since gradually regained its autonomy as a result of this retreat and more indirectly, as a result of the liberalization of the economy and exposures to global flows of information. In 1989, the outburst of student protests in Beijing even led outside observers to ponder whether a civil society had come to China. After several decades of debate, it seems fair to say that no civil society of the American society-oriented view exists in China, as most civic organizations are dependent on the political authorities.<sup>17</sup> This does not mean that some civic organizations cannot be more autonomous than others. In the same vein, there is no denying that nowadays governments at different levels have to heed the views of civic bodies, and 'state actions' are consequently modified or dropped. Against this general picture, the ability of religion to effectively deal with the state in managing their relationship is more limited. As reported below (the 'Responses from Religions' Section), the Wenzhou Protestant church has so far successfully engaged the local state in constructing a coop-

<sup>16</sup> Examples include Orthodox Christianity in some provinces, including Xinjiang, Heilongjiang, Zhejiang, and Guangdong. Some ethnic minorities have retained or re-claimed traditional religions, such as Dongba among the Naxi people in Yunnan and Bulotuo among the Zhuang in Guangxi. The worship of the folk deity Mazu reportedly has been reclassified as 'cultural heritage' rather than religious practice. See *International Religious Freedom Report 2010*, Bureau of Democracy, Human Right, and Labor, 17 November 2010. [www.state.gov/g/drl/rls/irf/2010/148863.htm](http://www.state.gov/g/drl/rls/irf/2010/148863.htm) accessed on 3 April 2011.

<sup>17</sup> There is hardly any literature on faith-based associations as actors of civil society, which perform an intermediary role between religion and politics. More prominent are studies on whether churches constitute or contribute to the formation of China's civil society. See Richard Madsen, *China's Catholics: Tragedy and Hope in an Emerging Civil Society*, Berkeley: University of California Press, 1998; and He Xiangping, 'Zongjiao yu zhongguo gongmin shehui jianshe' (Religion and Construction of China's Civil Society), *shehuixue yanjiu* (Sociological Studies), Issue 50 (#2, 2010), pp. 69-75.

erative relationship, to give a specific example. Generally speaking, organizations of faith-based charities as constituents of China's incipient civil society do reveal their growing assertiveness vis-à-vis the government.<sup>18</sup> But whether civil society can truly shape the religion-politics relations remains to be seen, because the government is still the stronger partner in the game and its preferences and policies matter more. It is on changes of its policy that we now turn ourselves to.

### The policy in change

The government's policy towards religion has been changing over the past years. We can roughly differentiate four major phases: 1949-1982, 1982-1989, 1989-2000 and 2000-present. The overall pattern is towards greater liberalization.

#### 1949-1982

The first period of the state's policy of religion is the most hostile and radical. In line with Marxism, religion was regarded as the opium of the people and a hurdle to modernization. The ultimate goal of the government was to eradicate religion. The consolidation of the new regime was more immediate. Hence, cooperation of all available social forces including religious ones was needed. Therefore, the government was at first restrained in coming to grips with religions. The first constitution of 1954 even guaranteed the freedom to believe in any religion for every citizen (Article 89).<sup>19</sup> The move however did not square with the actual advance of a 'movement regime'. A movement regime is a political system that negates the primacy of the human person and society. It not only monopolizes all sorts of power but also tolerates no check and balance even within the political leadership itself. It typically uses political movements to mobilize the people for rev-

<sup>18</sup> Benoit Vermander, 'Religion and Charities in China', *E-Renlai* (magazine), 25 April 2011. [www.erenlai.com/index.php?option=com\\_content&view=article&id=4208&itemid=339&lang=en](http://www.erenlai.com/index.php?option=com_content&view=article&id=4208&itemid=339&lang=en) accessed on 8 May 2011.

<sup>19</sup> It is noteworthy that in China, law often receives lip service. Citizenship does not entail equal and fair treatment with universal application. For instance, a particular group of citizens, i.e. Party members, are not allowed to adopt a religious faith. Laws on religious rights are ambiguously formulated and interpreted. The explicit expectation of peaceful withering away of religion renders any regulations on religious rights a dishonest tool of convenience. Official interpretations often contend that those rights include not only the freedom to believe in any religion but also the freedom of not to adopt any religious faith. An additional freedom refers to a change from believers to non-believers.

olutionary projects. The first three decades of the new Republic was replete with radical political movements (the Three Antis, the Five Antis, the Hundred Flowers campaign etc.), accompanied by short periods of retrenchment. Correspondently, the state of religious freedom followed a cycle of harshness and repose. At the time of the promulgation of the constitution, a 'socialist reconstruction movement' had been underway for some time. Religion was subjected to reconstruction too. Missionaries were expelled and foreign ties were forbidden. Many clergy and believers were intimidated. The early phase of socialist reconstruction was of slow tempo and low depth as the regime did not attempt to control what the people thought. The picture changed completely almost overnight when the regime introduced a new cycle: the Anti-Rightist and the Great Leap Forward movements. The overriding goal was a massive cleansing of thought. Clergy and laypeople were mobilized into study sessions, self-reflection and criticism campaign sessions, and forced to change occupations. Those who were classified as intransigent rightists were imprisoned, sent to labour camps or driven to commit suicide. The merging, closure or conversion (to other uses) of places of worship, already a practice in the first cycle, were now intensified, largely because religious leaders and believers were forced to live and labour in the People's Communes. Religious activities were discouraged or simply made impossible. The following tables concerning Jiangsu Province offer a picture of the severe damage to religious development in this period.<sup>20</sup>

	1952	1957	1959
Catholic	659	180	41
Protestant	586	321	83
Buddhist	43750	2428	467
Muslim	82	75	39
Daoist	535	182	42
Total	45612	3186	672

**Table 2.** Number of Churches and Temples in Jiangsu (9 cities, 24 counties).

<sup>20</sup>The Tables are taken from Ren Jiantao, 'fanyou yu jiangsu de zongjiao gaizao' (Anti-rightist [movement] and Religious Reconstruction in Jiangsu) (in Chinese), *Twenty-First Century* (Bi-monthly), No. 92 (Dec. 2005), pp. 116-122. Downloadable from the 'Archives' of the journal's website: [www.cuhk.edu.hk/ics/21c](http://www.cuhk.edu.hk/ics/21c).

	Right after 1949	Pre-Big Leap Forward'	Now	Frequent church-goers
Catholic	170,000	120,000	80,000	1,800
Protestant	41,500	64,100	41,000	3,000
Monks	17,000	8,000	6,000	750
Nuns	8,000	3,000	2,000	250
Daoist <i>jushi</i>	5,000	1,500	500	
Total	241,500	196,600	130,400	5,800

**Table 3.** Number of believers and churchgoers in Jiangsu, 1960.

When the Great Leap Forward movement failed and the Great Famine approached, the regime had to give up its harsh measures against Chinese society. Religion quickly took advantage of the breathing space to enjoy a revival starting late 1959 and early 1960. The cycle of relaxation was soon replaced by another policy thunderstorm, i.e. the Great Proletarian Cultural Revolution. Compared to all past movements, the Cultural Revolution ushered in the darkest age for all religions in China. The anti-religious excesses have been succinctly captured by Donald MacInnis as follows.

China's ultra-leftist leaders during that period, bent on eliminating religion, prohibited all public religious activities and incarcerated thousands of clergy and laypeople from the five officially recognized religions: Buddhism, Daoism, Islam, and Protestant and Catholic Christianity. Thousands of celibate monks, nuns, and priests, especially among the Tibetans, were forcibly laicized, and many were reportedly forced to marry. Graveyards were dug up and converted to farmland. Shrines and temples linked to local folk religions, once ubiquitous throughout the countryside, disappeared. Pilgrimages to holy places were banned.<sup>21</sup>

The Cultural Revolution, dubbed as 'the holocaust of a decade', knows no precedent in all of Chinese history. It was a blatant degradation of humanity with millions of victims, including ranks of political leadership. It smashed the

<sup>21</sup> Donald E. MacInnis, 'From Suppression to Repression: Religion in China Today', *Current History*, Vol. 95.602 (Sept. 1996), p. 285.

Party's organization, ruined the economy, disrupted the public order, broke down social relations, and intoxicated the people with a fervor that transformed them into warring barbarians without any regard to others. Worst of all, the animal instinct of fighting for self-survival nurtured during the Cultural Revolution left a strong legacy of social mistrust and amoral utilitarianism, which has until today contributed to many social ills and malpractices.

### **1982-1989**

Religious policy in this period is characterized by normalization shaped by a new recognition of the nature of religion, a move away from extremes, redresses of past wrongs and reliance on legislation for the control of religion.

When the holocaust of a decade was put to an end, the third plenum of the eleventh Party congress was convened in 1978 to reflect and draw bitter lessons from the past. A resolution was passed promising that class struggle had to be ended and the priority of the state should be replaced by the four modernizations instead, i.e. industrial, agricultural, national defense and science and technology. The fundamental shift in ideological emphasis from utopia to development signals the start of a new phase of state-building that is characterized by 'reform and opening'. The omnipotent state had chosen to retreat from its leftist excesses and allowed the economy and society greater space for development. This period of liberalization created opportunities for religion to revive and prosper. At the institutional level, the fourth (and current) constitution that represents a normalization of social life was promulgated in 1982. As far as religion is concerned, the 1982 constitution differs from those of 1975 and 1978 in omitting the anti-religious phrase about 'the freedom ... to propagate atheism'. It differs from that of 1954 in providing more details and a stronger normative tone about freedom of religion. It is worthy to quote in full the Article 35 on religions below:

Citizens of the People's Republic of China enjoy freedom of religious belief.

No state organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion.

The state protects normal religious activities. No one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the state.

Religious bodies and religious affairs are not subject to any foreign domination.

While these provisions, especially the non-discrimination clause, signify great (conceptual) progress as compared to past laws, the qualifier of 'normal' to the state's protection of religious activities, on the other hand leaves ample room for administrative manipulation at the time of implementation.

An important instrument called Document #19, 'The Basic Viewpoint and Policy on the Religious Question during Our Country's Socialist Period', was internally circulated within the Party and later issued in the year of 1982. It has been and continues to be the most authoritative and definitive document that guides the state's policy towards religion. The basic understanding of religion by the government now refers to the complex, mass-based, long-lasting nature with implications for relations with ethnic nationalities and foreign nations. The new overall policy priority is to 'bring all religious believers together for the common goal of building a modernized, powerful Socialist state'. Practical tasks then involve redress of past injustices perpetrated against religious professionals, restoration of places of worship to normal use, clarifying the limitations for religious activities, differentiating between the 'administrative' control of the Religious Affairs Bureau and the strictly religious functions of religious organizations, help in setting up seminaries for the training of young clergy, and development of friendly relationships with foreign religious groups while maintaining a policy of independence. All in all, it is a comprehensive programme of normalization and pragmatic-functional policy guidelines.

Against the background of the new constitution, Document #19 and the period of general political liberalization in the 1980s, religion was quickly revitalized and freedom for religious activities expanded. There were however still significant limitations. As summarized by Donald E. MacInnis, 'there are no foreign missionaries, no schools, hospitals, or other institutions under religious management, nor are there organizations or activities ... for young people under eighteen. Religious activities are restricted to the formal places of worship, and radio broadcasting and other forms of public evangelism are forbidden ... there have been situations in which house meetings or similar activities have been forcefully stopped by local officials'.<sup>22</sup>

### 1989-2000

The previous decade of normalization was short-lived. Strict control was renewed after the 1989 student movement in Beijing and the collapse of communism in Eastern Europe and the Soviet Union.

<sup>22</sup> Donald E. MacInnis, *Religion in China Today: Policy & Practice*, Maryknoll, N.Y.: Orbis Books, 1989.



These events and especially the case of Poland raised the Chinese rulers' sense of insecurity. These events triggered a backlash in the state's relations with religion, in which the new policy emphasis was put on severe containment of religion's influence in society and actively guiding religion to adapt to socialism. Thus, new rules and restrictions, for instance Document #6, were issued in 1991. From this point on, not only do religious venues have to be registered, but religious professionals too. Moreover, all religious activities have to be presided over by a government-authorized professional. On 7 November 1993 President Jiang Zemin elucidated in a speech at the 18<sup>th</sup> National Conference on United Front Work the new emphasizes of religious policy, i.e. law-based management of religious affairs and guidance of religion. The latter requires religious believers to be patriotic, support the leadership of the Communist Party and 'adapt to the socialist society'. More importantly, religious systems and teachings, which are not adaptable to socialism, must be revised in accordance with the government's policy. Needless to say, religious elements that resist state control would be suppressed. The most severe suppression of religion since the reform and open policy happened on 22 July 1999, the case of Falun Gong. It was declared as a heretical organization and to be relentlessly banned. On 23 March 2000, Amnesty International reported that '(T)ens of thousands of Falun Gong practitioners have been arbitrarily detained by police, some of them repeatedly for short periods, and put under pressure to renounce their beliefs. Many of them are reported to have been tortured or ill-treated in detention'.<sup>23</sup>

At about the same time, Jiang Zemin first introduced his theory of the 'Three Represents'. The 'Three Represents' refer to political representation of the advanced productive forces (*xianjin shengchanli*), advanced culture (*xianjin wenhua*), and the interests of the overwhelming majority (*zui guangda renmin de genben liyi*). The theory is at worst just another cult of personality or at best a justification of the pragmatic decision to admit members of the business class into the Party. The claim to represent the overwhelming majority did not signal the dawn of a consensus politics, let alone democracy with fair and competitive elections. More realistically, the purpose is to legitimate the right of the Party to continuously rule the country by striving to make itself more representative.

<sup>23</sup> See [www.amnesty.org/en/olibrary/info/ASA17/011/2000](http://www.amnesty.org/en/olibrary/info/ASA17/011/2000). Accessed on 18 February 2011.

### *2000-present*

In this new period, the legacy of religious policy under the Jiang Zemin administration lingers on, with a greater pragmatism and tactical twists of refined controls.

The sixteenth Party Congress in 2002 elected a more pragmatic, technocratic political leadership under Hu Jintao and Wen Jiabao. The ideology of the 'Three Represents' gradually lost ground to a new one introduced by Hu on 26 June 2005, i.e. 'Scientific Development Concept and Harmonious Society'. The first concept suggests a more empirical, evidence-based approach to policy formation and execution. But what is meant by a harmonious society? The answer is, according to Hu, that it 'should feature democracy, the rule of law, equity, justice, sincerity, amity, vitality, stability and order, man and nature live in harmony'.<sup>24</sup> The core implications of the new ideology include a redefinition of the Chinese Communist Party as a ruling party rather than a revolutionary party, and a shift in developmental priority from GDP growth to overall human development and social harmony. The concept of harmonious society might offer some hope for a policy of accommodation with religion. But one should not expect too much from an abstract ideology when it comes to issues of religious freedom. Hu-Wen's policy towards religion does not represent any significant departure from the previous two decades. It is still based on the realistic recognition of the nature of religion as articulated in Document #19 and on Jiang's advocacy of law-based management and adaptation of religions to socialism under the guidance of the Party. What is new is probably an even greater priority assigned to economic development and the awareness that rising social contradictions and conflicts have to be adequately addressed. In this light, religion is increasingly perceived to have a positive role to play. The new sense of engaging religion in this period of state-building can best be illustrated by the following speech of Jia Qinglin, Chairman of Chinese People's Political Consultative Conference with top responsibility for religious affairs.

I hope that every religious group sturdily establishes a sense of calling, responsibility and urgency for promoting harmony [*hexie*] as the important content in the work of religious groups, and that it is merged organically with the adaptation of religion to socialist society, one step further exploring the ways and means that religion can serve so-

<sup>24</sup> The full text in Chinese is downloadable via [www.china.com.cn/chinese/news/899546.htm](http://www.china.com.cn/chinese/news/899546.htm)

ciety and the masses, and that in the process of serving the promotion of social harmony also will promote other aspects of harmony in religion and society. Serving development should be made the important task in the work of religious groups, from beginning to end consciously merging one's own work closely with the general situation of national economic development, maximally uniting the great believing masses and within one's power share the burdens of the nation, going all out to exert oneself for development.<sup>25</sup>

All else remain more or less the same, with some important tactical twists. The policy baseline remains unchanged. First, religion has to be sanctioned. Secondly, sanctioned religion must be subordinated to the interests of the state. Thirdly, non-sanctioned religions such as evil cults must be repressed. The differences from the past are as follows. First, religious affairs should be less arbitrarily regulated. Secondly, sanctioned religion should be more adequately guided by the party. Thirdly, the method of control is much more refined, i.e. 'Control II'. While restriction of religious activities has been the norm, the talk of more proper administration is something new. A key indicator of the new trend is the intensified use of legislation to anchor a normative framework. A significant step was undertaken when, in 2004, the State Council issued the Religious Affairs Provisions which took effect on 1 March, 2005. These regulations are the first to clarify the rights and obligations of registered religious organizations *as well as* the duties and responsibilities of the State Administration for Religious Affairs and Religious Affairs Bureau. Note that there had been provincial and municipal regulations on the management of religious affairs before this national legislation. Thus, the 2005 Provisions were obviously enacted as the national standard for religious affairs administration at all levels of government.

The practical implication of the Party guiding religion to adapt to socialism<sup>26</sup> can mean a different kind of interference with religion practices. 'Guidance' can confine religion within new parameters and to officially assigned roles in the public life, i.e. primarily to serve economic growth and social order, and not to meet the spiritual needs of the people. While the execution of such a policy can be more tactical, law-based and practical purpose oriented, it is still a kind of control. More details about it will be discussed later when we look at the policy in practice.

<sup>25</sup> As quoted from Fredrik Fällman, 'Useful Opium? ...', *ibid*, p. 966.

<sup>26</sup> In practice, it means adaptation to 'post-socialist' development of capitalist market economy.

## Why policy change?

Policy change has been a response to a combination of macro-, mezzo- and micro-levels of factors in interaction with each other. They can be summarized into three major forces: globalization, including China's Re-entry into the world, the pragmatic turn of the regime, and awakening citizens and society.

### *The macro-level: globalization and China's re-entry into the world*

The impact of globalization is powerful, albeit mostly indirect for religion-politics relations. The replacement of central planning by the market as China exposed herself to the forces of economic globalization has led to changes in the state-society relationship and to empowered human agents who have benefited from marketization. Increasing multi-dimensional integration of China into the world brings along greater pressure for her to also adopt universal standards in other areas beyond commercial transactions, for example human rights. Exposure to global flows of information has opened up the eyes of the Chinese people to alternative views, practices and value systems, thereby leading to rising expectations of reforms.

It all started with the secret mission of Henry Kissinger to China in July 1971 to prepare for a visit by President Nixon from 21 to 28 February the following year. The historic event ended twenty-five years of hostilities between the two countries and facilitated China's entry into the United Nations as a replacement of Taiwan. The reform and opening policy announced in 1978 formally ended China's foreign policy of self-isolation from the Western world. By the 1980s, China also joined most UN-affiliated agencies, such as the World Bank and the International Monetary Fund, and started to give up its previous stand on self-reliance by receiving economic and technical assistance from agencies like the UN Development Programme. China's integration into the world system was further consolidated with its accession to the WTO in November 2001, after fifteen years of hard negotiations. Closer integration entails greater exposure to the forces of globalization, in particular its economic and information-technological aspects, with unintended effects for the freedom of religious activities. Suffice to mention here three impacts as reported in the above. In the process of changes, individuals are able to accumulate independent resources and thereby enhance their autonomy vis-à-vis the government. Globalization of information technology has offered them not only alternative information, but new vehicles to form and mobilize social ties. Globalization of legal norms has provided the Chinese people with reference points in their demands of the government. The external pressure for legal conformity

started first with international market transactions. Spillover effects slowly ensue in other functional areas.

### *The mezzo-level: pragmatic turn of the regime*

By 'pragmatic turn' I mean four different transformations in the nature of the regime. The first involves a shift from utopia to development in the interpretation of modernity and practice of modernizing the state. The other important regime transformation concerns a transition away from totalitarianism to soft authoritarianism. The third has to do with the change in the political leadership from revolutionaries to technocrats and bureaucrats. The last and not the least involves the growth of sub-national political jurisdiction as the central government devolves power to lower levels of authority.

The political regime of China today is radically different from the old one thirty years ago. The state is no longer totalitarian in the sense of exerting an encompassing control of society. The national elite are no longer revolutionaries, but technocrats and bureaucrats, with neither charisma nor superior authority like Mao Zedong or Deng Xiaoping. Their style of governance is much less ideology-driven, more empirical and pragmatic. The goal of the state-building project has also moved from utopia to development. As a result, communism as an ideology has lost ground to the capitalist spirit of getting rich by all means. Erosion of the official ideology bears significant implications for a growing market of religion in an unsettling China, especially for Christianity.<sup>27</sup> The system of government is no longer as centralized as before but compartmentalized and fragmented. In fact the central government has devolved considerable powers to the sub-national levels of government. On the other hand, entrepreneurial local states that have emerged from the economic miracle<sup>28</sup> have become more self-centered and assertive in pushing through their own interests. They often distort policies or frustrate directives from the above. The divergent agenda and interests of governmental units at the same jurisdictional level also lead to great variations, if not confusion, in the execution of the state's policy towards religion. Thus, the end of the unitary state has provided religious groups with more veto points in the political system for support or appeal. In a nutshell,

<sup>27</sup> Jiexia Elisa Zhai, 'Contrasting Trends of Religious Markets in Contemporary Mainland China and in Taiwan', *Journal of Church and State*, Vol. 52, No. 4 (Autumn 2010), pp. 94-111.

<sup>28</sup> As a phenomenon characterized as (local) state corporatism by Jean Oi, see her *Rural China Takes Off: Institutional Foundation of Economic Reform*, Berkeley: University of California Press, 1999.

the state's retreat and the growth of a market economy foster an ever-enlarging space for individual autonomy and for a social life independent of the dictates of governments at different levels. One could thus speak of a blooming civil society and market for religious activities, although their exact nature is still undetermined. Alternatively, one may argue that given the breakdown of morality as a result of the Cultural Revolution and the onslaught of primitive capitalism, China right now has an uncivil society where counterfeit, cheating and bribery are prevalent. The government has recognized the existence of a spiritual vacuum, but its efforts to uplift social morality have failed. In the final analysis, the state has failed to attend to the spiritual needs of the people and that is why religions of all kinds have been prospering to the chagrin of the rulers and despite their control of religion.

### *The micro-level: human agency*

As alluded to before, the state-society relationship has been changing. The overall pattern is characterized by the key words 'the state retreats and society advances'. Society is becoming more complex, pluralistic, resourceful and independent vis-à-vis the government. Concomitantly, the human agents in society cease to be compliant subjects. Instead, they are becoming citizens with a rising awareness of their rights, growing expectation of governmental accountability, readiness for political participation, and skills in organizing collective actions and using laws to defend their rights.

Individuals have many options in dealing with the macro- and mezzo-level forces of change. If we view religion-politics relations as an open process of mutual construction by the government and the believers, then we could attribute the eventual outcome to human agency. Whether the human agent exerts an influence on religion-politics relations depends on whether the human agent is a subject or a citizen, on the agent's resources for action, and on his or her determination to use it individually or in cooperation with others. Since the late 1970s, the nature of human agency in China has been changing. Individual Chinese nowadays are no longer the dependent, therefore helpless victims imprisoned in the institution of *danwei*. It is not just that they no longer depend on the state's allocation of resources to sustain their survival, but also that those who have successfully profited from the market have accumulated valuable resources to 'induce' an exchange with the relevant level of government. Last but not least, social ties and networks are proliferating, thereby providing ever better organizational support for collective actions to defend rights when infringed. As these trends continue, it becomes increasingly difficult for the government to ignore the collective voice of organized citizens without regard to its legitimacy to govern.

In sum, multiple levels of influences from globalization, to the changing political regime and to the human agency in local social contexts have all combined to weave the complex relationship between religion and politics. In the next two Sections, we shall discuss policy practices at the grass-root level and responses of selected religious groups to the limitations and opportunities offered by the government's policy in practice.

### **Current policy in practice**

As said, the current policy is characterized by a coexistence of toleration, control/containment and guidance. Activities of popular religions are largely tolerated as long as they do not pose a threat to the ruling regime or to public order. Unsanctioned religions that are threatening are relentlessly suppressed or watchfully contained. Actual control of the five sanctioned religions is focused on selected targets, dressed under the cloak of administrative regulations and generally with tact. Various government authorities also take pain to instrumentalize religious organizations for preferred political or economic objectives. Most importantly of all, toleration, control/containment and guidance of religions vary greatly depending on circumstances.

Specifically, the situations on the ground are complex, with uneven practices under different contexts. The national level of policy implementation can be extremely harsh with respect to certain religions, such as the countrywide campaign against the well-organized and assertive Falun Gong. Tibetan Buddhists and Uighur Muslims remain frequent targets of suppression. During certain national dates, the atmosphere used to be tense. For example, stricter limitations and harsher suppression of religious activities recur on regular events like National Day, June 4, and the plenary sessions of the National People's Congress and the Chinese People's Political Consultative Conference. Special occasions also call for heightened control, as seen during the visits of overseas dignitaries, the 2008 Olympic Games and Shanghai 2010 World Expo.

It is fair to say that most practices of the state's religious policy are played out at the local levels, leading to a great variation in treatment. For instance, 'Hebei province contains at least one-quarter of China's Catholic population, most of them living in predominantly Catholic villages where there have been frequent reports of official crackdowns on religious activities. In some inland provinces such as Hunan, Shaanxi, and Inner Mongolia, unregistered Catholic churches are built in the middle of the villages, market towns, and cities and operate publicly...'.<sup>29</sup> While the working interaction

<sup>29</sup> Joseph Tse, 'Christianity in Contemporary China: An Update', *Journal of Church and State*, Vol. 49, No. 2 (Spring 2007), p. 279.

between the national and sub-national governments still counts from time to time, the outcome can be largely determined by local levels of government. There is however an important exception to this general rule. As found by Joseph Tse, ‘...the underground Christian communities in Beijing and on the North China Plain are constantly involved in disputes with the Communist state because of their proximity to the political center of government. By comparison, various dialect-speaking Christian communities along the southeast coast have long been an integral part of the Overseas Chinese networks across the South China Sea and the Pacific Ocean, which transcends national boundaries and exists beyond the state’s control’.<sup>30</sup> Within the same level, different government departments may have different agendas and interests, and different cadres involved in dealing with religious activities may carry with them different personal views about religions and have different priorities with respect to their ‘political responsibility’ in following policies from the above. Practices also vary from region to region. Religious groups and believers in the northern parts of China experience more hard times than their counterparts in southern coastal areas.

Last but not least, foreign/external relations can also be a factor for the variations in treatment. Catholicism has had difficulties in its development partly because of the factor of Vatican’s status as a state as well as a universal church. Buddhism in general has been favoured more often than not, as the central government once used it to play a bridging role in a strategy to improve the cross-Taiwan-Straits relationship. It seems that Buddhism is favoured partly for its perceived potentials to become a universal religion in competition with Christianity. In a more general sense, having strong external ties along with other resources such as economic influence and cultural integration with the local society can put a certain religion in a much better bargaining position vis-à-vis the local government. In such a situation, religion can receive a better treatment from the authorities by making contributions to the improvement of local socio-economic life. This special situation will be presently revisited when we deal with the different responses of religions to the governments’ practices.

### **Responses from religions**

Different religions have experienced varying degrees of freedom in their activities, partly depending on how they and the government weave their working relationship with each other. To risk some degree of simplification,

<sup>30</sup> Joseph Tse, *ibid.*



responses of religions to the government policy of Control II and guidance can be placed between confrontation and cooperation.<sup>31</sup> Falun Gong occupies the confrontational end and Shaolin (Buddhist) the other extreme. Placed in between are Dalü in Baoding (Catholic), Sheshan in Shanghai (Catholic), 'China's Jerusalem' (Wanzhou Protestant), Nanputuo in Fujian (reformed Buddhist) Heilongdawang in Shaanbei (Popular religion/Daoist). In the following pages, Falun Gong, 'China's Jerusalem' and Shaolin will be elaborated as examples (see Figure 1, p. 697).

Falun Gong is a controversial system of beliefs and practices founded in 1992. It has been characterized differently as *qigong*, a spiritual movement, cultivation system in the Confucian tradition, heretical teaching (*xiejiao*), (an evil) cult, radical religious movement, new religious movement, or a popular religion based on Daoism and Buddhism. Beatrice Leung has characterized it as a 'quasi-religion' that 'poses a greater challenge to the government and the CCP than any state-recognized religion in China'.<sup>32</sup>

For the first year and a half since Falun Gong's foundation, its leader, Li Hongzhi, ran popular classes by invitation of official *qigong* associations in many localities. On 13 March, he was invited by the cultural unit of the French Embassy in Beijing to deliver a briefing, to be followed by the first Falun Gong class in Paris on 13–19 March and a month later in Sweden the same year. Falun Gong registered the fastest growth of religious organization in post-1949 China,<sup>33</sup> drawing followers from all walks of life including high-ranking cadres and organizing mass-scale public exercises. Li Hongzhi was even presented with a number of prizes and awards by government authorities for his contribution to the promotion of Chinese culture and public health. The turn of its fate might have been triggered by its

<sup>31</sup> Fredrik Fällman offers a lengthy analysis of different religions' responses to the official policy in his article 'Useful Opium? 'Adapted religion' and 'harmony' in contemporary China', *Journal of Contemporary China*, Vol. 19, Issue 67 (2010), p. 966.

<sup>32</sup> Leung, Beatrice 'China and Falun Gong: Party and society relations in the modern era', *Journal of Contemporary China*, Vol. 11, Issue 33 (2002), pp. 761–784; For a book-length treatment of the issues see Østergaard, Clemens Stubbe and Jude Howell eds. *Governance and the Political Challenge of Falun Gong*. Lanham, Md.: Rowman & Littlefield Publishers, 2003.

<sup>33</sup> Joseph Kahn cites an official tally of 70 million Falun Gong practitioners in his article, 'Notoriety Now for Movement's Leader', *New York Times*, April 27, 1999. [www.nytimes.com/1999/04/27/world/notoriety-now-for-movement-s-leader.html](http://www.nytimes.com/1999/04/27/world/notoriety-now-for-movement-s-leader.html) accessed on 20 April 2011. Falun Gong has by now spread to about 114 countries with over seventy exercise centres.

alarming growth and peaceful albeit aggressive protests against its critiques in mid-1990s. On 17 June 1996, *Guangming Daily* published an editorial denouncing the pseudo-science of Falun Gong, which attracted hundreds of protest letters by its believers. A month later, the News and Publications Bureau banned five publications of Falun Gong. In December, the Falun Gong Association was removed from membership of the National *Qigong* Association. Overnight, Falun Gong thus lost the protection of a registered organization and many connections. Furthermore, all of its activities have become illegal since then. Li Hongzhi was alert enough to timely immigrate to the United States in the same year. Falun Gong's relationship with the authorities continued to worsen. In May 1998, TV Station Beijing featured a programme with specialists and academics on issues of how to manage *qigong*. A remark made there by Professor He Zuoxiu that certain Falun Gong practitioners 'had been possessed by the devil' led to weeks-long, illegal protests by over a thousand practitioners in front of the station. In April 1999 another illegal protest in Tianjin ended with beatings and arrests. On the 25<sup>th</sup> of the same month, this state-society conflict escalated to a peak in an unprecedented manner. Some 10,000 practitioners staged a silent protest at *Zhongnanhai*, the residence compound of China's leaders, requesting the central authority to assure a proper and lawful environment for Falun Gong to cultivate their beliefs. In effect, Falun Gong woke up the central leadership to its alarming organizational muscle. Jiang Zemin swiftly responded by ordering a nation-wide crackdown.<sup>34</sup> On 10 June 1999, the '610 Office' responsible for cracking down on Falun Gong was established under the Central Committee of the Party, with sweeping powers and branches all over China. As a poor example of law-based management of religion and religious activities, the pertinent law in fact was enacted *post facto* to legitimize the policy decisions by the Party and the government. In addition, government ministries issued regulations before the National People's Congress legislated (in October) to outlaw 'heterodox religions' with retroactive effect to Falun Gong.<sup>35</sup>

<sup>34</sup> Xu Jiatur, 'Cultural Revolution Revisited in Crackdown', *Taipei Times*, 8 Sept. 1999. [www.taipeitimes.com/News/editorials/archives/1999/09/08/1308/2](http://www.taipeitimes.com/News/editorials/archives/1999/09/08/1308/2). Accessed on 20 April 2011. Xu is the former director of China's Xinhua News Agency in Hong Kong.

<sup>35</sup> For an analysis of the validity of the legal base for the crackdown, see Bryan Edelman; James T. Richardson, 'Imposed Limitations on Freedom of Religion in China and the Margin of Appreciation Doctrine', *Journal of Church and State*, Vol. 47, No. 2 (Spring 2005), pp. 243-267.

Specifically, on July 22 1999, the Ministry of Civil Affairs issued a Decision banning ‘the Research Society of Falun Dafa and the Falun Gong organization under its control’ for its engagement in illegal activities, advocating superstition and spreading fallacies, hoodwinking people, inciting and creating disturbances, and jeopardizing social stability. On the same day, the Ministry of Public Security also announced sweeping prohibitions on Falun Gong, as follows:

1. Everyone is prohibited from displaying in any public place scrolls, pictures and other marks or symbols promoting Falun Dafa (Falun Gong);
2. Everyone is prohibited from distributing in any public place books, cassettes and other materials promoting Falun Dafa (Falun Gong);
3. Everyone is prohibited from gathering a crowd to perform ‘group exercises’ and other activities promoting Falun Dafa (Falun Gong);
4. It is prohibited to use sit-ins, petitions and other means to hold assemblies, marches or demonstrations in defense and promotion of Falun Dafa (Falun Gong);
5. It is prohibited to fabricate or distort facts, to spread rumours on purpose or use other means to incite [people] and disturb social order;
6. Everyone is prohibited from organising or taking part in activities opposing the government’s relevant decision, or from establishing contacts [with other people] for this purpose.<sup>36</sup>

Today, the ‘strike hard’ campaign against Falun Gong still goes on unabated.

Over the years, there were credible reports<sup>37</sup> of arrest, detention, and imprisonment of practitioners; harsh treatment in prisons and reeducation-through-labor camps for those who refused to recant their beliefs; deaths due to torture and abuse; and harassment and intimidation of lawyers who defended Falun Gong clients.

To summarize, the case of Falun Gong represents the worst example of religion-politics relations in which a religion took a confrontational ap-

<sup>36</sup> Source: Amnesty International, ‘Crackdown on Falungong’, 17 November 2000, p. 16. [www.amnesty.org/en/library/asset/ASA17/011/2000/en/77562be8-df70-11dd-aaaa-7d9091d4638f/asa170112000en.pdf](http://www.amnesty.org/en/library/asset/ASA17/011/2000/en/77562be8-df70-11dd-aaaa-7d9091d4638f/asa170112000en.pdf), accessed on 20 April 2011.

<sup>37</sup> See Human Rights Watch, ‘Dangerous Meditation: China’s Campaign Against Falungong’, Report published on 7 February 2002; Thomas Lum, ‘China and Falun gong’, (updated) CRS Report for Congress, 11 August 2006. *Congressional Research Report #RL33437*. Accessed on 20 April, 2011; Bureau of Democracy, Human Rights, and Labor, Department of State, *International Religious Freedom Report 2010*, Nov. 17, 2010. [www.state.gov/g/drl/rls/irf/2010/148863.htm](http://www.state.gov/g/drl/rls/irf/2010/148863.htm). Accessed on 20 April 2011.

proach to defend its right to freely and openly practice its faith, while the government was equally determined to wipe it out as a heretical organization. There is no prospect for any compromise in the foreseeable future (see Figure 2, p. 698).

Unlike Falun Gong, Protestantism in Wenzhou, a once isolated rural town in coastal Zhejiang province, has excelled in adapting to the market transition during the era of reform and opening to the world, engaging state power and expanding the space for religious development.<sup>38</sup> The resultant religion-politics relations can be described as a cooperative process based on ‘exchange’ as advocated by Professor Reverend Lap-yan Kung below:

... the elite politics of the government aims to make the state-church relationship a give-and-take relationship rather than simply a manipulative one. This new phase creates new possibilities for Protestantism in society ... that in the context of the ideology of a harmonious society, Protestantism seen in this way has a more explicit role to play in public life. ... We should note, nevertheless, that this new phase brings with it no implication that the Chinese authorities have given up the control of religion, for religion can potentially threaten their legitimacy. However, I do not think that state-church relations in China today are appropriately understood in terms of curbing the growth of religion as this used to be practiced, for faced with challenges to their legitimacy, the Chinese authorities have had to choose between retreat, retrenchment or adaptation; they have chosen the latter, and it is the nature of this adaptation that the model of exchange relationship intends to explain and articulate.<sup>39</sup>

Wenzhou is now the most Christianized Chinese city<sup>40</sup> and a pioneer in China’s development of a market economy. It has earned the reputation as ‘China’s Jerusalem’ or otherwise served as a model of astounding Christian revival. Compared to the case of Falun Gong where radical confrontation ended with a total crackdown, this model serves as an example of how the skilful engagement of resilient believers can transform religion-politics re-

<sup>38</sup> For a comparison with another successful Catholic case of adaptation in a Hakka village in Guangdong province, see Eriberto P. Lozada, *God Aboveground: Catholic Church, Postsocialist State, and Transnational Processes in a Chinese Village*, Stanford: Stanford University Press, 2001.

<sup>39</sup> Lap-Yan Kung, ‘The Emergence of Exchange Politics in China and its Implications for Church-State Relations’, *Religion, State and Society*, Vol. 38, No. 1 (2010), pp. 9–28, here p. 10.

<sup>40</sup> Wenzhou has more than 1,000 churches and at least 12 percent of the population is Christian, compared to 3 percent of Christians in the total population of China.

lations from one characterized by dominance and resistance to one characterized by negotiable boundaries and dynamic interchange.<sup>41</sup> Wenzhou believers are powerful and tactful. They, in registered or unregistered churches alike, have been trying to push back the boundaries and have succeeded many times.

Why has the Protestant church in Wenzhou grown so fast? How could it overcome extreme odds in the past and lingering limitations in the present? The best introductory answer is provided by Aikman's book chapter 'China's Jerusalem',<sup>42</sup> from which four key factors can be extracted. First is the factor of leaders. Wenzhou was fortunate to have zealous and visionary evangelists. In 1867, a one-legged Scotsman named George Stott of the China Inland Mission brought Christianity to the town. He persisted in his missionary work despite all odds and succeeded in converting the locals thanks to sheer courage, his invalidity, and the fact that he preached in the local dialect, normally incomprehensible to the non-local. In 1878, he built the city's first Christian church on Chengxi Street, a historic landmark. Stott must have laid a solid foundation<sup>43</sup> well integrated into the local culture,<sup>44</sup> as Christianity in this locale survived anti-foreignism in the late Qing dynasty, political turbulence in the Republican era and the revolutionary movements in the late 1950s. There was already a critical mass of fervent and perseverant Christians in Wenzhou before Miao Zhitong, the 'greatly beloved leader of the main Wenzhou house church network', started to work his magic. Miao, as an orphan, was brought up by Christian relatives

<sup>41</sup> Nanlai Cao, 'Christian Entrepreneurs and the Post-Mao State: An Ethnographic Account of Church-State Relations in China's Economic Transition', *Sociology of Religion*, Vol. 68, No.1 (2007), pp. 45-66.

<sup>42</sup> David Aikman, *Jesus in Beijing*, Washington, D.C.: Regnery Publishing Inc., 2003.

<sup>43</sup> Aikman briefly introduced the intense Christian work of another leader during the Cultural Revolution, Zhen Datong. According to Aikman, Zhen had the following to say during an interview: 'The church in Wenzhou was very good during the Cultural Revolution. We never stopped meeting. The China Inland Mission had laid a good foundation here'. David Aikman, *ibid.* p. 186.

<sup>44</sup> According to Miss Yu-jing Zhu, earlier Christians were conscious of the foreign nature of their faith and endeavoured to shed that image by setting up independent local organizations, such as Independent Jesus Association of China (*zhonghua yesu zili hui*) in 1907, Protestant Local Association of China (*zhonghua jidujiao neidi hui*) in 1918 and Self-reliant Association of Protestants in China (*zhonghua jidujiao zili hui*) in 1920. Miss Zhu is currently a PhD candidate at the Department of Anthropology, the Chinese University of Hong Kong. She is working on an ethnographic project on 'the state-church relations in Wenzhou'.

and had his wayward teenage years. In 1967, right at the height of the Cultural Revolution, he took up the call to be a full-time preacher. Needless to say, he was charged as a ‘counterrevolutionary head of superstition’ and suffered from recurrent arrests, beatings and sessions of tortures. He was once almost beaten to death and saved by a large group of Christians who showed up to bravely clamor for his release. By all means possible, Miao stubbornly refused to admit any crimes during ‘struggle sessions’ but instead turned his ‘confession’ into a sermon about the Judgment. The authorities eventually gave up and released him. The moment he was free, he began again to mobilize Christian churches. By 1976 when the Cultural Revolution came to an end, Aikman wrote, the Zhejiang house churches were probably more active than those in any other part of China.<sup>45</sup> In Aikman’s description, Miao and his fellow Christian leaders were not only brave but visionary too. They dreamt of moving beyond ‘China’s Jerusalem’ or ‘China’s Antioch’. ‘Back to Jerusalem’ is the preferred idea, i.e. they will ‘take the Gospel back to the Middle East’.

This does not mean that Wenzhou is now free of government control of religion, however. Limiting regulations still lingers abound and the repression of ‘illegitimate’ religious activities continued.<sup>46</sup> The ‘successful’ model of Wenzhou is the contingent result of what happens when a religious community and the government are on good terms. How is such a relationship achieved? How do Wenzhou’s Protestants negotiate the boundary between legitimate and illegitimate activities and gain not only recognition but also ‘cooperation’ from government officials? A quick answer is that they make it not by subservience, but tactful defiance and social influence based on wealth<sup>47</sup> and philanthropy.

<sup>45</sup> According to Miss Zhu’s findings, there were about 330,000 Christians (Protestants and Catholics) in 1976 as compared to 140,000 just before the Cultural Revolution.

<sup>46</sup> For instance, it is reported with reference to Wenzhou that ‘Religious activities that are not under state control are considered illegal in China, and are often categorized as “illegitimate religious activities” and “cultic groups” in order to facilitate shutdown. Independent house churches face the brunt of this legislation. Bob Fu, the leader of China Aid, said that one of the newest developments is a strategy that labels Protestant movements as “cults”, allowing the government to justify repression. And yet, despite persistent and often violent persecution, the underground church in China is growing stronger every day’. Refugee Review Tribunal Australia, *RRT Research Response Number CHN32722*, 17 December 2007. [www.unhcr.org/refworld/pdfid/4b6fe19c0.pdf](http://www.unhcr.org/refworld/pdfid/4b6fe19c0.pdf). Accessed on 14 April 2011.

<sup>47</sup> A rich and powerful Wenzhou Christian is Zheng Shengtao, head of the Shenli (literally God’s Power) Group, who has been ranked by *Forbes* magazine as the 395<sup>th</sup>

A few examples of tactful defiance suffice here. Religious organizations have to be registered to be legitimate. Some Wenzhou house churches registered with the Industrial and Commerce Bureau rather than the Religious Affairs Bureau. There is also a law banning the conduct of religious activities in public. For example, religious procession and public display of religious symbols are forbidden. Wenzhou Protestants are however ingenious enough to turn funerals and weddings into evangelist occasions. In a public funeral's hall, the center stage is flanked by a portrait of the deceased placed on one side and a banner ten times bigger than the portrait on the other. On the banner is the inscription 'God loves us' and dancers perform in the middle of the stage to the tune of religious music. Government officials apparently know about such occasions but they turn a blind eye to them, for one reason or another. A plausible reason has to do with the fighting spirit of Wenzhou Protestants and their resourcefulness. In 2002, Wenzhou pastors resisted an edict to halt all Sunday-school teaching by 'banging on bureaucratic doors all the way to Beijing', on the legal ground that there was no law prohibiting the teaching of religion to children under the age of eighteen. They had won the backing of Bishop Ding Guanxun, president of the Nanjing Seminary and leader of the Three-Self and the China Christian Council, as well as the All-China Federation of Industry and Commerce. At the end, they won the case.

The success of the Wenzhou model could be attributed not only to the resourcefulness, perseverance, and social capital of Wenzhou Christians, but also to their economic power as well. In China, there is a correlation between economic growth and religious revival, with Wenzhou as a prime example. This city claims the highest number of merchants per capita in China. They trade all over in China and in major markets overseas too. Many of them are religious believers who spread their faith along with their trade. It is indeed amazing to note that 'Wenzhou merchants established perhaps the only government-sanctioned Christian gathering point in Lhasa, Tibet'.<sup>48</sup>

richest man in China, with assets estimated at more than \$400 million. He is a member of the provincial Chinese People's Political Consultative Conference, an advisory body to the government, and director of the Wenzhou General Chamber of Commerce. See Louisa Lim, 'In the Land of Mao, a Rising Tide of Christianity', NPR (Public Radio Station), 19 July 2010, [www.npr.org/templates/story/story.php?storyId=128546334](http://www.npr.org/templates/story/story.php?storyId=128546334). Accessed on 15 April 2011.

<sup>48</sup> Kam-Kwong Chan, 'China's Socioeconomic Changes and the Implications for the Religion-State Dynamic in China', *Brigham Young University Law Review*, Vol. 2004, Issue 2 (summer 2004), pp. 325-356, here p. 344.

This is the success story of ‘boss Christians’ as told by Nanlai Cao.<sup>49</sup> ‘Boss Christians’ refer to the prosperous entrepreneurs of Wenzhou who ‘have adopted their modern capitalist cultural logic in the production, management and consumption of religious activities’. They are recognized and respected for their rising economic power and for the social services they provide to the community. They have no fear of publicly displaying their faith and they name their enterprises after personalities in the Bible. Many of them act as local church leaders and preachers, and convert the economic capital, social knowledge, and civic skills they have acquired in the modern marketplace into capacities that are channeled towards church development, especially aggressive church property acquisition. They have thereby refashioned Chinese Christianity, a marginalized rural social institution in the popular imagination, into a modern urban institution with an entrepreneurial outlook. Also unlike their rural counterparts, they seek to be integrated into the current socioeconomic mainstream and to play a greater role in the public arena. They actively and creatively seek to integrate their religious and entrepreneurial identities, thus depoliticizing Christianity in the state-authorized context of business development. Cao argues that ‘Christian entrepreneurs and the post-Mao state actually share many important concepts, aspirations, and interests – particularly in the common pursuit of stability and development’. Christian revival can therefore be conceived as a dynamic process in which emerging socioeconomic groups embedded in local histories and memories try to claim their own space to practice a long established faith in changing political and economic conditions. Christian entrepreneurs are, while producing, managing and consuming God’s plan in the ongoing market transition, helping to transform religion-politics relations and the overlapping domains of religious and secular practice (see Figure 3, p. 699).

Compared to the two cases above, Shaolin Monastery represents a model of close cooperation between state and church in which the former wholeheartedly embraces the advanced-capitalist way of development, as a response to the official call for religious adaptation to socialism. Shaolin Monastery has a long tradition of close cooperation with the government. The present case is even more complicated and controversial than the past pattern. One may call it a version with Chinese-socialist characteristics.

<sup>49</sup>The following analysis is largely based on two articles by Nanlai Cao, i.e. ‘Christian Entrepreneurs and the Post-Mao State...’, *ibid.*; and ‘Boss Christians: The Business of Religion in the “Wenzhou Model” of Christian Revival’, *The China Journal*, Vol. 59 (January 2008), pp. 63-86.



Shaolin Monastery, the global face of Chinese Buddhism, has been and continues to be a brand. Like many other religious organizations, it has had its ups and downs. Generally speaking however, Shaolin Monastery has been on better terms with political authorities of the day. Its glorious history started when its martial monks assisted Li Shimin, the founder of the Tang Dynasty (618-907), in his military campaign. Li granted the Monastery with imperial patronage and a large amount of land. During the Ming Dynasty (1368-1644), the Shaolin monk soldiers helped the imperial army in its border defense campaigns three times, for which the temple was rewarded with a flag post and two stone lions placed in front of the temple and guaranteed institutional prominence over the centuries. However, the Monastery was destroyed and its monks dispersed upon the foundation of the Qing Dynasty (1636-1912) as a punishment for its continued loyalty to the Ming emperor. Relations were later improved after emperor Kangxi (1654-1722) honoured it with a horizontal tablet with his own calligraphy 'Treasure Tree and Fragrant Lotus' (*baoshu fanglian*) and 'Shaolin Temple'. The Temple was rebuilt twice with permissions from Emperors Yongzheng (1723-1735) and Qianlong (1736-1795). In the Northern expedition (1926-1928) of the Republican era, Shaolin Monks sided with the Zhi army (under Wu Peifu) in its battle in March 1928 against the Northwestern Army (under the command of Shi Yousan) but failed. On the 15<sup>th</sup>, the Northwestern army set fire to the Monastery and the next day a unit of the National army stationed in Dengfeng (under the command of Su Mingqi) came to completely burn down the entire temple. It was not restored until the 1950s with the help of the Communist government, only to be destroyed again during the Cultural Revolution. At the end of the Cultural Revolution, the shattered temple was guarded by no more than a dozen monks with 28 *mu* (1 *mu* = 0.0667 acre) of poor land.

It was in this difficult period that Shaolin Monastery experienced another turn of its fate, when Liao Chengzhi made an offer. Liao was Deputy Director of the Foreign Affairs Office of the State Council in charge of overseas Chinese affairs and Sino-Japanese relations, and was a victim of the Cultural Revolution. In 1972, he was rehabilitated by specific permission of Mao Zedong and assigned to assist Zhou Enlai in his diplomatic responsibilities. In 1978, he was again entrusted with the directorship of the Commission on Overseas Chinese Affairs. On 31 January of that year, with the goal of improving Sino-Japanese relations on his agenda, he invited Hong Kong movie producers to Beijing suggesting to them the production of a movie that would be both healthy and appealing to the public. In 1979, he talked to producer Liao Yiyuan again, proposing the production of a

movie about Shaolin Monastery. Liao believed that a movie about the Monastery would be attractive to the Japanese audience and could thereby help normalize diplomatic relations between China and Japan. One reason was that there was a Shaolin temple in Japan, established by Oyama Matsu-tatsu who had learned *kung fu* in Shaolin Monastery in 1939. Under his influence, Shaolin *kung fu* became a popular martial art in Japan. So, this is the story behind the 1982 *kung fu* movie about the Shaolin Temple, featuring Jet Lian Li, which broke box office records when it debuted in Japan, Mainland China, and many overseas markets. A long Shaolin series of movies was subsequently produced.

Shaolin Monastery not only mediated Sino-Japanese diplomacy, its *kung fu* reputation has complicated its economic relations with the local government. For the new 30<sup>th</sup> Abbot of the Monastery, Shi Yongxin, who is the first ever monk with an MBA degree, *kung fu* economy is one way of going out to the world. At the same time, the local government views the Monastery, a multiple billion *yuan* (RMB) business, as a lucrative source for boosting local government revenue. This is not to say that Shaolin Monastery could not have other ways to engage the outside world. Since 1986, it has established a number of charitable institutions such as Learned Society of Shaolin *kung fu*, Shaolin Red Cross, Academy of Shaolin Calligraphy and Painting, All-China Research Society on *Zen* Poetry, and Shaolin Monastery Foundation for Charity and Welfare. They are however overshadowed by Shaolin's business projects, like domestic and overseas *kung fu* performances, *kung fu* School and courses, and Shaolin Temple Enterprise Development Company Limited. The latter has, apart from petty businesses like Shaolin delicatessens, registered over one hundred patent businesses and granted licenses for other enterprises to use its name 'Shaolin Temple'. The government too lost no time to rezone a huge area with Shaolin Temple as its centre to become a Gao Mountain Resort Area for the development of tourism and cultural activities. The government has also set up its own enterprises and companies 'infringing' the brand name of 'Shaolin Temple'.<sup>50</sup>

The commercialization of Shaolin Monastery has attracted a lot of controversies. In recent years, business conflicts have adversely affected the Temple's relations with the local government. To give a small example, the number

<sup>50</sup> The Shaolin Monastery has three companies named after it, whereas seven companies established under the name of the Vice Director of the Finance Bureau of the local government are named 'Dengfeng Gao Mountain Shaolin' (dengfeng gaoshan shaolin).

of tourists attracted to the temple has grown from two hundred thousand in 1978 to over 150 million in the 1990s. Annual revenue from Shaolin tourism alone, reaching RMB 100 million in 2010, amounts to one-third of the total income of the local government, Dengfeng. The entrance charge to the temple costs RMB 100, of which only RMB 30 goes to Shaolin Monastery. The Monastery does not want to charge for entrance, since usually Buddhist temples rely on donations from believers. Negotiation with the local government to abolish the charge has so far been in vain. Local people know that in front of a side door to the West of the temple, there is a donation box for a sum of RMB 30 to gain admission into the temple.

What has transpired is that the (local) religion-politics relationship as exemplified by Shaolin Monastery is one of asymmetrical power and unequal exchange. Fortunately, its freedom to practice faith seems unaffected. In an interview with the *Guangzhou Shangbao* (Canton Commercial Daily) on 2 December 2010,<sup>51</sup> the Abbot insisted that the commercialization of Shaolin Monastery will not stop but should be accelerated, for the sake of Shaolin's next 1,500 years. He defended it as follows. First he referred to the tradition of Mahayana Buddhism saying that the church must not withdraw itself from the world but deal with secular society. As the landscape outside the church has changed, the church should also change. 'We have two hundred resident monks to feed', he said, 'and we do not want to depend on government's subsidies. By means of commercialization, we let modern technology work to facilitate people's understanding of Buddhism. In exporting *kung fu* for example, we are in fact spreading the culture of *Zen*. Mahayana Buddhism speaks of sharing, not self-cultivation. To share implies to broadcast, or to communicate. Practice of faith does not mean just to burn incense and kowtow, but also to upgrade cultural communication. Going out into the world also entails broadening the horizons of the monks'. 'What I have done', the Abbot continued, 'is to promote an excellent cultural legacy of humankind and to consolidate the leadership of the Shaolin Monastery in Buddhism. Whether the commercial approach is right depends on whether the products are derived from the essence of Shaolin culture. If the products are authentic, then their sale is conducive to the development of the temple and the Buddhist way. If we do not do it, many others will exploit Shaolin's brand name for the pure sake of making profit. Therefore, Shaolin must conduct business in order to protect its brand name

<sup>51</sup> [www.china.com.cn/news/txt/2010-12/02/content\\_21462583.htm](http://www.china.com.cn/news/txt/2010-12/02/content_21462583.htm). Accessed on 23 March 2011.

and its associated spiritual niceties'. 'Businesses conducted by Shaolin, such as drugstore, vegetarian restaurant, *kung fu* star contest, movies', so argued the Abbot, 'all have to do with faith and income thereby generated has been plowed back into charities and cultural preservation projects'. 'The biggest challenges are', the Abbot admitted, 'whether they can insist on the cultural quality of these products and to avoid from being "overcome" by commerce, instead of commanding it. It is imperative to incessantly enhance the quality and depth of faith as monks'. He emphasized that they all strictly maintain daily routines such as sutra chanting and *Zen* meditation and they also observe the retreat '*Zen 7*' annually.<sup>52</sup>

This is indeed an eloquent and powerful defense. Yet, it remains to be seen whether Abbot Shi can get what he truly wishes to get, such that Shaolin Monastery remains more of a religious centre than a *kung fu* Disneyland.

## Conclusion

This chapter has traced the considerable changes to the religion-politics relationship since the establishment of the People's Republic of China. Generally speaking, the space for religion's autonomy has been expanding, thanks to a number of domestic and external factors. Currently, the boundaries between religion and politics are still being negotiated and ongoing changes, sometimes chaotic, are likely. It is expected that globalization, regime transformation and the formation of civil society will continue to have an impact on the changing contour of religious freedom in the future.

There is no denying the fact that the state remains a crucial factor. It is the state that defines what amounts to religion or superstition, designs policies to deal with them, and backs up their implementation with coercive force when necessary. Having come to a better understanding of the nature of religion, the government acting in the name of the state has been learning new ways to control and guide religion in the service of defined interests. Instead of abolition and suppression, its current motto of religious governance is guided adaptation of religion to socialism. The policy of guided adaptation is by nature lop-sided, given religion's more dependent status in the power game.

This does not mean that religious groups and believers are entirely helpless or powerless, depending on the influence of other factors and the will of the human agent. Among the factors, the local context stands out. The general pattern here is that conflicts between the ruling authorities and religion are of a more pragmatic nature. Thus, execution of the religious policy

<sup>52</sup> That is meditation for 7 multiplied by 7 days.

from the above varies greatly from one locality to another. Religion that is well integrated within the local culture and with rich resources of one kind or another is likely to enjoy more room for manoeuvre. Even house churches not officially 'approved' or 'registered' can still maintain a delicate working relation with the government. Sanctioned churches fare better and their activities conducted even in 'illegal' ways are often tolerated. Believers who are entrepreneurial and skilful enough are often co-opted by the state, thereby signaling to other fellow believers that their practice of faith is safe from intervention. A Christian with Party membership or in government office can even help 'make' the local state. Nanlai Cao reports such a case in her article about the Christian entrepreneurs of Wenzhou and comments that 'the local government preferred a cadre who follows the Christian ethic and seeks to promote local development rather than a greedy, rent-seeking, but ideologically trustworthy atheist official'.<sup>53</sup>

Looking ahead, one cannot, despite the breakthroughs described above, expect that the government will fully relinquish its control of religion. Instead, tightening up of control is more likely in the short term, in light of the forthcoming 18<sup>th</sup> Party Congress in 2012. The religion-politics relationship beyond the immediate term is likely to move away from the state-manipulative mode to a give-and-take mode, as the interests of the state and those of church increasingly converge and as the relationship between the two parties becomes mutually determined. As for longer-term predictions, Dr. Kim-Kwong Chan has offered four scenarios based on two variants: religious policy (restrictive vs. reform) and social development (smooth vs. rough transition).<sup>54</sup> They can be succinctly stated as follows.

***Scenario one – victim model (under restrictive policy and smooth social transition)***

Restrictive policy will persist, while religion will grow in kinds as well as in quantity, especially in terms of more well-to-do believers. Society will

<sup>53</sup> As the story goes, there was a successful entrepreneur-cum-local party secretary. He refused to offer bribes in a road construction project. When an opponent reported his Christian faith to his party superior, 'he even took the opportunity to attack the internal conflicts and problems within the local government and stressed that a Christian-predominated government would be much more efficient, since Christians treat each other as brothers and sisters and value truth'. Nanlai Cao, 'Christian Entrepreneurs and the Post-Mao State...' *ibid.*, pp. 54-55.

<sup>54</sup> Kim-Kwong Chan, 'Religion in China in the Twenty-First Century: Some Scenarios', *Religion, State and Society*, Vol. 33, No. 2 (2005), pp. 87-119.

become more open-minded and individuals more concerned about the meaning of existence in the context of material well-being. The government will discover the wealth that can be generated from their authority over religious believers, especially from those from religions not officially approved or registered. As a result thereof, a new dynamic will develop: victimized religious groups cohabiting with corrupt government officials. Religion in China will thus mostly be playing the role of a victim constantly at the mercy of the ever-stronger Chinese government. Mid-Ming Dynasty offers an analogy here.

***Scenario two – revolutionary model (under restrictive policy with rough transition)***

A rough transition during the modernization process will involve (A) economic difficulties in areas such as agriculture when domestic crops are outcompeted on the global market and (B) social injustice e.g. a widening gap between rich and poor. Chaos will ensue and people will seek to transcend reality and turn to faith. Restrictive religious policy and decline of social stability will cause religious groups to focus on millennialist teachings that in turn may mobilize believers who are disappointed with the current regime into action. Religion will thus become a force of revolution. Here, the history of the Taiping Rebellion (1850–1864) repeats itself.

***Scenario three – philanthropist model (under reform policy and rough transition)***

Religious policy will be reformed to approximate those typically found in the developed nations. Social development however will experience a rough transition (see Scenario two above). Hence, religious organizations will focus all their energy on setting up social services and relief efforts to alleviate the sufferings of the people as well as to bring hope to those in despair. This model mirrors the experiences of Mother Teresa in India, faith-based charity programmes in refugee camps in South East Asia or in the former Yugoslavia.

***Scenario four – teacher model (under reform policy and smooth transition)***

As reformist China will rise to become a world power with an increasingly comfortable standard of living at home, the Chinese will focus on art, culture and leisure. Religion will become popular. Chinese Christians along with their American counterparts will form the largest and most powerful bloc of Christian believers in the world. Cultural and religious study centres will develop and attract increasing international attention. Christian and

Buddhist businessmen and entrepreneurs will establish a benchmark for ethical behaviour, as will religious believers in various professional groups. When Chinese religious organizations establish ever more ties with international religious communities, the Chinese will exert significant influence over international religious bodies. Chinese missionaries will eventually be sent out all over the world and will replace Korea as the largest missionary exporting country in the world, thereby shaping its future religious landscape.

Dr. Chan's scheme is perceptive and grand. It is however hard to predict which model will eventually emerge as the dominant pattern in future China. The present situation is already complex enough and large-scale developmental processes are indeterminate. Today, the religious policy of the government is reformist in some aspects and restrictive in others. Social-economic transition is smooth in some sectors and rough in others. How might these variations add up or cancel each other into a dominant pattern? As to the behaviour of religious bodies and believers, bits and pieces of the four scenarios are discernible. For instance, we may find the seeds of the Teacher Model in the 'back to Jerusalem' vision and in the projects of the Boss Christians from Wenzhou. Most religious bodies have for quite some time focused their energy on social welfare and charity, in conformity to the Philanthropy Model. Harsh treatments experienced by certain Catholics, Uighur Islamists and Tibetan Buddhists fit the description of the Victim Model. Lastly, although there is no revolution in sight, religion-related protests and uprisings are actually on the rise<sup>55</sup> and the case of Falun Gong is just a few steps away from a revolution.

The scenarios scheme is informed by a religious perspective, as Dr. Chan is a believer himself. In the present book, the chapter by F. Russell Hittinger has contributed a different, legal-political perspective. He uses four figures adapted from a chart by W. Cole Durham<sup>56</sup> to map the teaching of *Dignitatis Humanae* onto a spectrum of religion-state regime. I submit that we can also

<sup>55</sup> So much so that Wang Zuo'an, the new chief of the Religious Affairs Bureau, called the attention of his fellow cadres to recent religious developments and urging them to 'fully and correctly carry out the religious policy of the Party'. Wang Zuo'an, 'zengqiang zuohao zhongjiao gongzuo de nengli' (Strengthen the Capacity to Do Well Religious Work), *Qishi* (Journal), 9 January 2010. [www.qstheory.cn/zxdk/2010/201003/201001/t20100126\\_19764.htm](http://www.qstheory.cn/zxdk/2010/201003/201001/t20100126_19764.htm) accessed on 20 March 2011.

<sup>56</sup> W. Cole Durham, Jr., 'Perspectives on Religious Liberty: A Comparative Framework', *Religious Human Rights in Global Perspective: Legal Perspectives*, eds. Johan D. van der Vyver and John Witte, Jr., The Hague, Boston and London: Martinus Nijhoff Publishers, 1996, here p. 23.

use them to speculate about the future development of religion–state relations in China. On the basis of Hittinger’s Figures 1 and 2 (see pp. 667–8), one can argue that the religion–state regime in China has been traversing a history from ‘persecution’ by a totalitarian state, through ‘hostility’ towards ‘threatening’ religions and an authoritarian government’s ‘enjoinment, direction and forbiddance’ of practices of recognized religions, to ‘some identification of Church and State’ as promoted by a pragmatic, technocratic government. This seems to be the direction at the moment, but further development remains open, as the path may be interrupted, reversed, and changed in different directions depending on competing factors of influence.

The future is uncertain as there have been many contending forces at work. There is no easy solution, neither in theory nor in practice. In theory, both politics and religion are concerned with authority and its exercise. Each of them claims primacy of their authority over human affairs. Delineation of scope for the authority claim, for example, to confine religion to ‘the private’ sphere and politics to ‘the public’ sector is theoretically untenable and practically difficult to arrange. In China, it is hard to imagine that the state and the church can accept the dictum that the secular and the spiritual or the public and the private can truly be distinctively separated. The government would hardly stop intervening into the teaching of children by religious bodies since the formers’ education and socialization are perceived as responsibilities of the state. The religious bodies on the other hand could hardly abandon their role as prophets to fight injustices in the secular world, or to realize the Kingdom on earth.

It seems therefore better to acknowledge the innate connection between religion and politics.<sup>57</sup> If we can further assume a possibility that both religion and politics share an aspiration and obligation to bring China to ‘modernity’ (or even ‘post-modernity’) in a rapidly changing but still pluralistic world, then religion–politics relations can be conceived as a joint project in which they respect each other as legitimate institutions, engage each other, and check and balance each other in a *modus vivendi* conducive to the development of ‘the common good’ for all. In such a project, the

<sup>57</sup> This author is indebted for the following thought to two books. Ivan Strenski, *Why Politics Can’t Be Separated From Religion*, Chichester, U.K.; Malden, MA: Wiley Blackwell, 2010. Yoshiko Ashiwa and David L. Wank eds., *ibid*. In their introduction to the latter book, the co-editors argue that ‘the situation of religion is not simply a history of conflict between state and religion but rather processes of interactions among multiple actors that comprise the making of modern religion and the modern state over the course of the past century’.



minimal requirement to build up mutual trust would be the abandonment of *potestas* (coercive power) in their mutual engagement, to be initiated especially by the government, since religion is at present the more dependent partner in the game. In other words, such a project could only be promoted by *auctoritas* (moral power) of which religion enjoys an advantage whereas politics, when more increasingly civilized, could also afford. This is the future for China. It seems lofty. Let me leave it just at that.

# EXPERIENCES IN FREEDOM OF RELIGION IN THE AFRICAN CONTEXT

■ ABDULLAHI A. AN-NA'IM

Since my task is to discuss issues of freedom of religion in the African context at large, with its extensive diversity among and within more than fifty countries, I propose to advance a contextual approach to the subject, instead of attempting a detailed discussion of the practice of this right in one particular African country or another. In other words, this lecture is about *how* to understand and evaluate the protection of freedom of religion as a human right in Africa today. For this limited objective, I will discuss the implications of the post-colonial context, broadly speaking, for the protection of human rights in Africa. Next, I will highlight the need for mediating competing claims of self-determination and freedom of religion in particular. To illustrate my approach, I will conclude with a brief case-study on promoting freedom of religion from an Islamic perspective.

To begin with, however, let me first offer some reflections on the nature of the modern human rights paradigm in general to emphasize the need for such a contextual approach. Although I am concerned in this lecture with freedom of religion in particular, it is better to approach the subject in term of the human rights paradigm because it is an external standard for evaluating constitutional and legal norms and practice. Otherwise, we would have to accept whatever degree or form of protection, or lack thereof, a state grants this or other human rights. For the human rights paradigm to serve as arbiter of national standards, however, it needs to be globally accepted as legitimate among the relevant populations. There is also little point in affirming a universal standard without regard to its practical application.

Human rights, like freedom of religion and belief, are universal by definition because they are due to all human beings by virtue of their humanity. This humane and ambitious vision is challenging to all human societies, especially when human rights norms are believed to be in conflict with apparently superior or more compelling concerns with protecting general social security and stability, or safeguarding the rights of others. The idea of equal rights for all human beings is challenging because it contradicts the common human tendency to either discriminate among people in terms of these attributes, or expect them to conform to our own ethnocentric and uniform notion of a universal human being. Universal values, like those

affirmed by human rights norms, do not exist in the abstract to be discovered or proclaimed through declarations and treaties, as we all tend to perceive such values through the relativity of our own cultural and contextual world view and experience. If universal values are to exist at all, we have to construct them through debate and action.

The universality of human rights is a product of a process, and cannot mean the assertion of the relativist values of one society or group of societies over the rest of humanity. Since our perception of human rights is necessarily relative to our own cultural/religious traditions, consensus on any set of norms must be developed over time, and not simply proclaimed or taken for granted. As I have argued elsewhere,<sup>1</sup> this process of promoting consensus over the universality of human rights should occur through an internal discourse within different cultures, and dialogue among them. The question is therefore how to create conducive conditions for an effective internal discourse within and among cultures to promote consensus and cooperation on the protection of human rights.

It is also important to ensure that the means we use in promoting and protecting human rights does not defeat the end of protecting individual freedom and social justice for all persons in their communities on the ground everywhere in the world. For instance, an underlying paradox of the international protection of human rights is the expectation that any state would clearly articulate and effectively implement these safeguards against the excess or abuse of power by its own officials and policies. The similar paradox of constitutional protection against abuse and excess of power by national governments is mitigated by strong local civil society organizations and the public at large acting through national legal institutions and political processes to force governments to comply. In the absence of international enforcement mechanisms, however, human rights are supposed to be protected by monitoring, documenting and publicizing human rights violations in the hope of generating sufficient moral and political pressure to force offending governments to stop violating the rights of their own nationals. But the unavoidable consequence of the whole scenario is that it makes the protection of the right of the local population of one country dependent on the good will and commitment of external actors. Indeed, the fact that offending governments tend to comply because they are dependent on economic aid and security assistance by rich donor

<sup>1</sup> See, for example, 'Introduction', in Abdullahi Ahmed An-Na'im, editor, *Human Rights in Cross-Cultural Perspectives: Quest for Consensus* (University of Pennsylvania Press, 1992).

countries is itself the product of colonial and neo-colonial power relations, structural unfairness in global trade relations, and related aspects of the present, capitalist international economic order.

Other limitations of the present approach include the fact that it can only work in a piecemeal and reactive manner, responding to human rights violations after they occur, rather than pre-empting them or preventing their occurrence in the first place. The present approach also needs to focus on specific cases or some limited issues to be effective, without attempting to address structural causes of human rights violations or investing in institutional mechanisms for sustainable respect for and protection of these rights. This approach is also arbitrary and inconsistent, as it tends to focus on weaker and poorer countries because they are more likely to yield to pressure, than on stronger and richer ones, even when they are guilty of more gross and systematic violation of human rights.

I am not calling for an immediate end to this approach to the protection of human rights around the world because that is not a realistic possibility in the short term. Rather, I am calling for building local constituencies and promoting local institutions for the protection of human rights. The following reflections are therefore intended to enhance and support this more 'people-centered' approach to the protection of human rights, in order to diminish dependency on the ambiguities and contingencies of inter-governmental relations.

From this perspective, the protection of human rights should be achieved as part of a broader strategy for social and economic development of the country. Indeed, human rights and human development are complementary and mutually reinforcing processes. Neither can be realized in a comprehensive and sustainable manner without the other. Moreover, this integrated process should be followed with due regard to local and regional context, as well as consideration of the impact of patterns of global economic and political conditions and power relations. In relation to both development and the protection of human rights, special attention must also be given to the role of the state as the essential mediator of local, regional and global factors and processes in these interrelated fields. Another point to bear in mind is that one should consider the root causes and structural factors in the persistence of human rights violations and frustration of development initiatives. This does not of course mean disregarding the immediate symptoms of any problem, but it is only to say that one should also address underlying causes.

Development in general and the protection of human rights in particular anywhere in the world is a process, not an event that occurs once and

for all. While the state has the international obligations and domestic jurisdiction to protect human rights in daily life, the government of many countries is unlikely to have the necessary resources and institutions, even if it was committed to fulfilling those obligations. I am not seeking to excuse the state from fulfilling its national constitutional and international legal obligations to respect and protect human rights, but simply insisting that that cannot happen without the provision of necessary resources. This takes time and effort, but the determination to take the necessary action also requires generating and sustaining sufficient political support for these objectives within the country. For that to happen, we need to clarify and engage a wide range of issues, including questions about the legitimacy of international human rights norms among the general public, the nature of the state and its relationship to civil society, the ability of civil society actors to accept and struggle for human rights, and the availability of human and material resources for local advocacy of human rights.

It may also be helpful to note that the Universal Declaration of Human Rights avoided identifying any particular philosophical or religious justifications in an effort to find common grounds among believers and non-believers. But this does not mean that human rights can only be founded on secular justifications, because they need to be accepted as valid and legitimate from the perspectives of the wide variety of believers, as well as non-believers, around the world. The underlying rationale of the human rights doctrine itself entitles believers to seek to base their commitment to these norms on their own religious beliefs, in the same way that others may seek to affirm the same on their secular philosophy. All sides are entitled to require equal commitment to the human rights doctrine by others, but cannot prescribe the grounds on which others may wish to found their commitment.

The debate around these issues has very serious practical implications, and should not be dismissed as simply a pretext to justify human rights violations or excuse for avoiding these international obligations. The widest possible acceptance of the universality of human rights is essential for generating the political will to implement or enforce these rights at home, and for supporting their enforcement abroad. On the first count, a government is unlikely to allocate the necessary resources for the implementation of human rights, or ensure the accountability of its officials for violating these rights, without political pressure from within the country. Even if a government is somehow committed to upholding human rights norms which limit its own powers, it is unlikely to insist on enforcing any of these rights against the wishes of its own population. By the same token, a government is unlikely to risk its national economic, security or other interest in pres-

sureing other governments to respect the human rights of the population of those countries without either internal political pressure to do so, or at least a willingness among its own population to accept the consequences. It is clear that local populations are unlikely to pressure their own government to give high priority to the protection of human rights in the country's foreign policy, or accept the material or other costs of doing so, unless they accept the universal validity of human rights.

### **Human rights in the post-colonial context in Africa**

The contextual approach I am emphasizing here includes what might be called the post-colonial condition, which signifies a complex web of power relations, institutional arrangements, socioeconomic structures both within formerly colonized societies and in their relationship to former colonial European powers, and other parts of the world. This perspective is of course a familiar theme in a wide range of studies, especially in relation to African and Asian societies, politics, cultural studies, and law. The post-colonial condition can be seen not only in individual formerly colonized countries long after they have achieved formal political independence, but also as a broader principle that affects all of them collectively. While this condition can be elaborated and illustrated in relation to different parts of the world, I am primarily concerned here with its nature and manifestations in Africa today.

By the post-colonial condition in Africa I am referring to a predicament whereby the colonial legacy endures in former colonies through the persistence of the inherited apparatus of colonialism and its political, social, economic, and legal consequences. This legacy continues to strongly influence structural and institutional developments in African countries long after independence. Another aspect of the post-colonial predicament relates to the ways in which colonial exploitation and post-colonial hegemony are perpetuating conditions of dependency by former colonies on their respective European colonial states and other developed countries in general. The post-colonial predicament sustains a sense of profound ambiguity among former colonies who are struggling to incorporate and reconcile contradictory histories and political visions. On the one hand, the post-colonial state is shaped by the colonial vision that subjugated and exploited its population, without sufficiently preparing them for the responsibilities of sovereign independent statehood. On the other hand, the post-colonial state is also shaped by the visions that have resisted the colonial apparatus and still sustain the intellectual and political legacies of anti-colonial resistance and struggle. The post-colonial state is therefore being contested among

competing constituencies of leaders and populations at large by the pull of colonialism and the push of liberation.<sup>2</sup>

This profound ambiguity also relates to an underlying paradox of formal juridical sovereignty in contrast to empirical realities on the ground. To briefly explain, present states in Africa are direct successors of the colonies established by agreements among European powers (especially the Berlin Conference of 1884–85), regardless of the wishes of local groups. The borders of the colonies that African states came to inherit were established by European continental partition and occupation rather than by African political realities or geography. Colonial governments were organized according to European colonial theory and practice; their economies were managed with imperial and local colonial considerations primarily in mind; and their legal systems reflected the interests and values of European imperial powers. The vast majority of the African populations of those colonies had little or no constitutional standing in their own countries.<sup>3</sup>

When independence came, it usually signified the transfer of control over authoritarian power structures and processes of government from colonial masters to local elites.<sup>4</sup> With few exceptions, the post-colonial state in Africa was 'both overdeveloped and soft. It was overdeveloped because it was erected, artificially, on the foundations of the colonial state. It did not grow organically from within civil society. It was soft because, although in theory all-powerful, it scarcely had the administrative and political means of its dominance. Neither did it have an economic basis on which to rest political power'.<sup>5</sup> Since independence, the primary concern of the African post-colonial state has been more with the preservation of juridical statehood and territorial integrity, than their ability and willingness to live up to their obligations to their own people.

To make matters worse, the vast majority of first constitutions were either suspended or radically altered by military usurpers or single-party states within

<sup>2</sup> Crawford Young, *The African Colonial State in Comparative Perspective* (Yale University Press, 1994), pp. 2–12.

<sup>3</sup> Jackson, Robert H., and Carl G. Rosberg, 'Sovereignty and Underdevelopment: Juridical Statehood in the African Crisis', in *The Journal of Modern African Studies* no. 24 (1986), pp. 5–6.

<sup>4</sup> John A. Ayoade, 'States without Citizens: An Emerging African Phenomenon', in Rothchild and Naomi Chazan, editors, *The Precarious Balance: State and Society in Africa*, (Westview Press, 1988), p. 104.

<sup>5</sup> Patrick Chabal, 'Introduction: Thinking about Politics in Africa', in Patrick Chabal, editor, *Political Domination in Africa: Reflections on the Limits of Power* (Cambridge University Press, 1986), p. 13.

a few years of independence.<sup>6</sup> For decades after independence, successive cycles of civilian and military governments in the majority of African countries maintained the same colonial legal and institutional mechanisms to suppress political dissent to their policies and to deny accountability for their own actions. Lacking control over and ability to influence the functioning of their state, or expectation of its protection and service, African societies often regard the post-colonial state with profound mistrust. They tend to tolerate its existence as an unavoidable evil but prefer to have the least interaction with its institutions and processes.<sup>7</sup> Nevertheless, the post-colonial state is supposed to be firmly in control of the formulation and implementation of public policy at home and the conduct of international relations abroad. This is the context in which freedom of religion, and human rights in general, are supposed to be protected and promoted by the state.

In other words, the underlying paradox of the African post-colonial state is in its existing as a legal fiction, in contrast to empirical realities on the ground. On the one hand, the African post-colonial state continues to be a legal fiction in the sense that it is neither quite in control of its own territory, nor sufficiently sovereign in dealing with other entities, including the major transnational corporations which continue to exploit the human and material resources of the country. Yet, the same state controls the life of people in a wide variety of serious and far reaching ways. As far as its own populations are concerned, however weak and artificial it may be, the state is a fundamental and effective reality through its monopoly of the use of force, its legal institutions, its ability to enforce its will in a range of fields, from taxation to education and economic policies, control of international trade, and so forth. Indeed, one of the urgent tasks at hand is how to bring this awareness of the far-reaching and all-pervasive power of the state to the consciousness of African populations.

With due regard to these realities, I believe that the protection of human rights and promotion of related values of constitutionalism and democratic governance are not failing in African countries, but only taking the time necessary for its incremental success. By this I mean the accumulation of experiences that are conducive to stronger and sustainable implementation

<sup>6</sup> H.W. Okoth-Ogendo, 'Constitutions without Constitutionalism: Reflections on an African Political Paradox', and Issa G. Shivji, 'State and Constitutionalism: A New Democratic Perspective', both in Issa G. Shivji, editor, *State and Constitutionalism: An African Debate on Democracy*, (Harare, Zimbabwe, Southern African Political Economy Series (SAPES) Trust, 1991), pp. 3-25 and 27-54, respectively.

<sup>7</sup> Young, *The African Colonial State in Comparative Perspective*, p. 5.



of the principles, institutions and mechanisms over time, even though some experiences may be negative in the short term. This positive view of African experiences does not mean accepting the status quo uncritically, or assuming that every setback or crisis is necessary or unavoidable. Rather, it is a matter of clarification and application of appropriate standards of assessment and improvement in each case in its own context. Accordingly, the apparent failures and serious set-backs in the protection of human rights in various African countries are to be expected as integral to the necessary processes of adaptation and indigenization of this concept and its necessary principles and institutions. Moreover, the success of this process should not be expected to happen on its own. A sober and critical analysis of the experiences of each African country in light of a clearer understanding of the meaning and implications of the protection of human rights in each country in particular is necessary for developing and implementing practical strategies for improving practice in that country.

The promise of human rights can only be realized to the extent that these rights are integrated into national legal systems, and implemented through their norms, institutions and practice. The fact that human rights violations, and therefore their remedies or protection, always happen to actual people in a specific time and place is the reason why I emphasized earlier the critical importance of shifting focus to empowering local constituencies to protect their own human rights. There is also a dialectical relationship between these two aspects of the local protection of human rights. The integration of human rights into national legal systems will help empower local communities which, in turn, will use such empowerment to achieve more integration of human rights into national legal system. This is of course already happening, to varying degrees and in deeply contextual ways in various countries throughout the continent.<sup>8</sup>

This emphasis on strategies and resources for the local protection of human rights does not mean that regional and international efforts in this regard are irrelevant or useless. Indeed, the present mechanisms and processes of international protection of human rights are necessary, despite their limitations and constraints. The question is simply what else needs to be done to diminish dependency over time, instead of perpetuating it in the name of protecting the human rights of helpless communities. For example, international non-governmental human rights organizations, like

<sup>8</sup> See, generally, Abdullahi Ahmed An-Na'im, editor, *Human Rights under African Constitutions: Realizing the Promise for Ourselves* (University of Pennsylvania Press, 2003).

Amnesty International and Human Rights Watch, should strive to promote the monitoring and advocacy skills of local organizations, instead of simply using them to collect information about human rights violations and to gain access to local communities.<sup>9</sup> The development aid and technical assistance provided by rich donor countries should deliberately seek to promote the ability of local communities to protect their own rights, in addition to continuing to provide the needed degree of external support for the protection of rights.

To conclude this section, I am proposing a dynamic and dialectical synergy of local, regional and global efforts both to empower local communities to protect their own rights, as well as acting on their behalf whenever they are unable to act for themselves. There is a clear and most significant difference between an approach to international protection that seeks to perpetuate itself because it perceives the local communities it is working with as permanently helpless and powerless and one that strives to make itself redundant over time because it respects and trusts the human agency of those communities. The difference is between a conception of law, including protection of fundamental rights like freedom of religion, that is a poor copy of the codes and institutions left behind by colonial administrations, and one that promotes the self-reliance and true independence of African communities. The latter cannot be realized immediately and all at once, but it will never materialize if it is not clearly conceptualized and actively sought by African communities and their friends everywhere.

### **Mediation of competing claims of religious freedom and self-determination**

One premise of this lecture is that various aspects of social and political organization of human societies, including respect for and protection of human rights, are not ends in themselves. Rather, these are necessary though insufficient means for enabling human beings to realize their individual and collective self-determination. In terms of the specific subject of this lecture, freedoms of religion is necessary for each human person to pursue what she holds as the ultimate purpose and meaning of her life. In other words, people tend to link the value of rights like freedom of religion to the purpose for which they are asserting that right, rather than affirm it in the abstract or out of context. This does not mean that entitlement to the right

<sup>9</sup> Abdullahi A. An-Na'im, 'Human rights in the Arab world: A regional perspective'. *Human Rights Quarterly*, volume 23 (2001), pp. 701-732.

should be made conditional upon satisfying some commonly preconceived or authoritatively sanctioned meaning of the religion that is to be experienced by believers. Rather, the point is that one is unlikely to uphold a principle of freedom of religion that he or she believes violates the same religion he wishes to have the freedom to believe in and practice.

For our present purposes, religion can be defined as a system of belief, practices, institutions, and relationships that provides the primary source of moral guidance for believers. Religion also commonly serves as an effective framework for political and social motivation and mobilization among believers. If the necessary inter-religious and intra-religious consensus and solidarity can be generated and sustained, these general features of at least the major religious traditions make them good candidates for promoting consensus around freedom of religion itself, as well as other human rights norms and institutions in general. In other words, freedom of religion and other human rights are both a means and end of societal solidarity and cooperation among believers and non-believers.

That will not happen, however, unless the values of pluralism and toleration are actively promoted within religious traditions as well as among different communities. Conversely, hegemonic and exclusive tendencies must be resisted within and among different traditions and communities. As I attempt to illustrate with reference to Islam later, it is possible and desirable to interpret religious traditions in more inclusive ways that enhance possibilities of inter-religious solidarity and cooperation. But the possibility of contesting dominant religious doctrine, through the proposal of alternative understandings of each tradition, is contingent on a variety of factors, both internal and external to the religion in question. This process of contestation is what I call the 'politics of religion', which can have different outcomes, including the possibility of bringing moral restraints to bear on economic globalization. It is helpful to emphasize in this context that religion everywhere is *socially constructed*, dynamic, and embedded in socio-economic and political power relations, always in the particular context of specific religious communities. This premise is clearly indicated by the diversity of interpretations within each religious tradition and of the ability of each tradition to adapt to changing social, economic and political conditions at various stages of its history or in different settings during the same historical period.

Another important factor in these processes of contestation and adaptation is that the purpose and meaning of religion which one may seek to achieve and experience must be a matter of personal free and voluntary choice. Since there is no logical possibility of religious belief without the

equal possibility of disbelief, denying the right to disbelieve is denying the right to believe. In other words, the purpose and meaning of freedom of religion includes freedom *from* religion. Conversely, upholding freedom from religion should not be at the expense of freedom of religion. This mandate applies to dissent within religious traditions as well as between them, to protect heresy, apostasy and freedom to propagate one's religion, all subject to appropriate safeguards. Granted that there will always be the need to mediate and negotiate competing claims, the question is how to protect and facilitate that process.

While all human rights, including freedom of religion, are essential values, there are tensions within and among these rights. We should therefore candidly identify competing claims over the meaning and scope of freedom of religion, and seek normative and institutional ways of mediating those claims, instead of ignoring them or asserting our conceptions of any of these rights as absolute non-negotiable values. Accordingly, it is imperative that there should be no negative or restrictive *religiously mandated* legal consequences whether under penal or civil law, for exercising freedom religion. In the Islamic context in particular, for instance, there should be no criminal charges or civil law consequences for so-called apostasy, heresy, or related notions. It is true that there can be legitimate limitations on freedom of religion for public policy reasons or in order to protect the rights of others. But that should be mediated through 'civic reason' that all citizens can share and debate as explained later and not on a so-called religious mandate that one community claims to be non-negotiable.

To conclude this section, the strategy I am recommending for negotiating such difficulties in situations where that is necessary is premised on the view that the role of religion in politics, culture and society is always contingent on context and circumstance. Instead of assuming that Islam, for instance, is inherently or necessarily antagonistic to or supportive of freedom of religion, I propose viewing this relationship in terms of competing currents of Islamic thinking and practices, or visions of Islamic identities and their political, constitutional and legal consequences. Such possibilities of alternative initiatives and outcomes of the politics of Islamic identity make the impact of Islam on political and cultural institutions the subject of politics, not its rigid limitation. Accounting for the Islamic dimension of the legacies of some African societies also includes questioning a common assumption that religion is necessarily and permanently problematic in this regard. Recalling earlier remarks about the universality of human rights in general, I am suggesting that freedom of religion requires legitimacy and credibility in terms of the frameworks of specific communities, in their particular context, and not in abstract or purely

theoretical terms. I will now try to illustrate the proposed contextual approach to freedom of religion with reference to Islam because of the particular relevance of this perspective to recent events in Sudan, my country of origin, and other parts of the region.

### **An Islamic perspective on freedom of religion**

To begin with a caveat, I am not suggesting that Islam is the sole or even primary determinant of the status of freedom of religion, or any other human rights, in Muslim-majority countries or communities. Indeed, it is integral to my argument that the present status and future prospects of these rights should be assessed in terms of the historical experience and present context of each country, even where Muslims constitute the predominant majority. The role of Islam in that experience and context would necessarily vary from one country to another, but always as only one among many factors and forces that may influence the course of developments in each setting. At the same time, however, the role of Islam should not be underestimated because of its implications for the legitimacy and efficacy of freedom of religion and other human rights in those societies. In other words, the role of Islam in this connection should be taken seriously, without either exaggerating or underestimating it. As I have argued elsewhere, it is better to think of the relationship between Islam and politics as contingent and negotiated, rather deterministic and rigid.<sup>10</sup> For our purposes here this means that the outcome of the interaction of Islam and freedom of religion can vary according to a variety of factors, rather than being permanently settled one way or the other.

If this is true, it should be possible to influence this relationship by addressing the various factors that shape its outcome in any given context. This is not to underestimate the difficulty of this relationship since Islam is commonly taken to be synonymous with historical understandings of what is commonly known as Sharia. Whereas the term Sharia refers to the normative system of Islam in general, the specific content Muslims have given to this system is necessarily a product of the history of their own societies. This point is extremely important for our purposes here that the term Sharia always refers to human interpretation of the Qur'an and Sunna (traditions of the Prophet), and as such is neither divine nor immutable. The understanding of the content of Sharia prevalent among Muslims today

<sup>10</sup> Abdullahi Ahmed An-Na'im, *African Constitutionalism and the Role of Islam* (University of Pennsylvania Press, 2006).

contains some principles that are incompatible with some aspects of freedom of religion and the human rights of women in particular. However, this does not mean that Sharia as such is incapable of being understood by Muslims in ways that are consistent with these human rights, but the contradictions must first be acknowledged before the reinterpretation can begin. In accordance with my emphasis on a contextual approach to freedom of religion in Africa, the relevant question is how to facilitate possibilities of debate about re-interpretation, rather than focus on a particular methodology of reform that may or may not be adopted by Muslims.<sup>11</sup>

In my view, a secular state (i.e. one that is neutral but not indifferent or hostile to religion) is one of the necessary requirements for mediating competing claims of freedom of religion. I believe that I need a secular state and the protection of my freedom of religion and other human rights in order to be a Muslim by choice and conviction, which is the only valid way of being a Muslim. My argument for this proposition is premised on the view that the idea of an Islamic state to enforce Sharia as positive law is conceptually untenable and practically counter-productive from an Islamic point of view. The idea of an Islamic state is untenable because once principles of Sharia are enacted as positive law of a state, they cease to be the religious law of Islam and become the political will of that state. Moreover, in view of the wide diversity of opinion among Muslim scholars and schools of thought, to enact a principle of Sharia as positive law the state will have to select among competing views to the exclusion of other views which are equally legitimate from an Islamic point of view. Since that selection will be made by whoever happens to be in control of the state, the outcome will be political, rather than religious as such. This selective process will be counterproductive because it will necessarily deny some Muslims their religious freedom of choice among those views.<sup>12</sup>

I am calling for the institutional separation of religion and the state while recognizing and regulating the unavoidable connectedness of religion and politics not only because religious values influence political behavior but also to enable them to do so through the democratic process, just as non-believers may seek to advance their philosophical or ideological views. The mediation of this tension between the need to separate religion from the state despite

<sup>11</sup> For a possible theological approach see, for example, Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse University Press, 1990).

<sup>12</sup> I have presented this argument in detail in, Abdullahi Ahmed An-Na'im, *Islam and the Secular State*, (Harvard University Press, 2008).

the connectedness of religion and politics can be mediated through the distinction between the state and politics. The state should be the more settled and deliberate operational side of self-governance, while politics is the dynamic process of making choices among competing policy options. The state and politics may be seen as two sides of the same coin, but they cannot and should not be completely fused into each other. It is necessary to ensure that the state is not simply a complete reflection of daily politics because it must be able to mediate and adjudicate among competing views of policy, which require it to remain relatively independent from different political forces in society. Still, complete independence of state and politics is not possible because those who control the state come to power and keep it through politics, whether in a democratic process or not. In other words, officials of the state will always act politically in implementing their own agenda and maintaining the allegiance of those who support them. This reality of connectedness makes it necessary to strive for separating the state from politics, so that those excluded by the political processes of the day can still resort to state organs and institutions for protection against the excesses and abuse of power by state officials.

There are many other relevant aspects of the state and politics that are necessary for good constitutional governance, achieving social justice and protection of human rights that are not possible to discuss here. My focus in these brief remarks is on the secular state in the hope of contributing to clarifying its relevance to issues of freedom of religion anywhere in the world, regardless of whether Muslims are the majority or minority of the population. One caveat to note here is that I mean the secular state, and not secularism, secularization and related concepts and terms. Another caveat is that I mean a state that is neutral regarding religion in particular, and not neutral about all issues or matters of public policy. The secular state I mean is always inherently contextual and historical, and every society has its own experience unique to itself. The historical contextual development of the secular state as well as persistent controversy about its meaning and implication in practice continue to the present day in many parts of the world, including countries where the state is commonly acknowledged to be secular.

The critical need to separate state and religion while regulating the interconnectedness of religion and politics requires that proposed policy or legislation must be founded on what I call 'civic reason', which consists of two elements.<sup>13</sup> First, the rationale and purpose of public policy or legisla-

<sup>13</sup> On my concept of 'civic reason' and how it relates to 'public reason' according to John Rawls, see my book, *Islam and the the secular state*, 92-101.

tion must be based on the sort of reasoning that the generality of citizens can accept or reject, and make counter-proposals through public debate. Second, such reasons must be publicly and openly debated, rather than being assumed to follow from personal beliefs and motivation of citizens or officials. It is not possible of course to control inner motivation and intentions of the political behavior of people, but the objective should be to promote and encourage civic reasons and reasoning, while diminishing the exclusive influence of personal religious beliefs, over time.

I would also emphasize that the operation of civic reason in the negotiation of the relationship of religion and the state should be safeguarded by principles of constitutionalism, human rights and citizenship. The consistent and institutional application of these principles ensures the ability of all citizens to equally and freely participate in the political process, protect themselves against discrimination on such grounds as religion or belief, and so forth. With the protection provided by such safeguards, citizens will be more likely to contribute to the formulation of public policy and legislation, including objection to proposals made by others, in accordance with the requirements of civic reason. Religious believers, including Muslims, can make proposals emerging from their religious beliefs, provided they are also presented to other on the basis of reasons they can accept or reject.

Since every society needs to negotiate the relationship between religion and the state in its own specific context, it is not possible, or desirable in my view, to predict policy outcomes according to a preconceived view of that relationship. Instead, we should try to identify relevant factors and actors, and how to regulate their interaction to improve the prospects for genuine and sustainable neutrality of the state. 'Neutrality by the state should not be seen in an abstract way, but in a continuous dialogue with individual identity and individual religious freedoms'.<sup>14</sup> The basic tension in such negotiations is about the degree and form of autonomy of religious authority from the political and legal authority of the state. On the one hand, the territorial state seeks to control religious institutions in order to fulfil its obligations to keep the peace, maintain political stability, and achieve social and economic development. On the other hand, religious institutions need to maintain their autonomy against the coercive powers of the state in the interest of the legitimacy of religious doctrine and practice. These matters

<sup>14</sup> Rik Torfs, 'New Liberties and Church-State Relationships: Synthesis', in Dott. A. Giuffrè, editore, *New Liberties and Church and State Relationships in Europe* (Milan: European Consortium for Church-State Research, 1998), p. 10.



must be determined in accordance with the internal frame of reference and independent authority of religious institutions, without interference by state officials who will tend to impose their own views.

This paradoxical relationship can be understood with reference to the mode in which the state is rooted in the political life of society yet also preserves its autonomy from the latter. The modern state is a centralized, bureaucratic and hierarchically organization which is composed of institutions, organs and offices that are supposed to perform highly specialized and differentiated functions through pre-determined rules of general application.<sup>15</sup> Moreover, the state should be distinct from other kinds of social associations and organizations in theory, while remaining deeply connected to them in practice for its own legitimacy and effective operation. For instance, the state must seek out and work with various constituencies and organizations in performing its functions, such as maintaining law and order, providing educational, health and transport services. Therefore, state officials and institutions cannot avoid working relationships with various constituencies and groups who have competing views of public policy and its outcomes in the daily life of societies. These constituencies include non-governmental organizations, businesses, political parties and pressure groups, and any of them can be religious or not in different ways. These working relationships are not only necessary for the ability of the state to fulfill its obligations, but in fact required by the principle of self-determination.

The access of citizens to civic reason debates will vary according to the differences in their socioeconomic status, political experience or ability to maximize use of resources and build alliances, and so forth. But such factors are reasons for more fair and inclusive application of the principle, rather than for abandoning it. Marginalized actors can resort to a range of strategies to secure a greater degree of influence over the policy-making process. For example, groups which possess little resources or political influence may adopt moderate positions or be open to compromise in order to have access to civic reason at all. Alternatively, such groups may seek the assistance of the courts or other institutions of the state to ensure access on constitutional or human rights principles that supplement their lack of resources or influence.

With greater appreciation for the value and credibility of the civic reason process itself, religious believers will have more opportunity for promoting their religious beliefs through the regular political process without

<sup>15</sup> Graeme Gill, *The Nature and Development of the Modern State* (New York: Palgrave Macmillan, 2003), pp. 2-4.

threatening those citizens who do not share their religious beliefs. This balance is likely to be achieved precisely because religious views will not be directly enforced through the coercive power of the state without being mediated through fair and transparent political contestations and subject to constitutional and human rights safeguards as noted earlier. In the final analysis, religious beliefs are neither granted special privilege nor suppressed, which make the relationship between religion and the state more dynamic.

My purpose is to affirm that the secular state, as defined here, is more consistent with the inherent nature of Sharia and history of Islamic societies than are false and counter-productive assertions of a so-called Islamic state or the alleged enforcement of Sharia as state law. This view of the secular state neither depoliticizes Islam nor relegates it to the so-called private domain. My proposal is opposed to domineering visions of a universal history and future in which the 'enlightened West' is leading all of humanity to the secularization of the world, of which the secularity of the state is the logical outcome. In the conception of a secular state I am proposing, the influence of religion in the public domain is open to negotiation and contingent upon the free exercise of the human agency of all citizens, believers and unbelievers alike.

In essence, the proposed framework seeks to establish a sustainable and legitimate theoretical and institutional structure for an ongoing process, where perceptions of Sharia and its interaction with principles of constitutionalism, secularism, and democratic governance can be negotiated and debated, among different interlocutors in various societies. In all societies, Western or non-Western, constitutionalism, democracy, and the relationship between state, religion, and politics, are highly contextual formations that are premised on contingent sociological and historical conditions, and entrenched through specific norms of cultural legitimacy. The model proposed here combines the regulation of the relationship between Islam and politics with the separation of Islam and state as the necessary medium for negotiating the relationship between of Sharia to public policy and law. In this gradual and tentative process of consensus-building through civic reason, various combinations of persons and groups may agree on one issue but disagree on another, and consensus-building efforts on any particular topic may fail or succeed, but none of that will be permanent and conclusive. Whatever happens to be the *substantive* outcome on any issue at any point in time, it is made, and can change, as the product of a process of civic reason based on the voluntary and free participation of all citizens. For this process to continue and thrive, it is imperative that no particular view of Sharia is to be coercively imposed in the name of Islam because that would inhibit free debate and contestation.

## Concluding remarks

To advance a contextual approach to understanding and evaluating the practice of freedom of religion in African societies, I started this lecture with a brief exploration of the paradoxes of the human rights paradigm, and tensions within and among human rights. I also emphasized that the protection of human rights, like freedom of religion, should be achieved as part of a broader strategy for social and economic development of the country. I then explained the continuing influence of colonialism and the post-colonial condition on the protection of human rights in Africa today. With due regard to this and other limitations, I still believe that the protection of human rights and related values of constitutionalism and democratic governance are not failing in Africa, but only taking the time they need to succeed. In the conclusion of the first part of this lecture I called for a dynamic and dialectical synergy of local, regional and global efforts to empower local communities to protect their own rights, in addition to efforts by external actors to assist Africans in this process.

In the second part of this lecture I discussed the need for mediating competing claims of religious freedom and self-determination. The necessary mediation is unlikely to happen unless the values of pluralism and toleration are actively promoted within and among religious traditions and communities. As explained in that section, the fact that religion everywhere is socially constructed, dynamic and embedded in socioeconomic and political power relations supports the need for and facilitates the mediation of competing claims. Citing the example of Islam, I emphasized the contingency of Islamic views of freedom of religion. I also explained the contingency of the role of Islam in different parts of Africa. Both contingencies indicate the internal diversity and possibilities of re-interpretation as means for promoting the universality of human rights among Muslims.

This focus on Islam, also continued in more detail in the last part of this lecture, is due to the fact that it is one of the main religions in Africa. Though Islam is commonly associated with the Middle East, there are probably as many Muslims in sub-Saharan Africa, in addition to the predominantly Muslim societies of North Africa. Moreover, African Islam is not only as old as the religion itself, but has also adapted and interacted well with pre-existing local religious and cultural traditions. From this perspective, I followed the contextual mediation of Islam and freedom of religion by examining the challenges of this process by arguing for the separation of Islam and the state, while engaging in internal transformation of Muslims' understanding of Islam in the modern context.

The ultimate message of this lecture can be summarized as follows. First, freedom of religion and other human rights in Africa, as everywhere else,

should be understood in local context. Second, the most effective and sustainable way of protecting human rights like freedom of religion is to empower local actors to protect their own rights. Third, local actors will be more motivated to struggle for human rights when they believe these rights to be legitimate from their own religious and cultural perspectives. In the final analysis, my purpose is to emphasize and facilitate the role of the human agency of human beings in conceiving, articulating and realizing their own human rights, in solidarity and cooperation with other human beings throughout the world.

# HOW CHRISTIANS AND OTHER NATIVE MINORITIES ARE FARING IN THE UNFOLDING ARAB TURMOIL OF 2011

■ HABIB C. MALIK\*

## 1. Preamble

Ever since the self-immolation on 17 January 2011 of that desperate Tunisian vegetable vendor the Arab Middle East was plunged down a spiral of turbulence and popular agitation hitherto unseen in the region. High hopes stand uneasily alongside deep fears as they mark the attitudes and expectations of both participants and spectators in these unfolding events. At stake are the future prospects of several intertwined components: political regimes, ingrained outlooks and behavior patterns, freedom or continued enslavement, popular aspirations for a better life, and native minority communities.

The minorities of the region, especially the Christians, feel uncomfortably exposed at this time. Religious extremism of the Salafi variety<sup>1</sup> threatens to target them if developments take a nasty turn in some of the countries like Egypt and Syria experiencing tumult. The obverse is also true: if certain countries continue unaffected by the changes occurring all over the region, this too could have a detrimental effect on the future of minorities in the Middle East. The elephant in the room in this regard is Saudi Arabia whose fanatical version of Islam, Wahhabism, and the ability to export it region-wide if not beyond have been at the root of minority worries. It would be supremely ironic as well as historically tragic if the movements currently underway to liberate the Arab peoples from tyrannical rule were in some twisted fashion to result in a curtailment of freedom of religion for precisely those groups whose presence in the region offers hope for sustained pluralism and communal diversity.

Where the Arab world is headed, and the effects of the ongoing metamorphosis on the region's minority communities, are topics treated in this study. In addition, some suggestions are offered as to what truly concerned

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<sup>1</sup> Salafis and Salafism refer to a fundamentalist Sunni movement to return to the presumed uncontaminated purity of the 'good Salaf' or the dawn of Islam at the time of the Prophet.

people and groups outside the Middle East can do to fortify religious freedom and protect susceptible communities. In the Middle East in particular religious freedom is inextricably linked to the very existence and continuity of specific indigenous minorities like the Christians.

## **2. Minorities, historical narratives, primordial aggregates**

As the Arab revolts of 2011 sweep tsunami-like through one country after another we see little media attention being devoted to the plight of native Christian and other minority communities throughout the turbulent region. How these communities are being impacted by the ongoing upheavals and the far-reaching changes these upheavals are inducing are topics at best of marginal interest to the outside world. The same sadly was true for the embattled Christians of both Lebanon and Iraq during the years of turmoil experienced by those two Arab countries since 1975 and 2003 respectively. The results were widespread decimation, dislocation, and demographic shrinkage of these two ancient communities of Lebanese and Iraqi Christians.

Whether or not 2011 in retrospect will be viewed as the Arab 1989, in reference to the anti-communist revolutions in Eastern Europe, or the Arab 1848, in reference to the popular revolts with constitutionalist, socialist, and nationalist undertones that swept across the continent that fateful year, is a matter left to future historians. But one thing is certain: glib analogies bridging deceptively similar events in the civilizational West and beyond it suffer from the inherent limitation of real differences between pluralism under an overarching umbrella of shared values on the one hand, and the plurality of often viciously clashing worldviews on the other.<sup>2</sup> In other words, ethno-religious minorities living outside the West, understood in the broad cultural-civilizational sense, face uniquely perilous challenges of an existential nature. For these communities questions of religious freedom are viewed and articulated, in the first instance, as questions of freedom from religious persecution. The Western secular mind, however, with its ingrained materialism and absence of any sense of the transcendent, remains insensitive to, and unmoved by, instances of religious persecution occurring beyond the strict confines of the West. The language of Article 18 in the Universal Declaration of Human Rights appears to be losing its luster, and even its relevance, for these Western secularists. The adverse effects of this indifference

<sup>2</sup> See Habib C. Malik, 'Democracy and Religious Communities: The Riddle of Pluralism' published in the proceedings of the Pontifical Academy of Social Sciences, *Democracy – Reality and Responsibility*, Acta 6, Sixth Plenary Session, 23–26 February 2000, Vatican City 2001, pp. 367–401.

on the indigenous minority communities of the Middle East including the Christians are grave indeed.

Except for Sunni Muslims, everyone else in the wider Middle Eastern region belongs to a religious or sectarian minority. Even the Shiite Muslims, who are a clear majority in countries like Iran, Iraq, and Bahrain, constitute a minority when compared numerically to the Sunnis, who make up 85 percent of Muslims worldwide. Moreover, Sunnis have experienced centuries of being in power during which they ruled through successive empires over vast territories that contained a variety of native Muslim and non-Muslim subject minority communities. During the best of times these minorities were tolerated merely as second-class subjects deprived by law of many basic rights. The *dhimmi* system was applied to those the Koran refers to as 'People of the Book', namely Jews and Christians.

Contrary to romanticized depictions in many historical accounts by Western and other scholars from the early 20th century and before, dhimmitude was not a tolerant acceptance of Jewish and Christian minorities but a system designed to bring about their gradual liquidation. The cumulative and abrasive effects of the various *dhimmi* restrictions that included paying a special tax, not marrying Muslim women while the reverse was allowed, not building new places of worship or renovating existing ones, not carrying arms, and much more, were to drive individuals in the targeted communities either to conversion to Islam, or to emigration. Wherever dhimmitude prevailed relentless dehumanization resulted over time and the psychological residues of centuries of this corrosive process have been devastating for the *dhimmi* populations.

The history of Middle Eastern Christians rooted in their ancestral lands reveals two distinct narratives: a predominantly *dhimmi* one, and a relatively free one. The vast majority of these Christians, namely those living today in Egypt, Syria, Jordan, Iraq, and the Palestinian territories, fell into dhimmitude at one point or another during the centuries since the rise and spread of Islam and were relegated to a subordinate and progressively inferiorized status. The remaining Christians, principally those of Lebanon, managed to avoid dhimmitude and remain freer than their other regional coreligionists. The rugged topography of their mountainous land, especially during the pre-technological era, helped them evade the ravages of conquest and subjugation.<sup>3</sup>

<sup>3</sup> On dhimmitude and the two narratives see Habib C. Malik, *Islamism and the Future of the Christians of the Middle East* (Stanford, CA: Hoover Institution Press, 2010), pp. 9–27. See also George Sabra, 'Two Ways of Being a Christian in the Muslim Context of the Middle East' in *Islam and Christian-Muslim Relations*, Vol. 17, No. 1 (Routledge: January 2006), pp. 43–53.

These two divergent narratives mean the two groups of Christians involved have very different experiences as regards a central human aspiration which is freedom, and the related basic human component which is dignity. As a result their views of themselves, of one another, of other minorities, and of the ruling Sunni majority are far from identical. *Dhimmis* by and large tend to be pusillanimous and sycophantic toward their oppressors, while free Christians prefer an attitude of defiance with all the risks this entails.

If the current turmoil moving across the Arab landscape is going to make the region, or significant portions of it, devolve into its primordial aggregates, an examination of the possible fate awaiting minority communities the ‘morning after’ becomes imperative, particularly as it relates to the vital issue of religious freedom. By primordial aggregates is meant the underlying ethno-religious, sectarian, and tribal map that was concealed – in many cases artificially – beneath hastily cobbled mandate arrangements like the post-World War One Sykes-Picot agreement sectioning the Levant into British and French spheres of operation, with those funny straight lines traversing the desert and serving as the borders between newly designated states. Similar arrangements eventually produced today’s Gulf Sheikhdoms as well as North Africa’s distended states following the defeats of Vichy France and Fascist Italy and the departure of the French from Algeria. Decolonization after 1945 dragged on for twenty years and set the stage for the emergence of a string of independent Arab states many of which soon fell prey to successive military coups and the dictatorships they spawned. The first of these occurred in 1952 in Egypt with the Officers’ Revolution that brought Gamal Abdel Nasser to power.

### 3. Stressed communities

Even during the rare periods in the Middle East when a general calm seems to prevail minorities tend to feel insecure and stressed. In times of adversity the usual perils are multiplied, the uncertainty increases, and so does the stress. A quick survey of the various native minorities in the region can help isolate the elements informing this stress and uncover its deeper reasons.

Foremost among the minorities for our present discussion are the native Christians. Altogether they number somewhere between 10 and 12 million and are spread mainly in Egypt, Iraq, and the Levant. Since the start of the Arab upheavals in early 2011 the Christians of both Egypt and Syria quickly found themselves caught in the midst of impending momentous changes with little clarity as to the effects these changes would ultimately have on their wellbeing.

*Egypt:* The Copts are an ancient community in Egypt with roots going back to Mark the Evangelist and to the Desert Fathers who launched monas-



ticism at the dawn of the Christian era. Today, they number roughly around 10 percent of the Egyptian population (some 8 million) and are scattered throughout Egypt with no particular concentrations in any part of the country. As the Egyptian revolution that broke out on 25 January 2011 progressed and pressures mounted on the Mubarak regime attacks began to occur with greater frequency against Copts and their churches. Such attacks were not new, and the Copts had been the recurring targets of sporadic vicious assaults on many previous occasions usually when militant Islamists clashing with the authorities took out their anger and frustration on them, or when individual incidents between a Copt and a Muslim mushroomed to become a confrontation between the two communities. As *dhimmi*s living under Islamic rule the Copts never really knew a free existence. They have always subsisted at the mercy of the vicissitudes characterizing the fault line between a repressive regime and Islamic extremists.

Anecdotal evidence confirmed partially by later trials of figures from the fallen Mubarak regime revealed that some of the attacks on Coptic churches had been instigated by these regime elements as a cynical attempt to deflect the focus of the popular protests away from the beleaguered regime and in the direction of fanning religious hatreds – the regime’s counterrevolution, as it were. The subsequent emergence of popular patrols organized jointly by Muslims and Copts to protect churches in Alexandria and parts of Cairo suggested a determination on the part of the anti-regime protestors to shield their revolution from being derailed in this malicious direction.<sup>4</sup> But the attacks persisted, and on May 7 and 8, 2011, in the northwest Cairo suburb of Imbaba, clashes broke out between Copts and Salafis because the latter were enraged that an alleged Coptic female convert to Islam had been detained against her will at a local church. The results of the violence were 12 Copts dead, over 200 wounded, and the burning of the church in question. Other churches were also attacked and looted by mobs of fanatics incited by Salafist preachers. Predictably, the authorities – in this instance the army that took power after Mubarak was toppled – like the previous regime did not lift a finger to stop the attacks, a fact that led to several days of angry public protests by the Copts demanding justice for themselves and swift punishment for their attackers.<sup>5</sup>

<sup>4</sup> A blast occurred in Alexandria at the Al-Qiddisain Church on January 1, 2011. For more on this and related attacks see [www.bbc.co.uk/news/world-middle-east-12101748](http://www.bbc.co.uk/news/world-middle-east-12101748) and [www.businessweek.com/news/2011-01-01/church-bomb-kills-21-wounds-79-in-alexandria-egypt.html](http://www.businessweek.com/news/2011-01-01/church-bomb-kills-21-wounds-79-in-alexandria-egypt.html)

<sup>5</sup> See Nina Shea, ‘The Persecution of Egypt’s Coptic Christians Continues’ posted on May 10, 2011, *National Review Online* [[www.nationalreview.com](http://www.nationalreview.com)].

Christians in Egypt as in other volatile parts of the Arab world face a grueling dilemma: under the Moubarak regime, and despite the apathy of the authorities toward their hardships or even occasional conniving in exacerbating them, Copts were not looking at the prospect of outright annihilation or mass persecution as they surely would under an Islamist regime. And yet these same Copts cannot in good conscience remain supportive of corruption and abuse on a wide scale in government, nor are they willing to endure the indefinite and systematic marginalizing of their ancient community in the workings of government, not to mention in Egyptian society at large. The ambivalence resulting from this dilemma was detected in traces of vacillation within the Coptic leadership during the early days of the Egyptian revolution. Pope Shenouda, the Copts' chief spiritual leader, in an official statement on February 15, appeared to be praising both the youth of the revolution and the army while not openly calling for the regime's demise.<sup>6</sup> In an interview that appeared a few days later on 27 February, and after enumerating a string of attacks on his community, Pope Shenouda says: 'I cannot deny that we had good relations with President Moubarak as a person. That's why I see it a personal obligation of loyalty not to mention bad points but rather to remember the good ones'. He went on to add that the problems Copts faced 'were mainly due to those surrounding [Moubarak]'.<sup>7</sup>

With Moubarak out of the picture, the Salafists and their only slightly milder cousins, the politically well-organized Muslim Brotherhood, are poised to make a serious bid for power in Egypt. The Copts sense this danger acutely and have begun to trickle out of Egypt in a new wave of emigration that bodes ill for future prospects of pluralist diversity in the Arab region.<sup>8</sup>

*Syria and Iraq:* If Egypt's Copts are afflicted with an unsettling dilemma that places them uncomfortably in an equivocal position with respect to an authoritarian state, the same dilemma but more acutely pronounced besets the Christians of both Syria and Iraq where power was firmly held by the ostensibly secular Baath party headed by minorities in both countries.<sup>9</sup> Under Saddam Hussein's repressive Baath party control in Iraq where the minority Sunnis monopolized power for decades, and under Syria's Baath

<sup>6</sup> See <http://smsgmission.org/news%202011.pdf>

<sup>7</sup> See <http://britishorthodox.org/1676/pope-shenouda-comments-on-the-egyptian-revolution/>

<sup>8</sup> See Nina Shea, 'Egypt's Copts: Will the Region's Largest Non-Muslim Religious Community Simply Disappear?' *The New Republic*, June 10, 2011 [www.tnr.com].

<sup>9</sup> The Baath is a secular ideology of Arab unity based on adversity toward Israel and Western imperialism. Its founder, Michel Aflaq, was an Orthodox Christian from Syria.

regime run with an iron fist by the Alawite minority's Assad family, the Christians enjoyed protection from Islamist extremism and some modest privileges including occasional government and army appointments.<sup>10</sup> It is not surprising therefore that Iraqi and Syrian Christians were generally supportive of their respective single-party dictatorships mainly out of fear of the worse alternatives.

The impact of the 2003 American invasion of Iraq on the country's Christians was adverse and life-altering. The collapse of Saddam's regime took away an insulating layer over the Christians and exposed them to escalating brutal attacks from Islamists affiliated with Al-Qaeda. Internal displacement largely to the Kurdish north plus accelerated emigration abroad dispossessed close to 50 percent of the roughly 1.4 million Iraqi Christians that include Chaldeans, Assyrians, and assorted smaller denominations. Some moved to neighboring Syria where they were generally well received; others ended up in Lebanon where their treatment has been far from exemplary; however, the majority simply relocated to the West, principally to North America. The sad plight of these Iraqi Christians has been nothing short of tragic, and the scandalous neglect of their fate by Washington has been glaring. As ancient communities deeply rooted in their homeland these Christians never wanted to leave until an unfortunate confluence of circumstances forced them out.

In Syria, where the regime remains robust despite ongoing random challenges to its totalitarian grip on power and the bloody violent response it has undertaken, Christians also find themselves caught in a difficult situation. By remaining silent they cannot escape feelings of guilt in being complicit with the cruel violence visited by the regime on the people in many parts of Syria. At the same time they realize that the downfall of that same regime would certainly expose them to reprisals from militant Islamists among the majority Sunni population. A carefully worded statement about the events in the country put out by the Jesuits in Damascus conveys elements of this intractable dilemma being endured by Syria's Christians. Calls for national unity, open dialogue, freedom of expression, and the rejection of violence on all sides cascade with obvious unease one after the other throughout the statement. Without blaming any party for the violence the statement refers to feelings for individual liberties and demands that 'the citizen be an actor in the transformation of this society'. It continues: 'Un-

<sup>10</sup> Alawites, or Alawis, are an offshoot esoteric sect of Islam who revere Ali and are therefore close to Shiite Islam. They are found mainly in Syria.

fortunately, confusion has taken the upper hand, opening the way to violence. The rejection of the other person, as we all know, is the principal cause of violence which in its turn calls for more violence. At the moment we are observing efforts to foment trouble leading to a religious war which threatens to disintegrate our society'.<sup>11</sup> In fact, as of this writing no attacks have happened against Christians as such, or their places of worship in Syria. But high anxieties about the future persist. The Christian and Sunni bourgeoisie in Syria's major cities are supporters of the Assad regime because their interests and privileges are intertwined with it, but this is not the case for the bulk of the members of these two communities. A split in the army along Sunni-Alawite lines could usher in a protracted civil and sectarian war that might result in the breakup of the country. Christians would surely have plenty to worry about in the event that such a scenario unfolds.

*Lebanon:* Since the recent revolts in the Arab world erupted in Tunisia at the start of 2011 Lebanon has been eerily and uncharacteristically quiet. For years prior to this Lebanon endured civil strife and external occupation while its neighbors basked in a prolonged calm with interludes of prosperity. Lebanon's Christians, constituting today roughly a third of the total population of about 4 million, remain the freest in the Arab world. They are composed of Maronites, Orthodox, Melkites, Armenians, Syriacs, Latins, Protestants, and others – all can pray and publish and preach and proselytize freely and openly like the case is in any of the Western democracies. Despite the intense battering the country has gone through since 1975, Lebanon's civil society continues to be freer than its Arab counterparts. Beirut serves as a listening post for the grievances, conditions, and aspirations of the surrounding Arab Christians as well as their regional breathing lung and window on the rest of the world.

Because Christians are located on both sides of the current political divide in Lebanon that pits Saudi Arabia supported by its regional and international allies against Syria and Iran, dangers of renewed Christian-Muslim clashes as was the case between 1975 and 1990 are low. However, a violent sectarian confrontation between Sunnis and Shiites would spare no one and would drag the Christians willy-nilly along its path of self-destruction. The calm is precarious but holding on that particular Sunni-Shiite demarcation line in Lebanon, but this could rapidly change if, for example, matters were to deteriorate greatly in neighboring Syria between the ruling Alawite minority who are close to the Shiites and the Sunni majority. Lebanese of all stripes

<sup>11</sup> 'Statement of Jesuits in Syria', Damascus, June 7, 2011 [see [www.zenit.org](http://www.zenit.org)].

apprehensively eye developments across their long common border with Syria even though the vast majority of them show little appetite for revisiting the horrors of internecine carnage that marked their recent collective past.

And then there is the Special Tribunal for Lebanon (STL), set up by the United Nations to investigate the killing in 2005 of former Lebanese Prime Minister Rafiq Hariri and some 20 other prominent politicians and public figures dispatched by car bombs between 2005 and 2009. Many allege the tribunal is politicized and is being used as a tool in the hands of the United States and Israel to bludgeon Hezbollah, the leading Shiite pro-Iranian paramilitary organization in Lebanon, which is reportedly implicated in the murders of Hariri and his associates under orders from Damascus. Others defend the tribunal as the only international mechanism that has a chance to uncover the truth about the assassinations, bring the perpetrators to justice, and end the cycle of bloodshed with impunity in Lebanon. Whatever the case might be regarding the STL, most Lebanese are averse to having its indictments serve as the trigger for renewed sectarian fighting in Lebanon. The perennial issue in Lebanon as far as the Christians are concerned is whether the last remaining free and open Christian community in the entire Middle East, namely theirs, will survive or perish. Severe attrition has already occurred in terms of the toll emigration has taken on the community in recent decades as a direct consequence of the pressures of warfare it has withstood with great difficulty. More hemorrhaging would be nothing less than calamitous with irreversible results.

Other stressed minority communities include Palestinian and Jordanian Christians in whose societies Salafism is on the rise as witnessed by Hamas in Gaza and the Islamists in Jordan. The myth that Palestinians are blind to religious and sectarian differences, and that they are all unified against their common enemy, Israel, has been steadily eroded ever since Islamists split Palestinian ranks, sidelined women, purged non-Muslims, and Islamized the resistance. Interestingly, hardly any of the demonstrations across the Arab world are raising anti-Israeli and anti-American slogans, or chanting in support of Al-Qaeda and the Salafist Jihadis.

Non-Christian minority groups throughout the broad region from Morocco to Iran encompass Alawis, Druze, Kurds, Bahais, Amazigs, Jews, and others. All encounter challenges in their various lands. Alawis are fighting to retain power in a brutal regime ruling Syria for the past four decades. Druze, a minority Islamic offshoot rooted in parts of Lebanon and Syria, tend to side with whoever appears dominant at any given point in time – this is their time-honored survival strategy. Kurds are ethnically non-Arab, but they are largely Sunni Muslims spread over five states with the highest concentrations

being in Iraq and Turkey. Numbering over 20 million, they have not succeeded in carving out their own independent state of Kurdistan. Bahais belong to a universalistic and peaceful religion that syncretistically combines ingredients from Christianity, Islam, and ancient Persian creeds. They have been heavily persecuted in Iran where their once-thriving community is practically exterminated. Amazigs are non-Arab tribes of Berber stock found mainly across the Maghreb up to western Libya where they have been subjected to a campaign of ethnic cleansing by Colonel Mouammar Gaddafi. Jews are still living in small numbers throughout the region except in Morocco where they retain a sizeable community. Israel is the new Jewish homeland and enjoys considerable power including nuclear capabilities; however, it continues to be rejected by a good portion of its Arab and Iranian neighbors. And then there are the Sunnis in Bahrain who are a ruling minority over a Shiite majority, and the Shiites in eastern Saudi Arabia's oil-rich region who are a minority in the Sunni-Wahhabi Kingdom.

#### **4. Arab youth and Arab intellectuals**

The common cry around the Arab world today as the popular uprisings intensify and move from place to place is the call for greater respect for human rights. The Arab masses, composed predominantly of young people, have articulated their priorities: they want basic freedoms, an end to repressive regimes, better living conditions and economic opportunities, social justice, political pluralism, free elections, and democracy. What they are not interested in are the hackneyed causes of yesteryear: the anachronistic anti-colonial and anti-imperialist jargon that blames every frustration on America and Israel and depicts them as the ultimate causes of all Arab ills; the liberation of Palestine and the destruction of Israel; and the Salafist, Jihadist, and Takfiri hate-filled ideology of Al-Qaeda. None of these familiar clichés of violence and extremism are on the minds of the peaceful demonstrators in towns and cities all over the Arab world – the Facebook generation. This means the biggest losers alongside the culpable authoritarian governments are the ideologues of a bygone era and their remnant representatives today: Iran's theocrats, Hezbollah, Hamas, and the Salafis and Al-Qaeda wherever they happen to be lurking. Happily, these have so far failed to appeal to the hearts and minds of the region's rebellious youth.

This sudden and unforeseen spectacle of active protest around the Arab world does not emerge in a vacuum but comes out of a historical context: it is a damning indictment of the colossal failure of the dominant breed of Arab intellectuals during the 20<sup>th</sup> century. Leading figures among the Arab intelligentsia of the last century saw fit to import wholesale the concepts

of socialism and nationalism – the two ideologies that were directly responsible for the two World Wars and the unprecedented carnage they precipitated – and to create local Arab hybrids out of them. These hybrids went under the names of Arabism, Arab Nationalism, Baathism, Nasserism, Jamahiriyyism (Libya), and similar variants. What they bred were the military coups and consequent dictatorships of the middle decades of the 20th century that repressed their own people, hid behind verbal support for the Palestinian cause while perpetuating the suffering of Palestinian refugees in squalid camps, and lost every war with Israel.

Many of the key thinkers behind this wayward enterprise were Eastern Orthodox Christians harboring a deep-seated *dhimmi* complex.<sup>12</sup> Their subtle survival strategy was to alter the Muslim majority's focus on religious differences by concocting, and then championing, causes in the service of which they enlisted this same dreaded majority. The few voices of dissent from dhimmitude found themselves swimming against the prevailing current and crying in the Arab intellectual wilderness whenever they preached alternative ideas like liberal democracy, human rights, and basic freedoms. They were straightaway labeled traitors to the Palestinian or Arab or Salafist causes and accused of being agents of imperialism and Zionism.<sup>13</sup>

Eventually, when it became all too apparent that the regimes born out of these unfortunate ideological importations were not meeting any of the needs and aspirations of their people but instead were instilling terror and torture under the guise of a peculiar Arab version of secularism, the unsurprising Islamist backlash occurred. The Muslim Brotherhood in Egypt and its sister organization in Syria, followed closely by more determined Jihadis and Salafis across the region, had several violent clashes with the authorities in those two countries and elsewhere, while local minorities ended up invariably as collateral damage. Now, with Arab youth marching to a different and refreshing tune that repudiates in essence both the autocrats and the theocrats, and vindicates those vilified liberal thinkers who, against tremendous odds and with little success, tried to point the way forward, the region's minorities may at last have a chance to break free of their shackles and lead a more decent and dignified existence. But both the besieged regimes and the anachronistic religious fanatics are still far from being defeated, and the road ahead is strewn with lethal landmines, especially for native minorities.

<sup>12</sup> Habib Malik, *Islamism and the Future of the Christians of the Middle East*, pp. 50–54.

<sup>13</sup> Charles H. Malik (1906–1987), an Orthodox Christian from Lebanon and the present author's late father, was one of these intrepid voices.

## 5. Dangers and weaknesses

Several dangerous scenarios could result from an unforeseen turn of events in those countries experiencing the momentous transformations induced by what has come to be called the Arab Spring. In other words, this budding spring could in a variety of ways be hijacked to end up a prolonged and dreary winter for the peoples of the region including minorities. Repressive regimes themselves subject to counter pressures from their masses led by an organized opposition might still find ways to survive through a combination of brutality and clever reinvention of themselves under altered circumstances. The army in Egypt, replacing the fallen Mubarak regime, has promised national elections in the country, but if the generals begin to savor power too cozily, they just might decide to hang on to it. Complicated internal, regional, and international factors pertaining to Syria have colluded to increase the longevity of the ruling Alawite regime that has applied bloody use of force to silence the opposition.

There is as well the ever-present danger of the Islamists seizing power, or arriving at it through the ballot box and then deciding to stay – a case of ‘one man, one vote, *one time*’, so to speak. Even though the youth of the revolts don’t appear attracted by any overt Islamist platform or slogans, these extremist religious groups are in fact the most politically organized ones in many of the countries experiencing turmoil. It is not inconceivable that they will win elections and then decide to terminate the democratic process that allowed them to win in the first place. Non-Muslim minorities and women of all faiths will have plenty to fear from such an eventuality because the looming prospect of implementing *Shari‘a* (Islamic law) that relegates them to a subordinate and dehumanized status will be palpably real at that point.<sup>14</sup> There are some in the West who argue that Islamists should be allowed to come to power, and to fail. The argument is based on the assumption – probably accurate – that Islamists don’t really possess any viable solutions to the complex social and economic challenges of modernity, and that therefore their remedies will be exposed as inadequate and will be rejected by the people. Even if this prediction proves true, it is easy for those ensconced thousands of miles away to make it while the region’s vulnerable minorities will have to suffer through the experiment and its consequences

<sup>14</sup> I found the recently published collection of essays by Ibn Warraq (a pseudonym for a former Muslim from the Indian subcontinent who opted out of Islam and now lives in the United States) to be highly informative on *Shari‘a* totalitarian nature; see *Virgins? What Virgins?* (New York: Prometheus Books, 2010), p. 258.



like unwilling guinea pigs in a laboratory. Besides, there are no guarantees that the outcome of Islamist failure will unfold as smoothly as stated.

And what about the prospect of open-ended chaos in one or some countries let alone across the region? What would that do not only to minorities but to international stability and to the long-term regional interests of the big powers? Given the tribal composition of many of these societies, the latent ethnic divisions, the seething sectarian animosities, the gaping socio-economic disparities, and the endemic resentment against authoritarian rule, unresolved local clashes could degenerate into the festering internal conflicts characteristic of failed states like Somalia. Minorities of all stripes would stand to lose in a big way under such emerging conditions of instability and chaos.

Perhaps the greatest long-term danger facing everyone in the Arab region would be for the Kingdom of Saudi Arabia to escape the changes demanded by the youthful protestors: greater openness and liberalism and respect for pluralism and human rights and democratic institutions and essential personal and group freedoms. And since the ruling Saudis have going for them the fact that their country remains effectively the West's gasoline filling station, the West itself will help the Kingdom's dynasts resist these very changes that come out of the time-honored repertoire of universal values so much revered and alive in the West itself. Or at best the West will choose to look the other way and maintain a deafening silence. The West does this with little sense of hypocrisy and in the certainty that it is protecting the global stability of, and accessibility to, a vital resource: energy from fossil fuels. But such an attitude is very cynical as regards the general welfare of the peoples of the Arab region and of the Arabian Peninsula in particular. If the only effect on the Kingdom of these historic and unprecedented revolts is going to be that a few women dared to drive cars around Riyadh and Jeddah only to find themselves arrested by the authorities for breaking an utterly irrational law prohibiting females from driving, then the future looks quite bleak for the whole region despite any other gains scored here or there by these same revolts. The toxic effects of the Saudi-funded Koranic *madrassas* strewn around the Arab and Islamic worlds – those same institutions of fanaticism that were the breeding grounds for the violent terrorists who created Al-Qaeda and perpetrated 9/11 – represent the greatest danger over the long haul that threatens to undo the liberal achievements of the Arab Spring. They are also a mortal danger on minorities, moderates, women, and just about any enlightened element in a predominantly Islamic society.

All these dangers, potential or actual, when coupled with the inherent weaknesses of native Middle Eastern minorities, especially the Christians,

present a formidable set of existential challenges that threaten the very survival of such precarious communities. These weaknesses include steadily dwindling numbers due to emigration, a history of dhimmitude that has inflicted indelible psychological damage on these communities, little or no appreciation by the outside world of the grave ordeals afflicting these communities, internal divisions, and mediocre leaders both political and spiritual. When it comes to the numbers game the demographic battle appears to be a losing one with chronically low birth rates among Christians, a belief system that stresses strict monogamy, a high premium placed on education that tends to depress the number of offspring per family due to the associated economic costs, and difficulties of divorce as an option.

Complicating the picture further are Western Evangelical attitudes that tend to preach to Arab Christians a reductive and truncated theology of passivity dispensing with the need for earthly freedom. A true believer in Christ, so goes the sermon, can remain faithful to the deepest tenets of his/her faith under any earthly circumstances. Imagine for a moment where we would be today if the Poles living under communism had embraced this quietist position in the 1980s, or if the President of the United States had done so the morning after 9/11! While this dogma is not disputed in the absolute, left as such without contextual grounding it risks peddling bad theology since earthly freedom is certainly a virtue in itself that if possessed by a believing Christian would unfailingly enhance spiritual wellbeing, guarantee religious liberties for individuals and groups, and allow such free communities to be active in history for the propagation and anchoring of the precious truths to which they cling and by which they live. One has to wonder whether these same Evangelicals would practice what they preach if and when their own freedoms that they often take for granted were to be seriously threatened in any way.

Then there are the so-called Christian Zionists constituting a fringe of the Evangelical movement and exhibiting a peculiar blend of Dispensationalism and Restorationism. They regard the state of Israel, established in 1948, as a fulfillment of Biblical prophecies and the prelude to the end times. Their eschatology confuses politics with theology in a brazen manner that permits them to proceed to offer full material and moral support to Israel and Israeli interests. Serious problems arise when these groups come to the Middle East and begin to convey the impression, deliberately or inadvertently, that their beliefs are somehow shared by their local coreligionists the Arab Christians. This immediately evokes in suspicious and indiscriminating Muslim minds unwarranted associations that automatically incriminate the native Christians as supporters of Israel, misrepresent their true beliefs,

and label them latter-day Crusaders or agents of imperialism – all the way through the familiar roster of baseless and poisonous accusations. The last thing the Christians of the troubled Middle East need today is this kind of gratuitously tendentious affiliation. If this is the taint marking Western attention to their just cause, they would much rather carry their crosses by themselves and with dignity as they have done for centuries.

## **6. Possible outcomes, what real help entails**

During this period of transition throughout the Arab world – a period that may be of long duration in certain countries – specific hazards beset the region's minorities. But what are some possible outcomes when all the dust has settled? The reversion, alluded to earlier, to primordial aggregates is one distinct possibility, at least in those areas exhibiting greater local tribal or sectarian differentiation. So as to avoid the emergence of sectarian enclaves that would fragment the landscape in a manner not conducive to stability, institutionalized federal alternatives need to be seriously explored. The model of the state that the region received from the European Mandate period at the start of the 20th century was a unitary one molded in the image of the two leading European powers at the time, France and Britain. Perhaps when all the current upheavals have subsided the time will have come to entertain a new model that would be more fitting for accommodating the micro-heterogeneity in terms of socio-cultural and ethno-religious variations marking these societies. And such a model can only be a federal one.

The beauty of federalism is that it is a malleable concept able to be tailored to fit almost any set of givens. With the exception of the former Yugoslavia and for reasons unique to it, federal states have proven to be some of the most successful in the world. Federalism is ideally suited for divided or composite societies, which are societies that feature a number of distinct minority communities living side by side.<sup>15</sup> The objective of such a system would be to provide protection to these communities from the specter of demographic fluctuations and disparities and therefore the danger of a tyranny exercised by the majority. This is particularly vital in a Muslim-majority setting where historically minorities have not fared well under the rule of the majority, whether Sunni or Shiite. If the West therefore wishes to see democracy increasingly take root in the Arab and Islamic worlds, it

<sup>15</sup> See Xan Smiley, Middle East and Africa editor, *The Economist*, 'Arab Federalism, Anyone? An Idea whose Time is yet to Come' November 15, 2007, from *The World in 2008* print edition [[www.economist.com/node/10122329/print](http://www.economist.com/node/10122329/print)].

is incumbent that the emphasis be placed squarely on minority rights instead of on majority rule.

Taking Lebanon as an interesting example we see that although the country is officially a unitary state its composition and its constitution contain elements of a *de facto* federalism. Eighteen separate religious sects or denominations under the two broad headings of Christian and Muslim are recognized by the constitution, and so are unique laws covering the personal circumstances for each one of them. Lebanon has also enjoyed an advanced level of religious freedom both within and across its communal components, and even a peaceful coexistence among its various sects during the country's calm periods. Proposed improvements to Lebanon's complicated internal power-sharing formula have included a two-tier parliament with one chamber consisting of all the communities proportionally represented; a rotation among the leading sects of the three key posts of president, prime minister, and speaker of parliament; and the addition to the 18 recognized sectarian communities of Category 19, the non-denominational or secular option, which anyone above the age of 18 can freely opt to join. Despite the geographic segregation among the communities that the years of war exacerbated in Lebanon there remain considerable mixed areas, especially in and around Beirut and other cities. The type of federalism best suited for Lebanon would therefore not be based on geography, but would be constitutionally grounded and centered on the distinctive unit of the religious community.

