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## **Constitutionalism as Peaceful “Site” of Religious Struggles \***

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### **1 – Introduction**

Philip Jenkins, one of most accredited scholars of religion in the US, claims that when historians will look back at this period, they will probably see religion as «the prime animating and destructive force in human affairs, guiding attitudes to political liberty and obligation, concepts of nationhood and, of course, conflicts and wars»<sup>1</sup>. Yet, for much of the 20<sup>th</sup> century religion was almost banished from the political discourse: for many, God had been undone by Charles Darwin, dismissed by Karl Marx, deconstructed by Sigmund Freud. Furthermore, over the last twenty years, religious worship has declined markedly in Europe: best-selling books argue «the rise of clever atheism»<sup>2</sup>. At same time, however, on the other side of the Atlantic, during his mandates American ex-President, George W. Bush, began every day on his knees and every cabinet meeting with a prayer. Even now, after Barack Obama's victory, the easiest way to tell a Republican

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<sup>1</sup> Cit. in **THE ECONOMIST'S SPECIAL REPORT**, *In the God's name*, November 1<sup>st</sup> 2007.

<sup>2</sup> **Ivi**, *Time for a bruiser. The church's new English head is a tougher customer than his predecessor*, April 8<sup>th</sup> 2009.



from a Democrat is to ask how often they go to church. And, although European liberals sneer about the new “US theocracy”, some American conservatives claim that, because of the growing strength of Muslim communities, secular – childless – Europe is turning into “Eurabia”.

In reality, we are living in an era of unprecedented religious diversity. In some States one religion still predominates. In others, religious representatives may have a formal political role, such as the case of the bishops who sit in the House of Lords of the United Kingdom where, like in Greece, an established Church remains a reality. Nevertheless, the separation of Church and State is a generally accepted principle that prevails in politics and institutions in Western legal system. But, religion “questions” still remain an important aspect of what is called liberal constitutionalism. In fact, in a more and more globalised social and political context, the time seems to be propitious for an examination of both the relation between Church/es and State and the general principles of “constitutionalism”, whose definition cannot be separated from an analysis of its historical roots, deeply connected with secularism. Rather, as we will see, it is not arbitrary to explain the constitutionalism as a product of a “long process of secularization”, which key issues are necessary in order to capture a clear definition of this legal model (Part I).

As a requisite of liberal constitutionalism, the separation of Church and State – or secularism – is a common feature of modern political engineering. Interestingly, the ubiquity of that principle goes hand in hand with the variety of its institutionalization: even though secularism seems to have touched, in one way or another, most of the States, the way it has been implemented has been very different. Particularly, in Europe there seem to emerge two alternative ways of achieving secularism: 1) a separation of Church and State combined with the protection of religious practices; 2) protection of religious pluralism together with a certain degree of uniformity between a (majority or official or established) Church’s culture and the State’s legal “values”.

Even those European States which abide to the organic distinction between religious and secular powers do not testify an identical interpretation and implementation of secularism. Hence, comparative analyses are prompt to stress that, for example, in France and in Turkey *laïcité* and *laiklik* are used to refer to general secularism. Yet, the meaning of those two terms are strictly connected with these two specific – historical and political – contexts which, in this respect, have almost nothing to do with United States and British legal systems. In March 2004, for example, France found a highly controversial



manifestation in the law banning “conspicuous” religious symbols, including Islamic headscarf, from public school; at same time, the Court of Appeals of England and Wales stated the right of a Muslim student to wear the jilhad, a long and flowing gown much more “conspicuous” than the above mentioned headscarf. Furthermore, in this case the British judge affirmed that «the United Kingdom is very different from Turkey. It is not a secular state, and although the Human Rights Act [the 1998 Act which aims at giving “further effect” in UK law to the rights contained in the European Convention on Human Rights] is now part of our law, we have no written Constitution. In England and Wales express provision is made for religious education and worship in schools in Chapter VI of the 1998 Act. Schools are under a duty to secure that religious education in schools is given to pupils, and that each pupil should take part in an act of collective worship every day, unless withdrawn by their parent»<sup>3</sup> (Part II).

This shows that the idea of secularism-*laïcité* has never been clearly defined. On the contrary, it has often been the source of many potential tensions, as denoted by differing national approaches to the same concept of the separation between religion and politics during the debate about the reference to a common Judeo-Christian heritage in the EU draft constitutional Treaty<sup>4</sup>.

Despite these differences, though, in this Paper I will demonstrate that the use of human rights discourse – a pillar of modern-contemporary constitutionalism – at national and supranational level offers space for re-defining or re-inventing the meaning and boundaries of sovereign power because it is more compatible with some fundamental principles, such as human dignity, rule of law, liberty of religion and conscience; and more “homogeneous definition” of secularised constitutional legal system (Conclusion).

## **2 – Part I: Theological and Historical Roots of Western Constitutionalism**

As J.S. Mill affirmed, «language is the depositary of the accumulated body of experience to which all former ages have contributed their part,

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<sup>3</sup> England and Wales Court of Appeal (Civil Division), *The Queen on the application of SB v. Headteacher and Governors of Denbigh High School*, [2005] EWCA, Civ 199 C1/2004/1394, par. 76.

<sup>4</sup> From here stems the “compromise” informing the Preamble to the EU Constitutional Treaty, which refers only to «the cultural, religious and humanist inheritance of Europe». See **J.L. CLERGERIE**, *La place de la religion dans la future Constitution Européenne*, in *Revue du Droit Public*, 2004, p. 739.



and which is the inheritance of all yet to come»<sup>5</sup>. In short, words that designate some concepts (like those that refer to fundamental rights or sovereignty of the State) are indicators of experiences. Similarly, the term “constitutionalism” and the relative concept are the result of a long development of historical events, in which one could, however, see some constants<sup>6</sup>. One of these constants is the crucial role played by religion. In a way or another, religion has been very important for assuming the permanent characters – i.e. its essential qualities – of constitutionalism. Thus, the study of religion’s role in the Western constitutional history becomes important for a correct (historically and empirically speaking) “definition” of a legal model based on the constitutionalism’s values.

## 2.1 – King-Servant of God vs. Tyrant-Servant of the Devil

In Europe, during the 12<sup>th</sup> century a certain philosophical vision of society dominated the legal system. In general, and especially in England, the King’s power was legitimated in two ways: he was considered both the supreme judge of the State<sup>7</sup> and a person who represented his people; he portrayed his subjects’ rights and their protection<sup>8</sup>. This defined the main function of a sovereign. In particular, it described the theoretical boundaries of what distinguished a “King” from a “Tyrant”. In fact, the interpretation of legal systems was influenced by Christian theology and, consequently, by the “sacred envelop” covering the royal power. In other words, the framework of political and legal system was essentially based on the religious thought

<sup>5</sup> J.S. MILL, *A System of Logic, Ratiocinative and Inductive, Being a Connected View of the Principles of Evidence, and the Method of Scientific Investigation*, London, Harper & Brothers, 1859, p. 413.

<sup>6</sup> H. HØIBRAATEN, *Secular Society: An Attempt at Initiating*, in T. LINDHOLM, K. VOGT (eds.), *Islamic Law Reform and Human Rights*, Copenhagen, Nordin Human Rights Public, 1993, pp. 231 ff.

<sup>7</sup> T.F.T. PLUCKNETT, *A Concise History of the Common Law*, London, Little Brown & Co, 1957, pp. 40 ff. and pp. 328 ff.

<sup>8</sup> E. KANTOROWICZ, *The King’s Two Bodies: A Studies in Mediaeval Political Theology*, Princeton, Princeton University Press, 1957, p. 314: «By interpreting the People as an *universitas* “which never dies” the jurisprudents had arrived at the concept of a perpetuity of both the whole body politic (head and members together) and the constituent members alone. The perpetuity, however, of the “head” alone was of equally great importance, since the head would usually appear as the responsible part and its absence might render the body corporate incomplete or incapable of action. The perpetuation of the head, therefore, created a new set of problems and led to new fictions»



and the main goals of King's mission were to provide, along with his power, for peace and justice on Earth<sup>9</sup>. This explains the double personality of a king: he was said to be minister and servant before God, but *legibus solutu* before people (subjects)<sup>10</sup>. From here stems the dual nature of kingship: the man and the monarch<sup>11</sup>.

In embryo this system showed some key elements of the modern conception of constitutionalism: a potential overture for the revolutionary step through which the King power would be subjected to the law<sup>12</sup>. Despite the theological perspective based on the distinction between the King serving god and the tyrant serving the devil, the law still remained the only valid criterion for understanding if people were subjected to a King or, on the contrary, to a tyrant (imitating lucifer)<sup>13</sup>. In this context, the legal theory held that all law was ultimately derived from god and that, while the King could act unbound by laws, it was widely considered that he was subject to the principles of divine or natural law<sup>14</sup>. As John of Salisbury (1115-1180), «el fundador de la ciencia política occidental»<sup>15</sup>, wrote in 1159:

«A tyrant ... is one who oppresses the people by rulership based upon force, while he who rules in accordance with the laws is a prince. Law is the gift of god, the model of equity, a standard of justice, a likeness of the divine will, the guardian of well-being, a bond of union and solidarity between peoples, a rule defining duties, a barrier against the vices and the destroyer thereof, a punishment of violence and all wrong-doing». For these reasons, if the kings «fights

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<sup>9</sup> «Kings promised in their coronation oaths *to do justice*, and the political theorists argued that an un just king was no king at all, *but a tyrant*»; **J.R. STRAYER**, *On the Medieval Origin of the Modern State*, Princeton, Princeton University Press, 1972, pp. 31-32.

<sup>10</sup> **L. MAYALI**, *Lex animata. Rationalisation du pouvoir politique et science juridique (XII<sup>e</sup>-XIV<sup>e</sup> siècles)*, Montpellier, Société Histoire Droit, 1988, pp. 155 ff.

<sup>11</sup> **A. MUSSON**, *Medieval law in Context, The Growth of Legal Consciousness from Magna Carta to the Peasant's Revolt*, Manchester and New York, Manchester University Press, 2001, pp. 220 ff.

