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**Human Rights and the Osmosis between Secular and Religious Legal
Systems: The Post-modern European Right to Freedom of Religion
through the Prism of the Islamic Veil ***

ABSTRACT: Starting from the hermeneutic value played by the veil issue in analyzing the contemporary dynamics of the right to religious freedom in Europe, the paper will focus on the tension between the modern and contemporary paradigm of this right: a tension that makes its effects felt on the broader Mediterranean scale and that hints at new scenarios of a postmodern European right to religious freedom.

SOMMARIO: 1. Introduction - 2. Separation: The Matrix of Freedom of Religion as a Right of Modernity - 3. Islam and Separation: Modernity Stumbles - 4. A Broader Scenario: The Mediterranean Backdrop - 5. Prospects for a Post-modern Right to Freedom of Religion.

1 - Introduction

The aim of this article is to take stock of the current state of the right to freedom of religion on the “Old Continent”. It starts from the premise that Europe - and above all western continental Europe - is an “exceptional case” which, as such, offers a unique perspective. This is not so much due to any particular features of European secularism that may have been identified by sociologists of religion¹. It is first and foremost because it was in this part of the world that the concepts of “state”, “church”, “individual” and indeed the very notion of “religion” were developed. These formative concepts (“formants”) established freedom of religion as a

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¹ Cf., e.g., G. DAVIE, *Europe, the Exceptional Case: Parameters of Faith in the Modern World*, Darton Longman & Todd, London, 2002.



defining feature of modernity and a right, first under state law and later also under international law, as a result of the universalisation of those formants thanks to their inherent attractive capacity, coupled with the force of colonial arms and the expansion of markets².

In this article, the “European right to freedom of religion” will be interpreted in the light of relations between the state, the church and the individual through the prism of the (state) law’s treatment of the Islamic veil. Although the “question of the veil” has in some senses been fully teased out and although singling out the veil might have the effect of further increasing the burden on Muslim women (which is not, obviously, the intention of this paper), this “question” still offers a privileged viewpoint for reflecting on the legal dimension to religion on the “Old Continent”³. In particular, the core relevance for the issue of religion “without a church” (such as Islam) and of individuals “without a state” or with “too many states” (such as young European Muslims)⁴ highlights a tension between the modern state-centric embodiment of freedom of religion as a right premised on the dialectical separation between church and state and an emerging contemporary and globalised form of the right to freedom of religion based on human rights.

² Naturally the bibliography here is immense. I refer to three different works for each of the three formative concepts which, in my view, offer interesting reflections from different perspectives: **T. ASAD**, *Secular Translations. Nation-State, Modern Self, and Calculative Reason*, Columbia University Press, New York, 2018; **G. DELANTY**, *Formations of European Modernity. A Historical and Political Sociology of Europe*, Palgrave Macmillan, New York, 2013, and **B. NONGBRI**, *Before Religion: a History of a Modern Concept*, Yale University Press, New Haven, 2003.

³ The fundamental study in terms of its general approach is still that of **J.W. SCOTT**, *The Politics of the Veil*, Princeton University Press, Princeton and Oxford, 2007 whereas, for a discussion of the paradigmatic role of the question of the veil, cf. **M. HILAL-HARVALD**, *Islam as a Civilizational Threat: Constitutional Identity, Militant Democracy, and Judicial Review in Western Europe*, in *German Law Journal*, 21, 2020, pp. 1228-1256.

⁴ On the one hand, young Muslims have difficulty in accessing European citizenship within some national legal systems; on the other hand, even where they become European citizens, they are often unable to give up the citizenship of their respective countries of origin: cf. the two reports of the FRA - European Union Agency for Fundamental Rights, *Together in the EU - Promoting the participation of migrants and their descendants* (15 March 2017), and *Second European Union Minorities and Discrimination Survey Muslims - Selected findings* (20 September 2017): <https://fra.europa.eu/en/publication/2017/together-eu-promoting-participation-migrants-and-their-descendants> and <https://fra.europa.eu/en/publication/2017/second-european-union-minorities-and-discrimination-survey-muslims-selected> (18 February 2023).



At the same time, while the “question of the veil” casts light on attempts by nation states to domesticate contemporary religious transformations by conceptualising them according to existing well-established frameworks, it revives the modern collective image of relations between Europe and Islam, which is deeply rooted in the Old Continent’s identitarian memor⁵. This leads us to focus the debate on Islam and Muslims. However, this is no longer with reference only to the southern shore of the Mediterranean, as was the case during modernity, but also in terms of Islam and Muslims who have become part of Europe in more recent times. As such, the debate on the contemporary European right to freedom of religion is inevitably situated within a broader transnational and specifically Mediterranean context⁶.

These issues will be dealt with in the following four stages. First, we shall sketch out some aspects of separation of church, state, and religion as the matrix for and principal characteristic of the modern European right to freedom of religion. Second, we show how this modern paradigm is incapable of meeting contemporary challenges which are encapsulated in the “question of the veil.” After having expanded, third, our focus to the broader Mediterranean basin, we shall finally propose some possible scenarios for a post-modern European right to freedom of religion.

2 - Separation: The Matrix of Freedom of Religion as a Right of Modernity

There are many “European models” for dealing with “religion” in legal terms. However, leaving aside the numerous and indeed significant differences, separation is the common denominator to all of the⁷.

⁵ Cf. L. MAVELLI, *Europe’s Encounter with Islam: The Secular and the Postsecular*, Routledge, Abingdon, 2012.

⁶ This has moreover also been clear to the EU authorities since the *EU Guidelines on the promotion and protection of freedom of religion or belief* approved by Foreign Affairs Council meeting held in Luxembourg on 24 June 2013: cf. https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/137585.pdf (8 January 2023). On the limits to EU religious policy within the Mediterranean area, cf. S. WOLFF, *EU religious engagement in the Southern Mediterranean: Much ado about nothing?*, in *Mediterranean Politics* 23, 1, 2018, pp. 161-181.

⁷ “The Assembly reaffirms that one of Europe’s shared values, transcending national differences, is the separation of church and state. This is a generally accepted principle that prevails in politics and institutions in democratic countries”, see Recommendation



Separation is a word that fittingly encapsulates European modernity, the Promethean vocation of a continent that has sacrificed the lives of millions of people in establishing both internal and external borders. In particular, with its artistic⁸, geometric and Weberian rationality, separation was well-suited to operate as the cornerstone for the primacy of the “modern state” and its “Kompetenz-Kompetenz” as it could shape, in line with its own needs, the other two inventions of Western European modernity, namely the “church” and the “individual”. At the same time, state, church and individual have drawn strength from their mutual separation in order to fuel their respective identities, though have also used separation as a mechanism for engaging with one another. Having been strategically concealed during the modern era behind rhetoric that branded separation as an entirely impermeable wall dividing secular and religious systems, in contemporary times the relational dimension to separation has paved the way for a radical reinterpretation and transformation of the principle. Modernity emphasised, above all, the dualist and dialectical dimension to separation between the modern state and “the” church as a body monopolising the production of confessional religion, which was acceptable within the new public sphere presided over by state law. This dialectical separation made it possible to assert the primacy of the bond between the individual and the state, thus establishing the supremacy of the state over the church and marking the emergence of modern national citizenship as the core element of a new political system. This bond, and above all its exclusive nature, which relegated any other ties of the state’s new “citizens” to a secondary and contingent position⁹, was accompanied by a shift from the old canonical forum internum to an absolute political right to freedom of conscience, which the state committed to guaranteeing also in terms of its public exercise, although in this case only within certain limits¹⁰. The recognition of the right to freedom of conscience enabled the state to demand the loyalty of individuals-citizens and

1804 (2007) *State, religion, secularity and human rights* of the Parliamentary Assembly of the Council of Europe: <http://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=17568&lang=en> (8 February 2023).

⁸ M. WALZER, *Liberalism and the Art of Separation*, in *Political Theory*, 12, 3, 1984, pp. 315-330.

⁹ Cf. J.-P. WILLAIME, *Sociologie de l'affiliation*, in F. MESSNER (ed.), *L'affiliation religieuse en Europe*, Presses Universitaires de Strasbourg, Strasbourg, 2017, pp. 13-25.