However, federalism does present its own set of challenges. A heated debate has raged over the issue of a unified history book for all of Lebanon's high school students with proponents saying this would strengthen the concept of citizenship and help unify the country further, while opponents present the counter argument that any such single history textbook with one prescribed narrative covering controversial past events would be tantamount to totalitarian brainwashing through an 'official' version. At the same time, watering down the points of historical contention in any textbook would risk producing a sanitized and therefore useless version of the past. A compromise solution might be to have one textbook that features several varying accounts of the same disputed historical incidents presented side by side for the student to choose from. Attention to such details in the Lebanese context is a healthy sign and shows an acute awareness of the intricate pitfalls potentially facing minority communities as they attempt to coexist peacefully and interact with any prevailing majorities around them.

Federalism for a country like Iraq could also feature elements of power-sharing among the different communities, but there the Kurdish situation in the north will require careful consideration in order to balance Kurdish

aspirations of self-determination with Turkish and other neighboring sensitivities. Should matters deteriorate in Syria to the point of a Sunni–Alawite break, an Alawite enclave could emerge along the northern coastline to include the hills to the east. Such a fragmented Syria could spell disaster for the Alawite minority in the long-run if animosities with the Sunnis of the interior remain high, and the Christians of Syria would not be better off either under such fragmented conditions. A fascinating case is that of Sudan where for the first time in Islamic history a territory under Islamic rule has voted by referendum to secede and form the independent Republic of South Sudan composed of mainly Christians and animists. This isn't federalism or confederalism; it is complete separation and is unprecedented in the world of Islam except maybe for East Timor.

Side by side with federalist ideas have come calls to deconfessionalize the political system in composite societies like Lebanon's and to introduce wholesale the notion of secularism. While secularism is a product of the modern age in the West and comes not without its own set of problems as regards religious freedoms, it is basically alien to the Near and Middle East where ultimate identity for individuals and communities continues to be defined in religious or sectarian terms. Embarrassing and inconvenient as this fact about the East may be to the modern Western secular mind it remains a stark reality that one cannot ignore. To their credit, the Ottoman Turks who ruled the Middle Eastern region for some four centuries recognized the givens of religious and sectarian differentiation and decided to work with them rather than to obliterate them by force. The result was the Millet System that guaranteed a significant degree of local autonomy for each religious community in mixed areas of the Levant while maintaining umbrella Ottoman rule above everyone through a governor directly answerable to Istanbul. Accepting the reality of religious sects in the Middle East and their intimate intertwining with conceptions of communal identity and personal and group self-perceptions seems a more practical course to follow than the sudden parachuting of secularism onto a terrain still unready to receive it. Laying the foundations for a gradual evolution toward a greater acceptance of the secular alternative in a Muslim-dominated place like the Middle East appears the wiser and more viable approach. For Islam, where politics and religion are fused by doctrinal decree, to begin to swallow their separation is something that will require much time and painstaking efforts. Two things need to be learned by the Sunni majority in the Arab east: that inevitably they will have to share power in specific regional contexts and sometimes yield it altogether in favor of other groups; and that the burden of reassuring existentially anxious minority communities falls on their shoulders as the majority free of existential phobias.

Federalism carefully considered and creatively applied to the heterogeneous parts of the Arab region could serve as a roadmap toward the reshaping of these parts in ways more in harmony with their eclectic makeup and more faithful to the furtherance of human dignity within an accepted pluralism. On the other hand, secularism as a blanket panacea for the region's ills remains an illusion and might be useful only in very circumscribed contexts such as Category 19 in Lebanon. What then can sincerely concerned outsiders offer the region and its beleaguered minorities, moderates, and women by way of tangible help that addresses concrete and pressing needs? Real help coming from these external quarters would entail the following:

- Whenever possible and using all means available the spotlight of international publicity should be shone on any and all of the abuses of regimes and religious extremists throughout the Arab region. Nothing helps the weak and vulnerable more than getting the truth of their plight out to the rest of the world.
- Truly concerned outsiders can organize to put pressure on their own governments to in turn pressure local abusive authorities and hold them accountable.
- Related to the previous recommendation is the idea of reciprocity. Muslim immigrants arriving in the democratic West are assured beforehand of protection under the rule of law, respect for their basic human rights, a considerable amount of personal and group freedoms far exceeding what they had in their countries of origin, and much more. If in advance they didn't expect this to be the case, they wouldn't be heading in droves to the West as they have been for years. Western governments therefore must demand of the home countries of such Muslim immigrants a modicum of reciprocal treatment for those countries' native non-Muslim minorities and women of all religious affiliations.
- Thought must be given in universities, churches, research centers, independent think tanks, international and non-governmental organizations, civil society forums, intellectual circles, and wherever serious thinking and strategic planning normally occur to the viability of creating an international mechanism for the monitoring and protection of religious freedom. The challenges of implementing such a mechanism outside the West, and particularly in the Islamic world, are daunting. But the difficulties of the proposition are outweighed by the benefits that would accrue from getting it right.
- As much as possible a way needs to be found in which cozy arrangements with entities like Saudi Arabia for purposes of guarding the material interests of the West are not done at the expense of the welfare of the Middle

East's Christian and other minority communities. Some fidelity to the West's basic values ought to survive such interest-driven deals.

- Help the region avoid costly and potentially risky experiments such as the coming of Salafists to power 'in order to have them fail'.
- Beware false distinctions between so-called 'moderate' fundamentalists and 'radical' fundamentalists. Such misleading discourse was a favorite pastime among academic and think-tank types on the eve of 9/11, and now it seems to be making a regrettable comeback. All Salafists without distinction are bad news however one slices it.
- Re-evangelize the West, and the East will be helped. Remember Hilaire Belloc's words: '[Islamic] culture happens to have fallen back in material applications; there is no reason whatever why it should not learn its new lesson and become our equal in all those temporal things which now *alone* give us our superiority over it – whereas in *Faith* we have fallen inferior to it'.<sup>16</sup>
- Promote inter-Christian ecumenism, especially between Orthodox and Catholics. The year 2054, the thousandth anniversary of the Great Schism, is not far off, and a historic rapprochement between those two churches can only rebound positively upon Christians of the East.
- Forge direct links on the deepest levels with native Christian communities in the Middle East and help them not to emigrate by working closely with civil society institutions and credible NGOs to create for them economic opportunities at home.

These are only some suggested practical steps outside sympathizers can take to help indigenous Christian and other minority communities survive and even thrive in their ancestral lands where they want to remain.

## 7. Conclusion

What is unfolding all over the Arab world in 2011 is highly significant in the sense that the region will look quite different when all the upheavals have subsided. Arab youth are genuinely dissatisfied, and rightfully so. Change for the better is long overdue. The hazards of a transitional period such as this one are many and they could derail lots of the expectations for positive change; however, the risk simply has to be taken, and even in the worst of outcomes something good no matter how modest will endure.

<sup>16</sup> See Hilaire Belloc, 'The Great and Enduring Heresy of Mohammed' (March 1936), republished in Gabriel Oussani and Hilaire Belloc, *Moslems: Their Beliefs, Practices, and Politics* (Ridgefield, CT: Roger A. McCaffrey Publishing, no year), p. 160.

The globalized world in which we live allows people who have not known a free, prosperous, and democratic existence to view on a regular basis how others elsewhere in the world are enjoying the fruits of such open societies. For example, through the medium of television – not to mention magazines, the internet, social media, Skype, Blackberries, iPhones, etc. – ordinary Syrians are watching Turkish soap operas dubbed in Arabic that show them how their own lives can be better like the ones in the Muslim-majority country next door. The same is true for all Arabs watching films that feature life in the West. It used to be said that the ubiquitous export and crass display of American popular culture has its downside, and it certainly does; however, in this context a much simpler process is silently underway: relentless exposure to a different, freer, and seemingly happier life. Over time this can only be infectious in a revolutionary way.

Not only are the old ideological slogans of the 20th century that placed the blame for all Arab misfortunes on others virtually absent from the protests; so, to a large extent, is the conspiratorial mindset that afflicted the earlier generation. Only the regimes under attack are the ones incessantly pointing the finger at the United States, Israel, Al-Jazeera, Al-Qaeda, European colonialists, etc., as the real causes behind the turmoil. But the youth are not listening. They know what they want, and they know who the real culprits are.

It would be a cruel misconception to conclude from the anxieties expressed by Middle Eastern Christians about the future that somehow they can only feel safe and secure under repressive regimes. They are certainly not allied to repression, nor are they dependent on it for their survival. Their legitimate fears stem from the ominous prospect that Islamist groups could reach power and create circumstances that would be detrimental to their well-being. Generally speaking, Christians are not taught to dissimulate or lead a double life as a survival tactic like other minorities often do. Their honesty and openness should not be held against them. It is true that Syria's Christians lived under better conditions before the Baath and the Assads seized power; this fact may have been obscured after four decades of Baathist rule, but it cannot be denied. Egypt too was more open and democratic during the early decades of the 20th century than it became under Nasser, Sadat, or Mubarak. Christians there led freer and more productive lives in the earlier Egyptian period, and they contributed significantly to what came to be called the Arab cultural renaissance. Henceforth, and with prospects of opportunistic Islamist resurgence occurring regardless of where the priorities of Arab youth really lie, these Christians need to be prepared for a possible rough ride ahead. They also need to guard against the tendency among some Europeans to welcome them as convenient 'spare parts' that would replace, or at least ease, the influx



into Europe of increasing numbers of Muslim immigrant workers. Displacing the Christians out of the Middle East is no solution for Europe's Muslim immigration problem. Creating conditions in the Middle East for a freer life and better economic and political prospects for all, Muslims and Christians alike, is the only way to proceed.

# WHAT CAN BE LEARNED FROM THE INDIAN EXPERIENCE? CAN THERE BE A LEGITIMATE PLURALISM IN MODES OF PROTECTING RELIGIOUS FREEDOM?

■ RUMA PAL

Given that my field of study and work is limited to the law and to the laws of India, I have approached the topic of discussion from the legal standpoint as prevailing in India. The language of the topic lends itself to a legal approach – the brief for the cause being ‘religious freedom vs. religious constraint’ – and India, as far as religion is concerned, in a way reflects and is a microcosm of the world macrocosm.

## India, as a ‘world’ of religious diversity

India has five main faiths, namely Hinduism (which includes Sikhs, Jains and Buddhists), Islam, Christianity, Zoroastrianism and Judaism. Each faith has several sects and sub sects. Demographic studies as of April 2011 have put India’s population at 1.21 billion people.<sup>1</sup> Hindus represent 80.5%, Muslims 13.4% (the third-largest Muslim population in the world after Indonesia and Pakistan) and Christians 2.3% of the total population. The remainder covers smaller sects such as Sikhs, Jains, Buddhists, Zoroastrians, Bahai etc. Of its 28 States and 7 Union Territories,<sup>2</sup> two have a majority of Muslims,<sup>3</sup> three have a majority of Christians,<sup>4</sup> one has a majority of Sikhs<sup>5</sup> and the rest have a majority of Hindus. To add to the complexity there are more than two thousand ethnic groups within the four main ethnic groups viz: Aryan, Mongolian, Dravidian and Tribal and 29 languages spoken (excluding dialects), most of them with different scripts. Since her independence from the British in 1947 after nearly 200 years of being a colony, India has had to face and still faces disruptions on the grounds of the four ‘isms’ – casteism, communalism, linguism and regionalism.<sup>6</sup>

<sup>1</sup> Census 2011: The Office of Registrar General & Census Commissioner of India.

<sup>2</sup> Territories administered directly by the Central Government through the President of India.

<sup>3</sup> Jammu & Kashmir, Lakshvadeep.

<sup>4</sup> Mizoram, Nagaland and Meghalaya.

<sup>5</sup> Punjab.

<sup>6</sup> Granville Austin, *Working a Democratic Constitution*, p. 79.

But before building the case that freedom of religion within such diversity is possible for a democratic nation, a few words need to be defined for the purpose.

The word 'Universal' used in conjunction with 'rights' may mean rights which are common to all of humanity or it may mean rights which are or should be available to each denomination and individual irrespective of any distinction including colour, caste or creed. I intend to use the phrase in the second sense so that 'universal rights' not only means moving from exclusion and ghettoisation to inclusion, from the rights of a race or nation to humanity as a whole but also the realisation of those rights by the individual. These rights such as the right to life – including the right to live with dignity, equality and the right to freedom of conscience – have been described in the Indian Constitution as 'fundamental rights'<sup>7</sup> which not even Parliament can take away by any amendment of the Constitution.<sup>8</sup>

As far as the definition of 'religion' is concerned – in India, legally speaking, religion is certainly a matter of faith with individuals or communities – but it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but, the Courts in India have said that it would not be correct to say that religion is nothing else but such a doctrine or belief.<sup>9</sup>

However we define religion, historically, and even after the independence of India in 1947, communal conflict between the different faiths has, to a greater or lesser degree, existed.<sup>10</sup> The National Integration Council's

<sup>7</sup>The 'fundamental rights' are dealt with in Part III and IV of the Constitution. There is a remarkable similarity with the Universal Declaration of Human Rights both having been deliberated upon almost contemporaneously. Dr Ambedkar the principal architect of the Constitution while explaining the various sources of the Constitution has said that before finally drafting the Constitution, the Members of the Drafting Committee had before them almost all the important Constitutions including the American, Canadian, South African and Australian Constitutions. See *S.P. Gupta v. Union of India*, 1981 Supp SCC 87, at p. 400.

<sup>8</sup> *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225.

<sup>9</sup> *Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, 1954 SCR 1005.

<sup>10</sup> See for example The Report of Justice V. S. Dave Commission of Inquiry into Communal Disturbance in Gujarat in July 1985 which refers to the history of communal riots in Gujarat.

2007 report, listed about a hundred communal clashes since 1947 and till 2007 there were at least 29 Commissions of Enquiry in respect of these incidents<sup>11</sup> although according to others between 2001 and 2009 alone 6,541 communal clashes occurred.<sup>12</sup> Despite the discrepancy, it is evident that the number of incidents of communal conflict has been very large.

The clashes have occurred not only between the major faiths but there have also been conflicts between sub-divisions of these faiths for example disputes between different sects of the Syrian Christian Church,<sup>13</sup> between Sunnis and Shias,<sup>14</sup> and between the sects of the Sikhs inter se.<sup>15</sup> The causes of such conflicts are many. For example, while enquiring into the communal disturbance between Muslims and Hindus during December 1992 and January 1993, the Commission of Inquiry found that the political discourse which dominated the earlier decades has given way to communal discourse..., vocal Hindutva parties<sup>16</sup> and increasing assertion of Muslim ethnic identity.<sup>17</sup> All these reasons are ultimately based on a distrust arising from an ignorance of the 'other' and a growth of religion-based politics. Unfortunately, despite laws forbidding canvassing for votes on the ground of religion or by promoting feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language,<sup>18</sup> democracy inevitably brings in 'vote bank politics' with political leaders taking advantage of such situations to fan fear and distrust which may strengthen their vote base but which weaken the nation. It is doubly unfortunate because India is a secular State.

### **Constitutional pluralism**

The Constitution of India which was adopted in 1950 has in its Preamble constituted India as a 'Sovereign, Socialist, Secular and Democratic Republic'. Although the word 'secular' was borrowed from the West and was

<sup>11</sup> Report of Working Group of National Integration Council to Study Reports of the Commissions of Inquiry on Communal Riots. 2007.

<sup>12</sup> Communal Riots in 2010, by Asghar Ali Engineer.

<sup>13</sup> Most Rev. P.M.A. Metropolitan v. Moran Mar Marthoma, 1995 Supp (4) SCC 286.

<sup>14</sup> Gulam Abbas v. State of U.P. (1984) 1 SCC 81.

<sup>15</sup> See: Parkash Singh Badal: Chief Minister of Punjab: S.R. Bakshi, Sita Ram Sharma p. 73 et seq.

<sup>16</sup> Parties which advocate Hindu Fundamentalism.

<sup>17</sup> B.N. Srikrishna Report.

<sup>18</sup> The Representation of People Act, 1951 sections 123 (3) (3A); Section 295-A of the Indian Penal Code.

added to the Preamble only in 1976, it was always an implicit part of our Constitutional philosophy. More than 2000 years ago, Emperor Ashoka, who was a Buddhist and reigned over much of what is now India from 269 BCE to 231 BCE, in one of his edicts had advocated religious toleration based on the recognition that there is in every religion a common central truth and that differences were only in the external features, forms and ceremonies which are no part of the essence of religion.<sup>19</sup> The same approach to all religions is reflected in the Indian Constitution.

I use the word 'secular' in describing the State in its broadest senses to mean both 'worldly as distinguished from spiritual' and 'of no particular religious affiliation'.<sup>20</sup> In the political context secularism can and has assumed different meanings in different countries, depending broadly on historical and social circumstances, the political philosophy and the felt needs of a particular country. Thus, the First Amendment to the American Constitution prohibits the making of any law 'respecting an establishment of religion, or prohibiting the free exercise thereof'. The clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'.<sup>21</sup> The Australian Constitution has adopted this approach. Under the Indian Constitution however, there is no such 'wall of separation' between the State and religious institutions. In India the State is secular in that there is no official religion. India is not a theocratic State.<sup>22</sup> In fact the State is expressly prohibited from discriminating against any citizen on the grounds only of religion, race, caste, sex, place of birth.<sup>23</sup> It is also against the policy of the Constitution to pay out of public funds any money for the promotion or maintenance of any particular religion or religious denomination<sup>24</sup> and no 'taxes' inclusive of all other impositions like cesses, fees, etc., can be specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.<sup>25</sup>

However the Constitution envisages the involvement of the State in matters associated with religion and religious institutions, and even indeed with the

<sup>19</sup> Amartya Sen, *The Argumentative Indian*, Part IV, p. 274.

<sup>20</sup> *Black's Law Dictionary*.

<sup>21</sup> Per Jefferson, 'Reynolds v. United States' (1878) 98 US 145 at p. 164.

<sup>22</sup> At present the President of India is a Hindu, the Vice-President is Muslim, the leader of the party in power is Christian and the Prime Minister is Sikh.

<sup>23</sup> Article 15(1).

<sup>24</sup> Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 SCR 1005.

<sup>25</sup> Article 27 of the Constitution.

practice, profession and propagation of religion in its most limited and distilled meaning. Like other secular Governments, the Indian Constitution guarantees freedom of conscience and the right freely to profess, practice and propagate religion<sup>26</sup> to every individual so that he/she may hold any beliefs he/she likes.<sup>27</sup> Every person is free in the matter of his relation to his Creator, if he believes in one, and to worship God according to the dictates of his conscience. A person is not liable to answer for the verity of his religious views, and he cannot be questioned as to his religious beliefs by the State or by any other person. However actions in pursuance of those beliefs may be subjected to restrictions in the interest of the community at large namely to preserve public order, morality and health and the Fundamental Rights of others, as may be determined by common consent, that is to say, by a competent legislature. The right to worship or practice according to the tenets of a religion is also unfettered so long as it does not come into conflict with any restraints imposed by the State in the interest of public order, etc. and is not violative of the criminal laws of the country. Thus, though an individual's religious beliefs are entirely his/her own and freedom to hold those beliefs is absolute, the right to act in exercise of an individual's religious beliefs is not unrestrained.

It is also the fundamental right of a religious denomination or its representative to administer its properties in accordance with law. The law therefore must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the guaranteed right.<sup>28</sup> Religious minorities have the additional right to establish and administer educational institutions of their choice<sup>29</sup> although Courts have construed the right to administer as not being absolute; there could be regulatory measures for ensuring educational standards and maintaining excellence.<sup>30</sup>

But the Constitution also recognises the validity of laws relating to management of religious and denominational institutions<sup>31</sup> and contemplates

<sup>26</sup> Article 25(1).

<sup>27</sup> *Syedna Taher Saifuddin Saheb v. State of Bombay*, 1962 Supp (2) SCR 496; *Sri Adi Visheshwara of Kashi Vishwanath Temple v. State of U.P.* (1997) 4 SCC 606; *M.P. Gopalakrishnan Nair v. State of Kerala* (2005) 11 SCC 45.

<sup>28</sup> Clause (d) of Article 26.

<sup>29</sup> Article 30(1).

<sup>30</sup> *T.M.A. Pai Foundation v. State of Karnataka* (2002) 8 SCC 481, at p. 588.

<sup>31</sup> Article 16(5).

the State itself managing educational institutions in which religious instructions are to be imparted.<sup>32</sup> The State is empowered to make any law 'regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice'<sup>33</sup> but is limited to the regulation of aspects which are not an integral part of a religion and again only in the interest of public order, morality, health and the fundamental rights of others. Here the word 'secular' is used in the sense of activities which do not form an integral part of a religion or what Ashoka described as 'the essence of religion'.<sup>34</sup>

A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress. A religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold.<sup>35</sup> What the Constitutional provision contemplates is not regulation by the State of religious practices as such, the freedom of which is guaranteed by the Constitution, but regulation in the interest of public order, health and morality only of those activities which are economic, commercial or political in their character though they are associated with religious practices and also, as I have said earlier, those activities which are not essential or integral to the religion. It was on such humanitarian grounds, and for the purpose of social reform, that so called religious practices of Hindus like child marriage, immolating a widow at the pyre of her deceased husband, or of dedicating a virgin girl of tender years to a God to function as a devadasi,<sup>36</sup> or of ostracising a person from all social contacts and religious communion on account of his having eaten forbidden food, were stopped by legislation.

<sup>32</sup> Article 28(2).

<sup>33</sup> Article 25(2)(a).

<sup>34</sup> Supra.

<sup>35</sup> Article 26(b).

<sup>36</sup> Literally 'maid-servant of God'. The devadasi system is a custom by which a girl is 'married' to God to redeem a promise made for fulfillment of a prayer. The girl was normally forced into prostitution by temple authorities. The practice is said to be still prevalent in some states despite its abolition in 1988 [see in this connection *Trafficking in Women and Children in India*, National Human Rights Commission Report (2005) p. 225.

## The role of the judiciary

Very often when a right to practice is regulated by the State, members of that particular religion have questioned such regulation before the higher courts.<sup>37</sup> The courts therefore shoulder the burden of finally determining whether a particular activity is an essential religious practice or not and whether in making the regulation or law the State has overstepped its constitutional limitations. The decision may present difficulties because sometimes practices, religious and secular, are inextricably mixed up, and 'what is religion to one is superstition to another'. But the Courts have decided what constitutes the essential part of a religion primarily after ascertaining and with reference to the doctrines of that religion itself, irrespective of the religion in question. A few recent examples will suffice.

As is well known Hindu society in India has traditionally a rigidly hierarchical caste system. Although discrimination on any basis is Constitutionally prohibited, nevertheless discrimination by the so called 'higher castes' against the so called 'lower castes' continues to persist. For example, worship in a temple in the state of Kerala was traditionally performed by Brahmins, which is the priestly class and considered the highest amongst the four castes.<sup>38</sup> The appointment by the State of a non-Brahmin to perform the ritual worship in the temple was challenged on the ground that the appointment not only violated a long-followed mandatory custom and usage of having only a particular sub-sect of Brahmins for such jobs but that the appointment denied the right of the worshippers to practise and profess their religion in accordance with its tenets and manage their religious affairs. The Supreme Court rejected the claim and upheld the appointment saying:

Any custom or usage irrespective of even any proof of their existence in pre-constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament.<sup>39</sup>

The same reasoning was adopted by the court when it held that polygamy is not an integral part of Hindu religion<sup>40</sup> and that though the personal law of Muslims permitted having as many as four wives, having more than one wife

<sup>37</sup> Syedna Taher Saifuddin Saheb v. State of Bombay, 1962 Supp (2) SCR 496.

<sup>38</sup> The Brahmins or the priestly class; the kshatriyas or the soldier class; the Vaisyas or trader class and the Sudras or the untouchables.

<sup>39</sup> N. Adithayan v. Travancore Devaswom Board (2002) 8 SCC 106.

<sup>40</sup> State of Bombay v. Narasu Appa Mali: AIR 1952 Bom 84.



is not a part of the religion.<sup>41</sup> It has also been held that the sacrifice of a cow for earning religious merit on Bakr-Id, an Islamic festival, is not a part of religious requirement for a Muslim<sup>42</sup> and that the performance of 'Tandava'<sup>43</sup> dance in processions in public streets or in public places was not an essential religious rite of a Hindu sect called Ananda Margis.<sup>44</sup> Similarly it has also been held that no community or sect of that community can claim a right to add to noise pollution on the ground of religion whether by beating of drums or reciting of prayers by use of microphones and loudspeakers so as to disturb the peace or tranquility of the neighbourhood.<sup>45</sup> In practice therefore courts ensure that the State's involvement is limited to matters which are not intrinsic to that religion and that the regulation of practices is not only for the purposes of public order etc. but operates impartially and without discrimination.

The issue of conversions has been more controversial. Individuals have been guaranteed the fundamental right to propagate his/her religion, subject to the same limitations aforesaid, that is, public order, health and morality.

Several States have enacted legislation to prevent conversion by force, fraud or allurements making such conversion a punishable offence. Such statutes are constitutionally valid because forcible conversions impinge on the 'freedom of conscience' guaranteed to all the citizens of the country alike. In a decision which has been very heavily criticized both by scholars<sup>46</sup> and the media across the country, the Supreme Court has construed the word 'propagate' very narrowly. According to the Court the right to propagate was not a right to convert another person to one's own religion, but only to transmit or spread one's religion by an exposition of its tenets.<sup>47</sup> The justification for the opposition to this view would need more time and space than the present occasion will allow, but I may briefly indicate what, in my opinion, may have led the court to such a restrictive interpretation of the right to propagate religion.

Philosophy in India is essentially spiritual.<sup>48</sup> Ancient Indian philosophy assumed, broadly, three forms: the believers in *Advaita*, meaning non-dual

<sup>41</sup> Javed v. State of Haryana, (2003) 8 SCC 369, at p. 379.

<sup>42</sup> State of W.B. v. Ashutosh Lahiri: (1995) 1 SCC 189.

<sup>43</sup> The 'Tandava' dance symbolizes the cosmic cycles of creation and destruction.

<sup>44</sup> Commissioner of Police v. Acharya Jagadishwarananda Avadhuta (2004) 12 SCC 809.

<sup>45</sup> Church of God (Full Gospel) in India v. K.K.R. Majestic Colony Welfare Assn. (2000) 7 SCC 282; Om Birangana Religious Society v. State (1995-96) 100 CWN 617 (Cal).

<sup>46</sup> H.M. Seervai, *Constitutional Law of India* (4th edn), p. 1287.

<sup>47</sup> Rev. Stainislaus v. State of M.P. (1977) 1 SCC 677.

<sup>48</sup> S. Radhakrishnan, *Indian Philosophy*, Vol. I p. 24.

or 'not two' in which oneness is a fundamental quality of everything and everything is one non-dual consciousness; *Visistha advaita* which posits qualified non-duality or modified monism where every thing existing is 'nothing more than a mere flux of becoming' representing different degrees of 'intermediate reality', the degree being measured by the distance from the 'integral reality';<sup>49</sup> and *Dvaita* or dualism/theism in which there is a separation between the believer and the object of belief. These three systems covered innumerable sub-systems. Individuals were free to choose their philosophy as each system or sub-system was seen as a different but equally valid method of seeking to reach the ultimate truth. Those who prescribed to this philosophy, generically termed as 'Vedanta', were called Hindus by the Persians because they lived next to the river which in Sanskrit was known as 'Sindhu', which they called the 'Hindu' and which we now know as the Indus. The Vedanta as applied to the various customs and creeds of India was called 'Hinduism'.<sup>50</sup> One was therefore born a Hindu believing in one god, many or none<sup>51</sup> and the concept of conversion was alien. The differences of application of belief, their overt manifestations over time and subsequent historical events which identified a belief with political and economic power, led to a hardening of attitudes asserted through different forms and ceremonials and the perception of Hinduism as one religion. These in turn lead to rigid sectarianism and a change in attitude to 'the other' – from acceptance of difference to mere tolerance and from tolerance to an assertion of superiority of belief which in turn led to hostility in thought and militant expressions of intolerance.

The Indian Constitution was drafted by members of the Constituent assembly who were not only regionally representative but of all major faiths.<sup>52</sup> It was their vision of a unified India which led them not only to provide for the individual's right to religious freedom and the freedom of conscience but an equal respect for all religions.<sup>53</sup> In such a context the right to convert which proceeds on the basis of the validity of a particular faith and repudiation of others, does not rest easily with those who are re-

<sup>49</sup> *Ibid.* at p. 40.

<sup>50</sup> Swami Vivekananda as quoted by Marie Louise Burke in *Swami Vivekananda in the West: New Discoveries*, Part II p. 377. For judicial interpretation of the word 'Hindu' see *M.P. Gopalakrishnan Nair v. State of Kerala* (2005) 11 SCC 45, at p. 58.

<sup>51</sup> Mehru Jaffer, *The Book of Moinuddin Chishti*, p. 90.

<sup>52</sup> See: Basu's *Commentaries on the Constitution of India*, 6th edn., Vol. A, p. 5.

<sup>53</sup> See *Bal Patil v. Union of India* (2005) 6 SCC 690, at page 704: 'The States will treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual rights of religion, faith and worship'.

sponsible for the governance of the country particularly when communal passions have been raised on the ground that some one has been ‘forcibly’ converted to another religion.<sup>54</sup>

### **A common civil code**

The Constitution envisages homogeneity to be brought about in respect of all aspects of Civil Law applicable to all Indians and Article 44 says that ‘the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India’.<sup>55</sup> Nevertheless, the State’s right of regulation has not been exercised in respect of personal laws of religious communities relating to marriage, divorce, adoption and inheritance or succession although laws relating to marriage, inheritance and adoption can hardly be said to be part an intrinsic part of religion however sacred the source may be believed to be. The reluctance of the State is not a question of constitutional power but political expediency.

To a large extent uniformity in civil law has already been brought about within the different faiths. The British sought to introduce uniformity in civil laws as a measure of administrative convenience, and succeeded to a large extent. Thus there was The Muslim Law (Shariat) Application Act, 1937, the Parsi Marriage and Divorce Act, 1936, the Christian Marriage Act, 1872 and the Indian Divorce Act, 1869. The Shariat Act removed the differences between the different sects of Muslims such as the Khojas and Cutchi Memons of Gujarat and the Malsan Muslims with regard inter alia to inheritance. Under strict Hanafi Law, there was no provision enabling a Muslim woman to obtain a decree dissolving her marriage on the failure of the husband to maintain her or on his deserting her or maltreating her and it was the absence of such a provision entailing (according to the Legislature) ‘unspeakable misery in innumerable Muslim women’ that was responsible for the Dissolution of the Muslims Marriages Act, 1939.<sup>56</sup> The

<sup>54</sup> For example in 2008 communal clashes between Hindus and Christians erupted in the Kandhamal District of the State of Orissa. Although the immediate cause for friction was the removal of Christmas decorations put up at a place used by Hindus to worship, the real cause was the resentment of a radical Hindu group, to the increasing number of tribals in the district becoming Christians. This escalated when an 80-year-old priest and three others belonging to the radical group were killed. The Hindus concluded, (wrongly as it transpired later on investigation) that the killers were the local Christians. Incited by political leaders, mobs of Hindus set fire to many Christian settlements killing many of the residents and causing several hundreds of others to flee their homes.

<sup>55</sup> Article 44.

<sup>56</sup> *Jorden Diengdeh v. S.S. Chopra* (1985) 3 SCC 62, at p. 71.

Christian Marriage Act similarly applies equally to the various sects of all Christians. After Independence, this process of uniformity in personal laws was continued. Till the 1950s Hindus in different regions and belonging to different sects had different personal laws and practices. These were brought under one umbrella by the Hindu Code Bills which made the various personal laws uniformly applicable to all Hindus. For example, new concepts such as monogamy, divorce and inheritance by females were introduced despite vociferous opposition by the Hindu Marriage Act, 1955 and the Hindu Succession Act, 1956 respectively. Therefore at present, the laws relating to succession, marriages, and adoption are governed by the personal laws of the different faiths. All other aspects of personal Civil Law are covered by statutes which apply to all Indians irrespective of their faith.

For the framers of the Constitution a uniform civil code meant a shared identity and a deletion of differences in secular matters leading to national integration. Civil Rights activists support the uniform civil code because they expect a more equal society where the vulnerable, oppressed and marginalized members are given their rightful place. Besides, the difference in personal laws has at times been exploited to serve dubious purposes. This is particularly noticeable in relation to marriage and divorce<sup>57</sup> where ‘conversion’ is resorted to marry more than one wife or avail of grounds for divorce which are not available under one personal law but available in another.

Unfortunately the effort to secure a uniform civil code has taken on a communal hue. It is resisted by the minority religious communities as it is seen as an attempt by Hindu Fundamentalists to take away their cultural identity and survival. The distrust is heightened by the insistence of the Hindu Fundamentalists on a uniform code to eliminate so called ‘special privileges’ to ‘pampered minorities’. However ‘[t]he purpose of law in plural societies is not the progressive assimilation of the minorities in the majoritarian milieu. This would not solve the problem; but would vainly seek to dissolve it’.<sup>58</sup> As I see it uniformity in personal laws does not mean the imposition of any particular personal law of a particular faith but the adoption of ‘best practices’ so to speak, of the different personal laws based on universally acceptable norms.

Courts have on various occasions urged the adoption of a uniform civil code and have, through a process of interpretation, been able to achieve

<sup>57</sup> Lily Thomas v. Union of India (2000) 6 SCC 224; Sarla Mudgal v. Union of India, (1995) 3 SCC 635.

<sup>58</sup> ‘Law in a Pluralist Society’ by M.N.Venkatachaliah, J.

uniformity in personal laws but to a very limited extent.<sup>59</sup> It is ultimately the State which is charged with the duty of securing a uniform civil code for the citizens of the country and piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case. It is also doubtful that the goal of uniformity can be left to ideas and interpretations of judges where varying attitudes may dictate the outcome.

The framers of the Constitution did not define such concepts like ‘equality’, ‘liberty’ or ‘freedom’. They did not lay down what constitutes ‘public order, morality and health’ subject to which a person is entitled to freedom of conscience and the right to profess, practice and propagate any religion. It was primarily left to the judiciary to develop the jurisprudence and to give content to the concepts through a process of interpretation and application. Therefore, the judiciary has an important role to play in the implementation of secularism. Indeed, the concepts of communal harmony and secularism have, by and large, been well protected by the courts. For example they have on occasion directed that a case arising out of communal conflict be transferred from one State to another because of the bitterness of local communal feeling and the tenseness of the atmosphere and because public confidence in the fairness of a trial held in such an atmosphere would be seriously undermined.<sup>60</sup> They have upheld orders restraining a person known to incite communal clashes from entering and from participating in any function in a district.<sup>61</sup> The death penalty was awarded to a person who had killed a woman in a communal clash saying:

In our country where the Constitution guarantees to all individuals freedom of religious faith, thought, belief and expression and where no particular religion is accorded a superior status and none subjected to hostile discrimination the commission of offences motivated only by the fact that the victim professes a different religious faith cannot be treated with leniency.<sup>62</sup>

However Judges need great wisdom and restraint in wielding their great judicial power otherwise judges can and sometimes, though rarely, have transformed their own predilections and biases into principles.

<sup>59</sup> For example the right of a Muslim woman to maintenance on divorce: *Danial Latifi v. Union of India* (2001) 7 SCC 740.

<sup>60</sup> *G.X. Francis v. Banke Bihari Singh*, AIR 1958 SC 309, 310.

<sup>61</sup> *State of Karnataka v. Praveen Bhai Thogadia (Dr)*, (2004) 4 SCC 684.

<sup>62</sup> *Dharma Rama Bhagare v. State of Maharashtra* (1973) 1 SCC 537, at p. 543.

## Conclusion

Religious pluralism is provided and protected in the Indian Constitution. Although the laws may be applicable to all Indians, implementation is necessarily localized. Fundamental to the legal concept of religious freedom is that the task of superintending the operation of law rests with an impartial and independent judiciary. In any event the mere force of law cannot change attitudes nor can the law alone hope to wipe out in a few years a few centuries of cultural and religious exclusiveness still practiced by fundamentalists in all religious groups. Mahatma Gandhi said ‘I have come to the conclusion that, if it is proper and necessary to discover an underlying unity among all religions, a master key is needed. The master key is that of truth and non-violence’. This is not to say that strong and preventive action should not be taken against individuals or group of persons who either by speech or action seek to inflame communal feelings. As suggested ‘the importance of religious identity has to be separated from its relevance in the political context’<sup>63</sup> not only through an equitable enforcement of the law but also through education. To this end several universities have set up Centres or Departments dealing with Social Exclusion and Inclusive Policy Studies. Education has already led, marginally perhaps but palpably, towards a classless and more tolerant society. Finally a vibrant democracy has been a socially leveling factor. Without claiming that the pluralistic approach to religious freedom as envisaged in the Indian Constitution is the perfect template for every country, I can at least conclude that it has worked for India. An eminent historian has said that during the brief years that Indians have held the reins of government they have governed themselves successfully... ‘The Constitution... [has] met India’s needs. The inadequacies in fulfilling its promise should be assigned to those working it and to conditions and circumstances that have defied greater economic and social reform...’. The country has achieved greatly against greater odds.<sup>64</sup>

<sup>63</sup> Amartya Sen, Secularism and its Discontents, *The Argumentative Indian*, p. 307 [published by Penguin Books: p. 307].

<sup>64</sup> Granville Austin, *Working a Democratic Constitution*, Chapter 31, p. 633, 665.

# WHAT CAN BE LEARNED FROM THE EXPERIENCE OF RELIGIOUS FREEDOM IN LATIN AMERICA?

■ PEDRO MORANDÉ

1. The history of Latin America has very peculiar features in relation to religion. During the sixteenth, seventeenth and eighteenth centuries there was a total monopoly of religious freedom for the Catholic Church, as the Spanish and Portuguese Crown did not allow the coming of Reformed Christianity, nor the presence of Judaism and Islam. The conquest was religiously legitimated, as the Pope Alexander VI granted the lands discovered to the crown by the bull *Intercaetera* in 1493 that justified European presence in them for the purpose of evangelization. Mendicant orders (Franciscans, Dominicans, Mercederians, and Augustinians) accompanied the conquerors from the very beginning. After the Council of Trent the Jesuits were added, who played an important role in higher education. Latin America never had 'religious wars' and the principle 'cuius regio, eius religio', which won the pacification of Europe after the Thirty Years' War, was completely unknown. Nobody has ever used religion in Latin America to justify state sovereignty and after the independence from Spain and Portugal there has not been a war between states for religious reasons. It can be rather said, that Church and State were partners in the task of forming a civil society from the Spanish and Portuguese immigration and taking into account indigenous peoples and their traditions.

The Catholic Church has often been accused of not having recognized the religious freedom of indigenous peoples by promoting their forced conversion. Although there are some episodes of this kind, it cannot be generalized as a trend. The role of the religious orders involved, from the beginning, the defense of indigenous people from mistreatment at work, especially in mining, and the right to preserve their own language and culture. The School of Salamanca and the laws of India, fed both by the missionaries' constant claims of indigenous mistreatment, are impressive evidence of the legal analysis of the time on the rights of native peoples encountered by Europeans on American soil. But even more eloquent is, even in present times, the resulting popular religiosity that blended ancient traditions with the newness of the Gospel.

The social context of the encounter between the Europeans and the natives can be understood from the fact that there was no written culture

among indigenous peoples so that it was Spanish and Portuguese writing which progressively reached the cultural identity of the crown's dominions. The original indigenous languages which survived were those that Christian missionaries put into writing: the Nahuatl, Quechua, Aymara, Guaraní, Mapudungun among others. Some were kept only in terms of ancestral rituals and lost their dynamic expansion and growth with the passing of the centuries. The missionaries appealed for their preaching not only to the text of the doctrine, but also to the profuse symbolism of the rites of passage that are present in all cultures. They organized popular theater (the so-called auto sacramental), and also encouraged the creation of music, painting and Baroque architecture. There were famous missionary disputes about pre-baptismal catechesis. Some were in favor of giving baptism even without catechesis, arguing that natives were the guests at the eleventh hour of the parable of the banquet. Others, however, sought a more rigorous catechumenate. The indigenous response was rather to identify the new saints with their ancestral deities, as it was in Latin America with the devotion to the Virgin Mary and the devotion to 'mother earth' or 'common mother' (Tonantzin/Guadalupe, Pachamama/Carmelite Virgin, etc.).

Personally, I think there were only two areas of disagreement in relation to symbolism. On the one hand, the cult of the dead and ancestors which indigenous families celebrated in their homes, even when possible, with the mummification of their bodies. The Europeans, however, offered the undergrounds of temples to put down the dead and then opened general cemeteries. On the other hand, the consideration of precious metals by Europeans as means of payment, which were exported to Europe in large numbers, instead of the cultic funerary function attributed by the natives. Almost all the pieces that adorn today's gold museum in Bogota and Lima, the largest in Latin America, were taken from graves desecrated in search of this metal. Drug consumption for religious purposes was also banned, but this use was limited to some officers and did not affect the population as a whole.

More important than labor mistreatment for the disappearance of some native peoples was the transmission of disease because they had not yet developed the antibodies needed and it would take considerable time to develop this natural process. Sometimes missionaries thought that the best for indigenous people was to live physically separated from the Europeans and they created for this purpose the so-called 'hospital villages' and 'missions'. But the tendency of people to blend themselves grew vigorously throughout Latin America, overcoming segregation trends. This made possible also a cultural crossbreed and a religious syncretism rich in expressions. The first Europeans



who arrived on American soil were only men and it took a long time before they could bring their wives and families. The delivery of one's daughters to strangers to form family alliances with them is a practice known and documented among peoples of all continents. It was also customary in America, especially among those peoples who had a tribal structure and had not yet developed hierarchical stratification.

The most eloquent evidence that the native peoples came to accept the crossbreed and evangelization is the fact that the neo-indigenous movements present now in Mexico, Bolivia, Brazil and Chile, have not claimed for themselves religious freedom, but rather territories, self-government and ethnic constitutional recognition.

The largest religious conflicts of that time could be said to be the ones happened at the administrative level, since under the institution of 'patronage' the crown had assumed the management of the church, collected the tithes, appointed bishops, and all pontifical rules were subject to the exequatur of the crown. However, the most important church event of that time, the Council of Trent, was endorsed by Philip II to America in 1564, that is rather quickly and a few years after its closure. But there was one resident Apostolic Nuncio in Spain and it was not allowed to send papal delegates to America. With the change of the House of Austria by the House of Bourbon, the situation started to become more contentious and ended in the second half of the eighteenth century with the expulsion of the Jesuits from all Spanish and Portuguese dominions. The conflict was, in this particular case, not only administrative, but rather political, due to the introduction of liberal ideas through Catholic Enlightenment and Freemasonry. To the expulsion of the Jesuits was added the limitation of the diocesan seminaries and of other religious orders, in order to reduce the number of consecrated staff. This decision had great impact on the formation of the clergy and in the declining quality of higher education with the consequent effect on the ruling elites of different regions. Notwithstanding, as has been said, the monopoly of religious freedom by the Catholic Church remained.

2. The independence gained by Latin American countries at the beginning of the nineteenth century was not the result of a religious movement, but rather of a political and economic one. In fact, many members of the clergy participated in the new governing boards. However, the emerging sovereign States wanted to keep the right of patronage that had been assigned to the crown for their own, which was a source of conflict between State and Church throughout the century, but never affected religious freedom as such. With the arrival of immigrants of Reformed Christianity to most Latin American countries, the States began to accept religious plural-

ism even though they remained officially Catholic. From the second half of the nineteenth century began a transition toward the neutrality of the State facing religions, until formal separation between Church and State was achieved in the first half of the twentieth century in many countries. In some cases covenants were signed with the Holy See and not in others. But it was the policy of the Holy See to promote the independence of the Church from the State, although it was not always understood by local bishops. By the end of the twentieth century the equality of all religious creeds in many countries was legally accepted. This process culminated recently with the adopted constitutional reforms in Mexico that guarantee freedom of religion and state neutrality. However, a large majority of countries has still not approved the equal recognition by the State of all religious creeds, perhaps because they continue to be mostly Catholic, perhaps because they have not yet completed the transition. It is important to note that the UN declaration of 1981 on the elimination of all forms of discrimination and intolerance in matters of religion had its origin in the OAS.

In the second half of the nineteenth century the Church suffered a strong attack from liberal secularism and anticlericalism, mostly on three areas: with regard to education, seeking the State's monopoly; with regard to the family, with the imposition of civil marriage, and with regard to economics, with the confiscation of many church properties. Not in all countries, did this strike come to violence, as in Mexico or Colombia, but in other countries it had more lasting cultural effects, as in Argentina and Uruguay where a great secularization of public space took place. But it can be said however that secularism as an ideology in Latin America was not as strong as in Europe, probably due to the fact already noted that there were no wars of religion and a spirit of cooperation between the State and the Church always prevailed. The really constituent role played for centuries by the Church in relation to civil society, its education, its attendance to the families, its tolerance to religious syncretism with indigenous peoples, its presence in all stratified groups of society, has caused her to be seen as a mediating institution whenever there are internal governance conflicts, precarious social conditions of existence for the population, and also international conflicts, as happened between Chile and Argentina, happily resolved by the mediation of Pope John Paul II.

There have been, however, more recently outbreaks of tension between Church and State because of other ideological orientations that governments have sought to impose. First was the case of Cuba and its Marxist revolution, thereafter the case of military dictatorships in several Latin American countries, where the defense of human rights divided the

Catholics themselves and also confronted the laity with the hierarchy. Then followed Nicaragua and its Sandinista revolution with the participation of priests in the government which has now spread tension in Venezuela, Bolivia and Ecuador, with neo-Marxist socialism and neo-indigenous ideology. Except in the case of Cuba, there has been no direct constraint of religious freedom, but the ideological tension created in these countries has affected freedom of education, has placed administrative obstacles to the independence of the Church or simply has sought unsuccessfully to silence her as the 'voice of the voiceless'.

3. Notwithstanding, I must add that stronger than ideologies have been the mass media which have weakened the Church's presence in public opinion and not necessarily intentionally, but because of the overvaluation of information as an effective means of coordination of social activities. Religion – and, in the case of Latin America, Catholicism – has been the only religion capable of articulating civil society as a whole, but has ceased to be news even for the Catholics, excepting the newly discovered abusive sexual behavior of clergy or consecrates, men and women, with children or youth under their care. This has been, in my opinion, the greatest threat that the Church has had in its five centuries of existence in this region and perhaps elsewhere. The Church has shown herself to the public as a place of corruption, of cover-up, of impunity and in some countries, like Chile, her confidence level has gone down already to 17% even though 70% of the population recognized themselves as Catholics. This situation seems to affect even more young people who no longer recognize the Church as the support of their own culture. We must recognize that in the absence of electronic communication and social networks many of these cases would never have been known and could have gone unpunished. It is clear that the scandal is more newsworthy than the silent charity daily practiced. But what destroys confidence in the Church is the double standard with which on the one hand, she criticizes the world and its relativistic trends and secular permissiveness but, on the other, hides the crimes of those who apparently live an ascetic and holiness life.

This incident shows that religious freedom can no longer be understood solely as the freedom of churches and religious groups, that is, as freedom of cults, because people themselves begin to understand it as the individual right to have or not to have a religion or to blend self-selecting elements that seem most significant of all religious creeds. This leads somehow to a discrediting of official religions with official teachings. Increasingly, the willingness to think for themselves and to understand the freedom of religion as freedom of conscience can be seen in the faithful, including in Catholics. In a sense, all human rights treaties that protect individual freedom of belief

and thought support this view. But still more supporting than the rule of law is the operation of the functionally differentiated society, which is centerless, has no hierarchical structure and organizes itself on the mutual benefits that the interchange of its different subsystems make between themselves. This leads to the need to understand all the fundamental rights and also liberty of religion, not only in extreme cases of their flagrant infringement, but in the everyday functioning of social activity, where they suffer constraints not as a result of the ideologies oriented to deny them but by insufficient understanding of religious discourse and its usefulness for the operation of all subsystems of society.

The constitutional recognition of religious freedom and the international covenants that acquire constitutional status and that have recognized it are without doubt a great achievement of civilization. But in a functionally organized society, this achievement also shows its limitation in the sense that religious freedom, to be effectively recognized, must be prosecuted. As illustrated by the case of politics in several countries as well as quarrels over the use of religious symbols in public places, prosecution has its own limits, not only by the heavy workload of the courts and questionable procedures, but also because the public opinion's demand for transparency operates at a speed that could not match any judicial proceedings. Functionally organized society prefers conciliation rather than a good judgment, searching for a functional substitute to meet the requirement. In order to achieve that religious disputes can be resolved not as in the past by the use of weapons, the rule of law is certainly needed, both nationally and internationally. But it is not enough. The operation of the other functional subsystems is additionally required, and particularly, that the steady increase in the provision of information and communication does not distort their truth, their meaning and opportunity. The 'principle of good faith' has been recognized as one of the pillars of law, but must be extended as the basis for all systems of functions or at least in coordination with them. This applies to science and health, to education and sports, to politics and economy and also to religion. And it must apply especially also to real-time electronic communication.

Functionally speaking, I think that the main guarantor of religious freedom of the people is religion itself, if practiced with the hermeneutic criterion of 'Charity in Truth' as Pope Benedict XVI has written. If the information that religion produces and communicates carries this mark, which is the simplicity of heart, it will have the credibility and transparency that society demands for its balanced functioning. If it does not, religion will be suspected of vested interests, of covering up its own corruption, of ideological arrogance or hegemony claims, rendering useless the legal recog-

dition of religious freedom. What we have learned in Latin America, especially in the last decade, is that the Church was not able to achieve a smooth relationship with media. She fears being caught, that her arguments may be refuted, that her rites may be ridiculed. She is afraid of stirring up dissent among Catholics themselves. It is a great temptation for the Church to exclude herself from the functioning of a society that seems to need no hierarchies to operate and has not enough respect for them. Catholics need to believe more in religious freedom as a fundamental human right, not only as an inevitable recognition of a factual situation that needs to be tolerated reluctantly, but with the genuine belief that it is a fundamental human right rooted in human dignity itself.

# WHAT CAN BE LEARNED FROM THE EXPERIENCES OF VARIOUS SOCIETIES IN DEALING WITH THEIR PRINCIPAL TROUBLE SPOTS?\*

*Can there be a legitimate pluralism in modes of protecting religions and their freedom? The cases of Canada and South Africa*

■ IAIN T. BENSON\*\*

## Introduction

In both South Africa and Canada religions *per se* have not been principal trouble spots for a very long time. What has been very much at issue is the treatment of religious communities and religious believers by the State and from time to time disputes between rights claimants of one sort in relation to rights claimants of another. There are many differences between the two countries but in this paper I shall look for some common themes to evaluate a few of the more significant areas of conflict that engage religious pluralism. *Most importantly, however, I shall examine a change to the proper understanding of the 'secular' in the law which, it is hoped, will indicate a new direction for thinking about religion in relation to the public sphere.*

Religions have been and continue to be recognized as important to both societies. In Canada, the question of Catholic and Protestant accommodation was central to many of the Confederation debates in the 19th century with, for example, Section 93 of the *British North American Act of 1867* (providing for recognition of religious minority rights in education). This set of negotiated compromises continued (and continues in some provinces) until recently when that originating constitutional compromise was abolished in two provinces (Newfoundland and Quebec) by referenda in the late 1990s.<sup>1</sup> The *Canadian Constitution Act 1982* in the *Charter of*

\* ©Continuity Committee of the South African Charter of Religious Rights and Freedoms, 2010.

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*Rights and Freedoms* contains recognition in its Preamble that Canada is founded on principles that recognize ‘the Supremacy of God and the Rule of Law’ though this has not yet been seen to have particularly foundational relevance. The right to the freedom of ‘conscience and religion’ in Section 2(a) and the reference to religion as an enumerated ground protected from non-discrimination has been the subject of many judicial decisions since the Canadian *Charter* was re-patriated from the United Kingdom in 1982.

This paper is divided into three parts. First the framework for understanding religion and the public sphere as developed by the important decision of the Supreme Court of Canada in the *Chamberlain* decision. Second, the actual Constitutional provisions that recognize religious rights in both Canada and South Africa. Third, the experience of inter-faith cooperation in litigation and the development of a South African *Charter of Religious Rights and Freedoms* as examples of civil society initiatives that are outside legislation and litigation as such but which inform both politics and law in relation to religious pluralism.

## **Part 1. The framework for understanding religion and the public square**

### *Can there be legitimate pluralism in modes of protecting religions and their freedoms?*

The answer to this question whether religious pluralism may be protected by constitutional law and social initiatives in both Canada and South Africa is, as experience has shown in recent years, ‘yes’. The legal/political has been informed, in both South Africa and Canada by social developments in relation to litigation and civil society initiatives that will inform and should inform the legal and political developments in relation to protecting religious diversity. The key word, however, is ‘may’ and as I shall set out in this paper, there are some worrying examples of very real threats to religious liberty particularly in Canada at the moment.

<sup>1</sup> A detailed discussion of this history and various constitutional foundations and contemporary issues may be found in Iain T. Benson, *The Freedom of Conscience and Religion in Canada: Challenges and Opportunities*, *Emory International Law Review*, Vol. 21, No. 111, 2007 at 111-165. See also: Elizabeth Shilton, Chapter 13: ‘Religion and Public Education in Canada After the Charter’, in John McLaren and Harold Coward eds., *Religious Conscience, The State and the Law: Historical Context and Contemporary Significance* 206 (New York: SUNY, 1999). This volume also includes essays on the Canadian treatment of the Doukhobor and Hutterite communities.

That protection may be given to religious individuals and their communities, however, must be qualified by a recognition that sometimes the *foundational presuppositions* that are employed in relation to the nature of the public sphere and belief, cause a great deal of confusion and may pre-dispose to certain outcomes that cut against the public sphere as being religiously inclusive. Principal amongst these confusions is the use of terminology to describe the public sphere and it is for this reason that I would like to begin with this language to create what I hope is a stronger base upon which to analyze religious liberty in our contemporary period.

*The nature of the ‘secular’: what do we mean by it and is it religiously inclusive or exclusive?*

This section offers a critique of some of the common terminology that is frequently used to describe religion in relation to the state. In various ways these terms tend to assume that all ‘faith’ is religious and that religion is or should be *private*. In addition, the terminology tends to be both bifurcative, driving a wedge between religions and the public sphere and inaccurate by failing to view agnosticism and atheism as belief systems. The combined effect of these two tendencies is to leave religious belief systems at a public disadvantage (in terms of such things as public funding) in relation to the unexamined faiths of atheism and agnosticism.

Recent legal cases in Canada and South Africa suggest that, for the reasons just given, we are at a time when the settled understanding of ‘secular’ as ‘non-religious’ needs to be revised. A very important legal decision occurred in Canada in 2002. In the *Chamberlain*<sup>2</sup> decision the Supreme Court of Canada upheld the unanimous Court of Appeal from British Columbia which had determined that the meaning of ‘secular’ in Canadian law must be *inclusive* of religious believers (and by inference their communities) rather than excluding them from participation. Perhaps because this shift in understanding has been so radical, it is the case that, even now, some eight years later, the new interpretation of ‘secular’ for the purposes of Canadian law is not widely known in Canada and frequently missed by counsel who should be using this in legal arguments and by judges in making their decisions.

In addition, the fact that there is and should be no such thing as a non-religious secular can be somewhat threatening to those who have assumed this unquestioningly. The recognition that all positions, including atheism

<sup>2</sup> *Chamberlain v Surrey School District No. 36* [2002] 4 S.C.R. 710 (SCC) (‘*Chamberlain*’).



and agnosticism, are positions of 'faith',<sup>3</sup> even though not of religious faith, can prompt a re-understanding of the public sphere in a more accurate manner. How this happens depends on the definition of the public sphere as this determines how we eventually accommodate or fail to accommodate differing beliefs, regardless of whether these beliefs are religious or non-religious in nature. The principles of accommodation and diversity, both well established and recognized in the law, are of practical importance in terms of how they work out in culture and politics.

Much of the language that is used to characterize the public sphere virtually insulates it from religion and insulates religion from its proper public influence. Thus, if 'secular' is equivalent to 'non-religious' and 'secular' means all those public things like government, law, medical ethics, public education and so on, then these major aspects of culture are outside religion and religion is outside them. This important aspect of the foundational language is rarely commented upon and shows the dominance of the exclusivist (religion excluded from the 'secular' as public) position.

But what about the beliefs of the citizens who are in government, law, medicine and public education? When the 'secular' is read as 'non-religious' in its exclusivist position, then the beliefs of atheists and agnostics, who define themselves as 'non-religious', are accorded representation, but those who define themselves as 'religious' are not. This is neither representative nor fair, yet it is the dominant and largely unexamined result of assuming the 'public' as 'secular', and the 'secular' as 'non-religious'.

This article is a counter-reading to this common and, I have argued, erroneous construction of the public sphere. If 'secular' means 'the opposite of religious' or 'non-religious', and if the public realm is defined in terms of the 'secular', then the public sphere has only one kind of believer removed from it – the religious believers. I suggest that this way of using 'secular' is deeply flawed and will tend to lead us in the direction of religious

<sup>3</sup> John Henry Cardinal Newman recognized that everyone who acts must take matters on faith and wrote: 'Life is for action. If we insist on proofs for everything, we shall never come to action: to act you must assume, and that assumption is faith' see: Newman, John Henry Cardinal, 'Tamworth Reading Room Letters', in *Discussions and Arguments on Various Subjects* (London: Longmans, 1899) at 295. Closer to our own day, a philosopher who spent a considerable part of his working life in South Africa, R.F.A. Hoernlé, wrote that 'every bona fide judgment is characterised by belief...[and] if "faith" is firm belief, conviction of truth, then faith in this context is indistinguishable from knowledge', 'Knowledge and Faith', in *Studies in Philosophy*, Daniel S. Robinson. Ed. (Cambridge: Harvard University Press, 1952) at 55-61.

exclusivism. An express meaning to ‘secular’ or ‘public’ that rules out religion without arguments based on fairness and justice leaves those realms distorted in relation to principles of accommodation. If we start off with an implicit idea that the public is secular, thus ‘non-religious’, then it is difficult to balance or reconcile the various interests held by religious claimants and others in a public setting.

In contrast to this exclusivist position, this article suggests a different approach, that of ‘religious inclusivism’. Only within an inclusive approach can accommodation and diversity have their proper application and meanings. Proper understanding of the public sphere requires a more explicit acknowledgment of the beliefs of those within it, whether these beliefs come from religion or not.<sup>4</sup> A decision by the Canadian courts is an illustrative example of the new way in which the term ‘secular’ can be understood since it shows the development from the common definition of ‘secular’ to one that is more accurate and fair. At the same time, however, the decision handed down by the Supreme Court of Canada in the case of *Chamberlain* still failed to address properly the concept of ‘secularism’, a term it seemed to endorse when doing so was inconsistent with how it reconfigured the understanding of the term ‘secular’.

In an attempt to achieve a fairer and more accurate result, the Supreme Court of Canada unanimously endorsed the reasoning of the British Columbia Court of Appeal which had overturned the reasoning of a trial judge who had espoused what for many would be the common use of the term ‘secular’ as meaning ‘non-religious’: this involved re-understanding and, in effect, re-defining the meaning of the term ‘secular’. In *Chamberlain*, the Supreme Court of Canada drew on a definition of the ‘secular’ that had been put forward by Justice McKenzie, for the first time in any legal judgment, in the appeal ruling by the British Columbia Court of Appeal. This definition succinctly encapsulated the pluralist or inclusive sense of the ‘secular’:

In my opinion, ‘strictly secular’ in the *School Act* can only mean pluralist in the sense that moral positions are to be accorded standing in the public square irrespective of whether the position flows out of a conscience that is religiously informed or not. The meaning of strictly secular is thus pluralist or inclusive in its widest sense (paragraph 33).<sup>5</sup>

<sup>4</sup> See: Iain Benson, ‘The Case for Religious Inclusivism and the Judicial Recognition of Associational Rights: A Response to Lenta. Case Comment’, *Constitutional Court Review*, 1, pp. 297–312 (2008).

<sup>5</sup> *Chamberlain v. Surrey School Board* (2000), 80 B.C.L.R. (3d) 181; reversing (1998), 60 B.C.L.R. (3d) 311 (S.C.).

Understood in this manner, convictions emanating from religious beliefs ought to be at no disadvantage in terms of public access and respect to those beliefs of others that do not emanate from religious convictions. The Supreme Court of Canada majority agreed with the reasoning of Justice Gonthier in dissent on another aspect of the decision as to the religiously inclusive meaning of 'secular'. The term in Canadian law, therefore, now means religiously inclusive, not exclusive. Justice Gonthier gave the following reason for his position:

In my view, Saunders J. [of the British Columbia Supreme Court where the case was heard at trial] below erred in her assumption that 'secular' effectively meant 'non-religious'. This is incorrect since *nothing in the [Canadian] Charter, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy*. I note that the preamble to the *Charter* itself establishes that '...Canada is founded upon principles that recognize the supremacy of God and the rule of law'. According to the reasoning espoused by Saunders J., if one's moral view manifests from a religiously grounded faith, it is not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that everyone has 'belief' or 'faith' in something, be it atheistic, agnostic or religious. To construe the 'secular' as the realm of the 'unbelief' is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism. The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of a modern pluralism (paragraph 137, emphasis added).<sup>6</sup>

*As a result, the term 'secular' now in Canada means, legally speaking, religiously inclusive, not exclusive.* The approach of the Supreme Court of Canada that a public school must accommodate a variety of beliefs is at stark variance with the approaches taken where the 'secular' is defined as excluding religion and religious communities.

The Constitutional Court of South Africa has also recognized different spheres but, in common with general usage and the all too common judicial

<sup>6</sup> *Chamberlain*, footnote# 2 above, at 749.

dicta, placed ‘sacred’ and ‘secular’ in unhelpful opposition. Despite this, *Fourie*, in understanding the public realm as an area of ‘co-existence’ between different spheres, moved towards a richer and more nuanced understanding. In the words of Justice Sachs:

In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other [...]. The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. *The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.* [...] It is clear from the above that acknowledgment by the State of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected. The two sets of interests involved do not collide; they co-exist in a constitutional realm based on accommodation of diversity (paragraphs 94–98, emphasis added).<sup>7</sup>

In line with the argument above, however, it would have been better to describe the relationship between the state (law and politics) and religious believers as part of a relationship in which, despite the jurisdictional separation, there is co-operation within ‘the same public realm’ without reference to the ‘secular’ and the ‘sacred’.

<sup>7</sup> *Minister of Home Affairs and Another v. Fourie and Another (with Doctors For Life International & Others, Amici Curiae) and Lesbian & Gay Equality Project & Eighteen Others v. Minister of Home Affairs* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (‘*Fourie*’) In *Fourie*, Justice Sachs’s conception of differing beliefs co-existing within the public realm is of signal importance and sets the stage, along with the approach of Justice Gonthier in the *Chamberlain* case, for a redefinition or, better yet, *re-understanding* of what might be termed central public terminology.

### *The need to move away from ‘religion and the secular’*

For many people, including politicians and religious leaders, the phrase ‘religion *and* the secular’ contains the implicit assumption that whatever the ‘secular’ is, it is somehow completely separate from religion. Yet, if religions (religious persons and their communities) are to have a role in the public sphere (that includes, at the very least, public education, medical ethics, politics and law themselves), then a bifurcation of this sort is destructive to the idea of a interpenetration between religion and the wider culture that we have seen in the legal decisions just referred to, that the law has begun to recognize.

Certainly, the original and older uses of secular as *saeculorum* meaning in relation to ‘the age’ or ‘the times’ or ‘the world’, did not necessarily import a desacrilized conception of the public sphere; but this has certainly changed in commonly understood usage today. Indeed, in Roman Catholic usage, both the clergy and certain sorts of institutes have been understood to be properly ‘secular’ in this earlier use. Thus the clergy are divided between ‘secular’ and ‘regular’ clergy and there can be ‘secular institutes’ none of which are non-religious. This shift from a former religiously inclusive secular to a religiously exclusive one, therefore, is of the utmost importance at a time when the term secular is being used so widely in relation to the public sphere. We would do better, in fact, to banish the use of the term secular entirely when what we really mean is the public sphere and the relation of religion to the sphere. The term ‘secular’ with its deeply ambiguous usages in our contemporary age simply confuses our analysis at the outset.<sup>8</sup>

Prior to *Chamberlain*, it was not uncommon (and still is not in general usage) to see comments from the judiciary that drew a sharp line between the ‘secular’ and the sacred and between intellect and faith. Consider the following passage from a leading decision on Catholic denominational rights from 1999:

A non-believer would necessarily teach the subject *from an intellectual rather than a faith-based perspective*. Separate [religious] schools do not aim to teach their students about these matters from a neutral or objective point of view. Separate schools explicitly reject that secular approach...<sup>9</sup>

<sup>8</sup> I have written about this in ‘*Towards a (Re) Definition of the Secular*’, University of British Columbia Law Review (2000) 33 at 519–549 (cited with approval by Gonthier J. in *Chamberlain*).

<sup>9</sup> *Ontario (A.G.) v. Daly* (1999) 38 O.R. (3d) 37 at para. 65 per Sharpe J emphasis added; upheld by [1999] 172 D.L.R. (4th) 241 (Ont. C.A.), leave to appeal refused 21, Oct. 1999, S.C.C.A. No. 321.

Note how faith here is viewed as distinct from ‘intellectual’ and the secular is insulated from the religious perspective. *Chamberlain*, if its implications are worked out consistently therefore, will mark a revolutionary paradigm shift with major legal and cultural implications.<sup>10</sup>

***Religion not just a private right; the public place of religion in both South Africa and Canada; ‘separation of church and state’ and laicism rejected; co-operation of religions and the state affirmed in both Canada and South Africa***

It had been commonly understood, at least since the *Big M Drug Mart* decision of the Supreme Court of Canada (1985), that the essence of the freedom of religion was not just the right to have a religion in private but ‘...the right to declare religion openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching in dissemination’.<sup>11</sup>

Note that the words employed are active, public words – ‘declare’, ‘manifest’, ‘practice’, ‘teaching’, ‘dissemination’.

Further insight about the public nature of religious freedom may be found in South African jurisprudence. There it has been recognized that religion is not always merely a matter of private individual conscience or communal sectarian practice. Thus, Justice Sachs has stated that:

Certain religious sects do turn their back on the world, but major religions regard it as part of their spiritual vocation to be active in the broader society. Not only do they proselytize through the media

<sup>10</sup> A good example of a learned exchange that fails to show any appreciation of even the possibility of the religiously inclusive secular is a recent one between Professors Sajó and Zucca (though many other authors could provide illustrations of the point): See, András Sajó ‘Preliminaries to a concept of constitutional secularism’, *I•CON*, Vol. 6, Number 3 & 4, 2008 pp. 605–629 and Lorenzo Zucca, ‘The crisis of the secular state—A reply to Professor Sajó’ *I•CON*, Vol. 7, Number 3, 2009, pp. 494–514. Professor Zucca’s generally strong rejoinder to Professor Sajó would have been much more effective had he not accepted the former’s (and most people’s) discussion of ‘...conflicts between religion and the secular state...’ (at 514). We do need, as Professor Zucca suggests ‘...to modify the attitude with which the secular states respond to diversity and the fact of pluralism’ (at 514) but, ironically, the most likely way of doing this is to stop characterizing the public spheres and states as ‘secular’ when they are very much something else – *states made up of competing belief systems* that can and should expressly include the *public* dimensions of religions. Until these deeper epistemological waters are navigated we shall never properly deal with the relationships between law and religion or the state and beliefs including the religious.

<sup>11</sup> *R. v Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 at 336 (SCC).

and in the public square, religious bodies play a large part in public life, through schools, hospitals and poverty relief. They command ethical behaviour from their members and bear witness to the exercise of power by State and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution.<sup>12</sup>

In another decision, the same judge stated:

One cannot imagine in South Africa today any legislative authority passing or sustaining laws which suppressed central beliefs and practices of Christianity, Judaism, Islam or Hinduism. These are well-organised religions, capable of mounting strong lobbies and in a position materially to affect the outcome of elections.<sup>13</sup>

Neither country accepts the American conception of ‘separation’ (as that has come to be defined) nor the French conception of *laïcité*. This does not mean, however, that arguments based in whole or in part on these concepts are not made in courts or heard in political or popular rhetoric; they, and comments regarding the equally misunderstood concepts of ‘secularism’, are as ubiquitous as they are confused and confusing.

Neither South Africa nor Canada has been subject to the kind of inter-religious battles that one observes in other countries. This is not to say, however, that religious persons and their communities are sanguine about their position within contemporary Canadian or South African culture. The litigation examples, upon which I shall draw, below, show that here, as in other areas eternal vigilance (and litigation) have often been the price of religious liberty.

***Religion is recognized as being important to society more in South African case-law than Canadian***

The legal judgments in South Africa have recognized the importance of religion to South African society. They have done so in a language far more encouraging of the importance of religion than one would find in legal judgements elsewhere in the world, such as Canada. A judgment exemplifying a positive conception of the role of religion to South African

<sup>12</sup> *Christian Education*, 2000 (10) BCLR 1068.

<sup>13</sup> *Prince v. President of the Law Society of the Cape of Good Hope and Others*, 2002 (3) BCLR 289.

society is a decade-old decision from the Constitutional Court of South Africa in the case of *Christian Education v. The Minister of Education*. Though it was referred to more recently in a Supreme Court of Canada decision touching on religious rights, the following critical passage was not referred to by the Canadian judges:

For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong.<sup>14</sup>

Note here that religion is recognized as having a social dimension as well as a personal or individual dimension. This is important as some commentators (and a few Canadian legal decisions) have suggested that the right of religion is essentially individualistic. The passage above shows a greater awareness of the social importance of religion.

Nowhere can a passage be found in a Canadian Supreme Court decision, or any other Canadian decision with which the author is familiar, that says the sort of thing referred to above from the *Christian Education*-decision in South Africa. Canadian judges, and those in other countries, are much less confident about the important cultural role of religion or, alternatively, do not speak in such encouraging terms about it. This hesitance does not assist the public respect for religions or a richer conception of pluralism including religious pluralism.

### *Confusions regarding secularism*

As with secular, the term 'secularism' is conspicuous by its general non-definition. Almost everywhere the term is used at variance with its origins in the work of George Jacob Holyoak, the man who is credited by the *Oxford English Dictionary* with defining the term in 1851. In Holyoak's under-

<sup>14</sup> *Christian Education South Africa v. Minister of Education* 2000 (4) SA 757 (CC), paragraph 36; referred to in the judgment in Canada on the case *Bruker v. Marcovitz* 2007 SCC 54. For the scope of freedom of religion in South Africa, much of which was based on Canadian decisions, see Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (Cape Town: Juta, 5th ed. 2005) at 336-357.



standing, secularism was a project designed to reconstruct the public order on a ‘material’ basis to free it from the non-empirical risks inherent in any projects in which metaphysical claims that were not empirical would have a place. In particular, Holyoak sought to replace religious understandings with ‘material’ ones.<sup>15</sup>

Like the term ‘secular’ ‘secularism’ has been used by others in a bewildering variety of ways some open to religious involvement and some diametrically opposed. As with the term ‘secular’, therefore, ‘secularism’ is not a particularly helpful term to use in discussing the role of religions in the public sphere. Joining ‘secularism’ with such terms as ‘open’ further confuses the matter. Given its origins and the purpose of the man who founded the movement and his followers, it would be wiser to limit secularism to the ideology that is, in fact, anti-religious and speak of an *open public sphere* as the framework within which a contemporary political order is best grounded.

The terms ‘secular’ and ‘secularism’ and to a lesser extent ‘secularization’ are useful only if properly and clearly defined within their context but, it is suggested, would be better *left unused* if clarity and engagement are the purposes of our analysis since their clear definitions seem well beyond capture now that the uses are so confused.

## **Part 2. Constitutional provisions recognizing the freedom of religion in Canada and South Africa and the provisions limiting those rights:**

In South Africa, the formation of the *Interim Constitution (Act 200 of 1993)* and the *Constitution (Act 108 of 1996)* also incorporated significant recognition of religious participation and involvement as an aspect of personal and community rights. Religion is one of the rights enumerated in the equality provision (Section 9) from which the right is said to be ‘non-derogable’ with respect to unfair discrimination. As with the Canadian *Charter*, therefore, the frequent mistake of pitching religion *against* equality is a failure to understand that in both countries the text lists religion as *itself* one of the equality rights.

<sup>15</sup> See Iain T. Benson ‘*Considering Secularism*’ in *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion and Public Policy* (Montreal: McGill-Queen’s University Press, 2004) at 83–98. See also, Iain T. Benson ‘*That False Struggle between Believers and Non-Believers*’; ‘*Le faux combat entre croyants et non-croyants*’; ‘*Quella falsa lotta tra credenti e non credenti*’ Invited Article in the English, French, Italian, English-Urdu and English-Arabic editions of *Oasis* (Venice, Marcianum Press, 2011) Year 6 No. 12, December 2010.

The Freedom of ‘conscience, religion, thought belief and opinion’ is guaranteed (S. 15.(1)) and ‘Religious observances may be conducted at state or state-aided institutions’, provided that they follow rules made by appropriate authorities and they are conducted on an equitable basis and that attendance is voluntary (Sections 15 (2) (a – c)). Similarly, the education provision provides ‘...state subsidies [may be provided] for independent educational institutions’ (Section 29 (4)).

Further, and in a provision for which there is no exact parallel in the Canadian Constitution, the South African *Bill of Rights* provides, that: S. 31 (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community – (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the *Bill of Rights*.

In both Constitutions the limitation provisions (Canada, Section 1; South Africa, Section 36) the rights may be limited by such ‘reasonable limitations’ as are ‘demonstrably justifiable’ in a ‘free and democratic society’ (Canada) and ‘reasonable and justifiable’ in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

The South African language reflects the Canadian ‘*Oakes test*’<sup>16</sup> which set out similar proportionality and least restrictive means approach in Canadian jurisprudence.

<sup>16</sup> *R. v. Oakes* [1986] 1 S.C.R. 103 (SCC). The Court presents a two-step test to justify a limitation based on the analysis in *R v. Big M. Drug Mart* (cited elsewhere). First, it must be ‘an objective related to concerns which are pressing and substantial in a free and democratic society’, and second it must be shown ‘that the means chosen are reasonable and demonstrably justified’. The second part is described as a ‘proportionality test’ which requires the invoking party to show: First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair ‘as little as possible’ the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of ‘sufficient importance’.

***Recent experience with religious accommodation and including some threatening developments from Quebec and Ontario:***

In Canada, many religious believers and groups speak openly about feeling excluded and threatened by developments they see around them.<sup>17</sup> In recent decisions in both countries, religious symbols have been accommodated in relation to public schooling. Thus the wearing of a nose stud (in South Africa) in the *Pillay* decision<sup>18</sup> and a kirpan (for a Sikh student in a Quebec school) in the *Multani* decision<sup>19</sup> have been found to be required aspects of the freedom of religion (or culture and religion) in both countries.

In addition, both countries have developed jurisprudence that, as set out above in the reference to the passage from *Amselem* (Canadian Supreme Court) that the Courts must be careful not to get beyond a simple sincerity test when determining if a person's religious beliefs have been infringed. The courts do not, on one level, want to 'get inside' religion. So far so good.

What has happened, though, is that in some cases Human Rights Tribunals and on occasion courts have shown insufficient regard for the religious ethos of religious projects. Where they have been able to see the importance of religious garb or practice for individuals (*Pillay*, *Amselem*, or *Multani*) they have been rather less successful in understanding the importance of an overall religious ethos to religious *projects* for religious groups.

One way this manifests itself is the desire for courts to parse job functions in relation to complaints against religious employers to see whether in the tribunal or court's eyes the job in question is 'connected to religion' but this is a dangerous enquiry if it overlooks the importance of an overall project to a religious community. From the religious community's point of view, a janitor or a clerk who have no religious teaching duties may play an integral part in the overall religious ethos of an organization – taking part in religious services and so on. This failure to respect the overall project of religions is something that needs to be understood more in the years ahead by tribunals and courts in both countries.

One particularly worrying development involved a decision from an Ontario Human Rights Tribunal which determined that the special exemption provision which shelters religious employers from claims of discrimination when they hire co-religionists, would only apply when

<sup>17</sup> C. Lafferty, 'Religion, Sexual Orientation and the State: Can Public Officials Refuse to Perform Same-sex Marriages?' (2007) 85 *Canadian Bar Review* (2007) 287, at 307–312.

<sup>18</sup> *Mec for Education: Kwazulu-Natal v. Pillay* (2008) (1) SA 474 (CC).

<sup>19</sup> *Multani v. Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR 30.

religions served their own members. Such an extreme narrowing of religious work in the world was strongly resisted on judicial review and various groups including the Ontario Assembly of Catholic Bishops intervened in court to ensure that this significant narrowing of the meaning of 'religion' was corrected on appeal. In major ways it was so corrected with the Human Rights Tribunal's interpretation of the Statute found to have been 'absurd'.<sup>20</sup>

The most recent decision of the Supreme Court of Canada to date touching on the freedom of religion has been widely criticized for failing to give much weight to the minimal impairment aspect of the limitation provision of the Canadian *Charter* (see above). In the *Hutterian Brethren* decision, the court ruled that Hutterites who do not believe, for religious reasons, in having their photographs used for identification purposes, must nonetheless comply with a provincial law for reasons related to the public interest in identity in relation to driving licences. Critics have said that the Court should have considered that other means (such as finger-prints) could have been used to achieve the state's purpose without ignoring the concerns of the religious community. The decision was a very narrow majority with three justices of the seven in dissent.<sup>21</sup>

***Quebec mandatory curriculum on ethics and religious culture and refusal to grant exemptions or opt-outs for parents opposed on the ground of conscience and religion***

***compulsory course on ethics and religious culture with refusal to grant exemptions to students of objecting parents***

Most recently, in Quebec, a province known for its particular concerns about religion during and since 'the quiet revolution', a mandatory course entitled 'Ethics and Religious Culture' (ERC) has been created for all schools, public and private, confessional and non-confessional. Despite many hundred (some have said as many as two thousand) requests for exemptions from parents and from at least one Catholic High School, the Province has refused to grant exemptions.

The case involving the parents and the public school setting is to be heard in May 2011 at the Supreme Court of Canada.<sup>22</sup>

<sup>20</sup> *Ontario Human Rights Commission et al. v. Christian Horizons* (2010) 102 O.R. (3d) 267-298 (Ont. Div. Ct.) (May, 2010).

<sup>21</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567.

<sup>22</sup> *S.L. and D.J. v. Commission scolaire des Chênes and Attorney General of Quebec*, Supreme Court of Canada File 33678. Prior to this it was settled law in Quebec that no child

### *Failure to grant exemptions from mandatory ERC course to Catholic high school overturned*

In parallel proceedings a Catholic High School has successfully overturned the Province's failure to grant it an exemption from the course when the Minister failed to consider a Catholic course on world religions and ethics 'equivalent' to the required course.<sup>23</sup> In various statements, the Assembly of Quebec Bishops adopted a conciliatory 'wait and see' approach and said that it had 'some concerns' about the curriculum. The Assembly, however, failed to make any statements about the importance of exemptions or alternative delivery of valid program goals and, in so doing, was taken by the trial judge to have endorsed the matter from a Catholic perspective. Statements by a Catholic theologian (also not referring to parental exemptions) bolstered the judge's view that the Catholic Church endorsed the program. A much stronger statement citing the importance of parents as primary educators and the Province's duty to consider exemptions or acceptable compromises (i.e. alternative delivery to valid Provincial goals) was in order but was not forthcoming).

Recently a Directive from the Quebec minister de la Famille Mme. Yolande James, has instructed all subsidized religious day-cares in the Province to cease giving any religious instructions in religious day-cares. The Minister has indicated that for reasons of socialization those between 0 and 5 years of age will no longer be permitted to be exposed to any religious activities '...par exemple, la récitation répétée de prières, la mémorisation de chants religieux ou l'apprentissage de gestuelles religieuses'.<sup>24</sup> The justification rests upon the

could be forced to attend religious instruction contrary to the wishes of his or her parents. See: *Chabot c. School Commissioners of Lamorandière* (1957), 12 D.L.R. (2d) 796 (Que. C.A.). See, for a South African comparison respecting the denominational nature of religious schooling and a rejection of three leading Canadian cases (a rejection the author believes is justifiable) *Wittmann v. Deutscher Schulverein, Pretoria and Others* 1998 (4 SA 423 (T) (Transvaal Provincial Division) per. van Dijkhorst J. who distinguished *Adler v. Ontario* (1996) 3 SCR. 609, *Canadian Civil Liberties Association v. Ontario* (1990) 46 CRR 316 and *Zylberberg v. Sudbury Board of Education* (1988) 34 CRR 1 all of which rejected exemptions as satisfactory in the face of religious education and opening exercises.

<sup>23</sup> *Loyola High School v. Courchesne*, Superior Court (S.C.) Montreal, QC, Canada, 500 – 17 – 045278-085, Justice Gérard Dugré (June 18, 2010) Reported at 2010 QCCS 2631. This matter has been appealed to the Quebec Court of Appeal but at the time of writing no date has been set for the hearing.

<sup>24</sup> Centre de presse. Quebec Met fin A L'Enseignement Religieux Dans Les Services de Garde Subventionnées, Monreal le 17 decembre 2010 see: [www.mfa.gouv.qc.ca/fr/ministere/centre-presse/communiqués-famille](http://www.mfa.gouv.qc.ca/fr/ministere/centre-presse/communiqués-famille). Press reports have pointed out the public con-

claim that there is a difference between teaching religion and celebrating a cultural tradition. Christmas trees and the songs of Bing Crosby may be allowed to remain as long as the songs are of a non-religious sort.

The breadth and depth of this concern is not something that any citizen should take lightly given the important role that religious beliefs play in society. It remains to see what the Assembly of Bishops of Quebec, or any individual Ordinary will say publicly in relation to this most recent overreach by the Province of Quebec.

### *Inter-faith religious co-operation as a social good enhancing pluralism*

Canadian philosopher Charles Taylor has noted:

Judicial decisions are usually winner-take-all; either you win or you lose. In particular judicial decisions about rights tend to be conceived as all-or-nothing matters... The penchant to settle things judicially, further polarized by rival special-interest campaigns, effectively cuts down the possibilities of compromise.<sup>25</sup>

Religious communities cannot fail to be concerned about the effects of legal decisions on their rights. The Constitution (in common with most countries) does not focus on 'the Christian religion' but on 'religion' and what happens to one religion in terms of interpretation of the law will have an influence and impact on other religions. It is not surprising, therefore, that inter-faith religious coalitions have become a part of the litigation scene in Canada and (to a lesser extent) South Africa. It is necessary for those concerned about the role of the law to recognize that all religions ought to be concerned how other religions are treated by politics and the law.

Canada as a matter of fact has had a history of 'inter-faith' coalitions making successful attempts at intervention in some of the major court cases of the day where religious rights and freedoms are at issue.

cerns about the government's new Regulations and noted the irony that manger scenes may still be allowed but that those who run the schools may not name the figures. In addition the Minister explained that while Imams, rabbis or ministers may visit the religious day-cares they may not speak about religion. See: Lysiane Gagnon, 'Lose Religion or the Subsidy' *Globe and Mail*, Tuesday December 28, 2010 p. A17; Editorial, 'Religion in Retreat' *The National Post*, Thursday December 30, 2010 p. A10; Ingrid Peritz, 'Quebec Curbs Religion in daycare; Policy triggers emotional debate over how inspectors will differentiate between religious conviction and cultural values' *The Globe and Mail*, Wednesday, December 22, 2010 page A4.

<sup>25</sup> C. Taylor, *The Malaise of Modernity* (Toronto: Anansi Press, 2001), at 116.

Inter-faith coalitions intervened first, in relation to the status of the unborn in a case dealing with abortion (*Borowski*,<sup>26</sup> late 1980s). Then, a few years later, in relation to statutory conjugal language in statutes dealing with 'sexual orientation' in the early to mid 1990s, (*Egan and Nesbit*,<sup>27</sup> 1994) similarly, with respect to same-sex marriage (*Barbeau*,<sup>28</sup> *Halpern*,<sup>29</sup> and the *Marriage Reference*,<sup>30</sup> 2002 – 2006) all had inter-faith interventions.

Inter-faith, and sometimes expressly Christian groups (such as the Evangelical Fellowship of Canada or the Canadian Conference of Catholic Bishops or Provincial Assemblies of Bishops or lay-led Religious Civil Rights groups), have also made frequent representations to House and Senate Committees on a wide variety of constitutional and social justice issues over the years.

The expressly inter-faith (as opposed to simply Christian) coalitions that emerged in the 1990s in Canada were in part responsive to the fact that the concerns on the cases were shared across religious divides (such as the 'sanctity of life' in relation to the abortion issue). In addition, Canada, like South Africa, understands itself to be multi-cultural and pluralistic thereby lending a particular 'fit' to any application before the court that claims to speak to multi-cultural and inter-religious cooperation.<sup>31</sup>

In the same-sex marriage litigation in Canada, various groups including the Evangelical Fellowship of Canada (representing some 30 or so Protestant churches), joined together with the Canadian Conference of Catholic Bishops to form a coalition to argue that pressure on the 'traditional' definitions of marriage would eventually put pressure on the place of religions themselves. A Marriage Alliance in South Africa (not inter-religious but cross-denominational) also argued on behalf of certain religious concerns in the same-sex marriage litigation in South Africa.

The initial concern, over inclusion of same-sex couples into the definition of 'spouse' in the federal *Old Age Security Act* was that the recognition of same-sex relationships within a conjugal category such as 'spouse' would lead, in-

<sup>26</sup> *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

<sup>27</sup> *Egan v. Canada*, [1995] 2 S.C.R. 513, 1995 SCC 49.

<sup>28</sup> *Barbeau v. British Columbia (A.G.)* 2003 BCCA 406.

<sup>29</sup> *Halpern v. Canada*, [2003] O.J. No. 2268.

<sup>30</sup> *Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698, 2004 SCC 79.

<sup>31</sup> Section 27 of the *Canadian Charter of Rights and Freedoms* requires to the Courts to interpret the provisions of the Constitution so as to enhance Canada's 'multi-cultural heritage'; Sections 30 and 31 of the *South African Constitution* refer to the rights of 'language' and 'cultural life' and the importance of 'culture', 'religious' and 'linguistic' communities.

evitably, to a claim for same-sex marital recognition putting pressure on those communities that wished this recognition to be only for opposite sex couples. Though this concern was dismissed by counsel for the claimant couple (and interveners on their side of the case) as spurious, history showed that it was, years later, justified. It was not much more than eight years later that the challenges to the common-law recognition of marriage as ‘male/female’ arose in three Canadian provinces – British Columbia, Ontario and Quebec.

Again, an ‘inter-faith coalition for Marriage and the Family’ responded, retained counsel and went into court arguing that pressure on the national definition (the federal constitutional power dealing with the capacity to marry) of ‘marriage’ could put pressure on religions to maintain their own understandings about the nature of marriage.

In the event, whether inter-faith or simply Christian, these coalitions failed to maintain a heterosexual only recognition of marriage in both countries. Still, their expressed concerns about pressure being brought to bear on religious groups and individuals if the law changed was heard and due to the involvement of religious groups arguing that their perspective be respected, decisions of the highest courts in both countries made express mention of religious protections.<sup>32</sup>

The Court rejected the arguments made by certain religious groups stating that the recognition of same-sex marriages would discriminate against them.<sup>33</sup> The Canadian Supreme Court, in explaining its position, stated:

The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster.<sup>34</sup>

In answer to concerns that civil access to ‘same-sex marriage’ would create a ‘collision of rights’ in the culture, the Canadian Supreme Court said:

The protection of freedom of religion afforded by [§] 2(a) of the *Charter* is broad and jealously guarded in our *Charter* jurisprudence. We note that should impermissible conflicts occur, the provision at issue will by definition fail the justification test under [§] 1 of the

<sup>32</sup> See the decision of the Supreme Court of Canada in *Reference re Same-Sex Marriage* 2004 3 SCR 710 (Can) (*the Marriage Reference*) and the Constitutional Court of South Africa in *Fourie* note # 7, above.

<sup>33</sup> *Ibid.*, 718.

<sup>34</sup> *Ibid.*, 719.



*Charter* and will be of no force or effect under [§] 52 of the *Constitution Act, 1982*. In this case the conflict will cease to exist.<sup>35</sup>

On the third question posed in the Canadian *Marriage Reference*, ‘[d]oes the freedom of religion guaranteed by Section 2(a) of the *Charter* protect religious officials from being compelled to perform same-sex marriages contrary to their religious beliefs?’<sup>36</sup> the Court pointed out that the compulsion which the question envisages is by the state.<sup>37</sup> It also stated that such compulsion for officials or for ‘sacred places’ would violate the guarantee of freedom of religion under § 2(a).<sup>38</sup> Most significantly, the Court held this guarantee to be ‘broad enough to protect religious officials from being compelled by the state to *perform civil or religious same-sex marriages* that are contrary to their religious beliefs’.<sup>39</sup>

Justice Albie Sachs formerly of the Constitutional Court of South Africa, made the following thoughtful comment regarding the search for equality:

[E]quality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference brings to any society.<sup>40</sup>

<sup>35</sup> *Ibid.*, 721.

<sup>36</sup> *Ibid.*, 721.

<sup>37</sup> *Ibid.*, 721.

<sup>38</sup> *Ibid.*, 722–23.

<sup>39</sup> *Ibid.*, 723 (emphasis added); see also Iacobucci, “Reconciling Rights” The Supreme Court of Canada’s Approach to Competing Charter Rights’, 20 *Supreme Court Law Review* (2003) 137, at 137–167. The argument here is that ‘reconciling’ has advantages to ‘balancing’ as an analytical and practical tool in certain types of cases. The article reviews where reconciliation might be the best approach to what could, at first blush, appear to be a clash or conflict of rights. Of course the judgment left unanalyzed an equally practical question: whether this protection for ‘religious officials’ would apply to the accommodation of civic officials say, Marriage Commissioners operating under state licenses who base their objections on the constitutional grounds of ‘conscience and religion’. That matter is now before the courts in several Canadian provinces and academic opinion is divided how they should be resolved.

<sup>40</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 1574–1575 (Sachs J.).

Of course, one has to be careful in taking this approach that an unrealistic standard of human interaction is not adopted, lest ‘hurt feelings’ be elevated to a constitutionally-protected category, thereby watering down to an unacceptable degree the rigour of our conceptions of equality and dignity.<sup>41</sup>

Many religious bodies and inter-faith groups have intervened in important cases touching on religious liberty over the past decade and a half in Canada. They have seen first-hand, in situations such as the eradication of denominational education rights in Newfoundland and Quebec<sup>42</sup> that, in their view religious communities and individual believers are often not being accorded the respect they deserve and to which they are entitled.<sup>43</sup>

As referred to above, in South Africa, many religious believers were also concerned where changes to the legal understanding of marriage would take their own communities. Thus, in *Fourie*, religious groups sought, and obtained, status as *amicus curiae* based on an Affidavit by Cardinal Wilfred Napier, of the Roman Catholic Church.

In *Christian Education*, as we saw above, the majority of the Court was quite willing to comment on the importance of religious beliefs to South African society; we see the same openness in other more recent decisions of the same Court.<sup>44</sup>

In *Fourie*, the majority of the Court found religious beliefs and their associations to be socially important in these terms:

Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes. They command ethical behaviour from their members and bear witness to the exercise of power by state and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the gen-

<sup>41</sup> The following decision of the Supreme Court of Canada has been subjected to just this criticism. *Law v. Canada (Minister of Employment and Immigration)* 1999 1 SCR 497 (Can) and *Granovsky v. Canada* 2000 SCJ No. 28. For a review discussing both decisions see: Benson and Miller, ‘Equality and Human Dignity’, 39 *Lex View* (2000), at [www.cardus.ca/lexview/article/2261/](http://www.cardus.ca/lexview/article/2261/).

<sup>42</sup> *Constitution Act* 1867 § 93A.

<sup>43</sup> See MacDougall, ‘Refusing to Officiate at Same-Sex Civil Marriages’, 69 *Saskatchewan Law Review* (2006) 351, at 353–354. In favour of accommodating the right of officials not to perform same-sex marriages on the basis that tolerance allows for disagreement, see C. Lafferty, above, note # 17 at 307–312.

<sup>44</sup> *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para. 36. See, generally, Currie & De Waal *Bill of Rights* 5th ed (2005) 336–357; Farlam *Freedom of Religion* chapter 41. See further *Bruker v Marcovitz* 2007 SCC 54.

eral public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of a people's temper and culture, and for many believers a significant part of their way of life. Religious organisations constitute important sectors of national life and accordingly have a right to express themselves to government and the courts on the great issues of the day. They are active participants in public affairs fully entitled to have their say with regard to the way law is made and applied.<sup>45</sup>

Important to note here is the fact that the Court finds religion not simply to be an 'individual' matter but something important for the community and the whole society.<sup>46</sup> The Court continued, however, with this observation setting out a limitation on the public use of religious argumentation:

It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others ... Whether or not the Biblical texts support his beliefs would certainly not be a question which this Court could entertain. From a constitutional point of view, what matters is for the Court to ensure that he be protected in his right to regard his marriage as sacramental, to belong to a religious community that celebrates its marriages according to its own doctrinal tenets, and to be free to express his views in an appropriate manner both in public and in Court. Further than that the Court could not be expected to go.<sup>47</sup>

What the court wishes to see is co-existence within difference. If the experience in Canada is anything to go on, however, it is reasonable to suggest that such co-existence is going to require a considerable amount of litigation in order for the genuinely 'open' nature of the public sphere to be ensured. In the process of such litigation, a *Charter* of the sort that has now been signed in South Africa could be of considerable guidance to the courts and legislatures in terms of the key principles to be applied. This

<sup>45</sup> *Fourie*, note #7, above paragraphs 90-93 and 98.

<sup>46</sup> I have written about the tension between the right of religion and belief to be viewed 'individualistically' rather than in its (preferred) dimension – associationally; both aspects should be kept in view. See Iain T. Benson, 'The Case for Religious Inclusivism and the Judicial Recognition of Associational Rights: A Reply To Lenta', 1 *Constitutional Court Review* (2008) 297, at 297-312.

<sup>47</sup> *Fourie*, note #7, above, paragraphs 92, 93 and 98. The decision is referred to above.

brings me to more particular questions about the creation of the *South African Charter of Religious Rights and Freedoms*.

### *The creation of a South African Charter of Religious Rights and Freedoms*

The role that religions could play in relation to the ongoing formation of the South African Constitution was understood early on by Justice Albie Sachs when he wrote:

Ideally in South Africa, all religious organizations and persons concerned with the study of religion would get together and draft a charter of religious rights and responsibilities. ...it would be up to the participants themselves to define what they consider to be their fundamental rights.<sup>48</sup>

Section 234 of the *Constitution* of South Africa stipulates as follows:

In order to deepen the culture of democracy established by this Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.

Section 234 gives South Africans a means to offer guidance to both politics and the courts though, since it has not been used until now, it is not certain what the political process will do to the work that civil society (in terms of the major religions) has already done.

In principle Section 234 gives those who come up with such Charters, emerging from civil society, the chance to specify in greater detail what they think are important principles under the general rubrics of the Constitution (such as ‘the freedom of religion’). The location of Section 234 in the Constitution suggests that legislation passed under this provision will be accorded a kind of ‘super statutory’ or constitutional status by virtue of that inclusion.

The formation of the *South African Charter of Religious Rights and Freedoms* began with a group of legal and theological academics who met in Stellenbosch in October 2007. That original group (primarily Christian at the beginning though this changed over time) met to discuss whether it would be advisable to develop such a document. The author spoke about the Canadian experience of ‘inter-faith cooperation’ in relation to litigation and of the reconfiguration of the ‘secular’ recognized by the Canadian courts in *Chamberlain*.<sup>49</sup> As indicated, attempts to form such an interfaith approach

<sup>48</sup> A. Sachs, *Protecting human rights in a new South Africa. Contemporary South African Debates* (1990), at 46–47.

<sup>49</sup> Both terms admit of a variety of interpretations. Whatever interpretations are given, however, extension of cooperation beyond simply one racial or religious group is implied and important.

in litigation in South Africa had not been carried forward in relation to the same-sex litigation that culminated in the *Fourie* decision.

One conclusion of that meeting was that representation had to be extended further afield to invite all the major religions (including African customary religions) to attend to comment upon a basic Draft that was to be prepared prior to that meeting and that particular care should be taken to invite all religions to the table. The Draft was prepared by a small working group and further meetings called between February 2008 and its eventual signing in October 2010.

It was understood by those involved in the process that by leaving the right to religious freedom undefined in the Constitution, one actually accepts that the content of the right will be determined through court decisions and other measures on an *ad hoc* basis, in other words, as issues and difficulties occur. This is a process over which religious institutions have little control.

The existence of Section 234 in the South African Constitution, created the possibility for the creation of a charter of religious rights in which the content of the right is spelled out fully in a single charter. There were ample international examples that provided support for such a Charter approach. For example, all the primary international Bills of Rights protect the right to freedom of religion, but not a single one elaborates on the content of the right. (See for example Article 18 of the *Universal Declaration of Human Rights*, Article 18 of the *International Convention on Civil and Political Rights*, Article 9 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, and Article 1 of the *African Charter for Human and Peoples' Rights*. That was why the *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, which spells out the content of the right to freedom of religion much more extensively, was adopted in 1981. (See also the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* of 1992). Domestically as well as internationally there were, in other words, precedents for such a charter of religious rights.

What eventually occurred, through all the meetings (some group and many individual) and in spectacular fashion, was that the major religions which had participated – Hindu, Christian (including Catholic, Orthodox, Zion Christian Church and Reformed branches), LDS, Jewish, Muslim and others gave one hundred percent support not only to the need for a document but to the process being used and the terms of the document itself.

Those that drove forward the drafting (this was all outside of 'government') represented theology and law and were drawn as well from the various religious traditions and included members of the Constitutional

Commission for Culture, Religious and Linguistic communities. The process allowed for very broad and deep consultation across a wide spectrum of Religions in South Africa and some of the key groups involved in religion and human rights.

Key meetings involved, amongst others, those with The House of Traditional Leaders (Pretoria) (including all but two of their regional representatives); The Steering Committee for the Roman Catholic Bishops of South Africa (including Cardinal Napier); The Central Committee of the Dutch Reformed Church; The South African Human Rights Commission; the Editorial Committee for the Religion Hub (Television) of the South African Broadcasting Corporation; The Executive of the National Religious Leaders' Forum; The General Secretary of the South African Council of Churches; a Representative of the South African Buddhist Religion; a representative of the Rastafarian Religion and a representative of the Baha'i religion.

The groups consulted (which eventually extended considerably beyond the above list) continued to express support and interest in the Charter. Many substantive comments were received, some of these from individuals and others from academics in many countries internationally. These consultations continued and at the time of the public signing of the Draft in October 2010, (see attached Appendix) represented the insights and contributions of hundreds of interventions.

The Charter was eventually signed at a public meeting (at which members of the Press attended) on October 21, 2010 at the main Board Room of the University of Johannesburg. This was followed by a meeting of the signatories that established a *Council for Religious Rights and Freedoms* pursuant to Section 185 (1) (c) of the Constitution and other relevant provisions of the *Promotion and Protection of Cultural, Religious and Linguistic Communities Act 19 of 2002*. At the time of this writing a Steering Committee has been established of Members and experts that will continue to raise support for the Charter and to move ahead in discussions with the government.

What has occurred has been deep, meaningful and, might well be, in the long run of great importance not only within South Africa but in other countries as well.<sup>50</sup> The process, document and meetings have shown both

<sup>50</sup> In countries that do not have the equivalent of a Section 234 in their Constitutions it might be possible to consider whether other enactments could be developed that might serve in a manner akin to 'Interpretation Acts' in such a way that civil society initiatives could be both encouraged and effective in crafting greater delineation of the meaning of the general rights in national constitutional enactments.

that religions can cooperate at a high level of sophisticated and mature discussion and that principles important to each religion can be shared and recognized as important to all religions. These principles are a substantive contribution to the principles of *modus vivendi* as they include not only the right to join a religion but also to leave one.<sup>51</sup> The process has showed that there are alternatives to political and legal avoidance of key aspects when the civil society organizations themselves show leadership in important areas in the context of a constitutional document set up so as to encourage the involvement of civil society in its ongoing development. The process also provides the prospect of more holistic principled development than the *ad hoc* nature of litigation on a case by case basis (the concern expressed in the quotation from Charles Taylor at the head of this section of the paper).

In this respect, use of Section 234 of the *Constitution of the Republic of South Africa* provides an important landmark for those who are concerned that constitutional development has become the property of a small number of judges and activist litigation strategists.

It remains to be seen how the political process will respect the hard work that has been done by civil society. A sign of respect would be to recognize that the Charter represents an extraordinary cooperation between as wide a set of interest groups as could likely be assembled. It did not include every possible group – that goal would be impossible of realization. It is for the government, in conversation with the Council for Religious Rights and Freedoms that is being established to determine whether Section 234 of the Constitution will prove to be as useful a guide as many hope it can be for South Africa.

### **Conclusion: understanding religion and law and politics according to their natures – Religions as propositional, politics and law as impositional**

We will hear elsewhere at this plenary session about the meaning of religious freedom in relation to government developed up to and including *Dignitatis Humanae*. The rejection of religion in the form of theocracy is a signal development in the history of human communities and one which needs a richer theological ground within all world religious traditions.

The *Catechism of the Catholic Church* locates our conception of anthropology, the questions ‘who are we?’ and ‘what are we?’ close to the centre of the legitimacy of institutions and their ability to maintain a place for freedoms:

<sup>51</sup> This principle was endorsed by all signatories including representatives of the Muslim Judicial Council of South Africa.

Every institution is inspired, at least implicitly, by a vision of man and his destiny, from which it derives the point of reference for its judgment, its hierarchy of values [principles a better word here], its line of conduct. Most societies have formed their institutions in the recognition of a certain pre-eminence of man over things. Only the divinely revealed religion has clearly recognized man's origin and destiny in God, the Creator and Redeemer. The Church invites political authorities to measure their judgments and decisions against this inspired truth about God and man:

Societies not recognizing this vision or rejecting it in the name of their independence from God are brought to seek their criteria and goal in themselves or to borrow them from some ideology. Since they do not admit that one can defend an objective criterion of good and evil, they arrogate to themselves an explicit or implicit totalitarian power over man and his destiny, as history shows.<sup>52</sup>

Against this warning the Church witnesses to and insists upon principles that maintain a place for persons in relation and communities of difference – a place for diversity. And yet it is not aimlessness; there is a vision at work here – a vision of unity but not a convergence forced by law and politics but chosen by the free will of men and women. Law and politics can achieve forced convergences only by committing violence against freedom.

The Catholic vision of civic ordering limits civil authority and law. Subsidiarity erects places of difference and diversity (through mediating institutions and the instantiation of the principles of accommodation) against a uniformity that, if imposed from above, rather than proposed from below, will destroy it.

Law as *imposition* and religions as *proposition* need to be in relation to each other. This relation, however, demands a recognition of the key differences not only to the jurisdictions but the kinds of force (persuasion versus coercion) that are essential to each.

The long history of human communities shows us that theocracy corrupts religions. Within the Catholic tradition in the Second Vatican Council's key document *Dignitatis Humanae* (1965) the limits on religion in relation to the State were finally brought fully into Catholic doctrine within the understanding of the development of doctrine. This concept of development and the jurisdiction and limits of religion in relation to the state (law and politics) needs

<sup>52</sup> *Catechism of the Catholic Church*, para. 2244 footnotes omitted [final quotation from *Centesimus Annus* 45, 46].



to be learned within other religions as well. Government has a role to ‘...safeguard the religious freedom of all its citizens’ and part of this freedom is that it ‘...must not hinder men from joining *or leaving* a religious body’.<sup>53</sup>

I would like to suggest that a helpful line of inquiry in terms of understanding the appropriate jurisdictions of law and religions would be to examine the internal nature of each as a means of better describing the relationship between them. This could build upon the insights from Canada and South Africa to the effect that what constitutional development entails is a form of ‘dialogue’ between courts and legislatures. What is needed is to add to this sort of conversation by making it more open – to include civil society. Part of that involvement requires a greater recognition of the role that mediating institutions (and associations generally) can play in this more open conversation. In particular it is important to recognize the role that religions play in relation to the moral direction of government and law.

Is it possible, for example, to understand the nature of religions as *propositional* and law and politics as *impositional*.<sup>54</sup> That is to say that the essence of religion pertains to human being understood as freedom in relation to an ordered cosmos. Thus, though religions may in their internal matters (employment rules, hiring, discipline, etc.) have necessarily impositional *internal* rules (and these always informed by the religious ethos), their *external* action in relation to politics and the state must be *propositional*.

When religions become impositional, it may be argued that they betray the essence of their articulations of freedom as that is understood in essentially non-legal understandings within the contemporary state. Thus notions such as compassion, mercy, dignity and a theologically informed justice which are the centre of religious articulations<sup>55</sup> are not generally understood

<sup>53</sup> *Dignitatis Humanae*, Walter Abbott, S.J. ed., *The Documents of Vatican II*, p. 687 para. 6 (emphasis added).

<sup>54</sup> The line between transcendent and immanent law is ancient and universal. If one thinks of Sophocles’ *Antigone*, written over 2500 years ago, it is clear that the central tension in that play is the fact that King Creon, in his edict against sacred burial, failed to respect the transcendence which Antigone claimed requisite and the King’s decree, as the characters and chorus make clear, was an excess of his jurisdiction. In contemporary parlance, Creon’s claim to be the law (foreshadowing Louis XIV’s *l’état c’est moi*) is everywhere the unjust and disastrous claim of immanent kings against transcendent principles and the organizations which further them (principally religions) in societies.

<sup>55</sup> The Recitals of the Proposed *South African Charter of Religious Rights and Freedoms*, particularly no. 7, discuss concepts such as ‘compassion’ and ‘love’ which are not usually mentioned in legal enactments but few would deny they are important to society (see ‘Appendix’ to this paper).

by contemporary law and politics in those terms. Contemporary law and politics develop their rules and then impose those on all citizens irrespective of their associational commitments. Associations, however, including religions, propose their beliefs to the world around and when they seek to impose these generally undercut the richness of their spiritual/theological understandings. Perhaps this is why so many reform movements originate within religions and are driven by religious believers?

On the other hand, when law and politics over-extend their appropriate jurisdictions, this is to the detriment of associational life and religious practice. We are at a stage of development in the jurisprudence of both Canada and South Africa (and the same holds true for other countries) where, as we have seen in the decisions referred to above, from time to time, the courts under either the South African or Canadian constitutions have had to wrestle with the appropriate line between judicial interpretation and the lives of those persons living under a religious order.

In a relatively recent decision of the Canadian Supreme Court, the Chief Justice noted that both the state and the law should be reticent to delve into personal matters that are related to the nature of religious belief, because:

The state is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, ‘obligation’, ‘precept’, ‘commandment’, custom or ritual. *Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.*<sup>56</sup>

This is exactly correct.

The frame, therefore, is established between religion as having a necessarily but limited ‘outside’ public dimension (the *Big M Drug Mart* decision of the Supreme Court of Canada, above) and the same court’s reticence to get ‘inside’ religions and their dogmatic ‘private’ determinations (*Amselem*). A similar insight has emerged from the Constitutional Court of South Africa. This court has also recognized different spheres but, in common with general usage and the all too common judicial dicta, place ‘sacred’ and ‘secular’ in unhelpful opposition. Despite this, the *Fourie* decision, in understanding the public realm as a sphere of ‘co-existence’ between different spheres moves towards a richer and more nuanced understanding in line with the comments set out above. In the words of Justice Sachs:

<sup>56</sup> *Syndicat Northcrest v. Amselem* [2004] 2 SCR 551 at para. 50 (emphasis added).

In the open and democratic society contemplated by the [South African] constitution there must be a mutually respectful co-existence between the secular and the sacred. The function of the court is to recognize the sphere which inhabits, not to force the one into the sphere of the other... The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held worldviews and lifestyles in a reasonable and fair manner. *The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm*, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all... It is clear from the above that acknowledgement by the state of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage accords to heterosexual couples is in no way inconsistent with the rights of religious organizations to continue to refuse to celebrate same-sex marriages. The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected. The two sets of interests involved do not collide; they co-exist in a constitutional realm based on accommodation of diversity.<sup>57</sup>

This paper has examined the framework language used to discuss religion and law and suggested that many of the key terms are deeply confused and misleading. Thus, a re-thinking which recognizes that all persons are believers (it is not whether they believe but what they believe in that is the proper description of things) and that all are in some kinds of communities of faith and belief goes some way to identifying the all too common (and implicit) dominance of atheism and agnosticism in the current age.

The re-configuration of the meaning of the 'secular' begun in the Canadian Supreme Court decision in *Chamberlain*, needs to be more widely understood and applied against a clearer language to describe the public sphere. This paper has also suggested that social initiatives exist in the practice of both South Africa and Canada which offer suggestions for advancement of a richer approach to respect for pluralism than simply *ad hoc* judicial developments through litigation.

<sup>57</sup> *Fourie* above, note #7, at para. s.94-98 (emphasis added). Justice Sachs' conception of differing beliefs co-existing within the public realm is of single importance and sets the stage, along with the approach of Justice Gonthier in the Supreme Court of Canada Decision in *Chamberlain*, for a redefinition or better yet a 're-understanding' of what might be termed central public terminology.

Law has its public role but so does religion – yet they are different. Speaking truth to power is influenced by the means chosen to do the speaking. Theocracy seems to corrupt religious proposition by using the instruments of coercion that are essential to law in service of religions which should be about witness not coercion. On the other hand, when law extends beyond its proper boundaries into the areas that should be reserved for families and associations in relation to religious liberty, it too is corrupted.

The current phase in constitutional democracies is one of a kind of tug-of-war between convergence and accommodation of difference, between subsidiarity and statism. For this reason there is a co-operation that is both practical and principled. Practical because the concerns of any threatened *subsidium* is a concern of all, and principled because the affirmation of freedom and conscience demands respect for others.

Just as Encyclicals in the Roman Catholic tradition are also directed to all ‘men and women of good will’ so the co-operative decisions in defence and support of others are necessary steps on the road to living together *with* disagreement and respect. History shows the difficulties of this vision but perhaps wisdom and hope – the union of natural and supernatural insight, are the only road to a more harmonious co-existence in which proposition will stand up against the omnipresent temptations of imposition.

## APPENDIX

### Brief Index to the *South African Charter of Religious Rights and Freedoms*

[Particularly notable amongst the provisions are the following]:

*Preamble*, particularly #7;

Right to change religion 2.1;

Principle of religious accommodation 2.2;

*Medical services* or procedure protections 2.3;

Non-establishment provision 3.1;

*Free-exercise* provision 4.0 (including access to sacred places 4.2);

Freedom of *expression* (including public debate 6.1);

Right to *share religious faith* (6.1) including to attempt to convert others (6.2);

Access to public *media* (6.3) [a recent addition after representations from

African customary religions about difficulty getting access to public media];

Advocacy of *hatred* ‘that constitutes incitement to immediate violence or physical harm’ (6.4) [narrowing from ‘hate speech’ which should be abolished from human rights according to Moon Report recently released in Canada];<sup>58</sup>

*Education*, primary parental, right of information etc. (7.0);

Conditions of *employment* (9.1);

Relationship between *Church and State* recognizing autonomy (9.3) and confessional protection (9.4);

Religion not defined by ‘service to adherents’ so includes ‘whether they serve persons with different convictions’ (12).

## **South African Charter of Religious Rights and Freedoms**

*(Signed in Johannesburg, South Africa, October 21, 2010) Version 6.0 (as amended 6 August 2009)*

### *Preamble*

1. WHEREAS human beings have inherent dignity, and a capacity and need to believe and organize their beliefs in accordance with their foundational documents, tenets of faith or traditions; and

WHEREAS this capacity and need determine their lives and are worthy of protection; and

WHEREAS religious belief embraces all of life, including the state, and the constitutional recognition and protection of the right to freedom of religion is an important mechanism for the equitable regulation of the relationship between the state and religious institutions; and

WHEREAS religious institutions are entitled to enjoy recognition, protec-

<sup>58</sup> This Report of Professor Richard Moon (dealing with hate speech laws and recommending their abolition in a Human Rights context) may be found at: [www.chrc-ccdp.ca/publications/report\\_moon\\_rapport/toc\\_tdm-eng.aspx](http://www.chrc-ccdp.ca/publications/report_moon_rapport/toc_tdm-eng.aspx) (accessed 11 November 2010).

tion and co-operation in a constitutional state as institutions that function with jurisdictional independence; and

WHEREAS it is recognized that rights impose the corresponding duty on everybody in society to respect the rights of others; and

WHEREAS the state through its governing institutions has the responsibility to govern justly, constructively and impartially in the interest of everybody in society; and

WHEREAS religious belief may deepen our understanding of justice, love, compassion, culture, democracy, human dignity, equality, freedom, rights and obligations, as well as our understanding of the importance of community and relationship in our lives and in society, and may therefore be beneficial for the common good; and

WHEREAS the recognition and effective protection of the rights of religious communities and institutions will contribute to a spirit of mutual respect and tolerance among the people of South Africa; and

### *Therefore the Following*

#### *Charter of Religious Rights and Freedoms is hereby adopted:*

1. Every person (where applicable in this Charter 'person' includes a religious institution or association) has the right to believe according to their own religious or philosophical convictions, and to choose which faith, worldview, religion, or religious institution to subscribe to, affiliate with or belong to.
2. No person may be forced to believe, what to believe or not to believe, or to act against their convictions.
  - 2.1. Every person has the right to change their faith, religion, convictions or religious institution, or to form a new religious community or religious institution.
  - 2.2. Every person has the right to have their religious beliefs reasonably accommodated.
  - 2.3. Every person may on the ground of their religious or other convictions refuse to (a) participate or indirectly assist in or refer for certain activities, such as of a military or educational nature, or (b) perform certain duties or deliver certain services, including medical or related (including pharmaceutical) services or procedures.
  - 2.4. Every person has the right to have their religious or other convictions taken into account in receiving or withholding of medical treatment.

- 2.5 Every person has the right not to be subjected to any form of force or indoctrination that may cause the destruction of their religion, beliefs or worldview.
3. Every person has the right to the impartiality and protection of the state in respect of religion.
  - 3.1. The state must create a positive and safe environment for the exercise of religious freedom, but may not as the state promote, favour or prejudice a particular faith, religion or conviction, and may not indoctrinate anyone in respect of religion.
  - 3.2. No person may be unfairly discriminated against on the ground of their faith, religion, or religious affiliation.
4. Subject to the duty of reasonable accommodation and the need to provide essential services, every person has the right to the private or public, and individual or joint, observance or exercise of their religious beliefs, which may include but are not limited to reading and discussion of sacred texts, confession, proclamation, worship, prayer, witness, order, attire, appearance, diet, customs, rituals and pilgrimages, and the observance of religious and other sacred days of rest, festivals and ceremonies.
  - 4.1. Every person has the right to private access to sacred places and burial sites relevant to their religious or other convictions. Such access, and the preservation of such places and sites, must be regulated within the law and with due regard for property rights.
  - 4.2. Persons of the same conviction have the right to associate with one another, form, join and maintain religious and other associations, institutions and denominations, organise religious meetings and other collective activities, and establish and maintain places of religious practice, the sanctity of which shall be respected.
  - 4.3. Every person has the right to communicate nationally and internationally with individuals and institutions on religious and other matters, and to travel, visit, meet and enter into relationships or association with them.
  - 4.4. Every person has the right to single-faith religious observances, expression and activities in state or state-aided institutions, as regulated by the relevant institution, and as long as it is conducted on an equitable and free and voluntary basis.
5. Every person, religious community or religious institution has the right to maintain traditions and systems of religious personal, matrimonial and family law that are consistent with the Constitution and are recognised by law.
6. Every person has the right to freedom of expression in respect of religion.

- 6.1. Every person has the right to (a) make public statements and participate in public debate on religious grounds, (b) produce, publish and disseminate religious publications and other religious material, and (c) conduct scholarly research and related activities in accordance with their religious or other convictions.
- 6.2. Every person has the right to share their religious convictions with others on a voluntary basis.
- 6.3. Every religious institution has the right to have access to public media and public broadcasting in respect of religious matters and such access must be regulated fairly.
- 6.4. Every person has the right to religious dignity, which includes not to be victimised or slandered on the ground of their faith, religion, convictions or religious actions. The advocacy of hatred that is based on religion, and that constitutes incitement to imminent violence or to cause physical harm, is not allowed.
7. Every person has the right to be educated or to educate their children, or have them educated, in accordance with their religious or philosophical convictions.
  - 7.1. The state, which includes any public school, has the duty to respect this right and to inform and consult with parents on these matters. Parents may withdraw their children from school activities or programs inconsistent with their religious or philosophical convictions.
  - 7.2. Every educational institution may adopt a particular religious or other ethos, as long as it is observed in an equitable, free, voluntary and non-discriminatory way, and with due regard to the rights of minorities. The preference for a particular religious ethos does not constitute discrimination in breach of the constitution with respect to religious education.
  - 7.3. Every private educational institution established on the basis of a particular religion, philosophy or faith may impart its religious or other convictions to all children enrolled in that institution, and may refuse to promote, teach or practice any religious or other conviction other than its own. Children (or their parents) who do not subscribe to the religious or other convictions practised in that institution waive their right to insist not to participate in the religious activities of the institution.
8. Every person has the right on a voluntary basis to receive and provide religious education, training and instruction. The state may subsidise such education, training and instruction.
9. Every religious institution has the right to institutional freedom of religion.



- 9.1. Every religious institution has the jurisdictional independence to (a) determine its own confessions, doctrines and ordinances, (b) decide for itself in all matters regarding its doctrines and ordinances, and (c) in compliance with the principles of tolerance, fairness and accountability regulate its own internal affairs, including organisational structures and procedures, the ordination, conditions of service, discipline and dismissal of office-bearers and members, the appointment, conditions of employment and dismissal of employees and volunteers, and membership requirements.
- 9.2. Every religious institution is recognised and protected as an institution that functions with jurisdictional independence, and towards which the state, through its governing institutions, has the responsibility to govern justly, constructively and impartially in the interest of everybody in society.
- 9.3. The state, including the judiciary, must respect the jurisdictional independence of every religious institution, and may not regulate or prescribe matters of doctrine and ordinances.
- 9.4. The confidentiality of the internal affairs and communications of a religious institution must be respected. Specifically, the privileged nature of any religious communication that has been made with an expectation of confidentiality must be respected in legal proceedings.
- 9.5. Every religious institution is subject to the law of the land, and must justify any disagreement, or civil dissent, on the basis of its religious convictions or doctrines.
10. Every religious institution that qualifies as a juristic person has the right to participate in legal matters, for example by concluding contracts, acquiring, maintaining and disposal of property, and access to the courts. The state may allow religious institutions tax, charitable and other benefits.
11. Every person has the right, for religious purposes and in furthering their objectives, to solicit, receive, manage, allocate and spend voluntary financial and other forms of support and contributions. The confidentiality of such support and contributions must be respected.
12. Every person has the right on religious or other grounds, and in accordance with their ethos, and irrespective of whether they receive state-aid, and of whether they serve persons with different convictions, to conduct relief, upliftment, social justice, developmental, charity and welfare work in the community, establish, maintain and contribute to charity and welfare associations, and solicit, manage, distribute and spend funds for this purpose.

- ▶ 2. Europe as a museum of the tensions between human rights ideas and the various mechanisms for their implementation at the national, regional, and international level
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# RELIGIONSFREIHEIT IN DEUTSCHLAND – ALTE UND NEUE FRAGEN

■ HANS MAIER

## 1. Historische Voraussetzungen

Religionsfreiheit als subjektiver Anspruch des einzelnen, als persönliches Recht des Bürgers ist ein Postulat der Moderne. Sie tritt als öffentliche Forderung zu einer Zeit hervor, in der die alte Einheit von Religion und Politik sich aufzulösen beginnt, rivalisierende religiöse Bekenntnisse in der Öffentlichkeit um Macht und Einfluss ringen und der Staat immer häufiger mit Religionskonflikten konfrontiert wird. In den modernen staatlichen Verfassungen nimmt die Religionsfreiheit seit dem 18. Jahrhundert Gestalt an – historisch zuerst in den Vereinigten Staaten.

Die moderne Religionsfreiheit hat jedoch auch eine Wurzel in der Vergangenheit von Kirche und Christentum. Geschichtlich gründet sie in der *christlichen Freisetzung des Glaubens gegenüber den Staatskulten der antiken Welt*. Den frühchristlichen Gedanken, dass in Gewissensfragen Zwang von Übel ist, hat die Theologie nie gänzlich aufgegeben – trotz einer weitgehend *gegen* die Religionsfreiheit gerichteten Praxis im Mittelalter und in der frühen Neuzeit, als der Gedanke der *res publica christiana*, der Einheit von Staat und Religion das gesamte kirchliche Denken beherrschte. An diese – teilweise verschüttete – Überlieferung konnte das Zweite Vatikanum in seiner Erklärung über die Religionsfreiheit (*Dignitatis Humanae*) anknüpfen.

In Deutschland ist die mittelalterliche Einheit von Religion und Politik früher zerbrochen als in anderen Ländern. Religion war daher im Land der Reformation schon in der frühen Neuzeit grundsätzlich *Entzweite Religion*. Sie konnte folgerichtig bei der Entwicklung des modernen Staates kein ähnlich konstitutives und integrierendes Element des Gemeinwesens werden wie in den klassischen Ländern der Staat-Kirche-Einheit (und das waren in Europa die meisten, von Russland bis nach Frankreich und Spanien, Schweden und England).

Neben dem in Europa vorherrschenden religiös-politischen Einheitsdenken – und oft genug an seiner Stelle – hat sich in Deutschland vom 16. bis zum 18. Jahrhundert exemplarisch das entwickelt, was heutige Historiker ein „konfessionelles Krisen- und Konfliktmanagement“ nennen. Gemeint ist der Versuch, ein friedlich-schiedliches Miteinander verschiedener Konfessionen unter dem Dach des Gesamtstaates zu etablieren. Neben Polen

war das Alte Reich in dieser Zeit fast der einzige mehrkonfessionelle Staat in Europa. Da Katholiken und Protestanten in Deutschland einander weder bekehren noch verdrängen noch vernichten konnten, mussten sie auf die Dauer Frieden halten – *Religionsfrieden*; und die Artikel des Augsburger und des Osnabrücker Religionsfriedens bilden bis heute ein wichtiges Element der deutschen Verfassungstradition. So entstand eine zweipolige Ordnung, die bis zum Ende des Alten Reiches 1806 Bestand hatte: Im *Land*, in den Territorialstaaten des Reiches, herrschte konfessionelle „Purität“ (es gab nur eine Religion); im *Reich* dagegen galt als oberster Grundsatz das Nebeneinander, die „Parität“ der Konfessionen (Katholiken, Lutheraner und – seit 1648 – Reformierte). Über religiöse Fragen durfte im Plenum des Reichstags nicht abgestimmt werden; man ging in diesem Fall in die gesonderten Sitzungen der Religions-Parteien. Das Wort „Parteien“ als Rechtsbegriff taucht in Deutschland erstmals in diesem religiösen Zusammenhang auf (*Itio in partes*).

## 2. Korporative elemente der Religionsfreiheit

In Deutschland entwickelte sich die Religionsfreiheit aus dem in den Religionsfrieden geschaffenen labilen Gleichgewicht der Konfessionen. Das deutsche Religionsrecht trägt daher bis heute Züge der Konfliktschlichtung, der Friedenssicherung. Das Nebeneinander – und der Wettbewerb! – der Konfessionen hielt in Deutschland das öffentliche Leben auch in der Neuzeit in enger Verbindung mit christlichen Normen und Verhaltensweisen. Aufklärung und Toleranzgesetzgebung formten das christliche Erbe um, vertrieben und tilgten es aber nicht. Die Aufklärung war in Deutschland eine zwar kirchenkritische, aber nicht religionsfeindliche Strömung. Eine Forderung wie Voltaires: „Écrasez l’infâme!“ wäre im Mund Lessings oder Kants undenkbar gewesen. In Deutschland ging der Kirchenbürger nicht im Staatsbürger unter – im Gegenteil: der eine formte den anderen mit.

Daher die Züge einer – den ausländischen Beobachter oft überraschenden – bis heute sichtbaren *Nähe* von Staat und Religion, die sich äußert in konfessionellen Fakultäten, einer kirchlichen Militärseelsorge, dem Religionsunterricht an öffentlichen Schulen, staatlichen Zuschüssen für kirchliche Kindergärten, Schulen, Hochschulen, Krankenhäuser – ein System, das zusammengehalten wird durch die von der staatlichen Verwaltung eingehobene Kirchensteuer. Dies alles – seit der Weimarer Reichsverfassung von 1919 – bei grundsätzlicher *institutioneller Trennung* von Staat und Kirche, die sich jedoch bei genauerem Zusehen als „hinkende Trennung“ (Ulrich Stutz) erweist, positiv ausgedrückt: als ein System vielfältiger Kooperation zwischen Staat und Kirchen.

Dass der Augsburger Religionsfriede noch keinen Auftakt zu *genereller Religionsfreiheit* bildet, ist wiederholt hervorgehoben worden. Sein wesentliches Ergebnis war „nicht Glaubensfreiheit, sondern Glaubenszweiheit“ (Anschütz). Dennoch war die 1555 angebahnte rechtliche Gleichstellung der zwei großen Bekenntnisse (Katholiken und Lutheraner) für die spätere Entwicklung der religiösen Freiheit des einzelnen von Bedeutung. Denn trotz der überwiegend korporativ (kirchlich) konzipierten Form der religiösen Freiheit enthielt der Religionsfriede doch Bestimmungen, die der persönlichen Entscheidung Spielraum verschafften. So wurde den Konfessionsverschiedenen in § 24 die Möglichkeit gegeben, mit Frau und Kind gegen Bezahlung einer Nachsteuer auszuwandern – ein Recht, das gewiss in einer Zeit agrarischer und feudaler Ökonomie und starker Bindung an den Wohnort noch nicht allzu viel bedeutete, das aber doch ein bemerkenswertes Zugeständnis an die individuelle Gewissensentscheidung des einzelnen war.

Erheblich weiter zieht dann ein Jahrhundert später, nach der Erschöpfung der konfessionellen Leidenschaften im Dreißigjährigen Krieg, das *Instrumentum Pacis Osnabrugense* den Kreis der freien Religionsausübung. In Artikel V § 31 und 32 IPO wird bestimmt, dass die andersgläubigen Untertanen katholischer und protestantischer Stände, die im „Normaljahr“ 1624 das *exercitium Religionis* nach katholischer oder Augsburger Konfession besessen haben, dies auch in Zukunft behalten sollten; die es nicht besitzen oder künftig zur anderen Religion übertreten wollen, sollten vom Landesherrn „in Geduld ertragen werden“ (*patienter tolerantur*) und in *Gewissensfreiheit* – der Begriff der *conscientia libera* tritt hier zum ersten Mal im Reichsrecht auf – ihre Hausandacht pflegen und im benachbarten Gebiet dem öffentlichen Gottesdienst beiwohnen können. Die Abstufung in öffentliche und private Religionsausübung sowie ein als Mindestrecht jedem Reichsangehörigen zugesprochenes *Ius devotionis domesticae* (Recht zur Hausandacht, gelegentlich unter Beteiligung mehrere Familien und unter Heranziehung eines auswärtigen Geistlichen) lässt bereits die Ansatzpunkte für die spätere Ausgestaltung der Religionsfreiheit zu einem persönlichen Recht erkennen, wenn auch die individuellen Berechtigungen in dieser Zeit erst Nebenprodukte korporativer, im Begriff der Parität zusammengefasster Rechte der Religionsparteien als Reichsstände sind.

Erst das Ausbleiben der „Vergleichung“ der Religionsparteien, ihr tödlicher Kampf, der zur Bedrohung des Gemeinwesens wird, führt dann zu einer neuen Form der Religionsfreiheit, die nicht mehr Ausweich- und Aushilfslösung ist, sondern bereits den späteren weiten Begriff religiöser Freiheit vorwegnimmt. Die Initiative hierzu geht jetzt von den politischen Mächten aus – sei es, dass diese die widerstrebenden Kirchen und Bekennt-

nisse zum Vergleich zwingen (dabei Toleranz als jederzeit revozierbare Gewährung und politische Waffe handhabend) wie im absolutistischen Staatskirchentum des 16. und 17. Jahrhunderts, sei es, dass sie den Bereich des Religiösen privatisieren und freigeben und jeden „nach seiner Façon selig werden“ lassen wie auf dem Hintergrund der aufklärerischen Toleranzidee im 18. Jahrhundert in England, Holland, den USA. Entscheidend ist der Wandel des Kirchenbegriffs: nicht mehr die universale *Ecclesia* bildet den Hintergrund der Bemühungen um Religionsfreiheit, sondern eine Vielzahl von Kirchen und religiösen Gruppen, deren gegeneinanderstehende Ansprüche im öffentlichen Recht zum Ausgleich gebracht oder in die private Sphäre abgedrängt werden.

In dieser Lage nimmt Religionsfreiheit dann wesentlich den Charakter staatlicher Toleranzgewährung oder Privilegierung an, wobei die entscheidenden Tatsachen die Pluralität der religiösen Bekenntnisse, die Verhinderung der Monopolstellung einer Kirche wie in den USA oder doch deren strenge politische Beaufsichtigung in den Systemen des Staatskirchentums oder der Staatskirchenhoheit wie auf dem Kontinent, in Frankreich, Österreich, Preußen sind. Beispiele für eine solche Religionsfreiheit auf der Basis des Nebeneinanders gleichberechtigter (oder annähernd gleichberechtigter) Glaubensgemeinschaften sind die Utrechter Union von 1579, die Toleranzedikte von St. Germain (1562) und Nantes (1598), das englische Agreement of the People (1647) und die Religionsfreiheitserklärungen in den Verfassungen der nordamerikanischen Einzelstaaten und im Ersten Amendment der Verfassung der USA.

Im Alten Reich wandelt sich die zunächst auf die Augsburger Religionsparteien beschränkte, später auf die Reformierten ausgedehnte „Religionsfreiheit“ bereits im 17. Jahrhundert in einzelnen Territorien zu einer allgemeineren Glaubens- und Gewissensfreiheit, die zahlreiche neue Glaubensgemeinschaften in den staatlichen Schutz einbezieht. Diese Verhältnisse machen es erklärlich, dass Deutschland im 18. Jahrhundert ausländischen Beobachtern wie etwa Montesquieu und Rousseau – verglichen mit den westlichen, politisch-religiösen Einheitsstaaten – geradezu als Hort der Gewissensfreiheit und der bürgerlichen Rechte erscheinen konnte.

Der Übergang zur umfassenden, nicht mehr inhaltlich (christlich) bestimmten und nicht mehr korporativ (kirchlich) gebundenen Religionsfreiheit, zur Freiheit des Einzelmenschen, deren einzige Quelle die Vernunft ist, vollzieht sich dann – nach Vorspielen in Holland und England – im 18. Jahrhundert in den nordamerikanischen Staaten. Das Recht der freien Religionsausübung wird hier erstmals als fundamentales, naturrechtlich fundiertes Menschenrecht begriffen und in den Verfassungen verankert.

Die umfassende, totale Religionsfreiheit, die keine Gruppe, ja keine Einzelüberzeugung weltanschaulicher Art mehr ausschloss, ist in den modernen Verfassungstexten nur sehr allmählich rezipiert worden: ihr mächtiger Gegenspieler blieb bis ins 19. und 20. Jahrhundert hinein die Privilegierung von Staatskirchen und Staatsreligionen in den Verfassungen. Je mehr freilich die Kirchen, auch die staatlich privilegierten, in der modernen Welt in eine Minderheits- und Diasporasituation kamen, desto schwächer wurde dieser Widerpart, und so gewann die Religionsfreiheit für die öffentliche Stellung der Kirchen im 20. und 21. Jahrhundert zunehmend an Bedeutung – ein Prozess, der noch nicht abgeschlossen ist.

Dass die katholische Kirche im 20. Jahrhundert nicht nur die Tradition der Menschenrechte, sondern speziell auch das sperrige Gut der Religionsfreiheit für sich erschlossen hat, hängt zum einen mit dieser universellen Diasporasituation zusammen: Die Kirche lebt – wie ihr zunehmend bewusst wird – in der Moderne nicht mehr im alten Kondominium mit dem Staat, sie lebt wieder in der „reinen Welt“ wie in ihren apostolischen Anfängen. Der andere, tieferliegende Grund liegt in einem neuen Denken bezüglich des Verhältnisses von Wahrheit und Freiheit, in der Entdeckung, dass nicht nur vom Staat, sondern auch von der Kirche her eigene Wege zur religiösen Freiheit führen. Wie es Karl Rahner ausgedrückt hat: „Und darum ist die religiöse Freiheit nicht bloß der Anwendungsfall einer allgemeinen Forderung nach Freiheit für den Menschen, sondern im Wesen der religiösen Wahrheit als solcher begründet. Die religiöse Freiheit ist kein Einzelfall von Meinungsfreiheit. Sie ist vielmehr dort gegründet, wo es sich nicht mehr um beliebige Meinungen handelt, sondern um jenen Grundvollzug des geistigen Subjektes, in dem die radikalste Wahrheit notwendig die freieste ist und die radikale Freiheit, so sie nur ihrem eigenen Wesen getreu, also sittlich gut ist, auch die Wahrheit wirklich erreicht“ (Rahner-Maier-Mann-Schmaus, Religionsfreiheit, München 1966, 13).

### 3. Aktuelle Fragen

Seit dem Ende des Zweiten Weltkriegs haben sich in Deutschland die sozialgeschichtlichen Voraussetzungen der Religionsfreiheit grundlegend verändert. Einmal löste sich der alte Zusammenhang von Territorium und Konfessionalität bis auf geringe Reste auf.<sup>1</sup> Sodann multiplizierten sich die „Adressaten“ der Religionsfreiheit: Nach 1945 waren es nicht mehr allein oder doch überwiegend die christlichen Konfessionen, die im Blickfeld standen; vielmehr kamen jetzt immer stärker außereuropäische und nicht-christliche Religionen ins Spiel, die im Zug von Migration und Globalisierung an Gewicht gewannen – an erster Stelle der Islam, aber auch

fernöstliche Religionen.<sup>2</sup> Verändert hat sich auch die verfassungsrechtliche Stellung der Religionsfreiheit: sie wurde im Grundgesetz (1949) an hervorgehobener Stelle im Grundrechtsteil der Verfassung – dem „unveränderlichen Verfassungsrecht“ – verankert und bildete mit den aus der Weimarer Reichsverfassung übernommenen institutionellen Regelungen bezüglich der Kirchen (Art 140 GG) eine spannungsvolle Einheit.<sup>3</sup>

Daraus ergeben sich einige der Hauptfragen der Religionsfreiheit im heutigen Deutschland. In gedrängter, knapper Auswahl: Welche spezifischen Probleme und Konflikte gibt es gegenwärtig im Zusammenleben der Religionen in Deutschland, und wie sind sie mit Rechtsmitteln zu lösen?<sup>4</sup> Wo verlaufen die Grenzlinien zwischen Religion und Kultur – sind beide überhaupt in allen Fällen unterscheidbar, da uns doch Religion in der Öffentlichkeit fast immer in kulturellem Gewand, als „akkulturierte Religion“ erscheint?<sup>5</sup> Verlangt die Rücksicht auf religiöse Pluralität am Ende den Verzicht auf jegliche religiöse Symbolik außerhalb der Kirchen- und Gebetsräume, wie es das Kruzifixurteil des Bundesverfassungsgerichtes von 1995 nahezulegen scheint?<sup>6</sup> Und endlich: In welcher Weise wird die Interpretation der Religionsfreiheit in Deutschland heute nicht mehr nur von (inländischen) Theorien und Gerichtsentscheidungen beeinflusst, sondern auch von europäischen Institutionen?<sup>7</sup>

### 1. Konfessionalität und territorialität

Kirche und Staat waren im Alten Reich seit dem Augsburger Religionsfrieden territorial und konfessionell organisiert. Religionen wurden auf diese Weise „in den Staat verwebt“ (Hegel). Zwar findet sich der Grundsatz „Wes das Land, des die Religion“ noch nicht im Augsburger Religionsfrieden – die Formel *Cuius regio eius religio* hat erst der Greifswalder Jurist Joachim Stephani im Jahr 1576 geprägt. Aber sie ist sprichwörtlich geworden als Kennzeichnung des „deutschen Systems“ landesherrlicher Entscheidungsgewalt in Sachen Religion – und tatsächlich bringt sie den Ausgangszustand der Zeit nach 1555 – und ihr Nachdauern bis ins 19. und 20. Jahrhundert hinein – anschaulich zum Ausdruck.

