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**Religions, secularity and democracy in Europe: for a new Kelsenian pact**

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## *Religions, secularity and democracy in Europe: for a new Kelsenian pact<sup>1</sup>*

### **0. Europe: a dangerous “quiet”?**

The conflicts in the Balkans and in Northern Ireland have not taken away Europe’s reputation for being a “quiet continent”<sup>2</sup>. Compared to the “wars of religion” that still bathe other hemispheres in blood, the relations between politics and religion in Europe do indeed reflect the image of a substantially peaceful continent. This “quietness” is often explained as the fruit of an exceptional quality. Indeed in a “furiously religious”<sup>3</sup> world the European continent would seem to be the only one where the model of secularisation as emancipation from religion and as indispensable vehicle of modernity may still be considered pertinent today. The luxury of being able to live “exceptionally quietly”, however, should not mean that Europeans can be overly relaxed about it. Besides, increasingly often, reference to the exceptional nature of the “old continent” is accompanied by unfavourable prophecies by those who fear that Europe – weakened as it is by the moral relativism that all lazy quietness ends up by provoking – will succumb to “absolute beliefs”: Fascism, Nazism, Communism yesterday, Islamism today. The lack of moral tension consequent to the “quiet secularisation” would therefore lead Europe to self-destruct its own system of liberal democracy. Faced with this danger, the authors of such prophecies do not hesitate to criticise some of the most important legacies of European institutional history such as the separation between law and morals; the essentially procedural idea of majority democracy<sup>4</sup>; the enjoyment of political and civil rights by means of a State that is not completely absorbed by the idea of Nation and, for that reason, capable of integrating thanks to the convergence of its institutional instruments rather than through assimilation into a not better definable “local tradition”.

Now a brief survey of the relations between democracy, secularity and religion in Europe can lead to the following observation: not only do the religions continue to conserve an important political role but, above all, this role depends precisely on the features of European constitutionalism that have just been mentioned.

### **1. Ex pluribus, unum: the convergence of the models**

The European models of relations between States and religious denominations have at their base two ideal-type dynamics: laicisation on the one hand and secularisation on the other.

The “laicisation” dynamic is typical of countries with a strong Roman Catholic presence. Here the antagonistic opposition between modernity and religion has pushed States to affirm their own independence, expelling the religious from the

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<sup>2</sup> See Colin Crouch, *The Quiet Continent: Religion and Politics in Europe*, in *Religion and Democracy*, ed. by David Marquand and Ronald L. Nettle, Blackwell Publishers, Oxford Malden, 2000, 90-103.

<sup>3</sup> Peter L. Berger, *The Desecularization of the World: A Global Overview*, in *The Desecularization of the World. Resurgent Religion and World Politics*, ed. by Peter L. Berger, Ethics and Public Policy Centre, Washington DC, 1999, 2 for whom « my point is that the assumption that we live in a secularized world is false. The world today... is as furiously religious as it ever was, and in some places more so than ever ».

<sup>4</sup> See Anna Pintore, *I diritti della democrazia*, Laterza, Bari-Roma, 2003, 16.

public sphere<sup>5</sup>. However, in this way the affirmation of the democratic principle in public life not only did not coincide with a democratization of the churches, but it caused the latter to perceive it as a hostile phenomenon, as the primary cause of their marginalisation. Instead in the States distinguished by the dynamics of secularisation, which are those with a Protestant majority, the churches became authentic public bodies - the national Churches. Consequently, in these countries democracy was able to take root both in the public sphere and in the religious one. Indeed it was the law of the State that directly imposed on the national Churches the provisions considered most consonant to the changing times<sup>6</sup>.

Today these two dynamics have lost most of their distinguishing features which have been eroded by transformations experienced in a virtually identical manner by all European countries. At the social level, the crisis that has struck the “institutional Churches”<sup>7</sup> has spared neither those that can boast the status of national Church nor those that live in the separatist countries<sup>8</sup>. This crisis means that in the countries historically characterised by the secularisation dynamic a certain separation between the States and the traditional national Churches may be seen (in particular in England, Sweden, Norway)<sup>9</sup>, while in the countries connoted by the laicisation dynamic the same crisis has been accompanied by the considerable attenuation of the separatist significance of *laïcité*, as the States no longer feel that they are faced with an adversary they have to fight against<sup>10</sup>. At the same time, if the national Church States attenuate their jurisdictionalism, the separatist States increase theirs. Indeed the public exposure

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<sup>5</sup> In some countries this separatist dynamic has coexisted with the presence of concordats between the States and the Churches (Italy, Spain, Portugal, Germany, Austria, Alsace-Moselle); in others this possibility has been wholly excluded. Nevertheless, not all countries without concordats have brought about the same separation. Indeed, a “separation-delegation” has been mentioned, whereby the State delegates to the Roman Catholic Church the conduct of multiple functions that are public elsewhere (Ireland); of a “separation controlled by the State” in which, contrary to the previous model, it is the State that controls all the instances of civil socialisation (France) and, further, of a “separation-pluralism” in which it has the purpose of avoiding the pre-eminence of one religion over another (Belgium, Holland): see Yves Lambert, *Denominational Systems and Religious States in The Countries of Western Europe*, in « *Research in the Social Scientific Study of Religion* », 7, 1996, 137.

<sup>6</sup> In 1903, for example, the Danish Lutheran Church was obliged by a law of the State to agree to the election of its pastors by an electoral body composed also of women to which, from 1947 onwards, it became possible to add to the active electorate also the passive electorate: from Françoise Champion, *Interférences de la laïcité et de la démocratie, fragments d'histoire européenne, Laïcités-Démocraties des relations ambiguës*, in Actes du Colloque organisé par le Groupe de Sociologie des Religions et de la Laïcité, (UMR 8582 CNRS-EPHE) les 7 et 8 décembre 1998 à l'IRESO publiés sous la direction de F. Randaxhe et Valentine Zuber, Paris, Brepols, 2003.

<sup>7</sup> See Danièle Hervieu-Léger, *Les tendances du religieux en Europe*, Commissariat général du plan, Institut universitaire de Florence, Chaire Jean Monnet d'étude européennes, *Croyances religieuses, morales et éthiques dans le processus de construction européenne*, Mai 2002, [www.plan.gouv.fr](http://www.plan.gouv.fr), 10-12.

<sup>8</sup> See Joel S. Fetzer e J. Christopher Soper, *The Roots of Public Attitudes Toward State Accommodation of European Muslims' Religious Practices Before and After September 11*, « *Journal for the Scientific Study of Religion* », 42, 2, June 2003, 255 and Lambert, *Denominational Systems*, cit., according to whom the connection between religious practice and the model of State-Church relations is « very weak » (127). Indeed in the opinion of this Author « the only observable relationship concerns the fact that all the countries with a secular system are among the least religious (but not *the* least religious) and the fact that all the countries which recognize an official religion have a high level of nominal religious affiliation, even if personal involvement is weak or if the intergenerational decrease is a pronounced one ».

<sup>9</sup> See Wojtek Kalinowski, *Les institutions communautaires et “l'âme de l'Europe”. La mémoire religieuse en jeu dans la construction européenne*, in *Croyances religieuses, morales et éthiques dans le processus de construction européenne*, cit., 44.