¹⁰ Cf. D. LOCHAK, *For intérieur et liberté de conscience*, in CURAPP-CNRS (ed.), *Le for intérieur*, Presses Universitaires de France, Paris, 2015, pp. 180-205.



legitimised its actions in “emancipating” and “liberating” them from the pervasive effects of their pre-state bonds.

Dialectical separation allowed for homogeneity and cohesion both on the part of its promoter (the state) as well as the body that was unexpectedly subjected to it (the church)¹¹. Its rigid boundaries delineated the realms of religious and temporal authorities and channelled individuals towards a hierarchically determined common good. In contrast to separation in the USA - where, in the absence of both “church” and “state”, attention was focused on “We, the people” - according to the modern European separation, individual freedom of religion - focused on the citizen’s freedom of conscience - operated within spaces pre-defined by the institutions in an unequivocally top-down fashion . This caused major problems for non-church religions, i.e. those not organised into the institutional form of a church, which very often had to seek refuge across the Atlantic¹².

The dialectical separation between church and state was not the only way in which modern separation operated. There was another more hidden separation: that operating not just between state and churches but also that between state, churches and religion. Separation had turned churches into specialist institutions entrusted with two main tasks. Their first task was to act as lightning rods or scapegoats, bearing the weight of confessional religions that had been made irrational by modern man. The second task was to act as hermeneutic hubs charged with reassuring the state regarding the acceptability of individual confessional religious practices. In return for this “domestication” as it were and the willingness to perform this function for the state, churches avoided being “privatised” by continuing to be exempt from the “ordinary” legislation set out in civil codes. Although the maintenance of a public law regime was often associated with far-reaching state control, it helped to set churches apart from other social actors and ended up contradicting the claim to a universal right to freedom of religion guaranteed in equal measure to all citizens. In this way, although the modern European state complied with the dictates of separation by refraining from defining religion, it did

¹¹ As is known, the modern separation established a genuine heterogenesis of ends for the Catholic Church, which had progressively constructed its entire ecclesiology precisely on the strict separation between secular and clerical authorities, arguing that the latter were superior to the former as crystallised in the *Decretum Gratiani* with the formula *duo sunt genera christianorum*.

¹² **D.B. KRAYBILL**, *Concise Encyclopedia of Amish, Brethren, Hutterites, and Mennonites*, The Johns Hopkins University Press, Baltimore, 2010.



however define churches. Moreover, this process of institutional domestication of European freedom of religion proceeded in line with another transformation, namely the shift from pre-modern holistic “faiths” and “practice religions” to the “belief religions” rooted in individual choice¹³. As is explained by Cantwell Smith, modernity created a new notion of confessional religion based on the centrality of dogmas and creeds, purified of faith and of all-encompassing practices. As such, this made it perfectly suited to be classified as an “opinion”, as is exemplified by Article 10 of the 1789 French Declaration of the Rights of Man¹⁴. The identification of churches as the typical enclosure for confessional religions enabled the modern state both to filter the resources that churches were still able to provide to it and also to expand the notion of religion by distinguishing between confessional religions, now exclusively entrusted to churches and more fluid non-confessional religions. These latter religions were also useful in promoting the civic values and social cohesion underlying national legal systems. The twofold modern separation - the visible separation between church and state and the invisible separation between church, state and religions - produced what the French constitutional scholar Maurice Hauriou defined as a “fiction of legal ignorance,” namely the relationship of (only) apparent self-sufficiency between the modern Western European state and religion¹⁵.

Finally, modern European separation represented a perfect ideal type that supplemented the legal framework with a clear ideological, geometric-dogmatic framework¹⁶, the rhetorical radicalism of which concealed the pragmatic and accommodating nature of legal separation. It was precisely this accommodating attitude that cast light on the universalisable nature of separation and expressed the common

¹³ **W. CANTWELL SMITH**, *Philosophia, as One of the Religious Traditions of Humankind: The Greek Legacy in Western Civilization, viewed by a Comparativist*, in J.W. BURBIDGE (ed.), *Modern Culture from a Comparative Perspective*, State University of New York Press, Albany 1997 (1984), pp. 19-49, and **ID.**, *The Meaning and End of Religion. A New Approach to the Religious Traditions of Mankind*, Macmillan, New York, 1962.

¹⁴ As observed by Cantwell Smith, Western modernity encouraged people to consider religion as a «formalized structure, more or less coherent, more or less stable, something that a person could “have”, but basically existing independently of the persons whose lives were informed by or constituted through it», **CANTWELL SMITH**, *Philosophia*, cit., p. 25. Article 10 of 1789 Declaration provides that: “No one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order”.

¹⁵ **M. HAURIOU**, *Principes de Droit public*, Sirey, Paris, 1910, p. 399.

¹⁶ Cf., e.g., **H. PENA-RUIZ**, *Qu'est-ce que la laïcité ?*, Gallimard, Paris, 2003.



denominator between the various highly disparate European models of separation¹⁷. In confirming the political role of confessional religions, this accommodating stance itself was less presentable for purists and became the hidden face of separation. However, as a dimension it was indispensable for state legal systems and lay at the heart of the “legal fiction” evoked by Hauriou.

The relationship between “narrative separation” and “legal-institutional separation” has always been a complicated one, with the former particularly committed to achieving full control over “legal separation”, influencing its authentic interpretation and limiting the autopoiesis of law.

3 - Islam and Separation: Modernity Stumbles

The right to freedom of religion based on modern separation does not appear to operate properly in relation to Islam. Indeed, this religion has been regarded as the cause of the turbulence encountered by the prosperous voyage of European freedom of religion in the calm sea of secularisation. The fact is that Islam has not passed through the Westphalian filter of separation and “churchification.” Islam has never had any church that could operate as a “scapegoat” and Muslims have always borne themselves, directly and without any mediation, the weight of their “irrational” religion, as a religion incapable of producing a church and of finding sanctuary within the category - or, depending upon one’s viewpoint, the mausoleum - of the modern right to freedom of religion.

At the same time, contemporary Muslims have been unable to follow the route taken by European Jews in the wake of modern separation. Jews made up for the loss of their pre-modern nation by transforming themselves into a European church capable of legitimising individual religious practices vis-a-vis the state and of safeguarding their confessional identity¹⁸. In some senses, Islam became a European religion too late at a time when, on one side, Europe had lost the memory of the old legal pluralism, weakened by state law and, on the other,

¹⁷ Cf. J. BAUBEROT, *Vers un nouveau pacte laïque?*, Seuil, Paris, 1990, and previously G. LE BRAS, *Le Conseil d’État, régulateur de la vie paroissiale*, in *Études et documents du Conseil d’État*, Imprimerie nationale, Paris, 1950, pp. 63-76.

¹⁸ Cf. J.-M. CHOURAQUI, *La tradition juive confrontée à la modernité politique: l’exemple des rabbins français au XIX^e siècle*, in *Romantisme*, 3, 125, 2004, pp. 9-25.



contemporary constitutionalism had made it difficult to justify jurisdictionalist initiatives such as the Napoleonic Jewish churchification.

Islam became a European religion during the era of human rights, which overturned separation by exerting a twofold erosive effect on the confines to modernity. Human rights have freed individuals from the relationship of subjugation towards institutions, eroded institutional boundaries between church and state and exposed nation states to the influx of international legal systems. This has produced a new order in which the legitimacy of both secular and religious institutions depends on their capacity to guarantee human rights within a multi-level system for protection where nation states themselves could be held accountable for their own shortcomings. The result is a global citizen who no longer needs any national citizenship in order to claim protection for her fundamental rights, nor indeed any church in order to legitimately express her own confessional religion. As such, confessional religion is freed from the institutional constraints of modernity and directly entrusted to individual agency. Consequently, nowadays in Europe it is not possible to render the exercise of the right to freedom of religion conditional upon the holding of any particular citizenship, nor is it possible to receive citizenship in exchange for adopting a specific form of religious affiliation, such as that required of post-emancipation Jews¹⁹. In fact, the guarantee of human rights - and freedom of religion - no longer overlaps with the citizenship of a particular nation state. It is no longer a negotiable outcome and cannot even be used by nation states as a reward for accepting the imposition of churchification on any given religious confession.

