



AA. VV. (Pierluigi Consorti, Giancarlo Anello e Mohamed A. 'Arafa, Federica Botti, Rossella Bottoni, Germana Carobene, Cristina Dalla Villa, Maria d'Arienzo, Luigi Mariano Guzzo, Maria Cristina Ivaldi, Chiara Lapi, Maria Luisa Lo Giacco, Adelaide Madera, Enrica Martinelli, Cristiana Maria Pettinato)

The Meaning of 'Religion' in Multicultural Societies Law

Pierluigi Consorti

(Full Professor of Law and Religion, University of Pisa, School of Law)

The Meaning of 'Religion' in Multicultural Societies Law. An Introduction.

SUMMARY: 1. Introduction. 2. Religion in Law. 3. Is there a difference between religion and other kinds of faith? 4. Preliminary pieces of advice on this research.

1 - Introduction

From June 18th to June 22nd 2017 the first preparatory meeting of the newly-born European Academy of Religion: the so called Ex Nihilo Zero Conference was held in Bologna. The Adec - that is the Association of Italian University professors of Law and Religion - decided to take the opportunity to discuss about one of the two terms of its denomination, which indeed - and probably in a contradictory way - has never been examined in depth within the legal framework itself. The research question was really very simple - and at the same time quite explosive: what is the meaning of the word "Religion" when we find it written in the Eu Courts jurisprudence? We read "Religion", but are we sure that this word has a unique meaning? Are we able to give a unanimous definition of "Religion"?

To give an answer, we launched a call for papers receiving twenty-two applications focusing on likewise case studies that we discussed in Bologna on June 22nd in front of other scholars and interested persons that joined our session. Then we gave the speakers the opportunity to write a paper to disseminate our conclusions and hopefully to continue our discussion in the scientific arena. All papers were submitted to a peer-review process - directed by Professor Maria Luisa Lo Giacco and me - and finally, we now publish thirteen papers in *Stato, Chiese e pluralismo*



confessionale thanking Prof. Giuseppe Casuscelli for his kind hospitality. I hope that these contributions will be able to offer an effective insight into our issue as well as the possibility to foster our research.

2 - Religion in Law

Our approach has been pragmatic. We analyzed formal judgements expressed by some different Courts well knowing that the frame is for sure wider and that this research question is not new at all. In the twentieth century, Rudolf Otto steered European scholars towards a new “religious centralization” defining “Heilig as an *a priori*”¹ whereas Mircea Eliade stated that “the beginnings of culture are rooted in religion experiences and beliefs”². Nevertheless, both scholars studied religion as a social issue without pointing out what religion is. Thus, we lack this definition. To find the best grounded meaning of religion in law one could examine several, different, historical, philosophical, anthropological, sociological and - why not? – psychoanalytical perspectives. Nevertheless, I have decided not to analyze all these different options in this paper, since for sure the meaning of religion originates out of the law, we, as jurists, must find the epistemic meaning of religion looking in other areas *extra* law. Robert Crawford made this effort collecting different definitions of religion and finally, he argued that each of them reflected different perspectives according to where their authors moved from, and definitively stated that religion cannot be defined³. In his opinion, all efforts to define religion seem to be doomed to failure.

However, as we are involved in Law and Religion studies, we need to define as well as possible what religion is without necessarily claiming it to the law. In other words, it is important to state that politicians, judges and lawyers cannot think that the States - as Law makers - should give a legal definition of religion. That is not possible because of the State neutrality - or separateness - principle⁴, which, despite having different denominations all over the world⁵, in a few words impedes that the State

¹ R. OTTO, *Das Heilige: über das Irrationale in der Idee des Göttlichen und sein Verhältnis zum Rationalen*, Beck, München, 1917.

² M. ELIADE, *The Quest. History and Meaning of Religion*, The University of Chicago Press, London, 1969, p. 9.

³ R. CRAWFORD, *What is Religion?*, Routledge, London and New York, 2002, p. 3.

⁴ About the “grey areas” according to this principle, see E. FOKAS, *Sociology at the intersection between law and religion*, in *Routledge Handbook of Law and Religion*, edited by S. Ferrari, Routledge, Oxford-New York, 2015, pp. 59-74, (on “grey areas”, see p. 63).

⁵ See J. BAUBÉROT, *Religions et laïcité dans l'Europe des douze*, Syros, Paris, 1994; *La*



defines religion. After all, we are well aware that there are many different ways to be religious, also without God⁶. This wide religious pluralism is a common good that the law must protect and promote. Nevertheless, I need to restate that, as jurists, we need to understand what religion is if we intend to give it a juridical significance. If it is impossible to claim a normative definition by the State-law, on the one hand - as lawyers - we shall look for this result within the interiority significance of religion (and religiosity) seeking useful paradigms in the daily life⁷. On the other hand - as scholars - in order to find this "religious sense", we can help ourselves with an interdisciplinary approach, especially linked to anthropology⁸.

Italian scholars of Law and Religion did not pay enough attention to this question, so we have to look for the answer in the international arena. In this way we have the possibility to find several academic contributions entitled "Law and Religion". Therefore, we hope that these books and essays can give us the help that we need. However, our research seems to be quite useless because our Colleagues studied "Law and Religion" as the relationship between these two terms to better define a new academic area⁹, without explaining them. So, both law and religion are mainly seen as mirrors of the social aspect of our daily life, as Harold Berman has written and taught in more than one paper related to religion¹⁰.

Russel Sandberg summarized all these Anglo-Saxon approaches to conceptualize "law and religion as including both the study of religion law and religious law"¹¹. He explained why "religion law" and "religious law" are more preferred labels than "ecclesiastical law", "canon law" and "law and religion", but he skipped over the main question, which is again what

Laïcité à l'épreuve. Religions et Libertés dans le monde (collective work under the direction of J. Baubérot), *Encyclopædia Universalis*, 2004.

⁶ **R. DWORKIN**, *Religion without God*, Harvard University Press, Cambridge and London, 2013.

⁷ As judge O.W. Holme stated "Whether Anthropology" that "science of man" upon whose road set lawyers seeking a foundation for their profession (*The Law as a Profession*, in *Law Review*, 1886, pp. 741-742).

⁸ See **B. FAEDDA**, *L'antropologo culturale e il giurista. Per una moderna antropologia del diritto*, in *Materiale per una storia della cultura giuridica*, 2002, pp. 533-544; **S. FERLITO**, *Le religioni, il giurista e l'antropologo*, Rubbettino, Soveria Mannelli, 2005.

⁹ **A. BRADNEY**, *Politics and Sociology: New Research Agenda for the Study of Law and Religion*, in R. O'Dair and A. Lewis (eds.), *Law and Religion*, Oxford University Press, Oxford, 2001; **N. DOE** and **R. SANDBERG** (eds.), *Law and Religion. New Horizons*, Peters, Leuven, 2010.

¹⁰ *Inter alias*, see **H.J. BERMAN**, *The Interaction of Law and Religion*, Abingdon Press, Nashville, 1974.

¹¹ **R. SANDBERG**, *Law and Religion*, Cambridge University Press, Cambridge, 2011, p. 7.



religion is. I mean religion in a proper sense, not as a synonymous of “religious freedom”¹².

When Norman Doe argued the necessity to define “religion” at the national legal level, he highlighted that the States of Europe “do not generally define ‘religion’ in their Constitutions or other formal legislations, but rather, leave it to the courts to determine whether something is ‘religion’”¹³, but he used ‘religion’ to define “religious communities” as stated bodies according to the national law. That is to say “confessioni religiose” or “Religionsgemeinschaften” using the Italian or Germany constitutional expressions¹⁴. That is not ‘religion’ in a proper sense; it is ‘religion’ as an established faith¹⁵. Indeed, that it is something different. Giancarlo Anello explained in Bologna the difference between faith and religion: “Basically, the term ‘faith’ is defined as having ‘complete trust and confidence’, while the term ‘religion’ is normally used to name a set of objective and firm rules, and it includes the doctrine and the institutions. Of course, it is possible to have faith in God or a religion, but it is also possible to have faith in a secular text”¹⁶. He also quotes Wilfred C. Smith, who explains that it is more accurate to discriminate the “faith”, which is the personal faith, from the “cumulative tradition”, which is the set of overt objective data that constitutes the historical deposit of the past religious life: churches, literature, rites, myths, so that the link between the two is the living person. The importance of tradition in the legal context has been very well described by Patrick Glenn, and it is not necessary to repeat it here¹⁷.

As a consequence, when we look at religion in a proper way we have to refer to the implicit personal background that reveals itself as a space of overlapped beliefs, faiths, traditions, ethics, spirituality, convictions, which is strictly united with the human conscience. Religion in a proper sense is not religion as a juridical body or as rituals: these can be consequences of a specific way to express religion, but the latter precedes the first. It is their

¹² As did **C. HAMILTON**, *Family, Law and Religion*, Sweet Maxwell, London, 1995, p. VII.

¹³ **N. DOE**, *Law and Religion in Europe. A Comparative Introduction*, Oxford University Press, Oxford, 2011, p. 21.

¹⁴ **M. VENTURA**, *Religion and Law in Italy*, Kluwer Law International, Alphen aan den Rijn, 2013, p. 58, uses “Religious denominations” and **G. ROBBERS**, *Religion and Law in Germany*, Kluwer Law International, Alphen aan den Rijn, 2010, p. 122 “Religious communities”.

¹⁵ **J. HAYNES**, *Religion in Global Politics*, Harper Collins, London, 1998, p. 10.

¹⁶ **G. ANELLO**, in **G. ANELLO** e **M. ARAFA**, *The meaning of ‘Religion’ in the Legal Context. Some Remarks on the Pragmatics of Islam in Egyptian Law*, *infra*.

¹⁷ **H.P. GLENN**, *Legal Traditions of the World: Sustainable Diversity in Law*, Oxford University Press, Oxford, 2000.



origin. Therefore, if we want to conceptualize religion in a legal - and very concrete - way, we have to focus its source, the human conscience, and then its pragmatic expression, the spirituality, which appears in several different features.

I know that this is quite strange to say in a juridical sense since the law is a concrete social issue that regulates very hard items: property, branch, industries and so forth. Nevertheless, as the law is a social issue, it involves all human perspectives, and religion - seen as spirituality - is a part of human life. It is a tile of a wider mosaic. It reminds us - as jurists - that the law does not imply only our material bodies, but our souls as well.

In my book *Diritto e religione* I stated that "there is no doubt that human existence is not a mere biological fact. Human life is composed by feelings, emotions, memories that put each existence in a sacred space"¹⁸. Nowadays, the religious presence in the public space prevalently does not assume the appearances of churches as established bodies that claim to be respected by the States. At the same time, few people see their religious feeling mostly as their belonging to a church¹⁹. Churches and religious communities are institutionalized forms of the religious social presence. They are consolidated and therefore well known. Nevertheless, they do not give anymore the correct image of the religious presence in the social arena, which is more individual than social and more private than public²⁰. So, if the law wants to be incisive, it must shift its traditional paradigm moving from the institutional level to a social and individual one. In other words, it is necessary to move from the actual legal *vertical* position of the law and religion relationship to a *horizontal* one. That is to say no more - at least, not prevalently - focused on Church and State relations, but on the social religious sense felt by people. In fact, the experience of transcendent, traditionally referred to God²¹, is actually conceived as a "self-

¹⁸ P. CONSORTI, *Diritto e religione*, Laterza, Roma-Bari, 2014, p. 8 s.

¹⁹ G. DAVIE, *Believing without Belonging: Is This the Future of Religion in Britain?*, in *Social Compass*, 1990, pp. 455-469.

²⁰ See L. DIOTALLEVI, *Fine corsa. La crisi del cristianesimo come religione confessionale*, EDB, Bologna, 2017, who, *inter alia*, quotes *Religions as Brands. New Perspectives on the Marketization of Religion and Spirituality*, edited by J.C. Usunier and J. Stoltz, Ashgate, Farnham, 2015. See also *Religion in Public Spaces. A European Perspective*, edited by S. Ferrari and S. Pastorelli, Farnham, Ashgate, 2012.

²¹ See S. FERRARI, *New religious movements in western Europe*, in *Relioscope, Research and analyses*, 2006 (http://religion.info/pdf/2006_10_ferrari_nrm.pdf), p. 4 s. "Until the 1970s defining religion was not a real problem in most European countries: religion was largely associated with the idea of belief in and worship of God. From that time onwards the borders between religion, philosophy, and psychology have become increasingly blurred".



transcendence”²². Spirituality, ethics, religion are part of the human conscience, which is the focal point of personal identity. In some way, nowadays religion is something less political than in the last Centuries. Anyway, it involves politics as well as the everyday life of men and women, more than the traditional politics according to the “balance of powers” between Churches (understood in a broader sense as a set that includes also non-Christian religions) and States. This is a new approach that the law must consider in new contemporary ways²³.

3 - Is there a difference between religion and other kinds of faith?

The well-known art. 17 (the Consolidated versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union) gives the opportunity to change the paradigm as in few words it equalizes churches (and religious associations or communities) and philosophical and non-confessional organisations, compelling the European Union to “maintain an open, transparent and regular dialogue with” both churches and philosophical and non-confessional organisations. That is quite the same result reached in the law of the United States of America that, related to the First Amendment interpretation²⁴, includes in the meaning of religion “religious and nonreligious, moral, philosophical, and other strongly held beliefs”²⁵.

The concordance between religion and belief is strictly defined in the international law, for example in the 1981 *Declaration on the elimination of all forms of intolerance and of discrimination based on religion or belief*: “nevertheless, the term “religion” remains undefined as a matter of international law”²⁶. Since we have noticed the impossibility to define

²² H. JOAS, *Braucht der Mensch Religion? Über Erfahrungen der Selbsttranszendenz*, Freiburg im Breisgau, Herder, 2004; see also G. FILORAMO, *Ipotesi Dio. Il divino come idea necessaria*, Bologna, il Mulino, 2016.

²³ See M. HEROLD, *Going beyond reason? Variant of intertwining religion and law*, in *The Routledge International Handbook of Education, Religion and Values*, edited by J. Arthur and T. Lovat, Routledge, New York, 2013, pp. 350-361; M. RICCA, *Klee's Cognitive Legacy and Human Rights as Intercultural Transducers. Modern Art, Legal Translation, and Micro-spaces of Coexistence*, in *CALUMET - intercultural law and humanities review*, 2016, pp. 1-40.

²⁴ For a complete glance to this issue, see J.O. USMAN, *Defining religion: the struggle to define religion under the first Amendment and the contributions and insights of other disciplines of study including theology, psychology, sociology, the arts, and anthropology*, in *North Dakota Law Review*, 2007, pp. 121-223.

²⁵ L.J. STRANG, *The Meaning of "Religion" in the First Amendment*, in *Duquesne Law Review*, 2002, p. 204.

²⁶ T.J. GUNN, *The Complexity of Religion and the Definition of "Religion" in International*



religion in a unique way - undoubtedly in law - we can follow Jeremy Gunn's suggestion and distinguish religion related to law in three different facets: religion as a *belief*, as an *identity* and as a *way of life*²⁷. This suggestion can help us to differentiate the unique guarantee that the law provides explicitly related to religion (and belief) in three - but, probably, also more than the three facets evoked by Gunn - ways that express religion in our daily life, and therefore worthy of legal protection. This is a concrete consequence of the religious and legal pluralism that characterizes contemporary multicultural societies, and impedes to give a narrow definition of religion. As Mario Ricca stated,

"Religion and culture, if considered from a historical and anthropological point of view, are closely intertwined. Traces of religions can be found in many cultural habits, encapsulated in people's conduct and in the schemes they use to understand the world. The secularized and even the atheist contexts still encompass, as a result of cognitive resilience, paradigms of sense rooted in religious experience and traditions"²⁸.

Therefore, if the law cannot be disinterested in religion, it must be aware that religion in a broader sense is hidden in a very wide range of habits and behaviors. It is a part of the so called "Mute Law"²⁹ that the law in act must be able to give voice. From this point of view, there is no difference between religion and belief.

Rather, these arguments introduce the necessity to better define analogies and differences between religion and culture, especially in front of the law, or better, in front of the protection that traditionally the law reserves to religion (and belief) as tiles of personal identity, instead of culture, gender, and race too - as it is expressly named in a lot of laws (for example, in the Italian Constitution) despite without actual scientific grounds. I dealt with this issue in *Conflitti, mediazione e diritto interculturale*, which I refer to³⁰.

4 - Preliminary pieces of advice on this research

Law, in *Harvard Human Rights Journal*, 2003, pp. 189-215.

²⁷ T.J. GUNN, *The Complexity*, cit., p. 200.

²⁸ M. RICCA, *A Modest Proposal. An Overgrown Constitutional Path to Cultural/Religious Pluralism in Italy*, in *CALUMET - intercultural law and humanities review*, 2016, p. 10.

²⁹ R. SACCO, *Mute Law*, in *The American Journal of Comparative Law*, 1995, pp. 455-467.

³⁰ P. CONSORTI, *Conflitti, mediazione e diritto interculturale*, Pisa, Pisa University Press, 2013; forthcoming *Multiculturalist Conflicts and Intercultural Law*, in *Maps on Conflict: Law and Culture in Fragmented Societies*, Routledge, 2017.



The essays published at the end of our research offer a specific point of view, which is at the meantime a strong and a weak element. We are - more or less³¹ - all Italian scholars who have joined the Italian Association of Law and Religion university professors. We decided to deal with the opportunity to face an important issue for our research, although we were aware of our different backgrounds and most of all, that any of us are real experts of the State law that each of us decided to study, except - of course - Maria Luisa Lo Giacco and Cristina Dalla Villa, who analyzed the Italian jurisprudence.

Our first effort was addressed to give the wider European panorama during the symposium that was held in Bologna. As previously mentioned, we planned nineteen presentations³²; three scholars were not able to attend the Conference³³; two choose not to write their presentation³⁴; and others missed the deadline to submit their paper³⁵. Thus, we are able to publish

³¹ With the exceptions of Professor M. Arafa, who is Egyptian, and Professor J. Bonet Navarro, who is Spanish.

³² Maria Gabriella Belgiorno de Stefano (International University of Rome - UNINT), The Meaning of "Religion" in EHRC; Susanna Mancini (Alma Mater - University of Bologna, Italy), The Meaning of "Religion" in Luxembourg Court Jurisprudence; Federica Botti (Alma Mater - University of Bologna, Italy), The Meaning of "Religion" for the States of Eastern Europe in ECHR; Marco Croce (University of Firenze, Italy), The Meaning of "Religion" in Eu States jurisprudence related to Scientology recognition; Giancarlo Anello (University of Parma - Italy) and Mohamed 'Arafa (Alexandria University of Law, Egypt), The Meaning of "Religion" in Egyptian legal System; Ludovica Decimo, Antonio Fuccillo, Francesco Sorvillo, Angela Valletta (University of Campania "Luigi Vanvitelli", Italy), The Meaning of "Religion" in the Religious Arbitration Courts; Rossella Bottoni (Catholic University of Milan, Italy), The Meaning of "Religion" in Turkish Case Law; Enrica Martinelli (University of Ferrara, Italy), The Meaning of "Religion" in Greek Case Law; Cristiana Pettinato (University of Catania, Italy), The Meaning of "Religion" in the Maltese legal system; Jaime Bonet Navarro (University of Valencia, Spain), The Meaning of "Religion" in Spanish Case Law; Luigi Mariano Guzzo (University of Catanzaro, Italy), The Meaning of "Religion" in Polish Case Law; Chiara Lapi (University of Pisa, Italy), The Meaning of "Religion" in Irish Case Law; Maria Luisa Lo Giacco (University of Bari "Aldo Moro", Italy), The Meaning of "Religion" in Italian Constitutional Court Jurisprudence; Cristina Dalla Villa (University of Teramo, Italy), The Meaning of "Religion" in Italian Supreme Court Jurisprudence; Germana Carobene (University "Federico II" of Naples, Italy), The Meaning of "Religion" in Belgian Case Law; M. Cristina Ivaldi (University of Campania "Luigi Vanvitelli", Italy), The Meaning of "Religion" in French Case Law; Maria d'Arienzo (University of Naples "Federico II", Italy), The Meaning of "Religion" in French Cassation Court Jurisprudence; Adelaide Madera (University of Messina, Italy), The Meaning of "Religion" in U.K. Jurisprudence; Maria Rosaria Piccinni (University of Bari, Italy), The Meaning of "Religion" in German Constitutional Court jurisprudence.

³³ Maria Gabriella Belgiorno de Stefano, Marco Croce and Maria Rosaria Piccinni.

³⁴ Susanna Mancini and Jaime Bonet Navarro.

³⁵ Ludovica Decimo, Antonio Fuccillo, Francesco Sorvillo, Angela Valletta.



thirteen papers on the subsequent legal areas: European Court of Human Rights, referred to the States of Eastern Europe (Botti); Egypt (Anello and Arafa); Austria (Bottoni³⁶); Greece (Martinelli); Malta (Pettinato); Poland (Guzzo); Ireland (Lapi); Belgium (Carobene); France (d'Arienzo and Ivaldi); United Kingdom (Madera); and Italy (Lo Giacco and Dalla Villa). Our perspective is therefore limited, so our research can be considered as a first step to a larger one.

Our temporary results show the heterogeneous meaning of religion in the examined jurisprudence, related both to the national levels and to the singular cases. At first, it is possible to verify the most traditional meaning of religion accorded to religions as established churches or communities. That is very well pointed out in Poland - as analyzed by Luigi Mariano Guzzo related to the Church of the Flying Spaghetti Monster - and in the United Kingdom - Adelaide Madera discussed the recent case of the Temple of the Jedi Order - as well as in Belgium - Germana Carobene examined the Scientology case. Secondly, we can focus on the differences among the EU States related to their religiously oriented traditions: their historical roots influence their laws and their interpretation. That appears very well especially in Greece, Malta and Ireland - studied by Enrica Martinelli, Cristiana Pettinato and Chiara Lapi - as well as in the Court of Strasbourg jurisprudence related to the European Eastern States (former Socialist) - examined by Federica Botti. Those traditional elements are strictly connected to the most recent non-discriminatory areas that arise from the study of the French and the Italian case law - due to Maria d'Arienzo and M. Cristina Ivaldi for France, and Maria Luisa Lo Giacco and Cristina Dalla Villa for Italy. The latter area shows a progressive importance connected to the law in act since the freedom of religion is above all a principle that the state is against discriminations. Finally, the paper proposed by Giancarlo Anello and Muhammad Arafa opens a window on the other Mediterranean shore and on the problematics determined by the current Islamic presence in Europe.

Leaving scholars to their own reading, I hope that our contributions will be able to give the possibility to enlarge the discussion to better understand how religion works in current multicultural societies.

³⁶ She decided to change its subject moving from Turkey to Austria.



Giancarlo Anello*, Mohamed A. 'Arafa**

(*Professor of Anthropology and Institutions of Islam, Department of Humanities, Social Sciences and Cultural Industries (DUSIC), University of Parma-Italy, **Adjunct Professor of Islamic Law, Indiana University Robert H. McKinney School of Law-USA)

**The meaning of 'Religion' in the Legal Context.
Some Remarks on the Pragmatics of Islam in Egyptian Law ***

SUMMARY: 1. Introduction - 2. The Egyptian case. Direct relevance of the religion in the legal context: the Constitutional clause and the central role of the Egyptian Supreme Constitutional Court - 3. The meaning of religion in the Egyptian legal context. The cultural (indirect) relevance of religion in the decisions of the Court of Cassation about the Egyptian concept of public policy. The restriction of the faith in the Abu Zayd's case - 4. Conclusions

1 - Introduction

The epistemic problem of the meaning of religion in the legal context must take into account, the general issue of the definition of religion in the social sciences. "Religion" is a concept that originates out of the law - in a dimension of knowledge dominated by literature, sources, oral traditions and behaviors and their specific methodology³⁷ -, then it relates to the legal language and its categories. This paper will try to analyze the major epistemological profiles of the meaning of religion and to context the concept of religion (i.e. Islam) within the Egyptian legal system. Even though this reduction is not deeply studied, it still represents one of the key concepts of the legal theory. It seems necessary to deepen it in order to regulate secular societies and guarantee the freedom of religion within them. In anthropological terms, there is a large disagreement about the basic assumption whether it is adequate to describe religions by means of specific sciences or whether it is necessary to respect the letter of religious revelations. Probably another way is practicable, linking the historical study

* Giancarlo Anello is Author of the paragraphs 1, 4; Mohamed A. 'Arafa is Author of the paragraph 2; paragraph 3 is in common.

³⁷ **J. WAARDENBURG**, *Classical Approaches to the Study of Religion. Aims, Methods, and Theories of Research. Introduction and Anthology*, De Gruyter, Berlin/Boston, 2017, 3 ff.



of religions with the pragmatic model of varieties of forms of religious experience.

To begin, it should be noted that the history of the term “religion” in the West does not define any strict concept. The Latin word *religio* has a discussed etymology: it implies both an attitude (quality) and a set of rites (substance). For example, Cicero derives the word from the verb *relegere* which refers to all those men who are carefully engaged in acts of divine worship and, so to speak, those who read them carefully, then they are “religious” (*De natura deorum*, II, 28, 72). Later, Augustine again makes mention of the word *re-ligare* (*Retractationes*, I, 13) and, considering that in Greek there is not a specific term for religion (the word “*latraios*” simply refers to something which is hidden) he connects the meaning of *religio* to the word *threskeia* which literally means worship and piety and, under this respect, “religion” (*De Civitate Dei*, X, 1). Going further from the historical point of view, another important scholar Wilfred C. Smith affirms that

“men throughout history and throughout the world have been able to be religious without the assistance of a special term, without the intellectual analysis that the term implies. In fact, I have come to feel that, in some ways, it is probably easier to be religious without the concept; that the notion of religion can become an enemy of piety. One might almost say that the concern of the religious man is with God; the concern of the observer is with religion”³⁸.

This opens the door to the distinction between “faith” and “religion”. Basically, the term “faith” is defined as having “complete trust and confidence”, while the term “religion” is normally used to name a set of objective and firm rules and includes the doctrine and the institutions. Of course, it is possible to have faith in God or a religion, but it is also possible to have faith in a secular text such as a Constitution or a civil code (secular religion). More specifically, Wilfred C. Smith explains that it is more accurate to discriminate the “faith”, that is the personal faith, from the “cumulative tradition”, that is the set of overt objective data that constitute the historical deposit of the past religious life: churches, literature, rites, myths, so that the link between the two is the living person.

In recent years, the debate on religion has added concepts coming from the Asian/Eastern traditions³⁹. Asiatic scholars affirm that there have been in the past relatively few languages into which one can translate the

³⁸ Cf. W.C. SMITH, *The Meaning and End of Religion*, Fortress Press, Minneapolis, 1991, 19.

³⁹ W. COHN, “Religion” in Non-Western Cultures?, in *American Anthropologist*, New Series, vol. 69, no. 1 (Feb., 1967), pp. 73.



word “religion” outside of Western civilization (*dharma* is one of them). More exactly, in the oldest traditions, there is no word to reflect the modern term of “religion”, that is, the concept of a unitary system of beliefs embedded by people. This is the case of the Sanskrit texts of Hinduism, of the Buddhist Mahayana, and of the Pali Buddhism Theravada. This was also the case of the ancient Egyptian or Hebrew texts, of the classical Chinese, as well as of the Greek texts of the New Testament⁴⁰. Normally, all of these sources describe vital aspects of human behaviors such as faith, obedience and disobedience, piety, truth, rites, but not a self-contained and systematic entity of notions and beliefs. Islam is partially an exception to this scheme. While other traditions represent themselves as a set of beliefs or obligations, Islam is one of the few religious beliefs that, from the origins, represents itself as a “religion” among religions. It aims to be the best among the religions of humanity (*inna dyna Muhammadin khayr al-adyan*) and in doing so, it is ready for an explicit religious global competition. For example, the Islam is endowed of a proper name (“Islam” itself is a verbal name - a *masdar* - of the verb *aslama*) and its culture possesses a term (*dyn*)⁴¹ which describes the religion as a system of beliefs and objective rules⁴². Again, Wilfred C. Smith deepens this point:

“the word *dîn* in the seventh century Arabia had, in fact, many meanings, which may be classed in three principal groups according to three distinct sources. There was the new concept, as part of the impingement on Arabia at that time of the new ideas, movements, and sophistications from the surrounding cultures: namely, the concept of systematic religion. This was new, of course, not only in the sense that the idea was only beginning to be found in Arab’s minds. It was new more inevitably in that in the traditional life of these Arabs there had previously been nothing in practice to which such an idea could have referred. Arabian life had had facets that modern scholars, as with the Aztecs or ancient Egyptians, may dub and indeed have dubbed “the religion of” the pre-Islamic Arabs. But the customs and orientations to

⁴⁰ W.C. SMITH, *The Meaning*, cit., Foreword, p. vii.

⁴¹ It is interesting to underscore that the religion is an element of the ‘just character’ of judges. A.H.A.I.M.H. AL-MAWARDI, *al-Ahkam al-Sultaniyyah (The Laws of Islamic Governance)*, Ta-Ha Publishers, London, 1996, p. 100, reads that a judge must be: “being true in speech, manifest in his fulfillment of a trust, free of all forbidden acts, careful to guard himself against wrong actions, free of all doubt, equitable both when content and when angry, chivalrous and vigorous both in his *din* and his world affairs. When such qualities are perfected in him, this quality of justice - by which his testimony is permitted and his judicial authority is acceptable - may be said to be present. If, however, he is lacking in any of these qualities, his testimony is not accepted, his words are not accepted and his decisions are not executed”.

⁴² W.C. SMITH, *The Meaning*, cit., p. 81.



which the modern student gives that name had not been organized or systematized or reified either sociologically or conceptually in the area itself by their participants. It was only as new religious communities with new ideas of religious life and loyalty began from outside to filter down into Arabia that the Arabs began to see alternative ways of being religious and hence began for the first time to see also their own ways as something conceptually identifiable, though still not consolidated”.

There was a verbal noun meaning “judging, passing judgment, passing sentence”; and along with this, “judgment, verdict”. This is found also in the Qur’an, for instance in the expression “day of judgment” (*yawm al-dîn*). This represents an ancient Semitic root (...). Finally, there was the indigenous Arabic meaning: as the verbal noun of a verb “to conduct oneself, to observe certain practices, to follow traditional usage, to conform”; and subsequently thence as an abstract noun “conformity, property, obedience”, and also “usages, customs, standard behavior”. There was no plural⁴³.

Somehow the Islamic root of the word reveals the idea of the perceptivity that lies in every man, or his perceiving soul, understood as his religious faculty or organ⁴⁴.

In sum, in the history of revelations the word “religion” has not uniform meaning and - as a consequence - each observer tends to identify something as “religious” as an extrapolation from his own culture. In other words, in defining religions scholars apply the model of the tradition they know and - more - describe other traditions in terms of it. This methodological issue must be taken into account before referring to the meaning of religion in the legal context. More specifically, this premise introduces the following complex question: how to handle this concept of religion and reduce it into the legal language and discourse?

This point involves some other remarks like what is the role of the people’s culture in defining the concept of religion in the legislation and courts’ decision? To what extent the legal definition of “religion” is influenced by the regulative aims of the legal language? To what extent the religious law takes over the secular law in the contemporary legal interpretation? And to what extent the definition of a certain religion can contribute to design a legal & political system?