<sup>12</sup> **F.D. WORMUTH**, *The Origins of Modern Constitutionalism*, New York, Harper & Brothers, 1949, pp. 3 ff.; **G. BURTON ADAMS**, *The Origin of the English Constitution*, Beard Books, Frederick, 2000, espec. chap. I, Note B, *Anglo-Saxon Feudalism and Political and Economic Feudalism*, pp. 40 ff.

<sup>13</sup> **M. FUMAGALLI BEONIO BROCHIERI**, *Il pensiero politico medioevale*, Roma-Bari, Laterza, 2000, pp. 28 ff.

<sup>14</sup> **J.E.A. JOLLIFFE**, *Angevin Kingship*, London, Black, 1963, pp. 54 ff.

<sup>15</sup> **J. MARTINEZ-TORRON**, *Derecho angloamericano y derecho canonico. Les raices canonicas de la "common law"*, Madrid, Civitas, 1991, pp. 159-160.



for the laws and the liberty of the people», the tyrant «thinks nothing done unless he brings the laws to nought and reduces the people to slavery». In sum, «the prince is a kind of likeness of divinity; and the tyrant, on the contrary, a likeness of the boldness of the Adversary, even of the wickedness of lucifer, imitating him that sought to build his»<sup>16</sup>.

Few years after, in England the famous Constitutions of Clarendon (1164) were referred to by Henry II and others as *avitae constitutiones* or *leges*, a *recordatio vel recognitio* of the relations purporting to have existed between Church and State in the time of Henry I. In reality, these were ecclesiastical rules, even though they were promulgated by a secular authority<sup>17</sup>. However, as we said, at this time the legal system showed (little, but in any case important) evidence of a constitutional attitude, rather than of an absolute State. In effect, historians have emphasised the recognised constitutional duties of the King, showing how these interacted with prevailing concept of kingship<sup>18</sup>. The 1185 Abingdon's case gives us a clear example.

On the death of the Abbot (1185), Henry II entrusted the management of Abbey of Abingdon to T. Esseburn who proposed to deliver to the King all possessions, including those belonged to the Prior of the convent. Thus, Prior and brothers of Abbey appealed to the competent Court. In the end,

«*praevaluuit gratia Dei quod Rannulfus de Glanvilla, justiciarum primus, ad alias justicias se convertens dixit, consuetudines nostras rationabiliter et discrete institutas fuisse, nec aliquid superfluum in eis deprehendi posse, nec dominum regem velle, nec se audere, contra consuetudines tam antiquas et justas aliquatenus venire, aut circa eas aliquid immutare* [The grace of God prevailed, that Rannulphus de Glanvilla, the chief of the Court, turning to the other judges, said that our customary rights had been established reasonably and wisely and that nothing excessive could be found in them. For this, the lord king neither wishes

<sup>16</sup> **JOHN OF SALISBURY**, *Policraticus*, 1159, translation from Latin by J. Dickinson, New York, Russell & Russell, 1963, p. VIII.

<sup>17</sup> **P. GROSSI**, *L'ordine giuridico medioevale*, Roma-Bari, Laterza, 1999, pp. 110 ff.

<sup>18</sup> **W.M. ORMROD**, *Political life in Mediaeval England*, Basingstoke, Macmillan, 1995, pp. 65 ff. and pp. 72 ff.



nor dares to go against customs in some measure so ancient and so just or to change anything respecting them]»<sup>19</sup>.

The Abingdon' case is a clear example of the use of the law to provide legitimacy for action in international and domestic affairs, which can be also seen to characterise the politics of the period after Magna Carta (1215) was approved: being on the right site of the law or setting out cases that justified the decisions adopted became as important for the king when achieving ambitions at home and abroad as for those who sought to judge his behaviour or his reading of legality.

An effective and practical example of how religion, normally used for legitimizing the absolute monarchy, could be also taken into account as a mean for limiting political power, in particular the royal power<sup>20</sup>. This, as mentioned above, can be described as the historical and political prologue of modern constitutionalism<sup>21</sup>: a legal model based on "limitation of government by law" and that could be considered antithetical to despotism.

This characteristic of English legal system was evident in Henri Bracton (1216-1268)'s book, *De Legibus et Consuetudinibus Angliae*, which religious influences were even more marked than in Glanville's or Salisbury's. As Ch. McIlwain demonstrated<sup>22</sup>, there are some statements of Bracton's book that denote very well his constitutional views. Particularly, an example occurs in his *Introduction*:

«Nihil enim aliud potest rex in terris, cum sit dei minister et vicarius, nisi id solum quod de iure potest, nec obstat quod dicitur quod principi placet legis habet vigorem, quia sequitur in fine legis cum lege regia quæ de imperio eius lata est, id est non quidquid de voluntate regis temere præsumptum est, sed quod magnatum suorum consilio, rege auctoritatem præstante et habita super hoc deliberatione et tractatu, recte fuerit definitum [For the king has no other

<sup>19</sup> In M.A. JOSEPH STEVENSON (eds.), *Chronicon Monasterii de Abingdon*, London, Longman Brown Green Longmans and Roberts, 1858, vol. I, *From the Norman Conquest until Accession of Richard the First*, pp. 298-299 (my translation).

<sup>20</sup> It is important to note that **RANNULPHUS DE GLANVILLA**, *justiciarum primus* (Chief of the Court), and Henry's chief justiciar during his later years, is the author of a very important book, *De Legibus et Consuetudinibus Angliae*, considered at this time as a kind English equivalent of Justinian's *Institutes*.

<sup>21</sup> B. TIERNEY, *Religion, Law, and the Growth of Constitutional Thought*, Cambridge, Cambridge University Press, 1982, pp. 12 ff.

<sup>22</sup> CH. H. MCILWAIN, *Constitutionalism. Ancient and Modern*, Ithaca New York, Great Seal Books Cornell University Press, 1958, pp. 28 ff.



power in his lands, since he is the minister and vicar of God, save that alone which he has of right. Nor is that to the contrary where it is said *quod principi placet legis habet vigorem*, for there follows at the end of the law together with the *lex regia* which has been laid down concerning his authority. Therefore it is not anything rashly presumed by will of the king, but what has been rightly defined with the king's authorization on the advice of his magnates after deliberation and conference concerning it]»<sup>23</sup>.

In this case, Bracton quoted the *Institutes* of Justinian<sup>24</sup>. But, while in the *Institutes* the term *cum* is a particle introducing a clause which gives an historical justification for a complete and arbitrary authority of the Emperor, in the Bracton's book «the *cum* is a preposition governing a noun in the ablative». In other terms, Justinian says the Prince's will is law, because (*cum*) people have conceded to him all their powers. On the contrary, Bracton's statement affirms that the Prince's will is law together – in accordance with – the *lex regia*. «This *lex regia* admits of nothing beyond a true definition of what the law already is, promulgated by the king's authority only after discussion with the *magnates* and their advice». In short, Bracton, while quoting Justinian's statement of absolutism, «turns it into an assertion of constitutionalism by such heroic means as changing a causal conjunctive into a preposition and omitting entirely the reference in the original to the concession of the people's whole power to the prince»<sup>25</sup>.

However, in this system of thought there were some obvious contradictions which produced two opposite interpretations; opposite but rightful, as we will see. It depends on the point of view with which one might identify. This may be explained by the fact that Bracton's analysis of the normative system was based on a Christian theological background<sup>26</sup>. King is *sub deo*, said Bracton, which means *sub lege, quia lex facit regem*. The king was free from the law in the same way he was

<sup>23</sup> **H. DE BRACON**, *De Legibus et Consuetudinibus Angliae*, in G.E. WOODBINE (ed.), New Haven, Yale University Press, 1922, II, p. 305 (translation in **CH. MCILWAIN**, *op. cit.*, p. 44).

<sup>24</sup> **G. POST**. *Bracton on Kingship*, in *Tulane Law Review*, 1968, pp. 519 ff.; W. Stubbs, *Lectures on Early English History*, London, Longmans Green & Co, 1906, p. 250 ff.

<sup>25</sup> **Ch. MCILWAIN**, *op. cit.*, p. 45.

<sup>26</sup> **N.F. CANTOR**, *Church, Kingship and Lay Investiture in England, 1089-1135*, Princeton, Princeton University Press, 1958, pp. 6-9; **G. KALLEN**, *Der Investiturstreit als Kampf zwischen germanischem und romanischem Denken*, Köln, Creutzer & Co, 1937, pp. 65 ff.; **G. TELLENBACH**, *Church, State, and Christian Society at the time of the Investiture Contest*, Oxford, B. Blackwell, 1940, pp. 36 ff.



free from sin: his will had force of law because he depicted it in public. Thus, as a servant of the law, he was the true Prince. He could not fail to observe the law<sup>27</sup>. Yet, depending on where one focused one's attention – either the first part of the statement (the acts or edicts of *Dei Vicarius* could not be judged) or the second part (the King was under God, which meant under the law) –, the legal model could have been perceived respectively as absolutist or constitutionalist.

In any case this was not a contradiction of a single doctrine, but an aporias of the English legal system influenced for a long time by theological and religious thoughts<sup>28</sup>. For example, in November 1627, in the famous Darnell's case<sup>29</sup> – also known because it led to *Petition of Rights* of 1628<sup>30</sup> (written by Sir Edward Coke, a member of the House of Common) – the King's Bench must have decided whether granted freedom to some people imprisoned by the order of King Charles I. During the process both H. Calthrop, defender of those who had been imprisoned, and R. Heat, the Attorney General, quoted Bracton. The former says that if it was true that *lex facit regem*, King could not be *legibus solutu*: His Majesty must tell us why these gentlemen are in state of arrest. On the contrary, R. Heat affirmed that neither normal person nor the judges may have called any act of the King into question: «Majesty's special commandment was positive and sufficient in law, being a valid cause of imprisonment and not the cause of the cause»; in other words, «Charles's power of discretionary imprisonment was

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<sup>27</sup> P. BELLINI, *Legislatore, giudici, giuristi nell'esperienza teocentrica della Repubblica cristiana*, in Idem, *Saggi di storia dell'esperienza canonistica*, Milano, Giuffrè, 1969, pp. 129 ff.