This process entails the de-institutionalisation of the right to freedom of religion and its shift from an “exceptional” public right aimed at regulating the alter ego of state institutions into an “ordinary” special constitutional right among others. In some senses, human rights ensure the laicisation of the right to freedom of religion. Whilst they de-sacralise this freedom, they do not go so far as to fully secularise it by causing the

¹⁹ In actual fact, the issue of religious affiliation re-emerges in relation to the refugee question and, in particular once again in France, the issue of naturalisation applications: cf. **A. FORNEROD**, *L'islam, le juge et les valeurs de la République*, in *Revue du Droit des Religions* 6, 2018, pp. 43-57; **F. DIEU**, *Pratiques religieuses et acquisition de la nationalité française: la sanction par le juge administratif du refus de prendre part à la cohésion nationale*, in **F. FABERON** (ed.), *Liberté religieuse et cohésion sociale: la diversité française*, Presses Universitaires d'Aix-Marseille, Aix-en-Provence, 2015, pp. 443-455, and **E. SHAKMAN HURD**, *Muslims and Others. The Politics of Religion in the Refugee Crisis*, in **L. MAVELLI** and **E.K. WILSON** (eds.), *The Refugee Crisis and Religion. Secularism, Security and Hospitality in Question*, Rowman & Littlefield, London-New York, 2016, pp. 182-203.



specific legal relevance of religion to disappear. Human rights also offer a new language to confessional religious practices that take on a direct political significance by eroding the boundary between freedom of conscience and its manifestations which was essential for the modern state.

Within this context however, Islam as a religion without a church does not perform the function of allowing Europe to depart from clerical-church religion which some European intellectuals had ascribed to this religion in past centuries²⁰. Islam is rather perceived as a religion that calls dangerously into question the fiction of legal ignorance underlying the European separation between church, state and religion. At the same time, Islam finds itself precisely on the front line behind which modernity has been attempting to contain and filter the inexorable advance of a radically new political framework. The effect of this is that, given the lack of any Islamic church, it is the Muslim faithful and - in the paradigmatic case of the veil - female believers in particular who end up in the direct firing line of a nation state fearful of threats to its boundaries and that would prefer Islam to change, rather than changing its own consolidated model of the right to freedom of religion.

It will come as no surprise that, starting precisely from the two hundredth anniversary of the French Revolution²¹, it was the Islamic veil that became the principal target for a besieged modernity. The veil is perceived as a manifesto of a society without borders, where individuals and non-churchified confessional religions invoke human rights without regard to nation state borders. Moreover, the veil is immediately evocative of a religion historically considered to be incompatible with separation. The classic example was the very partial application of the 1905 French law on separation to colonial Algeria due to the fact that it was impossible to recognise a right to freedom of religion without an autonomous Muslim church and an autonomous Algerian citizenry²². This correlation between

²⁰ Cf. **A. BAH**, *La réception théologique et philosophique de l'islam en Europe à l'époque moderne*, L'Harmattan, Paris, 2014, pp. 287-298.

²¹ It was with the suspension in September 1989 of three female students from the Collège di Creil, near Paris, in the name of the prohibition on the "excessive manifestation of any religious or cultural affiliation" that the "question of the veil" came to the fore in Europe: **J.W. SCOTT**, *The Politics of the Veil*, cit., p. 21 et seq.

²² Cf. **R. ACHI**, *Les apories d'une projection républicaine en situation coloniale: la dépolitisation de la séparation du culte musulman et de l'État en Algérie*, in P.-J. LUIZARD (ed.), *Le choc colonial et l'islam. Les politiques religieuses des puissances coloniales en terres d'islam*, La Découverte, Paris, 2006, pp. 237-252.



religious freedom, churchification and political citizenship has not completely disappeared, but has taken on new forms. In this regard, it could be argued that over the last century the failure to extend the law on separation to Algeria resulted from an unwillingness to recognise the existence of an autonomous Algerian political community.

Today, the difficulty in allowing the veil to be used within public spaces results from the difficulty in recognising the full entitlement of Islam - and of Muslims - to participate in the construction of an European shared political community. The absence of any Muslim church not only makes it more difficult to conceptualise the Muslim confessional experience as an integral part of the European historical and cultural heritage, but also risks depriving those who wear a veil of a hermeneutic institution that can act as a guarantor of the legitimacy of their confessional religion vis-à-vis the nation state. Muslim women are thus left at the mercy of antagonistic interpretations of transnational religious constellations on the one hand and European nation states on the other hand, both of which have been nourished by centuries of opposing "orientalisms"²³. In the European context, a Muslim church could support individual interpretations and at the very least alleviate - if not avoid - the consequences of an interpretation of the veil as a political symbol incompatible with public order or inevitably discriminatory against women. In particular, it could do so if it were able to attract the issue of wearing the veil into the sphere of freedom of religion specifically, thereby releasing it from the generic sphere of freedom of conscience²⁴. Moreover, an Islamic ecclesiastical institution could provide a safer refuge for confessional religious practices that are becoming less well understood within a broadly secularised context and that are liable to be sacrificed as part of the process of the balancing of interests. Consider for example the

²³ Cf. **M. CAMPANINI**, *Dall'ammirazione al rifiuto. L'idea di Europa (e di Occidente) nel mondo arabo-islamico dall'Ottocento a oggi*, in *Quaderni di diritto e politica ecclesiastica*, 1, 2020, pp. 143-161. One particularly eloquent example of this reciprocal "Orientalism" is offered by the - strictly positivist - interpretation of sharia law by the ECHR in *Refah Partisi*. To assert "that sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention" and that "sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it" (*Refah Partisi v. Turkey* - App. Nos. 41340/98, 41342/98, 41343/98 and 41344/98 (2003), §§ 25 e 123) is essentially tantamount to accepting a "fundamentalist" interpretation of that source of law, disregarding its historical developments.

²⁴ Cf. **A. FORNEROD**, *Les édifices culturels et la liberté de culte pendant l'état d'urgence sanitaire*, in *Revue du Droit des Religions*, 10, 2020, pp. 178-179.



issue of ritual animal slaughter and the difficulty in balancing it against animal rights, or ritual circumcision as against the interests of minors. The positions taken by nation states - as well as the European authorities - in relation to both of these practices have been a major cause for concern for both Muslim and Jewish communities²⁵.

Moreover, just as churches in the age of formal equality - typical of modern separation - were able to shield confessional religions from "privatisation", churches in the age of substantive equality - typical of contemporary constitutional laicity - have become guarantors not so much of the "basic" contents of the right to freedom of religion, which is now universally guaranteed, but rather of the state's "affirmative actions" towards it. In fact, without a "recognised church", it is nowadays impossible to benefit from all of the opportunities that European rights provide for the exercise of freedom of religion in collective form. Nevertheless, at the same time, organisation into a "recognised church" is often reliant on broad political discretion on the part of public authorities. This discretion is guided by the idea of rewarding aspiring churches' loyalty to the state, rather than making up for the disadvantaged position of non-mainstream confessional religions. Thus, while highlighting the osmosis between churches and state, the central role performed by state support for the substantive dimension to freedom of religion has favoured the emergence of states' demands for confessional religions to achieve homogeneity and to assimilate²⁶. Just as human rights have expanded the public sphere, so too has the concomitant erosion of separation expanded the role of nation states both as interpreting bodies and as guarantors of these rights against the risks of overly individualistic and de-institutionalised interpretations. It is within this context of partnership for social cohesion, which has also been construed as "cooperation for promoting man for the good of the country"²⁷, that churches and their

²⁵ This issue is raised by **O. ROY**, *Religious Freedom and Diversity in a Comparative European Perspective*, in https://cadmus.eui.eu/bitstream/handle/1814/45533/6.conclusions_02.05.16.pdf?sequence=2 (8 February 2023) and, in relation to France, by **P.-H. PAULET**, *Le risque des religions séculières: le culte des droits de l'homme*, in **F. FABERON**, *Liberté religieuse*, cit., pp. 119-129.

²⁶ Cf. an example of sensitivity to assimilation drives in line with "local customs" is the decision of the ECtHR in the case of *Osmanoğlu and Kocabaş v. Switzerland* (application no. 29086/12) of the 10 April 2017.

²⁷ See Article 1 of the 1984 Concordat concluded between the Italian Republic and the Holy See.



institutional relations with states have taken on a new meaning and a new topicality.