In order to answer, we consider it very useful to find a way to lessen the opposition between religion as a faith and religion as a set of rules. In this field, recent studies have tried to breach the mind-body great divide adopted since the Cartesian age, proposing a concept of embodied mind

⁴³ W.C. SMITH, *The Meaning*, cit., pp. 101-2.

⁴⁴ W.C. SMITH, *The Meaning*, cit., p. 287, footnote n. 61.



that is always in touch with the world, as well as a pragmatic model of truth or verification that takes the body and the physical world seriously. When it come to religious studies these theories represent the human person as an integrated body-mind system following the laws of nature and produced by evolution⁴⁵. So we apply the distinction outlined by William James, who divided the religion into "ritual" and "personal,"⁴⁶ to the legal theory. The first concerns God and divinity and deals with its institutional forms of worship; the second concerns man and deals with the forms of religious conscience. James argued that the personal religion came before the ritual religion. For instance, James reads:

"in one sense at least the personal religion will prove itself more fundamental than either theology or ecclesiasticism. Churches, when once established, live at second-hand upon tradition; but the founders of every church owed their power originally to the fact of their direct personal communion with the divine. Not only the superhuman founders, the Christ, the Buddha, Mahomet, but all the originators of Christian sects have been in this case; - so personal religion should still seem the primordial thing, even to those who continue to esteem it incomplete".

Then, William James describes the personal religion as follows: "Religion, therefore, as I now ask you arbitrarily to take it, shall mean for us the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend".

In a historical and scientific perspective, we may accept the idea of William James (he was a prominent psychologist) and thought that religion has origin from the inside, from the deep soul of the individual. Furthermore, this definition takes into consideration the problem of the embodied mind and the possibility to describe a cultural cognition of religious tradition and their evolution in time and space. Also in a strict and religious perspective, we may accept the idea that the religious inspiration of the human soul has originated by the direct action of God. This double assertion is convincing and satisfies the conditions of a rational description. In the history of religions, the Revelation is an explicit *locutio Dei ad homines* and it consists in the transmission of the message of God to the Human gender, by different means and ways. As far as many prominent religions, we may find the core of Revelation itself either in the moment of inspiration

⁴⁵ E. SLINGERLAND, *Who's Afraid of Reductionism? The Study of Religion in the Age of Cognitive Science*, in *Journal of the American Academy of Religion*, vol. 76, No. 2 (Jun., 2008), pp. 378-9.

⁴⁶ W. JAMES, *The Varieties of Religious Experience. A Study in Human Nature*, Longmans, Green and Co., New York, London and Bombay, 1902.



of the human conscience, or in the act of God. Going further, we discover two different forms of Revelation: in the first, the divinity reveals herself, her existence, nature and her powers (we call this kind of disclosure, “epiphany”). In the second, the divinity reveals her will or her truths to a human mind, delivering to a particular people or individual the clear consciousness of the divine Truth. Anyway, we may observe that there is no contradiction between the inner and human origin of the religious feeling and the supposition of an act of God. Both represent a good platform to ground the religious discourse and to move forward and so we do, defining the Revelation as a human feeling or as an action of God and considering this definition as the platform from we move forward to the problem of the categorization of religion in the legal context. Once crystallized in some form of a historical revelation, the concept of religion is recognized and regulated by the legal language and its categories. This is the second level of reduction of religion that entails refracting the terms of a religious tradition through the language of the secular and modern State, and through the prism of a specific legal system. Thus, the following part of the paper tries to analyze the meaning of the word into the specific legal discourse, taking into account the particular religion to which it refers to, its context and its cultural framework, which is, in this case, the Egyptian law.

2 - The Egyptian case. Direct relevance of the religion in the legal context: the Constitutional clause and the central role of the Egyptian Supreme Constitutional Court

The concept of religion enforced into a legal system is not neutral towards the freedom of religion guaranteed by the same system. This is apparent in the current situation in of Egypt. The scuffle to define and explain the concept of “Islam” in Egypt has a long legal and constitutional history as those who favor political Islam square off against those who prefer a more secular-oriented form of government. Generally speaking, the State’s main obligation in any country is to preserve public order and to protect and defend its national citizens. This duty is generally difficult to harmonize with the accountability of any non-state dynamic. Under this respect, the Authors premise that Egyptian people expel the accusations proliferated by extremist streams and radical Islamists that the concept of a “civil (secular) State” is anti-religious or that it interests only the prosperous minority. Such untrue discourse and dialogue by extremists misinforms the folks, as human logic and knowledge shows that a State which is based on just laws, fair statutes, and respect for human rights is not antagonistic to religion, and is in the public interest of the whole community. Furthermore, playing



on religious sentimentalities by saying that God's (Allah's) sovereignty - as argued by some rigid classical religious jurists - rather than the people destabilizes the legal institutions and main foundations of the modern democratic civil state by adopting and codifying theocratic and radical notions takes Egypt back into the Dark Ages. Accordingly, this opens the door to complicated issues in constitutional litigation, and the enactment and repeal of legal rulings according to religious interpretations based on misunderstanding of the principles of divine sovereignty in Islamic law. In this domain, the conflation of Islam and Islamism has permeated the interpretation of Egypt's ethnic and personal character, leading one legal and political scholar to label the Muslim Brotherhood at the time where they were in office, as "the Muslims" or "Islamic" while calling their opponents "non-Islamic". Islamism is considered a vague politicization of a specific religious attitude throughout the Middle Eastern Arabian World and cannot be associated with Islam as a belief or faith. The Egyptian Government, along with the Egyptians, are in favor of having a place in a civil democratic Egypt for quiet, peaceful Islamists who would not want to change the State's national character and the form of its government into an Islamic religious theocracy.

Article 2 of the Egyptian Constitution issued in 2014 declares that Islam is the religion of the State and that the Sharie'a is the main source of legislation. The Supreme Constitutional Court has been reliable in interpreting what the Constitution instructs in its second article since its amendment in 1980 confirming that the principles of Islamic Sharie'a are [the] chief source of legislation. The Court has said that the principles of the Islamic Sharie'a bind both the legislative and executive authorities. Among those, are the provisions that it is not permitted for any statutory text to contradict the Sharie'a rulings: *al-ahkam al-shar'iyya alqat'iyya fi elthubut wa aldalalah*. These rulings only not subject to *ijtihad* (analogy), as they indicate the *mabadi'a kulliyya* (universal principles) and its *usuliha al-thabita* (fixed roots), which admit neither interpretation nor replacement that are unequivocally certain regarding their authenticity and meaning, hence, *ijtihad* is forbidden, so it is unconceivable that the explanation of [such values] would amended with a change of time and place, as it is *haram* (forbidden) to breach them or rotate their meaning. Over time, Egypt's Supreme Constitutional Court outlined an approach to such cases, based on modernist Islamic thought, led by diverse religious scholars, that focused on the query of how to cognize (interpret) the *Sharie'a* in an appropriate manner for a modern society's needs. The Court pointed out:

"that the use of reasoning, where there is no [scriptural] text, develops *qawa'id 'amliyya* (practical guidelines) that are, in their implications, softer for the folks and more concerned with their daily affairs and



[that] better defend their *masalihhim al-haqiqiyya* (true interests). Thus, statutory texts seek to recognize factual welfares in a suitable way for the individuals, confirming that the essence of God's law [*Sharie'a*] is justice, and that closing it (i.e. prohibiting re-interpretation) is neither adequate nor necessary, as the Prophet's companions who used *ijtihad*, often created decisions totally motivated by the public interests keeping them from *darar* (harm), and saving them from pain, bearing in mind that these benefits grow in light of the circumstances of the society's needs."

Legally speaking, the legislator is bound by the constitutional parameters and cannot exceed, contravene, or decline them. The Court recited:

"this is the Islamic [*Sharie'a*] in its (roots and sources), developing by necessity, declining [stringency]. In situations where there is no [obvious] text, *ijtihad* is only constrained by its *dawabituha alkulliyya* (universal controls) and Islamic law goals are not congested, it is not permitted to require the *wali al'amr* (follow mere) opinions in issues of the practical Islamic *al-ahkam al-fara'iyya* (legal rulings) that subject to development per se."

Also, the orthodox Islamic scholars' views on subjects related to *Sharie'a* are not granted any inviolability [sanctity] or placed beyond assessment or verification, as they can be switched by other [Islamic interpretations]. In the same vein, opinions based on *ijtihad* in contested queries do not have any binding force per se, applying to those who do not claim them, as it is not acceptable to hold [such opinions] to be stable and established Islamic law that cannot be infringed. The Court defined in its ruling *ijtihad* and its functions, as it "must track methods of reasoning out the *alahkam* (rulings) and (mandatory chains) for the *Sharie'a* (branches), preserving the main *maqasid* (objectives)".

Thus, the Supreme Constitutional Court has approved its influential authorization devotedly and has responded with a robust disposition to use its validity and recently enlarged policymaking ability to improve a reasonable liberal interpretation of *Sharie'a* norms, as in most cases, «*ijtihad*» is required. So, the Court has shifted from the prehistoric traditions of *fiqh* (Islamic jurisprudence) or the collective facts and studying the schools of jurisprudential thought and has established a new framework for deducing and understanding Islamic law as the fallible human effort to apprehend the content of that guidance. Then the Court elaborated: «[...] there is no duty to legislate following the classical *fiqh* contents, as the new legislation must not be in contrast with the bulk of the law, but only after enactment and must achieve the "common good"».



It should be noted that the legal interpretation of the Supreme Constitutional Court must be outlined considering the religion's role "at large" in the society, as a cultural factor, even in a strictly legal perspective, and hence, the Court role is not to establish the religion in the legal system, rather it is a symbolic reference of the religion's importance in the Egyptian society. So, the point is not so much whether the religion is mentioned in the Constitution or not, but rather its legal tie must be accommodated with the liberal commitment to democratize the society. Further, the Court highlighted that

"it is responsible for the obligation to watch out for any transgression of these Islamic rulings that are absolutely certain and to transpose any [legislative] *qai'da* (rule) that contradicts them. This provision located the *Sharie'a* rulings in a superior place over these [statutory] rules."

The Supreme Constitutional Court ruled that the appropriate *Sharie'a* commands were contestable, lithe, and subject to development, it also ruled that the relevant religious (divine) law was not sacred and could be modified, adjusted/replaced. The Supreme Constitutional Court's ruling on the *niqab* matter is remarkable. First, the Court echoed its obligation on a potential implementation of Article 2 to laws endorsed after the 1980's historical amendment. Second, it extended the Supreme Constitutional Court's jurisdiction to ministerial decrees, so escalating the scope of legislation that falls under Article 2. Third, it underscored the requisite for developing a moderate interpretation of the same article that would be reliable with other constitutional provisions defending public rights. Finally, the Court involved in a self-sufficient functional interpretation of both the Qur'an and authentic Sunnah. All in all, the Court established its specific interpretation of *ijtihad* irrespective of the opposing attitudes in Islamic jurisprudence, and its classical techniques, and thus, it situated itself as a *de facto* interpreter of divine ideals and legal guard on the *Sharie'a* values to avoid any extreme ideology or radical philosophy. It has advanced a flexible method to interpreting the divine law that differentiates between "unalterable and universally binding principles, and malleable application of those principles".

Laws that breach a strict, irreversible principle are acknowledged unconstitutional and invalid (annulled), but in the meantime, *ijtihad* (contemplation) is allowable in cases of textual gaps or where the relevant rules are ambiguous/open ended. Moreover, the government has been given comprehensive legislative will in policy areas where the *Sharie'a* is found to provide uncertain or numerous responses, provided that the statutory product does not violate the *Sharie'a* spirit (purposes) based upon a sensible, impartial secular *ijtihad*. Based on that ruling, the individual



reasoning rules via a *mujtahid* (qualified scholar) regulate the individuals' affairs to defend those interests that are legally appropriate. In Islam, a *mujtahid* is eligible if he possess the (a) ultimate awareness of legislating *ayaat al'ahkam* (verses) along with the knowledge of *Sunnah* and its narrator's reliability; (b) understanding of *nask'h* (abrogating/abrogated provisions) rules based on the *repeal theory*; (c) knowledge of *ijm'a* (consensus) and the familiarity with *'ilm usul al-fiqh* (*ijtihad's* methodology through a complete understanding of reasoning); (d) mastering the Arabic language along with piety (Islam); (e) thorough understanding of *makasid al-sharie'a* (*Sharie'a* objectives).

Generally, the *mujtahid's* knowledge should be necessary in which it can be absolutely certain and then undisputable. This ruling is significant to determine the concept of the religious clause in a contemporary State constitution and to track the possibility of a pluralistic interpretation of the *Sharie'a* reference consistent with the democratic state's governance. The crises of Islamic law are due to the conflict with the modern state institutions. Likewise, the "eternity clause" in the country's constitution [basic law] is designed to guarantee that the legislation/ constitution cannot be altered by amendment, as it recognizes that certain principles are part of the legal system, above and beyond the ^{written} constitution, and must be protected. Harvard Law School Professor Noah Feldman argues that "secularism of the Western variety is not a necessary condition of democracy" in order to justify the lack of separation between religion and State under an "Islamic democracy"⁴⁷. Likewise, Lama Abu-Odeh has stated:

"Islamic law should be approached as one, but only one, of the constitutive elements of law that has not only been decentered by the transplant but also transformed. Not only have its rules been reformed, but also its modes of reasoning, and its jurist class. Its treatises have been turned into codes, and its *qadis* turned into modern judges. Moreover, its internal conceptual organization, has been transformed by being reduced to a rule structure positivized in a code and dependent on State enforcement. Consequently, its normative hold over people has changed"⁴⁸.

Judicial authorization through a *Sharie'a* clause is an diverting secular approach; that the obsession with this clause is part of extreme

⁴⁷ N. FELDMAN, *After Jihad: America and the Struggle for Islamic Democracy*, Ferrar, Straus, and Giroux, New York, 2003, p. 12.

⁴⁸ L. ABU-ODEH, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, in *American Journal of Comparative Law*, Washington, vol. 52, Jan. 2004, pp. 789-824.



constitutional interest; and that validation of religious issues flings the ball from the political field to the legal scene. So, constitutionalizing the *Sharie'a* hampers the awareness of the main political duty. The acknowledgement of the puzzling presence of Islamic constitutionalism (Islam and democratic norms) should lead to the constant openness of the compromise between the ethical and political arenas (pluralism). Thus, when anticipating essential religion and state demands, constitutional courts in religious democracies (members' philosophical favorites + their own perceptive strategies) are powerfully motivated to rule within the community's interests and prospects of liberal groups and authority holders. Supreme Court justices may be observed as tactical artists to the level that they pursue to preserve or enrich the court's influential position vis-à-vis other foremost domestic decision, law, and policymaking apparatuses. Judges may agree upon playing it safe either by abstaining to decide or issuing equivocal/conventional rulings when the established motivation structure or political circumstances within which they function are not beneficial to judicial modernization (hyperactivism). This judicial shifting creates a key conundrum: how to guarantee that the courts will release decisions that echo the authority's ideological preferences. In constitutional systems, particularly those functioning in civil law practice, the constitution expressly mentions public rights/freedoms but leaves the issue of their meaning and regulation to legislation and this is a latent dodge, as a right can be robbed of much of its significance. In this case, the Court recited that "it is improper that any law can destabilize a freedom under the justification of regulating its practice, as once Muslims have acknowledged-with conclusiveness-a Sharie'a universal principle (fixed rule in an undoubtedly authentic text with a definite meaning), they must follow this principle or rule "as is," and may not try to elucidate it away or reason out an alternative legal norm.

3 - The meaning of religion in the Egyptian legal context. The cultural (indirect) relevance of religion in the decisions of the Court of Cassation about the Egyptian concept of public policy. The restriction of the faith in the Abu Zayd's case

Another issue of general concern is about the role of the people's culture in defining the concept of religion in the legislation and courts' decision. Under this respect, it is possible to affirm that the culture has an indirect effect on the law in designing the meaning of the religion in the public sphere. The examination of the legal interpretations of the concept of "public policy" shows that it is deeply rooted in the religion of Islam, since



it is a component of the culture of the majority of Egyptians. This indirect influence is striking when we observe the concept of “Egyptian public policy”, as reflected in the legislation and in the case law of the Court of Cassation.

i. Public policy as defined by the Egyptian legislation: aside from article 6(2) of Law 462 of 1955, public policy is mentioned only in the Civil Code and the Code of Procedure. Egyptian law does not define this term. Of the Explanatory Memoranda, only the one to the Draft Law of the Civil Code elaborates on its concept, using the common European interpretation of public policy as a flexible concept which may change with time and space in accordance with society’s needs. The flexibility of the concept also manifests itself in the fact that the judge is its sole interpreter. This description might also apply to public policy in interreligious conflicts law, since the Court of Cassation regard “public policy” in Civil Law and Law 462 as one and the same.

ii. Public policy as defined by the Court of Cassation: the Court of Cassation gave the most elaborate definition of public policy in its ruling of 17 January 1979. The Court begins by pointing out that public policy in both international and interreligious conflicts law is the same, and defines public policy as a secular concept:

“[Public policy] comprises the principles (*qawa'id*) that aim at realizing the public interest (*al-maslaha al-'amma*) of a country, from a political, social and economic perspective. These [principles] are related to the natural, material and moral state (*wada*) of an organized society, and supersede the interests of individuals. The concept [of public policy] is based on a purely secular doctrine that is to be applied as a general doctrine (*madhhab 'amm*) to which society in its entirety can adhere and which must not be linked to any provision of religious laws”⁴⁹.

The Courts then makes an exception to this secular concept:

“however, this does not exclude that [public policy] is sometimes based on a principle related to religious doctrine, in the case when such a doctrine has become intimately linked with the legal and social order, deep-rooted in the conscience of society (*damr al-mujtamd*), in the sense that the general feelings (*al-shifür al-'amm*) are hurt if it is not adhered to. This means that these principles [of public policy] by necessity extend to all citizens, Muslim and non-Muslim alike, irrespective of their religions. This is because the notion of public policy cannot be divided in such a manner that some principles apply to the Christians, and others to Muslims, nor can public policy apply only to a person or

⁴⁹ M. BERGER, *Public Policy and Islamic Law: The Modern Dhimmī in Contemporary Egyptian Family Law*, in *Islamic Law and Society*, vol. 8, No. 1 (2001), p. 104.



a religious community. The definition (*taqdyf*) [of public policy] is characterized by objectivity, in accordance with what the general majority (*aghlab 'amm*) of individuals of the community believes”.

According to Maurits Berger, in so stating without explicitly saying so, the Court stipulates that Egyptian public policy is rooted in Islam, since it is Islamic law to which the “general majority” in Egypt adheres in personal status affairs. In a ruling issued twenty years later, the Court of Cassation is more outspoken:

“[...] Islamic law is considered an [inalienable] right of the Muslims (*fi haqq al-muslimin*), and is therefore part of public policy, due to its strong link to the legal and social foundations which are deep-rooted in the conscience of society”⁵⁰.

In sum, although the Court of Cassation holds that public policy is a secular concept that applies to all Egyptians regardless of their religion, in its legal decisions it defines the public policy as «the principles which are deemed essential in Islamic law». In so doing, the Court admits that certain principles of Islamic law prevail over the laws of (Egyptians) non-Muslims. It should be noted that this implicit conception of the “culturally-religious” public sphere legally limits the freedom of religion of individuals in an indirect way, without any evaluation of the subjective position of the faithful and the objective contents of his opinion and behaviors.

Another decision of Egyptian courts in a matter of public policy shows the danger of this limitation of meaning and interpretation: this was the case of Nasr Hamid Abu Zayd⁵¹. Abu Zayd was an Egyptian and a Muslim assistant professor of Islamic studies and literature in the Arabic department of the Faculty of Literature at Cairo University. He was the author of several publications among which *Imam al-Shafî`i and the foundation of medieval ideology (al-imam al-Shâfi`î wa ta`sis al-idyûlûjîyya al-wasatiyya)* and *The concept of text: a study in the sciences of the Koran (Ma`fhûm al-nass: dirâsa fi `ulûm al-Qur`ân)*. In May 1992, he submitted an application for a promotion to full-time professorship. On the basis of one single unfavorable report (claiming the “obvious impiety” of Abu Zayd’s writings), the Promotion Committee decided that there was no ground for promotion and, on the 18th of March 1993, the Cairo University Council agreed to reject the request. Hitherto confined to the university walls, the case takes on a new aspect when, on the 16th of May 1993, a group of lawyers filed a lawsuit to the Personal Status division of the Giza Court of

⁵⁰ M. BERGER, *Public Policy*, cit., p. 105.

⁵¹ B. DUPRET, J.-N. FERRIÉ, *The Inner Self and Public Order: About a Recent Egyptian Affair*, in *Yearbook of the Sociology of Islam*, 2001, 3, pp. 141-162.



1st instance, in which they filed a suit against Nasr Hamid Abu Zayd, requesting a verdict of nullification of his marriage with Ibtihal Yunis, his wife, an Egyptian and a Muslim, the motive being that the publications of the former

“contain elements of impiety (*kufir*) thus excluding him from Islam”, “allowing him to be considered an apostate (*murtadd*)”, and “calling for the application, in his case, of the provisions (*ahkam*) related to apostasy (*ridda*)” and that, “among the unanimously recognized (*mujma` alayhâ*) consequences (*athâr*) of apostasy in jurisprudence, is a judgment calling for the separation of the spouses”⁵².

The defense of Abu Zayd was organized, among other ways, around the idea of the lack of personal interest of the claimants. But here the element of the *hisba* came in. That is how claimants claim their right to file a case in all matters related to Islam, the argument being that the personal interest of any Muslim is thus involved. Technically speaking, the possibility of invoking the *hisba* depends on the competence of the tribunals. The court of first instance, keen on demonstrating the isolation of a precedent of the Court of Cassation, preferred to refer all conflicts dealing with personal status to the provisions of civil procedure. By rejecting the *hisba* argument, the court could thus reaffirm that a personal interest in the cause is necessary for making a lawsuit pertaining to civil matters admissible. The conclusion was drawn that

“all things taken into account, the request submitted puts all the claims introduced under the heading of a *hisba* request, based on Islamic *Sharie'a* rules, and the claimants, when introducing it, cannot claim a direct and real interest as defined by the law”⁵³.

The group of lawyers, on the 10th of February 1994, appealed the decision. To begin with, the Court of Appeal declared invalid the interpretation of the first instance judge. In as much as, no legal text deals with the specific question of the *hisba*, it is appropriate to refer to the main texts of the Abu-Hanifa school. The Court goes on to affirm the validity of this procedure for all matters pertaining to one of God's rights (*haqq Allâh*), or to the violation of a prescription established by the Law of God. In this respect

“the Court indicates that what is meant by the rights of the All-Mighty and His sacrosanct due (*hurumâtihî*) is everything related to the general interest, to the Islamic community as a whole (*umma islâmiyya*), as well

⁵² Extracts from the lawsuit, as quoted by the Giza court of 1st instance, January 27, 1994, judging the claim inadmissible.

⁵³ Court of 1st instance, 27 January 1994, judgment on the admissibility of the lawsuit.



as everything pertaining to God and what relates to the general interest of Islamic society, so drawing a distinction between the latter and peoples' rights as related to individual rights in a limited and particular way (*`alâ sabîl al-tahdîd wa'l-ikhtisâs*). [...] The point here is to denounce a reprehensible act (*munkar*) which occurred, and to command a rightful act (*ma`rûf*) which may have long been neglected. Consequently when the claimants filed their case asking for the separation of the first defendant [Nasr Hamid Abu Zayd] from his wife, the second defendant, they were claiming for a recognition of the fact that the former had committed apostasy against Islam, while the latter remains a Muslim, thus justifying a *hisba* action, bearing in mind all the preceding arguments”.

Having thus established the basis for annulling the judgment pronounced by the court of first instance and judging the appeal admissible, the Court dealt with the issue of proving apostasy. Recognizing the absence of any text in Egyptian law or in the regulations governing personal status tribunals that would authorize any tribunal to judge the quality of a citizen's Islam, and consequently his impiety or his apostasy, the Court affirmed that this absence did not affect the case when the apostasy left no room for doubt. Before evaluating Abu Zayd's case according to this criterion, the Court created a very important distinction “between apostasy - a material act with its own bases, conditions and criteria of occurrence - and conviction”. By so doing, it gave apostasy a legal status by characterizing it as “a material act having an external existence”.

“The investigation of the occurrence of apostasy is, consequently, part of matters of priority pertaining to the competence of the mentioned courts who cannot be set aside in the petition for separation. This matter of priority does not exceed their field of competence. The court does indicate that there is a distinction between apostasy - a material act with its own foundations (*arkân*), conditions (*sharâ'it*) and criteria of prevention (*intiqâ' mawâni`ihî*) - and belief (*i`tiqâd*). Apostasy necessarily pertains to material acts with an external existence. Such facts must, necessarily, manifest themselves without ambiguity (*labs*), without divergence about the fact that he lied to God - glory be to Him -, or lied to His Messenger - may the peace and blessings of Allah be upon Him - to the extent where he rejects (*yajhad*) what made him enter the faith of Islam. If it is heard saying that he committed no impiety by a precise act, or if the proof thereof is weak, one cannot draw a conclusion as to his impiety and this cannot lead to a declaration that he is impious because impiety is a very serious matter. One is not authorized to declare a Muslim as being impious as long as there is a report excluding his excommunication (*`adam takfîrihi*). As for conviction, it is what a man keeps confidentially within him (*yusirru*), that which he firmly believes within his heart and which he intends.



This is obviously different from apostasy which constitutes a crime (*jarîma*) endowed with its own material foundation and which is submitted to justice so that it may conclude as to its occurrence. This falls within the purview of what justice is competent to examine or of what has to be judged and what is relevant to it. Conviction is, on the contrary, what falls within the purview of the human soul and what is enclosed in a man's inner self. It is a matter to which justice has no access. People must not enquire about it. It has to do with the relation between man and his Creator. Apostasy is an exit, to the highest degree, from the Islamic regime, by obvious material acts. In positive law, this comes close to dissidence (*khurûj*) from the state and its regime or high treason (*khiyâna `uzmâ*). The judge and the mufti are the ones to decide in matters pertaining to apostasy⁵⁴.

The comment of Dupret/Ferrié on the decision considers the rationale as a clear attempt to extend what is the culture and the religion of the majority under the cover of a restrictive definition of intimacy. They asserts:

«[...] the judge operates a typically modern distinction between religion, which he defines as the intimate relation with the Creator, pertaining to the inner self, and the law of the state, thus differentiating an individual subject of God from another one, subject of the state; he declares the first subject to be a private man, as the "Moderns" had always wanted it to be; the second subject he considers to be a public man. By so doing he, involuntarily, displaces the issue of apostasy from the domain of a religious economy of meaning to the domain of the law, i.e. to a site where the constitutive constraints of the social link as a latitude for the individual are clearly defined. This displacement situates the issue of apostasy within a, henceforth, secular logic, whatever the reference to the religious idiom»⁵⁵.

4 - Conclusions

The study of the notion of religion into the legal discourse first involves some methodological premises connected with the particular scientific history of the notion⁵⁶, then implies some characteristic conceptual reductions in order to describe and regulate the different religious behaviors by the legal theory, logic, language, and reasoning. Analyzing the

⁵⁴ Cairo Court of Appeal, Fourteenth Chamber of Personal Status Disputes, June 14, 1995.

⁵⁵ B. DUPRET, J.-N. FERRIÉ, *The Inner Self and Public Order*, cit., pp. 160-1.

⁵⁶ J. WAARDENBURG, *Classical Approaches*, cit., 373 ff.



case of Egypt, we can distinguish almost four legal nuances of this linguistically-pragmatic process. At the same time, we must be aware that all those nuances have practical legal effects on human rights:

1. The meaning of religion in the legal context often refers to an objective set of rules instead of a singular and inner faith: both the Constitution and the Supreme Constitutional Court cases have implemented this kind of conception⁵⁷. According to the legal reasoning, a religion typically involves a particular and comprehensive set of rules, and this aspect of religion prevails over the idea according to which religion is a deeply held personal conviction of beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfillment. The case of Abu Zayd tell us that the judges considered more the religion as an objective set of public legal rules rather than a faith, also in a case in which the sphere of intimacy was so deeply involved, in so doing evaluating only the conformity of the behavior of Abu Zayd, not his sincere faith. As we will see in short, this effect can represent a legal restriction of the freedom of individuals.

2. The previous sense of religion in the legal context favors the collective form of religions: the present reduction is a consequence of the former effect. The idea of a set of collective practices, which allow subjects to foster a connection with the divine, thorough a community which follows the rules in a legal context entails that denominational postures prevails over individuals'. This is not only the case of the Islam. In some other countries, like Belarus or Estonia, all the legal definition of religion make only mention of religious collectivity, associations, monasteries, religious brotherhood, missions, and sects. This legal definition needs always a structured organization of only specific type, while there are other kinds of religious organizations or experiences that are not even mentioned in the public provisions, with the result that they legally do not exist⁵⁸. Under this respect, the Egyptian case demonstrates that number of faithful and the religious majority count in defining the religion in the public and legal context and that the legal effects are not neutral from the particular religion that the community follows (Islam, Hinduism, Christianity, etc.). For example, in defining the public policy, courts admitted that certain principles of Islamic religion prevail over the laws of (Egyptians) non-Muslims.

⁵⁷ See in the same terms also *Syndicat Northcret v. Ansalem*, 2004 SC 47 [2004] 2 S.C.R. 551.

⁵⁸ Cf. **A. SHARMA**, *Problematizing Religious Freedom*, Springer, Dordrecht Heidelberg London New York, 2012, p. 22.



3. The meaning of religions in the legal context often depends on the formal legal recognitions: religion is not considered *per se*, but it needs norms (constitutional, domestic & international laws, religious rules when directly applicable) normally defining the “freedom” of religion and its characteristics instead of an implicit recognition of the posture of the soul or the inner self attitude. This kind of reduction entails several problems faced in order to lay down a universal Human Rights’ formula which contains all the possible expressions of world religions, because the concept of religious freedom cannot be divorced from the concept of religion and vice versa. It has also been noted that the common used conceptualization of religious freedom seems to assume the characteristic of the western concept of religion, so that every religion possesses a creed; that every religion contains a distinction between the sacred and the secular; that one could belong to one religion at a time. This conception seems to emphasize the element of freedom to choose or to abandon a religion but seems to ignore the element of unrestricted access to religions without the need to convert. In a semantically enlarged context like that one of a multi-religious society, probably we should distinguish between proclamation of religions and proselytization of religions. By proclaiming religion, religious actors enhance religious freedom of the collectivity; by proselytizing they arguably limit the religious freedom of the collectivity⁵⁹. In the first case they increase the awareness of religions in a given (globalized) society; in the second case, they can provoke an alternative choice which can be interpreted as a restriction of plural possibilities.