<sup>10</sup> See Yves Lambert, *Eglises et laïcité à l'heure de la déchristianisation*, « *Sciences Humaines* », hors série, n. 4, septembre-octobre 1996, 31.

of the churches means that they fall more easily into the area of competency of the public powers whose activity of guaranteeing fundamental rights is less and less prone to stopping at the threshold of religious legal systems<sup>11</sup>. Thus of the two dynamics, laicisation and secularisation, today it seems that only one variant of the latter remains which is connoted by a weak separation, by a moderate neo-jurisdictionalism and by substantial integration between the religious sphere and the civil one.

Also from a more strictly juridical point of view, the growing religious pluralism, the rise of Islam and the ever increasing influx of supranational institutions (the Strasbourg Court of Human Rights and the European Union in primis) have led the individual European countries towards evident convergences<sup>12</sup>. Indeed besides the national laws a common European law of religious freedom has been established, which is characterised by the primary position of the freedom of individual conscience, the autonomy of the churches and by increasing cooperation between States and religious groups. This common law is coherent with a model of political integration “by institutional means”, which means founded on the individual right to equal rights of citizenship, and it exercises its power of attraction on all the States at the gates of the Union, starting with the countries of the ex-Soviet block and with Turkey<sup>13</sup>.

## **2. A new Westfalia: the legal secularism**

The convergence of the various models is reflected also in the ever more frequent resort to the principle of secularism as a principle that is a synthesis of the European constitutional tradition on the subject of religious freedom. The possibility for secularism to go beyond its French origins depended fundamentally on its passage from the world of politics and morals to that of law. From this point of view it is interesting to observe how the law is increasingly used, even by non jurists, to substantiate this secularism. This even though explicit legal references to this principle are scarce, even in France which has made *laïcité* its banner, and the tendency therefore to emphasise above all the presence of a cultural, rather than a legal, *laïcité* as the real European specificity. For the sociologist of religion Jean-Paul Willaime, for example, this “cultural *laïcité*” is characterised by the religious neutrality of the public powers, by freedom of and from religion and by the autonomy of individual conscience<sup>14</sup>: all these are typical features of what was previously defined as the common European right to religious freedom.

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<sup>11</sup> See Ernest Caparros, *Le droit religieux et son application par les juridictions civiles et religieuses. Coexistence, interrelations, influences réciproques*, in Académie internationale de droit comparé/International Academy of Comparative Law, *La religion en droit comparé à l'aube du 21<sup>e</sup> siècle/ Religion in Comparative Law at the dawn of the 21<sup>st</sup> century*, XV<sup>e</sup> Congrès International de Droit Comparé (Bristol 1998), Id., Louis-Léon Christians (ed.), Bruylant, Bruxelles, 2000, 3-65.

<sup>12</sup> See Francesco Margiotta Broglio, *Il fenomeno religioso nel sistema giuridico dell'Unione Europea*, in Id., C. Mirabelli, F. Onida (cur.), *Religioni e sistemi giuridici. Introduzione al diritto ecclesiastico comparato*, il Mulino, Bologna, 1997, 87-223.

<sup>13</sup> See Silvio Ferrari, *Islam and the Western European Model of Church and State Relations*, in W. A. R. Shadid and P. S. van Koningsveld (eds.), *Religious Freedom and the Neutrality of the State: the Position of Islam in the European Union*, Peeters, Leuven, Paris, Sterling, Va., 2002, 6-10 and Id., *Conclusion: Church and State in Post-communist Europe*, in *Law and religion in Post-Communist Europe* ed. by S. Ferrari, W. C. Durham Jr., E. A. Sewell (ass.ed.), Leuven, Peters, 2003, 411-27.

<sup>14</sup> Jean-Paul Willaime, *Europe et religions. Les enjeux du XXI<sup>e</sup> siècle*, Fayard, Paris, 2004, 13 ; 29; 46 e 328.

Once it was a constitutional principle, on the one hand *laïcité* became “laicised”<sup>15</sup>, losing its nature of hostility towards religions, while on the other it “secularised”. It was no longer a principle for the regulation of relations between States and religious denominations but instead, more broadly, an “expression of the principle of democratic pluralism”<sup>16</sup>.

It was precisely the passage of secularism from morals to law that has allowed the churches to fully appropriate themselves of this concept. It is worth underlining how this “legal, pluralist and pacifying *laïcité*” does not date from today. Indeed it is genetically inscribed in the crucial hairpin bend of the period after the Second World War and, rather like in a new Westfalia, it represents the sealing of a pact. Indeed it was precisely in the period immediately following the Second World War that the churches for the first time, more or less consciously, supported a constitutionalism of Kelsenian origins<sup>17</sup>. Thus they did not hinder the shaping of the organisational structures of power and laws which were released from the authoritarian concepts that had been based on hierarchical and monistical models reflecting the divine *potestas*<sup>18</sup>. Consequently, taking note of the pluralism of the State, the churches have facilitated the tendency to synthesize this pluralism through resorting to a constitutional secularism that is less and less interpreted as separation and more and more as integration<sup>19</sup>. And it is this type of secularism that has represented the State’s acceptance of the public role of pluralism of religious origin.

Participating in that pact and therefore recognising pluralism, the “constituent religions” – the Roman Catholic Church, long-established Protestant Churches, Jewish communities – have shown that they are able to translate their expectations of *universal affirmations of a particular truth* into *particular affirmations of a universal truth*. In this way, they have been able to intercept the debate on “Human Rights”, thus ensuring that their morals enjoy full citizenship in the discussions and from which the public discursive reason of Habermas and Rawls obtain binding decisions for everyone<sup>20</sup>.

### **3. Constituent religions and civil society**

The “constituent Churches” appropriation of secularism as the regulating principle of overall social and institutional pluralism was also accompanied by their

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<sup>15</sup> See Id., *Laïcité et religion en France*, in G. Davie, D. Hervieu-Léger (dir.), *Identités religieuses en Europe*, La Découverte, Paris, 1996, 163 ss.

<sup>16</sup> Thus Marco Ventura, *La laicità dell’Unione europea. Diritti, mercato, religione*, Giappichelli, Torino, 2001, 105.

<sup>17</sup> With a declaration of 13 December 1945 the Assembly of French bishops recognised the full compatibility with the doctrine of the Roman Catholic Church of a *laïcité* directed at translating the « souveraine autonomie de l’Etat », considering it quite legitimate that « dans un pays divisé de croyance » every citizen should be allowed to practise freely his own religion, in Aa. Vv., *Historie de la laïcité*, Besançon, 1994, 272-5. In 1949, in an important article published in the review *Esprit*, J. Vialatoux e A. Latreille defined *laïcité* as « expression juridique de l’acte de foi »: see *La laïcité de l’Etat, expression juridique de l’acte de foi*, re-edited by the Protestant Teaching Federation in *Laïcité et paix scolaire*, Paris, 1957, 73-8. On the interventions of Roman Catholic teachings on the subject of *laïcité* see André Latreille, *L’Eglise catholique et la laïcité*, in Aa. Vv., *La laïcité*, PUF, Paris, 1960, 59-97.

<sup>18</sup> See Claude Lefort, *Permanence du théologico-politique ?*, « Le temps de la réflexion », 2, 1981, 13-60.

<sup>19</sup> Allow me refer you to my *Libertà scolastiche e laicità dello Stato in Italia e Francia*, Giappichelli, Torino, 2002, 127-43.