Die daraus im Lauf der Zeit entstandenen konfessionell-territorialen Besitzstände haben sich 1944–47 in der millionenfachen Bewegung von Flucht und Vertreibung, in der riesigen Wanderung und Neuansiedlung der deutschen Bevölkerung von Ost nach West definitiv aufgelöst. Geschlossene Konfessionsgebiete verschwanden. Bisher überwiegend „katholische“ Städte nahmen evangelische Minderheiten auf, „evangelische“ Städte öffneten sich für katholische Bürger. Die Diasporasituation wurde nahezu überall zur Regel. Das Zeitalter des *Cuius regio eius religio* ging in der letzten Phase des



Zweiten Weltkriegs und in der Nachkriegszeit unwiderruflich zu Ende. Mit diesem historischen Vorgang wurden wichtige Weichen für die endgültige Ent-Korporierung und Ent-Territorialisierung, für die definitive Individualisierung der Religionsfreiheit im Deutschland der Nachkriegsjahre gestellt.

## 2. Konfessionen und Religionen

Während in Deutschland über Jahrhunderte hin religiöses Zusammenleben fast ausschließlich ein Problem *zwischen den Konfessionen* war – so dass die (christlichen) Kirchen den Horizont von „Religion“ in Deutschland fast zur Gänze ausfüllen konnten –, trat nun neben die christlichen *Konfessionen* ein Spektrum alter und neuer *Religionen*. Es reichte vom Judentum bis zum Islam, von den „klassischen“ östlichen Religionen bis zu Neuschöpfungen in einer sich verbreiternden religiösen „Szene“, von Splittergruppen am Rand überlieferter Bekenntnisse bis zu den „virtuellen Kirchen“ im Internet. An der Spitze der „Neuzuwanderer“ standen die Muslime mit über 4.000.000, die Buddhisten mit rund 100.000 und die jüdischen Gemeinden mit gleichfalls ungefähr 100.000 Angehörigen (die letzten wachsen heute vor allem durch Zuwanderung aus den Ländern der ehemaligen Sowjetunion). Hinzukommt eine schwer überblickbare religiöse Szene außerhalb der christlichen Groß- und Freikirchen, die auf rund 800.000 Mitglieder geschätzt wird – nicht zu reden von der – bisher kaum organisierten – Millionenzahl derjenigen, die den Kirchen den Rücken gekehrt haben oder die von Anfang an keiner Religionsgemeinschaft angehörten.

Dass sich die Religions-Nachbarn vervielfachen, dass sie unterschiedlicher und unberechenbarer werden, dass eine Fülle neuer Beziehungen entsteht, aber auch neue Auseinandersetzungen sich abzeichnen – das alles lässt die bisherige übersichtliche Religions-Kartographie komplexer und schwieriger werden. Vieles ändert sich, vieles muss neu bedacht werden, von der Gemeindestruktur bis zu den Gotteshäusern, von den religiösen Vollzügen bis zur Finanzierung des Gemeindelebens, vom „Eintritt“ in eine Religion bis zu den diversen Regeln, die Tod und Begräbnis betreffen (in jüngster Zeit ein wachsendes Konfliktfeld!). Hinzukommen das Dienst- und Arbeitsrecht und seine Anpassung an die neue Religionsvielfalt, die Militär, Polizei – und Anstaltsseelsorge – nicht zu vergessen die mannigfaltigen und durchaus unterschiedlichen Tätigkeiten der Religionsgemeinschaften im Bildungswesen, im Gesundheits- und Sozialbereich.

## 3. Religionsfreiheit im Grundgesetz

Angesichts dieser eingreifenden strukturellen Veränderungen (deren Verlauf und Bedeutung 1949 noch kaum absehbar war!) hat der Verfassungs-

gesetzgeber weitsichtig gehandelt, indem er seinerseits der Religionsfreiheit im Grundgesetz eine neue Stellung zugewiesen hat. Die Religionsfreiheit wurde in Art. 4 Abs. 1 und 2 GG – ohne dass sie mit Namen genannt wurde – im einzelnen als Freiheit des Glaubens und des Gewissens, als Freiheit des Bekenntnisses und der Religionsausübung ausgestaltet. Die ins Grundgesetz inkorporierten Kirchenartikel der Weimarer Reichsverfassung (Art. 140 GG) spezifizierten diese Religionsfreiheit im Licht der deutschen Geschichte und ihrer besonderen Überlieferungen. Das Bundesverfassungsgericht hat in ständiger Rechtsprechung stets den inneren Zusammenhang von Art. 4 und Art. 140 betont. Die Verfassung lässt den Kirchen sowohl institutionell wie grundrechtlich ihren Schutz angedeihen.

Wie freilich das Verhältnis von Grundrecht und institutioneller „Verdeutlichung“ in den Weimarer Artikeln im einzelnen zu bestimmen ist, darüber gibt es in jüngster Zeit lebhaft Debatten. Das Verhältnis wird zunehmend kontrovers diskutiert. Betonten Lehre und Rechtsprechung lange Zeit den Zusammenhang, die wechselseitige Erhellung von Art. 4 und Art. 140, so betonen jüngere Stimmen deutlicher die Spannungen und Dichotomien. Es wächst die Neigung, die institutionellen Garantien des Grundgesetzes im Grundrecht der Religionsfreiheit (Art 4 GG) ausreichend „aufgehoben“ zu sehen, ohne den „Ballast“ eigener organisatorischer Verbürgungen – mit dem Argument, das Grundrecht enthalte selbst schon alle denkbaren Spezifikationen, weitere „Verdeutlichungen“ seien überflüssig. Vereinzelt wird gefordert, das „Staatskirchenrecht“ solle auf diese Weise in ein „Religionsverfassungsrecht“ zurückgeführt werden. Es ist freilich nicht zu sehen, wie das System hochkomplexer, geschichtlich gewachsener Beziehungen zwischen Staat und Kirche (allein) aus einem Grundrecht abgeleitet werden soll – in dem es bestenfalls „in nuce“ präsent sein kann. Insofern sind die staatskirchenrechtlichen Artikel des Grundgesetzes zur umfassenden Darstellung der Beziehungen zwischen Staat und Kirchen wohl kaum entbehrlich. Konsequenterweise verbindet sich denn auch der Ruf nach einem „Religionsverfassungsrecht“ meist mit der Forderung nach grundsätzlicher Beseitigung überlieferter staatskirchlicher „Privilegien“.

#### 4. Religionskonflikte

Das engräumige Zusammenleben heutiger Menschen vor allem in den Städten lässt Konflikte schneller sichtbar werden als früher. Reibungen können schon im religiösen Zentralbereich beginnen, beim *Beten*. Juden und Christen beten meist in Gotteshäusern oder im „stillen Kämmerlein“. Das öffentliche Gebet der Muslime dagegen, mit vorgeschriebenen Gebetsrichtungen und Körperhaltungen, ist zentraler, auffälliger – im Zweifel auch

lauter und fordernder. So gibt es rings um den islamischen Muezzin und seine Botschaft, rund um religiöse Gebetszeiten in der Öffentlichkeit in vielen westlichen Ländern Streit; die Konfliktfelder der Religionsfreiheit reichen von der Straßenverkehrsordnung bis zum Immissionsschutz.

In Deutschland hält sich dieser Konflikt bisher in Grenzen. Bezüglich des Gebetsrufs im Freien sind die Muslime zurückhaltend mit Anträgen, aus dem verständlichen Wunsch heraus, das Zusammenleben der Religionen nicht mit überhöhten Forderungen zu belasten. In der Tat kann man zweifeln, ob Gebetsrufe in einer überwiegend nicht-muslimischen Umgebung ihre Funktion überhaupt erfüllen können. Freilich, auf diesem Feld, wo es um Hörbares, um Unüberhörbares geht, gibt es inzwischen auch eine Diskussion über die *Glocken christlicher Kirchen*.

Dann die Gotteshäuser, die Synagogen und Moscheen. Synagogen sind ein Teil des europäischen baulich-religiösen Erbes. Der Neuaufbau jüdischer Gemeinden nach dem Zweiten Weltkrieg, nach der Shoa, war daher von Anfang an begleitet vom Neubau von Synagogen und Gemeindehäusern. Jede Neueröffnung war ein wichtiges kommunales und politisches Ereignis. Dass Synagogen in Deutschland nach wie vor gegen Anschläge geschützt werden müssen, gegen Neonazis, Skinheads, Extremisten, zeigt freilich, dass die Geister des Hasses noch nicht gebannt sind.

Anders als die Neuerrichtung von Synagogen wirft der Neubau von Moscheen in Deutschland Probleme auf – so sehr, dass man die manchmal schwierigen Beziehungen von Muslimen, Christen, Nicht-Gläubigen in Deutschland am Streit um neue Moscheebauten in den Städten bildhaft ablesen kann. Die kommunale Öffentlichkeit ist gespalten: die überwiegende Zahl der Stadtverwaltungen unterstützt den Bau von Moscheen, aber es gibt auch Abwehrreaktionen, Einsprüche von Stadtplanern, Bürgerinitiativen, die auf Verhinderung zielen. Oft kommen Moscheevereine durch sorgfältiges Abwägen und geduldiges Verhandeln zum Ziel. Dabei spielen die Kommunalpolitik, die örtliche Presse, aber auch die christlichen Kirchen und ihr Verhältnis zu den Muslimen eine wichtige Rolle.

Auch im alltäglichen Leben gibt es Konfliktfelder. Wie steht es mit der Beschneidung, der Bart- und Haartracht, mit dem Schächtgebot, mit koscherem Essen? Wie steht es mit der Bestattung? Jüdische Friedhöfe gehören in den meisten europäischen Ländern, auch in Deutschland, zur Tradition. Der „Carré musulman“ dagegen – die Bestattung in Tüchern – stößt in einem dichtbesiedelten Land unvermeidlich auf Schwierigkeiten, da die Sargbestattung auch dem Schutz des Grundwassers dient. Auch das Juden wie Muslimen gemeinsame Gebot der unbefristeten Totenruhe wirft Probleme auf, da die Verlängerung der Grabstättenbelegung erhebliche Kosten verursacht, die nicht alle Nutzer ohne weiteres tragen können.

Endlich die Kleidung. Dass sie bei Religionen, besonders alten Religionen, als Distinktionszeichen eine größere Rolle spielt als in den zur Uniformität neigenden profanen Gesellschaften, liegt auf der Hand. Dass sie auch befremden und provozieren kann, besonders wenn sie ungewöhnliche, exklusive Formen annimmt, ist keine neue Erfahrung. Hier spielen kulturelle Verschiedenheiten, kulturelle Gewöhnungseffekte eine Rolle. Seit Jahren konzentrieren sich die Auseinandersetzungen in Deutschland – wie auch in Frankreich – auf das muslimische Kopftuch. Viele sehen in ihm ein kulturelles, ein religiöses – einige auch ein politisches Symbol. Doch die „Botschaft“ des Kopftuchs, so scheint mir, ist keineswegs eindeutig. Es kann eine Schutzvorrichtung für die Haare bei der Arbeit sein wie in alten Zeiten, ein Schutz gegen Wind und Regen, ein Schmuck, ein Modestück, eine mädchenhafte Alternative zum Hut, ein Ausdruck des Ländlich-Pastoralen, ein Dritte-Welt-Symbol, ein Zeichen einer kulturellen Herkunft, zu der man sich bekennen will – oder etwas, was einfach gefällt, ein Stück eigenes Leben. Das Kopftuch hat viele Bedeutungen, nicht eine. Sein Sinn ist nicht eindeutig festgelegt. Auch das Bundesverfassungsgericht hat bei seiner Anhörung zum Fall Fereshta Ludin (2003) diese Vieldeutigkeit zur Kenntnis genommen und sie in seinem Urteil – das den Länderparlamenten einen weiten Spielraum offen ließ – ausdrücklich bestätigt.

Vieles aus dem dargestellten Bündel von Problemen lässt sich im Einzelfall pragmatisch lösen: in jenem „schonenden Ausgleich“ (Peter Lerche), der geboten ist, wenn Grundrechtsansprüche verschiedener Art und Herkunft aufeinander stoßen – bei der Religionsfreiheit ein besonders häufiger Fall. Die Rechtsprechung liefert viele fast schon selbstverständlich gewordene Beispiele für einen solchen Ausgleich. So kann ein Jude verlangen, dass seine Sache nicht in einem Gerichtssaal verhandelt wird, in dem ein Kreuz hängt. Jüdischen Geschäftsinhabern kann die Öffnung eines Ladens am Sonntag erlaubt werden, da sie am Samstag wegen des Sabbatgebots keine Verkäufe tätigen dürfen. Der Geltung der jüdischen Schächtvorschrift ist man durch eine Klausel beim Tierschutz gerecht geworden, die Ausnahmen aus religiösen Gründen zulässt (das ist in einer neueren Gerichtsentscheidung auch muslimischen Metzgern zugute gekommen). Auf jüdische wie islamische Feiertage wie auf Gebetsverpflichtungen wird bei Schulbefreiungen von Schülern und Urlaubsgesuchen von Arbeitnehmern im Maß des Möglichen Rücksicht genommen. Im koedukativen Sportunterricht können im Einzelfall, wenn muslimische Eltern dies verlangen, Jungen und Mädchen getrennt werden – das sind nur einige Beispiele, die sich unschwer vermehren ließen.

Überhaupt muss man betonen, dass nicht alle Berührungen zwischen den „neuen Nachbarn“ Streitbefangen sind. Im Zusammenleben der Reli-

gionen in Deutschland dürften vielmehr das friedliche Miteinander, auch die respektvolle Neutralität, der sorgfältig gewählte Abstand die Regel sein. Glücklicherweise sind Religionskämpfe oder gar – kriege, wie wir sie in Irland zwischen Katholiken und Protestanten oder in den Ländern des einstigen Jugoslawien zwischen Orthodoxen, Katholiken und Muslimen erlebt haben, im heutigen Deutschland kaum denkbar. Im Kontext der Verfassungsordnung sind die Konflikte, die aus unterschiedlichen religiösen Zugehörigkeiten entstehen können), prinzipiell lösbar – lösbar nicht mit Gewalt, sondern mit Mitteln des Rechts.

### 5. Religion und Kultur

Während der Grundgesetz-Artikel über die Religionsfreiheit in den ersten Nachkriegsjahrzehnten wenig Aufsehen machte und die Auseinandersetzungen meist noch in den alten historischen Spuren verliefen, hat sich das Diskussionsfeld seit den Siebziger- und Achtzigerjahren im Zug der Migration, der Europäisierung und Globalisierung sprunghaft belebt. Die Religionsfreiheit rückte vom Rand in die Mitte der Auseinandersetzungen. Dabei stand man freilich häufig vor der Frage, wo die Konflikte im einzelnen zu lokalisieren waren – im religiösen Kernbereich oder im kulturellen *ambiente* der Religionen. Wo ging es tatsächlich um einen Konflikt der Religionen, und wo handelte es sich eher um einen – dem Religiösen vorgelagerten – „clash of civilisations“?

War es die andere Religion, die befremdete – oder das ungewohnte kulturelle Gewand, in dem sie in der Öffentlichkeit erschien? Die Grenze war oft schwer zu ziehen. In einer rasch populär gewordenen Aufzählung hat Dieter Grimm 2002 die für die neue Lage typischen Fragen gestellt: „Kann ein Motorrad fahrender Sikh unter Berufung auf seine religiöse Pflicht, einen Turban zu tragen, Befreiung von der allgemein geltenden Helmpflicht verlangen? Muss einem jüdischen Häftling koscheres Essen vorgesetzt werden? Hat ein islamischer Arbeitnehmer das Recht, seine Arbeit kurzzeitig für Gebete zu unterbrechen? Kann ein Arbeitnehmer wegen Nichterscheinens zur Arbeit an den hohen Feiertagen seiner Religionsgemeinschaft gekündigt werden? Verliert ein aus diesen Gründen entlassener Arbeitnehmer seinen Anspruch auf Arbeitslosenunterstützung?... Können ausländische Eltern ihre Töchter von höherer Bildung ausschließen oder ohne ihr Einverständnis verheiraten? Ist eine Befreiung von der Schulpflicht nötig, wenn die Schule Erziehungsziele verfolgt, die den Werten einer fremdkulturellen Gruppe widersprechen? Muss Mormonen die Polygamie hier gestattet werden, wenn sie ihnen im Herkunftsland erlaubt ist?“ (Dieter Grimm, Kann der Turbanträger von der Helmpflicht befreit werden? Frankfurter Allgemeine Zeitung vom 21. Juni 2002).

Sucht man eine Antwort auf diese Fragen, so muss man in zwei komplementäre – manchmal aber auch gegensätzliche – Richtungen weiterdenken. Auf der einen Seite wird Religionsfreiheit legitimerweise weit gefasst – ein Ergebnis ihrer leidvollen, von Konflikten und Gewalttätigkeiten erfüllten Vorgeschichte. Doch hat sie unbezweifelbar auch ihre Grenzen. Schon bei der Diskussion über die Religionsfreiheits-Erklärung des Zweiten Vaticanums wurde auf den „ordre public“ als eine wichtige Grenze hingewiesen (ohne dass das Konzil diesen Gedanke vertieft hätte). Religionsfreiheit soll ja kein „außerirdisches“ Postulat sein, keine extraordinäre, exzentrische Forderung, sie soll sich einfügen in die jeweilige staatliche Rechtsordnung, in die geschichtlich-gesellschaftliche Wirklichkeit. Nicht in jedem primär *kulturell* motivierten und konnotierten Konflikt kann sich der Einzelne auf die Religionsfreiheit berufen – schon gar nicht dort, wo es um singuläre, aus dem Rahmen fallende Verhaltensweisen geht. Es ist im Einzelfall sorgfältig abzuwägen, inwieweit multikulturelle Konflikte religiöse Motive, einen religiösen Hintergrund haben – oder inwieweit die Betroffenen nur deshalb auf das Grundrecht der Religionsfreiheit rekurrieren, weil es im Konfliktfall die breiteste Deckung bietet.

Andererseits: Innere Begründung und äußere Erscheinung der Religion lassen sich bekanntermaßen im Einzelfall oft nur schwer trennen. Die Religion geht nicht einfach unberührt durch die Kulturen hindurch. Sie akkulturiert sich vielmehr in der Zeit, nimmt aus der jeweiligen Kultur etwas in die Zukunft mit. So schichten sich in der katholischen Kirche im Lauf der Zeit jüdische, griechische, römische, mittelalterliche, moderne Elemente übereinander. Die Liturgie ist dafür ein lebendiger, täglicher Beweis. Gerade Katholiken haben einen Blick für dieses religiös-kulturelle Doppelgesicht der Kirche. Nicht immer ist im Vorgriff klar zu unterscheiden, was im Vollzug des christlichen Lebens göttlichen Ursprungs ist und was geschichtlich erwachsenes, die Botschaft umkleidendes „Menschenwerk“.

## 6. Verzicht auf Symbolik?

Das hat Bedeutung auch für die Erscheinungsformen des Religiösen in der Öffentlichkeit, für Kippa und Schleier und ähnliche Symbole – vor allem aber für das seit Jahren in Deutschland wie auch in anderen europäischen Ländern umkämpfte christliche *Kreuz*.

Von den zahlreichen Entscheidungen des Bundesverfassungsgerichts zur Religionsfreiheit hat der „Kruzifix-Beschluss“ von 1995 mit Recht das größte Aufsehen erregt. Den einen erschien er als säkularer Trompetenstoß – passend zur neuen Lage nach der Wiedervereinigung, in der ja Deutschland keineswegs, wie von manchen erwartet, „nördlicher, östlicher, protestanti-

scher“ (Volker Rühle), sondern vielmehr „heidnischer“ wurde. Gesamtdeutschland wies jetzt eine hohe Zahl von Ungetauften, Kirchenfernen, von Agnostikern und Atheisten auf. Erstmals konnte sich die „Konfession der Konfessionslosen“ den Katholiken und Protestanten an Umfang und Bedeutung an die Seite stellen. Dazu schien die Entscheidung des Gerichts, die in Kreuzen in bayerischen Klassenzimmern einen Verstoß gegen die Neutralitätspflicht des Staates sah und den Unterricht „unter dem Kreuz“ für verfassungswidrig erklärte, der adäquate zeitgeschichtliche Kommentar zu sein.

Andere sahen in diesem Beschluß eher einen temporären Missgriff des Gerichts, eine Fehlentscheidung, die in deutlichem Widerspruch zu der „flexiblen Kontinuität“ (Ansgar Hense) stand, welche seine bisherige Rechtsprechung zur Religionsfreiheit gekennzeichnet hatte. Hatte doch das Gericht beispielsweise 1979 festgestellt, ein überkonfessionelles Schulgebet (außerhalb des Religionsunterrichts) sei verfassungsrechtlich unbedenklich, selbst dann, „wenn ein Schüler oder dessen Eltern der Abhaltung des Gebets widersprechen“ – diese müssten nur frei und ohne Zwänge über die Teilnahme entscheiden können. Warum sollte nun beim Kreuz im Klassenzimmer plötzlich alles anders sein? Warum sollte hier der Einspruch eines einzigen Schülers (oder Elternteils) die unmittelbare Abhängung des Kreuzes zur Folge haben (müssen)? Die Kritik wies auf die logische Inkonsistenz in der Argumentation des Gerichts hin. Mussten Schüler vor *Bildern*, nicht jedoch vor *Wörtern* geschützt werden? Durften sie beten und singen – aber nicht ein Kreuz betrachten? Das vom Gericht gebrauchte Argument, man könne dem Einfluss eines Kreuzes im Klassenzimmer „nicht ausweichen, verriet eine fast magische Bildauffassung. Paul Gerhards „O Haupt voll Blut und Wunden“ sollten also die Schüler ohne Anstand *beten* oder *singen* dürfen (Schulgebets-Beschluss); die *visuelle Vergegenwärtigung* des blutigen Hauptes aber sollte ihnen verwehrt sein (Kruzifix-Beschluss).

Der Kruzifix-Beschluss gehört zu den wenigen Entscheidungen des Bundesverfassungsgerichts, die in Deutschland auf grundsätzlichen Widerstand stießen. Er trieb vor allem in Bayern Tausende von Demonstranten auf die Straßen. Der bayerische Gesetzgeber schuf – um der Mehrheit wie der Minderheit gerecht zu werden – eine Auffangstellung: Er bestätigte einerseits das Kreuz in bayerischen Schulen, etablierte andererseits Mechanismen der Konfliktlösungen für den Fall des Einspruchs gegen die Schulkreuze an der betroffenen Schule. Der alte Zusammenhang von Religionsfreiheit und Religionsfrieden wurde neu entdeckt. In der Folgezeit fand man bei Konflikten (fast) überall örtliche Lösungen. Die Einsprüche blieben im ganzen atypische Einzelfälle, die keine „Bewegung“ gegen religiöse Symbole nach sich zogen. Bemerkenswert ist, dass auch kein Muslim die Abhängung von Kreuzen in Schulen verlangte.

Der Kreuz-Streit hinterließ viele Fragen – vor allem die nach der Präsenz religiöser Symbole in der Öffentlichkeit. Das Kreuz ist in der heutigen deutschen Gesellschaft sowohl in religiösen als auch in kulturellen Formen gegenwärtig. Die kulturellen Formen überwiegen. „Ungemischt religiös“ ist das Kreuz in Kirchen präsent – am deutlichsten in der Liturgie (Karfreitag). Das Kreuz in Schulen dagegen wird gewöhnlich weder begrüßt noch verehrt, es wirkt durch seine Gegenwart, diese jedoch löst nicht zwingend religiöse Reflexe aus. Es erinnert an die Tradition, an den geschichtlichen Grund, aus dem Erziehung, Bildung, Schule im Land erwachsen sind. In säkularen Zeiten ist es Anlass, über die Grenzen menschlichen Planens und Handelns nachzudenken – über den Sinn von Leid und Tod, über das Mitleid, das aus dem Anblick eines leidenden Menschen erwachsen kann.

Das Kreuz (und das gilt mutatis mutandis auch für andere religiöse Symbole) ist nicht – wie die Richtermehrheit annahm – etwas deutungsfrei Gegebenes, etwas, was Menschen unwiderstehlich in eine Richtung zieht. Es ist kein magisch zwingendes Symbol, es muss vielmehr durch Erklärung, Interpretation, Aneignung erst erschlossen werden. Man kann sich mit ihm identifizieren. Viele werden das – aus einer christlichen Erziehung heraus – tun. Man kann ihm jedoch auch ausweichen – die Skala von Identifikation bis zu Nichtidentifikation ist breit; und daher behält auch die negative Bekenntnisfreiheit dem Kreuz gegenüber den ihr zukommenden angemessenen Spielraum.

### *7. Europäische Wiederholungen*

Es wirft ein bezeichnendes Licht auf die wachsenden europäischen Verflechtungen, dass sich der deutsche Kreuz-Streit von 1995 in den Jahren 2009–2011 auf der europäischen Ebene wiederholte. Betroffen war Italien, und an die Stelle des deutschen Bundesverfassungsgerichts in Karlsruhe trat der Europäische Gerichtshof für Menschenrechte in Straßburg – zunächst dessen Erste Instanz. Der Ablauf des Prozesses, die Einzelheiten, die Argumente, selbst bestimmte Formulierungen wirkten wie eine genaue Wiederholung zum Thema Religionsfreiheit, Kreuz und Schule.

Eine in Italien lebende Finnin, Soile Lautsi, nach eigenem Bekenntnis Atheistin, hatte vor dem Verwaltungsgericht der Provinz Venetien dagegen geklagt, dass in den Klassenräumen ihrer Kinder Kreuze hingen. Da es sich um staatliche Schulen handelte, sah sie darin einen Verstoß gegen ihre weltanschaulichen Überzeugungen, einen mangelnden Schutz ihrer (negativen) Religionsfreiheit. Der Erste Senat gab ihr recht und befand, das obligatorische Anbringen von Kreuzen in italienischen staatlichen Schulen verstoße gegen die Europäische Menschenrechtskonvention und müsse daher unterbleiben. Das Erziehungsrecht der Eltern – und die Freiheit der Kinder, zu glauben



oder nicht zu glauben – werde durch eine solche Regelung unzulässig eingeschränkt. Auf Kinder anderer – oder keiner – Religion könne der Anblick eines Kreuzes „verstörend“ wirken. Das Gericht verurteilte Italien zur Zahlung einer Entschädigung an die Klägerin. Das Argument der italienischen Regierung, das Schulkreuz sei ein Landessymbol, es stehe für die erzieherische Tradition Italiens, seine kulturellen Werte, wurde nicht anerkannt.

Auch diese Entscheidung fand ein lebhaftes und kontroverses Echo in den europäischen Ländern. In Deutschland erinnerte man sich an den Beschluss des Bundesverfassungsgerichts von 1995 und registrierte überrascht, dass die tragenden Argumente der Karlsruher Entscheidung vom Straßburger Gericht einfach wiederholt wurden, ohne dass man der sehr eingehenden nachfolgenden juristischen und historischen Kritik Beachtung schenkte. Die italienische Regierung erhob Einspruch gegen den Beschluss. Andere im Europarat vertretene Länder schlossen sich an. Sie machten von den besonders in Deutschland vorgebrachten Gegenargumenten Gebrauch, indem sie darauf verwiesen, dass religiöse Symbole nichts Eindeutig-Zwingendes an sich hätten, sondern einem breiten Spektrum möglicher Deutungen unterlägen, dass die italienischen Schulen offen seien auch für andere Religionen (und Nicht-Religionen) und dass nationale Regierungen – je nach ihrer historischen Überlieferung und der aktuellen Stellung der Bekenntnisse und Weltanschauungen in den einzelnen Ländern – einen Entscheidungsspielraum für sich beanspruchen müssten; eine Kammer könne sich nicht – gestützt allein auf einen Einzelfall – zum gesamteuropäischen Gesetzgeber in einer so heiklen und komplexen Frage aufwerfen.

Das Erstaunliche geschah: im März 2011 hob die Große Kammer das frühere Urteil auf und stimmte mit einer Mehrheit von 15 zu 2 der Rechtsauffassung der Republik Italien zu. Nach Auffassung des Gerichtshofs hielt sich die Entscheidung der Behörden, die Kreuze in den Klassenzimmern der Schule zu belassen, in den Grenzen des Beurteilungsspielraums, den man dem italienischen Staat in Fragen der Erziehung und des Unterrichts zubilligen müsse. „Der Gerichtshof hat daher im Prinzip die Entscheidungen der Staaten auf diesem Gebiet zu respektieren, einschließlich des Stellenwerts, den sie der Religion beimessen, sofern diese Entscheidungen zu keiner Form der Indoktrinierung führen“. Eine missionarische Tendenz werde durch die Präsenz des Kreuzes nicht gefördert. Das Kreuz sei ein „passives Symbol“. Sein Anblick sei nicht mit einer Teilnahme an religiösen Aktivitäten zu vergleichen. Im übrigen bleibe das Recht von Frau Lautsis, ihre Kinder nach der eigenen weltanschaulichen Überzeugung zu erziehen, unberührt; es werde durch Symbole mit religiöser Konnotation – die den Charakter kultureller Erinnerungszeichen hätten – nicht behindert.

Mit diesem Urteil des Europäischen Gerichtshofs sind die Akten über dem allgemeinen Thema Religionsfreiheit – und dem speziellen Thema religiöse Symbolik – gewiss noch nicht geschlossen. Aber wichtige Differenzierungen des Problems, erwachsen aus einer jahrelangen, oft mit Leidenschaft geführten Diskussion, haben erstmals ihren Platz in einem verbindlichen Urteil gefunden, das inzwischen von allen 47 Ländern des Europarats anerkannt wurde. Das lässt hoffen, dass die stets prekäre Abwägung zwischen positiver und negativer Religionsfreiheit, zwischen dem Schutz des privaten Bekenntnisses und der Sicherung gemeinsamer Traditionen in Erziehung, Bildung, Staatsverständnis auch im Zeitalter der Globalisierung gelingen kann.

# LA LIBERTÉ RELIGIEUSE ET LE PRINCIPE DE LAÏCITÉ EN FRANCE

■ MICHEL FROMONT

L'article 1<sup>er</sup>, alinéa 1, de la constitution française du 4 octobre 1958 dispose: "La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion. Elle respecte toutes les croyances". Le Préambule de la constitution de 1946, qui a aussi valeur constitutionnelle, précise que ce principe de laïcité vaut tout particulièrement pour l'enseignement: "La Nation garantit l'égal accès de l'enfant, et de l'adulte à l'enseignement, à la formation professionnelle et à la culture. L'organisation de l'enseignement public, gratuit et laïque à tous les degrés est un devoir de l'État".

La France se caractérise ainsi par l'adoption du principe de laïcité, lequel est fondamentalement un principe qui se veut protecteur de toutes les opinions et de toutes les croyances, la spécificité de la croyance religieuse et de son expression par un culte célébré collectivement étant de ce fait sinon effacée, du moins très atténuée. La liberté religieuse est ainsi considérée comme une simple liberté d'opinion. Cela s'explique par l'histoire, notamment par le caractère profondément individualiste des droits de l'homme proclamés en 1789 et par les tensions ayant souvent opposé l'Église catholique au pouvoir civil, notamment à la République et à la démocratie, telle que celles-ci se sont installées en France à la fin du 19<sup>e</sup> siècle.

Avant la Révolution de 1789, la religion catholique était religion d'État en France, du moins depuis qu'en 1685 Louis XIV eut révoqué l'Édit de Nantes qu'avait promulgué Henri IV un siècle auparavant en faveur des protestants. Il faudra attendre le mouvement des Lumières pour qu'en 1787 Louis XVI adopte un Édit de Tolérance en faveur des "sujets qui professent une autre religion que la religion catholique, apostolique et romaine": grâce à ce texte, protestants et juifs purent avoir un véritable état civil.

La Déclaration des droits de l'homme et du citoyen du 26 août 1789 accorda la pleine liberté religieuse à tous les hommes vivant sur le territoire national: "Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la loi" (article 10). Cette liberté religieuse est toutefois conçue comme une liberté individuelle et non comme une liberté collective. En effet, la philosophie individualiste qui imprégna si fortement les Révolutionnaires, s'op-

posait à ce que la liberté religieuse soit conçue également comme une liberté collective : tout groupement est alors considéré comme une menace pour la liberté individuelle. D'ailleurs, aujourd'hui encore, cette hostilité envers les groupes explique que le principe de non discrimination posé en 1789 est aujourd'hui encore interprété comme s'opposant à ce que l'État recense l'appartenance religieuse des citoyens.

Durant tout le XIX<sup>e</sup> siècle, la France fut régie par le Concordat qui fut conclu en 1801 entre Napoléon et l'Église catholique (presque 30 millions de catholiques et un clergé fort de 24 000 personnes) et promulgué l'année suivante en même temps que la loi sur les Églises protestantes (Église réformée, Église de la confession d'Augsbourg, soit environ 600 000 fidèles). Les juifs (environ 40 000) bénéficièrent d'un régime à peu près identique à partir de 1808. Dorénavant il n'y avait plus de religion d'État, mais pour l'Église catholique, les évêques étaient nommés par le Gouvernement et, pour toutes les Églises, le Gouvernement avait un droit de regard sur la nomination des ecclésiastiques; en contrepartie, il versait un salaire aux trois clergés. Les lieux de culte restèrent propriété de l'État ou des communes. En outre, les écoles et les hôpitaux furent le plus souvent gérés par l'Église catholique.

Après la chute du Second Empire (1870), l'Église catholique s'opposa de façon véhémement à toute libéralisation des institutions politiques, spécialement à l'établissement de la III<sup>e</sup> République (1875) et à sa consolidation à partir de 1879. Les partisans d'une République libérale engagèrent alors un combat contre l'Église catholique qui devait durer plus d'un quart de siècle. Tout d'abord, en 1882 et 1886, des lois furent adoptées pour chasser progressivement l'Église de l'enseignement public: l'instruction religieuse ne pouvait plus être faite dans les locaux scolaires. Des écoles normales furent créées pour former des instituteurs et des professeurs de lycée laïques et ces nouveaux enseignants remplacèrent progressivement les ecclésiastiques frappés d'interdiction d'enseigner dans les écoles publiques. Le conflit s'envenima au début du 20<sup>e</sup> siècle et aboutit en 1905 à la dénonciation du Concordat de 1801 et à la promulgation de la loi du 9 décembre 1905 relative à la séparation de l'État et des Églises. L'article 1<sup>er</sup> de cette loi dispose: "La République ne reconnaît, ni ne salarie, ni ne subventionne aucun culte". La Papauté résista jusqu'en 1926 car elle s'opposait à ce que les édifices du culte fussent remis pour leur gestion à des associations culturelles gérées par les fidèles, et non pas par les évêques; depuis 1926, une solution de compromis a été trouvée: désormais des associations composées par des fidèles, mais présidées par un évêque, en assurent leur gestion; elles sont appelées associations diocésaines. En revanche, cette résistance explique que l'Église catholique a perdu tous ses autres biens immobiliers, notamment les séminaires et les couvents.

Depuis cette période de vives tensions, les esprits ont retrouvé le souci de la paix religieuse et même le souci d'aider chaque religion dans une mesure, certes limitée, mais néanmoins appréciable. De ce fait, le principe de laïcité est aujourd'hui plutôt conçu comme un principe de neutralité de l'État et de tolérance bienveillante. Néanmoins, l'arrivée de l'Islam et des "religions nouvelles" a de nouveau réveillé la méfiance de l'État.

Cette histoire explique qu'il n'y a pas un régime juridique unique applicable à toutes les religions, mais qu'il y a pratiquement autant de statuts que de religions. Malgré des relations tumultueuses dans le passé, l'Église catholique bénéficie aujourd'hui encore d'une position privilégiée par rapport aux autres religions. Certes les autres églises reconnues depuis Napoléon, les deux Églises protestantes (calviniste et luthérienne) et la communauté juive, acceptèrent de se placer sous le régime défini par la loi de 1905, mais elles n'en tirèrent qu'un profit limité, compte tenu de leur place modeste dans la société française. Quant aux religions dites nouvelles, elles bénéficient en principe du même régime, mais nous montrerons que dans la pratique, il leur est encore moins favorable. En outre, le législateur français s'est montré hostile à certaines religions nouvelles qui ont été accusées d'user de la violence psychologique et de recourir à des pratiques dites sectaires.

## 1. Les règles communes à toutes les religions

Le principe de laïcité consacré par les constitutions de 1946 et 1958 a fait l'objet de quelques applications par le Conseil constitutionnel<sup>1</sup> et par le Conseil d'État.<sup>2</sup> Selon cette jurisprudence et aussi selon l'opinion dominante

<sup>1</sup> Conseil constitutionnel 23 novembre 1977, n° 77-87, Rec. 1977, p. 42 (relative à la conciliation nécessaire entre le principe de laïcité et la liberté de l'enseignement); Conseil constitutionnel 13 janvier 1994, n° 93-329, Rec. p. 9 (à propos de la conciliation entre le principe d'égalité et la liberté de l'enseignement); Conseil constitutionnel 19 novembre 2004, n° 2004-505 DC (à propos du respect du principe français de laïcité par l'article II-70 du traité portant constitution de l'Europe). Noter que toutes les décisions du Conseil constitutionnel se trouvent sur un site officiel: [www.legifrance.gouv.fr/initRechJuriConst.do](http://www.legifrance.gouv.fr/initRechJuriConst.do).

<sup>2</sup> Voir notamment l'arrêt rendu récemment par le Conseil d'État le 9 juillet 2010 sur saisine de la Fédération nationale de la Libre Pensée, Rec. 2010 (voir les conclusions du rapporteur public et les commentaires doctrinaux parus à la *Revue française de droit administratif* 2010, p. 980; *Droit administratif* 2010, commentaire n° 130 et *Droit administratif* 2011, étude n°7). Dans cette affaire, le Conseil d'État a jugé que le décret de publication de l'accord entre la France et le Saint Siège sur la reconnaissance des grades et diplômes dans l'enseignement supérieur ne contredit pas la loi du 9 décembre 1905 concernant la séparation des Églises et de l'État et qu'elles "ne font prévaloir aucun critère religieux ni aucune

de la doctrine, le principe de laïcité signifie principalement que l'État a une obligation de neutralité et de respect vis-à-vis des religions, ce qui garantit la liberté religieuse dans toutes ses composantes: liberté de conscience, liberté de croyance, liberté de manifestation de la foi, liberté de culte.

En premier lieu, la neutralité de l'État entraîne la séparation de l'État et de l'Église; en particulier, le culte est une affaire purement privée et ne doit pas être soutenu par l'État (sous la forme d'une aide financière ou sous une autre forme). Les Églises doivent exercer leur activité sans aucune aide de l'État et réciproquement, l'État ne doit pas s'immiscer dans les affaires des Églises (autonomie des Églises). C'est pourquoi une collectivité religieuse ne peut agir que sous la forme d'une association de droit privé, même si celle-ci bénéficie d'un statut privilégié sur le plan du droit civil (par exemple, capacité de recevoir des dons et legs) ou du droit fiscal (possibilité pour le donateur de déduire ses dons de son revenu imposable) et même s'il s'agit d'une forme particulière d'association (association culturelle pour toutes les Églises, association diocésaine pour l'Église catholique).

En second lieu, l'obligation de respecter la liberté religieuse et spécialement la liberté des cultes ou encore l'obligation d'adopter une attitude de tolérance bienveillante vis-à-vis des religions signifient que l'État doit veiller à ce que soient satisfaits les besoins religieux de chacun. En particulier, l'État doit s'occuper des besoins religieux de ceux qui ne jouissent que d'une liberté de mouvement restreinte, tels que les prisonniers, les malades hospitalisés, les élèves vivant en internat ou les soldats dans les casernes.<sup>3</sup> Il a

considération de la pratique éventuelle d'un culte pour l'accès à l'enseignement supérieur public". Voir aussi l'arrêt du Conseil d'État du 16 mars 2005 relatif à la subvention d'une décision d'octroyer une subvention pour la reconstruction d'un presbytère de l'Église évangélique en Polynésie. Comme la loi du 9 décembre 1905 portant séparation de l'État et des Églises du 9 décembre 2005 n'est pas applicable en Polynésie française, le Conseil d'État a contrôlé la validité de la subvention au regard du principe constitutionnel de laïcité qui est immédiatement applicable et a jugé que ce principe "qui implique neutralité de l'État et traitement égal des différents cultes", ne s'opposait pas à l'octroi de cette subvention compte tenu de ce que le bâtiment en question "joue un rôle dans de nombreuses activités socio-éducatives notamment dans des îles éloignées" et qu'il est "ouvert à tous et accueille les sinistrés" (Conseil d'État 16 mars 2005, n° 265560). Noter que presque toutes les décisions des juridictions administratives françaises se trouvent sur un site officiel: [www.legifrance.gouv.fr/initRechJuriAdmin.do](http://www.legifrance.gouv.fr/initRechJuriAdmin.do).

<sup>3</sup> C'est en vertu de ce principe que l'État est tenu de créer des aumôneries dans ces lieux et de rémunérer les aumôniers que désignent les responsables des différentes religions. Selon la jurisprudence du Conseil d'État, l'État peut même utiliser des religieuses catholiques à titre de soutien au personnel des prisons, mais à condition que celles-ci

également l'obligation de prendre en considération les prescriptions alimentaires ou les dates des principales fêtes religieuses. Sinon la liberté religieuse ne serait qu'une enveloppe vide. En raison de ces aspects positifs, la laïcité est souvent qualifiée de laïcité ouverte.

En troisième lieu, l'État doit considérer que toutes les religions ont même valeur et les traiter en conséquence de façon égale. Ce principe de l'égal traitement, qui est affirmé par l'article 1<sup>er</sup> de la constitution, garantit le pluralisme religieux qui est indispensable dans toute démocratie. Aucune religion ne doit être privilégiée. Néanmoins, le poids du passé est tel que certaines religions se trouvent de fait privilégiées: ce sont celles qui ont un enracinement ancien et qui, aujourd'hui encore, regroupent un nombre important de fidèles. C'est principalement le cas de la religion catholique.

## 2. Le statut de l'Église catholique

Apparemment, l'Église catholique n'est pas la mieux placée. La loi de 1905 sur la séparation de l'Église et de l'État a été principalement adoptée pour briser la volonté de l'Église catholique de continuer à dominer la société française. Cette loi eut des effets d'autant plus défavorables que l'Église refusa de créer les associations cultuelles qui devaient être chargées de gérer les biens de l'Église. Devant ce refus, le législateur français prit alors une nouvelle loi transférant à l'État ou aux communes tous les biens de l'Église, étant entendu que les édifices du culte seraient mis gratuitement à la disposition des fidèles et du clergé tout en étant entretenus par l'État (pour les cathédrales) ou les communes (pour les églises). De fait, l'Église perdit séminaires, presbytères et couvents qui devinrent propriété de l'État ou des communes.

Néanmoins, l'Église catholique a conservé un certain nombre d'avantages ou en a même acquis de nouveaux par la suite.

Les privilèges tenant au passé catholique de la France sont les suivants. En premier lieu, les fêtes légales sont très largement les fêtes catholiques: outre les fêtes communes à toutes les religions chrétiennes (Noël, Pâques, Ascension et Pentecôte), la France a fait de l'Assomption de Marie et de la Toussaint des fêtes légales. En second lieu, les lieux de culte existant en 1905 étaient presque tous catholiques et, de ce fait, l'Église catholique a la jouissance gratuite de la quasi-totalité des lieux de culte anciens et elle dispose seule de la possibilité

s'abstiennent de tout prosélytisme (Conseil d'État, 27 juillet 2001, n<sup>os</sup> 215550 et 220980 à propos d'une convention conclue en 1995 par le ministre de la justice avec la Congrégation des sœurs de Marie-Joseph et de la Miséricorde et prévoyant la rémunération de la congrégation pour l'exécution des tâches qui leur sont confiées).

d'actionner les cloches des clochers. Toutefois, l'Église catholique se plaint de ne pouvoir recevoir aucune aide financière de l'État ou des collectivités territoriales pour construire de nouveaux édifices du culte dans les grandes agglomérations qui se sont constituées depuis la seconde moitié du XXe siècle (par exemple, la région parisienne est passée de 5 à 12 millions d'habitants).

D'autres privilèges sont plus récents et sont l'illustration d'une tendance à l'assouplissement du principe de laïcité depuis une cinquantaine d'années. Il s'agit d'ailleurs de privilèges qui ne sont pas propres à l'Église catholique, mais de possibilités qui sont ouvertes à tout organisme religieux, mais qui, dans les faits, sont utilisées presque exclusivement par l'Église catholique. La possibilité la plus importante est celle qui permet depuis la loi du 31 décembre 1959 à des écoles privées du premier et du second degré d'être aidées financièrement par l'État à la triple condition que tous les élèves soient accueillis "sans distinction d'origine, d'opinion ou de croyances", que les programmes d'enseignement soient identiques à ceux des établissements d'État (un enseignement religieux pouvant toutefois y être ajouté) et que le personnel enseignant ait les qualifications requises (art. L.L. 442-5 et suiv du code de l'éducation). En outre, les dépenses de fonctionnement (entretien et personnel non enseignant) de ces écoles "sous contrat d'association" sont à la charge de l'État et/ou des collectivités territoriales concernées. Dans la pratique, on estime à 15 à 20% la part des établissements d'enseignement privé dans l'ensemble de l'enseignement primaire et secondaire. Enfin, une loi du 29 juillet 1961 a autorisé les communes et les départements à garantir les emprunts contractés par les associations cultuelles ou des groupements locaux pour construire des édifices du culte dans les agglomérations en voie de développement (art. L. 2252 et L. 3231-5 du code général des collectivités territoriales).

Enfin, il faut relever le fait que trois départements français, ceux du Haut-Rhin, du Bas-Rhin et de la Moselle restent régis par le Concordat de 1801 et la législation qui l'a mise en œuvre. En effet, le concordat fut dénoncé par la France en 1904, c'est-à-dire à une période durant laquelle ces trois départements avaient été annexés par l'Empire allemand et, lorsque ceux-ci redevinrent français en 1918, le gouvernement français préféra respecter une situation à laquelle la population était très attachée. En conséquence, dans ces départements, les membres du clergé sont nommés par le Gouvernement ou avec son assentiment et ils sont rémunérés par l'État. En outre, l'enseignement des écoles comporte une instruction religieuse (facultative).<sup>4</sup> Bien que cette

<sup>4</sup> Cet enseignement religieux est même financé par l'État, comme le montre l'affaire jugée par le Conseil d'État le 6 avril 2001 (n<sup>os</sup> 219379, 221699, 221700): le ministre de



situation soit contraire au principe de laïcité qui fut introduit dans la constitution française à partir de 1946, elle n'est pas remise en question. Elle bénéficie non seulement à l'Église catholique, mais encore aux deux Églises protestantes d'Alsace et de Lorraine (Église réformée, Église de la confession d'Augsbourg),<sup>5</sup> ainsi qu'à la communauté israélite. Noter que le département de la Guyane a conservé un statut spécial très favorable à l'Église catholique, la séparation de l'Église et de l'État n'ayant pas eu lieu.

### **3. Le statut des autres religions traditionnelles (protestante et juive)**

Les différentes églises protestantes du XIXe siècle et la communauté juive ont bénéficié de 1802 (ou 1808 pour les Juifs) à 1905 d'un régime juridique proche de celui applicable à l'Église catholique: tant les bâtiments que les membres du clergé bénéficiaient des mêmes avantages financiers que ceux de l'Église catholique. L'intégration de ces minorités religieuses se fit même dans de bonnes conditions puisqu'il y eut dès la première moitié du XIXe siècle des ministres protestants et juifs dans le Gouvernement. Cependant, le nombre des fidèles demeura assez faible (650 000 protestants et 120 000 juifs en 1872, date du dernier recensement prenant en compte l'appartenance religieuse) et, de plus, ces religions avaient un nombre de religieux relativement faible et un patrimoine immobilier assez modeste. C'est pourquoi ces différentes communautés religieuses apprécient certes l'indépendance que procure la séparation d'avec l'État, mais regrettent l'absence de toute aide financière de la part de l'État et des collectivités territoriales.

La situation actuelle présente un certain nombre de défauts. En premier lieu, les temples protestants et les synagogues juives sont en nombre insuffisant, spécialement les synagogues puisque le nombre des juifs en France est passé de 200 000 avant la Deuxième Guerre mondiale à près de 600 000 aujourd'hui; cette remarque vaut tout particulièrement pour les grandes agglomérations qui se sont considérablement développées au XXe siècle. En second lieu, le statut des associations culturelles est trop rigide: il ne permet pas à ces associations d'avoir des activités culturelles (par exemple, édition de livres ou de films) qui seraient en liaison avec leur activité d'enseignement de la religion.

L'Éducation nationale peut valablement prévoir la création de postes supplémentaires pour l'enseignement religieux catholique et l'enseignement religieux protestant, car la loi du 1<sup>er</sup> juin 1924 a maintenu expressément en vigueur la législation locale et elle n'a pas été abrogée implicitement par les constitutions subséquentes de 1946 et surtout de 1958 qui consacrent le principe d'une République laïque.

<sup>5</sup> En 2006, elles ont constitué l'Union des Églises protestantes d'Alsace et de Lorraine et regroupent presque la moitié des protestants français.

En outre, la religion juive a des revendications particulières. En effet, le sabbat ne bénéficie d'aucun statut particulier et les fêtes légales sont actuellement exclusivement des fêtes chrétiennes et même la fête juive la plus importante, le Jom Kippur, n'est pas un jour férié. Dans la pratique, les services publics d'examens s'efforcent simplement de ne pas fixer les examens à des jours de fête juive. De plus, aucun texte juridique n'impose aux cantines scolaires l'obligation de respecter les prescriptions juives relatives à la nourriture; c'est seulement la bonne volonté des services scolaires qui, en général, règlent le problème au cas par cas.

#### **4. Le statut des religions traditionnelles nouvellement implantées en France (Islam)**

En 1905, année de la séparation des Églises et de l'État, la religion musulmane était pratiquement inexistante en France métropolitaine. Aujourd'hui, du fait de l'immigration en provenance d'Afrique, on estime que 5 millions de musulmans vivent en France dont 3 millions auraient la nationalité française et 2 millions pratiqueraient effectivement leur religion, au moins sous la forme d'une participation au Ramadan (ce qui en fait la deuxième religion en France). Ces musulmans rencontrent plusieurs difficultés pour remplir leurs obligations religieuses.

La première difficulté tient à ce que l'Islam n'est pas organisé en Église comme le sont les religions chrétiennes: il n'y a pas de hiérarchie, ni d'organisation regroupant l'ensemble des fidèles et des imams, qui d'ailleurs ont pour seule fonction de diriger la prière. En outre, la plupart des imams ne sont pas de nationalité française, mais sont originaires principalement du Maroc (ce sont les musulmans réputés modérés) et d'Égypte (réputés plus radicaux). Les raisons de ce phénomène tiennent à ce que l'imam doit maîtriser la langue arabe et aussi à ce que les moyens financiers ne sont pas fournis par l'État français, mais par des organisations étrangères, notamment marocaines, algériennes, égyptiennes ou des États du Golfe. En outre, il n'existait évidemment aucune mosquée sur le sol français en 1905, année d'entrée en vigueur de la loi de séparation. L'État français s'est efforcé de remédier à cette situation en suscitant la création d'organe consultatifs, le Conseil français du culte musulman au niveau national et les Conseils régionaux du culte musulman au niveau régional. Le Conseil français du culte musulman est l'organe principal d'une association qui a été créée en 2003 par des représentants des différentes mosquées; il a fait déjà l'objet de trois élections, respectivement en 2003, 2005, 2008 et 2011. Cette association ne peut avoir que des activités relatives au culte. Par ailleurs, afin de construire des mosquées, les principales organisations musulmanes de France ont créé

en 2005 une Fondation pour les œuvres de l'Islam de France. Dans la pratique, ces organismes sont peu efficaces en raison de nombreuses rivalités internes et aussi de l'absence de moyens financiers suffisants.

L'absence de toute possibilité d'aide financière de la part de l'État et des collectivités territoriales ainsi que le caractère récent et peu efficace des organismes représentatifs expliquent que les mosquées et autres salles de réunion sont en nombre insuffisant et souvent trop petites: seules 13 mosquées ont un minaret et peuvent accueillir plus de 1000 fidèles. De même, la formation des imams est encore mal organisée, ce qui explique que 75 à 90% des imams soient étrangers et que seules les organisations bénéficiant de l'aide étrangère peuvent faire fonctionner des instituts de formation; toutefois, l'État vient de mettre à la disposition des imams en cours de formation quelques enseignements portant sur la civilisation et la culture françaises. Comme les ministres des autres cultes présents en France, les imams ne sont pas rémunérés par l'État français; la seule exception est, comme pour les autres religions, le statut des aumôniers dans les prisons, les hôpitaux et l'armée, lesquels sont rémunérés par l'État, mais sont encore en nombre insuffisant.

D'autres problèmes ne sont pas résolus du seul fait que la société française, tout en étant aujourd'hui en grande partie déchristianisée, demeure de culture chrétienne. Ainsi, le mariage est nécessairement monogame. De même, les jours fériés correspondent largement à des fêtes chrétiennes (les seules exceptions sont le 1<sup>er</sup> janvier et le 1<sup>er</sup> mai). De plus, les usages alimentaires ne prennent pas en considération les exigences de la religion musulmane (comme, d'ailleurs, de la religion juive); cependant, l'abattage des animaux de boucherie est parfois organisé de façon à satisfaire les prescriptions religieuses, spécialement pour la fête de l'Aïd el Kebir (ce qui suppose une dérogation aux règles applicables dans les abattoirs); dans les écoles, les hôpitaux et les prisons, les cantines en tiennent généralement compte, mais il y a encore des exceptions.

Quant à l'habillement, il est théoriquement libre, mais une loi du 15 mars 2004 a interdit aux jeunes filles de porter le voile à l'école publique. Plus précisément, elle a interdit aux élèves des deux sexes "le port de signes ou tenues par lesquels les élèves manifestent ostensiblement leur appartenance religieuse" dans les écoles, les collèges et les lycées publics (art. L. 141-5-1 du code de l'éducation). Cette interdiction a été généralement respectée et elle n'a conduit qu'à un nombre très réduit d'exclusions; elle ne s'applique évidemment pas aux établissements scolaires privés, principalement catholiques (qui ont effectivement accueilli un certain nombre d'élèves musulmans portant le voile), exceptionnellement musulmans (il existe actuellement trois ly-

cées privés musulmans en France). Cette mesure a été justifiée par le législateur par la nécessité de respecter la laïcité de l'État et aussi par la volonté de soustraire les élèves de sexe féminin à tout assujettissement à des usages jugés sexistes.<sup>6</sup> Un pas supplémentaire a été fait plus récemment: la loi du 11 octobre 2010 a interdit à toute personne se trouvant "dans l'espace public" de "porter une tenue destinée à dissimuler son visage", ce qui vise en réalité le port de la burqa ou du niqab. La constitutionnalité de cette interdiction a été admise par le Conseil constitutionnel sur saisine des présidents des deux assemblées parlementaires.<sup>7</sup> Le Conseil constitutionnel a considéré que le législateur avait réalisé une conciliation, qui n'est pas manifestement disproportionnée, entre la sauvegarde de l'ordre public, la liberté religieuse et la nécessité d'épargner aux femmes "une situation d'exclusion et d'infériorité manifestement incompatible avec les principes constitutionnels de liberté et d'égalité". Il a toutefois émis une réserve d'interprétation: "l'interdiction de dissimuler son visage dans l'espace public ne saurait, sans porter une atteinte excessive à l'article 10 de la Déclaration de 1789, restreindre l'exercice de la liberté religieuse dans les lieux de culte ouverts au public".

Enfin, dans la pratique, les musulmans de France ont beaucoup de difficultés à respecter les rites relatifs aux défunts; en particulier, l'enterrement du corps du défunt à même la terre est interdit pour des raisons d'hygiène et bien souvent, les cimetières sont dépourvus d'un carré musulman permettant que les corps soient placés en direction de la Mecque.

## 5. Le statut des religions nouvelles

Au cours du siècle dernier, diverses religions nouvelles sont apparues. Les unes sont d'origine chrétienne, comme, par exemple, les Témoins de Jéhovah, les Mormons ou Moon; les autres sont de tendance orientaliste, comme Sokka Gakkai; d'autres ont une tendance spiritualiste, comme le mouvement New Age; d'autres encore sont d'orientation psychanalytique

<sup>6</sup> Dans la pratique, l'application de la loi a soulevé assez peu de difficultés, probablement parce que la loi exige que des efforts de conciliation soient d'abord tentés et, également, parce que les parents peuvent toujours placer leur enfant dans un établissement privé, même catholique. Lorsque le juge administratif est saisi, il admet généralement la validité de la mesure d'exclusion de l'établissement (par exemple, Conseil d'État 5 décembre 2007, n°295671, à propos d'une jeune fille refusant de quitter un bandana en classe). Cette interdiction ne vise pas seulement les porteurs de voile islamique, mais aussi les porteurs de turban sikh (Conseil d'État, n° 285394) ou de kippa (Conseil d'État, 8 octobre 2004, n° 269077).

<sup>7</sup> Conseil constitutionnel, décision n° 2010-613-DC du 7 octobre 2010.

comme l'Église de scientologie. Ces "nouvelles religions" jouissent de la liberté de religion et comme telles, elles ne doivent être ni interdites, ni entravées dans leurs activités. Néanmoins, il y a une vingtaine d'années, la population française s'est émue de certaines pratiques, notamment celles consistant à priver de nourriture ou de sommeil leurs fidèles et les enfants de ceux-ci afin d'obtenir leur soumission et l'abandon, total ou partiel, de leurs biens. L'opinion publique réclama la surveillance systématique de ces organisations qui se prétendent religieuses et seraient en réalité des sectes. Un rapport d'une commission d'enquête de l'Assemblée nationale dressa alors un tableau assez alarmiste de la situation et il donna une liste des organismes soupçonnés de "dérives sectaires".<sup>8</sup>

Dans un premier temps, la répression pénale des abus constatés fut aggravée. La loi la plus importante fut la loi n° 2001-504 du 12 juin 2001 "tendant à renforcer la prévention et la répression des mouvements sectaires portant atteinte aux droits de l'homme et aux libertés fondamentales"; cette loi a été modifiée par la loi n° 2007-293 du 5 mars 2007 réformant la protection de l'enfance. Cette loi contient tout d'abord une mesure préventive: elle interdit toute publicité en faveur d'une personne juridique "qui poursuit des activités ayant pour but ou pour effet de créer, de maintenir ou d'exploiter la sujétion psychologique ou physique des personnes qui participent à ces activités, lorsque a été prononcée au moins une fois, contre la personne morale elle-même ou ses dirigeants de droit ou de fait, une condamnation pénale pour ... atteintes volontaires ou involontaires à la vie ou à l'intégrité physique ou psychique de la personne, de mise en danger de la personne, d'atteintes à la liberté de la personne, d'atteinte à la dignité de la personne, d'atteintes à la personnalité..." (art. 19). Cette loi contient également une disposition de droit civil autorisant le juge civil à prononcer la dissolution d'une personne morale

<sup>8</sup> Rapport n° 2468, Assemblée nationale, Dixième Législature, fait au nom de la commission d'enquête sur les sectes par M. J. Guyard, député (se trouve sur le site de l'Assemblée nationale: [assemblee-nationale.fr/rap-enq/r2468.asp](http://assemblee-nationale.fr/rap-enq/r2468.asp)). La liste figurant dans ce rapport a été également reproduite par la circulaire du ministre de la justice du 29 février 1996; cette reproduction a été contestée par l'Église de Scientologie devant le Conseil d'État, mais cette juridiction a rejeté le recours pour la raison suivante: "Eu égard aux risques que peuvent présenter les pratiques de certains organismes communément appelés sectes, alors même que ces mouvements prétendent également poursuivre un but religieux, les associations ne sont pas fondées à soutenir que les circulaires précitées méconnaîtraient le principe de la liberté religieuse garanti par l'article 1<sup>er</sup> de la Constitution, l'article 10 de la Déclaration des droits de l'homme et du citoyen et les stipulations des articles 9 et 14 de la Convention européenne des droits de l'homme et des libertés fondamentales" (Conseil d'État, 18 mai 2005, n° 259982).

qui a été condamnée à plusieurs reprises pour les infractions qui viennent d'être mentionnées (et quelques autres). Enfin cette loi contient plusieurs dispositions de droit pénal qui définissent de nouvelles infractions et de nouvelles peines pour les personnes morales. En particulier, la définition de la publicité mensongère, de l'exercice illégal de la médecine ou de la pharmacie et surtout de l'abus frauduleux de l'état d'ignorance ou de faiblesse a été élargie (art. 2 à 14, 20). Enfin, comme les victimes hésitent souvent à porter plainte, la loi autorise des associations agréées par l'État à porter plainte à la place de la victime devant le juge pénal (art. 22).

La conformité de cette loi à la Convention européenne des droits de l'homme a été contestée par la Fédération chrétienne des Témoins de Jéhovah, mais le recours a été déclaré irrecevable par la Cour européenne des droits de l'homme le 6 novembre 2001 au motif "qu'un procès d'intention fait au législateur soucieux de régler un problème brûlant de société, n'est pas la démonstration de la probabilité d'un risque encouru par la requérante. En outre, celle-ci ne saurait sans contradiction se prévaloir du fait qu'elle ne constitue pas un mouvement attentatoire aux libertés et en même temps prétendre qu'elle serait, au moins potentiellement, une victime de l'application qui pourrait être faite de cette loi".<sup>9</sup>

Par ailleurs, divers textes de loi ont été adoptés depuis une dizaine d'années pour protéger tout spécialement les enfants. Le respect de l'assiduité scolaire est désormais surveillé de près et l'autorité parentale peut même être retirée aux parents en cas d'absences prolongées injustifiées (art. 5 de la loi n° 2004-1 du 2 janvier 2004 et décret n° 2004-162 du 19 février 2004). La répression des mauvais traitements infligés aux enfants a été également aggravée (art. 9 à 11 de la loi du 2 janvier 2004).

Pour suivre les activités des "mouvements sectaires" et coordonner l'action de l'État en ce domaine, le Gouvernement a institué la Mission interministérielle de vigilance et de lutte contre les dérives sectaires (décret n° 2002-1392 du 28 novembre 2002). Elle publie chaque année un rapport très documenté.<sup>10</sup>

## Conclusion

Le principe de laïcité de la République française s'explique à l'origine par la volonté de limiter l'influence politique de l'Église catholique: la sé-

<sup>9</sup> Cour européenne des droits de l'homme, Décision sur la recevabilité de la requête n° 53430/99.

<sup>10</sup> On le trouve sur Internet: [www.miviludes.gouv.fr/-Rapport-2009](http://www.miviludes.gouv.fr/-Rapport-2009).

paration de l'État et des Églises a été considérée comme nécessaire à l'établissement de la démocratie en France. Aujourd'hui, cette volonté de combat a entièrement disparu et, d'ailleurs, le principe de la liberté de religion imposait que des atténuations soient apportées au principe. Il n'en demeure pas moins que la France demeure caractérisée par la volonté de parvenir à une certaine uniformité des comportements qui certes s'inspire du christianisme qui a longtemps imprégné très fortement la société française, mais qui repose sur une sorte de conception humaniste de la société qui s'éloigne des religions traditionnelles. C'est ce qui explique que le droit français se caractérise fondamentalement par une certaine méfiance. Méfiance à l'égard des religions et spécialement de leurs dirigeants, car l'hostilité à l'égard des clergés demeure à l'état latent en France; mais aussi méfiance à l'égard des comportements qui sont induits par des religions d'origine étrangère et qui ne sont pas conformes à ceux qui prévalent dans la société française. Quoique fortement atténués, l'anticléricisme et le souci d'une certaine unité des mœurs demeurent ainsi sous-jacents dans un pays qui pratique cependant très largement la liberté religieuse et s'oppose à toute discrimination fondée sur les croyances.

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# FREEDOM OF RELIGION IN ITALY. PROBLEMS AND CHALLENGES

■ ROCCO BUTTIGLIONE

I. Kant made a clear-cut distinction between the realm of morals and the realm of law. A human action may be morally wrong without being legally forbidden. I have the right to blame an action as immoral although I cannot and I do not want to condemn it as illegal. This corresponds to the well known aphorism of Voltaire: I fully disagree with what you say but I am ready to give my life to defend your right of saying it. All men have a duty to search for truth and in this search we must accept the possibility that they incur in different kinds of errors. The best way to overcome errors is a free discussion and this presupposes both freedom of conscience and freedom of expression. The principle of toleration demands that we criticize the maxims and the behaviour of others without pretending to punish them and that we allow others to criticize us, making use of the same right.

A first problem we are confronted with in Italy (as well as in most western countries) today is that a new principle of intolerance is being introduced in our public discussion. It is forbidden to be 'judgemental', that is, it is forbidden to speak (and even to think) in terms of good and bad or in terms of right and wrong.

The old principle of toleration presupposed the existence of truth, the difficulty of the path towards truth and the possibility of error in good faith or even of unavoidable error. For this reason we must struggle for truth and against error but we have not the right to despise those who are in error. Moreover, since none of us possesses the totality of truth we can never rule out the possibility that we ourselves in one way or another may be wrong.

The new prohibition of being 'judgemental' is based on the conviction that there is no truth and we do not have the right of bothering anyone with questions on his way of thinking or acting. The fact that somebody thinks that he is wrong might make him unhappy and the subjective feeling of satisfaction or dissatisfaction is the last legitimate remnant of the antiquated concepts of good and evil, right and wrong.

The full acceptance of this new rule in the public discourse may easily collide with the principle of religious freedom. Let us take the example of Christian religion. We are ready to accept the principle of toleration. God does not want the sinner to die but rather that he is converted and lives. The



final judgement will come only after the end of this life and the Christian must hope and pray for the salvation of his opponents and even of his persecutors. The issue would be more complicated with other religions (Islam, for example) that pretend to enforce their precepts on this earth giving them the sanction of criminal law. For Christians however there is no inherent objection to the principle of toleration stated in the abovementioned form. This acceptance cannot be extended to the refusal to pass any judgement on good and evil. There are many things that are evil and it is routinely part of Christian teaching and preaching to tell right from wrong. The Church can be and ought to be delicate and full of charity in condemning the sin showing at the same time respect for the dignity of the person who is doing something wrong, but a Church that does not teach what is good and what is evil would not be the Church of Jesus Christ. Now exactly this right to express moral judgement in the public discourse is being questioned. It is not just a moral climate. This moral climate demands public recognition in the form of criminal law through the so called 'hate crimes'. There are many possible meanings of these words. Let us take the example of homosexuality. We are all against gay bashing and any form of violence against homosexuals. Men or women who happen to be homosexuals have the same rights to be protected against violence as any other citizen. But shall we qualify as violence the persuasion that homosexuality is morally wrong? Shall we consider as guilty of homophobia all those who have moral objections against homosexuality? Shall we forbid priests to censure homosexuality in their homilies or to teach children that God wants men and women to create families and to procreate and educate children? Gay rights movement want to go beyond tolerance and pretend full acceptance and seem to identify full acceptance with the prohibition to criticize their lifestyle.

I have produced one example, perhaps the most conspicuous in our society but this trend constitutes a general mood. The very idea of sin is discredited. Different social sectors consider as an attempt to their inalienable rights the very idea of being criticized and demand measures against possible criticism. The possible result is a limitation of the right of free speech and, as a consequence, of religious freedom.

A second issue is closely related to the first and to the crisis of the idea of tolerance. This is the issue of non discrimination. The traditional Kantian distinction of law and morals allowed us to consider certain patterns of action as lawful but as morally objectionable. They were lawful because they pertained to the private sphere of action of the person where the state has not the right to interfere. The state however retained the right to promote in the public square values different and sometimes opposed to those that

could be accepted in the private sphere. Let us make again the example of homosexuality. The family (the natural or traditional family based on marriage) has a social function: to engender and to educate children. In all civilizations the older generation lives out of the work and the support of the young. If there are no children then there will be no future and the senior generation will die unattended. Of course children may be born out of wedlock. Can they be equally well-educated? The generation of '68 thought that the family could disappear and be substituted through different agencies able to perform the same function. All attempts made in this sense have failed. The family has been desecrated but not substituted. Children can be fabricated but have a right to be born and educated in a family.

Many psychological and sociological investigations confirm that the family is the most appropriate environment for the rearing of children. To make a long story short: the family has an essential social function. It is different from a homosexual couple. In a family the parents invest most of their emotional, physical and economic resources in their children. Most of their savings will be spent for the children. One of the parents (most often the mother) will sacrifice a large part of her professional career to the educational tasks of the family. As a result parents will have a disposable income a good deal smaller than a homosexual couple or a heterosexual couple without children. Shall we recognize to these couples the same status and the same public support that are granted to families? It seems that there are good reasons to enhance in the symbolic order the standing of families and to support them also economically. The children raised by the families will pay taxes and contributions for the pensions and the health care also of those who had no families and therefore were more affluent throughout their whole active life. What shall we say in front of the pretensions of those who want families and homosexual couples to be put exactly on the same standing? Is it an illegitimate discrimination to say that the family has a social function and a social relevance and other forms of sexual living together have not? Is it a discrimination in schools to propose the family as a way of life it is worthwhile to concretize in one's life? Shall we on the contrary expose our children to homosexual and heterosexual lifestyles giving them equal value? Has at least the family the right to choose which models of sexual behaviour they want their children to be exposed to? Has a Catholic school the right to pretend that teachers conform to certain codes of behaviour expressing the core values of the institution?

A third issue regards constitutional values. Also in this case a concrete example will make it easier to see the point. Is euthanasia (or abortion) a right protected by the Constitution?

I am ready to admit that in a democracy after a discussion in Parliament and in the country a permissive law on euthanasia may be passed. I have an objection to the idea that euthanasia may be considered as a constitutional right. The recognition of euthanasia as a constitutional right implies that a law forbidding euthanasia cannot be passed and a fundamental principle of Christian social doctrine is considered incompatible with the Constitution. A Constitution is not only a document that dictates the principles of the organization of state powers. A Constitution summarizes the fundamental values that stand at the core of the life of a nation and embody her identity and her self consciousness. If the defence of life in the juridical and in the political order is banned from the political discourse then not only Christians but also all those who for different religious or philosophical reasons feel obliged in conscience to defend the right to life as a inalienable and indisposable right become second-class citizens. They can be discredited as supporters of an antiquated system of values opposite to the confession of political values contained in the Constitution. The demand to declare the defence of life to be unconstitutional was defeated in the Italian Chamber of Deputies a few days ago with a comfortable majority. It is however a sign of the times that it was proposed and defended. Whilst some of us are worried for the consequences of religious pluralism (and I shall explain soon the reasons why I am also concerned with this issue) I wonder whether we should start being worried about a different and opposite threat. Is a new reconessionalization or even a re-clericalization of society taking place in front of our eyes whilst we are not yet fully conscious of this new divide and of the demands arising from this new state of affairs? I have often defended against Catholic colleagues the positive meaning of the methodological doubt. It demands us not to be too certain of our possession of truth. A living truth is a truth that has to be discovered anew every day in front of new challenges. In this way we discover new dimensions of truth. We are not the masters of truth. Truth, rather, is our master. Now I defend the methodological doubt in front of a new kind of dogmatism that wants to forbid the dialogue on truth and the research of truth. This prohibition to ask metaphysical and existential questions characterizes a post pluralist society.

In a pluralist society different visions, different religions, different human experiences stand side by side in a common social space and discuss with one another on truth. Pluralist society has two presuppositions: truth exists, there is a common language of reason in which we can articulate our differences and search for a consensus.

The post pluralist society denies the existence of truth and the possibility of a discussion on truth. Those who cling to the idea of a search for truth and

of a dialogue on truth are enemies of the new public spirit and should be treated as such. One might consider whether a society without truth (or at least without the search for truth) would still be a society. The so-called liquid society resembles rather a mass of individual living side by side without constituting a community and without a real participation of one in the life of the other. It is equally doubtful if such a liquid society could survive for long. The family, in which children are born and educated, presupposes a living participation of one in the life of the other. The relation man/woman and even more the relation parents/children presupposes exactly that active interest of one in the life of the other that leads to questions on what should we do (together) and, as a consequence, what is the proper or true behaviour in a given situation. Without families and children societies disappear from history and die.

A further reason why it is improbable that a post pluralist societies may last for long is that there are in our world other non pluralist society that pose a challenge the post pluralist society is not ready to face. This challenge leads and almost compelles our societies to question the principles of a post pluralist society. In the case of Europe this challenge is the growing presence of Islam. In all of Europe identitary movements are growing that want to defend traditional national identity. Very often they rediscover the Christian roots of these national identities. In Finland a new party has taken 19 per cent of the electoral vote on the basis of a program based on the defence of life since conception and of the family, and Finnland is generally considered as a protestant and largely (very largely) secularized country. Unfortunately most of these movements are anti-European. Probably this depends upon the post pluralist image that for many reasons has been associated to the European Union in this last years. I do not support these movements. On the contrary I think they may become dangerous because the contrary of an error is not the truth but only the opposite error. The reaction against post pluralism leads to a kind of nostalgia for an integrated non pluralist society. These movements are, however, a sign of our times that seldom receives the attention it deserves. It tells us that peoples are not ready to accept the post pluralist perspective. The idea that the movement towards post pluralism is irresistible and irretrievable must perhaps be provided with a question mark.

We have seen that the presence of Islam in our countries has the effect of leading us to reconsider our civil and religious identity. How do we reconcile freedom of religion for Islam with our system of civil liberties? Here and now I shall propose a pragmatcal answer to this question. First of all we must point out the fact that there are a large number of different interpretations of Islam: Sunni Islam is not the same as Shia Islam; traditional maharabut Islam is not the same as Wahhabi Islam or as al Qaeda integralism. We must also make a

distinction between majority and minority Islam. Islam accepts in theory and also in historical practice that a minority Islamic community in a predominantly non Islamic country has to live in a kind of hospitality relation that imposes on them specific duties and obligations. We must make a compact with our Muslims and make clear what are in our country their rights and their duties and they must accept to formulate their religious practice in a form that does not collide with civil peace. On this basis we have a duty to allow islamic communities to build their mosques but have a right to control whence comes the money used for this purpose. We know that the vast majority of Islamic immigrants come from countries where non belligerent varieties of Islam are dominant. We know also that integralist groups subsidize the building and the functioning of mosques in order to ideologize the Muslims living in this country. We have a right to forbid that mosques be financed by integralist groups. We also have a right to control what is preached in the mosques and to forbid the preaching of holy war against Christians or of the holy massacre of Jews. We can therefore demand that the preacher be instructed in our Constitution and present a religious doctrine that is fully compatible with the values of the Constitution. A solution to this problem might be that the preacher must be provided with a degree of an Italian faculty of Islamic theology or with a degree of an Italian institute for religious studies. This is the content of a bill of law I am about to submit to the Italian Chamber of Deputies but it seems to me that on these principles there is a broad consent among Italian political forces and also in the Mohammedan community in Italy.

I have selected in this contribution four issues that are debated in Italy (and in many other western countries) today. Three of them arise out of a new post pluralist mentality that does not recognize the search of truth as the centre of the political order. The medieval political order had at its centre an established truth. In the modern, pluralist political order, the state does not pretend to know the ultimate truth. It however recognizes that truth must exist and the penultimate truths upon which the political order is founded can be determined (at least provisionally) through a free discussion in the context of a democratic decision making. In the post pluralist political order we have a new dogmatism: there must be no truth and the search for truth is interdicted.

The fourth issue we have considered is the result of the spread of Islam in European countries. How can Islam find its place in our civil and political order? It seems that a solution can be found in the context of a pluralist society but cannot be found in a post pluralist society.

► *b. European Convention on Human Rights*

# FREEDOM OF RELIGION IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS UNDER THE INFLUENCE OF DIFFERENT EUROPEAN TRADITIONS

■ JAVIER MARTÍNEZ-TORRÓN\*

## 1. In search of a balance between universality and diversity in the protection of religious freedom

The need to search for a balance between universality and diversity in the definition and guarantee of human rights is particularly clear when we look at the case law of the European Court of Human Rights (hereinafter “ECtHR” or “the Court”) on freedom of religion or belief.

As is well known, there are three articles of the European Convention on Human Rights (hereinafter “ECHR” or “the Convention”) that are particularly relevant for religion. Article 9 is the provision that deals directly with freedom of thought, conscience and religion, describing both its essential content and the limitations that can legitimately be imposed on its exercise.<sup>1</sup> Article 14 prohibits discrimination on grounds of diverse personal circumstances, including religion.<sup>2</sup> And article 2 of the First Protocol to the Convention

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<sup>1</sup> *Article 9 – Freedom of thought, conscience and religion.* 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.

<sup>2</sup> *Article 14 – Prohibition of discrimination.* The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

(hereinafter ECHR), after recognizing the right to education, and in the context of the functions assumed by the State in relation to education and teaching, guarantees the right of parents to ensure that their children are educated in accordance with their religious and philosophical convictions.<sup>3</sup>

For many years, the Court of Strasbourg paid little attention to issues related to religious freedom.<sup>4</sup> Prior to 1993 there are mainly two relevant cases, both decided in the light of article 2 ECHR – *Kjeldsen* (1976),<sup>5</sup> related to conscientious objection to sex education in school, and *Campbell and Cosans* (1983),<sup>6</sup> related to the opposition to have children physically punished at school. Since 1993, with the *Kokkinakis* case,<sup>7</sup> which involved the right to proselytism, the Court began an itinerary of decisions adopted in the light of article 9 or in the light of other articles but with a clear reference to religion – e.g. article 8 (right to privacy and family life)<sup>8</sup> or article 10 (freedom of ex-

<sup>3</sup> *Right to education*. No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

<sup>4</sup> There was, however, a certain case law of the formerly existing European Commission of Human Rights on those articles, with an orientation – in my view – not particularly protective of freedom of religion. Indeed, most decisions of the Commission declared those applications inadmissible as “manifestly ill-founded”, thus preventing the possibility that the Court decided on the merits of those cases. The Commission, which acted as a “filter” of the cases that could be judged by the Court, disappeared in November 1998, when Protocol 11 to the Convention entered into force. Since then, the Court itself decides on the admissibility or inadmissibility of applications. Protocol 14, which entered into force on 1 June 2010, modified the admissibility procedure with the purpose of rendering it more agile and reducing the caseload of the Court as well as repetitive or insignificant cases. See the explanatory report to Protocol 14 in: <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm> (visited 31 October 2011).

<sup>5</sup> *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976.

<sup>6</sup> *Campbell y Cosans v. United Kingdom*, 25 February 1982.

<sup>7</sup> *Kokkinakis v. Greece*, 25 May 1993. For an analysis of this landmark decision, see J. Martínez-Torrón, Libertad de proselitismo en Europa: A propósito de una reciente sentencia del Tribunal europeo de derechos humanos, in *Quaderni di diritto e politica ecclesiastica* (1/1994), pp. 59-71; P. Edge, The Missionary’s Position After *Kokkinakis v. Greece*, in *Web Journal of Current Legal Issues* 2 (1995), available at <http://webjcli.ncl.ac.uk/articles2/edge2.html>; J. Gunn, Adjudicating Rights of Conscience Under the European Convention on Human Rights, in *Religious Human Rights in Global Perspective* (ed. By J.D. van der Vyver & J. Witte), Boston 1996, pp. 305-30. On the problems involved in determining a concept of proselytism in international law, see N. Lerner, Proselytism, Change of Religion, and International Human Rights, in *Emory International Law Review* 12 (1998), pp. 477-561.

<sup>8</sup> This was the case, for instance, in *Hoffmann v. Austria*, 23 June 1993, or *Palau-Martinez v. France*, 16 December 2003. And also in the more recent cases *Obst v. Germany* and *Schüth v. Germany*, both of 23 September 2011, which I will briefly comment on below.



pression).<sup>9</sup> At this stage, we already have a significant number of cases which, although it is arguable that they constitute a consistent body of judicial doctrine, allow us to identify certain trends in the ECtHR's jurisprudence.<sup>10</sup>

From the perspective of this paper – which is a legal perspective – that body of case law reflects the tension, and the need for a balance, between universality and diversity in the protection of religious freedom at a supra-national or international level. The Court's attempts to reach that balance pivot mainly around two principles.

On the one hand, in support of diversity, the ECtHR has always held that national systems of relations between State and religion, which are the result of a variety of historical, social, political and cultural factors, should in principle be respected. The aim of article 9 of the European Convention is the protection of religious freedom and not the establishment of certain uniform criteria for Church-State relations in the Council of Europe member States or – even less – the imposition of a compulsory secularism (*laïcité*). Thus, diversity in State cooperation with religious communities is not, as such, incompatible with the ECHR. Even the privileged position of certain churches, in the form of a sociological confessionality of the State (as in Greece) or in the form of State churches (as in England or in some Scandinavian countries), has been considered legitimate as far as it does not produce, as a side effect, 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 and ideological matters.<sup>11</sup>

<sup>9</sup> For example, *Otto-Preminger-Institut v. Austria*, 20 September 1994, *Wingrove v. United Kingdom*, 25 November 1996, and a number of other cases after them. See, for further references and bibliography, J. Martínez-Torrón, Freedom of Expression versus Freedom of Religion in the European Court of Human Rights, in *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World* (ed. by A. Sajó), The Netherlands, 2007, pp. 233–269.

<sup>10</sup> The bibliography on the ECtHR's case law on religious freedom has been increasing over the years. See generally, among others, M.D. Evans, *Religious Liberty and International Law in Europe*, Cambridge 1997 (reprinted in 2008); C. Evans, *Freedom of Religion under the European Convention on Human Rights*, Oxford 2001; The European Court of Human Rights and Religion, in *Law and Religion*, Current Legal Issues 2001, vol. 4 (ed. by R. O'Dair & A. Lewis), Oxford 2001; and J. Martínez-Torrón & R. Navarro-Valls, The Protection of Religious Freedom in the System of the Council of Europe, in *Facilitating Freedom of Religion or Belief: A Deskbook* (ed. by T. Lindholm, W.C. Durham, B.G. Tahzib-Lie), Leiden 2004, pp. 209–238.

<sup>11</sup> This approach of the Court is implicit but clear in a number of cases. See, for further details and references, C. Evans, *Freedom of Religion...*, cited in note 10, pp. 80–87; J. Martínez-Torrón & R. Navarro-Valls, *The Protection of Religious Freedom...*, cited in note 10, pp. 216–218.

Precisely the second principle, aiming at universality, is the guarantee of an equal degree of protection of the freedom of religion and belief of all individuals and groups, be they in a majority or minority position in a given country. In the Court's view, this freedom, which has been won at a high price over the centuries and is essential for the pluralism inherent in democratic societies, constitutes a "precious asset" not only for religious believers but also for atheists, agnostics or indifferent.<sup>12</sup>

Naturally, the second principle (guarantee of religious freedom) may in practice imply limitations on the consequences of the first principle (respect for national Church-State systems). Thus, the combined interpretation of both principles leads to the conclusion that the *only* uniform religious policies that can be derived from the European Convention on Human Rights are those necessary for the adequate and equal protection of religious freedom of all individuals and communities.

## 2. The doctrine of the margin of appreciation

Although these principles seem clear and reasonable in the abstract, it is nonetheless clear that their application in actual situations of conflict is not exempt from difficulties. The main instrument of analysis used by the ECtHR to assess the necessary balance between diversity and universality is the doctrine of the *margin of appreciation*. In brief, this doctrine maintains that, while the substance of human rights is common, there may be national variations in the limitations that States can legitimately impose on the freedoms guaranteed by different articles of the ECHR (especially articles 8–11). In the view of the Court, States must be recognized a reasonable margin to appreciate when a limitation on freedom becomes necessary. The alleged reason is that national authorities, being closer to their respective societies, are in a better position to evaluate the necessity of the restrictive measures adopted and can better appraise the needs of the public interest and interpret the relevant domestic law.<sup>13</sup>

<sup>12</sup> "...freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it." (*Kokkinakis*, § 31).

<sup>13</sup> The origin of this doctrine of the ECtHR dates back to the case *Handyside v. United Kingdom*, 7 December 1976, which involved a conflict between freedom of expression and public morals. See, for further details and references, C. Evans, *Freedom of Religion...*, cited in note 10, pp. 142–143; J. Martínez-Torrón, *Limitations on Religious*

In the case of article 9 ECHR, this means that States have at their disposal a certain discretionary power – not, of course, unlimited power – to decide how to “adjust” the exercise of freedom of religion or belief to the particular circumstances of their system of relations between State and religion. We should bear in mind that the ECHR permits only those limitations on religious freedom that meet the three conditions expressed by article 9(2).<sup>14</sup> First, as a requirement inspired by legal certainty, the limitation in question must be “prescribed by law” – here the meaning of law includes not only statutory law but also case law and administrative regulations. Second, the limitation must pursue one of the legitimate aims set out by article 9(2): the interest of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others. Third, the limitation must be “necessary in a democratic society”. The Court has interpreted the latter expression as excluding milder notions – such as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable” – and implying the existence of a “pressing social need”.

It is not difficult to see that the terms used by article 9(2) ECHR are far from being a precise *vade mecum* and call for a constant judicial interpretation, which in turn cannot ignore the different meanings that those terms have in national legal systems. Therefore, the margin of appreciation doctrine gives national authorities some discretionary power to determine when limitations on the exercise of religious freedom are deemed “necessary” – and consequently legitimate – and at the same time grants the European Court its own discretionary power to supervise if national authorities have used their discretion reasonably. In other words, it allows to assess whether the restrictive measures adopted have respected the principle of proportionality, i.e., if they are proportionate to some of the five legitimate aims mentioned by article 9(2) ECHR.<sup>15</sup>

Freedom in the Case Law of the European Court of Human Rights, in *Emory International Law Review* 19 (2005), especially pp. 599–602.

<sup>14</sup> In addition to the works cited in the precedent note, cf. the 2nd issue of the volume 19 of *Emory International Law Review* (2005), which is a monographic issue containing a series of papers of different authors with a comparative and international law analysis of limitations on freedom of religion. Of particular interest within that series is the study of the least restrictive alternatives for religious freedom, in the context of a deep analysis of the use of the principle of proportionality, written by J. Gunn, *Deconstructing Proportionality in Limitations Analysis*, in *Emory International Law Review* 19 (2005), pp. 465–498. See also M. Nowak & T. Vospernik, *Permissible Restrictions on Freedom of Religion or Belief*, in *Facilitating Freedom of Religion or Belief...*, cited in note 10, pp. 147–172.

<sup>15</sup> See generally J. McBride, *Proportionality and the European Convention on Human Rights*, in *The Principle of Proportionality in the Laws of Europe* (ed. by E. Ellis), Oxford 199, pp. 23–36.

### 3. The religious neutrality of the State and its consequences

Among the criteria utilized by the Court to determine the proportionality of limitations on religious freedom is the principle that the State must remain neutral towards religions. It is important to note that this “European” concept of the religious neutrality of the State is not equivalent to some parallel or connected notions at the constitutional level in some States. State neutrality in its European sense must be understood as the ECtHR interpreted it in the *Manoussakis* case in 1996, when it held that “the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate”.<sup>16</sup> The Court’s assertion may have complex implications if we consider that the moral doctrines of some religions may be contrary to deeply rooted notions of public morals in given societies or to ethical values that are the basis of some constitutional principles. But, leaving those complexities aside now, it certainly seems reasonable if taken as expressing a notion of neutrality consisting in the State’s incompetence to make any judgments on the truth or falsity of religious tenets or dogmas.

In my opinion, the ECtHR has sometimes extracted the right consequences of this European notion of the religious neutrality of the State.

One of them is the State’s impartiality in religious differences or disputes. In these cases, the Court conceives the State as an impartial organizer of religious pluralism. When facing the social tension that is occasionally created by competing religious groups, the role of national authorities is not to take sides or to eliminate pluralism as the price to guarantee social peace. The State’s function is rather to organize religious pluralism in a way that ensures that all individuals are as free as possible to practice their religion and all groups are as autonomous as possible to take care of their own internal affairs without undue external interferences. Thus, the Court has affirmed that the States exceed their power when they fail to remain neutral with regard to changes in the leadership of a religious community, when they try to force the community to come together under a unified leadership against its own wishes, or when they attempt to prevent a schism in a church for dissensions of a religious nature. This has been the case, for instance, of the decisions *Serif*, *Hasan and Chaush*, *Agga* and *Supreme Holy Coun-*

<sup>16</sup> *Manoussakis v. Greece*, 26 September 1996, § 47. See also *Hasan and Chaush v. Bulgaria*, 26 October 2000, § 78, which alludes, without further specifications, to some “very exceptional cases” in which this principle may not apply.

*cil*,<sup>17</sup> which involved leadership disputes within Muslim communities, or *Metropolitan Church of Bessarabia*,<sup>18</sup> which referred to the national authorities' refusal to register an Orthodox church detached from the mother church.

There is another important consequence of the State's religious neutrality that has been affirmed long since by the ECtHR, with respect to some education cases which involved the conscientious objection of some students' parents to school contents or practices that were opposed to their deeply held religious or philosophical convictions. In *Kjeldsen* (1976),<sup>19</sup> a case of conscientious objection to mandatory sex education for teenagers in public schools, the Court interpreted that article 2 of the First Protocol does not grant parents any right to object, on moral grounds, to school contents or practices, as far as these are developed in an "objective, neutral and pluralistic manner". As a corollary, the Court was very specific in holding that the public school system must remain neutral with regard to religion or belief, and consequently the State is prohibited from using the educational system to indoctrinate students in religious or moral ideas against their parents' wishes.

While I cannot agree with the Court's restrictive interpretation of parents' rights over their children's education under article 2 of the Protocol, which reduces them to a mere prohibition of indoctrination of the youth by the State,<sup>20</sup> the prohibition of indoctrination constitutes in itself a positive assertion that State neutrality is an indispensable element in the protection of religious freedom. This is especially true after the cases *Folgerø* and *Zengin* have raised the standards used in practice by the ECtHR to assess when States have failed to comply with their duties of neutrality in education, and have indicated that recognizing the students' parents a right to conscientious objection is a necessary "safety valve" when the actual neutrality of teaching in public schools is debatable.<sup>21</sup>

<sup>17</sup> See *Serif v. Greece*, 14 December 1999; *Hasan and Chaush v. Bulgaria*, 26 October 2000; *Agga v. Greece*, 17 October 2002; *Supreme Holy Council of the Muslim Community v. Bulgaria*, 16 December 2004.

<sup>18</sup> *Metropolitan Church of Bessarabia v. Moldova*, 13 December 2001.

<sup>19</sup> *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976.

<sup>20</sup> For a critical analysis of this decision, see R. Navarro Valls & J. Martínez-Torrón, *Conflictos entre conciencia y ley. Las objeciones de conciencia*, Madrid 2011, pp. 253-255. See also the dissenting opinion of Judge Verdross to that decision.

<sup>21</sup> See *Folgerø v. Norway*, 29 June 2007, and *Zengin v. Turkey*, 9 October 2007. See for further details and references M.A. Jurdado & S. Cañamares, La objeción de conciencia en el ámbito educativo. Comentario a la Sentencia del Tribunal Europeo de Derechos Humanos *Folgerø v. Noruega*; and J. Martínez-Torrón, La objeción de conciencia a la enseñanza religiosa y moral en la reciente jurisprudencia de Estrasburgo, both in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 15 (2007) (www.iustel.com).

#### 4. State neutrality and State secularism

The notion of State neutrality described so far seems an appropriate and even necessary instrument to ensure the protection of religious freedom for all individuals and communities on equal terms. In recent years, however, it has been possible to see some signs suggesting that a new and different concept of State neutrality might be gaining momentum in the case law of the ECtHR – a concept close to the French-style notion of *laïcité*, i.e., to a constitutional principle of secularism that would require a separationist attitude in the State. In other words, some decisions of the Court might be confusing the religious neutrality of the State understood as incompetence to take positions in religious matters, and to interfere in churches' internal affairs, with strict State separationism, thus paving the way for a sort of European “constitutional” principle of secularism, which in turn would be presented as a necessary consequence of or condition for freedom of thought, conscience and religion.

This different meaning of State neutrality would certainly be disruptive, for nowhere in the European Convention on Human Rights can that principle be found and, as indicated above, the previous case law of the ECtHR has made clear that no particular system of relations between State and religion can be either excluded or imposed a priori, as far as the right to religious freedom is duly respected, in its individual as well as in its collective dimension. Two concrete signs of this underlying notion of neutrality as secularism can be identified in the case law of the Court in the last years. One is a tendency to justify erasing the visibility of religion in the public sphere with arguments based on State neutrality. The other is a parallel, and more recent, tendency to reduce or even invade the right of churches to their own autonomy – which is part of the protection offered by article 9 ECHR – especially when they engage in relationships with individuals in areas in which the State may claim to have a competing interest.

##### 4.1. Labour relations with churches

The latter tendency can be observed in two cases of 2010 against Germany, *Obst* and *Schiith*,<sup>22</sup> which dealt with labour contracts between churches and their employees. The issue at stake in both cases was an employee's dis-

<sup>22</sup> *Schiith v. Germany* and *Obst v. Germany*, both of 23 September 2010, decided in light of the right to respect private and family life (art. 8 ECHR). For an interesting comment on these types of cases and on which should be the right way to deal with them from the ECHR perspective, when those cases have not yet been decided by the European Court, see G. Robbers, Church Autonomy in the European Court of Human

missal grounded on breach of his loyalty duties towards his employer, and in particular on behaviour that his ecclesiastical employer deemed a grave violation of the moral tenets of the relevant church.<sup>23</sup> In *Obst*, the applicant had been discharged from his position as director of public relations of the Mormon Church because of an adulterous relationship that he had voluntarily confessed to his superiors. The Church understood that this serious moral offense undermined its credibility and its spiritual mission and proceeded to the immediate dismissal of the applicant. In *Schüth*, the applicant worked for a Catholic parish as organist and choir director, and had also been discharged on grounds of adultery – he had separated from his wife, with whom he had two children, and held an extra-marital affective and stable relationship with another woman. After his children told in their kindergarten that their father was expecting another child from his new partner, the parish proceeded to terminate his contract. In both cases the German courts held that the dismissal was justified by the breach of the employees' loyalty duties towards their respective churches, expressed not in public criticism but in serious moral misbehaviour, and that churches were the only ones in a position to assess the impact of those moral offenses on their spiritual mission. The German courts made use of the doctrine established by a 1985 decision of the Federal Constitutional Court, which was later ratified by the European Commission of Human Rights.<sup>24</sup> The applicants claimed that their right to respect for privacy and family life, protected by article 8 ECHR, had been violated.

One would have expected those two cases to be decided in the same way but, instead, in *Obst* the applicant lost while in *Schüth* the applicant won, although the ECtHR claimed to apply the same principles in both

Rights: Recent Developments in Germany, in *Journal of Law and Religion* 26 (2010–2011), pp. 281–320.

<sup>23</sup> There is also a later case on labour relations with churches, *Siebenhaar v. Germany*, 3 February 2011, less interesting from the perspective of this paper. The applicant was a woman, baptized as a Catholic, who worked as teacher at a Protestant kindergarten, while at the same time hiding her active membership of a religious community called “Universal Church-Fraternity of Mankind”. The Court did not find any violation of the applicant's religious freedom and held that the German courts had correctly appreciated that the applicant infringed her loyalty duties towards the Protestant organization that employed her.

<sup>24</sup> *Rommelfänger v. Germany*, Dec. Adm. 12242/86, 6 September 1989. The applicant was a gynaecologist, employed by a Catholic hospital, who had publicly criticized the doctrine of the Catholic Church with respect to the State abortion policies and legislation. The Commission found no interference with the applicant's freedom of expression under art. 10 ECHR and declared the application manifestly ill-founded.

decisions. It is not my intention to analyse here in detail the various nuances of these two cases and the differences between the facts of the two applications that may have led the Courts to reach different conclusions in each case. However, it is worth mentioning some aspects in the rationale of these decisions that are susceptible of generating some concern, because of the implicit – and in my opinion incorrect – notion of State neutrality that they may reveal, which would be restrictive of religious autonomy.

The Court's reasoning contains two initial statements that are entirely appropriate. One is a clear assertion that the autonomy of religious communities is an integral part of the right to religious freedom guaranteed by article 9 ECHR. The other is the reaffirmation of the above-mentioned incompetence of the State to make judgments on the legitimacy of religious (and non-religious) beliefs or the means used to express such beliefs.<sup>25</sup>

However, the subsequent reasoning of the Court weakened these apparently firm holdings. First the Court maintained that, in order to determine whether the applicants' right to privacy and family life had been violated by their dismissal because of adultery, it was necessary to perform a balance between the interests of the ecclesiastical employers in keeping their internal autonomy and those of the employees in keeping their private life as they wished. And secondly, above all, the ECtHR held that the State jurisdiction was obliged to effect such balance by taking into account especially two elements. One was the concrete position held by the employee, for the negative impact of the employees' moral misconduct on their Church's mission would vary depending on their position. The other was the nature of the loyalty duties or moral obligations imposed on the employee, which sometimes could be considered "unacceptable".<sup>26</sup>

In my opinion, the State jurisdiction's assessment of both elements is problematic in practice and may easily lead to unjustified interferences in the life of churches based on a peculiar notion of neutrality.

With regard to the first element, it is virtually impossible for the State to appraise the real importance of different jobs or positions for the mission and credibility of a church, and when an employee's moral misbehaviour, even in his private sphere, disqualifies him for those functions. It would be equivalent, to some extent, to replacing the individual's judgment of conscience on the existence or seriousness of a moral obligation.<sup>27</sup> This is a very

<sup>25</sup> See *Schiith*, § 58, and *Obst*, § 44.

<sup>26</sup> See *Schiith*, § 69, *Obst*, §§ 48-49.

<sup>27</sup> This was the case of the unfortunate statement of the Court, some years ago, in the *Efstratiou* and *Valsamis* decisions (*Efstratiou v. Greece*, 18 December 1996; *Valsamis v.*



delicate matter in which it is easy to exceed the limit signalled by the European Court itself, namely that “the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate”.<sup>28</sup> Thus, the ECtHR seems to suggest in *Obst*, although not very clearly, that the applicant’s former position as director of public relations was “important” for his church, and therefore his adultery justified his dismissal, while in *Schüth* it seems to imply the opposite, that the applicant’s job as an organist and choir director was not so important or did not need the moral qualifications required by the ecclesiastical employer (i.e., it was not so significant for the parish whether the employee adjusted his life to some essential rules of Catholic sexual morals).<sup>29</sup> Apparently the Court required State courts to check the ecclesiastical view of the role of the organist in the Catholic liturgy and, in particular, the alleged close relationship of this role with the missionary activity of the Church.<sup>30</sup> In other words, it seems that the ECtHR expected the Catholic Church to look at the position

*Greece*, 18 December 1996). The texts of both decisions are almost identical, as indeed were the facts in question. Those cases had their origin in the applications of two Greek secondary school students, Jehovah’s Witnesses, who refused, for religious reasons, to participate in the school parades organized during the national festival to commemorate the outbreak of war between Greece and Fascist Italy in 1940. They argued that their conscience prohibited them from being present in a civic celebration in which a war was remembered and in which military and ecclesiastical authorities took part. The two students were denied permission to be absent from the parade, and their failure to attend was punished by one day’s suspension from school. In its decision in favour of the Greek government, the Court affirmed, among other things, that it could “discern nothing, either in the purpose of the parade or in the arrangements for it, which could offend the applicants’ pacifist convictions”. See, for a critical comment on this and other aspects of those decisions, J. Martínez-Torrón & R. Navarro-Valls, *The Protection of Religious Freedom...*, cited in note 10, pp. 233–236.

<sup>28</sup> See *supra*, note 16.

<sup>29</sup> See *Schüth*, § 69, *Obst*, § 48.

<sup>30</sup> The Catholic diocese of Essen, intervening as a third party, emphasized that it would be incorrect to view the applicant’s job only as a music player, ignoring the role of sacred music in Catholic liturgy as well as the exemplary character that the parish wanted in the people actively involved in the performance of religious ceremonies (see *Schüth*, § 52). It is surprising that the Court affirmed, in this respect, that “la cour d’appel du travail n’a pas examiné la question de la proximité de l’activité du requérant avec la mission de proclamation de l’Eglise, mais qu’elle semble avoir repris, sans procéder à d’autres vérifications, l’opinion de l’Eglise employeur sur ce point” (*Schüth*, § 69). This seems in contradiction with the above-mentioned incompetence of the State to make judgment on religious matters (see *supra*, note 28 and accompanying text).

of the applicant with the State's secular ("neutral") eyes and therefore to respect his decisions regarding his sexual life, which would not be so meaningful for efficiently carrying out musical functions in the parish. However, this is not State neutrality in dealing with religion. On the contrary, this is the imposition of the State's view of reality on religious communities that are not supposed to be "neutral". What the religious neutrality of the State demands is, precisely, respect for the right of churches to take care of their own affairs with autonomy, from their particular, "non-neutral", perspective.

The second element offers similar difficulties from the perspective of State neutrality towards religion. The ECtHR's analysis departed from the principles established by the German courts: that State jurisdiction is entitled, and obliged, to intervene in these types of conflicts between employee and employer, otherwise an aspect of German labour law would become "clericalized".<sup>31</sup> Thus, the civil judges are not totally bound by the religious perspective of the labour relation between a church and its personnel. On the contrary, they must check that the ecclesiastical employers' pronouncements or orders are coherent with the rules of the relevant church and are not in contradiction with the "fundamental principles of the [State] legal system", which include the protection of fundamental rights and freedoms, and in particular the right to respect for private and family life.<sup>32</sup> In other words, State jurisdiction must ensure that churches are not imposing in their labour contracts "unacceptable" loyalty duties on their employees.<sup>33</sup>

The foregoing way of proceeding is certainly not feasible without interfering with churches' autonomy. First, it is very difficult for the State, in most cases, to appraise the coherence of ecclesiastical commands or conditions with ecclesiastical rules. Indeed, since such coherence must be judged from an internal religious perspective, it seems clear that only the ecclesiastical authorities are competent on these types of issues and that any pronouncement of the civil jurisdiction would be inappropriate and invasive of religious autonomy. Secondly, however reasonable the criterion of scrutinizing the compatibility of ecclesiastical prescriptions with the fundamental principles of State law may appear in the abstract from a secular perspective, the fact is that such criterion is also problematic, for it can easily be applied in practice in an excessive manner, as it indeed was in *Schüth*. In this case, the ECtHR seems, on the one hand, to share the German courts' findings that the Catholic doctrine on marital fidelity is not in contradiction

<sup>31</sup> See *Schüth*, § 70.

<sup>32</sup> See *Schüth*, § 60, *Obst*, § 46.

<sup>33</sup> See *Obst*, § 49.

with “the fundamental principles of the [State] legal system”, in view – among other things – of the special protection that the German Fundamental Law grants to marriage.<sup>34</sup> But, on the other hand, by stating that the loyalty duties accepted by the employee when signing his contract could not include the duty to live in sexual abstinence in case of separation or divorce, the ECtHR implicitly declares that the Catholic moral doctrine and legal discipline on the indissolubility of marriage, and more generally on sexual morals, are “unacceptable” when confronted with the employee’s right to freely adopt decisions on matters concerning his private life.<sup>35</sup>

Without of course denying the latter individual right, this holding of the Court is most surprising. How is the civil jurisdiction to make any judgment on the moral evaluation that a certain sexual conduct deserves in the eyes of the Catholic Church (or any other religious community)? Is the State at all competent to say anything about whether a religion can or cannot require sexual abstinence in the case of a marriage separation? What has the State to say about the “acceptability” of the Catholic doctrine on the indissolubility of matrimony, which requires an ecclesiastical process of nullity or dissolution before any of the spouses can legitimately marry a third person? State intervention in those issues would be understandable only if a person were forced to abide by some religious doctrines in his private life, but here the issue under consideration was whether a church can hold those doctrines and impose them as part of the loyalty duties freely consented to by employees. Mr. Schüth was not forced to comply, whether he liked it or not, with the Catholic moral rules on sex. He *voluntarily* and *publicly* broke those rules and was consequently dismissed from a job, which was deemed relevant by the parish, and which he had *voluntarily* accepted knowing that he was obliged to respect those essential moral rules.

The Catholic Church was not obliged to remain “neutral” before the moral choices of Mr Schüth in the exercise of his right to private and family life. The churches’ obligation to respect the moral choices of their members and employees is not equivalent to the State’s obligation of religious and moral neutrality. While the State must remain morally neutral, churches do not have to. Their only obligation of respect consists in renouncing all material coercion, but they do not have to renounce moral pressure – indeed, most churches use one type or other of moral pressure to induce compliance with their rules. Imposing on churches the State’s notion of moral

<sup>34</sup> See *Schüth*, § 62, *Obst*, § 47.

<sup>35</sup> See *Schüth*, § 71.

neutrality is not neutral at all. On the contrary, it would be a breach of the State religious neutrality, which includes, as indicated before, respect for the autonomy of churches.

#### 4.2. *The visibility of religion in the public sphere*

Another sign of the ECtHR's possible tendency to apply a distorted notion of State neutrality is the ratification of State measures aimed at reducing, or erasing, the visibility of religion in the public space, with the practical result of legitimizing restrictions of individual expressions of religious beliefs. It seems paradoxical that support for State neutrality, which is supposed to serve as a better protection of religious freedom when it is conceived as the State's incompetence to judge the truth or falsity of religious doctrines, can be used to justify prohibitions of personal public expressions of religious belief, particularly in educational environments, adopted in some countries – allegedly and surprisingly – in the interest of peace and tolerance.

##### *a) Neutrality in education and personal religious symbols: the Islamic headscarves cases*

We can see expressions of this attitude of the Court in cases on the use of personal religious symbols in school decided in the last decade. In *Dahlab*, in 2001,<sup>36</sup> the ECtHR declared inadmissible the application of a Swiss teacher in a public primary school, who had converted to Islam, who had been prohibited from wearing the veil on her head that she considered prescriptive when teaching her students, in application of a cantonal law aimed at preserving the secular character of public schools. The Court's analysis began by recognizing that imposing on teachers the prohibition of carrying "powerful" religious symbols constituted an interference with the applicant's religious freedom and the State had to provide a sound justification under article 9(2) ECHR. In this regard, the European Court shared the opinion of the Swiss Federal Court on the consequences of the principle of secularity (*laïcité*). In particular, the ECtHR accepted that this principle entailed some restrictions on the civil servants' right to manifest their religion or belief, especially in the educational environment, where students may be more easily influenced and "religious peace" must be protected with extreme care. In my view, it is difficult to fully understand why the principle of *laïcité* should require, in a country enjoying religious peace such as Switzerland, that no

<sup>36</sup> *Dahlab v. Switzerland*, ECtHR, Dec. Adm. 42393/98, 15 February 2001. *Dahlab* was declared inadmissible by the Court as "manifestly ill-founded" in a lengthy decision that, as sometimes occurs, actually went into the merits of the case.

religious personal symbols be visible on the teachers' clothes, instead of permitting students to see in their own school a reflection of the religious pluralism existing in Swiss society.<sup>37</sup> As long as teachers respect the students' beliefs and do not attempt to proselytize them, the presence of religious pluralism in schools seems to be more consistent with a neutral attitude of the State and, on the other hand, more instructive for students than the fictional absence of religion on the part of school personnel.

A few years after *Dahlab*, and holding on to the same notion of neutrality, came what has so far been the most important case on the use of personal religious symbols: *Leyla ahin*, first decided by a Chamber of seven judges and later by the Grand Chamber of seventeen judges, confirming the Chamber's decision.<sup>38</sup> This case also referred to the wearing of the Islamic headscarf by women, and had a remarkable impact on public opinion, inside and outside of Turkey, through the attention paid by the media.<sup>39</sup> The applicant, Leyla ahin, was a Muslim female student of medicine who had moved to Istanbul University in her fifth year, where she began to be subjected to disciplinary proceedings by the University authorities,<sup>40</sup> based on rules that prohibited the use of headscarves by women – as well as beards by men – with the aim of reducing the “visibility” of Islam within University facilities, thus allegedly guaranteeing the “secular atmosphere” of the

<sup>37</sup> On the other hand, the “religious peace” of the school did not seem to have suffered any serious threat, for the applicant wore the Islamic *foulard* during approximately five years until she was prohibited from doing so by the (female) general director of the primary schools of Geneva's canton. In all those years there were apparently no problems caused at the school by the applicant's veil, not even the evidence of a single complaint by the students or the students' parents. It is difficult to avoid the impression that the Court showed too much respect for the State's margin of appreciation in the *Dahlab* case.

<sup>38</sup> *Leyla Şahin v. Turkey*, 29 June 2004 (Chamber's decision), and *Leyla Şahin v. Turkey*, 10 November 2005 (Grand Chamber's decision). The Chamber's decision was adopted unanimously and the Grand Chamber's decision by sixteen votes to one.

<sup>39</sup> We must note that, while there are certain hesitations in many European countries about how to deal with Muslim women's attire in public places, in Turkey the headscarf issue has become a symbol of, and a battlefield for, the political struggles between those who defend the citizens' freedom to manifest the signs of their Islamic faith in public and those others who maintain that the preservation of secular democracy in Turkey requires a firm grip on banning any visible expression of religion – particularly of Islam – in the public space. See Ö. Denli, *Between Laicist State Ideology and Modern Public Religion: The Head-Cover Controversy in Contemporary Turkey*, in *Facilitating Freedom of Religion...*, cit. supra, note 10, pp. 497–511; R. Bottoni, *The Origins of Secularism in Turkey*, in *Ecclesiastical Law Journal* 9 (2007), pp. 175–186.

<sup>40</sup> The disciplinary measures adopted against her included denying her access to written examinations and suspension from the University for a semester.

public University. After a year-and-a-half long legal battle to be recognized her right to dress according to what she considered a religious and moral duty, she abandoned her medical studies in Turkey and pursued them at the University of Vienna, in Austria.

The ECtHR leniently applied its traditional doctrine of the national margin of appreciation and sustained the Turkish government's position. According to the Court, the Turkish authorities had acted within a legitimate margin of discretion when they considered that imposing certain policies contrary to the wearing of religious garb at the University was a restriction of the students' religious freedom, which was "necessary in a democratic" society in the meaning of Article 9(2) ECHR. In the eyes of the Court, the prohibition of wearing Islamic headscarves at the Turkish University was justified by the protection of the constitutional principle of secularism (*laïcité*), conceived as a guarantee of democracy and a safeguard against a possible advance of Muslim radicalism in Turkey.<sup>41</sup> The ECtHR agreed with the Turkish government's argument that the veto on personal religious symbols served to generate a climate of tolerance and to avoid social pressure on those female students who refused to wear headscarves.

It is not my intention to deal here with the various deficiencies of the rationale of this case in detail (including an evaluation of the facts that was not particularly careful),<sup>42</sup> but I would like to remark that the ECtHR made

<sup>41</sup> Some attempts in 2008 to change the law were declared unconstitutional by the Turkish Constitutional Court. In February 2008 the Turkish Parliament approved a change in the Constitution that would allow female students to wear their headscarves at University. The constitutional change received wide support – it was approved by 411 of the 550 members of parliament, far beyond the required two thirds of parliament. In June 2008 the Constitutional Court declared the measure unconstitutional for violation of the principle of secularism (sources: Reuters, BBC, The New York Times, Human Rights Watch). For a brief comment on these events, see I. Dagi, The AK Party, secularism and the court: Turkish politics in perspective, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 18 (2008), pp. 1–9.

<sup>42</sup> See, for a detailed analysis, the chapters by T.J. Gunn, N. Hostmaelingen, T. Lindholm and I.T. Plesner in the collective book *Islam in Europe: Critical Views and Emerging Legal Issues* (ed. by W.C. Durham, T. Lindholm & R. Torfs), Aldershot 2011 (forthcoming). See also N. Lerner, How Wide the Margin of Appreciation? The Turkish Headscarf Case, the Strasbourg Court, and Secularist Tolerance, in *Willamette Journal of International Law and Dispute Resolutions* 13 (2005), pp. 65–85; B. Chelini-Pont & E. Tawil, Brèves remarques sur l'arrêt Leyla Sahin, in *Annuaire Droit et Religions* 2 (2006–2007), pp. 607–611; T. Lewis, What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation, in *International and Comparative Law Quarterly* 56 (2007), pp. 395 ff. Among Spanish legal literature, see S. Cañamares, *Libertad religiosa, simbología y laicidad del Estado*, Pamplona

use of bizarre and hypothetical arguments such as “the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who chose not to wear it”<sup>43</sup> (curiously, the Court did not mention the same reasoning in the opposite direction, i.e., the impact of the ban of the headscarf on those who do choose to wear it). That argument implies, ultimately, a predominant view of religion as a potential factor of conflict, especially considering that there was no sufficient evidence of the intolerant atmosphere that wearing headscarves would allegedly generate at the University, nor of any real pressure on uncovered female students on the part of their female or male schoolmates.

As in *Dahlab*, the Court seemed to take for granted that the neutrality of the public sphere is best served when religion is absent or at least “invisible”. The paradoxical consequence of this reasoning is to assume that a climate of tolerance and respect can be achieved through intolerance towards a particular form of religious expression on the basis of mere hypotheses instead of on grounds of clear evidence of a “pressing social need”, which is one of the conditions for imposing legitimate limitations on freedom of religion.<sup>44</sup>

In spite of its flaws and of the amount of criticism received, the rationale of *Leyla ahin* has not remained an isolated episode in the life of the ECtHR. The principles and perspective present in *Leyla ahin* have subsequently been used by the Court to decide against the applicants in other cases of students or teachers who incurred in various sanctions for wearing Islamic headscarves at school in Turkey<sup>45</sup> and also in France, where the restrictive policies on the use of religious garb in public schools (but not at University) were confirmed and reinforced by the 2004 law on religious symbols.<sup>46</sup>

2005, pp. 179–180; E. Relaño & A. Garay, Los temores del Tribunal Europeo de Derechos Humanos al velo islámico: Leyla Şahin contra Turquía, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 12 (2006), pp. 1–32; I. Briones, El uso del velo islámico en Europa: un conflicto de libertad religiosa y de conciencia, in *Anuario de Derechos Humanos – Nueva Época* 10 (2009), pp. 17–82; J. Martínez-Torrón, La cuestión del velo islámico en la jurisprudencia de Estrasburgo, in *Derecho y Religión* 4 (2009), pp. 94–98. See also the dissenting opinion of Judge Tulkens to the Grand Chamber decision.

<sup>43</sup> *Leyla Şahin* (2004), § 108, and *Leyla Şahin* (2005), § 115.

<sup>44</sup> See *supra*, section 2 of this paper.

<sup>45</sup> *Köse and 93 other applicants v. Turkey*, ECtHR, Dec. Adm. 26625/02, 24 January 2006; *Kurtulmus v. Turkey*, ECtHR, Dec. Adm. 65500/01, 24 January 2006. See J. Martínez-Torrón, La cuestión del velo..., cited in note 42, pp. 98–101.

<sup>46</sup> *Loi n° 2008-224*, 15 March 2004. The ECtHR provides a general overview of the debate, as well as of the most relevant legislation and case-law, in §§ 17–32 of the ‘twin’

Thus, in the *Dogru* and *Kervanci* cases, in 2008,<sup>47</sup> related to two twelve-year-old female students of French public schools who refused to remove their headscarves in physical education classes, the ECtHR, by a unanimous decision, declared that the disciplinary measure adopted against the applicants – their expulsion from school – was justified in the light of the principle of proportionality, and consequently there was no violation either of their religious freedom or of their right to education.<sup>48</sup> In turn, *Dogru* and *Kervanci* soon influenced the subsequent case law of the ECtHR, as we can see in six decisions of 2009, rendered on the same date and related to similar factual circumstances. In all of them the applicants were students that had been expelled from school, in various French towns, and in application of the 2004 law against personal religious symbols in public schools, for persistently wearing religious clothing.<sup>49</sup> The ECtHR, in six almost identical

decisions *Dogru* and *Kervanci*, cited below, in note 47. For an analysis of the situation in the first years of the public debate about the Islamic headscarf in France, see D. Le Tourneau, La laïcité à l'épreuve de l'Islam: le cas du port du "foulard islamique" dans l'école publique en France, in *Revue Générale de Droit* 28 (1997), pp. 275–306. For a critical assessment of the 2004 law in France, see A. Garay, Laïcité, école et appartenance religieuse: pour un bilan exigeant de la loi n° 2004–228 du 15 Mars 2004, in *Cahiers de la Recherche sur les Droits Fondamentaux 4: Quel avenir pour la laïcité cent ans après la loi de 1905?*, Caen 2005, 33–48; B. Chelini-Pont & T.J. Gunn, *Dieu en France et aux Etat-Unis. Quand les mythes font la loi*, Paris 2005. The issue has attracted also the attention of Spanish scholars; see, among others, S. Cañameres Arribas, *Libertad religiosa, simbología...*, cited in note 42, pp. 70 ff.; A. González-Varas Ibáñez, *Confessioni religiose, diritto e scuola pubblica in Italia. Insegnamento, culto e simbologia religiosa nelle scuole pubbliche*, Bologna 2005, pp. 229 ff.; M.J. Ciáurriz, Laicidad y ley sobre los símbolos religiosos en Francia, in *El pañuelo islámico en Europa* (coord. by A. Motilla), Madrid 2009, pp. 91 ff.

<sup>47</sup> *Dogru v. France*, and *Kervanci v. France*, both of 4 December 2008. For a comment on those decisions, see B. Chelini-Pont & D. Girard, Le voile musulman et la conception française de l'Etat laïc, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 19 (2009), pp. 1–11; J. Martínez-Torrón, La cuestión del velo..., cited in note 42, pp. 103–107.

<sup>48</sup> The rationale of the Court, following explicitly and repeatedly the doctrine set up by *Leyla ahin*, underscored the importance of the principle of secularism in France, as in Turkey, and elaborated on the need to preserve the atmosphere of neutrality at school as a way of protecting the rights of other members of the school community. It also insisted on recognizing a broad margin of discretion to national authorities when they apply restrictive measures to religious freedom or freedom of expression in that context.

<sup>49</sup> In four of these decisions the applicants were female Muslim students that felt morally obliged to wear a headscarf: *Aktas v. France*, ECtHR, Dec. Adm. 43563/08; *Bayrak v. France*, ECtHR, Dec. Adm. 14308/08; *Gamaleddyn v. France*, ECtHR, Dec. Adm. 18527/08; *Ghazal v. France*, ECtHR, Dec. Adm. 29134/08. In the other two, the applicants were male Sikh students that had been expelled for wearing a *keski* – a more discreet garb that is usually worn under the turban characteristic of Sikhs (*Jasvir Singh v.*



decisions that explicitly followed the rationale of *Dogru* and *Kervanci*, found that the disciplinary measures against the students were justified, despite the fact that now the prohibition of religious clothing was not limited to sports classes but extended to all school hours and premises.<sup>50</sup>

**b) Neutrality in education and institutional religious symbols: the crucifix case**

There are some revealing analogies between the ECtHR's reasoning in the foregoing decisions on personal religious symbols, in particular Islamic headscarves, and in the first *Lautsi* decision (Chamber decision, 2009; hereinafter *Lautsi I*) on the use of institutional religious symbols, in particular the crucifix.<sup>51</sup> In all of them there is a latent understanding of State neutrality of religious "asepsis", incompatible by definition with the presence of religious symbolism.

The issue of the crucifix has been the subject of a heated public and legal debate in Italy in the last decade.<sup>52</sup> The *Lautsi* case is a result of that debate. The applicant was the mother of two students of a public school (aged 13 and 11 at the time), who had unsuccessfully asked the school's governors to remove crucifixes from classrooms – the Italian law prescribes that there shall be a crucifix on the wall of public school classrooms. The mother claimed that the presence of that religious symbol was against the constitutional principle of secularity (*laicità*), in which she wished to educate her children. The Court's Chamber decided unanimously in favour of the applicant, considering that there had been a violation of article 2 of the First Protocol to the Convention (rights of parents) in connection with article 9 ECHR (freedom of thought, conscience and religion). For the Court, the crucifix was a "powerful" symbol

*France*, ECtHR, Dec. Adm. 25463/08, and *Ranjit Singh v. France*, ECtHR, Dec. Adm. 27561/08). The six decisions were rendered on 30 June 2009.

<sup>50</sup> The only difference with *Dogru* and *Kervanci* is that the Court did not consider it necessary to deal with those six applications in a full decision on the merits and chose the more expeditious way of declaring them inadmissible as "manifestly ill-founded". This choice implies in practice a total and unconditional endorsement of the controversial French law of 2004.

<sup>51</sup> *Lautsi v. Italy*, 3 November 2009.

<sup>52</sup> See, for further details and references, in the context of analogous debates in other European and American countries, R. Navarro Valls & J. Martínez-Torrón, *Conflictos entre conciencia y ley...*, cited in note 20, pp. 374–393. For a useful source of documentation on the issue of the crucifix in Italy, with an interesting scholarly analysis from diverse perspectives, see La questione del "crocifisso" (ed. by A.G. Chizzoniti), in *Osservatorio delle libertà ed istituzioni religiose*, <http://www.olir.it/aretematiche/75/index.php> (visited on 31 October 2011).

with remarkable potential impact on young students, and with a primarily religious meaning. Therefore, its presence on the school premises could be emotionally disturbing for some students and was restrictive of the parents' rights to decide the orientation of their children's education and incompatible with the neutrality that must preside over the public school environment.<sup>53</sup> Naturally, the logical consequence of this rationale would be the removal of crucifixes from all public schools in Italy (and probably elsewhere).

Not surprisingly, *Lautsi I* gave rise to an unprecedented reaction from a substantial number of Council of Europe member States, as well as to a more general, and intense, controversy in Europe about the Strasbourg judicial policy with respect to the presence of religion in public life, and in particular the visibility of majority religions.<sup>54</sup> There certainly were grounds for controversy, for some aspects of the decision's rationale are weak and raise some concerns about the interpretation of State neutrality obligations under the European Convention.<sup>55</sup>

<sup>53</sup> "The Court considers that the compulsory display of a symbol of a particular faith in the exercise of public authority in relation to specific situations subject to governmental supervision, particularly in classrooms, restricts the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe. It is of the opinion that the practice infringes those rights because the restrictions are incompatible with the State's duty to respect neutrality in the exercise of public authority, particularly in the field of education." (*Lautsi*, Chamber's decision, § 57).

<sup>54</sup> See, among the many comments to this decision, from different perspectives, S. Cañamares Arribas, *La cruz de Estrasburgo. en torno a la sentencia Lautsi v. Italia*, del *Tribunal Europeo de Derechos Humanos*, in "Revista General de Derecho Canónico y Derecho Eclesiástico del Estado" 22 (2010), pp. 1-13; T. Prieto Álvarez, *Libertad religiosa y espacios públicos. Laicidad, pluralismo, símbolos*, Pamplona 2010, pp. 88-92 y 129-131; J.H.H. Weiler, *Crucifix in the Classroom Redux*, in "European Journal of International Law" 21,1 (2010), pp. 1-6; S. Mückl, *Crucifijos en las aulas: ¿lesión a los derechos fundamentales?*, in "Revista General de Derecho Canónico y Derecho Eclesiástico del Estado" 23 (2010), pp. 1-15 (analysing *Lautsi I* in the light of the case law of the German Federal Constitutional Court on the crucifix in Bavarian schools); M.J. Parejo Guzmán, *Orden público europeo y símbolos religiosos: la controversia sobre la exposición del crucifijo en las escuelas públicas*, in RGD-CDEE 24 (2010), pp. 1 ss.; P. Annicchino, *Is the glass half empty or half full? Lautsi v. Italy before the European Court of Human Rights*, in "State, Chiesa e Pluralismo confessionale", maggio 2010, pp. 1-19; N. Colaianni, *Il crocifisso in giro per l'Europa: da Roma a Strasburgo (e ritorno)*, in "Revista General de Derecho Canónico y Derecho Eclesiástico del Estado" 24 (2010), pp. 1-26; R. NavarroValls & J. Martínez-Torrón, *Conflictos entre conciencia y ley...*, cited in note 20, pp. 383-390.

<sup>55</sup> The decision also reflects a peculiar notion of education as part of the public function (in the French sense of *fonction publique*). As a consequence, public schools, being under State control, would necessarily be representative of the State's attitude towards religion, without further nuances or distinctions. This is an inappropriate point of departure. The

In particular, it is surprising how categorically *Lautsi I* assumed that students' freedom of religion or belief implies a negative dimension consisting in their right not to be "exposed" to the presence of a religious symbol that some may find alien or even offensive. The argument was analogous to that used in the Islamic headscarf cases (which not coincidentally are often cited in that decision), i.e., religious symbols must be avoided in the public school environment because of the hypothetical pressure they must cause on the students disagreeing with or opposing to the meaning of those symbols. This argument does not seem very persuasive, taking into account the nature of the crucifix as a "static" or "passive" symbol and the absence – as in the case of the Islamic headscarf – of any proselytizing intention or effect.<sup>56</sup> There was no evidence at all that the presence of that Christian symbol was used in practice to affirm the "superiority" of the majority religion in Italy, to indoctrinate students or to foster conversions. On the other hand, the Chamber's reasoning also seems to contradict the previous case law of the Court that held – in my view with all good reason – that the religious freedom of the believers of a certain religion – be it a majority or minority religion – does not confer them the right to be exempt from criticism or to be free from the influence of contrary or even hostile ideas.<sup>57</sup>

It is difficult not to conclude that *Lautsi I*, like the ECtHR's decisions on Islamic headscarf cases, transmits the implicit message that imposing the

education of youth is the direct responsibility of society and only indirectly is it a responsibility of the State, as far as public authorities act in representation of society. To make education in public schools equivalent to the public function in the strict sense is a wrong perspective, leading to subsequent mistakes about how to conceive the neutrality of the State as ultimately responsible, in practice, for the management of the public school system.

<sup>56</sup> Cfr. *Lautsi I*, §§ 54-55. See in this regard the essays, cited in note 54, written by S. Cañamares Arribas, pp. 6-7, and S. Mückl, pp. 8-10.

<sup>57</sup> See *Otto-Preminger-Institut v. Austria*, 20 September 1994, § 47. See, for further references and bibliography, J. Martínez-Torrón, Freedom of Expression versus Freedom of Religion in the European Court of Human Rights, in *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World* (ed. by A. Sajó), The Netherlands, 2007, especially pp. 238-239. With this same orientation, the German Federal Constitutional Court, in 2003, rejected the claim of a father demanding that the table blessing in the local elementary school attended by his son had to be discontinued, for he was an atheist and those prayers violated his ideological freedom. Among other things, the German Court affirmed: "it is not unconstitutional that all children, including those with parents of atheistic convictions, know since their childhood that there are in society people with religious beliefs that wish to practice their beliefs". See BVerfGE, 1BvR 1522/03 vom 2.10.2003, Absatz-Nr. (1-11).

absence of religious visible elements, at least in public schools, is a necessary consequence of State neutrality as a guarantee of freedom of thought, conscience and religion. The underlying assumption appears to be that religion is a factor of potential conflicts, easily leading to confrontation and social tension. Hence the best choice is to eliminate its visible features, and consequently State neutrality would require the protection of the individual right to build “uncontaminated” environments free from religion. From such perspective, as the exercise of every individual right calls for a conflict-free milieu, the State would become obliged to eliminate the possibility of conflict by prohibiting every visible religious symbol – when, in reality, conflicts and confrontation are normally produced not by religious symbols but rather by those who assert their absolute right to erase those symbols from their sight so that they are not exposed to their presence or alleged influence. This position easily leads to the effect that non-religious ideas, in practice, enjoy a superior position over religious ideas – in other words, it leads to the design of public spaces where an atheist can feel more comfortable than a religious believer.<sup>58</sup>

On the other hand, it is not easy to understand how such a conception of State neutrality, with respect both to personal and to institutional symbols, can contribute to build the pluralist, inclusive and objective educational environment that *Lautsi I* mentions.<sup>59</sup> Indeed, the effect of eliminating the visibility of the religious is to exclude and hide an important part of pluralism as well as to create a fictitious school setting, separated from the complexities of real life.<sup>60</sup> Such a school setting would not be at all neutral, since a naked wall at school is not in itself more neutral than having a crucifix on the wall.<sup>61</sup> On the contrary, removing religious symbols from where they had traditionally been may transmit the subliminal message that religion, being potentially conflictive, has its place out of the school but not inside it, thus implying that atheism and agnosticism are at the opposite end of the spectrum, i.e., are considered as non conflictive ideas, and therefore “acceptable” at school.

<sup>58</sup> See R. Puza, *La Cour constitutionnelle, la Bavière et le crucifix dans les écoles*, in *Revue de droit canonique* 45 (1995), pp. 373 ss., commenting the 1995 decision of the German Federal Constitutional Court on the crucifix in public schools in Bavaria.

<sup>59</sup> See *Lautsi I*, § 47.c).

<sup>60</sup> See in this regard M.D. Evans, *Manual on the wearing of religious symbols in public areas*, Council of Europe, 2009.

<sup>61</sup> See J.H.H. Weiler, *Il crocefisso a Strasburgo: una decisione “imbarazzante”*, en *Quaderni costituzionali* (2010), p. 153.

Fortunately, the Grand Chamber overruled the Chamber's decision in 2011 (*Lautsi II*),<sup>62</sup> rejecting that the exclusive notion of neutrality proposed by the Chamber was the only acceptable one, and pointing out that neutrality could also be achieved by a school environment that is inclusive and therefore open to visible expressions of both majority and minority religions or worldviews.<sup>63</sup> According to the Grand Chamber, the decision about the presence of religious symbols in public schools falls within the State margin of appreciation. The Court noted that the mere display of a crucifix in classrooms, as a sign of the religion of the majority of the Italian population, was not sufficient to conclude that there is a process of indoctrination, and even less taking into account that the Italian school environment was open to practices and visible expressions of other minority religions; for instance, students could freely wear Islamic headscarves, and optional religious education of creeds other than Catholic could be organized at school.<sup>64</sup> The subjective feeling of some students about the crucifix was not enough to challenge the legitimacy of a school setting that was objectively built according to an open and inclusive concept of neutrality.<sup>65</sup>

In my opinion, *Lautsi II* would have been even better if it had elaborated further on some points mentioned in the concurring opinions of the two judges, in particular, the idea that coercion should be the test of a violation of freedom of religion or belief, and not the subjective feeling of offence experienced by some persons in the presence of some religious symbols. Just as religious believers do not have the right to be free from criticism, atheistic believers do not have the right to be free from exposure to symbols – personal or institutional – that may offend their convictions or feelings.<sup>66</sup>

<sup>62</sup> *Lautsi v. Italy* (Grand Chamber), 18 March 2011. See V. Turchi, La pronuncia della Grande Chambre della Corte di Strasburgo sul caso Lautsi C. Italia: post nubila Phoebus, in *Stato, Chiese e pluralismo confessionale*, October 2011 ([www.statoechiese.it](http://www.statoechiese.it)), where further bibliographical references, especially to Italian legal literature, can be found. See also the interesting essay, comparing the Strasbourg and the US approach to institutional religious symbols, written by J. Witte, Jr. & N.L. Arold, "Lift High the Cross"? Contrasting the New European and American Cases on Religious Symbols on Government Property, in *Emory International Law Review* 25 (2011), pp. 5–55. In Spain, see S. Cañameres Arribas, Los símbolos religiosos en el espacio público: entre la amenaza real y la mera sospecha, in *El Cronista del Estado Social y Democrático de Derecho* 20 (April 2011), pp. 60–67; S. Meseguer Velasco, Símbolos religiosos en colegios públicos: ¿hacia dónde camina la jurisprudencia europea?, in *Anuario Jurídico Villanueva* 5 (2011), pp. 202–213.

<sup>63</sup> See especially *Lautsi II*, §74.

<sup>64</sup> See especially *Lautsi II*, §§ 70–72, 74.

<sup>65</sup> See especially *Lautsi II*, § 66.

<sup>66</sup> See concurring opinion of Judge Power.

In addition, it would have been useful if the Court had said more clearly that the value protected by the Convention is religious freedom and not secularity, however legitimate and traditional may the latter be in some European States.<sup>67</sup> Separationism is not included in the ECHR, only the State neutrality described above in this paper is, as a condition for the respect for religious freedom. Finally, I would also have welcomed a more explicit statement by the Court about the fact that erasing all religious symbols from the school “panorama” is not neutral but rather supportive of secularist ideologies over alternative religious worldviews.<sup>68</sup> Indeed, once the Court has recognized secularism as a “philosophical conviction” within the meaning of article 9 ECHR and article 2 of the First Protocol,<sup>69</sup> the most coherent option is probably a pluralist and inclusive school environment, and not an allegedly “neutral” environment that excludes the visibility of religion, therefore giving preeminence to secularist views.<sup>70</sup> This is applicable to the institutional display of crucifixes or other religious symbols, as well as to the personal wearing of religious garments as, for example, Islamic headscarves or Sikh turbans.

## 5. Conclusion: towards an inclusive notion of State neutrality

As we have seen, the ECtHR has sometimes justified national policies aimed at imposing a conception of the public sphere that excludes the visibility of religion. It is not easy to avoid the impression that former references of the Court to pluralism, and to the central role that pluralism plays in a democracy, risk yielding to an exclusive concept of neutrality. By nature, pluralism is inclusive, and tends to reflect the plurality of positions – religious or not – actually existing in society. On the contrary, the notion of neutrality proposed by the Turkish and French interpretations of secularism (*laïcité*), ratified by the Court, is exclusive of religion in some areas of public life, particularly in educational settings – virtually any ideological or philosophical position may be visible as far as it is not religious. The implicit idea is that religion is a factor of tension and conflict. Of course religion, like many other realities protected by fundamental rights, can be incidentally conflictive, but to let this peripheral dimension of religion dominate the

<sup>67</sup> Cf. concurring opinion of Judge Bonello.

<sup>68</sup> Cf. concurring opinion of Judge Power.

<sup>69</sup> See *Lautsi II*, §58.

<sup>70</sup> If the secularist notion of neutrality were the only legitimate option in the organization of the public school environment, it would imply that the State is obliged in practice to organize public schools in accordance with a specific philosophical conviction, with the exclusion of all other convictions, religious or philosophical.

definition of how the neutrality of public space should be construed is inadequate and disruptive. As the European Court has repeatedly affirmed, the State is obliged to guarantee tolerance and respect, but eliminating tension at the cost of eliminating pluralism is disproportionate and excessive.<sup>71</sup> The result of these types of policies could be described as “mutilated” pluralism and does not seem compatible with real neutrality but rather with that deformation of neutrality that makes it, always and necessarily, synonymous with “secularism”.

It is true that the ECtHR has not actively supported this exclusive notion of neutrality and it could be argued that the Court has only applied the traditional margin of appreciation doctrine, trying not to impose unnecessary uniform European patterns on national systems of relations between State and religion. However, the mere fact that the Court justified the French and Turkish secularist policies that limit expressions of religious identity, without enough evidence of a danger for public order, might denote a certain agreement with the philosophy underlying those policies – that the public sphere is better organized, and “less problematic”, when religion is absent.