4. The practical content of religious freedom depends on the concept of religion which is assumed in the norms: the Abu Zayd’s case is a clear example of the fact that the religious freedom cannot be divorced from the kind of religion to which it refers to. In the case, the - so to speak - “set of rules-meaning” (of religion) prevails over the “faith-meaning” (of religion). As a consequence, the *hisba* process - which is historically connected to the role of Islam in the public sphere and to the culture of the Egyptian society - limits the extent of the religious heterodoxy in the interpretation of the law. More in general, in the Islamic world, the more is the apostasy considered the denial of the religion as a “set of rules”, the less there will be room for the religion as a “faith”.

ABSTRACT: No other idea than “religion” needs more to be qualified and recognized into the legal categories, in order to regulate societies and guarantee freedom of religion. The problem is that “religion” is a concept that firstly originates out from the law, in a dimension of knowledge dominated by the religious sources

⁵⁹ A. SHARMA, *Problematizing Religious Freedom*, cit., p. 22.



and literature. Only in a second moment, the concept of religion is recognized and regulated by the legal language and categories. The aim of the paper is to make a comparison of the way to describe the idea of religion into the legal discourse, taking into account the ways to regulate the religion in the public sphere of countries of different culture. In order to achieve their goals the Authors try to comparatively use their respective legal cultures, by analyzing the context in which the term "religion" is defined in the Egyptian legal system, considering not only some important key-rules (Constitution, decisions of the Supreme Constitutional Court and Court of Cassation) but also the cultural background of the categorization, like the presence of religious actors, the role of the public opinion, and the importance of the academic knowledge.



Federica Botti

(Resercher at the University of Bologna, School of Law)

The meaning of 'Religion' for the former Socialist Countries in ECHR

SUMMARY: 1. Introduction - 2. The laws of the former socialist states of Europe: characteristics and peculiarities - 3. The decisions of the European Court of Human Rights on religious freedom in the former socialist countries - 4. Conclusions.

1 - Introduction

Religious freedom in former European socialist countries is a recent achievement when compared to the other continent states of a longest and more established democratic tradition.

However, although the deployment of this freedom finds its origins in different vicissitudes, East and West Europe today are united by the duty to resolve the same issues.

While in the West the acquisition of legislation for the defense and the protection of the religious phenomenon has had a constant and linear processing, this can not be said for former socialist countries.

At a first stage, Eastern European countries, freed from state atheism, were subject to the assault of "new religious movements" who used a kind of vehicular, fast and cheap communication, such as the web.

These new religious denominations have attempted to settle in territories that they considered at one time unrelated to religious experiences and at the same time in need of them, affecting the individual dimension of religious freedom through intense proselytizing.

The countries concerned by this phenomenon, fearing to see their cultural references transformed, preferred to revitalize the traditional cults as an identity function, restoring their public role, in many cases establishing privileged relationships with them and managing relationships with religious communities through a new legislation that privileged in many cases relationships with one organization for each denomination⁶⁰.

⁶⁰ Bulgaria has chosen to privilege relations with the Bulgarian Orthodox Church, as Orthodox religion is identified in the Constitution as the traditional religion of the Bulgarian people (Article 13). A preference for Catholic religion was expressed by: Hungary, Poland, Slovakia, Croatia and Lithuania. Instead, countries which opted for a



The next impact was the explosion of migratory phenomena. These countries have at the same time become places of emigration, exporting their traditional cultures to the West, while immigration from the South of the world imported new cultures in their territories or, in an even more alarming way, revitalizing religious and ethnic communities that they had fought even using ethnic cleansing during the remodeling phase of their state⁶¹.

It is therefore important to analyze this complex phenomenon because, on the one hand, it affects the multireligious composition of the Western Europe countries and, on the other, it explains the reasons why many of these Eastern countries are resolutely opposed to immigration⁶², which characterizes the current historical phase of Europe, and to the introduction of new cultures, which has strongly influenced the very concept of religious freedom that these nations have.

These issues have created a number of conflicts that have become the subject of multi-level rights protection.

This process has come to the attention of the European Court of Human Rights, especially in those apical themes that have characterized the various national societies.

The case law of the Court must therefore be read in the light of the general framework outlined in order to be able to understand its characteristics, problems and decisions so that said case-law is seen in the perspective of the development of new rules capable of mediating the conflict.

somewhat equidistant position between the religious cults were Romania, Serbia, Montenegro, Macedonia, Slovenia and Ukraine, while Belarus has shown preference for relations with the Orthodox Church of Moscow obedience. Latvia and Estonia look more favorably at the Lutheran National Church, while the Czech Republic sees the atheist positions prevail among the population and thus maintains an equidistant position among the religious cults. Albania practices the absolute equality of cults and the separation between them and the state in the context of pluralist confessionism.

⁶¹ G. CIMBALO, *Libertà religiosa e cittadinanza nell'area balcanica*, in *Quaderni di Diritto e Politica Ecclesiastica*, I, 2016, pp. 151-165.

⁶² The Visegrád group was formed in 1991. Today, part of it are Poland, Czech Republic, Slovakia and Hungary. Their cohesion was strengthened in 1999 by the establishment of the Visegrád Investment Fund for the enhancement of their economies. These countries had opposed to the decisions of the European Union on the resettlement of immigrants by quotes in the countries of the Union. On 6 September 2017, the Court of Justice dismissed the actions brought by Slovakia and Hungary against the relocation of asylum seekers from Italy and Greece, confirming the (EU) 2015/1601 of 22 September 2015.

The unsuccessful countries, supported by Poland and the Czech Republic, refuse to enforce the sentence even at the expense of having to abandon communitarian funding, claiming that they do not want to introduce people of Islamic faith in their territories.



2 - The laws of the former socialist states of Europe: characteristics and peculiarities

The crisis of the states of socialist democracy has brought in all Eastern European countries the change of constitutional norms and the consequent introduction in the new Constitutions of norms aimed at the protection of religious freedom.

With the set of rules in force before 1989, religious issues had been "resolved" with the imposition of state atheism. The latter had, from the point of view of the exercise in associate and organized form of the various cults, to the denial of the public role of the religious communities, while, as far as the individual aspect of the exercise of religious freedom had led the various socialist regimes to enact specific repressive standards.

The abovementioned regimes thus left as legacy the new ones, established from the nineties of last century, the principle of separation between state and religious communities and the propensity, except for some exceptions, to a special form of protection for the traditional and prevailing religion in their respective country⁶³.

Indeed, although the proclaimed Soviet atheism has influenced the regulation of relations between the state and religious communities in that area, it has been realized in different ways to the point that it allowed - with the only exception of Albania - the survival of favorable relations, though limiting autonomy, with their respective traditional Churches.

The proclaimed separatism and the negation of the autonomy of religious communities, in any case, did not exempt the latter from the emergence of inter - and intra - confessional conflicts which, even after the fall of socialist regimes, remained largely submerged for a long time due to the absence of legislative and jurisprudential intervention which in fact avoided the resolution of these issues.

The incorporation into the Constitutions, in execution of the Treaty of Copenhagen (1995), of the subject of religious freedom as one of the conditions for the recognition of the democracies of the new regimes, put back at the top the issues highlighted.

We find an evident track in the laws on religious freedom, emanated from almost all States⁶⁴. These laws necessarily had to take on the task of regulating at least some issues, such as:

⁶³ The above-mentioned case of Bulgaria is emblematic. Other states such as Hungary, for example, make this choice by referring in this case (Article VII of the Constitution 3) to a special organic law or to the general law on religious freedom.

⁶⁴ All the laws on religious freedom emanated from Eastern Europe, in their historical succession, can be consulted on the website <http://licodu.cois.it>.



1. the presence of an official or identity religion and the relationship between it and other cults;
2. conflicts within religious communities, also due to the interference made by the past regimes on the organization of the same in order to condition their autonomy;
3. the presence of new cultures that were to be added to the traditional countries of the various countries that had come from the obscuring ashes caused by atheism.

It should be added that the opening up of the political and cultural frontiers of these countries gave way to proselytism activities of the religious organizations from all over the world. The latter considered that the area under consideration was a fertile and virgin land of evangelization and therefore launched a massive religious propaganda campaign in these territories. This type of conduct has found a clear opposition of the traditional confessions that have appealed to new political authorities so that the laws on religious freedom would hinder or at least contain the phenomenon of new cults⁶⁵.

Thus, constitutional law legislation and the laws on religious freedom of ex-socialist countries of Eastern Europe faced the problems that we are currently facing among the actions of the EDU Court.

3 - The decisions of the European Court of Human Rights on religious freedom in the former socialist countries

One of the most relevant matters covered by the ECHR's decisions, is undoubtedly the contrasts that have arisen in traditional religious confessions in order to be accredited as unique and exclusive representatives of the religious denomination.

Significant and emblematic in this sense is the conflict in Bulgaria between the Holy Synod of the Bulgarian Orthodox Church and the Alternative Synod⁶⁶.

It is exceptionally Albania that has refused to enact a specific law on religious freedom, but regulates the phenomenon with the norms of common law. On the Albanian case for all: **G. CIMBALO**, *Pluralismo confessionale e comunità religiose in Albania*, Bononia University Press, Bologna, 2012, pp. 1-242.

⁶⁵ **F. BOTTI**, *La transizione dell'Est Europa verso la libertà religiosa*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), n. 31/2013.

⁶⁶ Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v. Bulgaria, ECtHR, Applications nos. 412/03 and 35677/04, 16 September 2010, Final 21 February 2011.



Decided through a copious and alternate jurisprudence of the national Courts of every order and degree, the issue was resolved politically with the recognition of the legitimate representation of the traditional Church of the Holy Synod, which lawfully claimed all the properties built before 1989⁶⁷.

The case was brought before the ECHR to verify the compliance for the rights of religious freedom, the autonomy of religious communities and the recognition of property rights ⁶⁸ on the goods claimed by the two confessional members. It ended with the acknowledgment, though partial, of the property rights to the Alternative Synod for parts of buildings built after 1989, although the ruling of the ECHR then had little effect on the Bulgarian legal system.

Also in Bulgaria, under the 2002 Freedom of Religion law,⁶⁹ it was necessary to resolve the conflict within the Bulgarian Islamic community, where two different parties contested the leadership of the Muslim community, contesting the regularity of the elections, so that alternately, they had seen both one and the other preside over the Supreme Council.⁷⁰

This case was also the subject of the EDU Court's interest, which found a violation of Art. 9 of the EDU Convention, reflecting the attitude of the state authorities and, as such, seriously damaging to pluralism within a democratic society.

The two reported very complex events demonstrate a certain inadequacy of Bulgarian national legislation to peacefully resolve intra-confessional conflicts and in any case to regulate in general the religious phenomenon as a whole. Also with reference to the space accorded by the legislation to the new cults.

One can not ignore the fact that - for example - the attribution of the qualification of traditional and identity-based religion to the Bulgarian Orthodox Church, beyond constitutional declarations of equality between different religious communities and respect for the principle of separation between the state and Cults, shows the gaps in Bulgarian law on denominations⁷¹.

⁶⁷ For an exhaustive reconstruction of these events: **K.I. PETROVA**, *La Bulgaria e l'islam. Il pluralismo imperfetto dell'ordinamento bulgaro*, Bononia Univerity Press, Bologna 2015.

⁶⁸ Case of Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v. Bulgaria, Applications nos. 412/03 and 35677/04 (today in <http://licodu.cois.it/?p=5589>). On the same site, you can consult decisions of the Constitutional Court and other Bulgarian Courts on these matters.

⁶⁹ <http://licodu.cois.it/?p=945>

⁷⁰ Supreme Holy Council of the Muslim Community v. Bulgaria, ECtHR, no. 39023/97, 16 December 2004 (in <http://licodu.cois.it/?p=5587>).

⁷¹ There are countless cases of non-recognition of legal personality to new cults in



Lacks, to the view of the author, attributable to the pretense of the rule of law, through the Central Institute of Cults, which today is dependent on the Presidency of the Council, to rule on the legal status and internal life of religious communities. It is in fact within this organism - present with different denominations, but with similar tasks in all of the Eastern countries - that, in the example of Soviet experience, the various interests of religious organizations present in each individual State are mediated.

The internal conflict within the Bulgarian Muslim community, among other things, shows another obvious limitation of the law on denominations, which forces the diverse and unequal Islamic religious world to a forced coexistence within a same confessional organization.

Perhaps aware of the limits previously reported, the Romanian legislature, when it issued the Law on Religious Freedom in 2006⁷², has better weighted the criteria for the identification of different cultures. As evidence, we note that the conflict between them is drawn to the attention of the EDU Court, solely in terms of the restitution of confiscated goods in connection with the general laws on the restitution of those goods and the identification of the ecclesiastical denominations, which possessed them prior to confiscation⁷³.

In this case, the conflict does not concern, as is the case in other countries, the restitution or compensation by the state of the confiscated goods, but the restitution of assets already belonging to the Greek-Catholic Church linked to Rome⁷⁴ and attributed to the Roman Orthodox Church⁷⁵, given the privileged role retained by the latter during the previous regime⁷⁶.

The issue of the restitution of ecclesiastical goods confiscated is, in fact, very extensive and affects almost all socialist democracies⁷⁷. It has

Bulgaria. On the point see: **L. VANONI**, *Pluralismo religioso e Stato (post) secolare: Una sfida per la modernità*, Giappichelli, Torino, 2016, pp. 69 ss.; **S. FERRARI**, *La Corte di Strasburgo e l'articolo 9 della Convenzione europea. Un'analisi quantitativa della giurisprudenza*, in R. Mazzola (a cura di) *Diritto e religione in Europa. Rapporto sulla giurisprudenza della Corte europea dei diritti dell'uomo in materia di libertà religiosa*, Il Mulino, Bologna, 2012, p. 44 ss.

⁷² <http://licodu.cois.it/?p=1378>

⁷³ V.: licodu.cois.it, section "Confiscation and restitution of property of religious communities".

⁷⁴ <http://licodu.cois.it/?p=10011>.

⁷⁵ *Lupeni Greek Catholic Parish and others v. Romania*, ECtHR, Application no. 76943/11, 29 November 2016.

⁷⁶ **I. ANGELI MURZAKU**, *Religion and Politics in Post-Communist Romania*, by L. Stan and L. Turcescu, Oxford University Press, Oxford, 2007; **L.N. LEUSTEAN**, *Orthodoxy and the Cold War. Religion and Political Power in Romania, 1947-65*, Palgrave Macmillan, Basingstoke 2009; **C. OPREA**, *Tra Roma, Bucarest e Mosca. Cattolici, ortodossi e regime comunista in Romania all'inizio della guerra fredda (1945-1951)*, Aracne, Roma 2013.

⁷⁷ **F. BOTTI**, *I diritti di proprietà della Chiesa greco-cattolica tra il diritto interno albanese e la "sentenza pilota" della Corte EDU*, in F. Botti (a cura di), *L'Albania nell'Unione europea fra*



given rise to copious national jurisprudence, although this has not always come to the attention of the EDU Court with a clear identification of the conflict between the State and the Religious Communities⁷⁸.

The problem of the uniqueness of denominations also applies to the Moldovan Orthodox Church, where the problem is the recognition of confessional autonomy and of the right under art. 9 of the ECHR Convention to have its own autonomous identity recognized.

The Orthodox Church of Bessarabia, suppressed in 1944 by the Soviets after its failure to be recognized before the Moldovan State Courts, claims to be the legitimate heir to the historic Orthodox Church present in the country⁷⁹. For this reason, it filed an appeal with the ECHR and obtained in 2012 recognition under the Law of denominations⁸⁰, despite the fact that the Orthodox Church of Moldova linked to the Patriarchate of Moscow claimed the right to be the only orthodox identity of the country.

However, strong pressure from the Parliamentary Assembly of the Council of Europe was needed to enforce the sentence, since the Orthodox Church of Bessarabia, as the legitimate heir to the ancient Orthodox Church, could demand the restitution of all the confiscated properties in 1948 (buildings of worship, lakes, land, buildings).

Or, again, in Ukraine, where the violation of art. 9 Convention by the State for having denied a member of the Orthodox Church to abandon the teachings of the Patriarchate of Moscow to embrace those of the Patriarchate of Kiev⁸¹.

The problem is that the emergence of new nationalities after the Soviet Union crisis has stimulated within the Orthodox Church the tendency to constitute self-governing structures based on the existence of

tradizione e sviluppo della libertà religiosa, Bononia University Press, Bologna, 2017, pp.145,172; **F. BOTTI**, *Properties of religious communities in Albania between the restitution or compensation of confiscated goods and the acquisition of new assets*, in *Jeta Juridike*, III, 2015, pp. 167 - 188.

⁷⁸ Cfr. Decision of the Constitutional Court for annulment of Articles of the Law on the Legal Status of Churches, religious community or a religious group. Decision No. 104/2009 adopted on 22 September 2010 (in <http://licodu.cois.it/?p=5358>). Significant is the legal dispute that opposes the Tetovo Tetovo Bektashi community to the Islamic Community of Macedonia, which last, according to the 2008 denomination law, (<http://licodu.cois.it/?p=5363>) claims ownership of certain goods as sole Islamic denomination of the country.

⁷⁹ ECHR, Judgment on cult buildings Metropolitan Church of Bessarabia, Moldova, 15 January 2011 (in <http://licodu.cois.it/?p=5727>).

⁸⁰ Law on religious freedom of Churches and their members in 2007 (in <http://licodu.cois.it/?p=1276>).

⁸¹ *Svyato-Mykhaylivska Parafiya v. Ucraina*, ECtHR, Sez. I - Ric. 77703/01, 14 June 2007.



an independent nation⁸². The new regimes, precisely because of the laws on religious freedom adopted, were able to deal with these problems with difficulty.

It should be stressed that this type of legislation does not arise by chance, but it is suggested by the Venice Commission, which, without knowing the internal affairs of the religious confessions of these countries and without taking any account of the reasons which had characterized the legislation before the end of World War II, has recommended advising the adoption of the Belgian Church-State Relationship model⁸³, not suitable for dealing with these situations. Proof of this it's the high interreligious conflict that the law has not been able to mediate and manage⁸⁴.

This makes us reflect on the fact that the Albanian regime, refusing to adopt its own law on religious freedom, and having wisely opted for the use of common law as a general tool for regulating relations with cults, makes every religious community see their civil legal personality recognized under the law governing such matters for non-governmental organizations. Thus, the Albanian system has managed to preserve religious peace and the absence of interreligious conflicts.

Out of the scope of protection under art. 9 of the ECHR on Freedom and Rights of Religious Communities, we have to say that the Court has also focused its attention on the individual protection of religious freedom in relation to art. 11 of the ECHR.

⁸² See, for example, the constitution in Latvia of the autonomous Latvian orthodox Church that refers to the Ecumenical Patriarchate with the intent to distance itself from ties with the Russian Orthodox Church. See: Judgment of the Supreme Court of Latvia, Case No. SKC - 79, February 8, 2006 (in <http://licodu.cois.it/?p=4784>); Judgment Nr. A42673207 AA43-0250-11/14 about entry in the register of the religious denominations of the autonomous Orthodox Church of Latvia (Ecumenical Patriarchate) 2011 (in <http://licodu.cois.it/?p=4786&lang=en>).

⁸³ **G. CIMBALO**, *Pluralismo confessionale e comunità religiose in Albania*, Bononia Univeristy Press, Bologna, 2012, p. 198 ss.; **G. CIMBALO**, *Separatismo, laicità, pluralismo e politiche di convivenza*, in F. Botti (a cura di), *La convivenza possibile. Saggi sul pluralismo confessionale in Albania*, Bononia University Press, Bologna, 2015, pp. 9-24.

⁸⁴ Relationships between religious confessions in Eastern European countries are characterized by a strong interreligious conflict that develops in different directions. Conflicts are common inside the general denominations (Orthodox Church, but also Muslim Communities) that contend for the representation of the entire denomination with a conflict fueled by the necessity and interest in recovering goods confiscated from the past regime. The other side of conflict is generated by the so-called new cults who have difficulty penetrating within the narrow meshes of the various denomination laws. These findings suggest to the European Union, and in particular to the Venice Commission, a critical reflection that is fueled by the copious case law of the ECHR, which we have repeatedly referred to.



A case of transition between the two issues is certainly constituted by the freedom of association right, raised by the *Sindicatul Păstorul cel Bun*⁸⁵, concerning the exercise of trade union rights within a religious community, resolved by the Grand Chamber's pronouncement for which the refusal of the departmental tribunal to register the recurring union did not go beyond the margin of appreciation enjoyed by the national authorities in the matter and, therefore, is not disproportionate.

By moving decisively on the ground of individual rights of religious freedom, a very important case of Macedonia, raised by a sanctioned worker after being absent from work to attend a Muslim festival⁸⁶, must be reported. In response to the applicant's allegations, alleging that he had been forced to reveal his religious convictions, the judges stated (§ 39) that

“it is not oppressive or in fundamental conflict with freedom of conscience to require some level of substantiation when that claim concerns a privilege or entitlement not commonly available and, if that substantiation is not forthcoming, to reach a negative conclusion”.

Remaining on the subject of individual protection of religious freedom, but with different outcome and finding a full violation of art. 9 Convention, worthy of note is the ruling on *Ivanova vs. Bulgaria*⁸⁷.

The plaintiff, director of the pool at a public education institute, complained of violation of his religious freedom for being dismissed because of her membership of an unregistered religious organization. This case emerges, with renewed evidence, the shortcomings of the denominations law which has among its main tasks that of containing the expansion of religious differentiation with the intent of safeguarding the country's religious identity.

4 - Conclusions

⁸⁵ **F. BOTTI**, *L'esercizio dell'attività sindacale dei ministri di culto nella Chiesa ortodossa romena*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 30/2012; **F. BOTTI**, *Diritto sindacale e confessioni religiose alla luce della giurisprudenza della Corte di Strasburgo. Il caso rumeno: «Sindicatul Paștorul cel Bun c. Romania»*, in *Quaderni di Diritto e Politica Ecclesiastica*, 2013, vol. I, pp. 171-182; **L.S. MARTUCCI**, *Libertà sindacale nelle confessioni religiose. Spunti comparativi*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 39 /2014.

⁸⁶ *Kosteski v. The Former Yugoslav Republic of Macedonia*, ECtHR, Application no. 55170/00, 13 April 2006.

⁸⁷ *Ivanova v. Bulgaria*, Application no. 52435/99, 12 April 2007.



The case law of the Court has certainly highlighted the shortcomings and limitations of the laws on religious freedom, especially with regard to the option for a single denomination for each religious community.

This choice harms the autonomy of the religious communities and forces them to unnatural and controversial compromises in order to find a *modus vivendi* within a single organization, regardless of ritual differences, traditions, structure of relations within the clergy, and touching on delicate aspects that concern differences on the theological and doctrinal plan, as well as the differences to international cults.

The sacrifice of confessional autonomy, just to obtain an apparently orderly classification of cultures, which actually conceals a need for control by the state of organisms such as the religious ones of which it deeply distrusts, re-launches the unresolved debate on differentiated agreements with different cultures and communities. Therefore it emerges that there is a need for bilateral or negotiated legislation or, alternatively, for the use of the common law to regulate the collective religious phenomenon.

The case law on the protection of individual rights related to the exercise of religious freedom, however, highlights the need for the principle of religious freedom to be measured by the protection of human rights and the fundamental and irreplaceable principles that a liberal democracy system own and which cannot be disregarded.

In essence, we can see the secularization of the right to religious freedom, though the Court's jurisprudence, as well as the tendency oriented to confessionalization of interpersonal relations and the thrust of many cults to radicalize, resulting in infrequent conflict, or intrinsic, risking to question the peace and social cohesion, rights and political stability of this area of the world.

The hope is that this process of secularisation and secularization linked to the protection of human rights can make a renewal and regeneration element on a more open basis for comparison by the traditional religious communities, making them to measure with the multiethnic and multireligious composition of the peoples and their need for peaceful coexistence.

Keywords: Religion; Religion and Law; Science of Religion; European Court for Human Rights; Socialist Countries.



Rossella Bottoni

(Researcher at the Catholic University of the Sacred Heart in Milan,
Department of Social and Political Sciences)

The Meaning of 'Religion' in Austrian Case Law

SUMMARY: 1. Introduction - 2. The Austrian Case - 3. The Meaning of "Religion" in Austrian Case Law - 4. Conclusions.

1 - Introduction

In Austria, like in other countries, the need to define "religion" was not an issue for a long time, because this term "was largely associated with the idea of belief in and worship of God"⁸⁸. The emergence of new religious movements has challenged this interpretative category and has posed great challenges to legal systems like the Austrian one, where traditional religions enjoy a privileged status.

This paper aims to examine recent Austrian case law concerning the meaning of "religion" in a two-fold perspective⁸⁹. In the first place, it focuses upon judgments determining the legitimacy (or the illegitimacy) of specific legal rules and administrative practices, grounded on a differentiation between religious groups (for example, between "religious denominations" on the one side, and "sects" or "cults" on the other side). In the second place, it examines decisions concerning the relationship between a religious worldview and the religious groups established on the Austrian territory and claiming to represent that "religion".

2 - The Austrian Case

According to Austrian scholars, the "Austrian specificity in comparison to other European countries" lies in the fact that the country's catalogue of

⁸⁸ **S. FERRARI**, *New Religious Movements in Western Europe*, in <http://religion.info>, October 2006, p. 4.

⁸⁹ For older case law (1920s-1970s) see **L. MUSSELLI**, *La libertà religiosa nell'esperienza costituzionale austriaca: primi materiali per un'analisi comparativa*, in *Studi in onore di Pietro Agostino d'Avack*, Giuffrè, Milano, 1976, vol. III, pp. 361 ff.



fundamental rights is

“embodied in Constitutional Acts or Treaties under International Law [...] that date from several historical epochs with a different state-church relationship and a different understanding of fundamental rights”⁹⁰.

The origins of the Republic of Austria date back to 1918, when it was established as one of the successor states to Austria-Hungary. The 1920 Constitution recognizes the equality of all citizens before the law and excludes privileges based inter alia upon religion (Art. 7 § 1), but it does not contain any provisions on either religious freedoms or religious denominations. In fact,

“[t]he main political groups could not agree on a new catalogue of fundamental rights, basically because the Social Democrats demanded the incorporation of social rights that were emphatically rejected by the Conservatives. As a consequence, the 1867 Basic Law on the General Rights of Nationals [...] remained in force”⁹¹.

The 1867 law, inherited by Austria-Hungary and still legally binding, guarantees the right to freedom of conscience and creed (Art. 14 § 1) and introduces a distinction between recognized Churches and religious societies (Art. 15) and legally not recognized confessions (Art. 16). Fundamental freedoms (including the right to freedom of thought, conscience and religion) are further protected by the 1919 Treaty of Peace signed in St. Germain-en-Laye⁹²; the 1955 Treaty for the Re-establishment of an Independent and Democratic Austria⁹³; the European Convention on

⁹⁰ **R. POTZ**, *Religious Freedom and the Concept of Law and Religion in Austria*, in <http://www.osce.org/odihr>, 10 July 2009, p. 4; **B. SHINKELE**, *Church Autonomy in Austria*, in *Church Autonomy. A Comparative Survey*, ed. by G. Robbers, Peter Lang, Frankfurt am Mein, 2001, p. 563. See also **A. GAMPER**, *Introduction to the Study of the Law of the Austrian Federal Constitution*, in *ICL Journal*, 2008, II/2, p. 94: “Fragmentation instead of incorporation was and to a smaller extent still is one of the key features of Austrian constitutionalism”.

⁹¹ **M. STELZER**, *The Constitution of the Republic of Austria. A Contextual Analysis*, Hart Publishing, Portland, 2011, p. 9.

⁹² In particular, under Art. 63, “Austria undertakes to assure full and complete protection of life and liberty to all inhabitants of Austria without distinction of birth, nationality, language, race or religion. All inhabitants of Austria shall be entitled to the free exercise, whether public or private, of any creed, religion or belief, whose practices are not inconsistent with public order or public morals”.

⁹³ According to Art. 6 on human rights, “1. Austria shall take all measures necessary to secure to all persons under Austrian jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting. 2. Austria further undertakes that the laws in force in Austria shall not, either in their content or in their application, discriminate or entail any



Human Rights, which Austria signed in 1957 and ratified in 1958⁹⁴, and which has a constitutional status⁹⁵.

Austria's ecclesiastical law system⁹⁶ fits in what Silvio Ferrari has described as the European model of State-religions relations. Contemporary European countries are characterized by three common principles: the individuals' religious freedom and equality, the religious denominations' doctrinal and organizational autonomy, and the State's selective cooperation with religious denominations⁹⁷. The latter principle deserves special attention because of its relevance in Austrian case law on the meaning of "religion".

As early as 1972 the Constitutional Court stated that "differentiation between religious communities which are recognized by statute and other religions does not infringe the principle of equality"⁹⁸. Potz has stressed the distinction "between two different forms of religious neutrality: the 'distancing' neutrality (*distanzierende Neutralität*) and the including neutrality (*hereinnehmende Neutralität*)". The former requires the State to avoid "any possible identification with religious or philosophical beliefs", but the latter does not prevent it from promoting religious denominations "as socially relevant factors". This assessment must be based on secular, and not religious characteristics: for example, the number of members⁹⁹.

The differentiation between religious communities has further deepened after the approval of the Law Concerning the Legal Status of Registered Religious Communities in 1998, which has amended the 1874 Law concerning the Legal Recognition of Religious Communities, and which has in fact created a three-tier system¹⁰⁰. At the top, there are

discrimination between persons of Austrian nationality on the ground of their race, sex, language or religion, whether in reference to their persons, property, business, professional or financial interests, status, political or civil rights or any other matter".

⁹⁴ See **L. MUSSELLI**, *La libertà religiosa nell'esperienza costituzionale austriaca...*, cit., pp. 339 ff.

⁹⁵ **C. MAYER, H. WUTSCHER**, *Are Austrian Courts Obligated to Consider the Jurisprudence of the European Court of Human Rights when Interpreting the ECHR?*, in *ICL Journal*, 2014, VIII/2, p. 202.

⁹⁶ An exhaustive description goes beyond the purposes of the present article. For more information, see **R. POTZ**, *État et Églises en Autriche*, in *État et Églises dans l'Union européenne*, ed. by G. Robbers, Nomos, Baden-Baden, 2008, pp. 417-448.

⁹⁷ **S. FERRARI**, *Dalla tolleranza ai diritti: le religioni nel processo di unificazione*, in *Stato, Chiesa e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), January 2005.

⁹⁸ Quoted by **L.L. GARLICKI**, *Perspectives on Freedom of Conscience and Religion in the Jurisprudence of Constitutional Courts*, in *BYU Law Review*, 2001/ 2, pp. 492-493.

⁹⁹ **R. POTZ**, *Religious Freedom*, cit., p. 6.

¹⁰⁰ **B. SHINKELE**, *Religious Entities as Legal Persons - Austria*, in *Churches and Other Religious Organisations as Legal Persons*, ed. by L. Friedner, Lueven, Peeters, 2007, p. 37.