<sup>28</sup> F.W. MAITLAND, *The Origin of Uses*, in H.A.L. Fisher (ed.), *The Collected Papers of Frederic William Maitland*, Cambridge, Cambridge University Press, 1911, vol. II, pp. 469-470: «The King of England, who was often involved in contests about the election of bishops – contests which would sooner or later come before the Roman Curia – kept Italian canonists in his pay. Young Englishmen were sent to Bologna in order that they might learn the law of the Church. The University of Oxford was granting degrees in civil and canon law, the University of Cambridge followed her example. There was no lack of ecclesiastical lawyers; indeed, the wisest and most spiritual of the clergy thought that there were but too many of them, and deplored that theology was neglected in favour of a more lucrative science. And what we might call an ecclesiastical "Bar" had been formed».

<sup>29</sup> In *Public Record Office, King's Bench records*: KB 21/9 (Rule Book, Car. 1, unfoliated).

<sup>30</sup> It is interesting to read the Clause III: «whereas also by the statute called "The Great Charter of the Liberties of England" it is declared and enacted, that no freeman may be taken or imprisoned or be disseized of his freehold or liberties, or his free customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land».



upheld by strict law and precedents on record in King's Bench, and that those so imprisoned were not bailable»<sup>31</sup>.

This case shows that the rule of law<sup>32</sup> remained a simple principle with limited possibilities for practical implementation: the English legal system lacked the legal mechanism capable of controlling the abuses of political power and safeguarding the subjects' rights. In addition, apart from the rebellion, at this time there were no real "sanctions" for King and, as a consequence, no tangible limit, virtually imposed on him by the law<sup>33</sup>. This is because the connection between the divine law and the definition of subjects' rights<sup>34</sup> was not clear yet.

## 2.2 – Hobbes and *la religion de l'État*

In the fifteenth century there was a decline of some cultural matrices that until then had been affirmed in Europe at political and legal level. The Catholic Church must have combated the heresies following the Reformation; wars of religions promoted the fragmentation of "religious geography" and, consequently, the end of the monopoly of a single creed. Moreover, new studies brought about a growing attention for a new *episteme* (theory of knowledge), which encouraged the use of inductive method<sup>35</sup>, on the one hand, obscuring the reference to God, on the other. It was the beginning of what is called the "process of secularization". To this respect, and in connection with the evolution of constitutionalism, T. Hobbes' thought has been very important.

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<sup>31</sup> J.A. GUY, *The Origins of the Petition of Right Reconsidered*, in *The Historical Journal*, 1982, 2, p. 292; H.R. TREVOR-ROPER, *Archbishop Laud, 1573-1645*, London, Macmillan, 1962, pp. 80 ff.

<sup>32</sup> M. PATRONO, *Le origini della Rule of Law nell'Inghilterra Medioevale*, in M. PATRONO (ed.), *Studiando i diritti. Il costituzionalismo sul palcoscenico del mondo dalla Magna Carta ai confini del (nostro) tempo*, Torino, Giappichelli, 2009, pp. 21 ff.

<sup>33</sup> W. BAGEHOT, *The English Constitution*, London, Fontana, 1873, pp. 206-207: «The notion of law as we have it – of a rule imposed by human authority, capable of being altered by that authority when it likes, and in fact, so altered habitually – could not be conveyed to early nations, who regarded law half as an invincible prescription, and half as a Divine revelation. Law "came out of the king's mouth;" he gave it as Solomon gave judgment, – embedded in the particular case, and upon the authority of Heaven as well as his own. A Divine limit to the Divine revealer was impossible, and there was no other source of law».

<sup>34</sup> H.J. BERMAN, *Law and Revolution: The Formation of the Western Legal Tradition*, Harvard-Mass, Harvard University Press, 1983, pp. 276 ff.

<sup>35</sup> F.W. MAITLAND, *Introduction*, in O.F. VON GIERKE, *Political Theories of the Middle Age*, Boston, Beacon Press, 1958, pp. xiii ff.



In effect, the merit of Hobbes appears when he is compared to earlier political theorists: his theory is completely free from superstition. He is clear and logical; his ethics, right or wrong, is completely intelligible and does not involve the use of religious concepts<sup>36</sup>. In this sense, apart from Machiavelli, he may be considered as «first really modern writer on political theory»<sup>37</sup>. Yet, paradoxically, Hobbes' thought supported a “rational absolutism”, rather than the evolution of constitutionalism. On political ground, Hobbes developed a series of concepts that led him to cultivate a sort of “religion of sovereignty”, potentially capable of legitimizing an unlimited public power, which could dominate «over all the rest». Sovereign «derives his Right of Sovereignty from the Power it self»<sup>38</sup>; it «is annexed to the sovereignty, the whole power of prescribing the rules, whereby every man may know, what goods he may enjoy, and what actions he may do, without being molested by any of his fellow-subjects »<sup>39</sup>. Thus, about the relation between secularism and constitutionalism, it is interesting to note that among the elements that Hobbes considered as factors of political instability and dissolution of the commonwealth there were: giving too little power to the sovereign, the idea that the sovereign is

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<sup>36</sup> F. CORDERO, *Gli osservanti. Fenomenologia delle norme*, Torino, Aragno, 2008, pp. 146 ff.

<sup>37</sup> B. RUSSELL, *History of Western Philosophy*, London, Routledge, 2004, p. 508. Here is an example: «... if we cannot remember what is certainly understood by those words, but sometimes one thing, sometimes another seeme to be apprehended by us, then we are said to thinke. For example, if it be propounded that two and three makes five; and by calling to minde the order of those numerall words, that it is so appointed by the common consent of them who are of the same language with us, (as it were by a certaine contract necessary for humane society) that five shall be the name of so many unities as are contain'd in two and three taken together, a man assents, that this is therefore true because two and three together, are the same with five. This assent shall be called knowledge, and to know this truth is nothing else but to acknowledge that it is made by our selves; For by whose will and rules of speaking the number || is called two, ||| is called three, &c. |||| is called five, by their will also it comes to passe, that this Proposition is true, Two and three taken together makes five. In like manner if we remember what it is that is called theft, and what injury, we shall understand by the words themselves, whether it be true that theft is an injury, or not. Truth is the same with a true Proposition; but the Proposition is true in which the word consequent, which by Logicians is called the praedicate, embraceth the word antecedent in its amplitude, which they call the Subject; and to know truth is the same thing as to remember that it was made by our selves in the common use of words» (T. HOBbes, *De cive. Philosophical Rudiments Concerning Government and Society*. London, Printed by J.C. for R. Royston, at the Angel in Ivie-Lane, 1651, cap. XVIII, IV.

<sup>38</sup> IVI, cap. XV, *Of Religion*, III.

<sup>39</sup> ID, *Leviathan*, in W. MALESWORTH (ed.), *The English Works of Thomas Hobbes of Malmesbury*, London, J. Bohn, 1839-1845, XVIII, p. 162.



subject to civil laws, the recognition of absolute private property, refusing the power of taxation to the sovereign, division of the sovereign power, and, above all, allowing private judgement in subjects, separation of temporal and spiritual powers and the liberty of disputing with the sovereign. To this respect Hobbes was influenced by the civil wars that swept Europe from 1530 to 1690s. They were not only struggles for political powers, but also die hard religious conflicts. Hence, Hobbes considered religious homogeneity indispensable for both social stability and political legitimacy. In his case, religious questions were political questions in their entirety; and any form of religious diversity was considered as a menace for political authority. Therefore, Hobbes was led to considerer the national interest as a whole, assuming that the major interests of all citizens are the same. This is connected with the assumption that the interests of a monarch were almost identical with those of his subjects.

Now, it is true that in time of war there is a sort of unification of interests. But in time of peace the clash of interests between categories of people may be great and, in such a situation, it is not true that the best way to avert anarchy is to preach the absolute power of the sovereign. On the contrary, separation of temporal and spiritual powers, the liberty of disputing – which on the base of religious freedom – may be the only (if not the best) way to prevent civil war, as the English constitutional history has clearly shown.

In sum, as G.W. Leibniz rightly affirmed, at the end of the day «Hobbes ... croit, et au peu près, pour la même raison, que la véritable religion est celle de l'état»<sup>40</sup>. And, it is against this background that some thinkers, like John Locke and Roger Williams, aimed for a more principled justification of religious tolerance and, therefore, the separation between Church and State. In other terms, as we will soon see, what Hobbes saw as serious “enemies” of political stability were considered as pillars of the modern legal system by Locke and Williams. That system was based on both real secularization – grounded in a material distinction between «the business of civil government» and the «business of creed» – and the simultaneous affirmation of freedom of conscience and religion; two outstanding features that have contributed in re-defining constitutionalism, in the modern sense of the term. In fact, while many assumed that the king should suppress false religions, Williams and Locke's pragmatic considerations addressed them toward secularization, tolerance and

<sup>40</sup> G.W. LEIBNIZ, *Méditation sur la Notion Commune de la Justice*, Leipzig, 1885, p. 1703.



religious freedom. Since enforcement of religious uniformity seemed to be unachievable, they considered all these concepts as the best means for a peaceful and civic coexistence.

### **2.3 – John Locke's Principle of Tolerance. The modern constitutionalism**

An important characteristic of John Locke, descended from him to the English Liberal movement, is the lack of dogmatism or the presence of few certainties: God, our own existence and mathematics. The truth is hard to ascertain, which means that rational man will keep his opinions with some measure of doubt. These are the premises from which Locke derives his religious tolerance. Despite his deep religiosity – Locke has always accepted revelation as real source of knowledge – he nevertheless hedges round his faith with rational safeguards. In the end, for Locke revelation must be judged by reason, which remains supreme<sup>41</sup>; this because «reason is easier to be understood, than the fancies and intricate contrivances of men, following contrary and hidden interests put into words»<sup>42</sup>. For all these reasons, he realized that religious diversity is unavoidable and religious difference would prove intractable. Furthermore, because «it is only light and evidence that can work a change in men's opinion; and that light can in no manner proceed from corporal suffering, or any other outward penalties»<sup>43</sup>, the State could not enforce religious uniformity.