Sometimes it has been suggested that French and Turkish secularist policies could be explained by the declared interest of the government of those countries in restricting the visibility of some symbols of Islam that could be understood as offensive for women – the female headscarf especially – or even as expressions of Islamic extremism, and that could exert pressure on people, particularly on Muslims who refuse to wear those symbols.<sup>72</sup> But the fact is that a similar notion of neutrality inspired the Chamber’s decision in *Lautsi I*<sup>73</sup> suggesting that the neutral organization of the public school system entails the State’s obligation to eliminate all visible religious symbols, and the crucifix in particular, out of respect for the secularist convictions of some parents or students. When the Grand Chamber’s decision overruled the Chamber’s judgment in 2011, it actually denied that this exclusive notion of neutrality was the only adequate one and accepted that neutrality could also be achieved by a plural and inclusive environment that was open to visible expressions of both majority and minority religions or worldviews. Indeed, *Lautsi II* was, in my opinion, mitigating, and perhaps implicitly contradicting, the doctrine that inspired the Court’s rul-

<sup>71</sup> See *supra*, notes 17–18 and accompanying text.

<sup>72</sup> See, for further details on those positions, J. Martínez-Torrón, *Islam in Strasbourg: Can Politics Substitute for Law?*, in *Islam in Europe...*, cited in note 42.

<sup>73</sup> See especially §§ 56–57.

ings on Islamic garment cases. And I consider this is a positive development in the ECtHR's case law.<sup>74</sup>

On the other hand, it seems that the ECtHR's support of active secularist policies mainly applies to education cases. Indeed, out of the educational environment, the European Court has declined to support strict secularist policies aimed at erasing the visibility of religion in the public square, as the case of *Ahmet Arslan* demonstrates.<sup>75</sup> And it is certainly justifiable, and

<sup>74</sup> Some scholars have drawn attention to the apparent contradiction between the principles established by the Court in *Lautsi II* and the criteria used in *Dahlab* or *Leyla Şahin*, suggesting, at the same time, that the Court's attitude in *Lautsi II* is wrong (see P. Ronchi, Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v. Italy*, in *Ecclesiastical Law Journal* 13 (2011), especially pp. 296–297). On the contrary, I think it is right for the Court to correct its views on the Islamic headscarf cases, which have been strongly criticized by many scholars, with all good reason, in the last years. The right way is not to return to *Leyla Şahin*, but rather to keep, and perfect, the track of *Lautsi II*.

<sup>75</sup> *Ahmet Arslan et al. v. Turkey*, 23 February 2010. In this case, the ECtHR held that forbidding the wearing of religious garment in the public square was a disproportionate limitation on religious freedom. The applicants were part of a religious Muslim group called *Aczimendi tarikati*, which gathered in Ankara, in 1996, coming from diverse Turkish regions, to participate in a religious ceremony in a mosque. They were arrested for walking around the city wearing the characteristic garment of their community – turban, loose pants (*saroual*) and tunic, all black – and a cane in memory of Prophet Muhammad. Later, in the judicial hearing, most of them refused to uncover their heads before the judge. The applicants were sentenced to a moderate fine (equivalent to 4 USD) but the sentence was never executed. According to the Turkish government, the doctrines of that religious group were aimed at the replacement of the current democratic regime by a *Sharia*-based regime, and the arrest and prosecution of the applicants was justified by the afore-mentioned laws on religious attire and by the need to preserve public order and avoid acts of religious provocation or proselytism. The ECtHR, though recognizing and emphasizing the importance of the secularity principle for Turkish democracy, decided in favour of the applicants, taking into account that the *Aczimendi*'s attire was mandatory according to their beliefs and judging that State interference in their religious freedom was not proportionate. In the Court's view, the government had not proved the alleged existence of a danger for democratic principles and for public order, because the applicants were ordinary citizens, without any specific public position of representation or responsibility, who had just worn their religious dress in public streets and places open to all. The Court noted that this circumstance was essential to distinguish this case from other cases (especially *Leyla Şahin*) in which the applicants had worn religious garb in the specific environment of educational institutions. We could also mention other cases in which the ECtHR considered disproportionate and unjustified some sanctions imposed by the Turkish authorities on parliamentary representatives, politicians, religious leaders or journalists for publicly defending the use of the female Islamic headscarf and openly criticizing the restrictions imposed by Turkish law. These decisions are:



desirable, that the Court has a particular sensitivity on education issues, probably keeping in mind that minors tend to be more vulnerable and there is a greater need to guarantee their protection against indoctrination or religious pressure. In my opinion, however, and precisely because the realm of education is so special, the Court should have been more accurate in defining an inclusive notion of the neutrality of the public sphere, in a way that is open to religious and belief pluralism and does not favour in practice secularist positions.

A number of recent cases indicate that the European Court has been very careful to protect the individuals' *right not to disclose*, even indirectly, their religion or beliefs, an aspect of religious freedom which is *implicit* in article 9 ECHR.<sup>76</sup> I wish that the Court showed at least the same zeal in protecting individuals' *right to express* their religion or beliefs in *practice*, i.e., having the possibility of adjusting their conduct in ordinary life to their moral tenets, an aspect that is *explicit* in article 9 ECHR.

*Kavakçı v. Turkey*, *Ilicak v. Turkey*, and *Silay v. Turkey*, all of them decided on 5 April 2007 with almost identical reasoning; *Gündüz v. Turkey*, 4 December 2003; *Erbakan v. Turkey*, 6 July 2006; *Güzel v. Turkey*, 27 July 2006; and *Kutlular v. Turkey*, 29 April 2008. See J. Martínez-Torrón, *La cuestión del velo...*, cited in note 42, pp. 101-103.

<sup>76</sup> See *Grzelak v. Poland*, 15 June 2010 (indirect disclosure of a student's belief in the school reports through reporting his refusal to participate in confessional religious instruction); *Alexandridis v. Greece*, 21 February 2008, and *Dimitras et al. v. Greece*, 3 June 2010 (oath formulas); *Sinan Işık v. Turkey*, 2 February 2010 (mention of religion on identity cards). For a comment on *Dimitras*, see A. López-Sidro, *Libertad religiosa y juramento en el Tribunal Europeo de Derechos Humanos. el caso Dimitras y otros contra Grecia*, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 24 (2010), pp. 1-12; for a comment on *Sinan Işık*, see Z. Combalá, *Relación entre laicidad del Estado y libertad religiosa: a propósito de la jurisprudencia reciente del Tribunal Europeo de Derechos Humanos*, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 24 (2010), pp. 1-19.

### ► 3. A worldwide view

# RELIGIOUS FREEDOM IN A WORLDWIDE SETTING: COMPARATIVE REFLECTIONS

■ W. COLE DURHAM, JR.\*

## I. Introduction

In this paper, my aim is not so much to describe unfolding legal events visible across a range of legal systems, but to reflect from a comparative perspective on what I see as a looming crisis in defending religious freedom. I first reflect on the nature of that crisis (Section II) and the social setting in which it is unfolding (Section III). We live at a time when every level of society – global, national, and local – is more pluralistic than ever before. The differences seem deeper and more intractable and the potentially resulting conflicts pose greater risks of devastation. Freedom of religion holds a time-tested key for addressing these challenges. Yet at precisely the time we are coming to understand its effectiveness better than ever before, we are forgetting its significance and permitting its erosion.

Against this background, I sketch a general comparative framework for analyzing the institutional structures that have been developed in varying cultural and political settings for dealing with the complex interrelationships of religion, state, and society (Section IV). The analysis suggests that there are a range of possible religion-state configurations that can be reconciled with high levels of religious freedom protections. But such freedom is likely to be jeopardized by excessive positive or negative identification of the state with religious institutions – i.e., with excessive privileging of some religion or religions or with excessive privileging of secularist or anti-religious positions (ranging from inadvertent insensitivity to outright persecution). New conceptions of equality are beginning to collide with instead of to reinforce religious freedom rights.

Recognizing that contemporary challenges to religious freedom tend to take the form not of overt challenge to the ideal of religious freedom but of erosion by exception or by emptying of protections, the remainder of the paper looks at four major types of erosion: (1) replacing the idea of secularism, which in its best form guarantees a neutral governmental framework

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for accommodating and protecting different belief systems, with ideological secularism, which makes secularism an end in itself (Section V); (2) the erosion of the standards of review applied by the judiciary in assessing religious freedom claims (Section VI); (3) the loss of the appreciation of the priority of religious liberty, both in its relative priority vis-à-vis other human rights and in light of emerging arguments concerning the ‘redundance’ of the religious freedom right (Section VII); and (4) the deeper loss associated with forgetting the virtue of reverence – reverence that can take many forms, but is critical to cultivating openness to the transcendent and respect for rival interpretations of the transcendent – both of which are vital to democratic society (Section VIII).

## II. The nature of the religious freedom crisis

In some ways, the crisis – at least as experienced in strong constitutional democracies – is an odd one. It is not a crisis that takes the form of a frontal attack on religious freedom norms or their status as fundamental human rights. No one is suggesting repeal of Article 18 of the International Covenant on Civil and Political Rights, or that the guarantees of religious freedom in most constitutions on earth should be withdrawn. Rather, there is a tipping point phenomenon and a pattern of erosion by exception – exceptions in the name of other rights and other state interests, exceptions in the name of transformed equality norms, and exceptions deriving in the end from lost perspective on the importance of freedom of religion.

A striking feature of the crisis is its incremental character. In the regions where most of us live, it is a crisis of apathy more than passion, of gradual erosion and cultural drift more than dramatic political and social transformation. It is a crisis of lost moorings. It is a crisis whose long-term costs are overlooked because in many ways religious freedom is better protected today than at most times during human history. Think how much better the situation is today than it was a quarter century ago. The collapse of Soviet communism and its ripple effects in many other parts of the world have resulted in major improvements in the global protection of freedom of religion or belief. But this success and the longer history of religious freedom elsewhere carry with them a hidden peril: long-enjoyed blessings of religious freedom can act as a social anesthetic, leading to a gradual forgetting of how truly foundational religious freedom is and to a skewing of the weight accorded this right in comparison with other rights and social interests. This drift is made all the more difficult to combat because it often proceeds in small steps, no one of which can easily galvanize strong public opinion and political pressure. The great irony, as Allen Hertzke has pointed

out<sup>1</sup> and as the path-breaking work of Brian Grim and Roger Finke has documented,<sup>2</sup> is that popular understanding of the preeminence of religious freedom in the pantheon of human rights is slipping away at precisely the time when we have better empirical evidence for its significance than ever before.

Of course, for those suffering violations of their right to freedom of religion or belief, there is nothing remote or gradual about the injustice they face. Those of us who live in countries blessed with strong protection of this right tend to forget the plight of Christians fleeing persecution in the Middle East; of Christian Montagnards in Vietnam faced with jail terms, forcible de-conversion, and death; of Christians, Ahmadiyyah, and other religious minorities being persecuted in Pakistan; of religious groups who have suffered loss of homes, places of worship, and lives as a result of inter-communal violence in India; of Buddhists, Muslims, and house-church Christians facing persecution in China; of Muslims and non-Muslims facing the steady state of religious oppression in Saudi Arabia; and of countless other victims of persecution.<sup>3</sup> The daily flood of reports that those of us tracking religious freedom violations receive is a grim reminder of the reality highlighted by the *Global Restrictions on Religion* study published in December 2009 by the Pew Forum on Religion and Public Life,<sup>4</sup> which found that 32% of the countries on earth, comprising 70% of the world's population, have high or very high restrictions on religious freedom.

In comparison with the harsh realities of cases of acute persecution, battles about religious symbols in public buildings or many other religious controversies arising in stable constitutional democracies seem quite tame. Many countries would feel blessed if problems of the latter variety were their most severe religious freedom controversies. Nonetheless, it is vital to pay attention to the less acute challenges to religious freedom in the major democracies. As James Madison wrote in his famed *Memorial and Remonstrance Against Religious Assessments*, one of the key documents shaping thought on religious freedom in the United States, "it is proper to take alarm

<sup>1</sup> Allen D. Hertzke, 17<sup>th</sup> Plenary Session paper, pp. 108-133 of this book.

<sup>2</sup> Brian J. Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century* (Cambridge: Cambridge University Press, 2011).

<sup>3</sup> For a collection of cases drawn from news reports in recent days, see [www.religlaw.org/index.php?blurb\\_id=1057](http://www.religlaw.org/index.php?blurb_id=1057).

<sup>4</sup> Pew Forum on Religion and Public Life, *Global Restrictions on Religion* (December 2009), available at [pewforum.org/uploadedFiles/Topics/Issues/Government/restrictions-fullreport.pdf](http://pewforum.org/uploadedFiles/Topics/Issues/Government/restrictions-fullreport.pdf).

at the first experiment on our liberties'.<sup>5</sup> Moreover, if sound and effective implementation of religious freedom norms is not maintained among leading democracies, there is little hope that it will be protected more effectively elsewhere. One of the perennial problems for religious liberty everywhere is that while it ranks high as a fundamental right, it often ranks low in the priorities of practical implementation. But if left on the back burner too long, simmering religious freedom issues are all too likely to explode.

### III. Essential features of the global social setting for religious freedom

A few basic points about the global setting necessarily shape thinking about religious freedom.<sup>6</sup> The first point is that religion is here to stay. Even staunch advocates of the secularization thesis have conceded in light of the data that religion is not withering away. To the contrary, we are witnessing the desecularization of the world<sup>7</sup> and the resurgence of religion, especially in the public sector.<sup>8</sup> There is a major reawakening of religion in Latin American<sup>9</sup> and in Africa<sup>10</sup> and throughout the Muslim world.<sup>11</sup> To the extent that the secularization thesis has any residual explanatory power, it

<sup>5</sup> James Madison, Memorial and Remonstrance Against Religious Assessments (1785), para. 3, available at <http://original.religlaw.org/interdocs/docs/jmadagainstreli-gassessments1785.htm>.

<sup>6</sup> This section draws from the General Report written by Javier Martínez-Torrón and myself in Javier Martínez-Torrón and W. Cole Durham, Jr., *Religion and the Secular State / La Religion et l'État laïque*, Interim National Reports Issued for the Occasion of the XVIII International Congress of Comparative Law (Provo: International Center for Law and Religion Studies, 2010), 3-5, available at <http://jrcb-lar.byu.edu/common/files/General%20Report.pdf>.

<sup>7</sup> Peter Berger, ed., *The Desecularization of the World. Resurgent Religion and World Politics* (Washington, D.C.: Ethics and Public Policy Center, 1999).

<sup>8</sup> José Casanova, *Public Religions in the Modern World* (Chicago: Univ. of Chicago Press, 1994).

<sup>9</sup> David Martin, *Tongues of Fire: The Explosion of Protestantism in Latin America* (Oxford: Blackwell, 1990). '[M]ost writers place the number of Protestants in Latin America at between 12 and 15 percent of the population – dramatic increase from an estimated 1 percent in 1930 and 4 percent in 1960. The largest percentages are in Guatemala, Brazil, Chile, El Salvador, and Nicaragua, but the expansion is continent-wide'. Paul E. Sigmund, ed., 'Introduction', in *Religious Freedom and Evangelization in Latin America: The Challenge of Religious Pluralism* (Maryknoll, New York: Orbis Books, 1999), 1, 2.

<sup>10</sup> See, e.g., M. Christian Green and John D. van der Vyver, *Law, Religion and Human Rights in Africa: Introduction*, *Afr. Hum. Rts. L.J.* 8: 337-356 (2008).

<sup>11</sup> See, e.g., Paul Marshall, ed., *Radical Islam's Rules: The Worldwide Spread of Extreme Shari'a Law* (Lanham, Boulder, New York, Toronto and Oxford: Rowman & Littlefield Publishers, Inc., 2005).

seems to apply primarily with respect to ‘European exceptionalism’.<sup>12</sup> Even in China, which has particularly strong governmental constraints on religion, religiosity appears to be on the rise among many sectors of the population, and Chinese leaders are rethinking how religion fits into and contributes to the building of a ‘harmonious society’.<sup>13</sup>

Second, the trend is toward greater religious pluralization virtually everywhere. At the global level, no religion has a majority position; all are minorities. Even in countries that at one point had relative religious homogeneity, the percentage of adherents to the dominant religion is declining. In part this reflects purely secular trends: the realities of labor force movement, refugee flight, trade, education, and countless other factors. The result is that the number of religious minorities is proliferating in every country. Muslim populations are becoming substantial throughout Europe, the United States, Canada, and elsewhere. The growth of other groups is less visible, but is also significant. In addition to demographic shifts associated with migration, significant shifts are occurring because of conversion (e.g., the growth of Protestantism in Latin American) and deconversion (growing numbers of non-believers in many societies). Moreover, while ethnicity and religion are often linked, the correlation is becoming less automatic. Many minority religions are not ethnically based. At a minimum, these trends mean that the realities of religious difference need to be taken into account in addressing countless legal issues.

Third, while pluralization is increasing, traditional religions continue to hold a very significant place in many societies. They typically have deep roots, and have generally played a significant role in molding a country’s history and shaping and preserving national identity. Because of their centrality in culture, traditional religions can easily become a significant factor in nation building. More generally, politicians often cater to religious groups to garner support. Despite their dominant position, however, prevailing religions often feel threatened by the combination of forces of secularization and the growth of other religious populations in what has traditionally been ‘their’ space. Not surprisingly, they are motivated to find ways to strengthen their position in society. As a result, reactions to issues of religious rights are often colored by identity politics, fear of immigrants, and security concerns. Depending on the circumstances, playing to majority sensitivities can

<sup>12</sup> Peter Berger, Grace Davie, and Effie Fokas, *Religious America, Secular Europe?: A Theme and Variations* (Aldershot, UK and Burlington, VT: Ashgate, 2008).

<sup>13</sup> See, e.g., Zhuo Xinping, *Religion and Rule of Law in China Today*, 2009 BYU L. Rev. 519.

exacerbate tensions with other religious groups. Moreover, concern for minority rights sometimes generates a backlash among those in majority positions, who may feel that their position is at risk or under-appreciated. In some ways, prevailing religions exhibit behaviors analogous to monopolies or oligopolies in economic settings in seeking to exclude competition.<sup>14</sup>

Fourth, while most countries on earth have constitutional protections of freedom of religion, implementation of these protections is uneven, and, as already mentioned, a high percentage of people on earth live in countries with high or very high restrictions on religious freedom. The latest work by Grim and Finke documents a strong correlation between government and social restrictions on religion and incidents of religious violence in society.<sup>15</sup> Their work identifies societal mechanisms that strongly suggest that governmental restrictions on religion are a significant factor in causing religious violence.<sup>16</sup>

Taken together, these considerations underscore the urgency of assuring better global protection of the right to freedom of religion or belief. The challenge in our increasingly pluralistic world is to find ways for persons holding competing, inconsistent, and often deeply irreconcilable views to live together peacefully in society. The problem is not merely how adherents of differing religious views can live together, but how those with different comprehensive views, including anti-religious comprehensive views, can live together. Since at least the Peace of Westphalia, progressively stronger versions of the right to freedom of religion have been recognized as holding the key to a solution. The core theory was articulated by John Locke: if a certain measure of social stability can be assured by favoring the dominant religion, an even greater level of social peace can be achieved by tolerating and respecting an even broader range of beliefs.<sup>17</sup> The theory has been validated by extensive historical experience over the intervening centuries, and has found persuasive empirical validation in the work of scholars such as Grim and Finke.<sup>18</sup> The key here is not achieving some type of overlapping

<sup>14</sup> Shima Baradaran-Robison, Brett G. Scharffs, and Elizabeth A. Sewell, *Religious Monopolies and the Commodification of Religion*, 32 *Pepperdine L. Rev.* 885 (2005).

<sup>15</sup> Grim and Finke, *supra* note 2, at 68-87, 215-222.

<sup>16</sup> *Id.*

<sup>17</sup> See John Locke, *A Letter Concerning Toleration* (first published in 1689; cited edition: Buffalo, NY: Bobbs-Merrill, 1990), 68-69. For a fuller discussion of the Lockean insight, see W. Cole Durham, Jr., in Johan D. van der Vyver, and John Witte, Jr., *Religious Human Rights in Global Perspective: Legal Perspectives* (The Hague, Boston and London: Martinus Nijhoff Publishers, 1996), 1, 7-12.

<sup>18</sup> See Grim and Finke, *supra* note 2, at 68-87, 215-222.



consensus. Rather, what is critical to peace in a pluralistic world is assuring the members of society that everyone is committed to respecting (and not harassing or persecuting) others, or at a minimum, that the risks of rights violations will be held to a tolerable minimum. If the tools that religious freedom norms provide for resolving such conflicts do not work, it is difficult to see what will.

A corollary is remembering the principle enunciated by the European Court in *Serif v. Greece*.<sup>19</sup> In that case, an individual selected as a mufti by the relevant Muslim community was convicted for ‘impersonating a mufti’ because he was not the mufti officially appointed by the Greek government. This case has important general implications for dialogue between religious communities and the state. The state doesn’t necessarily get to define its dialogue partner. Rather, the state needs to respect the governance structures of religious communities. In the process of reaching that decision, however, the Court enunciated another principle that has broader validity for protecting religious freedom:

Although the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other ...<sup>20</sup>

In general, protecting the framework of pluralism involves protecting the right of individuals and groups to maintain their differences. The aim is not to repress difference but to allow differences to be authentically expressed, albeit in peaceful ways.

#### **IV. A comparative framework for analyzing religion-state configurations**

Religious freedom issues typically arise in the context of the religion-state configurations that exist in particular states. Indeed, the degree of religious freedom in a particular state is an aspect of the general relationship of religion, state, and society in a particular country. In analyzing the full range of religion-state configurations on a comparative basis, it is helpful to think of them being spread out along a continuum stretching from positive identification of the state with religion (e.g., theocracies, established churches, confessional states) through various types of state neutrality and

<sup>19</sup> *Serif v. Greece* (ECtHR, App. No. 38178/97, 14 December 1999).

<sup>20</sup> *Id.*, at § 53.

extending to negative identification). It turns out that if this continuum is curved, with the two endpoints at one end and the middle at the other, as in the accompanying diagram,<sup>21</sup> there is a rough correlation between the position on the identification continuum and the degree of religious freedom experienced in the relevant country. The various positions along this 'loop' need to be understood as Weberian ideal types; no state structure corresponds exactly with any of the described positions. Indeed, it is probably best to think of the various positions along the loop as contested equilibrium points reached in different societies at different times. In this sense, the loop structure can be used to map not only the current positions of various states but also the range of discourse arguing for alternative positions at a given time in a particular country. For example, the major constitutional debates in the United States are focused in the range between separation and accommodation. In other countries, the range of debate is often much wider. Because the various types of religion-state relations have been explored in detail elsewhere, I will not go into greater detail here, except to make a few basic points.

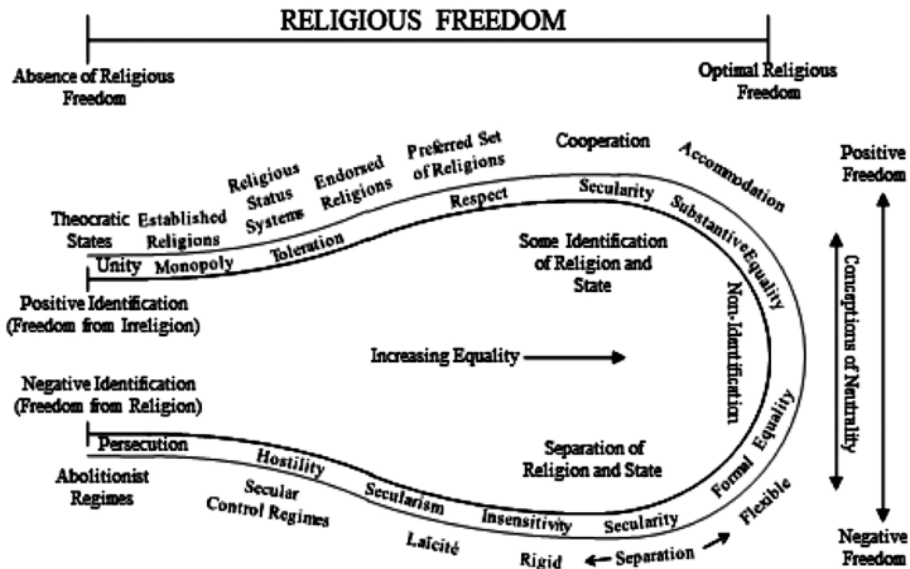
First, the diagram can be used to help model various types of religion-state relations not only as viewed from the perspective of the state but also as viewed from the perspective of religious communities. In this regard, I am grateful for the essay of Professor Hittinger, who has adapted an earlier version of this diagram to help chart a range of 'plural, legitimate religion-state regimes' as envisioned by *Dignitatis Humanae*.<sup>22</sup>

Second, a range of possible religion-state configurations can correlate with high degrees of religious freedom.

Third, the level of religious freedom in a particular country can decline either through excessive positive or excessive negative identification of the state with religion. Dangers exist as a regime moves toward either end of the identification continuum.

<sup>21</sup> I have published various versions of the diagram over the years. The version included here is the most recent iteration, prepared for an article entitled 'Patterns of Religion-State Relations', to be published in a volume edited by John Witte, Jr. and M. Christian Green, *Religion and Human Rights Anthology* (Oxford University Press, forthcoming 2011). The significance of various positions along the identification continuum is elaborated in more detail in W. Cole Durham, Jr. and Brett G. Scharffs, *Law and Religion: National, International and Comparative Perspectives* (Austin, Boston, Chicago, New York: Aspen, Wolters Kluwer Law & Business, 2010), 114-22.

<sup>22</sup> F. Russell Hittinger, 'Political Pluralism and Religious Liberty: The Teaching of *Dignitatis Humanae*', presented at the Pontifical Academy of Social Sciences, 17<sup>th</sup> Plenary Session, pp. 39-55 of this book.



Fourth, the mapping of equality notions has become problematic. Instead of providing increased protection to religious groups and individuals, newly minted equality notions are beginning to have the opposite effect when religious beliefs collide with shifting sexual mores and other ethically sensitive practices. More generally, we are witnessing a paradigm shift from freedom to equality norms as the deep structure of human rights, and key dimensions of freedom of religion or belief disappear or suffer de-emphasis as a result of this shift.<sup>23</sup> This problem becomes more troubling as equality norms are twisted to justify discrimination *against* religion.<sup>24</sup> This phenomenon lies at the heart of the crisis we face, but since others have addressed this issue in more detail, I focus in this essay on other questions.

<sup>23</sup> See W. Cole Durham, Jr. and Brett G. Scharffs, State and Religious Communities in the United States: The Tension between Freedom and Equality, in *Church and State Towards Protection for Freedom of Religion* 362 (Japanese Association of Comparative Constitutional Law, Proceedings of the International Conference on Comparative Constitutional Law, 2-4 September 2005).

<sup>24</sup> For an excellent treatment of these issues, see Marta Cartabia, 'The Challenges of "New Rights" and Militant Secularism', presented at the Pontifical Academy of Social Sciences, 17<sup>th</sup> Plenary Session (pp. 428-455 of this book), especially sections 4-7.

Fifth, freedom is likely to be optimized across a range of systems characterized by ‘secularity’, as opposed to ‘secularism’ or strong versions of *laïcité* (on the negative identification half of the loop) or excessive privileging of religion (on the positive identification half of the loop). Because one of the major incremental hazards to religious freedom, in my view, involves drifting away from secularity, it is worth saying more about what is intended by this concept.

## V. Secularity vs. secularism

Secularity is most easily explained by contrasting it with secularism. Briefly, the contrast is between secularism as an ideological position and secularity as a framework within which different comprehensive views – both religious and secular – can be held. Both ideas are linked to the general historical process of secularization, but as I use the terms, they have significantly different meanings and practical implications. By ‘secularism’, I mean an ideological position that is committed to promoting a secular order as an end in itself. At a minimum, this view is committed to confining religion to the private sector, and more militant versions are more aggressively anti-religious altogether. By ‘secularity’, in contrast, I mean an approach to religion-state relations that avoids identification of the state with any particular religion or ideology (including secularism itself) and that provides a neutral framework capable of accommodating or cooperating with a broad range of religions and beliefs.

In most modern legal systems there are exponents of both types of views. Constitutional and other legal texts addressing religion-state issues can often be interpreted as supporting one or the other of these views, and in fact, some of the key debates turn on the difference between the two approaches. Historically, French *laïcité* is closer to secularism; American separationism is closer to secularity. But there are debates in both societies about how strictly secular the state (and the public realm) should be. This tension between two conceptions of the secular runs through much of religion-state theory in contemporary settings. My contention is that human rights should constitute a framework that embodies secularity, not secularism.

This basic contrast is familiar in Catholic circles.<sup>25</sup> Pope Pius XII spoke already in 1958 of the ‘healthy secularity of the state’ (*sana laicità dello*

<sup>25</sup> See Evaldo Xavier Gomes, Church-State Relations from a Catholic Perspective: General Considerations on Nicolas Sarkozy’s New Concept of *Laïcité* Positive, *J. Cath. Legal Stud.* 48:201 (2009), 209–11, 213–5.

stato'),<sup>26</sup> thereby legitimating secularity as one of the attributes of the state from a church vantage point.<sup>27</sup> Such 'healthy secularity' is contrasted with secularism, which involves 'a negative conception of separation between Church and state, in which the Church is persecuted or denied its basic rights'.<sup>28</sup> Secularity in contrast is 'understood as a healthy cooperation between Church and state. ... [T]he Church and state are not opposed to each other; both are in the service of human beings, so between them there must be dialogue, cooperation, and solidarity'.<sup>29</sup> Pope Paul VI also distinguished between secularism and secularity, equating the former with 'militant atheism' that aims at 'suffocating faith – combatting it and extirpating it from society'.<sup>30</sup> A similar notion is implicit in President Nicolas Sarkozy's conception of *laïcité positive*, introduced at his speech at St. John Lateran in Rome in December 2007. As he used this expression, it connoted 'an open secularism, an invitation to dialog, tolerance, and respect'.<sup>31</sup> Pope Benedict XVI responded warmly to this new idea, viewing it as a historical step forward in church-state relations.<sup>32</sup>

From a comparative law perspective, the contrast between secularity and secularism is evident in the approaches states take to a variety of concrete issues affecting religious freedom. Reflecting on Canadian developments, José Woehrling and Rosalie Jukier have commented that as a general matter, there are four key principles in modern secular states: 'the moral equality of persons; freedom of conscience and religion; State neutrality towards religion; and the separation of Church and State'.<sup>33</sup> But much depends in their view on the relative weights and interpretations given to these ideas. They contrast what they call 'rigid secularism', which corresponds with secularism as used here, and 'open secularism', which corresponds with secularity. In their view, 'strict' or 'rigid' secularism

<sup>26</sup> '[T]he legitimate healthy laicity of the State is one of the principles of Catholic doctrine'. *Alla vostra filiale*, 23 March 1958, *AAS* 50 (1958), 220.

<sup>27</sup> Gomes, *supra* note 22, at 210.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 211, citing Paul VI, Apostolic Exhortation *Evangelii Nuntiandi* §55 (1975).

<sup>31</sup> President Nicolas Sarkozy, *Allocution de M. le Président de la République dans la salle de la signature du Palais de Latran* (20 December 2007), [www.elysee.fr/documents/index.php?mode=cvview&cat\\_id=7&press\\_id=819](http://www.elysee.fr/documents/index.php?mode=cvview&cat_id=7&press_id=819).

<sup>32</sup> Pope Benedict XVI, Address of His Holiness Benedict XVI: Meeting with French Episcopal Conference (14 September 2008); Gomes, *supra* note 22, at 214–5.

<sup>33</sup> José Woehrling and Rosalie Jukier, Religion and the Secular State in Canada, in Martínez-Torrón and Durham, *supra* note 6, at 185.

would accord more importance to the principle of neutrality than to freedom of conscience and religion, attempting to relegate the practice of religion to the private and communal sphere, leaving the public sphere free of any expression of religion. Also termed ‘a-religiousness’, this concept of secularism is obviously less compatible with religious accommodation, as well as antithetical to the recognition of the place of pluralism in the modern state.<sup>34</sup>

A more ‘flexible’ or ‘open secularism’, in contrast,

is based on the protection of freedom of religion, even if this requires a relaxation of the principle of neutrality. In this model, state neutrality towards religion and the separation of Church and State are not seen as ends in themselves, but rather as the means to achieving the fundamental objectives of respect for religious and moral equality and freedom of conscience and religion. In open secularism, any tension or contradiction between the various constituent facets of secularism should be resolved in favour of religious freedom and equality.<sup>35</sup>

The ‘flexible’ and ‘open’ (secularity) approach is the one recommended in Canada by the highly publicized Bouchard–Taylor Commission constituted in Quebec in 2007, and it appears to be the approach followed by Canadian Courts.<sup>36</sup> As stated in a landmark Canadian case, ‘[a] truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct’.<sup>37</sup>

The contrast is evident not only in the general approach to thinking about religious freedom issues but also in a host of more practical settings. Secularity favors substantive over formal conceptions of equality and neutrality, taking claims of conscience seriously as grounds for accommodating religiously-motivated difference. Secularity is likely to give more favorable treatment to a wide range of conscientious objection claims. Secularity would be more accommodating of distinctive types of religious clothing, at a minimum allowing female Muslim students to wear traditional head coverings, and likely allowing teachers to do so as well.<sup>38</sup>

<sup>34</sup> Id.

<sup>35</sup> Id.

<sup>36</sup> Id., at 185–86.

<sup>37</sup> R. v. Big M. Drug Mart, [1985] 1 S.C.R. 295 at para. 94, 18 D.L.R. (4th) 321 (Dickson, C.J.).

<sup>38</sup> That is, the European Court’s decisions in *Dahlab v. Switzerland* (ECtHR, App. No. 42393/98, 15 February 2001) and *Şahin v. Turkey* (Grand Chamber) (ECtHR, App. No. 44774/98, 10 November 2005) appear to be manifestations of secularism, rather than secularity.

Of course, the line between secularity and secularism does not resolve all disputes. Even among advocates of secularity, differences of opinion might arise about the extent to which representatives of the state as opposed to private individuals should have their religious beliefs accommodated. Similarly, with respect to religious symbols in public buildings, there can be differences of opinion about whether allowing or disallowing such displays is more effective in accommodating religious difference. The answer to this question may well depend on the local cultural setting.<sup>39</sup>

Because of the conceptual and rhetorical similarity of secularism and secularity claims, it is all too easy to slip from the optimal and open practices of secularity to the more hostile and restrictive approach of secularism. The cost is measured in increased restrictions on religious life, a greater tendency to rule religion off limits in the public square, an expanded range of potential conflicts between the state and religious believers and organizations, and in general, a greater tendency to violate religious freedom norms. Sharpening public awareness of this contrast can help prevent erosion of religious freedom in many spheres.

## VI. Standards of judicial review

The landscape of religious freedom is strewn with concrete legal battles. The most dramatic involve litigation on same-sex marriage issues, questions of conscientious objection to participation in ethically sensitive medical procedures, and controversies regarding religious symbols. Others include issues relating to the autonomy of religious institutions and broader problems associated with giving offense to religious sensitivities, and in particular, the problem of religious defamation. Less visible but arguably more significant than these outcome-oriented ‘culture war’ controversies are the key constitutional decisions that decide the standards of review that will be applied in reviewing religious freedom claims. This is because the standards of review become a critical leverage point in addressing virtually all of the other issues. Erosion occurs in this area both through reformulation of the applicable standards themselves and through less obvious changes in the starting calibrations of the balancing mechanisms used by judges (the baseline assumptions of what constitutes neutrality) and through changing weights assigned to other values thrown into the balance against religious freedom.

The struggle concerning the standard of review has been the central drama regarding religious freedom for the past two decades in the United

<sup>39</sup> See, e.g., *Lautsi and Others v. Italy*. (Grand Chamber) (ECtHR, App. No. 30814/06, 18 March 2011).

States, and is also vital in other legal systems where such claims wend their way into courts. Prior to 1990, Supreme Court decisions in the United States held that burdens on religious liberty could only be justified by narrowly tailored compelling state interests. That is, they had to withstand ‘strict scrutiny’ – a difficult though not insurmountable challenge. In 1990, in *Employment Division v. Smith*,<sup>40</sup> the Supreme Court jettisoned that test, and held that subject to certain exceptions, any general and neutral law would override religious freedom claims. This unleashed a series of efforts in Congress and state legislatures to reinstate strict or at least heightened scrutiny, thereby providing stronger protection of religious freedom than had been established by the Supreme Court as the minimum constitutional standard.

In retrospect, one of the most striking features of this controversy has been the resilience of free exercise values. While the Congressional effort to reimpose a strict scrutiny standard on the states via the Religious Freedom Restoration Act (RFRA)<sup>41</sup> was struck down in *City of Boerne v. Flores*,<sup>42</sup> RFRA remains in effect with respect to federal legislation. Moreover, a number of additional federal statutes have been passed requiring strict scrutiny of religious claims for specified but significant federal laws are involved.<sup>43</sup>

Even more interesting is the response at the state level, which is summarized on the chart on the following page. At this point, there are majority of states (26 jurisdictions) that have decided to retain heightened scrutiny, either by passing state legislation to that effect, or as a result of a decision by the highest courts of the respective states construing the state constitution to impose a higher constitutional standard than the federal constitution. Perhaps the biggest surprise is that only three states have explicitly followed the *Smith* approach as a matter of state constitutional law. Six have reached a similar result, albeit in decisions that don’t make it clear whether it is state or federal constitutional law that is being followed. Four states have had cases raising religious freedom issues, but not ones that required the courts to decide whether strict scrutiny was required under the applicable state

<sup>40</sup> 494 U.S. 872 (1990).

<sup>41</sup> The Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb et seq. (2007).

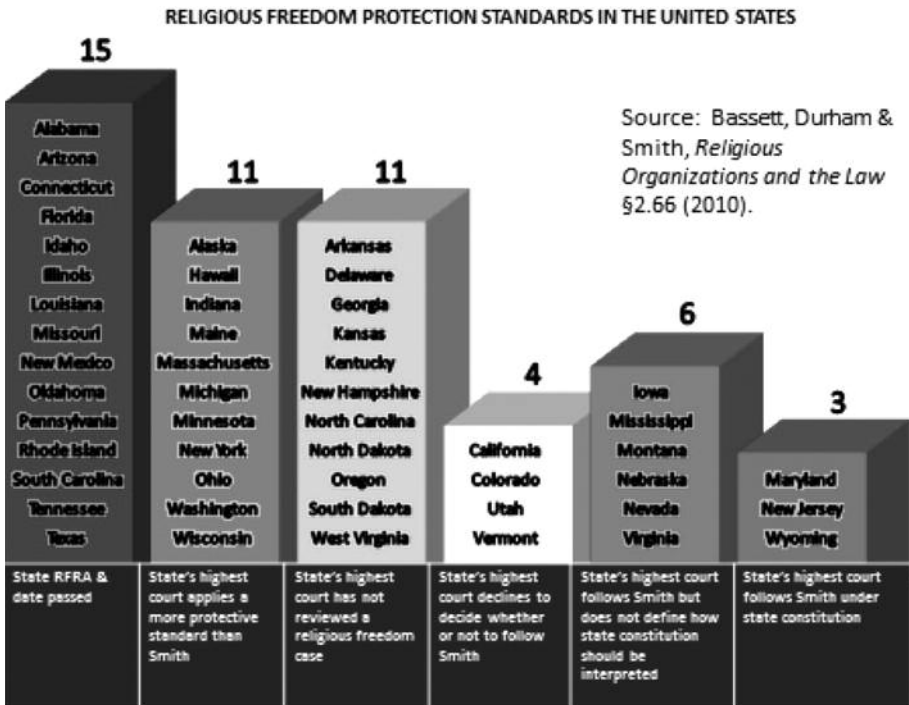
<sup>42</sup> 521 U.S. 507 (1997).

<sup>43</sup> Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, 112 Stat. 517 (1998) (amending 11 U.S.C. 544, 546, 548, 707, 1325 (1994)); Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc et seq.; American Indian Religious Freedom Act Amendment of 1994, 42 U.S.C. § 2000bb-2(4) (which incorporates a somewhat broadened definition of religious exercise from RLUIPA into RFRA, making it clear that the term ‘religious exercise’ includes the ‘use, building, or conversion of real property for the purpose of religious exercise’).



constitutions. Eleven states have not yet had cases posing the question, although several of these have pre-*Smith* precedents which suggest that they would follow a strict scrutiny approach. In short, the general pattern suggests significant resistance to the idea of lowering religious freedom protections.

The standards used in applying the International Covenant on Civil and Political Rights (ICCPR) by the U.N. Human Rights Committee and those applied under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) are virtually identical. This is not surprising, since the relevant treaty provisions contain largely parallel language. Only ‘manifestations’ of religion may be subjected to limitations; internal forum matters lie beyond state purview, though as a practical matter, relatively few cases are dealt with in this category. Limitations on manifestations must pass three tests. First, they must be prescribed by law. This requirement has a formal element (requiring that the interference in question is legally authorized) and a qualitative element (requiring that fundamental rule of law constraints such as non-retroactivity, clarity of the legal provisions, absence of arbitrary enforcement and the like be observed). Note



that as a practical matter this is the minimum floor established by the *Smith* decision in the U.S., which implicitly assumes that rule of law constraints alone provide a sufficient protection of religious freedom.

International standards go further and prescribe a restricted set of permissible or legitimating grounds for limitations. As enunciated in the ECHR, these legitimating grounds are restricted to those which are necessary ‘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’.<sup>44</sup> While the legitimating grounds are quite broad and in most cases at least one is available to support the particular limitations being challenged, it is quite clear that only the enumerated legitimating grounds may be invoked to justify a limitation.<sup>45</sup> Note the U.S. ‘compelling state interest’ test is arguably broader, in the sense that anything a court thinks is ‘compelling’ may meet the standard.

The real core of the ICCPR/ECHR test lies in assessing whether the particular limitation is ‘necessary’ or ‘necessary in a democratic society’, and the European Court has construed this to require a ‘pressing social need’ that is ‘proportionate to the legitimate aim pursued’.<sup>46</sup> Clearly, when analyzed in these terms, the issue of necessity must be assessed on a case-by-case basis. However, certain general conclusions have emerged. First, in assessing which limitations are ‘proportionate’, it is vital to remember that ‘freedom of thought, conscience and religion’ is one of the foundations of a ‘democratic society’.<sup>47</sup> State interests must be weighty indeed to justify abrogating a right that is this significant. Second, limitations cannot pass the necessity test if they reflect state conduct that is not neutral and impartial,<sup>48</sup>

<sup>44</sup> ECHR, art. 9(2).

<sup>45</sup> See U.N. Human Rights Committee, General Comment 22 (48), adopted by the U.N. Human Rights Committee on 20 July 1993. U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), reprinted in U.N. Doc. HRI/GEN/1/ Rev.1 at 35 (1994); Nolan and K v. Russia (ECtHR, App. No. 2512/04, 12 February 2009), § 73.

<sup>46</sup> See, e.g., Kokkinakis v. Greece, 17 EHRR 397 (A/26-A) (1994) (A/26-A) (ECtHR, App. No. 14307/88, 25 May 1993), § 49; Wingrove v. United Kingdom, 24 EHRR 1 (1997) (ECtHR, App. No. 17419/90 25 November 1996), § 53; Manoussakis and Others v. Greece, 23 EHRR 387 (1997) (ECtHR, App. No. 18748/91, 26 September 1996), §§ 43–53; Serif v. Greece, 31 EHRR 20 (2001) (ECtHR, App. No. 38178/97, 14 December 1999), § 49; Metropolitan Church of Bessarabia v. Moldova, 35 EHRR 13 (2002) (ECtHR, App. No. 45701/99, 13 December 2001), § 119.

<sup>47</sup> Metropolitan Church of Bessarabia v. Moldova, 35 EHRR 13 (2002) (ECtHR, App. No. 45701/99, 13 December 2001), § 114.

<sup>48</sup> *Id.*, § 116.

or that imposes arbitrary constraints on the right to manifest religion.<sup>49</sup> Discriminatory and arbitrary government conduct is not ‘necessary’ – especially not in a democratic society. In particular, state regulations that impose excessive and arbitrary burdens on the right to associate and worship in community with others are impermissible.<sup>50</sup> In general, where laws are not narrowly tailored to further one of the permissible legitimating grounds for limitation, or where religious groups can point to alternative ways that a particular state objective can be achieved that would be less burdensome for the religious group and would substantially accomplish the state’s objective, it is difficult to claim that the more burdensome alternative is genuinely necessary. Further, counterproductive measures are obviously not necessary. Finally, the U.N. Human Rights Committee has noted that limitations ‘must not be applied in a manner that would vitiate the rights guaranteed in article 18’,<sup>51</sup> and the European Court would no doubt take a similar position. Finally, restrictions on religious freedom ‘must not impair the very essence of the right in question’.<sup>52</sup>

In addition to the foregoing, both the United States strict scrutiny and the ICCPR/ECHR approaches impose threshold requirements below which religious liberty claims are not cognizable. In the United States there must be a ‘substantial burden’ on free exercise before the burden shifts to the state to establish that there is a compelling state interest that cannot be accomplished in some less restrictive manner. In Europe, there must be an ‘interference’ with a manifestation of religion. Unfortunately, as cases proliferate, it is becoming evident that some courts will find ways to set this threshold unreasonably high, so that they can dismiss a case without further balancing of the rights and interests at stake. These cases are fact-sensitive, and time does not allow exploring them in depth here, but in the future, efforts are needed to prevent setting the burden/interference threshold too high. Some of the cases seem to suggest that even massive monetary burdens are not sufficient to cross

<sup>49</sup> *Ibid.*, § 118; *Manoussakis and Others v. Greece*, 23 EHRR 387 (1997) (ECtHR, App. No. 18748/91, 29 August 1996), §§ 43–53.

<sup>50</sup> *Metropolitan Church of Bessarabia v. Moldova*, 35 EHRR 13 (2002) (ECtHR, App. No. 45701/99, 13 December 2001), § 118.

<sup>51</sup> United Nations Human Rights Committee General Comment No. 22 (48) (Article 18) Adopted by the U.N. Human Rights Committee on 20 July 1993. U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), reprinted in U.N. Doc. HRI/GEN/1/ Rev.1 at 35 (1994), § 8.

<sup>52</sup> Decision, Republic of Korea [2007] UNHRC 5; CCPR/C/88/D/1321-1322/2004 (23 January 2007) (U.N. HRC).

the threshold because they are ‘merely financial’. In some cases, this has allowed imposition of significant burdens on individual claimants.

The proportionality analysis that lies at the core of ICCPR and ECHR limitations analysis has become

an overarching principle of constitutional adjudication. ... From German origins, [it] has spread across Europe, including to the post-Communist states in Central and Eastern Europe, and into Israel. It has been absorbed into Commonwealth systems – Canada, South Africa, New Zealand, and via European law, the U.K. – and it is presently making inroads into Central and South America. By the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of [proportionality analysis]. Strikingly, proportionality has also migrated to the three treaty-based regimes that have serious claims to be considered ‘constitutional’ in some meaningful sense: the European Union (EU), the European Convention on Human Rights (ECHR), and the World Trade Organization.<sup>53</sup>

Proportionality analysis has thus become the dominant approach in many parts of the world for addressing religious liberty claims.

Paying attention to these judicial tests is extremely important. While courts authorized to engage in judicial review of legislation are clearly obliged to follow constitutional laws, they have an obligation to review legislation with sufficient rigor to assure that the right to freedom of religion or belief is given effective protection. Strict scrutiny and careful application of proportionality tests has the effect of promoting secularity, because it assures that neither intentional nor inadvertent encroachments on religious freedom rights are permitted. Relaxing the standard makes it easier for systems to drift either toward privileging of majority religious or majority secularist communities, depending on which groups have democratic dominance in a country.

There are a variety of ways that religious freedom rights can be eroded under the various tests examined here. Relying solely on rule of law constraints (as opposed to insisting on proportionality tests in addition) places religious groups at the mercy of legislative majorities. More significantly, it drastically shifts the likelihood of success for religious claimants at the grass roots level. When a religious claimant meets with an official requesting an accommodation with respect to a religious claim, the official is more likely to seek a solution if his solution will be subjected to strict

<sup>53</sup> Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, *Colum. J. Transnat'l L.* 73-74 (2008).

scrutiny.<sup>54</sup> In contrast, if the laws authorizing the official's activity are reviewed under a deferential standard of review according to which any neutral or general law can trump religious freedom, the official has virtually no legal incentive to cooperate and an accommodation depends on his or her good graces. This is particularly problematic for unpopular or less known groups.

As already noted, the interpretation of what constitutes an 'interference' with or a 'substantial burden' on religious freedom can be manipulated in ways that significantly reduce the viability of religious freedom claims.

More significantly, both American compelling state interest and proportionality analysis confer significant discretion on judges in weighing religious freedom claims. A primary issue here is that cultural shifts associated with the process of secularization lead many judges to assign greater weight to secular state interests and less to religious concerns. This can occur because religion is no longer seen to deserve special protection, because there is a sense that religious activities and religious views should be consigned exclusively to the private sector, because religion has become more suspect as a locus of social danger, or for any of a variety of other reasons.

Even if judicial biases are not skewed in this way, there is a risk that the characterization of the values being balanced can be manipulated so that they system wide interests of the state are balanced against the individualized concerns of the religious freedom claimant. A more reasonable approach balances the marginal burden faced by the state in the particular interest against the actual burden of the claimant.

Another factor that can be particularly significant as a practical matter is whether the governmental interest in question can be sufficiently achieved in a way that is narrowly tailored to assure that it does not intrude unduly on the religious right in question. It is important to insist on fair characterizations of the state's interest in this regard, since characterizing a state interest in one way will rule out consideration of all possible alternatives, where a more reasonable description of the state's interest might allow more room for negotiation. There are a number of formulations of this basic narrow tailoring requirement, including among others insisting that the state employ the 'least restrictive alternative',<sup>55</sup> or applying the Canadian notion of 'minimal impairment' of the right or freedom.<sup>56</sup>

<sup>54</sup> See Douglas Laycock, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 244 (1994).

<sup>55</sup> See, e.g., Religious Freedom Restoration Act.

<sup>56</sup> See, e.g., *Multani v. Commission Scolaire Marguerite-Bourgeoys and Attorney General of Quebec*, Supreme Court of Canada, 1 S.C.R. 256, 2006 SCC 6 (2006).

Depending on the particular country, the history of judicial appointments, the current composition of the judiciary, and traditions of deference or activism, religious communities may be more or less wary of judges and the power they have in interpreting religious freedom norms. It is important to remember, however, that while the rule of law is not necessarily sufficient in itself to provide full protection for religious liberty, the rule of law poses a vital minimum set of protections for religious communities, and great care needs to be taken to respect the importance of an independent judiciary in maintaining the rule of law. Moreover, in countless situations, legislation cannot fully specify the full range of protections for religious freedom that reasonable interpretation of legislation will afford. In general, however, a competent and unbiased judiciary plays an important role in implementing the ideal of secularism, and this role is enhanced where heightened standards calling for rigorous scrutiny of state action infringing religious freedom are applied.

## VII. Resisting the erosion of religious freedom's primacy

### A. *The priority of religious freedom*

In the United States, we often refer to religious freedom as a first freedom, or even as *the* first freedom. This is not merely because it appears in the First Amendment of the U.S. Constitution. That, after all, is somewhat of an accident of history. In some early drafts, the religion clause was in the third amendment. But freedom of religion is in fact a first freedom, or *the* first freedom, because of its profound links to the core of human dignity, to the very center of our normative consciousness, to conscience, and to all that calls us to what is highest in human affairs.

*Dignitatis Humanae* takes essentially the same position, proclaiming that the 'demand for freedom in human society ... regards, in the first place, the free exercise of religion in society'.<sup>57</sup> Moreover, 'the right to religious freedom has its foundation in the very dignity of the human person as this dignity is known through the revealed word of God and by reason itself'.<sup>58</sup>

Rooted in dignity and protective of conscience, religious freedom is foundational for other human rights in at least three respects. It is *historically foundational* because so many other rights emerged as additional supports for or expansions of legal protections originally provided in the name of religious freedom. It is *philosophically foundational* because it protects the comprehensive

<sup>57</sup> Pope Paul VI, Declaration on Religious Freedom *Dignitatis Humanae* (1965) § 1.

<sup>58</sup> *Id.*, at § 2.

belief systems and world views in which our other ideas are rooted and from which they derive their meaning. It is *institutionally foundational* because it protects and fosters the institutions that engender the vision, the motivation, and the moral support that translate religious and moral ideals into personal and communal practice. Religious freedom often overlaps with other rights, such as freedom of expression, freedom of association, rights to non-discrimination, rights to protection of an intimate or private sphere, and so forth, but the sum of religious freedom is greater than any of these individual parts.

Part of the impending crisis we face is that both religion and freedom of religion are losing their priority status in social consciousness. This is a global pattern. In part this reflects what Scott Appleby has described as ‘the ambivalence of the sacred’<sup>59</sup> – the fact that while the sacred can elicit the highest in human nature, it has all too often elicited just the opposite – the darkest manifestations of man’s inhumanity to man, and to woman. The dark side of religion is trumpeted in the media, undermining confidence in religious institutions, while the massive day-to-day service rendered by believers and the tremendous social capital generated by religion are too easily forgotten. The challenge is how to respond to the claims so alluring to secular equalitarians that neither religion nor religious freedom deserves any special protection.

### **B. Redundancy arguments**

Here I will focus primarily on an aspect of such argumentation that is attracting increasing attention: claims that the right to freedom religion or belief is essentially redundant in a constitutional world with robust protections for freedom of expression (including symbolic conduct), association, and strong anti-discrimination norms.<sup>60</sup> In the United States, this move takes the form of arguing that ‘free exercise of religion’ has become largely redundant in light of other constitutional developments. As early as 1983, Professor William Marshall argued that if freedom of speech is interpreted with sufficient breadth, using a broad notion of symbolic speech to cover religious conduct, the free speech clause could be used to cover everything that is protected by free exercise clause.<sup>61</sup>

<sup>59</sup> R. Scott Appleby, *The Ambivalence of the Sacred: Religion, Violence, and Reconciliation* (Lanham/Boulder/New York/Oxford: Rowman & Littlefield Publishers, Inc., 2000).

<sup>60</sup> See, e.g., Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 *Loy. U. Chi. L.J.* 71, 72 (2001); William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 *Minn. L. Rev.* 545 (1983).

<sup>61</sup> Marshall, 67 *Minn. L. Rev.* 545.

This argument has been given added force by subsequent developments. After the Supreme Court downgraded free exercise protections in 1990 in the *Smith* case so that virtually any neutral and general law could trump religious liberty claims,<sup>62</sup> one could make the argument that free speech provided even stronger protection than free exercise. That is, after *Smith*, free speech claims still triggered compelling state interest/least restrictive alternative analysis (i.e., ‘strict scrutiny analysis’), whereas free exercise claims no longer did so, unless there was explicit or implicit targeting of religion (i.e., non-neutral state conduct), or unless the free exercise claim was buttressed by a stronger constitutional right (so-called hybrid rights cases),<sup>63</sup> or involved institutional religious autonomy claims.<sup>64</sup>

The better view is that freedom of religion claims should receive protection at least as strong as that provided by freedom of speech, freedom of association, and equal protection norms,<sup>65</sup> but so long as those norms are available, the argument runs, why is an additional right to freedom of religion necessary?

A more recent version of this argument has been advanced by Professor Mark Tushnet.<sup>66</sup> He asks, ‘Suppose the Free Exercise Clause were simply ripped out of the Constitution. What would change in contemporary constitutional law?’<sup>67</sup> His response: not much. After noting that the scope of the Free Exercise Clause is quite narrow after *Smith*,<sup>68</sup> he goes on to document how ‘other constitutional doctrines protect a wide range of actions in which religious believers engage’.<sup>69</sup> These actions include direct protec-

<sup>62</sup> *Employment Division v. Smith*, 494 U.S. 872 (1990).

<sup>63</sup> The idea was that strict scrutiny analysis might apply if free exercise were buttressed by another constitutional right such as freedom of speech or family rights. But of course, where that is the case, the other right alone is sufficient to prevail, so the religious right becomes not only redundant but irrelevant.

<sup>64</sup> In the *Smith* case, the Supreme Court explicitly noted that it was not overruling a long line of cases that affirmed the right of religious communities to autonomy in their own affairs (e.g., with respect to church property disputes and internal issues such as ecclesiastical appointments). For an overview of these issues, see James A. Serritella, Thomas C. Berg, W. Cole Durham, Jr., Edward McGlynn Gaffney, Jr., Craig B. Mousin, eds., *Religions Organizations in the United States: A Study of Identity, Liberty, and the Law* (Durham, NC: Carolina Academic Press, 2006).

<sup>65</sup> See, e.g., Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 *Geo. Wash. L. Rev.* 925 (2000).

<sup>66</sup> Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 *Loy. U. Chi. L.J.* 71 (2001).

<sup>67</sup> *Id.*, at 71.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*, at 72.



tion of speech,<sup>70</sup> bans on coerced speech,<sup>71</sup> symbolic speech (i.e., expressive conduct that is intended to communicate and is so understood by others),<sup>72</sup> free speech doctrines that proscribe viewpoint discrimination, require equal access to public resources, or proscribe disparate regulatory impacts.<sup>73</sup> Also significant are rights of expressive association,<sup>74</sup> which can help explain legal doctrines such as the ministerial exception to legislation forbidding employment discrimination (religious groups can engage in preferential hiring of their own members)<sup>75</sup> and more generally, the right of religious communities to autonomy in their own affairs.<sup>76</sup>

Tushnet acknowledges a few areas where coverage may be inadequate. For example, symbolic speech may not be sufficient to cover certain activities motivated by religious belief, because while they are ‘intended to communicate ... belief, [they] are not generally understood to be communications’.<sup>77</sup> This may be the counterpoint of decisions in the European Court of Human Rights that that refuse to find a ‘manifestation of religion’ in conduct that is motivated by religion but does not symbolically express the religious beliefs.<sup>78</sup> Similarly, expressive association cases may not provide full protection to church-related employment cases, because American law respects the autonomy of religion with respect to all employment decisions of religious employers, not merely those in which direct religious expression activities are involved.<sup>79</sup> But in general, Tushnet concludes that ‘[c]ontemporary constitutional doctrine may render the Free Exercise Clause redundant’.<sup>80</sup>

<sup>70</sup> *Id.*, at 73–80.

<sup>71</sup> *Id.*, at 74.

<sup>72</sup> *Id.*, at 75.

<sup>73</sup> *Id.*, at 75–76, 80–83.

<sup>74</sup> *Id.*, at 84–90.

<sup>75</sup> *Id.*, at 84–86. For a recent case summarizing developments with regard to the ministerial exception, see *Petruska v. Gannon University*, 462 F.3d 294 (3d Cir. 2006), *cert. denied*, 550 U.S. 903 (2007). See also *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). The Supreme Court has recently granted review in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 597 F.3d 769 (6th Cir. 2010), *cert. granted*, 2011 WL 1103380 (2011).

<sup>76</sup> See Tushnet, *supra* note 47, at 85.

<sup>77</sup> *Id.* at 76–77.

<sup>78</sup> *Arrowsmith v. United Kingdom* (ECmHR, App. No. 7050/75, 12 October 1978) ((1981) 3 EHRR 218).

<sup>79</sup> See Tushnet, *supra* note 21, at 86, citing Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 20 (2000).

<sup>80</sup> Tushnet, *supra* note 47, at 73.

Note that this is not a parochial problem of American constitutional law. The redundancy problem is likely to arise in most modern constitutions because, by and large, these also include rights covering freedom of expression, freedom of association, and protecting against non-discrimination.<sup>81</sup>

This is also true at the level of international human rights law.<sup>82</sup> Thus, Professor James Nickel has argued that freedom of religion is adequately covered by a constellation of nine basic liberties that are widely recognized in international law: (1) freedom of belief, thought and inquiry; (2) freedom of communication and expression; (3) freedom of association; (4) freedom of peaceful assembly; (5) freedom of political participation; (6) freedom of movement; (7) economic liberties; (8) privacy and autonomy in the areas of home, family, sexuality, and reproduction; and (9) freedom to follow an ethic, plan of life, lifestyle, or traditional way of living.<sup>83</sup> In Nickel's view, once this full set of basic liberties is in place, no separate mention of freedom of religion is necessary to protect the interests traditionally covered by freedom of religion.<sup>84</sup>

For Nickel, this approach has at least four advantages. First, it clarifies that no special religious reasons need to be given for grounding religious freedom, which has the same general grounding as other basic liberties.<sup>85</sup> Second, it provides a 'broad and ecumenical scope for freedom of religion that extends into areas such as association, movement, politics, and business',<sup>86</sup> further underscoring the multifaceted character of religious freedom. Third, this approach transcends a clause-bound approach to religious freedom that sees its contours as defined by the happenstance of the wording of constitutional and international documents.<sup>87</sup> And fourth, it resists 'exaggerating the priority of religious freedom',<sup>88</sup> setting it on a more equal footing with other rights.

### C. Responses to redundancy claims

The redundancy arguments have considerable force in our equalitarian environment, but in the end the arguments are flawed for a variety of rea-

<sup>81</sup> See, e.g., German Basic Law, Grundrechte.

<sup>82</sup> ICCPR, arts. 2, 18-21, 26; ECHR, arts. 9-11, 14.

<sup>83</sup> James W. Nickel, *Who Needs Freedom of Religion?*, 76 U. Colo. L. Rev. 941, 943 (2005).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*, at 944.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

sons. Defenders of religious freedom need to be vigilant against these arguments, which are being made with increasing frequency around the world. The redundancy arguments are virtually always made in support of a secularist agenda, and they typically do not have concern for secularism, as opposed to secularism, at heart. In what follows, I list counterarguments I have identified thus far. Additional counterarguments are welcome.

### **1. General anti-redundancy claims**

Redundancy arguments are an unusual species of human rights argument. In most areas, redundant coverage is welcomed as a source of increased strength and legitimacy for threatened rights. The move in the opposite direction is unusual. No one seems exercised about redundant non-discrimination provisions.

In most areas, the tendency is toward generating greater specificity in human rights norms. Excessive abstraction leaves too much room for discretion. This helps to explain why most constitutions around the world are much more detailed today than similar documents were in the 18<sup>th</sup> century. Some see this as a loss of elegance, but in large part it is a result of increased experience and a desire to clearly resolve known issues.

Whatever attitude one has toward originalism in constitutional interpretation, this is surely an area where it should not be ignored. Non-originalists sometimes argue for expanded interpretation or shifts in meaning over time to adapt to new circumstances, but arguing that a provision should simply be ignored would seem particularly brazen.

Rights grow in legitimacy with age, particularly when they protect core values such as human dignity and the right to freedom of religion or belief. Rights have historical associations and help entrench clear meanings regarding key protections. Different rights, although no doubt providing some overlapping coverage, do not necessarily have the same range of coverage and gravitational influence with regard to subsequent cases. Sometimes they cover similar cases, but without lending the same degree of weight to the protection. In general, freedom of speech and association, and non-discrimination norms, capture many of the values of the secular enlightenment, but relying on these ‘younger’ rights risks leaving deeper strata of values unrecognized and unprotected.

### **2. Coverage shortfalls**

Marshall, Tushnet, and Nickel all recognize that the freedom of religion right – the legitimacy of which none of them questions – can only be covered by other rights if some stretching of the other rights is allowed. For example,

the conduct dimension of religious freedom is covered only with some stretching of alternative doctrines such as the protections available for symbolic speech. Rights that have different centers of gravity may not allow the same flexibility for doctrinal growth that the original freedom of religion doctrine has. Redundancy is an important safeguard against such shortfalls in coverage. The following paragraphs identify several potential shortfalls that are easily imaginable if a separate religious freedom right is not maintained.

Reconceptualizing protections in terms of secular rights may result in reduced coverage. Although the headscarf cases in the European Court of Human Rights have been dealt with under the European Convention's religion provision, the freedom was for all practical purposes analyzed in terms of secular priorities, and religious concerns were given relatively little weight. Removing explicit reference to religious freedom would weaken the protections even further. Indeed, whether intended or not, treating religious freedom as redundant would send a powerful message that religious values have dropped in legal importance.

With respect to the core freedom of 'thought, conscience and belief', should secular thought be the core, and religion the penumbra, or vice versa, or should both be regarded as equally important? Religion has more premises than the secular mind has thought of. While philosophical elegance is attractive, breadth and depth of coverage are even more important. If a particular mental filter is applied, it is too easy to filter out as 'noise' the substance of what others are claiming. Alternatively, other premises often resonate across value systems, earning respect and promoting understanding. We cannot afford to arbitrarily exclude some using a criterion of sufficient secularity.

In the freedom of association area, one thinks of the '*Bahá'í Case*'<sup>89</sup> – one of the key German precedents in the domain of religious autonomy and the law of registration of religious associations. Under German association law applied as normally interpreted, the distinctive *Bahá'í* religious structure could not have been approved. One can easily imagine the right to freedom of religion being given a similar interpretation, inconsistent with the religious community's right to autonomy in organizing its own affairs. Earlier, in a number of communist countries, association laws required 'democratic' governance, so Catholic or other hierarchical organizations might not pass muster. Democratic association laws can have similar effect if they are not construed to take religious autonomy rights into account. More generally, freedom of expression and freedom of association values do not necessarily cover neatly

<sup>89</sup> *Bahá'í Case*, German Constitutional Court, 5 February 1991.

the sensitive domain of communal belief and practice typically covered by religious autonomy and self-determination doctrines.<sup>90</sup>

Freedom of movement is important to religious communities for a variety of reasons. But freedom of movement can easily be trumped by national security or other considerations. In this regard, *Nolan and K v. Russia*<sup>91</sup> is important in recognizing that while nations have a strong interest in policing their borders, they cannot use border prerogatives.<sup>92</sup> Indeed, national security concerns alone, in the absence of demonstrated concrete risks to public health, safety and order, are not sufficient to override right to travel claims where religious freedom claims are involved.<sup>93</sup> The right to travel alone would not be so robust.

Freedom of political participation is also cited at least by Nickle as an area that may provide some overlapping protection. The difficulty in this area is that there is too much pressure in the opposite direction. Governments are as likely to restrict religions on the grounds that they are dangerous as to protect their rights to political participation. When religious groups become a source of tension, the temptation is to resolve the tensions by eliminating pluralism. The reminder in the European Court's *Serif* case, mentioned earlier,<sup>94</sup> that the obligation of the state is to protect religious pluralism rather than repress it, is an important non-redundant reminder of what should be done.

### 3. *Grounding of claims for distinctive treatment*

Leaving problems of inadequate coverage aside, religious freedom is vital because it represents a crucial constraint on the social contract. It operates in effect as a reservation clause to use the language of international treaty law. In Madisonian language, it protects the duty that believers owe to the Creator, and as such, it is 'precedent both in order of time and degree of obligation, to the claims of Civil Society'.<sup>95</sup> *Dignitatis Humanae* is even more explicit. 'Religious freedom ... which men demand as necessary to fulfill their duty to worship God, has to do with immunity from coercion in civil society'.<sup>96</sup> The

<sup>90</sup> See Tushnet, *supra* note 47, at 86.

<sup>91</sup> ECtHR, App. No. 2512/04, 12 February 2009.

<sup>92</sup> *Id.*, at §§ 62-65.

<sup>93</sup> *Id.*, at § 73.

<sup>94</sup> See text accompanying notes 19-20, *supra*.

<sup>95</sup> Memorial and Remonstrance, *supra* note 5, at § 1.

<sup>96</sup> *Dignitatis Humanae*, *supra* note 57, at § 1.

right to religious freedom ‘is known through the revealed word of God and by reason itself’.<sup>97</sup> Man should not be ‘restrained from acting in accordance with his conscience, especially in matters religious’, because ‘the exercise of religion, of its very nature, consists before all else in those internal, voluntary and free acts whereby man sets the course of his life directly toward God. No merely human power can either command or prohibit acts of this kind’.<sup>98</sup> Religious freedom relates to an order of obligation that transcends normal civil arrangements, and accordingly deserves distinct protection.

Religious freedom is thus about more than protecting the values of secular enlightenment. Religious values have distinctive dignity, centrality, and importance not adequately captured by enlightenment notions of freedom of speech, association, and equality.

Second, expanding on the first point, freedom of religion is not merely about protecting particular ideas and particularized communications. It is about protecting comprehensive world-views – the frameworks within which individual ideas and norms are born, nurtured, and given meaning. It is about protecting the norm-generating, nurturing, and transmitting process. It protects the seedbeds of pluralism, generating the ideas and social arrangements that give the other rights their content and their significance.

### VIII. Virtue ethics, reverence, and the distinctive role of religious freedom

A final area of erosion and loss is drawn from the domain of virtue ethics, and in particular, from what Paul Woodruff has referred to as the forgotten virtue of reverence.<sup>99</sup> Woodruff’s argument for renewing this forgotten virtue

<sup>97</sup> *Id.*, at § 2.

<sup>98</sup> *Id.*, at § 3.

<sup>99</sup> Paul Woodruff, *Reverence: Renewing a Forgotten Virtue* (Oxford: Oxford University Press, 2001). Woodruff uses the English word ‘reverence’ to translate three Greek terms with overlapping meanings: *hosion*, *eusebeia*, and *aidos*. He notes that in the *Euthyphro*, *hosion* is often (but he thinks wrongly) translated as ‘piety’, but this has a meaning closer to religiosity, which is not the kind of ethical virtue intended by the term. Correspondence from Paul Woodruff in possession of author, July 5, 2011. Woodruff considers reverence to be one of the cardinal Greek virtues. See Ursula Goodenough and Paul Woodruff, ‘Mindful Virtue, Mindful Reverence’, *Zygon: Journal of Religion and Science* 36 (2001) 585–95, 590. In his introduction to his translation of the *Bacchae*, he states, ‘Reverence itself, a cardinal virtue in the period [of Greek antiquity], is most deeply the sense of holiness that comes over an individual during initiation’. Euripides, *Bacchae* (Paul Woodruff trans.) (Indianapolis/Cambridge: Hackett Publishing Company, Inc., 1999), xiv.

can be expanded to provide a powerful additional ground for explaining why religion in general and religious freedom in particular deserve special protection. This provides one additional ground for affirming that religious freedom is not redundant, but for more importantly, it underscores society's deep need to provide protection to freedom of religion and belief.

As an expert in classical Greek philosophy, Professor Woodruff began to recognize some time ago that the great thinkers of Greece attached a significance to reverence that we moderns seem to have forgotten. At the outset of his book, he states, 'Reverence is an ancient virtue that survives among us in half-forgotten patterns of civility, in moments of inarticulate awe, and in nostalgia for the lost ways of traditional cultures'.<sup>100</sup> Reverence is not merely about being quiet in church or, more generally, about attitudes of religious believers. In Woodruff's view, reverence is a universal human capacity or virtue. It is evident in the lives of both believers and non-believers, and sometimes, paradoxically, even in the lives of individuals who pride themselves on being irreverent. As Woodruff portrays it, '[r]everence begins in a deep understanding of human limitations; from this grows the capacity to be in awe of whatever we believe lies outside our control – God, truth, justice, nature, even death. The capacity for awe, as it grows, brings with it the capacity for respecting fellow human beings, flaws and all'.<sup>101</sup> Thus, '[t]he Greeks ... saw reverence as one of the bulwarks of society ...'<sup>102</sup> 'To forget that you are only human, to think you can act like a god – this is the opposite of reverence'.<sup>103</sup> 'Ancient Greeks thought that tyranny was the height of irreverence, and they gave the famous name of *hubris* to the crimes of tyrants'.<sup>104</sup> Woodruff points out that much of Greek tragedy is really about *hubris*, the core of irreverence. It is no surprise, then, that the chorus in Greek drama has so much to say about reverence.<sup>105</sup>

For these reasons, Woodruff maintains that '[r]everence has more to do with politics than with religion. ... [P]ower without reverence – that is a catastrophe'.<sup>106</sup> Power that seeks to manipulate religion for mere political

<sup>100</sup> Id.

<sup>101</sup> Id.

<sup>102</sup> Id.

<sup>103</sup> Id. at 4.

<sup>104</sup> Id.

<sup>105</sup> See, e.g., Euripides, *Bacchae* (Paul Woodruff trans.) (Indianapolis/Cambridge: Hackett Publishing Company, Inc., 1999), ll. 370–72 (Chorus: 'O Reverence [*hosia*], queen of gods,/Reverence, who over earth/spread golden wing ...').

<sup>106</sup> Woodruff, *Reverence*, *supra* note 99, at 4.

gain, or religion that panders to power for the sake of economic or social gain, is an affront to true reverence.

Woodruff traces this theme through many settings relevant to modern society which cannot be explored in detail here. For my purposes, three connected points need to be emphasized. The first is that reverence is a virtue that is vital for any human society – particularly any democratic society – that hopes to flourish. Democracy provides rich political machinery for weaving together the diverse values of society into a harmonious community. But the output of that machinery can rise no higher than the vision, the dreams, and the aspirations of the people. That which is highest in this regard emanates from moments of reverence in individual lives. Reverence is crucial to moral striving and envisioning that is essential if democracy is to become more than a chaos of self-interest.

Second, reverence is the best reminder that human things, including states, need to be subjected to limits. The experience of authentic reverence, widely disseminated in the populace, is the best safeguard against the counterfeits of demagoguery. The ideal of the rule of law – that we should be ruled by law and not men – reflects the two sides of what we learn from reverence: that there are things that transcend the human domain, and that human institutions need limitations.

Third, reverence is particularly vital to the flourishing of modern pluralistic societies. Here reverence is vital in pointing the pathway to respect. We may not fully understand the beliefs that other people hold, but we can resonate with their sense of reverence, and when we do, we come to respect them in deep ways that make pluralistic democracy possible. A society filled with people and subcommunities showing each other such respect can take maximal advantage of the synergies of life in a pluralistic society. People with reverence for very different values can nonetheless respect each other, and find ways to work together in productive and peaceful ways. In contrast, efforts to use state power either to impose or to exploit religion can only breed resentment and patterns of distrust. Conscience coerced is conscience denied.

Religious freedom is vital, and can never be redundant, because it protects and cultivates the insights and the wellsprings of reverence. It is not just one among many human rights; it is foundational for all the others. By protecting the space in which very different individuals and communities experience reverence, freedom of belief opens the possibility for dignity to unfold and for other rights to take root and grow. It provides legal protection for the activities and institutional contexts in which the fragile virtue of reverence can flourish, and without which society is imperiled and impoverished. In so doing, it protects a dimension of human existence that



the more secular values of speech, association and equality never fully grasp. It has an ontological depth that corresponds to the magnitude of the human capacity to feel and respond to reverence – whether that reverence takes religious or secular forms, and whether it is experienced directly or sensed in the lives of others. It recognizes both the sanctity of conscience and the limits that conscience sets. In the end, freedom of belief is vital because it facilitates the ability of human beings to build social worlds open to the best that human beings can be and become.

## IV. RELIGIOUS FREEDOM, CIVIL SOCIETY AND THE STATE

### 1. Legal and related questions

# LAW AS A PRECONDITION FOR RELIGIOUS FREEDOM\*

■ CHRISTOPH ENGEL

## I. The issue

Religion is universal. Everywhere in the world, people believe that there exist forces they cannot see with their eyes, and that even science cannot make visible for them. They believe that these forces matter for their lives, be it today or after their physical existence will have come to an end. Usually they even believe that these unintelligible forces command goods or evils that have higher value than anything money can buy, political power can impose, or attachment can bestow. Yet this universal human trait has played itself out very differently across time and space. Some religions believe there is one God. Others believe there are many gods. Yet others do not personify the supreme forces at all. For some religions, life after death is the supreme goal. In others, not being forced into reincarnation is bliss. Some religions care about saving the souls of those who have not had the privilege of meeting God. Others do not feel the urge to spread their mission. The list of differences is at least as long as the number of religions. And there are sceptics. While of course nobody is able to prove that religion is superstition, the existence of religion, or the correctness of the beliefs on which a specific religion is grounded, cannot be proven either. By its very nature, religion defies human epistemic abilities. Sceptics go on: and therefore I ignore it; or even: and therefore it should be ignored.

Since from the perspective of a religious person being in line with the commands of one's religion is of the utmost importance, throughout history religious leaders have sided with worldly powers. In the name of religion, wars have been declared, countries have been depopulated, those holding a different belief have been prosecuted, freedom of expression has been stifled. It has taken religious leaders centuries to adopt a more tolerant attitude. Instead of combating competing religions, and of forcing pagans to join them, some now aim at organising peaceful coexistence. While historically the main driving force behind this shift in attitude has been the experience of all too many cruelties, globalisation has added a new facet. The world's

\* Helpful comments by Felix Bierbrauer and Stefan Magen are gratefully acknowledged.

economy remunerates physical by social mobility. Those who move to the thriving centres stand a much better chance to secure a prosperous life for themselves and their families. Yet the ensuing migration engenders religious pluralism in many societies that used to be religiously homogeneous.

Peaceful coexistence implies freedom of religion (Huster 2002; Grimm 2009:2371). While one religion may well deeply believe all or some other religions to be fatally wrong, it still accepts that other religions think differently. It may try to persuade the adherents of different religions to convert. But it will not force them to give in to what this one religion, from an internal perspective, of course believes to be the truth. This attitude of tolerance could follow from insight. It might even be backed up by religious doctrine. Yet insight is elusive, and different religions are very differently prepared to build tolerance into their set of doctrines. It was a horrendous religious war that prompted Thomas Hobbes to proclaim absolute state power (Hobbes 1651). The state is able to guarantee religious freedom precisely because it musters the power to coerce. It may not only oblige but even effectively force reluctant religious leaders and fanatic followers to play by the rules of peaceful coexistence. This is not only important with respect to what the literature tends to call 'strong religions' (see e.g. Sajó 2009:2403 and 2421). If the state credibly commits to combating aggression between religions, it also creates a level playing field. Religions that would not intrinsically be aggressive have no longer reason to nonetheless act aggressively, just because they are afraid otherwise their theological competitors will invade their spheres.

For Thomas Hobbes, containing the war of all against all was so important that he postulated the moral obligation to absolutely transfer original individual liberty to a worldly ruler. Unsurprisingly, the ensuing historical experiments amply extolled the downside of the solution. Heads of state abused their powers lavishly. Quite a few of them were not enlightened, but stupid or reckless. Even religious wars did not disappear. Religious divergence served as a pretext for countries invading each other, in the interest of enlarging their territories. It once more took centuries before sovereignty was constitutionalised. Constitutional states rest on the idea of sovereignty. Yet the exercise of sovereign powers is bounded by a rich institutional arrangement, the law. The law sets substantive and procedural limits. Those in power may not overstep these limits. When they exercise sovereign powers, they have to obey the constitutional rules for making and for applying rules.

The constitutional state is not only in a position to enforce religious tolerance without the risk of itself deteriorating into tyranny. Once all governance is constitutionally embedded, the state also disposes of much more

elegant technologies for managing a religiously pluralistic society. These subtle tools make the state sensitive to historic context. Interventions may keep the balance between determination and predictability on the one hand, and the maximum respect for the individual religion to which they are targeted on the other hand. The state may use the same technologies for solving an equally pressing, related problem: the peaceful coexistence between state and religion(s).

In the title of this paper, the term religious freedom is used to describe social reality. It characterises a society in which everyone is in principle free to hold the religious beliefs of their choosing, and to live their worldly lives in line with the commands of their religions. To make this possible, despite a plurality of religions, and in deference to the legitimate needs of the state, the state uses its sovereign powers to manage this plurality. Once the relationship between competing religions, and the relationship between religion and the state, are governed by law, religious freedom has a second meaning. This second meaning is doctrinal. The Constitution obliges government to act in a way that makes peaceful coexistence practical. To that end the Constitution guarantees freedom of religion as a fundamental right. Consequently, a more complete version of the title of this paper would read: 'The Constitutional Protection of Freedom of Religion as a Precondition for Making Religious Freedom Practical'.

In the following, I speak of religious freedom when I mean social reality, and of freedom of religion when I mean the constitutional guarantee. I then read the constitutional guarantee broadly. I mean it to encompass any constitutional protection of religiously motivated action, and against any religiously motivated exercise of sovereign powers, even if concrete legal orders rather bring the respective action under the rubric of freedom of life and limb, of property, of immigration and emigration, of profession, or whichever constitutionally protected aspect of life may be affected.

My way of presenting the issue implicitly votes again two alternatives. The constitution of a country may more or less intensely side with one specific religion. This is of course the historically widespread model of a state religion. In its extreme form, as in the peace of Augsburg, it is built on the principle *cuius regio, eius religio*. Under that principle, freedom of religion is only granted to heads of state. If the Prince has chosen to be Protestant, his Catholic subjects must choose between leaving the country and converting. Today, some Islamic countries come close to this radical version of a state religion. Milder versions survive in Western democracies. A well-known example is England where one has to be Anglican to be Prime Minister. By contrast, this paper starts from the assumption that the Constitution

does not privilege any religion. Doctrinally, this is the state of affairs in most democracies, and under human rights treaties. And practically, constitutional neutrality is a precondition for managing a religiously diverse society.

This paper also votes against a more recent competing concept. This concept accuses the ‘enlightenment project’ of being hidden ideology (Ladeur 2009; Rosenfeld 2009) (but see Raday 2009). This claim is based on post-modern philosophy. It maintains that the distinction between faith and reason itself requires a leap of faith. In the name of ‘the religion of secularism’, constitutional law unnecessarily tramps on the exercise of religious freedom. I have two counterarguments, one conceptual and one pragmatic. While I am willing to grant that our understanding of reality is bound to be constructed (Berger and Luckmann 1967; Thompson, Ellis *et al.* 1990), this does not mute objectivity as a regulative idea. Even if we know that we will never completely achieve it, it makes a difference whether we strive for intersubjectivity or not. My more important reason is, however, pragmatic. We need the neutral, disinterested, and at least purportedly objective vantage point of constitutionalised law to make a religiously plural society viable.

Religion is as old as humanity. There has never been just one religion. Individual religions have sided with worldly forces to combat competing religions. And worldly authorities have fought religions as competing sources of power. Centuries ago, treaties and constitutions guaranteed freedom of religion. I can therefore certainly not claim my research question to be new. I am also self-consciously confessing that I am very likely to have missed some earlier voices. I try to make two contributions. I first aim at finding a concise conceptual language for explaining why freedom of religion poses a dilemma: safeguarding this freedom is a necessity: for religions, and for the state (II). Yet at the same time, freedom of religion also is a threat: again for religions, and for the state (III). While theory helps understand the character of the dilemma, I try to show that theory cannot offer a closed solution. Against this backdrop, my second contribution is to show why only legal pragmatism is able to mitigate the dilemma, and how law becomes a precondition for religious freedom (IV).

## **II. Freedom of religion as a necessity**

### ***1. Necessity for religions***

Freedom of religion, in its doctrinal meaning, i.e. the constitutional protection of holding and exercising one’s freely chosen religion, first and foremost protects the individual believer. They invoke the constitutional guarantee when the state prevents them from some course of action which

they claim is religiously mandated (more from Robbers 2005; Classen 2006; Grimm 2009; von Campenhausen 2009). Such prohibition may result from the state's desire to contain religious conflict. An example would be the interdiction for a procession to pass through a residential area mainly populated by militant members of a competing church. Or the prohibition may be grounded in a regulatory purpose that, at least at face value, has nothing to do with religion. An example would be the obligation for Sikhs to wear a helmet when riding a motorcycle.

The believer may also invoke freedom of religion since she feels discriminated against due to her religion (more from Robbers 2005; Classen 2006; Grimm 2009; von Campenhausen 2009). Again, discrimination may result from the state directly privileging one religion. In modern constitutional states, the privilege is frequently couched in the statement that the privilege is not granted to a religion, but to national 'culture' (Roellecke 2007). Yet discrimination may also result from the application of rules that do not directly target religion. For instance, Native Americans complain that they are prosecuted for the sacramental use of peyote, while the ritual use of wine was allowed for Catholics and Jews during Prohibition (Rosenfeld 2009:2353).

All of this certainly matters. Yet these are rather minor conflicts. Bringing them under the purview of the Constitution is certainly conducive to making religious freedom practical. But one could hardly claim that such protection is a necessity. Happily enough, these days in civilised democracies, those conflicts that originally made the constitutional protection paramount are not real. But one need not go far back in history to find vital conflicts. Sadly enough, they can even be found in these days if only one broadens geographical scope. Most often, conflicts become vital once the state uses its sovereign powers to combat religion, be that in the interest of a state religion, or in the interest of atheism, as in the former communist countries. Consequently, conflicts have been particularly acute when the majority religion has sided with the state in its fight against religious minorities.

Let me recall a few of the ominous examples from my own country. During the Nazi regime Jews were almost extinguished, purportedly because of their race, but also because of their religion. Lamberti Church in Münster to this day still boasts three iron cages where the corpses of the leaders of the Anabaptist movement had been displayed after public execution. The Archbishop of Salzburg forced thousands of his subjects who had clandestinely remained Protestants to leave the country within a couple of days. Many of them were permanently separated from their children. In the GDR, those who confessed their membership in a church stood little chance to receive university education, and many of them went to jail.

Why were so many prepared to endure so much for the sake of their religions? Why does religion make so vulnerable? Certainly, the general utilitarian argument may be featured in: people seem to have a preference for a religious lifestyle. Everything else held constant, people holding this preference are better off if neither the state nor a competing religion prevent them from living in line with the commands of their respective religions (Leiter 2008:7). Moreover, religions offer side benefits, like social solidarity, psychological comfort, and a better way of coping with the unknown and death (Raday 2009:2776). Yet none of this would suffice to explain martyrdom, or the willingness to sacrifice all professional aspirations.

Such observations point to the fact that religious freedom is not an ordinary good. There are three reasons for this. For a believer, leading a religious life has extreme value. Believers know that they do not know. They must take faith for knowledge. Once they have made the leap of faith, they become tied to their choice. Finally, many religions threaten heretics with worldly sanctions.

The first of the three reasons carries most weight. To understand how religious freedom is special, it is helpful to use the utilitarian language of economics. Economic theory starts from preferences. In the standard model, all is relative. The model assumes desires to be infinite. If I can have another piece of cake, another house, another education for free, I want it. The problem to be understood is how I choose if I cannot have everything, for instance since my wealth is limited. My preferences tell me how many units of one good I am willing to trade for a unit of another. Apparently, for many believers the freedom to live a religious life does not fit this model. They are not willing to make tradeoffs. They do what their religion asks them to do, whatever the cost.

There are several ways of capturing this behaviour within the economic model. One stays closest to the standard framework if one assumes standard preferences, but for the fact that the utility derived from a religious life is infinite. One may also model being in line with one's religion on the one hand and worldly goods on the other as strict complements. For religious individuals, worldly goods only have value conjointly with leading a religious life. Another modelling alternative is lexicographic preferences. Actors holding such preferences in principle engage in the same tradeoffs between ordinary goods as do standard agents. Yet they consider these tradeoffs only if they first meet the minimum standard of a religious life their religion has set for them.

One may also use non-economic language. Religions issue categorical demands on action, demands that must be satisfied, no matter what the believer desires otherwise, and no matter what incentives or disincentives the



world offers (Leiter 2008:15). Due to this, religious conflicts become ‘intractable’ (Rosenfeld 2009:2354). Religion not only provides the individual with well-being, it provides her with an identity (Witte 2000). Identity is a precondition for the ability to choose (Ladeur 2009:2463).

Why are religious values so important? Because they are transcendental. For a religious person, eternity is at stake. One may also say: for a religious person, obeying the commands of her religion is a precondition for dignity (Mahlmann 2009:2474). To this, religious doctrine frequently adds transcendental incentives. Those who live a religious life will be rewarded in Paradise. Those who commit sins at least have to endure purgatory, if they do not directly go to hell. Not so rarely, religious doctrine even holds those living today responsible for the transcendental fate of their ancestors. If only they pray enough, the ancestors can be saved, the Mormons teach. Yet other religions even expect their members to simply save the world (Sajó 2009:2421).

*Credo quia absurdum*, as Tertullian is said to have taught. A religious person may recognise God in any sunbeam. But those adhering to a different religion, or not religious at all, will not accept this as proof. From the very fact that religion is transcendental it follows that the superiority of one religion over another cannot be proven by scientific means. For the same reason, no religious person can prove that a command of her religion is vital. Religion requires faith (more from Macklem 2000). This increases vulnerability for two reasons. The first reason is a corollary of the fact that eternity is at stake. Therefore potentially mistakes are fatal (cf. Leiter 2008:15). The believer has to navigate uncertainty where certainty would be of the utmost importance. All the more she will stick to her conviction once she has made the leap of faith. Moreover since proof is out of the question, government stands no chance to convince the believer that the risk of compromising on a command of her religion is minor.

Religions do not only threaten with transcendental sanctions. They also inflict tangible punishment. They do not longer accept a believer to religious services, they prevent her from holding religious offices, or they even expel her. Religions also exploit private and public law for the purpose. For instance they fire an employee if she has aborted her child. Some religions even sanction believers for the mere fact that they have been soft on the violation of religious commands by others (cf. Arce and Sandler 2003).

Not all religions are organised in churches. But all religions are supra-individual. Religions are social, not individual phenomena. This is not only an empirical fact. It also follows from the impossibility of proving religious convictions to be true. Believers therefore feel the urge of relieving the burden of uncertainty by entrusting the formulation of religious commands,

and the interpretation of the signs that gods are sending them, to those holding an office, having better education, or otherwise having superior access to the transcendental (cf. Grimm 2009:2373 and 2376).

Organisations are much better regulatory targets than individuals. Government frequently exploits this fact. It for instance obliges a dozen car producers to fit catalytic converters, rather than obliging millions of car owners to adopt a more environmentally friendly driving style. By the same token, a few tightly organised churches are much easier to monitor than millions of individual church members. Organisations are also more vulnerable. Ultimately, government can only break the individual's will by killing her. Even in jail she can go on proselyting. History provides ample proof of individuals who have indeed been willing to risk their lives for the sake of eternity. By contrast, for an organisation to function smoothly, people must meet, and resources must be available. It is relatively easy for government to prevent people from meeting, and resources from being used.

## 2. *Necessity for the State*

'Religion is opium for the people' (Marx 1844:71). Karl Marx had not meant this as a piece of advice to government. Yet the explanation he gave is utilitarian. 'Religion is the sigh of the oppressed creature, the heart of a heartless world and the soul of the soulless conditions' (Marx 1844:71). If there is the promise of a better life after death, people are willing to endure and to risk more. This may help government if it is unable to alleviate the burden, or if it even wants to knowingly impose hardship, for instance if it declares war.

Among German lawyers, a more civilised, and a deeper version of the dictum is famous. 'The liberal, secular state is built on conditions it cannot guarantee itself' (Böckenförde 1991:112). Constitutional lawyers have built a whole doctrine of 'the preconditions of the Constitution' (*Verfassungsvoraussetzungen*) on this one sentence (see only *Veröffentlichungen der Vereinigung der Staatsrechtslehrer* 2009). Religion generates the culture of mutual respect that is a precondition for democratic government. Critically, the constitutional state lacks the mandate to create this culture itself. The state may intervene if words or actions can be shown to be dangerous. But the state is not entitled to educate the electorate (Lüdemann 2004).

Freedom of religion also complements governmental assistance to the needy. Religious organisations are not only cheaper, and willing to help when public officials refuse to become active. More importantly, religious assistance is not just a service. For the recipients it matters that help has a soul (Seligman 2009:2881). Freedom of religion further complements freedom of expression. Religiously motivated speech enriches the marketplace of ideas (Mill 1859).

Religious people are less easily tempted by worldly perks and therefore less vulnerable to corruption. Their faith even empowers them to resist fatal threat (Leiter 2008:16). This explains why deeply religious people were among the few who resisted totalitarian government, be that the Nazi state (the *Bekennende Kirche*) or the communist state in the GDR.

Eventually the reverse side of this medal is even more compelling. Since for believers eternity is at stake, religious organisations may credibly threaten government with vigorous resistance against interventions that curtail what the religion considers to be essential. Sadly the US have seen devoutly religious persons bombing abortion clinics and flying airplanes into high-rises (Leiter 2008:16). In the technical language of economics: religions command high nuisance value. It is in the best interest of the state to accommodate, and to establish a regime of peaceful coexistence: among each religion and the state, and between religions.

### III. Freedom of religion as a threat

#### 1. Threat for religions

The attitude of most religions towards freedom of religion as a constitutional guarantee is ambivalent at best. Over centuries, even the Christian churches have seen religious freedom as a threat, rather than a benefit (von Campenhausen 2009). In the Catholic church, this only changed with the Second Vatican Council (*Dignitatis Humanae* 1966). In the Protestant churches, change was more gradual but also basically not before the middle of the 20<sup>th</sup> century (more from von Campenhausen 2009:517). In Israel, the religious lobby has seen to it that freedom of religion is not constitutionally recognised to these days (Raday 2009:2771).

This hesitance has a reason. If the constitution guarantees freedom of religion, this implies secularism. State action may not be grounded in the commands of any one religion (Krüger 1964:178 ff.). Through the very guarantee, government is obliged to stay neutral between religions. The law starts from the assumption that there are different interpretations of the transcendental. For the purposes of law, no religion is unique or absolute. The law does not even assume that the set of religions is finite. If a new movement originates and claims to be a religion, this claim is to be assessed against an abstract definition of religiosity. Once freedom of religion is constitutionally protected, believers are not only legally obliged to accept a plurality of eternities as a matter of fact. Government is also prevented from openly siding with one religion. This has for instance led to the prohibition of prayer in US schools (*Engel v. Vitale*, 370 U.S. 421 (1962)) and to the pro-

hibition of hanging the crucifix in German classrooms (*Crucifix*, BVerfGE 95,1 (1995)).

The doctrine of constitutional guarantees is not the same in all legal orders. In the German and in the European traditions, no fundamental right is absolute. Even if the provision does not explicitly have limitations, these limitations result from the fact that the Constitution protects a whole set of freedoms, and that fundamental freedoms have to be harmonised with competing value judgements of the Constitution (this concept of ‘practical concordance’ goes back to Hesse 1995). Therefore other normative goals may be pitted against freedom of religion. The legislator may be prevented from turning religious belief into legal command, even if a large majority deems this desirable. A current case in point is the legalisation of homosexuality (Brown 2010; Gilreath 2010; Klein 2010).

## 2. *Threat for the State*

Protecting freedom of religion is not without risk for the state either. In so doing, the constitutional state faces the paradox of tolerance (Mahlmann 2009:2475). It grants a protected sphere to individuals and organisations that may not be inclined to reward the protection by being tolerant themselves with competing religions or with the state. Potentially religious freedom threatens the authority of the law (Mestmäcker 2010). The problem is particularly acute with what has been called ‘strong religions’ (Rosenfeld 2009:2347; Sajó 2009:2403) like fundamentalist movements and sects (Richardson 2004). Devoutly religious individuals have not only resisted the Nazi regime, they have also brought terrorism to Western democracies (Leiter 2008:16). The European Court of Human Rights has acknowledged the problem and allowed Turkey to dissolve a political party since it aimed at abolishing the constitutional protection of secularism (*Refah Partisi v. Turkey*, 37 Eur.H.R.Rep 1, 33 (2003)) and it has allowed the German government to issue warnings against the brainwashing methods applied by the Osho sect (*Leela Förderkreis v. Germany*, app. 58911/00 (2008)). By contrast, if a religion itself acknowledges a plurality of transcendental powers, like the religions prevalent in ancient Rome, the conflict is particularly mild.

Freedom of religion is a threat for the state for the very same reasons that make this freedom valuable, and even necessary, for religion and the state itself. Religious goods are transcendental. The correctness of religious beliefs and commands defies proof. Many religions expect believers to bring faith to pagans and to save the souls of those who are not feeling the urge themselves.

Again the transcendental character of religions carries most weight. For the individual believer, eternity is at stake. Living in line with the commands of her religion has infinite value. Worldly goods are only considered once the threshold of a life without sin has been passed. Worldly goods are worth nothing if religious commands are violated. From the internal perspective of religious belief systems, the individual believer is not entitled to compromise, whatever non-religious reasons the state brings forward for limiting the exercise of religious freedom. The state lacks jurisdiction for the modification of religious doctrine. Religions systematically blur a line that is essential for the constitutional state. Religions are not content with legality. They ask for morality. From the perspective of her faith, if she gives in to governmental pressure, a religious person ventures transcendental sanctions. Her religious identity is in peril. Not so rarely, religious organisations may also inflict earthly harm.

The state is not only likely to provoke religious resistance if it prevents believers and religious organisations from specific courses of action. By the very fact of protecting freedom of religion, the constitution adopts an external perspective on religion (cf. for the parallel question for law Hart 1961). It inevitably treats religions as historically contingent social phenomena. For a true believer, this very thought is heretical.

For the constitutional state, the threat is exacerbated by the fact that religious beliefs and commands defy scientific proof (Leiter 2008:15 and 25). Therefore the state cannot assuage anxieties of religious addressees by showing that the legal expectation is not at variance with religious commands, or that the sacrifice is minor.

Many religions are missionary. Believers have the duty, or they are at least encouraged and rewarded, if they bring faith to those who have not had the privilege of awakening. Many religions are also not content with enunciating ethical precepts. They want to effectively ban unethical behaviour, in their members, but also in non-members. The unborn life shall be protected, the human genome shall not be manipulated, marriages shall not be dissolved. On all of these issues, in most modern democracies substantial fractions of the population think differently. If constitutional protection gives religions room for thriving, this is likely to also heat religiously motivated conflict. The constitutional guarantee potentially makes it more difficult for government to hold society together.

In one way or other, all religions are social. The individual believer's insight in and access to the supreme transcendental forces is facilitated, moderated or even mediated by more or less formalised organisations. These organisations provide believers with the authoritative reading of holy texts, with rules and

ceremonies for membership, with a religious community that generates or heightens their sense of identity, and with a host of more mundane services. From the perspective of state constitutions, the most important feature of religious organisation is governance. These organisations do not only give individual believers assistance. They aim at governing their lives. From the outside perspective of law, this is an exercise of power. Fundamental freedoms do not require that they be exercised in a power free vacuum. In this respect, the constitution even limits internal sovereignty. Yet the right to govern others is necessarily in conflict with the constitutionally protected freedom of addressees. The freedom of religious organisations to guide their members inevitably conflicts with the freedom of these same members to live the religious life they have been choosing themselves. It may also conflict with the desire of democratically elected government to govern these same lives. For both reasons, for a constitutional state granting autonomy is a greater risk than just granting individual freedom (more from Engel 2004).

Finally, religious freedom is not only a precondition for a viable democracy (see again Böckenförde 1991:112). It at the same time is also a risk for democracy (Möllers 2009:84: 'Gefährdungen der demokratischen Gemeinschaftsbildung'). In their internal doctrines, religions need not be, and indeed often are not, individualistic. The supreme goal of religions is not the individual's autonomy but her fate in eternity, maybe also the victory of this religion over erroneous competitors. Religions may adhere to a concept of human dignity. But for them dignity is indirectly defined, by the individual's relationship with the transcendental, not directly by attaining self-selected goals and aims. Religions may not value liberty at all. If they do, they do not define liberty the same way as democracies. For them, liberty is not deference to the individual's wishes whatever they happen to be. Rather they define liberty as liberating individuals from obstacles that prevent them from recognising what truly matters for them (for a similar secular concept see Habermas 1973).

To the extent that religions are missionary, and that they care about state legislation being in line with religious ethics, granting freedom of religion creates a further problem for democratic governance. Religion will be used as a conversation stopper (Rorty 1994). Religion instils 'divisiveness' into politics (Breyer 2006:122, 124; Feldman 2006). Religious argument will be used to disempower the free marketplace of ideas. Much as those dominating a market of goods are tempted to turn regulation into a barrier to market entry (Holcombe and Holcombe 1986), religions are tempted to have the legislator help them combat their actual or potential competitors in the 'free marketplace of religions' guaranteed by freedom of religion.

#### IV. Mitigating the dilemma by legal pragmatism

Seemingly, we have spotted a tragic dilemma. The power of the state to coerce saves religious freedom and the viability of democratic government. Yet at the same time freedom of religion is a threat for religions and the state. Seemingly we cannot make a definite recommendation. We must leave it to historical accident whether a constitution guarantees freedom of religion and, if so, how this freedom is interpreted. On grounds of principle, a narrow reading seems as justifiable as a broad reading.

Yet law is neither science nor philosophy. For good reason, the discipline is called jurisprudence. The adoption of a new rule, and a new interpretation of an existing one, are not predicated on deriving the rule from first principles, nor on grounding it in scientific evidence. For sure, the law should not be blind to science and philosophy. Over the last decades, law as an academic discipline has become more and more scientific. Yet ultimately law as a social technology is about dissolving conflict (more from Engel 2003a) and about governing people's lives (more from Engel 2007a). The gold standard is neither consistency (more from Engel 2006b) nor objectivity (cf. Daston 1999). Law is as good as its effects. The task of lawyers is not advancing knowledge, but making decisions. Ultimately, a decision is a good one because the professional legal decision maker is able and willing to take on responsibility for it (more from Engel 2009).

In safeguarding religious freedom, the pragmatic nature of law is not only helpful. Given the otherwise tragic dilemma between necessity and threat, a pragmatic approach is the only feasible one. Pragmatism is of course never perfect (Barak-Erez 2009). Pragmatic solutions are 'conventions' (Sajó 2009:2411 f.), which gives them a dose of historical contingency, and traces of power play. Pragmatism risks hiddenly privileging the religion of the majority (Sajó 2009:2417) and perpetuating its historical dominance (cf. Ladeur and Augsburg 2007). Pragmatic interventions are bound to be imperfect. They cannot dissolve the dilemma, but they may help mitigate its obnoxious effects. Pragmatism may take a long time to overcome religiously motivated resistance. These days, the Bible is not proffered as a justification for slavery, although one may find passages in it that take slavery for granted (e.g. Exodus 21:2-6). But the Bible is used to justify the differential treatment of men and women (Solomon 2007). Pragmatic law does not stand outside the battles between competing religions, and between religion and the state. Pragmatic law is policy-making in the guise of legislation and adjudication.

Yet pragmatic law is policy-making of a very special kind, and under very special conditions (more from Engel 2003b). The interpreter of the Constitution is not entitled to policy-making from scratch. While respon-

sibility brings in a grain of subjectivism, the legal decision maker may not simply impose her individual will on the law's addressees. She is bound by the text of the Constitution and, much more importantly, by the judicial tradition of interpreting it. Any political argument must be couched in doctrinal terms. Legal power is not invested in individuals, but in complex institutional arrangements. The right of initiative is with the parties, not with those deciding. If the parties do not bring the right case, decision-makers must wait. Conversely, those directly interested in one solution, i.e. the parties, have no direct influence on the outcome. All they may do is exploit the opportunities of procedure, and make their case as compelling as they can. Usually, and in particular when it comes to constitutional scrutiny, legal decision-makers are not individuals, but benches. They must give explicit reasons (more from Engel 2007b), and they know that the reasons of today will be held against them tomorrow. If they change doctrine for one fundamental freedom, the change risks spreading over to other freedoms, where its effects might be less welcome. Even more fundamentally: judges know that the power of the judiciary will be curtailed if they more than very rarely fail to convince the population that their rulings are at least acceptable, if not desirable.

Specifically, the pragmatic nature of law is able to address the three reasons why religious freedom is at the same time a necessity and a threat. Law is aware of the fact that all normative argument is fundamentally relative (more from Engel 2001). One can, for instance, not prove that the growth of the economy is more important than improving the dire fate of the needy. Nonetheless, constitutional law does not content itself with creating a procedure for policymakers to fight this out. For instance, the German Basic Law simultaneously guarantees freedom of commerce and property, and it obliges government to make sure that everybody has at least enough to lead a humane life. In principle, it is for the legislator to exactly draw the borderline. But the Constitutional Court sees at it that the legislator does not overstep the constitutional limits. If necessary, as just a couple of months ago, the court even spells out that the law as it stands is no longer within these limits (BVerfG 9 Feb 2010, 1 BvL 1/09).

The same techniques may be used to balance the freedom of one religion against the freedom of another, the freedom of religion against the freedom to choose not to be religious, the freedom of a believer against the autonomy of her religious organisation, and the freedom of religion against competing freedoms that are also constitutionally protected, or against objective goals that have constitutional status. Balancing is not calculable, but controlled. The conceptual steps are worked out in the principle of proportionality (Robbers



2005; Grimm 2009:2375). The way in which they are used and filled is pre-determined by the existing body of constitutional jurisprudence.

The law is also prepared to alleviate the epistemic challenge. Courts may not refuse to decide cases. Yet in court, the scientific standards of evidence can hardly ever be met. The legal order has reacted by rules on the standard of proof and on the burden of proof. The standard depends on the relevance of the decision to be taken. But even the most stringent standard is content with silencing 'reasonable doubt'. And this high standard is not regarded as appropriate in all cases. Different legal orders have different techniques for alleviating the standard. American law may then be content with 'preponderance of the evidence'. Continental law would rather redistribute the burden of proof. It would for instance accept 'prima facie' evidence, and leave it to the opponent to cast doubt on its applicability in the case at hand. Of course, none of this makes it possible to prove the existence of God. Yet the legal order may accept a proxy. It may accept the consistency of theological doctrine, or a long-standing practice of a confession.

Finally the law may also respond to the additional conflicts resulting from religions becoming missionary, or trying to influence general politics. Neither of this is prohibited. The former squarely comes under freedom of religion. The latter at least is protected by the general political freedoms. One may even discuss whether this too is an exercise of freedom of religion. Yet then religions try to impose their will on others who, themselves, are also protected by freedom of religion, including the freedom to decide against any religion at all. Therefore, constitutional freedom is pitted against constitutional freedom. If they try to introduce a religiously motivated argument into general politics, furthermore freedom of religion is pitted against the guarantees of democratic process. Using the principle of proportionality, the competing freedoms have to be balanced out. From the very fact that two constitutional protections are in conflict it follows that, in such cases, freedom of religion may be more intensely limited.

Pragmatic law is sensitive to local conditions. If a conceptual divide does not affect the case at hand, pragmatic law sets it aside. It is content with 'incompletely theorised agreement' (Sunstein 1995). If a theoretical conflict is not practical in the concrete instance, pragmatic law grants more freedom to those present (Rosenfeld 2009:2343). As long as the demand for tolerance is marginal, as in the case of the Amish, pragmatic law is more open-minded than with respect to similar wishes from less contained religions (critical on this Sajó 2009:2422). If being strict on legal principles risks causing revolt, the judiciary may act more cautiously. It may start by establishing a principle, and granting exceptions for a while, announcing that it will become gradually

stricter. If a community is already more advanced on the road towards tolerance, the judiciary may impose closer scrutiny on one and the same case here. Under the European Convention on Human Rights, this is brought about by the doctrine of 'margin of appreciation' (Engel 1986; Martínez-Torrón 2005).

Where the law cannot slight the conflict, it can try to transform it. The practically most important shift is from freedom to equality (Huster 2002; Grimm 2009). Instead of dissolving an intractable conflict between religions, religious and nonreligious people, or religion and the state, on grounds of first principles, the law approaches a solution from the premise that it may not discriminate on transcendental grounds (see for the European Convention of Human Rights Tulkens 2009:2582). One and the same action may not be treated differently only because in one case it is mandated or at least justified by religious doctrine (Eisgruber and Sager 2008). Translation requirements may also be brought under this rubric. The neutrality of the law between religions does not require that the law ban any religiously motivated act and any religious speech from the public sphere. It suffices that the legal decision can be translated into a criterion that does not condition on religious doctrine, or on religiosity (Huster 2002; Sajó 2009:2401) (this is missing in Rosenfeld 2009).

Finally, the law may offer religions a deal. If they are willing to organise themselves in a way that makes conflicts with other religions, with the non-religious, or with the state less likely or more manageable, they are granted the privilege. To my reading, this is the essence of what in German law is often referred to as the choice between *Staatskirchenrecht* and *Religionsrecht* (Magen 2003; Classen 2006; Heinig and Walter 2007). Of course, giving churches the right to collect taxes through public administration, to send their teachers to public schools, to grant university degrees, to be remunerated by government for running hospitals privileges them in competition with other religions. Yet using the translation principle, this does not violate religious neutrality as long as the offer is good for any religion. It may be justified by the very reason why freedom of religion is a necessity. All these privileges not only help religions attract believers. They also bring these religions into a permanent relationship with the state. Religions who accept these privileges have something to lose if they frustrate the legitimate expectations of the state. As part of the quid pro quo they have made themselves more 'regulable' (the term has been coined by Lessig 1999) (for an application see Engel 2006a). Given religious conflicts are theoretically not tractable and have all too often proven atrocious for those suffering from them, I am convinced this technology for making these conflicts negotiable is justified. I think so, even if one acknowledges that the promise of these

privileges puts religions under pressure to organise such that they become credible negotiation partners for the state. In Germany, this is currently an issue with Islam, since the Islamic religion is intrinsically less prepared to organisation than in particular the Catholic church.

## V. Conclusion

Arbiters sometimes say with tongue in cheek: if both parties complain, the award can't be that bad. With my presentation of the issue I have certainly fulfilled the condition. I must have disappointed believers, non-believers, religious organisations, government officials, and my legal colleagues. Believers will surely dislike the areligious perspective. Throughout this paper, I adopt an external perspective on religion. I see it as a social phenomenon. I insist that religions are historically contingent. I accept a religiously pluralistic society as a fact. I regard religion inasmuch as a threat as I regard it as a necessity for governing this world. I say that the signs of God's presence in this world, of which believers think dearly, do not count as proof. By contrast, non-believers will dislike how much room I am willing to grant religion. I do not oblige government to combat what they see as superstition. I am not holding the absence of scientific evidence against religion. Through the many facets of pragmatism I effectively give government some room for supporting religiosity. I even allow for outright deals between the state and organised religions. Religious organisations will dislike that I allow for privilege only to the extent that it makes them vulnerable to regulatory intervention. They will also dislike that I am accepting their historically gained dominant positions in specific jurisdictions only to the extent that they can be translated into religion-neutral criteria, and that I insist on the constitutional right of competing religions to erode these dominant positions. Government officials will dislike that I am calling for tolerance even with religions that seem alien if not hostile to the culture on which this government's power is built. They may also find it restrictive that I limit the proper scope of government to the management of religious plurality. Finally my legal colleagues may dislike the external view on our discipline. I am not talking about the constitution because it is in force, but because it might be instrumental. It is key for my argument that legal doctrine is neither a mere exercise of logic, nor of tradition. For my solution to work the law in action must be only partly determined by the legislator. In my perspective, judges are not just legal professionals. They are policymakers, only of a different kind and under different constraints. Yet I deeply believe that partly disappointing all involved is the only possibility to overcome the otherwise tragic dilemma. The constitutional protection of freedom of religion is indeed a precondition for religious freedom being a social fact.

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# WHAT IS OR SHOULD BE THE ROLE OF RELIGIOUSLY INFORMED MORAL VIEWPOINTS IN PUBLIC DISCOURSE (ESPECIALLY WHERE HOTLY CONTESTED ISSUES ARE CONCERNED)?

■ VITTORIO POSSENTI

1. The title of my speech was suggested by the organizers and I gladly accepted: it refers to the religiously informed moral viewpoints in public discourse and to the hotly contested issues. Among them there are not only the problems concerning religious freedom, but several other questions of the same level of importance. For each of these, the problem is what should be the role played by a religious public opinion.

I begin with an assumption which represents the background of the paper, that is to go beyond the liberal-individualistic interpretation of rights, moving towards a postliberal society and finding ‘personalistic’ arguments to understand the framework of rights, including religious freedom and the right to life. Two assumptions are part of the view set out: democracy should abandon the temptation to speak in a purely aggregative form, namely in the form that R. Dworkin has vividly described as ‘statistical democracy’;<sup>1</sup> and public debate, necessary to a genuine process of deliberation, should reject the primacy of individual preferences and opinions, accepting the premise that people can change their minds during public discussion. Deliberation is a method to change our minds through reason. It is typical of the resolution to transform opinions into rational or reasonable arguments, so as to reach a common way of thinking.

Let’s start with a famous passage by Tocqueville: ‘In order that society should exist and, a fortiori, that a society should prosper, it is necessary that the mind of all the citizens should be rallied and held together by certain predominant ideas; and this cannot be the case unless each of them sometimes draws his opinions from the common source and consents to accept certain matters of belief already formed’.<sup>2</sup> Where do we stand in this respect

<sup>1</sup> R. Dworkin, *The Moral Reading and The Majoritarian Premise*, in H. Hongju Koh, R. C. Slye (eds.), *Deliberative Democracy and Human Rights*, Yale U.P., New Haven 1999, p. 94.

<sup>2</sup> A. de Tocqueville, *La democrazia in America*, I, III, Rizzoli, Milano 1995, p. 427. See also: ‘There is hardly any human action, however particular a character be assigned to it, which does not originate in some very general idea men have conceived of the Deity,

in the West, where the debate is never ending and the ground of common truths is thinner than in the past?

The mess and deadlock of public discourse in Western countries, where serious charges are traded and many slogans proclaimed, reveal the deep disagreement that pervades our democracies. The disagreement is not only political but also moral, as citizens and their representatives have increasingly taken polar positions. A better kind of public discussion is needed, capable of addressing some of our most difficult controversies and allowing diverse communities separated by class, ethnic group, religion, and gender to reason together. In principle political arguments, grounded on reciprocity and dialogue in exchanging arguments, should be based on reasoning that can be understood and accepted by other citizens interested in reaching agreement. But cases do exist, such as the abortion issue, where there is a fundamental deliberative disagreement, and at present little hope to reach a substantive agreement.<sup>3</sup>

I suggest two remarks on present and near future situation of public debate:

1) Since nearly three decades an increasing share of problems stems from the libertarian and individualistic interpretation of human rights, and this just when the individualistic idea shows increasing limits. So the first consideration is that we must reach a *postliberal society*, where the reference to freedom of choice of the individual is no longer the only (or almost only) policy rule of public matters. The term 'postliberal', which of course does not mean hostility toward freedom, is substantiated by *four meanings and contents*: a) the rights of freedom must not possess always and everywhere a predominance; b) the balance between rights and obligations must be more rigorous than in liberal individualism; c) religion cannot only be *cultus privatus*, but should have a public presence and influence, and finally d) freedom cannot be the sole or ultimate political goal, which takes shape in the common good. Everyone sees the big differences between the two following formulas: *finis rei publicae libertas est* and *finis rei publicae bonum commune est*.

of his relation to mankind, of the nature of their own souls, and of their duties to their fellow-creatures. Nor can anything prevent these ideas from being the common spring from which everything else emanates. Men are therefore immeasurably interested in acquiring fixed ideas of God, of the soul, and of their common duties to their Creator and to their fellow-men; for doubt on these first principles would abandon all their actions to the impulse of chance, and would condemn them to live, to a certain extent, powerless and undisciplined. This is then the subject on which it is most important for each of us, left to himself, to settle his opinions by the sole force of his reason' (p. 437).

<sup>3</sup> A. Gutmann, D. Thompson, *Democracy and Disagreement. Why moral conflict cannot be avoided in politics, and what should be done about it*, The Belknap Press of Harvard U.P., Cambridge, Mass., 1996, p. 55.



As regards freedom of religion, in a postliberal view it cannot be understood only on an individualistic basis as freedom to profess or not profess a religion (freedom of religion and freedom from religion, which surely remains necessary), but as a right to be understood also in relation to the traditions of a people, to its own self-understanding and to the identity of a nation's history. So it is a right to some extent mediated with a common good which is not only made of a summation of individual positions.

To continue the 'history of freedom' we can no longer look only at the 'free society', as do the libertarian currents, but also at the 'just society'. When the pressure in favour of individual autonomy is absolute, it is worth remembering the real situations of many people and the conditions of dependence in which they are, as well as the needs of care and loving concern that they express. In short, we do not arrive at a solution trying to bring the moral dilemmas only within the private sector and focusing only on the freedom of choice. M. Sandel Rightly observes: 'A just society can't be achieved simply by maximizing utility or by securing freedom of choice. To achieve a just society we have to reason together about the meaning of the good life, and to create a public culture hospitable to disagreements that will inevitably arise'.<sup>4</sup>

The liberalism of neutrality says that when we participate as citizens in a public debate we should leave aside our most thoughtful moral and religious convictions, eventually relying only on a political and reduced conception of the person (Rawls). This pattern of neutrality is theoretically inadequate and did its time – perhaps at first in North America where it was very strong from the 60s to early 90s – more than in Europe.

2) Secondly, it should be noted that in Western countries there is no open violence against religion, but mostly creeping hostility and rooted prejudices against it, and especially Christianity, so that since some time the term 'Christianophobia' has been created.<sup>5</sup> The distrust against religion often feeds on the idea that it is an obstacle to the full realization of human rights, especially in their extreme interpretation of the libertarian type that sets them as absolute.

<sup>4</sup> M. Sandel, *Giustizia. Il nostro bene comune*, Feltrinelli, Milan 2010, p. 293.

<sup>5</sup> The term Christianophobia appears for the first time in the speech of Benedict XVI to the Roman Curia (20 December 2010). Differently from the past, the Christian is not usually one who is on the side of power, but often he is discriminated. The matter of persecution of Christians in the world should not be addressed only in a confessional way, but in the name of defending fundamental human rights, including religious freedom. Do not let the Christians fight Christianophobia, the Jews battle against anti-Semitism and Muslims against Islamophobia.

This approach is subject to criticism, showing that human rights are inalienable, indivisible and interdependent or interrelated, so that no one can be pushed to infinity without violating other important rights, and no one can be left out. You should also entrench the rights framework in personalistic anthropology which includes the concept of human nature as a source of *normativity*: in this perspective not everything can become a matter of free choice of subjects. It is ungrounded that two subjects of the same sex can form a ‘family’ and adopt those ‘children’ which homosexual union, intrinsically infertile, denies them.

Finally, the arguments to use in hotly contested issues are also commensurate with the patterns of secularism which prevail in certain contexts. In Europe there are basically two schemes of secularism, which we could call *laïcité de combat et laïcité apaisée et ouverte*. The first form of secularism, which prevailed in the past in France and is now in slow change, was not neutral, but ended up clearly to favour the secular position and a biased critical attitude towards religion. The *laïcité de combat* is opposed in principle to the public presence of religion, while open secularism, which of course still holds the difference between Church and State, incorporates a more friendly attitude towards religion, and tends to see it more as a resource to rely on that as a negative problem.

I wish to add that in a well ordered society it is not up to the secular State to build up the society, but it is a better and more effective way to rely on fresh and plural energies of civil society.

## **2. The mutual learning between believers and nonbelievers, and the crucial points, namely the lack of mid-point between opposite principles**

Faced with the situation of our society, it is no longer proper to think that religious communities will be dissolved under the pressure of a secularism that progresses: moreover this is no longer true, if it ever was. The right attitude is to ask openly to *all* citizens not to deny cognitive value to the religious discourse, and to seek a dialogue between religious and ‘secular’ people in which we have in place processes of mutual learning, as suggested by Habermas: ‘But respect [for religious positions] is not all, philosophy has good reason to show itself, in the face of religious traditions, eager to learn... The secularized citizens, to the extent that present themselves as citizens of the State, do not have the right to deny in principle a potential truth to the religious images of the world, or to contest the right of religious citizens to contribute to public discussion with a religious language’.<sup>6</sup> Believers can

<sup>6</sup> *Tra scienza e fede*, Laterza, Roma 2006, p. 14 and p. 18.

not be seen by secularised citizens as a species threatened with extinction, which is expected with relief. In public debate religious people bring a sensitivity and a contribution of its own, declined through the methods of dialogue and public discourse, and represent the religiously informed moral viewpoints. Thus they do not break any rule but rather bring an essential contribution, without which the public sphere would be devoid of something vital. On the other hand believers should commit themselves to honestly understand the motivations of the secular people, avoiding to condemn them a priori. The 'gap media' should also be put in the income, namely the situation of minority of the religiously informed moral viewpoints in the public sphere in Europe in general and in the West, where a considerable part of the media is not favourable to the positions of the religious area, and perhaps especially to the Catholic one.

At this point we are forced by the nature of the problems involved to ask the question: is mutual learning, rightly wished by Habermas, always possible, or are there issues that cannot be mediated?

I do wish to recall that the issue of disagreement is immanent to the nature itself of some (not all) questions and to the fundamental diversity between *interests* and *principles*. Let us reflect a bit on this very crucial matter: interests have a price, can be bargained and admit mid-points during the negotiation. We can think of a commercial bargaining referred to the purchasing of a flat. On the contrary principles have a dignity and not a price, and by themselves do not admit a mid-point: there is no mid-point between to kill and not to kill. So it is very difficult and sometimes impossible to solve divergences between positions of principles without a mid-point. An important example is offered by laws which do not *prohibit* or *order*, but which *permit* some behaviours: let us consider abortion laws. Permanent is the charge raised against antiabortion and pro life people: 'If you do not want it, why can't I?'. In the abortion case it is difficult to circulate the essence of the problem, which cannot be solved with the question: 'If you do not want it, why can't I?', for pro life people are contrary to abortion as it is a violation of the universal right to life. In some sense pro life people are charged by an abortion law more than pro choice people are burdened by an antiabortion law.<sup>7</sup>

<sup>7</sup> J. Habermas asserts: 'The burdens of tolerance, as demonstrated by the more or less liberal rules on abortion, are not symmetrically distributed between believers and non-believers', *Tra scienza e fede*, cit., p. 17.

### 3. Criteria and contexts to enforce religiously informed moral viewpoints

The appropriate criteria and the general objectives of religiously informed moral viewpoints in public discourse are not difficult to identify in their generality, and now we do not need to compile a complete list. They include promotion of human dignity and the fundamental rights and duties, showing that what is to be preserved is something that affects everyone and not just believers, participation on an equal basis to the public debate, contribution to the formation of a well-ordered public opinion, etc.<sup>8</sup> But to proceed, you must directly address some of the knotty problems of the contemporary debate by identifying the most dramatic and controversial ones, because the structure of argument to be taken will depend on the nature of the problem at stake.

Of particular importance is the investigation of fundamental spiritual opposition now existing. In my opinion the main battlelines today are of three types: a) a *religious split* between believers and nonbelievers. It invests in particular the issues of open and explicit presence of religion and its symbols in the public sphere, against the liberal position of religion as a private affair: this attitude started with the French Revolution, which was contrary to public exhibition of religious symbols; b) a *cognitive or epistemological divide* between those who believe that the supreme court of reason is science, and those that follow, in addition to science, philosophy and natural law; c) an *anthropological split* between those who report the human being to freedom of choice and those who have a more complete account of human being. The three poles do not coincide completely, even if they have different points of contact, often denoted by a post-metaphysical postulate; moreover the second and third fractures exert a very high influence that rarely shows itself on the surface.

<sup>8</sup> It seems appropriate to recall the opinion of David Hollenbach, American Jesuit, quoted by J. Rawls in *The Idea of Public Reason Revisited* (Rawls, *The Law of Peoples*, 1999, p. 135): 'Conversation and argument about the common good will not occur initially in the legislatures or in the political sphere (as narrowly conceived in the domain and power which interests are adjudicated). Rather it will freely develop in those components of civil society that are the primary bearers of cultural meaning-and value - universities, religious communities, the world of arts, and serious journalism. It can occur wherever thoughtful men and women bring their beliefs on the meaning of the good life into intelligent and critical encounter with the understandings of this good held by other people with other traditions. In short, it occurs wherever education about and serious inquiry into the meaning of good life takes places', David Hollenbach S.J., *Civil Society: Beyond Public-Private Dichotomy*, 'The Responsive Community', Winter 1994-95, p. 15.

I'll discuss two cases: that of the display of religious symbols in public places, with reference to the crucifix displayed in Italy, and the case of the human embryo. In the first case specific cultural and religious traditions come into play, which can enter the problem and promote a positive solution, while in the second in which the issue is more general, it is necessary to present my own positions arguing with philosophy, anthropology and constitutionalism.

#### 4. The crucifix in public places

Within the ambit of the debated issue of religious symbols on display in public places (for example, courtrooms and classrooms) two important sentences were recently issued, which converge in their assessment of the subject matter and are destined to create 'jurisprudence'. The first sentence was handed down in Italy by the Court of Cassation.<sup>9</sup>

The other sentence comes from the European Court of Human Rights (Strasbourg), the organ of the Council of Europe (which collects 47 States) called to pass judgment on the crucifix diatribe in the wake of an appeal filed by an Italian citizen of Finnish origin, Ms. Soile Lautsi. She contested the presence of that religious symbol in Italian public schools, which included the one attended by her children because that presence was assumed to violate the freedom of education of the parents. After having initially decided in favour of Ms. Lautsi (November 3, 2009), the case was appealed and the Grand Chamber of the Court, made up of a larger number of magistrates (and with fifteen votes out of seventeen) judged that the crucifix may legitimately remain on display in Italian classrooms since, contrary to what the plaintiff had argued, it does not violate freedom of education and conscience. As the first verdict created notable reactions in several European countries, ten different countries (Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Monaco, Romania, Russia and San Marino) supported Italy in the appeal before the European Court. Later they were joined by

<sup>9</sup>The Italian Court of Cassation brought to a close the law suit filed by Mr. Luigi Tosti, a justice of peace in Camerino who had refused to enter a courtroom until the crucifixes had been removed from all the courts in the country. In fact, the Court of Cassation sitting in its joint civil sections (March 2011) rejected the final appeal lodged by Mr. Tosti, transferring further judgments on the merits of the issue to the will of the legislative branch. In particular, the judges determined that the principle of the non-confessional nature of the State now in force in Italy, even if not explicitly set forth in the letter of the Italian Constitution, 'cannot be doubted in any manner whatsoever' by the presence of the crucifix in courtrooms, and that for the possible display of other religious symbols 'a discretionary choice on the part of the legislative branch necessary is, which at present does not exist'.

other States (Albania, Austria, Croatia, Hungary, Moldova, Poland, Serbia, Slovakia and Ukraine) which, questioning the first verdict, asked that national identity and religious traditions be respected. They submitted written records requesting the Court to reconsider its ruling. Belgium, France, Portugal, the Netherlands, United Kingdom, Germany, Spain and Switzerland did not support Italy.

In more specific terms, the sentence of the European Court demonstrates with due authority that the culture of human rights (in itself at the selfsame origin of the Council of Europe) cannot be placed in contradiction with the religious foundations of the European civilization, to which Christianity gave the essential contribution.

The idea of the Grande Chambre is that the crucifix is a passive symbol, so that a subjective feeling of discomfort/trouble is not sufficient to configure a legally relevant offense. In addition, Italy has the right to preserve its traditions. In this sentence the Court specifically recognizes the existence of the principle of subsidiarity at the European level and applies it in concrete terms, respecting liberty and identity (cultural and historical) of the individual States, and not intervening too frequently to not disturb legal domestic balance in individual member States.

4.1 The character of subsidiarity that is affirmed by Strasbourg in relation to religious traditions, avoids that the laicity/*laïcité* criterion as a core of European Union is intended in one way, i.e. in the secularized French style. Many States, especially orthodox and Eastern European countries escaped from State atheism, have indicated the danger of the de-Christianization of their societies. Influential is the intention of the Orthodox Churches to protect them from the advance of secularism, as requested by Patriarch Cyril of Moscow. In this sense, the Metropolitan Hilarion of Volokolamsk, president of the Foreign Relations Department of the Russian Orthodox Church, has proposed the establishment of a strategic alliance between Catholics and Orthodox to defend together Christian tradition against the secularism, liberalism and relativism prevailing in modern Europe. This may mark a profound change in the spirit of the formation of Europe, hitherto thought of as a movement that proceeded from west to east through a conquest of the latter to economic liberalism and western culture. Eastern Europe and a share of Catholicism are opposed to Western secularism in order to defend the Christian culture and a proper understanding of religious freedom. Freedom of/from religion cannot become an ideological battle against those who believe. Is only that which comes from the absence of God respectful of pluralism?

## 5. The case of the human embryo

The current status of bioethics and its problems, despite the focus of many researches on it, seems precarious because of the difficulty in forming shared 'evidences'. The bioethics debate is one of those areas in which hotly contested issues are present almost everywhere. The urgency of finding solutions to moral dilemmas raised by the advance of biotechnologies that achieve a power of disposition on life, has its importance in driving to hasty decisions. In this context the theme of human embryo takes on symbolic value, which combines its 'unapparent' status, i.e. its reduction to something quantitatively and dimensionally minimum, and its vital importance and value, because in it is at stake the understanding of the human being and the dramatic question of eugenics.

The problem of the embryo is universal and applies to all, at least for the fact that each of us was an embryo: impossible to find a more universal problem than that! No ground possess objections, rare indeed, that the embryo treatment would fall within a private realm before which the State should stop. In reality, in the embryo case the most fundamental and public right is at stake: the right to life.

You cannot resolve the moral and the legal embryo question without addressing the problem of its identity and the underlying anthropology: the moral and legal status of the embryo depends on its ontological status, which cannot be ascertained only by science. This confirms that anthropology more than ethics is the real pivot of the matter. In other words, the question of the embryo makes the problem of the person emerge in all its power, for the clarification of the concept of person is essential to solve many problems with which bioethics is concerned. While the idea that we should respect the person is almost universally accepted (it is a kind of ecumenical value), it must be acknowledged that often there is agreement only in words. It is not uncommon in researches on the identification of the person, particularly complex in border cases, that different and *ad hoc* concepts of person are formed. Such an event occurs within bioethics.

## 6. How to address the crux of the embryo and how to argue?

Recurring only to a *religiously informed* moral viewpoint to manage the issue of the embryo may be misleading, because it suggests that the positions in favour of the embryo are motivated only by faith, and therefore are 'idiomatic' and confessional. This criticism is frequently repeated in various countries, including Italy, as a refrain that the Catholic Church and the believers want to impose their partial and sectarian views upon all. The first step is to show that the theme of the embryo not only affects everyone, but

that it should be regulated with an argument that can be universally recognized and based on a close intertwining of science and philosophy. Moreover the question is whether the central concepts of *person* and *human dignity* (constitutionally protected in several countries and included in the Universal Declaration of 1948) should or should not be applied to the human embryo. In the affirmative we must protect it from destruction that can come from scientific research or therapeutic purposes, as well as from the practice of prolonged freezing, which denies the natural and primary right of the embryo to develop.

The topics to be proposed must take into account the latest scientific knowledge and the best philosophical arguments, avoiding improper references to positions of faith or in principle demonization of scientific research. The fundamental language of reality and being remains that of ontology, not that of sciences, and it is worth repeating this. Moreover, there is a fundamental harmony between the realism of the sciences and the realism of philosophy of being, so that we have to bet on it and seek a new alliance between ontology, ethics and science. If we consider the case of fertilization, discoveries of sciences offer significant support to the view that the conceptus is a human being in its own right. I think in particular of two discoveries: a) The discovery of the mammalian ovum in 1827 (E. von Baer), and the subsequent identification of conception in the uniting of spermatozoon and ovum. This discovery undermined belief in a radical transition at forty days (or ninety days for women), and b) the discovery of DNA and the individual human genome, perfectly identified and capable of governing in an autopoietic way the embryo's ontogenetic development from conception forward (Crick and Watson, 1953). We must make certain we don't force ourselves into a false choice between science and ethics – because we need both. And there is good reason, and growing scientific evidence, to believe that we can have both.

We can now formulate the relevant questions so many times raised: without appealing to religion, are there enough reasons to think that from fertilisation there is a new human life? Isn't the early embryo just a ball of cells? These matters raise questions and issues of reality (ontological problems) more than moral ones, and we have to respond to them. In any case, the position with which to enter the debate should be clear: a religiously informed moral viewpoint on the embryo is not only religious or moral. In this tangle of problems it may be that the philosophical and scientific arguments advanced are not considered conclusive by some people, but at least they will be able to silence a frequent and aggressive criticism that merely says: you talk like that because you defend a fideistic position.



In *Il Principio-Persona* (Armando, Rome 2006) I have developed an argument showing that the human embryo is a human being in its own right, and therefore a person deserving unconditional respect. The central point of the argument lies in the fact that at conception a substantial transformation occurs, i.e. the formation of a new substantial reality (the conceptus/unborn), and that from then on do not appear further substantial changes, but only accidental ones: accidental, however, does not mean secondary.<sup>10</sup> The argument claims that becoming person is an act and not process, and between a not-developmental and developmental view of the human person it is necessary to opt in favour of the former. The developmental conception of the person includes a developmental conception of the rights of the embryo, so that the human embryo does not have the same range of rights as the newborn baby, and then of the adult. This is excluded if we resort to language of substantial transformation. The unconditional respect towards human embryo includes the minimal care, demanded by a human being at every stage of development: to be supported in his process of development and not to be destroyed. Ethically this must mean, at the very least, that embryos should not be deliberately created for experimental purposes of any kind, and should not be frozen, for freezing denies the fundamental natural right to development and growth.

<sup>10</sup> I developed this argument for the first time twenty years ago in *Medicina and morale* (La bioetica alla ricerca dei principi: la persona, *Medicina e morale*, n. 6, 1992, pp. 1075–1096), and I have taken it up and discussed further in the book *Il Principio Persona*, cit. I was pleasantly surprised to find very similar language in a report by the United States' Government's Domestic Policy Council. It admits that embryos are human beings: the only differences between embryos and human beings, the report says, are accidental differences in levels of development, Washington DC, January 10, 2007 (LifeSiteNews.com). 'Embryos are humans in their earliest developmental stage', writes the Council. Each of us originated as a single-celled embryo, and from that moment have developed along a continuous biological trajectory throughout our existence. To speak of 'an embryo' is to designate a human being at a particular stage. The report condemns the destruction of human embryos for the purpose of stem-cell research, and instead advocates alternative sources of stem-cells, including cells derived from amniotic fluid and adult stem-cells. 'In sum', reads the Executive Summary, 'it increasingly appears that the qualities researchers value in embryonic cells may also exist in other stem cells that are easier to procure, more stable to grow, safer to use in therapies, and free of the ethical violations of embryo destruction'. Human embryos are what the embryology textbooks say they are, namely, human organisms – living individuals of the human species – at the earliest developmental stage. Read 'Advancing Stem Cell Science Without Destroying Human Life' by the Domestic Policy Council: [www.whitehouse.gov/infocus/healthcare/stemcell\\_010907.pdf](http://www.whitehouse.gov/infocus/healthcare/stemcell_010907.pdf)

Ontological personalism supports full identity between *homo* and *persona*, *homo* being any member of the human race for its genetic inheritance, and whatever his degree of development. This position removes the categories of non-person (the foetus), quasi-person (the baby), semi-person (the old and severely declining), no-more-person/no-longer-person (the patient in a vegetative state). One thing is personalism, the other ‘personism’: I call personism those doctrines for which there are human beings that are ‘not yet persons’ and ‘no more persons’, as claimed by many contemporary authors including H.T. Engelhardt, D. Parfit, P. Singer, etc.

In the Catholic Church in recent decades, bioethical and embryo issues have received much attention, in the last two pontificates in particular. Biotechnologies require an answer to the question whether the human embryo is indeed someone and not something. I will not develop here the complex history of a journey which should include the instructions *Donum Vitae* (1987) and *Dignitas personae* (2008). The case is still ongoing, and Benedict XVI devotes much attention to it. Alluding to the human embryo, he argued recently: ‘It is not an accumulation of biological material but rather of a newliving being, dynamic and marvelously ordered, a new unique human being...there is no reason not to consider him a person from conception’.<sup>11</sup>

## 6.2. *The right to life of the embryo*

The right to life from conception was a matter that was placed during the preparation of the Universal Declaration of 1948. Currently, the right to life is protected by Article 3, which reads: ‘Everyone has the right to life, liberty and security of person’, but two delegations in the preparatory work (Chile and Lebanon) proposed to reformulate art. 3, including with regard to the right to life the following phrasing: ‘from conception up to the natural death’. But the integration was not implemented. Very recently it has been observed that the new Hungarian Constitution protects the life of the foetus from conception.<sup>12</sup>

Now perhaps it is clear why I concentrated on the case of the embryo instead of taking up once more that of abortion. The two problems differ

<sup>11</sup> Benedict XVI’s Homily at First Vespers of the First Sunday of Advent, November 27, 2010, cf. *Avvenire*, November 28, 2010, p. 7.