<sup>20</sup> See Jürgen Habermas, *Fede e sapere*, « Il Regno-documenti », 19, 2001, 653-56 e Pierangelo Sequeri, *Cesare e Dio*, in *Cristianesimo e Democrazia nel Futuro dell’Europa*, Atti dell’Incontro di Camaldoli, 12-13-14 luglio 2002, « Il Regno », Supplemento al n. 4 del 15 febbraio 2003, 6-7.

appropriation of a further notion of civil society. Nevertheless, if on the one hand the internal transformations of all the religious groups have effectively brought them closer to other social realities (3.1), on the other the emphasis they have placed on the notion of civil society sometimes appears to be instrumental for the conservation of a very precise speciality which is pregnant with consequences for the democratic system of States (3.2 ff.).

### **3.1. *The constituent religions as protagonists of the public square***

From the point of view of the internal transformations the religious groups would seem to have experienced a process of “Protestantisation”<sup>21</sup>, connoted by abandoning the negative concept of “century” and by rendering the eschatological tension and projected onto the centrality of the human being.

This “immanentization” is made visible by various phenomena. Among these may be mentioned the transformations of authority relationships, with the indisputable role that the non “clerical” staff has by now assumed, and the substantial conformation of the religious denominations’ social institutions (schools, hospitals, charity centres) to the demand coming “from below”, which means from a clientele that is little disposed to give up its own, subjective, autonomy<sup>22</sup>.

These transformations, which were more or less suffered, have become a sort of certificate of good conduct on which depends recognition of the religions’ full political citizenship<sup>23</sup>.

The law has accompanied a large part of these changes, turning a blind eye to the specificity of the religious factor which is now prevalently perceived in its generally ideal, cultural and civilising dimension. Religious buildings are considered as buildings “of a social or cultural character”<sup>24</sup>; religious freedom is likened to general personal convictions<sup>25</sup> while already for some time religious activities in the “broader sense” (especially instruction and charity) have to a large extent been regulated by a common law that does not take into account its special religious nature.

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<sup>21</sup> Resort to the category of “secularisation” might lead one to suppose, given the interpretation commonly attributed to it, the liquidation-extinction of all “religious” features. However as “protestantisation”, contrary to secularisation, does not in itself designate an escape from the religious, it seems better to describe phenomena of transition which were never completed, leaving to the legal-assessment field any hypothetical inclusion of these phenomena in the logic of secularisation. However it is necessary at the same time to bear in mind that “protestantisation”, even though it can to all effects refer to most contemporary religious experiences, highlights above all the transformations internal to European Christianities, taking into account that the other “traditionally European” religions, Judaism and Islam, seem to have always articulated the eschatological tension into less conflicting or alternative forms between heaven and earth.

<sup>22</sup> An empirical survey in this regard was recently carried out in the United States by Helen Rose Ebaugh, Paula F. Pipes, Janet Saltzman Chafetz, Martha Daniles, *Where’s the Religion ? Distinguishing Faith-Based from Secular Social Service Agencies*, in « *Journal for the Scientific Study of Religion* », 42, n. 3, September 2003, 411-26 while for a long time studies on French religious teaching have abounded, about which see, for example, Lucie Tanguy, *De l’existence de l’école catholique à la création d’un service privé d’enseignement*, « *Orientations* », 48, octobre 1973, 33-52.

<sup>23</sup> See Jean-Paul Willaime, *Europe et religions*, op. cit., especially 201-76.

<sup>24</sup> See EEC regulation of 2 July 1993 (2454/93).

<sup>25</sup> See the EU directives n. 43 29 June 2000 and n. 78 27 November 2000 in which the dissociation of protection against discrimination for religious reasons from that for racial reasons (persecuted considerably more severely) has ended up by favouring the (religious and private) bodies to the detriment of the protection of individual freedom: Vincenzo Pacillo, *Contributo allo studio del diritto di libertà religiosa nel rapporto di lavoro subordinato*, Giuffrè, Milano, 2003, 169; 176 e 286-302.

Now if, as has previously been observed, these transformations entail increased State interference, the other side of the coin is that they have allowed the religious groups to recover all those places that the laicising dynamic had started with and on which the reproduction of the modern secular State was based, beginning with schools and charity.

This contracting of public functions, of which the religious groups are increasingly often in charge, has then led them to a “permanent negotiation of indeterminate content”<sup>26</sup> with the State authorities. This is a very different negotiation from the typical one of the old concordat tradition which ambitiously aimed at sharing out static spheres of influence between Church and State and which the latter could also use as an instrument for containing any excessive temporal interference by the former<sup>27</sup>. Instead the current negotiation between public powers and religious groups assumes more the guise of an incessant procedure through which both parties, once they have overcome the logic of division according to subject matter, share the regulation and management of the multiple areas of social life at all administrative levels.

Today the negotiation between the public powers and the religions would appear to be another feature of European secularism, the final and perhaps unexpected outcome of a principle born to make distinctions and separate. Indeed if negotiation with the religious denominations has now also made its appearance in separatist France<sup>28</sup>, it was therefore in the order of things that the European Constitution should commit the Union to “maintain an open, transparent and regular dialogue with such churches and organisations, recognising their identity and specific contribution” (art. I-52, 3<sup>rd</sup> paragraph)<sup>29</sup>. Moreover this recognition is set in the picture of an enlargement of the frontiers of the Union where the increased importance of the ethic and cultural dimension emphasises the valorisation of the public role of the churches as fully fledged members of civil society (see the White Book on European *Governance* of 2001)<sup>30</sup>.

Nevertheless this mechanical confluence of religious organisations into the *mare magnum* of civil society may well give rise to some doubts.

### **3.2 The ambiguities of an “identitarian” religion**

The fact is that the religious organisations can play on several registers, attributing a general private guise to the internal ties by which the hierarchies of the various communities maintain complete control of associative life. Thus on the one hand the religions can use the common law to expand the operative nature of the same religious rule, presented as the free expression of the wishes of private people<sup>31</sup>, while on the

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<sup>26</sup> Thus Raffaele Botta, *Le droit religieux et son application par les juridictions civiles et religieuses : coexistence, interrelations, influences réciproques, le cas italien*, in *La religion en droit comparé*, op. cit., 187.

<sup>27</sup> See François Méjan, *La solution concordataire d'ensemble*, in *La laïcité*, op. cit., 401-34.

<sup>28</sup> Cf. Jean-Paul Durand, “*La création d'une instance de dialogue au plus haut niveau*” entre l'église catholique et l'état français. 13 février 2002, “Année Canonique”, 46, 2004, 245-58.

<sup>29</sup> This article is significantly contained in title VI of the first part, devoted to the “Democratic Life of the Union”.

<sup>30</sup> See Thomas Jansen, *Dialogue entre la Commission européenne, les Eglises et les communautés religieuses*, in *Iglesias, confesiones y comunidades religiosas*, op. cit., 77-84 and the contributions collected in *Chiese, associazioni, comunità religiose e organizzazioni non confessionali nell'Unione europea*, Atti del Colloquio Università Cattolica del Sacro Cuore, Milano, 28-29 maggio 1999, ed. by Antonio G. Chizzoniti, Vita e pensiero, Milano, 2002.