Two judgments of the French Constitutional Council powerfully exemplify this dynamic. On the one hand, the Constitutional Council upheld the constitutionality of the Napoleonic concordat in 2013, holding that this *confessional institutional accommodation* of modernity was fully compatible with the post-modern constitutional principle of laicity²⁸. In 2004 on the other hand, when imposing a limit on the permeation of European law on national law, the Council took the opportunity to raise a preventive defence against any *confessional individual accommodations*. Although laicity guarantees the concordat, it does not however allow “any person whatsoever to rely on his religious beliefs in order to circumvent the ordinary rules governing relations between public bodies and individuals”²⁹. 2004 was moreover the year in which the “anti-veil” law was enacted out of fears that a right to freedom of religion conceived of as a human right - centred on the individual and not mediated by an institutional church - could turn this item of clothing into a Trojan Horse that could contribute to the re-emergence of a dangerous political “faith religion” capable of undermining the exclusive bond between the nation state and its citizens. Paradoxically, it has been precisely the post-modern individual agency of “second generation” Muslims³⁰ that has reactivated

²⁸ CC, 21 February 2013, QPC no. 2012-297, nos. 7 and 8 and, in relation to the application of the Special Statute for Guyana, CC, 2 June 2017, QPC no. 2017-632: <https://www.conseil-constitutionnel.fr/decision/2013/2012297QPC.htm> and <https://www.conseil-constitutionnel.fr/decision/2017/2017632QPC.htm> (8 February 2023).

²⁹ ²⁹ Decision no. 2004-505 DC of 19 November 2004, no. 18, <https://www.conseil-constitutionnel.fr/decision/2004/2004505DC.htm> (8 February 2023). This passage from the decision would often be used in order to criticise the legitimacy of reasonable accommodations pursued at local level, forcing the Council of State to strike a delicate balance. However, the 2004 ruling of the Constitutional Council made it more difficult to establish the public relevance of individual religious needs: cf., on alternative menus in school canteens, Conseil d'État, 11 December 2020 (no. 426483): <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-12-11/426483> (8 February 2023).

³⁰ The Lévy sisters who raised the “question of the veil” were the daughters of an atheist lawyer of Jewish origin and a mother born in Cabilia, who had been baptised at the age of five in the middle of the Algerian War, and was a non-practising Muslim: cf. <https://www.leparisien.fr/societe/les-confessions-d-alma-et-lila-16-02-2004-2004761480.php> (8 February 2023); cf. the pioneering work of **D. BOUZAR** and **S. KADA**, *L'une voilée, l'autre pas. Le témoignage de deux musulmanes françaises*, Albin Michel, Paris, 2003. Cf. on this issue also **T. ASAD**, *Secular Translations*, cit., p. 46 and, from a different perspective seeking to illustrate the revitalising role of religion played by individual agency **U. BECH**, *A God of One's Own. Religion's Capacity for Peace and Potential for Violence*, Polity Press, Cambridge,



unconscious European perceptions of Islam as an irrational religion and thus also increasingly pressing calls for an “Islamic church” that would be capable of rationalising and domesticating its religious practices.

The new centrality assumed by the principle of loyalty and the reduction of separation between church(es) and state also produce an entropic expansion and exhaustion of the fiction of legal ignorance. The new separation is at the same time “thin”, in terms of the shorter distance compared to the old secular and religious divide and also “thick” due to the heavy requirement of assimilation imposed on confessional religions³¹. The entropy of the “fiction of legal ignorance” was clearly apparent in the shift from “separation” to the neologism “separatism” under the French law of 24 August 2021 on “respect for the principles of the Republic”³².

The expansion of the boundaries of the public sphere, the revitalized churches’ role as the guardians of confessional religions and the nation states’ fears of social diversity and confessional pluralism also lie at the root of a form of aggressive *selective* and *exclusionary neutrality* which, permeating from France, has also taken root in the European legal space. It is invoked as an alternative to the more direct references to the national cultural and religious heritage that is more common in Eastern Europe in order to filter the confessional religions that are admitted to the public space and to exclude from it those religions that are at odds with the “loyal conformism” required by the new separation³³. However, the

2010, pp. 26-30.

³¹ Cf. **M. WALZER**, *Thick and Thin: Moral Argument at Home and Abroad*, University of Notre Dame Press, Notre Dame-London, 1994.

³² Law no. 2021-1109 of 24 August 2021 “reinforcing the respect of the principles of the Republic” was proposed in the Senate on 12 April 2021 as a law “reinforcing the respect of the principles of the Republic and the fight *against separatism*”. According to the press release issued by the French Cabinet on 9 December 2020, the law constitutes “a fundamental aspect of the government’s strategy to combat separatism and abuses of citizenship. It responds to the decline in identity and the development of radical Islam, an ideology hostile to the fundamental principles and values of the Republic”. All of this was done in the conviction that “(W)hen faced with this separatist reality, the legal arsenal has proved to be insufficient”, <https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000042635616/> (8 February 2023). However, the separatism term was soon removed from the title and text of the law and has been diligently avoided by the courts, the Council of State and the Constitutional Council, when ruling on the draft legislation and the actual law.

³³ Cf., for an example of this approach, **J.-M. WOEHLING**, *La neutralité religieuse de l’État constitue-t-elle un principe opérationnel?*, in *Revue du Droit des Religions* 5, 2018, pp. 157-172, and the § 4 (3) of the Austrian Federal law on the external legal relationships of Islamic Religious Societies of 25 February 2015 n. 61, which calls for “Islamic Muslim



wide-scale use of this neutrality risks provoking a disproportionate de-politicisation of the public sphere. This is both because “exclusionary neutrality” results in the extirpation not only of manifestations of confessional religions that are incompatible with the democratic constitutional order, but also of expressions of belief as a whole. Insofar as exclusionary neutrality is not limited to the separation between state and religions, it also extends to political expressions and manifestations of conscience and opinions. Moreover, this neutrality ends also up in delegating to private operators, in particular employers, the task of cleaning up the public sphere. The veil in workplaces clearly reflects this dynamic that has given rise to a principle of neutrality that can go so far even as to neutralise and de-politicise the space that, by virtue of the work-taxation-representation triad, constitutes the core locus for the exercise of popular political sovereignty. This has occurred, moreover, with the consent of the European Court of Justice³⁴.

Thus, a principle of modernity such as neutrality has been progressively imposed on contemporary constitutional laicity which, by virtue of its link with human rights and openness to pluralism, presaged new and different relations between state, individuals and religions³⁵. Clearly, this “public sphere of neutrality” is particularly conducive to the assimilationist “*vivre ensemble*”³⁶ related to the resurgent state-centric

societies” to have “a positive basic attitude towards society and state”.

³⁴ Cf. **L. VICKERS**, *Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace*, in *European Labour Law Journal*, 8, 3, 2017, pp. 1-26.

³⁵ Despite having identified laicity with neutrality since the outset, the constitutional scholar Jean Rivero was already heralding the end of the era of legal ignorance. For Jean Rivero in fact, constitutional laicity (and hence neutrality) was “very distant from a laicity conceived of as ignorance as regards religious matters, and at the same time very distant from a laicity that is limited to tolerating religious worship”. According to Rivero, “the lay state as such has entered into an obligation towards its citizens to allow them to follow the imperatives dictated by their conscience”. Consequently, the contemporary constitutional state must “take steps to comply with this obligation; and this is not solely a capacity that its laicity allows it to have, it is rather an obligation that laicity imposes on it: neutrality does not only mean a duty to refrain from any actions that might interfere with freedom of religion, but it also has a positive element, entailing a duty to allow any person who so wishes to follow their own convictions”: **J. RIVERO**, *De l'idéologie à la règle de droit: la notion de laïcité dans la jurisprudence administrative*, in *CENTRE DE SCIENCES POLITIQUES DE L'INSTITUT D'ÉTUDES JURIDIQUES DE NICE* (ed.), *La laïcité*, PUF, Paris, 1960, pp. 278 et seq.

³⁶ Cf. **M. HUNTER-HENIN**, *Why Religious Freedom Matters for Democracy. Comparative Reflections from Britain and France for a Democratic “Vivre Ensemble”*, Bloomsbury, London, 2020.



approach acknowledged by the ECtHR's margin of appreciation³⁷. This ends up affecting the notion and interpretation of public order, favouring an "ideal public order" that is sensitive to ambiguous requirements of prevention. At the beginning of this millennium, Judge Françoise Tulkens sought to counter the indulgent approach of the ECtHR when confronted with national prohibitions of the Muslim veil. The UN attempted to do likewise in objecting to these prohibitions in the name of a public order careful to avoid preventive arbitrary restrictions on fundamental rights. Both of these attempts are evidence of the different balance that is struck between state, churches and individuals, depending upon whether a right to freedom of religion is state-centric or universally focused³⁸.