Yet these considerations did not prevent Locke from affirming the use of the State's force against certain doctrine, like atheism, that, by their very nature, constituted for him a threat to the civil order of commonwealth: «Those are not at all to be tolerated who deny the being of God. Promises, covenants, and oaths, which are the bound of human society, can have no hold upon atheist. The taking-away of god, though but even in thought, dissolves everything»<sup>44</sup>. In logical term, it must have been clear to Locke that intolerance against atheist was

<sup>41</sup> J. TULLY, *Toleration, Scepticism and Rights: John Locke on Religious Toleration*, in E.J. FURCHA (ad.), 1990 *Symposium on Truth and Tolerance*, Montreal, McGill university Press, 1990, pp. 13 ff.. See also D. AUGENSTEIN, *A European Culture of Religious Tolerance*, in EUI Working Papers, Law 2008/04, pp. 1 ss

<sup>42</sup> J. LOCKE, *Two treatises of Government*, Book II, *The second Treatise of Civil Government*, London, by A. Millar, H. Woodfall et al., 1690, chap. II, sec. 12, p. 10.

<sup>43</sup> J. LOCKE, *A Letter Concerning Toleration*, ed J. HORTON, S. MENDUS, London, Routledge, 1991, p. 19 (English translation from Latin by W. POPPLE).

<sup>44</sup> IVI, p. 54.



incompatible with his affirmation about the involuntary nature of religious creeds insomuch as the atheist too. But this is due to the fact that Locke's notion of religious tolerance was deeply influenced by Christian cultural framework. Thus, his definition of Commonwealth was «shaped and dominated by a picture of the earthly setting of human life as a created order, an order designed and controlled by an omnipotent, omniscient and also, mercifully, benevolent deity: the God of Christian»<sup>45</sup>. The concept of tolerance becomes here subjected to the contingencies of politics directed toward public good.

In any case, the tolerance toward religious diversity, rather than the attempt to implement religious uniformity, is the core of Locke's thought. In other words, Locke was a Christian, but his Christianity was shorn of everything that had made Puritanism revolutionary (of direct contact with God, enthusiasm). Indeed, he favoured religious toleration, and his tolerance was the rational calculation of the 1689 *Toleration Act*<sup>46</sup> and *Bill of Rights*, rather than the humanist idealism, like John Milton's political idea: «it is not the diversity of opinions, which cannot be avoided; but the refusal of toleration to those that are of different opinions, which might have been granted, that has produced all the bustles and wars, that have been in the Christian world, upon account of religion»<sup>47</sup>. The separation between State and Church becomes therefore one of the Locke's arguments against religious persecution. The commonwealth is «a society of men constituted only for procuring, preserving, and advancing of their own civil concerns»<sup>48</sup>; in this case, «the law is not made about religion, but about political matter»<sup>49</sup>. He accepted 1689 as the Revolution to end the Century of revolutions.

To this respect, it is interesting to note that Locke's *Two Treatises on Government*, of which the second is especially important in the history of liberal constitutionalism's ideas, is a reply to Sir Robert Filmer's book, *Patriarcha: or The Natural Power of Kings* – which was sponsored by the Stuarts – whose theories belonged to extreme section of the Divine Right party. Filmer began by combating what was called “common opinion” that mankind is naturally endowed and born with

<sup>45</sup> J. DUNN, *What is living and What is Dead in the Political Theory of John Locke?*, *Interpretation Political Responsibility*, Cambridge, Polity Press, 1990, p. 11.

<sup>46</sup> The Act granted freedom of worship to so-called Nonconformists. It allowed them their own places of worship and their own teachers and preachers, subject to acceptance of certain oaths of allegiance.

<sup>47</sup> J. LOCKE, *A Letter Concerning Toleration*, cit., p. 52.

<sup>48</sup> IVI, p. 17.

<sup>49</sup> IVI, p. 37.



freedom from all subjection, and at liberty to choose what form of government it pleases, and the power which any one man hath over others was at first bestowed according to the discretion of the multitude:

«This Tenant was first hatched in the Schools, and hath been fostered by all succeeding Papists for good Divinity. The Divines also of the Reformed Churches have entertained it, and the Common People every where tenderly embrace it, as being most plausible to Flesh and blood, for that it prodigally distributes a Portion of Liberty to the meanest of the Multitude, who magnifie Liberty, as if the height of Humane Felicity were only to be found in it, never remembering That the desire of Liberty was the first Cause of the Fall of *Adam*»<sup>50</sup>.

The desire of liberty is a sentiment which Filmer regarded as impious. In his thought political power derived not from any contract, nor yet from any consideration of the public good, but entirely from the authority of a father (King) over his children (subjects). In effect, for him the patriarchs in Genesis were monarchs and, consequently, kings were the heirs of Adam, or at least were to be regarded as such.

Locke performed the easy task of demolishing the Filmer's theories. In this case, as Christopher Hill says, from Hobbes, whom he did not attack, Locke took his utilitarianism, his logic way of arguing and his necessity of government<sup>51</sup>. But Locke, in contrast with the author of *Leviathan*, argued that the Executive power may forfeit its rights if it dangers the stability of property or, in general, individual rights, maintenance of which is the reason for the existence of the State. So, in Locke's theory of the commonwealth, the State is deprived of its absolute value. In this case, the political authority was seen as function, not as part of the divine plan; it was no longer people that existed for the State, but it is the State that existed for people. Hence, for Locke, freedom of conscience and religion became a necessary prerequisite for building a new concept of the political phenomenon. An aspect of his theory which is more clearer in the thought of a contemporaneous of Locke, disciple of Sir Edward Coke and friend of John Milton as well as the founder father of Rhode Island: Roger Williams who devoted his

<sup>50</sup> Sir R. FILMER, *Patriarcha: Or the Natural Power of Kings*, London, Matthew Gillyflower and William Henchman, 1680, pp. 2-3.

<sup>51</sup> C. HILL, *The Century of Revolution*, London and New York, Routledge, 2006, 295 ff.



life to freedom of conscience and to a more democratic, pluralistic, modern notion of political community.

## 2.4 – Roger Williams: Apostle of Religious Liberty. The Root of American Secularism

In the area of religion, the American tradition has some distinctive features that ultimately proved valuable in forging the constitutional heritage. This is embodied in Williams' thought, which inaugurated a first, distinctive emphasis on the importance of a mutually respectful civil peace among people who differ in conscientious commitment. People have different ideas on views of life's meaning and, therefore, they really needed to learn to live together on decent conditions. Williams dramatizes this fact by stressing the importance of finding a way to live on terms of mutual respect with people whom one believes to be in error<sup>52</sup>.

The second distinctive feature of Williams' thought is a sense of the preciousness and vulnerability of each individual person's conscience, through which each individual seeks for meaning in his own way: the free conscience requires the civil peace, which is the Williams' distinctive approach to religious liberty and equality; equality before law.

The equal status of religious minorities was William's most persistent concern. In one of his studies of American natives' life and languages, written during a voyage back to England in 1643, He underlined the Indians' ability to coexist in «this [America] wild and howling land». Williams found it astonishing that the Indians did not mind picking up and moving on to a new place, whenever climate or sheer inclination moves them: «I once in travel lodged at a house, at which in my return I hoped to have lodged again there the next night, but the house was gone in that interim, and I was glad to lodge under a tree»<sup>53</sup>. Thus, the general ideas of Williams' writings became the dominant ethos of the America colonies, especially about religious liberty. As Marta Nussbaum have affirmed in his recent book, Williams «pointed to features of human experience that were vivid to the new settlers in any case; thus people who did not revere him, ultimately

<sup>52</sup> J. EBERLE, *Roger Williams's Gift: Religious Freedom in America*, in *Roger Williams University Law Review*, 1998-9, n. 4, pp. 425 ff.; P. HAMBURGER, *Separation of Church and State*, Cambridge-Mass, Harvard University Press, 2002, pp. 38 ff.

<sup>53</sup> R. WILLIAMS, *A Key into the Language of America*, London, Gregory Dexter, 1643, Vol. 1., p. 47.



discovered the wisdom of his position on their own. By the time of the Founding, America had evolved considerably, if not under Williams' direct influence, at least in the spirit of his life and work»<sup>54</sup>. They were in many ways the truest friends he had.

Despite his fervent Christian religiosity, Williams never tried to convert anyone, even though he showed interest in the theory of Menasseh ben Israel, that the Indians are the lost tribes of Israel. Rather, under the Williams' guide, Rhode Island rapidly became a sort of haven for people who were in trouble elsewhere. Thus, considered as dissidents in their Countries, Quakers and Baptists joined the New Colony. Moreover, in 1658 some European Jewish families arrived in Newport, enjoying the same religious liberty granted to others individuals. Considering that Jews in Britain would have full civil rights only in 1858, this is an astonishing example of Williams' political capability. In addition, one must remember that in 1652 Rhode Island passed the first law in North America making slavery illegal.

In meanwhile, the civil wars and the Restoration made it necessary to renegotiate the Charter of Rhode Island. Williams was therefore forced to return in England, where he found in Charles II an ally for his extraordinary experiment about freedom of religion on the other side of Atlantic. With amusement he describes the reaction of the King's Ministers when they read the new Charter written by Williams himself. In effect, as Nussbaum notes, the «charter was shocking indeed, not only in its odd provision regarding the Indians, but also, and above all, in its clause regarding religious liberty»:

«Noe persons within the sayd conlonye, at any time hereafter, shall bee any wise molested, punished, disquieted, or call in question, for any differences in opinione in matters of religion, and doe not actually disturb the civill peace of sayd colony; but all of every person and persons may, from tyme to tyme, and at all tymes hereafter freely and fully have and enjoye his and theire owne judgements and consciences, in matter of religious concernments, throughout the tract of land hereafter mentioned; they behaving themselves peaceable and quietlie, and not useinge this libertie to lycentiousnesse and profanenesse, nor to the civil injurye or outward disturbance of others; any lawe, statute, or clause, therein contained, or to be contained, usage or custom of this

<sup>54</sup> M.C. NUSSBAUM, *Liberty of Conscience. In Defence of America's Tradition of Religious Equality*, New York, Basic Books, 2008, p. 45.



realm, to the contrary hereof, in any wise, notwithstanding»<sup>55</sup>.