<sup>31</sup> See, for example, an elastic notion like “peculiar character” that has entered many civil laws for the protection of the religious identities. Outside Europe, a particularly glaring case is provided by the proposal by



other they can shield themselves with all their specificity/alterity when their internal practices are criticised. Consequently, the ancient *libertas ecclesiae*, the special right by which States guaranteed the autonomy of the internal order of ecclesiastical institutions, still retains all its importance. Indeed it is rather like a sort of upside-down tip of an iceberg. Once the tip's surface – the religious society – has melted into the sea of civil society, a “hard invisible core” remains submerged which continues to legitimise the permanent jurisdictional demands of the churches on their adherents: in this sense the antagonism between States and religious denominations cannot be considered entirely overcome, as neither of the two parties has renounced to the nature of *societas perfecta*.

Now the public powers may have too much faith in the subsidiary principle based on a possible impartiality of the services managed by religious associations. This might turn out to be an injustice to religious freedom, as the question of the German Roman Catholic advisory bureaus has abundantly shown when, according to the wishes of Rome, they withdrew from the network of the National Health Service on the grounds of their refusal to cooperate in any way in the conducting of abortion practices. Indeed the assumption of good conduct normally recognised to the “constituent religions”, which are generally considered to be “politically correct”, does not only lead to underestimating their “incorrectness”. Indeed it also ends up by limiting the freedom of the other religions, in proportion to their degree of assimilation and therefore to their desire/possibility to enter into obligatory and omnipresent negotiations with the public authorities.

In this context, the old special rights (concordats, national churches, agreed separations) are for the “constituent churches” the requirement to “be in civil society but not of civil society”. Indeed, although the cost has been to place them on the same plane as the “philosophical and non religious organisations”<sup>32</sup>, it is precisely thanks to the “constitutionalisation” of the special national rights at the European level (art. I-52, 1° comma of the European Constitution)<sup>33</sup> that these religious denominations have been able to claim a role that is quite peculiar in the public scene of the Union<sup>34</sup>. Indeed this “constitutionalisation” legitimises the social action of the “constituent churches” as expressions of cultures and civilisations definable, generally, as the common heritage of all Europeans. However at the same time the wheel turns full

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some Canadian Muslim associations to make binding for Muslims recourse to the *shari'a* in the State of Ontario in the name of the recognition by the latter of “civil and commercial arbitrations”. Moreover, it was pointed out how the same deregulation/privatisation of the institution of marriage could be used for the civil recognition of unions founded on religious laws.

<sup>32</sup>See Francesco Margiotta Broglio, *In Europa il Vaticano è declassato*, «Limes», 1, 2000, 153-162.

<sup>33</sup> The article of the new European Constitution allows the “constituent religions” to obtain that constitutionalisation of the national statutes that did not succeed at the time of the Treaty of Amsterdam which guaranteed respect of the “Statute of which they enjoy, in virtue of national law, the Churches and the associations or religious communities in the Member States” only in the eleventh declaration annex on which see, *La posizione degli Stati dell'Unione europea nel dibattito sulle “chiese” nella revisione del Trattato di Maastricht*, in *Iglesias, confesiones y comunidades religiosas*, op. cit., 87 ff. and Jansen, *Dialogue entre la Commission européenne, les Eglises et les communautés religieuses*, cit.

<sup>34</sup> See the answer by the President of the European Commission, Romano Prodi (11 March 2004) to written question E-0186 by Maurizio Turco “Violazione della libertà religiosa in Italia, Spagna e Portogallo”, in <http://www.olir.it>.

circle as it is precisely this social action that lends foundation to the demand by these churches to have renewed privileged institutional recognition<sup>35</sup>.

By being legitimised in a broadly secularised society as “reserves of civilisation”, these churches have assumed a fundamental role in the management of cultural and religious pluralism. Indeed they have become “bridges” between the values at the basis of the European institutions and religious universes which have settled more recently in that public space<sup>36</sup>. In this way, the “constituent churches” on the one hand favour the integration of the new arrivals in a socio-institutional context that is clear-cut and not infrequently hostile, while on the other, by accompanying this process they can prevent this integration from becoming a marginalisation of religion, in particular the one they represent, from the public scene<sup>37</sup>.

Now, nevertheless, there is a tendency by the public powers to entrust to religious organisations a determinant role in the process of the political integration of the new religious and cultural realities, and also of States (for instance the Orthodox countries of the East and the case of Muslim Turkey). This highlights the affirmation of an integration that is on a prevalently cultural basis, founded on the assimilation of the “new” to a presumed ethnic-cultural-religious pre-existing identity. At the very moment of transition from the old nation-State to other forms of political aggregation, the State model typical of the modern age based on the fruition of rights independent of ethnic-religious belonging appears to be surmounted by “nationalistic” forces emerging as much at the European level as at a more local one<sup>38</sup>. This difficulty in

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<sup>35</sup> See Kalinowski, *Les institutions communautaires et “l’âme de l’Europe”*, cit., 43-9.

<sup>36</sup> James A. Beckford, Sophie Gilliat-Ray, *Religion in Prison*, Cambridge University Press, Cambridge, 1998, 15, describe these religions as “gatekeepers”. Besides, the same phenomenon occurs also outside the borders of the Union. Inger Furseth, *Secularization and the Role of Religion in State Institutions*, «Social Compass» 50 (2), 2003, 194 ff., observes that “if it is true that religion in Norway is declining and eventually will disappear ... There are no signs that there is a withdrawal of the Church’s formal functions within the Army or the prisons”, and justifies this presence of the national Church in the public and institutional space precisely for the function of go-between that the Church provides between the public powers and the “new religions”. It is interesting to note how the deliberation by the parent-teacher-student association of the junior high school “Vittorino da Feltre” of Abano Terme, where the lawsuit on the crucifix in the classroom was rekindled and which was examined by the Italian Constitutional Court, motivated the desire to leave “on display religious symbols... also to incentivate a greater education to religious integration and to the respect of the freedom of ideas and thought for everyone” (“lasciare esposti i simboli religiosi... anche per incentivare una maggiore educazione all’integrazione religiosa e al rispetto della libertà di idee e di pensiero per tutti”): it was implicit that the only religious symbol on display was the Roman Catholic crucifix.

<sup>37</sup> On a more specifically intra-religious plane it may be asked whether, in the light of the contemporary end of the “religious constellations”, the same encouragement of ecumenical dialogue by the public powers might not lead to the danger feared by Jean Séguéy, *Les conflits du dialogue*, Cerf, Paris, 1973, 96-114, in other words an extreme attempt by the institutional churches, once they have lost the “secular arm”, to control their followers by means of the management “from above” of knowledge and power. On the other hand, the public recognition of the “constituent religions” appears to be directly proportional to the diminution in their followers.