4 - A Broader Scenario: The Mediterranean Backdrop

The prism of the Islamic veil immediately reflects the importance of relations between the two shores of the Mediterranean. It is no coincidence that the only dissenting opinion within the Committee on Human Rights in Geneva when ruling against the French legislation prohibiting the concealment of the face, i.e. against the burqa and the niqab, was that of a renowned Tunisian jurist who stressed the non-religious, i.e. non-churchified nature of the incriminating practice³⁹. It is also no coincidence that when France, acting as a kind of trailblazer, prohibited or restricted forms of Islamic dress within its territory, it sought in all instances to obtain approval from "ecclesiastical authorities" on the Southern shore of the Mediterranean, starting with those from Al Azhar, the institution that could most easily - by some leap of the imagination - be considered to be equivalent to an ecclesiastical authority on the Northern shore⁴⁰. In fact,

³⁷ Cf. Article 1 of Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms.

³⁸ Cf. the dissenting opinion of Judge Tulkens in *Leyla Şahin v. Turkey* (Application no. 44774/98 of 10 November 2005 ([https://hudoc.echr.coe.int/fre#%7B%22itemid%22:\[%22001-70956%22\]%7D](https://hudoc.echr.coe.int/fre#%7B%22itemid%22:[%22001-70956%22]%7D) 8 February 2023)).

³⁹ Cf. <https://www.ohchr.org/fr/NewsEvents/Pages/DisplayNews.aspx?NewsID=23750&LangID=F> (8 February 2023).

⁴⁰ Cf. **F. BURGAT**, *Le Sud musulman contre la loi française. L'écho exacerbé des malentendus de la modernisation coloniale*, in F. LORCERIE (ed.), *La politisation du voile. L'affaire en France, en Europe et dans le monde arabe*, L'Harmattan, Paris, 2005, pp. 245-257. It is interesting that support for the attempt at churchification - and the relaxation of ties to state authorities - attempted by the Grand Imam of Al-Azhar is also clear within the Abu Dhabi Document on Human Fraternity for World Peace and Living Together, signed on 4



the Southern shore of the Mediterranean operates as a mirror, reflecting - and reversing - the essential features of the European paradigm for freedom of religion. Whereas the latter has been premised on a fiction of legal ignorance regarding the political role of religion, the Southern shore has embraced the opposite fiction, namely that of the legal recognition of religion as a necessary precondition for the legitimacy of political sovereignty. These two fictions have fuelled the identitarian narratives of the Mediterranean area and still today heavily condition its political systems, albeit to differing extents depending upon the specific national contexts.

These two opposing fictions reflect a mismatch between the political chronologies of the two Mediterranean shores. Whilst on the Northern shore the pendulum swung towards the nation state at the time of the mythical Westphalian peace, on the Southern shore the nation state only established itself in the wake of the Second World War as part of the process of decolonisation. However, it was precisely at the time when the Northern shore was moving from modernity into the age of human rights that the Southern shore embraced the Westphalian form that finally resulted in a self-sufficient empty shell filled only with authoritarianism⁴¹. With the “Arab Spring”, the Southern shore aligned with the Northern shore, identifying the human rights proclaimed by the international community as a yardstick for the legitimacy of sovereignty, whether secular or religious⁴². The openness towards international law of the new constitutions adopted on the southern shore and parallel references to the 1948 UN Universal Declaration within discourses by the more state-centric

February 2019 by Pope Francis and the Grand Imam of this institution, Ahmad Al-Tayyeb. The document suggests a parallelism between “Al-Azhar al-Sharif and the Muslims of the East and West” and “the Catholic Church and the Catholics of the East and West”: cf. https://www.vatican.va/content/francesco/en/travels/2019/outside/documents/papa-francesco_20190204_documento-fratellanza-umana.html (8 February 2023).

⁴¹ See **F. FANON**, *The Wretched of the Earth*, Grove Press, New York, 1963, p. 148; cf. also **P.-J. LUIZARD**, *Laïcités autoritaires en terres d’islam*, Fayard, Paris, 2008.

⁴² Cf. **N. BERNARD-MAUGIRON**, *Islam et constitutionnalisme dans le monde arabe après les soulèvements de 2011*, in *Société, droit et religion*, 10, 2, 2020, pp. 163-177, and, for an initial assessment, the special issue of the *Revue des droits de l’homme* n. 56, 2014. Amongst the now numerous documents published by confessional agencies, cf. in particular the Marrakesh Declaration of 27 January 2016, <https://www.marrakeshdeclaration.org> (8 February 2023) on which cf. **E. PISANI**, *La Déclaration de Marrakech du 27 janvier 2016. De la civilité au devoir de citoyenneté en islam*, in *Midéo. Mélanges de l’Institut dominicain d’études orientales* 32, 2017, pp. 267-293, <https://journals.openedition.org/mideo/1655#text> (8 February 2022).



Islamic confessional agencies bore witness to a departure from an exclusivist Islamo-centric perspective and the rhetorical synchronisation of the entire Mediterranean area around the same political reference point⁴³. This dynamic is also at work within Islamo-Christian dialogue which crystallised in the Document on Human Fraternity for World Peace and Living Together, signed on 4 February 2019 in Abu Dhabi by Pope Francis and the Grand Imam of Al-Azhar Ahmad Al-Tayyeb⁴⁴. This synchronisation around human rights - and the inevitable focus on individuals - stressed the osmosis between state, international, religious and interreligious systems and exerted general pressure on the opposing, yet convergent, fictions on which the respective paradigms on the two shores were based. It is no coincidence that European hostility towards the Islamic veil has been fuelled by the re-emergence of political Islam on the southern shore along with states' reactions to it.

At the same time, whilst those seeking to remove the authoritarian regimes on the Southern shore look to the freedoms of the Northern shore, those very same authoritarian regimes are able to legitimise restrictions on human rights by making selective reference to the case law of the ECtHR itself⁴⁵. So-called "Islamic terrorism" has launched a new form of "Thirty Years' War", which interrupted what had appeared to be the linear "absolute progress" achieved by human rights. Responses to this violence have quickly reignited institutionalist dynamics that feed nationalism as well as the role of churches as bulwarks against confessional "bad

⁴³ Cf. **M. MOUAQUIT**, *La liberté de religion et de conscience au Maghreb. Configuration intellectuelle et idéologique et état de l'évolution des idées*, in *Quaderni di diritto e politica ecclesiastica*, 1, 2018, pp. 177-190.

⁴⁴ The document states that "the pluralism and the diversity of religions, colour, sex, race and language are willed by God in His wisdom, through which He created human beings": cf. note 40.

⁴⁵ Cf. the response by the Algerian Government to the report by the Special Rapporteur on Religious Freedom and the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion concerning the case of Saïd Djabelkheir, an Algerian journalist convicted to three years' imprisonment and a fine of 50,000 Algerian dinars for having offended the Prophet and the precepts of Islam in various posts published on Facebook. Arguing that Article 144-bis(2) of the Algerian Criminal Code was indeed fully compatible with the human rights guaranteed under international law, the Algerian Government relied on the ECtHR judgment in *E. S. v. Austria* (Application no. 38450/12) of 25 October 2018, which had upheld the applicant's conviction for having defamed the Prophet Muhammad by associating him with paedophilia: <https://www.redes.m.org/2022/03/01/linconstitutionnalite-de-larticle-condamnant-le-blaspheme-en-algerie-soulevee-dans-laffaire-djabelkhir/> (10 March 2023).



religions". At the same time, fears of terrorist threats intersect with fears of globalisation and the ordinary social conflict within pluralist and democratic societies. On both Mediterranean shores this situation favours the temptation of "preventive security" that may result in unreasonable interference with human rights, setting off vicious circles that undermine trust in the possibility of effective political consensus on the basis of constitutional democratic systems⁴⁶.