(currently 16) religious societies (*Religionsgesellschaften*)¹⁰¹, which have a public-corporation status¹⁰² and enjoy a number of rights and benefits. Each

¹⁰¹ This status has been recognised by virtue of different legal provisions. The Catholic Church was “historically recognized”, but had its status renewed through the Concordat signed in 1933 and entered into force in 1934. A group of religious societies has obtained this recognition through *ad hoc* laws: the Jewish Religious Association through the Jewish Act of 1890; the Islamic Religious Community through the Islam Act of 1912, as amended in 2015; the Protestant Churches of Augsburg and Helvetic Confession (that is, Lutheran and Reformed respectively) through the Protestant Act of 1961; the Eastern Orthodox Church (including not only the Greek Orthodox Church, but also the Russian, Serbian, Romanian, and Bulgarian Orthodox Churches) through the Orthodox Act of 1967; the Syrian Orthodox Church, the Coptic Orthodox Church, and the Armenian Apostolic Church through the Oriental Orthodox Churches Act of 2003. Another group has been recognized by a ministerial ordinance under the 1874 Law concerning the Legal Recognition of Religious Communities, as amended in 1998: the Old Catholic Church in 1877; the Methodist Church in 1951; the Church of Jesus Christ of Latter-day Saints (Mormons) in 1955; the New Apostolic Church in 1975; the Buddhist Religious Association in 1983; the Jehovah’s Witnesses in 2009; the Islamic Alevi Congregation in 2013; the Free Christian Churches (a federation of the Baptist Union, the Evangelical Alliance, the ELAIA Christian Community, the Mennonite Free Church, and the Free Christian Pentecostal Church) also in 2013. See **R. POTZ**, *Religious Freedom*, cit., pp. 1-4; *Austria 2013 International Religious Freedom Report*, in <https://www.state.gov/documents/organization/222401.pdf>; **G. CATALANO**, *Osservazioni sulla situazione concordataria della Repubblica Austriaca*, in *Il diritto ecclesiastico*, 1963, I, pp. 390-406; **A. TALAMANCA**, *Politica e legislazione ecclesiastica in Austria, Germania e Italia negli anni tra le due guerre mondiali; parallelismi, differenziazioni e prospettive di studio emersi in un recente colloquio italo-austro-tedesco*, in *Il diritto ecclesiastico*, 1974, I, pp. 349-354; **R. BOTTA**, *Ispirazione pluralista e residui di giuseppinismo nei rapporti tra Stato e confessioni nella Repubblica austriaca. (Note in margine ad un recente incontro di studio italo-austriaco)*, in *Il diritto ecclesiastico*, 1982, I, pp. 132-137; **P. CIPROTTI, E. ZAMPETTI**, *I Concordati di Giovanni XXIII e dei primi anni di Paolo VI. 1958-1974. (Austria, Germania, Jugoslavia, Spagna, Svizzera, Argentina, Bolivia, Colombia, Paraguay, El Salvador, Tunisia, Venezuela)*, Giuffrè. Milano, 1976, pp. 1-30; **S. TESTA BAPPENHEIM**, *Brevi cenni introduttivi sull’istituzionalizzazione dell’Islam nella felix Austria*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), May 2007; **H.C. SCHEU**, *The emergence of new minorities in Austria and current issues concerning their legal protection*, in *Acta Humana*, 2015/4, pp. 55-58; **J. MOURÃO PERMOSER, S. ROSENBERGER, K. STOECKL**, *Religious Organisations as Political Actors in the Context of Migration. Islam and Orthodoxy in Austria*, in *Religious Actors in the Public Sphere. Means, Objectives and Effects*, ed. by J. Haynes, A. Henning, Routledge, New York, 2011, pp. 77-95; **D. HEINZ**, *Church, Sect, and Governmental Control: Seventh-Day Adventists in the Habsburg Monarchy*, in *Eastern European Quarterly*, 1989, XXIII/1, pp. 109-115.

¹⁰² “Their legal status as public corporations includes the relative compulsory membership. All those belonging to a particular confession who are resident in Austria are members of it” (**R. PUZA**, *Legal Position of Churches, Church Autonomy and Tendencies in Jurisprudence. Report of Austria*, in *Legal Position of Churches and Church Autonomy*, ed. by Hildegard Warnik, Peeters, Leuven, 2001, pp. 57-58).



of them

“has the right to joint public religious practice, arranges and administers its internal affairs autonomously, and retains possession and enjoyment of its institutions, endowments and funds devoted to worship, instruction and welfare”¹⁰³.

Religious societies *inter alia* receive subsidies, and are granted tax exemption and State-funded religious instruction in public schools. They are also “entitled to give an opinion to law drafts as long as they are of relevance for them and their religious and social activities”¹⁰⁴.

The 1874 Law recognized a religious denomination as a *Religionsgesellschaft*

“if their teachings, services, internal order and chosen name [do] not contain anything unlawful or morally offensive, and if the setting up and continued existence of at least one community of worship (*Cultusgemeinde*) is ensured”¹⁰⁵.

The 1998 Law has envisaged further conditions, which have been criticized by scholars¹⁰⁶:

- existence of the religious association for at least twenty years in Austria, for at least ten years as a registered religious community;
- a minimum number of two out of a thousand of the Austrian population;
- the use of income and other assets for religious purposes, including charitable activities;
- a positive attitude toward society and the state;
- no illegal interference with recognized or other religious communities”¹⁰⁷.

The demographic requirement, which is currently estimated at

¹⁰³ Art. 15 of the 1867 Basic Law on the General Rights of Nationals. On its traditional and actual interpretation, see **B. SHINKELE**, *Church Autonomy in Austria*, cit., pp. 564 ff.

¹⁰⁴ **R. POTZ**, *State and Religion in Austria*, in *State, Law and Religion in Pluralistic Societies - Austrian and Indonesian Perspectives*, ed. by R. Potz, S. Kroissenbrunner, A. Hafner, Vienna University Press, Vienna, 2010, p. 20.

¹⁰⁵ **C. HOFHANSEL**, *Recognition Regimes for Religious Minorities in Europe: Institutional Change and Reproduction*, in *Journal of Church and State*, 2013, LVII/1, p. 93.

¹⁰⁶ See *inter alia* **C.J. MINER**, *Losing My Religion: Austria's New Religion Law in Light of International and European Standards of Religious Freedom*, in *BYU Law Review*, 1998/2, pp. 607-647.

¹⁰⁷ **C. HOFHANSEL**, *Recognition Regimes for Religious Minorities*, cit., pp. 93-94.



approximately 17,400 members¹⁰⁸, is especially “prohibitive”¹⁰⁹.

The middle tier is occupied by (currently 8) registered religious communities (*religiösen Bekenntnisgemeinschaften*)¹¹⁰. This is a new status introduced by the 1998 Law, which can be applied for by a religious group having at least 300 members. As legal persons, they can purchase property in their own name and contract for goods and services, but they are not entitled to the financial and educational benefits granted to religious societies¹¹¹.

At the bottom, there are all other religious communities, who do not qualify for neither of the abovementioned statuses¹¹², and whose members “may practice their religion at home, in so far as this practice is neither unlawful, nor offends common decency”¹¹³. Many are organized as non-profit associations, like Scientology. According to Art. 3 a) of the Association Law of 1951, this law does not apply to orders, congregations and religious groups, on the grounds that they are subject to laws and regulations approved specifically for them. In other words, in Austria, unlike other European countries, religious groups may not be organized as private associations. In fact, until the beginning of the 1980s, only associations with a partly religious function were registered. However, now - in the light of Arts. 11 and 14 ECHR which guarantee the right to freedom of association without discrimination - any religious groups of at least three people are allowed to register as associations¹¹⁴.

Between 1983 and 2003 no religious denomination was recognized as a *Religionsgesellschaft*, and in the meantime the 1998 Law was approved to make requirements stricter. One of the reasons has been the reaction to the

¹⁰⁸ *Austria 2016 International Religious Freedom Report*, in <https://www.state.gov/documents/organization/269032.pdf>, p. 4.

¹⁰⁹ **R. POTZ**, *State and Religion in Austria*, cit., p. 18.

¹¹⁰ They are the Bahai Faith, the Christian Community-Movement for Religious Renewal, the Pentecostal Community of God, the Seventh-Day Adventist Church, the Hindu Mandir Community, the Islamic-Shia Community, the Old-Faith Alevis, and the Family Federation for World Peace and Unification (Unification Church). See *Austria 2016 International Religious Freedom Report*, cit., p. 4.

¹¹¹ *Austria 2016 International Religious Freedom Report*, cit., p. 4.

¹¹² See *Austria 2016 International Religious Freedom Report*, cit., p. 5.

¹¹³ Art. 16 of the 1867 Basic Law on the General Rights of Nationals.

¹¹⁴ **R. POTZ**, *New Religious Movements in Austria*, in *New Religious Movements and the Law in the European Union - Les nouveaux mouvements religieux et le droit dans l'Union européenne*, Giuffrè, Milano, 1999, p. 78; **B. SCHINKELE**, **W. WIESHAIDER**, *Le statut juridique des communautés religieuses en Autriche*, in *Revue de droit canonique*, 2004, LIV/1-2, pp. 135-136; **R. PUZA**, *Legal Position of Churches*, cit., p. 73; **C. HOFHANSEL**, *Recognition Regimes for Religious Minorities*, cit., p. 99.



emergence of new religious movements¹¹⁵ - or, alternatively, to the claims of religious denominations which are not new, but revolve around a notion of “religion” different from the traditional one. The “explanations” (*Erläuternde Bemerkungen*) to the 1998 Law

«for the purpose of differentiation to “Weltanschauung” define “Religion” as “a historically developed concept of convictions explaining man and world with a transcendent reference, including specific rites and symbols giving precepts for acting according to its fundamental doctrines, and which is presentable regarding its contents”»¹¹⁶.

Miner has reported that in the 1980s and 1990s more than twenty religious groups applied to be recognized as religious societies¹¹⁷.

“This increase in applications may have stemmed from the fact that in the late 1980s and early 1990s, more Austrians than ever before were leaving traditional churches and joining nontraditional churches. However, a rising antiforeigner movement soon began to turn the tide of Austrians leaving traditional churches for beliefs that often came from other countries”¹¹⁸.

Thus, the process of recognizing new *Religionsgesellschaften*

“was brought to an end with the emerging of new religious movements. On the one hand, the conception on which the legal recognition is based did not seem suitable to be transferred on some of these groups owing to different structures. On the other hand in several cases the administrative body hesitated to confer public law-status on some of these groups for reasons pertaining to socio-political considerations”¹¹⁹.

The emergence of new religious movements is also the context framing the approval, in 1998, of the Law for the Establishment of a Documentation and Information Office for Matters Concerning Sects¹²⁰. Its

¹¹⁵ A very recent case has involved a request by a member of the “Church of Flying Spaghetti Monster” (CFSM): “[i]n 2011, Austrian citizen Niko Alm requested and received the right to sport a colander on his head on the passport picture he used on his driver’s license. This “hat” is one of the pastafarians’ signs of allegiance, along with the pirate costume. Not satisfied with this relative victory, Alm went further by applying for official recognition of the CFSM as religion by the Austrian government” (L. OBADIA, *When Virtuality Shapes Social Reality. Fake Cults and the Church of the Flying Spaghetti Monster*, in *Online. Heidelberg Journal of Religions on the Internet*, 2015, VIII, p. 125).

¹¹⁶ Quoted by R. POTZ, *New Religious Movements in Austria*, cit., p. 75.

¹¹⁷ C. J. MINER, *Losing My Religion*, cit., p. 613.

¹¹⁸ C. J. MINER, *Losing My Religion*, cit., p. 614.

¹¹⁹ R. POTZ, *Religious Freedom*, cit., p. 4.

¹²⁰ See R. POTZ, *État et Églises en Autriche*, cit., p. 446.



purpose is “to show the endangerings that can be caused by sects or similar movements or the risks somebody runs when establishing contact with such groups”¹²¹. These developments have been sharply criticized *inter alia* by the NGO Foref (Forum for Religious Freedom): “Austria, with a population of 8, 2 Million has no less than 34 Anti-Sect offices operating in the country. Proportionally, this marks an unmatched record in Europe and even on a global scale”¹²².

3 - The Meaning of “Religion” in Austrian Case Law

If we understand “religion” as a worldview, Austrian case law, like the jurisprudence of other European countries, has not given a definition of this term. As stressed by scholars, “religion” is an undetermined legal notion and the State’s competence to define this concept is controversial¹²³. However, like elsewhere in Europe, courts have been called to decide whether a specific legal status guaranteed to “religions” (here to be understood as self-defined religious groups) could be conferred or not. This status “may not be granted to an organization that, for example, represents national socialist ideology or is based on a particular language or ethnic identity”¹²⁴. As stated by the Constitutional Court in the 1950s with regard to the movement “Gotteserkenntnis Ludendorff, characterised by a Nazi and racist ideology, “the practice of an at least primitive and rudimentary cult is a necessary precondition for being protected as manifestation of religion”¹²⁵.

In more recent times, as noted above, this issue has not concerned so much revived Nazi or racist movements, as groups whose self-identification with a religion is contested by Austrian authorities. As regards specifically case law, only rarely may the term “sect” be found. In the judgment of 29 March 1995, the Supreme Court quoted the scholar Gerhard Schimdtchen’s statement that «it is part of the nature of a sect that

¹²¹ B. SHINKELE, *Church Autonomy in Austria*, cit., p. 573.

¹²² FOREF, *Statement and Recommendations to the 2007 Human Dimension Implementation Meeting*, in <http://www.osce.org/odihr/27023?download=true>, 25 September 2007, p. 1. In this sense, see also C. BRÜNNER, T. NEGER, *FECRI and Its Affiliates in Austria. State and Mainline Religions Against Religious Diversity*, in *Religion-Staat-Gesellschaft*, 2012, XIII/2, pp. 307-339; C.J. MINER, *Losing My Religion*, cit., pp. 620-621.

¹²³ B. SCHINKELE, W. WIESHAIDER, *Le statut juridique*, cit., p. 131.

¹²⁴ L.L. GARLICKI, *Perspectives on Freedom of Conscience and Religion in the Jurisprudence of Constitutional Courts*, in *BYU Law review*, vol. 2001, Issue 2, p. 487.

¹²⁵ R. POTZ, *New Religious Movements in Austria*, cit., pp. 75-76.



“the border of the group becomes for the members the border of the reality of their life”»¹²⁶. In other instances, the Supreme Court had to decide whether the use of the term “sect” was defamatory and thus could be deemed as a legal ground to demand compensation¹²⁷.

Beyond terminological issues, Austrian courts have examined more frequently substantive problems, such as the question of the extent to which a new religious movement - or a not-so-new group whose characteristics are negatively connoted in public perception - could be offered legal protection.

Under the 1874 Law concerning the Legal Recognition of Religious Communities, religious groups were recognized by an administrative act, against which they were not entitled to appeal. In a case originated in an application by Scientology¹²⁸, the Constitutional Court has stated that the differentiation between *Religionsgesellschaften* and other religious denominations is constitutionally justified, only if - inter alia - there is an enforceable legal right to recognition. In application of the principles of equality and rule of law, the Ministry of Education must formally issue a negative decision when it denies recognition, it, and the concerned religious group has the right to apply to the court (judgment no. 11931 of 12 December 1988)¹²⁹.

Whereas, in the aftermath of this decision, the Association Law started being applied to religious groups, the Administrative Court only subscribed to the Constitutional Court’s reasoning nine years later (judgment no. 96/10/00049 of 28 April 1997). This decision was issued in the context of the twenty-year long judiciary saga, which concerned the recognition of the Jehovah’s Witnesses, and which was also subject to a ruling by the European Court of Human Rights. By virtue of the

¹²⁶ Quoted by **R. POTZ**, *New Religious Movements in Austria*, cit., p. 76. See also **L. MUSSELLI**, *La libertà religiosa nell’esperienza costituzionale austriaca*, cit., pp. 364-366.

¹²⁷ **R. POTZ**, *New Religious Movements in Austria*, cit., p. 76.

¹²⁸ According to Art. 144 § 1 of the Constitution, “[t]he Constitutional Court pronounces on rulings by an Administrative Court in so far as the appellant alleges an infringement by the ruling of a constitutionally guaranteed right or on the score of an illegal ordinance, an illegal pronouncement on the republication of a law (treaty), an unconstitutional law, or an unlawful treaty”. For a brief outline, see **R. FABER**, *The Austrian Constitutional Court - An Overview*, in *ICL Journal*, 2008, II/1, pp. 49-53.

¹²⁹ **R. PUZA**, *Legal Position of Churches*, cit., p. 73; **B. SHINKELE**, *Church Autonomy in Austria*, cit., p. 572; **R. POTZ**, *New Religious Movements in Austria*, cit., p. 70; **B. SHINKELE**, **W. WIESHAIDER**, *Le statut juridique*, cit., p. 124; **S. SCHIMA**, *Focus: Freedom of Religion in Austria*, in *ICL Journal*, 2009, III/3, p. 202; **C. HOFHANSEL**, *Recognition Regimes for Religious Minorities in Europe*, cit., p. 105.



abovementioned decision, the Administrative Court for the first time

“issued a binding decision (*Erkenntnis*) to the effect that the Minister had a duty to decide on the request for recognition within eight weeks and set out the principles which the Minister had to take into account when taking this decision”¹³⁰.

The Minister’s subsequent negative decision was grounded on reasons indicating well the public perception of what may be legitimately encompassed by the notion of “religion” and what may not.

«The Minister of Education, Elisabeth Gehrler, [...] stated that she “could not be responsible for the possible influence of the Witnesses on the youth through state-supported religious instruction”. The Minister gave three reasons for the rejection: the intolerant attitude of the Jehovah’s Witnesses toward the government, their refusal of blood transfusions (especially for children), and the fact that the church would be led from Brooklyn, New York»¹³¹.

A further conservative reaction was the approval of the 1998 Law Concerning the Legal Status of Registered Religious Communities. As mentioned, this act contains restrictive conditions, among which is the requirement of existence as a registered religious community for at least ten years. When the Jehovah’s Witnesses were found unable to meet this condition, they lodged a complaint with the Constitution Court, which nonetheless dismissed it. According to its case law (judgments nos. 16102/2001 and 16131/2001), the concerned requirement was consistent with the Constitution¹³².

These judgments should be placed in the context of Austrian case law concerning the right to internal autonomy, which is affirmed, as mentioned, by Art. 15 of the 1867 Law on the General Rights of Nationals.

“All Austria’s three highest courts, the Constitutional Court, the Administrative High Court and the Supreme Court were involved [...] in clarifying the interpretation and the development of what constitutes internal affairs and the distinction between these and

¹³⁰ ECtHR, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, application no. 40825/98, judgment of 31 July 1998, para. 25. See also B. OHMS, *Recognizing Jehovah’s Witnesses as a Religious Society: A Case Winding its Way Through the Courts*, in *ICL Journal*, 2009, III/3, pp. 201-217.

¹³¹ C.J. MINER, *Losing My Religion*, cit., p. 615. The reference to an allegedly undue foreign influence is especially interesting, as it bears a resemblance to the argument which led Locke to exclude Catholics from the regime of toleration.

¹³² S. SCHIMA, *Focus: Freedom of Religion in Austria*, cit., p. 202; R. POTZ, *État et Églises en Autriche*, cit., p. 424; B. SCHINKELE, W. WIESHAIDER, *Le statut juridique*, cit., p. 124; C. HOFHANSEL, *Recognition Regimes for Religious Minorities in Europe*, cit., p. 105.



external affairs. In 1974 and 1987 the Supreme Court defined internal affairs as those which affect the inner core of ecclesiastical activity, and in which, in the absence of autonomy, religious societies would be restricted in the promulgation of the salvific truths which they teach and in the practical exercise of their faith¹³³.

Despite this acknowledgment, which correctly identifies autonomy as something that is at the very core of the contemporary notion of religious freedom, only *Religionsgesellschaften* are recognized the right to arrange and administer their internal affairs autonomously¹³⁴, as confirmed by the Constitutional Court's case law (see for example the abovementioned judgment no. 16102/2001). It should be agreed with Potz that this position est à critiquer dans la mesure où ce droit est à concevoir comme une conséquence du droit fondamental à la liberté de religion et est ainsi en général à garantir indépendamment du statut juridique en cause¹³⁵.

In fact, this opinion is consistent with the position of the European Court of Human Rights, which

“reiterated that the right of a religious community to an autonomous existence was indispensable for pluralism in a democratic society and thus it is at the very heart of the protection which Article 9 affords. Even the creation of auxiliary associations with legal personality could not compensate for the authorities' prolonged failure to grant legal personality”¹³⁶.

In the aftermath of the Strasbourg judges' ruling, the clause “as a religious association for at least twenty years, of which at least ten years”, contained in the 1998 Law, was declared illegitimate by the Constitutional Court (judgments nos. G 58/10 and G 59/10). This legal provision was thus repealed with effect from 30 September 2011¹³⁷. By contrast, when

¹³³ R. PUZA, *Legal Position of Churches*, cit., p. 70. See also S. SCHIMA, *Focus: Freedom of Religion in Austria*, cit., pp. 203-204. A detailed exam of this issue goes beyond the purposes of this paper. Suffice it to mention an example. In the judgment no. 2944 of 19 December 1955 the Constitutional Court declared the illegitimacy of the legal provision punishing the celebration of a religious marriage before the civil marriage. The celebration of a marriage by a religious society was regarded as a part of its internal affairs, because this act had no consequences and produced no effects in the State legal system. See R. POTZ, *Religious Freedom*, cit., p. 11, fn. 27; L. MUSSELLI, *La libertà religiosa nell'esperienza costituzionale austriaca*, cit., pp. 367-368.

¹³⁴ R. PUZA, *Legal Position of Churches*, cit., p. 63.

¹³⁵ R. POTZ, *État et Églises en Autriche*, cit., p. 429.

¹³⁶ F. TULKENS, *The European Convention on Human Rights and Church-State Relations. Pluralism vs. Pluralism*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), February 2011, p. 9.

¹³⁷ T. MANTANIKA, *Legal recognition of religious communities*, in *ICL Journal*, 2010, IV /4,



examining a complaint lodged by the Seventh-Day Adventist Church, which only has 5,770 members in Austria, concerning the requirement of a minimum number of 2% of the Austrian population, the Constitutional Court had regarded this condition as legitimate and consistent with Art. 9 ECHR (judgment no. B 516/09 of 16 December 2009). This decision was not adopted unanimously, though, and dissenting judge Steiner referred to the European Court of Human Rights' judgment concerning the Jehovah's Witnesses¹³⁸.

Austrian case law has investigated the meaning of "religion" not only as regards the issue of recognition, but also with respect to the problem of representation: can a religion be represented by more than one religious denomination? This question has been addressed in a set of judgements concerning Judaism and Islam.

The *Israelitische Kultusgemeinde Wien* (IKG) is the largest Jewish community, it accounts for 98% of the Austrian Jewish population, and it is spread in five out of nine provinces of the country. Its representatives constitute the leadership of the IRG (the *Israelitische Religionsgesellschaft*, that is, the Jewish society recognized by the Jewish Act of 1890). In the 1950s some Jewish groups started complaining about the IKG and demanding recognition as a separate community. In the 1970s a group called *Agudas Israel* applied to the Constitutional Court to have the provision concerning the compulsory *Einheitsgemeinde* repealed. The *Einheitsgemeinde* (unity community) refers to the centralization, at the local level, of the community structure, which encompasses all streams of Judaism. In the judgment no. G 31/79 of 2 July 1981, the Constitutional Court ruled that the *Einheitsgemeinde*-related provisions were unconstitutional, insofar as the principle of equality was breached. According to the judges, any person self-defining as a Jew according to his or her own conception had to be regarded as a Jew (it is interesting to note that this interpretation is inconsistent with the *halakhic* definition); any group of Jews had the right to form a Jewish community (legally recognized), besides the one already existing on a given territory. The importance of this decision lies in the circumstance that the Court was called to intervene in Jewish internal affairs. However, in doing so, Austrian case law affirmed for the first time the prevalence of the individual dimension of the right to religious freedom over the collective sphere¹³⁹.

The Islam Act was enacted in 1912, but only in 1979 was a religious

p. 707.

¹³⁸ B. MOSER, *Freedom of religion and legal recognition as a church or religious community: VfGH 16.12.2009, B 516/09*, in *ICL Journal*, 2010, IV/2, pp. 232-234.

¹³⁹ S. COHEN-WEISZ, *Joining the Jewish Fold: The Changing Conversion Policies in Austria*



society recognized: the Islamic Religious Authority of Austria (*Islamische Glaubensgemeinschaft in Österreich*, henceforth IGGiÖ)¹⁴⁰. In the judgment no. 11574/1987, the Constitutional Court interpreted the Islam Act of 1912, which formerly applied only to the adherents of the Hanafi school, as applying to the other Sunni schools as well as to other streams of Islam, like Shi'ism. According to the judges, this limitation breached Art. 15 of the 1867 Law¹⁴¹. However, this decision did not solve the problems of representation within Islam in Austria. Alevis, whom the IGGiÖ refused to consider as Muslims, tried for years to obtain a recognition but, according to the competent Ministry, only one Islamic community could be recognised. In the judgment no. B 1214/09-35 of 1 December 2010 the Constitutional Court declared the Ministry's decision illegitimate. In the same month, the Islamic Alevi Congregation (*Islamische Alevitische Glaubensgemeinschaft*, henceforth IAGÖ), one the Alevi groups seeking recognition, succeeded in being registered as a religious community (the new legal status introduced by the 1998 Law) and, in 2013, it was upgraded to the status of *Religionsgesellschaft*¹⁴². The 2015 amendment to the Islam Law has inter alia strengthened the status of both the IGGiÖ and the IAGÖ¹⁴³, but problems of representation have not been solved yet. A dissenting Alevi group

“has contested IAGÖ's claim to represent all Alevis. Considering that

and Germany since 1945, in *Becoming Jewish. New Jews and Emerging Jewish Communities in a Globalized World*, ed. by T. Parfitt, N. Fisher, Cambridge Scholars Publishing, Newcastle upon Tyne, 2016, p. 139-143; **R. POTZ**, *Religious Freedom*, cit., p. 3.

¹⁴⁰ **C. SCHEU**, *The emergence of new minorities in Austria*, cit., p. 55.

¹⁴¹ **P. OBERNDORFER, B. WAGNER**, *Legislative Omission as a Problem of Constitutional Review. Report of the Austrian Constitutional Court XIV. Congress of the Conference of European Constitutional Courts Vilnius, Lithuania, June 2-7, 2008*, in http://www.confconstco.org/reports/rep-xiv/report_Austria_en.pdf, p. 10; **L. MUSSELLI**, *Edilizia religiosa, Islam e neogiurisdizionalismo in Europa. Alcune note sul nuovo «Islamgesetz» austriaco e sul divieto di edificare minareti in Svizzera*, in *Quaderni di diritto e politica ecclesiastica*, 2015/2, p. 451; **L.J. ABID**, *Muslims in Austria: Integration through Participation in Austrian Society*, in *Journal of Muslim Minority Affairs*, 2006, XXVI/2, p. 268; **A. SKOWRON-NALBORCZYK**, *A Century of the Official Legal Status of Islam in Austria: Between the Law on Islam of 1912 and the Law on Islam of 2015*, in *Muslim Minorities-State Relations. Violence, Integration and Policy*, ed. by R. Mason, Palgrave Macmillan, New York, 2016, p. 66.

¹⁴² **A. ÇAKIR**, *The Struggle of the Alevi Religious Community for Recognition: Formatting of Alevism into Liberal Islamic Alevism*, in *Migration und Integration - wissenschaftliche Perspektiven aus Österreich*, Vienna University Press, Vienna, 2016, p. 230; **T. SCHMIDINGER**, *Austria*, in *Yearbook of Muslims in Europe*, ed. by J.S. Nielsen, Brill, Leiden, 2011, vol. III, p. 34; **F. HAFEZ**, *Institutionalised Austrian Islam: One institution representing the many*, in *Debating Islam. Negotiating Religion, Europe, and the Self*, ed. by S.-M. Behloul et al., Transcript Verlag, Bielefeld, 2012, p. 236; **A. SKOWRON-NALBORCZYK**, *A Century of the Official Legal Status of Islam in Austria*, cit., p. 68.

¹⁴³ **C. SCHEU**, *The emergence of new minorities in Austria*, cit., p. 57.



Alevism as a distinct religious community that stands outside Islam, the Federation of Alevi Communities in Austria (*Föderation der Aleviten Gemeinden in Österreich*, AABF) also applied for registration. Another such application is expected from the Islamic Shi'i Religious Community in Austria¹⁴⁴.

The last, but not least Muslim organization unhappy with the current legal regulation is the *Österreich Türkisch-Islamische Union* (Austrian Turkish Islamic Union, henceforth ATIB), an umbrella association financed and staffed by Turkey's Presidency of Religious Affairs, and one of the IGGiÖ's largest constituent members. The 2015 amendment to the Islam Law prohibits the funding of religious services by entities outside Austria - a limitation that does not apply to any other religion in Austria. In June 2015, ATIB applied to the Constitutional Court. Legal experts doubt that this clause may hold up to its scrutiny - or that by the European Court of Human Rights - because it breaches both the principle of equality and religious denominations' right to internal autonomy¹⁴⁵. It will be interesting to see how the Constitutional Court will assess the lawmakers' notion of "religion" and attempt to establish an Austrian Islam.

4 - Conclusions

The Republic of Austria has inherited and - despite changes and adjustments made in the course of time - basically confirmed the ecclesiastical law system inherited from Austria-Hungary. This system, defined by Austrian scholars as a "denominationally neutral system in ecclesiastical matters"¹⁴⁶, aimed to overcome the previous situation, characterized by a confessionist regime privileging the Catholic Church. This aim - like in other European countries - was not attained through the repeal of the privileges and benefits formerly guaranteed to the Catholic Church, but through their extension to denominational groups, whose worldview inter alia could be encompassed in the notion of "religion" commonly held by Austrian authorities and the public at large. As seen, this conformity was attested by the recognition of a specific legal status.

The increasing religious diversity of Austrian society has started challenging the pattern of *Religionsgesellschaften* from both "outside" and

¹⁴⁴ K. ÖKTEM, *Austria*, in *Yearbook of Muslims in Europe*, ed. by J. S. Nielsen, Brill, Leiden, 2015, vol. VII, p. 47.

¹⁴⁵ K. ÖKTEM, *Austria*, in *Yearbook of Muslims in Europe*, ed. by J. S. Nielsen, Brill, Leiden, 2016, vol. VIII, p. 52.

¹⁴⁶ See inter alia R. POTZ, *Religious Freedom*, cit., p. 1.



“within”. From “outside”, new religious movements or not-so-new movements whose religion is negatively connoted in public perception have tried to accede to the privileged legal status offered to religious denominations. From “within” dissenting religious groups have complained about the traditional institutional architecture of religious societies. In this process, Austrian courts have played and are playing a very important role, which has an impact on the definition of the meaning of “religion”. Despite the variety of situations examined in Austrian case law, it seems possible to conclude that they all revolve around the same essential issue: that is, the striking of a fair balance between the individual and the collective dimensions of religious freedom, in order to prevent the infringement of an individual’s fundamental right based only on the legal status of the religious group he or she belongs to.

Abstract

This paper aims to examine recent Austrian case law concerning the meaning of “religion” in a two-fold perspective. In the first place, it focuses upon judgments determining the legitimacy (or the illegitimacy) of specific legal rules and administrative practices, grounded on a differentiation between religious groups (for example, between “religious denominations” on the one side, and “sects” or “cults” on the other side). In the second place, it examines decisions concerning the relationship between a religious worldview and the religious groups established on the Austrian territory and claiming to represent that “religion”.