<sup>38</sup> To give an example related to a “national” case, in which the character of *Nation State identity* continues to prevail over *State Nation identity*, see Paolo Segatti, *Perché è debole la coscienza nazionale degli italiani*, « il Mulino », XLVIII, 381, 1, 1999, 15-23. See also Jean-Pierre Bastian, *Conflits ethniques, communautarisme et religions*, in *L’Europe à la recherche de son âme. Les Eglises entre l’Europe et la nation*, Travaux du colloque réalisé au Conseil de l’Europe les 4-5 novembre 1996, Id. et Jean-François Collange (dir.), Labor et Fides, Genève, 1999, 87-96 ; Andrei M. Greely, *Religion in Europe at the End of the Second Millennium: a sociological profile*, Transaction Publisher, New Brunswick, London, 2003, 86, for whom «while Europeans in general accept the clichés about the intolerance of religions, only a minority wants to see religion have less power in their own country» and Jean-Paul Willaime, *De l’inscription territoriale du religieux à sa prise en charge individuelle et subjective: les mutations du religieux*

distinguishing the State from the Nation and at the same time in recognising the possibility of rights “without foundation”, clearly arose during the discussions on the Preamble of the European Constitution. Here was the opportunity for the “constituent churches” to renegotiate, this time in full consciousness, the “pact” that they had in some way suffered in the period immediately following the Second World War.

If in the end the pact was renewed, the discussion that accompanied its confirmation revealed how the consensus around the idea of “human” rights, in so far as they are created and guaranteed by men, was far from being unanimous – and not only in hemispheres that are different from the Western European one. The lively participation of the “constituent churches” in the controversy between those who opposed the substantial power of the rights guaranteed by God and the formal fragility of rights entrusted to a “mere” procedure seemed for some aspects to confirm the theory put forward by Marcel Gauchet from the very first page of his *Désenchantement du monde*<sup>39</sup>. Indeed the insistence with which the reasons supporting a theophany were pleaded in the new European Constitution<sup>40</sup> would appear to betray an underlying, timorous agreement by the religious authorities themselves with the diagnosis of this illustrious author. For Gauchet, in fact, the worldly trajectory of the religious has effectively been concluded with the interiorisation of the religions (which culminated with Christianity) and with the loss of their consubstantial function, namely the legitimisation of the political and social order.

In any case, even though an explicit reference to God, to Christianity or to the Judeo-Christian heritage of Europe in the Preamble to the European Constitution would not have perhaps endangered the enjoyment of the rights of freedom it also guaranteed<sup>41</sup>, the problem would instead have been of the pedagogical-educational order. Indeed such references, by favouring the culturalisation of some specific religious traditions, also facilitate their transformation into civil religions. Nevertheless,

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*chrétien en Occident*, « Archives de Sciences Sociales des Religions », 1999, 107 (juillet-septembre), 145, who distinguishes a personal God, connected with personal choices and a God that is far from the individual but acts at the social level and takes part in the management of the public goods and of the national and supranational identity. For a more general discourse, see Jacques Rupnick, (dir.), *Le déchirement des nations*, Paris, Seuil 1995.

<sup>39</sup> *Le désenchantement du monde. Une histoire politique de la religion*, Gallimard, Paris, 1985, 1.

<sup>40</sup> See, among the many speeches, Hyppolite Simon (archbishop of Clermont-Ferrand and vice president of COMECE), *Dieu et la Constitution européenne*, « Le Monde », 8 mai 2003, 15 and *Il futuro dell'Europa. Responsabilità politica, valori e religione*. Contribution by the Secretariat of the COMECE to the debate on the future of the European Union in the ambit of the European Convention, original typescript.

<sup>41</sup> Art. 31 of the Vienna Convention establishes an indissoluble bond between the Preamble and the body of an international treaty. At the same time, however, it should be observed how, at the national level, such mentions have never entailed a limitation of the rights of the citizens. See, for example, the case of secular France which in 1946 constitutionalised the reference to the Supreme Being contained in the 1789 Declaration of rights; or the Norwegian case in which the Supreme Court, rejecting the appeal of a Lutheran pastor against the law on abortion, pointed out that the existence of special constitutional ties between the national Church and the State cannot be interpreted in the sense of limiting the freedoms of citizens; or finally, the Canadian experience, in which reference to the “supremacy of God” contained in the 1982 Constitution was interpreted by the local Supreme Court exclusively in the sense of an interdiction of the atheisation of the State (see Micheline Milot, *Séparation, neutralité et accommodements en Amérique du Nord*, in *Laïcités-Démocraties des relations ambiguës*, op. cit., 114-7). A similar tendency may moreover also be found in those “Muslim countries” which, after setting the *shari'a* at the head of the sources of law, use various conjuring tricks to defuse the potential effects of this formal recognition.

if the European “constituent churches” owe their political citizenship to a “politically correct” management of a universal religious heritage which it is difficult to use to “mark” a space barred to Others<sup>42</sup>, the secular political powers can manipulate the religious factor by means of a civil religion with far more self-confidence, especially at the local level<sup>43</sup>. Moreover, if in the United States the civil religion arose “from below” due to its connection with an “open pluralism”, the European case risks giving rise, on the contrary, to a civil religion “from above” which would be in practice a “closed pluralism”<sup>44</sup>.

In the light of these considerations the European institutions’ backing of the “constituent churches” should be assessed not only on the basis of the several ambiguities that this support raises, but it should also be evaluated as the attempt to prevent manipulations of the holy that are potentially subversive of the democratic system<sup>45</sup>.

#### **4. An identity by contrast? The building of “counter-models”: sects (briefly mentioned) and Islam**

In the current circumstances it is not hard to observe how the main limitations to the rights of (not only religious) freedom are motivated by the need to protect democratic societies from the danger of “sects” and of Islam.

The “sects” are opposed mainly because of their “centrifugal force”, which means the capacity that has been attributed to them of estranging the individuals that come into their possession from the circuits of democratic citizenship (beginning with their active and passive participation at elections), which is short-circuited with a devious infiltration into the halls of power<sup>46</sup>. Instead Islam is opposed for the opposite reason and therefore for its “centripetal force” which would lead it to overstep every separation between religion and politics. The “sects” and Islam thus catalyse all the tensions of a polyarchic society, which is sensitive to the disruptive threats coming both from the individualistic fragmentation onto which “sects” fasten, and from

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<sup>42</sup> See Theodor Hanf, *The sacred marker: Religion, Communalism, Nationalism*, «Social Compass», 1994, 41/1, 9-20. The argument, in reality, could also be stated from an exclusively political point of view: in the opinion of Willaime, *Europe et religions*, op. cit., 15, it is precisely because Europe has something universal that it cannot be reduced to Western or Christian values.

<sup>43</sup> See, in particular, Silvio Ferrari, *Dio, religione e Costituzione*, in [www.olir.it](http://www.olir.it) and Marco Dani, «L'importante è non avere paura». *Un'Unione Europea profana in un'Europa cristiana?*, «Quaderni costituzionali», 4, 2004, 763-790. Besides, for example in Italy, it is in the most recent regional Statutes that references to the “Christian roots” and to the privileged relations with the “pactional” religious denominations are to be found, which can in some cases, when they are interpreted in the light of a presumed defence of Christianity, foster tendencies of a clearly exclusivist character that emerge also at the national legislative level: see in this regard Nicola Colaiani, *Come la xenofobia si traduce in legge: in tema di edifici di culto*, in [www.olir.it](http://www.olir.it) (*Commenti*) and, for a full picture of the growing role played by the Italian Regions on the subject of religious freedom, Daniela Milani, *La tutela degli interessi regionali delle comunità locali tra riforma della Costituzione e nuovi statuti regionali*, «Quaderni di diritto e politica ecclesiastica», 2005/1, 201-244.

<sup>44</sup> The resort to the notions of “closed” and “open” pluralism to compare the European and United States experience is Jean Baubérot's.