A careful reading of this shows that Williams wanted to protect something: a very valuable thing for the life of the realm; what he called «the most precious and invaluable Jewel»<sup>56</sup>, i.e. freedom of conscience in religious matters. In particular, the Charter granted freedom of religion principle while protecting relative individual rights. Therefore, «if law says that you have to swear an oath before God to old public office, this law is nullified by the Carter»<sup>57</sup>. In order to achieve this goal, Williams realized that the Church/es must always be kept separate from the State; that is, no Church or coalition of Churches was to coerce States or federal governments into enacting religious laws.

This explains the core aspects of the Williams' thought. A few years before (1644) he had defined the conscience as a «holy Light», «fixed in the minde and heart of a man, which inforceth him to judge ... and to do so and so, with respect to god, his worship, etc.»<sup>58</sup>. Since then he had been aiming at realizing a political system where freedom of conscience could be safeguarded. Thus the new Charter offered Williams a formidable opportunity to translate his vision into normative supreme principles that could neutralize any rule violating the fundamental freedom of religion and conscience. In other words, no persons, «Papists, Jews, Turkeys, or Indians be disturbed at their worship»<sup>59</sup>: everyone should be able «to pursue its own way»<sup>60</sup>. In short, «the civil State» must respect «religion»<sup>61</sup>, as the «Magna Charta of highest liberties»<sup>62</sup> had already affirmed. For this reason, Roger

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<sup>55</sup> Cit. in **ID**, p. 49.

<sup>56</sup> **R. WILLIAMS**, *The Bloody Tenent Yet More Bloody* (1652), in **S.L. CALDWELL** (ed.), *The Complete Writings of Roger Williams*, New York, Russell & Russell, 1963, Vol. IV, p. 30.

<sup>57</sup> **M.C. NUSSBAUM**, *Liberty of Conscience. In Defence of America's Tradition of Religious Equality*, cit., p. 50. See also **ID**, *Kant and Stoic Cosmopolitanism*, in **J. BOHMAN, M. LUTZ-BACHMANN** (ed.), *Perpetual Peace*, Cambridge-Mass, MIT Press, 1997, pp. 25 ff.

<sup>58</sup> **R. WILLIAMS**, *The Correspondents of Roger Williams*, cit., Vol. I, p. 33.

<sup>59</sup> **ID**, *The Bloody Tenent of Persecution* (1644), in **P. MILLER** (ed.), *The Complete Writings of Roger Williams*, Paris-Arkansas, The Baptist Standard Bearer, 2005, vol. III, p. 220.

<sup>60</sup> **IVI**, p. 252.

<sup>61</sup> **IBIDEM**.

<sup>62</sup> **IVI**, p. 221. See also **J. MARITAIN**, *The Rights of Man and Natural law*, Washington DC, Catholic University of America Press, 1951, *passim*; **M.A. GLENDON**, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, New York, Random House, 2000, *passim*.



Williams is recognized by historians as the first man in modern history to fully affirm the right of *religious liberty* that G. De Ruggiero, the eminent Italian scholar on liberalism and constitutionalism, considered the “liberal embryo” from which all other individual constitutional liberties developed<sup>63</sup>. In fact,

«At a time when Germany was the battlefield for all Europe in the implacable wars of religion; when even Holland was bleeding with the anger of vengeful factions; when France was still to go through the fearful struggle with bigotry; when England was grasping under the despotism of intolerance; ... Roger Williams asserted the great doctrine of intellectual liberty. It became his glory to found a state [Rhode Island] upon that principle ... He was the first person in modern Christendom to assert, in its plenitude, the doctrine of liberty of conscience, the equality of opinions before the law. Williams would permit persecution of no opinion, of no religion, leaving heresy unharmed by law and orthodoxy unprotected by terrors of penal statutes»<sup>64</sup>

For this reason pluralism became a legal peaceful “weapon” against the theories claiming that political power had divine origin<sup>65</sup> and purified the political arena from a transcendent vision of the law. At the end of the day, from here stems a new vision of rule of law (i.e. the Supremacy of Law as Dicey said<sup>66</sup>) indissolubly linked with the protection of individual rights, that is to say constitutionalism “values”.

### 3 – Part II: The Secularism-*laïcité*.

#### 3.1 – The Double Separation (Emancipation): the State from Religion, Religion from the State

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<sup>63</sup> G. DE RUGGIERO, *Storia del liberalismo europeo*, Roma-Bari, Laterza, 2001, pp. 18 ss.

<sup>64</sup> R. BANCROFT, *History of the United States of America, from the discovery of the American continent*, Boston, Little, Brown, and company, 1874, Vol. 1, pp. 254-255.

<sup>65</sup> A. DELBANCO, *Roger Williams and the Foundation of Religious Liberty*, in *Boston University Law Review*, 1991, n. 71, pp. 455 ff.

<sup>66</sup> A.V. DICEY, *Introduction to the Study of the Law of the Constitution*, London, MacMillan, 1915, pp. 165 ff.



With the above mentioned ideas, in an ideal legal system two different kinds of liberty must have been affirmed: from the individual's point of view, the "freedom *of* religion"; from the State's point of view, the "freedom *from* religion". These two liberties produced two kinds of separations: the former became a corollary of the separation (i.e. autonomy) of creed/s *from* political power, Church/es from State; the latter supported the separation (i.e. autonomy) of law from religion, the State from Church/es<sup>67</sup>. This explains, for example, the famous statement of Montesquieu, who affirmed that in a modern legal system there is no longer spaces for what «s'y passe entre l'homme et Dieu, qui sait la mesure et le temps de ses vengeances»<sup>68</sup>.

Indeed, these ideas must be considered as a revolution in Western constitutional history. Nevertheless, they were not a complete foundation for good political principles regarding religion. Williams' doctrine of accommodation, for example, was promising, but underdeveloped. And of course, like Locke and all thinkers of his time, he did nothing about the equality of women.

In reality, in Western legal system, and especially in Europe, religious tolerance in post-Reformation embodied an ambivalent value. Generally speaking, rather than affirming rights to freedom of religion, the notion of tolerance were used to grant limited concession to adherents of established or official creeds. For examples, in England King Henry VIII broke with the Catholic Church in 1534 and after that, with one or two very short exceptions, Protestant Christianity has been the established belief of that Country<sup>69</sup>. Hence, laws were passed that discriminated severely against Catholics: in particular, they were prevented from holding public office, voting, inheriting land, joining the army and owning property<sup>70</sup>. It was only at the end of the 18<sup>th</sup> Century and the beginning of the 19<sup>th</sup> Century that a series of Acts were passed removing all these discriminations. In other words, the liberal transformation of European constitutionalism took place gradually. Nonetheless, even at this stage, tolerance, secularism, freedom of religion and conscience helped to promote the elimination of religious

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<sup>67</sup> L. FERRAJOLI, *Principia iuris. Teoria del diritto e della democrazia*, Bari-Laterza, Vol. 2, *Teoria della democrazia*, pp. 315 ff..

<sup>68</sup> MONTESQUIEU, *De L'Esprit des lois et Défense de l'Esprit des lois*, Genève, Barillot, 1748, Part I, Livre XII, chap. IV, p. 343.

<sup>69</sup> Thus, in 1700 an Act of Westminster Parliament provided that the king had to be a member of the Church of England, which remains the position to this day.

<sup>70</sup> S. DORAN, *Princes, Pastors and People: The Church and Religion in England, 1500-1700*, Routledge, London, 2002, pp. 143 ff.



conflict in the early-modern Europe: therefore, they were fertile whether they came to posterity.

As a result of the transition from ancient to modern-contemporary liberal constitutionalism, some Western States no longer endorsed a religious concept of common-wealth. Rather they began to promote the equality before the law. Thus, as Lord Chief Justice of England and Wales, Lord Philips, rightly affirmed during his speech at the London Muslim Center (July 3<sup>rd</sup>, 2008):

«British law has, comparatively recently, reached a stage of development in which a high premium is placed not merely on liberty, but on equality of all who live in this country. That law is secular. It does not attempt to enforce the standards of behaviour that the Christian religion or any other religion expects. It is perhaps founded on one ethical principle that the Christian religion shares with most, if not all, other religions and that is that one should love one's neighbour. And so the law sets out to prevent behaviour that harms others. Behaviour that is contrary to religious principles, but which is detrimental only to those who commit it, is not, in general, contrary to our law. A sin is not necessarily a crime»<sup>71</sup>.

Yet this process of a double emancipation (the State from religion; religion from the State) also posed the question of how to integrate the adherents to a creed into society. Actually, this problem involves both the national identity and human rights. In today's Western legal system the notion of nation-state still influenced the concept of fundamental rights and, therefore, citizen's equal freedom of religion. Immigration and today's national multicultural society, on the other hand, see masses of people that come to Western with a global project and their identity. They aim at exercising the rights of freedom of religion, as guaranteed by the Western legal system; but, some time they want to reshape this system too. This shows that, in contrast to Locke's time, we have moved from a number of creeds sharing, more or less, a common Christian background to today's variety of different religions, ethnicities and cultures<sup>72</sup>.

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<sup>71</sup> LORD PHILIPS, *Equality before the Law*, in London Muslim Center, Paper, p. 16.

<sup>72</sup> N. COLAIANNI, *Eguaglianza e diversità culturali e religiose*, Bologna, il Mulino, 2006, 43 ff.



In this new “geographical religious context”, the classic notion of secularism or *laïcité* have lost much of their descriptive abilities as well as the capability to govern the demands and needs of multicultural societies. Nonetheless, in the past, the crucial exigency of liberal constitutionalism continues to be the coexistence of different cultural-religious groups, avoiding, at the same time, a sectarian social segmentation.

Hence, multiculturalism and immigration have contributed to determine the link between the State and the religious communities of which immigrants are part. But this, on the other hand, complicates the century old tension between universal principles – launched by the English (1689) American (1787) and French (1789) Revolutions – and the cultural specificities of immigrants and their religious belonging<sup>73</sup>. From here stems the intensive process of updating the State’s legislation in this particular sector<sup>74</sup>. France, for example, has just redefined its relation (including the financial aspects) with Islam<sup>75</sup>; Portugal, has a new law on freedom of religion<sup>76</sup>; in 2006 Spain approved a new Act for financing the religious beliefs<sup>77</sup>; Norway has changed its ecclesiastic regime, affirming a new system of relations between the state and creeds in which there is no longer a “State’s Church”<sup>78</sup>. In these and other cases, however, the “integration” seems to remain the principal approach of the various Western legislators<sup>79</sup>: an approach that in the

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<sup>73</sup> T. MODOOD, *Anti-Essentialism, Multiculturalism and “Recognition” of Religious Groups*, in *Journal of Political Philosophy*, 1998, pp. 378 ff.