<sup>12</sup> On the new Hungarian Constitution see the Hungarian Deputy Prime Minister Tibor Navracscics’ article on *The Wall Street Journal*, April 19, 2011, p. 13, with important remarks about the idea of marriage, possible only between a man and a woman, and the idea of family, applied also to single-parent family.

structurally, as human realities are at stake in the first two: the mother and the foetus that in some cases are opposed existentially (or rather this is the perception of the adult: either he/she or I), while in the second such existential opposition is not at stake. In this respect, the question of the embryo may be less difficult to solve than that of abortion since the discovery of non-embryonic pluripotent stem cells removes many claims and legitimacy to the manipulation and destruction of the embryo: there is a way out.

### **6.3. *Situation of the defence of the embryo***

Legislation on the human embryo is different, but generally do not express an appropriate degree of protection. In several countries the embryo can be frozen indefinitely, destroyed to obtain stem cells, used by science, manipulated in various ways, and then subjected to the voracious power of the principle of utility. The claim so often repeated is that you cannot put limits on the research, its effects and therapeutic techniques: what is useful, what produces effective drugs and care is ethical. It would be very lengthy to follow the individual national laws and practices: I will only consider the UK situation where the human embryo is only partially protected. In this country, according to the Warnock report, the human embryo does not possess complete protection but only a special status, that should guard it against use in anything other than important and necessary research, or so deemed. The Warnock report concluded that ‘the embryo of the human species ought to have a special status and that no one should undertake research on human embryos the purposes of which could be achieved by the use of other animals or in some other way’. But this special status, which in truth does not guarantee the full right to life of the embryo, is likely to be diminished. Recently Professor Lisa Jardine, chair of the HFEA (Human Fertilisation and Embryology Authority), said: ‘My worry is that to achieve a consistent approach to research licensing, the safeguarding of the “special status of the embryo” will be lost – that fundamental principle laid down in the Warnock report, which provides special protection in law for the human embryo and embryonic material outside the body. Under current law, scientists wishing to use human embryos in research have to go through a lengthy consultation process with the HFEA in order to receive permission. We are concerned that if the regulation of research on human embryos is handed to a more general body, the special status of the embryo recognised in law will be further eroded’. As it is easy to understand, a simple developmental concept of human embryo is unable to defend his full right to life from dangers and temptations rising from biotechnologies.

### **6.4. *The constitutional legal framework***

In national and international debate the wording of some constitutions and the support from ‘neo-constitutional’ movements may be important: with the latter term I mean a movement that, relying on the material validity of values (and not only of formal procedures) of various constitutions, can evolve into forms, perhaps not explicitly declared, of natural law/right.

In the 35/1997 ruling the Italian Constitutional Court ruling was confronted with a request of a referendum promoted by the Radical Party, aimed at the mere deletion of any legal regulation of abortion and its liberalization. The Court examined the exigencies of constitutional defence of the life of the unborn, and in that sense the expression ‘right to life’ occurs several times in the sentence. The reference to Article 2 of the Italian Charter is explicit and so is the assumption that human life must be protected from the very beginning, a principle that has achieved over the years more and more recognition, including the international and global levels. ‘So we have also reinforced the belief, inherent in the Italian Constitution, in particular art. 2, whereby the right to life, understood in its most ample extension, is to be included among the inalienable rights, that is, between those rights which occupy, so to speak, a privileged position, since they belong – to use the expression of Ruling No 1146 of 1988 – “to the essence of supreme values on which is founded the Italian Constitution”’. The ruling does not use the term ‘person’: the Court’s reference is to the right to life, not to the category of person, and that right is equal for all and for each, it is unitary and indivisible. Subsequently, Law 40 of February 19, 2004 (‘Rules for medically assisted procreation’) in art. 1 has secured the rights of the unborn, prohibiting experimentation on human embryos and their cryopreservation.

## Conclusions

1. At the beginning I wished for a *postliberal* society, and here I repeat that by that name I mean a society in which the only rights of freedom do not always have primacy, where religions can have a public presence, and where the paradigm of secularism is open (*laïcité ouverte et apaisée*). I discussed two important and controversial cases: the public presence of religious symbols, and the right to life of the embryo. The first right has been pretty long run by the criteria of non-discrimination, neutrality and privacy, which ended up confining the religious fact and freedom of religion in private realm, and sometimes discriminating the public presence of the religions. Something begins to change with the signals arriving from Strasbourg Court. When looking ahead to the future with some hopefulness, we can say that the Europe of the 21st century will concretely be what its citizens and especially its creative minorities will make of it.

The libertarian and 'technological' parties recognize that the question of the embryo is not manageable with the criteria of neutrality and privacy, so the supporters of his manipulation should look elsewhere for arguments against the embryo, creating a conditional right to life which is the danger against which the whole project of human rights can smash. The right to life begins with conception and does not have degrees. A developmental idea of the human being as a person, essentially empiricist and post meta-physical, undermines the understanding of the right to life and its attribution to humans.

Of course a religious minority should not impose religious views, but the relation of religion to ethics is complex. Often religion plays the role of *inspiring* people to take up ethical causes (for example, the abolition of slavery, and now embryo protection), but ethical and anthropological causes are and remain matters of *common concern*. I confirm this, adding that the Christian humus is a key inspiring factor for the success of the human rights project. Without its nourishment this project and the liberal democratic societies would enter into a danger zone.

# THE CHALLENGES OF 'NEW RIGHTS' AND MILITANT SECULARISM

■ MARTA CARTABIA

## 1. A subtle hostility

In recent speeches, the Holy Father has reiterated his concerns about freedom of religion, making an insightful distinction between the different situations in the East and the West of the world: whereas in a number of Eastern countries violence, persecution and repression overtly threaten that freedom, in the West a more subtle form of hostility is spreading. In his discourse for the Message for the Day of Peace, 1 January 2011, Pope Benedict XVI remarked that:

It is painful to think that in some areas of the world it is impossible to profess one's religion freely except at the risk of life and personal liberty. In other areas we see more subtle and sophisticated forms of prejudice and hostility towards believers and religious symbols.

And in his Address to the Diplomatic Corps, 10 January 2011, His Holiness Pope Benedict XVI explicated that:

Turning our gaze from East to West, we find ourselves faced with other kinds of threats to the full exercise of religious freedom. I think in the first place of countries which accord great importance to pluralism and tolerance, but where religion is being increasingly marginalized. There is a tendency to consider religion, all religions, as something insignificant, alien or even destabilizing to modern society, and to attempt by different means to prevent it from having any influence on the life of society.

Whereas in some regions freedom of religion is utterly repressed by means of violence, in many others it is rather a sophisticated form of prejudice and disparagement against religion which in fact undermines the capability of fully enjoying that liberty.

Europe shows the most extreme example of the Western approach to religion.

Even a first-glance overview of contemporary legal trends in Europe reveals an ever-spreading distrust towards religion, religious institutions and their role in public life. A diffuse sentiment that religion is in contrast with the basic values of a modern liberal society occasionally evolves into attempts to marginalize the religious dimension of life from the public discourse. In

European liberal democracies, formal direct attacks against religious freedom seldom occur; more often freedom of religion is a secondary target, a victim of actions, the main purpose of which is to expound individual rights, especially 'new rights'. In other words, in western countries dangers for freedom of religion often derive as side-effects of a zealous attitude towards individual rights, especially towards 'new rights'. That is why hostility towards religion is more sophisticated and subtle: religion is portrayed and perceived as a hindrance to the full accomplishment of the human rights project, a major component of our contemporary liberal societies.

## 2. A freedom under strain

To introduce ourselves to the challenges that freedom of religion is confronted with in western liberal democracies, let us muse over the following dilemmas.

Can a faith-based charitable organization or a religious university take religion into account when hiring and firing staff, faculty or counselors? Or is it a form of unpermitted discrimination under liberal principles? Can religious festivities be celebrated in public schools? What about religious displays in schools and public buildings? Can a Catholic charity be required to place children for adoption with same-sex couples? Is a Christian hospital obliged to provide abortions?

Similar questions are no longer pure theoretical. Clashes between freedom of religion and other values considered as fundamental in liberal societies have multiplied in recent years. Hereinafter some real examples taken from the practice of judicial bodies and other human rights institutions.

The first example is taken from the field of *education*.

In the United Kingdom, a panel of nine Justices of the Supreme Court determined that a criterion in an over-subscription policy of a faith school which gave priority to those regarded as 'Jewish by birth' constituted racial discrimination. In fact, a couple of years ago, the British Supreme Court<sup>1</sup> condemned a Jewish faith school in London for unlawful discrimination, because the school – which is always consistently oversubscribed – adopts an over-subscription policy giving preference in admissions to Jewish children. One of the applicants was not admitted to the school on the consideration that the child was not recognized as Jewish by the competent religious authority,

<sup>1</sup> R. (on the application of E) v. The Governing Body of JFS and the Admission Appeal Panel of JFS and others [2009] UKSC 15.

for he was not a descendent from a Jewish mother, nor had he converted following the official rules and procedures.

In a word, according to the reasoning of the British court, when an applicant is not admitted to a Jewish School for the reason that he is not Jewish, the school is discriminating on the ground of race.

Difficult to imagine a more obnoxious defamation for a Jewish institution.

Should this orientation be confirmed and possibly imitated in other countries, freedom of religious education would be seriously undermined. The possibility of selecting teachers<sup>2</sup> and students on a faith-based orientation is an essential element of that freedom. However, as has been said, the threat is subtle and sophisticated, because it does not have *prima facie* the appearance of a direct attack to freedom of religion. Freedom of religion is rather thwarted by a misconstrued understanding of the right not to be discriminated against for ethnic or religious origins. In fact in the British Supreme Court decision, religious schools are reported as potential discriminators. If they want to preserve their religious character they are suspect institutions, acting close to the border of unlawful discrimination.

Other clashes between freedom of religion and the principle of non discrimination occurred in the UK in the field of *faith-based welfare services*.

For example, the High Court was recently asked to deal with the problem of Catholic charitable providers of services offering adoption services only to married couples, while refusing the same service to other couples, same sex couples included. Is this policy covered by freedom of religion or is this rather an impermissible form of discrimination on the ground of sexual orientation? More generally, do non-discrimination rules apply to private bodies as well as to public institutions? And what about publicly funded charities? The case brought before the High Court<sup>3</sup> was in the end answered in the sense that under certain conditions and under the supervision of a public institution, Catholic charities can continue to follow a policy of refusing to consider same sex-couples as potential adoptive parents. But the problem has not been definitively settled and new cases in different forums are likely to be presented again.

Another sensitive issue is *conscientious objection*. In those countries where abortion, euthanasia, contraception, medical assisted reproduction, same sex

<sup>2</sup> The problem looms in ECHR 20 October 2009, n° 39128/05, Lombardi Vallauri v. Italy. But in the end the decision is taken on procedural aspect.

<sup>3</sup> [2010] EWHC 520 (Ch), Catholic Care (Diocese of Leeds) and the Charity Commission for England and Wales and the Equality and Human Rights Commission.



marriage or civil partnership are legally permitted, conscientious objection is necessary to effectively safeguard the freedom of religion. In recent times, however, sharp criticism to conscientious objection have been raised and a request for strict regulation of this right has been advanced in view of guaranteeing the full protection of individual freedom of choice in matters which are sensitive and controversial from the ethical point of view. In particular, restrictions to conscientious objection have been proposed in a Draft resolution of the Council of Europe,<sup>4</sup> in order to ensure free access to medical care services, including abortion, euthanasia and artificial fertilization. The final document approved by the Assembly<sup>5</sup> eventually rejected the original proposal and restates the right to conscientious objection. In particular the Council of Europe secures the right to refuse to perform abortions, human miscarriage, euthanasia, or any act which could cause the death of a human foetus or embryo, while at the same time acknowledging the necessity of a regulation in order to ensure that patients are able to access lawful medical care in a timely manner.

Nevertheless, the discussion on conscientious objection goes on in different contexts and involves legal and administrative professions as well as medical ones.

Another British case<sup>6</sup> helps us to better understand the point: a Christian woman was a registrar for births, deaths, and marriages. With the introduction of civil partnerships for gay and lesbian couples in the UK, she was required to officiate over civil partnership ceremonies. After several attempts to change her position and to arrange her tasks on an informal basis, she was in the end forced to leave her job. Leaving the job, she made several claims – most importantly, that she was forced to quit on account of religiously-based discrimination. In the Court of Appeal, her claims were rejected, because the Court held that her

<sup>4</sup> Council of Europe, Parliamentary Assembly, doc. 12347, 20 July 2010 and doc. 12389, 6 October 2010, Women's access to lawful medical care: the problem of unregulated use of conscientious objection.

<sup>5</sup> Council of Europe, Parliamentary Assembly, resolution 1736 (2010), The Right to conscientious objection in lawful medical care.

<sup>6</sup> *Ladele v Islington LBC* [2010] 1 WLR 955 (CA). A similar view was held by the European Court of Human Rights, in *Pichon and Sajous v. France*, 4 October 2001, n° 49853/99 where the Strasbourg Court considered 'the main sphere protected by Article 9 is that of personal convictions and religious beliefs'. In that case it was determined that a prohibition against pharmacists conscientiously objecting on religious grounds to the sale of contraceptives was permissible. The pharmacists, the Court insisted, could 'manifest [their] beliefs in many ways outside the professional sphere'.

inability to maintain her job as a registrar while excluding herself from civil partnership ceremonies did not impact on her religious belief. The list of the actual and potential clashes between ‘new rights’ and freedom of religion could be continued. In some cases, the problem has been dealt with at the legislative level. For example in some non-discrimination laws and regulations exceptions and exemptions allow religious organizations to disregard the legislation when legal requirements conflict with the tenets of religious doctrine, or would require such organizations to forfeit any portion of their autonomy.<sup>7</sup> This solution is welcome in its practical effects, but it cultivates nonetheless the sentiment that religion is at odds with the basic principles of modern societies, in particular with human rights and non discrimination principles.

How does it come about that contemporary legal discourse hints that freedom of religion – the first and most fundamental of human rights<sup>8</sup> – is an impediment to other human rights? And in contrast: how come that human rights are invoked to limit freedom of religion and to put it under strain?

It is worth noting that these problems are relatively new. Until the sunset of the 20<sup>th</sup> century almost no controversies on freedom of religion are reported in European forums: the first case ever when the European Court of Human Rights was asked to solve a problem of freedom of religion was *Kokkinakis versus Greece*, in 1993,<sup>9</sup> concerning the prohibition of proselytism for minority religious denomination. What are the peculiarities of the new generation of rights that cause tensions with the freedom of religion?

<sup>7</sup> See for example Council of Europe, Parliamentary Assembly, Resolution 1728 (2010), *Discrimination on the basis of sexual orientation and gender identity*, par. 17. Similar exceptions and exemption can be retrieved in several legislation on non discrimination, at the international and national level.

<sup>8</sup> Pope Benedict XVI, *Address to the Diplomatic Corps*, cit., saying that freedom of religion ‘is indeed the first of human rights, not only because it was historically the first to be recognized but also because it touches the constitutive dimension of man, his relation with his Creator’. The idea that freedom of religion is ‘the cornerstone of the structure of human rights and the foundation of every truly free society’ is recurrent in the teachings of Pope John Paul II. See for example the *Address of His Holiness John Paul II to the Fiftieth General Assembly of the United Nations Organizations, New York, 5 October 1995*. In general on this point see Università Cattolica del Sacro Cuore, Centro di Ricerche per lo studio della dottrina sociale della Chiesa, *La libertà religiosa negli insegnamenti di Giovanni Paolo II (1978-1998)*, Milano, Vita e Pensiero, 2000.

<sup>9</sup> ECHR 25 May 1993, n° 14307/88, *Kokkinakis v. Greece*, concerning the freedom of proselytism.

In the last ten to fifteen years some deep changes have been taking place in the fields of human rights that call for a more accurate conceptual analysis. In order to better understand the tensions between 'new rights' and freedom of religion, I would like to examine the conceptual matrixes of 'new rights' – which are (i) the right to privacy and (ii) the non-discrimination principle – and to assess the impact that they produce on an idea of public space, deeply marked by a call for 'neutrality'. In its turn the State leaning to neutrality is at the origin of the present pervasive secularism, which is generally considered as the only institutional framework compatible with multi-religious society. Finally I will discuss the relationship between secularism and freedom of religion, showing that the two concepts are not necessarily related to each other.

The scope of my enquiry is primarily directed to the European context, although the same analysis could be repeated in all Western countries as well as in the domain of international institutions.

### 3. 'Rights under privacy'

Where the end of the Second World War ushered a 'new world'<sup>10</sup> – whose most expressive emblem is the Universal Declaration of Human Rights of 1948 – likewise the end of the Cold war started a new era, under the sign of *new rights*,<sup>11</sup> at least in western countries. To be sure, in North America, the 'rights revolution' began some decades before; in Europe, a pervasive rights discourse has landed more recently although it has not taken a long time for Europe to gain a vanguard position in the race.

What kind of rights are the new rights? What needs do they intend to answer?

Each generation of rights has its own hallmark. The first generation aimed at the protection of the human person towards the abuses of political power; the second generation was rather concerned with the economic and social conditions for human development. The new generation of rights is permeated with the idea of individual autonomy, independence and capacity of deliberative choices.

<sup>10</sup> M.A. Glendon, *A World Made New* (Random House 1991) on the origin of the Universal Declaration of Human Rights. Likewise some people speak of the 'age of rights' referring to the reconstruction of western countries after the Second World War: N. Bobbio, *L'Età dei diritti* (Torino, Einaudi, 1990), A. Cassese, *I diritti umani oggi* (Roma, Laterza, 2005) 28 f.

<sup>11</sup> For those who are interested in the phenomenon of 'new rights', they can refer to a wider analysis that I have conducted in 'The age of new rights', in [www.nyustra.com](http://www.nyustra.com).

As a matter of fact most of the rights of the new generation originate in the idea of privacy, one of the most prolific legal concepts of our times, interpreted as the protection of the person's 'independence in making certain kinds of important decisions'.<sup>12</sup> At its origin, privacy used to be the right to keep certain personal facts and information from the public view; however, privacy eventually evolved into a new right, i.e. the rights to be able to engage in certain conduct without restraints. Whereas old privacy meant freedom from undue interference, new privacy aims at securing a positive liberty, to behave following one's personal preferences and choices. Here is to be found the attractive side of privacy rights: in the spotlight of privacy, the individual appears liberated from all constraints and empowered to be the master of his own life.

The aspiration of new rights that mushroom under the umbrella of privacy may be described using Sir Isaiah Berlin's words in his essays on Liberty:<sup>13</sup>

The "positive" sense of the word "liberty" derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men's acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own, not by causes which affect me, as it were, from outside. I wish to be somebody, not nobody; a doer – deciding, not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human role, that is, of conceiving goals and policies of my own and realizing them.

There is a strict connection between the high value that privacy confers to the individual as master of her life and the fact that many 'new rights' are an offspring of it. For this capacity of valuing the autonomy of the individual, privacy is becoming one of the passepartouts for new rights – the other being the principle of non-discrimination (see *infra* par. 4 and 5).

After their first debut in cases on contraception and abortion,<sup>14</sup> privacy rights are now blooming on the fertile soil of bio-ethical disputes, regarding

<sup>12</sup> M. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 Calif. Law Rev. (1989), 521 highlights a clear distinction between old privacy and new privacy: 'Where the contemporary right of privacy is the right to engage in certain conduct without government restraint, the traditional version is the right to keep certain personal facts from public view', at 524.

<sup>13</sup> I. Berlin, Two Concepts of Liberty (1958), in *Four Essays on Liberty* (Oxford, Oxford University Press, 1969), 8.

<sup>14</sup> An insightful historical narrative of the right of privacy is in Mary A. Glendon, *Rights Talk* (New York, USA, 1991) at 48 ss, showing how John Stuart Mill's *On Liberty*

the edges of life. On this ground, a whole new generation of rights is developing as an outcome of the value of individual privacy: the right to have a child and the right to abortion, the right not to be born and the right to die, the right to receive and the right to refuse medical treatment. The list could be continued with all the rights concerning family life: the right to marry and the right to divorce, the rights of children and the rights on children. In a word, all contemporary controversial issues involving moral disputes are placed in the domain of privacy and are shaped in terms of individual rights.

So, what do all these new rights have in common?

There is one main feature of the new generation of rights that deserves attention.

They all reflect a voluntarist conception of the human person. 'I will, therefore I am', could be the motto of the new rights.

All new rights capture an important component of human agency, that is the capacity to make some fundamental decisions concerning the good life without undue restraint. The strength and the merit is that they want to protect the individual from all forms of coercion on the part of public and private powers. The intent of new rights is to empower and emancipate every individual from all forms of paternalism and alienation. To this purpose new rights emphasize the individual capacity of free-choice, an important component of human freedom and human personality, indeed.

More problematic is undoubtedly to assess whether the emphasis of new rights on an autonomous and self-directed man captures a thorough image of human experience. Sometimes, in reading cases and legislation concerning new rights one wonders whether the holder of the rights is treated as a real person, or rather as an abstract image of an airy individual, made of a pure will, living in a no-man's land, unencumbered and disentangled. After all every personal deliberative choice is a process that takes place in a given context made of personal, social, cultural, relational conditions that wittingly or unwittingly play a role for a decision to ripen. Most privacy rights focus on freedom of choice and autonomy while concealing other dimensions of human experience: dependency, factual constraints and social conditions, needs and relationships, to name but a few. The result is often times a reductive legal image of the human subject, where the rights holder appears somehow artificial, misrepresented.

influenced the case law of American courts, even up to the Supreme Court, with the decisions of *Griswold v. Connecticut*, 381 U.S. 479 (1965) on contraception and *Roe v. Wade*, 410 U.S. 113 (1973) on abortion.

The question is momentous and subtle, because an abstract individual has the appearance of an independent subject freed from all constraints, but as a matter of fact might be an easy prey of all sorts of insidious undue power. A nuance of idealism and utopian dream looms in the picture of an individual defined only by his own pure free will. The tendency of privacy rights to focus too narrowly and exclusively on free will requires attentive consideration because it may jeopardize the very promise of liberation that those rights entail.

Moreover this conception of individual, understood as totally autonomous, self-sufficient, capable of self realization does not need God. Better, as has been said,<sup>15</sup> God is not necessarily eliminated, but is made irrelevant:

What does occur, however, is something much more cunning than the denial of God. Cornelio Fabro has summed it up well: 'If God does exist, He does not matter'. God has nothing concrete to do with man. God is now extrinsic to human cares and human problems: within this ambit, man is his own measure, his own master, the source both of the formulation of his plans and of the energy needed to bring them into being, the origin even of the ethical intention implicit in all he does. Thus, even if God does exist, within the ambit of human problems it is as if He did not. In this way, a division between the sacred and the profane comes into being, as though there could exist something outside the 'temple' of God that is the entire cosmos.

This conception of human person is now affecting all the West. 'New rights' under *privacy* spring from a reductive conception of the person and spread a *libertarian*<sup>16</sup> culture of human rights, which started in the US in the sixties and now affects all western democracies as well as the international practice of human rights. The dignitarian tradition of human rights based on an integral understanding of the human person is now overtaken by new rights, even in those European countries where it used to be deeply rooted, both in social life and in the national constitutions.

#### **4. Non discrimination and the 'new equality'**

At a careful consideration, one cannot help noting that a second legal principle fuels the development of 'new rights': privacy always goes hand in hand with non discrimination and in the international language of human rights privacy and non discrimination rhyme with each other. They are the twin

<sup>15</sup> L. Giussani, Religious awareness in modern man. Notes for committed Catholics, Communio, *International Catholic Review*, Washington DC, USA, 1998, Ch. 3.

<sup>16</sup> Mary Ann Glendon, *Rights Talk*, cit, at 48 f.

cornerstones of contemporary human rights practice, and their intimate kinship is mirrored – for example – by the frequent use in cases brought before the European Court of Human Rights of art. 14 on non discrimination in conjunction with art. 8 on the right to privacy, as the very bases of free choice rights. And if we turn our attention to the European Union, it is impossible not to be struck by the insistence on non discrimination as a human right.<sup>17</sup> Suffice it to recall that in the EU Charter of fundamental rights, recently vested with formal legal status, the whole of chapter III deals with equality and non discrimination and that a number of directives<sup>18</sup> implement the principle in different fields of social life, as well as a significant number of cases dealt with by the European Court of Justice.

In order to catch the connection between the principle of non discrimination and the 'new privacy rights' it is useful to consider that non discrimination originates in the idea of equality, but it conveys a specific understanding of it which fosters uniformity rather than differentiation.

In fact, whereas for centuries the Aristotelian idea of equality – that likes (and only likes) should be likely treated – was highly valued as capable of removing inequalities while respecting diversities, nowadays a diffuse sense of dissatisfaction surrounds this approach. The general principle of equality is being replaced by a more complex, nuanced and sophisticated body of legislation on non discrimination. In the most recent non discrimination codes, the principle of equality is unfolded in many and multiform ramifications – different grounds of non discrimination are enumerated, different instruments are articulated such as direct and indirect discrimination, affirmative and positive action, and so on – and each practical situation is provided with an appropriate rule, and if necessary with exceptions to the rules as well. One of the most pristine expression of this trend is the UK Equality Act of 2010, which counts more than 200 provisions.<sup>19</sup> Considering this evolution one might expect that the capacity of the legal principle of non discrimination to reflect and respect diversity is enhanced and at the same time all unlawful disadvantages are removed and outlawed. After all, the most challenging task of equality in our contemporary multicultural society is precisely to ban discrimination without jeopardizing diversity. Unfortunately,

<sup>17</sup> For an overview of the European legislation on non-discrimination see S. Fredman, *Discrimination Law* (Oxford, Oxford University Press 2002); C. Favilli, *La non discriminazione nell'Unione Europea* (Il Mulino, Bologna, 2008).

<sup>18</sup> The most relevant are Directive 2000/43/EC on racial discrimination and Directive 2000/78/EC on non discrimination in the workplace.

<sup>19</sup> [www.equalities.gov.uk/equality\\_act\\_2010.aspx](http://www.equalities.gov.uk/equality_act_2010.aspx).

as a matter of fact, equality as non discrimination fosters uniformity over diversity and standardization over differentiation. Under non discrimination, Europe is moving steadfastly towards a society ‘indifferent to differences’.

A wide range of examples could be taken from the context of non discrimination on the grounds of race, sex, nationality, sexual orientation, and age, for instance.

Even language suggests an ongoing transformation in the idea of equality: in fact, European institutions manifestly prefer ‘non-discrimination’ to ‘equality’. The slippage in linguistic usage hints at a conceptual move from *equality* as modulation of law according to the varieties of real life to *non-discrimination* as uniformity.

In non discrimination legislation words like reasonableness, likeness, difference, rationality, proportionality, similarities, relevant comparator, and so on, all disappear. Non discrimination legislation follows a different path: some relevant diversities in reality are singled out and enumerated – race, sex, gender, religion and philosophical beliefs, nationality, age, disability – with the purpose of rendering them irrelevant before the law. In the new concept of equality those people that fall into the enumerated protected groups are guaranteed that their characteristics do not matter before the law. Diversities are relevant and taken into account to define the scope of non discrimination legislation; however once a given type of diversity is considered by the legislation, uniformity of treatment is guaranteed by the law.

This change has been possible because there has been a significant shift in how the equality principle has come to be justified, with considerably greater emphasis on its role in protecting an individual’s self-identity, and considerably less emphasis on distributive justice.

## 5. New rights and neutral institutions

This turn from equality to non discrimination helps to understand the reasons why privacy and non discrimination are good allies in promoting ‘new rights’: in the perspective of privacy rights, for a full protection of individual autonomy, legislation has to step back from all terrains where a plurality of options are disputed because the only accepted task to be performed by the liberal legal system in ethically controversial areas is to keep all possibilities open and available. Non-discrimination serves this purpose because it postulates that factual differences should not count in front of the law.

Thanks to non-discrimination everyone is made free to make her own choices according to her view of the good life without restriction. If we want each person to decide for herself what she values and how she is going to live in the light of these values, she must be entitled to a set of ‘deliberative free-



doms', allowing her to live following her personal preferences. Non-discrimination is a preeminent tool for the securing of those deliberative freedoms: when non-discrimination is respected everybody can freely engage in (or accede to) one of the options available regardless of colour, sex, race, age or other preferences.<sup>20</sup> Non-discrimination is essential to the liberal project, because it urges the legal system to remove all hindrances to free choice on account of race, religion, sex, gender, personal opinions or social conditions.

A good example to understand the effect of non discrimination on controversial issues is *S.H. v. Austria*,<sup>21</sup> a recent case regarding medically-assisted procreation decided by the European Court of Human Rights. Austrian legislation strictly regulates and almost bans heterologous fertilization and the plaintiffs contended that those limits violated their right to privacy and non discrimination (protected by art. 8 and 14 of the European Convention). The plaintiffs claimed that the decision of a couple to have, or not to have, a child is an expression of the right to privacy (art. 8) and that all limitations on the use of some types of artificial fertilization cause discrimination (art. 14) against couples suffering certain types of impediments to procreation. In the plaintiffs' reasoning, the right to privacy associated with the non-discrimination principle should lead to the removal of all legal barriers to techniques of artificial reproduction, with a view to free determination in reproductive rights being fully respected.

The European Court endorsed the claimants' approach and condemned Austria. The reasoning followed this line: if the right to privacy encompasses 'the right of a couple to conceive a child and to make use of medically assisted procreation for that end', then this right to have a child must be guaranteed without discrimination. In line with this conceptual framework all restrictions on the use of available techniques would exclude some couples from the opportunity of having a baby, deprive them of their 'right to a child', and ultimately amount to discrimination in breach of the European Convention. Accordingly, all technical devices should always be rendered available without limitation in order not to produce discriminatory effects.

<sup>20</sup> S. Moreau, *What is discrimination?*, in *Philosophy and Public Affairs*, 38, n° 2, 2010, 143–79, construing discrimination as a wrong akin to a tort, where the interest protected is precisely the personal capacity for deliberative freedoms.

<sup>21</sup> ECHR, Decision 1 Apr. 2010, n°. 57813/00, *S.H. and others v. Austria*.

The reasoning of the European Court departs from the traditional approach wherein the first step is to appreciate whether a national measure interferes with a right protected by the European Convention, and wherein later steps both involve discussion of whether such an interference might be justified by other general interests necessary to a democratic society and abide by the principle of proportionality. In this case, after the first step, the majority opinion shifted the reasoning towards the non-discrimination principle, which trumped all the other values and interests at stake, like protecting the biological identity of the baby, preventing the exploitation of women, banning selective and eugenic reproduction, for example.

When different views about the good life confront one another, non-discrimination smoothes the discussion. It provides uniform treatment, regardless of all differences, avoiding all judgmental stances in front of personal preferences.

After all, going back to the case on medical assisted fertilization, why should the right to have a baby be granted only to those couples that can overcome their problems by means of homologous fertilization? Why, on the contrary, should other partners be excluded from that right if they happen to need heterologous fertilization?

Non discrimination is a fundamental ally of privacy rights, because it fosters uniformity of treatment, levelling all factual differences.

A legal system giving paramount value to freedom as individual autonomy is bound to appear indifferent to all options at stake. Non discrimination is functional to individual autonomy precisely because it provides a supposedly 'neutral' framework wherein all personal preferences are equally permitted and the personal autonomous choices of the individual are equally secured.

The interaction between non-discrimination and freedom of choice cultivates the ambition of squaring the circle in protecting diversity without inequality: differences in reality should simply not count in the legal realm. Seen through the lens of non-discrimination all differences become indifferent to the law. In this perspective non-discrimination serves the aspiration of liberal society to 'neutrality'.<sup>22</sup>

Equality as non-discrimination furthers the liberal goals of state neutrality, individualism and promotion of autonomy, since it forbids public pref-

<sup>22</sup> M. Sandel, *Democracy Discontent*, in M. Sandel ed., *Justice – A Reader* (Oxford, 2007) 331, pointing out that the liberal self-image requires two basic features: an independent, autonomous, unencumbered self, *and* equal respect. Freedom as autonomy of choices, and equality as non discrimination.

erence being granted to any one group or any one conception of the 'good life' and requires that all individual preferences be treated alike.

In a way *autonomy* and *neutrality* are twin concepts, since the former defines an essential quality of the liberal individual while the latter describes a typical trait of liberal institutions. In between, *non discrimination* is the necessary bridge connecting the individual dimension and the institutional side of the liberal democracy.

Paradoxically, whereas in the 20<sup>th</sup> century equality was the core value of social democracies and liberty the core value of the liberal democracies, so much so that liberty and equality were once considered competing or even antagonist values, in the current post-modern society freedom of choice – the contemporary version of liberty – and non-discrimination – the contemporary version of equality – have complementary effects, supporting one another. They both concur to model the institutions of the post-multicultural state as 'neutral institutions', blinded to all personal preferences, religious ones included.

## 6. The myth of neutral institutions and secularism

So far, our journey through the cultural backgrounds of new rights has shown three fundamental lemmas of the contemporary lexicon of rights: (i) privacy as freedom of choice; (ii) equality as non discrimination; (iii) neutrality as equidistance of legislation and institutions towards different ideas of a good life.

Going back to freedom of religion and to the relationship between State and religion, it is interesting to notice that the same three folded framework underpins the idea of the secular state, *à la française*. Interestingly, the fundamental ideas of the ideology of new rights perfectly mirror the basic assumption of French *laïcité*.

The opening remarks of the Stasi Report of 2003,<sup>23</sup> which eventually influenced the law on secularism in France,<sup>24</sup> read as follow:

La laïcité, pierre angulaire du pacte républicain, repose sur trois valeurs indissociables: liberté de conscience, égalité en droit des options spirituelles et religieuses, neutralité du pouvoir politique. La liberté de conscience permet à chaque citoyen de choisir sa vie spirituelle ou

<sup>23</sup> *Commission de réflexion sur l'application du principe de laïcité dans la République*, Rapport remis au Président de la République le 11 décembre 2003, in <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf>.

<sup>24</sup> *Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*.

religieuse. L'égalité en droit prohibe toute discrimination ou contrainte et l'Etat ne privilégie aucune option. Enfin le pouvoir politique reconnaît ses limites en s'abstenant de toute immixtion dans le domaine spirituel ou religieux. La laïcité traduit ainsi une conception du bien commun. Pour que chaque citoyen puisse se reconnaître dans la République, elle soustrait le pouvoir politique à l'influence dominante de toute option spirituelle ou religieuse, afin de pouvoir vivre ensemble.<sup>25</sup>

In particular, if in the new rights discourse non discrimination and neutrality are seen as two sides of the same coin, likewise in the field of religious freedom, equality of all religious denominations and neutrality of the public institutions are considered as necessary to each other.

La neutralité de l'Etat est la première condition de la laïcité. ... Pour l'essentiel la neutralité de l'Etat a deux implications.

D'une part, neutralité et égalité vont de pair. Consacrée à l'article 2 de la Constitution la laïcité impose ainsi à la République d'assurer "l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion". Les usagers doivent être traités de la même façon quelles que puissent être leurs croyances religieuses.

D'autre part, il faut que l'administration, soumise au pouvoir politique, donne non seulement toutes les garanties de la neutralité mais en présente aussi les apparences pour que l'utilisateur ne puisse douter de sa neutralité.<sup>26</sup>

To be sure, in the Report, it has been made clear that *laïcité* is a peculiar value of France, deriving from the national history of that country. The Report accounts for other experiences and shows respect for different options entrenched in the constitutional architectures of other countries regarding law and religion. Nevertheless, the French option for secularism has quickly crossed the national borders and is gradually displaying a subtle influence all over the continent. Secularism beckons the European institutions, first of all those which are vested of the power of interpreting the European Convention of Human Rights and through them also all the national institutions of the member states.

Apparently, the European countries found themselves unprepared to handle the new challenges brought about by a general secularization of the national population and by religious pluralism, resulting from the copious

<sup>25</sup> Commission Stasi Report cit., Preamble.

<sup>26</sup> Commission Stasi Report, cit., 2.2. Emphasis added.

flux of immigration of Islamic populations and from globalization. There are still a few enclaves of religious homogeneity, but generally speaking in the new geographical dimensions of the global world and in the new social fabric of multicultural societies, all religious traditions are in a minority position.

Built around the old idea of *cuius regio, eius religio*, many European countries used to have a dominant religion which was followed by the majority of the population – Anglican in the UK, Orthodox in Greece and in many East European Countries, Catholic in Spain and Italy, Protestant in many northern countries, etc. –. Consequently each State used to have a preferred relationship with one religious denomination, be it by means of established churches, or endorsed churches, or concordats. At the end of the 20<sup>th</sup> century, suddenly, any form of preferential treatment has been perceived unwarranted in societies where the social texture is made of religious pluralism and – even most important – of a diffuse secularization.<sup>27</sup> What model could be more suitable to the new environment than the French version of the *laïcité*? At first glance, French *laïcité* proposes a neutral stance towards religion and for this reason offers an appropriate way out to the difficult question of defining the place of religion in post-modern pluralist societies.

The bewilderment caused by the social changes in the European context is clearly exemplified by the European Court of Human Rights case law on religious symbols. In these matters, the European Court has endorsed – until very recently – the French model of *laïcité*, banning the display of crosses and other religious symbols in public buildings and preventing the use of personal religious apparel in schools, universities and other institutional places.<sup>28</sup>

In different situations, the European Court has repeatedly asserted that the presence of religious symbols in public buildings is incompatible with art. 9 of the European Convention of Human Rights, protecting freedom of religion. This jurisprudential trend started with the issue of *personal* religious dress codes and, ironically as it may be, the Court held that the protection of freedom of religion may require

<sup>27</sup> Secularism in the sense described by Ch. Taylor, *A Secular Age* (Harvard University Press, Cambridge Massachusetts and London England 2007) 14 ff, that religion has become one out of many option in western North Atlantic societies.

<sup>28</sup> At a careful reading of a case like ECHR, Arslan v. Turkey, 23 February 2010, n° 41135/98 it seems undisputable that religious symbols and clothes cannot be worn by public functionaries and that within public institutions restrictions to religious ornaments can always be applied.

the prohibition of wearing religious clothes – like the Islamic headscarf – or religious symbols – like necklaces with crosses – in public places. The first controversy on this matter was *Dahlab*, dated 2001<sup>29</sup> and it concerned a Swiss teacher, converted from Catholicism to Islam, who was prohibited to wear the Islamic headscarf when teaching in public schools, otherwise the ‘denominational neutrality’ of the State would be compromised, to the detriment of non believer pupils or pupils of a different faith. Then it was the turn of students wearing personal religious symbols: cases arose in Turkey – with *Şahin* of 2005<sup>30</sup> – and in France – with *Dogru* and *Kervanci* of 2008<sup>31</sup> – in which the Court showed a high degree of deference towards the national tradition of both Turkey and France, where the principle of secularism is deeply rooted in the national Constitution and explicitly considered compatible with the European Convention by the Court. For this reason the Court upheld the decisions of the national authorities to prevent some university students from keeping the Islamic headscarf on while attending classes or even while inside the University. Lastly came the case of the display of crucifixes in Italian schoolrooms:<sup>32</sup> initially the second section of the Court held that the presence of crucifixes infringed the freedom of religion of non believer students, because in a context – like the Italian one – where the great majority of the population show allegiance to one particular religion, the State has the duty to confessional neutrality, in order to keep equidistance from all religions. Then, a few weeks ago the Grand Chamber<sup>33</sup> reversed the judgment.

In this series of judgments there are a number of inconsistencies, starting, for example, with the variable use of the margin of appreciation doctrine,<sup>34</sup> because in some cases the European Court is very deferential to the national institutions, whereas in other cases it is more activist. Some arguments, however, recur in the European jurisprudence. First, the Court shows an insistent

<sup>29</sup> ECHR, *Dahlab v. Switzerland*, 15 February 2001, n° 42393/98

<sup>30</sup> ECHR, *Leyla Şahin versus Turkey*, 10 November 2005, n° 44774.

<sup>31</sup> ECHR, *Dogru v. France*, 4 December 2008, n° 27058/05; *Kervanci v. France*, 4 December 2008, n° 31645/04.

<sup>32</sup> ECHR, *Lautsi v. Italy*, 23 February 2010, n° 41135/98.

<sup>33</sup> ECHR, *Lautsi v. Italy*, 18 March 2011, n° 30814/06.

<sup>34</sup> It is worth remarking that in the Turkish and French cases on the Islamic headscarves the Court simply upheld the secularist choices made by the national institutions, whereas in the first *Lautsi* case concerning the crucifixes in the Italian schools the European Court reversed the position of the national judges.

concern for the position of individuals who do not follow the majority religion. Generally speaking, the position of the historical majoritarian religion is 'suspect' and it is frequently submitted to restrictions in the name of freedom of religion. No doubt the historical presence of a dominant religious denomination in each European country makes the issue of the protection of religious minorities very sensitive. Second, it is often assumed that the only way for freedom of religion to be fully protected in a pluralistic context is to promote the neutrality of state institutions. The result is that in this case law, freedom of religion and neutrality of the state (and even freedom of religion and secularism) tend to overlap.

The seeds of this ambivalence was already planted in the first decision of the European Court of Human Rights on freedom of religion in 1993.<sup>35</sup> Ever since then an identical paragraph connecting democracy, religious pluralism and neutrality/secularism is often repeated in the European case law:

... in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected. ... The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society.

... the principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention.<sup>36</sup>

There is a common assumption in European law as well as in the dominant culture that in a multicultural society the effective protection of freedom of religion requires strict State neutrality, hence secularism. Freedom of religion and secularism are often used as synonyms and the conceptual distinction be-

<sup>35</sup> This connection between freedom of religion and neutrality in Kokkinakis (1993) is correctly pointed out by N. Hatzis, *Neutrality, Proselytism, and Religious Minorities at the European Court of Human Rights and the U.S. Supreme Court*, in 49 *Harvard ILJ Online* 120 (2009).

<sup>36</sup> ECHR, *Refah Partisi*, n° 41340 to 41344/98, 13 February 2003, par. 91 and 93. The same expression can be found in several decisions concerning freedom of religion starting with Kokkinakis.

tween the two of them blurs, so much so that even when the European Court has decided in favour of the presence of crucifixes in the Italian schoolroom, it could not help repeating the same conceptual framework that

‘art. 9 of the Convention which guarantees freedom of thought, conscience and religion, including the freedom not to belong to a religion’, ... imposes on Contracting States a ‘duty of neutrality and impartiality’.<sup>37</sup>

Secularism or *laïcité* are not even mentioned in the European Convention. However, according to a great part of the European culture, freedom of religion is not thinkable outside a secular framework.

### **7. Neutrality or neutralization of religion?**

Be as it may for the relationship between freedom of religion and secularism, the question arises whether ‘neutral secularism’ has proved to be the best institutional architecture to protect freedom of religion in multi-cultural societies. After all the value protected by the Convention, the Charter of fundamental rights of the European Union and by the national constitutions is freedom of religion, whereas secularism has only, if any, an instrumental value. Unlike the French constitution, where secularism is an entrenched principle, in the rest of the continent the final goal is the protection of freedom of religion, and the institutional arrangements between state and religion play a mere handmaiden role and should change according to their capacity to better protect freedom of religion. Whereas freedom of religion is a non-negotiable value, because it is entrenched in the very nature of human dignity,<sup>38</sup> the framework of the relationship between the distinct sphere of political power and religious institutions are susceptible to adaptation to different and changing historical contexts. Different countries with different traditions are likely to have different institutions in the sensitive area of religious freedom and a considerable range of church-state configurations may be consistent with genuine religious liberty. The institutional framework varies from place to place and over time. In this perspective, secularism is but one of the possible options to protect freedom of religion in a given context. Secularism is not a necessary condition for freedom of religion to be fully respected, nor is it always the optimal political option for religious freedom. In some cases it might also be detrimental to freedom of religion. We should keep in mind that freedom of religion is

<sup>37</sup> ECHR, *Lautsi v. Italy*, 30814/06, 18 March 2011, par. 60.

<sup>38</sup> *Dignitatis Humanae*, par. 2.



the *telos* and the framework of the relationship between church and state is the tool. Consequently, the second should be shaped, and restlessly re-shaped and adapted, to social changes in order to preserve an integral freedom of religion, which is the fundamental value to be protected.

As has been demonstrated,<sup>39</sup> historical experience has shown that insistence on State blindness towards religious diversity easily slips into marginalization of religion. One cannot easily assume that the more strictly is applied the principle of state neutrality, the more religious liberty will be enhanced. On the contrary, at some point insistence on rigid neutrality creates insensitivity and even 'subtle hostility' to religion.<sup>40</sup>

In fact, the problem with secular neutrality towards religions is that it is not a neutral principle, but rather a 'neutralizing' one.

Although many variations of secularism have been articulated and in fact secularism is a polisemic word, in the legal practice secularism boils down to strict 'neutrality', leading to insensitivity – if not distrust – towards the religious fact. To be more precise, different models of secularism have been distinguished, and the strict French interpretation is, in theory, considered an extreme interpretation of an idea that is susceptible to a wide range of modulations. Some speak of a dichotomy between open and protected secularism, others of positive and negative secularism, others of formal and substantive neutrality, for example.<sup>41</sup> Secularism is nowadays a polisemic word, the content of which may be very diverse. In so far as it tends to draw a line of distinction between the political power and the sphere of religion, secularism is healthy<sup>42</sup> and necessary. The problem with the idea of secularism arises because in practice secularism tends to conflate in 'neutrality' and when the model of 'neutral secularism' is followed, religion is always quarantined, marginalized or privatized. Strict neutrality is often presented as the rational,

<sup>39</sup> W. C. Durham Jr., Perspectives on Religious Liberty: a Comparative Framework, in J. D. van der Vyver and J. Witte jr (eds), *Religious Human Rights in Global Perspectives* (Martinus Nijhoff Publisher, The Hague, Boston, London, 1996) 1–44, at 24.

<sup>40</sup> J. Finnis, Religion and State, in *The Collected Essays of John Finnis*, forthcoming OUP Oxford 2011, vol. V, ch. 4, at 97 demonstrates that freedom of religion as freedom from coercion and violence in religious matters does not imply state neutrality: the two ideas are conceptually distinct.

<sup>41</sup> A. Barbera, *I sei volti della laicità*, in [www.forumcostituzionale.it](http://www.forumcostituzionale.it); D. Laycock, Formal, Substantive and Disaggregated Neutrality towards Religion, 39 *DePaul L. Rev.* 993 (1990).

<sup>42</sup> His Holiness Pope Benedict XVI has frequently referred to the necessity of a healthy and positive distinction between civil society and religion. See for an overview of all His intervention on this point G. Feliciani, *La laicità dello Stato negli insegnamenti di Benedetto XVI*, in [www.statoechnese.it](http://www.statoechnese.it).

scientific, enlightened position: a sort of common ground shared by all, religious or non religious people alike. But, if tested in historical experience, this enlightened secularism<sup>43</sup> has not proved to be scientific or neutral towards religions, but rather inimical to them, because it pretends to embody a rationalistic attitude to social life that contrasts with what is considered to be the ‘irrationality’ of the religious views.

Again the point had already been captured years ago:<sup>44</sup> under such a secularism...

...God is reduced to a more or less private option. He becomes a pathetic psychological consolation, or a museum piece. For a man who feels keenly the brevity of his life and the many tasks to be accomplished, such a God is not only useless, but even harmful: He is the ‘opiate of the people’. A society informed by such a mindset may not be atheistic formally, but it is atheistic *de facto*.

In truth, such a God is not only useless, not only harmful; He is not even God. A God who does not pertain to human activity, to his construction, to his path towards human destiny, is at best a waste of time; and in the end, a god of this sort should be dispensed with, eliminated. The formula, ‘If God does exist, He doesn’t matter’, bears within itself the logical conclusion, ‘God does not exist’.

The real enemy of authentic religiosity, in my view, is not so much atheism as it is the secularism outlined above. If the sacred is irrelevant to the concrete domain of our daily efforts, then man’s relationship with God is conceivable only as something totally subjective. Consequently, human reality is left to itself. Our problems and concerns are then at the mercy of sheerly human criteria, which, in practice, are readily subsumed by the powers that be.

In our postmodern societies, one can’t help pointing out the fallacy of secular neutrality: in a world like the western one, where the deepest cleavages are between believers and non believers – and not, as it is often assumed, between believers of different faiths – state secularism means in fact an endorsement of one of the options at stake,<sup>45</sup> precisely the secular one.

<sup>43</sup> J. Davison Hunter, *Culture Wars: The Struggle to Define America* (New York 1991).

<sup>44</sup> L. Giussani, *Religious awareness in modern man*, cit. ch. 3, p.

<sup>45</sup> See for example, W. Cole Durham and A. Dushku, Traditionalism, Secularism, and the Transformative Dimension of Religious Institutions, *Brigham Young Law Review* (1993), 421, at 463; J.H.H. Weiler, *Un’Europa Cristiana* (Milano Rizzoli 2003) at. 82 ff and his hearing before the Grand Chamber in the Lautsi case, on 30 June 2010 available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=870705&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA39864>.

The example of religious symbols is a telling one: religion is not forbidden, but its recognizable presence is forbidden in public spaces. However, a naked wall deprived of all symbols is not silent: it does take sides within competing visions of life. A State renouncing all religious symbols is no more impartial or neutral than a State that permits some specific symbols to be displayed. It suggests that a vision of life without God is the most respectable one. In the end, neutrality means privileging one vision of the world over other ones, pretending that this is neutrality.

Many other examples could be provided. Another terrain where marginalization of religion is becoming incontrovertible concerns religion classes in public schools.

In fact, the regulation of religion classes is following a trajectory, a kind of parabola, the starting point of which was the provision of mandatory classes of the majority religion in public schools; the intermediate step is the possibility of attending religious or ethical classes on a voluntary basis,<sup>46</sup> and the final end seems to be the abolition of all teaching concerning religion in European public schools.

The Grzelak case versus Poland is a good illustration of this trajectory. Nowadays, in Poland classes of religion are offered on demand. Parents or students can ask to be enrolled in a class of a religion that they prefer or a class of ethics. The classes of religious or ethical teaching are provided if a minimum number of students apply. So, religion is an optional subject and religion classes may refer to any religion or to ethics, depending on the students' preferences. The case of Grzelak concerned the problem of marks on official reports. The applicant complained that his report contained no mark corresponding to the line of religious teaching, because whereas he had requested a class of ethics, the school did not receive enough applications to provide the class. According to the plaintiff, in Poland, where the large majority of the population is Catholic, the absence of a mark for religious/ethics would be understood as an indication that he did not follow religious classes and consequently he was likely to be regarded as a person without religious beliefs. The Court held that 'the absence of a mark for religious/ethics...amounted to a form of unwarranted stigmatization of the applicant' and issued a finding of violation of art. 9 on freedom of religion.

<sup>46</sup> This was the rationale in ECHR, *Folgero v. Norway*, 29 June 2007, n° 15472, requiring Norway to concede student a full exemption from the teaching of KRL – Christianity, religion and Philosophy.

So, what should Polish schools do in order to comply with the decision of the Court? In my opinion there is no way out. Either all public schools are obliged to organize all sorts of religious or agnostic ethical classes that are requested by every single student, despite costs and financial burdens, or religion classes are bound to be abolished. All things considered the second option is the more likely.

The evolution of freedom of religion in a secular neutral context leads to the disappearance of religion.

In fact, secularism is not neutral towards religion; it is rather a neutralizing element of the religious presence in the public space. Sooner or later, maybe through incremental steps, secularism becomes inimical to religion. It might seem a paradox; but it is a paradox demonstrated by historical experience.

This is even more evident in the European context, where state action is pervasive in all spheres of social life. European secularism is much more than American non establishment, because of the different conception of state-society underneath:<sup>47</sup> a typical expression of the continental cumbersome state – a legacy of the Leviathan and of the Hegelian state – European secularism is one of the faces of the ‘pantheistic state’ to recall a famous expression of fr. Luigi Sturzo,<sup>48</sup> the other being confessionalism:

Lo stato laico, per conquistare la sua completa autonomia da ogni altro potere, si è andato orientando sempre più verso una specie di ‘confessionalismo’ proprio, al quale la Chiesa serve secondo i casi di contrapposto o di presupposto, di termine di lotta ovvero di elemento costruttivo.

Where public regulation of social life is more pervasive, the secular stance of the public institutions reduces the space of religious liberty: the cases recalled in the opening pages of this presentation are clear examples of that. In those cases, a detailed regulation of non discrimination and a multiplication of individual rights come to clash with the spaces of religious liberty, imposing cumbersome constraints on religious schools and religious based charity providers, for example. A *prima facie* neutral regulation becomes in practice a hostile religious one.

The paradox is that in Europe secularism tends to generate a confessionalisation of the State, be it ‘secular confessionalism’ or ‘religious confessionalism’. For this reason in the context of European secularism religion is gradually pushed back to the borders of social life, reduced to a private fact and above all reduced to a mere belief: one out of many beliefs that

<sup>47</sup> L. Diotallevi, *Una alternativa alla laicità* (Rubbettino, Soveria Mannelli, 2008); G. Dalla Torre, *Le laicità e la laicità*, in F. D’Agostino (ed), *Laicità cristiana* (Milano, 2007), 18.

<sup>48</sup> L. Sturzo, *Chiesa e Stato. Studio sociologico-storico* (Bologna, Zanichelli, 1958).

belong to the private sphere of the individual. Privacy, neutrality, non discrimination impinge upon freedom of religion to the point of assimilating it to one of the new rights under privacy.

## 8. Second Lautsi and beyond

The decision of the Grand Chamber on the crucifixes in Italian schools<sup>49</sup> brings a positive note to the grey landscape of freedom of religion in the secularist European context.

The message of the decision is clear: the presence of a religious symbol in a public building like a school does not necessarily infringe the freedom of religion of non believers nor that of other believers. This turn must not be underestimated: the European Court of Human Rights who in recent years has become famous all over the world for promoting French-style *laïcité* in public schools and public life, striking down Muslim headscarves and other religious symbols as contrary to the message of tolerance, respect for others, and equality and non-discrimination that a democratic society must maintain, in a case like *Lautsi* suggests a new policy that respects the rights of religious and secular groups alike to express their views, but allows governments to reflect democratically the traditional religious views of its majority. Freedom of religion does not necessarily require a 'wall of separation between church and State' – to recall a famous image of the US Supreme Court<sup>50</sup> – and we could add, neither does it require a white and naked wall in public buildings. This position brings something new.

Similarly, it is no exaggeration to remark the reasonableness of the Court argument that the mere display of the crucifix is not capable of affecting religious liberty of students, and that gives a great relevance to the educational context of Italian schools: it is the concrete analysis of the factual context that shows elements like the openness of the scholastic environment to other religions, the absence of any form of indoctrination or coercion or proselytizing tendency and the critical method of teaching, that induce the Court to conclude that no infringements of the rights protected by the Convention occurred. The shift from a 'Cartesian-like' syllogistic reasoning, to a broadened form of reasoning where context, facts, and experience have due place has made the difference.

<sup>49</sup> ECHR, Grand Chamber, 18 March 2011, *Lautsi v. Italy*, n° 30814/06.

<sup>50</sup> *Everson v Board of Education* 330 US 1 (1946). Starting from this decision the U.S. Supreme Court applied a strict Jeffersonian doctrine and dismantled the previous state legislation which instead endorsed a 'mild' separation.

Nevertheless, one cannot overlook that in the Court's reasoning old-fashioned elements of doctrine based on the idea of state neutrality occasionally emerge. In a way, the decision is important because it breaks the trend towards the identification of freedom of religion with state *laïcité*; but a new doctrine alternative to the old secularist interpretation of freedom of religion is still to be crafted. In fact, the decision of the Court was taken on the grounds of freedom of education (art. 2, Protocol n. 1 to the European Convention) rather than straightforwardly on the basis of freedom of religion (art. 9). This shift suggests that the Court has not been able to reverse the previous decision on the ground of freedom of religion: an alternative doctrine to *laïcité* is still missing.

Why is it so difficult to abandon secularism? I would like to highlight some cultural obstacles that make a re-conceptualization of freedom of religion difficult. Some of them come from the general legal doctrines and hamper the departure from the pivotal idea of neutrality: one of these is the reduction of equality to non discrimination, that cultivates the imperative of uniformity of treatment and neutrality of the State – as has been shown in the previous pages. Another is the reduction of religion to belief. Under the influence of the meta-value of privacy, religion is often reduced to its anemic ghost: it is treated as a simple matter of belief, thought, conscience and opinion and its capability of informing all aspects of human experience fades. Consequently, the specific characteristic of religion in social life are ignored.

In a more general sense, other obstacles derive from common bias against religions, like the shared idea that religions are inclined to violence,<sup>51</sup> both physical and moral violence, war and coercion; or the common opinion that religion belongs to the sphere of sentiment and irrationality<sup>52</sup> and in general is hardly compatible with the basic values of liberal democracies.<sup>53</sup>

<sup>51</sup> This bias has been recently confuted by W. Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (OUP, Oxford 2009).

<sup>52</sup> Here one can't help cheering the insistence of the Holy Father about the mutual interdependence of faith and reason. Just to mention one of his most famous interventions on this issue, see Lecture of the Holy Father, Aula Magna of the University of Regensburg, 12 September 2006, Faith, Reason and the University Memories and Reflections.

<sup>53</sup> Mc Crudden, *Multiculturalism, Freedom of Religion, Equality and the British Constitution*, University of Oxford Legal Research Paper Series, n° 72/2010, describing a post relativistic approach to multicultural societies, where all cultures should respect some basic liberal values.

All these, and many more factors cultivate distrust towards religion. And in a way secularism is the constitutional translation of distrust towards religion.

How to recover reciprocal trust, a benevolent attitude of State towards religion and above all a form of cooperation between State and Church, while preserving their autonomy and distinctiveness?

Overcoming the State distrust is crucial for the integrity of freedom of religion. As has been demonstrated, history shows that the best institutional regime for protecting freedom of religion is not secularism, but a model<sup>54</sup> based on a distinction of state and churches and yet retaining a benevolent attitude towards religion. A regime where religious peculiarities are not simply tolerated, but taken into consideration, accommodated, protected and supported, because they are valuable to the society. A regime where issues such as financial subsidies to churches, recognition of religion as part of the local and national culture, display of religious symbols, support to educational religious institutions and religious based charities, respect for dietary restrictions, holidays and all sort of special needs are taken into account by the state institutions.

Such a benevolent attitude and healthy cooperation between state and religion is a *conditio sine qua non* for freedom of religion. Better: it is a *conditio sine qua non* for freedom of public religion.<sup>55</sup> But such an approach can only ripen if religion is perceived as an essential ingredient for social flourishing. As some important social studies<sup>56</sup> show, it is necessary to prove that religion is crucial to thriving societies and peace and to human flourishing. Put slightly differently, a *favor religionis* can develop if 'religion is not a problem to be solved but a resource' – as Pope Benedict XVI said in Westminster Hall to the British leaders.<sup>57</sup>

Here a concurring responsibility is required.

On the one hand, a new understanding of the relationship between the state and religion is to be discussed and considered on the part of public institutions and legislatures. The social challenges of multi-religious societies call for a new sympathetic gaze towards religious realities. After all, many voices are saying that without religion in the public space, social life is impoverished.

<sup>54</sup> W. C. Durham jr., *Perspectives on Religious Liberty: a Comparative Framework*, cit.

<sup>55</sup> J. Witte, *Freedom of Public Religion*, 32 *Capital University Law Review* 499 (2004).

<sup>56</sup> I refer to the contribution of A.D. Hertzke, *Religious Freedom in the World Today: Paradox and Promise*, pp. 108–133 of this book.

<sup>57</sup> Pope Benedict's address to Politicians, Diplomats, Academics and Business Leaders Westminster Hall, City of Westminster, Friday, 17 September 2010.

On the other hand, a renewed self-understanding of religious life is equally necessary. Privatization of religion is not due only to bad legislation. As Joseph Weiler said a few years ago, Christians in Europe are in a ghetto: but there are internal walls as well as external ones to this ghetto. Sometimes religious people lock themselves into private rooms, so that legislation reducing religion to private belief reflects a western style religiosity, strictly separated from other dimensions of life.

In western countries, the 'wall of separation' had been built and is firmly established; and paradoxically enough it has been established with the co-operation of Christians themselves.

Interestingly, this problem is not new and had already been pointed out since the *Pacem in terris*, in 1963:

It is no less clear that today, in traditionally Christian nations, secular institutions, although demonstrating a high degree of scientific and technical perfection, and efficiency in achieving their respective ends, not infrequently are but slightly affected by Christian motivation or inspiration.

It is beyond question that in the creation of those institutions many contributed and continue to contribute who were believed to be and who consider themselves Christians; and without doubt, in part at least, they were and are. How does one explain this? It is Our opinion that the explanation is to be found in an inconsistency in their minds between religious belief and their action in the temporal sphere. It is necessary, therefore, that their interior unity be reestablished, and that in their temporal activity Faith should be present as a beacon to give light, and Charity as a force to give life.

How can we overcome the distrust between state and religion and its constitutional codification, which is the 'neutral secularism'?

Once again Pope Benedict XVI has indicated the way. In the address at the *Collège des Bernardins* in 2008<sup>58</sup> he has shown the contribution of religion to public life. He did not simply state that religion is valuable for social life; he has shown the truth of this statement with the example of the spiritual, cultural, social and economic reconstruction of the European continent in the Middle Ages, which spread incrementally starting from the monasteries.

... amid the great cultural upheaval resulting from migrations of peoples and the emerging new political configurations, the monasteries

<sup>58</sup> Meeting with representatives from the world of culture, address of His Holiness Benedict XVI, Collège des Bernardins, Friday 12 September 2008.



were the places where the treasures of ancient culture survived, and where at the same time a new culture slowly took shape out of the old. But how did it happen? What motivated men to come together to these places? What did they want? How did they live? First and foremost it must be frankly admitted straight away that it was not their intention to create a culture nor even to preserve a culture from the past. Their motivation was much more basic. Their goal was: *quaerere Deum*.

And in front of the *Sagrada Familia*, in Barcelona the Holy Father in November 2010<sup>59</sup> indicated the same method, in a different context:

In this place, Gaudí desired to unify that inspiration which came to him from the three books which nourished him as a man, as a believer and as an architect: the book of nature, the book of sacred Scripture and the book of the liturgy. [...] *In this he accomplished one of the most important tasks of our times: overcoming the division between human consciousness and Christian consciousness, between living in this temporal world and being open to eternal life, between the beauty of things and God as beauty.* Antoni Gaudí did this not with words but with stones, lines, planes, and points.

From a genuine search for God, small spots of renaissance and beauty once commenced, and still commence today; small spots that in the middle age eventually affected the whole continent; small spots that still may give birth to a renewed civilization.

<sup>59</sup> Holy Mass with Dedication of the *Sagrada Familia* and the Altar, Homily of the Holy Father, Barcelona, November 7, 2010. Emphasis added.

# FUNDAMENTALIST AND OTHER OBSTACLES TO RELIGIOUS TOLERATION

■ MALISE RUTHVEN

We live in troubled times. Religious conflict – or, to be more precise, conflicts to which religious labels have become attached – are causing devastation in many parts of the world. Inter-religious and inter-communal tensions have flared up not only in Egypt and Malaysia but also in Sudan, Nigeria, Turkey, Iran, Afghanistan, Bangladesh, and Indonesia. The resulting conflicts have varied from acts of discrimination, to forms of violence including individual assassinations and the destruction of villages, churches, schools, hospitals and mosques. Iraq and Pakistan have seen vicious sectarian attacks mainly directed at Shi'ite worshippers who are systematically targeted by suicide bombers. In Bahrain democratic protests by Shi'ites complaining about decades of repression under a minority Sunni regime have been brutally suppressed by the government with the aid of Saudi co-religionists. A few hundred kilometers to the west, in the Arab republic of Syria, protestors are shot by security forces commanded by a Shi'ite sectarian group – the so-called Alawites – who hold the levers of power.

In Egypt the Christian Coptic Community has been under systematic attack. During the strife that led to the fall of the Mubarak regime earlier this year, evidence was produced to support oppositionist claims that the attack on a church in Cairo was deliberately provoked by the authorities as part of a 'divide and rule' strategy aimed at sustaining an increasingly unpopular regime in power. Communal tensions may be exacerbated by government agencies, but they were not invented by them. At Nag Hamadi in Upper Egypt, at least seven people were killed when gunmen attacked a crowd of worshippers following the celebration of midnight mass on the Coptic New Year's eve in January 2010. The escalation of communal tensions in this town, (famous for the discovery in 1945 of texts dating from the second century CE that are shedding new light on Christian origins) were said to have been caused by the alleged rape of a Muslim girl by a Christian man. In this case government officials and religious leaders, including leader of the Muslim Brotherhood, the Shaikh al-Azhar and the Grand Mufti joined the Coptic Pope in condemning the atrocity. One year later, on January 6 2011, thousands of Muslims turned out for candle-lit vigils that served to protect Coptic worshippers celebrating mass by serving as human shields.

But government complicity also exists. In Pakistan Salmaan Taseer, the governor of the Punjab, who strongly opposed that country's blasphemy law, was assassinated by one of his own bodyguards in January this year. Unlike in Egypt it was the assassin, not the atrocity, that attracted public support. According to Ahmed Rashid, the well-known Pakistani journalist, five hundred lawyers signed up to defend Mumtaz Qadri, Taseer's alleged killer; but not a single registered Imam in the city of Lahore, which has 13 million people, was willing to read Taseer's funeral prayers, and his widow could not find a single lawyer to prosecute the killer. The blasphemy law, despite widespread recognition that it is manipulated to pursue personal claims or vendettas, remains on the statute book.<sup>1</sup>

Perhaps the most devastating example of recent conflicts involving religion – or, as I prefer to call it, religious labeling – has been Northern Nigeria where some 50,000 people have been reported killed in sectarian and ethnic violence since 1999.

Democracy was restored to Nigeria in May 1999 after years of autocratic military rule. In the North newly-elected parliaments with large Muslim majorities demanded 'restoration' of the Islamic Shari'a law, as applied in early colonial times. Restoration was described as the 'dividend from democracy'. A Shari'a-based penal code was introduced in Zamfara, Kano, Sokoto and nine other states or governorates. In colonial times Shari'a included the death penalty for Muslims who participated in 'pagan' – i.e. traditionalist – religious rites. A Muslim accused of murdering a Christian could be freed by the court if he swore his innocence on the Koran. Nigerian Muslims are defensive about outside criticism of Shari'a punishments.<sup>2</sup>

Thus the Southern Council for Islamic Affairs said in a statement: 'Islam and Shari'a are inseparable. No amount of black mail ... will stop Muslims from the pursuit of their fundamental human rights to practice their religions in full, without dictation, as to which aspect of their faith should or should not be observed'.<sup>3</sup>

The issue, of course, is highly controversial and contentious. In Muslim-majority states Muslim norms, such as sex segregation in schools and ban on alcohol are being imposed on Christians and other non-Muslims. Yet in

<sup>1</sup> John L. Esposito and Sheila L. Lalwani, Christians Under Siege. *Huffington Post* 27/1/11, accessed 12/4/11.

<sup>2</sup> Johannes Harnischfeger, *Democratization and Islamic Law. The Shari'a Conflict in Nigeria*, Frankfurt 2008, p. 13-41; 239-249.

<sup>3</sup> *Ibid.* p. 41.

the absence of a Supreme Court ruling declaring Shari'a constitutional, judges are reluctant to impose Shari'a penalties, such as amputation for theft. In 2007 the Baluchi State Shariah commission asked the newly elected governor to ratify 43 amputations and death penalties for adulteries, sodomy & c., passed by the State's Shari'a court since 2003. The issue is clearly subject to official embarrassment not least because Nigeria is, in theory at least, a fully secular state. Johannes Harnischfeger, a German academic, states that it is 'almost impossible to access court files, and the authorities do not provide reliable information'.<sup>4</sup>

Gunnar Weimann, a researcher attached to the German Embassy in Abuja<sup>5</sup> has identified a number of cases where floggings for sexual misdemeanors and amputations for theft have been carried out, but public embarrassment has also been a powerful restraining force. Three Nigerian women sentenced to death by stoning were acquitted on appeal after massive publicity campaigns. In the case of Safiyya Hussain, a widow accused of having a lover outside of marriage, in Spain alone six hundred thousand people signed an Amnesty International petition, Pope John Paul II urged Catholics to pray for her, while the mayors of Rome and Naples declared her an honorary citizen of their cities. Sentenced in October 2001, she was acquitted on appeal in March 2002.

The issue of Shari'a law in Nigeria is particularly problematic, as it is a religiously mixed society with significant minorities living in majority areas. While the Northern States are largely Muslim, there are substantial Christian minorities. The same goes for the mainly Christian south, where substantial numbers of Muslims are located. Authorities differ on the overall proportion of Christians and Muslims. According to the World Christian Encyclopedia Christians form an overall majority; but *The Economist* magazine and CIA put the Muslims ahead, with 50 per cent against 40 per cent of Christians (with the balance of ten per cent being animists or adherents of traditional religions). Harnischfeger sees religious populism as dangerous, not least because of the ethnic and social tensions it articulates.

What looks like a national conflict that splits the 140M Nigerians into two camps, appears, on close inspection, as a series of local conflicts in which very different actors are involved. In Kano and other cities of the far North, Christian migrants from the South, mostly

<sup>4</sup> *Ibid.* p. 35.

<sup>5</sup> Gunnar J. Weimann, *Islamic Criminal Law in Northern Nigeria: Politics, Religions, Judicial Practice*, University of Amsterdam Press 2010.

Igbo and Yoruba, have clashed with Muslim Hausa-Fulani who use the Islamization campaign to assert their ancestral rights over the economically successful 'settlers'.<sup>6</sup>

Further south, in the so-called Middle Belt, where Hausa-Fulani settlers compete with the indigenous non-Muslim population over the dwindling supply of land, calls for restoration of Shari'a amount to an assertion of political supremacy. 'In this context', Harnischfeger comments, 'religion is attractive not as a resource for peace, but as a means for mobilizing for violent conflict. Political Islam, with its claim to enforce religious laws, is well placed to mobilize for the defense of land and to assert political dominance'.<sup>7</sup>

Political Islam – or Islamism – is by definition political, so one should not be surprised that it can be seen to function as a faith capable of advancing the material interests of its adherents. But can such religious conflicts be reduced to competing claims over material resources that can theoretically at least be resolved by political means? A central difficulty, as I have pointed out elsewhere, is that conflicts over territorial resources couched in religious terms tend to be 'absolutized' or 'transcendentalized' since divine imperatives are deemed to be non-negotiable. An obvious case in point is the Arab-Israel dispute, where religiously-inspired rejectionists on both sides of the divide, elevate the historical quarrel between Israelis and Palestinians into a Manichean contest between the absolute values of good and evil. Under these circumstances political accommodation needs to be underpinned by an acceptance of 'toleration' that sincere believers may see as damaging spiritually, as imperiling their commitment to their faith.

Toleration is a problematic term. Religious tolerance has been described as 'the recognition of the relative and subjective right of error to existence ... A person who is tolerant in the domain of dogma resembles the botanist who cultivates in his experimental beds both edible plants and poisonous herbs as alike valuable growths, while a person intolerant of error may be compared to a market-gardener who allows only edible plants to grow, and eradicates noxious weeds'.<sup>8</sup> It is 'akin to patience, which also connotes an attitude of forbearance in the face of an evil'.<sup>9</sup> The Nigerian example, however, suggests that there are situations where the processes of toleration or the accommodation of religious differences may actually exacerbate religious conflict in a wider theatre.

<sup>6</sup> Harnischfeger, p. 37.

<sup>7</sup> *Ibid.* p. 239.

<sup>8</sup> *Catholic Encyclopedia* 1911, ed sv Toleration.

<sup>9</sup> *Ibid.*

The introduction of Shari'a, with the conspicuous application of the *hadd* (Koranic) penalties of stoning and amputation served as a unifying shibboleth for disparate Muslim groups that had long been divided historically. As Weimann demonstrates in his discussion of the famous 'Miss World' controversy that erupted in Nigeria in 2002, a *fatwa* (legal opinion) calling for the death of a young Christian journalist Isioma Daniel, for 'insulting' the Prophet Muhammad, though controversial because of its origin, produced a closing of Muslim ranks, exacerbating Christian-Muslim tensions.

In 2002 the annual Miss World pageant was scheduled to take place in Abuja, the Nigerian capital, as a Nigerian woman had won the previous contest, held in South Africa, in 1998. Muslims of all persuasions had made their objections known as the event, accompanied by massive publicity, was scheduled to take place during the final days of the sacred month of Ramadan. The crisis point came when Daniel published an article in *This Day* magazine which was seen to rile the Muslims for their puritanical attitudes.

The Muslims thought it was immoral to bring ninety-two women to Nigeria and ask them to revel in vanity. What would Mohammed think? In all honesty, he would probably have chosen a wife from one of them.<sup>10</sup>

Although the magazine and the journalist issued apologies that were widely carried by the Nigerian media, they failed to counter the news of the alleged slander to the Prophet carried by text messages and mobile phones, and uproar was inevitable. Mamuda Shinkafi, deputy governor of Zamfara state, made a public statement, subsequently described as a *fatwa*, comparing Isioma Daniel to Salman Rushdie, as someone whose blood it was legitimate to shed. 'It is binding on all Muslims wherever they are to consider the killing of the writer as a religious duty'. Non-Muslim intellectuals such as Nobel Laureate Wole Soyinka considered the statement an appeal for murder. Within the Muslim religious establishment there were deep divisions as several trained scholars doubted the authority of the deputy governor to issue a *fatwa*. His boss the governor of Zamfara State, Ahmad Sani, told the BBC that Shinkafi's *fatwa* was not a '*fatwa per se*' – he had been 'misquoted for simply trying to state the position of Islam as regards making derogatory remarks about the Prophet Mohammed. Therefore I can say that he did not pass a death sentence on Isioma'.<sup>11</sup>

Nevertheless the JNI – the Jamat Nasr al-Islam – one of the constituent bodies of the Nigeria Supreme Council for Islamic Affairs (NSCIA) with

<sup>10</sup> Weimann p. 150.

<sup>11</sup> *Ibid.* p. 154-5.

competence to issue fatwas – concluded after appointing a committee to study the matter, that Shinkafi's statement was an 'evident and unavoidable fatwa' and that Daniel had insulted the Prophet. Pardon was not acceptable and death unavoidable. However the death sentence must be carried out by an independent body appointed by the state. As Weimann comments, it was inconceivable that the secular Nigerian state would empower a group to carry out such a sentence, a factor that would have been clear to all the members of the committee: in this way the JN1 acceded to populist demands by affirming the validity of the 'fatwa', while subjecting its execution to conditions that would be impossible to fulfill.<sup>12</sup>

Weimann study shows that in this case, as in the divisive efforts to Islamize the law in the northern states, the Islamic establishment put unity before principle. At first the religious establishment demonstrated leadership by declaring that the Zamfara State government had no competence to issue fatwas. However their efforts to outflank populist politics were thwarted when more radical elements joined the campaign, questioning their prerogatives to interpret the Shari'a by issuing fatwas. In order to maintain their claims to be the voice of Nigerian Islam, they had to embrace the position of their critics.

Paradoxically in order to retain authority and safeguard the unity of Muslims, the Muslim religious establishment had to acquiesce in the demands of radical factions among its constituencies which challenged this very authority.<sup>13</sup>

The outcome of what might be called intra-Muslim ecumenism has been a radicalization of the discourse. As Weimann puts it

To avoid offending parts of their constituencies, they have tended to support, at least verbally, positions that satisfy the radical factions, while the subtleties of their formulations have been difficult to detect for outside observers.<sup>14</sup>

Members of the Muslim religious establishment who disagreed with the manner in which Islamic criminal law was introduced and initially implemented, were reluctant to voice their criticisms in public. In sum, they gave priority to maintaining the façade of Muslim unity and consensus over improving relations with Christian communities.

In effect, the agreement on mutual tolerance, conceived as a means to achieve Muslim unity in the face of an alleged Christian threat,

<sup>12</sup> *Ibid.* p. 155.

<sup>13</sup> *Ibid.* p. 168.

<sup>14</sup> *Ibid.* p. 169.

has made it impossible for religious leaders to contain more radical Muslim voices aiming at, or willingly accepting, further deterioration of inter-religious relations.<sup>15</sup>

The Nigerian crisis – and there are many similarities both with the Rushdie affair that preceded it and the Mohammed cartoons crisis that came after – gives us cause to question how we fashion our approach to ‘respect’ when we state that toleration means ‘mutual respect’ for each other’s religion. Religious polemic is part of the contemporary cultural landscape. Competing religious traditions rub shoulders in a way that occurred in the past, but not to the extent that happens in today’s media-saturated globalized world where, as Clifford Geertz once stated, ‘From no one no one will leave anyone else alone’.<sup>16</sup>

Fundamentalism – to use a problematic term – is a profoundly modern phenomenon, being the outcome of interactions between competing religious traditions and struggles within religious traditions. Fundamentalists, despite claims that are sometimes made about them, are not a monolithic group, and nor are they static. They are surprisingly shifting and adaptable. Since they make absolute claims about the supremacy of their own tradition, fundamentalists may seem constitutionally averse to compromise. In actuality the picture may be considerably more complex. Among American fundamentalists opposed to Darwinism, for example, one can observe a shifting of epistemological ground, from the ‘six-day creationism’ of the 1980s to the ‘intelligent design’ of today. Believers in the forthcoming apocalypse, known technically as pre-millennial dispensationalists, have quietly shifted from the literalistic apocalypticism described in of the Scofield Reference Bible (first published in 1909, with numerous subsequent editions), towards the fictionalized ‘end time’ scenarios described in the hugely popular *Left-Behind* series of novels recently heading the best-seller lists in America, with sales exceeding 70 million copies.<sup>17</sup> Writing biblical fiction – and reading it – may be a way of deliteralizing textual hermeneutics without acknowledging that the ‘end times’ are not going to happen just yet.

<sup>15</sup> *Ibid.*

<sup>16</sup> Cited in Martin Marty, *The Fundamentals of Fundamentalism*, in Lawrence Kaplan (ed.) *Fundamentalism in Comparative Perspective* (Amherst MA 1992) p. 18.

<sup>17</sup> *Left Behind* is a series of 16 best-selling novels – named after the first in the series – by Tim LaHaye and Jerry Jenkins dealing with the Christian dispensationalist view of the end of the world. The series has yielded at least three action thriller movies and several videogames built around theme of the rise of the Antichrist. In 2005 *USA Today* reported that sales of the original novel exceeded 8 million with 62 million copies of the related titles. Source: *Wikipedia* sv ‘Left Behind’; *USA Today* 28/02/05 accessed 17/4/11.



Indeed it may be in the United States, the country that gave birth to 'fundamentalism' in its modern forms, that the best approach towards addressing religious conflict may be found. The post-Westphalian state that emerged from the European wars of religion finds its most completed and formalized expression in the US system of church-state separation. The US has seen a bitter civil war, but very few killings in the name of religion.

How do we accommodate competing religious absolutisms? Arguably church-state separation de-absolutizes religion by maintaining the neutrality of the state. This may be easier in the New World than the old one, because the experience of migration canonized by history inculcates a sense of identity that is more open to diversity and change than are old world religious legacies. One may argue, with American fundamentalists, that the United States was founded as a Christian, specifically protestant, nation, and that the 'Wall of Separation' between church and state guaranteed by the First Amendment to the Constitution does not mean that the state whose currency bears the legend 'In God We Trust', is atheist or even secular in the fullest sense of the word. According to US constitutional doctrine the state merely maintains a posture of neutrality towards different churches or denominations, a category progressively extended by Supreme Court rulings to embrace Jews, Muslims and other non-Christians, including 'secular humanists' or non-believers. However the pluralistic assumptions of American Protestantism during the colonial period, and the evangelical competition between rival sects, have tended to de-couple religion from personal or group identities (though exceptions can be made for Mormonism, the most successful new religion to have originated in North America, and for Judaism, with its strong sense of community cohesion). According to a 1985 survey, one in three Americans had switched from the faith in which they had been raised, compared with one person in 25 thirty years previously. In the intervening period the population had not only become more religiously mobile, but the denominations had made it easier for people to switch.<sup>18</sup> Indeed, in comparison with the old world, including Europe, 'denominational switching' is a compelling fact of social and religious life, telling us that for a majority of Americans religion is a matter of choice.

This may be formally in line with the rights of religious freedom enshrined in the UN charter, but the reality is that much of the Old World honors religious freedom in the breach.

<sup>18</sup> Robert Wuthnow, *The Restructuring of American Religion: Society and Faith Since World War II*, Princeton 1988, p. 88.

The glue, I would suggest, that ties most ‘old worlders’ to the religions of their forefathers is less the voluntarism of choice than the accumulated habits of the centuries in which personal and group identities are forged. The Dutch sociologist Hans Mol sees the ‘sacralization of identity’ as a phenomenon that ‘produces immunity against persuasions similar to the biological immunization process’. ‘Sacralization’ he argues ‘is the inevitable process that safeguards identity when it is endangered by the disadvantages of the infinite adaptability of symbol-systems’.<sup>19</sup> In the New World, one might suggest, ubiquitous symbol-systems such as the McDonald arches, the almighty dollar and the American flag (the desecration of which is regarded as an act of sacrilege) may weaken the attachment to older tokens of religiosity or religious identity that serve as identity-markers in the Old. In Mol’s formulation, the process of sacralization is Janus-faced in that it can either obstruct, or legitimate change. Mol’s view of sacralization is much more fluid and flexible than that of Emile Durkheim, who made an absolute distinction between the sacred and the profane.

This is a complex area of inquiry that cannot be fully addressed in this paper. However few social scientists would deny that group identities are socially constructed and interactive, or that they are often, if not invariably, formed in contradistinction to a concept of ‘the Other’. I write as post-Christian Irish-born protestant, raised partly in the republican south where protestants have been a dwindling minority for the better part of a century. As Marianne Elliott reminds us, Irish Protestantism was structured around the paranoid fear of ‘popery’ long after the British Isles had ceased to face any major strategic threat from Catholic Europe.<sup>20</sup> Hatred of Catholicism was enshrined in protestant hermeneutics: the Pope was the anti-Christ of the Book of Revelation. Rome was the ‘Whore of Babylon’. Prejudice was frozen in time, like some vicious insect suspended in amber, yet readily provoked into life. Instructions given to his clergy by the Protestant Archbishop of Armagh in 1745 encapsulated a theme that would endure for at least two centuries:

You are to raise in your people a religious abhorrence of the Popish government and polity for I can never be brought to all Popery in the gross a religion ... Their absurd doctrines ... their political government ... [make] it impossible for them to give any security of their being good governors, or good subjects in a Protestant kingdom.<sup>21</sup>

<sup>19</sup> Hans Mol, *Identity and the Sacred: A sketch for a new social-scientific theory of religion*, Oxford 1976, p 5.

<sup>20</sup> Marianne Elliott, *When God Took Sides: Religion and Identity in Ireland – Unfinished History*, Oxford 2009.

<sup>21</sup> *Ibid.* p. 54.

A similar message was conveyed by the Protestant leader, Pastor Ian Paisley, in a statement to the European Parliament during a papal visit to Ireland in 1988:

There is no difference between the Europe of today and the Europe in Reformation times. The Hapsburgs are still lusting after protestant blood. They are still the same as they were in the days of Luther.<sup>22</sup>

These are not just matters of rhetoric. There were consequences for human life and safety. The most recent cycle of what Irish people on both sides of the border choose to call the Troubles began in 1969 when Ulster Catholics, and some Protestants, inspired by the American civil rights movement began demanding their own civil rights in peaceful protests not unlike those we are witnessing in the Arab world today. Instead of seeing this as a back-handed compliment to the British state where a new generation was beginning to seek its destiny, rather than looking to the republican south, the all-Protestant 'B-Special' militia reacted with violence. Protestants would see in the demonstrations the all-too-familiar sign of a popish plot, orchestrated by the Catholic church: 'Rome never changes' proclaimed the *Loyalist News*. 'One word from their Cardinal would have ended the violence, the responsibility lies at the door of the papist Hierarchy, the Red Robes are [Bishop] Conway's and they drip with innocent blood'.<sup>23</sup>

Protestant mythology is rich in martyrdom, dwelling on the St Bartholomew's Day massacres of 5,000 Huguenots in France as if it were a recent event or on the troubles of the 1680s when Protestants suffered during the reign of the Catholic King James II. The massacre of Catholics at Drogheda by Oliver Cromwell in 1649 when 2,000 mainly unarmed Catholics were murdered in cold blood, including hundreds who had taken refuge in a church, do not feature in Protestant memory. The same selectivity and focus on victimhood applies equally on the other side. The writer Colm Toibin, brought up in Catholic Enniscorthy, grew up without ever learning that during Ireland's 'Year of Liberty' in 1798 when the whole country (including Protestant dissenters) rebelled against Britain, a massacre took place at nearby Scullabogue, where – as Toibin quietly puts it 'our side took a large number of Protestant men, women and children, put them in a barn and burned them to death'.<sup>24</sup>

One might suggest that toleration – like confession, should begin with acknowledgement of the crimes of one's own tradition – a discipline that

<sup>22</sup> *Ibid.*, p. 120.

<sup>23</sup> *Ibid.*, p. 89.

<sup>24</sup> Colm Toibin, *The Sign of the Cross – Travels in Catholic Europe*, London 1994, p. 290.

could subvert the Manichean fear of the 'Other'. Elliott says that it is only recently that 'Protestant church leaders have been prepared to talk publicly about the anti-popery at the heart of their theology'.<sup>25</sup> The cultivation of victimhood serves to perpetuate sectarian attitudes, fusing with the ethnic, nationalist or ideological drivers.

The religious component that serves the sense of victimhood – or anticipated victimhood – relates less to theological issues of belief in a deity or deities, than to the manner in which religious teachings are transmitted by means of highly routinized ritual processes. As Harvey Whitehouse observes, many routinized religious are successful at holding on to their followers through a variety of mechanisms, including supernatural sanctions (such as eternal damnation) and, more positively, incentives (such as eternal life and salvation). Of course, the power of these mechanisms depends on people believing the religious teachings. In order for people to believe in a set of doctrines, these doctrines have to be cast in a highly persuasive fashion ... Routinized religions tend to be associated with highly developed forms of rhetoric and logically integrated theology founded on absolute propositions that cannot be falsified. All of this is commonly illustrated by poignant narratives that can easily be related to personal experience.<sup>26</sup>

Poignant narratives – often reproducing memories of victimhood or danger – invite our sympathies. Acts of brutality, cruelty and injustice, when ritualized or reproduced in ritualized texts, are invariably committed by 'others'. The Irish essayist, Hubert Butler, caused the Papal Nuncio to walk out of a meeting in a famous Dublin hotel, when he challenged him for speaking only of the mistreatment of Catholics by communists in Eastern Europe, without reference to Catholic massacres of Serbs and forced conversions in Croatia during the Second World War. Butler was ostracized in his home town of Kilkenny, because, as his biographer put it, 'he had upset a delicate balance in whereby Catholics generously affirmed the principle of toleration so long as Protestants ensured its actual practice remained unnecessary. By voicing his dissent publicly on such a sensitive topic, Butler had put an end to this charade, leaving Catholics sounding curiously defensive even as they spoke of how offended they were'.<sup>27</sup>

<sup>25</sup> Elliott p. 240.

<sup>26</sup> Harvey Whitehouse, *Modes of Religiosity: A cognitive theory of religious transmission*, Lanham MD 2004, p. 67.

<sup>27</sup> Elliott p. 233.

As Elliott points out, it has been the traditional propensity of Irish Catholics and Protestants ‘to look for insults and feel satisfied at their prejudices being confirmed when they apparently found them’.<sup>28</sup> The same mentality, I would suggest, can be found among Jews and Muslims. Holocaust memory, enshrined in museums, perpetuates a sense of victimhood for a group of peoples whose actual situation has changed from being the oppressed to becoming oppressors. The Orange marches, commemorating the landmark historical events that guaranteed protestant survival in north-eastern Ireland, perpetuate the memory of a threat that disappeared more than three centuries ago. Supposed ‘insults’ to the prophet Muhammad, suggested by the Danish cartoons or passages in a highly complex literary novel, conferred the dignity of victimhood on disparate groups of Muslims in Europe seeking patronage from the wider, and sometimes wealthier, Muslim *umma*.<sup>29</sup>

The sense of victimhood, cultivated but also repressed, can become a powerful revolutionary force, but also a highly destructive one, especially when violence is directed towards an alienated ‘other’, where mirror neurons in the mind that engender empathy are suppressed or overtaken by notions of disgust.

What might be called ‘othering’ may also be effected through rhetorical tropes, gradually transformed into fixed assumptions. As Susan Greenfield, one of Britain’s leading neuroscientists, explains ‘disgust is a biological defense against things that harm the body. It has nothing to do with anger or fighting something. It’s preserving your body against contamination’.<sup>30</sup>

Greenfield points out that the language Hitler used in *Mein Kampf* is pseudo-medical rather than rooted in rage: Jews are parasitic aliens, like viruses, that infect and endanger the purity of the Aryan race. As Hitler had it the wandering Jew is not a nomad, who has some noble characteristics – he ‘has never been a nomad, but always a parasite, battering on to the substance of others ... He is and remains a parasite, a sponger who, like a pernicious bacillus, spreads over wider and wider areas according as some favourable area attract him’.<sup>31</sup>

In condemning Nazis and anti-Semites for their fastidious disdain of the Jewish ‘other’, it is all too easy to overlook the extent to which similar

<sup>28</sup> *Ibid.*

<sup>29</sup> Jytte Klausen, *The Cartoons that Shook the World*, New Haven 2009; Malise Ruthven, *Why are the Muhammad Cartoons Still Inciting Violence?*, *New York Review* blog 9/2/11.

<sup>30</sup> Professor Baroness Greenfield: author’s interview, Oxford 28/2/11.

<sup>31</sup> Adolf Hitler, *Mein Kampf*, tr James Murphy, London 1939, p. 255.

rhetorical tropes, embedded in popular language, have infected less obviously discredited *religious* attitudes. Elliott suggests, somewhat mischievously, that there is a long history connecting one early 19<sup>th</sup> century Irish protestant landowner's descriptions of Catholic as 'varmin' with Unionist Prime Minister David Trimble's outburst in 2000 that that Sinn Fein needed to be 'house-trained'.<sup>32</sup> But there is substance underpinning her point: she states that when Catholics moved into urban areas, Protestants moved out 'as much from the old fear of 'pollution' as for religious reasons.<sup>33</sup>

The association of dirt with the Irish goes back – at least – to the Elizabethan conquest and the early protestant plantations. Geoffrey Keating's *History of Ireland* (1634) describes the Irish as a 'filthy people wallowing in vice'.<sup>34</sup> In the 20<sup>th</sup> century Unionist propaganda depicted the nationalist quarter of Belfast as 'Microbe Street, its sub-tenants emptying chamber-pots into infested streets below'.<sup>35</sup> When loyalists demonstrated at the opening of a branch of a southern chain store in the mainly protestant town of Portadown in 1998 they threw maggots over the merchandise to dramatize the dangers of Catholic infection.<sup>36</sup> In the late 20<sup>th</sup> century Catholics were routinely described at DUP (Democrat Unionist Party) meetings as 'greedy pigs wallowing in muck, taking family allowances and government grants and always demanding more'.<sup>37</sup>

In *Purity and Danger*, her masterly study of pollution fears, the anthropologist Mary Douglas suggests that the pollution rules that define or draw boundaries around many religious activities are actually substitutes for morality, for in contrast to moral rules, they are unequivocal.

They do not depend on intention or a nice balancing of rights and duties. The only material question is whether a forbidden contact has taken place or not. If pollution dangers were placed strategically along the crucial points in the moral code, they could theoretically reinforce it. However, such a strategic distribution of pollution rules is impossible, since the moral code by its nature can never be reduced to something simple, hard and fast.<sup>38</sup>

<sup>32</sup> *Irish Times*, May 29 2000, cited in Elliott p. 15.

<sup>33</sup> Elliott p. 15.

<sup>34</sup> *Ibid.* p. 188.

<sup>35</sup> *Ibid.* p. 192.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.* p. 193.

<sup>38</sup> Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo*, London 1966/1984, p. 130.

Pollution taboos maintain the condition of purity, but as Douglas suggests purity can be a deadening concept. It 'is the enemy of change, ambiguity and compromise'.<sup>39</sup> She cites, with approval, Jean-Paul Sartre's observation that anti-Semitism is rooted in the quest for purity:

It is simply the old yearning for impermeability ... there are people who are attracted to the permanence of stone. They would like to be solid and impenetrable, they do not want change, for who knows what change might bring? ... It is as if their own existence were permanently in suspense.<sup>40</sup>

This is not to argue that concepts of purity are always deadening, or that purity is dangerous in itself. The condition of ritual purity that some religions demand – for example in connection with the Islamic pilgrimage, or after sexual activity – may be psychologically liberating, reinforcing emotional experience by linking it with the divine idea of purity. The problem with purity lies in its opposite. The notion that infidels, aliens and in some cases women are unclean and therefore dangerous can engender postures similar to those described above.

In her study of sexuality in modern Iran Janet Afary describes the inhibiting effects born of the 'dangers threatening the body'<sup>41</sup> affecting young women, as well as the traumatic effects of unveiling to which women were exposed under the modernizing reforms of the Pahlavis:

Unveiling and also modern clothing for women exposed believers to ritual pollution and possible damnation in the afterlife – contributing mightily to antagonism toward gender reforms on the part of the old middle classes.<sup>42</sup>

The consequence was a society living under what the philosopher Daryush Shayegan has called a condition of 'cultural schizophrenia':<sup>43</sup> as Afary explains with regard to the *bazaaris* or traditional urban trading classes in Iran,

modernity instituted a double life for pious Muslims. Outwardly they behaved as modern citizens of the state, ignoring religious hierarchies and engaging not just in business and trade with women and non-Muslims, as they had always done, but also mingled socially, shaking hands and sharing tea or meals with them. Inwardly, many *bazaaris*

<sup>39</sup> *Ibid.* p. 162.

<sup>40</sup> *Ibid.*

<sup>41</sup> Janet Afary, *Sexual Politics in Modern Iran*, Cambridge 2009, p. 26.

<sup>42</sup> *Ibid.* p. 152.

<sup>43</sup> Daryush Shayegan, *Cultural Schizophrenia: Islamic Societies Confronting the West*, trans. John Howe, London 1992.

harboured a constant sense of anxiety since they continued to believe that a pious Shi'i Muslim who ignored the proper rituals of purification after encounters with *najes* (polluted) individuals had 'nullified' his prayers and supplications to God and the Imams.<sup>44</sup>

One can read the Islamic revolution that erupted in Iran in 1979, in part, as a response to ritual pollution, a reaction against personal defilement. The consequences are beyond the range of this paper – but it is worth noting that ritual purity now rules officially in the Islamic Republic, with socially awkward results. A Canadian friend (of Shi'ite origin) who has a diplomatic post in the Kyrgyz capital of Bishkek tells me that neither of the two Iranian ambassadors who have been there during her tenure will shake her hand. One, she says, seemed a 'bit uncomfortable' – the other, who she knows quite well and she is friendly with his wife, has sent message explaining that he cannot be seen to be shaking her hand 'for diplomatic reasons'.<sup>45</sup>

Religious intolerance, I venture to suggest, is not so much about differences of belief as about manifestations of customs or social habits that are the outcome of those beliefs. Theological differences – about God, or the Virgin, the Real Presence, the divine mission of Muhammad, the docetic Christology of the Qur'an, the inheritance of Ali ibn abi Talib or the martyrdom of the Imam Hussein – are not the reasons that people indulge in murderous behaviour towards their neighbours or 'intimate enemies'. Religious conflicts, between Catholics and Protestants, Sunnis and Shias, Hindus and Muslims, are best seen as 'turf wars' between parties over resources and rights and the less tangible, but not of itself theological, issue of human 'respect'. Threats were made against the life of Salman Rushdie, author of *The Satanic Verses* and Kurt Westermaark, the Danish cartoonist who depicted Muhammad with a bomb-shaped turban, not because they may or may not be 'non-believers', but because they were deemed to have insulted Muslims by violating what might be called two of their sacred icons: the aniconic image of the Prophet and the integrity of the inerrant Qur'an. One could even extend this notion to the September 11 attacks on America – which were motivated, in part, by Bin Laden's accusation that holy Islamic soil was being violated by the presence of infidel US troops.

The defence of the sacred can be expressed territorially, iconically, or even sartorially – when the idea of the sacred is configured around women's clothing, because sexual activity is deemed to have mystical overtones. But

<sup>44</sup> Afary p. 150.

<sup>45</sup> Personal communication Doha, Qatar 25/11/10.



it is too simplistic to argue that conflicts arising from clashes over the contested symbols that represent the sacred, are necessarily motivated by questions of faith or belief. The more problematic issue is the way that sacred symbols become the bearers of identity, both personal and group identity.

In her book *ID – the Quest for Identity in the 21<sup>st</sup> Century* Greenfield stresses the importance of narrative in making sense of experience. For the neuroscientist, she argues, the

old dualism of ‘mental’ and physical, indeed of ‘mind’ and ‘brain’ is as unhelpful as it is misleading. The mind, far from being some airy-fairy philosophical alternative to the biological squalor of the physical brain, IS the physical brain – more specifically the personalized connectivity of the otherwise generic brain.<sup>46</sup>

After describing the extreme plasticity of the infant brain she stresses the importance of the pruning of synapses and connections in the construction of individual identity:

Many of the haphazard experiences, the deluge of disconnected events that were the hallmark of our early years, are ‘forgotten’ as the synapses that subserved them are pruned away in favour of a clear, connected, conceptual framework for how we see ourselves, the rest of the world and our life story as a ‘connected chain’: a narrative.<sup>47</sup>

Thus far, I would guess, her description would be acceptable to most of her colleagues in the field. More controversially she makes interesting structural parallels between the development of individual and group identities, and between the growth of the individual and that of the organization.

<b>SIMILARITIES BETWEEN BRAINS AND SOCIETIES</b>	
<b>Brain region</b>	<b>Culture/tribe/group</b>
Distinct, large structure constituted from nested hierarchy of cells-synapses-networks	Distinct, large structure constituted from nested hierarchy of networks
Quasi-permanent, but can be modified by large-scale event (eg stroke)	Quasi-permanent, but can be modified by occasional large-scale event (eg tsunami, strike, revolution)
Together make up whole brain	Together make up global society

<sup>46</sup> Susan Greenfield, *ID – The Quest for Identity in the 21<sup>st</sup> Century*, London 2008, p. 59.

<sup>47</sup> *Ibid.*

<b>SIMILARITIES IN THE DEVELOPMENT OF IDENTITY</b>	
<b>In the mind...</b>	<b>In the organization...</b>
Neurons become increasingly specialized as network grows ... and more resistant to change in general function	People become increasingly specialised as network grows ... and more resistant to change in general function
Supernumerary connections atrophy via under-use	Friendships/non-essential posts fade/redundant when not active/needed
Transition from omnipotence of external influences to interaction with environment	Transition from omnipotence of external (eg market) forces to interaction with inner resources
Balance of network-environment interaction constantly shifting	Balance of internal-external forces constantly shifting
A unique identity of a brain evolves into a mind	Organizations evolves a unique identity

I was impressed by these parallels and asked Professor Greenfield if she had empirical data to support her idea of structural parallels between individual brain development and that of organizations. Her answer was problematic, but nonetheless interesting:

So far as I know, I'm the only person who has come up with this. Unlike many scientists I talk very much to the private sector and to companies I know the kind of language they enjoy and like – so I'm very comfortable looking for analogies – the average neuroscientist thinks you're mad if you said – 'Can you talk parallels between brain cells and people?' And they would say, 'Of course not. Brain cells are brain cells and persons are persons'. Scientists are very literal in the way they see the world – they are not used to metaphor.<sup>48</sup>

Metaphors, she pointed out, elude young children and people suffering from schizophrenia. Yet they are absolutely crucial to our understanding of language. As Julian Jaynes, another scientist who, like Greenfield, had a habit of straying outside his chosen field – psychology – into the world of classical literature, metaphor is fundamental to language and hence to the way we think as adults.

Metaphor is not a mere trick of language, as it is so often slighted in old schoolbooks on composition; it is the very constitutive ground

<sup>48</sup> Professor Baroness Greenfield: author's interview, Oxford 28/2/11.

of language ... It is by metaphor that language grows ... In early times, language and its referents climbed up from the concrete to the abstract on the steps of metaphors, even, we may say, created the abstract on the basis of metaphors.<sup>49</sup>

The same applies, a fortiori, to religions. All religions approach the divine by constructing narratives whose meanings are approached via metaphor. The events recorded in religious narratives, whether they occurred in actuality, or merely in human minds or memories, acquire their symbolic charge, their organizing power, not because they refer to actual events (such as the Hebrew sojourn in Egypt, or the battles of Muhammad and his Companions, for which there may be no archaeological evidence) but because through a process of reproduction and routinization they confer collective identity on the groups that rehearse, celebrate and sometimes seek to replicate them.

A similar point was forcefully made by Abd al-Karim Soroush a reformist Islamic thinker from within the Shi'i tradition at a discussion I recently attended at Yale University. In terms that are not incompatible to the passage already cited from Mary Douglas, Soroush argued that a significant portion of the books of *fiqh* (jurisprudence) derived from Islamic Shari'a law concerns the maintenance of boundaries or the collective identity of the *umma* – the Muslims community. Such regulations, he argued, were not about ethics, but about maintaining the distinct identity that the Prophet Muhammad wanted for his community. These identity-strengthening measures included the highly controversial law of apostasy that makes conversion to Islam a one-way street: in some Muslim majority countries, apostasizing from Islam is still punishable by death. Issues of identity, argues Soroush, have nothing to do with the truth or falsity of religious ideas.<sup>50</sup>

A noted Harvard scholar of religion, Wilfred Cantwell Smith, uses the term 'reification' to describe the process by which religious ideas are externalized and made accessible to outside observers. In defining religion he cites the Catholic Encyclopedia (in a definition that should encompass all the monotheistic faiths). 'Religion ... means the voluntary subjection of oneself to God'.<sup>51</sup> Smith's argument, however, is best put negatively: 'a religious understanding of the world does not necessarily imply that there is a generic religious truth or a religious system that can be formulated and ex-

<sup>49</sup> Julian Jaynes, *The Origin of Consciousness in the Breakdown of the Bicameral Mind*, Boston 1977, p. 48-51

<sup>50</sup> Abd al-Karim Soroush, Round Table discussion, Yale University 4/4/11.

<sup>51</sup> Wilfred Cantwell Smith, *The Meaning and End of Religion*, London 1962, p. 113.

ternalized into an observable pattern theoretically abstractible from the persons who live it'.<sup>52</sup>

His book, first published in 1962, is a classic of religious studies. But it is slender on the construction of group identities. Reification is the process by which the subjectivity of feeling (the sense of transcendence, the belief that ordinary activities have cosmic resonance) acquires external configurations. Smith understands that these configurations can be observed by outsiders, but not the inner experience itself. According to Smith reification is a gradual process: it is 'the preaching of a vision, the emergence of followers, the organization of a community, the positing of an intellectual idea of that community, the definition of the actual pattern of its institutions'.<sup>53</sup> These external configurations, I would suggest, can be highly problematic because group identities formulated through collective narratives – and forged into the synaptic configurations of individual human brains – are often predicated on heroic struggles against the evil 'Other'. 'The God of other religions is always an idol', as Emile Brunner put it.<sup>54</sup> Jews – and indeed Mormons – require 'gentiles' – to sustain their group identities (a predicament that Philip Roth exploited, brilliantly and playfully, in *Portnoy's Complaint*).<sup>55</sup>

Every August Orange Ulstermen solemnly re-enact the closing of the Gates of Londonderry against the forces of James II; on July 12<sup>th</sup> they march to commemorate their the victory over what they regard as Popish superstition at the Battle of the Boyne in 1690. Needless to say they appear oblivious of the inconvenient historical fact, that at that particularly juncture, Pope Alexander VIII was supporting a European coalition that included the forces of William of Orange. It was the Pope who sung *Tē Deums* after the victory of the protestant forces of King William.

Toleration obviously requires recognition of diversity and pluralism, as well as the value and legitimacy of personal religious experience. But if charity begins at home, so does toleration. Its beginnings must lie in the recognition that the narratives that serve to confer identities on persons or groups are necessary for personal or group development. They are not scientific truths subject to disconfirmation. Religions – with their truth claims – are vital to human cultures. We can begin to look more generously at the group identities of others if we recognize the arbitrary and ephemeral configurations underpinning our own.

<sup>52</sup> *Ibid.*, p. 57.

<sup>53</sup> *Ibid.*, p. 67.

<sup>54</sup> *Ibid.*, p. 140.

<sup>55</sup> Philip Roth, *Portnoy's Complaint*, London 1969.

- 2. Creating an atmosphere of openness and respect

# WHAT CAN THE SOCIAL SCIENCES TEACH US ABOUT THE RELATIONSHIPS BETWEEN CULTURAL IDENTITY, RELIGIOUS IDENTITY, AND RELIGIOUS FREEDOM?

■ ROBERTO CIPRIANI

## 1. Premise

Every human being who comes into the world finds myriad religious options, established over time within different territorial and cultural contexts already waiting for him or her. The pre-existence of these options is, to a large extent, also their strong point, consisting as it does in a heritage handed down from generation to generation almost without interruption. As centuries and millennia pass, we may find in them signs of decline or growth due to particular circumstances, but it is unlikely that a religion which has been sufficiently institutionalised will suddenly lose its consistency or its appeal. People and organizations, beliefs and rites, values and symbols, traditions and acquisitions are capable of standing the test of the most drastic changes though they may also alter in the face of minor events. Thanks to this, in the course of history, in the various societal contexts of the north, the south, the east and the west, the salient features of religions have become consolidated and remain, as a whole, a more or less important reference point for millions of individuals as well as for more restricted groups of people.

## 2. The hereditary process

The transmission of ideals, norms and values from one generation to another within the same society, is a hereditary process which does not occur simply upon the death of one's predecessors but takes shape much earlier, evolving over the years and decades, very slowly, minute by minute, step by step, without ostentatious and/or extravagant leaps. Metaphorically speaking it might be said to be a gradual distillation which takes place over a considerable period of time and the decantation of which is as gentle and almost as imperceptible as drops of water which will eventually wear out the hardest of rocks. This transition, moreover, has a typical connotation in that it is global, not fragmented and, at least tendentially, systemic in its organic unity and completeness. Parents pass on to their children what they in turn

have been taught by those who are now their children's grandparents and the progenitors of contemporary educators and inculcators of culture.

Initially, the impact of the cultural inheritance of adults may be mild, even soft, but as young people develop so too does their spirit of criticism which questions the meaning of everything. Subsequently there may be estrangement from acquired attitudes and behavioural models, yet, a trace of them persists somewhat like a Karst process, unexpressed, yet ever present. An overflow of inherited values may occur at a later stage, at the least predictable moments or on the most problematic occasions when the very value and meaning of existence is called into play.

It is unlikely that a patrimony of values be partial or segmented in form. In short, a set of values does not break up into a fragmented set of disjointed events or interventions but enjoys a basic unifying strength of its own. Hence, no one value is an isolated 'bequest' limited only to its specific sphere, but each one belongs to a coherent set capable of containing multiple principles, of providing guidelines and specifically targeted aims. It is precisely this interconnection between values that seems to represent the effective solution in that it is capable of directing the actions of the social individual in a tendentially uniform way.

Obviously, as time passes, new choices and actions present themselves so that individuals may put aside certain elements and attribute importance to others as life proceeds. Rarely does one's received inheritance remain identical to itself never waning never waxing. What is more, one's inheritance is not always transmitted in its entirety, intact in every detail, but tends to mature within a given cultural context, to replicate the tendencies of the past, the same traditions as those of an earlier age and, basically, the same essential values. Its global comprehensiveness is, likewise, a guarantee of its greater holding power compared to other more fragmentary processes.

Succession in inheritance does not simply mean making inspiring principles and behavioural patterns work; it also implies the transmission of the means by which to perform the role of inculcator of culture-education-training. Therefore, passing the baton in a hypothetical relay race of life involves both passing on a set of values and assigning a responsible role for retransmission of one heritage to a succession of future generations. The multi-century sequence of a cultural legacy, handed down from generation to generation, entails, in fact, implicit duties rather than the right to ensure the continuity of a common reference frame capable of providing for the identification and collective needs of future members of the community. In this respect Durkheim (1912) hit the mark.

If we think about it, every set of values people inherit contains aspects and styles belonging to the past from which it derives its legitimacy. But

the transition from generation to generation may be compared to a kind of avalanche which picks up much of what it encounters on its downward journey, thus delivering to the plain below a much more conspicuous and varied inheritance than when it started out. By way of example, it suffices to recall the house-museums (Besana 2007) of numerous families who have collected the heirlooms and memorabilia of their lineage and of the religious faith to which they belong (photos of ancestors, works of art, sacred artefacts), to bear witness to the existence of a cultural capital that is precious and versatile and worthy of being preserved not only for future generations but, above all, for future inculcators of culture-education-training.

### 3. Culture and socialization

The inculcation of cultural values in children by parents is based on a complex of ethics, traditions, principles, values, ideas and spiritual elements which, in fact, lay the foundations of what these young individuals will use when, later, they come into contact with education systems; in other words the children are directed intentionally by their nearest and dearest to fit into and learn to behave within society and hence face the challenges of interpersonal socialization outside of the family circle and interact especially with their peers and with the adults who act as educators (at school, during free time, in religious practices and in forms of communication that are increasingly globalized).

The chain of cultural inculcation remains, generally, unbroken, even in cases where parents – presumed educators – deliberately and explicitly abandon their role/task as transmitters of a cultural inheritance, which may or may not include religion. Indeed, even in the presence of a deliberate refusal to transmit given ideas, that is, an ideological – in the neutral sense of the term – refusal, it may be argued that some kind of cultural inculcation occurs just the same, because the very absence of a message is, in itself, a signal indicating the non-relevance of certain ideas held by others and a means of proposing alternative ones which are never devoid of ideological content and always imply value judgments, regardless. In other words their content of some kind is always conveyed to the person for whom it is intended: the infant, the child, the adolescent, the young adult.

In the field of sociology, the impact of intercultural relationship-education-formation should not be underestimated or overlooked since it represents the chief birthright a religion offers to both its practising faithful and occasional practitioners who claim not belonging to any religion at all (Davie 1994).

Thanks to the results of a previous research project (Cipriani 1992), we have argued that the religion of values embraces vital issues [...]. In particular, the area ascribed to the religion of values extends from the



category known as *religious (church) critical* to that described as *religious (distancing self from church) critical*, and thus includes both a part of church religion (the less indulgent part) and the whole gamut of diffused religion, along with all forms of critical religion. Thus the framework of non-institutional religion appears much broader than that of the institutional kind, being, as it is, based on shared values which are represented essentially by choices acted upon, according to interviewees, because considered the guiding principles of their lives, due to the education they received up to the age of about eighteen.

It is reasonable to maintain that we are faced not only with a set of beliefs based largely on shared values since they have been diffused chiefly through primary and, later, secondary socialization, but these very values may be considered intrinsically a form of religion. This religion has non-confessional, profane, secular threads.

In brief, we have gone from a dominant church religion to a diffused majority form of credo, to a religion composed of mixed values. [...] the conclusion is that religion can be considered as a means of transmission and diffusion of values; indeed, that it performs this task in a particularly functional and efficient manner (Cipriani 2001: 300–301).

Now, the very cultural bequest transmitted to children is itself subject to interaction, in that the education carried out by adults is subject to the personality of the young learners and their ability to react to and re-examine the values received. In any case, we cannot ignore the fact that what is experienced in the family, especially during the earliest years of life when values are being transmitted, makes young people a party to the values they receive right from the start and almost always induces them to identify with the teachings thus acquired.

#### 4. Religion and socialization

Fundamentally speaking, sociology did not emerge as a comfort zone for institutions nor did the sociology of religion, in particular, act in its own interests, in the pay, as it were, of churches and religious congregations. The aim of sociology remains critical analysis regardless of the topic examined, and, therefore, the discipline is no slave to the defence of any aspect of the *status quo*. Indeed, the critical role of sociology is that of casting a three-hundred-and-sixty-degree field light on the past and the present. Sociological research is, necessarily, at the service of science *tout court*, but of science as a correct methodological approach. Especially in a field such as religion, a professional ethical code is required to guarantee the utmost quality and act as a procedural and disenchanting buffer against facile, institutional

sirens, against the temptation of kowtowing to any momentary victor or jumping onto the bandwagon of this or that powerful figure, who, going beyond the specifically religious sphere, seeks to invade other domains.

The most effective action on the part of religions and churches, in the past as in the present, is the creation and promotion of conditions capable of encouraging millions of people to embrace a religion. The number of those who actually practise a professed faith is, generally, much lower – a ‘vicarious’ religion in Davie’s (2000, 2007) terms – than the number of believers in or sympathisers with a particular creed. This, however, does not mean that the influence of a particular religion loses in vigour proportion to the numerical difference between its faithful and its less convinced supporters. The best working solution for churches and religious groups is to intervene at the early stages of life and, generally, within the first fifteen years – in other words at the dawn of development when many of choices are made.

The future of an individual, roughly up to the age of 15 or 16, depends on his/her social and educational schooling up to that moment. It is during these formative years that the bases of the future social agent are laid. This means, obviously, that the socialising efforts made by adult-parents with regard to their offspring is strategically important. But other people involved in the process are also vital: teachers and other academic figures (whether religious or not), individual friends, groups of friends and peers, various other educational agencies, such as cultural entertainers, lay and religious figures, group leaders etc.

All these people, working together or separately, prepare the ground for the course that the adolescent will then take alone.

Usually, it is during this phase that the diffusion of a religion, prevalent within a given context, broad or restricted as it may be, takes place. Hence the acquired religion, sown by the biological family, develops throughout the following generation and takes root. From one generation to the next the religious creed is passed on almost uninterrupted except in cases of personal modifications on the part of one or other of the parents or educators.

Without this initial phase during which religious content is transmitted, it is unlikely that specialised catechists or religious instructors can intervene significantly. The seeds of initial religious socialization bear immediate fruits upon the initiation of young people and their participation in public religious life. Later on, one may note a further investigation of the reference values of the religion, or even partial withdrawal from the faith in more or less ostentatious terms. However, despite this, at a much later stage, the values inculcated by the family and the environment external to it will begin to operate, to discriminate between alternative actions, between one choice and another, between a virtuous and a non-virtuous deed.

## 5. Diffused religion

Diffused religion today is not so different from that of the past. Indeed it is its very persistence that gives it that peculiar, almost structural, characteristic which Claude Lévi-Strauss (1967) would have conceived as a hard core not easily altered by time, but subject, nevertheless, to variations that may not always be easy to perceive. If anything has changed, it has occurred at a secondary level where detail rather than substance is affected. Diffused religion is the result of a vast process of religious socialization that continues to pervade cultural reality and not only that. The pervasive character of beliefs endures because it is an intrinsic aspect of religion itself, strongly imbued with religious connotations.

Even atheism, for example within a Catholic country, is not an ineluctably anti-Catholic phenomenon just as it is not such in other contexts where a given religion is dominant and has become diffused, as in the case of Islam or Hinduism, Shinto or Buddhism. It is also true that a person who adheres to a diffused religion is usually not very devout and pays greater attention to teachings which produce immediate practical results than to those of a more general nature.

Furthermore, reference to religion found in the speeches of politicians – whether they be American or Iranian, Russian or Israeli, English or Italian – confirms the existence of a specific characteristic, both emotive and persuasive, of diffused religion the strength of which is certainly not lost on those seeking levers to boost political–electoral consensus. It should be pointed out, however, that there is no direct link between the civil (not *civic*) religion of the United States and the diffused religion of Italy, for instance, even in metaphorical terms. What Robert Bellah (1970) says on the basis of concepts such as ‘exodus’, ‘chosen people’, ‘promised land’, ‘New Jerusalem’, ‘sacrificial death’ and ‘resurrection’ with reference to a presumed national and cultural inheritance of the American people, cannot be applied elsewhere and less so in Italy or in Europe where historical events are chronologically very different and are transmitted from generation to generation without any reference to an exodus or to a divine predilection for a nation or to a palingenesis after the destruction of the ‘Old Jerusalem’ or after choosing the supreme sacrifice in hopes of rebirth and renewal. These are scenarios that are extraneous to the European cultural heritage or which, at least, are not prevalent. This means that, in the long run, we must recognize that there are many ways of inculcating culture or of transmitting values from one generation to another and therefore of considering a religious inheritance, diffused in the past, operative in the present and destined, one way or another, to continue in the future.

## 6. The strength of religious belief

The buoyancy of a religion, or, in other words, its ability to resist crises, is usually greater in creeds with larger numbers of followers, but careful handling of periods of difficulty can permit even quantitatively smaller or so-called minor religious groups to rise above the difficulties, the anguish and the suffering encountered. Especially in cases of religions confined to a specific locality, devoid of worldwide diffusion, progress can be rather unpredictable: their numbers might, perhaps, remain constant for quite some time only to witness a sudden and numerically exponential growth due to an extraordinary event or to the influence of a particular leader and the movement founded by him or her. In the case of the so-called new religions, a court case receiving massive media coverage, for example, might generate suspicion and diminish the number of followers. On the other hand, the positive outcome of civil and penal trial regarding religious expression might well rekindle a spirit of proselytism and attract people who no longer harbour doubts about the trustworthiness of a given group. From a longitudinal historical perspective in some instances, religions, once prevalent in a particular context, have later dwindled so much as to become barely ascertainable, sociologically speaking. In the case of other religions, there have been unforeseeable developments leading to an increase in influence and diffusion. Generally speaking, it is not possible to pinpoint the exact reasons underlying these two tendencies without investigating each one in depth.

The fact remains that, when we observe a growth in religious allegiance, we might be led to envisage a system of communicating vessels whereby an increase in one religion corresponds to a decrease in another, as though the overall number of religiously-oriented subjects did not change significantly but simply redistributed itself in a different fashion because of specific connections existing between the various religions.

The content of religion is grounded in the very meaning of existence and in the decisive directing influence that values have on action. In short, we can consider actions that do not normally enter into any historically recognised religion as religious. However, to avoid unjustifiable diversions, we should emphasize the fact that the presence of values is so relevant as to assume a pre-eminent position as regards thinking and acting. With reference to this, it is appropriate to draw a line between other ways of thinking, suggested by authors such as Thomas Luckmann (1967) for example. This non-religious outlook permits investigation of historical and innovative experiences that have been commonly recognized but which should also be included *ex cathedra* in socially oriented religious phenomenology. Hence, we leave the beaten track of the officially recognized religions to address the problem of the dis-

inction between religions and non-religions (where Buddhism has often paid the price, being recognized as a philosophy rather than as a real religion, sociologically speaking). And so we reach a different perspective which does not exclude *a priori* any religious group with even a semblance of religious content. Often in the past, even among the most advanced sociologists, the idea of a sort of official definition of religion to be taken for granted insofar as it entered the historically legitimate canons of churches, sects, movements, communities or any other self-proclaimed religious group, prevailed.

It does not, moreover, appear indispensable to establish beforehand what religion is supposed to be. We can start from simple 'theoretical sensitivity' towards religious modalities and then proceed to collect and analyze data to which we may finally apply certain 'sensitizing concepts' deriving from the data themselves. In short, an approach in the manner of the *Grounded Theory* (Glaser, Strauss 1967), re-elaborated and modified, might turn out to be very useful in when seeking to free ourselves from the trammels of a predefined, preordained and pre-oriented sociology of religion.

In actual fact, human action is motivated by many factors. Each individual is guided by fundamental values that influence his or her behaviour. Such values are deeply rooted in abstract ideas, even if they are susceptible to empirical validation.

Values are of the utmost important, because they are regarded as belonging to a superior level. They cannot be replaced very easily; they seem non-negotiable, and, at the same time highly desirable. That is the reason why individuals are prepared to undergo all kinds of sacrifice and difficulties for their sake.

On the basis of the consideration we attribute to values, we establish our practical behaviour. One's appraisal of good and evil, right or wrong, legitimate or illegitimate depends on the organization of one's set of values. Values can be either a starting point or a target to reach, an idea to be implemented, a goal to be achieved. Therefore, we might say that values always inspire human behaviour whether as a goal or as a source of inspiration.

At present, it seems more apt to assume a connection between inspiring value and practical action, that is to say, between value and choice (or a refusal to choose). In other words, the implementation of a value, that is to say the behaviour preferred, involves the need for a distinction between what is desirable from what is possible, and therefore reasonable consideration of actual contingencies.

## **7. Diffused religion and religion of values**

On the other hand it should be kept in mind that diffused religion can easily fall prey to exploitation since calls to religious values can nearly always

have a very strong appeal. Rather than refer to sacred scripture or other religious texts, politicians often avail of simple, popular reference to well-known personages associated with the diffused religion of their region: Padre Pio or a pope, a Madonna deemed as the protector of a certain area, a saint believed to be a miracle worker, a holy man or a guru, an ayatollah or a prophet, a charismatic leader or a marabout, a rabbi or an imam, a shaman or a bonze.

In any case, it is not easy to distinguish between diffused religion and the religion of values: the former is included in the latter which, in turn, embraces a larger section of any population characterised by different levels of belief. Diffused religion as such concerns, in fact, a category of people who do not regard religion as their *raison d'être* but who, nonetheless, fall back on the values of religion when they have to make important decisions that require more ethically relevant choices.

Conversely, the religion of values concerns a wider spectrum of attitudes and behaviour that may be more or less superficial regarding the so-called official model of the religion adhered and/or referred to. Hence, in the religion of values we can find orthodox forms of religion as well as forms that are more critical, if not actually opposed, to the credo and the official rites of that religion. But the widespread effect of a religion as a whole is not limited to its own environment alone. It also manages to influence areas of thought and action outside of its specific ambit, areas which have been estranged from it. Here we are talking about contexts where forms of morality, although not in line with that of the pre-eminent religion, still preserve traces of it – at least as an expression of a universal ethical afflatus not altogether alien to some previous contact with religious values, the result of personal, family history or of education or of the kind of socialization experienced.

In the long run, political circumstance and, above all, election results cannot be explained in terms of confessional support or reference to religious issues: many more complex factors that go beyond official and/or private religious pronouncements are involved.

Starting from a theoretical proposition of this kind, which may be summed up as religion diffused through values, it is possible to choose an empirical procedure to build up an ulterior, basically medium-range theory; a theory with reduced powers of implementation, as far, essentially, as, the data obtained during research are concerned. To this regard we can speak of a new form of triangulation between quantitative and/or qualitative methodological instruments, but first and foremost between the basic and the research theories (in other words, one based on data, in fact *Grounded Theory*).

This leads to a double scientific guarantee derived from a dual, converging theorization both of basic and research approaches and also from a method-

ological triangulation that is usually a harbinger of a more in-depth and more convincing theory, one better supported than usual by research results.

Following a similar path, the idea of a religion diffused through values might acquire a more adequate overall profile corroborated by a wide-ranging examination without preclusions of any kind.

## **8. Values as cognitive dimension**

Many authors agree that values have a cognitive dimension. At first, we have to remember the work of Kluckhohn (1951) who, besides the cognitive dimension (related to either positive or negative judgment and to facts and behaviour) includes an affective dimension (regarding acceptance or refusal of those conforming or not conforming to values) and a selective dimension (that highlights the solid influence that values exert on human behaviour). This third dimension remains abstract and general in the case of reference values in particular, but it becomes a normative rule when related to particular and contextualized actions (Sciolla 1998: 751).

An ethical and political dimension may be added to the cognitive one. As such it is more closely connected with structures and organized institutions. It is therefore necessary, in order to strengthen individual positions, to connect them with shared values, to avoid explaining each time – at interpersonal level – attitudes and preferences, habits and behaviour, criteria and procedures. As a matter of fact, institutions do not often support individuals sufficiently when facing similar responsibilities; therefore, it is quite common for single social actors to provide explanations, motivations and reasons for certain personal evaluations and actions. This way, they are obliged to address the plurality of diverse values and positions, a clear clash of points of view, of operational choices and evaluations. The relationship between subject and society is also brought into discussion, as well as the connections between citizens and the state, social actors and their socio-political and economic context.

In situations of this kind the debate concerning the ‘crisis’ or ‘end of values’ emerges. In fact, all kinds of social realities tend towards disorganization, towards the abdication of forms of cohesion in favour of facile solutions, even of an undemocratic nature, in that they are wanting in adequate legitimizing consensus. If the malaise thus generated is further complicated by high levels of massified communication processes and socio-political influence, a utilitarian kind of action prevails over communication, according to Habermas (Habermas 1984; 1987). Thus, values become obsolete and meaningless.

In the end, individuals find themselves operating in a vacuum of values or in a context that does not take them into consideration, because values, even if commonly shared, should emerge as precise and non-negotiable. The pos-

sibility to establish criteria, to this regard, is quite difficult, because the risk is that of providing remedies that are not feasible in practical situations.

Sociologists, and especially sociologists of knowledge, have no doubt about the cognitive content of values. The Weberian approach entails attributing sense to every single aspect of reality so that values and meanings seem either to coincide with or overlap each other, or, in any case, to be very closely connected.

Identity is another *Leitmotiv* of the phenomenology of values. It is through values that people identify with a movement, a religion, a political party or an ideological faith. At the same time, historical and sociological dynamics are such that individual characters are taken into consideration, together with a proportional development of freedom and autonomy.

One last constant is the guiding role social structures, political and legal institutions, and collective organizations assume for social actors. Processes creating legitimization and identification consolidate a feeling of belonging through rational and affective motivations. The core of similar consolidation of social relations consists in a number of basic values which bestow specificity on a sense of community participation.

Modern and post-modern notions have destroyed the presumed certainties of the past and have opened up the way to 'alternative' values, less predictable and more flexible than solid traditional ones. However, these novel values pave the way to new quests for alternative knowledge based on different certainties, because truth becomes a process to build rather than a certainty to believe in.

Many different possible outcomes of this pursuit of non-traditional values emerge, seeing that the new values are not handed down vertically by previous generations, that is, by consolidated custom which is the bastion of pre-existing values.

Contemporary societies have a very original challenge to face: they have to find new and reliable paths based on grounded reasoning and solid motivation. This calls for a finer kind of knowledge and adequate experience. There are no easy ways out in a similar kind of diversified society. The social actor's mode of behaviour is submitted to analysis and produces new terms of comparison capable of provoking a more and more complex, problematic and articulated type of reflexivity, interacting with values, knowledge and social practices.

## 9. Values, interests, habits

Alongside values, shared interests alongside habits and custom also exert considerable influence on social and individual action. However, values occupy a special position within the socio-dynamic context that promotes



and supports them. From the earliest stages of life, individuals interact with a number of older social actors such as their parents (sometimes only their mothers), their relatives (siblings, but also more distant relatives), the citizens of the same country (who normally speak the same language or dialect), their neighbours (in adjacent houses or jointly-owned buildings). All these people surround the newborn, not only physically but also with their culturally common modes of behaviour, as well as their way of speaking and acting. This is how the fundamental phenomenon of early communication begins: the newborn receives a variety of inhomogeneous messages, which are, despite this, convergent to a certain extent because they all belong to a similar cultural pattern; that is to say, to a shared opinion about life, about how to face it and about opportune social behaviour. Finally, even before they are officially registered, the new social subjects are *de facto* 'objects': the objects of attention and care, affection and worry, to whom the content of meanings, emotions and symbols has to be transmitted.

Actually, those who worry about newborns underwent the same experience when they too were infants. That is how ideas, habits, attitudes and behaviour are transmitted from generation to generations, creating a sort of continuous chain (except in some rare cases). There is no other explanation for this continuity, too often taken for granted, and therefore not adequately considered as an essential influence on one's education, and, therefore, on one's *Weltanschauung*. This is, more often than not, seen as a 'natural occurrence'.

The world is, thus, accepted 'naturally', as it is, it does not represent a problem, and it enters daily life becoming as a habit where nothing is to be discussed. A typical *Leitmotiv* is 'that's the way the world wags'. Therefore, mothers usually feed their newborns or take care of them, fathers generally look after material and economic affairs while the elderly provide a link with the past, representing continuity of existence. However, we must also consider the fact that values fit into pre-established, fixed frames. History shows a community how to accumulate experience, institutional organizations emerge and develop and a solid knowledge is acquired. This is the milieu where the new social actor is expected to live and grown up.

As fresh water from the spring follows the course of former streams and river beds, so do socializing individuals follow the path traced by those who go before, a sort of compulsory track with no possibility of choosing an alternative route – especially during the early phases of life. Only at a later stage will it be possible to follow unorthodox pathways. Only when one reaches the age of reason and full autonomy does it become possible to pursue uncharted paths, innovative ways and opt for previously unpredictable solutions.

The constitution of interests precedes the creation of sets of values. The interests of neonates, besides a number of primary needs common to all infants, do not seem to be innate. Essential needs are, for example, self-preservation, protection, maintenance, the pursuit of pleasure, avoidance of unpleasantness and physical harm (or affective harm, associated with the loss of something cherished or retained essential for living). As a matter of fact, the values provided by exterior stimuli are likely to act upon previously defined interests, or interests the subject is well acquainted with.

The same may be said of deeply rooted social habits. They become a sort of *habitus* for all subjects who tend to conform to existing attitudes, or avail of common-sense solutions to favour acceptance by others. Finally, even before their own values, social actors are obliged to attend to external habits having the same basic interests and which are likely to become their own and exercise considerable influence when they need to make choices.

According to Ronald Inglehart, who has carried out systematic empirical research into values in America and Europe, abilities and structures should be considered as the pre-existing independent variables influencing social change. When Inglehart talks of 'abilities' (Inglehart 1977: *Introduction*), he refers to people's tendency to be interested in politics, to understand it and to participate in it, as an aspect of a 'challenge to elites'. When referring to structures, Inglehart means the economic, social and political organization of the countries that were the object of his comparative studies (France, Belgium, The Netherlands, Germany, Italy, Luxemburg, Denmark, Ireland and Great Britain).

Inglehart adopts the same attitude (1997) in the subsequent research he carried out in 43 countries. This investigation focused more precisely on the modern and post-modern processes which have placed greater emphasis on the quality of life and self-realization, and the role of individuals. The outcome is a kind of reflexivity which induces single actors to stand back from absolute values and direct them towards a more subjective context, based on individual preferences.

This occurs following degrees of uncertainty, hesitation, effort, expectation, contradiction and disappointment. However, the final outcome elaborated by the individual is the one where new rules and new laws are more in keeping with the problems of social actors, especially the younger members of society.

As such, the primary socialization process remains in the background, while the secondary process intervenes in a more decisive way. It enhances horizontal inter-generational change, where the younger generation replaces the older one.

The sociological consequence of this dynamic shift is a ‘polytheism of values’, as well as of the reasons and motivations underscoring values, therefore of all the actions deriving from it, as Bontempi underlined (2001).

Despite the diversity of the variables to be taken into consideration, there is essential agreement concerning the kind of sociological discourse to be applied to values, because empirical findings confirm the interpretation provided. While Inglehart emphasized the role of education above all, here we suggest a preference for the phase preceding socialized schooling. This secondary socialization phase seems obviously less important than the primary family one, which involves a long-lasting period of introduction to life, a sort of initiation that cannot be ignored.

### **10. Values and ideologies**

Ideologies tend to deny solutions derived from the ethics of discourse (Habermas 1990). This critical attitude concerns both religious and lay perspectives, because both are anchored in their own deep-rooted convictions. This two-fold (religious and a-confessional) attitude leads to fundamentalism which is harmful to communicative action and seeks solutions which caters for the needs of only a number of social subjects. Hasty solutions are not desirable from any point of view, because all solutions should obtain explicit and general consensus. Furthermore, many useful solutions may be those forwarded by minority groups. The most important thing is to avoid coercive imposition of values and all forms of legal, military, and affective blackmail. Swift and easily reached goals with no promise for the future should be avoided. Only consolidated praxis, the steady outcome of tradition and custom, respectful of the interests of the social actors, can hope to become widespread consensual reference frames.

However, an awkward issue is that related to individual interests. When similar interests become diehard habits and traditions, they are difficult to overcome. Regulation of subjective requests seems necessary to avoid harming collective expectations.

Nowadays, there is an evident increase in the importance attributed to individual rights, which are often disjointed from the social context and difficult to harmonize with issues of solidarity. The notion of the social-actor is an attempt at seeing individuals as the true hubs of relational network, thus underlining their human ability to socialize, engage in dialogue and confrontation, accept shared values, all from a point of view which is neither utilitarian nor purely functional.

The dynamics of migration, which assume multi-cultural, multi-religious, multi-linguistic forms, emphasize the urgency of common values and

adequate ethical principles capable of resolving conflict, misunderstanding and strife. The hypothesis of universal values, widely accepted by different ethnic groups seems exceedingly utopian. On the other hand, the idea that social subjects belonging to different religious faiths with visions of life neatly divided into good and evil with no possibility of dialogue, mediation, or discussion in an attempt to find shared, compatible positions is equally unacceptable. Sometimes there are rules, adequate behaviour and coherent attitudes which can be universally accepted, without the mediation of the transcendental dimension of a religion. That is why, speaking of ethical values, it is worthwhile reading Weber (1946) once more, this time, however, accepting his suggestion that values should be seen in terms of an ethic of responsibility, such as to take into account the immediate situation, the need to resolve problems without harming people, or, at least only to a minor extent and for the sake of the common good; this means considering the consequences of certain actions, or the effects some actions produce. Therefore, choices always produce consequences which are determined by the desire to achieve the greatest advantage for the community at large on the one hand, and what can feasibly be achieved, on the other.

### **11. Universal and local values**

The issue of universal values is by no means secondary. The need felt by some to spread the values of certain organizations and nations is directly related to this issue. An eloquent example might be that of bringing freedom or democracy to others. We should ask ourselves if it is ethically desirable to export such values through war which is in se an implicit denial of freedom and democracy itself.

As we can see, determining which values are universal is not an easy task. Anything we say may be contradicted by empirical results. Individuals and communities decide if a value is 'good', has a true bearing on everyday life and really is worth adhering to in the long run.

Universal values to be diffused worldwide and commonly shared by all cultures is a simple hypothesis; from an operative, practical point of view it can appear as a failure, as soon as a careful empirical survey proves the opposite.

We may discover, for instance, that human sacrifice, voluntary or involuntary, stands at a very high premium in certain cultural milieus, that in given ideological and religious realities it may even be associated with everlasting rewards, a position in contrast with that of cultures where a totally negative view is taken of violent death whether chosen or coercive.

Moreover, within a sole social reality we can also surmise clear distinctions between majority and minority group values. This is a typical of de-

viant or marginal religious groups, which often follow a rationale quite different from that of the majority.

No classification such as 'universal values' can claim to be either all-inclusive or general. It might be advisable to refer to quasi-universal values rather than adopt such a categorical assumption and avoid radical and self-referential positions. Values do not depend only on the ability of a dominant group to impose them on other individuals and social groups.