<sup>45</sup> It is perhaps for this reason that in *Hasan and Claus v. Bulgaria* (26 October 2000) the Strasbourg Court considered that “the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which art. 9 (Of the European Convention on Human Rights) affords”.

<sup>46</sup> See on this subject Françoise Champion, Martine Cohen (dir.), *Sectes et Démocratie*, Éditions du Seuil, Paris, 1999, *passim*.

community re-composition which is the “neo-millet” of the Muslim tradition. In the end the problem is that of the integration of “non-constituent religions”, absent from the European public space in the period immediately following the Second World War, in a deeply disillusioned democratic society<sup>47</sup> that is tempted to substitute confrontation with the inevitable daily chronic problems, made up of slow and prosaic technical, procedural and discursive practices processes, with an immediate resort to the “substantial values”. In this sense it is possible to agree both with Sami Zemni, in whose opinion “the problem of Islam in Europe has become an ideological battlefield that highlights the limits and borders of multiculturalism”<sup>48</sup>, and with Marcel Gauchet when he observes that the “true differences, those that make the crucial enigma of history no longer have the right of citizenship”<sup>49</sup>.

Even more than the hazy world of the “sects”, what seems to frighten Europeans is an inexorable invasion by the Muslim universe. Moreover, the idea of a profound incompatibility between democracy and Islam also appears to have been bolstered by the European Court of Strasbourg which declared its opinion on two occasions (31 July 2001 e 13 February 2003) regarding the dissolution of the *Refah partisi*, the Prosperity Party, which at that time was the governing party in Turkey by means of free and democratic elections<sup>50</sup>.

For the Court the difficulty of “declaring itself at one time respectful of democracy and Human Rights and supporting a regime founded on the *shari’a*” (§123 of the sentence of 13 February 2003) would derive from the contradiction between democracy as a legal picture able to guarantee the constant adjustment of laws and the *shari’a* as a system “faithfully reflecting the dogmas and the divine rules enacted by the religion” in which individuals obeyed “static rules of law imposed by the religion in question” (*ibid.*, § 119)<sup>51</sup>. Indeed, from such rules derive “entirely different legal

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<sup>47</sup> Didier Lapeyronnie writes, in his *Préface* to Sandrine Rui, *La démocratie en débat. Les citoyens face à l'action publique*, Armand Colin, Paris, 2004 : « La démocratie est notre horizon politique “indépassable”. Elle rallie tous les suffrages. Même ceux qui l’avaient combattue – il est vrai que c’était un autre siècle – y font aujourd’hui allégeance, ou font semblant. Sans adversaire déclaré, elle va de soi. Du coup, elle ne suscite plus guère d’enthousiasme. Bien plus, elle déçoit. C’est même là une des caractéristiques essentielles : la démocratie s’accompagne d’une profonde désillusion. Elle suppose des compromis, elle révèle le fossé séparant le citoyen du lieu de la décision, elle fait surgir des oppositions et des conflits insolubles, elle entérine la distance infranchissable entre l’idéal et la réalité. Elle manque de souffle et n’offre guère de perspectives autres que des politiques concrètes limitées prenant acte d’une société divisée. Aussi, elle rend la vie politique triviale en nous révélant les citoyens tels qu’ils sont, des individus sociaux, proches de leurs intérêts, loin de l’entité abstraite et morale du citoyen éclairé ». In this sense one might agree with what Joseph Ratzinger stated in *Radici spirituali dell’Europa. I suoi fondamenti spirituali ieri, oggi e domani*, Biblioteca del Senato Sala Capitolare del Chiostro della Minerva, 13 maggio 2004, according to which the “praiseworthy” and “comprehensive” opening of the West towards the Other is accompanied by a certain dissatisfaction with itself: the cardinal speaks of “the West’s self-hatred” (“odio di sé dell’Occidente”).

<sup>48</sup> Sami Zemni, *Islam, European identity and the Limits of Multiculturalism*, in *Religious Freedom and the Neutrality*, op. cit., 158.

<sup>49</sup> Marcel Gauchet, *Quand les droits de l’homme deviennent une politique*, « Le Débat », 110, 2000, 282. See, in this regard, the penetrating considerations by Stéphane Vibert, *La Démocratie dans un espace “postnational” ? Holisme, individualisme et modernité politique*, in « Anthropologie et Sociétés », vol. 26, 1, 2002, 177 ff. This tendency might lead one to forget that religious freedom consists in the acceptance of what appears, from other points of view, unreasonable, see Rik Torfs, *Phénomènes religieux et métamorphoses de l’Etat en Europe*, « Le Supplément », 226, septembre 2003, 156.

<sup>50</sup> See the Court site: [www.echr.coe.int](http://www.echr.coe.int).

<sup>51</sup> Sentence *Loizidou v. Turkey*, 23 March 1985 and the *Communist Party v. Turkey*, 30 January 1995 (§ 45)

systems” (ibid. § 42) which “would catalogue subjects on the basis of their religious beliefs” (ibid., § 119).

All in all, it would be possible to maintain that the Strasbourg Court has considered Islam’s interception of the issue of human rights, which has made it possible for the “constituent religions” to have legitimate access to the public space, to be absolutely incomplete. Islam, in other words, would still be presenting itself as the *universal statement of a particular truth* (and not, as has been said for the “constituent religions”, on the level of a *particular statement of a universal truth*). And this for the fact that Islam would not have completed the passage from the (certainly static and not interpretable) positive divine law to the (presumably dynamic and interpretable) natural divine law that alone would allow religions full political citizenship<sup>52</sup>. Indeed for the “constituent religions” the resort to natural law would be a guarantee of dynamism, peaceful processes and a chance of finding points in common with different currents of thinking. Indeed the reference to natural law would respond to the reference to a generic moral which can be perfectly well spent on the political plane, rather than to deferment to a positive, rigidly predetermined legal system. It is on these grounds that the decision taken in the comment leaves open the possibility of a “Muslim democratic party”, stating that “a political party that is inspired by the *moral values imposed by a religion* could not be considered in itself as a formation that goes against the fundamental principles of democracy” (§ 100). It is not difficult to see that in the “Party of Justice and Development” of the current Turkish premier Erdogan there is a development precisely in this sense. Born from a rib of the *Refah partisi*, this neo-Islamic party describes itself as democratic-conservative, inclined towards the spirit of compromise and faithful to a *laïcité* that “tolerates all beliefs”<sup>53</sup>. The programme base of the new party no longer appears to be the *shari’a* but rather the *edep*, a code of conduct which is inspired (and not dictated) by the Koran and which has become, through a secularisation process that is still in progress, a sort of moral code for the “respectable person” that is also accepted outside the circle of “religious people”. What is happening in Turkey would seem therefore to be a transition from the “laicisation dynamic” of the Kemal period to a “dynamic of secularisation” in which, having accessed power thanks to the democratic instrument, Islam is changing together with Turkish society and its institutions<sup>54</sup>.

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<sup>52</sup> On this theme see Silvio Ferrari, *Lo spirito dei diritti religiosi. Ebraismo, cristianesimo e islam a confronto*, il Mulino, Bologna, 2002, especially 109 ff.

<sup>53</sup> See Thierry Zarcone, *La Turquie moderne et l’islam*, Flammarion, Paris, 2004, 263, which also tells of how the historic leader of Turkish Islamism, Erbakan, the day after the dissolution of the *Refah partisi*, brought into being a more Islamically connoted political formation that that of Erdogan, the “Happiness Party”. However, the result obtained by this party at the political elections of 2002 was rather disappointing.