The risk on both shores of the Mediterranean thus concerns the emergence of a kind of "Salafism of modernity". In the same way as religious millenarist Salafism wishes to overcome the fiction of legal recognition and essentially to bring about the absolute primacy of Allah that this latter fiction only foreshadows, the new "Salafism of modernity" disregards the fiction of legal ignorance in order to fully assert the monistic primacy of the state. It is significant, for example, that, both in Muslim-majority countries as well as in Europe, reference to "political Islam" increasingly implies a reference to anti-democratic action and subversion of the constitutional order, thus denying, also through language itself, any legitimate political relevance for osmotic forms of "political Islam" - and maybe also other religious experience(s).

5 - Prospects for a Post-modern Right to Freedom of Religion

It would appear from the above that the restructuring of the boundaries between the various components of the right to freedom of religion is not simply a marginal appendage within societal dynamics but also often reveals general processes, in turn conditioning other processes. At the same time, due to the link between the right to freedom of religion and political structures, current neo-modernist reactions must be assessed with prudence, precisely due to their multifaceted nature. Indeed, these reactions also reveal the need for a political synthesis that prevents the law of the survival of the fittest from prevailing. However, this legitimate search for a viable mode of "*living together*" calls for answers and mechanisms that are not at odds with the fundamental rights that one is seeking to protect.

⁴⁶ Precisely in order to avoid this spiral, in 2019 the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) published *Freedom of Religion or Belief and Security Policy Guidance*: <https://www.osce.org/files/f/documents/e/2/429389.pdf> (accessed 8 February 2022).



Starting from these general precautions, it is now possible to attempt to sketch out some of the characteristics of a possible post-modern European right to freedom of religion that is founded on the reciprocal synchronisation of state and confessional systems around human rights and the consequent central role of the individual.

First of all, the central role of the individual favours the emergence of non-churchified forms of “faith” and “practice” religions. At the same time, the thinner boundaries between states and religions call for forms of communication between them that are capable of taking account of individual agency. This communication relativises the classical concordatary systems inferred by a legal pluralism that is anchored to precise and stable institutional boundaries. In addition, it also encourages links between religious and secular systems that are directly rooted in human rights constitutionalism, which offers state, religions, and individuals a space for striking a balance between the requirements of freedom, equality and solidarity.

Consequently, a post-modern constitutional-oriented European right to freedom of religion should be focused more on (constitutional) laicity than on (modern) separation. This implies the need to overcome the continuity of interpretation that downplays, or even negates, the novelty of this constitutional principle that is still read through the Westphalian lens and a separatist neutrality focused on uncontaminated modernity. Moreover, if constitutional laicity is concealed behind a cumbersome modernist separation, this will result in new forms of “secularism” being seen as incredible novelties, even though they do not add anything new in reality to what the post-Second World War European constitutionalism has already been presenting for seventy years⁴⁷. This dynamic involving the concealment of the novelty of constitutional laicity has been particularly evident in France which was the first country to enshrine this principle formally in a constitution - its 1946 Constitution of the Fourth Republic. The transformation of laicity into a formal constitutional principle has not only marked the departure from (modern) separation, which was not mentioned by the Constitution. It has also marked the recognition of a pluralist public sphere⁴⁸ and demonstrated the porous

⁴⁷ Cf., e.g. the enthusiasm that has often been aroused in Europe by a description of “Indian secularism” that is entirely consistent with the “classic” postulates of European constitutional laicity: cf., e.g., **R. BHARGAVA**, *The Distinctiveness of Indian Secularism*, in *Critique internationale*, 35, 2, 2007, pp. 121-147.

⁴⁸ Maurice Schumann, the promoter of the constitutionalisation of the principle of laicity within the 1946 French Constituent Assembly, asserted that the state “has a duty,



nature of the boundaries between the secular and the religious. This is clear from the convergence around this constitutionalisation of the French Catholic Episcopate, the greatest opponent of of this principle at the time of modern separation⁴⁹.

However, the force of the continuity of interpretation has been able to impose itself also at the European level. Whilst not establishing laicity as a self-standing concept of its own, according to an explicit interpretation of Convention provisions that would probably favour a pluralist interpretation⁵⁰, the ECtHR has rather understood laicity as a “*secular laïcité*”. This formula is always presented as a limit to expressions of freedom of religion and is elevated to the status of a “self-standing concept” only when it reflects the influence of national neo-modern dynamics on the European Court. In this way, the “*secular laïcité*” of the

where the nation is comprised of people who do not have the same beliefs, to allow each of its citizens to live in accordance with the dictates of their conscience. It follows that the doctrine of the neutrality or, better put, the impartiality of the state vis-a-vis the beliefs of all of the members of the national community must not be conceived of as a restrictive constraint, whether political or financial in nature, but as a guarantee of genuine freedom”, in *Annales de l'Assemblée Nationale Constituante élue le 2 juin 1946*, 2^e séance du 3 septembre 1946, 3474-3476. Consequently, as François Méjan observed from the 1940s onwards, the principle of separation was no longer preferred: cf. **F. MÉJAN**, *La laïcité française en droit positif et en fait*, in *La laïcité*, cit. (ft. 35), p. 229.

⁴⁹ The 1945 Declaration of French Bishops “on the human person, the family and society” of 13 November 1945 revealed an even deeper dynamic in the wake of the Second Vatican Council, which is described well in the article by **J. VIALATOUX** and **A. LATEREILLE**, *Christianisme et laïcité*, in *Esprit*, 160, 10, 1949, pp. 520-551, in which laicity turned into the legal expression of the freedom of the act of faith. For the Declaration cf. **J. BAUBÉROT ET AL.**, *Histoire de la laïcité*, CRDP de Franche-Comté, Besançon, 1994, pp. 272-275. Thus, whereas Protestant churches and Jews had previously proved to be well-disposed towards a laicity that freed them from the constraints of Catholic confessionalism, it would subsequently be European Muslims to prove their endorsement of constitutional laicity, and so they will not to subvert the Western political order by signing Charters and Pacts of adhesion to the continental constitutional model.

⁵⁰ The ECtHR has identified the link between the right of religious freedom and pluralism (and thus between the right of religious freedom and the contained principle of constitutional laicity) as being “indissociable from a democratic society, which has been dearly won over the centuries”: *Kokkinakis v. Greece*, 25 May 1993, § 31, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57827%22%5D%7D> (8 February 2023). In the opinion of the Italian Constitutional Court, “(T)he principle of laicity, as it emerges from Articles 2, 3, 7, 8, 19 and 20 of the Constitution, does not imply the indifference of the State to religions but rather a guarantee of State protection of the freedom of religion, in a regime of confessional and cultural pluralism”, judgment no. 203 of 11 April 1989: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza_203_1989_Casavola_en-fin.pdf (8 February 2023).



ECtHR views neutrality not as a means for, but rather as the end of pluralism. As a result, in absence of any careful balancing, one of the essential elements of laicity - i.e. neutrality - ends up negating the others, i.e. freedom of religion and pluralism⁵¹. At the same time, when the ECtHR censures the state for not guaranteeing effective pluralism, it is only neutrality that is invoked and never *laïcité* or secularism.

However, this resistance to appreciating the leap made by constitutional laicity does not halt the osmosis between religious and secular systems and gives rise to a different hierarchy between *rationality* and *relationality*. The principle of relationality should lead contemporary “composite” legal systems⁵² to focus more on the need for concrete protection for fundamental rights than on abstract agreements concerning dogmatic principles. Moreover, these “ideological” agreements risk imposing the vision of the strongest interlocutor by violating confessional autonomy, although they are likely to remain a dead letter in any case. This primacy of relationality as a condition for improving shared rationality helps, on the one hand, to realise Böckenförde’s postulate concerning the need for an underlying social consensus concerning the prerequisites for “living together”⁵³. On the other hand, it demands that “rationality” not be used as a smokescreen for the prejudice-based exclusion of non-mainstream confessional groups from the public sphere. Enforcing relationality requires vigilance in resorting to formal convergence requests between states and confessional groups, which often turn into agreements, charters and declarations that stigmatise the groups involved by adversely affecting their access to the general right to freedom of religion and duplicating the rights already established within general constitutional provisions.

One possible alternative to these risks might be found in a right to “freedom of religion of proximity” that establishes key roles for local

⁵¹ This is in spite of the fact that paragraph 102 of the first Şahin judgment mentioned the principle that the margin of appreciation “does not exclude European supervision, especially as such regulations must never entail a breach of the *principle of pluralism*, conflict with other rights enshrined in the Convention, or entirely negate the freedom to manifest one’s religion or belief”: it is interesting to note that, in the version reproduced by many commentators, the *principle of pluralism* is turned into the *principle of secularism*.