Respect or lack of respect for values depends frequently on not easily foreseeable variables. In the field of values in particular, prediction is often destined to fail. The number of variables underscoring the persuasive powers of a value or set of values can be numerous indeed. In some situations values are commonly shared; in others they are not; in some situations they generate clear division; in others they are not evidently opposed to 'counter values'. As human beings are variable themselves, so too are the dynamics of values. This fact depends on the degree of importance that each value has for single individuals and groups. It is no accident that the most difficult decisions to take are those regarding more than one value, values equally present in people's cultural and personal backgrounds, related to more or less conscious taxonomies, but which become evident when there is a decision to reach.

However, even if a certain value is more influential than others, it cannot be taken for granted that in the future, under similar circumstances, the same value will prevail again. Situations, real conditions and other factors, including affective issues, can assume significant importance, often independent of the scale of values of single social actors.

Today, greater human mobility throughout the world is noticeably increasing occasions to share values as well as occasions apt to provoke clashes between different cultures and religions (Huntington 1996). This is one reason why political and governmental structures are competing, as it were, to devise constitutions, laws and rules to protect basic local principles from other cultural values imported by immigrants. In the meantime, more effective ways of solving value clashes are under consideration.

The United States initially attempted the melting pot strategy, which meant trying to mix all cultural peculiarities and hopefully attenuate the differences. Later they tried the salad-bowl strategy, in an attempt to favour respect for the different values without changing them. Neither of these two attempts brought about positive results. At present the patchwork approach is being attempted.

Europe, and not only Europe, is trying to enforce laws based on the particular local values of the member countries. However, every single country

has the right to adjust these values according to its necessities even if it cannot refuse shared European values.

Among the major values are: gender equality, freedom of speech, freedom of education, the repudiation of recourse to war as a means by which to resolve conflict, the promotion of peaceful coexistence between people from different cultural backgrounds, the abolition of the death penalty, the promotion of racial acceptance, of school integration, of ideological and religious pluralism and last, but not least, freedom of conscience.

To this regard a number of official declarations and documents already exist (Blau, Moncada 2005: 44-49). The sections in these documents which define the parties also reveal the clear intention to safeguard religious creed and practice, as well as national identity.

The status thus accorded to religion is based on the long course of history during which maximum power was afforded, initially, to God (sovereigns were considered God's anointed). Only at a much later stage were democratically elected leaders chosen to legislate in the name of the whole community.

In the not too distant past breach of the law was considered a sin against God; nowadays similar infringement of rules is called crime and is seen as committed against individuals and society. A change in the mentality of the Catholic Church, which is one of the foremost universal religions, has led to a renewal of vocabulary which now defines as crimes major social sins such as fiscal fraud, negligence at work, drug dealing, gambling, mystification of public truth, mendacious statements, and other forms of 'anti-social' behaviour.

However, many of these declared values are often disregarded because the damage they cause the community is not considered a truly harmful. Only a limited number of reference-values are truly shared and acts such as homicide, theft, sexual harassment and a few others are generally considered as real crimes.

Notwithstanding this, society continues to be viewed in a sacred, superior and almost metaphysical light. Social values seem to be mandatory, imposed as it were, by some kind of compulsory authority which obliges individuals to respect them. This happens when values have been interiorized and deeply accepted by individuals.

Global values and local values may enter into conflict with one another, especially when the same individual has to play more than one different role. In this case interests and habits clash causing conflict between value-oriented and goal-oriented choices, as well as between the interests of the community and those of single individuals and/or families. Other factors may come into play such as interpersonal and/or class relations (no easy issue to lay aside, regardless of the outcome of Marxist theories) as well as awareness of one's role within society.

It is clear enough that some of today's so-called 'universal' values (also called 'global') are actually representative of the interests of one social class only, that is, of the bourgeoisie. In other words the French revolutionary triad of freedom, brotherhood and equality is now undergoing a general and thorough adjustment.

When all comes to all, the social actor also decides whether or not to accept certain values rather than others on the basis of personal convenience, in other words he or she can make a 'rational choice' (Coleman 1990).

We cannot ignore the fact that values are often more a matter of irrational individual choice and of personal preference than of other factors. Social actors may, in fact, opt for certain values simply because they mean something to them, or because they are attractive and convincing even when they do not represent a rationally convenient option.

One last point concerning individual interpretation of values must not be forgotten, that is that values can lose all true significance and become liable to all kinds of further interpretation and implementation.

The present-day scenario reveals a general tendency for individuals to seek self-realization and autonomy, post-materialist values according to Ronald Inglehart (1997).

The commonly voiced opinion that values are vanishing completely is not convincing either. We are well aware of the role that values still play within the contemporary world.

Not even the Weberian world-disenchantment concept (Weber 1946) has led to an ultimate turning point, and Weber's idea of awareness of the polytheism of values seems to have created more difficulties than anything else. This theory did not solve the problem of social ethics at all, because to have too many different principles is like having none.

The Weberian *Wertfreiheit* idea has led to keen debate, however. Weber's idea insisted on the distinction between facts and values whereby it required social scientists to stand back from their own values, and refrain from expressing any sort of judgement concerning the scientific 'objects' they were investigating. The outcome of this position was that the work of social scientists was ideally that of gathering and interpreting mere data alone.

The main objection made against the idea of perfect impartiality in scientific approaches, against the presumption that any theory of knowledge can be truly neutral, is that one must assume that behind all proclamations of neutrality, however sincere, there is always value frameworks and ethical bases underscoring and influencing researchers whether they are aware of them or not.

In actual fact, underlying methodically correct research, even that claiming neutrality, there are principles, which, because they are varied, polymor-

phous, prove that pluralistic values exist from the start, *in nuce*, even before investigation of the universe begins.

The Kantian idea of a universal ethic, from which common values capable of creating harmony in the world and among men stem, has lost credence and is no longer in vogue. Contemporary sociologists cannot ignore the fact that there is something more (or less, depending on one's points of view) than 'a starry sky above us' and more than the 'moral conscience inside of us'.

The demand for rationality simply complicates matters further. What rationality should be applied? The secular rationality born of the French-speaking Enlightenment, perhaps? The history of Europe (and not only of Europe) has revealed the limits, the idiosyncrasies and, ultimately, the tragic consequences of that kind of approach. Not only, but history has shown us that the thinking, however attentive, of small elites cannot guarantee the rights of all. Shall we renounce research, which may even prove vain, until we find common ethical references? Or shall we choose to compare various ethical systems of inquiry, to come up with those we consider the most acceptable because most frequently applied?

Habermas (1990) advocates an ethic of discourse: a two-way open communications channel between peers, where those involved trust each other and are reciprocally open to criticism, without believing that they alone hold the key to absolute truth and are receptive of the opinions of others for the sake of on-going research aimed at favouring the common good and promoting the interests of the scientific community as a whole.

## 12. Values and social change

In general, a single value does not change without creating significant modification around it, especially adjustments to other value sets. Let us take a look, by way of example, at the value of freedom: changes perceptions of freedom inevitably lead to relative changes to how the State is considered and the form democratic participation in the affairs of the nation should take.

At times combinations of values, as they undergo development, can be quite difficult to detect, even harder to formulate. It can happen too, that conflicting values coexist and produce changes in modes of primary socialization. One should not forget that the will of every single individual is sovereign and inscrutable in its intentions, in its fundamental motives, in a chosen course of action.

The most commonly shared global and local values also undergo modifications, confirmations and adjustments. The very idea of democracy and freedom may be interpreted differently according to different cultural frames of reference and/or initial ideological and political perspectives.



When we say ‘*Cuba libre*’, for example, that is, ‘Free Cuba’, two contradictory interpretations may spring to mind, the first is the idea of the liberation of the Island from the government of Fidel Castro (considered by many a dictator), the second implies setting Cuba free from the economic, military and capitalistic hegemony of the United States.

This kind of dichotomy suggests a tendency to counterpoise opposite values so that what is most desired by one party is least desired by the other and vice versa. Chosen options are the consequence of decisions operated in favour of approaches which may be emotional or neutral, individual or collective, particularistic or universalistic, specific or widespread, ascribed or acquired (Parsons 1951).

In actual fact, concrete value decisions are not the outcome of all these possible options, but tend to focus on particular topics and issues. Here the central role is played by a cultural and social interweave of values. From a Durkheimian point of view, we can establish the existence of some sort of collective morality (Durkheim 1925) which lies at the very basis of society itself and is shared by the individuals belonging to the community whose utility seems to be directly proportionate to the respect its members have for the social consortium. This is not tantamount to a critical endorsement of Durkheim’s concept of a ‘collective consciousness’, a characteristic typical of a ‘sacred’ society where respect for society is achieved by the practice of its moral norms, without criticizing them. One immediate effect of this approach is respect for individuals, which, according to Durkheim, occurs as a secondary result. Moreover, according to this theory, the individual can make only a minimum, almost non-existent contribution, because with it and through homage is paid only to a generic and abstract collectivity – a collectivity lacks any serious individual contribution to the construction of its common morality not particularly authoritarian but devoid of any true consensus.

There is certainly no dearth of studies or theories suggesting alternative interpretations indicating relationships between values and attitudes (in favour of a functionalist approach see Brewster Smith 2006) or placing great emphasis on moral values (Hartmann 2002) and the possibility of teaching them, a view forwarded by a number of international publications like the *Journal of Beliefs & Values*, the *Journal of Moral Education*, *Issues in Religious Education*, or dedicated research centres like the University of Wales’s *Centre of Beliefs and Values* at Lampeter.

Recently the issue of a public ethic regarding the visible behaviour of individuals at collective level and its impact on common interests, upon administrative bodies, at managerial, political, trade-union and economic level,

has gained considerable ground. Nowadays, public opinion and the media in general tend to emphasize events and episodes that threaten the widespread expectations of citizens at local and national levels.

It seems that, at present, managers and policy-makers are increasingly more inclined to steer clear of individual and institutional control. At the moment, it has become quite difficult to detect any ethical bases behind economic and political decision-making.

The neo-contractual or neo-utilitarian stances which appeared on the international scene, significantly and not surprisingly, simultaneously with the new waves of conservatism called *neocon* (neo-conservatism) that has taken a foothold all over the world, have reduced the ethical issue to mere correct application of rules and norms, without posing the issue of accountability.

The imaginative proposal of Niklas Luhmann (1982), centred on a purely procedural conception of society determined by cybernetic algorithms and formal rules, belongs to this para-bureaucratic vision which sees society as a huge machine, devoid of self-awareness and of a historical consciousness from both an individual and a collective point of view.

The attempts made and the implementations carried out in this sense have not produced significant results, on the contrary, they have increased levels of non-participation by social agents in the direct management of the social realities to which they belong. Contractualism, utilitarianism and functionalism, however revised or embellished, have all failed to enhance (or, contrariwise, to alter) values among members of social networks.

### 13. Crisis of values?

It is difficult not to accept the idea that values underscore human and religious rights. Actually, according to *Encyclopedia of Public International Law* (1995: 886), 'human rights are those liberties, immunities, and benefits which, by accepted contemporary *values* [emphasis by R.C.], all human beings should be able to claim 'as of right' of the society in which they live'.

Values, intended as such, may also represent a normative criterion, a valuation parameter to which to adhere. Values, in fact, guide the choices of human beings and interact, therefore, with pre-existing interests, customs and habits (and so, values are not immune *per se* from conditioning factors which tend to emphasise a given range of interests and consolidate a number of specific customs, preferred to the many other possible options available within the ambit of interests, habit and custom).

A distinction between values as ideals (which orientate individual existence) and values as concrete practice (aimed at achieving goals) must always be made, were it only for the sake of description. As a matter of fact, both

of these aspects are present in empirical situations, where it is usually impossible to establish which is *prius* and which *post*. Neither values as ideals nor values as practice are mutually identifiable. To be more precise, we cannot analyse the situation from a behaviouristic point of view only. We have to go a step further and consider a broader cognitive range involving entire networks of interactions between individuals and society, subjectivity and social structure, attitudes and patterns of behaviour.

One is often told that 'there are no values left these days', that is to say, that people no longer behave as they used to, when, it is held, people acted upon 'sound' principles. First of all, the reliability of such a statement needs to be verified. History presents numerous accounts of slaughter, repugnant torture, wild hatred, and catastrophic wars. This is certainly not a reassuring picture of the 'good old times'. Therefore we are obliged to accept the fact that in the past too family and social issues were not always resolved by recourse to peaceful methods.

The question of the true nature of contemporary social dynamics is still wide open. In other words, we are not sure whether they lead to conflict or to peaceful, non-conflictual solutions. And even were one to establish that conflict is of greater consequence than consensus, it still remains to establish whether the present inclination towards contention, hatred, revenge and boundless competition, is greater today than in the centuries and decades gone by. The problem is, therefore, how to devise markers capable of defining their differences and levels, that is, indicators of their percentage rate per inhabitant in a given territory, in relation to available economic resources, without taking into consideration the presence or otherwise of norms and sanctions, enforcement of law and order, detention centres, repressive measures, but also of educational, preventive and conciliation agencies, aimed at arriving at solutions grounded in reciprocal respect, in recognition of the equal dignity of the abilities and needs of others, within a context open to solidarity, to disinterested donation of the self and to interpersonal interaction of a non-utilitarian nature. A long time has elapsed since social and anthropological research first revealed the existence of societies, communities and groups informed either by consensual or by conflictual modes of behaviour. We have to admit, however, that even within situations of this kind some form of collaboration exists, just as contention is not completely absent from peaceful conditions.

Therefore, individuals and groups adjust according to the continual ebb and flow of the culture they belong to and may decide what to do each time in a different way, according to inherited values and the convenience of the moment or prospects of an immediate or future gain.

However, one datum remains unquestionable: all social actors are motivated by the values and guiding-principles which inform all forms of law whether oral or written, and are continuously in conflict with emotions, affection, the expectations of family and friends, sudden mood swings, conditions of temporary (or long-lasting) stress or pressure. If, on a daily basis, the press and the media present us with lengthy and detailed accounts of embezzlement, fraud, cheating, physical and psychological violence, scandal and all kinds of heinous deeds, this cannot be regarded as a marker of an abnormal or unpredictable lack of values. It suffices to browse old newspapers to read about similar or even graver happenings.

We cannot appraise social maladies in order to discover whether contemporary social milieus are more or less unsound than former ones. The same may be said when trying to compare two or more contemporary social realities, whether they belong or not to Western culture.

As a matter of fact, each social reality has its own fundamental set of values, with behavioural rules, traditions and practices, regulated by its own particular laws. Too often we tend to judge other people and other societies by the yardstick of our own ideas, our own *Weltanschauung* and our concept of reality, through the lens of our chosen values or principles. But these are not, and cannot be considered, universal. In actual fact, each social group has its own fundamental values, its own mores, traditions and customs. We are often led to judge other individuals and social groups on the basis of our own ideas, our own *Weltanschauung*, our own notions of reality, that is, on the grounds of our own values. But our values are not and cannot be universal. Each cultural framework has its own particular attitudes towards action, its distinctly complex and detailed cognitive heritage, not always accessible or interpretable in all their manifold aspects.

That some values belong to a specific territory, to a given 'ethnos', to a particular religion, a precise linguistic group or shared experiential context, is an indubitable empirical datum, which can be observed scientifically.

A totally different kind of approach is the ideological and/or confessional one, which passes judgement (mostly negative) on the behaviour of others deemed out of line with the values of the person expressing judgement.

On the other hand, however, a number of values are shared by rather large socio-territorial ambits. Democracy, for example, is a value acquired and taken for granted by nations where citizens are free to express their opinions regarding the political and institutional choices of the government. This does not mean, however, that democracy as a value is experienced always and everywhere, even within the same social context. In actual fact, apparent democracy may be riddled with bureaucratic authoritarianism or

upheld by ruthless policing or due to the power held by a privileged few who remain substantially the same although the formulae or coalitions which oversee public affairs may vary somewhat.

The relevance of the values of public awareness, of a sense of the state, of responsible citizenship appears vital. But all this does not bloom spontaneously or bear fruit of its own accord; it needs to be planted and cultivated. In other words the value of 'active citizenship', like that of democracy or other values, are the final outcome of long, on-going, meticulous and prudent preparatory action, that is, of education and training, which does not cease suddenly when formal schooling ends but continues throughout one's entire life, guaranteeing a 'fruitful harvest' to the seeds sown in early childhood. Such action of recognition, of legitimization (or incessant re-legitimization) and of motivation (even flexible in certain circumstances) is hazardous, failure-prone, pressured, as it is, by opposite thrusts, associated with individualistic choices, family and corporative interests with purely opportunistic motives.

All told, it appears quite clear that the history of values involves a long series of clashes between collective ethical issues and the subjective ambition. When the latter prevails, acceptance and resignation set in causing withdrawal from and avoidance of public service.

All told, it appears quite clear that the history of values involves a long sequence of clashes between ethical references and the subjective will. When the latter prevails, it gives rise to attitudes of resignation, summary statements and hasty decisions. The fact is that the struggle between more or less collective values and the anarchy of individual wills is a salient feature of the history of men and women. The story of Adam and Eve like that of Cain and Abel, or of Romulus and Remus and many other real or legendary figures, is emblematic of the cyclical flux of human history. An excessively strong spirit of conservation, which can turn into one of domination and abuse, clearly marks the different and manifold stages of life, in the past and in the present, and most probably, in the future as well.

These historico-sociological considerations give rise to necessarily conflictual, contrastive interpretations of human attitudes and behaviour. Even a type of education focussed on the transmission of values, even if particularly efficacious and scientifically directed, can always give rise to foreseeable deviant variations, to actions harmful to the set of values it is based on. Moreover, if reference to values is particularly wanting in a given environment, it is most likely that the system will force all subjects to accept the situation, also to prevent 'defensive' responses against coercive decisions, which although not accepted are difficult to oppose.

Only a strong, solid and convinced person, with a strongly rooted set of values, can resist an environment lacking in ethics, and devoid of respect for others. It is clear enough, therefore, how crucial, strategic and decisive a value-oriented kind of education, such as that envisaged in the Weberian ethics of responsibility (Weber 1946) or in the Habermasian idea of the replacement of exploitation by communication (Habermas 1984, 1987) can prove. Therefore, before speaking of the 'end' or 'crisis' of values it is necessary to think of the importance of education and of serious commitment to values.

#### 14. Religions and values

All the so-called universal religions, from those 'of the book' (Judaism, Christianity and Islam) to those of Oriental origin (Taoism, Confucianism, Hinduism, Buddhism, Shintoism), offer sets of values, each centred around a specific conception of the world, the meaning of life, and the fate of humanity.

A value-centred attempt at syncretism might concede a certain degree of convergence between Judaism, Christianity and Islam, despite the fact that many past and present events show how difficult it is for these religions to reach consensus despite official, organized efforts.

The Oriental and Chinese religions provide the remarkable experience of *Ju-Fu-Tao* which blend Confucianism, Buddhism and Taoism into one religion. *Ju-Fu-Tao* is widely practised especially by the Chinese.

Elsewhere, in Japan, some people have taken a step even further, not only by adopting rites and values belonging to other Asiatic religions (especially Shintoism and Buddhism) but by including elements of Christianity, thus determining a combination of values and practices which are often varied, according to the personal life choices of individuals, families and communities. It is no accident that during the first decade of the last century attempts to amalgamate Shinto, Buddhism and Christianity were made.

Among the values most widely spread in the Orient one of the foremost is certainly profound veneration for former generations, which often takes the form of a veritable cult of the ancestors. One of the salient features of this tradition is filial piety, which is often extended to embrace the respect due to all human beings. In some cases respect for people is more highly rated than love of the divinity, so much so, that great men, called masters, enjoy far more consideration than divine entities.

Compared to the ethical-social features of Confucianism, Buddhism attributes greater prestige to spirituality. But one must add that with the proclamation of the Chinese Republic, at the beginning of the last century, a system advocated by Sun Yat-Sen, based on three new values: nationalism,

democracy and socialism took hold. It assumed more ideological and militaristic connotations under Maoism.

Hinduism and Buddhism, on their part, continue to appear more sensitive towards eschatological issues, in particular the destiny of humans once they have reached the end of their life cycle. The focal values of Hinduism and Buddhism are, in fact, concerned with the dynamics of the transmigration of the soul, which make them more spiritual in outlook.

Hinduism is, however, characterized by the caste system which has provoked several responses including an important reform which actually led to the birth of a new religion, Sikhism, set up by Nanak, five centuries ago. At practically the same time, Kabir tried to overcome ritualism and idolatry by attempting a fusion between Hinduism and Islam, later introduced in political terms by the Muslim Indian emperor Akbar. In the end Islam became prevalent, also thanks to the military feats of the Mogol ruler Shah Jahan.

Hinduism regained ground when it took an even more spiritualist turn (derived from Brahmanism), which created the basis for the proclamation of the value of goodness, backed by Devendranath Tagore, father of the more famous poet, also a fundamental reference figure for Hindu culture.

Further thrusts towards the union of different religions appeared from time to time: first Ram Mohan Roy, advocate of what is known as Unitarian Hinduism, a result of British reformism in India; then there was Keshab, who tried to amalgamate Christianity and Unitarian Hinduism; later Ramakrishna attempted total syncretism between all religions.

The liveliness of the internal dynamics of Hinduism owes much to its exaltation of the vegetarian life-style, as preached by Dayananda Sgravati, active in the USA and Europe. Finally, the Mahatma Gandhi preached the values of non-violence and passive resistance, purity and truth. Later the idea of religious tolerance gained considerable credit, although very often tolerance can prove to be tantamount to non-acceptance.

Buddhism, on its part, has insisted down through the ages on the concept of absence of desire, associated with control of one's own body, and the principle of self-help.

The birth of the Theosophical Society owes much to age-old strands of Eastern religion especially Buddhism and Hinduism on which it is based, fundamentally. Meanwhile the history of mankind is studded with myriad examples of religious philosophy: from the Arab Averroës to the Jewish Maimonides and the Christian Thomas Aquinas. In the field of literature Chaucer exalts the value of human communion and social brotherhood in his *Canterbury Tales*. Erasmus of Rotterdam and Thomas More espouse the value of a simple lifestyle. Rousseau insists on freedom of thought. The philosophers Lessing

and Herder see potential for human development in all kinds of religion. Wordsworth emphasizes the spirituality of a commune-style life. Felix Adler founds the Ethical Society in New York and Stanton Colt the English Ethical Society. Horace Bridges is associated with the Ethical Society in Chicago. Tolstoy and Kropotkin advocate the values of social justice and human brotherhood. Rauschenbush too deserves being recalled on account of his 'Social Gospel', John Dewey for *A Common Faith* and J. Middleton Murray for 'Religious Socialism'. Albert Einstein is also worthy of mention thanks to his defence of the intrinsic worth of human life and ethics. Martin Buber attributes great significance to the dimension of individuality. Given these premises, the idea of the first International Congress of Humanism and Cultural Ethics organized during the first half of the 20<sup>th</sup> century comes as no surprise.

Hans Küng, who recently completed his trilogy on the so-called 'book religions', underlines the numerous points they share, stating that there is a common basis: do not kill, do not torture, do not violate; do not steal, do not corrupt, do not betray; do not lie, do not bear false witness; do not use sexual violence. These principles are found in all these religions. Generally speaking, Catholics agree with them fully. The problem arises when one begins identifying respect for life with condemnation of contraceptives, when attitudes towards abortion are rigid, when homosexuality is discriminated against and questions regarding euthanasia misunderstood. He concludes that we need a moral basis. But this cannot be secularism, neither can it be clericalism; it cannot be the restoration of a Christian Europe like that envisaged by Karol Wojtyła, nor can it be the restoration of an Atheist State like the one founded after the French Revolution. We need sound ethical foundations, that is, acceptance of basic ethical norms, sustained by all the important religions and all significant philosophical traditions, which non-believers too can accept.

Religious values, intrinsically informed as they are by necessarily ideological apparatus, intended as a set of primary and binding ideas, often act as vehicles of censure, instructions and prohibitions. This does not prevent them from being rather widely accepted and shared. Sometimes, it happens that in the name of a religion, professed and practiced, some seek to promote their own standards, even claiming juridical constitutional status for them, their inclusion within the laws regulating religious practice, even their extension to questions alien to the specifics of religious belief. In times of evident crises of values, the restoration of those related to is often invoked as the only possible and feasible remedy.

The knowledge provided by sociological studies informs us that no value, whether religious or secular, is capable of satisfying *in toto* the exi-



gencies of social coexistence. The same is true of sets of values specific to a given religious creed. The law, state organizations and procedures are so complex that they cannot be implemented through reference to a single framework of values. It is extremely important to take into consideration that situations evolve, that they can appear unexpectedly, and can be rife with complicated and inextricable difficulties.

To base a juridical system on a set of specific religious values and oblige the whole of the community to mould its actions according to them, does not appear to be a truly viable option nor one capable of meeting the manifold exigencies of the entire milieu, one able to provide *a priori* solutions to resolve conflict, to foresee all possible developments of the democratic dynamics and political choices of the population

Furthermore, values, whether religious or not, do not execute their function or influence by means of any single normative scheme. They reach well beyond similar systems and banal simplification, and are informed, therefore, by vaster ranges of reference and sounder bases, provided by the social actors they affect, and offer strong critical principles by which to make choices.

Values are by no means a panacea for all ills. Their implementation alone requires an accurate analysis of the social reality. At most they provide general guidelines but they cannot replace the informed action of individuals thus depriving them of fundamental freedom of action. Values, besides, rather than a defence mechanism appear to be more of a viaticum, a set of instructions for behaviour in the world, to act upon wisely, not out of acquired fear. In actual fact, values resemble scientific theories somewhat: they guide without constricting, they leave room for autonomy with moderation, they avail of 'transcendence' but not in the strictly religious sense but as a means by which to overcome limited, fixed, indefectible principles. In other words, values too change, adapt, come to terms with social realities.

However, it is not a diffused kind of relativism either, to be applied at all costs; it is, rather, an attentive and careful approach, which, in actual fact takes pluralism into account while remaining aware of the relativity of a variety of existing and feasible positions.

It is possible to postulate that social actors will not consider the flexibility of values as much as their basic weaknesses due to the fact that they are bound to come up against the hard facts of social life and people's future lives.

It is not by chance that the basic legislation of a state, that is, its constitution, although considered 'sacred', fundamental, needs updating, revision, also thanks to the quest for *tendentally* universal values, that is, for values which win sufficiently significant consensus concerning its indispensability *at a given moment, in a clearly identifiable community*.

All attempts at creating state religions, at stipulating agreements between religion and state are short-lived, fundamentally because individual social subjects are pretty much accustomed and inclined to re-elaborate personally what has been codified, thus arriving at interpretations of their own and, above all, at limited, critical and pragmatic application of the norms thus produced. Pacts between churches and the public administration, even if leading to concrete results favouring the religious organizations, at the same time they produce reluctance on the part of the citizens to accept them unconditionally because people are always inclined to claim their individual rights and exercise them regardless of legal concordats between top-level religious and political representatives: religion thus loses its function as bearer of values available to all and begins to be considered essentially as an instrument of ideology and power and as an imposition devoid of consensus. As a result, its value system, ostensibly in favour of human and civil rights and freedom, its stance against slavery, along with its refusal of totalitarianism, all lose credibility.

### **15. Secular values**

It is not always possible to arrive at a clear distinction between secular and religious values. Some religious values are shared by people who declare being non- or a-confessional or non-religious. On the contrary there are many typically secular values which obtain the consensus of many who are guided by mainly religious principles.

The chief snag is that of identifying the depositaries of these two sets of values. If in the case of religious values one can suppose it to be the churches, the denominational organizations, non-religious values are usually considered a matter for the state. In the latter case perhaps it might be better to use a different definition because the values in question are secularist whereas secular values are a matter for the individual moral conscience, a question of individual freedom of choice.

At this point it is evident that individuals consider and behave towards both religion and politics, church and state, in a similar fashion. Absolutist value systems are not sociologically dominant also because values are different and multiform and because ethical purpose cannot be reduced to a sole religious and/or political system.

One must also take into account the fact that presumed unity of religious values does not automatically imply correspondence to a sole political formula. Vice versa a shared political solution does not necessarily give rise to a single set of values. In other words Weber's polytheism is applicable to religious and political milieus alike.

Because all institutions are founded on a number of shared values, they are never neutral or devoid of prejudice. An a-confessional or secular point of view has its own set of values. If a state simply claims being ethical and becomes the main value reference-frame for its citizens, they will turn to their autonomous capacities when reaching decisions, to their personal conscience and freedom of action.

If, however, the state is genuinely grounded in ethical principles and defends them, it becomes the true guarantor of freedom of conscience and action for its citizens, especially where the value of liberty is held at a premium, above all in matters concerning the disposal of one's body ('this body is mine and I will do as I please with it') and of one's non-material property ('these thoughts are mine and I will use them as I see fit').

Even a 'cybernetic' idea of social reality, such as Luhmann's (1982) neo-functionalism, might be seen as being based on the secular values of proper functioning, order, social balance and systematic regulation. Historical and social experience has revealed that this approach is not self-sufficient and has to cope with matters of individual autonomy and free choice just the same. When the values of the state and the inclinations of citizens are not reciprocal, a social crisis arises, causing conflict and an increase in anomic behaviour.

Only if the state organization through all its apparati and representatives, in all its basic values, is in keeping with the tendencies of its citizens can proper functioning be guaranteed, because it rests on shared values: individuals are not considered as 'moral strangers', as H. Tristram Engdhal might put it. In the background of this secular perspective stands the value of freedom of conscience, a basic characteristic that no state can usurp. That is why no state, whether worldly or secular (or 'secularist') can fail to take into due consideration the ethical autonomy of either religions or social actors.

Although this does not imply that politics depend on religion, the one and the other must take into account the value of reason, whose secular character is, certainly, the brainchild of French Enlightenment although not unknown to universal and non-universal religious traditions.

It is almost impossible to contest the fact that secular values are rooted in metaphysical beliefs. The history of philosophy is full of examples in this sense; many philosophers consolidated their values by making them 'sacred', a characteristic better suited to metaphysics than pure philosophical speculation.

The existing relationship between secular and religious values comes as no surprise, therefore. In order to understand value shifts, it is necessary to examine the origins they stemmed from. Therefore, certain traditional pathways have to be trodden once more, to obtain a clear vision of the source of many present-day values.

A similar study ought to reveal just how conspicuous the number of contemporary values rooted in antiquity and religious aspiration is.

From the point of view of the sociology of knowledge, one can say that longer-lasting religious institutions and their intellectual *élites* have been able to influence social dynamics more than fleeting political and state apparati, without, however, underestimating the durable effects of the norms, administrative systems, life-styles, the social customs of peoples, of the various languages which, by defining and distinguishing phenomena, people, events, objects and more, in actual fact recognize, legitimize and consolidate them, especially as far as the domain of values is concerned.

Yet, if religions lose their vigour and their influence, the values they express suffer and become less widespread; the same happens to values backed by political parties, trade unions or other movements, which can lose credit within the public sphere. One of the first markers of similar weakness is the emergence of new, more or less alternative, pluralistic values, accompanied by a strong oscillation of pre-existing values defended to the bitter end by dyed-in-the-wool militant groups with a tendency towards fundamentalism.

## 16. From values to rights

Values can be considered independent variables, that is, phenomena that underscore interests, habits, custom, processes of identity and social solidarity, as well as dependent variables, that is, derivatives of other social factors. In both cases the substantial issue remains that of values, which, in general may be called human because related to human beings and their basic needs, the fundamental beliefs, they avail of in order to make choices.

The range of human values is very vast indeed, practically comprehensive, so much so that it embraces various spheres of existence: from cognition to communication, from jurisprudence to morals and ethics, from politics to economy, from education to health, from religion to secularity, from personal to social life.

A distinction, made frequently, regards the difference between applied and finalized values (Rokeach 1973), that is, between practical individual and social values and values representing goals to be achieved.

Another rather widespread distinction is the one between general and specific values. But which values are to be considered general is still an open matter of debate. The discussion tends to superimpose universal values and universal rights, that is, human values and rights.

During the last century the human rights issue kept pace with 'scientification'. Especially by the end of World War II, the authority and influence of scientific research began to be taken into greater consideration (Drori,

Meyer, Ramirez, Schofer 2003) especially in the fields of medicine, economy and management.

Although the spread of democracy is increasing, it has caught up with the question of human rights which stands at the very top of the scale. Human rights are no longer the concern of the few nations and organizations which took an interest in them at the beginning of the 20th century; now they are a vital issue for over three hundred organizations and nations directly involved in the question. To this regard, the role of third-level education is of crucial significance (Schofer, Meyer 2005). The diffusion of human rights is now a matter for the world community. Therefore, it has become a fundamental feature of present globalization processes.

Problems of equality and exclusion are the object of constant attention today. The low percentages of some groups – especially minority, rural and low social-income groups – receiving higher education is a matter of keen concern to governments and international organisations.

Strong avocation of the values of individual equality and democratic participation has been in the foreground for some time now, thanks also to the United Nations' *Declaration of Human Rights*. One asks, however, if other real or presumed human rights exist.

The *Universal Declaration of Human Rights*, even if not endorsed by all the nations of the world, remains, nonetheless, a valid reference point.

Sociological research can simply offer data concerning the values most commonly found in different cultural and geo-political realities around the world. A worldwide study, availing of appropriate and meaningful methodologies, could provide general information about the existence of meta-values, that is, values monitored empirically in different social realities and of such a nature, that compared on a vaster scale, might be defined as universal.

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# QUALE RUOLO DELL'EDUCAZIONE NELLA PROMOZIONE DELLA LIBERTÀ RELIGIOSA?

■ JEAN-LOUIS BRUGUÈS

Eccellenze, Illustri Accademici, Signore e Signori, sono molto lieto di prendere la parola nel corso della XVII Plenaria della Pontificia Accademia delle Scienze Sociali, ringrazio il Presidente della Pontificia Accademia, la Professoressa Glendon e il Cancelliere S. Ecc.za Mons. Sánchez Sorondo per l'invito rivoltomi. Il tema della libertà religiosa non lascia indifferente il mondo dell'educazione, anzi lo coinvolge sia sul piano della ricerca, dei principi, dello studio, della pedagogia, che su quello della prassi delle istituzioni educative. Il ruolo che l'educazione ha in questo ambito è davvero vasto abbracciando le aule universitarie, i centri di ricerca, le scuole, le comunità educative. La realtà educativa, che coinvolge studenti, famiglie, docenti costituisce anche un osservatorio privilegiato ed è allo stesso tempo risorsa e sfida. Nel tracciare sommariamente i tratti del ruolo dell'educazione per la promozione della libertà religiosa darò un breve sguardo al contesto educativo odierno per poi soffermarmi più diffusamente sui fondamenti educativi e gli attori coinvolti nel processo educativo.

## Il contesto educativo e l'emergenza educativa

Il tema che mi è stato affidato parte dall'assunto che l'educazione sia essenziale per la promozione della libertà religiosa. In molti documenti della comunità internazionale possiamo leggere di questo ruolo attivo e propositivo dell'educazione. L'educazione viene invocata come una risposta efficace, quasi risoltrice dei problemi. Come, giustamente, è stato da molti osservato il superamento di ogni forma di discriminazione e di intolleranza e la promozione di un clima di libertà e di rispetto, esige dagli individui un cambiamento interiore, che non può essere solo frutto di leggi, ma di una nuova consapevolezza che nasce da una più compiuta educazione a livello morale e spirituale. Tale educazione deve far sì che ogni essere umano venga riconosciuto come dotato di un'innata dignità, da proteggere e rispettare. Tale dignità è il principio fondante di tutti i diritti umani universali. L'educazione è chiamata così a servire la crescita dell'uomo, a renderlo consapevole della propria ed altrui dignità, a rendere l'uomo più uomo. In particolare, alle istituzioni educative, alla scuola, si richiede un'azione incisiva e risolutiva. Non sempre i sistemi educativi svolgono un ruolo positivo sia

perché costretti da una secolarizzazione che tende a limitare la libertà religiosa agli aspetti individuali, come in molti paesi occidentali, sia perché vi sono paesi dove la religione maggioritaria di fatto restringe la libertà religiosa alla libertà di culto, più o meno ampia, o, se vogliamo più o meno ristretta. Inoltre, l'educazione si trova spesso di fronte alla difficoltà di elaborare un progetto educativo efficace e preferisce ripiegare su un concetto di neutralità educativa, che in ultima analisi non è neutrale, ma sposa modelli di laicità escludente, di cui abbiamo esempi nelle legislazioni scolastiche di alcuni paesi come il Québec. La libertà religiosa continua ad essere oggetto di minaccia: da parte del secolarismo aggressivo, che è intollerante verso Dio e verso ogni forma di espressione religiosa e da parte del fondamentalismo religioso, della politicizzazione della religione o dall'imposizione di religioni di Stato e questo ha profonde ricadute sull'educazione.

Il panorama educativo, inoltre, risulta essere problematico: le comunità educative diventano espressione drammatica della crisi del nostro tempo, di quell'emergenza educativa che il Santo Padre Benedetto XVI ha portato con forza alla nostra attenzione.<sup>1</sup>

### **I fondamenti per un progetto educativo efficace**

Il rispetto e la promozione della libertà religiosa nell'educazione è in qualche modo espressione della visione stessa che si ha del processo formativo. Negli ultimi anni nei dibattiti sull'educazione si è particolarmente insistito sul concetto di qualità, cioè su un'educazione che risponda il più possibile alle sfide di oggi e consenta agli educandi di entrare nella società con un sufficiente bagaglio di "conoscenze" e di "saperi" in grado di facilitare l'integrazione in una società altamente competitiva ed in continua evoluzione. In un tale legittimo rinnovamento ed adeguamento dell'educazione si può correre il rischio di ridurre i processi educativi a semplice "istruzione", o al "saper fare", dimenticando che l'educando è persona inserita in una cultura, che vive una profonda dimensione umana, sociale, spirituale e religiosa che l'educazione è chiamata a rispettare, a far maturare ed a sviluppare. Un'educazione di qualità ed integrale non può fare a meno di rispondere a quell'esigenza primaria ed irrinunciabile che è tipica soprattutto della scuola: la socializzazione degli alunni. Una corretta prospettiva educativa deve dunque porre al centro la persona con i suoi bisogni, con la sua globalità, con la necessità di farsi carico della sua crescita integrale fin dalla fase scolare. Un approccio integrale e globale dell'educazione è

<sup>1</sup> Benedetto XVI, *Lettera sul compito urgente dell'educazione*, in [www.vatican.va](http://www.vatican.va).



così un compito ed una sfida per ogni istituzione educativa. In questo contesto di educazione a tutto campo riveste un ruolo essenziale l'educazione ad "essere". Ciò significa agire secondo una concezione antropologica che concepisce l'educando come una vita da promuovere, persona da suscitare e sostenere nel suo processo di maturazione umana affinché gli sia possibile raggiungere la pienezza delle sue potenzialità ed aspirazioni.

Le politiche educative che privilegiano solo gli aspetti funzionali dell'educazione, non solo impoveriscono il percorso educativo, ma possono favorire atteggiamenti di chiusura, egoismo, carrierismo, eccessiva competizione, rifiuto dell'altro, atteggiamenti di superiorità. In un tale orizzonte risulta alquanto difficile porre in atto una educazione significativa per la promozione della libertà religiosa. Spesso si crede di ovviare con una sbiadita educazione civica, che riesce ad offrire appena una conoscenza "tecnica" dei sistemi di partecipazione alla vita sociale e democratica.

La libertà religiosa sfida l'educazione perché la costringe ad andare al cuore del suo obbiettivo: la persona umana e la sua dignità. Infatti, il beato Giovanni XXIII nella *Pacem in terris* affermava: "In una convivenza ordinata e feconda va posto come fondamento il principio che ogni essere umano è persona...; e quindi soggetto di diritti e di doveri, che scaturiscono immediatamente e simultaneamente dalla sua stessa natura: diritti e doveri, che sono perciò universali, inviolabili, inalienabili".<sup>2</sup> Radicata nella dignità della persona umana, che ha una vocazione alla trascendenza, la libertà religiosa esprime la capacità e il desiderio di ogni persona a cercare di realizzare se stessa. Essa è ricerca di un significato nella vita e scoperta di valori e principi che rendono la vita piena di senso. La libertà religiosa, in definitiva, è l'espressione della capacità dell'uomo, di porre le domande fondamentali, di cercare la verità di Dio e la verità su se stesso. Essa non è solo libertà dalla coercizione, ma libertà per la verità, è espressione di una persona che è al tempo stesso essere individuale e comunitario. Insomma in essa si mostra la specificità della persona umana, che l'educazione è chiamata ad accompagnare e far maturare. Delle conseguenze negative che la limitazione della libertà religiosa porta con sé ne ha parlato ampiamente Benedetto XVI nel messaggio per la giornata mondiale della pace di quest'anno, prima fra tutte vi è quella di coltivare una visione riduttiva della persona umana e generare una società ingiusta, perché non proporzionata alla vera natura della persona umana e così rendere impossibile l'affermazione di una pace autentica e duratura di tutta la famiglia umana.<sup>3</sup> Per tale ragione la promozione della

<sup>2</sup> B. Giovanni XXIII, Lett. Enc. *Pacem in terris*, n. 5.

<sup>3</sup> Cfr. Benedetto XVI, *Messaggio per la giornata mondiale della pace 2011*, n. 1.

libertà religiosa non può essere un segmento a sé stante del processo educativo, come pure prescindere da una visione il più possibile globale ed olistica dell'educazione. Un progetto educativo deve così contribuire ad assicurare a tutti una educazione adeguata e secondo coscienza, nei termini previsti, tra l'altro, dalla Dichiarazione dei diritti dell'uomo.<sup>4</sup>

La visione della dignità umana di cui si fa portatrice la Chiesa, anche nel progetto educativo, è quella di una dignità trascendente, impressa da Dio in ogni uomo e ogni donna ed accessibile a tutti mediante la ragione. Consiste nella capacità di conoscere e volere il vero, il bene e Dio, ossia di trascendere se stessi, di ricercare la verità sia come singoli, sia assieme agli altri, nella propria comunità di appartenenza, nella società. Si tratta quindi di una dignità che va letta ed interpretata secondo quella metafisica della relazione a cui rimanda Benedetto XVI nella *Caritas in veritate*.<sup>5</sup>

L'educazione è così chiamata a condividere e promuovere la consapevolezza che “ogni essere umano nasce libero ed uguale in dignità e diritti”,<sup>6</sup> della profonda unità della famiglia umana,<sup>7</sup> nonché la convinzione che una società giusta si realizza solo nel rispetto della dignità di ogni persona umana, la quale va considerata sempre come un altro se stesso, tenendo conto della sua vita e dei mezzi necessari per viverla degnamente.<sup>8</sup> Al riconoscimento dell'uguaglianza della dignità di ciascun uomo e di ciascun popolo deve corrispondere la consapevolezza che la dignità umana potrà essere custodita e promossa solo in forma comunitaria, da parte dell'umanità intera<sup>9</sup> e che per questo tutti sono coinvolti in questa opera di salvaguardia, formazione ed educazione. E che questa educazione è un diritto dovuto a “tutti gli uomini, di qualunque razza, condizione ed età, in forza della loro dignità di persona, e [che essa] risponda al proprio fine, convenga alla propria indole, alla differenza di sesso, alla cultura ed alle tradizioni del loro paese, ed insieme aperta ad una fraterna convivenza con gli altri popoli al fine di garantire la vera unità e la pace su tutta la terra”.<sup>10</sup> Per tale ragione la Chiesa, non ha risparmiato le sue migliori energie consolidando i propri centri sco-

<sup>4</sup> Dichiarazione universale dei Diritti dell'Uomo, art. 26.

<sup>5</sup> Cfr. Benedetto XVI, Lett. Enc. *Caritas in veritate*, nn. 52-55.

<sup>6</sup> Dichiarazione Universale dei Diritti dell'Uomo, art. 1.

<sup>7</sup> “I vari popoli costituiscono una sola comunità. Essi hanno una sola origine...”, Conc. Vat. II, Dich. *Nostra Aetate*, introd.

<sup>8</sup> Cfr. Conc. Vat. II, Cost. Past. *Gaudium et spes*, n. 27.

<sup>9</sup> Cfr. Pont. Consiglio della Giustizia e della Pace, *Compendio della dottrina sociale della Chiesa*, pag. 77.

<sup>10</sup> Conc. Vat. II, Dich. *Gravissimum educationis*, n. 1.

lastici, dando vita a nuove istituzioni, rendendosi presente in situazioni a rischio dove la dignità dell'uomo è calpestata e la comunità è disgregata.

### **Un progetto educativo a più mani**

La scuola in collaborazione con la famiglia ha proprio il compito di aiutare il giovane a prendere coscienza di sé e del mondo, a dilatare le sue percezioni e le sue conoscenze raccordandole ed arricchendole con il patrimonio culturale dell'umanità. Essa è portatrice di un progetto educativo che deve essere volto, come ho avuto modo di sottolineare, il più possibile alla formazione integrale del giovane. L'elaborazione di un tale progetto è un'opera a più mani, che esige il coinvolgimento di tutti. L'educazione è un'impresa comunitaria ed il sistema educativo è un sistema "a rete", nel quale interagiscono diversi soggetti educanti, ciascuno con la propria originalità: la famiglia, la scuola, lo stato, la Chiesa, le associazioni e le diverse realtà presenti sul territorio.

Insieme ai contenuti e ai programmi, l'ambiente scolastico è educativo per sé stesso. In esso, infatti, i ragazzi e i giovani passano gran parte del loro tempo, imparano a relazionarsi, a vivere insieme, attraverso l'acquisizione di atteggiamenti di accoglienza e di solidarietà. Particolarmente importante è la maturazione della reciprocità primariamente tra ragazzi e ragazze con la scoperta della dimensione uni-duale della persona umana, primo paradigma concreto per educare al riconoscimento reciproco e al rispetto. Accanto alle nozioni e concetti occorre fare esperienza della propria e dell'altrui dignità. La Congregazione per l'Educazione Cattolica ha ritenuto di dover particolarmente insistere sulla scuola come comunità "costituita dall'incontro e dalla collaborazione delle diverse presenze: alunni, genitori, insegnanti, ente gestore, personale non docente" in cui è fondamentale "il clima relazionale e lo stile dei rapporti".<sup>11</sup> Non è raro, purtroppo, constatare il deterioramento delle relazioni personali anche nella scuola e in altri ambienti educativi, a causa della fretta, del disagio che vivono gli educatori, della funzionalizzazione dei ruoli. Un obiettivo centrale di ogni politica educativa dovrebbe risiedere nel pensare ed organizzare la scuola come palestra in cui ci si esercita a stabilire relazioni positive tra i vari membri della comunità scolastica. La ricerca della soluzione pacifica dei conflitti che possono sorgere nella scuola offre un'opportunità educativa. Una parola in più vorrei dirla sui genitori, sulle famiglie. È noto quanto la Chiesa e la Santa Sede

<sup>11</sup> Congregazione per l'Educazione Cattolica, *La scuola cattolica alle soglie del terzo millennio*, 1997 n. 18.

insistano sul ruolo delle famiglie dei genitori e sulla libertà educativa. Non mancano in questo ambito delle tensioni, dei tentativi di ridimensionare il ruolo ed i compiti dei genitori, di ridefinire ciò che è famiglia. Talvolta è necessario, come ha notato già Pio XII, che “*si restituisca l'autorità dei genitori in tutti i suoi diritti, anche colà ove fossero stati ristretti ed assorbiti, per esempio nel campo della scuola e dell'educazione*”.<sup>12</sup> In altri casi occorre tenere alta la guardia da parte dei credenti e di tutti gli uomini di buona volontà affinché si continui a guardare ed a tutelare la famiglia fondata sul matrimonio come un bene di tutti. Il coinvolgimento delle famiglie nei processi educativi è quanto mai urgente, soprattutto in quelle aree del mondo in cui si imparano nel focolare domestico atteggiamenti di odio. La scuola potrà così offrire non solo momenti di incontro e conoscenza, ma un cammino educativo per le famiglie stesse chiamate a crescere con i loro figli. La comunità educativa in questo diviene così proposta educativa, esperienza vissuta dagli alunni e dalle alunne.

### **Il contributo del progetto educativo cattolico**

La Chiesa ha una vasta rete di istituzioni educative, sono circa 250.000 le scuole cattoliche, che coinvolgono oltre cinquanta milioni di allievi. Innanzitutto viene richiesto alle istituzioni cattoliche, globalmente prese, di essere luoghi di formazione integrale attraverso anche le relazioni interpersonali fondate sul mutuo rispetto e sull'accoglienza reciproca dando così “vita ad un ambiente comunitario scolastico permeato dello spirito evangelico di libertà e di carità”.<sup>13</sup> Poi di adottare un approccio, diremmo così interdisciplinare nel quale la formazione culturale ed umana è, in certo senso, più significativa ed urgente dei singoli apprendimenti. Questa è stata sempre una priorità della tradizione educativa cristiana, di cui si sente oggi maggiore urgenza. A tale riguardo conserva intatta la sua attualità quanto si legge nel documento *La scuola cattolica*, pubblicato nel 1977 dalla Congregazione per l'Educazione Cattolica: “se si ascoltano le esigenze più profonde di una società caratterizzata dallo sviluppo scientifico e tecnologico, che potrebbe sfociare nella spersonalizzazione e nella massificazione, e se si vuole dare ad esse una risposta adeguata, emerge con evidenza la necessità che la scuola sia veramente educativa, in grado di formare personalità forti e responsabili, capaci di scelte libere e giuste. Caratteristica questa che ancora

<sup>12</sup> Pio XII, *Allocuzione ai Parroci ed ai quaresimalisti di Roma*, in “Discorsi di Pio XII”, vol.V, Città del Vaticano, 1944, pag. 196.

<sup>13</sup> Conc. Vat. II, *Gravissimum educationis*, n. 8.

più facilmente si può desumere dalla riflessione sulla scuola vista come istituzione in cui i giovani siano resi capaci di aprirsi progressivamente alla realtà e di formarsi un'adeguata concezione di vita".<sup>14</sup>

Questa azione concreta si attua in diversi modi, innanzitutto attraverso l'apertura a tutti delle istituzioni educative scolastiche. L'apertura delle scuole cattoliche a tutti non è solo un dato di fatto, ma risponde alle esigenze ed alla natura stessa della scuola. Nella lettera circolare *La scuola cattolica alle soglie del terzo millennio* la Congregazione per l'Educazione Cattolica descriveva così un'istituzione scolastica cattolica, "essa svolge un servizio di pubblica utilità ... non è riservata ai soli cattolici, ma si apre a tutti coloro i quali mostrino di condividere una proposta educativa qualificata. Questa dimensione di apertura risulta particolarmente evidente nei paesi a maggioranza non cristiana ed in via di sviluppo, dove da sempre le scuole cattoliche sono, senza discriminazione alcuna, fautrici di progresso civile e di promozione della persona".<sup>15</sup>

In questo contesto va fatta una particolare menzione alla tutela della libertà religiosa nella scuola cattolica. L'identità della scuola viene spesso ritenuta come possibile fonte di discriminazione e di non tutela della libertà religiosa, invece le nostre scuole sono esempio concreto dell'opposto. La presenza di alunni provenienti da altre tradizioni religiose non è un fatto nuovo, il Concilio Vaticano II ne aveva già preso atto incoraggiando le scuole cattoliche a farsi carico di questi allievi.<sup>16</sup> La Congregazione per l'Educazione Cattolica ha poi indicato nel rispetto della libertà religiosa degli alunni un principio irrinunciabile da tutelare: "Le scuole cattoliche sono anche frequentate da alunni non cattolici e non cristiani. Anzi in certi paesi essi costituiscono una larga maggioranza. Siano quindi rispettate la libertà religiosa e di coscienza degli allievi e delle famiglie. E' libertà fermamente tutelata dalla Chiesa...".<sup>17</sup> Una parola vorrei spenderla, sia pure brevemente su un tema intorno al quale la Congregazione per l'Educazione Cattolica sta riflettendo molto, cioè quello dell'educazione interculturale. In detto ambito è stato celebrato un colloquio internazionale, organizzato dal Dicastero insieme alla FIUC-ACISE, nel marzo 2008, con la partecipazione di un centinaio di esperti provenienti da tutto il mondo ed è stato avviato un progetto di raccolta di "buone pratiche",

<sup>14</sup> S. Congregazione per l'Educazione Cattolica, *La scuola cattolica*, 19 marzo 1977, n. 31.

<sup>15</sup> Congregazione per l'Educazione Cattolica, *La scuola cattolica alle soglie del terzo millennio*, 1997, n. 16.

<sup>16</sup> Conc. Vat. II, Dich. *Gravissimum educationis*, n. 9.

<sup>17</sup> Congregazione per l'Educazione Cattolica, *Dimensione religiosa dell'educazione nella scuola cattolica*, n. 6.

per la pubblicazione di un libro bianco, nel quale si evidenzia come le istituzioni educative cattoliche coniughino concretamente identità ed intercultura e quanto la dimensione religiosa non sia di ostacolo, ma di arricchimento in detto ambito. Si tratta di percorrere un itinerario educativo che porti a passare dalla semplice tolleranza alla ricerca del confronto e di un dialogo autentico, che non omologa o appiattisce, ma conduce alla comprensione ed al rispetto della dignità di ciascuno, fino alla dimensione della fratellanza. Nella visione cristiana tale istanza educativa si fonda sul modello relazionale che ha una sua base teologica.

### **Conclusioni**

La lezione della libertà religiosa, si declina essenzialmente in termini di una educazione che dia contenuti morali e spirituali e sia orientata all'azione. Al cuore della "visione allargata" e dell'"impegno rinnovato" per la libertà religiosa viene posta un'azione ad ampio raggio che coinvolge tutti. Le istituzioni educative cattoliche vogliono collaborare a "dare senso" all'educazione partendo da un progetto educativo che ha nel Vangelo il suo fondamento e porta ogni uomo e donna a scoprirsi figli dello stesso Padre ed a vedere nell'altro un fratello, da rispettare e da amare e con cui condividere l'appassionata ricerca della verità, per cui l'uomo, come ebbe a dire il sommo poeta italiano Dante Alighieri, non è nato per viver come bruto, ma per perseguir virtute e conoscenza.

Grazie.

# THE NEW REVOLUTION IN COMMUNICATIONS

■ MARIANO GRONDONA

In the first pages of *The Politics*, Aristotle observed that animals as well as humans communicate among themselves by emitting and receiving various signs as gestures, sounds and songs, but there is one sign that pertains exclusively to human beings: Speech. How is speech different from the rest of the signals that humans share with animals? It is that, in speech, men do not only emit and receive expressions of pleasure and pain like the rest of the living beings, but also exchange the only thing that is their own: a sense of what is advisable and harmful, just and unjust? The word is exclusively man's because only he possesses the faculty to say what is good and what is bad, 'and the community of these things is what constitutes the house and the city'. Man is a political animal that, for being so, participates in the life of the city or *polis*, and for that reason, he who dispenses with the life of the city, 'would be a beast or a god, but not a human being'. As a result, 'while perfect man is the best of all animals, apart from justice, he is the worst, because, justice being the "quality of the city", without it man sinks into barbarism'.

The ability to communicate by speech is the universal gift of humans. It has had different manifestations throughout history however. But people, having accepted one form of communication in a given era, are troubled each time a new form of communication appears to threaten it. *Cultural fear* accompanies each change in the form of communication because humans, having become accustomed to identify the form of communication they possess with the culture itself, fear that, when a new form of communication appears that rivals theirs, it will plunge them into chaos, into a Tower of Babel of communicational confusion capable of eradicating their cultural identity.

The first form of human communication was *oral*. The most ancient human groups communicated among themselves via oral tradition. Gathered around the fire, the primitive Greeks and other peoples preserved their culture generally in poetic form because, still without the aid of written text, verse could fix their epic tales and mythologies in memory. Recall that the *Iliad* and the *Odyssey* circulated through the transmission of oral culture, from fathers to sons. When you think about the considerable length of the Homeric poems, it is clear that the memory required for oral culture was incomparably superior to that which we could produce in our day, because the predomi-

nance of the written word exempts us from such a gigantic effort. From the Greek *aedas* to the Latin American poets or *payadores*, there is a long tradition of reciters and singers whose mission was to conserve and transmit, almost always in verse, the cultural possessions of their peoples.

It is estimated that oral culture was prevalent in the West from the beginnings of civilization until around the eighth century BC, when Homeric poems finally passed into written form, the emergence of which marked the revolutionary beginning of *writing* as the new form of communication. Greek was the key language in this cultural transformation from oral to written because it had the advantage, before other languages did, of a simple and efficient alphabet with a complete set of vowels and consonants, making it more conducive to writing than other early languages such as Egyptian or Phoenician.

The *Indoeuropean* language merits a separate mention, a language about which we know almost nothing because it only succeeded in leaving traces in the roots of the European languages that succeeded it, from Greek and Latin to the modern European languages, though naturally in written form. Along with this whole set of western languages should be added Sanskrit, the Indian aspect of Indoeuropean culture.

Very little is known of oral culture, but the various ancient languages that have come down to us, entered for example in the Old Testament, are eloquent testimony to their admirable richness. The passage from oral cultural to writing was received with alarm by the practitioners of oral culture, who saw it as a threat to their own culture because it was difficult for them to see at the dawn of writing that it would complement oral tradition rather than threaten it.

Socrates, who lived between the years 470 and 399 BC, did not use written language, despite the fact that he knew how to write, out of respect for the oral culture he had inherited. His disciple Plato (427–347 BC) not only knew how to write but elevated the language, in prose rarely equaled, in his famous *Dialogues*. Why did his writings adopt the dialog form? Because it reproduced the oral exchanges among Socrates and his disciples in colloquia, that today we would call ‘classes’, ‘scholarly meetings’, or ‘round-tables’, on such great philosophical themes as justice, education and love.

Because the dialog form was adopted not only by Plato but also by the majority of ancient authors until the arrival of Cicero himself (106–43 BC), the fact of its prevalence until well into the season of written communication should be interpreted as a vast exercise in *cultural nostalgia* for preserving as far as possible the valuable capital of the oral tradition. We should also note that in the beginning reading was practiced not so much in private by each reader, as is usual today, but through meetings during which someone



read a written text aloud to his listeners, who in this way became 'passive readers' of the same material.

After the barbarian invasions that would finish off the Western Roman Empire (5th century AD), the Middle Ages began in the midst of a long Dark Age that lasted until the advent of the High Middle Ages, beginning, approximately, in the eleventh century AD. Throughout this lengthy stage Western civilization was preserved in the monasteries, where selfless monks laboriously copied ancient texts to protect them from oblivion. 'Laboriously' but not always 'faithfully', as, motivated by their orthodoxy and their piety, the monks from time to time introduced interpolations on their own authority to 'correct' so far as possible the pre-Christian cultural inheritance they judged 'pagan'. The word 'pagan' comes from 'pago', the rural and traditionalist sector where the influence of Christianity, which had become the official creed of western Europe since the Emperor Constantine (272-337), had not yet arrived.

José Ortega y Gasset distinguished between *ideas* and *beliefs*. We have ideas, but beliefs 'have us' because, without having created them, we have them, barely consciously, as part of our cultural inheritance. In the Middle Ages, religious faith was not, like today, an 'idea' that some have and others not, but a true collective belief that sustained all of cultural life, as no one imagined then that the text of the Old and New Testaments was uncertain and thus merited investigation and debate. Anyone who dared to question the content of Christian culture was considered in that time a dangerous rebel and a 'heretic' deserving of the gravest punishments by the Inquisition because his preachings compromised the cultural identity of Christendom.

The cultural heritage of Christendom was held to be not subject to objection until the Protestant, and Puritan, Reformation, the roots of which can be traced to the fifteenth century, manifested itself fully with Luther and Calvin in the sixteenth century, dividing Christendom into two irreconcilable camps, whose reciprocal hostility, accompanied by episodes of unusual violence (violence is never more terrible than when exercised in the name of God), culminating in the terrible 'wars of religion', that bled Europe until the Peace of Westphalia in 1648 consecrated the principle of 'to each kingdom, its religion', (*cujus regio, ejus religio*), which opened the doors of religious tolerance, permitting at the same time that each kingdom could be just as tolerant or intolerant as it wanted within its own borders.

While these processes developed, writing encountered a series of difficulties spreading, due to still-reigning illiteracy. In the Middle Ages, few knew how to read and write apart from the monks. Consequently, literary culture (now no longer solely oral) only reigned in small circles, outside of

which the oral tradition, and not writing, counted no rivals in sight. To this we must add that the still-archaic methods for copying and disseminating written texts did not give books the decisive role they later acquired. Let us say then that for a long time medieval culture continued being oral, with small literary islands.

This drastic limitation remained until the German blacksmith Johannes Gutenberg developed the new technology of moveable type in 1450, which brought a revolution in the diffusion of books and documents. Gutenberg printed the Missal of Constanza and the Bible in editions that today appear to us as modest runs, but that from then forward were multiplied to set up a true literary revolution. It was soon after Gutenberg's moveable type that writing began to develop, on a path to overtake oral culture.

And, as Plato had warned, nostalgia for oral tradition still lived, enduring well into the Middle Ages. Anyone who reads St. Thomas Aquinas's (1225-1274) *Summa Theologica*, for example, notices that his writings are in a certain sense 'oral', as they tend to reproduce the university discussions prevalent in his time, by a definitively 'scholastic' method that begins by posing a question to be resolved, continuing with a succinct exposition of the contrasting theses and culminating with the offering of a solution to the question posed. What was still most important in the thirteenth century in the brand-new university of the Sorbonne where St. Thomas taught, was not so much books – Aquinas himself only possessed a small library, that he knew from memory – as the 'written' record of his 'oral' classes. Even today the Church, with its two thousand year tradition, mixes the issuing of its written documents in the form of papal encyclicals and conciliar and episcopal declarations with a formidable residual oral tradition in the form of 'sermons' that are preached from pulpits throughout the world every Sunday.

### **Freedom of the press**

The predominance of the oral culture shone in the agora of Athens and the Roman forum, where few people needed to know few things, which they were informed of through direct contact among citizens. The revolutionary eruption of the printed word gave rise to the appearance of *journalism* in the nineteenth century, which resulted in the fundamental innovation that people, feeling called on to receive news of events that occurred beyond the almost familial precincts of the forum, did not have – unlike their experience within those precincts – a 'direct' contact with that which was occurring, but only an 'indirect' contact, that required the intermediation of those witnesses of the faraway, who came to be journalists. But this new 'remoteness' resulted in the problem of the *credibility* of the

transmitters of information. If, now deprived of direct contact with the events and personages that interest them, readers need the intermediation of journalists – who of them they believe?

Almost all of the facts that today we take for certain we only have news of through the mediation of journalists. We have not seen with our own eyes any of the great scientific, political or social happenings of whatever kind that now condition our perceptions and instead of paying attention only to what we see and touch, we must pay attention to news others bring us, which forms an inevitable risk of alienation.

If the relating of the wide world that now so vitally interests us were in the hands of a single agent of transmission, we could be easily manipulated and if we rejected all manipulation we would still navigate in a sea of doubts. The only way to avoid dependence on others in the matter of information and opinion is for the sources of transmission of information that reach us to be multiple. In a pluralistic society, the media of communication enjoy the right of free expression but the foundation of this right is not only to protect the broadcasters but also the audience, since the multiplication of broadcasters is the only effective way for the receivers to know where they stand with information that comes to them from afar, by comparing the diverse versions of reality that are presented to them. Normally a reader will establish a relation of habit and confidence with a particular news source, but the guarantee of his choice depends on the audience member knowing that, at any moment, he can change broadcasts.

Therefore, freedom of the press exists not just for broadcasters but also for the audience, and from this it can be derived that the first sign that a political regime is heading on a path in the direction of authoritarianism and even totalitarianism is the restriction on freedom of information and opinion, with the intention of monopolizing them. While *authoritarianism* consists of the concentration of power in a single hand, *totalitarianism* goes farther because it doesn't claim only to concentrate power but also that the citizens, now converted into subjects, think as they think or as they are told to think by those in power. The deepest intention of oppressive regimes is to submit systems of communication to a return to a state equivalent to that which existed before the revolutionary modernization of written communication and, in particular, before the expansion of journalism.

For this reason, contemporary democratic constitutions protect freedom of expression more than any other freedom because it is the condition for the exercise of all the other liberties, even going so far as to prohibit states from regulating it in any form because the very act of regulating the circulation of ideas and information inevitably leads to the suspicion that behind

this regulation lurks a coercive intent. Apart from being prohibited by democratic constitutions, attempts to condition freedom of expression reveal the extent of the vigor of free thought such that even in totalitarian regimes like the Soviet Union, seventy years of state monopoly of communications and education was not enough to suffocate it, such that, as was demonstrated from 1989 on, societies apparently submitted to strict control of communication recovered suddenly, almost magically, the freedom of communication that had been denied to them for so long. I remember that when I read the book *Can the Soviet Union Survive in 1980?* by the Russian dissident Andrei Amalrik (1938–1980), I noted with astonishment that the author had read practically the same books that we used in the West in his generation, confirming that even underneath totalitarian censorship free thought continues to flourish on the part of those who are supposedly submitted to it.

### Television and radio

But if the expansion of writing in books, documents and newspapers brought a radical change in forms of communication, although the modern world now was incomparably more open than in earlier eras, thanks to now-prevailing written communication, it left out the immense ‘reserve army’ of the illiterate still prevalent, above all, in the developing world.

At this point two new media instruments arrived on the scene to expand the contemporary revolution in communications: *radio* and *television*. With them, paradoxically, came the first resurgence of the old world of oral culture. Radio, in effect, consisted in the expansion of the word in its *vocal* expression. It was as if, through it, we had once again the ancient oral communication between issuer and receiver of information. The other communications innovation belonging to the twentieth century, in addition to radio, has been television, which is able to illustrate with powerful images that which it announces in words. This amplification, also revolutionary, brings with it however the presence of a less precise type of material of information and opinion than written messages. For this reason, it is recommended to young journalists that the first stages of their formation be in the rigorous discipline of written expression; in that way, we can marginalize at beginning of their careers the strong emotionality ascribed to audiovisual messages.

On the other hand, television, similar to radio, has been able to reach through its wide diffusion hundreds of millions of persons who can’t read, who were previously absent from citizen debates, amplifying decisively the number who can be amazed by what happens in the outer world, even while these same audiovisual outlets can, sometimes with alarming fre-

quency, be put to demagogic use, a tendency aggravated in turn by state monopolies on media of communication, which becomes easier to effect as radio and television airwaves are more controllable by a central state than was old-style freedom of the press that was only controllable through a monopoly on paper; audiovisual messages may have less resistance to the arbitrary distribution of the licenses that the State grants to particular operators.

### **The rebellion of audience**

Except in islands of ‘intercommunication’, the back and forth relation between emitters and receivers of information, which only existed fully in the popular assembly or *ecclesia* of Athenian democracy and its imitators in the golden fifth century BC (in which the members of the *polis* received the active name *politai* (politicians), not simple ‘citizens’ (because they simultaneously issued and received messages in discussions and votes in the popular assembly), *all* forms of communication we have mentioned so far, from oral culture almost to our own day, share a common feature: the *dominant position* of the broadcasters with respect to the audience members who, as we have seen, only have the capacity to choose among this or that station in order to guarantee so far as possible the truth of the messages directed at them.

This historical audit is key to noting the extraordinary reach of the most recent communications revolution that is taking place today via the diffusion of the Internet in a universe of dizzying expansion, that now reaches hundreds of millions of people and that appears destined in a few years to cover the entire world population. We may say that while almost all messages prior to the present time, from oral culture to television, were characterized by the primacy of the issuer of information, the communications revolution that is occurring before our eyes is characterized by the *emancipation of the audience member*, or, in other words, by the possibility that is open to the audience members to convert themselves into issuers of information.

Looking over the numerous variations that people the Internet today, all channel in one way or the other what we can call the *rebellion of the audience*. The role of the audience before the diffusion of the Internet did exist, but was severely limited. Newspapers can publish ‘letters from readers’ though in a limited number that demands they be carefully edited. Some newspapers also give recourse, sometimes obliged by law, to a ‘right of reply’ to audience members who feel themselves affected by some broadcast or report, written or oral. Radio has featured, more and more frequently, direct interventions of listeners. It is evident, moreover, that the proliferation of public opinion polls, by agencies of greater or lesser credibility, is one of

the 'intercommunication' features of our era. But these new forms of expression run the risk that those who commission or transmit the surveys incarnate a new method, more subtle, less obvious, of the conditioning of the audience by the issuer of information.

Whatever the variety of the services today multiplying on the Internet, those called *Facebook*, *Twitter*, *Wikipedia*, *Wikileaks*, *social networks*, or otherwise, all have the common feature of being carriers of the vast rebellion of audiences at the expense of the old quasi-monopoly of broadcasters of information.

This new form of intercommunication contains, no doubt, a *political* implication. Can we say then that we find ourselves before a new form of *democracy*? In his book *The New Prince*, the analyst Dick Morris is so enthusiastic as to affirm that this is the birth of a form of democracy that he calls *electronic democracy*, something like a new Athens within which the citizen, a new *polites*, can inform herself and meet in virtual assemblies open to mass debate and also to voting where each *polites*, after having debated no-holds-barred the matters that interest her, can also exercise her ability to vote for or against candidates and propositions presented.

It could appear to us in a sense that 'electronic democracy' can only have its full reach in developed societies with near-universal access to the Internet, but the popular revolutions against dictatorships like that of Mubarak in Egypt and Qaddafi in Libya are telling us that, even with less technological development, the oppressed inhabitants of the Third World have been able to use 'social networks' to communicate among themselves regardless of the will of their dictators, which was previously all-embracing, taking advantage of this method of sudden democratization of communications and putting on defense not only Arab dictators but also authoritarian regimes outside the Arab world like the Chinese regime, that has not hesitated to censor intercommunication on the Internet among millions of its subjects who aspire to convert themselves into active citizens in a new democracy. The fact that Qaddafi has bombed his own people from the air, openly committing the greatest crime imaginable against humanity, reveals at once the desperation of the autocrats in the face of the democratic revolution the Internet has made possible, against which they cannot employ the old repressive methods.

Various questions arise, in any case, around the rebellion of the audiences. From the right, one can ask whether it doesn't give place to a kind of *communicational anarchy*, in consequence of which no authority, not even democratic ones, has been able to channel constructively the new energies that have been unleashed. In particular, 'Wikileaks', with its sometimes scandalous diffusion of diplomatic cables originally confidential and even secret, is it not

an attack against the secrecy that until recently protected exchanges between States? To what point must we accept diffusion of information without filters or curbs capable of compromising public security in these times so open to the actions of terrorists? If that is what is asked, from the right, by those who want to shield their countries from subversive threats, then from the extreme, or if you like, from the left, others worry in the face of danger that, being in possession of more efficient and more sophisticated instruments than the common people, the centers of power will take advantage of social networks by utilizing them as vehicles of their own projects of domination. In his famous study on *Power*, Bertrand de Jouvenel took note that, despite the fact that many revolutions, such as the French Revolution and the Russian Revolution, began with ardent cries of liberty, they ended in the exponential growth of the power of the State, this leviathan against which they fought in the beginning, whose capacity to pressure the citizens always augments beyond the libertarian intentions of its own revolutionaries.

But these questions that now present themselves from the right and the left before the new intercommunication revolution, are they not, in turn, the most recent manifestation of the ancestral *cultural fear* that we spoke of at the beginning of this paper, that reappears all throughout history each time a new form of communication dawns?

Another observation that can also be made before the formidable expansion communications are experiencing today via the Internet and ‘audience rebellion’ is that, of the hundreds of millions of people fit out to cross over from mere reception to the broadcasting of messages, only a minority, although an extensive one, appears disposed to take advantage of this. The supposed anarchy that could accompany the rebellion of the audience, does it not then constitute a passing phase, a fashion even, after which the world will return to the rule which the ‘Machiavellist’ Gaetano Mosca, who did not believe in what for him was the illusion of democracy, defined by saying that in whatever regime, whether defining itself as democratic or not, an ‘organized minority’ always rules over a ‘disorganized majority’? For those who accept this polemical point of view, what the revolutions have done is not annul the dominance of a minority to the benefit of the people, but to the benefit of ‘another’ emergent minority, that also will falsely proclaim the sovereignty of the people. So thought another follower of Machiavelli, Wilfredo Pareto, in his theory of the ‘circulation of elites’ which posits that revolutions, even in their majoritarian proclamations, have always culminated in the replacement of one minority for another, more modern and efficient and not to the satisfaction of authentic democratic aspirations.

All of which signifies definitively that not even the revolutionary amplification of communication the advent of the Internet has brought promises to resolve in one fell swoop the ancestral conflict between liberty and authority. What is clear is that the Copernican revolution we are experiencing with respect to the eruption and universalization of the internet will demand of new generations, whatever their origins and ideological biases, that they rethink and revise from a new view the most profound dilemmas of our life in society.

### **From ‘real’ communication to ‘virtual’ communication**

‘Don’t bite off more than you can chew’, the saying goes. Communication via the Internet ‘bites off’ a space incomparably more extensive than interpersonal communication, in a movement that the old frontiers of the family, the city and even the nation can no longer contain. But it is also true that some who bite off little, chew much. Relations established between two or more persons in a small community of a family or a neighborhood have a level of intensity rarely reached by Internet messages. It is true that the almost casual contacts established on the Web can on occasion generate friendships and even marriages that never could have been conceived of before. But it is also true that relations beyond one’s physical neighborhood, between interlocutors, for example in the circles of ‘friends’ on Facebook, are most of the time superficial and ephemeral because it is not possible to cultivate thousands of friends all the time. Other times, legions of operators contracted by the Government inundate a web space in obedience to directives that are arrived at and financed from the nucleus of power.

What is, then, the ‘weak’ flank in these Internet relations in comparison with the ‘strong’ relations that accompany the links between spouses, parents and children, teachers and students, political co-religionists, followers of the same faith, or between those in close friendships? Is the world crossed by two circles that don’t touch each other, one of the most amplified circle of ‘friends’ on the Internet and the other the reduced circle where learning, apprenticeship and friendship flourish?

Maybe the border that separates the two circles of communication that co-exist today in the world is the fact that, as much as the profound relations between human beings, quantitatively limited, are *real*, the superficial relations, quantitatively more extensive but less intense, taking place in the new empire of the Internet, are *virtual*.

What is the difference between the ‘real’ world and the ‘virtual’ world? The word ‘real’ is related to the Latin ‘res’, which is to say ‘thing’. The embrace, the handshake, the intimate communication, confidence, spiritual



affinity, to be 'real', must necessarily have a bounded spatial range. One can't have more than a reduced number of family members and friends, that maybe fit in a house. Confronted with the revolutionary fact that millions of persons can now contact each other via the Internet, as emitters or receivers, if we say that this massive communication is 'virtual' we are also saying that it cannot articulate itself in the warmth of real intercommunication among few persons, but across a screen that, without being, is everywhere, but we are also saying that, thanks to technology, this new communicational wave can expand indefinitely.

Are we saying then that, so much as real communication is *direct*, person to person, virtual communication is *indirect* because, by way of it, concrete persons, of flesh and blood, emerge in a medium that is, in and of itself, impersonal and, for that reason, what we call 'media-like'? Not solely the 'physical' encounters between people but also their telephone conversations or letters are, in this sense, 'real', while the contacts between an author and reader are in a certain sense 'virtual', as are all those that figure on the screens of the Internet, as they create spaces to which all, emitters and receivers, can come in a form not exclusive but inclusive, open to all. But the universality of the screens is also 'virtual' because it only includes a 'representation' of what it communicates by them, without their real, effective presence.

The enormous diffusion of *e-mails* deserves a separate paragraph. If well utilized and directed to personalized recipients, are similar to old paper letters. As a new mode of traditional letters, e-mails, if interpersonal and not 'circulars', are an additional proof of the immense expressive richness the eruption of the Internet has given place to, without knowing yet if it will end by channeling itself in the examples we have mentioned, or if it will still give new surprises.

Faced with the eruption of a new form of communication like the Internet, the people of our time are solicited, like our ancestors were, by two opposing trends. There are enthusiasts of the new invention who see in it the possibility that democracy will be amplified, overcoming old social and political restrictions. But there are also the new carriers of the old 'cultural fear', who are alarmed in the face of the negative impacts that the new revolution in communications could cause, as for example the militancy of the sadly famous bloggers who flood the screens in exchange for a payment in cash or fanaticism.

Before this new condition that affects human beings today, we can remember that technology as such is morally *ambivalent*. Nuclear energy brings and can still bring with it the cure for the gravest diseases that yesterday were taken for incurable, but also brings and can bring with it large-

scale slaughter as in Hiroshima, Nagasaki, Chernobyl or Fukushima in present-day Japan. All is open, in sum, to the use we make of our *freedom*. What happens is that, as Martin Heidegger warned in *The Question Concerning Technology*, since man is each day more powerful in his new scientific and technological possibilities, his capacity to do good, as much as his capacity to do ill, has grown enormously. The worst that could be would be that Humanity, now armed with its new technological faculties and now having in its hands previously unsuspected possibilities, will not develop a comparable moral progress capable of channeling them in the right direction. The philosopher Robert Nozick maintained that ‘moral progress’ consists of the warning that, in view of our greater technological power, we know that as much as the frontiers of the good that we can do, so the frontiers of bad into which we can fall, have widened decisively. The killer no longer has only the dagger, but the doctor has, for his part, instruments incomparably more useful to combat illness. For good as well as for bad, our moral options have become extreme.

In a world more and more interconnected, both the power to create beneficent ideas and the power to spread propagandistic manipulation of human beings, have multiplied. The optimists trust that we will be able to use our new weapons of the communications revolution to extend the empire of good. The pessimists fear that evil and deception will conquer new frontiers. William Shakespeare wrote that human life is a tale told by an idiot, but it appears at other times a tale told by a wise man. It falls to each of us to choose between the two tales, knowing that the *nous* (‘intelligence’) that Teilhard de Chardin anticipated, is the revolutionary appearance of an intelligent area that, for being interconnected, will be universal, will challenge us as never before because it is already knocking on our doors.

## ► V. RELIGIOUS FREEDOM IN THE GLOBALIZED WORLD

### 1. The transnational and international world

# HOW CAN A UNIVERSAL RIGHT TO FREEDOM OF RELIGION BE UNDERSTOOD IN THE LIGHT OF MANIFEST DIFFERENCES AMONG RELIGIONS, CULTURES, NATIONS, SCHOOLS OF INTERPRETATION, FORMULATIONS OF RIGHTS, AND MODES OF IMPLEMENTING THEM?

■ HANS F. ZACHER

## The challenge

In present times, looking for an adequate regime to materialize freedom of religion means to learn. To learn the very reality of religion and of its freedom in today's globalised world. To become aware of the extremely manifold phenomena which are meant when we speak about freedom of religion. And to see that freedom of religion poses not only a complex problem, but that it poses a vast complex of problems.

I will start by disclosing the central – and perhaps provocative – result of my observations. What we are looking for is – as I presume – an adequate regime for freedom of religion. However, the conclusion I have arrived at is this: the solution cannot be one single regime of freedom of religion. The solution can only be a plurality of regimes. And the huge challenge behind this diversity is a new question: is there a basic concept which the manifold regimes should have in common? We should be able to find a general principle governing the plurality of regimes. That would be a decisive step towards global implementation of freedom of religion. But I cannot see that this regime behind the regimes is known to us.

My project to contribute to an analysis of the problem and thus to approximate visions of a solution is to sketch perspectives and finally to dare some outlines of a regime behind the regimes.

## Approaches

### 1. What is 'religion'?

Religion in itself is understood as a relation between God (or a multiplicity of gods or other metaphysical powers) and men. Religion may (like

in Buddhism) also be experienced as the comprehensive insight into a non-personal metaphysical reality. Religion in itself thus is a phenomenon of transcendent reality. 'Religion' however is also a name for that what men think, feel and do if they live on the basis of their religion. Insofar religion is a phenomenon of earthly reality.

## ***2. Religion as a transcendent and a social phenomenon***

Human rights are a central means to regulate human coexistence – in other words: they are a central means to regulate social life. Among human rights however freedom of religion has a very peculiar position. It pertains to human life in its earthly, terrestrial dimension as well as in its transcendent, spiritual dimension. Insofar as social life is human life and the terrestrial dimension of human life cannot be separated from the human potential to participate in transcendent spiritual life, social life also includes the transcendent, spiritual element. But human participation in transcendent life can neither be observed or assessed, nor conditioned or influenced as it can be done with human participation in secular reality. What is thought or done relating to social life has to respect the potential of spiritual life. But it is impossible and even forbidden to presume or to ascertain its reality. For the regulation of human life, the transcendent reality is therefore of very relative relevance.

If freedom of religion is concerned, though, the constellation changes. To be the scope of a right to freedom, religion has to be taken as something which is socially real – as a social phenomenon: constituting and shaping relations between men. But when looking at religion as a reality, we cross a critical boundary. What God (or any other metaphysical power) is, thinks, wants, recommends or commands or what that non-personal metaphysical reality is, is known only through the intermediation of human beings. This makes religion open for uncertainty and variety, but also for any kind of assertion of definitiveness. The possibilities of defining religion are endlessly manifold. And endlessly manifold are also the human beings whose teachings create the large amount of doctrines and advice: the great founders who originally communicate the substance of a religion; the great leaders who develop the doctrine, who perhaps also split up a community and define the peculiarities of new denominations, sects etc.; the bishops, scholars, priests, preachers, ministers who transport the assets of the religion from past to future. But besides all these realities created by various leaders, the reality of a religion also exists by virtue of all the believers who inevitably have their own, their highly individual picture of god as well as their personal selection of the teaching – be that within or without a church or any other form of religious community.

### ***3. The individual right – the right to collectivity and autonomy***

In legal terms this means that freedom of religion has two sides: the individual one and the collective one. The individual one is very close to freedom of thought and freedom of conscience. It makes religion potentially omnipresent and the shape of religion endlessly variable – including diminution and disappearance. The public articulation of common convictions or religion-borne interests is amorphous, as mass-actions generally are. The collective side is the basis of religious communities and thus the basis of other extremely important ways of manifestation of religion: the common tradition of belief, the common exchange of avowal, the common implementation of rites and services and so on. Beyond that, collective freedom of religion is borne by an elementary human condition: the desire to experience religion as something that is not restricted to oneself but that we have in common with others – as something that is perhaps universal, that is an inevitable truth. The downside is: religion as a source of truth is a hope; the plurality of religions is a reality. That is the difference between the truth of religion and the truth which can interpersonally govern our practical life.

Realised in a collective way, freedom of belief enters special fields of tension. On the one hand, there is the tension between the individual freedom of religion and the collective freedom of religion. The individual, who is a member of a religious community from a general human point of view, keeps his or her individual freedom of religion. If transgressing certain limits of tolerance the community might blame the dissident for apostasy, for heresy or for schism, might punish or expel or even kill him or her. Or the dissident will split the community or leave it. On the other hand, there is the possible tension between collective freedom of religion and the involvement in other social units – be they kinsmanlike, professional, commercial, political or anything similar.

### ***4. Believers and non-believers***

Modern societies do not simply consist of believers and non-believers. There are many variations and facets between. There are, for example, religiously distanced people who want to keep their options open – in order to identify or not to identify themselves depending on the situation. They all share the freedom of religion. In the event of dispute, they claim a ‘negative freedom of religion’. And normally it will not be refused. The reasons are various: it may be due to the intensive connectivity between the freedom of religion, freedom of conscience and freedom of thought; the difficulty to discern between a positive and a negative freedom of religion; the secular improbability of the elements of religion; finally the democratic unintelligibility of an essential legal difference between believers and non-believers.

The social reality of freedom of religion is, however, significantly distinguished and characterised by this equalizing coexistence of freedom of belief and freedom of non-belief – and, what is even more important, an indefinite number of variations between them. Freedom of religion is normally manifested through community membership and community building, a special form of organisation, common rites and services, and finally through the invocation of God or some other transcendent reality as an argument for the solution to profane problems. Freedom of religion applied to non-believers, in contrast, does normally not involve building or joining communities – it is rather a matter of individual life, of families or groups of personal like-minded friends; it is not exercised through a special form of organisation; not through common rites and services; and on the other hand arguments for the solution of social problems are concentrated on secular ones. After all: the social freedom of religion for believers regularly goes along with visibility and constancy; freedom of religion for non-believers, however, primarily means invisibility and a maximum of flexibility.

Exceptions to these rules are not excluded, however. There may be groups sharing common convictions and attitudes, and perhaps also feeling the mission to spread these. And the way to develop and to unfold them may be similar to the way religious groups exercise their rights. Especially militant atheists may choose corresponding paths.

### ***5. Constellations of religious congruencies and differences within common spaces of social life***

#### ***a) Religion and non-religion as an element of living together***

The phenomena of freedom of religion materialize in a confusing diversity of levels, spaces, directions etc.

- As individual relations and collective relations as well as the position of individuals amidst a collectivity.
- In peaceful parallel existence of strangeness and restriction or of harmony, respect and cooperation or in contempt, hostility, strife and war.
- Through the different arenas where groups of people meet: religious arenas formed by disputes between the religious leaders and/or the followers of one and the same denomination; social arenas like the ones constituted by racial or ethnic conflicts, by economic circumstances, by standards of education, by living territory, by the traces left by history etc., if religious differences come along with social differences or cross the latter. Sometimes – and not too rarely – political parties or other systems of political rivalry are arenas for political disputes.

- Through the means of implementing relations. On the positive, peaceful side this involves the exchange of information, becoming acquainted with each other, common enterprises and experiences, mutual assistance. On the negative, hostile side this means the blocking of information, spreading of wrong information or negative arguments and judgements; discrimination and exclusion from access to goods; material aggression turned against churches, temples, houses of priests or followers and vented through destruction; finally personal infringement such as deportation, imprisonment, torture, bodily harm, killing, and the extinction of the believing.
- Distinguishing themselves by the transcendent realities which the followers believe in, by the consequences which they draw for their religious practices and/or for their profane ways of life, or finally by the consequences which they draw for the life of the whole society, the general public, the state and its law.

***b) Is freedom of religion only a freedom or also a common good?***

Religion and non-religion are an omnipresent potential for conditioning human living together. Freedom of religion therefore could and should include the responsibility for freedom of religion of the respective other ones. Any kind of freedom can only exist within a common order applicable to all the subjects who are able to make use of it. Freedom which is not general, which is not for everyone but reserved for one person or a selection of entitled persons only, is not freedom. It is domination. Think of property right or the freedom of commerce which are a priori to be understood as being subject to legal regulation. Freedom is only possible within the framework of mutuality – multilateral mutuality, reciprocity, a fact that those who make use of freedom of religion are normally not aware of. The background is that religion is felt to be a participation in truth. Thus freedom of religion means responsibility for truth: responsibility for the communication of truth; responsibility for the implementation of truth through the individual and through social life. Freedom of religion thus tends to spread the truth, to make truth generally accepted, to make truth to be followed. That may be similar with freedom of conscience or freedom of thought. But no other freedom shares this essential connection with truth. The use of other freedoms can be subject to compromise. The message of truth is unable to accept a compromise.

That was also true in times, and under circumstances, when in certain societies and states only one religion was present. Then it was normally neglected, however. It disregarded the possibility of individual disagreement. Think of the most elaborated practice of inquisition at the height of the European Middle Ages, when the Church stated the difference between the in-



dividual conviction and the official teaching of the Catholic truth, and the state excluded the dissident from society. The Peace of Westphalia still stuck to this way of thinking – by ‘modernizing’ the implementation. Only when dissidents themselves founded the American states and finally the United States, the soil of a new paradigm entered the ‘Western world’. But until now no mature philosophy of coexistence of different religion-borne ‘truths’ has been generally accepted. The development of a philosophy of pluralism which optimizes the chances of religion-borne ‘truths’ to be respected and listened to is a decisive precondition for the prosperity of freedom of religion.

That means that religious communities and thus also and especially the Catholic Church have to withstand severe tensions within themselves. On the one hand they are the trustees of the truth which they took and continue to take out of their transcendent background. They are responsible for spreading out ‘their’ truth over the whole of mankind. On the other hand they will and cannot expect that freedom of religion can prosper or even only prosper for the message of one religion, of one community. They have to understand that the future of the freedom of religion will only survive and prosper as a common good of all religions. And not only that: they also have to tell the secular part of mankind that freedom of religion is also an integral part of their world – that ‘their’ freedom of thought and ‘their’ freedom of conscience will not survive and even not prosper if mankind is bereft of freedom of religion. To achieve that, it will be essential to differentiate between the transcendent reality of eternal life and the social reality of earthly life.

## ***6. The responsibility of the state***

### ***a) Diversities***

The greatest responsibility for guaranteeing the freedom of religion and for controlling the conflicts and dangers which go along with it lies with the state. It has the responsibility to arrange a peaceful, free, safe and sufficient life for its citizens or other people who live in its territory. Assuming that not all of the people share the same religion (nor even the same interpretation and/or practice of the respective religions) means: the state has the responsibility to develop a commonwealth on the basis of various contradictions:

- Contradictions between a concept of human life, state and society which is based on purely human reasoning and agreement on the one hand, and a concept of state, society and human life which is also based on the religious message about the state, society and human life on the other hand;
- Contradictions between the different religious messages about human life, state and society;

- And contradictions between the different humanist concepts of human life, state and society.

In addition there is another series of contradictions. It starts with the innermost manifestations of religion: the organisation of religious communities, the common worship and service, the rites etc. Supposed that freedom of religion is accepted, there should normally be no conflict. But exceptions can arise.

- The religious manifestations of one religious community can come into conflict with religious manifestations of one or more other religious communities;
- The religious manifestations of a religious community can come into conflict with individual spheres of freedom of religion, conscience and/or thought;
- Or – and that is the most frequent case – the manifestation comes into conflict with basic values or goods of the state and the civil society.

Apparently, a concept which offsets all these contradictions is not possible, and the conclusion that the religious messages are to be disregarded seems to be obvious to some people. The starting assumption for them is: all men have and experience a relation to earthly reality; but not all men discern and accept a transcendent reality. Thus – that is the conclusion – to be aware of the earthly reality is the common character of men. The consciousness of transcendent reality in contrast is a potential for disturbance. Therefore it should be neglected as an individual, ‘private’ risk. This would, however, disregard the essential meaning of freedom of religion: that human existence can be traced back to a transcendent reality. This is a capacity which no one can be denied and which no one can be supposed to never feel. To view one’s own life against the transcendent background or to deny it, is the true asset of freedom of religion, as well as the corresponding right of individual choice. Thus no solution is allowed that excludes from longing to think about a transcendent reality during one’s life, from longing to feel it. The burden to live with contradictions and to give them a bearable, tolerable structure persists.

### *b) Essays on solutions*

Here we touch upon the core challenge of freedom of religion. It would not be fair to claim the availability of easy solutions. What is most necessary is to get ahead with more satisfying ways to render freedom of religion possible under the condition of diversity and contradiction. Let us look behind the matters of course, which we quickly have in mind when we talk about freedom of religion. These matters of course are mostly shaped by familiarity, by our country, by our time, by the opposition of a general religious public

and non-religious individuals, perhaps also by the opposition of an atheist majority and a religious minority. But in what country are things today as they were when we were children? And we all are afraid that things will have changed even more the day after tomorrow. We need deeper going views, a richer stock of construction elements and a better knowledge of their effects.

I will, however, risk some hypotheses:

- The state is the most general trustee for freedom of religion. As the state does not identify itself with a religion (or a non-religious analogy of that), it is the last resort to protect the individual freedom of religion;
- The state has the responsibility to arrange a peaceful, equal, free, safe and sufficient life for all its citizens and inhabitants. Freedom of religion must not violate these values. Individuals and communities which exist or at least act on the basis of the freedom of religion are obliged to respect the other citizens' and inhabitants' rights to a peaceful, equal, free, safe and sufficient life. They are also obliged to respect other individuals' and communities' freedom of religion;
- Collective freedom of religion must not be bartered for a regime of individual freedom of religion only. Freedom of religion must not be bartered for a regime of freedom of conscience and freedom of thought only. From the very beginning the right was granted as a right to 'freedom of religion' – as a right in favour of the persecuted believers, not as a right to 'freedom from religion' or as a 'right of non-religion'. To see human life not only in its social realness but also in a transcendent realness is an essential human habitus. And there is no other right to protect it in a way that freedom of religion does;
- Freedom of religion does not mean that all religions in one and the same country have the same space to unfold in any context. Culture, the number and distribution of followers and similar social circumstances and particularities may play a role regarding differentiation. History and tradition will certainly be strong arguments. But not only the changes of the present and even more of the past teach us that the future has to stay open. The past is not a downright lawmaker for the future practise of the freedom of religion. Freedom of religion is a vital right of every new generation. Limited imbalances between religions or religious communities are especially tolerable if they improve the peaceful living together of a plurality of religions as well as the living together of religious communities, religious people and the secular population;
- But it certainly means that all religions share a regular basic position which deserves the name 'freedom';
- The autonomy of religious communities gives none of their authorities the unlimited power to condition and to control the life of their members.

The general responsibility of the state for a peaceful, equal, free and sufficient life can limit the autonomy of religious communities;

- In order to achieve equality for all, law is the key competence of the state. To acknowledge law as national law only because it is understood as ‘God’s will’ by one or more religious communities violates the responsibility of the state for all its citizens and inhabitants. That is equally true for the handing over of the administration of the law to authorities of a religious community or a group of religious communities.

### *c) Ways of implementation*

These layers of analysis show how far the way from the legal wording of ‘freedom of religion’ to operational rules is. Judicial work dealing with cases by interpreting some words in a constitution or an international treaty may often be too simple, too undifferentiated, much less open for variety or future development, too surprising to be accepted. On the other hand, political decisions through democratic legislation may, for instance, be too influenced by tactics to keep the political power or to arrive at it and too limited to weigh up the scope of possible solutions. Certainly, laws and court decisions are irreplaceable. But the necessity to complement the instruments is obvious:

- To make the real diversity of circumstances visible by comparative studies;
- To enhance and intensify the stock of experiences by observatories;
- To approximate consensus by discussion and agreement through bargaining;
- To facilitate the acceptance of new arrangements by itinerary approaches;
- To accompany practices by monitoring;
- To accompany developments by counselling, etc.

### *7. Theocracies and totalitarian states: the absolute problem*

States are the most important trustees of human rights. They are especially also the most important trustees of the freedom of religion. And law is the most important means to materialize this responsibility. Taking on this responsibility is impossible for totalitarian states. They refuse freedom of religion. And it can also be impossible for theocracies. In the case of theocracies, however, things may be gradually different.

Totalitarian states negate a transcendent reality – especially if the transcendent reality is a religious one, and even more if it is bound to a religious community which may question the absolute leadership of the ruler or the ruling group. In principle this means that totalitarian states negate the social relevance of a transcendent background of any person’s life. Whoever bases a manifestation of his or her personality on a banned transcendent ground, excludes him or herself from the full participation in the totalitarian common-

wealth. And every inclusion in a totalitarian commonwealth supposes and commands that transcendent aspects are excluded from being relevant. The reactions to resistance may be various and go from killing, deportation and imprisonment to different grades of discrimination. But for followers of a banned belief, of banned believes or – as the circumstances may be – of any socially relevant belief in a transcendent reality, full equality with other citizens and inhabitants is impossible.

Theocracies, on the other hand, privilege one religion and exclude all the others from full participation: both believers of other religions and non-believers. There may also be differences in the intensity and the perfectness of the exclusion as well as differences in the degrees of the exclusion ordered by totalitarian states. But there is one extreme constellation: if law is understood to be directly given by God and if the judges or similar officials who administer the law are understood to be commissioned and authorized by God. Law is man-made. And it should be the rational result of a process of human exchange of opinions. Religious thinking may be one of the sources to find good legal rules and good legal decisions. But as law is man-made and the administration of the law is a human mandate, everyone who is confronted with law and the courts in his or her understanding of the law might follow his own conviction – be it his own religion, his own morale, his own rationality. The supposition that the law is ‘God’s word’ and that the judges or similar officials are God’s commissioners deprives the people concerned of their human independence and compels them to be obedient to a God who is not ‘their’ God and to respect the authority of the judges as a divine mandate which can only be based on a religion which is not ‘theirs’.

Altogether, there is a deep and very important rift between totalitarian states and theocracies on the one hand and more or less liberal, more or less constitutional states on the other hand. This difference is commonly characterised by an essential intolerance against religion and a resolved readiness for a religiously or anti-religiously rooted inequality.

## **Some consequences for the global world**

### *1. The comprehensive relevance of ‘globality’*

#### *a) Territorial ‘globality’ versus historical ‘globality’*

To get ahead with materializing freedom of religion in a globalized world, it is urgently necessary to understand ‘global’ not only in terms of a geographical, territorial meaning. And not only as a phenomenon of geography, communication, traffic etc. It is necessary to realise ‘global’ as the ever more complete, more intensive self-detection of mankind: mankind as an entirety;

not only as the entirety of the population living today, but also as an entirety over the history, from the first beings who deserved the name ‘man’ to this very day. What was religion throughout all these thousands of years? Throughout all the multifariousness of human civilisations and cultures? In present times – unlike any other time in the past – men know so much about their history. Men also know more about religion than before – about the visions of transcendent reality and about the social reality of religion. People know about the manifestations of religion at very different times at very different places. And people ask: is that God’s world all together? Are those all God’s children? And if not, what then is the meaning of the different ways for the equal children? Or are children a priori unequal? Over the centuries, when thinking of religion, people knew only one religion or a very limited multiplicity of religions. And they knew religion only as one and the same religion, across all eras they experienced or they remembered one step of development or a few steps. Now the world history of religion teaches them how often religions come and go, split up or get unified.

But not only that. They also know about Christianity from Christ’s birth onwards: throughout the different times, in the different places, as the many churches, the denominations, the many other particular units. They even know about the many manifestations shown by the Catholic Church over time, in the diverse places, under such various conditions. And they ask themselves again: why so many ways, so many changes? Are not all men God’s children? Why should not all their ways be God’s ways? And what does that essential challenge mean for freedom of religion? Who is allowed to make a difference between religion and religion, and when? Who is entitled to require sacrifices if the ‘right’ way was failed?

### *b) The lessons of history*

The lessons taught by the history of mankind are impressive – and unambiguous.

On the one hand there is clear evidence that men have always lived on religious ground. Not all men. But religion in principle has always been important as a framework of human life. Regarding the history of mankind, the secular claim that the religious ground of human life could get lost or become irrelevant looks vain.

On the other hand, we see that the landscape of religions has changed all the time. Even Christianity has changed all the time. And the whole picture of religions has been developing all the time. There is an extreme difference between the self-conception of religions of being absolute and historical reality. And also the self-conception of a religion of being the right one and

the only right one becomes extremely relative. No one can dispute that claim to be legitimate in itself: to be communicated by the community and to be believed by the followers. But no one from outside is entitled to confer this title or to deny it.

Thus we observe a very complex situation. Religion is a human capacity, a human potential, a human habitus, is a *conditio humana*. But religions as phenomena are nothing absolute. Each of them may develop itself and will probably develop itself. The believers experience 'their' religion in a certain situation, at a certain time. But any other believer may experience it in a very different way.

## *2. International governance*

### *a) The institutional difficulties*

There is one consequence which is irrefutable: freedom of religion. Freedom of religion for everybody. And freedom of religion as a common good for the world. But what ways to materialise that are the right ones, and what ways the wrong ones? What can the formulation of one fundamental right mean? One sees how important the concrete situation is: the situation of a state, the situation of a civil society, sometimes the situation of a region, an ethnic community etc. The distance from the formula of a universal formula to the reality of national, regional etc. life is extreme. And so is the distance from one court of human rights to the reality of vernacular reality. Are global minimalia possible? Are global directives possible in order to lead particulate practices and regulations? It is necessary to detect the complexity of situations which jeopardize, violate or cancel freedom of religion; and it is necessary to detect the whole complexity of the ways to grant and to guarantee freedom of religion.

With respect to fostering the stock of knowledge and experiences of the doctrine, the legal regulation and the practice of freedom of religion is therefore also a common responsibility of all states that want to integrate freedom of religion, as well as of all religious communities. Developing the proficiency to interpret and practise freedom of religion in order to improve for instance the regulations and practice or to adapt them to the changing structures and mentalities of the populations, their convictions and their attitudes etc., is likewise a common business for states and religious bodies. This in fact means to also engage in the activities recommended above for the national situation – comparative studies, observatories, reports about procedures like bargaining, itinerary approaches, monitoring of the practice, accompanying developments by counselling – in order to arrange them on a global level. A transnational or an international agency to care for that is to be strongly advocated.

### *b) The split world*

To be honest, however, one important aspect of the reality of this world has to be regarded: the division of the world into ‘liberal’ states on the one hand and totalitarian states and theocracies on the other hand. In the framework of the United Nations the concern for freedom of religion causes a dilemma. Global governance requires an institution in which all nations participate. And that representation is only effective if the nations act through their governments. Thus the United Nations are an assembly of governments regardless of whether the states (and their governments) are in favour of freedom of religion or against it. And in fact in the United Nations theocracies and totalitarian states have a strong vote.

Freedom of religion thus is a value which we cannot trust to be unequivocally developed and defended by the United Nations. A separate Organisation should therefore be discussed. Such a solution is not unusual. There are also other values which to foster and to develop only some of the states and governments are interested intensely enough. For instance the organisations developing the market economy. The organisation could probably not be built within the UN-framework. But there are other ways available. Whether a group of especially involved states arrange a separate international Organisation, whether non-governmental agents (presumably churches and other religious communities) or whether a type of private law corporation is to be used, cannot be reflected here.

An international institution run by the states that really want to arrange for freedom of religion or that at least tolerate it and that, in any case, offer full and equal participation in the commonwealth without any reservation against religious people, could be the basis of an international seedbed for concepts of freedom of religion. It could be a place for collecting materials about facts, regulations, institutions and practices. It could be a framework for scholarly research. Political strategies there could be discussed. Any experiences could be exchanged and discussed. Experts could get acquainted with each other. Thus also personal resources could be developed. The expertise to optimise freedom of religion could be strengthened.

The global challenge of religion requires a global culture of freedom of religion. In this endeavour the Catholic Church should take a strong role – in giving and taking.



# KANT ON POLITICS, RELIGION, AND SECULARISM

■ MARCELLO PERA

## 1. Kant's liberal secularism

Though Kant may be considered the most prestigious Father of liberal secularism, my interpretation of his ideas about the relationships between religion and politics is that they can be profitably employed to contrast precisely that widespread form of contemporary Western secularism, which maintains that religion is a private matter that should play no role in the design of political institutions and the adoption of political decisions. According to this view, the secular liberal state, if it intends to be (as indeed it must) the common, tolerant home of all its citizens, independently of their own moral and religious commitments, must be neutral between different traditions or “comprehensive doctrines” and must be justifiable in terms not exclusively referring to any one of them. Resorting to religious faiths would bring about a discrimination among citizens and would amount to a hindrance to peaceful social coexistence. I do believe that Kant rejected this view, and that he thought religion, and Christianity in particular, to be the best support of the secular liberal society and state. Far from denying or neglecting or devaluating the public role of religion, Kant's secularism presupposes it.

The Kantian metaphor of “the apple of God's eye” is a good starting point for examining Kant's liberal secularism. It corresponds to our “fundamental human rights” which Kant defined as “innate and inalienable rights belonging necessarily to humanity”,<sup>1</sup> or “the sacred right of humanity”.<sup>2</sup> According to him, it is the supreme duty of a political ruler to preserve these rights, making him worthy of “the exalted epithets” of “divinely anointed” or “administrator of the divine will on earth and its representative”.<sup>3</sup> Such epithets, as Kant wrote, “far from making the ruler of a country arrogant, would rather have to humble him in his soul if he is intelligent (as must be assumed) and make him reflect that he has taken on an office too great for a human being – namely the most sacred office that God has on earth, that of trustee of the right of human beings – and that he must

<sup>1</sup> *Peace*, 8: 350n.

<sup>2</sup> *Enlightenment*, 8: 39.

<sup>3</sup> *Peace*, 8: 353n.

always be concerned about having in some way offended against this ‘apple of God’s eye’”.<sup>4</sup> Kant also claimed that “the greatest problem for the human species, the solution of which nature compels him to seek, is that of attaining a civil society which can administer justice universally”.<sup>5</sup>

Let us consider some possible implications of this outlook. If political rulers must in the first place safeguard fundamental human rights; if these rights are “innate”, that is, in Kant’s words, “not so much laws given by a state already established as rather principles in accordance with which alone the establishment of a state is possible;”<sup>6</sup> and if innate rights are ‘the apple of God’s eye’, and therefore are not of man’s making but somehow stemming from God’s intentions and design, then we might conclude that rulers have at least the following three fundamental obligations:

- (a) Political rulers should care about religion and consider it a guide or source of inspiration for their own policies;
- (b) Political rulers should preserve religion especially in order to safeguard fundamental rights;
- (b) Political rulers should promote above others that religion which deems man a creature endowed by God with fundamental rights.

Kant, apparently, held a quite different or opposite view. According to him,

- (a’) Political rulers must not meddle with their citizens’ religious faiths; as a consequence:
- (b’) Political rulers must not favour any religious faith; therefore:
- (c’) Political rulers must impartially respect the pluralism of religious faiths present in any given society.

For example, with regard to (a’), Kant wrote: “Rulers may authorize by civil law all vices that do not contradict the civil covenant between citizens, thus permitting any irreligious behaviour”.<sup>7</sup> With regard to (b’), he sustained that “The essence of any government consists in that everyone strives for his own happiness, being allowed to this purpose to enter freely into relationship with everybody else. It is not the governments’ role to strip its private citizens of this liberty, but only to grant harmony among them according to the laws of equality and without establishing any privileges”.<sup>8</sup>

<sup>4</sup> *ibid.*

<sup>5</sup> *Idea*, 8: 22

<sup>6</sup> *Saying*, 8: 290.

<sup>7</sup> *Nachlass*, XIX, 6, 490, n. 7684.

<sup>8</sup> *Nachlass*: XV, 2, 631–32, n. 1447.

And with regard to (c'), he upheld that "as long as [a monarch] sees to it that any true or supposed improvement is consistent with civil order, he can for the rest leave it to his subjects to do what they find it necessary to do for the sake of their salvation".<sup>9</sup> Precisely for this reason, Kant praised (perhaps, even flattered) Frederic II, who "even declines the arrogant name of tolerance", because he "left each free to make use of his own reason in all matters of conscience".<sup>10</sup> Kant, quite consistently with his positions above, also insisted upon the mutual non-interference of state and church.<sup>11</sup>

Points (a')-(c') are cornerstones of contemporary secularism, the enduring part in modern Western societies of the Enlightenment's heritage. They correspond, respectively, to the independence of political institutions from religion and to the separation of state and church; to the neutrality or indifference of government in religious matters; to the impartiality of the state with respect to religious views. Did Kant – the Enlightenment philosopher *par excellence* – seriously profess (a')-(c')? Yes, he did. Why did he? He did so because, as a liberal and secular thinker, the greatest liberal and secular thinker in modern history, he believed these points to be bulwarks of citizens' freedom, "the only original right belonging to every man by virtue of his humanity".<sup>12</sup> Did Kant profess (a')-(c') in the sense we understand them today? No, he did not, because he praised the moral and political role of religion, above all Christianity. We might say that, according to Kant, (a)-(c) and (a')-(c') are not in contradiction or at least that they can be combined, with a few appropriate qualifications. Kant's secularism consists precisely in such an original combination.

Here I will first introduce Kant's secular ideas, comparing them with our present-day situation (§2). In my opinion, this is a typical case in which modernity conflicts with post-modernity and the best heritage of the Enlightenment goes astray. Then, I will focus on why, according to Kant, religion is necessary to both morality (§3) and politics (§§4-5). In particular, I will try to show (§6) why, in Kant's view, the liberal secular state requires a religious faith or why the political community needs to "unfurl the banner" of an ethical and religious community in order to establish and maintain itself. Finally (§7), I will examine the connection Kant established between Christianity and Western civilization and attempt an overall evaluation of Kant's project (§8).

<sup>9</sup> *Enlightenment*, 8: 40.

<sup>10</sup> *Enlightenment*, 8: 40.

<sup>11</sup> *Morals*, 6: 327ff.

<sup>12</sup> *Morals*, 6: 237.

My main focus here is on Kant's way of providing a secular framework for a liberal society and state. Kant's secularism – a notion he never explicitly made use of, though he constantly referred to it – has not yet been much explored. Like many of his celebrated “syntheses”, it is not alien from tensions and ambiguities that need to be examined and solved. Here I will not discuss the relevant literature although I have consulted it and profited from it. Rather, I aim both to present my own reconstruction and interpretation of Kant's secularism, trying to make it as consistent as possible, and to defend it. In my presentation (debatable like any other) I intend to contribute to Kant scholarship. In my defense I venture rather more. My view is that Kant's project deals with certain civilizational principles that are still fundamental today and, as Kant himself said, when principles are at stake and all arguments and counter-arguments have been spent, “nothing is left but *defense*”.<sup>13</sup>

## 2. Kant's modern hopes and our post-modern condition

Kant has proved to be the most influential liberal secular philosopher of modern history. His ideas, though seldom overtly embraced or even mentioned, continue in many respects to dominate Western thought. Our national constitutions and international charters refer to fundamental human rights, just as Kant conceived of them. These constitutions prescribe the separation between religion and politics, church and state, as Kant intended it. Political authorities are barred from taking care of the salvation of their citizens' souls, precisely as Kant himself recommended. And believers acting in the political square are nowadays asked to motivate their positions not in religious terms but by making use of rational arguments, not too differently from what Kant had suggested in his appeal for the “public use of reason”.

Kant has also left profound traces in Christian theology. The Bible teaches us that man was created in God's image and likeness. But the principle that each man is a *person* and as a consequence has a right to have his own moral dignity respected, depends mainly on Kant's second formulation of the categorical imperative. Similarly, Kant is the source of a line of Scriptural hermeneutics that tries to combine historical narrative with faith, saving the “essence” of the latter from the possible revisions of the former. By focusing on the inherent worth of each single person, Kant has also proved to be influential in Catholic social doctrine and in its shift toward the culture of human rights. Though, arguably, intellectual history does not proceed

<sup>13</sup> *Groundwork*, 4: 459.

by jumps, it undeniably sometimes hurries, making sudden, dramatic changes. Kant is one of them: there are a “Before Kantian Era” and an “After Kantian Era” also in the field of theology.

We might thus say Kant has won on many important fronts. And yet, the most common wailing among philosophers, intellectuals, political leaders and public opinion in the West, is that Kant’s victory is not leading us where he intended. In the relations between states, we have not reached the “perpetual peace” he wished for. Within each single state, we seem unable to defeat the “bad principle” or moral disease that threatens to break it up, an occurrence Kant wished to avoid. Against his better judgement, political leaders continue to meddle with our souls, directly or indirectly and, against his enlightened hope, the fundamental, non-negotiable rights he advocated are often negotiated, if not sometimes completely denied. As a result, social cohesion and tolerance are *not* on the increase but are rather more often declining. Raised and waved as the banner of liberty and individual freedom, contemporary secularism seems to be turning against itself instead.

In truth, partly thanks to liberal secularism, we have moved from absolute and theocratic states to liberal and democratic ones, from oppressive regimes to free states, from sovereign nations to the League of Nations and the United Nations, and from despotism to constitutionalism; but if we find ourselves today still crying out loud, in several countries: “No violence in God’s name!” or “Take your hands off my God!”, it means we are not making much progress with respect to Kant’s best hopes (as well as Locke’s or Spinoza’s). On the contrary, we seem to be immersed in what may be termed the *paradox of secularism*: the more our secular, post-metaphysical, post-religious reason aims to be inclusive, the more it becomes intolerant; and the more it promises to liberate us from the tyrannies of conformism, dogmatism and superstition, the more we feel restrained in a new oppressive ideological cage.

The deep reason for this paradox is not contingent but theoretical, depending on a tension between liberalism and democracy. On the one hand, the liberal component of our constitutions calls us to respect the innate rights of mankind, “the apple of God’s eye”. On the other, the democratic component requires us to have a say in the definition, promotion and propagation of these rights, and first of all, as Kant says, “freedom, and indeed the least harmful of anything that could even be called freedom: namely, freedom to make public use of one’s reason in all matters”.<sup>14</sup> Yet such freedom does not prove as harmless as Kant thought, because it transforms free reason into *un-*

<sup>14</sup> *Enlightenment*, 8: 36.

*limited* or *independent* reason, a supreme judge not only of the ordinary policies of our rulers but also of the inalienable rights they should abide by. Hence the paradox of secularism: the more free reason is promoted the less religion becomes relevant to public life; and the more religion becomes irrelevant the more our social bonds weaken and our societies suffer a moral crisis.

Kant wanted people to enlighten themselves, since “if I have a book that understands for me, a spiritual advisor who has a conscience for me, a doctor who decides upon a regimen for me, and so forth, I need not trouble myself at all”.<sup>15</sup> Today we consider ourselves enlightened at a higher level, perhaps even fully; but the number of instructions or Do It Yourself manuals we take for granted in the form of democratic decisions, judicial verdicts, supreme courts rulings, or in the subtle hidden way of cultural fashions, advertising slogans, uncritical attitudes, mindless expectations, increases rather than diminishing.

Kant repeatedly insisted that no theoretical knowledge of God is possible, and any attempt to found morality on God’s revealed commands, that is on a historical basis, would violate our autonomy and finally result in a lack of universality, because a faith “merely based on facts, can extend its influence no further than the tidings relevant to a judgment on its credibility can reach”.<sup>16</sup> Nowadays we consider God as a private issue and moral autonomy as the hallmark of our freedom, happiness and welfare, but by so doing we fall into the spires of relativism, not universalism, and our chances for a peaceful life in trans-cultural communities that respect the rights of man are getting slimmer.

Kant thought that religion “is an inner disposition lying wholly beyond the civil power’s sphere of influence”, and that “as institutions for public *divine worship* on the part of the people, to whose opinion or conviction they owe their origin, churches become a true need of a state, the need for a people to regard themselves as subjects of a supreme *invisible* power to which they must pay homage and which can often come into very unequal (*sehr ungleichen*) conflict with the civil power”.<sup>17</sup> Such conflict is no longer unequal nowadays; democracies claim power over churches, and churches are not a “need of state” at all. Conflict between political power and religious faiths, however, is not disappearing.

Kant was very much in favour of the separation between church and state. “It is absurd – he wrote – that next to the supreme civil power there must also be an independent power in ecclesiastical matters, uttering unappealable external

<sup>15</sup> *Enlightenment*, 8: 35.

<sup>16</sup> *Religion*, 6: 103.

<sup>17</sup> *Morals*, 6: 327.

judgements, claiming to possess the administration of positive laws not issuing from sovereign powers and representing in conclusion a state in the state”.<sup>18</sup> Today we take the “wall of separation” between church and state as a dogma of our democracies, but the conflict between religion and politics nonetheless is often simmering under the ashes, and sometimes abruptly surfacing.

Finally, Kant wrote that “if Christianity should ever come to the point where it ceased to be worthy of love (which could very well transpire if instead of its gentle spirit it were armed with commanding authority), then, because there is no neutrality in moral things (still less a coalition between opposed principles) a disinclination and resistance to it would become the ruling mode of thought among people; ... but then, because Christianity, though supposedly *destined* to be the world religion, would not be *favoured* by fate to become it, *the* (perverted) *end of all things*, in a moral respect, would arrive”.<sup>19</sup> Today Christianity is no longer armed with political authority (or is much less so), but hostility against it is nonetheless growing in Western countries, increasing the risk of a crisis of civilization, if not of a final countdown.

The questions are: has Kant’s secularism won but was it mistaken? Was Kant’s Enlightenment project well founded, but was it disseminated with unintended, undesirable and perhaps unnecessary consequences? This is my – our – present day quandary.

### 3. Moral reason and God

Firstly, what is secularism? In popular and political parlance, secularism is a rather vague though widespread ideology upholding separation between church and state and independence of politics from religion, and demanding individual freedom in the choice of lifestyles, regardless of religious limitations. Philosophically speaking, secularism may be set in more precise terms. It may be defined as the doctrine maintaining that reason is *self-sufficient* in any field of application. This is why Kant may be taken as the Father of liberal secularism, because he is the thinker who, more than any other, insisted upon the moral autonomy of man and the self-sufficiency of human reason.

From the vantage point of our definition, moral (practical) reason is the possible basis for ethics, and politics (in its broadest sense: institutions, charters, laws, public decisions) needs no other validating foundation or justification than that which can be argued in terms of political or public reason. For example, asserting that political liberalism is “free-standing” (Rawls) or

<sup>18</sup> *Nachlass*, XIX, 6, 490, n. 7684.

<sup>19</sup> *End*, 8: 339.

“self-sufficient” (Habermas), is the same as maintaining that we dispose of a tool, an organon, a procedure – provided by reason – that is sufficient to induce people to establish free, open societies and institutions, provided idiosyncrasies, local traditions, historical circumstances, cultural hindrances of any sort are lifted. From our contemporary secular point of view, religion is irrelevant to moral and political life, a mere supplement to them or even, according to a more radical version, an obstacle to be removed. In this sense, secularism aims to construe morality and politics along the lines of science, whose achievements are paradigmatically regarded as trans-culturally valid and independent from any religious presupposition, based as they are on reason alone. Coherently and typically, secularists consider religion a private affair with little or no use in the public square.

Kant’s thought apparently follows corresponding lines. As to ethics, he wrote: “so far as morality is based on the conception of the human being as one who is free but who also, just because of that, binds himself through his reason to unconditional laws, it is in need neither of the idea of another being above him in order that he recognize his duty, nor, that he observe it, of an incentive other than the law itself. . . . Hence on its own behalf morality in no way needs religion (whether objectively, as regards willing, or subjectively, as regards capability) but is rather self-sufficient by virtue of pure practical reason”.<sup>20</sup> Hence morality is secular. To act morally, agents must act according to certain universal, rational laws and not in allegiance to cultural habits, historical traditions, or the instructions of religious authorities.

The same seems to hold true of politics. Not unlike Rawls and Habermas, Kant held that the establishing of a liberal state (a “republican constitution” in his phrasing) “must initially abstract from the present obstacles which may perhaps arise not so much from what is unavoidable in human nature as rather from neglect of the true ideas in the giving of laws”.<sup>21</sup> According to Kant the “universal principle of right” and the corresponding “universal law of right” which forms the basis of the liberal state and safeguards its citizens’ freedom – “so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law”<sup>22</sup> – is an imperative of reason. It needs neither to be based on any political decision, because “right must never be accommodated to politics, but politics must always be accommodated to right”,<sup>23</sup> nor does it re-

<sup>20</sup> *Religion*, 6: 3.

<sup>21</sup> *C.P.R.*, A 316, B 373.

<sup>22</sup> *Morals*, 6: 231.

<sup>23</sup> *Lie*, 8: 429.



quire validation from moral doctrines or religious faiths since, being rational, right is self-sufficient. Law and politics, therefore, are secular just like morality. As a consequence, secular political rulers must strictly apply secular right keeping their personal worldview to themselves. They may be neither despotic nor paternalistic. In a paternalistic government “the subjects, like minor children who cannot distinguish between what is truly useful or harmful to them, are constrained to behave only passively”<sup>24</sup> and therefore deprived of freedom. As for despotism, it “abrogates all the freedom of the subjects, who in that case have no rights at all”.<sup>25</sup> As Kant famously wrote, “no one can coerce me to be happy in his way (as he thinks of the welfare of other human beings)”.<sup>26</sup> That would violate the principle of right, which safeguards liberty, not happiness.

But though this is Kant’s position, it is not his *entire* view. Kant wanted morality and right founded on reason alone, but stated at the same time that religion is *necessary* to reason. Why did he believe so? In what sense? And, if moral reason and political reason are really founded on reason alone, how can they be self-sufficient? Let us examine moral (practical) reason first.

According to Kant, morality is based on the (rational) categorical imperative of duty. It is well known that, in the *Groundwork of the Metaphysics of Morals*, Kant asserts that this imperative is the only (formal) foundation of moral life and the only source and test of our moral maxims. God, apparently, has no place in the *Groundwork*; neither as a source of morality, because “we have the concept of God ... solely from the *idea* of moral perfection that reason frames a priori”,<sup>27</sup> nor as an inspiration for morality, because the fear of God “combined with dreadful representations of power and vengefulness, would have to be the foundation for a system of morals that would be directly opposed to morality”.<sup>28</sup> But in Kant’s mature thought God cannot be so easily forgone.

In the first place, the categorical imperative, while ensuring that man can be *virtuous*, does not offer him any hope of also being *happy*. “Happiness” is everybody’s ambition but, since moral duty requires our inclinations to be restrained, and since our inclinations can never be pushed aside, happiness is not of this world. Only “being worthy of happiness” is within man’s reach. But to be worthy of happiness man needs to believe in a Being who

<sup>24</sup> *Saying*, 8: 290.

<sup>25</sup> *Saying*, 8: 291.

<sup>26</sup> *Saying*, 8: 290.

<sup>27</sup> *Groundwork*, 4: 409.

<sup>28</sup> *Groundwork*, 4: 443.

penetrates his inner intentions, sees his manifest actions, predicts their consequences and, taking everything into account, rewards his efforts with a state of happiness proportional to its morality. This is the state of the “highest good”. But man cannot attain the highest good in this world because “there is not the least ground in the moral law for a necessary connection between the morality and the proportionate happiness”.<sup>29</sup> Only a being who “contains the ground of this connection” can raise man to such a state. This being cannot but be God. Hence God is necessary to morality. As Kant writes, “it is morally necessary to assume the existence of God”.<sup>30</sup>

Secondly, man cannot hope to be happy by pursuing goals incompatible with those pursued by his fellow creatures. The third formulation of the categorical imperative recites: “so act as if you were by your maxims at all times a lawgiving member of the universal kingdom of ends”.<sup>31</sup> A kingdom of all (compatible) ends is a “systematic union”.<sup>32</sup> If we think of this union from the moral point of view, we have a morally perfect world in which “rational creatures have personal worth”<sup>33</sup> and deserve to be happy. If we think of it from the point of view of “the nature of things”, that is of our human nature, we have “the physical perfection of the world”. Our own world is not physically perfect: in it “the rational creature might certainly have a preeminent value, but its state could still be bad”.<sup>34</sup> To wit: if individual A acts according to the second formulation of the categorical imperative she certainly considers herself and any other individual B as a person. This does not imply that A is actually happy or makes B happy. And vice-versa: if A or B are actually happy this does not mean that they take each other as persons, because they may consider each other simply as a means for the satisfaction of their respective inclinations or desires. To be persons, as required by morality, and, at the same time, to be happy, as our human constitution demands, we need to combine a morally perfect world with a physically perfect one. Who can provide the combination of both worlds and their harmony thus bringing about “the best of worlds?” Only God. Hence God is essential to morality: “the objective end of God in creation was the perfection of the world and not merely the happiness of creatures: for this constitutes only the [world’s] physical perfection. A world with it alone would still be lacking in moral perfection, or the worthiness to be happy”.<sup>35</sup>

<sup>29</sup> *C. Pr. R.*, 5: 124.

<sup>30</sup> *C. Pr. R.*, 5: 125.

<sup>31</sup> *Groundwork*, 4: 438.

<sup>32</sup> *Groundwork* 4: 433.

<sup>33</sup> *Lectures on Religion*, 28: 1099.

<sup>34</sup> *Lectures on Religion*, 28: 1100.

<sup>35</sup> *Ibid.*

It is not entirely accurate therefore to say that practical reason is self-sufficient and can do without religion. The truth is rather the contrary: “morality inevitably leads to religion”,<sup>36</sup> and the idea of the highest good, and with it the idea of God, “rises out of morality and is not its foundation:” “it is an end which to make one’s own already presupposes ethical principles”.<sup>37</sup> With this Kant maintains that the right order in morality is not the voluntaristic one: first God then our moral duties as He commands, but the intellectualistic one: first comes moral law, then God follows as its only possible author. As Kant writes in the first *Critique*, “so far as practical reason has the right to lead us, we will not hold actions to be obligatory because they are God’s commands, but will rather regard them as divine commands because we are internally obligated to them”.<sup>38</sup>

Stressing his ethical voluntarism, Kant writes that “as far as its matter, i.e. object is concerned, religion does not differ in any point from morality, for it is concerned with duties as such. Its distinction from morality is a merely formal one: that reason in its legislation uses the Idea of God, which is derived from morality itself, to give morality influence on man’s will to fulfil all his duties”.<sup>39</sup> And also: “the concept of God and even the conviction of his existence can be met with only in reason, and it cannot first come to us either through inspiration or through tidings communicated to us, however great the authority behind them”.<sup>40</sup>

Yet that God originates within practical reason because, as Kant writes, He fulfils “*the right of reason’s need*”,<sup>41</sup> means that God is a *postulate of reason*; it does not mean that He is *made by* reason. Saying that God is *within the boundaries of* reason is not the same as saying that He is the *God of* reason. Quite to the contrary, once the idea of God is postulated or acquired, it corresponds to the standard concept of God according to religion, of a perfect, omnipotent, omniscient, merciful Being. Kant writes that “religion as the doctrine of duties *to* God lies entirely beyond the bounds of purely philosophic ethics”.<sup>42</sup> But philosophic ethics is the rational, secular counterpart of religious ethics; they share the same moral codes, but with different, though convergent and equipollent, sources. Stating that morality is

<sup>36</sup> *Religion*, 6: 6; *C. Pr. R.*, 5: 129.

<sup>37</sup> *Religion*, 6: 5.

<sup>38</sup> *C.P.R.*, A 819, B 847.

<sup>39</sup> *Conflict*, 7: 36.

<sup>40</sup> *Thinking*, 8: 142.

<sup>41</sup> *Thinking*, 8: 137.

<sup>42</sup> *Morals*, 6: 488.

“the knowledge of all our duties as imperatives of reason” amounts to saying that religion is “the recognition of all our duties as divine commands”.<sup>43</sup> In both cases God is at work: in the latter case because He is the external authority dictating His commands, in the former because He is the inner path by which reason dictates its laws to itself. This is why it is morally necessary to assume the existence of God and to act and live “*as if*” God exists.

#### 4. Political reason and God

Does political reason as well lead to God and religion? Is living “as if” God did exist necessary in politics too as it is in morality? Apparently, it is not, because the rational principle of right seems adequate and sufficient by itself to perform the essential political functions. But in this case, too, appearances are deceiving.

The first and “greatest problem”<sup>44</sup> of political reason is the foundation of the liberal state, or, in Kant’s terminology, of a “republican constitution”. The process deals with the safeguard of those fundamental human rights (“the apple of God’s eye”), the protection of which is the liberal political authorities’ main duty. The greatest problem amounts to this: “how it is to be arranged that in a society, however large, harmony in accordance with the principles of freedom and equality is maintained (namely by means of a representative system)”.<sup>45</sup> Or else: “given a multitude of rational beings all of whom need universal laws for their preservation but each of whom is inclined covertly to exempt himself from them, so to order this multitude and establish their constitution that, although in their private dispositions they strive against one another, these yet so check one another that in their public conduct the result is the same as if they had no such evil dispositions”.<sup>46</sup>

This problem can be solved by establishing a constitution conforming with the principle of right, because “the *republican* constitution is the only one that is completely compatible with the right of human beings”.<sup>47</sup> Since the principle of right is rational, a priori, the problem of the republican constitution is, from a theoretical point of view, easily soluble: “the problem of establishing a state, no matter how it may sound, is *soluble* even for a nation of devils (if only they have understanding)”.<sup>48</sup> Things are different, how-

<sup>43</sup> *Religion*, 6: 153; *C. Pr. R.*, 5: 129.

<sup>44</sup> *Idea*, 8: 22.

<sup>45</sup> *Lie*, 8: 429.

<sup>46</sup> *Peace*, 8: 366.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

ever, in actual practice, and the concrete application of the principle of right is far from easy: “the *republican* constitution . . . is the most difficult one to establish and even more to maintain, so much so that many assert it would have to be a state of angels”.<sup>49</sup> Why is it so?

As we previously observed, in the first *Critique*<sup>50</sup> Kant had maintained that the obstacles to establishing a republican constitution “arise not so much from what is unavoidable in human nature”. But the problem lies precisely here! The most serious obstacle to the republican constitution, as Kant came to discover especially in *Religion within the boundaries of mere reason*, derives from human nature. The fact is that men are *not* angels: they actually are devils. Thanks to right and the coercive power of the state, each man “is constrained to become a good citizen even if not a morally good human being”,<sup>51</sup> and in virtue of this coercion “within each state [malevolence] is veiled by the coercion of civil laws, for the citizen’s inclination to violence against one another is powerfully counteracted by a greater force, namely that of the government”.<sup>52</sup> But hidden malevolence is none the less still malevolence. If the force of the state were always contrasted by the inclination of citizens to abuse or harm each another, if one state always inclined to attack the other, a never ending condition of tension and conflict would result in which no state, let alone a liberal state, would be conceivable, and no peace, let alone a “perpetual peace”, could ever be achieved. In a similar scenario, even “the word *right* would never be uttered by states wanting to attack one another, unless merely to make fun of it”.<sup>53</sup>

This is precisely the tragic human condition we are immersed in. Like all liberal thinkers, Kant had a negative moral and theological anthropology not too different from Augustine’s. According to it, men are fallen angels, living a condition of “unsociable sociability”.<sup>54</sup> “The character of the species, as it is known from the experience of all ages and by all peoples, is this: that, taken collectively (the human race as one whole) it is a multitude of persons, existing successively and side by side, who cannot *do without* being together peacefully and yet cannot *avoid* constantly being objectionable to one another”.<sup>55</sup> It is so, indeed necessarily, because men are affected by an

<sup>49</sup> *Ibid.*

<sup>50</sup> A 316, B 373.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Peace*, 8: 375n.

<sup>53</sup> *Peace*, 8: 355.

<sup>54</sup> *Idea*, 8: 20.

<sup>55</sup> *Anthropology*, 7: 331.

obscure sickness called by Augustine “original sin” and by Kant “radical evil” or “bad principle”, so deeply rooted in human nature that “it is also not to be extirpated through human forces”.<sup>56</sup> Although this evil is ontological, it has a social source, it is triggered by the social environment, and produces social effects: “envy, addiction to power, avarice, and the malignant inclinations associated with these, assail his nature, which on its own is undemanding, *as soon as he is among human beings*. Nor is it necessary to assume that these are sunk into evil and are examples that lead him astray: it suffices that they are there, that they surround him, and that they are human beings, and they will mutually corrupt each other’s moral disposition and make one another evil”.<sup>57</sup>

Man, in this position, is doomed to relapse into an ethical state of nature akin to a condition of moral anarchy in which “the good principle, which resides in each human being, is necessarily attacked by the evil which is found in him”.<sup>58</sup> This is something “the natural human being ought to endeavour to leave behind as soon as possible”.<sup>59</sup> But can he really? And how?

The principle of right is not enough to answer the purpose, because it restrains external freedom only and not inner dispositions. Likewise, the laws of morality are insufficient, because they refer to individual, internal states of mind, and not to social, public states of affairs. In fact, both *political* coercion on the side of the state, to prevent citizens from harming each other, and *spiritual* conviction on the side of citizens, to fight against the radical evil individually affecting them, are necessary to achieve the goal of a liberal constitution, if it can be achieved at all.

Again, how can it be? Only if citizens feel they have “a duty *sui generis*, not of human beings toward human beings but of the human race toward itself”<sup>60</sup> can moral anarchy be prevented and the good principle defeat the evil one. “Inasmuch as we can see, the dominion of the good principle is not otherwise attainable, so far as human beings can work toward it, than through the setting up and the diffusion of a society in accordance with, and for the sake of, the laws of virtue – a society which reason makes it a task and a duty of the entire human race to establish in its full scope”.<sup>61</sup> Such duty is a “banner of virtue” that reason must unfurl as a “rallying point

<sup>56</sup> *Religion*, 6: 37.

<sup>57</sup> *Religion*, 6: 93–94.

<sup>58</sup> *Religion*, 6: 97.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Religion*, 6: 94.

for those who love the good”, “in addition to prescribing laws to each individual human being”.<sup>62</sup> It takes the form of a social duty, opposite and alike the social evil it is called to cure: the duty to build up a “union of persons into a whole”,<sup>63</sup> or, according to the many different but equivalent expressions Kant uses, an “association of human beings merely under the laws of virtue”, an “ethical society”, an “ethico-civil society”, an “ethical state”, a “kingdom of virtue”.<sup>64</sup>

As no duty can exist without a corresponding imperative of reason, and as the duty in question is *sui generis*, the imperative must also be *sui generis*. Although Kant does not formulate it in these terms, we might call it the *religious-political categorical imperative* and express it along the lines of the third formulation of the moral categorical imperative: ‘so act as if you were always through your maxims a member of an actual ethical community’, or ‘so act as if you were always subject to public laws of virtue’. Independently of its formulations, it is important to stress that this special imperative of duty is both political and religious.

It is political, because it bids men to pursue “a good common to all”<sup>65</sup> by fighting the bad principle that would transform their social and political life into a strife of everybody against everybody else, bringing about an Hobbesian state in an *already* existing political community. “The ethical state of nature [is] a *public* feuding between the principles of virtue and a state of inner immorality”,<sup>66</sup> which means it arises *within* an already formed political community. As Kant writes: “in an already existing political community all the political citizens are, as such, still in the ethical state of nature”.<sup>67</sup>

But the special imperative of duty is also religious, because it orders men to refer to God to avert and remedy their public feuding. Kant says that this imperative “differs entirely from all moral laws (which concern what we know to reside within our power)”,<sup>68</sup> and that it “differs from all others in kind and in principle”. Being another imperative, it “will need the presupposition of another idea”.<sup>69</sup> Which idea does it require? It requires the religious idea of “a higher moral being through whose universal organization

<sup>62</sup> *Ibid.*

<sup>63</sup> *Religion*, 6: 97.

<sup>64</sup> *Religion*, 6: 94–95.

<sup>65</sup> *Religion*, 6: 97.

<sup>66</sup> *Religion*, 6: 98.

<sup>67</sup> *Religion*, 6: 95.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Religion*, 6: 98.

the forces of single individuals, insufficient on their own, are united for a common effect”.<sup>70</sup> That is to say: “an ethical community is conceivable only as a people under divine commands, i.e. a *people of God*, and indeed in accordance with the laws of virtue”.<sup>71</sup> Since an ethical community is necessary for the survival of the political community, God is necessary to politics. As a consequence, political reason, just like moral reason, leads to religion.

## 5. Rational religion and ecclesiastical faiths

What kind of God and religion is necessary to politics or political reason? As is well known, according to Kant “there is only *one* (true) *religion*; but there can be several kinds of faith”.<sup>72</sup> The former is a “purely rational faith”,<sup>73</sup> i.e. a “religion *within the boundaries* of mere reason”, the latter are “historical”, “statutory”, “ecclesiastical” faiths. In a similar way, God is a pure idea of reason and, according to popular faith, a source of revelation. Should we then conclude that political reason merely requires pure rational religion and the pure idea of God, while it neglects and bypasses ecclesiastical faiths and a personal God?

This is what Kant hoped for. He in fact wrote, “*in the end* religion will gradually be freed of all empirical grounds of determination, of all statutes that rest on history and unite human beings provisionally for the promotion of the good through the intermediary of an ecclesiastical faith. Thus *at last* the pure faith of religion will rule over all, ‘so that God may be all in all’”.<sup>74</sup> Kant proved to be so optimistic about this process of “gradual purification”, as he also called it,<sup>75</sup> that he believed that “enlightened Catholics and Protestants, while still holding to their own dogmas, could thus look upon each other as brothers in faith, in expectation (and striving towards this end) that, with the government’s favour, time will gradually bring the formalities of faith closer to the dignity of their end”.<sup>76</sup>

Unfortunately, such optimism is ill-founded, as Kant himself found out. Although he spoke of a “gradual transition of ecclesiastical faith toward the exclusive dominion of pure religious faith in the coming of the Kingdom of God”,<sup>77</sup> he contended that ecclesiastical faith “attaches itself (*affiziert*) to

<sup>70</sup> *Ibid.*

<sup>71</sup> *Religion*, 6: 99.