<sup>54</sup> Pierre-Jean Luizard, *Islam, laïcité et démocratie: proposition d’une problématique*, in *Laïcités-Démocraties des relations ambiguës*, op. cit., observes: « Le fait qu’une identité religieuse paraisse aujourd’hui le meilleur garant d’un accès de la société civile à l’espace public et politique ne condamne pas pour autant les pays arabes à une confusion éternelle entre pouvoir politique et religieux. Cela montre, en revanche, que l’identité n’est pas toujours soluble dans la laïcité... On peut parier que, dans un contexte symbolique musulman, la *shari’a* pourrait tout à fait servir à légitimer un système politique moderne, représentatif de la société civile et conforme aux principes démocratiques et laïques. Les oulémas sunnites et les institutions islamiques sunnites comme Al-Azhar qui ont été incorporés à l’état, seraient ainsi confirmés dans leur rôle de grands « légitimateurs ». Mais ce pari, reconnaître la légitimité d’une « laïcité musulmane », constitue aussi une défi à une certaine idée de la laïcité. Car la conversion au jeu politique démocratique des mouvements islamistes symbolise également leur prétention à l’universalisme qu’ils entendent disputer à l’occident “laïc”. S’il peut exister une « laïcité musulmane », n’est-ce pas un renvoi vers l’identité des autres laïcités ? ».

Shifting attention away from the institutional plane regarding a country of Muslim tradition to the personal one of individuals of Islamic faith who have settled or who were born in European countries where respect of religious freedom is in force, the same dynamic can be found. This means a “secularised use of religion” which is little inclined to making direct recourse to Islam in the political fray<sup>55</sup>, and the adoption of “believer/consumer behaviour that is comparable to that of young Roman Catholics of the same age”<sup>56</sup>.

Precisely these transformations of institutional and personal Islam would counsel caution when discussing them, so as to avoid venturing into facile categorisations based more on abstract views than on practices that have concretely been experienced. In particular, this complexity should prevent people from attributing effects to the decisions of the Court of Strasbourg that are *ultra vires*, drawing legal rules of universal application from sentences that are (naturally) considerably conditioned by special cases. Just to cite the two most obvious examples, it would be misleading to draw from the European Court’s sentences on the *Refah partisi* the equation Muslim religion = literal application of the positive divine law of the shari’a = incompatibility with a democratic form of government<sup>57</sup>. It would be equally misleading to deduce from the sentences of the same Court on the subject of the Islamic headscarf<sup>58</sup> a necessary equation between the veil and discrimination against women.

In reality, evidence of a common fate between the various hemispheres is the temptation to close the borders of Europe to the Islamic counter-model which seems to be generated by the same “bad intentions” ascribed to the latter. Indeed it is accompanied by an artificial (affected?) reactivation of the “transcendent features” of the social bond and therefore by the illusion of interrupting the phase of “liquidation” of the religious to return to the previous phase of “transference”. In this context, Carl Schmitt’s opinion, according to which politics is none other than the continuation of theology (of the old theology) by other means, acquires new significance<sup>59</sup>. And that,

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<sup>55</sup> See Fetzer, Soper, *The Roots of Public Attitudes*, cit., 256.

<sup>56</sup> Thus Jocelyne Cesari, *Les musulmans en Europe : nouveau pluralisme religieux et démocratie*, in *Laïcités-Démocraties des relations ambiguës*, op. cit., and, fully, Olivier Roy, *Vers un islam européen*, Éditions Esprit, Paris 1999 and *L’islam mondialisé*, Éditions du Seuil, Paris, 2002.

<sup>57</sup> Besides, the same Court does not appear to wholly exclude the possibility of reconciling the European legal system with a (limited) legal pluralism on a religious basis. Indeed in the same decision of 2003 on *Refah partisi* the Court repeatedly stated that the model judged to be in contrast with the European Convention was only the one where there was proposed “a difference of treatment among the citizens in *all* the fields of public and private law on the basis of religion or of their conviction” or that imposed on people to live “in *all* the fields of private and public life in conformity with the religious rules” (§ 123).

<sup>58</sup> See, in particular, the decision *Karadum v. Turkey* of 3 May 1993 which legitimised the prohibition of the headscarf in Turkish State Universities on the basis of the requirement to protect the non-Muslim minorities in a country with a strong Muslim majority and the *Dahlab v. Switzerland* decision (15 February 2001) in which for the first time the Court, entering into the merit of the meaning of a veil worn by a teacher in a public primary school, considered it “difficult to reconcile the use of the Islamic headscarf (*yet again connected with compliance with a “Koranic precept”*) with the message of tolerance, respect for the other and above all of equality and non discrimination that in a democracy every teacher has to transmit to their pupils”, thus justifying the ban also in the imperative name of “safeguarding the possibility of an educational pluralism, which is essential to the conservation of democratic society as conceived by the Convention” (decision on *Kjeldsen and others v. Denmark*, 7 December 1976, § 50).

<sup>59</sup> At the same time the split between technique and politics and the building of religiously or culturally connoted counter-models on which to forge an antithetic and possibly antagonistic identity (see Marcello Pera, *Il relativismo, il Cristianesimo e l’Occidente*, lesson at the Pontificia Università Lateranense for the 150 year anniversary since the foundation of the Faculty of civil law, Rome, 12 May 2004) may also serve to disguise

both in the case where this reactivation of the transcendent assumes the guise of a “republican” French-style variant, in which *laïcité* repropose the universalistic and englobing archetype of the religions, and in the case where the reference to the holy appears more direct, in a sort of “Christianly” connoted religious variant.

In the “French-style” variant *laïcité* and Republic are opposed to democracy, or better, to a caricatured representation of the Anglo-Saxon “counter-model”<sup>60</sup>, and to the technical-jurisprudential proceduralisation to which the absolute primacy of Parliament and the universal power of the law are opposed. From this springs the desire to tackle two questions, the “sects” and the “veil”, with laws that the “experts” (and perhaps, in reality, not only they) felt there was no need for. Typical of a country based on a “State-Nation identity”, the most macroscopic expressions of this variant entail the tendency towards the marginalisation of the religious and of its symbols from the public space.

In the religious variant, the criticism levelled at procedural democracy is associated with the direct reference to the Christian values as the only possible substantial assumption of a social system that is effectively democratic<sup>61</sup>. Typical of States founded on a “Nation-State identity” (for example Germany and Italy), this variant, contrary to the former, initially leads to emphasis of the role of “traditional” religious symbols in the public space<sup>62</sup>. Nevertheless, this variant is always integrated in pluralistic legal systems and that risks favouring a recurrence of the laicising dynamic, as the requirement to re-establish an equality that has been too manifestly obliterated may lead the use of all religious symbols to be called into question. This is the direction in which the decision by the German administrative tribunal would appear to have been going when it extended the interdiction provided by the laws of the Land for just the Islamic headscarf to include also the veil of Roman Catholic nuns.