Germana Carobene

(Researcher in Law and Religion, University "Federico II" of Naples,
School of Political Science)

The Meaning of 'Religion' in Belgian Case Law

SUMMARY: 1. Introductory considerations. Religion, Sect, New Religious Movement - 2. Legislative Evolution in Belgium - 3. Jurisprudential Developments - 4. The "Scientology Case" and Comparison with the French Process.

1 - Introductory considerations. Religion, Sect, New Religious Movement

The definition of the concept of religion is fundamental for a correct translation into legal terms and is a topic that focuses the attention of public opinion, not related to the novelty of the phenomenon itself but to the different social perceptions of the dangers of its forms of deviance. Recently this issue, as is well known, has involved many countries and international organizations¹⁴⁷. Applying criminal law rules for actions that, regardless of the concept of religion, whether real or presumed, are structured as a criminal offense, it's important to underline that the lack of a clear legal definition (including church, sect or new religious movement), has now become a social and political challenge. Nowadays, the phenomenon of Islamic terrorism has shifted the attention from fear of new movements towards types of fanaticism so that nowadays, highly secularized societies are searching for stabilization and inclusion of religious phenomena in order to avoid dangerous forms of implosion within civil society¹⁴⁸.

¹⁴⁷ Cf. **M. INTROVIGNE**, *Rapporti parlamentari e governativi sulle "sette" in Europa occidentale, 1996-1999*, on *Quad. dir. pol. eccl.*, 1999, 2, pp. 397-421. Cf. *Résolution du Parlement Européen sur la situation des droits fondamentaux dans l'Union européenne*, A5- 0223, 2001 (in www.unadfi.org/actio_etat) reads, at point n. 49, the recommendation to the Member States to focus on the physical and psychological aspects of the person, in particular by means of careful information and awareness-raising activities, but above all through legal, fiscal and criminal provisions capable of preventing the illegal conduct of sects. Cf. *Religion and Secularism in the European Union. State of Affairs and Current Debates*, J. Neils, C. Sägerser, J.P. Schreiber (ed.), Peter Lang, Oxford, 2017.

¹⁴⁸ In Belgium, in 2016, an education course on philosophy and citizenship was introduced in the schools of the French community, a substitute for non-confessional religion or morals.



Religious denominations are not a simple filter between the individual and the State, but stand out as social entities constitutionally recognized, and affecting the conduct of the individual. The problem with regard to their qualification is therefore focused on the possibility of acquiring legitimacy in the public sphere. The heterogeneity of the definition of the phenomenology of religion, as it is found in sociological studies, is currently lacking in the legal domain. At the regulatory level, in fact, the conflict centers on the 'dichotomy' between religions and sects where religions are well-structured and socially accepted and accepted, though differentiated from one country to another, whereas sects, whilst varying, are mostly incorporated but have a clear negative connotation.

There has never been a universal legal definition of religion in Belgian law, and experience across the legal world over many years has shown the pitfalls of attempting to attach a narrowly circumscribed meaning to the word. There are several reasons for this - the different contexts in which the issue may arise, the wide variety of world religions, the development of new religions and religious practices, and ongoing developments in the common understanding of the concept of religion owing to cultural changes in society. The assessment must be based on case observation but there is no doubt that the most recent jurisprudential decisions provide an expansion of the concept of religion. Unless there is some compelling reason to support the contrary, the concept of religion cannot be confined to religions that recognize a supreme divinity. This would be a form of religious discrimination unacceptable in today's society, leading to exclusion of Eastern beliefs, now commonly included as 'religions': for example Buddhism as well as Jainism, Taoism, Theosophy and part of Hinduism.

The qualification of a religious movement is to be assessed according to nationally established criteria, in the light of the constitutional principle of religious freedom which is subject to well-defined limits: these being the fundamental limitations that constitute the essential conditions for the achievement of a peaceful coexistence of individuals in the society, the limits that are imposed by civilization itself and relevant essential values and constraints. There is clearly a significant importance given to the principle of the effectiveness of self-qualification (a necessary, but not sufficient condition; for a religious group to be called a religion is to auto-qualify itself as a 'religion'). The impossibility of defining in a rigid and unchangeable manner the concept of religious phenomenon, linked to the evolution of forms of religiosity in different space-time coordinates, is once again reiterated today. All religions were created by a slow evolutionary process that progressively delineated their structure, dogmas and rituals, and, with reference to new religious movements, the fact that its statutes



have explicitly assumed these characteristics only in recent decades, cannot act as a reason for denying their religious nature. A sect is definable, as a group of subjects governed by its own internal code, the protection of which is therefore linked to what generally the domestic laws and international conventions grant to associative phenomena not often recognizing the *quid pluris* that characterizes them based on the bond to the religious phenomenon¹⁴⁹.

The State has very limited competences in defining the terms religion, beliefs and sects as a neutral and impartial organizer¹⁵⁰; public authorities must use objective criteria and avoid any analysis generally focused on formal aspects¹⁵¹. European case law has pointed out that it is not up to them to decide in an abstract manner whether a set of beliefs, and the practices associated with it, can or should not be considered a religion¹⁵². If in the past there was frequent use of the expression new religious movements or sects, now some legislations seem to place the legal emphasis only on the dangers of the phenomenon of “sects abuses”.

In a democratic State the public authority must be neutral and religious freedom must also include expressing itself through the participation to a community¹⁵³. The autonomy of religious movements is

¹⁴⁹ In the European Convention, reference is made to Art.11 which sanctions the "right to freedom of peaceful assembly and freedom of association".

¹⁵⁰ Cf. ECHR, *Refah Partis and others c. Turquie*, February 13th 2003, par. 9 (on <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-697689-705588&filename=003-697689-705588.pdf>).

¹⁵¹ Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe and European Commission for Democracy through Law (Venice Commission), *Joint Guidelines on the Legal Personality of Religious or Belief Communities*, 2014, on [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)023-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)023-e), n. 31.

¹⁵² In this case, the problem was linked to the recognition of Scientology as a religion: ECHR, *Kimlya and others v. Russia*, 1st October 2009, (on <https://www.legal-tools.org/doc/6ae309/pdf/>), par. 32 but also *Church of Scientology v. Sweden*, May 5th 1979 (on www.legislationline.org/documents/id/20236) in which the request of the Church of Scientology was declared inadmissible; ECHR, *Church of Scientology and others v. Sweden*, July 14th 1980 in which the Commission had recognized the applicability of art. 9 Conv. to the Church of Scientology (on www.legislationline.org/documents/id/20235); ECHR, *Scientology Moscow v. Russia*, April 5th 2007 (on <http://www.icnl.org/research/library/files/Russia/Church%20of%20Scientology%20Moscow%20v.%20Russia.pdf>) in which the Court declared the violation of artt. 9 e 11 Conv.: “the Court observes that the religious nature of the applicant was not disputed at the national level and it had been officially recognised as a religious organisation since 1994” (par. 64).

¹⁵³ Cf. *Le droit belge face à la diversité culturelle. Quel mode de gestion de la pluralité?*, J. RINGELHEIM (dir.), Bruylant, Bruxelles, 2010. The Legislative Section of State Conseil has given two warnings about laws seeking to oppose mental destabilization and abuse of the



therefore functional to pluralism in a democratic society and has a direct interest not only for the organization of the groups but also for the effective enjoyment of the religious freedom of its members.

It is known that secularism is a sort of social pact between a State and a citizen, according to which the citizen is free in his religious choices. This principle is based on two pillars: the protection of individual freedom and the separation of powers. In a decision of the Belgian Council of State it was emphasized that the principle of neutrality, although not included in the Constitutional Charter, is closely linked to the interdiction of discrimination and the principle of equality¹⁵⁴. The ECHR emphasized that art. 9 European Convention must include the protection of living according to one's wishes as a religious community, otherwise all other aspects of individual freedom become weak¹⁵⁵.

2 - Legislative Evolution in Belgium

In Belgium, State-Church relations are related to the 1831 Constitution, proclaimed after independence, and are the result of a compromise between Catholics and Liberals, whose focus is represented by three fundamental articles: 19-20 and 21¹⁵⁶. Part of the doctrine defines a system of mutual independence or neutrality, even in the presence of a *favor religionis* for the benefit of certain confessions, which have received official recognition by law¹⁵⁷.

state of weakness. It points out that it is not necessary to enumerate by law all the means of persuasion forbidden, but a detailed statement is necessary: Avis 46.070/2; 46.072/2, March 16th 2009; State Conseil, 46.641/2, June 2nd 2009.

¹⁵⁴ Avis 44.521/AG, May, 20th 2008, on a bill that wanted to apply the separation of non-confessional religious and non-religious philosophical State-communities, Doc. Parl. Sénat, 2007-2008, n. 4-351/2.

¹⁵⁵ ECHR, *Hasan and Choush v. Bulgaria*, 26 October 2000 (on http://host.uniroma3.it/progetti/cedir/cedir/Giur_doc/Corte_Stras/Hasan_Bulgaria2001.pdf), par.62.

¹⁵⁶ Article 11 of the Constitution states that: the enjoyment of the rights and freedoms granted to the Belgian population must be guaranteed without discrimination. To this end, the law and the legislation guarantee the rights and freedoms of ideological and philosophical minorities.

¹⁵⁷ Catholicism, Protestantism, Judaism, Anglicanism, Islam and Orthodox Church. The Belgian Buddhist union since 2008 received a grant and called for recognition of Buddhism as a non-confessional philosophical organization as well as the Hindou Forum of Belgium and the Federation of the Union of Belgian Alevias. Cf. **P. ERRERA**, *Traité de droit public belge*, Giard et Brière, Paris, 1918, specially p. 87; **Ph. BRAUD**, *La notion de liberté publique en droit français*, LGDJ, Paris, 1968, p. 383; **H. WAGNON**, *La condition juridique de l'Eglise Catholique en Belgique*, on *Annales de droit et des sciences politiques*, 1964, speaks instead of



The constitution defines a legal framework which, if not constitutionally secular, has adopted this principle as the basis of its legislative structure. We can not really talk about a separatist system because, for example, art. 181 Cost. Provides for pension plans of ministers of worship to be paid by the State¹⁵⁸. In the 1993 Constitution, secularism was placed equally with religions, for State funding, through the engagement that also provides financial aid to delegates of legally recognized organizations that offer moral assistance according to a philosophical beliefs that are non - confessional. It is therefore considered as one of the ideological components of Belgian society, qualified at the same level as religious communities, as an a-religious conception of the world, a particular sort of philosophical choice¹⁵⁹. At present, therefore, the term 'religion', at least in Belgian law, also designates a philosophical and ideological movement, very far from the semantic field of origin of the concept.

The Constitution does not define the criteria for recognition of a religion. However, according to a declaration made by the Minister of Justice, we might say that it includes (a) it must have a large number of members (several tens of thousands); b) be structured; c) be established in the country for a long period of time; d) to present a certain social interest; e) not be involved in any way in activities that may threaten public order¹⁶⁰.

protected freedom (p. 70).

¹⁵⁸ An analysis of the financial system shows that the costs of confessions are almost entirely borne by the state both through staff remuneration and through support measures in deficit hypotheses over numerous indirect benefits. Cf. **R. TORFS**, *État et Eglises en Belgique*, (on https://www.uni-trier.de/fileadmin/fb5/inst/IEVR/Arbeitsmaterialien/Staatskirchen_recht/Staat_und_Kirche_in_der_EU/01-Belgique.pdf). Certain agreements have recognized recognition, alongside confessions, of organized secularism, through the Central Council of the Philosophical Communities of Belgium or the Central Left Council (CCL). The CAL, the Action Liaison Center and the UVV, Unie Vrijzinnige, were, in fact, the Conseil Central Laique, CCL, in 1972 with the aim of accessing public funding under art. 181 Costs. This objective was achieved in 2002 with the adoption of the relevant law at Conseil Central des Communautés philosophiques non confessionnelles de Belgique, in *Moniteur Belge*, October 22nd 2002. Cf. *Le financement public des religions et de la laïcité en Belgique*, **C. SÄGESEER, J.P. SCREIBER** (dir.), Bruylant, Bruxelles, 2012.

¹⁵⁹ In two decisions, the Court of Cassation referred to the principle of autonomy, outlined in art. 21 Cost., ruling out the decisions of the Appeals Courts that the cults had to respect not only their own rules but also the right to defense and other principles, ex art. 6 of the European Convention, thus broadening their margin of autonomy: Court of Cassation, October 20th 1994, *Arresten van het Hof Van Cassatie*, 1994, 861, *Rechtskundig Weekblad*, 1994-1995, p. 1082, a *arresten van hat Hof van cassatie*, 1995, p. 57; Court of Cassation, 3 June 1999, *Chambres réunies*, *Chroniques de droit public*, 2000, p. 214.

¹⁶⁰ Cf. *Questions et Réponses*, Chambre, 1990-2000, 4 September 2000, 5120, Question n. 44, *Borginon*, *Questions et Réponses*, Chambre, 1996-1997, 4th July 1997, 12970, Question



In order to limit the discretionary nature of this recognition, a cooperation agreement was signed in 2004 to establish these criteria¹⁶¹.

With reference to the concept of "religion", a decisive change in this prospective has occurred in the Western countries (in France and Belgium in particular) in the 1970s, when new religious movements began to attract many young people of the middle class, university students, with a rather intense commitment, often in a communitarian framework. At the same time emerged the "defence associations" of the victims of such movements and the first reports of study by political powers.

Anti-Belief militancy in Belgium started in the 1980s; among the first dedicated papers there is a Parliamentary question of 1984, which did not follow either in public opinion or in the legal debate¹⁶².

The centralization of the 'sect' problem in Western States was scheduled in the political agenda, moved on by public opinion, particularly dramatized by sensational media articles¹⁶³, but has also been linked to

n. 631, Borginon. Cf. **L.L. CHRISTIANS**, *Une mise en perspective du concept de culte reconnu en droit belge*, on *Islam en Belgique*, Luc Pire, Bruxelles, 1998, pp 23-39. Cf. **E. SHAPIRO**, *Destructive cultism*, on *Am. Fam. Phys.*, 1977, 15 which lists: "1. Demands complete obedience to and subservience to one individual, who purports to be God, the Messiah or some form of, or a messenger of, the deity. 2. requires separation from society. Association with non members is discouraged, except to gain money or to proselytize. 3. Discourages any form of self-development. Education is scorned and the self image is totally destroyed. 4. Teaches hatred of parents, organized religion and, sometimes, the U.S. government. 5. Does not have concern for the material body; feels only the soul is important. 6. Takes all material possessions (past, present and future) for its own use. Members are not permitted to own anything in their own names. 7. Makes it almost impossible for a member to leave, either through physical restraints or psychologic fears. 8. Maintains the member in a "brainwashed" state through destructive behavior modification techniques" (p. 83). Cf. also **M.C. DEL RE**, *Plagio criminoso e lecita persuasione nei culti emergenti*, on *Studi Nuovolone*, vol. II, Giuffrè, Milano, 1991, p. 69 ss.; **G. GUIZZARDI**, *I nuovi movimenti religiosi. Prospettive sociologiche*, on *Diritti dell'uomo e libertà dei gruppi religiosi. Problemi giuridici dei nuovi movimenti religiosi*, S. Ferrari (ed.), Cedam, Padova, 1989.

¹⁶¹ One further is 2nd of July 2008, on *Moniteur Belge*, 23 July 2008. The 2002 law not only recognized an organization but also defined the concrete ways of organizing philosophical communities, how the composition of the board of directors etc.: **C. SAGESSER, V. De COOREBYTER**, *Cultes et laïcité en Belgique*, Cahiers du CRISP, Brussel, 2000, p. 7.

¹⁶² On that occasion, the Minister of Justice, responding to a Parliamentary interpellation on the nature and activities of the sects ended, underlined the lack of special intervention by the authorities since they had not been informed of criminal behavior or psychological maltreatment: *Bull. Q.R.Ch.* Sess.ord. 1983-1984, question 168 all. April 20th 1983, 3024 (Vanvelthoven).

¹⁶³ Think of the massive suicide of followers of Reverend J. Jones in november 1978 in Jonestown, Guyana, involving more than 900 people; or, in cases such as the 1993 massacre of the Davidians Branch in Waco, Texas, where 80 adepts died, those of the following year when, in Switzerland and Canada, 53 adepts of the Solar Time Order died, in 1997, in San



more careful social analyses, relating to fear for the safety of individuals, especially with regards to the weaker section of the population, *in primis* of minors¹⁶⁴. Over the years, the perception of concern for this phenomenon seems to have led, in some cases, to repressive actions, from a legislative point of view, in the midst of a primary criminalization, based on the increase in prosecution-related incriminations, and one of a secondary type, with simple application of the criminal process¹⁶⁵.

In France, the Gest and Guyard Commission produced a document in 1995 which provided some criteria for classifying a group as a sect (including: mental destabilization, exorbitant financial demands, constraint for its members to break the bonds with their previous life, physical damage, recruitment of children, anti-social discourses, public order disorders and legal disputes, improper appropriation, infiltration into public institutions). This text led to the establishment of an Inter-ministerial Mission (MIVILUDES), under the authority of the Prime Minister (with the task of observing and analysing the sectarian phenomenon and related dangers¹⁶⁶), the creation an observatory and the production of various

Diego, California, where 50 people were adhering to Heaven's Gate worship: cf. **M.INTROVIGNE**, *Idee che uccidono. Jonestown, Waco e il Tempo solare*, MIMEP-Docete, Pessano (Milano), 1995; **E. POZZI**, *Il carisma malato. Il People's Temple e il suicidio collettivo di Jonestown*, Liguori, Napoli, 1992.

¹⁶⁴ Cf. **G. CAROBENE**, *Libertà individuale ed appartenenza comunitaria. Rilievi penalistici del brainwashing*, on *Comunità e Soggettività*, M. Tedeschi (ed.), Rubbettino editore, Soveria Mannelli (CZ), 2006, pp. 527-538.

¹⁶⁵ Between 1991 and 2005, 179 dossiers were labeled under the term 'sect' and not on the basis of criminal offenses committed. Of these, 93% were sufficed either for lack of offense or for lack of offense: cfr. **B. MINE**, *L'urgence d'un problème: l'objet politique "secte" en Belgique*, on *Criminologie*, 41, 2, 200, pp. 157-183, and **ID.**, *La notion de "dérive sectaire": quelle(s) implication(s) pour la régulation du "phénomène sectaire"*, on *Varia*, 6, 2009, pp. 1-19 (and <https://champpenal.revues.org/7535>).

¹⁶⁶ Cf. <http://www.derives-sectes.gouv.fr>. There is a definition of sectarian drift on the same site: "Il s'agit d'un dévoiement de la liberté de pensée, d'opinion ou de religion qui porte atteinte à l'ordre public, aux lois ou aux règlements, aux droits fondamentaux, à la sécurité ou à l'intégrité des personnes. Elle se caractérise par la mise en œuvre, par un groupe organisé ou par un individu isolé, quelle que soit sa nature ou son activité, de pressions ou de techniques ayant pour but de créer, de maintenir ou d'exploiter chez une personne un état de sujétion psychologique ou physique, la privant d'une partie de son libre arbitre, avec des conséquences dommageables pour cette personne, son entourage ou pour la société". Cf. **S.J. PALMER**, *The New Heretics of France: Minority Religions, la République, and the Government-Sponsored "War on Sects"*, Oxford University Press, Oxford/New York, 2011; about France cf. also **D. HERVIEU-LEGER**, *La Religion en miettes ou la question des sectes*, Calmann-Lévy, Paris, 2001 (first capitole). **L.L. CHRISTIANS**, *Public Policies and Cults in European Case Law: Between Security, Non-discrimination and Public Information*, on *State Responses to Minority Religions*, **D.M. KIRKHAM** (dir.), Ashgate, Farnham/Burlington, 2013, pp. 101-114; *Legal Cases, New Religious Movements, and Minority Faiths*, **J.T.**



reports which led to the adoption of the 2001 law concerning criminal repression of the new offence of "abuse of ignorance and weakness"¹⁶⁷.

The articulation of the sectarian struggle in Belgium has emerged in various phases, starting in the nineties, following the guidelines of the French political and legislative systems. In 1993, State Security was commissioned to undertake a study on the sectarian phenomenon in the country¹⁶⁸, but it was only five years later that this task was legally

RICHARDSON, F. BELLANGER (dir.), Ashgate, Farnham/Burlington, 2014; *Droit des Religions*, **F. MESSNER** (dir.), CNRS Éditions, Paris, 2010.

¹⁶⁷ Law 2001-504, June 12th 2001 (http://www.unadfi.org/action_etat/textes_pouvoirs), *Loi tendant à renforcer la prévention et la répression des mouvements sectaires portant atteinte aux droits de l'homme et aux libertés fondamentales*. Such laws were subsequently adopted in 2011 in Belgium and in 2013 in Luxembourg. Other governments have tackled the issue of "sectarian" groups in different ways: no official reaction, as in the case of the United Kingdom and Denmark; in some cases limited government response, as in Austria (publication of a brochure by the Ministry of Education). There have been governmental responses through parliamentary committees, reports and studies in many countries, such as Canada, Belgium, France, Germany, the Netherlands, Switzerland and the United States of America. For Austria: Bundesministerium für Umwelt, Jugend und Familie, *Sekten: Wissen schützt*, Wien (1999). For Canada: D. Hill, *Study of Mind Development Groups, Sects and Cults in Ontario, A Report to the Ontario Government*, Toronto, 1980; Canadian Security Intelligence Service, *Doomsday Religious Movements*, 1999, www.csis-scrs.gc.ca/en/publications/perspectives/200003.asp. For Belgio: Chambre des Représentants de Belgique, *Enquête parlementaire visant à élaborer une politique en vue de lutter contre les pratiques illégales des sectes et le danger qu'elles représentent pour la société et pour les personnes, particulièrement les mineurs d'âge* (1996-1997), www.lachambre.be/FLWB/pdf/49/49/0313/49K0313007.pdf. For France: **A. VIVIEN**, *Les Sectes en France: expression de la liberté morale ou facteur de manipulations?*, Documentation Française, 1985. For Germany: *Endbericht der Enquete-Kommission, Sogenannte Sekten und Psychogruppen, Neue religiöse und ideologische Gemeinschaften und Psychogruppen in der Bundesrepublik* (1998), www.bundestag.de/ftp/pdf_arch/13_10950.pdf. For Netherlands: **T.A.M. WITTEVEEN**, *Overheid en nieuwe religieuze bewegingen Tweede Kamer, vergaderjaar*, report by the Dutch Government (1983-1984). For English Summary: www.math.mcgill.ca/triples/infocult/DutchReport.pdf. For Switzerland: "Sectes" ou mouvements endoctrinants en Suisse. For USA: F.B.I., *Project Mediggo*, 1999, permanent.access.gpo.gov/lps3578/www.fbi.gov/library/megiddo/megiddo.pdf.

¹⁶⁸ Doc. Parl. Ch. Sess.ord. 1996-1997, 313/8: 208. The Security Officer in a hearing before the Commission noted the difficulties of his administration to intervene in the absence of a clear definition of the concept of "sect": cf. **B. MINE**, *L'émergence d'un problème*, cit., The idea was to create a Commission commissioned to develop a political strategy to combat the seven and the dangers they represent, especially for minors: Doc. Parl. Ch., Sess. ord., 1992-1993, 920/1: 1. specially in response to Council of Europe Recommendation 1178 of 1992. The Commission defines a sect as "un groupement contractuel minoritaire de volontaires convertis partageant une même croyance élitiste, soumis à un chef charismatique ou à une administration hiérarchisée, centralisée et autoritaire, dont les visées peuvent être religieuses, politiques, économiques ou autres, mais dont le caractère essentiel avoué est une conception pure du divin à laquelle il faut se soumettre pour assurer son salut".



formalized¹⁶⁹. From the initial proposition emerged a concern about the danger of sectarian movements. At the same time, in addition to the Commission for Inquiry, CIAOSN (Center for Harmonized Sects) was established by a 1998 law, amended in 2004, and then structured as an independent organization, whose members are appointed by the House of Representatives¹⁷⁰.

In 1997, the Belgian Parliament published a 670-page report drawn up by the Parliamentary Commission on Cults, which stigmatized around 189 religious groups with arbitrary charges, labelling them as "dangerous sects", despite the absence of any serious investigation, counter-examination or replication possibilities. This document concluded that the term "sect" in its current use had to be considered depreciatory but that neither the sect nor the "new religious movements" could be considered themselves harmful or pose a danger. On the other side the Commission had used the word "harmful sectarian organization" to define a group that has a psychological or spiritual vocation and which practices harmful activities for individuals or society or that violates human dignity¹⁷¹. This document has been adopted by the Belgian government to justify the adoption of multiple repressive measures against those religions defined as "sects", those actions have caused discrimination and marginalization of members of these religious communities¹⁷².

In 2011, a new law supplemented criminal law by introducing the criminalization of "abuse of weakness" in Belgium, as in France ten years before¹⁷³. The political position assumed by both States as "sectarian

¹⁶⁹ Cf. Law organique November 30th 1998 relative aux services de reiseignement et de securité, on *Moniteur Belge*, December 18th 1998, artt. 7-8.

¹⁷⁰ Cf. <http://www.ciaosn.be/lecentre.htm>.

¹⁷¹ Chambre des Représentants de Belgique (in www.lachambre.be/FLWB/pdf/49/0313/49K0313008.pdf).

¹⁷² Report 2004, on religious freedom in the world (in http://host.uniroma3.it/progetti/cedir/Eventi/acs_rapporto_liberta_religiosa_2004.pdf).

¹⁷³ In addition to providing such abuse as an aggravating circumstance for a number of infringements, the law has included an article in the penal code: art. 442 quater: "Quiconque aura, alors qu'il connaissait la situation de faiblesse physique ou psychique d'une personne, altérant gravement la capacité de discernement de cette personne, frauduleusement abusé de cette faiblesse pour conduire cette personne à un acte ou à une abstention portant gravement atteinte à son intégrité physique ou mentale ou à son patrimoine, sera puni d'une peine d'un mois à deux ans d'emprisonnement et d'une amende de cent euros à mille euros ou d'une de ces peines seulement. § 2. Les peines seront un emprisonnement d'un mois à quatre ans et une amende de deux cent euros à deux mille euros ou une de ces peines seulement dans les cas suivants :1° si l'acte ou l'abstention visé au § 1er résulte d'une mise en état de sujétion physique ou psychologique par l'exercice de pressions graves ou réitérées ou de techniques propres à altérer la capacité de



tendencies" was, therefore, quite consistent, over a long period of time, until the recent ruling of 2016 on the Church of Scientology¹⁷⁴.

The difference, within the varied numbers of sects, according to French and Belgian political elaboration, is underlined by c.d. "mental manipulation" which would distinguish the movements that the State must protect and guarantee, as an expression of religious freedom, and groups to marginalize, control and eventually suppress. It seems, however, obvious that such an approach risks to detract from resolving any problem and it does not offer any easy legal delineation tools.

3 - Jurisprudential Developments

There are numerous Belgian case law affecting the religious phenomenon, especially in these times concerning religious symbols and particularly the use of veil in workplaces¹⁷⁵. In an attempt to reconstruct the concept of religion and its semantic field at the legal level, the reference must be obviously based on the jurisprudence of sectarian abuses¹⁷⁶.

discernement; 2° si l'abus visé au § 1er a été commis envers un mineur; 3° s'il est résulté de l'acte ou de l'abstention visé au § 1er, soit une maladie paraissant incurable, soit une incapacité permanente de travail personnel, soit la perte complète de l'usage d'un organe, soit une mutilation grave; 4° si l'abus visé au § 1er constitue un acte de participation à l'activité principale ou accessoire d'une association. § 3. La peine sera la réclusion de dix ans à quinze ans si l'acte ou l'abstention de la personne a causé sa mort. § 4. Le tribunal peut, en application des §§ 1er et 2, interdire au condamné tout ou partie des droits énumérés à l'article 31, alinéa 1er, pour un terme de cinq ans à dix ans. § 5. Le tribunal peut ordonner que le jugement ou un résumé de celui-ci soit publié, aux frais du condamné, dans un ou plusieurs quotidiens, ou de quelque autre manière que ce soit". The law of November 26th 2011 entered into force on 2 February 2012, on http://www.ciaosn.be/Moniteur_belge-120123-loi_abus_faiblesse-111126.pdf.

¹⁷⁴ Cf. **H. DE CORDES**, *L'État belge face aux dérives sectaires*, CRISP, Bruxelles, 2006; **B. MINE**, *La régulation du phénomène sectaire en Belgique, on Révue de droit pénal et de criminologie*, 6, 2006, pp. 617-654; **L.L. CHRISTIANS**, *Vers un principe de précaution religieuse en Europe? Risques sectaires et conflit de normes*, on *Annales d'études européennes*, 4, 2000, pp. 229-273; **A. LALLEMAND**, *Les sectes en Belgique et au Luxembourg*, EPO, Bruxelles, 1994.

¹⁷⁵ In 2015, the Brussels Tribunal condemned the regional employment agency Actiris for its working regulation prohibiting the use of religious symbols. In 2016, the case of Islamic veil in public schools led to the condemnation of the Haute Ecole in Liège, whose regulation prohibited the wearing of the veil: *Affaire du voile*, the Haute école de la Liège province was refaire son règlement, Rtbf.be, 6 October 2016. In the Flemish community, the State Council gave reason to a prof. of Islamic religion who had appealed against a circular that forbade wearing the veil: State Council, n. 233.672, February 1st 2016.

¹⁷⁶ In a French circular it is possible to read a clear definition of sectarian drifts: "les atteintes portées par tout groupe ou tout individu, à l'ordre public, à la sécurité ou à



The first jurisprudential action against Belgium is in 2005, following the political activities of the Commission of Inquiry into Sectarian Movements, concluded with a judgment of the Brussels Court of Appeal in favor of the Universal Church of the Kingdom of God. The Court emphasized that the Commission report could not be accepted and criticized the methodology, based on anonymous and unverified statements. In the same year, in another case, the same Court of Appeal condemned the CIAOSN against the Sahaja Yoga group for which it had published outrageous information, having also failed to comply with their legal obligations and violating the right of defence and absence of contradiction¹⁷⁷.

The following year also ended with a conviction, the cause of the Anthroposophical Society against the French Community of Belgium, accused of incorrectly including false statements about the movement in an informative brochure against the sect and his guru, supported by an intense public awareness campaign¹⁷⁸.

The most interesting case of recent Belgian case law is, however, represented by an important and well articulated decision of 2016 when the Criminal Court in Brussels rejected all allegations against the Church of Scientology and a group of Scientologists¹⁷⁹. Controversial offenses, such as in the French case, were: fraud, extortion, abuse of the weakness of the child, abuse of the medical profession and lack of assistance of people in danger. Just as in the Paris case-law, the dissolution of the legal person of the

l'intégrité des personnes par la mise en oeuvre de techniques de sujétion, de pression ou de menaces ou par des pratiques favorisant l'emprise mentale et privant les personnes d'une partie de leur libre arbitre". Circular 19 September 2011 relating to surveillance and the fight against sects, on http://www.la-croix.com/Actualite/S-informer/France/Lutte-contre-les-derivees-sectaires-_NG_-2011-10-25-727597.