<sup>74</sup> M.C. FOLLIERO, *Libertà religiosa e società multiculturale: la risposta italiana*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica ([www.statoechiese.it](http://www.statoechiese.it)) June 2008, pp. 1 ff.

<sup>75</sup> See the *Programme vie politique, cultuelle et associative. Mission: Administration générale et territoriale de l’Etat*, in [www.finances.gouv.fr](http://www.finances.gouv.fr).

<sup>76</sup> Act of June 22, 2001, n. 16.

<sup>77</sup> In particular see the *LEY 42/2006, de 28 de diciembre, de Presupuestos Generales del Estado para el año 2007*.

<sup>78</sup> In effect, in 2012 the Norwegian Church will be allowed to elect its own leaders, and the ties between state and church will be loosened. In the April 2008, all the parties of the Norwegian National Assembly had agreed on the future of the state church: the church will be allowed to appoint its own bishops as from 2012, but the presupposition is that the church will be undertaking a democracy reform. The requirement of this reform is defined in the settlement which was submitted to the cabinet meeting as follows. Furthermore, Article 2 of the Constitution will be adjusted: the phrase stating that «the Evangelical-Lutheran religion» shall be the religion of the State, will be replaced by a paragraph stating that «The articles of faith remain our Christian and humanistic heritage. This Constitution shall ensure democracy, a state founded on legal protection and the articles of human rights».

<sup>79</sup> N. COLAIANNI, *Islam ed ebraismo: dall’integrazione all’interazione*, in *Quaderni di diritto e politica ecclesiastica*, 2009, n. 1., to be published.



past was used for integrating non-official (non-established) religions and now it is used for the “new immigrant creeds”.

In Italy, for example, in this area the legal regime goes back to that set of rules introduced from 1984 to 1993. This is a regime that respects the creeds and their rules, especially those that will meet the constitutional “values” established in the articles 7, 8, 19, 20 and 21 of the Italian Charter<sup>80</sup>. In particular, it is based on two specific legal instruments: the *Patti Lateranensi* (“Conventional Agreements”) (art. 7 Const.) regulating the relations between the State and the Catholic Church; and the *Intese* (agreements) concerning the relations between the State and other creeds «diversi dalla Cattolica [which are different from the Catholic belief]» (art. 8 Const.) (my translation). Hence, in this area the architecture of today's system is clearly tailored on the needs of traditional creeds; there is no such an instrument respect to the other (minority) “religions”, which are simply incorporated under the provisions of a 1929 Act (n. 1159), which was approved by the fascist regime.

This explains some recent governmental attempts like the “*Carte dei valori per l'integrazione e la cittadinanza*”<sup>81</sup> (Charter of values for integration and citizenship)<sup>82</sup>, promoted as the basis for a future “understanding” between State and Islam. But, to this regard, one must remember that the Charter has not been subscribed by some important Islamic groups, like UCOII and other Islamic associations. That is to say that the *Carta* has been refused by the majority of Islamic individuals who live and work in Italy. This shows the lack of the “governmental Project” for the above mentioned “understanding” between State and Islam(s)<sup>83</sup>; a project that, indeed, does not take in account the specific (theological and historical) characteristics of Islamic creeds<sup>84</sup>.

### 3.2 – Islam and *la laïcité à la française*

As we can note, this state of affairs involves the “question” of pluralism and the manifestation of religion in the democratic public sphere. In

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<sup>80</sup> M.C. FOLLIERO, *op. cit.*, pp. 6 ss.

<sup>81</sup> In [www.federalismi.it](http://www.federalismi.it).

<sup>82</sup> See C. CARDIA, *Introduzione alla Carta dei valori della cittadinanza e dell'integrazione*, Home Italian Minister, s.i.d.

<sup>83</sup> N. COLAIANNI, *Una carta postcostituzionale (A proposito di una recente iniziativa in tema di “integrazione”)*, in *Questione giustizia*, 2007, pp. 637 ff.

<sup>84</sup> ID, *Alla ricerca di una politica del diritto sui rapporti con l'Islam (Carta dei valori e Dichiarazione di intenti)*, in [www.statoechiese.it](http://www.statoechiese.it), January 2009, pp. 1 ss.



particular, the tension between universal principles of Western constitutionalism and the ethnic-cultural-religious specificities of immigrants is obvious in those European States – like Italy – that, in a way or another, continue to appeal to Christian “culture” in their process of political and legal decision-making – as the “crucifix debate” has largely shown in Italy and Germany<sup>85</sup>. However, for several reasons this tension is more clearer in those States adhering to a secular tradition which insists on a “stricter” separation between State and Church/es, as 2004 law banning “conspicuous” religion signs from public school denotes in France; law that significantly purports to be a mean of defending the threatened secularism or the *laïcité à la française*.

Among Western States, the US and France are said to be the only true secular Republics. Three important constitutional principles of American and French mirror one another on the question of the relation between Church and State<sup>86</sup>: A) the American Constitution, (Article VI.3) like the French *Declaration des droit de l'homme et du citoyen* 1789 (article 6), ensures equal access to public mandates and positions to believers and non-believers; B) the US Non-Establishment clause (Amend. I, US Const.), has a counterpart in the French 1905 law concerning the separation between Churches and State<sup>87</sup>; C) the US Free Exercise clause is analogous to the second Article of the French 1958 Constitution which states that the Republic respects all beliefs. However, this textual proximity should not be overstated. In fact, despite the above mentioned principles, the strong dichotomy between freedom of religion and freedom of expression underlying the French

<sup>85</sup> On debite about the presence of crucifixes in public spaces (in particular in public schools) in these two normative contexts see, among others, **F. D'AGOSTINO**, *Ripensare la laicità: l'apporto del diritto*, in **G. DALLA TORRE** (ed.), *Ripensare la laicità. Il problema della laicità nell'esperienza giuridica contemporanea*, Torino, Giappichelli, 1993, pp. 39 ff.; **R. COPPOLA**, *Ma la laicità relativa non l'ho inventata io ... ovvero dell'egualanza delle confessioni religiose secondo Procuste*, in *studiocelentano.it*, 2003; **ID**, *Ancora sulla guerra mossa al crocefisso. Riflessioni minime di un ecclesiasticista*, in *forumcostituzionale.it*, January 6, 2002; **G. DALLA TORRE**, *Dio o Marianna? Annotazioni minime sulla questione del crocefisso a scuola*, in *Giustizia civile*, 2004, I, pp. 512 ff.; **R. BOTTA**, *Simboli religiosi ed autonomia scolastica*, in *Il corriere giuridico*, n. 2, 2004, pp. 239 ff.; **C. LUZZATI**, *Lo strano caso del crocefisso*, in *Ragion pratica*, 2007, n. 28, pp. 127 ff.; **N. COLAIANNI**, *La “laicità” della croce e la “croce” della laicità*, in *olir.it*, May 2004, **ID**, *Il Crocefisso a scuola: l'integralismo del consiglio di Stato*, in *Il Ponte*, 2006, n. 4, pp. 86 ff.; **R. BIN**, **G. BRUNELLI**, **A. PUGIOTTO**, **P. VERONESI** (ed.), *Laicità crocefissa?*, Torino, Giappichelli, 2005, *passim*.

<sup>86</sup> **E. ZOLLER**, *La Laïcité aux Etats-Unis ou la Séparation des Eglises et de l'Etat dans la Société Pluraliste*, in **E. ZOLLER** (ed.), *La Conception Américaine de la Laïcité*, Paris, Dalloz-Sirey, 2005 pp. 4 ff.

<sup>87</sup> «*Loi du 9 décembre 1905 concernant la séparation des Eglises et de l'Etat*».



law (2004) banning “conspicuous” religion signs from public school is predominantly perceived in the United States as a violation of liberty of conscience and religion<sup>88</sup>. In addition, several arguments point to the likelihood of a judicial rejection of a hypothetical American counterpart of the French ban: first of all, the role of founding myth played by freedom of religion in the US; second, the State’s absolute duty of protection of religion<sup>89</sup>; third, the status of special liberty accorded to freedom of expression; and finally, the strong protection of a student’s right to express his or her faith in primary and secondary school and universities<sup>90</sup>. These are explicit examples of how in the United States an immigrant – of first, second or third generation – could keep the flavour of his ethnicity while also embracing American democratic ideals.

On the contrary, in France the principle of *laïcité* is also read as the State’s duty in imparting the knowledge necessary for effective *citoyenneté* (citizenship)<sup>91</sup>. Thus, the public school must aim at empowering individuals not only in the social-economic spheres, but also in the political arena. As a result, in this context the general secularism is translated into an educational secularism<sup>92</sup>. Moreover, in France many believe that, because of immigration, in the last years secularism has been threatening and that, therefore, the *laïcité* needs to be re-affirmed. This is a common good superior to religion and capable of preserving public order<sup>93</sup> as well as the neutrality of the public space<sup>94</sup>.

The former French President Chirac (December 17, 2003) clearly stated:

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<sup>88</sup> Although religious garb proscriptions have been enacted in some American States, they exclusively concern school teachers. **G. GEY**, *Free Will, Religious Liberty, and a Partial Defence of the French Approach to Religious Expression in Public Schools*, in *Houston Law Review*, 2005, n. 1, pp. 18 ff.

<sup>89</sup> As **WILLIAM O. DOUGLAS**, a liberal judge of Supreme Court, affirmed in 1952 Americans «are a religious people whose institutions presuppose a Supreme Being»; *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

<sup>90</sup> To this respect see **T.J. GUNN**, *Religious Freedom and Laïcité: A Comparison of the United States and France*, in *Brigham Young University Law Review*, pp. 429 ff.

<sup>91</sup> **G. CALVES**, *Les politiques françaises de discriminations positive : trois spécificités*, in *Pouvoirs*, 2004, n. 111, pp. 29 ff.