⁵² Cf. **M. MOUAQIT**, *Dans les pays musulmans, l’autonomisation du juridique est une question fondamentale. Entretien*, in *Droit et Société*, 107, 2021, pp. 133-134.

⁵³ **E.-W. BÖCKENFÖRDE**, *Die Entstehung des Staates als Vorgang der Säkularisation*, in **ID.**, *Staat, Gesellschaft, Freiheit. Studien zur Staatstheorie und zum Verfassungsrecht*, Suhrkamp, Frankfurt am Main, 1976, pp. 65-92.



government, societal bodies, and cities as the new locus of the sacred⁵⁴ as well as for “reasonable accommodation” as an instrument for achieving relationality “here and now.” Proximity also emphasises the homeostatic function of a principle-based jurisprudence that is not only guided by strict positivism, but also by a technique capable of grasping the *aequitas* and the flexibility typical of religious rights. The growing role of European jurisprudence in the field of religious freedom can also lead European Courts to strike a more careful balance between different national choices. An interesting example was offered by the case law of the European Court of Justice on the Muslim headscarf in the workplace. Despite the “constitutionalisation” of the margin of appreciation, the Court of Justice has been able to strike a balance between its more restrained decisions towards confessional pluralism - usually those taken in relation to states that are less open to recognising religious identities, as France - and its more open decisions, such as those taken in relation to more accommodating states like Germany⁵⁵. In turn, recourse to reasonable accommodation does not by any means imply the uselessness of the law. Rather, it is an alternative instrument to legislation conceived as a magic consolatory and performative remedy that seeks to achieve absolute legal certainty in opposition to the so-called “relativism” that is no more than the consequence of constitutional pluralism itself.

At the same time, consolatory legislation can only be avoided if society is immunised against the risk of religious illiteracy. A religiously illiterate society is incapable not only of interpreting calls for alterity originating from confessional religious groups but also, at the same time, of noticing - and accepting - their contributions to the construction of shared citizenship. In this regard, one might also ask whether the difficulty in recognising the novelty of constitutional laicity is not ultimately dependent precisely on the difficulty of appreciating its osmotic

⁵⁴ Cf., P. BRAMADAT et AL. (ed.), *Urban Religious Events: Public Spirituality in Contested Spaces*, Bloomsbury, London-New York-Oxford-New Delhi-Sidney, 2021, and J. RÜPKE, *Urban Religion. A Historical Approach to Urban Growth and Religious Change*, Walter de Gruyter GmbH, Berlin-Boston, 2020.

⁵⁵ Cf. e.g., most recently the judgment of the Court of Justice in Cases C-804/18 and C-341/19 *WABE and MH Müller Handel*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=244180&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=26099994> (8 February 2023), in which the legitimacy of the banning of religious symbols was subject to more stringent conditions than it had been in the previous Achbita and Bougnaoui judgments (cf. note 34), although without radically calling into question the general ability of private operators to “neutralise” the workplace by imposing a general prohibition.



role. Religious illiteracy can turn into fertile ground for the aggravation and political - or religious - exploitation of any tension existing between different normative systems⁵⁶. At the same time, commitments made to combat that illiteracy, which have been made by the European institutions on various occasions, especially since 9/11⁵⁷, must avoid confusing bidirectional literacy which affects society as a whole with unidirectional literacy which is aimed mainly at religious communities and entails their reconfiguration and assimilation on a top-down basis⁵⁸.

A right to freedom of religion based on constitutional laicity also enables a particular category such as that of religious minorities to be reconsidered in line with the age of human rights. In recent times, this category has returned to centre stage not only as a result of cases involving old “minorities”⁵⁹, but also due to the view that the use of this category could be beneficial in ensuring substantive equality for religious groups that are not adequately considered or that are even marginalised by national rights to freedom of religion⁶⁰. It would appear that the re-

⁵⁶ Analogous risks of religious illiteracy also affect confessional religions themselves: cf. **O. ROY**, *La sainte ignorance: Le temps de la religion sans culture*, Seuil, Paris, 2008. The progressive osmosis between different normative and value spaces has evolved, also within confessional religions, into congruent antagonistic reactions. This has even occurred within the Catholic Church itself which has been permeated since the Second Vatican Council by neo-modernist reactions that, clinging to the modern Tridentine model, reject the pluralist openness and focus on the individual’s internal forum typical of contemporary ecclesiology ... and politics.

⁵⁷ Cf. <https://www.coe.int/en/web/education-and-religious-diversity> (8 February 2023).

⁵⁸ There is, once again, a risk associated with various “civil education” initiatives directed at religious communities, and in particular Muslim communities. These initiatives are often associated with support in the process of “legal inculturation”, which may even turn into unrealistic and illegitimate interference.

⁵⁹ Cf. ECtHR, *Molla Sali v. Greece* GC 19 December 2018 (Application no. 20452/14), <https://hudoc.echr.coe.int/eng#%7B%22respondent%22:%5B%22GRC%22%5D,%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%5D,%22itemid%22:%5B%22001-188985%22%5D%7D> (8 February 2023).

⁶⁰ Cf., e.g., **S. FERRARI**, *Religious Minorities and Legal Pluralism in Europe*, in K. VON DER DECKEN and A. GÜNZEL (ed.), *Staat - Religion - Recht: Festschrift für Gerhard Robbers zum 70. Geburtstag*, Nomos, Baden-Baden, 2020, pp. 353-368, and **ID.**, *Overcoming the ‘Same Rights for All Special Rights for Minorities’ Dichotomy*, in F. PETITO, F. DAOU, and M.D. DRIESSEN (eds.), *Human Fraternity & Inclusive Citizenship. Interreligious Engagement in the Mediterranean*, Ledizioni LediPublishing, Milano, 2021, pp. 133-143, <https://www.ispionline.it/en/publicazione/human-fraternity-and-inclusive-citizenship-interreligious-engagement-mediterranean-30794> (8 February 2023). And for an overview: M. VENTURA (ed.), *The Legal Status of Old and New Religious Minorities in the European Union*, Editorial Comares, Granada, 2021.



establishment of this category has occurred as part of an attempt to identify an antidote to the weakening of the pluralist impetus of democratic constitutionalism. In particular, the current usage of the notion of “religious minorities” is a response, on the one side, to the re-emergence of identitarian discourses seeking to defend (supposed) “national majorities” from globalisation and, on the other side, to the fading away of the public persuasiveness of the needs and rationales of confessional religious identities, especially “minority” ones⁶¹.

However, the use of the notion of religious minority is not entirely unproblematic. On one side, the rigid internationalist model of “religious minorities” as having emerged in the wake of the break-up of the Ottoman Empire appears to be highly counterproductive. Indeed, the Strasbourg Court has held that this perspective which is so distant from the contemporary individualist perspective, is no longer tenable and is moreover extremely controversial politically⁶². On the other hand, it must not be forgotten that the equality guaranteed under contemporary constitutions already incorporates a substantive dimension⁶³. Consequently, recourse to such an indeterminate notion⁶⁴ appears to be quite useful in exerting political pressure on the arbitrary exercise of political and administrative discretion and inertia and/or abuses by the legislature, as well as in supporting judges who seek to achieve the greatest possible extension to constitutional equality. In particular, the notion of religious minority can be used as a shortcut for avoiding the possible pitfalls that the institutionalist model of the right to freedom of religion not infrequently lays for non-churchified confessional religious practices. In fact, access to the instruments of substantive equality for non-church religions is made conditional on the possibility of their identification as ecclesiastical institutions recognised at the discretion of

⁶¹ Cf. note 25.

⁶² Cf. **E. FOKAS**, *On Aims, Means, and Unintended Consequences: The Case of Molla Sali*, in *Religions*, 12, 2021, p. 859, <https://www.mdpi.com/2077-1444/12/10/859/htm> (8 January 2023).

⁶³ According to the case law of the Italian Constitutional Court, substantive equality is a “project” (judgment no. 70 of 2015), which makes it possible to identify “under specific circumstances [...] *de facto* differences between persons whose circumstance are the same, which the legislator may assess and regulate at its discretion, without any limit other than the requirement that this assessment must be rational” (judgment no. 104 of 1969).