## 5. *Thank you Kelsen ! Thank you Sen !*

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other intentions. This may not be so different from what happened at the time of the affirmation of eighteenth century *laïcité*, when the laicising dynamic, directing political passion against the “excessive power of the clergy”, also served as a tool for containing the “socialist danger”. In particular the idealisation of cultural and religious counter-models might also have the function of directing critical attention away from problems that are “merely” social, arising from a process of economic integration that it is hard to dispute in its fundamental lines, about which see Zemni, op. ult. cit., 158 ff. Besides, in the opinion of Samuel P. Huntington, *La terza ondata. I processi di democratizzazione alla fine del XX secolo*, Il Mulino, Bologna, 1995, 108, “the place” of the wave of democratisation experienced between the 1970s and 1980s “could well be a crucifix superimposed on the dollar sign”.

<sup>60</sup> See, for example, Régis Debray, *Que vive la République*, Odile Jacob, Paris, 1989 and Id., *Républicain ou démocrate ?*, « Le Nouvel Observateur », 30 November 1989 on which see Pierre Birnbaum, *La France imaginée. Déclin des rêves unitaires ?*, Fayard-Gallimard, Paris, 1998, 29-37.

Criticisms of the “communitarian” model do not at all consider that in the Anglo-Saxon system positions exist according to which « very few, if any, pluralists currently subscribe to an interpretation of the theory of “cultural relativism”, in terms of which all cultural traditions and practices are accorded equal weight and value on the grounds that no cross-cultural judgements can be independent, impartial, and objective» (thus Sebastian Poulter, *Ethnicity, Law and Human Rights. The English Experience*, Oxford University Press, Oxford-New York, 1999, 20).

<sup>61</sup> See, for example, Philippe Bénéton, *Démocratie, modernité et christianisme*, in « Gregorianum », 80, 4, 1999, 624 ff.

<sup>62</sup> On this question see the essays by Alessandro Morelli, *Simboli e valori della democrazia costituzionale*; Gabriella Mangione, *Il simbolo religioso nella giurisprudenza recente del tribunale federale tedesco* and Natascia Marchei, *Il simbolo religioso e il suo regime giuridico nell'ordinamento italiano*, in E. Dieni, A. Ferrari, V. Pacillo (ed.), *Symbolon/Diabolon. Simboli, religioni, diritti nell'Europa multiculturale*, il Mulino, Bologna, 2005.



In reality, if the European religions wish to conserve and revive their role in the public space, there appear to be few alternatives to their participation in the by now old “constituent pact”, however prosaic and frustrating this may seem. Such a pact obliges their divine, positive or natural rights, or whatever, to go through the filter of a comparison in which the religious values do not exhaust the set of possible options<sup>63</sup>. On the other hand, it is democracy that appears to be the system that best respects and valorises the force of the “eschatological reserve” which is peculiar to religions<sup>64</sup>. Indeed, on the one hand European democracy does not provide space for projects that “aim at its destruction” (*Refah partisi*, cit.); on the other, a secular democracy cannot accept the translation into law of specific morals that expect to impose themselves by force on individual consciences. Besides, the centrality of conscience does not only represent the most precious nucleus of the European legal heritage (Pellegrino Rossi). Indeed it increasingly constitutes a limit and a value for the same religious legal systems<sup>65</sup>. Of course the democracy of the conscience will not always reproduce the harmony of the celestial world. However, it will help people to remember that, on the one hand, a democratically governed paradise does not exist<sup>66</sup>, and on the other, that it can be dangerous to exchange the earth for heaven. In this sense the numerous nostalgic sentiments for a “civil religion” are rather puzzling. Besides, even though it was germinated in Europe, the civil religion rapidly crossed the Atlantic or, when it really did take root in the old continent, the fruits did not always seem to be the most excellent<sup>67</sup>.

Even the most traditional attempt to ensure by legal means the role of a religion or of a religious moral really seems too similar to the surrender by the religions to social transformations to be able to produce anything different from a statue with feet of clay, from an illusion destined to collapse at the first electoral upheaval as the Spanish situation illustrates so well today.

Perhaps what makes Europe what it is now are in fact its contradictions, its unsolved tensions, its suspicion of every excessive virtuosity after having already tried some of them. If it has been said that a certain facility in the transition from moral to law<sup>68</sup> is a peculiar feature of the United States, a certain discontinuity between the two seems typical of the old continent.

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<sup>63</sup> On the relationship between rights and values and on the overcoming of a concept of rights as “limits to power” and therefore, on a possible criticism of the emphasis on the role of the religions as “limits of the political”, see Gianluigi Palombella, *L'autorità dei diritti*, Laterza, Roma-Bari 2002, *passim*.

<sup>64</sup> See, in this sense, Giuseppe Angelini, *La democrazia in questione*, in « Teologia », 1, 2004, 3-13, in which the Author severely criticises the manipulative use of religion for the purposes of democracy that Habermas position might also suggest.

<sup>65</sup> Albeit in reference to the only experience of the Roman Catholic Church after *Dignitatis Humanae* and to the Christian world in general see Eberhard Jüngel, *Pluralismo, Cristianesimo, Democrazia*, in *Cristianesimo e Democrazia nel Futuro dell'Europa*, cit., 21-9.

<sup>66</sup> Thus Sidney Hook, cited by Kelsen, *Democrazia e religione*, in *La democrazia*, il Mulino, Bologna, 1998, 292. This essay by Kelsen (ivi, 275-333) even though it reflects some sensitivities that have by now (in part) been overcome, especially in relation to the relationship truth-religions and to the attribution of an exclusively meta-judicial value to the category of pardon, remains indispensable for any consideration on this subject.

<sup>67</sup> Jean-Pierre Sironneau, *L'échec des “religions civiles” et des “religions politiques” en Europe signe-t-il la fin de toute légitimation religieuse du pouvoir ?*, in J.-L. Chabot, C. Tourneau (dir.), *L'héritage religieux et spirituel de l'identité européenne*, L'Harmattan, Paris, 2004, 171-97.

<sup>68</sup> See Gret Haller, *Europa: come ricostruire le convivenze*, in *Nel Suo Nome. Dio e il confronto delle civiltà*, Atti dell'Incontro di Camaldoli, 3-5 ottobre 2003, « Il Regno », Supplemento al n. 6 del 15 marzo 2004, 54-9.

Faced with *tolerance without discussion à la Rorty* or *discussion without tolerance à la Habermas* or *à la Rawls*, the challenge for Europe, its institutional mechanisms and its procedures<sup>69</sup>, is precisely that of favouring a *tolerant discussion* - insofar as any “human discussion” can be so. All in all, in my opinion this is the only, very substantial, truth at the roots of the history of this continent and, perhaps, not only of this one<sup>70</sup>.

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<sup>69</sup> See Pintore, *I diritti della democrazia*, op. cit., *passim*.

Reflecting on the absence of any reference to the Muslim presence in Europe in an article published by Habermas and Derrida in «Frankfurter Allgemeine Zeitung» of 31 May 2003 in which the two Authors condemned the United States' unilateralism demonstrated on the occasion of the war against Iraq, Ibrahim Kalin, *The World Congress of Philosophy and Islamic Thought*, «Isim newsletter», 13, December 2003, 9 maintains: «there is no indication that Habermas and Derrida want to see Europe as a truly multicultural entity beyond the limits of Judeo-Christian tradition on the one hand, and secular European culture, on the other».

<sup>70</sup> See Amartya Sen, *La democrazia degli altri. Perché la libertà non è un'invenzione dell'Occidente*, Mondadori, Milano, 2004.