<sup>92</sup> **H. PENA-RUIZ**, *Dieu et Marianne. Philosophie de la laïcité*, Paris, PUF, 2005, pp. 284 ff.

<sup>93</sup> **M. PENA**, *Liberté d’expression et religion*, in *Rapport présenté à la XXIIe Table Ronde Internationale: Constitution et liberté d’expression*, Aix-en-Provence, September 14-15, 2007, pp. 115 ff.

<sup>94</sup> **R. DEBRAY**, *Ce que nous voile le voile*, Paris, Gallimard, 2004, pp. 19 ff.



«La laïcité est le lieu privilégié de la rencontre et de l'échange où chacun se retrouve pour apporter le meilleur à la communauté national. C'est la neutralité de l'espace public qui permet la coexistence harmonieuse des différentes religions [the *laïcité* is the privileged place for meetings and exchanges, where everyone can come together bringing the best to the national community. It is the neutrality of the public space that enable different religions to harmoniously coexist]»<sup>95</sup>.

Hence, to better understand the paradigm of French secularism one needs to stress the importance that the French legal system gives to the role of the State in the society. In this legal context, individuals acquire freedom, even freedom of religion, *through* the State and not *from* the State. In other words, the State, in the name of republican universal principles, has the responsibility for safeguarding the common-wealth and public order<sup>96</sup>. From here stems the French political background of March 2004, when the law banning the "conspicuous" religious signs from public school was promulgated by the President Chirac.

The 2004 Act is very brief and it consists of four articles. The first is the most important:

«Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit. Le règlement intérieur rappelle que la mise en oeuvre d'une procédure disciplinaire est précédée d'un dialogue avec l'élève [In primary and secondary public schools students are prohibited from wearing symbols or clothing that conspicuously evince a religious affiliation. The internal statute (of the School) requires that disciplinary procedures be preceded by a dialogue with the student]»<sup>97</sup>.

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<sup>95</sup> **JACQUES CHIRAC**, *Discours relatif au respect du principe de laïcité dans la république palais de l'Élysée mercredi 17 décembre 2003*, in [www.cndp.fr](http://www.cndp.fr), p. 14 (my translation).

<sup>96</sup> **B. MATHIEU**, *La liberté d'expression en France: de la protection constitutionnelle aux menaces législatives*, in *Revue de droit public*, n. 1, 2007, pp. 236 ff.

<sup>97</sup> Article 1, *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*, (my translation).



This Act and the relative debate show very well the particular inflection of the principle of secularism-*laïcité*. This becomes a mean of preserving the common good<sup>98</sup>.

Therefore, in France secularism symbolises not only the neutrality of the State, but also the neutrality of whole public sphere, included its subjects<sup>99</sup>. In this sense, since the 1789 Revolution and above all the Third Republic, the *laïcité* has been using as a "machinery of governance". In particular, it has been used to promote the normative ideal of French national-republican tradition, deeply connected with some universal notions, like *citoyenneté* and human rights, as stated in the 1789 *Declaration des droit de l'homme et du citoyen*, in the 1958 Constitution, in the 1905 law on "separation" of State and Church, and in the Preamble of 1946 Constitution<sup>100</sup>. All these principles could be considered as a sort of "legislative codification" of France egalitarian ethos. Under these and other provisions France treats all citizens the same, refusing to group them into ethnic categories. This explains, for examples, the fact that it is forbidden by law to collect statistics referring to "racial or ethnic origin". Moreover, when Yazid Sabeg, the government's diversity commissioner, set up a group to find the best way to collect information to make it possible to measure "diversity", critics see this "ethnic and religious data" as an assault on the «*principes fondateurs de notre République*», that is the France Republic's secular principles<sup>101</sup>.

In any case, or we'd better say at the same time, this cannot remove the fact, that even the casual tourist notices, of how multi-ethnic and multi-religious France is<sup>102</sup>.

<sup>98</sup> B. BASDEVANT-GAUDEMEL, *Commentaire de la loi du 15 mars 2004*, in *Quaderni di diritto e politica ecclesiastica*, 2004, n. 2, pp. 407 e ff.

<sup>99</sup> J. ROBERT, *Les fondements juridiques de la laïcité*, in *Revue Politique et Parlementaire*, 2006, n. 1, pp. 7 ff.

<sup>100</sup> H. PARIS, *Communautarisme et laïcité*, in *Revue Politique et Parlementaire*, 2006, n. 108, pp. 60 ff.

<sup>101</sup> SOS Racisme, for examples, has collected over 100,000 signatures for a «*Campagne contre la statistique ethnique* [Campaign against ethnic statistics]». Not only would this be anti-constitutional, they argues: classifying people by race and religion would also encourage discrimination. See [www.sos-racisme.org/Campagne-contre-la-statistique.html](http://www.sos-racisme.org/Campagne-contre-la-statistique.html).

<sup>102</sup> And how few non-whites have top jobs. Patrick Lozès, a Beninese-born activist, set up a lobby group called «*Conseil Représentatif des Associations des Noires* [Representative Council of Black Associations]». He argues that, for France to recognize and correct discrimination, it must have the courage to name those being discriminated against. «People don't like it when I describe myself as black because they say that skin color doesn't count, but it's hypocrisy», he said: «I'm black in the eyes of the police, or an employer. So as a society we should have the courage to say



In effect, as we said, since religions are still multiplying in the Country today, with a wide variety of Churches and communities, the above mentioned legal instruments do not meet any more the needs of a changed "religious geography"; in particular, they do not meet the Islam needs. As a result, the full inclusion of religious minorities in France is no longer conditional on their religious beliefs but their "assimilation-integration" to a French national identity, which perhaps remains infused with Christian "culture"<sup>103</sup>. The majority religion is set up as a model which not only informs the drafting of some State's law, but also serves as the reference for a process of uniformity of the manifestation of religious belief in the public sphere. This explains the reaction of some immigrants – as religious group or even as individuals – who, especially after the 2004 law was promulgated, have marked their "cultural-ethnic-religious" identity in the public sphere.

Therefore, minority creeds (and above all Islam) imposing wearing religious signs as a primary or exclusive mode of expression of their religious adherence appear to be directly affected by the ban. As D. Custos affirms, «the lack of consideration for the difference among religions as to sartorial expression of faith, and the mechanical use of the majority religion as a basis for legislative design are at the core of the operation of the French universalistic approach to equality in this context of religious pluralism»<sup>104</sup>.

Thus, since religious pluralism is intensifying in Western States, not only in France, the implications of its secularism are compounded by a particularly universalistic construction of equality. In fact, one today's difficulty about the relation between Islam and general Western definition of secularism<sup>105</sup> is that the former seems to possess somewhat differing notions of what constitutes the core of human rights<sup>106</sup>.

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so». See [www.lecran.clubaverroes.com](http://www.lecran.clubaverroes.com). See also **THE ECONOMIST**, *To count or not to count. A new effort to gather data on ethnic origins is stirring up a fuss*, March 26<sup>th</sup> 2009.

<sup>103</sup> **J-LOUIS SCHLEGEL**, *L'Église catholique de France et la laïcité*, in *Revue Politique et Parlementaire*, 2006, n. 1, pp. 67 ff.; **J. DUSSEAU**, *L'histoire de la Séparation entre permanence et ruptures*, in *Revue Politique et Parlementaire*, 2006, n. 1, pp. 13 ff.

<sup>104</sup> **D. CUSTOS**, *Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004*, in *The American Journal of Comparative Law*, 2006, p. 398.

<sup>105</sup> **L.N. GREEN**, *Religion et ethnicité. De la comparaison spatiale et temporelle*, in *Annales*, 2002, vol. 57, n. 1, pp. 127 ff.; **D. DIGNAN**, *Europe's Melting Pot: A Century of Large-scale Immigration into France*, in *Ethnic and Racial Studies*, 1981, pp. 137 ff.; **L.N. GREEN**, 'Filling the Void': *Immigration to France before World War I*, in **D. HOERDER** (ed.), *Labor Migration in the Atlantic Economies*, Westport, Greenwood Press, 1985, pp. 143 ff.

<sup>106</sup> **D.E. ARZT**, *Heroes or Heretics: Religious Dissidents Under Islamic Law*, in *Wisconsin International Law Journal*, 1996, 349 ff.



### 3.3 – Individual Rights vs. Group Rights

Under a general view, one can categorize human rights into two categories, individual rights and group rights. The former includes those rights that protect a person's individual autonomy and freedom, such as freedom of expression, freedom of conscience, and freedom of religion; group rights are those that protect a set of people, like the right to self-determination and the rights of minority groups. So that, general governmental trends emerge from the kind of rights a given political community emphasizes. For instance, French democratic model tends to align itself with a strong belief in the importance of individual rights, seeing such rights as being inherent in man's existence; a society can only truly realize human rights through a liberal democracy that emphasizes the rights of the individual<sup>107</sup>. On the contrary, under a traditional Islamic model, the primary purpose of human rights seems to be collective; individual rights are tied to the individual duties to society as a whole. Yet, these rights are inextricably linked to each other. Furthermore, in some ways, we can argue that this dichotomy does not exist in reality. As Article 2 of Italian Constitution declares, the State recognises rights to the social group (*formazioni sociali*), but only because they are important for an individual in developing his personality. So that, in term of human rights, the social groups, including the religious group, is not important *per se*; unless one wants to support the organic or ethical conceptions of the Nation-State, like those that refer to W. Hegel or C. Schmitt, among others.

To this respect, one can considerer the more rigorous language of the Universal Declaration of Human Rights (UDHR), adopted in 1948 in a spirit of revulsion over the evils version of this organic or ethical conceptions of the State, that is to say the national-fascism. The UDHR asserts the right of human beings in ways that are more adherent to the theory and the practice of liberal constitutionalism: it upholds the right of people to live in freedom from persecution and arbitrary arrest, to hold any faith or none, to change religion, and to enjoy freedom of expression, which by any fair definition includes freedom to dispute with the tenets of any religion. In short, it protects individuals, not religions or any other set of creeds; for it is not possible systematically

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<sup>107</sup> **R. RUSTON**, *Theologians, Humanists and Natural Rights*, in **M. HILL** (ed.), *Religious Liberty and Human Rights*, Cardiff, University of Wales Press, 2002, pp. 14 ff.



to protect religions or their followers from offence without infringing the right of individuals.