¹⁷⁷ Cf. the text of the judgment of the Appeal Court of Brussels, April 12th 2011 on http://www.ciaosn.be/110412-cour_d%27appel_de_bruzelles-2008-AR-889.pdf.

¹⁷⁸ In its decision in favor of the Anthroposophic Society, the Court ruled that the French Community was obliged to remove the controversial passages from the brochure and its website. Anthroposophy is defined by its advocates as a spiritual and philosophical path, based on R. Steiner's teachings. In its judgment of 7 April 2006, the Court imposed a symbolic damage of one euro on the French Community to be paid to the Anthroposophic Society and other anthroposophic institutions and members who participated in the Company's legal action. In another resort the same company contested the law of June 2nd 1998, which established an information and advisory center aimed at combating harmful sectarian organizations, but on March 21st 2000 the Arbitration Court rejected the appeal. In September 2000, the Anthroposophical Society filed a complaint with the European Court of Justice in Strasbourg.

¹⁷⁹ First Instance French-speaking Court of Brussels, n. 01260, March 11th 2016, unpublished (a summary is on <http://www.osce.org/odihr/268701?download=true>).



Church and the imprisonment of the defendants, had been demanded¹⁸⁰. The particularly lengthy judgment, of 173 pages, was the concluding moment of eighteen years of investigations. The Court has decided to reject unequivocally all the allegations, which are declared inadmissible. In particular, the total absence of objectivity towards such religious worship was observed, in violation not only of Belgian law but of art. 6, par. 1 of the European Convention on Human Rights.

The Court pointed out that the allegations made were in fact the procedure of a religion and that all defendants had been held guilty only on the basis of their voluntary commitment to Scientology. Indeed, it has emerged that no criminal offenses against individuals had been challenged and proven, according to the normal criteria of the determination of criminal law, but the accusations were generally addressed to Hubbard's ideology and teachings, their spiritual reference. The accusation, as in the Italian¹⁸¹ and French proceedings, had chosen to focus on the ideology or philosophy contained in the teachings of that author in attempting to demonstrate the criminal project contained in his doctrine, and the defendants had been presented as tools for achieving of the goals of Scientology's philosophy, for the realization of non-identified criminal

¹⁸⁰Cf. Paris Criminal Court, October 27th 2009, n. 9835623114 v. Association Spirituelle de l'Église de Scientology, SARL SEL, and others, unpublished. The investigation lasted for eight years, after which the Prosecutor of the Republic had made a request for 'no place to proceed'. The sentencing sentence issued in October 2009 covered both natural and legal persons, with custodial sentences and diversified funds. Cf. **G. CAROBENE**, *Le minoranze religiose tra normativa penale e diritti di libertà: rilievi a margine di una recente sentenza su Scientology*, on *Laicità e dimensione pubblica del fattore religioso. Stato attuale e prospettive*, R. Coppola, C. Ventrella (eds.), Cacucci, Bari, 2012, pp. 391-401, and also **ID.**, *Juridical Status of Scientology in European Case Law*, on *Cultural and Religious Studies*, vol. 4, n. 5, 2016, pp. 321-331.

¹⁸¹ The Italian vicissitudes have been multiple the doctrinal and jurisprudential interventions, related to the tax affairs of the organization and to the long process of Milan. Among the first cf., *inter alia*, **F. FINOCCHIARO**, *Note marginali sulle pseudo religioni in Spagna*, on *Dir. Eccl.*, 1990, II, p. 323 ss.; **ID.**, *L'organizzazione di Scientology ed i suoi fini*, on *Dir. Eccl.*, 2, 1991, p. 122 ss. And **ID.**, *Scientology nell'ordinamento italiano*, in *Dir. Eccl.*, 1995, I, p. 601 ss.; **F. ONIDA**, *Nuove problematiche religiose per gli ordinamenti laici contemporanei: Scientology e il concetto giuridico di religione*, on *Quad. dir. pol. eccl.*, 1998, 1, pp. 279-293. Cf. also **P. COLELLA**, *Sul carattere "religioso" dell'associazione di Scientology*, in *Corriere giuridico*, 1/2002, pp. 41-44; **G. D'ANGELO**, *Ultime vicende giudiziarie della Chiesa di Scientology*, on *Dir. Eccl.*, 1, 1998, p. 384 ss.; **R. SARACENO**, *Scientology fra libertà religiosa e diritto comune*, on *Dir. Eccl.*, 2, 2001, p. 112 ss.; **P. MAZZEI**, *La natura della "Chiesa di Scientology"*, on *Dir. Eccl.*, 1991, II, p. 405 ss. In general cf. **S. FERRARI**, *La nozione giuridica di confessione religiosa (come sopravvivere senza conoscerla)*, on *Principio pattizio e realtà religiose minoritarie*, V. Parlato, G. B. Varnier (eds.), Giappichelli, Torino, 1995, p. 20 ss.



purposes and considered guilty of being members of their Church¹⁸². The defence also underlined that religious connotation is present throughout the collection of the founder's works, as the whole purpose of this organization is to advance people on the "Bridge to Total Freedom".

Police officers had pointed out the lack of texts in the word "religion" but it was replied that this term does not appear in the Bible, in the Qur'an or in any of the great religious texts: it is not the presence of the word "religion" that can correctly highlight the goal and the purpose of the community.

The revolutionary nature of such a decision is evident, which, following the analysis of an analogous Italian judgment concluded in 2000, which confirmed the thesis that the process of a religion, a doctrine and its beliefs, stems from the assumption that adepts can be considered guilty only when the faithful or followers of a cult commit a violation of fundamental human rights¹⁸³. For this reason, this judgment is important for the judicial affirmation of religious freedom and for the semantic delimitation of the concept of religion. Below this profile, it is evident that judges have absolutely avoided any definitive attempt, aware of the impossibility of delimitation not based on the self-qualification of the movement¹⁸⁴.

¹⁸² Cf. p. 147 of this case law. The State Security, in a 2002 Report sent to the magistrate instructor, concluded that the Church of Scientology, in its organization and in its practice, appears to be of such a nature as to harm the individual or the purple society with human dignity. Even though they have not effectively substantiated these statements, it concludes, however, that these elements are not criminal in character: cf. p. 149 of this case law.

¹⁸³ Cf. **G. CAROBENE**, *Scientology tra religione e sanzione*, Liguori, Napoli, 2012, specially p. 59 ss.

¹⁸⁴ Cf. **S. FERRARI**, *Stato e Chiesa in Italia*, on *Stato e Chiesa nell'Unione Europea*, G. Robbers (ed.), Milano-Baden-Baden, 1996, indicates belief in a transcendent reality (not necessarily a God), capable of answering the fundamental questions about the existence of man and things that is capable of providing a moral code and of generating an existential involvement of the faithful that manifests itself (among other things) in the cult and in the presence of an even minimal organization (p. 189). The extravaluation method is characterized by the 'inversion of the burden of proof', so it is up to the competent person to demonstrate that the group is not a confession, in the absence of which the self-qualification will remain valid: **G. DI COSIMO**, *Privilegi per le confessioni religiose*, cit., p. 4244. Also **N. COLAIANNI**, *Sul concetto di confessione religiosa*, on *Foro It.*, 1995, part II, c. 2992, stresses that there is no doubt about the possibility of controlling self-qualification, but it is possible and happens at a later stage, the procedural one. This analysis begins with two judgments on Scientology, Italian Appeal and Italian Cassation, respectively, in 1993 and 1995. About Italian case law: Court of Milan (Procura della Repubblica), July 13th 1988, on *Dir. Eccl.*, 1988, p. 590 ss.; Court of Milano, I, 2nd of July 1991, on *Dir. Eccl.*, 1991, p. 419 ss., with note of **F. FINOCCHIARO**, *L'organizzazione di Scientology e i suoi fini*; Court of Cassation February 9th 1995 and Court of Appeal of Milano, November 5th 1993, on *Foro*



The Court correctly pointed out that the insertion of the Church of Scientology into the list of "dangerous" sects, drawn up by the Parliamentary Committee in 1997, was the basis of subsequent investigations. With reference to that list, the Court not only declared that it was inadmissible, but stressed that the Parliamentary Commission had exceeded its objectives and that, therefore, the conclusions drawn from that work constitute a clear violation of certain fundamental rights. It has also been noted that all the analyses were obviously influenced by prejudice, not based on scientific data, and therefore could not constitute a solid regulatory basis¹⁸⁵.

It emerges from this case-law that disregarding these lists or reports, which have become unfortunately frequent in many countries c.d. democrats, undoubtedly represents the first step towards a path of clarification of the concept of religion, leading to the affirmation of a truly democratic secularism, a concrete response to the various religious institutions emerging from the social fabric, void of any discriminatory actions.

It is from the Italian jurisprudence on Scientology that the problem has been focused on the religiosity of the movement as a condition for the subsequent of the possible penalties related to the actions of the group. Such recognition has been attributed, indirectly, to a discriminatory effect on the violation of criminal law: if the movement is of a religious nature, it can not be qualified as an association to commit a criminal offense at least not in entirety; individuals can be condemned for misconduct but not to the community as a whole. Today special attention is needed on this point of reference because it involves, for example, the assertion that crimes of pedophilia and terrorism can not be attributed to religious movements but to individual deviating subjects.

Of course, the concept of religious freedom implies an evaluation of the term religious confession which, as has been stated, does not have a precise legal qualification. If a group qualifies itself as a religious confession, the Court must limit evaluation of effectiveness of the community life by referring, in the absence of a legislative definition, to other criteria adopted by doctrinal elaboration, policy and jurisprudence.

it., II, 1998, p. 395 ss., with note of **N. COLAIANNI**, *La via giudiziaria alla religiosità: la vicenda di "Scientology"*; Court of Appeal of Milano, October 5th 2000, n. 4780, on *Giur. It.*, 2001, p. 1408 with note of **P. COLELLA**, *Ancora a proposito di Scientology*. Cf. also **G. CASUSCELLI**, *Ancora sulla nozione di "confessione religiosa": il caso Scientology*, on *Quad. dir. pol. eccl.*, 1998, p. 816 ss.

¹⁸⁵ This first-degree decision became final since the Federal Prosecutor's Office decided not to appeal.



Moreover, the idea of limiting the identification of some criminal cases (in this case: mental manipulation/abuse of weakness) only to the 'sectarian' field raises causes the lawyer quite strong perplexity¹⁸⁶, unless the criminal conduct relevant as statutory predictions as a way to worship. This is associated with the difficulty of defining a concept of "sect" or "religious confession" that is relevant to criminal law¹⁸⁷. Any limitation should be set on a threefold axis: firstly, to safeguard the freedom of religion or belief, to underline the limited competence of the State in this area, and finally based on respect for the self-definition of the community or religious organization.

It is interesting to note, however, that the outcome of the proceedings, with particular reference to the Scientology case, has highlighted Belgium's concern for the effective protection of the freedom of religion, which has in fact defeated political and legislative action¹⁸⁸. In the last process, it has been said again that it isn't possible to criminalize a religious movement and that the activities carried out by the adepts within it and with reference to religious ideas must fall into the path of the protection of religious freedom. Substantially the judgment affirms that

¹⁸⁶ Cf. **S. FERLITO**, *Le religioni, il giurista e l'antropologo*, Rubettino, Soveria Mannelli (CZ), 2005, p. 14 who highlights the importance of ecclesiastical law for understanding the new legal and social dynamics of multiculturalism. On such reflections cf. also **M. RICCA**, *Diritto e religione. Per una pistemica giuridica*, Cedam, Padova, 2002; **R. MAZZOLA**, *La convivenza delle regole. Diritto, sicurezza e organizzazioni religiose*, Giuffrè, Milano, 2005.

¹⁸⁷ Cf. **J.P. DURAND**, *Recherches à propos des sectes en droit français: de la pertinence de l'usage de la catégorie de la secte pour désigner certains groupement religieux*, on *Année Canonique*, 1992, pp. 329- 350; **J.M. WOERHLING**, *Une définition juridique des sectes*, and **J.P. WILLAIME**, *Les définitions sociologiques de la secte*, both on *Les sectes et le droit en France*, F. Messner (ed.), PUF, Paris, 1999, pp. 63-93 e pp. 21-47; **A. AMORÓS, A. COLLADO, M.L.L. MARTÍNEZ-VILLASEÑOR**, *Concepto jurídico de secta*, on *Derecho y Opinión*, 2, 1994, pp. 25-36. **R. FRIEDLI**, *Essai sur le concept de 'secte': un critère 'bonne santé-maladie'*, on *Conscience et liberté*, 1999, pp. 21-47. Cf. in general **G. FILORAMO**, *I nuovi movimenti religiosi. Metamorfosi del sacro*, Laterza, Bari, 1986; **M. INTROVIGNE, J.F. MAYER, E. ZUCCHINI**, *I nuovi movimenti religiosi. Sette cristiani e nuovi culti*, Leumann, Elle Di Ci, Torino, 1990.

¹⁸⁸ Cf. even Resolution 1412/1999 of the Parliamentary Assembly of the Council of Europe, the 1998 report of the 1998 Interministerial Mission to Fight the Seven, Paris, 1999 and the report of November 25th 1999 of the Criminal Commission of the Canton of Geneva on seizures on the question of mental manipulation. Cf. **R. DELGADO**, *Religious Totalism: Gentle and Ungentle Persuasion Under The First Amendement*, on *Southern California Law Review*, 1977, pp. 1-99; **G. FENECH**, *Face aux sects. Politique, Justice, Etat*, PUF, Paris, 1999, specially pp. 134-140; **J.P. MORIN**, *Le viol psychique: un projet de définition juridique*, on *Revue de sc. Crim. et de dr. Pén. Comp.*, 1978, p. 275; **P. NOINOT**, *Sectes religieuses et droit pénal*, on *Rev. Sc. Crim.*, 1983, p. 409 ss., **G. RAYMONDI**, *Considerazioni sulla colpa cosciente e sul dolo eventuale con particolare riferimento ai c.d. culti emergenti*, on *Giur. di merito*, 1987, II, p. 421.



there is a substantial lack of common law to suppress the substantial specificities and the dangers of some religious groups¹⁸⁹.

Despite the autonomy of criminal law, a fiscal, civil and commercial approach also demonstrates that this Church has a non-lucrative purpose. According to Belgian administrative law, philanthropic, charitable, spiritual, religious and cultural activities are automatically considered non-profit, even though they are carried out commercially. They are legally considered as functional public services¹⁹⁰. The 1921 Law, which grants legal personality to unprofitable associations and public utilities, defines non-profit association (ASBL) as one that is not engaged in industrial or commercial operations or which does not seek to procure its members a material gain, and for it is provided an easier tax system¹⁹¹. In Belgium Scientology has been an ASBL since 1974 and is therefore a religious organization of common law, according to the terminology used from the definitions of the OSCE and the Venice Commission¹⁹². In this process, it was correctly emphasized that it was a religious/spiritual service offered by the community, both in teaching and in courses and in the sale of sacred objects (for which Article 182 of the Code of Conduct applies tax)¹⁹³.

Tax inspectors have pointed out that the pursuit of a lucrative business does not necessarily imply pursuit of a profit, but it is necessary to assess the *animus* of the subjects. In a previous jurisprudential intervention, always related to a religious confession, it was emphasized that in order to determine whether an occupation is lucrative, it is sufficient to note the

¹⁸⁹ Cf. **D. PASTEGER**, *Les A.S.B.L. et activités commerciales: le fil d'Ariane*, on *Les personnes morales sans but lucratif. Questions choisies*, **D. GOL** (dir), Anthémis, Liège, 2012, n. 19, p. 7 ss.

¹⁹⁰ Cf. **M. COIPEL**, *Le rôle économique des ASBL au regard du droit des sociétés et de la commercialité*, on *Commission droit et vie des affaires, les ASBL. Évaluation critique d'un succès*, Story-Scientia, Gand, 1985, p. 147 ss. Cf. also Cassation Court, 5 July 1997, Pas. 1937, I, 212.

¹⁹¹ Cf. art. 1 Law June 27th 1921.

¹⁹² So also in Italy, Turkey, Romania, Germany. For Germany cf. ECHR, *Scientology Kirche DeutschlandV c. Allemagne*, 7 April 1997 (on <http://echr.ketse.com/doc/34614.97-fr-19970407/view/>) in which it is presented as a registered association in accordance with German law. In Spain and Sweden it is a religious organization with special status or civil law. In the UK, after the decision of December 11th 2013 of the Supreme Court has been granted the right to celebrate marriages with civil effects: on www.supremecourt.uk/decided-cases/docs/UKSC_2013_0030_Judgment.pdf. Benefit of such special protection as provided for in Art. 324 bis, 2, c. Belgian, according to which an organization whose object is purely political, trade union, philanthropic, philosophical or religious, can not, as such, be regarded as a criminal.

¹⁹³ Article 182 Tax Code exempts "les opérations qui constituent une activité ne comportant qu'accessoirement des opérations [...] commerciales [...] ou ne mettant pas en œuvre des méthodes industrielles ou commerciales".



existence of profit without having to look for whether the purpose of profit animated by its authors¹⁹⁴. The Belgian Code allows a religious organization to carry out lucrative activities that are indispensable to the maintenance of spiritual activity, which must always be predominant; however, it provides for taxation¹⁹⁵. In Belgium, for example, many monasteries are financed by the sale of handicrafts and this activity, while purely commercial, is considered a logical and indispensable corollary of the religious one.

4 - The "Scientology Case" and Comparison with the French Process

The fear of possible discrimination against new religious movements has prompted the Parliamentary Assembly of the Council of Europe to invite States to verify respect for the protection of human dignity and equality in the protection of their inalienable rights¹⁹⁶. Pursuing a religious confession involves limitations to the freedom of adepts who wish to manifest a religious belief, that occurs in violation of domestic and international norms of democratization. Such restrictions touch on the essence of religiosity, in fact they are not related to a religious belief because condemnation seems to be linked to the only legal condition of "faithful" whose attitudes are automatically considered to be contrary to the law. Therefore, a multicultural criminal law should be developed that can accommodate the pluralism of values that characterize the 'new' societies and the new typologies of religious phenomena.

Let me conclude by emphasizing that the issues raised by these judgments are of particular interest to the jurist as, in the study of contemporary religious groups, one of the most difficult problems is the approach to these movements with the appropriate theoretical framework. The current social issues, arising from "religious groups" not formed according to traditional rules, requires the lawyer to deal with this phenomenon in a careful manner and to avoid, first, the construction of a completely open system - easy prey to exploitation - and secondly, to impose what has become an obsolete legal framework. The management of diversity - cultural and religious - is, in fact, one of the major challenges of our time, especially in our democratically structured societies. The novelty in this contemporary world is the rise of the politics of identity, the result

¹⁹⁴ Appeal Court of Mons, May 17th 1996, on *FJE*, 1996/2000.

¹⁹⁵ Cf. also Appeal Court of Anvers, November 25th 2003, on *Fiscologue*, n. 921, p. 11.

¹⁹⁶ Parliamentary Assembly of the Council of Europe, Resolution on the protection of minors against sects n. 1992, 2014, n. 9 (on <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileID=20889&lang=en>).



of a mature theoretical awareness, linked to the inability of managing modern social dynamics, according to obsolete patterns of inclusion/exclusion.

In view of the impossibility of a semantic delimitation of the concept of religion in a univocal way, it is necessary to think in terms of multiple legal traditions, normative structures that define a model but which, as multiple, allow the coexistence of multiple models in the name of democratic tolerance¹⁹⁷. The definition of religion is currently an etymologically complex concept, expanding and changing, compared to the classic setting associated with a monocultural universe. In the Belgian experience it can even include organizations that offer moral assistance in a non-confessional philosophical conception (article 181 Cost). Only the use of tolerant parameters can make it possible to understand the complexity of the concept, avoiding unnecessary normative berths, but limiting itself to the acceptance of differences and of relativism. It's therefore necessary simply to acknowledge and accept the conceptual multivalence of the term religion and to use as a legal parameter the doctrine of "margin of appreciation" or discretion, as elaborated by the European Court of Human Rights¹⁹⁸. This principle is, in fact, a statement of judicial impartiality of the claims of State sovereignty and of the freedoms solemnly enunciated by the Convention. Applied to our ambition, it implies that the concept of religion should take the utmost possible expansion within a democratic and multicultural society, with the limits associated with respect for the imperative and indispensable rules of order. The qualification of a movement as a religious must, in fact, be properly assessed in the light of the constitutional principle of religious freedom, typically present in all democratic systems, which is not a boundless right, but subject to very

¹⁹⁷ Cf. **N. COLAIANNI**, *Eguaglianza e diversità culturali e religiose. Un percorso costituzionale*, il Mulino, Bologna, 2006; **M. VENTURA**, *La laicità dell'Unione Europea. Diritti-Mercato-Religioni*, Giappichelli, Torino, 2002, emphasized that the competitive approach of the Community to the religious phenomenon consists in denying the juridical relevance to the specificity of the religious element itself, in enhancing the principle of equality and non-discrimination and highlighting how in this scheme the community treatment inevitably entails the loss of religious specificity and the terminological and categorial assimilation of the religious phenomenon to the economic phenomenon (pp. 149-152). Cf. also **G. DAMMACCO**, *Diritti umani e fattore religioso nel sistema multiculturale euromediterraneo*, Cacucci, Bari, 2000; **V. TOZZI**, *Società multiculturale, autonomia confessionale e questione della sovranità*, on *Dir. Eccl.*, 1, 2000, pp. 124-147; **W. KYMLICKA**, *La cittadinanza multiculturale*, il Mulino, Bologna, 1999; **P. CAVANA**, *Nuove dimensioni della cittadinanza e pluralismo religioso: premesse per uno studio*, in *La cittadinanza. Problemi e dinamiche in una società pluralistica*, G. Dalla Torre, F. D'Agostino (eds.), Giappichelli, Torino, 2000, pp. 59-150.

¹⁹⁸ Cf. **Y. ARAI-TAKAHASHI**, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, Antwerpen, 2002.



specific limits: the fundamental ones that constitute the necessary conditions for the realization of a peaceful coexistence of individuals in the social organization, those imposed by civilization itself, its essential and indispensable values. The liberal model cannot and does not have to point out to subjects the “right way”, but must be the actual guarantor of the freedom granted to those subjects, between formal liberties and socio-psychological determinism¹⁹⁹.

¹⁹⁹ **D. HERVIEU-LÉGER**, *La religion en miettes ou la question des sectes*, Calmaun-Levy, Paris, 2001; **S. FERRARI**, *Le droit européen en matière religieuse et ses conséquences pour les sectes*, on *Sectes et démocratie*, **F. CHAMPIONS**, **M. COHEN** (ed.), Seuil, Paris, 1999, p. 369 ss.



Cristina Dalla Villa

(Researcher at the University of Teramo, School of Law)

The Meaning of 'Religion' in Italian Supreme Court Jurisprudence Labour Cases

SOMMARIO: 1. Performance of work - 2. Discriminatory layoff - 3. Ideological agreement - 4. Different treatment.

1 - Performance of work

Freedom of religion provides believers with the right to believe or not in a specific religion, express their affiliation to a church and change their faith at any time, as well as the right to abide by the specific precepts required by their religion. Religious precepts are nothing but life rules, or rather "a rule aimed to affect the life choices of individuals and, as such, it ends up affecting not only the person's life but also their relationship with the surrounding community"²⁰⁰.

The general conviction is that a person's behaviour in compliance with a religious precept does not affect the appropriate performance of their work and that their exercise absolutely cannot prevent the worker from being hired, or keep their job or enjoy specific benefits. Thus, any contractual clauses that jeopardize the worker's ability to follow their religious precepts shall be considered void, as they are not justified by the need to protect the employer's freedom of economic initiative.

Employees belonging to another religion shall autonomously take all the measures that are necessary to comply with the food requirements of their religion. The issues related to the different religious prescriptions about holidays and weekly rest day are also strictly connected. Our regulations do not include a general right to skip work in order to take part in religious celebrations and rites, nor that the weekly rest day matches the religious holidays of workers.

This is also confirmed by the fact that the weekly rest day shall not be considered as related "to the exercise of freedom of religion, but rather to the protection of the workers' health and psycho-physical integrity,

²⁰⁰ **V. PACILLO**, *Contributo allo studio del diritto alla libertà religiosa nel rapporto di lavoro subordinato*, Giuffrè, Milano, 2003, p. 178.



promoting their resilience²⁰¹, thus there is no connection to religious festivities. Therefore, the Italian legislator has chosen Sunday as the fixed weekly rest day in accordance with the customs and traditions of the Country, without giving it a particular religious meaning but connecting it to the enjoyment of the so-called free time.

Some scholars have claimed that the special rules regulating the Jewish and Adventist holidays provide a greater protection for Adventist and Jewish workers than for Catholic ones, as

“religious choices are considered as autonomous causes of absence from work and subject to protection through the provision of an individual right²⁰², whereas “Sunday cannot be imposed nor required as rest day by the worker declaring to be Catholic²⁰³.

This interpretation cannot be accepted for several reasons: first of all, by express agreement, the days or hours in which the worker was absent must be performed on a Sunday or any other day, without the right to receive extra remuneration. Moreover, any work performed by a Jewish or Adventist employee on a Saturday or other holiday is not related to any form of extra payment, as it happens for Catholic workers performing work on holidays.

This is in conflict not only with the principles of ideological, religious and cultural pluralism, but also with our case law; as a matter of fact, the Corte di Cassazione right to a proportionate remuneration to the quantity and quality of the work performed.

The agreements between the State and non-Catholic churches do not ensure that workers can celebrate their religious holidays but, at the same time, the lack of an understanding that allows workers the right to celebrate their rites, non-Catholic workers can be subject to disciplinary or remunerative penalties that are legitimate on paper. Thus, workers who belong to a church that has no agreement with the Italian State do not have the right to skip work to celebrate their holidays.

With this respect, it is worth remembering the position of the Consiglio di Stato about a teacher who did not go to work on two days that are considered holidays according to the Serbian Orthodox Church; the Council has stated that

²⁰¹ **L. MUSSELLI**, *La rilevanza civile delle festività islamiche*, in **R. BENIGNI**, *L'identità religiosa nel rapporto di lavoro*, Jovene, Napoli, 2008, p. 46.

²⁰² **P. BELLOCCHI**, *Pluralismo religioso, discriminazioni ideologiche e diritto del lavoro*, in *ADL, Argomenti di diritto del lavoro*, n. 1, 2003, p. 206.

²⁰³ **P. BELLOCCHI**, *Pluralismo religioso, discriminazioni ideologiche e diritto del lavoro*, in *ADL, Argomenti di diritto del lavoro*, cit., p. 207.



“according to the system implemented by our Constitution, the civil relevance of specific holidays referred to a specific religion must be subject to an agreement aimed to regulate the relationship between that religion and the Italian State”²⁰⁴.

The case law on religious holidays not only refers to non-Catholic churches, but many decisions also involve Catholic workers. As a matter of fact, the Corte di Cassazione has recently passed a judgment stating that the disciplinary measures against a worker who skipped work on a Sunday, for religious reasons, and caught up during his rest day were disproportionate.

In this specific case, the Supreme Court stated that what was questionable was not the penalty per se but its proportionality with the worker’s violation. For this reason, the Court - considering the confidence “induced by the company behaviour, that had led the worker to think that the management would tolerate his absence on the Sunday”²⁰⁵, and the worker’s collaborative attitude who showed up on his day off - concluded that the penalties given to the worker for not working on Sunday were not proportionate.

The above-mentioned case clearly shows that it is often very difficult to find the right balance between the two rights, both protected by our Constitution: the employers’ right to organize their company in accordance with the production needs and the workers’ right to abide by the precepts of their religion.

2 - Discriminatory layoff

The institution of discriminatory layoff is disciplined by several legal provisions, some of them dating back to some time ago, offering protection from any conducts that are against the principles of equality, freedom and human dignity that are guaranteed by our Constitution.

It is easy to understand the difficulty for workers to prove that the layoff is based on a discriminatory reason; however, this is made easier by the so-called simple presumptions, which, according to art. 2697, must be “serious, accurate and concordant”.

Therefore, a layoff based on the religious convictions of the worker belongs in the category of discriminatory layoff and must be considered void, regardless of the reasons offered by the employer.

²⁰⁴ Consiglio di Stato, Counsel 11 February 1998, in **R. BOTTA**, *Dieci anni di giurisprudenza su fattore religioso e diritto del lavoro*, in *Quaderni di diritto e politica ecclesiastica*, n. 3, 2001, p. 729.

²⁰⁵ Corte di Cassazione, Labour Section, 22 February 2016, n. 3416.



Thus, the layoffs resulting from the workers' belonging to a particular church and those resulting from the assumption of any ideological position towards a religion shall be considered forbidden for discriminatory reasons.

Moreover, as already pointed out, a layoff shall be considered discriminatory when based on the religious practices - or rather, precepts - that the worker has or has not followed in his/her life at work and outside work, i.e. not only the actual rites but all the behaviours that are directly related to compliance with a religious precept.

Similarly, the layoff of a manager who allowed a religious organization - with which he was affiliated - to administer aptitude tests to employees was not considered discriminatory.

The Supreme Court has stated that

“the fact that the organization that administered the tests belongs to a particular religious-ethical stance was taken into consideration to the extent in which it had adversely affected the company context, as the survey performed by that organization had upset the employees due to the invasive nature of the tests with respect to their privacy and the resulting negative impact”²⁰⁶.

The Court finally stated that the layoff of the manager was legitimate, as there was no violation of the rules on discriminatory treatment based on ideology or religion. Apart from these cases, when an employer wants to cause damage to an employee due to their religious choices, there can be no valid reason, no balance of the interests in conflict, because in this case the only interest to protect is the worker's freedom of religion.

The observations of the Courts with respect to freedom of religion within religion-based organizations were inspired by the need to protect not the religious staff but the non-clerical staff involved in specific activities. The first issue brought to the attention of the Italian Courts is the possible relevance for layoff of some private behaviours of an employee that might be in contrast with the moral directions of the religious employer.

The Supreme Court, setting aside the previous decisions on the matter, moves from the assumption that the layoff - being “connected to the worker's exercise of constitutional rights such as the freedom of opinion, the freedom of religion and, with respect to schools, the freedom to teach” - can be considered legitimate

“only if it is necessary to ensure the exercise of other constitutional rights, such as the freedom of political parties and trade unions, the freedom of religion and the freedom of schools and only in the cases

²⁰⁶ Corte di Cassazione, Labour Section, 16 February 2011, no. 3821.



where ideological compliance is a requirement for the performance of work”.

Any ideological discordance between the clerical authorities and the teacher or any moral or behavioural profiles that stay within the teacher’s private life are not relevant; however, on the other hand, a layoff can be based on the actual impact of a teacher’s behaviour on the religious morals of the organization.

Another issue brought to the attention of the Courts is related to the right of a worker, who is employed by a religion-based organization, to promote another faith or religious ideology even when it is contrary to the one followed by the employer.

It is important to point out that the Court does not consider the layoff illegitimate based on the worker’s right to freely promote a religion that is in contrast with the ideology that inspires the employer, but based on the fact that the employer’s reaction is disproportionate with respect to the employee’s behaviour.