⁶⁴ Cf. **D. FERRARI**, *New and Old Religious Minorities in International Law*, in *Religions*, 12 2021, p. 698, <https://www.mdpi.com/2077-1444/12/9/698> (8 January 2023).



states⁶⁵. From this perspective, the cover offered to non-churchified religions by the category of religious minority could provide justification for objecting to those political systems that are unwilling to recognise what the contemporary constitutionalism of human rights already gives to confessional religious identities, whether with or without a church. However, this should occur without having to deal with an uncertain category that risks assigning people automatically to particular categories or to subject them to a discriminatory heterogenesis.

The issue of “religious minorities” highlights another aspect of the “right to religious freedom of proximity.” Attention to the local dimension and to religious groups within local communities helps us to recall their associative, rather than institutional, nature. In turn, consideration of the associative nature of religious experience relativises the desperate search for churchification of confessional religions as an essential prerequisite for the full enjoyment of the right to freedom of religion. In many cases, the empowerment of local communities, subject to the supervision by state and supranational authorities⁶⁶, can curb political interference with religious bodies and reduce the centrality of the search for sophisticated theologies or taxonomies that overlap fully with those of mainstream confessions⁶⁷ as well as the artificial construction of clerical classes with a low level of authority over their fellow believers. In other terms, the right to freedom of religion must be framed in terms that are not conditioned by concerns to seek out unitary national representations at all costs⁶⁸. It is

⁶⁵ A case in point is the recognition by the Italian Constitutional Court (sentence no. 52 of 2016) of the absolute discretionary power of the Government in deciding whether or not to enter into negotiations with a religious group concerning the conclusion of an agreement with the state. For the Constitutional Court, in fact, such a decision represents an unquestionable political act. In addition, the recognition of a religious group as a religious body, or as a “church”, which is a necessary condition in order to be able to request the launch of negotiations with the Government, is also conditional on a discretionary political act, namely the approval of the recognition decree by the Council of Ministers. Naturally, they are “religious minorities” that suffer most from this situation.

⁶⁶ This control is particularly important to ensure the “determination of the basic level of benefits relating to civil and social entitlements”: thus, Article 117 (m) of the Italian Constitution.

⁶⁷ Cf., e.g., the enduring search for a Muslim clergy who is well-versed in the situation in Europe: F. MESSNER (ed.), *Le statut des ministres du culte musulman en France. Études comparatives et proposition d'une charte nationale*, Presses Universitaires de Strasbourg, Strasbourg, 2021.

⁶⁸ Cf. the decisions of the ECtHR *Serif v. Greece* (application no. 38178/97) of the 14th March 2000 and *Hasan and Chaush v. Bulgaria* (application no. 30985/96) of the 26th



rather necessary to establish general and national principles that can be given tangible form at local level, *inter alia* through open and non-selective forms of participation. In any case, the degree of institutionalisation of religious interests cannot preclude access to the fundamental core of the right to freedom of religion, such as the right to use places of worship, which, as an essential component of the human right to freedom of religion, cannot be impaired without violating the right as a whole.

This “religious freedom of proximity” would also seem to be more in line with the present evaporation of confessional religions which entails not so much their disappearance, but rather their repositioning at the level of individual agency. Not mistaking evaporation for the disappearance of confessional religions also means exercising a degree of caution when interpreting the secularisation of the Old Continent as an irreversible move away from confessional religion.

This allows us to make a final observation. Today, paradoxically, the issue of the evaporation of confessional religions and secularisation is linked to calls by many atheist and agnostic movements to be granted the same legal status as confessional religions. The issue of the reasonableness - or unreasonableness - of any difference in treatment between confessional and non-confessional religion is at stake everywhere in Europe. This request signals a radical departure from the perspective of Article 10 of the 1789 Declaration of the Rights of Man that adopted a diametrically opposite approach, framing any type of religious experience whatsoever, whether confessional or not, under the generic category of “opinions”. Having now morphed these “opinions” into “beliefs”⁶⁹, the European right to freedom of religion made an important move by incorporating Declaration no. 11 into the Treaty of Amsterdam, signed on 2 October 1997, which refers for the first time to “philosophical and non-confessional organisations” alongside churches and religious associations or communities. This focus is destined to remain an integral part of EU law concerning religious matters⁷⁰. In fact, since then the extension of the right to freedom of religion to non-confessional collective forms of religion has continued. First of all, it has occurred as a consequence of human rights - in particular the swapping of the roles of freedom of conscience

October 2000.

⁶⁹ Cf. **M. VENTURA**, *The Formula ‘Freedom Of Religion Or Belief’ in The Laboratory Of The European Union*, in *Studia z Prawa Wyznaniowego*, 23, 2020, pp. 7-52.

⁷⁰ Cf. *Codice europeo della libertà di non credere. Normativa e giurisprudenza sui diritti dei non credenti nell’Unione Europea*, ed. S. BALDASSARRE, Nessun Dogma, Roma, 2020.



and freedom of religion, with the former becoming the generic notion and the latter a specific manifestation. Secondly, the extension of the right to freedom of religion to non-confessional religious forms has occurred as part of the process of moving beyond the fiction of legal ignorance. This has resulted in the identification and recognition of forms of non-confessional religious beliefs that had previously been concealed by a purely binary understanding of separation, thus constraining the sphere of the religious to the dialectical relationship between confessional church religions and a supposedly a-religious state. At the same time, however, equating atheists and agnostics with confessional religions risks a descent into a “hyper-confessionalisation” of the public space. On the one hand, if the aim of atheist and agnostic organisations is to combat confessional religions, they will end up becoming specific “negative confessions”, endowed with the mission of seeking to attract converts and not groups that manifest a general interest. On the other hand, if the aim of such organisations is to increase the demand for a public sphere regulated by law that - in terms of its fundamental guarantees - does not depend on the religious affiliation of a country’s inhabitants, then their confessionalisation will be in open contradiction with the recognition of constitutional laicity which already satisfies this need. Moreover, under such a scenario, the confessionalisation of atheism would reduce the scope for achieving spaces available to be shared not only *on the basis* of citizens’ personal beliefs, but also *notwithstanding* such beliefs by ensuring the ability to operate in the public sphere without necessarily having to show some confessional marker. At the same time, were the confessionalisation of atheism to occur without accounting for the specific antagonism directed against confessional religions, that antagonism might still remain concealed behind calls for neo-modern exclusionary neutrality, thus favouring the undue expansion of (in this case) non-confessional religion and the marginalisation of confessional religious practices within the public sphere. And this, again, would be in contradiction with constitutional laicity.

Ultimately, it can therefore be concluded that human rights may have rendered modern separation irrelevant and radically transformed the boundaries of “religious freedom.” However, as we have seen, this does not mean that separation can be dispensed with, nor the state as the guarantor of human rights, nor indeed churches as autonomous centres for the imputation of interests and purposes that do not coincide with those of the state. Human rights rather require a form of separation that is consistent with constitutional laicity. This conclusion was set out in Recommendation no. 1804 of 2007 of the Parliamentary Assembly of the



Council of Europe “*State, religion, secularity and human rights*”⁷¹. Whilst, as already noted, the ECtHR has brought laicity within the scope of secularism by ensuring that it coincides with an exclusionary neutrality, in Recommendation 1804 it has been “secularity” - which has replaced “secularism” - that is attracted to within the scope of constitutional laicity. Indeed, the Recommendation reflects an attempt to strike a balance both between common law secularism and continental laicity, and between separating the state from religious systems and allowing the legitimate political engagement of religious communities.

The age of human rights thus is promoting a “process of crystalline conversion”⁷², profoundly transforming existing categories, without however rendering them entirely obsolete. Separation is no longer a rigid dividing line, but rather a moving and porous boundary, a meeting point between “composite normative systems”⁷³ unified by an individual agency that is capable of acting within multiple spheres and systems. The globalisation of state institutions must therefore be reinterpreted within the perspective of multilevel protection of the fundamental rights of individuals. The globalisation of ecclesiastical institutions must on the other hand be viewed not so much as an obstacle for non-church confessions, but rather as a self-standing opportunity for formalising spaces open to occupation, in different and also changing ways, by those who consider their principal normative sources to lie outside and to be free from the dynamics of political representation.

⁷¹ Cf. note 7.

⁷² Cf. **M. SCHERER**, *Beyond Church and State. Democracy, Secularism, and Conversion*, Cambridge University Press, New York, 2013, pp. 1 and 97-131.

⁷³ Cf. note 52.