Now, a careful reading of some Islamic principles shows that they could be interpreted as «concept of rights» that does not seem foreign to «Western». As M.D. Reed notes<sup>108</sup>, «Islam shares several ideals with Western notions of justice, including human dignity, fundamental human rights, ideas of natural justice, and the rule of law. Even though the Western, developed world appears to currently protect individual rights more effectively than the Islamic world, one could argue that this protection is not due to the human rights interpretations of Western countries but due to the stability of the ... regimes of those particular countries». This is clear in the recent Resolution (n.7/19) on "Combating defamation of religions" adopted by the UN's Human Rights Council (March 27<sup>th</sup> 2009), mainly at the behest of Islamic States, not the Islamic religion. In effect, the Resolution reads like another piece of harmless verbiage churned out by a toothless international bureaucracy: «Defamation of religious is a serious affront to human dignity leading to a restriction on the freedom of their adherents and incitement to religious violence», the adopted text read, adding that «Islam is frequently and wrongly associated with human rights violations and terrorism». But a closer look at the Resolution's language, and the context in which it was adopted, makes clear that bigger issues are at stake. The States that lobbied for the vote (Saudi Arabia, Egypt and Pakistan, among others) use the word "defamation" to mean something very close to the crime of blasphemy, «which is in turn defined as voicing dissent from the official reading of Islam». As rightly *The Economist* notes in the *Leaders* section of April 2<sup>nd</sup> 2009, «In many of the 56 member states of the Organisation of the Islamic Conference, which has led the drive to outlaw "defamation", both non-Muslims and Muslims who voice dissent (even in technical matters of Koranic interpretation) are often victims of just the sort of persecution the 1948 Declaration sought to outlaw. That is a real human-rights problem. And in the spirit of fairness, laws against blasphemy that remain on the statute books of some Western countries should also be struck off; only real, not imaginary, incitement of violence should be outlawed»<sup>109</sup>.

So that, because of their universality, in the last years human rights have allowed individual and domestic religious groups to find

<sup>108</sup> M.D. REED, *Western Democracy and Islamic Tradition: The Application of Sharia in a Modern World*, in *American University International Law Review*, 2004, pp. 485 ff.

<sup>109</sup> THE ECONOMIST, *The meaning of freedom. Why freedom of speech must include the right to "defame" religions*, April 2<sup>nd</sup> 2009.



legitimacy for their claim at the international level. A trend that some Islamic regimes and their supporters seek to contrast; the above mentioned Resolution is an example. But, apart from this, it is interesting to note that claims at the international level based on human rights also happens in those Western States that, more than others, adhere to a stricter notion of secular-laic model<sup>110</sup>. For examples, in France, the members of Collective Against Islamophobia (CCI) have perceived the above mentioned 2004 Act banning conspicuous religious symbols from the public School as a law against the spirit of *laïcité*: this law have extended the principles of neutrality to users of the public service, which was not affirmed in the law of 1905; the law goes against the principle of neutrality that underpins the notion of *laïcité*. In short, for the CCI the 2004 law is a clear manifestation of discrimination against girl's individual rights, girls wearing the headscarf, and, therefore, against a particular religious creed:

«le principe de laïcité qui n'a d'autre objet de garantir la neutralité de l'Etat, la liberté de religion et le respect du pluralisme, a été bafoué par l'Etat lui même, au vingt et unième siècle par l'adoption d'une loi d'exception: la loi du 15 mars 2004 [The principle of *laïcité*, which ha no other purpose than guaranteeing the neutrality of the State, freedom of religion and respect for pluralism, has been betrayed by the State itself that adopted in the 21th century a law of exception: the 2004 law]» (my translation)<sup>111</sup>.

Furthermore, although it focuses its work at the nation level, the CCI's documents always refer to human rights as these are defined and protected at international level. To this respect, we must underline that they have been intensively working with some human rights groups in Europe and US, notably the United States International Commission on Religious Freedom.

In the same way, in Turkey, the other State that adheres to a strictly secular-laic model of democracy, Mrs Merve Kavakci has been able to win a Case at the European Court of Human Rights (ECHR)

<sup>110</sup> C. LABORDE, *Toleration and laïcité*, in C. MACKINNON, D. CASTIGLIONE (eds.), *The Culture of Toleration in Diverse Societies*, Manchester, Manchester University Press, 2001, pp. 163 ff.

<sup>111</sup> CCI, *Le bilan de la loi du 15 mars 2004 et de ses effets pervers*, in [www.islamicite.org](http://www.islamicite.org), p. 3.



against the State for an issue related to the headscarf<sup>112</sup>. In fact, Mrs Kavakci was elected in Turkey Parliament. After the election she walked in Parliament wearing her headscarf. The ruling parties saw this as an offensive against the principle of *laicklik*, which significantly derives from the French term of *laïcité*. She and two her colleagues were therefore banned from Parliament as well as from politics for five years. Working with some international secular groups, Mrs Kavakci used then her rights to seize ECHR which, the 5<sup>th</sup> of April 2007, stated the Turkey was in violation of Art. 3, Protocol 1, of the European Convention of Human Rights<sup>113</sup>. It is important to underline that, despite it ruled in favour of appellant, the judgment of the European Court was quite mitigated. As in the previous jurisprudence about Turkey (see for example the law-cases of *Refah Partisi*<sup>114</sup>, *Leyla Sahin*<sup>115</sup> and *İ.A*<sup>116</sup>), the ECHR Court left a "great margin of appreciation"<sup>117</sup> to the Country, preserving the secular-laic character of Turkey State. Hence, although the appellant considered that Turkey had violated the Article 9 of ECHR, Article protecting specifically the religion freedom, the European Court stated that there had only been the violation of Article 3, Protocol 1, which affirm that «The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature».

However, apart from the reservation of Court ECHR, or despite it, one should note that, especially in Europe, supranational legal forums (like European Union and ECHR), together with the human rights discourse, offer a platform for re-defining crucial notions of

<sup>112</sup> A. BARRAS, *Using Rights to Re-vent Secularism in France and Turkey*, in *EUI Working Paper (RSCAS)*, 2008/20, pp. 5 ff.

<sup>113</sup> COURT OF ECHR, 5-4-2007, n. 71907/01, *Kavakçı v. Turkye*.

<sup>114</sup> COURT OF ECHR, 31-7-2001, nn. 41340/98, 41342/98, 41343/98, 41344/98, *Refah Partisi et v. Turkey*.

<sup>115</sup> COURT OF ECHR, 10-11-2005, n. 44774/98, *Leyla Sahin v. Turkey*.

<sup>116</sup> COURT OF ECHR, 13-9-2005, n. 42571/98, *İ.A. v. Turkey*.

<sup>117</sup> J.A. SWEENEY, *Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era*, in *International and comparative law quarterly*, April 2005, pp. 459 ff.; P. TANZARELLA, *Il margine di apprezzamento*, in M. CARTABIA (ed.), *I diritti in azione. Universalità e pluralismo dei diritti fondamentali nelle Corti europee*, Bologna, il Mulino, 2007, pp. 145 ff.; S. GREER, *The Margin of Appreciation and Discretion under the European Convention on Human Rights*, Rights files, no. 17, Council of Europe, 2000, pp. 8 ff.; E. KASTANAS, *Unité et diversité: notion autonomes et marge d'appréciation des états dans la jurisprudence de la Cour européenne des droits de l'homme*, Bruxelles, Bruylants, 1996, *passim*; M. O'BOYLE, *The Margin of Appreciation and Derogation under Article 15: Ritual Incantation or Principle?*, in *Human Rights Law Journal*, 1998, 23 ff.



constitutionalism model, such as secularism and ecclesiastic law, forcing the national legislators to “harmonize” their laws with those of the others States. Thus, in order to give effect to European Directives<sup>118</sup> that in UK, in 2003, Regulations were introduced that prohibited discrimination in the field of employment on the ground of a person’s religion or belief; and in 2006 the *Equality Act* extended the prohibition against discrimination on the ground of religion or belief to cover other areas such as the provision of goods, facilities and services, the letting of premises and the provision of education. Moreover, we have to remember that the Article 10 of the European Union Charter of Fundamental Rights is very similar to Article 9 of ECHR with only a difference: in the former there is nothing to compare with the second paragraph of the latter<sup>119</sup>; the second paragraph that have informed “jurisprudential” clause of “margin of appreciations”<sup>120</sup>.

#### **4 – Conclusion. Secularism and Supranational Constitutionalism**

Thus, in light of recent conflicts, the relationship the human rights discourse seems to be quite interesting; a mean of redefining, at national and international level, the concept of secularism, adapting it to today’s international context. Yet, now, just as at the time of Locke and Williams, all seems to merge again into the need to find a balance between “unity” and “diversity”. That is to say, the peaceful coexistence between several religious or ideological points of view, in an increasingly globalised and supranational perspective. To this respect, we have to remember that, although they have Christian roots, most of the pillars of modern and contemporary constitutionalism – like rule of law, equality, freedom, secularization and respect of human dignity and human rights –, are above all the result of a long, violent and sometimes horrifying process of emancipation from those roots.

In fact, the merits of constitutionalism appear clearly when it is regarded in the light of religious and ideological conflicts.

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<sup>118</sup> 2000/43/EC of 29 June 2000 *implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*; 2000/78/EC *establishing a general framework for equal treatment in employment and occupation*.

<sup>119</sup> «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 the protection of the rights and freedoms of others»

<sup>120</sup> See, among others, the recent judgement of ECHR COURT, 13-11-2008, n. 24479/07, *Shingara Mann SINGH v. France*.



Constitutionalism has been able to “invent” a legal “site” for human struggles, including religious struggles. After all, using the democratic procedure constitutionalism has been able to translate these violent contrasts into peaceful “legal conflicts” while recognising and respecting fundamental rights. In other words, the separation between the State and the Church/es has the same advantage as democracy under Winston Churchill’s famous statement: it is the worst way for a modern society to deal with religion, except for all those other forms that have been tried from time to time.