3 - Ideological agreement

Authors and jurisprudence define ideologically oriented organizations as those “institutions established and operating for pursuing ideal, confessional, denominational, political, labour or cultural aims”²⁰⁷. The notion of ideologically oriented organization, in other words, refers to

“all the socio-economic entities in which the production of goods or the delivery of services is strictly related to the intention of implementing specific ideological goals: this intention can be the exclusive purpose of the employer or contribute to profitable activities”²⁰⁸.

The peculiarity of these organizations can be identified in the inherent ideology of the aim pursued and the subsequent involvement of the worker, therefore, “the factor of difference is the ideological involvement of the worker and the attraction of ideal or denominational profiles into the object of control”²⁰⁹. Religious organizations, more than other entities characterized by an ideology, required a theory of the

²⁰⁷ G. PERA, *Le organizzazioni di tendenza nella legge sui licenziamenti*, in *Riv. it. dir. lav.*, 1991, I, p. 455; R. DE LUCA TAMAJO, F. LUNARDON, *Aziende di tendenza e disciplina dei licenziamenti individuali*, in *Quaderni di diritto e politica ecclesiastica*, n. 3, 2004, p. 704 ss.

²⁰⁸ V. PACILLO, *Contributo allo studio*, cit., p. 229.

²⁰⁹ R. DE LUCA TAMAJO, F. LUNARDON, *Aziende di tendenza e disciplina dei licenziamenti individuali*, in *Quaderni di diritto e politica ecclesiastica*, cit., p. 704.



ideologically oriented organizations and “experienced the relevant jurisprudential and regulative evolution”²¹⁰.

For a long time, before adopting a criterion for balancing the employer’s needs and the worker’s freedom of religion, authors and jurisprudence

“had to research the regulatory basis for a juridical relevance of the employer’s ideology and define a theory of the ideologically oriented -organizations, because the legislator regulated the matter only in 1990, however not completely filling the regulatory gap”²¹¹:

the first legislative intervention will be the 108/1990 Law reforming individual layoffs and thus, for these reasons, it has been said that ideologically oriented -organizations in our system are “the effect of an empirical observation, rather than a juridical one”²¹².

Therefore, in the Italian legal system, an ideology bearer can be defined as “the individual or collective subject that processes the content of the message of opinion and organizes its strengthening and spreading also using employees”²¹³.

The criterion for settling any possible conflict between the individual and the group, also for ideologically oriented organizations, was searched in art. 2 of the Italian Constitution, which “requires that groups maintain their specific identity in order to allow the individuals to choose the social formation that matches their line of thinking between the various available ones”²¹⁴.

Therefore, the fulfilment of work obligation is not jeopardized simply by the existence of an ideological contrast, but any possible non-fulfilment shall be evaluated individually with respect to the activity required on the part of the worker and his/her behaviour, admitting the possibility for the parties to establish behavioural obligations aimed to protect the ideology of the organization while restricting the worker’s freedom of religion:

“the existence of an area of non-application of the prohibitions set to protect the constitutional rights of the worker can be tolerated only if the employer - as well as pursuing or drawing inspiration from

²¹⁰ R. BENIGNI, *L’identità religiosa*, cit., p. 167.

²¹¹ R. BENIGNI, *L’identità religiosa*, cit., p. 144.

²¹² F. SANTONI, *Le organizzazioni di tendenza e i rapporti di lavoro*, in R. BENIGNI, *L’identità religiosa*, cit., p. 146.

²¹³ R. BENIGNI, *L’identità religiosa*, cit., p. 147.

²¹⁴ M.G. MATTAROLO, *Il rapporto di lavoro subordinato nelle organizzazioni di tendenza*, in R. BENIGNI, *L’identità religiosa*, cit., p. 147.



religious or ideological aims - performs an activity that is aimed at spreading the ideology"²¹⁵.

In particular, this non-application area only refers to those workers who operate to spread the ideology of the group and only if the lack of compliance with these obligations is required to protect the genuineness of the ideology.

While waiting for systematic rules and regulations on the matter, authors and jurisprudence have looked for laws that could be applied to the employer. At first, employers running an ideologically oriented organization were considered as not belonging in the category of entrepreneurs and, as a matter of fact, this figure is not entitled to the rights provided for by chapter III of the Workers' Statute.

This issue was addressed by the Supreme Court, judging the rightfulness of art. 35²¹⁶ of Law no. 300 of 1970 with respect to the part where it rules out the application of art. 18 and chapter III of the Statute to private non-entrepreneur employers. According to the Court, the exclusion of the rights ensured by chapter III of the Workers' Statute is valid also for ideologically oriented -organizations

“or for private organizations with cultural, sport-related, recreational and charitable purposes, and any other non-entrepreneur employers, such as professionals, whose simple organizational structures are normally not fit for allowing the trade-union activities that are usually carried out within larger enterprises”²¹⁷.

Therefore, ideologically oriented -organizations are considered and subject to a special set of rules not because of the need to protect its ideology, but because of its non-entrepreneurial nature.

The Corte di Cassazione brought the statements of the Supreme Court to the extreme consequences: as a matter of fact, it defines ideologically oriented -organizations as “employers that do not aim to make

²¹⁵ V. PACILLO, *Contributo allo studio*, cit., p. 237; A. DE OTO, *Precetti religiosi e mondo del lavoro: un'analisi giuridica*, Ediesse, Roma, 2007.

²¹⁶ “As regards industrial and commercial enterprises, the provisions of Chapter III, with the exception of the first paragraph of article 27, apply to each branch, facility, office or department that employs more than fifteen people. The same provisions apply to farming enterprises that employ more than five people. The above mentioned rules also apply to industrial and commercial enterprises that employ more than fifteen people within the same municipalit  and farming enterprises that employ more than five people within the same territory, even if each individual production unit does not reach that limit. Without prejudice to the provisions of articles 1, 8, 9, 14, 15, 16 and 17, collective employment agreements apply the principles set by this law to shipping companies with respect to travelling personnel”.

²¹⁷ Constitutional Court, 8 July 1975, n. 189.



profit and do not carry out productive or economic activities with an entrepreneurial organization”²¹⁸.

The lack of a pecuniary purpose, which prevents these organizations from being considered as enterprises, involves the exemption from the application of Chapter III and art. 18 of the Workers’ Statute, granting actual protection in case of layoff.

This nature was confirmed in several judgments of the time; as a matter of fact, the Court of Naples stated that

“the predominance of the denominational and ideological purpose of the activity carried out by the organization absorbs any other entrepreneurial character of the institution, so as to neutralize any concurring profit-making purpose”²¹⁹.

Thus, when defining the ideologically oriented -employers, the ideal purposes leave space to an objective analysis of the structure and activity performed, leading to breaking the “dogma of incompatibility between ideologically oriented -organization and enterprise”²²⁰.

This evolution particularly comes out at jurisprudential level; starting from healthcare and hospital facilities, the judges start getting ahead of the conclusions of the Supreme Court of 1975.

In 1980, as a matter of fact, the Corte di Cassazione confirms the entrepreneurial nature of state-recognized church institutions that professionally perform healthcare activities; in particular, the Court states that church institutions that perform these activities can be considered “as enterprises if their activity is objectively organized and performed so that it can potentially produce profit”²²¹.

Finally, the Corte di Cassazione completely embraces this stance, “explaining that the object of the investigation for the purposes of entrepreneurial classification must be the aim of the activity performed by the institution”²²², ending up stating that “for the purposes under discussion, the main aim - the destination of the goods produced or services delivered - is negligible, whereas only the purpose of the activity performed is crucial”: this goes beyond the position of the Supreme Court, ending up admitting that the ideologically oriented organizations, that also perform an economic activity, shall be considered as enterprises²²³.

²¹⁸ Corte di Cassazione, Labour Section, 30 March 1982, n. 1986.

²¹⁹ Court of Naples, 1 February 1980, n. 12530.

²²⁰ R. BENIGNI, *L'identità religiosa*, cit., p. 170.

²²¹ Corte di Cassazione, Labour Section, 15 February 1980, n. 1138.

²²² Corte di Cassazione, 11 April 1994, n. 3354.

²²³ R. BOTTA, *Dieci anni di giurisprudenza*, cit., p. 729 ss.



4 - Different treatment

In the organizations characterized by a specific religious orientation, religion can exceptionally become the cause for a different treatment of the employees of the organization and, therefore, it can represent a crucial and essential requirement for the performance of the work activity within that particular institution.

Thus, for some activities, the European Directive lets the Member States allow that the employer includes the affiliation to a specific religion or a certain ideology as a preferential requirement for the applicants.

Moreover, it can be possible for some groups of employers to lawfully dismiss those who do not believe in a specific religion or agree on a certain ideology. However, in order for this exception to be considered lawful, there are two specific requirements: first of all, there must be a legitimate purpose; secondly, the exception must be proportionate to the extent of the activities for which it is taken into consideration.

With respect to the proportionality principle, it is important to point out that the Court of Justice considers this principle as “being one of the general principles of community law”²²⁴, which requires that any action taken is necessary and appropriate with respect to the aims pursued.

This involves that, pursuant to the Directive 2000/78/EC, art. 4, paragraph 1, the

“particular nature of the productive activity does not justify an unlimited sacrifice of equality, but only as much as it is necessary in order to prevent the worker’s activity from becoming unproductive or counterproductive”²²⁵.

Specific reference to ideologically oriented organizations is introduced in the second paragraph of the same article, which also provides that the Member States can keep in their national legislations in force before the application of the Directive - or include in a future set of rules recognizing the current customs - provisions for a difference of treatment based on religion or personal convictions, in the case of churches or other public or private organizations whose ethics is funded on religion or personal convictions.

This difference does not represent discrimination if, due to the nature of the activities or the context in which they are performed, religion or

²²⁴ Court of Justice, 11 July 1989, lawsuit 265/87, in **V. PACILLO**, *Contributo allo studio*, cit., p. 289.

²²⁵ **F. ONIDA**, *Il problema delle organizzazioni di tendenza nella direttiva 2000/78/CE attuativa dell’art. 13 del Trattato sull’Unione Europea*, in *Il Diritto Ecclesiastico*, I, 2001, p. 907.



personal convictions represent an essential, legitimate and justified requirement for the performance of the work activity, taking into consideration the ethics of the organization.

Also in paragraph 2 of art. 4, specifically dedicated to religious institutions, there is indirect reference to the proportionality principle: this reference can be considered as indirectly resulting from the fact that the last part of paragraph 2 provides that the differences in treatment allowed by it shall be implemented in compliance with, among other things, the general principles of community law, which include the proportionality one.

Thus, the community directive allows the sacrifice of some basic rights, such as freedom of religion or thought, only as an exception and as long as they are in contrast with other basic principles, such as the protection of the ideology genuineness.

The 2000/78/EC Directive was implemented into the Italian legal system by Legislative Decree no. 216 of 9 July 2003, with which the legislator had recourse to the powers granted by the European Commission, creating a special system deviating from the principle of equal treatment without religion-based distinctions.

Experts did not find the implementation of the Directive on the part of the Italian legislator in line with the community Directive. As a matter of fact, art. 3, paragraph 5, does not make reference to the essential proportionality principle and this leads to think that the Italian law breaks the limits set by the Community Directive.

As well as the lack of reference to the proportionality principle, it is important to notice that the law allows the possibility to deviate from the equal treatment principle not only to religious institutions but also to other public or private organizations.

Therefore, it includes all

“public or private employers, regardless of the fact that they have or do not have an exclusive or predominant religious purpose; this benefit certainly does not apply only to employers that are not structured as an organized group”²²⁶.

Subsequently, all organized groups can set restrictions, distinctions or preferences based on the worker's belonging to a certain religion with respect to both the access to the employment and the conditions for layoff.

The Italian system grants this benefit to a much wider range of subjects than those defined by the European Commission, which caused several doubts about its rightfulness:

²²⁶ V. PACILLO, *Contributo allo studio*, cit., p. 297.



“the overall set-up created over time by jurisprudence with respect to the balance between workers’ rights and ideologically oriented - employers’ rights allows for exceptions to the general rules set by the equal treatment principle, but in a stricter way compared to the community rules”²²⁷.

This setting involves, as confirmed by jurisprudence, the possibility to accept a rightful dismissal “caused by a major ideological disagreement between the organization and the worker performing ideologically oriented activities”²²⁸; that is, making an exception to the prohibition of discrimination, “there is no unjust reason for dismissal in the event of a failure to comply with the ideology and institutional goals of the employer”²²⁹.

The Corte di Cassazione has also specified that, for the purposes of the application of art. 4,

“employers can be classified as entrepreneurs according to the nature of their activity, which shall be evaluated in accordance with the ordinary criteria that are related to the type of organization and economic character of its management, regardless of the existence of an actual profit and whether the delivery of services - if carried out with entrepreneurial economic and organizational methods - is performed exclusively to the associates of the subject delivering them or not”²³⁰.

Therefore, the entrepreneurial nature of an activity and its subsequent exclusion from the exemption provided for by art. 4 results

“from the objective economic character of the activity, as it is aimed at covering the expenses with the revenues as anyone who produces wealth is an entrepreneur, regardless of the fact that its goods or services are destined to third parties or other institutions directly related to the organization”²³¹.

In setting the prohibition of discrimination on grounds of religious convictions and practices, the Consolidation Act of 1998 offers broader

²²⁷ N. FIORITA, *Le direttive comunitarie in tema di lotta alla discriminazione, la loro tempestiva attuazione e l'eterogenesi dei fini*, in *Quaderni di diritto e politica ecclesiastica*, n. 2, 2004, p. 361.

²²⁸ Corte di Cassazione, 8 July 1987, n. 189, in R. DE LUCA TAMAJO, F. LUNARDON, *Aziende di tendenza e disciplina dei licenziamenti individuali*, in *Quaderni di diritto e politica ecclesiastica*, cit., p. 707.

²²⁹ R. DE LUCA TAMAJO, F. LUNARDON, *Aziende di tendenza*, cit., p. 707.

²³⁰ Corte di Cassazione, 26 January 2004, n. 1367, in P. Cendon (ed.), *Il lavoro*, 4th ed., in *Il diritto privato nella giurisprudenza*, Utet, Milano, 2009, p. 202.

²³¹ P. Cendon (ed.), *Il lavoro*, cit., p. 202.



protection compared to Legislative Decree no. 216 of 2003, which only refers to religion leading to doubt that

“cult acts and behaviours that are work-related or not and directly relatable to the compliance (or non-compliance) with a religious obligation, even if they do not affect the appropriate performance of work, are excluded from the factors of different treatment that can result in discrimination”²³².

A special evidential system was introduced, as it helps workers prove the casual connection existing between different treatment and discrimination factor. In particular, once workers can prove the existence of a negative treatment towards them with respect to the chosen benchmark, then the employers shall provide verifiable facts in order to assess - in the event of direct discrimination - the inexistence of discrimination and thus the existence of a non-discriminatory reason for the different treatment, or the existence of an exemption from the prohibition of discrimination; on the other hand,

“in the event of indirect discrimination, the inexistence of discrimination or the traceability of the potentially detrimental criterion or practice to a legitimate aim pursued with appropriate and necessary means, so that the employer is totally responsible for proving the inexistence of discrimination or its justification”²³³.

Moreover, recent jurisprudence has defined that whether “an employer threatens a worker’s fundamental right, including freedom of religion and conviction, the worker can have recourse to self-protection by refusing to perform the work required”²³⁴.

Keywords: Religion; Religion and Law; Science of Religion; Italian Constitution; Labour and Law.

²³² **M. DE GIORGI**, *Osservatorio UNAR: libertà religiosa e discriminazione nell’ordinamento italiano*, in *Quaderni di diritto e politica ecclesiastica*, n. 1, 2013, p. 172.

²³³ **E. TARQUINI**, *La Corte di Cassazione e il principio di non discriminazione al tempo del diritto del lavoro derogabile*, in *Rivista italiana del diritto del lavoro*, n. 3, 2016, p. 740.

²³⁴ **J. PASQUALI CERIOLI**, *Il lavoro*, in G. Casuscelli (a cura di), *Nozioni di diritto ecclesiastico*, 5th ed., Giappichelli, Torino, 2015, p. 182; **ID.**, *Il divieto di discriminazione religiosa sul luogo di lavoro: riflessioni critiche*, in *Quaderni di diritto e politica ecclesiastica*, n. 1, 2005, p. 94 ss.; **ID.**, *Parità di trattamento e organizzazioni di tendenza religiose nel «nuovo» diritto ecclesiastico europeo*, in *Quaderni di diritto e politica ecclesiastica*, n. 1, 2013, p. 71 ss.



Maria d'Arienzo

(Professor of Confessional Rights at the University Federico II of Naples,
School of Law)

**The Meaning of 'Religion'
in the French *Cour de cassation* Jurisprudence ***

SUMMARY: 1. Law and Religion in French Legislation. Terminological Issues - 2. Civil Insignificance of Confessional Statutory Regulations - 3. Religious Freedom and Contractual Relationships - 4. The Expression of Religious Convictions in the workplace

1 - Law and Religion in French legislation. Terminological Issues

The pronouncements of the Civil Court of Cassation are the perspective that I have chosen for the analysis of the meaning of 'religion' in French law. This choice has been determined by the greater variety of civil litigation stances in comparison to those pertaining to penal law. Such a variety allows for a more complex analysis of the interpretative method with which the judge, in identifying criteria for the application of juridical rules, establishes the jurisprudential hermeneutics concerning the amplitude and the limits of religious freedom rights. Furthermore, the balancing of rights in actual court cases is taken into account.

As in all interpretation processes, the juridical definition of "religious facts" in sociological terms²³⁵, meets with limitations based both on the vagueness and on the terminological variety used in legal texts²³⁶. The Act of Separation of the Churches and the State of 1905 established the main restrictions that define the juridical analysis method: respect for freedom of conscience (art. 1)²³⁷ and the neutrality of the State (art. 2)²³⁸.

*A quite similar Italian version has been published in *Diritto e Religioni*, 23, 1-2017, pp. 112-123.

²³⁵ É. DURKHEIM, *De la définition des phénomènes religieux*, in *L'année sociologique*, 1898, pp. 1-28.

²³⁶ On the matter concerning a juridical definition of religion, starting from terminological varieties in the French normative texts, see F. MESSNER, P. H. PRÉLOT, J.M. WOEHRLING, *Traité de droit français des religions*, Litec, Paris, 2th ed., 2013, p. 33 ss.

²³⁷ "La République assure la liberté de conscience. Elle garantit le libre exercice des cultes sous les seules restrictions édictées ci-après dans l'intérêt de l'ordre public".

²³⁸ "La République ne reconnaît, ne salarie ni ne subventionne aucun culte".



The preamble to the French Constitution of 1946 enshrines the principle of non-discrimination for reasons of sex, origin and religion²³⁹. This principle is confirmed in the First Article of the Constitution of 1958, which establishes the equality of all citizens before the law, and the respect of all religious beliefs²⁴⁰.

Hence, the term *religion* in the Constitution indicates the dimension of everyone's identity. The twofold standpoint which the juridical notion of religion is composed of is specified in the subsequent declaration contained in the Constitution which states that all beliefs, including convictions of conscience, are equally respected by the legal system.

On the one side, there is the criterion of the citizen's affiliation to a range of values, doctrines and rituals typical of a religious community; on the other, priority is given to the conviction, belief, or creed, not necessarily religious, shaping the conscience of each individual²⁴¹.

The first aspect deriving from the juridical qualification assigned to the notion of religion is precisely the individual feature of value options. What is relevant for the French law is not the normative essence of religion. Its wider and more complex meaning is not acknowledged, but religion is viewed as a faith or a creed that is different from all other convictions,

²³⁹ “[...] le peuple français proclame à nouveau que tout être humain, sans distinction de race, de religion ni de croyance, possède des droits inaliénables et sacrés. Il réaffirme solennellement les droits et les libertés de l’homme et du citoyen consacrés par la Déclaration de 1789 et les principes fondamentaux reconnus par les lois de la République”.

²⁴⁰ *Constitution de la République Française du 4 octobre 1958*, art. 1: “La France est une République indivisible, laïque, démocratique et sociale. Elle assure l’égalité devant la loi de tous les citoyens sans distinction d’origine, de race ou de religion. Elle respecte toutes les croyances”. Freedom for all before the law with no distinction of [...] religion, and respect for all convictions allow to specify the concept of secularism as neutrality-separation, and the prohibition to discriminate in matters of religion, but also as a protection of the freedom of conscience not only limited to beliefs relating to religion and cult. See **G. KOUBI**, *La laïcité dans le texte de la Constitution*, in *Revue de Droit public et de la science politique en France et à l’étranger*, 5, 1997, pp. 1301-1321 (especially p. 1309). In other terms, unlike the version of 1946, in the Constitution of 1958 the term ‘religion’ referred to the prohibition to discriminate appears, even though the protection of each and every conviction without specifications highlights that religious choices are on the same footing as those produced by agnostic, non-religious’ or merely philosophical beliefs. On this point, see **M. d’ARIENZO**, *La religione della laicità nella Costituzione francese*, in **P. BECCHI, V. PACILLO**, *Sull’invocazione a Dio nella Costituzione federale e nelle Carte fondamentali europee*, Eupress, Lugano, 2013, p. 143.

²⁴¹ Concerning the distinction in meaning of terms such as “creed”, “opinion” and “thought” pertaining to religious matters, see **C. MAGNI**, *Interpretazione del diritto italiano sulle credenze di religione. Possibilità operative analitiche e strutture d’ordine delle scelte normative*, Cedam, Padova, 1959, p. 88 ss.



philosophical creeds or opinions, as expressions of the freedom of thought²⁴².

Consequently, in legal decisions, the subjective prevails over the objective aspect, which stems from the collective standpoint. This conceptualization is reflected in the much more frequent use of the term “cult” which is used in the technical-legal sense as a synonym for “religion”, albeit with overlapping meanings²⁴³. Such usage betrays an underlying guilty ideology. It considers religion only for its cultural and ritual features, as the exterior expressions affecting the social field, thus ratifying the distinction and the separation between the private and the public spheres²⁴⁴ of religious affiliations.

The terms “cult” and “cultural association” can be traced in the provisions of the Act of Separation of 1905, which states, “the French Republic does not recognize subsidies or funding for any worship”²⁴⁵. Therefore, the term ‘cult’ is used to qualify religious institutional and communal forms of organization in legal terms²⁴⁶. More often, it is used to specify the right to religious freedom²⁴⁷.

²⁴² Concerning the lack of the clear distinction in the French law between terms such as opinion, convictions of conscience and religious faith.

²⁴³ Regarding the term “cult” in the French Law, see **F. MESSNER, P.H. PRÉLOT, J.M. WOEHRLING**, *Traité de droit français*, cit., p. 6 ss. The over simplification of legal vocabulary carried out by overcoming the distinction between Churches and other forms of religious organization by means of the only legal denomination of “cult” is ratified by **Loi du 18 germinal an X (8 avril 1802) relative à l'organisation des cultes**.

²⁴⁴ See *Droit des cultes*, edited by X. Delsol, A. Garay, E. Tawil, Dalloz, Paris, 2005, p. 25.

²⁴⁵ *Loi du 9 décembre 1905 concernant la séparation des Églises et de l'État*, cit., art. 2. A first formula of separation between State and religious confessions was ratified by the Thermidorian Convention with the Constitution of the year III (1795), which stated in art. 354: “nul ne peut être empêché d'exercer, en se conformant aux lois, le culte qu'il a choisi. Nul ne peut être forcé de contribuer aux dépenses d'un culte. La République n'en salarie aucun”. See **J. BAUBEROT, J.P. SCOT, C. DELACAMPAGNE, H. PEÑA-RUIZ, R. RÉMOND**, *Faut-il réviser la loi de 1905?*, Puf, Paris, 2005; **É. POULAT, M. GELBARD**, *Scruter la loi de 1905: la République française et la religion*, Fayard, Paris, 2010. On the distinction between the idea not to subsidize any affiliation and the idea of secularism, see **G. KOUBI**, *Les voiles de la laïcité ou la laïcité sans le voile*, in *Les Petites Affiches*, n. 145, 1989, pp. 4-9, especially pp. 5-6.

²⁴⁶ See **F. MESSNER, P.H. PRÉLOT, J.M. WOEHRLING** (2003), *Traité de droit français*, cit., where it is specified that even though “Le mot culte reste associé à l'idée de contrôle et de régulation publique” - and therefore maintains a more restrictive connotation of the term ‘religion’ - “au plan des textes juridiques internes il existe une certaine équivalence entre les termes de religion et de culte”, p. 23. See also, **P. ROLLAND**, *Qu'est-ce qu'un culte aux yeux de la République?* in *Archives de sciences sociales des religions*, 129, 2005, pp. 51-63.

²⁴⁷ **C. LANDHEER-CIESLAK**, *La religion devant les juges français et québécois de droit civil*, Ed. Yvon Blais, Cowansville, 2007, p. 255; **L.P. RAYNAULT-OLLU, G. ZUCCHI**, *Droit et religion. Concepts de religion dans le droit. Étude éclectique des approches juridiques à la définition*



The equivalence in meaning assigned to the terms “cult” and “religion” probably traces its origins to the laws prior to 1905, which only provided for four recognized cults, while the others remained without a specific juridical regulation²⁴⁸. Consequently, the word “cult” has been used as the legal term to refer to religion giving it a more global and extended meaning.

Essentially, the normative silence concerning the meaning of the terms “religion” and “cult” is echoed in the principle of separation intended as neutrality constitutive, but not exhaustive of French secularism²⁴⁹. Moreover, the latter term also lacks a legal definition and is often used as an adjective in legal texts, i.e. “Republic, indivisible, secular, democratic, social” (art. 1, Const. 1958) or in reference to public school teaching that is free and secular (art 46)²⁵⁰.

et au droit à la liberté de religion, in *Revue Juridique Thémis de l'Université de Montréal*, 2013, pp. 649-477.

²⁴⁸ The law of 9 December 1905 put an end to the distinction between the four recognized cults - Catholic, Lutheran, Reformed, Israelite - which benefited from a specific legal system, and the other cults not recognized by public law.

²⁴⁹ **A. BOYER**, *Comment l'État laïque connaît-il les religions?*, in *Archives de sciences sociales des religions*, 2005, pp. 37-49; **D. KOUSSENS**, *L'État français et l'expression des confessions religieuses: entre neutralité confessionnelle et neutralité référentielle*, in *Politique et sociétés*, 2010, pp. 39-60; **ID.**, *La religion "saisie" par le droit. Comment l'État laïque définit-il la religion au Québec et en France?*, in *Recherches sociographiques*, 2011, pp. 811-832. On French secularism, *ex plurimis*, **C. DURAND-PRINBORGNE**, *La laïcité*, Dalloz, Paris, 2004; **G. HAARSCHER**, *La laïcité*, Presses universitaires de France, Paris, 2017 (first ed. 1996); **R. SCHWARTZ**, *Un siècle de laïcité*, Berger-Levrault, Paris, 2007; **J. BAUBEROT**, *Histoire de la laïcité en France*, Presses universitaires de France, Paris, 2010; **ID.**, *Les sept laïcités françaises. Le modèle français de laïcité n'existe pas*, Maison des Sciences de l'Homme, Paris, 2015.

²⁵⁰ “L'organisation de l'enseignement public gratuit et laïque à tous les degrés est un devoir de l'État”, *Préambule de la Constitution française du 27 octobre 1946*, cit. About the principle in the Constitution of secularism in French Republic cf. **É. POULAT**, *Notre laïcité publique. “La France est une République laïque” (Constitutions de 1946 e 1958)*, Berg, Paris, 2003. Concerning the history of secularism in French schools, cf. **P. CHEVALLIER**, *La séparation de l'Église et de l'école. Jules Ferry et Léon XIII*, Fayard, Paris, 1981; **D. GROS**, *La séparation de l'Église et de l'École (1878-1886). Principes juridiques fondateurs de la laïcité scolaire*, in **J. BAUDOIN**, **P. PORTIER**, *La Laïcité. Une valeur d'aujourd'hui? Contestations et renégociations du modèle français*, Presses Universitaires de Rennes, Rennes, 2001, pp. 51-63; **L. GARREAU**, *L'École, la religion et la politique de Condorcet à Ferry*, L'Harmattan, Paris, 2006; **B. BASDEVANT GAUDEMET**, *École publique, école privée. L'épiscopat devant le Conseil d'État en 1883*, in *Revue d'Histoire de l'Église de France*, 1988, pp. 245-259; **EAD.**, *L'épiscopat français et le centenaire de la Révolution*, in *Les catholiques français et l'héritage de 1789. D'un centenaire à l'autre*, Actes du colloque de l'Institut Catholique de Paris (Paris, 9-11 March 1989), Textes réunis sous la direction de **P. COLIN**, Paris, 1989, pp. 29-44; **P. VALDRINI**, *Evoluzione dei rapporti tra Chiesa cattolica e Stato nelle scuole cattoliche francesi*, in *Quaderni della scuola di specializzazione in diritto ecclesiastico e canonico*, 7, *Studi di diritto ecclesiastico e*



The legal concept of secularism is a method to regulate the separation between the public sphere, based on shared and universally shareable values, and the private sphere, based on values connected with personal affiliation and biased²⁵¹. Hence, secularism allows to regulate the coexistence of subjective liberties as the principle to carry out the organization of public authorities and public services²⁵².

The perspective for the survey of the legal aspects of religion in France, produced by the Supreme Court in reference to the dialectics between the right to religious freedom, the right to equality and secularism is based on three approaches. Specifically: neutrality, as the separation between law and religion; freedom of individual conscience; the principle of non-discrimination based on religion or convictions of other nature²⁵³.

2 - Civil Irrelevance of Confessional Statutory Regulations

In reference to the first approach concerning the interpretation of neutrality as separation, the judgments of the Second Section of the Civil Court of

canonico, Jovene, Napoli, 2002, pp. 65-77; **A. FERRARI**, *Libertà scolastiche e laicità dello Stato in Italia e Francia*, Giappichelli, Torino, 2002. On the relationship between Liberal Protestantism and Secularism, see **F. BUISSON**, *Éducation et République*, Introduction, présentation et notes de **P. HAYAT**, Kimé, Paris, 2003; **P. OGNIER**, **J. BAUBÉROT**, *Une école sans Dieu? 1880-1895. L'invention d'une morale laïque sous la III^e République*, Presses Universitaires du Mirail, Toulouse, 2008.

²⁵¹ **J. LALOUETTE**, *La séparation des Églises et de l'État: genèse et développement d'une idée, 1789-1905*, Éd. du Seuil, Paris, 2005. Concerning the evolution of the concept of Secularism-Separation, as an institutional model between public and private spheres, see **M. d'ARIENZO**, *La laicità secondo Nicolas Sarkozy*, in *Diritto e Religioni*, 2008, p. 259; **EAD.**, *La laicità francese: "aperta", "positiva", o "impositiva"?*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), dicembre 2011, e in *Diritto e Religioni*, 2011, p. 355; **P. ROLLAND**, *La Séparation comme forme de régulation de la pluralité religieuse*, in *Annuaire Droit et religions 2010-2011*, 2010, pp. 167-181.

²⁵² **C. KINTZLER**, *Qu'est-ce que la laïcité?*, Vrin, Paris, 2014.