<sup>72</sup> *Religion*, 6: 107; *Peace*, 8: 367n.

<sup>73</sup> *Religion*, 6: 104.

<sup>74</sup> *Religion*, 6: 121.

<sup>75</sup> *Conflict*, 7: 42.

<sup>76</sup> *Conflict*, 7: 52.

<sup>77</sup> *Religion*, 6: 115.



pure religion”,<sup>78</sup> that it is a “vehicle”<sup>79</sup> or “a mere vehicle”<sup>80</sup> or a “still indispensable shell”.<sup>81</sup> There are compelling reasons for this.

Pure rational religion cannot merely be an abstract doctrine referring to an abstract God worshipped in an abstract way in abstract temples. Pure rational religion does not warm up men’s hearts as it ought to if they are to feel the duty *sui generis*. Kant was an admirer of the French Revolution but not to the point of approving of the cult of Goddess Reason. “No doctrine exclusively based on reason would seem to the people to make an unalterable norm; they demand a divine revelation, hence a historical authentication of its authority through the deduction of its origin”.<sup>82</sup> If God is to be intended as “one who knows the heart”<sup>83</sup> and rewards and punishes, and if His commands are to be considered as our duties, the duties we living creatures ought to follow here and now, then He needs to manifest himself and we need to give Him a face and a voice. It is not only a question of “a peculiar weakness of human nature”,<sup>84</sup> or of “the unavoidable limitation of human reason”,<sup>85</sup> it is rather a question of “natural need”.<sup>86</sup>

Rational religion in man truly “hides inside him and depends on moral dispositions”.<sup>87</sup> But it is a well known a fact too that by their very nature human beings, made of blood and flesh, need somewhat more than rational religion: “the ordinary human being will every time understand by it his own ecclesiastical faith, which is the one that falls within the grasp of his senses”. (*ibid.*) People need “something that *the senses can hold on to*”.<sup>88</sup> “Unless certain statutory ordinances – which, however, have standing (authority) as law – are added to the natural laws which reason alone can recognize, what constitutes a special duty of human beings and a means to their higher end is still lacking, namely their permanent union in a visible church”.<sup>89</sup> This means that no rational faith can exist without ecclesiastical faith, just like nothing may be carried in absence of a vehicle, or like each step implies

<sup>78</sup> *Religion*, 6: 115.

<sup>79</sup> *Religion*, 6: 106.

<sup>80</sup> *Religion*, 6: 116.

<sup>81</sup> *Religion*, 6: 135n.

<sup>82</sup> *Religion*, 6: 112.

<sup>83</sup> *Religion*, 6: 99.

<sup>84</sup> *Religion*, 6: 103.

<sup>85</sup> *Religion*, 6: 115.

<sup>86</sup> *Religion*, 6: 109.

<sup>87</sup> *Religion*, 6: 108.

<sup>88</sup> *Religion*, 6: 109.

<sup>89</sup> *Religion*, 6: 158.

and requires a previous one: “ecclesiastical faith naturally precedes pure religious faith: there were temples ... before churches...; priests before ministers... and for the most part they still come first in the rank and value accorded to them by the crowd at large”.<sup>90</sup>

We may then conclude that rational religion alone is not sufficient for pursuing a moral life and creating an ethical community, ecclesiastical faiths are required as well and are indispensable. They may be considered the *specific* forms of rational religion ethical communities have historically availed themselves of. By implication, ecclesiastical faiths are the *historical* (not all and not always necessarily successful) ways and means of preserving the political community engaged in its own development.

Though historical ecclesiastical faiths are many, no single one is theologically better than the other. They are equivalent in their meeting of the basic human spiritual need for divine assistance, as well as in the worship of their Gods. “Whether the devout individual makes his statutory visit at *church* or undertakes a pilgrimage to the sanctuaries in Loreto or Palestine; whether he takes his formulas of prayer to the heavenly with his *lips*, or by means of a *prayer-wheel*, ... it is all the same and of equal worth”.<sup>91</sup> In this respect Christians, Muslims, Jews, Hindus, etc. are on the same foot because they all provide “reinterpretations” of revelation.<sup>92</sup> However, ecclesiastical faiths are not equivalent, neither ethically, with respect to the morality they inspire and convey, nor politically, with respect to the welfare they favour and promote in society. There is therefore a scale for ranking and assessing them. Before examining this scale, we still need to address some questions regarding the relationship between ethical communities (with their ecclesiastical faiths) and the political community.

## 6. Ethical community, political community and the secular state

The first objection to the discussion and analysis in the last paragraphs is that it gives too much emphasis to the political role of religions. Kant’s problem in *Religion* – so the objection sounds – was not political but religious, as Kant scholars usually consider. After discovering the bad principle, Kant turned to examine the resulting struggle between bad and good principles, aiming to find a solution to the problem of individual salvation and of the rational founding of religion and churches because, as he wrote, “the

<sup>90</sup> *Religion*, 6: 106.

<sup>91</sup> *Religion*, 6: 173.

<sup>92</sup> *Religion*, 6: 111.

idea of a people of God cannot be realized (by human organization) except in the form of a church".<sup>93</sup>

The objection is well founded. Nonetheless, it is true that Kant links the religious problem with the political one especially in Part three of *Religion* (as well as in *Conflict*). The religious problem is: how can man triumph over the bad principle he is ontologically affected by? Or: "how it is possible that a naturally evil human being should make himself into a good human being? ... How can an evil tree bear good fruit?"<sup>94</sup> The political problem is: how can man overcome the negative condition he is socially immersed in? Or: "how could one expect to construct something completely straight from such crooked wood?"<sup>95</sup>

The answer to the first question is: by becoming "morally good (pleasing to God)",<sup>96</sup> namely by a sort of conversion. "A 'new man' can come to light only through a kind of rebirth, as it were a new creation and a change of heart".<sup>97</sup> The answer to the second question is: by the "wish of all well-disposed human beings"<sup>98</sup> to produce a political community and, within it, an ethical community in accordance with God's commands. Clearly, the state can neither impose individual conversion nor good social dispositions, only the idea of God is capable of doing so. Thus the idea of God performs both functions, individual and religious, social and political. No individual salvation, no ethical community, and therefore no stable political community are conceivable in the absence of the belief in God. Religion – rational religion accompanied by an appropriate ecclesiastical faith – is essential to man's salvation as well as to society's welfare.

A second, more serious objection drives straight to the core of Kant's secularism. How can a state be secular if we consider its own survival to depend on religion (and not only on the principle of right)? Kant does not explicitly deal with this question, but we may try to provide an answer to it by examining the relationship between the political and ethical communities he had in mind. Three points are worth examining.

First. The two communities are *distinct*. Each of them has "a form and constitution essentially distinct from those of the other".<sup>99</sup> Their differences

<sup>93</sup> *Religion*, 6: 100.

<sup>94</sup> *Religion*, 6: 44–45.

<sup>95</sup> *Religion*, 6: 100.

<sup>96</sup> *Religion*, 6: 47.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Religion*, 6: 101.

<sup>99</sup> *Religion*, 6: 94.

are deep and unmistakable. The political community is coercive, whereas an ethical community is not: “the citizen of the political community remains, as for the latter’s lawgiving authority, totally free: he may wish to enter with his fellow citizens into an ethical union over and above the political one, or rather remain in a natural state of this sort”.<sup>100</sup> Moreover, the political community, affecting all citizens, is general, an ethical community is “particular” or “partial”,<sup>101</sup> as it involves only its faithful. Finally, the political community takes the form of a state of citizens, an ethical community takes the form of a church of servants: “the idea of a people of God cannot be realized (by human organization) except in the form of a church”.<sup>102</sup>

Second. The two communities are *autonomous*. Neither of them can impose itself over the other. On the one hand, the political community cannot dictate its own rules to an ethical community, because citizens have the right to join or not to join an ethical community, and “it would be a contradiction (*in adjecto*) for the political community to compel its citizens to enter into an ethical community, since the latter entails freedom from coercion in its very concept”.<sup>103</sup> Nor can political rulers limit the public use of reason in matters religious, “for otherwise the *laity* would be forcing the *clerics*”.<sup>104</sup> Religious freedom, including the freedom to criticize religious faiths, is to be respected. “Woe to the legislator who would want to bring about through coercion a polity directed to ethical ends!”<sup>105</sup> On the other hand, an ethical community can not dictate its own rules to the political community either, because that would produce a “theocracy”, an “aristocratic government [of priests]:” in both cases the outcome would be a violation of the principle of right and a loss of citizens’ freedom.

Third. The two communities are *interlinked*. They cannot proceed separately, alien to each other. An ethical community cannot but be involved in the already established political community within which it arises. The political community cannot but be interested in an ethical community which is part and parcel of its citizens’ life.

The conclusion we may draw is that each one of the two communities has a stake in the other. The political community, on the one hand, profits in having a strong ethical community because its formation and very sur-

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> *Religion*, 6: 100.

<sup>103</sup> *Religion*, 6: 95.

<sup>104</sup> *Religion*, 6: 113.

<sup>105</sup> *Religion*, 6: 96.

vival depend in good measure on the growth of the latter. An ethical community, on the other hand, has an interest in the political community because it pursues and possibly achieves its goals in its bosom. Not unlike Augustine, who thought of the City of God and the City of man as intermingled (*intermixtae*), Kant states that, between political and ethical community, there is interplay. And, again similarly to Augustine, who thought that the City of God avails itself (*utitur*) of the City of man, and that the latter profits from the former, Kant thinks that the political community calls for the ethical one. Indeed he writes, “it belongs to the character of our species that, in striving toward a civil constitution, it also needs a discipline by religion, so that what cannot be achieved by *external* constraint can be brought about by *internal* constraint (the constraint of conscience)”.<sup>106</sup>

Does this infringe upon Kant’s idea of the secular state? In a way, it does *not*, because the relationship Kant envisages between the political and ethical communities refers to *civil society* or “civil constitution”, it does not involve political institutions. Church and state are, as they should be, separate, autonomous bodies. Both of them have to keep within certain limits. The state has the right to request that “nothing be included in this [ethical] constitution which contradicts the duty of its members as citizens of the state”.<sup>107</sup> And believers, “insofar as an ethical community must rest on *public* laws and have a constitution based on them, must ... not allow the political power to command them how to order (or not order) such a constitution internally”.<sup>108</sup> The separation of church and state at the institutional level does not imply a corresponding separation between religion (ethical community) and politics (political community) at the level of civil society. “Every political community may indeed wish to have available a dominion over minds, according to the laws of virtue; for where its means of coercion do not reach, since a human judge cannot penetrate into the depths of other human beings, there the dispositions to virtue would bring about the required result”.<sup>109</sup> Of course, to wish does not mean imposing, but it does not imply neutrality either. It involves educating, demanding and striving for “the required result”, i.e. the creation and diffusion of appropriate “dispositions to virtue”, i.e. (self) “constraint of conscience”, and a “discipline by religion”. If civil society does not fight for building an ethical community, if it does not feel the duty for its formation, if it does not perceive itself

<sup>106</sup> *Anthropology*, 7: 333n.

<sup>107</sup> *Religion*, 6: 96.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Religion*, 6: 96.

as submitted to divine commands and does not live as if God did exist, then public feuding would last indefinitely and no political community could be possible or, if already existing, could ever be stable.

However, from a different perspective, Kant's position on the relationship between the ethical and political communities *does* infringe the principles of the secular state in the version we maintain today. The distinction between civil and institutional levels does not easily work in actual practice. Not only does Kant endorse the idea that people in civil society are not allowed to steer clear of the bid to create an ethical community because, in his words, "human beings are not permitted to remain idle in the undertaking and let Providence have free rein, as if each could go after his private moral affairs",<sup>110</sup> Kant argues, too, that the state is not allowed to remain passive.

Clearly, the state cannot adopt or champion any specific ecclesiastical faith or religious doctrine, because that would amount to a violation of the autonomy of political reason or of the liberty to "the public use of reason". But the state is not a mere combination of people under the rule of law nor is it just a "belonging (*patrimonium*)".<sup>111</sup> The state is indeed a "moral person".<sup>112</sup> As a consequence, it cannot be indifferent or neutral or independent or impartial towards the religions of its citizens, their ecclesiastic faiths and their churches, from which its own "person" depends. Quite to the contrary, the state is forced to elect religion, at least in its universal, non-partisan form of pure rational religion, as its own foundation or source or "discipline". Kant reached rather explicitly this conclusion when he faced the problem of atheism and the issue of religious pluralism.

As for atheism, Kant professes that an atheist "robs his fellow-men of an efficacious means whereby duties to one another are protected by a higher hand, and everyone is determined to the fulfilment of duty without enforcement by others".<sup>113</sup> As this is harmful for society, "the state is authorized to forbid such corrupting affirmations of a paradox".<sup>114</sup> A state that *forbids* opinions in religious matters is clearly not religiously neutral.

As for pluralism, the situation is the following. There is only one pure rational religion, while ecclesiastical faiths are numerous. Pluralism, or "sec-tarianism", as Kant names it, is both a spontaneous and a natural fact: it is spontaneous, because "as soon as ecclesiastical faith begins to speak with

<sup>110</sup> *Religion*, 6: 100.

<sup>111</sup> *Peace*, 8: 344.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Vigilantius*, 27: 531.

<sup>114</sup> *Ibid.*

authority on its own and forgets that it must be rectified by pure religious faith, sectarianism sets in".<sup>115</sup> It is natural because, as we have seen, whatever the faith they profess, men need symbols and cults. The question is: besides being a fact, is pluralism a *good* thing?

Kant believes it is *not*. He argues that "on the subject of sectarianism (which, as in Protestantism, goes so far as to multiply churches) we are accustomed to say that it is desirable for many kinds of religion (properly speaking, kinds of ecclesiastical faiths) to exist in a state. And this is, in fact, desirable to the extent that it is a good sign – a sign, namely, that the people are allowed freedom of belief. But it is only the government that is to be commended here".<sup>116</sup> However, for pluralism to be desirable "in fact" does not imply that it is also desirable "in itself". Quite the contrary. Kant writes that "*in itself* such a public state of affairs in religion is not a good thing *unless* the principle underlying it is of such a nature as to bring with it universal agreement on the essential maxims of belief, as the concept of [rational] religion requires".<sup>117</sup> In other words: religious pluralism is good *provided* there be the fullest agreement in civil society about the "essential maxims of belief" and the minimum of disagreement about the "non essentials".<sup>118</sup>

Kant's preoccupation in this context is clearly political and typically liberal. If in civil society there were no agreement on rational religion – the "essential maxims" – the political community would not have the discipline to aspire for a civil constitution and, as a consequence, the state either could not be established or it would risk disintegration. As Kant writes, "the natural principles of morality [are] the *mainstay* on which the government must be able to count if it wants to trust the people".<sup>119</sup> Of course, "it is not the government's business to concern itself with the future happiness of the subjects and show them the way to it",<sup>120</sup> but it *is* the government's business to have good citizens: "the government's purpose with regard to ecclesiastical faith can be only to have, through this means too, subjects who are tractable and morally good".<sup>121</sup> Although "ecclesiastical faith must remain open to gradual purification until it coincides with religious faith ... it comes under the protection of the Government, which watches over public unity and peace".<sup>122</sup>

<sup>115</sup> *Conflict*, 7: 51.

<sup>116</sup> *Conflict*, 7: 52.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> *Conflict*, 7: 60.

<sup>120</sup> *Conflict*, 7: 59.

<sup>121</sup> *Conflict*, 7: 60.

<sup>122</sup> *Conflict*, 7: 42.

The state must then take a decision. It cannot endorse a specific religion: if it “chooses to enjoin orthodox statutory doctrines and means of grace, it can fare very badly”, because “it is an easy thing for a human being to accept these statutes, and far easier for the evil-minded than for the good”.<sup>123</sup> Since “in religious matters the only thing that can interest the state is: to what doctrines it must bind teachers of religion in order to have useful citizens, good soldiers, and, in general, faithful subjects”,<sup>124</sup> the state cannot but choose to favour “the teaching of the church [that is] directed straight to morality”, because that church follower believes he “must answer to a future judge for any evil he has done that he cannot repair”,<sup>125</sup> and that expectation consequently leads him to conduct a better moral life and makes him a better citizen. For the state, choosing the ideas of a specific church means *adopting* a religion or a religious-like creed as its own “banner”. The liberal secular state is liberal to the extent of respecting all religions but it cannot be so secular as to dispense itself of that kind of religion on which its own existence and survival depend. State religion is a state’s necessity.

To conclude. Religion is necessary to morality, morality (the effort to defeat the socially destructive bad principle) is necessary to civil society, a civil society made morally responsible by the development of an ethical community in the form of a church is necessary to the liberal state. Without God, religion and the church, the state would either turn into an aggregation of people fighting each other, and therefore not a state at all, or else it would merely develop into a coercive, therefore illiberal, police community.

## 7. Christianity and Western civilization

The question now is: precisely *which* God, religion, and church? Kant answers this question quite firmly and unequivocally. It is the *Christian* God, religion, and church that secure moral reason and political reason, personal morality and social discipline, the foundation of an ethical community and the mainstay of the liberal state. Morality and liberal politics are the essential touchstones of religions. Kant was so convinced of this that he denied Judaism the proper nature of a religion, with the argument that Judaism does not so much aim at an ethical community but a political one. “Strictly speaking Judaism is not a religion at all but simply the union of a number of individuals who, since they belong to a particular stock, established themselves into a community under purely political laws, hence not into a church”.<sup>126</sup> In Kant’s interpretation

<sup>123</sup> *Ibid.*

<sup>124</sup> *Conflict*, 7: 60n.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Religion*, 6: 125.



only the Christian God can play the role of a true ethical community, by performing its task of serving the political community.

Considered from the point of view of scientific reason, “the transcendental and single determinate concept of God that merely speculative reason gives us is in the most precise sense *deistic*, i.e. ... the idea of something on which all empirical reality grounds its highest and necessary unity”.<sup>127</sup> But considered from the prospect of moral and political reason, the concept of God cannot but be *theistic*, in the sense of Somebody (not “something”), a Person (not just a Supreme Being) who rewards and punishes our intentions and actions. This does not imply we have cognitive proof of the existence of God, because proving as much would be impossible. Fortunately, proving the existence of God is not required. All we need is that the idea of the existence of God is neither contradictory nor empirically or theoretically falsifiable. Kant writes, “the *minimum* of cognition (it is possible that there is a God) must alone suffice for what can be made the duty of every human being”.<sup>128</sup> From science’s standpoint a personal God is something that may or may not exist; for morality He *must* exist. “Must” is to be understood in the sense of moral certainty: “I will inexorably believe in the existence of God and a future life, and I am sure that nothing can make these beliefs unstable, since my moral principles themselves, which I cannot renounce without becoming contemptible in my own eyes, would thereby be subverted”.<sup>129</sup>

The fact that Kant’s personal God is the Christian one follows from his choice of Christianity as the religion best fitted to morality and politics. Amidst the several kinds of ecclesiastical faiths, “Christianity, as far as we know, is the most adequate”.<sup>130</sup>

Kant bases this claim on three main reasons.

First. Christian religion matches perfectly with practical reason. “The doctrine of Christianity ... gives ... a concept of the highest good (of the kingdom of God) which alone satisfies the strictest demand of practical reason”.<sup>131</sup> Morality aims at a state of happiness proportional to our good intentions and actions, but such a state cannot be bestowed upon men merely by abiding by the moral law. “The Christian doctrine of morals now supplements this lack (of the second indispensable component of the highest good) by representing the world in which rational beings devote themselves with their whole soul

<sup>127</sup> *C. P. R.*, A 675, B 703.

<sup>128</sup> *Religion*, 6: 154n.

<sup>129</sup> *C. P. R.* A 828, B 856.

<sup>130</sup> *Conflict*, 7: 36.

<sup>131</sup> *C. Pr. R.*, 5: 127–28.

to the moral law as a *kingdom of God*, in which nature and morals come into harmony, foreign to each of them of itself, through a holy author who makes the derived highest good possible”.<sup>132</sup> Kant is so firm in his idea of Christianity as the religion best matching the principle of practical reason (autonomy), that he both praises Christianity with respect to Judaism: “the new faith ... was to contain a religion valid for the world and not for one single people”,<sup>133</sup> and interprets Christianity in a way clearly at odds with the standard teachings of the Christian doctrine itself. Kant in fact writes, “nevertheless, the Christian principle of *morals* itself is not theological (and so heteronomy); it is instead autonomy of pure practical reason by itself, since it does not make cognition of God and his will the basis of these laws but only of the attainment of the highest good subject to the condition of observing these laws, and since it places even the proper incentive to observing them not in the results wished for but in the representation of duty alone, faithful observance of which alone constitutes worthiness to acquire the latter”.<sup>134</sup> Or: “Christianity’s true first purpose was none other than the introduction of a pure religious faith, over which there can be no dissension of opinions”.<sup>135</sup>

Second. Christian religion matches natural religion. Again twisting Christian traditional teachings to his own advantage, Kant views “Christian religion as natural religion”<sup>136</sup> and Christ as “a teacher [who] was the first to advocate a pure and compelling religion, ... [who] did so publicly and even in defiance of a dominant ecclesiastical faith ... [and who] made this universal religion of reason the supreme and indispensable condition of each and every religious faith”.<sup>137</sup> In short, Christ is “the person who can be revered, not indeed as the *founder* of the *religion* which, free from every dogma, is inscribed in the heart of all human beings (for there is nothing arbitrary in the origin of this religion), but as the founder of the first true church”.<sup>138</sup> This is why “we cannot begin the universal history of the church ... anywhere but from the origin of Christianity, which, as a total abandonment of the Judaism in which it originated, grounded on an entirely new principle, effected a total revolution in doctrines of faith”.<sup>139</sup>

<sup>132</sup> *C. Pr. R.*, 5: 128.

<sup>133</sup> *Religion*, 6: 127.

<sup>134</sup> *C. Pr. R.*, 5: 129.

<sup>135</sup> *Religion*, 6: 131.

<sup>136</sup> *Religion*, 6: 157.

<sup>137</sup> *Religion*, 6: 158.

<sup>138</sup> *Religion*, 6: 159.

<sup>139</sup> *Religion*, 6: 127.

Third. Christianity is a source of civilization, i.e. European civilization. Kant writes: “we have reason to say that ‘the Kingdom of God is come into us’, even if only the principle of the gradual transition from ecclesiastical faith to the universal religion of reason, and so to a (divine) ethical state on earth, has put in roots universally and, somewhere, also in *public*”.<sup>140</sup> ‘Somewhere’, but where? Where has the universal religion of reason most resembling Christianity put down roots and expressed itself in public? The answer is: in Europe. Europe is not a mere historical entity or geographical expression. It is a civilization: “I may call European a nation only if it exclusively admits legal coercion, therefore restrictions of liberty, only by universally valid rules”.<sup>141</sup> Europe is a continent with a mission: “if one starts from *Greek* history – as that through which every other older or contemporaneous history has been kept or at least accredited – if one follows their influence on the formation or malformation down to the present time its influence on the education or miseducation of the state of the *Roman* nation which swallowed up the Greek state, and the latter’s influence on the *barbarians* who in turn destroyed the former, down to the present time, and also adds to this *episodically* the political history of other nations, or the knowledge about them that has gradually reached us through these same enlightened nations – then one will discover a regular course of improvement of state constitutions in our part of the world (which will probably someday give laws to all the others)”.<sup>142</sup> “Progress must come from Europe”,<sup>143</sup> because this is the place where “the principles of its [the Kingdom of God] constitution begin to become public”.<sup>144</sup>

This is why civilization originated in Europe and Christianity is destined to be the world religion. The process has experienced several drawbacks. Here, “in the West, faith erected a throne of its own independent of secular power”.<sup>145</sup> Here, Christianity “could justify the outcry, *tantum religio potuit suadere malorum!*”<sup>146</sup> Yet this is the place, too, where “reason ... has accepted the principle of reasonable moderation”,<sup>147</sup> the principle that the sacred narrative “should at all times be taught and expounded in the interest of morality”,<sup>148</sup> and that “it is the duty of the rulers not to hinder the public

<sup>140</sup> *Religion*, 6: 122.

<sup>141</sup> *Nachlass*, XV, 2, 773, n. 1497.

<sup>142</sup> *Idea*, 8: 29.

<sup>143</sup> *Nachlass*, XV, 2, 781, n. 1499.

<sup>144</sup> *Religion*, 6: 151.

<sup>145</sup> *Religion*, 6: 131.

<sup>146</sup> *Ibid.*

<sup>147</sup> *Religion*, 6: 132.

<sup>148</sup> *Ibid.*

diffusion of these principles".<sup>149</sup> A government that "prohibits *the public declaration* of one's religious opinions while not hindering anyone from *thinking* in secret whatever he sees fit" is "doing violence to conscience".<sup>150</sup> This is to be avoided. Enlightened rulers in enlightened times have different duties and must follow different policies: they should never "conspire to hinder such a free development of the divine predispositions to the world's highest good, or even promote its hindrance", because that would "hamper, perhaps for a long time to come, or indeed even set back the advance in goodness envisaged by the world's government, even though no human power or institution could ever abolish it entirely".<sup>151</sup> Enlightenment is not fully achieved but it is marching.

Christian Europe is a footstep in this forward march. When the "gradual purification" of ecclesiastical faiths and the "gradual transition" to universal pure religion is accomplished, when the "discipline by religion" is accepted and the "essential maxims of belief" are widely recognized as a creed and practised as a custom, even "the degrading distinction between *laity* and *clergy* ceases".<sup>152</sup> That will be the time when finally "equality springs from true freedom, yet without anarchy, for each indeed obeys the law (not the statutory one) which he has prescribed to himself, yet must regard it at the same time as the will of the world ruler as revealed to him through reason, and this ruler invisibly binds all together, under a common government, in a state inadequately represented and prepared for in the past through the visible church".<sup>153</sup> That day Europe, the West, without dispensing with its liberal secular state, but rather with the determination and need to strengthen it, will unfurl a Christian banner as a public rallying point for its civilizing mission.

## 8. Kant's project and prophecy

Kant's philosophy of religion and politics is a minefield of endless conflicting interpretations mainly because his thought on these issues and many others is a battlefield of conflicting positions. Undeniably, his many grandiose, astonishing, and epoch-making syntheses and combinations – between empiricism and rationalism, reason and faith, law and morality, liberalism and religion, human corruption and hope, history and salvation –

<sup>149</sup> *Religion*, 6: 133.

<sup>150</sup> *Religion*, 6: 133n.

<sup>151</sup> *Religion*, 6: 134.

<sup>152</sup> *Religion*, 6: 122.

<sup>153</sup> *Ibid.*

leave room to quite a few apparent inconsistencies, tensions, ambiguities, unsettled questions. Kant scholars are right in denouncing the several limits of Kant's arguments and claims. Sometimes he seems to want to reconcile what cannot possibly be reconciled. To limit ourselves to the arguments developed in our paper, there is a clear tension between advocating the self-sufficiency of moral reason and stating that, without admitting the existence of God, "the rules of conduct have no motive power",<sup>154</sup> or between declaring that the problem of founding a republican constitution can be solved by reason alone and admitting that it also needs a "discipline by religion".

This is not to say that coherent interpretations of Kant's thought are never possible. In some cases they actually are, in others they are not, in still others they are, provided some adjustments are made here and there. To provide such coherent interpretations is the Kant scholars' task. In my view, there is an additional one. An effort should be made not only to solve, but to understand Kant's tensions within his overall project. This is especially important for the questions we have examined.

Kant was both a philosopher of the Enlightenment and a Christian thinker. As an exponent of the Enlightenment he tried to give the (still to be born) European liberal state a secular face, mindful as he was of the illiberal and sometimes tragic consequences of theocracy, religious wars, despotism, absolutism, paternalism, censorship, and lack of liberty. As an admirer of Christianity, although not a devout Christian himself, he tried to save its core values of freedom and salvation. As an Enlightenment philosopher he aimed to protect fundamental human rights, above all the first and utmost, liberty. As a Christian thinker, he bound these rights to the concept of the human person, its dignity, its worthiness of respect, its end-in-itselfness, and therefore its holy, God-like nature.

The Enlightenment ideal and the Christian message arise from two different perspectives, the earthly and the heavenly. According to the former, man is a master (and in some radical versions, the only master) of his own life *in this world*; according to the latter, man is a limited creature incapable of his own salvation *in the other world*. Although apparently incompatible, the two outlooks can intersect (or may be stretched so as to intersect) on one single point: that human reason – independently of whether it is considered a gift of God, as Christianity asserts, or a fact of nature, as Enlightenment claims – can improve man's condition. Kant examines this intersecting point and tries to make reason tally with faith, human power

<sup>154</sup> Collins, 27: 312.

with human destiny, man's limits with man's hopes. He is aware such convergence has no horizon in this world, but is also confident that improvements are within our reach if only we take them dutifully and we make our best efforts to achieve them. In this sense, Kant's was a project of moral, social, political, and religious reform. It was a grandiose, revolutionary Christian project, the rationalized and secularized version of a Christian reformation before Christianity in Europe was doomed to fade away.

For Kant, morality, law, politics, and religion are elements of one single tradition and culture that needs to be vindicated or transcendentally, rationally, "deduced". They are members of the same family, parts of the same living organism. What reason regards as an autonomous duty corresponds to what Christianity considers a divine command; the goal of pure rational religion tallies with the purest preachings of Christ; the needs of the state with its ethical community coincide with the promises of the Christian God with his universal church; the categorical imperative has Christian contents; pure rational religion is a Christian religion without revelation, hierarchies, priests, dogmas, authentic interpretations; the ethical community is a union under Christian command; the liberal state wants Christian principles and values. Even scientific knowledge with its postulate of a rational order of nature presupposes a Christian Lawgiver. This is why Kant (like Locke before him) removed atheists from his liberal state: a dogmatic atheist "loses the above-mentioned supports in the fulfilment of our duties, and it is undeniable that to that extent he cannot be regarded as a good citizen, and damages the obligating power of the laws, which this idea makes effective".<sup>155</sup> And this is also why Kant proclaimed Europe, and the West, as the centre of civilization: because in the West law, morality, politics, science, and religion are bound together within, and converge towards, a single point, the Christian tradition and culture.

Did Kant's project succeed? If his arguments are tenable and defensible, as I believe they are, he did. But just as important or even more important than his arguments, are his concerns and worries. When he famously wrote that he had "to deny knowledge in order to make room for faith"<sup>156</sup> he knew what he meant. He meant that a civilization based on science alone would destroy itself, exactly like a society based on faith alone would give rise to fanaticism.

Kant proclaimed the autonomy of reason and strived for its self-sufficiency. But he opposed a transformation of the autonomy and self-suffi-

<sup>155</sup> *Vigilantius*, 27: 531.

<sup>156</sup> *C. P. R.*, B XXX.

ciency of reason into the *independence* of reason. In his view, to confide in the independence of reason would turn reason against itself, give rise to yet another kind of atheism, finally destroying our freedom and, along with it, our best hope for a liberal, disciplined, peaceful, cosmopolitan society.

Kant was so gripped by this hope and so concerned about its fulfilment that he launched a warning that sounds like a prophecy. He wrote: “because, however, human reason always strives for freedom, when it first breaks its fetters the first use it makes of its long unaccustomed freedom has to degenerate into a misuse and a presumptuous trust in the independence of its faculties from all limitations, leading to a persuasion of the sole authority of speculative reason which assumes nothing except what it can justify by *objective* grounds and dogmatic conviction; everything else it boldly repudiates. Now the maxim of reason’s independence of its *own need* (of doing without rational faith) is *unbelief*. This ... *unbelief of reason*, a precarious state of the human mind, which first takes from moral laws all their force as incentives to the heart, and over time all their authority ... occasions the way of thinking one calls *libertinism*, i.e. the *principle* of recognizing no duty at all”.<sup>157</sup> It is because of this unbelief of reason and libertinism – just the state of moral anarchy the political community aims to avoid in its formation – that “the authorities get mixed up in the game, so that even civil arrangements may not fall into the greatest disorder; and since they regard the most efficient and emphatic means as the best, this does away with even the freedom to think, and subjects thinking, like other trades, to the country’s rules and regulations. And so freedom in thinking finally destroys itself if it tries to proceed in independence of the laws of reason”.<sup>158</sup>

Unlimited freedom is no freedom, and liberty with no dependence can go astray. “Friends of the human race and of what is holiest to it!” – Kant’s pleading and prophecy continues – “accept what appears to you most worthy of belief after careful and sincere examination, whether of fact or rational grounds; only do not dispute that prerogative of reason which makes it the highest good on earth, the prerogative of being the final touchstone of truth. Failing here, you will become unworthy of this freedom, and you will surely forfeit it too”.<sup>159</sup>

The arrogance of reason may initially produce the euphoria of reason, soon followed by the slumber of reason. More than two centuries later, Kant’s

<sup>157</sup> *Thinking*, 8: 146.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*

prophecy seems to have come true in European history. In new times of libertinism of reason, fanaticism is arising again, political authorities, on the pretext of avoiding that “civil arrangements may fall into the greatest disorder”, continue to “get mixed up in the game”, and our civilization is at risk.

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# STATE AND NATION; CHURCH, MOSQUE AND SYNAGOGUE – ON RELIGIOUS FREEDOM AND RELIGIOUS SYMBOLS IN PUBLIC PLACES

■ JOSEPH H.H. WEILER

## The debate that won't go away

Church and State – a topic which had seemed passé for some decades, encrusted in the genres of ‘typology’ and ‘taxonomy’ – endless articles and books with all appropriate graveness explaining the different ‘models’ of Church and State – has rather abruptly come to life. One reason for this, often swept under the carpet of political correctness, has been the advent of Muslim communities in many European states, frequently espousing a vibrant and unapologetic Islam. The perception, justified or otherwise, of a nexus between Islam and Muslim communities and terror organizations, and the reactions – popular, populist (and oft ugly) and official – have occupied the front pages.

Today's front pages, however, are proverbially used for wrapping up tomorrow's fish. More interesting has been the less visible, more profound debate on the place of religion in European society, not only Islam but a simmering engagement, in the face of a Christianity which has been continuously losing ground in an ever-secular Europe, with the role of Christian culture in the self-understanding of the European nations and nation states. There was a huge discussion on the possible reference to ‘Christian Roots’ as part of the Identikit of the European Union in the Preamble to its defunct ‘Constitution’ and now questions arise in national contexts with the debate, for example, on the appropriateness of a crucifix in public schools – which has been litigated before the German Constitutional Court, is under legislative consideration in several countries, and was the subject of consideration by the Grand Chamber of the ECHR following the November 2009 *Lautsi* decision by the Second Chamber. It is hard to recall in recent times ECHR litigation which has attracted as much public and media attention. Relate the discussion on the cross to that on the burqa and you have your finger on the constitutional pulse in and of Europe.

I want to offer a somewhat novel, surely contestable, way of framing the issues as they manifest themselves today. In a recent editorial in the *European Journal of International Law*, I wrote a sharp critique of the first *Lautsi* decision. Subsequently, I was invited by eight intervening States to appear for

them in the Oral Hearing of the appeal before the Grand Chamber which I readily accepted (*pro bono*).

### **Framing the issue**

We habitually talk of the commitment to religious freedom, both positive and negative: freedom of religion and freedom from religion, which European states are constitutionally, and under the Convention system, to guarantee their citizens and residents.

In fact, I would suggest, the European constitutional landscape posits two rather than one ‘Freedom of Religion’. In addition to the classical *individual* Freedom of and from Religion, in its very structure Europe represents a second *collective, identitarian*, Freedom, conceptually stemming from self-determination, namely the freedom of nations/states to include in their self-definition, in their self-understanding and in their national and statal symbology, a more or less robust entanglement of religion and religious symbols. (Right ‘off the bat’ let me say that there is no small measure of hypocrisy in the oft-heard insistence that Turkey must be *laïque*. Turkey yes and Denmark no?)

Consider France and the United Kingdom, good examples because both are founding members of the European Convention of Human Rights and, with the usual imperfections, are both considered robust liberal democracies in good standing.

France, in its very Constitution, defines itself as *laïque* – usually understood as a political doctrine which does not allow the State any endorsement or support of religion and would, say, consider the display of religious symbols by the State or the funding of religious schools, as, well, anathema. At an *individual* level, *laïcité* does not necessarily mean individual atheism or agnosticism. I know many persons, and so do you, who are religious in a profound and capacious way, but uphold *laïcité*. They do so because they believe that, independently of their personal conviction, it is wrong for the State to get entangled with religion. This precision is important since it helps highlight the fact that *laïcité* is a political doctrine about the best way to regulate the relationship between the State and Religion. The origins of, and justification for, *laïcité* can be historical (the specificities, for example, of the *Ancien Régime* and the subsequent French Revolution) but also theoretical – rooted in both principled and pragmatic consideration of, say, how best the State may ensure peaceful coexistence among religious factions.

*Laïcité* is to be contrasted with an opposing doctrine, which is also very common in Europe and which has no accepted name. ‘Theocracy’, even to the most ardent supporters of French style *laïcité*, would not be an appro-

priate label to describe a state like the modern UK or Denmark. For convenience let us refer to ‘non-laïque’ states. Like France, like everyone else, the non-laïque are both committed to, and obligated by, an imperative of assuring individual freedom of and from religion, but see no wrong in a religious, or religiously rooted, self-understanding of nation and state, and in a public space more or less replete with state-endorsed religious symbology. In England, part of the UK, the Monarch is both the Head of State but also the Titular head of the Anglican Faith and its institutional manifestation in the Church of England: the ‘Established Church’ of the Nation and State. Many state functions have a religious character: clergy sit (or sat) *ex-ufficio* as part of the legislature, the flag carries the Cross (of St. George) and the national anthem is a Prayer to God.

In somewhat of a mirror image of what I wrote above, I know, and so do you, many persons in England who are very convinced atheists and yet see no harm in the ‘non-laïque’ state, also able to invoke considerations of principle and pragmatism: has the UK been more riddled with religious strife than, say, France? It would seem that at least until recently, Catholics, Jews and Muslims were at peace with, say, a photo of the Monarch on the wall of a classroom or, more significantly, the English (or British) population at large has been at peace with a Catholic, or Jewish or Muslim or Church of England classroom funded from the general tax receipts of a population which is mostly secular, just as their French counterparts would be uncomfortable with the above.

It is not my purpose to claim normative parity for these two positions – a proposition which makes many people become very hot under the collar. But I will make two claims in relation to them. First, both the France and the UK (English) models are considered constitutionally legitimate in Europe. The UK (or Denmark, or Malta, or Greece and many others with different recipes from the ‘non-laïque’ cookbook) is not, simply by being what it is, in violation of the Convention or in violation of the common constitutional traditions of Europe. Second, and more controversially, I do assert that the claim that *laïcité* embodies a principle of neutrality – requires a very narrow (and self-serving) definition of what we mean by neutrality. Sure, a *laïque* state, à la France, is neutral as between different *religious* factions in the French public space. But it is not neutral in a broader political sense. What may hang on a French classroom wall will depend on the political colour of French democracy at any given time: A bust of Voltaire? *S’il Vous Plait*. Marx? *Pourquoi Pas?* The noble Battle Cry of the French Revolution – *Liberté, Égalité, Fraternité* – is, in fact, to be found on countless schools across the country. The only things that may not be displayed, independently of the contemporary colour of voter preference, is a cross, or

a mezuzah or a crescent. Kids may come to school with any manner of emblems such as the famous peace triangle, but not with you-know-what.

There is not contestation in Europe about the principle of freedom of and from religion (though many debates about its application). But there is a deep contestation about the most suitable way to regulate the symbolic and iconographic entanglement of Church and State. The *laïque* position is surely not ‘neutral’ about that contestation: it is as much a polar position as is the ‘non-*laïque*’ position. It does not simply choose a side. It is a side. It is theoretically autistic or disingenuous to claim neutrality for a term which defines one pole in a bipolar dispute.

This argument brings about yet a third very important underlying distinction which is rarely articulated, but which was very visible in *Lautsi*, since, in my view, it undergirded the impassioned plea by the lawyers of the redoubtable Ms. Lautsi and, in my most humble and respectful opinion, also undergirded the decision of the Chamber currently on appeal before the Grand Chamber. There are those who truly believe that *laïcité* is a primordial condition – *sine-qua-non* for a good liberal democracy and that, at least implicitly, the non-*laïque* position is sub-optimal at best and aberrational at worst. Consequently, it is morally imperative for good democrats and liberal pluralists to attempt to clip the wings of religious manifestations of the non-*laïque* state as far as possible – a principled and consistent position.

There are others (myself included) who hold the view that, even more in today’s world than before, the European version of the non-*laïque* state is hugely important in the lesson of tolerance it forces on such states and its citizens towards those who do not share the ‘official’ religions and in the example it gives the rest of the world of a principled mediation between a collective self-understanding rooted in a religious sensibility, or religious history, or religiously-inspired values and the imperative exigencies of liberal democracy. That there is something inspiring and optimistic by the fact that, even though the Queen is the Titular Head of the Church of England, the many Catholics, Muslims and Jews, not to mention the majority of atheists and agnostics, can genuinely consider her as ‘their Queen’ too, and equal citizens of England and the UK. I think there is intrinsic value of incalculable worth in the European pluralism which validates both a France and UK as acceptable models in which the individual right to and from religion may take place.

This, then, is how I would frame the issues against which the spate of cases and debates currently present in the European public space must take place. All too often these debates are reduced to the oft-difficult line drawing exercises between freedom of and from religion and their counterbalancing by other societal mores.

We all accept that when it comes to Freedom of Religion, the right, like all other fundamental rights, is not absolute. We would not allow in the name of religious freedom human sacrifice, or even the kind of conduct which incites to hatred or threatens public order and peace. The individual liberty is 'balanced' against a collective good variously defined.

But surely Freedom *from* Religion is not absolute, and its vindication has to be so balanced, and the principle collective good against which it should be balanced would, in my view, be the aforementioned collective freedom of a self-understanding, self-definition and determination of the collective self as having some measure of religious reference. Freedom of Religion surely requires that no school kid be obligated to chant God's name, even in, say, God Save the Queen. But does Freedom *from* Religion entitle such to demand that others not so chant, to have another national anthem? How does one negotiate the individual and the collective rights at issue here?

I think that both to understand the new debates and to arrive at meaningful, ethical, deontological, identitarian and pragmatic results may profit by this reframing.

**Oral Submission by Professor JHH Weiler on behalf of Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, The Russian Federation and San Marino – Third Party Intervening States in the Lautsi case before the Grand Chamber of the European Court of Human Rights**

*June 30th, 2010*

May it please the Court,

1. My name is Joseph H.H. Weiler, Professor of Law at New York University and Honorary Professor at London University. I have the honour to represent the Governments of Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, The Russian Federation and San Marino. All Third Parties are of the opinion that the Second Chamber erred in its reasoning and interpretation of the Convention and its subsequent conclusions.
2. I have been instructed by the President of the Grand Chamber that the Third Parties must not address the specifics of the case and be limited to the general principles underlying the case and its possible resolution. Time allocated is 15 minutes. I will, thus, only mention the most essential arguments.
3. In its Decision the Chamber articulated three key principles with two of which the Intervening States strongly agree. They strongly dissent from the third.

4. They strongly agree that the Convention guarantees to individuals Freedom of Religion and Freedom from Religion (positive and negative religious freedom) and they strongly agree on the need for a classroom that educates towards tolerance and pluralism and is bereft of religious coercion.
5. The Chamber also articulates a principle of ‘neutrality’:  
The State’s duty of neutrality and impartiality is incompatible with any kind of power on its part to assess the legitimacy of religious convictions or the ways of expressing those convictions [paragraph 47].
6. From this premise the conclusion is inevitable: having a crucifix on the walls of classrooms was obviously found as expressing an assessment of the legitimacy of religious conviction – Christianity – and hence violative.
7. This formulation of ‘neutrality’ is based on two conceptual errors which are fatal to the conclusions.
8. First, under the Convention system all Members must, indeed, guarantee individuals freedom of religion but also freedom from religion. This obligation represents a common constitutional asset of Europe. It is, however, counter balanced by considerable liberty when it comes to the place of religion or religious heritage in the collective identity of the nation and the symbology of the State.
9. Thus, there are Members in which *laïcité* is part of the very definition of the State, such as France and in which, indeed, there can be no State endorsed or sponsored religious symbol in a public space. Religion is a private affair.
10. But no State is required under the Convention system to espouse *laïcité*. Thus, just across the Channel there is England (and I use this term advisedly) in which there is an Established State Church, in which the Head of State is also the Head of the Church, in which religious leaders, are members, *ex officio*, of the legislative branch, in which the flag carries the Cross and in which the National Anthem is a prayer to God to save the Monarch, and give him or her Victory and Glory.  
  
[Sometimes God does not listen as in a certain football match a few days ago...]
11. In its very self definition as a State with such an established Church, in its very ontology, England would appear to violate the strictures of the Chamber for how could it be said that with all those symbols there is not some kind of assessment of the legitimacy of religious belief?

12. There is a huge diversity of State–Church arrangement in Europe. More than half the population of Europe lives in States which could not be described as *laïque*. Inevitably in public education, the State and its symbols have a place. Many of these, however, have a religious origin or contemporary religious identity. In Europe, the Cross is the most visible example appearing as it does on endless flags, crests, buildings etc. It is wrong to argue, as some have, that it is only or merely a national symbol. But it is equally wrong to argue, as some have, that it has only religious significance. It is both – Given history that is part of the national identity of many European States. [There are scholars who claim that the 12 Stars of the Council of Europe has this very duality too!]
13. Consider a photograph of the Queen of England hanging in the classroom. Like the Cross, that picture has a double meaning. It is a photo of the Head of State. It is, too, a photo of the Titular head of the Church of England. It is a bit like the Pope who is a Head of State and Head of a Church. Would it be acceptable for someone to demand that the picture of the Queen may not hang in the school since it is incompatible with their religious conviction or their right to education since – they are Catholics, or Jews, or Muslims? Or with their philosophical conviction – they are atheists? Could the Irish Constitution or the German Constitution not hang on a class room wall or be read in class since in their Preambles we find a reference to the Holy Trinity and the Divine Lord Jesus Christ in the former and to God in the latter? Of course the right of freedom from religion must ensure that a pupil who objects may not be required actually to engage in a religious act, perform a religious ritual, or have some religious affiliation as a condition for state entitlements. He or she should certainly have the right not to sing God Save the Queen if that clashes with their world view. But can that student demand that no one else sing it?
14. This European arrangement constitutes a huge lesson in pluralism and tolerance. Every child in Europe, atheist and religious, Christian, Muslim and Jew, learns that as part of their European heritage, Europe insists, on the one hand on their individual right to worship freely – within limits of respecting other people’s rights and public order – and their right not to worship at all. At the same time, as part of its pluralism and tolerance, Europe accepts and respects a France and an England, a Sweden and a Denmark, a Greece and an Italy all of which have very different practices of acknowledging publically endorsed religious symbols by the State and in public spaces.

15. In many of these non-laïque States, large segments of the population, maybe even a majority, are no longer religious themselves. And yet the continued entanglement of religious symbols in its public space and by the State is accepted by the secular population as part of national identity and as an act of tolerance towards their co-nationals. It may be, that some day, the British people, exercising their constitutional sovereignty, will divest themselves of the Church of England, as did the Swedes. But that is for them, not for this distinguished Court, and certainly the Convention has never been understood as forcing them to do so. Italy is free to choose to be laïque. The Italian people may democratically and constitutionally elect to have a laïque State. (And whether or not the crucifix on the walls is compatible with the Italian constitution is not a matter for this court but for the Italian Court). But the applicant, Ms. Lautsi, does not want this Court to recognize the right of Italy to be laïque, but to impose on her a duty. That is not supported by law.
16. In today's Europe countries have opened their gates to many new residents and citizens. We owe them all the guarantees of the Convention. We owe the decency and welcome and non discrimination. But the message of tolerance towards the Other should not be translated into a message of intolerance towards one's own identity, and the legal imperative of the Convention should not extend the justified requirement that the State guarantee negative and positive religious freedom, to the unjustified and startling proposition that the State divest itself of part of its cultural identity simply because the artefacts of such identity may be religious or of religious origin.
17. The position adopted by the Chamber is not an expression of the pluralism manifested by the Convention system, but an expression of the values of the laïque State. To extend it to the entire Convention system would represent, with great respect, the Americanization of Europe. Americanization in two respects: first, a single and unique rule for everyone, and second, a rigid, American style, separation of Church and State as if the people of those Members whose State identity is not laïque, cannot be trusted to live by the principles of tolerance and pluralism. That again, is not Europe.
18. The Europe of the Convention represents a unique balance between the individual liberty of freedom of and from religion, and the collective liberty to define the State and Nation using religious symbols and even having an established Church. We trust our constitutional democratic institutions to define our public spaces and our collective edu-



cational systems. We trust our courts, including this august court, to defend individual liberties. It is a balance that has served Europe well over the last 60 years.

19. It is also a balance which can act as a beacon to the rest of the world since it demonstrates to countries which believe that democracy would require them to shed their religious identity that this is not the case. The decision of the Chamber has upset this unique balance and risks to flatten our constitutional landscape robbing of that major asset of constitutional diversity. This distinguished Court should restore the balance.
20. I turn now to the second conceptual error of the Chamber – the conflation, pragmatic and conceptual, between secularism, *laïcité*, and neutrality.
21. Today, the principal social cleavage in our States as regards religion is not among, say Catholics and Protestants, but among the religious and the ‘secular’. Secularity, *laïcité*, is not an empty category which signifies absence of faith. It is to many a rich world view which holds, inter alia, the political conviction that religion only has a legitimate place in the private sphere and that there may not be any entanglement of public authority and religion. For example, only secular schools will be funded. Religious schools must be private and not enjoy public support. It is a political position, respectable, but certainly not ‘neutral’. The non-*laïque*, whilst fully respecting freedom of and from religion, embrace some form of public religion as I have already noted. *Laïcité* advocates a naked public square, a classroom wall bereft of any religious symbol. It is legally disingenuous to adopt a political position which splits our society, and to claim that somehow it is neutral.
22. Some countries, like the Netherlands and the UK, understand the dilemma. In the educational area these States understand that being neutral does not consist in supporting the secular as opposed to the religious. Thus, the State funds secular public schools and, on an equal footing, religious public schools.
23. If the social pallet of society were only composed of blue, yellow and red groups, then black – the absence of colour – would be a neutral colour. But once one of the social forces in society has appropriated black as its colour, then that choice is no longer neutral. Secularism does not favour a wall deprived of all State symbols. It is religious symbols which are anathema.
24. What are the educational consequences of this?

25. Consider the following parable of Marco and Leonardo, two friends just about to begin school. Leonardo visits Marco at his home. He enters and notices a crucifix. ‘What is that?’, he asks. ‘A crucifix – why, you don’t have one? Every house should have one’. Leonardo returns to his home agitated. His mother patiently explains: ‘They are believing Catholics. We are not. We follow our path’. Now imagine a visit by Marco to Leonardo’s house. ‘Wow!’, he exclaims, ‘no crucifix? An empty wall?’ ‘We do not believe in that nonsense’ says his friend. Marco returns agitated to his house. ‘Well’, explains his mother, ‘We follow our path’. The next day both kids go to school. Imagine the school with a crucifix. Leonardo returns home agitated: ‘The school is like Marco’s house. Are you sure, Mamma, that it is okay not to have a crucifix?’ That is the essence of Ms. Lautsi’s complaint. But imagine, too, that on the first day the walls are naked. Marco returns home agitated. ‘The school is like Leonardo’s house’, he cries. ‘You see, I told you we don’t need it’.
26. Even more alarming would be the situation if the crucifixes, always there, suddenly were removed.
27. Make no mistake: a State-mandated naked wall, as in France, may suggest to pupils that the State is taking an anti-religious attitude. We trust the curriculum of the French Republic to teach their children tolerance and pluralism and dispel that notion. There is always an interaction between what is on the wall and how it is discussed and taught in class. Likewise, a crucifix on the wall might be perceived as coercive. Again, it depends on the curriculum to contextualize and teach the children in the Italian class tolerance and pluralism. There may be other solutions such as having symbols of more than one religion or finding other educationally appropriate ways to convey the message of pluralism.
28. It is clear that given the diversity of Europe on this matter there cannot be one solution that fits all Members, all classrooms, all situations. One needs to take into account the social and political reality of the locale, its demographics, its history and the sensibilities and sensitivities of the Parents.
30. There may be particular circumstances where the arrangements by the State could be considered coercive and inimical but the burden of proof must rest on the individual and the bar should be set extremely high before this Court decides to intervene, in the name of the Convention, in the educational choices made by the State. A one rule fits all, as in the decision of the Second Chamber, devoid of historical, political, demographic and cultural context is not only inadvisable, but undermines the very pluralism, diversity and tolerance which the Convention is meant to guarantee and which is the hallmark of Europe.

# THE PROTECTION OF FREEDOM OF RELIGION WITHIN THE INSTITUTIONAL SYSTEM OF THE UNITED NATIONS

■ CHRISTIAN WALTER

On 25 November 2011 the 1981 ‘United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief’ will celebrate its 30<sup>th</sup> anniversary. It will do so in a time where issues of religion dominate world politics more than probably ever before during these thirty years: Practically all Western European countries are struggling with the integration of growing Muslim communities into their formerly predominantly Christian societies, the Arab Israeli conflict is still on the agenda, the military conflicts in Iraq and Afghanistan are, at least by some, also read in a religious perspective, issues of religion are at the roots of conflicts in India, Indonesia and many other parts of the world, and finally, the uproar created by the Mohammed caricatures demonstrated that the Internet may turn the World into a huge public square where seemingly small incidents in one corner may spread at lightning speed all over the place.

What role do freedom of religion and its protection within the institutional system of the United Nations play in that context? Let me briefly sketch the overall system and place emphasis on one specific institution, namely the UN Special Rapporteur on Freedom of Religion. I will start with a brief description of freedom of religion as an international human right (I.), before turning to the 1981 Declaration (II.), and the existing mechanisms of surveillance (III.). I conclude with an evaluation of the system (IV.).

## I. Freedom of religion as an international human right

The history of freedom of religion in international law may be traced back to the Thirty Years’ War and in some early antecedents even beyond.<sup>1</sup> In modern international law freedom of religion was originally included into the general framework of minority protection. While attempts at including a provision concerning freedom of religion into the League of Na-

<sup>1</sup> For details see M. Evans, *Religious Liberty and International Law in Europe*, 1–41.

tions Covenant failed<sup>2</sup>, the system of minority protection established after World War I offered the possibility to include freedom of religion. In fact, the concern to protect the Jewish minority in Poland<sup>3</sup> was the triggering factor which finally led to minority treaties not only with Poland, but also with Czechoslovakia, Greece, Romania and the Kingdom of Serbs, Croats and Slovenes.<sup>4</sup> The advantage of the inclusion of the minority treaties into the system of the League of Nations must be seen in the fact that the League of Nations was involved in the implementation of the protection clauses. The respective commitments were expressly labeled ‘obligations of international concern’.<sup>5</sup>

However, and irrespective of the important achievement of the minority treaty system as regards the protection of religious minorities, it is obvious that minority protection of the type established after World War I and individual human rights protection are fundamentally different concepts. Therefore, the Universal Declaration of Human Rights of December 1948 is the first international document in which freedom of religion as an international individual right is spelled out (Art. 18 UDHR).

Since then, freedom of religion has remained separated from minority rights, although, of course modern anti-discrimination provisions also prohibit discrimination on religious grounds.<sup>6</sup> Virtually all modern human rights instruments contain provisions protecting freedom of religion and prohibiting discriminations based on religion. Apart from the UDHR one may mention Art. 18 and Art. 2 para. 1 International Covenant on Civil and Political Rights (ICCPR), Art. 9 and Art. 14 European Convention of Human Rights (ECHR), Art. 12 and Art. 1 para. 1 American Convention of Human Rights (ACHR), Art. 8 and Art. 2 African Charter of Human and People’s Rights (ACHPR). Furthermore, a number of specialized human rights instruments contain corresponding provisions for their specific purposes. This holds true, for example for the UN Convention on the Rights of the Child (Art. 14) or the Geneva

<sup>2</sup> The debate is described by Evans (note 1), 83–103; the proposals discussed differed in scope and in style, but their common ground was that religious persecution and intolerance are ‘fertile sources of war’.

<sup>3</sup> Evans (note 1), 105.

<sup>4</sup> For details of the respective clauses relating to religion see R. Grote, *Die Religionsfreiheit im Spiegel völkervertraglicher Vereinbarungen zur politischen und territorialen Neuordnung*, in: R. Grote/Th. Maruhn (eds.), *Religionsfreiheit zwischen individueller Selbstbestimmung, Minderheitenschutz und Staatskirchenrecht – Völker- und verfassungsrechtliche Perspektiven*, Berlin u.a. 2001, 3–52 (23–25).

<sup>5</sup> Art. 12 Polish Treaty.

<sup>6</sup> This holds already true for the Universal Declaration, see Art. 2, para. 1 UDHR.

Refugee Convention (Art.4). International humanitarian law protects freedom of religion of the civilian population (Art.27, para.1 GC IV), during occupation (Art. 58 GC IV), concerning prisoners of war (Art. 34 – Art. 37 GC III) and in respect to the protection of civil objects (Art. 52, para. 3 AP 1).

It may generally be said that freedom of religion was an ‘easy case’ during the deliberations on almost all the instruments mentioned. It may also be said that the most important universal and regional instruments of human rights protection have been strongly influenced by the compromise found for the wording of Art. 18 UDHR. The ICCPR and the American Convention furthermore highlight the importance of freedom of religion by including it into the so-called non-derogable rights, i.e. rights which must be respected even in times of a national emergency.

## **II. The 1981 United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief**

As was already mentioned, the inclusion of general provisions relating to freedom of religion and to non-discrimination on religious grounds was relatively easy. This may be explained by the fact that with regard to freedom of religion problems arise rather when the norm is applied than at the level of its acceptance in principle: Few would deny a right to freedom of religion generally, but many will differ on limits to the free exercise of religion when it comes to wearing headscarves in schools, ritual slaughtering of animals, missionary activities etc. Freedom and taxes are similar in that regard: what really counts is the remaining net freedom after the deduction of allowed limitations, not the shining gross freedom, which can easily be promised.

For that reason, already in the mid-1960s there was a strong movement in the United Nations to establish a document, either a convention or a declaration, which would spell out the specific guarantees of freedom of religion more in detail.<sup>7</sup> With regard to a possible convention the attempts failed completely. The last draft for a convention dates back to 1973 and even the UN Special Rapporteurs on Freedom of Religion dropped the issue of a binding document in 1993.<sup>8</sup>

<sup>7</sup> The General Assembly asked the Human Rights Commission in 1962 to work on a draft declaration and a draft convention against all forms of religious intolerance (GA Res. 1781 (XVIII) of 7 December 1962); for the history of the debates between 1962 and 1981 see N. Lerner, *Toward a Draft Declaration Against religious Intolerance and Discrimination*, *Israel Yearbook on Human Rights* 11 (1981), 82 (84–89).

<sup>8</sup> The last recommendation in that regard is contained in the report of 1993, see UN Doc. E/CN.4/1994/79, para. 111; the idea was practically abandoned in 1995, when a Convention was labeled as a ‘necessary but premature step’, UN Doc E/CN.4/1996/95, para. 69.

What are the reasons for the problems regarding such a convention? First, and most of all, the reason must be seen in the already mentioned fact that spelling out the details of freedom of religion is much more painstaking than formulating the general principle. There were, however, two concrete issues. One was the communist position that protecting specifically ‘religion’ would imply a discrimination of atheist or non-religious convictions as opposed to religious convictions. Given the fact that Art. 18 UDHR and all other relevant norms protect ‘belief’, this claim was already flawed at the time when it was made. With the end of the East-West block confrontation it has lost its remaining persuasiveness. The 1981 Declaration found a compromise in adding the word ‘whatever’ before the word ‘belief’.<sup>9</sup>

The second point of debate is still of relevance. It relates to the formulation contained in Art. 18 UDHR according to which ‘this right includes freedom to change [...] religion or belief’. There was a growing opposition against this formulation in Muslim countries after 1948, when the UDHR was adopted. Already the ICCPR in 1966 does not contain a similarly clear guarantee. Art. 18 CCPR reads in the respective passage: ‘This right shall include freedom *to have or to adopt* a religion or belief of his choice [...]’. It was commonly understood that the wording ‘adopt’ would also apply in the situation of a pre-existing religion and thus cover the change of religion.

But it is obvious that already this solution is a weakening as compared with the 1948 text and its clear formulation ‘change’.

The 1981 Declaration goes back one step further and does not even indirectly refer to the change of religion. It does not address the issue at all. However, it does contain a salvatory clause in Art. 8 according to which ‘Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights’. On the basis of this clause, the freedom to change one’s religion expressly contained in Art. 18 UDHR and indirectly accepted in Art. 18 CCPR is preserved, even though the 1981 Declaration does not mention it any more.<sup>10</sup> This is also

<sup>9</sup> The relevant passage in Art. 1 of the Declaration reads: ‘Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or *whatever* belief of his choice [...]’ (emphasis added); see N. Lerner, *The Final Text of the U.N. Declaration Against Intolerance and Discrimination based on Religion or Belief*, *Israel Yearbook on Human Rights* 12 (1982), 185 (186).

<sup>10</sup> See the detailed analysis by P.M. Taylor, *Freedom of Religion – UN and European Human Rights Law and Practice*, Cambridge UK 2005, 27–42.

the position of the UN Human Rights Committee which, in its General Comment No. 22 on Freedom of Religion states: 'The Committee observes that the freedom to 'have or to adopt' a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief'. It must nevertheless be acknowledged that the development of the texts since 1948 shows a continuous weakening of that guarantee.<sup>11</sup>

What are the strengths and weaknesses of the 1981 Declaration? There is undoubtedly the merit of having spelled out a rather detailed catalogue of what is comprised by freedom of religion.<sup>12</sup> Given the difficulties of detail this achievement should not be underestimated. For example, the list mentions expressly the right 'to worship and assemble in connection with a religion or belief, and to establish and maintain places for this worship'.<sup>13</sup> Under the European Convention, where it is not expressly mentioned, the right to maintain places of worship and assembly had to be established by the European Court of Human Rights in a Greek case<sup>14</sup> which illustrates the problems for religious minorities (in the case at hand the Jehovah's Witnesses) in that regard. A parallel development took place regarding the free choice of leaders, which is guaranteed in the 1981 Declaration and under the ECHR again had to be established by the Court in a Bulgarian case.<sup>15</sup>

On the other hand, it must be acknowledged that the Declaration is not in itself a legally binding document under international law. To be sure, it serves, and will continue to serve as an important and helpful tool in interpreting the formally binding international guarantees of freedom of religion. It is even possible to ascribe to the most fundamental and uncontroversial guarantees of freedom of religion the character of customary international law. But it is certainly too far reaching if – as some authors do – the whole document as such is qualified as an expression of customary international law. The most important weakness must be seen in the softening of the right to change one's religion which the 1981 Declaration tends to induce.

<sup>11</sup> See the criticism voiced by Evans (note 1), 237 f. in that regard.

<sup>12</sup> B. Dickson, *The United Nations and Freedom of Religion*, *ICLQ* 44 (1995), 327 (344 f.).

<sup>13</sup> Art. 6 lit. a) of the Declaration.

<sup>14</sup> Rep. 1996-IV, 1346 – Manoussakis.

<sup>15</sup> Rep. 2000-XI, 117 – Hasan and Chaush.

### III. Mechanisms of surveillance

Let me now turn to the mechanisms of surveillance and implementation. There are the general mechanisms which apply with regard to all human rights guarantees. They exist in form of treaty bodies, i.e. mechanisms which are set up for implementing the guarantees contained in a specific treaty, such as the Human Rights Committee established under the ICCPR (1.). In addition there is the Human Rights Council which replaced the former Human Rights Commission in 2005 as a non-treaty based universal surveillance mechanism. Under the new regime of the Human Rights Council the most important mechanism is the so-called Universal Periodic Review Mechanism – UPR (2.). Finally, there is a broad range of so-called Special Procedures, the most relevant of which in the context of freedom of religion is the Special Rapporteur on Freedom of Religion (3.).

#### 1. Treaty bodies

The most important advantage of treaty bodies must be seen in the fact that they operate on the basis of legally binding texts and with formalized procedures. In consequence, such treaty bodies need to be established separately with regard to each human rights instrument. This has become a matter of discussion in itself, because the proliferation of such bodies implies a risk to have different interpretations of similar or even identical norms. Also, since the usual instrument applied by treaty bodies are state reports which the member states have to submit regularly, there is a problem of capacity since states are more or less constantly under reporting obligations to one or the other treaty body. The Office of the High Commissioner for Human Rights has therefore suggested to establish what it called a ‘unified standing treaty body’.<sup>16</sup> However, given the fact that membership in the different instruments is far from uniform, this goal will be difficult to realize.<sup>17</sup>

The most well-known among the many treaty bodies is the Human Rights Committee established under the ICCPR. It may serve as an example of how treaty bodies work. All Human Rights treaty bodies consist of independent experts. Under the ICCPR three different procedures are available: state reports which have to be submitted regularly. State reports are the only surveillance instrument which is obligatory under the ICCPR (Art. 40

<sup>16</sup> UN Doc A/59/2005/Add. 3; see also the concept paper of the IHCHR, HRI/MC/2006/2 of 22 March 2006.

<sup>17</sup> For a more detailed criticism see C. Tomuschat, Human Rights Committee, MN 36, in: *MPEPIL*, available at: [www.mpepil.com](http://www.mpepil.com).



ICCPR). After having dealt with the reports, the Committee formulates ‘concluding observations’, which are, however, often cautious and diplomatic.

A second instrument are inter-state communications, i.e. claims by other states parties to the ICCPR and that a member state is in violation of its obligations deriving from the treaty (Art. 41 ICCPR). Under the ICCPR this instrument is only mandatory after the respective state has made a specific declaration. Although the inter-state application stands in the logic of mutually binding treaty obligations, it must be considered of extremely limited value. No such procedure as yet taken place under any of the existing international human rights treaties. There are many reasons for this abstinence of other member states. The most important seem to be diplomatic considerations and, of course, a fear of ‘retaliation’ at some later point in time.

Under the first additional Protocol to the ICCPR the Committee is also competent to receive individual communications and to pronounce its ‘views’ on these communications. These views are, as the term indicates, not formally binding for the member state concerned, although the Committee tends to use more and more a language which one would usually find in Court judgments. Finally, the Human Rights Committee has adopted so-called ‘General Comments’ which either concern specific guarantees such as freedom of religion or systematic issues like reservations to human rights treaties.<sup>18</sup>

The different procedures available for treaty bodies must be seen as mutually complementary. At first sight one might be tempted to consider the individual communication as the most effective instrument since it offers the possibility for an individual who feels violated in his or her human rights, to claim the violation directly before an internationally competent human rights body. However, a look at the actual figures of cases reveals that that the practical importance is limited. As of April 2008 (which is the latest date with available figures) the Human Rights Committee had dealt with 1777 individual complaints, which is a remarkably low figure given a membership of 113 states.<sup>19</sup> For comparison: The European Court of Human Rights responsible for complaints emanating from 47 member states has received 61,300 individual complaints only in 2010. At the end of the year 2010 there were almost 140,000 individual complaints pending

<sup>18</sup> For details see E. Klein, General Comments – Zu einem eher unbekanntem Instrument des Menschenrechtsschutzes, in: *Recht – Staat – Gemeinwohl, Festschrift für Dietrich Rauschnig*, Köln u.a. 2001, 301–312.

<sup>19</sup> See the figures available at: [www2.ohchr.org/english/bodies/hrc/stat2.htm](http://www2.ohchr.org/english/bodies/hrc/stat2.htm).

at the ECHR.<sup>20</sup> The comparison illustrates that the individual procedure available at the universal level of the ICCPR does not seem to be accepted in a similar way as its European counterpart. The reasons for that difference are manifold. One important factor certainly is that the procedure simply is not well enough known in many parts of the world, others factors are probably a lack of willingness or of ability to lodge such complaint, or even fear of repression.

## **2. *The Human Rights Council and its Universal Periodic Review Mechanism***

In view of these limits to the existing treaty mechanisms, the new United Nations Human Rights Council, which replaced the former Human Rights Commission, established the so-called ‘Universal Periodic Review Mechanism – UPR’. The mechanism has several advantages: The first and most important is that it applies to all member states of the United Nations, irrespective of whether at all and if so to which human rights treaties they are parties. The second advantage is that it does not require a trigger, for example an individual or an inter-state complaint. Thus, the state concerned is not automatically in a situation of defense. The mechanism is ‘democratic’ in the sense that each member of the United Nations will be reviewed regularly, irrespective of whether the overall human rights record is said to be excellent or terrible.

The main disadvantage of the mechanism must be seen in the fact that it is not operated by independent experts, but by the members of the Human Rights Council, i.e. 47 member states of the United Nations. The review mechanism has inevitably become politicized and the quality of the reports and recommendations does not match the outcome of proceedings before independent experts. It is against this background that the role of the Special Rapporteur on Freedom of Religion must be assessed.

## **3. *The Special Rapporteur on Freedom of Religion***

In 1986 the then existing Human Rights Commission instituted the ‘Special Rapporteur on Religious Intolerance’ as it was originally named.<sup>21</sup> The Special Rapporteur was mandated with examining incidents and governmental actions which are inconsistent with the 1981 Declaration on the

<sup>20</sup> See the figures for 2010 available at: [www.echr.coe.int/NR/rdonlyres/C99DDB86-EB23-4E12-BCDA-D19B63A935AD/0/FAITS\\_CHIFFRES\\_EN\\_JAN2011\\_VER-SION\\_WEB.pdf](http://www.echr.coe.int/NR/rdonlyres/C99DDB86-EB23-4E12-BCDA-D19B63A935AD/0/FAITS_CHIFFRES_EN_JAN2011_VER-SION_WEB.pdf).

<sup>21</sup> Res. 1986/20 of 10 March 1986, ECOSOC OR, 1986, Supp. 2, 66.

Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief and with recommending remedial measures against such situations. In 2001, on the occasion of the 20<sup>th</sup> anniversary of the 1981 Declaration, the title was changed into ‘Special Rapporteur on Freedom of Religion or Belief’.<sup>22</sup> The change in title reflects a broader mandate, which was, as it was formulated by Special Rapporteur *Amor*, ‘no longer confined to expressions of intolerance and discrimination based on religion or belief, but extended to all issues relating to freedom of religion or belief [...]’.<sup>23</sup>

### *a) The scope of the mandate and its development in practice*

A brief look at the work of the different Special Rapporteurs reveals how the scope and the methods of their work have changed. First, it should be noted that the Special Rapporteur on Freedom of Religion was given broad possibilities of action. Already the 1986 resolution, which created the office, mentions the possibility of dealing with individual complaints. Also, the Special Rapporteurs were given the possibility to receive material not only from official government sources, but also from NGOs and from religious communities concerned. However, a certain development may be discerned as regards the application of the instruments available. Over the last twenty-five years the Special Rapporteurs have moved towards a more intensive dialogue and they have increased the publicity of their actions.

The first Special Rapporteur was the Portuguese lawyer *Angelo Vidal d’Almeida Ribeiro*. He had to establish the mechanism against resistance in many states which had forced a prior Special Rapporteur, who had been instituted provisionally in 1983 by the Sub Commission on Prevention of Discrimination and Protection of Minorities.<sup>24</sup> Thus, *d’Almeida Ribeiro* could not press too hard in his actions. In his first report, he only mentioned problematic issues without linking them to specific countries. But already in his second report, *d’Almeida Ribeiro* started mentioning the countries concerned. He described the facts presented in individual complaints but refrained from taking position himself.

In 1994 *Abdelfattah Amor*, a Tunisian lawyer, took over and in 2001 he passed the office on to *Asma Jahangir* from Pakistan. Thus, the two Special Rapporteurs responsible from 1994 until 2010 had a Muslim religious and cultural background. Notably *Asma Jahangir* considerably changed the pre-

<sup>22</sup> Res. 2001/42.

<sup>23</sup> UN Doc E/CN.4/2003/66, para. 2.

<sup>24</sup> UN Doc E/CN.4/Sub.2/1983/43, 98-99.

existing practice. But already the data submitted by Special Rapporteur *Amor* in his 2001 report show a significant increase in individual complaints addressed to him.<sup>25</sup> He distinguishes three phases: 1989–1994: 30 communications on the average; 1995–1999: 56 communications on the average; 2000–2001: 88 communications on the average. The current reports do not give figures by year, but merely mention that since 1986 a total of more than 1,200 communications had been transmitted to the governments of the member states concerned (more than 130).<sup>26</sup> As of 2005 Special Rapporteur *Jahangir* started printing the individual complaints and the reaction by the Government of the member state concerned (if there was any...) in a separate document.<sup>27</sup>

Apart from individual communications there is a second important instrument of operation, namely country visits. While Special Rapporteur *d'Almeida Ribeiro* during his term of office from 1986 to 1993 only visited Bulgaria in 1987, Special Rapporteur *Amor* developed the country visits into a regular instrument, trying to visit two countries each year. Furthermore, the reports on the country visits have been, from the beginning, much more detailed and critical than the reactions to individual complaints. While the 1994 report on China, although mentioning the difficult situation in Tibet expressly, refrained from a critical legal assessment contenting itself with 'recommendations' regarding future practice, later country reports are characterized by a detailed analysis of the legal situation in the member state concerned. For example the 1999 report on a visit to the United States of America contains a rather detailed analysis of the jurisprudence of the U.S. Supreme Court. And also the 1997 visit to Germany gives evidence of an in-depth examination of the national legal situation. The respective passage is worth being quoted, since it underlines the merits of the German system of co-operation:

As regards legislation, the provisions of the Constitution fully guarantee freedom of religion and belief, and the provisions incorporated from the Weimar Constitution governing relations between the State, the churches and the religious communities are very comprehensive. They strike the right dynamic balance between religion and politics, avoiding the extremes of 'anti-religious clericalism' and 'religious cler-

<sup>25</sup> See UN Doc. A/56/253, para. 84.

<sup>26</sup> UN Doc. A/65/207 of 20 July 2010, para. 54; A/HRC/16/53 of 15 December 2010, para. 11.

<sup>27</sup> UN Doc. E/CN.4/2005/61/Add.1 of 15 March 2005.

icalism' and allowing a symbiotic relationship, governed by principles of neutrality, tolerance and equity, between the State and religions. In this respect, it is noteworthy that the status of legal person in public law that may be accorded to cults and entails certain rights and advantages is related not to the religious nature of the cult but to whether it is in the public interest. This status ensures a form of co-operation with the State, but unlike other legal persons in public law, cults are not incorporated into the State structure. Where the principle of neutrality is concerned, and as the question of religion in State schools demonstrates, whether in the case of the crucifix or religious instruction, interpretation of the principle is not rigid and has to take balanced account, within the framework of the provisions of the Constitution, of the minorities and the majority, while respecting the freedom of belief of all.<sup>28</sup>

What are the strengths of the approach followed by the Special Rapporteurs? The mechanism certainly is 'soft' in the sense that it does not have the possibility to render binding judgments on the question of whether in the individual case presented the right to freedom of religion or not to be discriminated against were violated. Against this weakness there is, however, one important strength to be mentioned which should not be underestimated. This strength must be seen in the possibilities which the dialogue offers which the Special Rapporteurs maintain with the member states.

The concept of country visits includes the necessity of collaboration of the visited state, which must allow the entry into the territory of the delegation of the Special Rapporteur and consent to its traveling schedule. Furthermore, transmitting individual complaints and relying on comments by the government which are then followed by observations of the Special Rapporteur also focuses very much on a dialogue on the relevant issues. Finally, the Special Rapporteurs are increasingly placing emphasis on a follow-up mechanism. Country visits are complemented by a follow-up procedure in which commitments undertaken by the state concerned are monitored. The possibility of such a general follow-up mechanism is an advantage which no 'hard' international surveillance mechanism can offer. Thus, it offers the possibility to induce systematic changes in the law and practice of the state concerned. By contrast, judgments in individual cases rather lead to individual solutions, without approaching the systematic problem that may stand behind an individual complaint.

<sup>28</sup> Un Doc. A/CN.4/1998/6/Add.2, para. 84.

## *b) Controversial substantive issues*

In 2011, on the occasion of the 25<sup>th</sup> anniversary of the office of the Special Rapporteur on Freedom of Religion a ‘Rapporteur’s Digest’ has been prepared which gives a systematic access to controversial issues of freedom of religion.<sup>29</sup> The material presented in the digest gives a good overview of controversial issues regarding freedom of religion and the prohibition of discrimination on religious grounds. The following substantive issues are worth being mentioned:

### *aa) Registration requirements*

In a number of states predominantly, but in no way exclusively belonging to the former communist block registration requirements have been found to infringe upon freedom of religion. The 2005 report and different country reports mention among others Byelorussia, Kyrgyzstan, Mongolia, Moldavia, Turkmenistan, Uzbekistan, Azerbaijan and China. The problems of registration requirements are well illustrated by the case of the Moscow Branch of the Salvation Army, which the European Court of Human Rights decided in 2006. In this case the Russian authorities had refused to register the Moscow Branch of the Salvation Army (which had already existed as an autonomous legal person at the time when the registration requirement was introduced) on various grounds. The consequence of non-registration was that the Moscow Branch of the Salvation Army at least partially lost its legal personality which, in turn, had a number of further negative consequences. The reasons for refusing the registration were essentially that the Moscow Branch of the Salvation Army was dominated by foreign members from outside Russia, that, in view of its military structure, it might present a danger to public security, and that it had not properly described the content of its religious convictions.<sup>30</sup> The last point is partic-

<sup>29</sup> The document is available at: [www2.ohchr.org/english/issues/religion/docs/RapporteursDigestFreedomReligionBelief.pdf](http://www2.ohchr.org/english/issues/religion/docs/RapporteursDigestFreedomReligionBelief.pdf).

<sup>30</sup> ‘The Court points out that, according to its constant case-law, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate (see Hasan and Chaush, cited above, § 78, and Manoussakis and Others v. Greece, 26 September 1996, § 47, Reports 1996-IV). It is indisputable that, for the members of the applicant branch, using ranks similar to those used in the military and wearing uniforms were particular ways of organising the internal life of their religious community and manifesting The Salvation Army’s religious beliefs. It could not seriously be maintained that the applicant branch advocated a violent change in the State’s constitutional foundations or thereby undermined the State’s integrity or security’.

ularly important since it points to a general problem: To what extent are state organs in a position to judge differences in religious convictions? In increasingly religiously pluralized societies it becomes more and more difficult for the state to take a position on such distinctions. In Germany, the issue has most recently arisen in the context of orthodox and liberal forms of Judaism, but it applies more or less to all religions. The only solution seems to be to leave it to the people concerned whether they feel that they belong to the same community or not.

### **bb) State religions**

State religions are not in themselves incompatible with the concept of freedom of religion as enshrined in the international human rights documents and notably in the 1981 Declaration. This has been said many times, not only by the Special Rapporteurs but also by the former European Commission on Human Rights. However, it cannot be denied that state religions or structures that come close to a state religion, like the situation in Greece, tend to create problems of non-discrimination. In, again, a registration case the European Court of Human Rights decided that it violated Art. 9 ECHR if the registration of a place of worship and assembly for Jehovah's witnesses was made subject to an authorization from the local ecclesiastical authorities of the Greek Orthodox Church.<sup>31</sup>

A similar situation of a quasi-official status is described by Special Rapporteur *Amor* with regard to Turkey when he writes that '[...] despite the proclaimed secular nature of the State, the treatment of Islam in Turkey, [...], tends to give a quasi-official status, or at least a sufficiently prominent position, to Hanafi Islam'.<sup>32</sup>

In sum, it seems that, although at the general level of principle systems with a state church or an official religion do not necessarily present a problem of freedom of religion, in practice the preference of one religion very often not only leads to problems of equal treatment of religions but also to unjustified interferences with the right to freedom of religion.

### **cc) Sects**

Special Rapporteur *Amor* placed great emphasis in his reports on the difficulties relating to the treatment of so-called 'sects'. The position is best reflected in the 1997 report:

<sup>31</sup> ECHR Rep. 1996-IV-1346.

<sup>32</sup> UN Doc. A/55/280/Add.1, para. 129.

In actual fact, the fairly widespread hostility towards sects can be largely explained by the excesses, the breaches of public order and, on occasion, the crimes and despicable conduct engaged in by certain groups and communities which trick themselves out in religion, and by the tendency among the major religions to resist any departure from orthodoxy. The two things must be treated separately. Sects, whether their religion is real or a fiction, are not above the law. The State must ensure that the law – particularly laws on the maintenance of public order and penalizing swindling, breach of trust, violence and assaults, failure to assist people in danger, gross indecency, procurement, the illegal practice of medicine, abduction and corruption of minors, etc. – is respected. In other words, there are many legal courses open and they afford plenty of scope for action against false pretences and misdirection. Beyond that, however, it is not the business of the State or any other group or community to act as the guardian of people's consciences and encourage, impose or censure any religious belief or conviction.

#### *dd) Missionary activities*

The problem of missionary activities has already been dealt with when describing the general characteristics of the 1981 Declaration as compared to other international guarantees of freedom of religion. The right to inform others of one's own religious convictions and try to convince them is protected under the European Convention as 'teaching' within the meaning of Art. 9 ECHR.<sup>33</sup> A similar position has been taken in literature regarding Art. 18 ICCPR.<sup>34</sup> The reports of the Special Rapporteurs frequently refer to situations where missionary activities are limited by coercion, sometimes even against family members.<sup>35</sup>

It should not be overlooked in that context that limiting missionary activities is not in itself unlawful. There are a number of good reasons, the most important certainly being the protection of rights of others who may feel molested or even risk to become victims of fraudulent activities. Furthermore,

<sup>33</sup> ECHR Rep. 260-A-Kokkinakis, para. 31: '[Art. 9] includes in principle the right to try to convince one's neighbour, for example through 'teaching', failing which, moreover, 'freedom to change [one's] religion or belief', enshrined in Article 9, would be likely to remain a dead letter'.

<sup>34</sup> Nowak, ICCPR-Commentary, Art. 18, para. 24.

<sup>35</sup> See for instance, UN Doc. E/CN.4/2006/5, para. 149, 219 ff.; 237; and most extensively in 2005 report to the UN General Assembly, UN Doc. A/60/399, para. 55-68.



depending on the concrete circumstances of the society concerned it cannot be excluded that intensive missionary activities lead to critical destabilization. Therefore, limitations often pursue a legitimate aim. However, specifically with regard to the Greek situation one may ask the question whether this was the case. It seems clear that the Greek prohibition on proselytism was intended to protect the orthodox majority. Against this background there are good reasons to assume that it lacked a legitimate aim.<sup>36</sup>

### *ee) Further issues*

There are further important issues, notably relating to religion in schools (religious symbols and religious education) and to autonomy of religious communities regarding family law which cannot be dealt with in this paper. With respect to religion in public schools, the approach taken by the Grand Chamber of the European Court of Human Rights in the *Lautsi* case indicates the right direction. Member states enjoy a broad margin of appreciation, which – of course – is subject to supervision by international human rights bodies such as the European Court of Human Rights, the Human Rights Committee or the UN Special Rapporteur on Freedom of Religion, but gives the necessary leeway for appropriate solutions on the basis of national traditions.

## **IV. Evaluation**

The practical implications of freedom of religion as an international human right depend to a large extent on the social and legal conditions existing in the different member states of the United Nations. The great challenge for international surveillance must be seen in the fact that, on the one hand, these different conditions cannot be ignored, but that, on the other hand, its task is to develop universally applicable international standards.

The analysis of the annual and country reports of the UN Special Rapporteurs on Freedom of Religion shows that a ‘soft’ mechanism, i.e. a mechanism operating without legally binding instruments, copes pretty well with this challenge. After an initial period characterized by cautious activities, the Special Rapporteurs have developed working methods which allow them to take concrete and substantive positions regarding more or less all essential and controversial issues relating to freedom of religion. It should be highlighted

<sup>36</sup>This was the position of a minority opinion in the former European Commission of Human Rights, see the Partially Dissenting Opinion of Mr. Frowein, joined by Mr. d’Almeida Ribeiro, ECHR Rep. A- 260, 52; see also Taylor (note 10), 49-50.

that their reports not only refer to the 1981 Declaration as their main document of reference, but include positions on whether or not certain measures or activities of the member states are in violation of binding treaty obligations stemming from the relevant international human rights instruments. As a 'soft' mechanism the Special Rapporteurs must rely on publicity as their main sanction. While it is true, that this may often not immediately produce the desired results, the analysis of their activities creates hope that in a mid-term perspective broadly accepted universal standards can be developed which may lead to an integrative international law of religion.

► 2. The Catholic Church in the transnational and international world

# LA DIPLOMAZIA PONTIFICIA E LA LIBERTÀ RELIGIOSA

■ CARD. TARCISIO BERTONE

## 1. Introduzione

Sono grato alla Prof.ssa Mary Ann Glendon, al co-organizzatore Prof. Hans Zacher e al Cancelliere della Pontificia Accademia delle Scienze Sociali, S.E. Mons. Marcelo Sánchez Sorondo, per avermi invitato a questa Sessione Plenaria dedicata ad approfondire l'importante e attuale tema dei "Diritti universali in un mondo diversificato. La questione della libertà religiosa". A loro, agli altri Accademici e a tutti i presenti il mio deferente e cordiale saluto, accompagnato dall'augurio per il pieno successo dei lavori della sessione.

Desidero esprimere il mio vivo compiacimento per la scelta della tematica, perché in tal modo la Vostra Accademia mostra di aver colto una delle sfide più rilevanti nel mondo contemporaneo e, allo stesso tempo, può così offrire un prezioso contributo di riflessione ed approfondimento intorno ad un aspetto molto importante della Dottrina Sociale della Chiesa, secondo le finalità che sono proprie di questa prestigiosa istituzione. Anzi, questo approfondimento del tema dei diritti universali e soprattutto di quello di libertà religiosa si colloca in una profonda sintonia con il magistero del Santo Padre Benedetto XVI e dei suoi predecessori.

Fra essi non possiamo oggi, a due giorni dalla cerimonia della sua beatificazione, non menzionare soprattutto il Beato Giovanni Paolo II, che durante il suo Pontificato fece del tema della libertà religiosa uno dei contenuti più rilevanti del suo insegnamento e dell'azione sua e della Santa Sede. Egli riconosceva nella libertà religiosa un diritto che, stando "alla radice di ogni altro diritto e di ogni altra libertà",<sup>1</sup> può senz'altro considerarsi "uno dei pilastri che sorreggono l'edificio dei diritti umani"<sup>2</sup> o, ancor più precisamente, la sua "pietra angolare".<sup>3</sup> Un diritto che "esiste in ogni persona ed esiste sempre, anche nell'ipotesi che non venga esercitato o sia violato dagli stessi soggetti cui inerisce".<sup>4</sup>

<sup>1</sup> Giovanni Paolo II, *Discorso ai partecipanti al IX Colloquio internazionale romanistica canonistico organizzato dalla Pontificia Università Lateranense*, 11 dicembre 1993, n. 3.

<sup>2</sup> Giovanni Paolo II, *Discorso ai membri della Società Paasikivi*, 5 giugno 1989, n. 2.

<sup>3</sup> Giovanni Paolo II, *Messaggio per la giornata della Pace* 1991, n. 5.

<sup>4</sup> Giovanni Paolo II, *Discorso ad un gruppo di studiosi partecipanti al V Colloquio giuridico*, 10 marzo 1984, n. 5.

Mi è stato affidato il tema “La diplomazia pontificia e la libertà religiosa”, perché compito del Segretario di Stato e della Segreteria di Stato è proprio quello di guidare l’azione svolta dalla Santa Sede in campo internazionale, che, come vedremo, ha fra i suoi fini appunto la promozione di tale diritto fondamentale.

Ovviamente, a motivo della sua vastità, potrò solo accennare ad alcuni aspetti del tema assegnatomi, compatibilmente col breve spazio di un intervento. Ulteriori elementi sull’argomento li fornirà la Prof.ssa Fumagalli Carulli, che si soffermerà su uno degli atti tipici “prodotti” dalla diplomazia pontificia, cioè i concordati e gli altri tipi di accordo internazionale che la Santa Sede conclude con altri soggetti di diritto internazionale.

## 2. Il ruolo ecclesiale della diplomazia pontificia

La diplomazia è uno strumento di cui si servono gli Stati per perseguire i loro fini ed interessi nel contesto delle relazioni internazionali. Essa è una realtà con i propri organi di responsabilità e con le proprie regole, che sono in parte definite dalle consuetudini e in parte fissate dalle convenzioni sul diritto diplomatico e dalle norme di diritto interno: ciò costituisce la base comune per l’esercizio dell’attività diplomatica. Infatti, a tali regole si attiene anche la Santa Sede, che, del resto, ha attivamente partecipato anche alla loro formulazione.

Quindi, la Santa Sede ha assunto e usa lo strumento della diplomazia, e lo fa non solo per perseguire i suoi fini propri, che sono diversi da quelli delle entità statuali, ma, secondo la sua natura peculiare, dà una sostanza ed un senso differente a tale strumento.

Infatti, la diplomazia pontificia è anzitutto uno strumento di coesione intraecclesiale, perché appartiene ad una comunità che è sparsa in tutto il mondo e che ha il suo centro di unità nell’ufficio petrino. In realtà, la diplomazia pontificia ha la sua prima ragion d’essere nella collaborazione al compito singolare affidato a Pietro e ai suoi successori. Riordinando l’ufficio dei Rappresentanti del Romano Pontefice dopo il Vaticano II, Paolo VI richiamava perciò anzitutto le verità dogmatiche circa il ruolo del Papa nella Chiesa: “*Il Vescovo di Roma... in virtù del suo ufficio, ha su tutta la Chiesa una potestà piena, suprema e universale, che può sempre esercitare liberamente,<sup>5</sup> essendo essa ordinaria e immediata;<sup>6</sup> egli inoltre, come successore di Pietro è il perpetuo e visibile principio e fondamento dell’unità sia dei Vescovi, sia della moltitudine dei fe-*

<sup>5</sup> Cfr. Concilio Vaticano II, *Lumen Gentium*, n. 22.

<sup>6</sup> Cfr. Concilio Vaticano I, *Pastor aeternus*, cap. III.

deli;<sup>7</sup> e pertanto ha come funzione precipua nella Chiesa il tenere unito e indiviso il Collegio episcopale.<sup>8</sup> Con l'affidare al suo Vicario la potestà delle chiavi e con il costituirlo pietra e fondamento della sua Chiesa (Cfr. Mt 16, 18), il Pastore eterno gli attribuì pure il mandato di confermare i propri fratelli (Cfr. Lc 22, 32): ciò si avvera non solo col guidarli e tenerli uniti nel suo nome, ma anche col sostenerli e confortarli, certamente con la sua parola, ma in qualche modo anche con la sua presenza".<sup>9</sup> Si colloca qui tanto la motivazione dell'invio dei Rappresentanti Pontifici quanto il primo compito che essi devono svolgere. Il vigente Codice di Diritto Canonico afferma infatti che "il compito principale del Legato pontificio è quello di rendere sempre più saldi ed efficaci i vincoli di unità che intercorrono tra la Sede Apostolica e le Chiese particolari" (can. 364).

La diplomazia pontificia realizza così un'esigenza che la Chiesa ha sempre avvertito, ancor prima che sorgesse la diplomazia nella forma attuale che conosciamo a partire dal secolo XV, e prima che i Pontefici facessero proprio tale strumento. In questo senso uno dei maggiori esperti della storia della diplomazia della Santa Sede, il gesuita Pierre Blet, parlava più precisamente di storia della "rappresentanza pontificia", comprendendo in tale concetto figure come i vicari apostolici, gli apocrisarii, i legati, i collettori, ecc., che precedono quella dei nunzi apostolici.

Ma da questo radicamento ecclesiologico si comprende anche come la diplomazia pontificia assuma un carattere unico nella sua azione, in quanto ciò le apre campi d'azione preclusi di per sé alla diplomazia civile. I Rappresentanti del Papa non sono solo Ambasciatori come gli altri, perché non sono degli "estranei" là dove operano, soprattutto per le Chiese particolari del Paese a cui vengono inviati.

### 3. Il ruolo "ad extra" della diplomazia pontificia

Oltre a questa missione intraecclesiale, la diplomazia della Santa Sede è al servizio del rapporto fra la comunità civile e quella ecclesiale. Questo compito, che è quello che più l'avvicina alla diplomazia civile, la pone al servizio delle relazioni fra la Santa Sede e gli Stati e, più in generale, con l'intera comunità internazionale.

Ci dobbiamo però chiedere a che cosa mirano queste relazioni, avvicinandoci così al tema di questa relazione. Infatti, in estrema sintesi, si potrebbe dire che la diplomazia pontificia, nell'esercizio delle sue funzioni

<sup>7</sup> Cfr. Concilio Vaticano II, *Lumen Gentium*, n. 23.

<sup>8</sup> Cfr. Concilio Vaticano II, *Lumen Gentium*, n. 18.

<sup>9</sup> Paolo VI, Motu proprio *Sollicitudo omnium Ecclesiarum*, introduzione.

rispetto agli altri soggetti di diritto internazionale, ha fra i suoi scopi principali quello di difendere e promuovere la libertà religiosa, soprattutto quella dei membri della comunità cattolica in tutto il mondo.

Dal punto di vista storico, va osservato che le diverse tipologie assunte da quella che con il Blet denominiamo “rappresentanza pontificia” e quindi anche la diplomazia pontificia hanno avuto fra i loro scopi quello di assicurare il rispetto della “*libertas Ecclesiae*”, cioè di garantire alla Sede Apostolica e alla Chiese particolari con i loro Pastori la necessaria autonomia di organizzazione e azione rispetto al possibile intervento limitante o di controllo da parte dell’autorità civile nella vita interna della comunità ecclesiale. Quest’esigenza si fa sentire subito, già negli anni che seguono la fine delle persecuzioni, con l’Editto di Milano (313). Fu soprattutto a partire dal secolo XI che il termine “*libertas Ecclesiae*” indicò espressamente la rivendicazione di indipendenza del potere ecclesiastico rispetto ad ogni potere statale (lotta per le investiture). Nella dichiarazione del Concilio Vaticano II “*Dignitatis Humanae*” si afferma che “la libertà della Chiesa è principio fondamentale nelle relazioni fra la Chiesa e i poteri pubblici e tutto l’ordinamento giuridico della società civile”.<sup>10</sup>

D’altra parte, soprattutto dalla seconda metà del secolo scorso ed in particolare con il Concilio Vaticano II, l’insegnamento e l’azione della Chiesa e della Santa Sede pongono in luce l’importanza del rispetto del diritto di libertà religiosa, impegnandosi ad ottenerla non solo per i cattolici, ma per tutti gli uomini, in quanto diritto fondamentale della persona umana.

A questo punto si pone ineludibilmente la questione se tale “*libertas Ecclesiae*” sia coincidente con la libertà religiosa. Se esse non coincidono, in che cosa si differenziano? Vi può essere contraddizione fra loro?

Di fatto si trovano posizioni che affermano che la “*libertas Ecclesiae*” altro non sarebbe che la libertà religiosa riconosciuta alla Chiesa in quanto realtà collettiva. Altri, invece, sostengono che permane una distinzione fra queste due libertà. Infine, rimangono alcuni per i quali alla base della rivendicazione della “*libertas Ecclesiae*” sta la convinzione che il cristianesimo è l’unica vera religione e la Chiesa cattolica l’unica vera Chiesa, mentre l’attuale impegno per la libertà religiosa favorirebbe una caduta nell’indifferentismo e nel relativismo religioso.

La verità è stata proclamata solennemente dal Concilio Vaticano II che afferma: “vi è... concordia fra la libertà della Chiesa e la libertà religiosa che deve essere riconosciuta come un diritto a tutti gli esseri umani e a

<sup>10</sup> Cfr. Concilio Vaticano II, Dichiarazione *Dignitatis humanae*, n. 13.

tutte le comunità e che deve essere sancita nell'ordinamento giuridico delle società civili".<sup>11</sup>

#### 4. "Libertas Ecclesiae" e libertà religiosa

Ma, appunto, concordia non significa identità: siamo cioè di fronte a due realtà distinte, anche se non opposte. Cerchiamo perciò di indicare gli elementi che contraddistinguono ciascuna di esse.

a) Anzitutto, quando si parla di libertà religiosa ci si riferisce ad una realtà che è propria dell'ordine naturale, conoscibile cioè attraverso la ragione umana. Per questo di libertà religiosa si può parlare, discutere e convenire con tutti gli uomini, indipendentemente dal loro credo religioso, purché seguano i dettami della retta ragione.

Quando invece si parla di "libertas Ecclesiae", si fa riferimento ad una realtà – la Chiesa – che è di ordine soprannaturale e, quindi, conoscibile a partire dalla Rivelazione e dalla fede: tale libertà costituisce una caratteristica voluta da Gesù Cristo, divino Fondatore della Chiesa stessa. "È questa, infatti, – afferma il Vaticano II – la libertà sacra, di cui l'unigenito Figlio di Dio ha arricchito la Chiesa acquistata con il suo sangue. Ed è propria della Chiesa, tanto che quanti l'impugnano agiscono contro la volontà di Dio".<sup>12</sup>

Tuttavia come tra fede e ragione, così fra queste due libertà non vi è contraddizione, e "la Rivelazione... fa... conoscere la dignità della persona umana in tutta la sua ampiezza, mostra il rispetto di Cristo verso la libertà umana degli esseri umani nell'adempimento del dovere di credere alla parola di Dio, e ci insegna lo spirito che i discepoli di una tale Maestro devono assimilare e manifestare in ogni loro azione. Tutto ciò illustra i principi generali sopra cui si fonda la dottrina"<sup>13</sup> circa la libertà religiosa.

b) Libertà religiosa e "libertas Ecclesiae" si distinguono reciprocamente, anche perché mentre la prima, nell'accezione della "Dignitatis humanae", è un concetto prevalentemente di tipo negativo, cioè è il "diritto all'immunità dalla coercizione esterna in materia religiosa",<sup>14</sup> la "libertas Ecclesiae", che è la libertà della Chiesa "necessaria per provvedere alla salvezza degli esseri umani",<sup>15</sup> esprime un concetto più positivo.

c) Ancora, nel concetto di libertà religiosa il titolare di tale diritto è la persona umana, considerata sia singolarmente sia all'interno di una forma-

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Idem*, n. 9.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Idem*, n. 13.



zione sociale (famiglia, associazione...), la quale rivendica tale libertà nei riguardi dello Stato.

Invece, la “*libertas Ecclesiae*” ha come soggetto titolare la Chiesa in quanto istituzione che si pone di fronte allo Stato. Si tratta di quella libertà che permette il realizzarsi dell’indipendenza e autonomia di cui godono rispettivamente la Chiesa e lo Stato,<sup>16</sup> che sono entrambi ordinamenti giuridici primari. Questa libertà richiede che la società civile rispetti l’identità propria della Chiesa stessa e le consenta di svolgere la missione che le è propria.

D’altra parte, rientra già nel diritto di libertà religiosa che va riconosciuto alle persone “quando agiscono in forma comunitaria”, cioè a quelli che la “*Dignitatis humanae*” chiama “gruppi religiosi”:

- “il diritto di essere immuni da ogni misura coercitiva nel reggersi secondo norme proprie, nel prestare alla suprema divinità il culto pubblico, nell’aiutare i propri membri ad esercitare la vita religiosa, nel sostenerli con il proprio insegnamento e nel promuovere quelle istituzioni nelle quali i loro membri cooperino gli uni con gli altri ad informare la vita secondo i principi della propria religione”;
- “il diritto di non essere impediti con leggi o con atti amministrativi del potere civile di scegliere, educare, nominare e trasferire i propri ministri, di comunicare con le autorità e con le comunità religiose che vivono in altre regioni della terra, di costruire edifici religiosi, di acquistare e di godere di beni adeguati;
- “il diritto di non essere impediti di insegnare e di testimoniare pubblicamente la propria fede, a voce e per scritto”;
- il diritto di manifestare liberamente la virtù singolare della propria dottrina nell’ordinare la società e nel vivificare ogni umana attività”.<sup>17</sup> Vi è quindi un’ampia convergenza di contenuti fra queste due libertà.

Questo breve confronto fra libertà religiosa e “*libertas Ecclesiae*” lascia, penso, intravedere come la distinzione fra i due concetti si accompagni appunto alla “concordia” fra essi, di cui parla il Concilio Vaticano II. Per questo la diplomazia pontificia s’impegna a conseguire entrambe queste libertà, posto che non vi è contraddizione fra di esse.

## 5. Gli odierni attentati alla libertà religiosa nel mondo

Se questo è a grandi linee quello che la diplomazia della Santa Sede intende perseguire con la sua azione diplomatica, occorre però guardare al

<sup>16</sup> Cfr. Concilio Vaticano II, Costituzione pastorale *Gaudium et spes*, n. 76: “La comunità politica e la Chiesa sono indipendenti e autonome l’una dall’altra nel proprio campo”.

<sup>17</sup> Cfr. Concilio Vaticano II, Dichiarazione *Dignitatis humanae* n. 4.

quadro concreto in cui essa si trova ad agire nelle diverse situazioni e nelle varie parti del mondo.

Nel discorso indirizzato al Corpo Diplomatico accreditato presso la Santa Sede lo scorso 10 gennaio 2011 il Santo Padre Benedetto XVI ha tracciato un'ampia panoramica della situazione della libertà religiosa e soprattutto delle sue violazioni e negazioni, specialmente per quanto riguarda le comunità cattoliche nei vari Paesi. Come ha scritto in occasione della Giornata Mondiale della Pace di quest'anno, il Santo Padre ha rilevato che "in alcune regioni del mondo non è possibile professare ed esprimere liberamente la propria religione, se non a rischio della vita e della libertà personale", mentre "in altre regioni vi sono forme più silenziose e sofisticate di pregiudizio e di opposizione verso i credenti e i simboli religiosi".<sup>18</sup>

Da parte mia non farò però riferimenti ad aree e Paesi concreti, quanto piuttosto cercherò di enucleare le diverse modalità in cui si manifesta quella che Sua Santità definisce la "grave ferita inferta contro la dignità e la libertà dell'*homo religiosus*".

Vi è anzitutto la violenza aperta che uccide e ferisce e distrugge i luoghi di culto di comunità, persone e luoghi che normalmente appartengono alle minoranze religiose di un Paese. Si crea così un contesto che fa sentire i membri di tali minoranze come cittadini di seconda classe, non protetti dalle pubbliche autorità e, quindi, spinti spesso a lasciare la loro stessa terra in cerca di migliori condizioni di vita.

Un ruolo particolare nel garantire o meno il rispetto della libertà religiosa lo svolge l'ordinamento giuridico dello Stato. Vi sono situazioni in cui la legislazione e la prassi che ne consegue riducono la libertà religiosa alla sola possibilità di celebrare il culto, "per di più con delle limitazioni", oppure pongono ostacoli a che la comunità religiosa abbia le necessarie strutture per radunarsi e per agire. Addirittura si può arrivare ad avere leggi che tutelano talmente una determinata religione da mettere in pericolo il libero esercizio delle altre (pensiamo a certe norme anti-blasfemia). Come ha detto il Santo Padre, "il peso particolare di una determinata religione in una nazione non dovrebbe mai implicare che i cittadini appartenenti ad un'altra confessione siano discriminati nella vita sociale o, peggio ancora, che sia tollerata la violenza contro di essi".

Altre volte non è la predominanza di una religione, ma l'ispirazione ideologica dello Stato e dei suoi governanti a condurre ad una mancanza di ri-

<sup>18</sup> Benedetto XVI, *Messaggio per la celebrazione della XLIV Giornata mondiale della pace*, 1° gennaio 2011, n. 1.

petto della libertà religiosa. Anche se a livello costituzionale tale diritto viene sancito, nella prassi e nella vita i credenti non ne godono veramente. Vi sono, infatti, situazioni in cui “la vita delle comunità religiose è resa difficile e talvolta anche precaria, perché l’ordinamento giuridico o sociale si ispira a sistemi filosofici e politici che postulano uno stretto controllo, per non dire un monopolio, dello Stato sulla società”. Tale monopolio impedisce così “alle comunità cattoliche la piena autonomia di organizzazione e la libertà di compiere la loro missione”.

Vale per tutte queste situazioni il monito del Santo Padre: “L’ordinamento giuridico a tutti i livelli, nazionale e internazionale, quando consente o tollera il fanatismo religioso o antireligioso, viene meno alla sua stessa missione, che consiste nel tutelare e nel promuovere la giustizia e il diritto di ciascuno”.<sup>19</sup>

Secondo Papa Benedetto XVI, soprattutto nei Paesi occidentali, si assiste al fenomeno di una crescente marginalizzazione della religione, ritenuta “un fattore senza importanza, estraneo alla società moderna o addirittura destabilizzante”. Sulla base di una tale visione si arriva a pretendere che “i cristiani agiscano nell’esercizio della loro professione senza riferimento alle loro convinzioni religiose e morali, e persino in contraddizione con esse, come, per esempio, là dove sono in vigore leggi che limitano il diritto all’obiezione di coscienza”. L’emarginazione della religione si manifesta anche nella volontà di “bandire dalla vita pubblica feste e simboli religiosi”.

Se grazie alla libertà religiosa le comunità religiose operano “nella società, con iniziative nei settori sociale, caritativo od educativo”, risulta preoccupante che, in particolare per l’educazione delle giovani generazioni, si cerchi di “creare una sorta di monopolio statale in materia scolastica”. Sempre in ambito educativo e con riferimento ai diritti dei genitori, il Santo Padre ha evidenziato “un’altra minaccia alla libertà religiosa delle famiglie”, quando cioè viene “imposta la partecipazione a corsi di educazione sessuale o civile che trasmettono concezioni della persona e della vita presunte neutre, ma che in realtà riflettono un’antropologia contraria alla fede e alla retta ragione”.<sup>20</sup>

Come si può notare da questa veloce panoramica, sono davvero molteplici le problematiche e le sfide che la difesa e la promozione della libertà religiosa pongono all’attività diplomatica della Santa Sede. Le suaccennate

<sup>19</sup> Benedetto XVI, *Messaggio per la celebrazione della XLIV Giornata mondiale della pace*, 1° gennaio 2011, n. 8.

<sup>20</sup> Benedetto XVI, *Discorso ai membri del Corpo Diplomatico accreditato presso la Santa Sede, per la presentazione degli auguri per il nuovo anno*, 10 gennaio 2011.

violazioni di tale diritto si presentano con diverse gradazioni e combinazioni e si differenziano in base alla concreta situazione storica, economica, politica e culturale di ogni singolo Paese. Per questo la diplomazia pontificia deve, allo stesso tempo, mantenere una visione complessiva della problematica, e misurarsi e agire nella concretezza delle singole situazioni particolari.

## 6. attori e Mezzi della diplomazia pontificia

Quali sono gli attori e mezzi attraverso i quali la diplomazia della Santa Sede adempie alla sua missione e, quindi, anche all'impegno per conseguire un rispetto sempre maggiore e più pieno del diritto di libertà religiosa?

Anzitutto va notato che la natura spirituale della Chiesa fa sì che essa non disponga di grandi mezzi umani in termini economici o militari. La sua forza è quella del suo messaggio e della sua testimonianza dipendenti dal Vangelo. Come ha ricordato il Santo Padre nel secondo volume dedicato alla figura di Gesù di Nazareth, il regno di Cristo è un regno diverso da quelli umani, ed è un regno essenzialmente di verità.

Allo stesso tempo, la cattolicità, cioè l'universalità, della Chiesa stessa le dà una capacità di azione e di influsso che è certamente singolare, anzi unica, rispetto agli altri soggetti della vita internazionale. Per questo non è solo la Santa Sede che parla e opera, ma vi sono anche le Chiese particolari, gli istituti di vita consacrata, le associazioni e i movimenti laicali, tutti e singoli i fedeli, i quali condividono con la preghiera, la parola e l'azione quella che impropriamente viene chiamata "la politica della Santa Sede" a favore della libertà religiosa.

Vi è quindi come il paradosso, da una parte, della debolezza di chi può solo cercare di convincere delle sue buone ragioni e, dall'altra, della forza di un popolo che è diffuso da un confine all'altro della terra, che è presente con numeri più o meno grandi in tutti i Paesi della terra.

Vorrei indicare ora brevemente i tre principali attori dell'azione diplomatica della Santa Sede a sostegno della libertà religiosa.

a) Il primo e principale attore è lo stesso Pontefice, che si spende in molteplici forme perché alla Chiesa e ad ogni uomo sia garantita la libertà di credere. Pensiamo ai suoi incontri, ai viaggi apostolici, ai suoi interventi magisteriali. E consideriamo quanto nel mondo si guardi al Successore di Pietro, il quale sempre più viene considerato, anche da chi non appartiene alla Chiesa, come colui che dà voce ai grandi problemi e sofferenze dell'umanità, anche a quelli dimenticati, e che offre un orientamento morale sicuro.

b) Fra i Dicasteri della Curia Romana, ha un particolare ruolo per ciò che riguarda il tema della libertà religiosa la Segreteria di Stato, che è il centro di un intensissimo scambio di informazioni e che fa da organo pro-

pulsore e coordinatore di tante iniziative a favore della libertà religiosa. E con la Segreteria di Stato collaborano anzitutto le Congregazioni e i Pontifici Consigli, i quali, ciascuno secondo le rispettive competenze, si interessano ai vari aspetti e contenuti della libertà religiosa.

c) Anche “l’attività dei Rappresentanti Pontifici presso Stati ed Organizzazioni internazionali è ugualmente al servizio della libertà religiosa”.<sup>21</sup> Infatti, come ho sopra ricordato, occorre un’attenzione ad ogni singolo Paese, ma, allo stesso tempo, va rilevato come sempre più il rispetto della libertà religiosa sia legato all’azione delle Organizzazioni e le Conferenze internazionali. A quest’ultimo livello la Santa Sede si avvale anche del contributo delle Organizzazioni non-governative (ONG), specialmente quelle di ispirazione cattolica.

## 7. Esigenze attuali della promozione della libertà religiosa

Cosa chiede nell’attuale contesto la Santa Sede ai suoi interlocutori, soprattutto a coloro che hanno in mano il governo delle nazioni, a proposito dell’effettivo rispetto della libertà religiosa?

Mi sembrano illuminanti al riguardo alcuni principi dell’azione della Santa Sede a livello multilaterale – ma analogamente anche a quello bilaterale –, che il Santo Padre Benedetto XVI ha enucleato nel già citato discorso agli Ambasciatori presso la Santa Sede.

a) “In primo luogo... non si può creare una sorta di scala nella gravità dell’intolleranza verso le religioni”. Fino ad un recente passato si è prestata – giustamente – molta attenzione a fenomeni di discriminazione o persecuzione verso gli appartenenti all’ebraismo e all’islam. I fatti recenti, nei quali appaiono i già accennati modi in cui è violato oggi il diritto di libertà religiosa, hanno fatto e devono far comprendere sempre più che purtroppo gli atti discriminatori e persecutori si dirigono anche e in misura assai rilevante contro i cristiani. Come ha scritto Benedetto XVI nel Messaggio per l’ultima Giornata della Pace: “I cristiani sono attualmente il gruppo religioso che soffre il maggior numero di persecuzioni a motivo della propria fede”.<sup>22</sup> Per questo l’azione della diplomazia pontificia è volta richiamare l’attenzione su tale realtà, che con termine sintetico è stata denominata “cristianofobia”, riaffermando che la libertà dev’essere davvero un diritto universalmente riconosciuto a ogni uomo e ad ogni comunità religiosa.

<sup>21</sup> *Ibid.*

<sup>22</sup> Benedetto XVI, *Messaggio per la celebrazione della XLIV Giornata mondiale della pace*, 1° gennaio 2011, n. 1.

b) Il Santo Padre ha pure messo in guardia dalla tendenza ad instaurare un contrasto “tra il diritto alla libertà religiosa e gli altri diritti dell’uomo, dimenticando o negando così il ruolo centrale del rispetto della libertà religiosa nella difesa e protezione dell’alta dignità dell’uomo”.<sup>23</sup> La Santa Sede non si stanca di ribadire che “questo diritto dell’uomo... è il primo dei diritti, perché, storicamente, è stato affermato per primo, e, d’altra parte, ha come oggetto la dimensione costitutiva dell’uomo, cioè la sua relazione con il Creatore”. Non è dunque da credere che gli altri diritti saranno meglio affermati e riconosciuti se si negherà quello alla libertà religiosa, né l’esercizio corretto di quest’ultimo può in alcun modo ostacolare o impedire la fruizione degli altri diritti. Infatti, come ha ribadito il Santo Padre, “una libertà nemica o indifferente verso Dio finisce col negare se stessa e non garantisce il pieno rispetto dell’altro”.<sup>24</sup>

c) La vostra Sessione plenaria si è opportunamente soffermata anche sulla problematica dei “nuovi diritti”. Come ha ricordato il Santo Padre, essi vengono “attivamente promossi da certi settori della società e inseriti nelle legislazioni nazionali o nelle direttive internazionali”. In realtà tali diritti sono “l’espressione di desideri egoistici e non trovano il loro fondamento nell’autentica natura umana”.<sup>25</sup> È sotto gli occhi di tutti quanto la diplomazia pontificia si spenda soprattutto nei fori internazionali, ma anche a livello nazionale, per contrastare una pseudo-cultura che propugna tali supposte esigenze fondamentali, che sono in realtà in contrasto con una concezione antropologica adeguata. Ed è pure palese come ciò susciti spesso una non troppo celata e diffusa ostilità verso la Chiesa, il Papa e la Santa Sede, soprattutto quando interferiscono sui temi di vita, matrimonio e famiglia.

d) Ho sopra ricordato come la proclamazione teorica della libertà religiosa inserita nelle leggi fondamentali di uno Stato non basti di per sé a garantirne l’effettivo riconoscimento. Papa Benedetto XVI ha ribadito che “questa norma fondamentale della vita sociale deve trovare applicazione e rispetto a tutti i livelli e in tutti i campi; altrimenti, malgrado giuste affermazioni di principio, si rischia di commettere profonde ingiustizie verso i cittadini che desiderano professare e praticare liberamente la loro fede”.<sup>26</sup> La capillare pre-

<sup>23</sup> Benedetto XVI, *Discorso ai membri del Corpo Diplomatico accreditato presso la Santa Sede, per la presentazione degli auguri per il nuovo anno*, 10 gennaio 2011.

<sup>24</sup> Benedetto XVI, *Messaggio per la celebrazione della XLIV Giornata mondiale della pace*, 1° gennaio 2011, n. 3.

<sup>25</sup> Benedetto XVI, *Discorso ai membri del Corpo Diplomatico accreditato presso la Santa Sede, per la presentazione degli auguri per il nuovo anno*, 10 gennaio 2011.

<sup>26</sup> *Ibid.*

senza della diplomazia pontificia permette alla Santa Sede di rilevare queste discrepanze fra il dettato astratto e la realtà quotidiana e di operare perché appunto nei fatti non vi siano forme di discriminazione religiosa.

## 8. Conclusione

Nel suo Messaggio per la Giornata Mondiale della Pace di quest'anno, dedicato proprio al tema della libertà religiosa, il Santo Padre faceva rilevare: "Come negare il contributo delle grandi religioni del mondo allo sviluppo della civiltà? La sincera ricerca di Dio ha portato ad un maggiore rispetto della dignità dell'uomo. Le comunità cristiane, con il loro patrimonio di valori e principi, hanno fortemente contribuito alla presa di coscienza delle persone e dei popoli circa la propria identità e dignità, nonché alla conquista di istituzioni democratiche e all'affermazione dei diritti dell'uomo e dei suoi corrispettivi doveri. Anche oggi i cristiani, in una società sempre più globalizzata, sono chiamati, non solo con un responsabile impegno civile, economico e politico, ma anche con la testimonianza della propria carità e fede, ad offrire un contributo prezioso al faticoso ed esaltante impegno per la giustizia, per lo sviluppo umano integrale e per il retto ordinamento delle realtà umane".<sup>27</sup> Tutto ciò non può non indurre a comprendere quanto sia errato o dannoso eliminare o discriminare la religione o anche una specifica religione.

Per questo la diplomazia pontificia, nel suo quotidiano impegno per la libertà religiosa di tutti e ovunque, mira certamente a garantire alla Chiesa sparsa su tutta la terra condizioni di vera libertà per svolgere la sua missione, ma, in tal modo, essa lavora anche per il vero bene dell'umanità, che, come già ricordato, non si potrà conseguire, dimenticando, negando o ostacolando il fondamentale legame che intercorre fra Dio e la creatura umana. "L'uomo infatti non è limitato al solo orizzonte temporale, ma, vivendo nella storia umana, conserva integralmente la sua vocazione eterna".<sup>28</sup>

<sup>27</sup> Benedetto XVI, *Messaggio per la celebrazione della XLIV Giornata mondiale della pace*, 1° gennaio 2011, n. 7.

<sup>28</sup> Concilio Vaticano II, Costituzione pastorale *Gaudium et spes*, n. 76.

# CONCORDATS AS INSTRUMENTS FOR IMPLEMENTING FREEDOM OF RELIGION

■ OMBRETTA FUMAGALLI CARULLI

## 1. 'Historia concordatorum, historia dolorum'?

Is this curial adage – with which in the past Concordats were criticized as mutual concessions of privileges between Church and State – still relevant today? Drawing on a question of a prominent member of the Italian Constituent Assembly, Giuseppe Dossetti (who was also a canon lawyer): are Concordats a 'bad deal for the Church'?

In order to answer, I would preliminarily clarify that Concordats are international treaties between two entities, the State and the Catholic Church, both sovereign in their own domain respectively, the temporal and the spiritual one. They are just tools, in themselves they are neither good nor bad. They become good or bad depending on their contents.

It would be interesting to retrace the historical development of Concordats in order to detect whether and how they have guaranteed freedom of religion in its three aspects, institutional, collective and individual. We could start with an initial arrangement (basically a concordat) still under emperor Commodus in Roman times, which allows a temporary cessation of persecution against Christians, to find that it guarantees religious freedom as a minimum existential level: the freedom to live as Christians. Or, for a formal agreement to ensure the *libertas Ecclesiae*, we refer to the Concordat of Worms (1122), which in the Middle Ages ended the Investiture Controversy, freeing the Church from the power of the Princes. It would also be interesting to dwell on the concordats of the Age of Absolutism: they were an equivocal alliance between Throne and Altar but allowed for a space (now small, now large) of freedom that in a society based on privilege would not be otherwise granted. Nevertheless it was a space surrounded by such caution and distrust that represented a jurisdictionalist restriction both on the *libertas Ecclesiae* and on the religious freedom of the subjects having a religion different from the Sovereign's one. Finally we consider the first non-confessional Concordat, Napoleon's Concordat (1801). For the first time religious freedom was no longer linked to the choice of the sovereign but to the choice of the people.

Being not possible to deepen these issues here, I would focus my thoughts to the Twentieth Century and the beginning of our Century to



highlight a particular trend: the purification of the concordat from ‘exchange of privileges’ to ‘pact of liberty’.

Several factors lead to the passage from privilege to liberty.

*Ex parte Status* the spread of democratic regimes in once authoritarian States creates the need to harmonize the previous Concordats with the new principles of freedom. Let us consider, for example, the three most important and controversial Concordats of the Twentieth Century with Western European countries: the Concordats with Fascist Italy, with Nazi Reich and with Franco’s Spain. Concordats were a protection against the spread of authoritarian – if not totalitarian – regimes: they were not a full protection – of course – but still they were a protection. After the fall of illiberal regimes, the ‘pact of liberty’ becomes the model of Concordat which – made it so compatible with the confessional pluralism – is inserted in the evolutionary process of pluralist democracy.

*Ex parte Ecclesiae* the ‘pact of liberty’ is reached after an extraordinary event in the rethinking of the relationship between Church and political community: the Second Vatican Council. It is prepared by the Encyclical *Pacem in Terris*, the watershed between ancient times and modern times. Aspects of the Church’s concordatary policy post-Vatican II show a great capacity of the Catholic Church to become a standard-bearer for freedom. Let’s look at them.

## 2. Vatican II: the tomb of the Concordats?

A question was heavily debated immediately after the Council: did the Council Fathers intend to bury the Concordats? The answer is no. But we need to qualify this statement.

First, the Council does not express itself in technical legal terms. The Council does not use the term Concordat but the reference to *sana cooperatio* on one hand and, secondly, the claim that ‘the Church and the political community in their own fields are autonomous and independent from each other’ (*Gaudium et Spes*, n. 76) are arguments in favour of the concordatary system. The dialogue between Church and State will be more fruitful to the extent that it will respect the equal dignity, even in legal terms, of the parties. The Concordat – as legal act between two entities that mutually recognize each other’s sovereignty in their respective domain and that are both designed to serve the human person – allows to reach an agreement which is the fruit of cooperation rather than the result of an act of supremacy. Let’s consider the Italian example. During the Fascist Age, in 1929, the Concordat provides important – albeit limited – areas of freedom for the Church and for the individual which would otherwise not exist, and

the two entities, Church and State, seem jealous of their own sovereignty. During the democratic age, in 1984, the Concordat is a tool of 'mutual co-operation in the interest of the person and for the good of the country'. It goes from a static position of *actio finium regundorum* to the dynamic perspective to be serving the common good. The 1993 Concordat with Poland expresses itself in similar terms.<sup>1</sup>

The second point concerns a discontinuity of the Council with the past. *Gaudium et Spes*, n. 76, states that the Church 'does not place her trust in the privileges offered by civil authority. She will even give up the exercise of certain rights which have been legitimately acquired, if it becomes clear that their use will cast doubt on the sincerity of her witness or that new ways of life demand new methods'. So the privileges are to be abandoned, not the Concordats.

A third novelty of the post conciliar Concordats regards freedom of the person and of his/her choices. The Conciliar Declaration *Dignitatis Humanae* continues a turning point in a direction already indicated by *Pacem in Terris*. John XXIII (in discontinuity with the *Syllabus* of Pius IX) had already invited to distinguish between error and the person who errs. Accordingly *Dignitatis Humanae* provides for religious freedom as a fundamental right benefiting also 'those who do not live up to their obligation of seeking the truth and adhering to it', in the belief that 'the truth cannot impose itself except by virtue of its own truth'.

Hence further developments in various post-conciliar Concordats such as the need to ensure the freedom of religious choice. An example from the 1984 Agreement with Italy: it is guaranteed the right to attend to Catholic religious teaching in public schools as well as it is guaranteed the right to not attend to such teaching. Hence the tendency to avoid preferential legal regime for Catholics, since a differential treatment could have detrimental consequences for non-Catholics.

Finally, the facts also prove that the post-conciliar Church does not consider the Concordats' season closed. After Vatican II not only there was a review of existing Concordats to adapt them to the Council's teaching, but several others were also signed, even with officially or sociologically non-Catholic Countries. Let's consider the Agreement with Israel or the one

<sup>1</sup> 'The Republic of Poland and the Holy See reaffirm that the State and the Catholic Church are, each in its own domain, independent and autonomous, and that they are fully committed to respecting this principle in all their mutual relations and in co-operating for the promotion of the benefit of humanity and the good of the community'.

with Kazakhstan. This shows that the Concordat will continue to be a tool for a *sana cooperatio*.<sup>2</sup>

### 3. Today's systems of relations between Church and State

In order to better assess the characteristics of the Concordats let me broaden now the horizon to the various systems of relations between Church and political community (which usually is the nation-State but which can be another articulation in federal systems, such as the Land in Germany).

They mirror and reflect the historical, cultural and legal traditions of each country. They are essentially referable to three models: a) the separatist model, b) the Church of State's model; c) the concordatarian model.

Before evaluating each of them not so much in the abstractness of the theory but in the concreteness of the present reality, I would point out that freedom of religion can be protected in each of the three models. The imposition of a single model – as someone would wish in the case of the European Union – would violate the principle of subsidiarity, which gives to each political community a margin of appreciation in choosing how to regulate their relations with religious denominations and how to guarantee its citizens religious freedom.

#### a) *The separatist model*

The separatist model has as its most famous archetypes France and USA: separatism 'hostile to religion' the first one, 'friend of religion' the second. This distinction was valid at the beginning of the Twentieth Century when the echoes of the Enlightenment in France and of the French Revolution was not yet extinguished, while in America the reference to the Founding Fathers was still strong. Recently there has been a mitigation of French separatism has increased (at least in the words of President Sarkozy), and U.S. separatism (some judgments of the Supreme Court have emphasized the role of the so-called wall of separation) in the sense opposite to that outlined by Alexis de Tocqueville in his famous essay 'Democracy in America'.

<sup>2</sup> Another criticism of the Concordats is based on the assertion that the relationship between Church and State after the Council can no longer be classified as a relationship between two legal systems, but between two communities of men. The teaching of Paul VI already denied this claim in 1969, so soon after the ending of Vatican II. His *Motu Proprio Sollicitudo Omnium Ecclesiarum* states that State and Church 'both are perfect societies, endowed therefore with their own means, and are autonomous in their respective spheres of activity'. Moreover, reasserting the aims of the dialogue between Church and States, it considers them more easily accessible if there is an official legal relationship, such as the concordatarian practice.

Separatism is characterized by the fact that the State shall refrain from adopting measures in support of religious denominations (e.g. public funding), offering as a *pendant* a commitment not to interfere in the activity of such denominations. It is a model in itself not contrary to religious freedom but which raises three concerns.

First, the lack of state support to religious phenomena can lead to unequal treatment: the choice not to fund religious denominations is not expressing neutrality in front of the religious phenomenon but a favourable attitude toward non-religion. Second, separatism often appears as ‘free Church in a free State’. A well known expression to the Italians, having been coined by Cavour. A seductive but misleading expression. Because ‘in’ actually means that the Church is not recognized by the State as primary and original legal order (it is not said ‘free Church and a free State’), but as a secondary legal order, therefore subject to State’s sovereignty.

The promise, therefore, not to interfere in the activity of the Church can remain a dead letter. Finally – and it is perhaps the most important aspect – separatism imposes incommunicativeness between State law and religious legal order. Except that we all know that if there are purely spiritual matters (the sacraments) and purely temporal matters (the sword, the scale and the currency), there are also different *res mixtae*. Let us consider, for example, cultural heritage of religious interest belonging to ecclesiastical structures: incommunicativeness between the two legal systems makes it difficult for a regulation satisfactory for the one or for the other, being the result of a unilateral decision.

### *b) The Church of State’s model*

The Church of State’s model (confessionalism) is even more varied than the separatist one. It is present in very different contexts: in several Orthodox and Protestant Countries, just to mention Christian contexts. But even Israel and many Islamic States adopt it.

It is possible to identify a common denominator: the non-existence (or at least the weakening) of the distinction between temporal and spiritual power. This in two ways: either the head of state is also the head of the National Church (think of the Queen of England), or religious leaders have a role of government. In this second sense the case of Iran is emblematic. Also the Dalai Lama asserted political, as well as spiritual, leadership of Tibet, which he waived very recently.

The general objection to such a model is that it denies the principle of the duality of mankind’s government, embodied in the Gospel precept ‘repay to Caesar what belongs to Caesar and to God what belongs to God’.

On a more practical plan the Church of State's model can produce violations of religious freedom not only of the members of other denominations, but also of the freedom of Church of State. The Church of Norway, for example, is subject in all respects to the legislation of the National Parliament (Storting) that in June 2008 legalized same-sex unions. As a result, the National Church was expected to endorse these unions and was called upon to reform the liturgy in order to comply with new legislation. Violation of institutional religious freedom is obvious: a relevant decision – even from the doctrinal point of view – is not taken by the religious authorities (the Synod), but by the political power.<sup>3</sup>

### c) *The concordatarian model*

The concordatarian model entails a bilateral negotiation between Church and political community which is respectful of their reciprocal autonomy. In democratic Countries the dialogue with the Church meets a participatory conception which nourishes freedoms. We have already mentioned it above referring to the Italian situation. It should be added here that the strong concordatarian tradition in Italy was driving for the freedom of other denominations. Our founding fathers have in fact introduced a new legal institution, the *Intesa* (agreement) with non-Catholic denominations, which allowed them to protect their own identity through negotiation with the Government. The difference in treatment derives from the fact that the Catholic Church has legal personality under international public law and may therefore conclude an international treaty (the Concordat), while other denominations – without international legal personality – enter into an agreement under domestic public law. This principle of bilateralism was reflected in 1997 by the democratic Constitution of Poland which looked at the Italian example as a model.

If the concordatarian model is not in itself immune from criticism (especially when used as an instrument of privilege to the detriment of members of other religious denominations), nevertheless it has at least two aspects that make it preferable to other models: 1) it implies the recognition by the State of the Church's sovereignty (whose implications we will examine shortly) and

<sup>3</sup> On the other hand in Greece a legislation was in force until the Nineties (later abrogated following up the European Court of Human Rights' judgment *Manoussakis v. Greece*) according which the building of places of worship of religious denominations different from the Greek-Orthodox one was subject to the authorization of the local Orthodox Metropolitan. The intent to keep the historical and religious tradition of the Country is appreciable but we cannot help reporting the consequent violation of the religious freedom.

thus the distinction between temporal and the spiritual sphere; 2) the regulation of *res mixtae* is the result of bilateral negotiations and is not one-sided.

Where possible, the Catholic Church has entered into Concordats (or, beyond the *nomen iuris*, similar international treaties) to adjust its relations with the States. To date, the Holy See has diplomatic relations with 178 States and 43 of them have signed a concordatarian agreement.

#### 4. The issue of sovereignty

The fact that the concordatarian system presupposes and confirms the sovereignty of the Catholic Church is not a merely decorative or ceremonial issue. It relates to fundamental aspects, first of all the Holy See's claim of legal personality and capacity under international law. If the legal doctrine differs in providing the theoretical justification for such principle (there are those who argue that it would be a dogma of faith), an empirical overview of this issue (an approach that characterizes international public law) leads to recognize her legal personality and capacity. In fact the Holy See historically participates in international relations, meeting the criterion requested under international law for external sovereignty: the existence *de facto* as a centre of will and independent action. Among the most significant contributions, I would recall that the Holy See has participated in the work of drafting of the Vienna Conventions on diplomatic relations and on international treaties and then became a party of them. Similarly in 1972, when the Conference on Security and Cooperation in Europe was convened, she was considered a participating State, without any dispute on her sovereignty.

Two issues need to be mentioned. The first concerns the fact that the Holy See's international sovereignty is independent from the temporal power on the Vatican City State. After *debellatio* of Papal States, from 1870 to 1929 the Holy See continued to exercise active and passive rights of legation and to conclude Concordats. It is a demonstration of the spiritual – not temporal – nature of her international sovereignty, recognized by the *ius gentium*. The second question is closely linked to this special nature: the Holy See – self-limiting her sovereignty (Article 24 of the Lateran Treaty) – declares herself 'not involved in international disputes between the States and in international conferences organized for that purpose'. Therefore she no longer intends to deal with purely political or military disputes.

Even so limited, the international sovereignty of the Holy See is victim of a propaganda campaign aimed at excluding her from International Organizations and at denying the Concordats' nature as international treaties. These lobbies are extremely dangerous not so much, or just because, they are intended to deprive the Church of a right essential for the exercise in

the World of her priestly, prophetic and royal office, but also because, limiting her sovereignty, surreptitiously seek to impose on the Church rules conflicting with her religious beliefs.

Unlike in the past, when it was the freedom of episcopal appointments which was at stake, today the neo-jurisdictional attack is more subtle but no less dangerous. Denying the sovereignty of the Church means, in this context, opening the way for the application of State law even within the Catholic Church itself. The European Parliament has already adopted a resolution contrary to religious denominations that do not allow women access to positions of government. It is expected that soon another resolution will object to the Church ban against same-sex marriage under Canon law.

From this point of view Concordats have crucial importance. In addition to reaffirming the sovereignty of the Holy See they are an important bulwark to ensure that State's legislation does not affect the very nature of the Catholic Church. It is such an important legal bulwark that there are several attempts to attack it indirectly. Supranational bodies (I refer in particular to the European Court of Human Rights and to the EU Institutions) – being unable to directly challenge the contents of the Concordats – contest them indirectly. These bodies claim that the State Party, while giving execution to Concordats, introduces into domestic law a legislation which is not in line with international standards. It follows an invitation to the States, more or less explicit, to denounce the Concordat.

The ultimate goal of these manoeuvres is to exclude religion from public life. Eliminating in fact any autonomy and individuality of religious communities and subjecting them to the laws of the State becomes instrumental to the assimilation of religious choice to the choice to join charitable or sporting associations. In essence, it means removing the public role of religion and relegating it to a purely private fact.

## 5. The Concordats and the national episcopate

In conclusion, I mention an issue which, although specific, has consequences of a general nature: the role of the national bishops' conferences. After the Council, there were those who put into question the role of the Holy See in its relations with States, and tried to exclude any jurisdiction of the apostolic nuncio in favour of the conferences of bishop.

Although more nuanced than previously, the current Canon Law<sup>4</sup> continues to give to the Holy See (*Sectio altera* of the Secretariat of State) and

<sup>4</sup> *Motu Proprio Sollicitudo Omnium Ecclesiarum*, can. 365 Code of Canon Law and article 46 of the Constitution *Pastor Bonus*.

to the apostolic nuncio the authority to entertain relations with the States and gives to the first the power to enter into Concordats. In some Concordats there is a mediation: they defer to subconcordatary agreements between the State and the episcopal conference the establishment of the practical implementation of general principles set out in the Concordat.

I do not want to address the issue of the relationship between the Holy See and the conferences of bishops from a theological and pastoral point of view. From a legal point of view I note that a further expansion of this practice runs the risk of leading to the emergence of national churches. History shows how the national conferences of bishops have sometimes come to terms with unjust governments. Our French colleagues, but not only them, will certainly remember the 1682 Declaration of the Gallican Clergy with its infamous four articles: a black page of subservience of the episcopacy to the absolute King.

To avoid similar temptations, the universal authority of the Holy See seems the best guarantee of freedom.



# ECUMENISM AND FREEDOM OF RELIGION<sup>1</sup>

■ KURT CARDINAL KOCH

## 1. Ecumenism and freedom of religion: a necessary correlation

‘There is no true ecumenical dialogue without freedom of religion’. With this unequivocal confession Cardinal Johannes Willebrands, the second president of the Pontifical Council for the Promotion of Christian Unity, pointed to the necessary and positive relationship between ecumenical activity and the right to religious freedom, and named this right as ‘the indispensable precondition for ecumenical trust’.<sup>2</sup> That a very close relationship exists in this regard is already evident from the historical fact that it was Cardinal Augustin Bea, the first president of the then Secretariat for the Promotion of Christian Unity, who was entrusted with the task of preparing a draft for the Second Vatican Council on the question of freedom of religion, and that draft was originally treated as an appendix to the Decree on Ecumenism. Already in the second version of that text we find the remarkable sentence that the principle of freedom of religion is ‘*conditio omnino necessaria ut dialogus oecumenicus haberi possit*’. This declaration in turn was located in an ecumenical context, insofar as the World Council of Churches had already shortly after its foundation in 1948 taken up the issue of the freedom of religion in the 1950s, in connection with the question arising among its member churches regarding the concrete structuring of the relationship of the churches to one another.<sup>3</sup>

The close connection between ecumenism and freedom of religion should not of course give rise to the misunderstanding that the issue of freedom of religion applies to a problem concerning only or even primarily Christians. As the final text of the conciliar Declaration on Religious Freedom shows in grounding this right in the ‘dignity of the human person’, and in the deliberately wide and open formulation ‘freedom in matters religious’ used in the sub-title,<sup>4</sup> the question of freedom of religion is in fact

<sup>1</sup> Lecture to the XVII Plenary Session of the Pontifical Academy of Social Sciences on the topic ‘Universal Rights in a World of Diversity. The Case of Religious Freedom’ in Rome, 29 April to 3 May 2011.

<sup>2</sup> J. Kardinal Willebrands, Religionsfreiheit und Ökumenismus, in: Ders., *Mandatum Unitatis. Beiträge zur Ökumene* (Paderborn 1989) 54–69, cit. 54.

<sup>3</sup> Cf. N. Koshy and D. Epps, Article: Religious Liberty, in: N. Lossky *et al.* (Ed.), *Dictionary of the Ecumenical Movement* (Geneva 2002) 976–979.

<sup>4</sup> Cf. J. Hamer and Y. Congar (Ed.), *Die Konzilerklärung über die Religionsfreiheit* (Paderborn 1967).

a question which concerns every individual in his own religious conduct. Pope Benedict XVI has therefore again and again emphasised that the right to freedom of religion must be accorded ‘pride of place’ among the fundamental human rights ‘since it involves the most important human relationship, our relationship with God’.<sup>5</sup> Since the church can only be a credible advocate for respecting religious freedom in the civil and social realm if it realises that freedom itself within the church and in inter-church relations, freedom of religion is rightly considered the touchstone of the ecumenical engagement of the churches. Among the broad spectrum of questions arising from that, only a few central aspects of the relationship between ecumenism and religious freedom can be touched on in the current context.

## 2. Freedom of religion as a prerequisite for ecumenical dialogue

The correlation of religious freedom and ecumenical dialogue arises in the first instance out of the quintessential nature of dialogue as such. A true dialogue can only take place when it is conducted between convictions, and when both dialogue partners have something to say to one another and are willing to seek and find the common truth. Since such a dialogue is only possible in the sphere of freedom, in the sense of respect for the other precisely in his otherness, thus respecting his freedom, it presupposes a symmetrical relationship between the two dialogue partners or, in the words of Otto F. Bollnow, the ‘anticipation that both partners are prepared to speak with one another in full openness on the plane of fundamental equal rights and freedom’.<sup>6</sup> That true dialogue presupposes an elementary reciprocal relationship readily becomes clear on the basis of the simple fact that a real dialogue is hardly imaginable between a prison warder and his prisoner. On the other hand, the necessary equality does not mean levelling out the convictions of the two partners; equality forms part of the methodology of true dialogue and genuine encounter. These can only do justice to their claim if they are carried out in the spirit of substantive tolerance.<sup>7</sup> There is an essential distinction between this and the purely formal tole-

<sup>5</sup> Benedetto XVI, Giustizia, libertà, perdono e riconciliazione, speranza: Formidabili impegni per costruire la pace nella verità. Al Corpo Diplomatico presso la Santa Sede durante l’udienza per la presentazione degli auguri per il nuovo anno, in: *Insegnamenti di Benedetto XVI II*, 1 2006 (Città del Vaticano 2007) 43-51, cit. 47.

<sup>6</sup> O. F. Bollnow, *Das Doppelgesicht der Wahrheit* (Stuttgart 1975) 66.

<sup>7</sup> Cf K. Koch, Säkulare Toleranz und christlicher Glaube, in: Ders., *Konfrontation oder Dialog? Brennpunkte heutiger Glaubensverkündigung* (Freiburg / Schweiz – Graz 1996) 123-147.

rance which prevails today, which immediately accuses all differences as discrimination and accepts only equality, so that tolerance only seems possible and practicable when the search for truth is suspended, under the false assumption that convictions presented with the certainty of truth would simply endanger peace between people. But a 'dialogue' conducted between partners who do not themselves represent any clear standpoint and are indifferent to the truth that is sought, does not deserve this honorific title. By contrast, substantive tolerance respects existing differences and leads to unity and peace precisely through the recognition of those differences.

What is true of dialogue between individuals is even more relevant for ecumenical dialogue, where questions of faith are involved. The Decree on Ecumenism of the Second Vatican Council stressed that in ecumenical dialogue 'each one deals with the other on an equal footing', and therefore formulated the necessary reciprocal relationship for any true ecumenical dialogue in the term 'par cum pari agat'.<sup>8</sup> It deserves to be remembered that this fundamental formula for ecumenical dialogue was already contained in the *Instructio Ecclesia catholica* published by the Holy Office in 1949, which has become foundational in the history of Catholic ecumenism. There it is stated that 'each of the two partners, Catholic and non-Catholic, is to discuss questions of faith and morality and explain the teaching of his confession on the basis of equality (*par cum pari*)'. Therewith it also becomes clear that ecumenical dialogue takes place and is therefore a dialogue between brothers and sisters on the foundation of the common Christian heritage.

Ecumenical dialogue consequently resembles a tightrope walk between extremes: on the one hand, a 'dialogue' which is not interested in the truth and allows any arbitrary point of view to stand unquestioned very soon leads to the boredom of indifference. On the other hand, any 'dialogue' leads to the fanatical bigotry of intolerance if one partner claims absolute truth for himself alone. A truly ecumenical dialogue distinguishes itself from both extremes of apathy and fanaticism, of indifference and intolerance, by being conducted in freedom between convictions of truth, and thereby serves unity and peace. That demands a tolerance which engages itself in dialogue and recognises the principle of religious freedom as an indispensable prerequisite, as Pope Benedict XVI expressed it in unambiguous words: 'We impose our faith on no-one. Such proselytism is contrary to Christianity. Faith can only develop in freedom. But we do appeal to the

<sup>8</sup> *Unitatis redintegratio*, No. 9.

freedom of men and women to open their hearts to God, to seek him, to hear his voice'.<sup>9</sup>

### 3. Missionary witness and proselytism

With that, the second keyword has been uttered, a word which deserves special consideration in reflecting on the correlation between ecumenism and freedom of religion, that is the keyword proselytism. This word of course bears within it the difficulty that it can be used in varying senses.<sup>10</sup> In a positive or at least neutral connotation the word can define all endeavours of a religious community to gain new members. In ecumenical discussion of course the negative connotation of the word predominates, which is understood as all endeavours of a religious community to gain new members at any price and with the application of all methods which may in some way be effective, acting according to the morally decadent principle that the end justifies the means. This negative connotation has become dominant in the ecumenical movement since the study document which was adopted by the General Assembly of the World Council of Churches in New Delhi in 1961, and which states: 'Proselytism is not something totally distinct from authentic witness: it is the corruption of witness. Witness is distorted when – subtly or openly – cajolery, bribery, undue pressure or intimidation are applied in order to achieve a seeming conversion'.<sup>11</sup>

The Second Vatican Council also rejected every form of proselytisation in its Declaration on Freedom of Religion, when it is for example emphasised that 'in spreading religious faith and in introducing religious practices' everyone ought at all times refrain 'from any manner of action which might seem to carry a hint of coercion or of a kind of persuasion that would be dishonourable or unworthy especially when dealing with poor or uneducated people'.<sup>12</sup> With the keyword 'persuasion' the Council gave a helpful pointer for making an essential distinction between the force of persuasion and the art of conviction. While the temptation and the attempt to persuade another person is always authoritarian and totalitarian and has the aim of imposing one's own standpoint on the other, the art of conviction proves

<sup>9</sup> Benedetto XVI, La 'vendetta' di Dio e la croce: Il 'no' alla violenza. La solenne concelebrazione eucaristica sulla spianata della 'Neue Messe' in München il 10 settembre 2006, in: *Insegnamenti di Benedetto XVI* II, 2 2006 (Città del Vaticano 2007) 230–135, cit. 234.

<sup>10</sup> Cf. S. Ferrari, Proselytism and human rights, in: J. Witte, Jr. and F.S. Alexander (Ed.), *Christianity and Human Rights. An Introduction* (Cambridge 2010) 253–266.

<sup>11</sup> F. Lüpsen (Ed.), Neu Delhi-Dokumente (Witten 1962)) 104–106, in: *Ecumenical Review* 13/1 October 1960, p 79–89.

itself to be a free invitation to the partner to commence communication and enter into an invigorating dialogue. It is self-evident that only the second alternative is consonant with the Christian gospel of freedom.<sup>13</sup>

In the draft of the Declaration on the Freedom of Religion which was presented to the Central Committee during the lead-up the Council in 1962, the key-word ‘proselytism’ was still used expressly: ‘vitatis omnibus apertis vel consortis improbi proselytismi molimentis seu mediis improbiis vel inhonestis’. But that word was not retained because it seemed as though this passage was directed exclusively at Catholic missionaries. The Council wished thereby to prevent another misunderstanding: that with its Declaration on the Freedom of Religion the Second Vatican Council had heralded the end of the mission activity of the church. That this was in no way the case is unmistakably demonstrated in Article 14 of ‘*Dignitatis humanae*’: ‘The Church is, by the will of Christ, the teacher of the truth. It is her duty to give utterance to, and authoritatively to teach, that truth which is Christ himself, and also to declare and confirm by her authority those principles of the moral order which have their origin in human nature itself’.<sup>14</sup> The Declaration on Religious Freedom does not in any way express an obligation to renounce missionary witness to the truth of the faith, but it expresses an obligation to renounce all those means which are not consonant with the good news of Jesus Christ, and instead to apply solely the means of the gospel itself, which consist in the proclamation of the word and the testimony of life, even to the extent of martyrdom. Or to use the precise words of Cardinal Johannes Willebrands: the conciliar Declaration on Religious Freedom ‘contributes to an intensification of missionary work in that it causes it to become more true and more pure’.<sup>15</sup>

Every Christian church needs render an account of whether it has not again and again succumbed to the temptation of proselytism. The Milanese legal expert Silvio Ferrari has drawn attention to one particular problem, in commenting that the charge of proselytism made by the Russian Orthodox Church against those churches which have established their own communities and organisational structures on Russian territory again following the

<sup>12</sup> *Dignitatis humanae*, No. 4.

<sup>13</sup> Cf. K. Koch, Mission oder De-Mission der Kirche? Herausforderung an eine notwendige Neuevangelisierung, in: G. Augustin / K. Krämer (Ed.), *Mission als Herausforderung. Impulse zur Neuevangelisierung* (Freiburg i. Br. 2011) 41–79.

<sup>14</sup> *Dignitatis humanae*, No. 14.

<sup>15</sup> J. Kardinal Willebrands, Religionsfreiheit und Ökumenismus, in: Ders., *Mandatum Unitatis. Beiträge zur Ökumene* (Paderborn 1989) 54–69, cit. 63.

collapse of the Soviet Union is not compatible with the principle of religious freedom. He states that this is also true of the actual background for this charge, which is located in the principle of Canonical Territory, based on the principle 'One city – one bishop – one church'.<sup>16</sup> In response, Cardinal Walter Kasper has rightly maintained that the Catholic Church cannot 'permit itself to be deprived of the missionary dimension of its being as church in the name of an abusively extended proselytism concept', and that consequently the charge of proselytism, like the whole issue of converts, touches on the fundamental human right of religious freedom.<sup>17</sup>

#### **4. No established state church but religion in the public sphere**

This example is not mentioned in order to denigrate any specific church as especially negative, but because it harbours the fundamental problem of the relationship of church and state, which concerns every church in one way or another, and which has a direct effect on the understanding and practice of religious freedom. With regard to the Roman Catholic church, it is still instructive today to read what Pope Benedict XVI as a young theologian had to say on the conciliar debate over the Declaration on Religious Freedom in his highly regarded reports on the course of the Second Vatican Council: it was the Anglo-Saxon, American and South American episcopates and the episcopate of the so-called mission countries which were most vocal in speaking out in favour of the Declaration on Religious Freedom. By contrast, the most vehement opponents of the Declaration were the Italian and Spanish episcopates, which were still living under the protection of the state and were fearful on account of their concordats, which had by then become anachronistic. This strong minority demonstrated the tenacious strength which traditional positions can exert even when they are theologically untenable and can only hurt the church. Joseph Ratzinger therefore evaluated the Declaration on Religious Freedom as 'one of the most important events of the Council' and defined it as the 'end of the Middle Ages, the end even of the Constantinian age'. He did so in the conviction that in the last 150 years there was little that had hurt the church as much as the 'tenacious clinging to outmoded political-religious positions', and drew the conclusion: 'The use of the state by the church for its own purposes, climaxing in the Middle Ages and

<sup>16</sup> S. Ferrari, Proselytism and human rights, in: J. Witte, Jr. and F.S. Alexander (Ed.), *Christianity and Human Rights. An Introduction* (Cambridge 2010) 253–266, esp. 259–261.

<sup>17</sup> W. Kasper, Theologische Hintergründe im Konflikt zwischen Moskau und Rom, in: *Ost-West. Europäische Perspektiven* 3 (2002) 230–239, zit. 237.

in absolutist Spain of the early modern era, has since Constantine been one of the most serious liabilities of the church, and any historically minded person is inescapably aware of this'.<sup>18</sup>

That is an unambiguous expression of the fact that respecting religious freedom has as its prerequisite the separation of church and state, and therefore a positive relationship of the church to a healthy laicity. Pope Benedict XVI professed this above all in his address of greeting at the beginning of his Apostolic Journey to France in a most principled manner: 'At this moment in history when cultures continue to cross paths more frequently am firmly convinced that a new reflection on the true meaning and importance of laicity is necessary. In fact it is fundamental on the one hand to insist on the distinction between the political realm and that of religion in order to preserve both the religious freedom of citizens and the responsibility of the state towards them, and on the other hand to become more aware of irreplaceable role of religion for the formation of consciences and the contribution which it can bring to – among other realities – the creation of a basic ethical consensus in society'.<sup>19</sup>

That statement addresses in a sense the negative side of the principle of religious freedom, that the state may not exercise control over the faith of its citizens, but that instead each citizen is able to freely choose his faith. Religious freedom therefore includes the right of each individual to change his religion or confession, without that action being liable to result in social, economic or political disadvantage. But far more fundamental is respect for the positive or corporative freedom of religion, which permits each person the right to proclaim his faith in public, both as an individual and in community with others, and means that faith communities are to administer their internal affairs in spheres of freedom protected by the state. Anyone who acknowledges the separation of church and state and with it a certain healthy laicity of the state, is therefore not only entitled but also obligated to defend himself against the strong current tendency towards total privatisation of religion and its expulsion from the public sphere into the purely private sphere of the individual person. Pope Benedict XVI has done so in an exemplary manner, above all during his pastoral journey to the USA, where he declared unequivocally that there is in principle no room for purely private religion within Christendom: 'Christ is the Saviour of the world, and, as members of his Body and sharers in his pro-

<sup>18</sup> J. Ratzinger, *Theological Highlights of Vatican II* (New York 2009) 144.

<sup>19</sup> Benedetto XVI, *Tra Chiesa e Stato un dialogo più aperto e positivo. La cerimonia di benvenuto nel Palazzo Presidenziale dell'Eliseo il 12 settembre 2008*, in: *Insegnamenti di Benedetto XVI* IV, 2 2008 (Città del Vaticano 2009) 265-269, cit. 267.

phetic, priestly and royal “munera”, we cannot separate our love for him from the commitment to the building up of the Church and the extension of his Kingdom. To the extent that religion becomes a purely private affair, it loses its very soul’.<sup>20</sup> Since the modern declaration of religion as a private matter of the individual civil subject may at its core simply represent opposition to established state religion, but not to the public social dimension of religion, the principle of religious freedom intrinsically includes state facilitation of the public mission of a religious community, as Pope Benedict XVI has in turn demanded in his famous address to the UN: ‘The full guarantee of religious liberty cannot be limited to the free exercise of worship, but has to give due consideration to the public dimension of religion, and hence to the possibility of believers playing their part in building the social order’.<sup>21</sup>

### 5. Ecumenical responsibility for the freedom of religion today

It is not possible to claim that these fundamental lessons of the Second Vatican Council have really been learned even in Europe. Hence it is an urgent demand of the present hour that the Christian churches in ecumenical solidarity become strong advocates for safeguarding religious freedom, not only in its negative and individual sense but above all in its positive and corporate sense. That should be seen as a specific touchstone for the correlation of religious freedom and ecumenism, particularly since individual churches have very different traditions in the structuring of the relationship of church and state, and this relationship is one of the least discussed subjects in ecumenical dialogues.

In past centuries we find a tendency for a church, whether Catholic, Protestant or Orthodox, to demand for its members full freedom of religious confession in those states in which it existed as a minority, while denying the same freedom to other religious communities in those countries where it existed as the majority. Such an unequivocal attitude towards religious freedom must today be judged as in principle anachronistic,<sup>22</sup> not

<sup>20</sup> Benedetto XVI, Nuovi modi di pensare l’Identità Cattolica e la Libertà. Le risposte alle domande dei Vescovi sul secolarismo, l’individualismo e il declino delle vocazioni in Washington il 16 aprile 2008, in: *Insegnamenti di Benedetto XVI IV*, 1 2008 (Città del Vaticano 2009) 587-592, cit. 590.

<sup>21</sup> Benedetto XVI, I diritti umani vanno radicati nella giustizia. Ai partecipanti all’Assemblea Generale delle Nazioni Unite, in: *Insegnamenti di Benedetto XVI IV*, 1 2008 (Città del Vaticano 2009) 618-626, cit. 625.

<sup>22</sup> Cf. W.Thönissen, Art. Religionsfreiheit, 3. Ökumenischer Aspekt, in: Ders. (Ed.), *Lexikon der Ökumene und Konfessionskunde* (Freiburg i. Br. 2007) 1173-1175.



least in view of the fact that the Christian faith is the most persecuted religion in the world today. In this situation it proves insufficient and also lacking in credibility for individual churches to claim religious freedom for themselves alone. They are instead called upon to show empathy and solidarity in particular with those Christian churches and other religious communities which have to suffer persecution on the basis of their faith. Such solidarity ought to be taken for granted as soon as it becomes evident that any breach of the religious freedom of other faith communities at the same time puts at risk the fate of one's own religion. Our actions must be directed according to the principle which Benedict XVI called to mind in his Message for the World Day of Peace 2011: 'Religion is defended by defending the rights and freedoms of religious communities'.<sup>23</sup>

It is the credible translation of this principle into concrete action by Christians and churches which will demonstrate whether religious freedom really is 'a kind of litmus test for respecting all other human rights',<sup>24</sup> as Pope John Paul II was wont to express it. And then, in view of the fact that today all Christian churches and ecclesial communities have their martyrs, he also spoke of 'an ecumenism of martyrs', and linked that to the beautiful promise: In spite of the drama of church division, the steadfast witnesses to the truth in all Christian churches and ecclesial communities have shown how God himself upholds communion between the faithful at a deeper level, with the ultimate claim of faith testified by the sacrifice of one's life. While we Christians and churches here on earth still live in an imperfect communion to and with one another, the martyrs in heavenly glory already live in full and perfect communion. Martyrs are therefore 'proof for the fact that total devotion of the self to the cause of the gospel can confront and overcome any element of division'.<sup>25</sup>

This prospect should encourage us Christians even more to give credible witness to it with effective aid to persecuted Christians and Christian communities in the world today, with the public denunciation of persecution situations and ecumenical engagement for respecting religious freedom and human dignity. In the ecumenism of the martyrs the correlation of religious freedom and ecumenism finds without a doubt its most urgent kairological concretisation.

<sup>23</sup> Benedict XVI, Religious Freedom, the path to peace. Message for the celebration of the World Day of Peace 2011, No 13.

<sup>24</sup> John Paul II., Ansprache an die Teilnehmer der Konferenz der Organisation für die Sicherheit und Zusammenarbeit in Europa OSZE, in: AAS 96 (2004) 111.

<sup>25</sup> John Paul II., *Ut unum sint*, No. 1.

# POLAND: THE CASE OF RELIGIOUS FREEDOM

*National case studies: concentrating on the status quo and current developments*

■ HANNA SUCHOCKA

## I. Evolution of religious freedom after 1989

Religious freedom occupies a prominent place in the Polish Constitution of 1997. One should note, however, that the foundations shaping the constitutional scope of religious freedom had been introduced by laws adopted by the last communist parliament in May 1989.<sup>1</sup> That was several weeks before the June election which resulted in representatives of the hitherto underground opposition entering parliament. Paradoxically, a broad catalogue of guaranteed religious freedoms was introduced into Poland's legal system by the outgoing communist authorities. That was the result of roundtable agreements in which the Church and extra-parliamentary opposition had played a significant role.

The introduction of that legislation created a basic framework for religious freedom in the state. The new Polish constitution was not adopted until 1997, or rather late, hence, before it was adopted, the regulations of the 1952 constitution remained in force. But it was laws passed in 1989 introducing a broad catalogue of freedoms of conscience and religion that formed the basis for their interpretation.

The promulgation of a full constitution was preceded by long years of debate. One of its essential points were disputes relating to natural law and codified (positive) law, whose legal aspect boiled down to specifying the interdependence of *ius* and *lex*. Following the changes of 1989, there existed a clear need to refer to a more durable foundation than just positive law, to something that could constitute a pattern of axiological references to codified laws.

The experience of the recent communist past, the fragility of the foundations, on which the constitutions of authoritarian systems were based, necessitated such points of reference and quests.

<sup>1</sup> Law of 17<sup>th</sup> May 1989 r. on the relation of the State to the Catholic Church in the People's Republic of Poland (*Journal of Laws*, 1989 No. 29, item 154), Law of 17<sup>th</sup> May 1989 r. on guarantees of freedom of conscience and religion. (*Journal of Laws*, 1989 No. 29, item 155).

Natural law had become a reference point of order, whilst codified law had become its antithesis. Natural law was perceived as just, meaning that a conflict of norms could lead to the rejection of codified law. As one author, a judge of the Constitutional Tribunal, had written: 'It is true that the doctrine of natural law encounters great applicative difficulties within codified law, [...] nevertheless the experience provided by two massive totalitarian systems has shown that invoking it is not only possible but even necessary. After all, there already exists a point of reference acknowledged by the international community in the form of human-rights pacts. [...] They contain a major share of the catalogue of norms of human rights'.

A rather prevailing conviction at that time was that the new system should be a kind of reversal of the previous one, also, or perhaps above all, in the realm of values. In light of the huge role played by the Catholic Church in preparing the transformation and its assistance to the opposition community, at least amongst a portion of former opposition circles the dominant view was that it was only natural for the new system to directly invoke Christian values. But although such thinking was close to the heart of many Christians, some however voiced misgivings over whether one official ideology would not be replaced by 'another', thereby closing the road to pluralism.

It was characteristic that every debate evoking or even touching upon the problem of Christian values as well as freedom of conscience and religion, particularly the place of religion in public life, generated a great deal of controversy and social repercussions. One can risk stating that probably in no other country undergoing transformation did the debate on values and the place of religion in public life produce more emotions and misunderstandings. (Maybe it was the effect of a very strong position of the Church in Poland).

Mutual accusations were hurled which, depending on their source, either accused opponents of attempting to create a confessional state or, conversely, an ultra-secular one.

Although the pursuit of compromise solutions in the regulation and guarantee of religious freedom and church-state relations was one of the thorniest problems in the work of the constitutional commission, a compromise was ultimately found. The final legal regulations of the 1997 Constitution, approved in a referendum, were the result of a nationwide debate on the place of religion in life and on a Concordat signed in 1993, four years before the adoption of the Constitution.

The experience of that frequently quite aggressive debate made it possible to find formulations which were effective responses to the charges levelled against the Church and the place of religion in the state. Hence, the

constitutional provisions in that area are rather detailed. They are not limited to simply declaring freedom of conscience and religion, but in many cases indicate highly detailed ways in which that freedom is to be implemented.

## II. Constitutional guarantees of religious freedom

Relevant regulations may be found in the chapter devoted to the State's general principles (art. 25 regulating the state's relations with churches and religious associations) and in that devoted to an individual's rights and freedoms (art. 53 dealing with freedom of conscience and religion). In light of the Polish Constitution, freedom of conscience and religion is not only an individual's personal freedom but, in view of the regulations of art. 25, also a principle of polity.

What principles can be extracted from those regulations?

1. In art. 53 of the Polish Constitution, freedom of religion is expressed in the category of a classic personal freedom. It is a sphere free of state interference. A person does not benefit from religious freedom by the will of the state. Instead, it is conceived as a natural freedom which the state guarantees. 'Everyone is assured of freedom of conscience and religion'. It is not linked to citizenship, but is guaranteed to everyone. Recognition of religious freedom is therefore tantamount to the recognition of religious pluralism (art. 53, passage 1).
2. The Constitution guarantees 'the freedom to profess or accept the religion of one's own choice'. It regards that freedom (free will) as an immanent feature of religious freedom. The Constitution therefore not only permits the freedom to profess a religion as well as the unrestricted freedom to change one's religion. Changing one's religion is solely a matter of a person's free will and human liberty. The state has no right to interfere therein, nor can it place any restrictions on the individual in that area (art. 53.ust. 2).
3. In various places, the Constitution refers to churches and religious associations. That formulation had engendered disputes as to which associations and churches it was to apply. The Constitutional Tribunal ruled in the matter stating that 'freedom of religion is very broadly treated as constitutional norm in that it encompasses all religions and membership of all religious associations, hence it is not restricted to participations in religious communities constituting a formal, separate organisational structure and duly registered in registers conducted by the public authority' (ruling of 15<sup>th</sup> February 1999 [SK.11/98]).
4. The Constitution enumerates ways in which religious freedom is to be implemented. Although it contains an extensive catalogue of behaviour,

it should be perceived as an exemplification. The constitution speaks about worship, prayer, participation in rituals, practice and teaching and the possession of churches and other places of worship depending on the needs of believers. However, one should not conclude that this excludes forms of religious freedom other than those enumerated here.<sup>2</sup> For example, the Constitution does not mention spreading or disseminating religion. But can spreading religion be eliminated from the ways religious freedom is realised? I am convinced it cannot. This is indeed a delicate issue, because it may intrude on other rights of the individual. But it does not violate the freedom of others as long as it is limited to persuasion and does not involve forcing someone to change his/her religion. One may also refer to the ETHC ruling (of 24<sup>th</sup> February 1998, Larissis *et al.* v. Greece) where the Tribunal ruled that, without the right of dissemination ‘freedom to change religion or conviction (...) would remain a dead letter’.<sup>3</sup>

5. The constitutional scope of religious freedom encompasses its externalisation, both individually and with others. Whilst acknowledging religious freedom as an individual liberty of a personal nature, the Constitution also creates guarantees for its collective externalisation. The Constitution therefore does not impose silence on religious matters. At the same time, it clearly states that no one can be obliged by organs of the public authority to reveal their worldview, religious convictions or denomination (art. 53, passage 7). It is therefore up to the individual whether he/she wishes to externalise his/her freedom with others or prefers to maintain silence. The Constitution has created a framework for the public externalisation of religion. That is a basic difference compared to the previous communist system which had emphasised silence in matters pertaining to religion. Guarantees of such silence and to non-revelation of religious convictions were often regarded as the very essence of freedom of conscience and religion.
6. The Constitution also guarantees diverse forms of externalising religion. It clearly states that such externalisation may be private or public. In the light of constitutional regulations, religious freedom is not reduced to the private sphere. The externalisation of religion may be restricted only by legislation and only when that is necessary to protect state security,

<sup>2</sup> *Constitution of the Republic of Poland, Commentary*, edited by L. Garlicki, Parliamentary Publishers, Warsaw 1999, chapter II, p. 4.

<sup>3</sup> *Ibid.*, p. 6.

public order, health, morality or the liberties and rights of others (art. 53, passage 5). Simultaneously, the Constitution contains a direct regulation safeguarding the individual's right to externalise religion by directly stating that 'no one may be forced to participate or not participate in religious practices' (art. 53, passage 6).

Within the framework of religious freedom the Constitution also expresses certain categories in terms of rights, using the term 'right' in its texts, namely:

- People's right to avail themselves of religious assistance wherever they may be. The separate mention of that right obviously does not pertain to the behaviour described in point 4 above. That pertains to special situations when individuals are subject to some form of confinement and cannot make use of their freedom, as might be the case in a hospital, prison, pre-trial lock-up or the armed forces. But, according to the Constitution, also in those circumstances, individuals should have the right to avail themselves of religious freedom. The duty to organise it rests upon the state.
- The right of parents to rear their children and provide them with moral and religious teaching in accordance with their convictions (art. 53, passage 3).

### III. The role of rulings by the Constitutional Tribunal

The right of religious instruction quite unexpectedly turned out to be one of the thorniest problems in Polish reality. The dispute was waged, and essentially continues to be waged, round three basic issues: 1. Where religious instruction is to be held; 2. The option of choosing between religion class and some other subject; and 3. The inclusion of religion grades in school reports together with other subjects. All three issues were the subject of rulings by courts, the Constitutional Tribunal and the European Court of Human Rights (point 2).

The right to teach religion arises from art. 53, passage 3. In point 4 of article 53, the Constitution states that 'religion (...) may be a subject of school instruction, but the freedom of conscience and religion of other individuals may not be violated'. That formulation is found in the 1997 Constitution, but the fact that religious instruction was to take place in schools, also public ones, on a voluntary basis was essentially already decided in 1990.

The dispute over religious instruction in schools was set within a broader historical context.

Poland was among those countries where religious instruction in schools had been associated with the existence of a democratic state. Religion had always been eliminated as a school subject in times of terror and radical re-

striction of human rights. There existed therefore the symbolic thinking that one of the elements of restoring democracy following the 1989/1990 breakthrough should be ‘the return of religious instruction to school’. It was significant, however, that in 1990 that decision did not meet with the enthusiastic acceptance of society. On the contrary, there erupted a stormy debate exaggerating the alleged threat connected to the reintroduction of school religious instruction, accompanied by the first wave of public criticism of the Church’s public presence.

The atmosphere surrounding the reintroduction of religious instruction to schools prompted the ombudsman to direct a complaint to the Constitutional Tribunal (K 11/90). Formally, he criticised the measures by which religious instruction had been introduced to public schools, namely two 1990 directives of the Ministry of National Education. He referred to them as legal acts of too low an order to introduce changes countermanding legislated regulations. But the ombudsman did not limit himself to formal issues. By invoking the then binding art. 67 (principle of equality) as well as art. 82 (the principle of freedom of conscience and religion) of the 1952 Constitution, he questioned the very principle of such instruction which the Tribunal emphasised in its ruling. Among other things, the ombudsman questioned the presence of crosses in classrooms. In his final presentation, the ombudsman stated that ‘the introduction of religious instruction to school is contrary to the principle of the state’s religious neutrality and not in accordance with the idea of a democratic state of law in its liberal version’. That statement went beyond purely legal argumentation.<sup>4</sup>

The Tribunal addressed both the formal issue, i.e. the measures whereby religion was introduced to schools, as well as the merits of the case. The Tribunal acknowledged the legality of the directive introducing religious instruction, stating that the voluntary teaching of religion in public schools in accordance with the will of interested parties had been possible on the basis of the 1989 laws on freedom of conscience and religion and the relation of the state to the Catholic Church and not on the basis of the Ministry of National Education’s directives contested by the ombudsman.<sup>5</sup> Moreover, the Tribunal stated that previously existing legal and actual state, shaped on the basis of the 1961 education law, which had removed religious instruction from schools, had significantly restricted constitutional guarantees of a

<sup>4</sup> W. Łączkowski, ‘Ethical and worldview dilemmas as the object of constitutional control’ in *Twenty Years of the Constitutional Tribunal’s Rulings*, Constitutional Tribunal Publishers, Warsaw 2006, p. 391.

<sup>5</sup> Constitutional Tribunal’s ruling of 30<sup>th</sup> January 1991 (*CT Rulings of 1991*, item 2).

citizen's freedom of conscience and religion. The Constitutional Tribunal stated that that 'whereas voluntary religious instruction as the internal matter of churches is conducted by catechism teachers delegated by church authorities according to programmes established by said churches, and state educational programmes are not permeated with religious content, one cannot claim that the principle of a secular school and the neutrality of the state have been violated. Moreover, said secularism and neutrality not only cannot serve as the basis for introducing the obligation of religious instruction in state schools, nor can it mean banning such instruction if it is demanded by interested citizens. (...) Any other understanding of those concepts would amount not to neutrality but to state interference in the conscience and confession of citizens' (K 13/02).

In 1992, the minister's directives were replaced by an order of the Minister of National Education which, however, did not prevent the ombudsman again submitting the matter to the Tribunal (U 12/28'9). The formal objection was repeated, but this time not only the order was contested but most of the substantive complaints were also repeated. One got the impression that the purely legal objections constituted a pretext for the presentation of substantive objections of an ideological nature. The Tribunal once again did not acknowledge objections alleging that the order had been unconstitutional (ruling of 20<sup>th</sup> April 1993, CT Rulings, part I, item 9).

Conducting religious instruction in public schools also entailed the obligation of parents who did not want their children to attend catechism classes to submit negative declarations. In that regard, the Constitutional Tribunal found the relevant regulation to be unconstitutional, arguing that it may provide a basis for discrimination within the school community. The European Court of Human Rights received a complaint from parents over the lack of an opportunity to elect a replacement subject such as ethics for their son who did not attend religious instruction.

The right to choose between religion and ethics, mandated by law, had yet to be implemented. The European Court of Human Rights ruled that article 14 (banning discrimination) had been violated in conjunction with article 9 (protecting freedom of thought, conscience and religion of the *Convention on Protection of Human Rights and Basic Freedoms*, stating that there must be a choice between ethics and religion in Polish schools, as its lack constitutes a violation of human rights. Leaving a dash instead of a grade next to religion on a school report constitutes discrimination.<sup>6</sup> (The ruling

<sup>6</sup> Ruling of 15<sup>th</sup> June 2010 r. in the case of *Grzelak v Poland*, complaint No. 7710/02.



is not final). The reason for the acknowledged violation was found to be the poor practices prevailing in the school attended by the contesting pupil rather than the legal measures regulating the teaching of religion and ethics in Polish schools.

In Polish reality, the problem however is the lack of an ethics programme, the lack of a clear conception as to what ethics teaching should be and the fear that ethics might become an 'anti-religion'. There is a lack of qualified ethics teachers. It turned out in many cases that the priests were the best prepared ethicists. Nevertheless, that that situation does not exempt the public authorities from enforcing law and introducing in practice the alternative ethics option.

Religious freedom is also safeguarded by the Constitution's general principles defining the place of churches in the State as well as the mutual relations between the state and churches and other confessional associations.

Art. 25 introduces the following principles: 1. Churches and other religious organisations shall have equal rights; 2. Public authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to worldviews and shall ensure their freedom of expression within public life; 3. The relationship between the State and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good.<sup>7</sup>

Within the scope of those principles, one of the most controversial elements has been the concept of 'state neutrality'. That discussion is exceptionally vigorous at present. One may observe a tendency to equate the concept of a neutral state with that of an active state, contrary to the very definition of neutrality or impartiality. A neutral state, according to some rather widespread views, is one which has the obligation to negate and eliminate any religious presence from the public sphere. It should be acknowledged that such an interpretation runs counter to the essence of the constitutional norm regulating freedom of religion. The State is neutral in the sense that it cannot organise the religious life of any faith community,

<sup>7</sup> Art. 25 also contains the following points: 4. The relations between the Republic of Poland and the Roman Catholic Church shall be determined by international treaties concluded with the Holy See, and by statute 5. The relations between the Republic of Poland and other churches and religious organisations shall be determined by statutes adopted pursuant to agreements concluded between their appropriate representatives and the Council of Ministers.

but neither can it shirk certain obligations imposed upon it, whose essence is to ensure the implementation of religious freedom.

One example is the constitutional norm stating the admissibility of access to religious assistance wherever an individual happens to be. One may regard that formulation as extremely broad and imprecise, but it is a constitutional norm which must be implemented. No one has got the right to deny access to religious assistance in any place nor with respect to any religion. In institutions belonging to the State, the State is obliged to ensure such assistance and is not exempted from it by the principle of state neutrality.

#### **IV. Evaluation of the status quo and issues pertaining to future threats of religious freedom**

Also of great significance to interpreting the scope of religious freedom is the article defining relations between internal law and international law.

In view of the experience with a communist state, which arbitrarily regulated the question of individual liberties and in extreme cases introduced restrictions that actually liquidated the essence of freedom, it was felt that a safeguard against that in the new reality should be a clear definition of the role of an international treaty in relation to national law. The relevant constitutional regulation states that in art. 91.2 'An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes and pass. 3 If an agreement ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws'.

Undoubtedly, Poland's existing legal regulations clearly warrant the conclusion that, within their particular classification of the category of religious freedom, Poland's solutions fall within what is commonly referred to as the *right to religious freedom*. Up till now, such a stand could be noted in the rulings of the Constitutional Court.

Beyond any doubt, there has emerged a clearly visible tendency to revise that formula and endow religious freedom with a form that might be called the right to freedom of religion.

That tendency has so far not been reflected in any legal norms or rulings, but there exists such a clear tendency seeking reinforcement in the rulings of European Tribunals.

The legal shape of religious freedom in Poland creates guarantees of its proper implementation. That applies not only to the majority religion but to minority denominations as well.

The Constitutional Tribunal has spoken out on that subject in its ruling on a motion of the Autocephalous Eastern Orthodox Church (ruling of 2nd April 2003, K 13/02).

A new development not taken into account during the constitutional debate was the role of international human-rights courts. They were justifiably regarded as important guarantors of human rights. There appeared to be an accepted agreement that we are all functioning in an area in which we share the same system of values, based on a foundation of Christianity, Roman law and Greek culture. At least in Central Europe, and perhaps too idealistically, Western Europe was regarded as a repository of traditional Christian values which could not be protected in the Europe under Soviet domination. Hence 'threats' from international institutions in the area of protected values were not foreseen. A tilt in the development of human rights in the direction of unrestricted liberalism initially went largely unnoticed. It entailed an extremely broad ban on discrimination transcending the traditional bounds of what we had regarded as our common values, particularly in the realm of personal liberties and the guarantees stemming from the freedom of religious conviction.

The Polish Constitution contains clear regulations pertaining to moral issues and moral foundations including, for example, its definition of marriage. Regulations such as art. 18 in the section devoted to polity principles defines 'marriage as the union of a woman and man'. Art. 48, passage 1 states that 'parents have the right to rear their children in accordance with their own convictions'. Those issues may not directly fall into the concept of religious freedom, but they fall into what are known as religious convictions. Are they sufficiently protected in light of art. 53 of the Constitution? I am convinced that the Constitution provides a good basis for that. Such was the position of the Supreme Court in its ruling of 6<sup>th</sup> April 2004<sup>8</sup> in which it stated that 'protecting freedom of religion means protecting the sphere of a given individual's religious concepts, imagination, convictions and sentiments. Religious sentiments may therefore be defined as a legally protected personal value'. The question thus arises what can be the consequences of the European Human Rights Court's ruling equating the statement that marriage, in the light of non-discrimination, cannot be exclusively a union between woman and man. That issue has yet to be reviewed by any Polish court, but it appears to be a very distinct possibility in future.

<sup>8</sup> ICK 484/03, OSNC 2005, No. 4, item. 69.

A clear example of that construction could be observed in the case of *Lautsi v. the Italian Government*.

We therefore find ourselves in a very sensitive place, when a particular type of decision may be posed by a (European) court of law going against the provisions of the constitution and being a kind of 'threat' to the values guaranteed by the national constitution. This doubt prevailed in the thinking of the Polish government when in 2007 it decided to ratify an opt-out protocol to the European Charter of Fundamental Rights. It was the idea that in the light of an opt out Protocol the Charter will not extend the powers of any court to strike down Polish legislation and not create any new justifiable rights.

There is, however, considerable debate concerning what effect the protocol will actually have. One view is that the protocol is an opt-out that excludes the application of the Charter to Poland and another is that that protocol is an interpretative protocol which will either have limited or no legal consequence.

But is the principle of an independent judiciary and an independent court not a cornerstone of democracy which should not be undermined?

It seems that the principle of subsidiarity should have an important role to play in this area, but that is only one of the principles courts take into account when interpreting the law. It is the court that decides the hierarchy of principles.

The debate is not yet over.

## ► CLOSING OBSERVATIONS

# RELIGIOUS FREEDOM IN THE 21<sup>ST</sup> CENTURY OLD BIASES, FRESH CHALLENGES, NEW FRONTIERS

■ MARY ANN GLENDON

The theme of religious freedom has been treated so often that it might seem as though there is little left to say. But changing circumstances unsettle old ways of thinking. And while new developments can pose unprecedented threats, they sometimes open doors that previously seemed tightly shut.

It was especially heartening to the Academy to have the encouragement of Pope Benedict XVI in our choice of topic, and then to see the Pope himself calling attention to the importance of religious liberty on numerous occasions in the months leading up to our meeting.<sup>1</sup> Freedom, as the Holy Father has reminded us, is “a challenge held out to each generation, and it must constantly be won over for the cause of good”.<sup>2</sup>

In its Seventeenth Plenary Session, the Academy, with the help of an extraordinary group of distinguished experts, explored that challenge as it relates to religious freedom. The Plenary opened with a look back at the struggles for religious freedom in the past, and then proceeded to survey the state of religious liberty in the world today, but mainly the participants strove to look forward in search of more effective ways to make religious freedom a reality and a path to peace. A highlight of the meeting was the Pope’s message in which he reminded us that religious freedom goes to the very heart of what it means to be human. “A yearning for truth and meaning and an openness to the transcendent,” he said, are “deeply inscribed in human nature”.<sup>3</sup>

The initial presentations, recalling the gradual and often difficult progress of the concept of religious liberty, traced its development in various religious and political settings to the point where nearly every nation

<sup>1</sup> Pope Benedict XVI, Address to Council of Europe Delegation, September 8, 2010; Address to the Roman Curia, December 20, 2010; World Day of Peace Message, January 1, 2011; Address to the Diplomatic Corps, January 10, 2011.

<sup>2</sup> Pope Benedict XVI, White House Address, April 2008; cf. *Spe Salvi*, 24.

<sup>3</sup> Pope Benedict XVI, Message to the Pontifical Academy of Social Sciences, April 29, 2011.

in the world, and many of the world's religions have acknowledged it as a fundamental human right.<sup>4</sup> Yet it is all too evident that the consensus embodied in various formal documents has not led to agreement on the meaning and foundations of religious freedom, nor on its relation to other fundamental rights, nor on modes of bringing the right to life under diverse cultural conditions. Hence the question that pervaded our proceedings: How can a universal right to religious freedom be brought to life in a world of diversity?

As we looked around that world of diversity, we received a vast amount of information about the actual state of religious practice and religious freedom, East and West, North and South.<sup>5</sup> We were given a rich panorama of the diverse contexts in which contemporary religious freedom issues arise,<sup>6</sup> and we heard immensely informative reports on the experiences of various societies in dealing with challenges to religious freedom such as those posed by claims of new rights, by militant secularism, by various forms of fundamentalism, and by governmental co-optation and persecution.<sup>7</sup>

After four densely packed days of presentations and discussions, we were left with a fair number of paradoxes, a few conclusions, and enough questions to keep social scientists busy for years to come. Since no summary could do justice to the richness of the papers and discussions at the Plenary, I must confine myself in these closing observations to a few of the most salient points that emerged from four days of looking back, looking around and attempting to look ahead. I will mention first some bad news from the social sciences, then some encouraging news, then some areas where (if I am not mistaken) there was wide consensus among the participants, and some areas where the most we could do was clarify the issues. I will conclude with a set of challenges for the social sciences in general and for Catholic social thought in particular.

<sup>4</sup> Minnerath, *La liberté religieuse: théologie et doctrine sociale*; Hittinger, *Political Pluralism and Religious Liberty: The Teaching of Dignitatis Humanae*.

<sup>5</sup> Lutz and Skirbekk, *The Demography of Religions and their Changing Distribution in the World*; Mouzelis, *Modernity: Religious Trends*; Hertzke, *Religious Freedom in the World Today: Paradox and Promise*; Durham, *Religious Freedom in a Worldwide Setting: Comparative Reflections*.

<sup>6</sup> An-Na'im (Africa); Kuan (China); Ruma Pal (India); Morandé (Latin America); Benson (Canada and South Africa); Maier (Germany); Fromont (France); Malik (Middle East); Buttiglione (Italy); Suchocka (Poland); Durham (USA).

<sup>7</sup> Cartabia, *The Challenges of "New Rights" and Militant Secularism*; An-Na'im, *Experiences in Freedom of Religion in the African Context*; Ruthven, *Fundamentalism and other Obstacles to Religious Toleration*; Kuan, *Religion and State and China*.

Let us begin with the bad news from the most recent surveys of the actual state of religious freedom in the world.

### **Religious freedom world-wide is at increasing risk**

Social science data paints a grim picture of the current status of religious liberty.<sup>8</sup> According to the most extensive cross-national study ever conducted, nearly 70 percent of the world's people currently live in countries that impose "high restrictions" on religious freedom, the brunt of which falls on religious minorities, especially on Christian minorities.<sup>9</sup> Behind those cold figures is the harsh day-in day-out reality of discrimination, persecution, and violence suffered by religious believers in many parts of the world – sometimes due to governmental policies, sometimes to societal intimidation, and often to both in combination.

### **Religious freedom is at risk even in countries that officially protect religious freedom**

Even in countries that impose "low to moderate" restrictions on religious freedom, influential figures in the media, the academy and public life often portray religion as a source of social division, and treat religious freedom as a second-class right to be trumped by a range of other claims and interests. Those largely un-examined biases among elites are spreading to the population at large in many Western societies.<sup>10</sup> It is "a profound paradox of our age," according to Professor Hertzke, that, just when evidence of the value of religious freedom is mounting, "the international consensus behind it is weakening, attacked by theocratic movements, violated by aggressive secular policies, and undermined by growing elite hostility or ignorance".<sup>11</sup>

<sup>8</sup> Hertzke, Lutz and Skirbeck.

<sup>9</sup> Hertzke, citing *Global Restrictions on Religion*, Pew Forum on Religion and Public Life (December, 2009). The study covers 198 countries, representing more than 99.5% of the world's population. Another recent study has found that 75 percent of victims of violent religious persecution worldwide are Christian. *Aid to the Church in Need, Religious Freedom in the World – Report 2010*, summarized on National Review Online, March 17, 2010.

<sup>10</sup> Mouzelis, *Modernity: Religious Trends*;

<sup>11</sup> Hertzke; see also Possenti, *What is or should be the role of religiously informed moral viewpoints in public discourse (especially where hotly contested issues are concerned)?*



Juridical trends in Western countries also reveal a “spreading distrust towards religion, religious institutions and their role in public life”.<sup>12</sup> After reviewing legal rulings on such matters as hiring practices in religious schools and institutions, religious symbols in public places, the role of religion in schools, and conscience protection for religious individuals and institutions, Professor Cartabia concluded that legal protection of religious freedom is declining as the time-honored liberty principle gives way to postmodern notions of choice and as the equality principle (that like should be treated alike) is replaced by a non-discrimination principle that is indifferent to differences and tolerant of intolerance.

Commenting on trends toward confining religion to the private sphere, Archbishop Minnerath pointed out that the banishment of religion from the public square leaves “an immense vacuum” open to all sorts of ideologies.<sup>13</sup> Where that situation prevails, Cartabia and Benson warned, it could lead to establishing secularism as a *de facto* official “religion”. In Senator Pera’s view, the liberal democracies are “immersed in what we might call the *paradox of secularism*: the more our secular, post-metaphysical, post-religious reason aims to be inclusive, the more it becomes intolerant”.<sup>14</sup>

Fortunately, however, not all the news from the social sciences was bad. There were also some encouraging developments on the contemporary landscape.

### **New research casts doubt on the claim that religion is a source of social strife**

Social science has begun to cast doubt on the common – almost dogmatic – belief in secular circles that religion is *per se* a source of social division, and on the related claim by many authoritarian governments that religious freedom must be curtailed for the sake of social peace. An important and growing body of empirical evidence reveals that the political influence of religion is in fact quite diverse, sometimes contributing to strife, but often fostering democracy, reconciliation and peace.<sup>15</sup> Some studies in-

<sup>12</sup> Cartabia. See also Benson, Can there be a legitimate pluralism in modes of protecting religions and their freedoms? The cases of Canada and South Africa.

<sup>13</sup> H.E. Mons. Roland Minnerath, “La liberté religieuse: théologie et doctrine sociale”. See also Buttiglione, and Martínez Torrón.

<sup>14</sup> Pera, The “Apple of God’s Eye” and Religious Freedom: A Re-Examination of Kant’s Secularism.

<sup>15</sup> Hertzke; see also, Monica Toft, Daniel Philpott, and Timothy Shah, *God’s Century: Resurgent Religion and Global Politics* (New York: Norton, 2011); Brian Grim and Roger Finke, Religious Persecution in Cross-National Context, *72 American Sociological Review* 633-58 (2007).

dicating that violence actually tends to be greater in societies where religious practice is suppressed,<sup>16</sup> and that promotion of religious freedom actually advances the cause of peace by reducing inter-religious conflict.<sup>17</sup>

Political journalist Malise Ruthven cautioned that those who automatically associate religion with strife may be confusing religious conflicts with identity politics. He suggested that “the sacralization of identity” – rather than religion as such – may be at the heart of conflicts to which religious labels have been attached.<sup>18</sup> In other words, the religious rhetoric and symbolism associated with such conflicts may have more to do with issues of individual and group identity than with theological differences.

Though all agreed that much additional work needs to be done along these lines, the presentations offered support for the belief that religious freedom can indeed be a path to peace.

### **Social science research suggests a positive correlation between religious freedom and other important human goods**

Recent research in the social sciences also suggests that there is a significant positive correlation between levels of religious freedom and measures of other economic, social and political goods, while, conversely, the denial of religious liberty correlates with the denial of such goods.<sup>19</sup> One study concludes that, “The presence of religious freedom in a country mathematically correlates with the longevity of democracy” and with the presence of civil and political liberty, women’s advancement, press freedom, literacy, lower infant mortality, and economic freedom.<sup>20</sup>

These modern studies buttress Tocqueville’s classic analysis of the relation between religion and freedom. In *Democracy in America*, Tocqueville advanced two propositions that challenged the presuppositions of both believers and skeptics in his day. His insistence that freedom would be good for religion was doubted by devout Christians, while his assertion that religion would be beneficial for emerging democracies seemed preposterous to those of his con-

<sup>16</sup> Hertzke; see also Brian Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the 21<sup>st</sup> Century* (Cambridge University Press, 2011).

<sup>17</sup> Hertzke; see also Thomas Farr, *World of Faith and Freedom* (New York: Oxford University Press, 2008).

<sup>18</sup> Ruthven, *Fundamentalism and other Obstacles to Religious Toleration*.

<sup>19</sup> Hertzke, *Religious Freedom in the World Today: Paradox and Promise*; Lutz and Skirbekk.

<sup>20</sup> Hertzke; see also Brian Grim, *Religious Freedom: God for what Ails us? 6 Review of Faith & International Affairs* 3–7 (2008).

temporaries who considered themselves enlightened sons of the French Revolution. Urging the latter to overcome their prejudice against religion, he said, “Lovers of liberty should hasten to call religion to their aid, for they must know that one cannot establish the reign of liberty without that of mores [by which he meant the habits and attitudes of citizens and statesmen], and mores cannot be firmly founded without beliefs”.<sup>21</sup> Religion, he continued, “is the guardian of the mores, and the mores are the guarantee of the laws and pledge for the maintenance of freedom itself”.<sup>22</sup>

### **New trends in elite opinion concerning religion**

Meanwhile, some prominent intellectuals, Senator Pera among them, have begun to challenge the traditional bias against religion in elite circles, and to question the assumption that the liberal state can afford to be indifferent or hostile to religion. No serious thinker disputes that the preservation of a free society depends on citizens and statespersons with particular skills, knowledge, and qualities of mind and character. But many have taken the position that the free society can get along just fine without religion, and that the more closely religion is confined to the private sphere, the freer everyone will be. Such writers maintain that the experience of living in a free society is sufficient in itself to foster the civic virtues of moderation and self-restraint, respect for others and so on.<sup>23</sup>

That faith in the ability of democracy to generate the virtues it needs in its citizens was shaken, however, in the wake of the social and cultural upheavals of the late 20<sup>th</sup> century. It now appears that liberal societies having been living on inherited social capital, so to speak, and that – like spendthrift heirs – they are consuming their inheritance without replenishing it. In fact, a major conclusion of this Academy’s working group on democracy in 2005 was that democracy depends on a moral culture that in turn depends on the institutions of civil society that are its “seedbeds of civic

<sup>21</sup> Tocqueville, *Democracy in America*, H. Mansfield trans., Vol. I (Chicago: University of Chicago Press, 2000), 11.

<sup>22</sup> *Id.* at 44.

<sup>23</sup> For an overview of the positions of leading political theorists on this issue see William Galston, *Liberal Purposes* (Cambridge: Cambridge University Press, 1991). Galston states his own position thus: “Liberalism contains *within itself* the resources it needs to declare and defend a conception of the good and virtuous life that is in no way truncated or contemptible. This is not to deny that religion and classical philosophy can support a liberal polity in important ways...But it is to deny that liberalism draws essential content and depth from these sources” (304).

virtue”.<sup>24</sup> We observed that, “To play their role effectively in the ecology of democracy, these seedbeds need not be democratic, egalitarian or liberal; their highest loyalty need not and should not be to the state, and their highest values need not and should not be efficiency and productivity”. With the passage of time, it has become ever more apparent that “a liberal politics dedicated to full and free human development cannot afford to ignore the settings that are most conducive to the fulfillment of that idea. In so doing, liberal politics neglects the conditions for its own maintenance”.<sup>25</sup>

In recent years, with families, schools, religious groups, and other institutions of civil society in distress,<sup>26</sup> some prominent non-believers have expressed concerns about the political costs of neglecting a common cultural inheritance in which religion and liberty are inextricably intertwined – an inheritance that includes the classical civilizations of Greece and Rome, the Hebrew Scriptures and the Apostolic Writings, the explosive energies of the Renaissance and the Enlightenment, and the concept of human rights.<sup>27</sup> They have begun to ask questions like: Where will citizens learn to view others with respect and concern, rather than to regard them as objects, means, or obstacles? What will cause most men and women to keep their promises, to limit consumption, to answer their country’s call for service, and to lend a hand to the unfortunate? Where will a state based on the rule of law find citizens and statesmen capable of devising just laws and then abiding by them? Jürgen Habermas has gone so far as to speculate that the good effects that some philosophers have attributed to life in free societies may well have had their source in the “legacy of the Judaic ethic of justice and the Christian ethic of love”.<sup>28</sup>

Notable among the developments that have rekindled interest in the question of the role of religion in societies that aspire to be free, democratic, and humane are scientific advances that pose moral dilemmas unknown to previous generations. In the case of Habermas, it was concern about biological engineering and the instrumentalization of human life that led him

<sup>24</sup> Pontifical Academy of Social Sciences, *Democracy in Debate*, Hans F. Zacher ed. (Pontificia Academia Scientiarum Socialium, 2005), 266.

<sup>25</sup> Glendon, *Rights Talk* (New York: Free Press, 1991), 137.

<sup>26</sup> See, e.g., Pontifical Academy of Social Sciences, *Vanishing Youth: Solidarity with Children and Young People in an Age of Turbulence*, Glendon and Donati eds. (Pontificia Academia Scientiarum Socialium, 2006).

<sup>27</sup> See Marcello Pera, *Perché dobbiamo dirci Cristiani* (Milan: Mondadori, 2008) (a contemporary reflection on the theme of Benedetto Croce’s 1942 essay, *Perché non possiamo non dirci “cristiani”*).

<sup>28</sup> Habermas, *Time of Transitions* (Malden, MA: Polity, 2006), 150–51.

to conclude that the West cannot abandon its religious heritage without endangering the great social and political advances that are grounded in that heritage. Habermas, a professed atheist and political leftist, stunned many of his followers when he announced he had come to think that, “Christianity, and nothing else, is the ultimate foundation of liberty, conscience, human rights, and democracy, the benchmarks of Western civilization. To this day, we have no other options. We continue to nourish ourselves from this source. Everything else is postmodern chatter”.<sup>29</sup>

Regarding the question of how a universal right to religious freedom can be understood in view of the manifold differences among religions, cultures, nations, schools of interpretation, formulations of rights, and modes of implementation, there seemed to be consensus in the Plenary on a few key points.

### **There is no “one size fits all” model of religious freedom**

Given the wide diversity of human societies, there cannot be one model of religious freedom that suits all countries.<sup>30</sup> Nor can one country’s approach to religious liberty serve as a model for another if by “model” one means something that can simply be copied and transplanted. Each nation’s system is the product of its own distinctive history and circumstances.<sup>31</sup> Most of the continental European systems, for example, were decisively influenced by confrontations between Enlightenment secularism and Roman Catholicism, against the background of religious conflict. The United States’ system was initially devised to protect the various Protestant religions from the State, and to promote peaceful co-existence among Protestant confessions.<sup>32</sup> The distinctive situation in Latin America has been shaped by the absence of religious wars, and the accommodationist relationship between the state and the Catholic Church. The native people of Latin America de-

<sup>29</sup> *Ibid.*

<sup>30</sup> Zacher, How can a universal right to freedom of religion be understood in the light of manifest differences among religions, cultures, nations, schools of interpretation, formulations of rights and modes of implementing the latter? Weiler, State and Nation; Church, Mosque and Synagogue – On Religious Freedom and Religious Symbols in Public Places; Freedom of Religion in the European Convention on Human Rights, Martínez Torrón.

<sup>31</sup> Maier, Religionsfreiheit in Deutschland – Alte und Neue Fragen; Fromont, La liberté religieuse et le principe de laïcité en France; Benson, Can there be a legitimate pluralism in modes of protecting religions and their freedoms? The cases of Canada and South Africa. Buttiglione, Martínez Torrón, Durham, Cartabia.

<sup>32</sup> The classic study is Philip Hamburger, *Separation of Church and State* (Cambridge, Mass.: Harvard University Press, 2002).

veloped a synthesis between their own cultures and the Christian faith, resulting in a rich popular religiousness that is open to a gradual advance of religious pluralism.<sup>33</sup> The situation in many parts of Africa and Asia cannot be understood without reference to colonialism.<sup>34</sup>

### **Universal rights can co-exist with a legitimate variety of approaches to their implementation**

To accept that there are no universal models is not to deny that religious freedom is a universal right. Rather, it is to recognize that there must be room for a degree of pluralism in modes of bringing religious freedom and other fundamental human rights to life under diverse cultural circumstances.<sup>35</sup>

That was the approach taken by the Second Vatican Council which affirmed in *Dignitatis Humanae* that there could be several valid ways to implement that right.<sup>36</sup> A pluralistic approach to human rights is also followed by the European Court of Human Rights through its concept that each country must be accorded a reasonable “margin of appreciation” as it develops its own protections for rights in the light of the circumstances and needs of its own population. The ECHR has not always applied that concept in a manner favorable to religious freedom, but its recent decision in the Italian crucifix case seems to represent a more tolerant view.<sup>37</sup> The Court held that Italy’s display of the crucifix in public schools, in reflection of the traditional religious views of the majority of Italians, does not necessarily violate the freedom of religion of other believers or non-believers.<sup>38</sup>

### **The dilemmas of pluralism: what limits? who decides?**

A major difficulty with a pluralistic approach, of course, is to determine its legitimate scope and limits.<sup>39</sup> The devil, as they say, is in the details: Where

<sup>33</sup> Morandé, What can be learned from the experience of religious freedom in Latin America?

<sup>34</sup> An-Na’im.

<sup>35</sup> Zacher, How can a universal right to freedom of religion be understood in the light of manifest differences among religions, cultures, nations, schools of interpretation, formulations of rights and modes of implementing the latter? Weiler, State and Nation; Church, Mosque and Synagogue – On Religious Freedom and Religious Symbols in Public Places.

<sup>36</sup> Hittinger, Political Pluralism and Religious Liberty: The Teaching of *Dignitatis Humanae*.

<sup>37</sup> Cartabia; Martínez Torrón.

<sup>38</sup> Lautsi v. Italy, ECHR decision of March 18, 2011.

<sup>39</sup> Weiler; see also Walter, The Protection of Freedom of Religion Within the Institutional System of the United Nations; Engel, Law as a Precondition for Religious Freedom.

does legitimate pluralism end and pure cultural relativism begin? Equally thorny is the issue of “who decides” those perplexing questions of scope and limits. Speakers from diverse regions discussed a great variety of approaches to those dilemmas within various political systems.<sup>40</sup> They explored such questions as: What should be the limits of tolerance and accommodation? What models are available for determining the scope and limits of freedom to practice one’s religion, the freedom of religious institutions to govern themselves, and the resolution of conflicts between freedom of religion and other rights? What is or should be the role of religiously grounded moral viewpoints in public discourse?<sup>41</sup> What should be the relationships among the various institutions and entities engaged in protecting human rights – at local, national, regional, and international levels?<sup>42</sup> Europe emerged as a veritable museum of the tensions among the various mechanisms for implementing religious freedom and other human rights at the national, regional, and international levels.<sup>43</sup>

Several dilemmas emerged from these discussions. On the one hand, the more broadly religious freedom is conceived, the more tensions arise among individual religious freedom, the autonomy of religious bodies, other rights, and the interests of the state. Yet, one of the principal ways in which religious liberty is violated is by construing it so narrowly as to confine it to the private sphere.<sup>44</sup> To abolish religion from the public sphere, as Professor Durham pointed out, does not resolve conflicts but merely papers them over.

The prevailing juridical approach to the problems of scope and limits in liberal democracies is for constitutional courts to use pragmatic legal techniques to achieve balance among the various freedoms. In this process, the proportionality analysis developed by the German Constitutional Court, and explained by Professor Engel, has been highly influential.<sup>45</sup> With respect to whether such a balancing feat can be accomplished in a principled manner, Judge Ruma Pal emphasized the importance of an impartial and independent judiciary. Pointing out that India with its many religious faiths is itself “a world of diversity,” she emphasized the need for “great wisdom and

<sup>40</sup> Fumagalli Carulli, *Concordats as instruments for implementing religious freedom*; Ruma Pal, *What can be learned from the Indian Experience?* Engel, Possenti, Cartabia, Kuan.

<sup>41</sup> Possenti.

<sup>42</sup> Weiler, Walter, Cardinal Bertone.

<sup>43</sup> Martínez Torrón; Durham, *Religious Freedom in a World-Wide Setting: Comparative Reflections*; Suchocka.

<sup>44</sup> Minnerath; Cartabia.

<sup>45</sup> Engel, *Law as a Precondition for Religious Freedom*.

restraint” in the delicate task of protecting religious freedom while promoting social harmony and public order.<sup>46</sup>

Professor An-Na'im, however, argued for a more “people-centered” approach that would “promote the ability of local communities to protect their own rights,” rather than relying too heavily on the “ambiguities and contingencies” of official action.<sup>47</sup>

Professor Durham cautioned that the more that liberal democracies entrust their most divisive issues to constitutional courts, the more they risk undermining the very foundations of representative government. For constitutional adjudication effectively closes the door on further resort to the ordinary democratic processes of debate, education, persuasion, and voting – and thus effectively banishes the losers to the margins of the polity.

On the other hand, in response to a question posed by the Chancellor on value of philosophy and especially natural law as criteria to limit religious pathologies such as fideism and fanaticism, as the Church maintained, following St. Paul, St. Augustine and St. Thomas, Senator Pera affirmed that the universality of natural law was not always explicitly acknowledged, but was present nevertheless. He pointed out that Cardinal Ratzinger, in his debate with Jürgen Habermas, underlined the “necessary correlation between faith and reason”, culture and religion, which are called to clarify each other in “an attempt at a polyphonic relatedness ... so that a universal process of purification can proceed. Ultimately, the essential values and norms that are in some way known or sensed by all men will take on a new brightness in such a process, so that that which holds the world together can once again become an effective force in mankind”.<sup>48</sup>

While no consensus emerged on the solutions to these dilemmas, considerable progress was made in clarifying the issues, and thus in suggesting promising avenues for further research.

### **The priority and the paradoxes of culture**

Although much attention was paid to legal and institutional mechanisms for protecting religious freedom, there was broad agreement that the rule of law ultimately depends on the mores, the habits and attitudes of citizens and statespersons – that is, on culture. Speakers offered a variety of ideas on

<sup>46</sup> Pal, What can be learned from the Indian experience?

<sup>47</sup> An-Na'im, Experiences in Freedom of Religion in the African Context.

<sup>48</sup> *The Dialectics of Secularization: On Reason and Religion*, Jürgen Habermas, Joseph Cardinal Ratzinger, Ignatius Press, San Francisco, 2005, p. 79f.



the question of how best to foster a culture of mutual respect and genuine tolerance. Professor Weiler, who argued in support of Italy in the crucifix case, warned that legal measures based on the idea of a legitimate pluralism will only work if they are supported by such a culture.<sup>49</sup> This means, he explained, that in countries where a secularist model prevails, as in France, special care must be taken to avoid marginalizing religion and religious believers. Possenti elaborated on this point, citing Habermas for the proposition that “respect” for religious positions “is not enough; philosophy has good reason to show itself eager to *learn*. Secular citizens, to the extent that they present themselves as citizens of the state, do not have the right to deny on principle a potential truth in the religious ideas of the world, or to contest the right of religious citizens to contribute to public discussion”.<sup>50</sup>

By the same token, in countries where confessional or accommodationist models exist, special care ought to be taken to assure respect to persons of all faiths and no faith. Weiler emphasized that, “[T]he European version of the non-*laïque* state is hugely important in the lesson of tolerance it forces on such states and their citizens towards those who do not share the “official” religions, and in the example it gives the rest of the world of a principled mediation between a collective self-understanding rooted in a religious sensibility, or religious history, or religiously inspired values and the imperative exigencies of a liberal democracy”.

There seemed to be consensus in the Plenary Session that religions and religious believers themselves have a particular responsibility to educate and encourage their members to the responsible exercise of religious freedom.<sup>51</sup> It is up to them to teach their members to advance their religiously grounded moral viewpoints with reasoning that is intelligible to all men and women of good will. It is up to them to reject ideologies that manipulate religion for political purposes, or that use religion as a pretext for violence. And it is up to them to find resources within their own traditions for promoting respect and tolerance.

In that connection, it is well known that it took a long time for the Catholic Church to reach the point where the Second Vatican Council officially declared that religious freedom means that everyone is “to be im-

<sup>49</sup> Weiler, *State and Nation: Church, Mosque and Synagogue – On Religious Freedom and Religious Symbols in Public Places*. See also, Possenti, Durham, An-Na’im, Kurt Cardinal Koch, *Ecumenism and Freedom of Religion*.

<sup>50</sup> Possenti, citing Habermas, *Tra scienza e fede* (Laterza, Roma, 2006), 14, 18.

<sup>51</sup> See especially, Cardinals Bertone and Koch; and Weiler, Durham, Ruthven.

mune from coercion on the part of individuals or of social groups and of any human power, in such wise that no one is to be forced to act in a manner contrary to his own beliefs whether privately or publicly, whether alone or in association with others, within due limits” (*Dignitatis Humanae*, 2). It took a long time for Church leaders to embrace the best of modern thought, as Thomas Aquinas embraced the gifts of the ancients. Today, however, Pope Benedict XVI does not hesitate to affirm that: “It is necessary to welcome the real achievements of Enlightenment thinking – human rights, and especially the freedom of faith and its exercise, recognizing these as elements that are also essential for the authenticity of religion”.<sup>52</sup>

Regarding the prospects for Islam in this respect, Professor An-Na’im cautioned against assuming that Islam is necessarily antagonistic to religious freedom. He stated his own belief that protection of religious freedom and a state that “is neutral but not indifferent or hostile to religion” are both necessary for one “to be a Muslim by choice and conviction, which is the only valid way of being a Muslim”.

As an example of how interfaith cooperation can accomplish what government cannot, Professor Benson provided the group with an inspiring description of the achievement in 2010 of unanimous agreement by representatives of Hindu, Christian, Muslim, Jewish and other religions on a South African Charter of Religious Rights and Freedoms.

### Looking ahead: challenges for the social sciences

Looking ahead, the Plenary Session brought to light a number of areas where social scientists can contribute to meeting the challenges that confront religious freedom in today’s world.<sup>53</sup> In addition to the dilemmas just discussed, the Plenary identified the following areas where further work would be desirable:

1. Clarification of terminology. That “the beginning of wisdom is the definition of terms” is both an ancient Chinese proverb and a saying attributed to Socrates. Unfortunately, discussions of religious freedom are afflicted by considerable confusion and debate about key terms such as “secularism”, “secularity”, *laïcité*, “rights”, and even “religion”. As Professor Greisch pointed out, religious liberty remains a “difficult” concept, both philosophically and practically – not least because there are so many

<sup>52</sup> Address to the Roman Curia, December 22, 2006.

<sup>53</sup> Cipriani, What can the social sciences teach us about the relationships among cultural identity, religious identity, and religious freedom?

different understandings of “religion” and “religious freedom”.<sup>54</sup> Professor Benson and Senator Pera added that imprecision about the nature of the “secular” has fostered beliefs that privilege non-religious belief systems while putting religion at a disadvantage.<sup>55</sup> There was considerable debate at the Plenary Session about whether it is useful to distinguish between “positive” and “negative” secularism – the first term referring to a non-confessional or “lay” state that is open to cooperation with religion on a neutral basis and the second term referring to a lay state that is indifferent or hostile to religion.

2. Further research is needed to critically test assumptions that undermine support for religious freedom, such as the common notion that religious freedom promotes social division and strife. What are the mechanisms that link religious freedom to religiously motivated violence or to its reduction in diverse societies?
3. Further research, with the aid of systems analysis, is needed on the promising evidence of linkages between religious freedom and other social goods.<sup>56</sup> What aspects of religious freedom have positive effects and under what conditions?
4. To aid in meeting the formidable challenge of creating a culture of respect for freedom of religion, further work needs to be done in the fields of education (“a key driver of culture”)<sup>57</sup> and in the rapidly changing field of communications.<sup>58</sup>
5. In the fields of law and politics, there is a particular challenge for Catholic social scientists to demonstrate how the principle of subsidiarity can help to achieve legitimate pluralism in forms of freedom by differentiating among the tasks appropriate to different levels of authority.<sup>59</sup>

<sup>54</sup> Greisch, *Difficile liberté religieuse*. See also Zacher.

<sup>55</sup> Benson, Can there be a legitimate pluralism in modes of protecting religions and their freedoms? The cases of Canada and South Africa; Pera; Zacher.

<sup>56</sup> Lutz.

<sup>57</sup> Lutz and Skirbekk; Bruguès, *Quale ruolo dell’educazione nella promozione della libertà religiosa?*

<sup>58</sup> Grondona, *The New Revolution in Communications*.

<sup>59</sup> Suchocka, Poland: The case of religious freedom; see also the path-breaking work of Paolo Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 *American Journal of International Law* 38 (2003); and Demos, *Nomos and Globalization in The Governance of Globalization*, Malinvaud and Sabourin eds. Pontifical Academy of Social Sciences, *Acta* 9 (Vatican City: Pontificia Academia Scientiarum Socialium, 2004), 85.

# Homilies

# HOMILY

■ **H.E. MSGR. EGON KAPELLARI**

*Bishop of the Diocese of Graz-Seckau*

*Delegate of the Holy See to the Council of the Foundation of the PASS*

(John 21, 1-14)

Five days after the Feast of Easter a reading from the Gospel of John is used in the liturgy, which we have just heard. It tells about a meeting of seven disciples with the risen Christ at Lake Tiberias in Galilee. They had been fishermen when Jesus had met them on the shore of this lake some years ago. He had addressed them at their boats and their nets and told them that they ought to follow him and become fishers of men. For three years they had been students, disciples of Jesus, not always exemplary students. Now for a short time at least they had returned to the place where everything had begun together with the apostle Peter. Once again they were fishermen, once again they cast their nets, without any success at first and then also a second time at the word of the risen Christ, who had come into their midst like a stranger. This time the net was filled to the brim with one hundred and fifty-three large fish.

Peter and the other disciples did not stay in Galilee. As a fisher of men Peter wandered to the west and to Rome eventually. It is here, on the Vatican Hill, that his life dramatically drew to an end on a cross. And it is here that his two hundred and sixty-four successors up to now fulfilled their office. Many of them were martyrs like Peter, many were exemplary Christians and are therefore venerated as saintly or blessed Christians by the Church. More than a few others were sinners but the foundations of the papacy were stronger than any crisis. The day after tomorrow, on the Sunday after Easter, the two hundred and sixty-third successor of Saint Peter as Bishop of Rome will be received into the communion of the blessed and holy men and women of the Catholic Church. All of us have known him and some of us were able to meet him in person.

In the long list of popes there were two holy men so far on whom the attribute “the Great” was conferred by the *sensus fidelium* and by the Church’s historians. These are Pope Leo the Great and Pope Gregory the Great. As early as six years after his death, for many people Pope John Paul II appears to be such an exceptional figure within the Church and within humanity that they want to place him alongside of these two great popes

from the fourth and the sixth century. Ultimately this is not so important, because regardless of this special appreciation John Paul II was and remains a figure of eminent historical importance for the whole world. He was a fingerpost who consistently pointed to Christ and to the human person, especially the person in need and in danger. In him fatherhood and brotherhood were united in a way that let him capture the devotion of countless people, particularly young people. His commitment to human rights and human dignity reached beyond those limits that a post-Christian humanism normally does not want to transcend. This is demonstrated in a special way by his opposition to abortion, euthanasia and sexual promiscuity. He was criticized by many for it, yet the same people admired his commitment to world peace, social justice, Christian ecumenism and peace among world religions. The Pope also was an exemplary advocate for the freedom of religion on a global scale. What he has said and done in this regard will also inspire this year's plenary session of the Pontifical Academy of Social Sciences. At his funeral in Rome the highest representatives of world politics, world religions and the Christian churches and communities took part together with millions of people of all ages, particularly countless youths. On top of the Pope's plain casket made from cedar wood there was a small Book of Gospels. A recurring wind turned its pages. Finally, a strong gust raised the right side of the book, let it fall on the other part and thereby closed it. To many this appeared to be a symbol for God's final Amen as a seal on a long life of relentless commitment to the preaching of the Gospel.

To summarize: This pope, the two hundred and sixty-third Bishop of Rome, who walked in the shoes of the fisherman Simon Peter, was an authentic Christian, deeply filled with the Holy Spirit. He will remain an inspiring example for the Church and for all of us and he will be an intercessor for us before God.

*Translation by Kurt Remele*

# HOMILY

■ MAURO CARDINAL PIACENZA

*Prefect of the Congregation for the Clergy in the Roman Curia*

Praise be Jesus Christ!

Dear Brother Bishops and Priests,  
Distinguished Professors, Ladies and Gentlemen,

We are in the Solemnity of the Resurrection of the Lord that spiritually extends to each day of the Easter Octave. In Christ's Resurrection all the cosmic realities are summarised and the entire story of humanity is recapitulated and definitively attracted Toward God, the God, who so loves us that He became a poor creature, by sharing our existence He took upon Himself our sins and destroyed them on the cross. Now, the Risen One is before us, *'full of grace and truth'* (Jn 1:14) showing us the signs of His love.

There are numerous insights that The Divine Liturgy offers us today whilst you celebrate the Twelfth Plenary Session of the Pontifical Academy. Let us ponder two of them.

Firstly, the philosophical and legal category of 'religious freedom', which is the theme of this session, is highly relevant both in light of the movements that cross the populations of the African and Asian continents and with regard to the urgency for the West to rediscover their proper religious and historical-cultural identity. Religious freedom, if correctly understood, offers the road towards, and in a certain sense to recuperate, the widening of the boundaries of reason so desired by the Papal Magisterium in recent years.

In religious freedom, which is founded on man's natural openness to dialogue with a personal God, we find both the absolute foundation of human dignity, which is too often deliberately celebrated, going so far as to arrive at the relativistic extreme, and the nucleus of that authentic rapport with reality that is expressed in the innate questions of purpose, goodness, beauty, and ultimately self fulfilment.

As we have just heard proclaimed in the first reading, the liturgy providentially offers us a formidable synthesis of the concept of religious freedom. *'You must judge whether in God's eyes it is right to listen to you and not to God. We cannot stop proclaiming what we have seen and heard'* (Acts 4:19-20). This response from the Apostles, Peter and John, to the prohibition by the authority of the Sanhedrin to speak and preach in Jesus' name, brings with it a significant number of elements.

In the first place it indicates a clear horizon of reference: *'before God'*.

Religious freedom is not founded solely upon freedom of conscience, but on the contrary, freedom of conscience arises from religious freedom! This directs the conscience to the comparison with reality, considering that man is totally inserted, along with each of his brothers, in the cosmos of space and time and therefore he is constantly in the presence of the One from whom reality itself was created. Man is the summit of that reality, and in it he recognises the eloquent signs of God.

It is not by virtue of the recognition of a generic and widespread spiritual practice that the legal recognition of religious freedom is based. Rather, it is in the clear affirmation of the existence of God to whom, either directly or indirectly, every authentic human movement turns.

In our text the right dimension of authoritative rule is reinstated: *'Whether it is right [...] to listen to you rather than to God'* (Acts 4:19). In fact, authority can not ever put itself in competition with the Absolute, claiming to draw from itself its own *raison d'être* and arbitrarily deciding its own criteria for action. Always, instead, it finds its proper origin and goal in the service of the human person and through political-social action that is directed to the participation in works of divine love, as is the case of the authority of the Holy Father and the ecclesial hierarchy.

This authoritative service, in so far as it belongs with its nature, will firmly play its proper role where it positively guarantees the exercise of religious freedom. It is directly expressed through the recognition of the necessary range of public experience and indirectly expressed through the promotion of life, of the family, of education and of scientific research.

In third place, the Apostles make a universal appeal to the very essence of human reason, *'Whether it is right [...] you must judge'* (Acts 4:19).

The authentic dimension of human reasonableness and its true universality are not, in fact, the recent effects of the Enlightenment. Rather, they remain founded on the certainty that all men are constitutively open to the intelligent search for the truth, good and beauty. And that man is capable of considering the rights of his own existence and that of the others in relation to He who has 'cast' him into existence and He who providentially guides him in life's adventure.

In the end, the very essence of the Christian experience emerges, *'for we cannot but speak of what we have seen and heard.'*

It is by no accident that religious freedom historically was established within the ambit of Judeo-Christian Salvation history. In fact, these two peoples are the only ones who are able to say, *'For what great nation is there that has a god so near to it as the LORD our God is to us, whenever we call upon him?'* (Dt



4:7) God's unprecedented closeness to His people was manifested firstly in the story of Israel which cumulated in the person of Jesus of Nazareth, the One who '*the whole fullness of deity dwells*' (Col 2:9). From Christ's presence Christians of every age have been animated to talk about what they have seen and heard. As the Holy Father has taught us in his first encyclical, '*Being Christian is...the encounter with an event, a person, which gives life a new horizon and a decisive direction*' (cfr. Benedict XVI, *Deus caritas est*, n. 1).

For Christians, the real exercise of religious liberty coincides with the fidelity to the '*Christian fact*'. It is from this fact that, especially when authorities assume rights that don't pertain to them, the Christian receives renewed strength and certainty before every power and authority.

Religious freedom is also a guarantee with respect to the secular ambit of scientific research and for its own natural autonomy.

Through divine Revelation we are not permitted to infer any of the physical laws of the cosmos, but we are permitted to receive a far lasting and greater contribution which is the real presence of Him through whom all things were made (cfr *Jn* 1:3). That intimate union, which was sacramentally donated to us on the day of our Baptism, and is renewed in the real meeting with the Lord Jesus in the Eucharist, the Word of truth and the mercy of Confession, introduces us in a new way to the confrontation with reality.

We know that to rely on the human capacity for knowledge, we are able to understand the many hidden secrets of reality and we surprise ourselves how the ultimate boundaries of existence are not the finiteness of the matter, but the Infinite Mystery to which it refers. The Christian knows that this very reality, investigated by reason, was consigned to our knowledge by He who loves us. Now, through His incarnation, death and resurrection He lives, in every instant, in a fully human way. This knowledge can only animate a new and decisive positivity in all our research work.

Here, by grace, the Eucharistic Lord Jesus was given to us so that we can contemplate, at a glance, the '*whole reality*' to which the whole world looks and aspires. Here the decisive antidote was given to us. Let us benefit from God's infinite condescension and let us escape, with resoluteness, the unique thing that the Lord could rebuke us for: the incredulity and hardness of heart before all the signs of His presence in the world. Let us look in this way at Christ, Present in the Holy Eucharist, to heaven that is made present here in the midst of us on earth and to the luminous icon of the Blessed Virgin Mary so that we can say with renewed understanding with Tertullian: '*Great is the emperor, because he is smaller than the heavens!*'

# OMELIA

## ■ CARDINAL GIOVANNI BATTISTA RE

*Prefect emeritus of the Congregation for Bishops*

*and President emeritus of the Pontifical Commission for Latin America*

Per tutti noi è stato motivo di intima gioia partecipare ieri alla beatificazione del Papa Giovanni Paolo II ed è felice coincidenza che tale cerimonia abbia avuto luogo proprio in questi giorni della Sessione Plenaria della Pontificia Accademia delle Scienze Sociali.

Perché una folla grande, proveniente da ogni parte della terra fra cui molti giovani, ha voluto essere presente in Piazza San Pietro? Perché tanti hanno seguito l'evento alla televisione? Perché 5 milioni di persone si sono collegate in quel giorno con il sito vaticano in Internet riguardante il nuovo beato e 13 milioni nel giro di un paio di settimane?

Le ragioni sono molte. Ha avuto peso la sua grande carica umana, che gli ha permesso di entrare nel cuore della gente come un amico e un padre. Ma vi è una ragione più profonda: cioè il fatto che Papa Giovanni Paolo II era un uomo totalmente immerso in Dio. Il motivo della sua incisività e del suo fascino va trovato nel fatto che era un vero uomo di Dio, radicato nella certezza che Cristo sta al centro della vita, dell'intero creato e della storia.

La Divina Provvidenza mi ha concesso la gioia e il privilegio di essere vicino al Papa Giovanni Paolo II dall'inizio del suo pontificato fino alla fine. Vivendo vicino a lui, molte erano le cose che colpivano, però la cosa che mi ha impressionato di più è stata l'intensità della sua preghiera. Una preghiera profonda e intimamente personale, e in pari tempo legata alle tradizioni e alla pietà della Chiesa.

Attrava l'attenzione il modo in cui egli si abbandonava alla preghiera: si notava in lui un trasporto che gli era connaturale e che lo assorbiva come se non avesse impegni urgenti che lo chiamassero alla vita attiva. Il suo atteggiamento nella preghiera era raccolto e, in pari tempo, naturale e sciolto: testimonianza, questa, di una comunione con Dio intensamente radicata nel suo animo; espressione di una preghiera convinta, gustata, vissuta.

Egli si preparava ai vari incontri, che avrebbe avuto in giornata o nella settimana, pregando. Prima di ogni decisione importante Giovanni Paolo II vi pregava sopra a lungo. Più importante era la decisione, più prolungata era la preghiera. Il mondo lo ha ammirato perché è stato un grande uomo di azione, caratterizzato da uno straordinario dinamismo, ma egli era innanzitutto un uomo di preghiera.

La prima e fondamentale caratteristica del suo Pontificato è stata religiosa. Intatti, il movente di tutto il Pontificato, il motivo ispiratore di tutte le iniziative intraprese fu religioso: tutti gli sforzi del Papa miravano a fare rientrare Dio da protagonista in questo mondo e ad avvicinare gli uomini a Dio. Col dinamismo che gli era proprio, lavorò perché a Dio fosse riconosciuto il diritto di cittadinanza in questo mondo.

Egli era anche un sostenitore di un ruolo attivo della fede cattolica nella vita pubblica, a servizio del bene comune.

Il vibrante appello pronunciato nella prima celebrazione in Piazza San Pietro: “Non abbiate paura! Aprite le porte a Cristo!”, esprime bene la linea ispiratrice di tutto il suo pontificato.

In breve, possiamo dire che Papa Giovanni Paolo II è stato grande come uomo, grande come Papa e grande come santo.

*Grande come uomo*: aveva una straordinaria ricchezza di umanità. Aveva profondità di pensiero, con un impianto filosofico e, in pari tempo, era un mistico che aveva dentro di sé una forte tensione spirituale; un mistico che era molto attento alle persone e alle loro vicende e inquietudini.

Egli è stato profondamente inserito nella storia del suo tempo ed ha saputo influire da protagonista sul corso degli eventi, incidendo nella storia.

Aveva anche una straordinaria capacità di apprezzare e godere le bellezze della natura, dell’arte, della letteratura, del calore dell’amicizia, delle conquiste umane.

*Un grande Papa*: è il primo Papa che ha fatto il giro del mondo, percorrendo più chilometri degli altri Papi messi insieme. Nessuno ha incontrato tante persone come lui. Ovunque è stato un grande seminatore di speranza. E il primo Papa che è entrato in una Sinagoga. Il primo Papa che ha visitato una moschea. Un Papa che ha saputo compiere il suo ministero visitando e incoraggiando le comunità cristiane sparse nei cinque continenti. È stato il leader morale più conosciuto, più visto e più amato dei nostri tempi. Un comunicatore nato, che ha realizzato una infinità di cose ed ha aperto vasti orizzonti davanti al cammino della Chiesa.

Il giornalista Gian Franco Svidercoschi, con espressione audace, ha scritto che Giovanni Paolo II “ha accorciato la distanza fra il cielo e la terra”, nel senso che ha fatto molto per aiutare gli uomini e le donne di questo mondo ad avvicinarsi a Dio.

*Un grande santo*: fu un gigante di Dio. Per lui Dio non era un concetto astratto, ma il Padre che ci ama e il Creatore di quanto esiste. Il grido nato tra la folla ai suoi funerali: “santo subito”, manifestò la convinzione che c’è nel cuore di molte persone. Aveva fama di santità per la sua alta spiritualità

e perché in lui vi era una perfetta coerenza fra ciò che diceva e ciò che pensava; ciò che appariva e ciò che era.

Giovanni Paolo II è stato un protagonista di portata storica e appartiene ai giganti della storia. Ha dato al cristianesimo un orientamento verso il futuro ed ha aiutato i cristiani a non aver timore a dirsi cristiani. A tutti ha indicato la via della verità e dei valori morali e spirituali, come unica strada che può assicurare un futuro più umano, più giusto e più pacifico.

# Tables

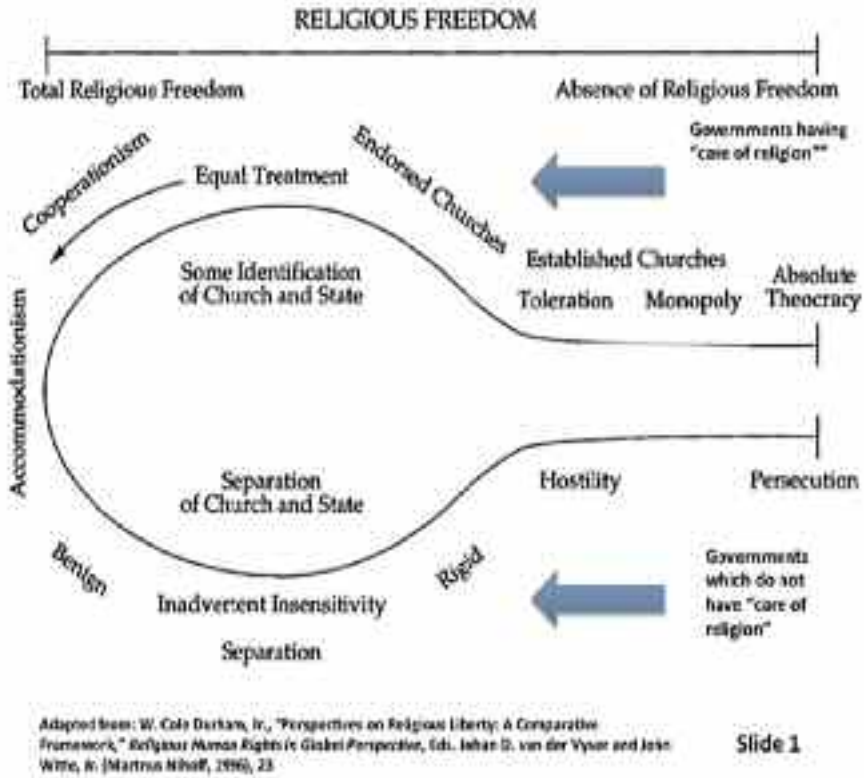


Figure 1.

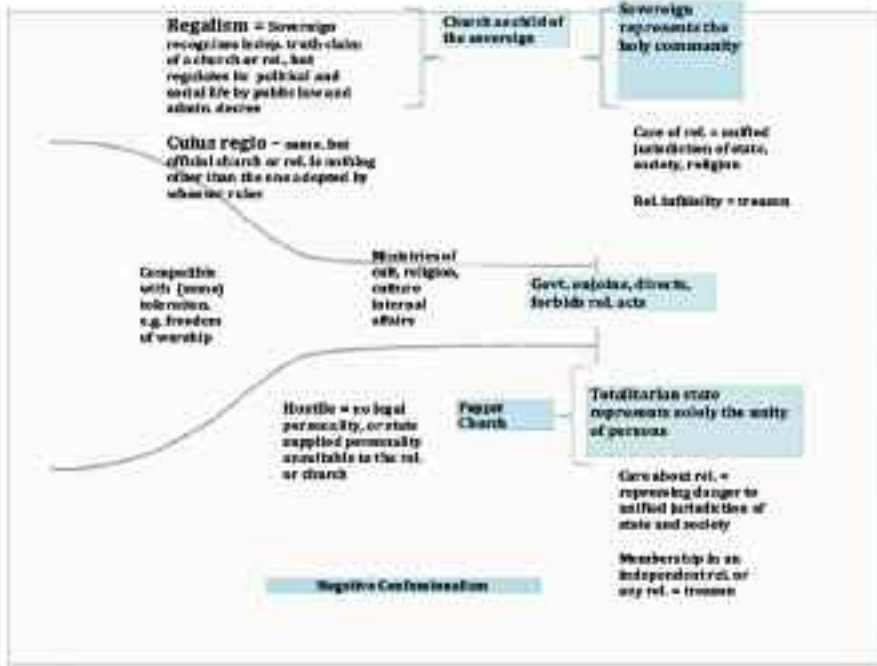
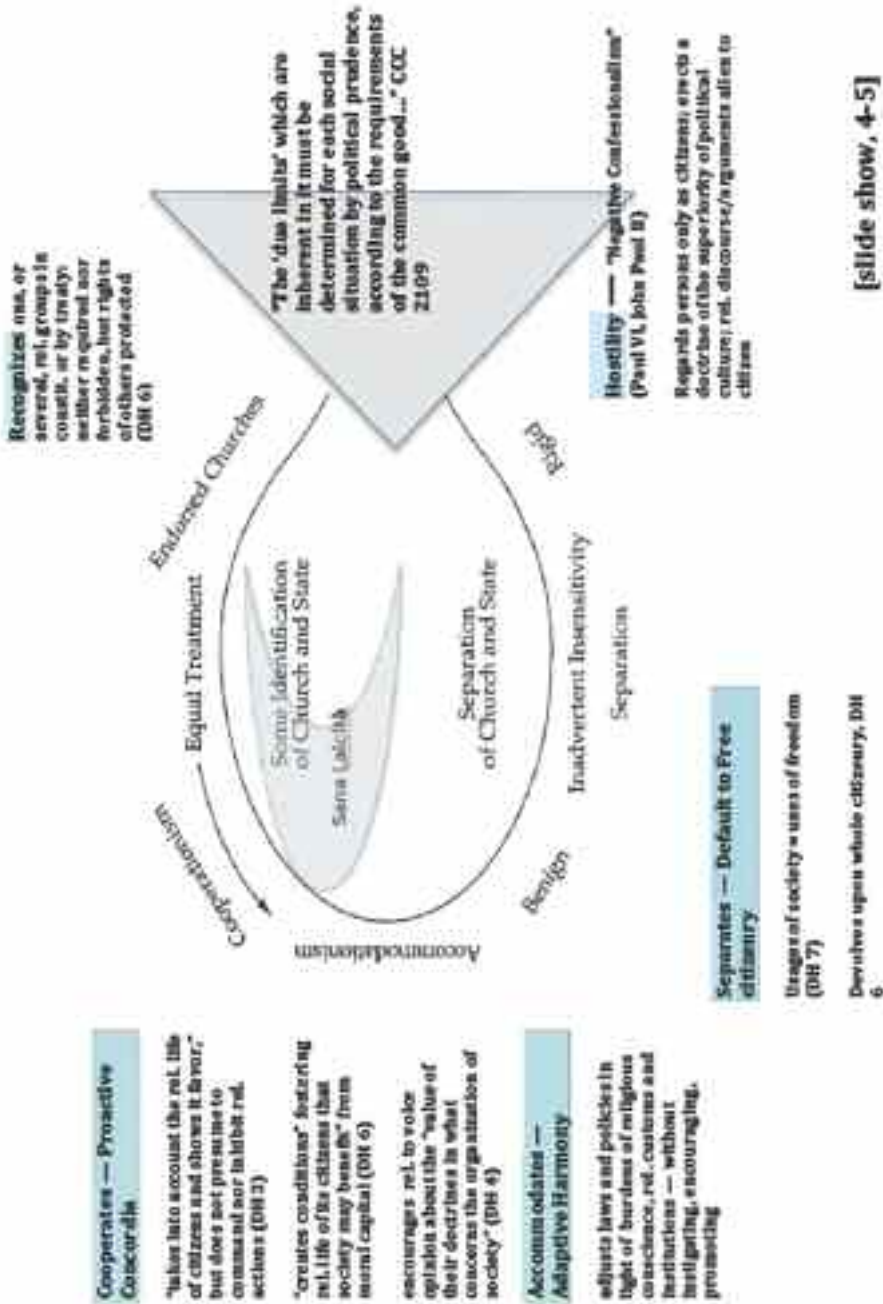


Figure 2.

RIGHTS	Regalium Causa regis	Limits on human power
Right inheres in all persons by virtue of the duty to pursue and adhere to truth, DH 2		Divine law: Constitution and mission of the Church, DH 13
Right is not a forbearance or toleration, DH 2-3		Divine and natural law: Non-coercive means of evangelization, DH 4, 12
Right protected in constitution, not by mere administrative decrees, DH 1-2, 13, 15		Natural law: No merely human power can command or prohibit internal acts of conscience
Right of the family to its domestic religious life, and choice of rel. education, DH 5		Natural law: External rel. acts curtailed only according to the objective moral order in view of the common good, DH 7
Right includes social liberation, not just private worship, DH 15		Natural law: Freedom of Church having the same rights as other societies, DH 4, 13
Right to make religious-based proposals for what concerns the organization of society, DH 4	Puppet Church	
	Inroads = Denial of legal personality, or state supplied personality amenable to the rel. or church; forbid rel. arguments in what concerns society	

Figure 3.





[slide show, 4-5]

Figure 4.

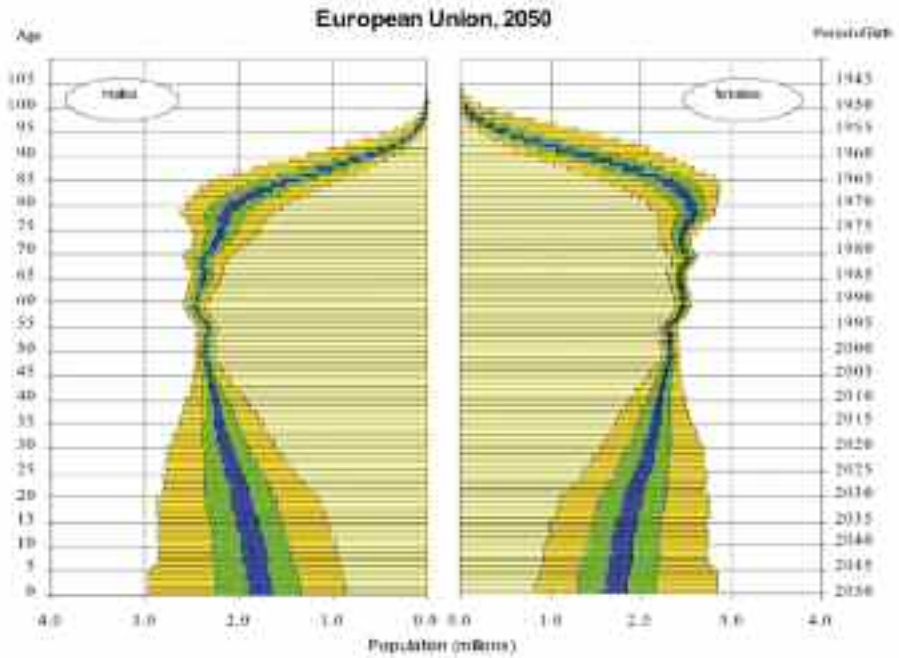


Figure 1. Probabilistic population pyramid for the European Union (EU-27) in 2050. The orange area gives the 95 percent uncertainty range, the green the inner 60 percent and the blue the inner 20 percent range. Source: Lutz *et al.* (2008a).

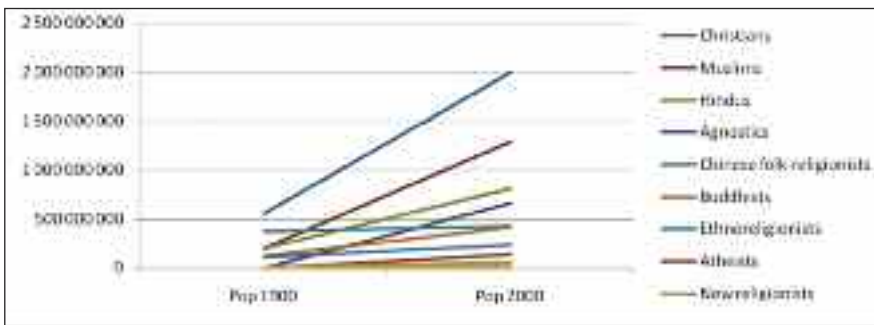


Figure 2. Religious change and estimates, 1900-2000. Source: Barrett *et al.* (2001).

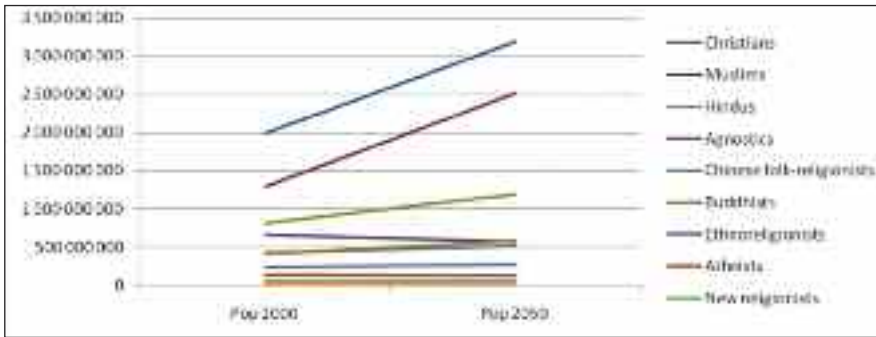


Figure 3. Projections of main religions, 2000-2050. Source: Barrett *et al.* (2001).

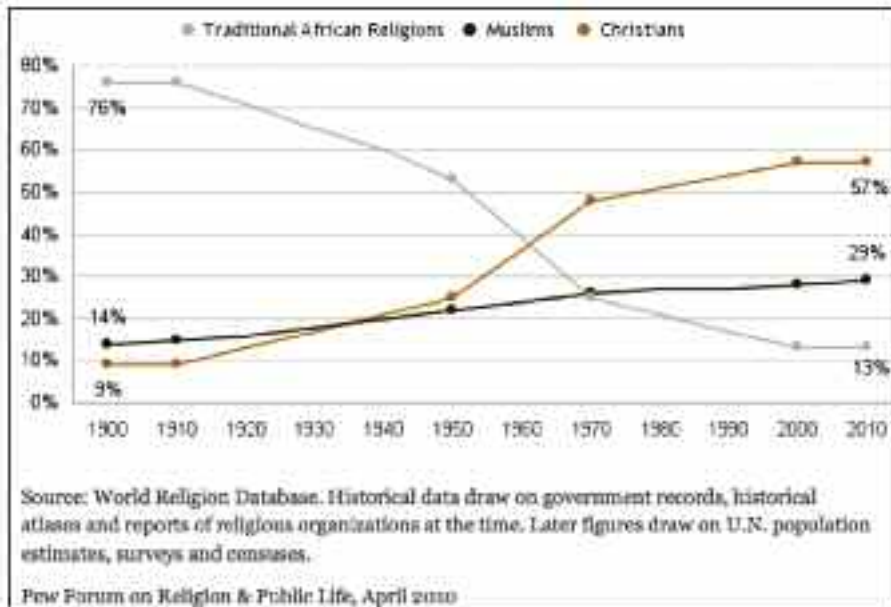


Figure 4. Growth of Islam and Christianity in Sub-Saharan Africa since 1900. Source: Johnson and Grim (2008). Historical data draw on government records, historical atlases and reports of religious organizations at the time. Later figures draw on U.N. population estimates, surveys and censuses.

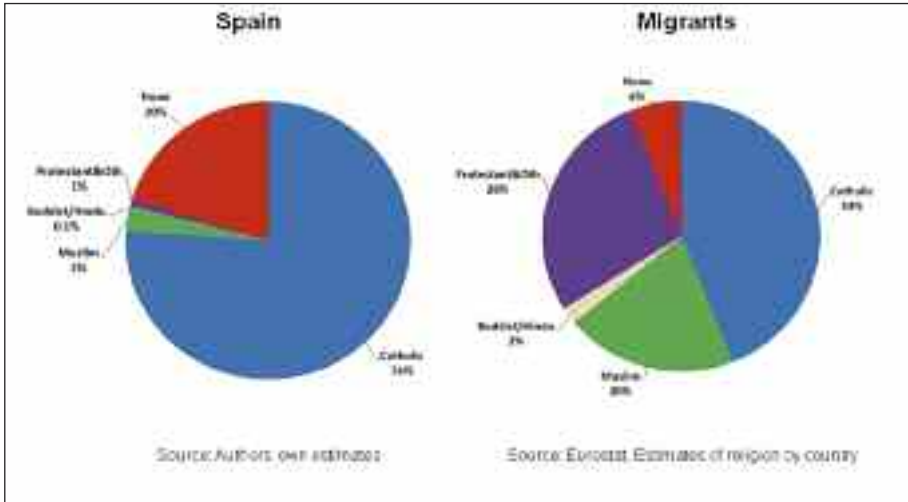


Figure 5. Religious composition of natives and immigrants, 2004. Source for Spain: Authors' estimates. Source for migrants: Eurostat, estimates of religion by country.

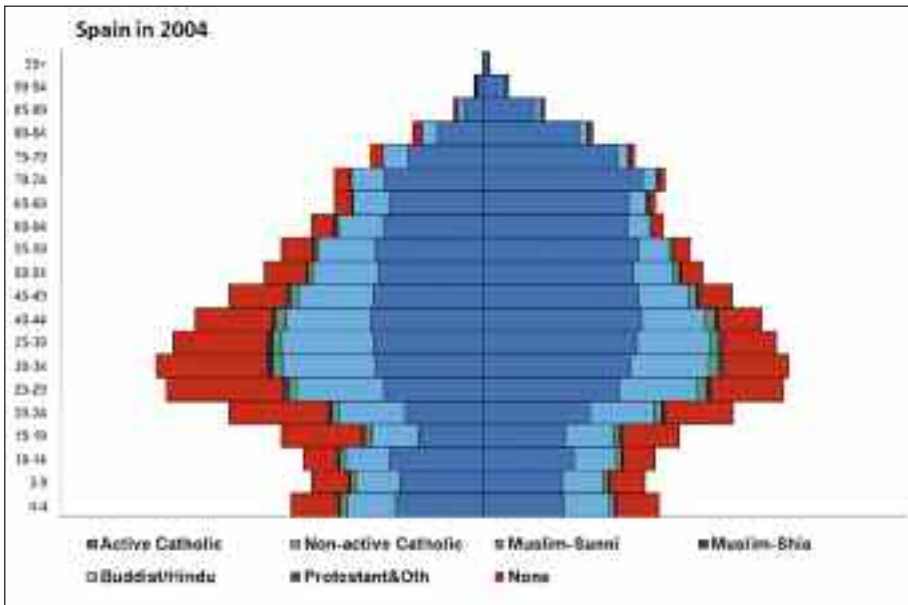


Figure 6. Estimated religious composition by age and gender, Spain, 2004. Source: Authors' estimates.

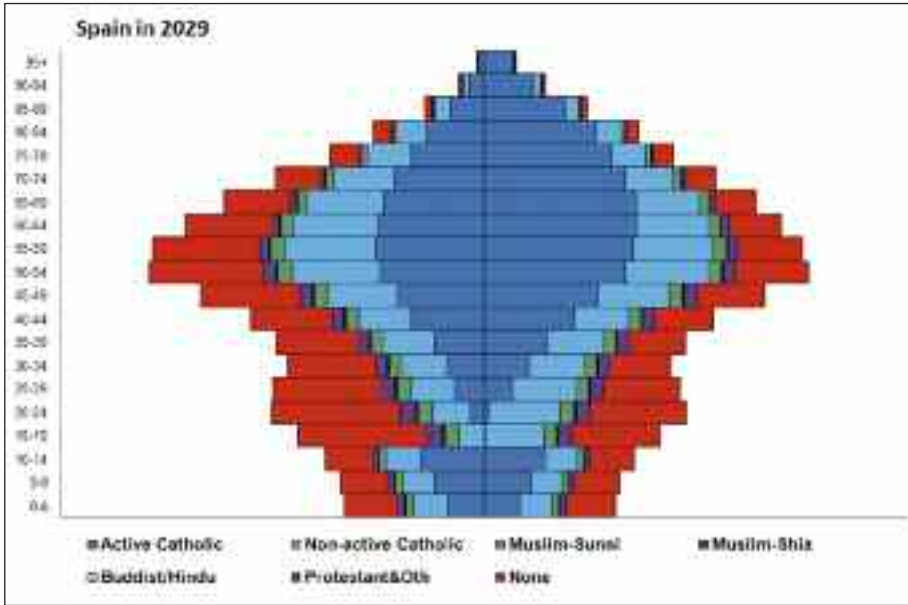


Figure 7. Projected religious composition by age and gender, Spain, 2029. Source: Authors' estimates.

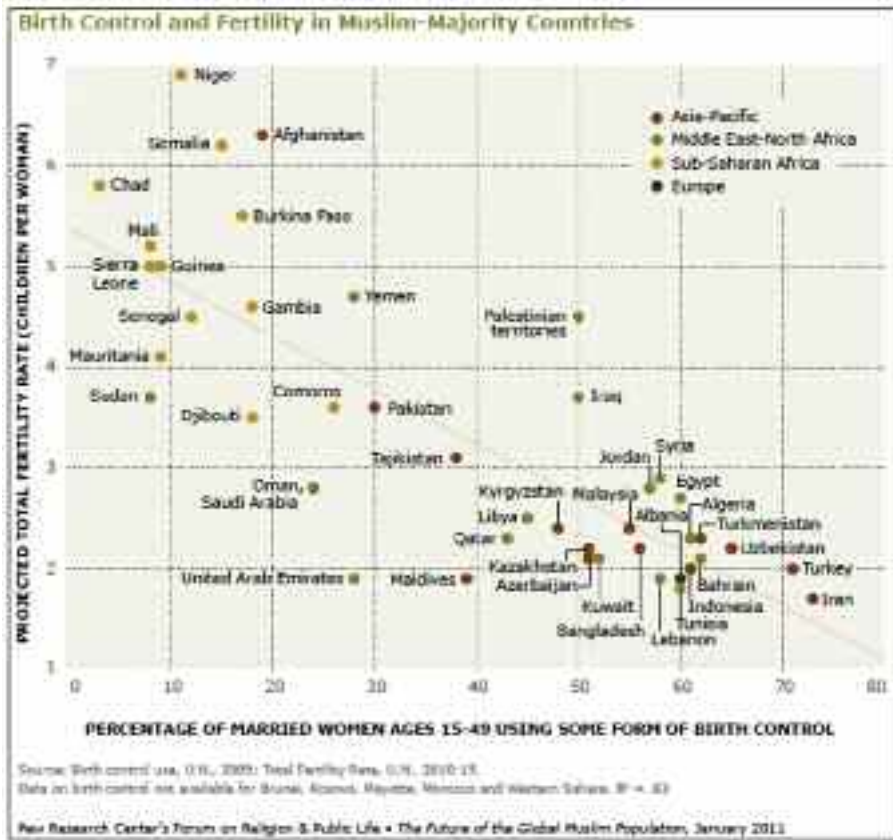


Figure 11. Relationship between female education and level of fertility for countries with Muslim majorities. Sources: Pew Forum on Religion and Public Life (2011); birth control use: UN (2009). Total Fertility Rate projected for period 2010-15. Data on birth control not available for Brunei, Kosovo, Mayotte, Morocco and Western Sahara.  $R^2 = 0.63$ .

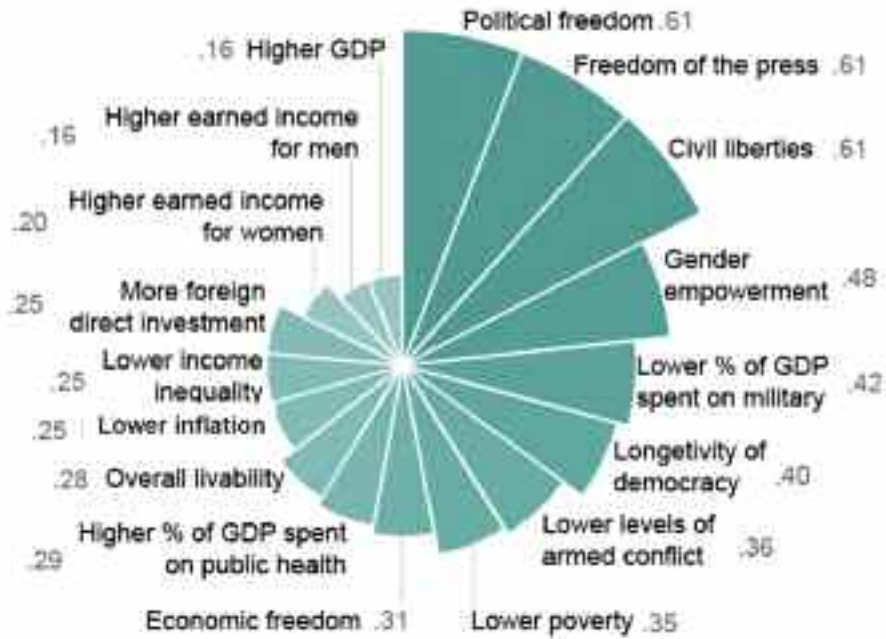
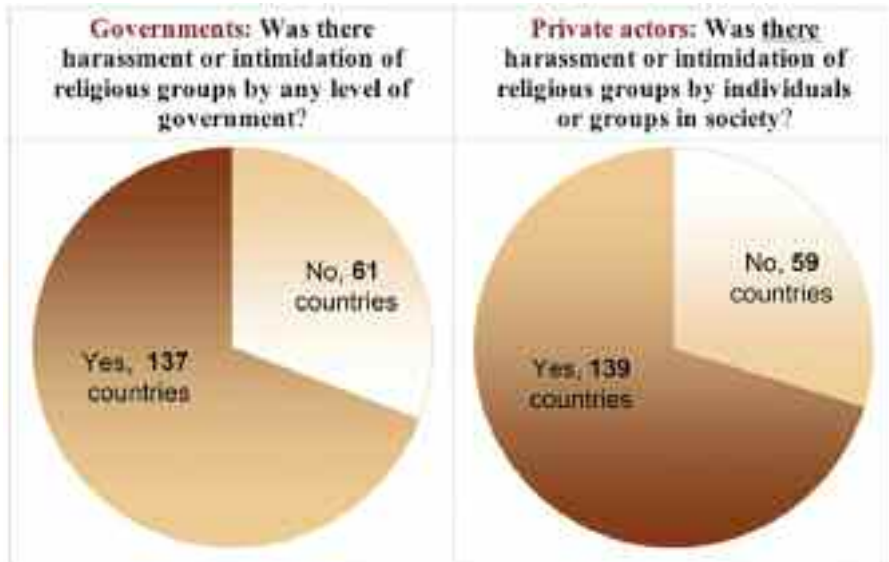


Chart 1. Correlation of religious freedom with other freedoms and well-being within countries. Brian J. Grim and Roger Finke, *The Price of Freedom Denied*, Chapter 7. All correlations are statistically significant, with the larger the area and number, the stronger the direct correlation.



**Chart 2.** Presence of Harassment or Intimidation of Religious Groups in Countries, by Governments and Private Actors. Governments: Was there harassment or intimidation of religious groups by any level of government? Private actors: Was there harassment or intimidation of religious groups by individuals or groups in society? Source: Pew Forum on Religion and Public Life, *Global Restrictions on Religion*, December 2009.



<b>Government Restrictions</b>	<b>Social Hostilities</b>
<b>Very High</b> <i>Top 5% of scores</i>	<b>Very High</b> <i>Top 5% of scores</i>
SCORES FROM 6.7 TO 8.4	SCORES FROM 6.8 TO 9.4
Saudi Arabia	Iraq
Iran	India
Uzbekistan	Pakistan
China	Afghanistan
Egypt	Indonesia
Burma (Myanmar)	Bangladesh
Maldives	Somalia
Eritrea	Israel
Malaysia	Sri Lanka
Brunei	Sudan
	Saudi Arabia

Chart 3. Ranking of Countries with Top 5% Government Restrictions and Social Hostilities Scores. Source: Pew Forum on Religion and Public Life, *Global Restrictions on Religion*, December 2009.

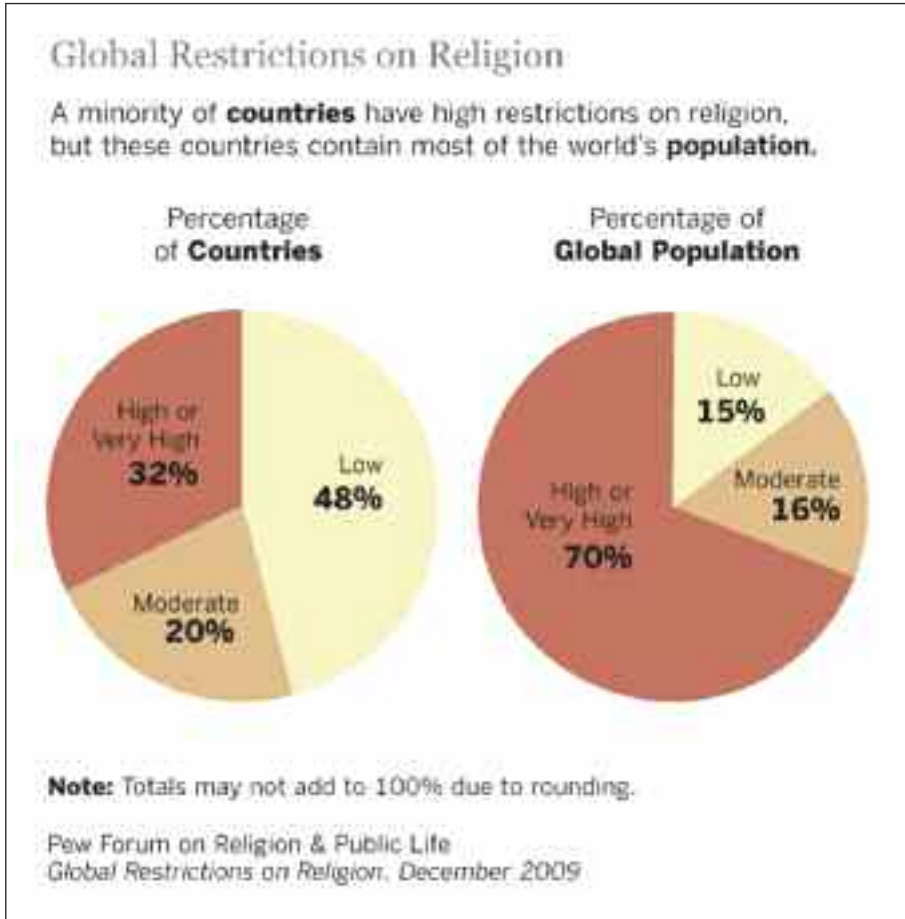
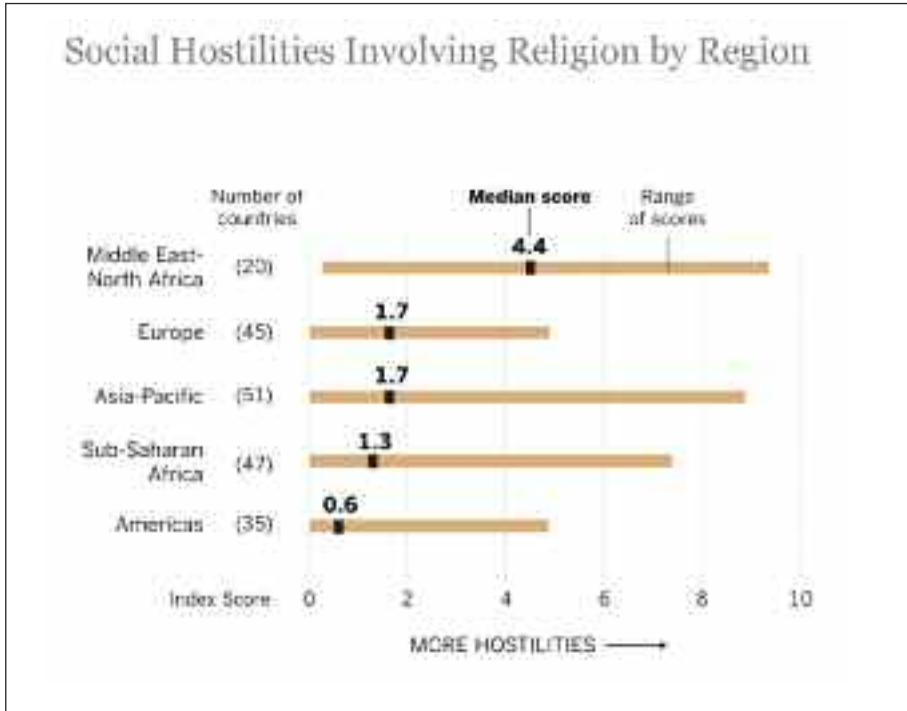


Chart 4. Global Restrictions on Religion.



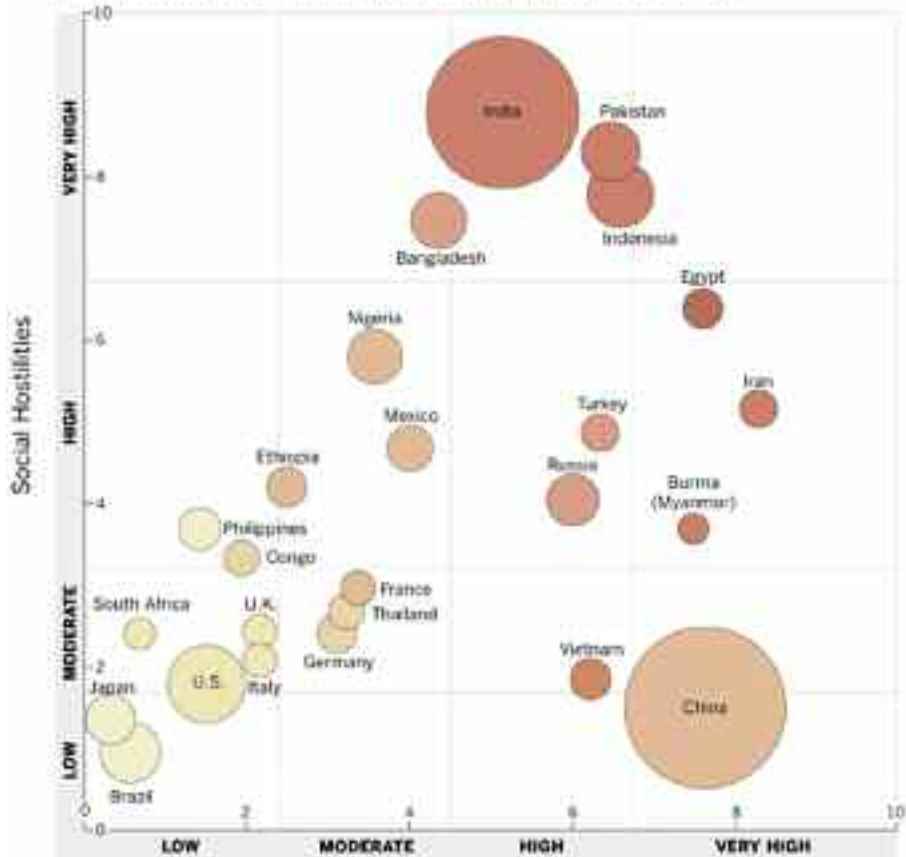
**Chart 5.** Government Restrictions on Religion, by Region. Source: Pew Forum on Religion and Public Life, *Global Restrictions on Religion*, December 2009.



**Chart 6.** Social Hostilities Involving Religion, by Region. Source: Pew Forum on Religion and Public Life, *Global Restrictions on Religion*, December 2009.

### Religious Restrictions in the 25 Most Populous Countries

This chart shows how the world's 25 most populous countries score in terms of both government restrictions on religion and social hostilities involving religion. Countries in the upper right have the most restrictions and hostilities. Countries in the lower left have the least.



**Notes:** The Pew Forum categorized the levels of government restrictions and social hostilities involving religion by percentiles. Countries with scores in the top 5% on each index were categorized as "very high." The next highest 15% of scores were categorized as "high," and the following 25% were categorized as "moderate." The bottom 55% of scores were categorized as "low."

**Circles are sized proportionally to each country's population size:**

- 1 billion
- 500 million
- 100 million
- 50 million

**Colors are based on each country's position on the chart:**

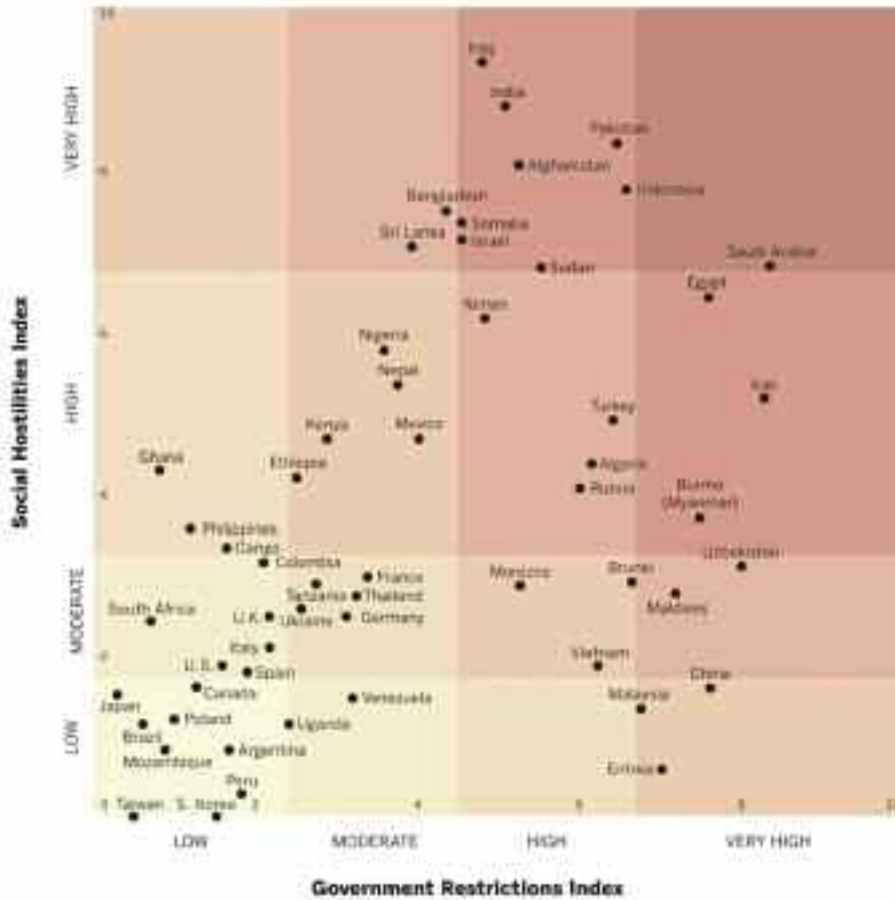
↑ MORE HOSTILITIES  
→ MORE RESTRICTIONS

Pew Forum on Religion & Public Life • Global Restrictions on Religion, December 2009

Chart 7. Religious Restrictions in 25 Most Populous Countries.

## Religious Restrictions in the 50 Most Populous Countries

This chart shows how the world's 50 most populous countries and selected others score in terms of both government restrictions on religion and social hostilities involving religion. Countries in the upper right have the most restrictions and hostilities. Countries in the lower left have the least.



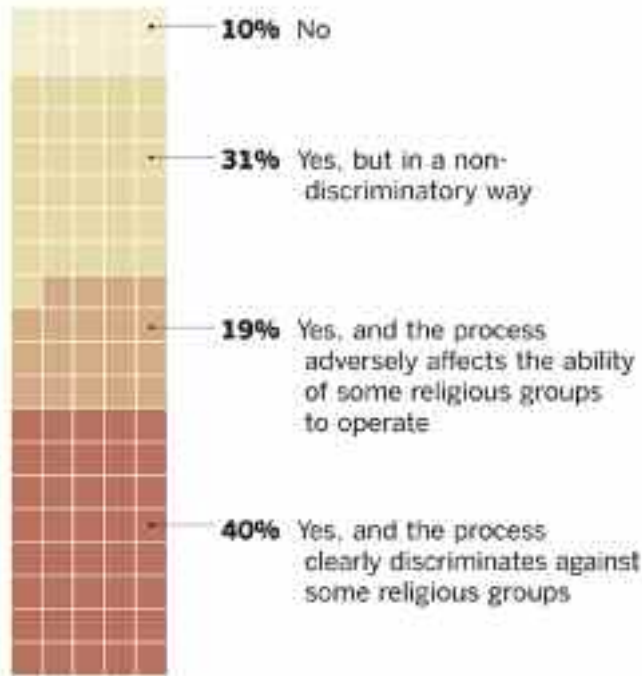
**Note:** The Pew Forum categorized the levels of government restrictions and social hostilities involving religion by percentages. Countries with scores in the top 5% on each index were categorized as "very high." The next highest 15% of scores were categorized as "high," and the following 20% were categorized as "moderate." The bottom 60% of scores were categorized as "low."

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Chart 8. Religious Restrictions in 50 Most Populous Countries.

## Registration Requirements

*Does any level of government ask religious groups to register for any reason, including to be eligible for benefits such as tax exemption?*



GRI.Q.18

Pew Forum on Religion & Public Life

*Global Restrictions on Religion, December 2009*

Chart 9. Registration Requirements for Religious Groups.

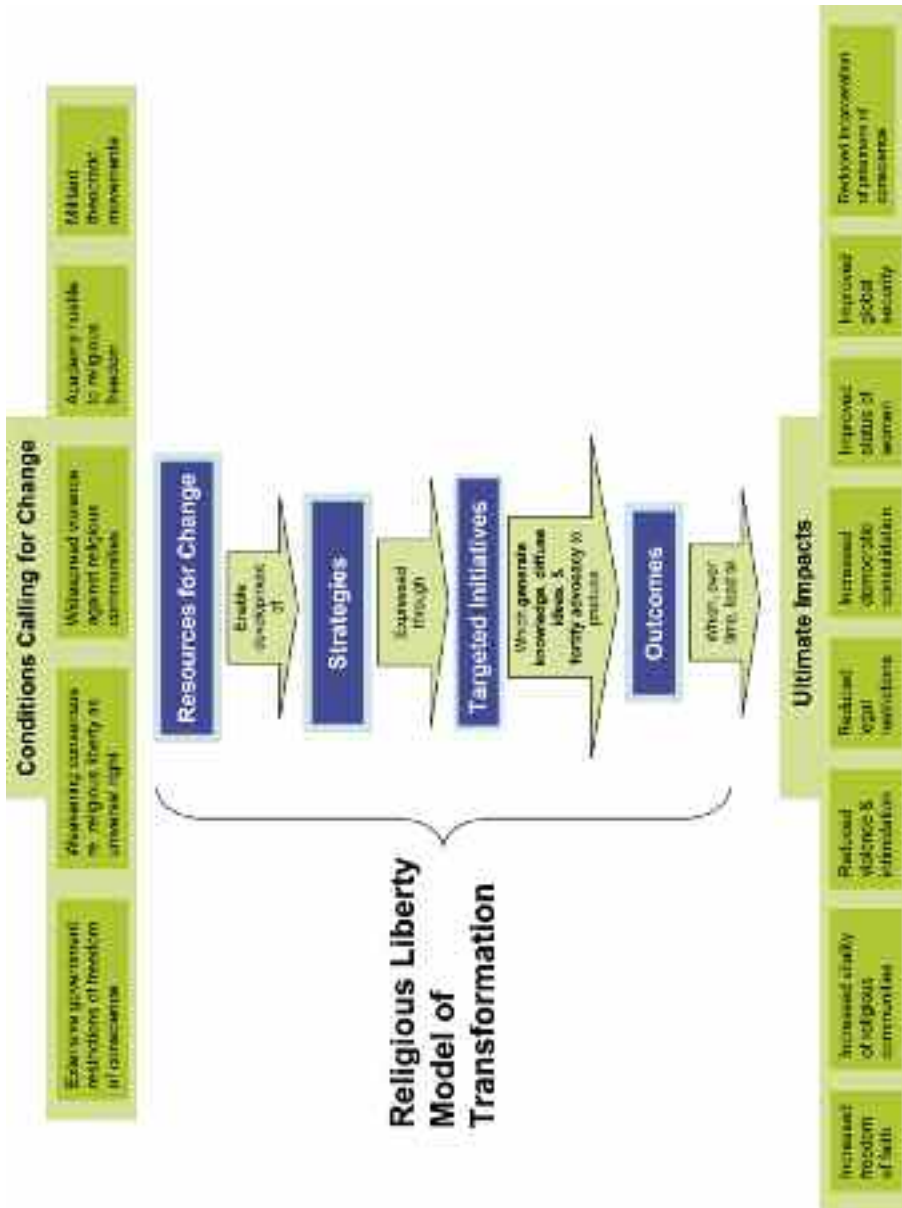


Diagram 1.



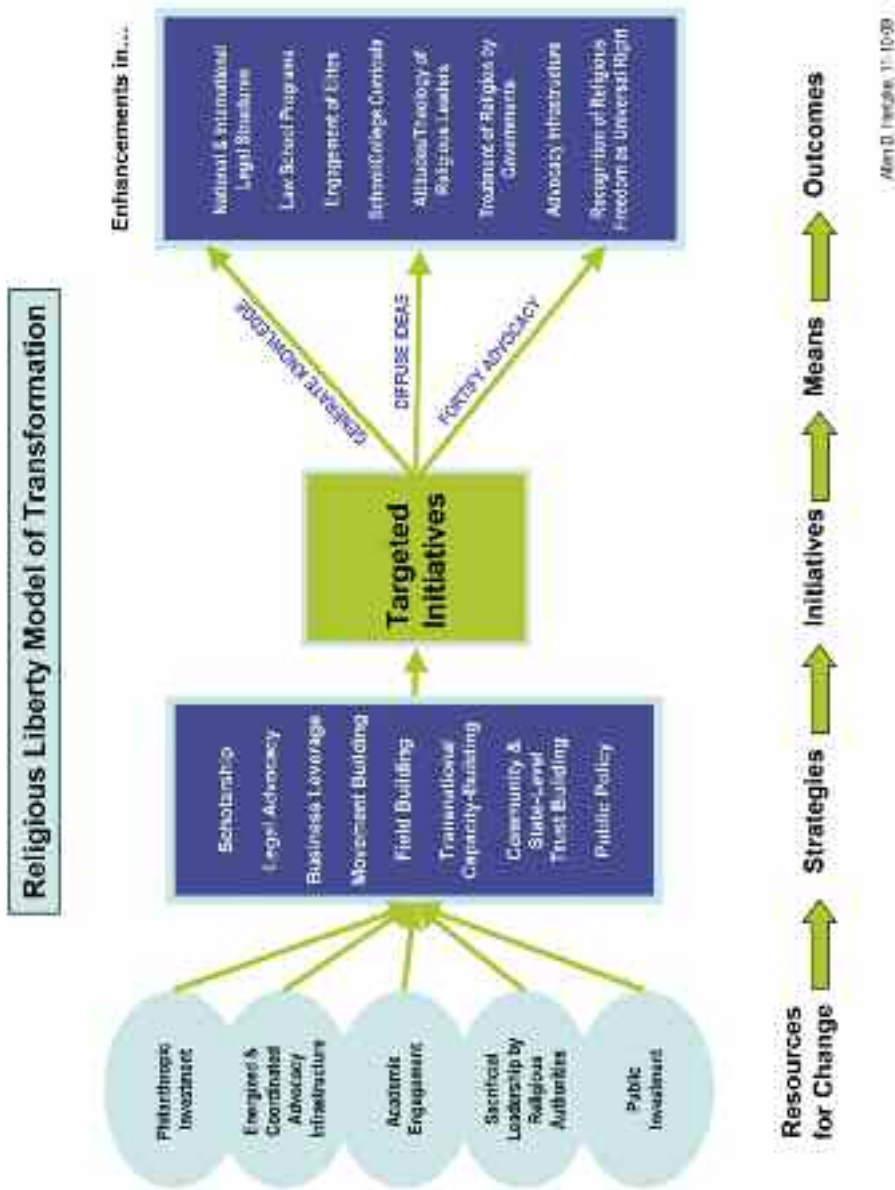


Diagram 2.

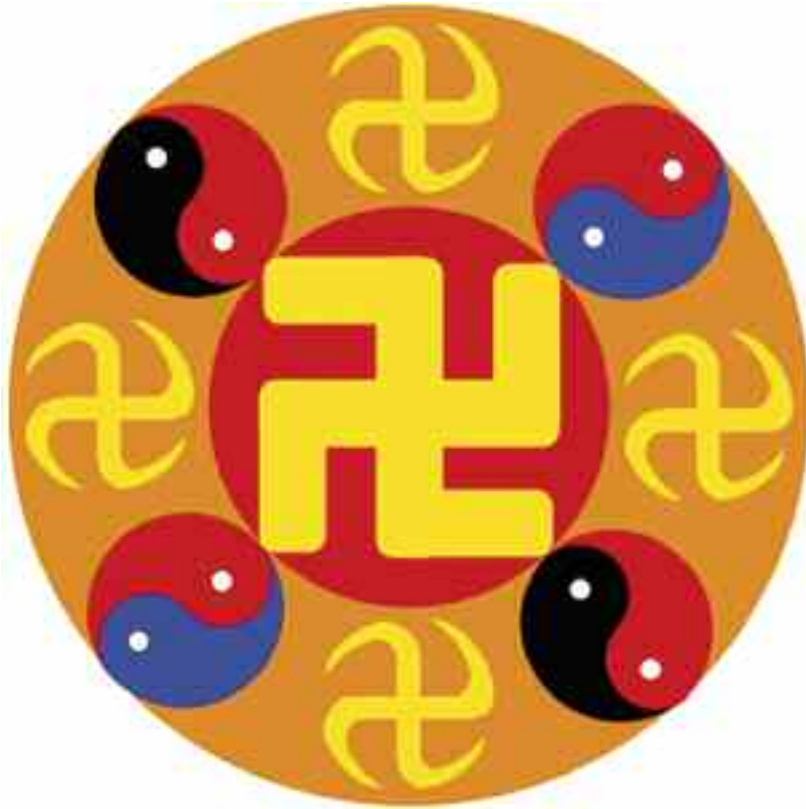


Figure 1. Falun Gong – The confrontational approach.



Figure 2. China's Jerusalem (Wenzhou) – The engagement approach.



Figure 3. Shaolin Monastery — The *kung fu* economy approach.