²⁵³ **J. BAUBÉROT**, **M. MILOT**, *Laïcités sans frontières*, ed. Seuil, Paris, 2011; **J. WOEHLING**, *Quelle place pour la religion dans les institutions publiques?* in **J.F. GAUDREAU-DESBIENS** (dir.), *Le Droit, la religion, le "raisonnable". Le fait religieux entre monisme étatique et pluralisme juridique*, Montréal, Éd. Thémis, 2009, pp. 115-168; **J.M. WOEHLING**, *Réflexions sur le principe de la neutralité de l'Etat en matière religieuse et sa mise en œuvre en droit français / Reflections Concerning the Principle of Religious neutrality of the State and its Implementation in French Law*, in *Archives de sciences sociales des religions*, 1998, pp. 31-52; **ID.**, *Le principe de neutralité confessionnelle de l'État*, in *Société, droit et religion*, 2011, pp. 63-85; **C. FOUREST**, *Génie de la laïcité*, Grasset, Paris, 2016.



Cassation pronounced in 2012²⁵⁴ against CAVIMAC, (the Pensions and Social Security Fund of the main Cults)²⁵⁵, emphasizes that the religious rules establishing membership status within a community or a congregation have no relevance for civil law. Therefore, no formal or material reference is made to confessional statutory norms concerning the commencement date for the calculations of pension provisions. Such cases regarded the years spent in religious seminaries or to the year of novitiate.

CAVIMAC's internal regulations conformed the religious rules with which one became a member of a congregation or a territorial community to administrative regulations, thereby calculating pension rights from the time of completion of the pronouncement of one's first vows or first tonsure.

The French Court of Cassation has instead determined that the status of a member is not determined by confessional criteria, which are established within each religious order²⁵⁶, but exclusively by law, according to the objective circumstances marking communal life.

When a clerical student, a postulant or a novice is carrying out daily communal services in obedience and under the supervision of a higher authority, and in addition to "activities serving religion", they are considered to all effects members of the congregation and religious communities. Their status is established, for all confessional institutions and communities, by the law of 1978, based on a tacit civil contract, in accordance with Art. 1101 and Art. 1102 C.C. and Social Security Code²⁵⁷.

²⁵⁴ Cour de Cassation, deuxième chambre civile, *Arrêt* n° 97, 20 janvier 2012, *pourvois* nn. 10-24.603 et 10-24.615; *Arrêt* n° 101, 20 janvier 2012, *pourvois* nn. 10-26.845 et 10-26.873; *Arrêt* n. 882, 31 May 2012, *pourvois* nn. 11-15294 et 11-15426; *Arrêt* n° 1074, 21 juin 2012, *pourvoi* n. 11-18782; *Arrêt* n° 1045, 21 juin 2012, *pourvois* 11-18801 et 11-19079; *Arrêt* n° 1620, 11 octobre 2012, *pourvoi* n. 11-20775.

²⁵⁵ La Caisse Assurance, Vieillesse, Invalidité et Maladie des cultes (CAVIMAC) is a National Organization established by law n. 78 on 4 July 1999, handling Social security for all of the members of congregations, Ministers of Cult and religious communities.

²⁵⁶ Concerning the legal recognition of consecrated life, in French legislation and jurisprudence, see **C. BURGUN**, *La vie consacrée en droit canonique et en droit public français*, ed. Artège Lethellier, Paris, 2016.

²⁵⁷ Cassation rejects the appeal of the *Association diocésaine de Dijon* stating that: "[...] la cour d'appel, sans méconnaître les dispositions des articles 1er de la loi du 9 décembre 1905 ni les stipulations de l'article 9 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales ni le principe de la contradiction, et en appréciant souverainement la valeur et la portée des preuves qui caractérisent l'engagement religieux de l'intéressé manifesté, notamment, par un mode de vie en communauté et par une activité essentiellement exercée au service de sa religion, a pu déduire de ces constatations et énonciations que celui-ci devait être considéré, dès son entrée au grand séminaire, comme membre d'une congrégation ou collectivité religieuse au sens de l'article L. 721-1, devenu l'article L. 382-15 du code de la sécurité sociale, de sorte que la période litigieuse devait être prise en compte dans le calcul de ses droits à pension": Cour de Cassation, deuxième



The Court's judgments of 2012 confirmed the tendency that had been affirmed in 2009²⁵⁸, which would be reiterated in 2015²⁵⁹.

Specifically, the civil legal status and the period of spiritual preparation preceding the vows overlap. In fact, the preparation period is comparable to a trial period, as under religious law, one is not yet a full member of the congregation. Hence, tax obligations are therefore at the expense of religious congregations and diocesan associations from the time one becomes a seminarian, a postulant or a novice²⁶⁰.

It is interesting to note that the legal judgment includes a reference to activities serving religion, referring this term to the organizational form in which the declaration of faith is practiced. Clearly, the substitution of the term “cult” confirms the correspondence of the terms “religion” and “cult”.

As is evident, the principle of neutrality is not the result of the simple separation between the spheres of the state and religion. Rather, it is a sort of “indifference” we could define “active”, as it is aimed at affirming the supremacy of French law and, consequently, the juridical insignificance of religious rules for the protection of individual rights even within religious communities.

3 - Religious Freedom and Contractual Relationships

The second approach can be represented by the limitations placed by the law on religious practices in contractual relationships. In accordance to

chambre civile, *Arrêt* n° 882, 31 mai 2012, *pourvois* nn. 11-15294 and 11-15426, (<http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000025961379>).

²⁵⁸ Since 2009, the Court of Cassation constantly states that clerical students are “ministers of cult, members of congregations” due to their religious obligations, according to L. 382-15 of *Social Security Code*. Cf. Cour de cassation, deuxième chambre civile, *Arrêt* n° 1607, 22 octobre 2009, *pourvoi* n. 08-13656, available at site: <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXTE000021194385>.

²⁵⁹ Cour de cassation, deuxième chambre civile, 8 octobre 2015, *pourvoi* n. 14-25097.

²⁶⁰ “Attendu [...] que l’admission au noviciat résulte d’une demande de la postulante soumise à l’approbation de l’autorité religieuse, commence par une prise d’habit qui sera porté tout au long de la période du noviciat, cette période étant consacrée à la formation spirituelle, à la connaissance de la règle, à la pratique des exercices communs de la congrégation; qu’il résulte des constatations ci-dessus que tant la période du postulat que celle du noviciat peuvent être considérées comme analogues à une période d’essai au sein de la congrégation, résiliable librement et sans condition par l’une ou l’autre des parties à tout moment, la postulante et, plus encore, la novice, exerçant de fait, au sein de la congrégation, des activités de la nature de celles des membres de celle-ci”: Cour de Cassation, deuxième chambre civile, *Arrêt* n° 101, 20 janvier 2012, *pourvois* nn. 10-26845 and 10-26873.



settled case law, Cassation affirms the preponderance of the compulsory strength of contracts with respect to religious freedom.

In fact, on 30 September 2015, the Court of Cassation ruled in favor of the legitimacy of the repeal of the gratuitous loan of a hall, which had been granted to a Muslim community since 1971. Hence, the hall was to be employed as a multi-purpose space to include its use as a prayer hall.

The violation of the freedom to exercise worship practices, invoked by the claimants as a result of the closing of the only meeting room available to Muslims in that area was not recognized by the Court. It established, in fact, that the owning company was not qualified to warrant worship practices for residents. The availability of the premises had only facilitated its use as a prayer hall, as no specific utilization had been established in the agreement between the parties. Therefore, the closure of the premises was not a limitation of a fundamental liberty, nor could it be considered discriminatory for religious reasons, as residents could practice “their religion” without using the prayer hall or could attend another mosque which was less than two kilometers away²⁶¹.

In another pronouncement in 2015, the Court disqualified the *Association Consistorial Israelite* of Paris from carrying out cultural activities and ceremonies in the halls of its owned propriety, as the premises were located within a shared property area. The reason was that the transformation of a space, originally designated for residential or commercial purposes, into a community center was against the intended use of the property, according to co-ownership regulations. In point of fact and as specified in the judgement, given the sensitivity of the issue, the worship practices as such were not running against co-ownership regulations. Rather, it was the extremely noisy nature of the functions caused by the large number of participants and by the performance of religious chants at all hours of the day, in addition to meetings held even in common areas, that disturbed the other inhabitants of the shared property²⁶².

This decision confirms the tendency already affirmed in 2006 concerning the removal of a hut built on the balcony of a Jewish couple’s apartment during the celebration of Succoth to symbolize the errant Jews in the desert after the flight from Egypt. The reason was that the construction

²⁶¹ Cour de cassation, Première Chambre civile, 30 septembre 2015, 14-25709 (available at site: <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000031264149>).

²⁶² “La pratique d’un culte ne saurait être interdite en tant que telle par un règlement de copropriété. Mais si son exercice régulier, dans une boutique au rez-de-chaussée, entraîne des nuisances excessives pour les habitants de l’immeuble, la copropriété peut exiger qu’il y soit mis fin”: Cour de cassation, Troisième Chambre civile, 16 septembre 2015, 14-13518..



of the hut was against the town planning limitations imposed by condominium regulations. The pronouncement stated that “religion, albeit a fundamental right may not violate provisions stated by co-ownership regulations”²⁶³.

Previously, in 2002, the Court of Cassation had affirmed that ‘practices dictated by the religious convictions of tenants, do not imply any specific obligation on the part of the lessor, unless there is a specific agreement’²⁶⁴.

In light of these decisions, it is possible to affirm that in the contrast between the right to religious freedom and contractual secularism, what prevails is the respect for secularism, which can be identified as the basis of the adopted legal decision. The right to religious freedom, like all fundamental rights is not absolute, but it can be proportionally limited to the rights of freedom of others. However, this interpretation highlights the non-inclusive and non-pluralist connotation of French secularism, which sets limitations on expressions of religious freedom in the juridical regulation of individual liberties.

Nevertheless, it is interesting to focus on the use of the terminology used in the judgments related to the expression of religious identity. While in the ruling of 2002 the reference is to “practices dictated by religious beliefs”, in 2006, the Court referred to religious freedom as being a fundamental right. Yet, in the ruling of 2015, the reference to religious rights was expressed by “the practice of one’s own religion”. What can be observed in the jurisprudence of the French Civil Court of Cassation is that firstly, the term ‘cult’ is used less frequently, even as an adjective, to qualify external expressions of religious affiliation. However, above all, the expressed reference to religion, as no longer exclusively corresponding to or interchangeable with ‘cult’ is not without significance. In other terms, juridical semantics seem less imbued with laicism, and more sensitive to qualifying religious phenomenology as codes determining the behavior of believers. Religious practices are not only considered expressions of

²⁶³ Cour de cassation, Troisième Chambre civile, 8 juin 2006, 05-14774: “Attendu, d’autre part, qu’ayant retenu à bon droit que la liberté religieuse, pour fondamentale qu’elle soit, ne pouvait avoir pour effet de rendre licites les violations des dispositions d’un règlement de copropriété et relevé que la cabane faisait partie des ouvrages prohibés par ce règlement et portait atteinte à l’harmonie générale de l’immeuble, la Cour d’Appel, en a exactement déduit que l’assemblée générale était fondée à mandater son syndic pour agir en justice en vue de l’enlèvement de ces objets ou constructions”.

²⁶⁴ “Les pratiques dictées par les convictions religieuses des preneurs n’entrent pas, sauf convention expresse, dans le champ contractuel du bail et ne font naître à la charge du bailleur aucune obligation spécifique”: Cour de cassation, Troisième Chambre civile, 18 décembre 2002, pourvoi n. 01-00.519.



religious convictions and are therefore qualified as the result of individual choices. Rather, they follow the principle of affiliation to a religious community which is provided with its own regulations and which is therefore qualified as being religious in a global sense and no longer exclusively from the point of view of the individual.

4 - Expressing Religious Convictions in the Workplace

The law has adopted a different position concerning matters of freedom of religious expression in working relationships. Two rulings representative of this approach were pronounced by the Chambre Social of the Cour de Cassation, concerning the dismissal of a woman from work because of her Islamic veil. In ruling n. 536 of 19 March 2013, the Court confirmed the dismissal of the CPAM employee because she had refused to remove her veil. For the first time “the principles of neutrality and secularism of the public service and therefore the duty not to express religious affiliations with visible signs during the performance of one’s duties” was being extended to organizations which answer to private law, as participants in the public service and thereby subjected to the provisions of the Labor Code²⁶⁵. On the contrary, in the case of the nurse employed by Baby Loup kindergarten, the Cassation stated that dismissal due to the Islamic veil was illegitimate, as deemed discriminatory and harmful to religious freedom²⁶⁶.

The different judicial solutions resulted from the different nature of the employees’ functions, which were public in the first case and private in the second

Undoubtedly, this ruling is a sign of a new legal tendency of the Court in the dialectics between secularism, i.e. the equal treatment of all beliefs both religious or not, and safeguarding the individual’s full freedom of conscience. This ruling definitely marks a stop in the extension of neutrality and to the interpretation of secularism as all encompassing and restrictive of specific identities, while encouraging, instead, a new inclusive and pluralist vision.

Moreover, a different juridical tendency safeguarding individual religious conscience vis-à-vis the secularism of the institutions is obvious also in a new and interesting pronouncement, which took place on 1

²⁶⁵ Cour de cassation, Chambre sociale, 19 mars 2013, *arrêt* n° 537, *pourvoi* n. 11-690.

²⁶⁶ Cour de cassation, Chambre sociale, 19 mars 2013, *arrêt* n° 536, *pourvoi* n. 11- 28845.



February 2017. The pronouncement related to the dismissal of an RATP²⁶⁷ employee who refused to take an oath as provided by the law of 15 July 1845 for railway police staff²⁶⁸, in the case of a permanent contract, after a trial period for train conductors.

The employee objected that her Christian religion prevented her from pronouncing the form of oath "I swear", required by law, according to the evangelical prohibition prescribed both in the Gospel of Mathew 5, 34 and in Saint James' letter 5, 12²⁶⁹.

The alternative form of oath proposed to the President of the Court by the employee reproduced the same spirit of solemn obligation expected by law, according to EU laws and to the general principles of common law, but was rejected by the President of the *Tribunal de Grande Instance* of Paris²⁷⁰.

The Court of Cassation annulled the pronouncement of the Court of Appeal on the grounds that art. 23 of the Railway Police Law does not enforce a preordained form of oath and it does not prohibit that the form of oath can reflect the forms accepted by one's own religion²⁷¹. It therefore

²⁶⁷ RATP stands for *Régie Autonome des Transports Parisiens*, founded in 1948, by the fusion of *Compagnie du Chemin de Fer Métropolitain de Paris* and *Société des Transports en Commun de la Région Parisienne*.

²⁶⁸ Art. 23 of *Loi du 15 juillet 1845 sur la police des chemins de fer*, provides the following: "Au moyen du serment prêté devant le tribunal de grande instance de leur domicile, les agents de surveillance de l'administration et des concessionnaires ou fermiers pourront verbaliser sur toute la ligne du chemin de fer auquel ils seront attachés".

²⁶⁹ In reality, the dismissal was subsequent to the verbalization of the missed oath of the worker by the president of the Court. The discrimination inherent in the refusal of accepting the new form of oath, respectful of the religious beliefs of the worker as an alternative to the expected one, based on a custom does not therefore seem ascribable to the employer.

²⁷⁰ Cour de cassation, chambre sociale, 1 février 2017, *pourvoi* n. 16-10459 settled: "qu'il résulte de l'article 23 de la loi du 15 juillet 1845 sur la police des chemins de fer que le serment des agents de surveillance exerçant au sein des entreprises visées par cette disposition peut être reçu selon les formes en usage dans leur religion"; and deduced from that "que la salariée n'avait commis aucune faute en proposant une telle formule et que le licenciement prononcé en raison des convictions religieuses de la salariée était nul". It is obvious that the *Chambre Sociale* interpreted Art. 23 of Law 15 July 1845 in the light of Art. 9 of Cedu.

²⁷¹ On the religious foundations of taking oath cf. **É. BENVENISTE**, *Vocabolario delle lingue indoeuropee*, II, Einaudi, Torino, 2001, p. 406 ss.; **G. AGAMBEN**, *Il sacramento del linguaggio. Archeologia del giuramento*, Laterza, Bari, 2008. Regarding the sacral function of the oath see **A. MAGDELAIN**, *La sponsio internationale*, Bibl. Cujas, Paris, 1943, p. 163; **P. NOAILLES**, *Du droit sacré au droit civil*, Sirey, 1949, p. 275 ss. For the process of secularism of *sacramentum*, cfr. R. Verdier (ed.), *Le serment*, I-II, CNRS Éditions, Paris, 1991; **M. HUMBERT**, *Droit et religion dans la Rome antique*, in *Mélanges Félix Wubbe*, Editions universitaires, Fribourg, 1993, p. 191 ss.; **M. JASONNI**, *Il giuramento. Profili di uno studio sul processo di secolarizzazione dell'istituto in diritto canonico*, Giuffrè, Milano, 1999; **P.**



ruled against the pronounced dismissal due to the employee's religious convictions finding the pronouncement discriminatory.

In conclusion, with respect to the imposition of a uniformity, which fossilizes a secular oath whose nature is, in any case, religious, the Court interpreted the norm in a way that is much more compliant to the expression of specific identities.

Therefore, neutrality is no longer conceptualized as the consecration of approved secularism excluding religious options within the public sphere, but increasingly more open towards an axiological and, as such, pluralist impartiality.

CHIAPPINI, *Le droit et le sacré*, Dalloz, Paris, 2006, p. 209 ss. Concerning taking oath as a sacrament of public power, cf. **P. PRODI**, *Il sacramento del potere. Il giuramento politico nella storia costituzionale dell'Occidente*, il Mulino, Bologna, 1992; **M. JASONNI**, *Il giuramento politico nella grecità*, in **ID.**, *La lealtà indivisa. Autonomia soggettiva e sacralità della legge alle origini e nella tradizione d'Occidente*, Giuffrè, Milano, 2004, p. 31 ss.; **C. BORGHERO**, *Il giuramento dell'infedele: stato di diritto, tolleranza e obbligazione politica*, in *I castelli di Yale. Quaderni di filosofia*, 2004, pp. 9-29; **N. BANNEUX**, *D'une formule unificatrice aux fondements d'une déontologie contemporaine: étude de droit constitutionnel sur le serment des magistrats judiciaires*, in *Revue belge de Droit constitutionnel*, 2008, pp. 81-116; **ID.**, *Brèves observations sur le caractère religieux du serment au XIX^e siècle à travers l'affaire "Michel"*, in **D. HEIRBAUT, X. ROUSSEAU, A. WIJFFELS**, *Histoire du droit et de la justice/Justitie -en rechts- Geschiedenis*, Presses Universitaires de Louvain, Louvain, 2010, pp. 499-509.



Luigi Mariano Guzzo

(Ph.D Candidate, Magna Graecia University of Catanzaro)

The Meaning of 'Religion' in Polish Law

SUMMARY: 1. Introduction - 2. Law and religion in the Polish legal system - 3. A legal definition of religion in Poland? - 4. Two cases-law about the meaning of religion - 4.1. The Polish Raelian Movement (1999) - 4.2. The Church of the Flying Spaghetti Monster (2013) - 5. What is the idea of sacrum in Polish law? - 6. Conclusion.

1 - Introduction

Despite the anti-Church policy of the Communist regime, Poland is still a largely Catholic country, where «at least 90 percent of Poland's 38 million inhabitants still declare themselves of catholic religion»²⁷². Furthermore, Poland²⁷³, with Greece²⁷⁴, is the European nation with the highest Herfindahl measure regarding religious diversity (85)²⁷⁵, with the result of being a country of religious uniformity²⁷⁶. This observation is important for a study about law and religion as it shows that Polish society is in fact one

²⁷² See **J. LUXMOORE**, *From Solidarity to Freedom. The Mixed Fortunes of Churches in Postcommunist Eastern Europe*, in **A.D. HERTZKE**, *The future of Religious Freedom. Global Challenges*, Oxford University Press, New York, 2013, p. 186.

²⁷³ **K. COMPLAK**, *Will Poland be the most confessional state on the European Union?*, in *Jurisprudencija*, 1 (119), 2010, pp. 85-95, concludes that the constitutional provisions on religious matters demonstrate that the regulations or provisions on religious matters "in the Polish basic statute are not more confessional than those established in other European Union countries" (p. 93).

²⁷⁴ About the co-evolution of the collective dimension of religious freedom and the shifting concepts and antonyms used for the construction of collective identities in Greek culture, see **A. GROMITSARIS**, *Pluralism, Secularism and New Constitutionalism: On Art. 3 of the Constitution of Greece*, in *Diritto e questioni pubbliche*, 1/2016, pp. 56-71.

²⁷⁵ **F.B. CROSS**, *Constitutions and Religious Freedom*, Cambridge University Press, Cambridge, 2015, p. 187: «A common measure of religious diversity uses a Herfindahl-style index. This takes the percentage of people for each religion, squares that number, and then adds the squared totals. The more diverse a nation, the lower these scores will be. The index was designed to measure competition, with scores ranging from zero to one, the latter representing a monopolistic lack of competition».

²⁷⁶ See **M. RYNKOWSKI**, *State and Church in Poland*, in G. Robbers (ed.), *State and Church in the European Union*, Baden-Baden, Nomos, 2005, pp. 419-420; **M. PIETRZAK**, *Church and State in Poland*, in S. Ferrari, W. C. Durham Jr., E.A. Sewell (ed.), *Law and Religion in Post-Communist Europe*, Peeters, Leuven-Paris-Dudley, 2003, p. 218.



of the more religiously homogeneous societies in Europe: that may cause problems in order to religious freedom protection²⁷⁷. Nevertheless, the secularization process affected also Poland, mostly after the Pope John Paul II's death in 2005: the 2011 political elections gave the opportunity to join the Parliament to an anticlerical party that based its electoral campaign on the promise of "secularizing the State"²⁷⁸.

These evolution is a background for my essay, focused on seeking a definition of "religion" in Polish legal system. At first, I have to emphasize that this issue is, for its nature, open to debate²⁷⁹. Defining religion is a process very difficult for public powers, because this seems more a theological, philosophical or moral issue to debate on rather than a legal question²⁸⁰. Anyway, to clarify the concept of religion in a legal system is important, because the protection of religious freedom and the right of not being discriminated depends also on the meaning of religion. As Norman Doe states, "at the national level, it may be necessary to define 'religion' in order to determine whether legal benefits and burdens apply in particular circumstances, for example whether a claim is properly one of religious freedom, whether an exception to discrimination law is religious, or whether an activity is for the advancement of religion"²⁸¹.

This paper is divided in two spheres of action, a constitutional one and an applicative one²⁸². The Polish legal system provides a specific

²⁷⁷ There is an association between religious freedom and religious diversity. «Nations with less religious diversity have less religious freedom», because religious freedom is associated with greater religious diversity in a nation: «Religious freedom might result in more or less religiosity. If religious freedom encourages religious pluralism, which in turn produces a market in religions, one might expect it to produce greater religiosity, as consumers were better able to find a program on beliefs that they liked», **F. B. CROSS**, *Constitutions*, cit., pp. 188-189.

²⁷⁸ See **J. LUXMOORE**, *From Solidarity to Freedom*, cit., p. 186.

²⁷⁹ See **P. CONSORTI**, *Diritto e religione*, Laterza, Rome-Bari, 2014, p. 88. About the difficulty to find a concept of religion in Italian and European legal order, see **A. MANTINEO**, *Associazioni religiose e "nuovi movimenti" religiosi alla prova del diritto comune in Italia e del diritto comunitario*, in *Stato, Chiese e pluralismo confessionale*, October, 2009, and **J. PASQUALI CERIOLI**, *I principi e gli strumenti del pluralismo confessionale*, in G. Casuscelli (ed.), *Nozioni di Diritto ecclesiastico*, 5^a ed., Giappichelli, Turin, 2015, pp. 87-90. For the contradictory nature of "non-Catholic" cults in the definition of religious beliefs in Italy see also **D. BILOTTI**, *I ministri dei culti acattolici: incompiutezze definitorie e inderogabilità funzionali*, Giuffrè, Milan, 2013.

²⁸⁰ A jurisprudential approach to an original concept of religion who includes theistic and non-theistic beliefs can be found in **R. DWORKIN**, *Religion without God*, Harvard University Press, Cambridge-London, 2013.

²⁸¹ See **N. DOE**, *Law and Religion in Europe. A Comparative Introduction*, Oxford, Oxford University Press, 2011, 21.

²⁸² Even Ferrari seems to prefer this method. In fact, according to him, a proper



definition of religion contained in a statute (the Act of June 13th, 2003), referring to one category of subjects: the refugees. But this notion is not applicable in the whole legal system, because there is an implicit Constitutional definition of religion, which is further confirmed in the administrative practice and in the cases-law, using a judicial substantive-content approach²⁸³.

The constitutional idea of religion is expressly related to the Christian roots. This concept is written right in the Constitutional Preamble, which contains a reference to God, as stated:

“We, the Polish Nation - all citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources [...]”.

This appeal to God and to conscience has been considered an adhesion of the State to the natural law theory²⁸⁴. Although religious and atheistic citizens, regardless their source, are connected by the values of truth, justice, good and beauty and that this is a guarantee of non-discrimination, it should be noted that this Preamble gives an Abrahamic and personalist idea of God as a source of values. As a matter of fact, in the same Preamble we can see a reference to Christian heritage. This Abrahamic and personalist

methodology, therefore, requires first to verify the presence of “the religious fact specific techniques” (and which ones they are); then, in case of affirmative answer, to apply them in order to clarify the notion of religious confession, finally evaluating the consequences that this concept could have on the norms that discipline the religious-oriented groups recognition and activity, **S. FERRARI**, *La nozione giuridica di confessione religiosa (come sopravvivere senza conoscerla)*, in V. Parlato, G.B. Vernier (eds.), *Principio pattizio e realtà religiose minoritarie*, Giappichelli, Turin, 1995, p. 20 (free translation).

²⁸³ The two main methods of elucidating the meaning of religion ascertainable in the case law are the “subjective-functional approach” and the “substantive-content approach”, **R. AHDAR, I. LEIGH**, *Religious Freedom in the Liberal State*, 2^a ed., Oxford University Press, Oxford, 2013, pp. 145 ff.

²⁸⁴ **K. COMPLAK**, *Will Poland be the most confessional state*, cit., pp. 86-87: “This declaration of responsibility before God and conscience should be treated rather as a bond of the state with the natural law. This feature implies a ban on state totalitarianism. Examination of the particularly rich German case law on this matter reveals that the legal content of the religious appeal is only tantamount to a pledge to not absolutize popular sovereignty and to the renounce atheism as a type of established state church. In this way, the declaration can be seen as cultural (symbolic) or as a precaution against any uncontrolled and unlimited models of state power. These elements are included in the law as reflection of positive values, power. These elements are included in the law as reflection of positive values, especially those directed against the voluntaristic theories of popular sovereignty. The reference to God is not a general, pro-Catholic directive on the interpretation of the Polish basic statute. In particular, the appeal to God does not preclude tolerance of other religions or beliefs or the openness of the Constitution of Poland”.



idea of God as a source of values affects the normative notion of religion in the Polish legal system.

Nevertheless, I demonstrate that in Poland the meaning of religion is still a highly disputed issue, and a cause of unequal treatment and discrimination related to religious faith.

2 - Law and religion in the Polish legal system

As Poland is a cooperative State²⁸⁵, its sources of law approach religions and beliefs²⁸⁶ as those of other similar European countries, such as Spain and Italy²⁸⁷. The most important source of law is the Constitution of April 2nd, 1997. Art. 25²⁸⁸ reads as follows:

²⁸⁵ See **A. LICASTRO**, *Il diritto statale delle religioni nei Paesi dell'Unione Europea*, 2^a ed., Giuffrè, Milan, 2017, pp. 55-56.

²⁸⁶ About law and religion in Poland, see **P. STANISZ**, *Relations between the State and Religious Organizations in Contemporary Poland from Legal Perspective*, in W. Rees, M. Roca, B. Schanda (ed.), *Neuere Entwicklungen im Religionsrecht europäischer Staaten*, Dunker & Humblot, Berlin, 2013, pp. 687 ff; **P. STANISZ**, *The Presence of the Cross in Public Spaces in the Context of the Freedom of Thought, Conscience and Religion: A Polish Perspective*, in P. Stanis-M. Zawislak-M. Ordon (ed.), *Presence of the Cross in Public Spaces. Experiences of Selected European Countries*, Cambridge Scholars Publishing, Cambridge, pp. 155 ff.; **P. STANISZ**, *Religion and Law in Poland*, Kluwer Law International, Alphen aan den Rijn, 2017.

²⁸⁷ For an historic legal approach to the cooperative model State, see **M. CANONICO**, *I sistemi di relazione tra Stato e Chiese*, 2^a ed., Giappichelli, Turin, 2015, pp. 167-207.

²⁸⁸ If art. 25 is a provision on collective religious freedom (because it refers to churches and religious communities), art. 53 protects the individual religious freedom, who is considered equally to the conscience freedom: "1. Freedom of conscience and religion shall be ensured to everyone. 2. Freedom of religion shall include the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching. Freedom of religion shall also include possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services. 3. Parents shall have the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions. The provisions of Article 48, para. 1 shall apply as appropriate. 4. The religion of a church or other legally recognized religious organization may be taught in schools, but other peoples' freedom of religion and conscience shall not be infringed thereby. 5. The freedom to publicly express religion may be limited only by means of statute and only where this is necessary for the defence of State security, public order, health, morals or the freedoms and rights of others. 6. No one shall be compelled to participate or not participate in religious practices. 7. No one may be compelled by organs of public authority to disclose his philosophy of life, religious convictions or belief". This English translation is adopted by the Polish *Sejm*'s official website: <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.



1. Churches and other religious organizations shall have equal rights.
2. Public authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, and shall ensure their freedom of expression within public life.
3. The relationship between the State and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good.
4. The relations between the Republic of Poland and the Roman Catholic Church shall be determined by international treaty concluded with the Holy See, and by statute.
5. The relations between the Republic of Poland and other churches and religious organizations shall be determined by statutes adopted pursuant to agreements concluded between their appropriate representatives and the Council of Ministers.

Pay attention to Section 4, that is a constitutional guarantee for the in force Concordat of 1993 between Poland and the Holy See, that is as well an important source of law in this matter. Furthermore, there are other special statutes regarding the relations between the State and various Churches or religious communities, adopted either by the President of the Republic's ordinance (Eastern Old Rites Church, March 22nd, 1928) or by Acts of Parliament (the Muslim Religious Association April 21st, 1936; the Karaite Religious Community, April 21st, 1936; the Roman Catholic Church, May 17th, 1989; the Polish Autocephalous Orthodox Church, July 4th, 1991; the Augsburg-Confession in the Republic of Poland, better known as the Lutheran Church, May 13th, 1994; the Protestant Reformed Church, May 13th, 1994; the Protestant Methodist Church, June 30th, 1995; the Baptist Christians Church, June 30th, 1995; the Seventh Day Adventists Church, June 30th, 1995, the Polish Catholic Church, June 30th, 1995; the Union of Jewish Confessional Communities, February 20th, 1997; the Catholic Church of the Mariavites, February 20th, 1997; the Pentecostal Church, February 20th, 1997)²⁸⁹. It is worth underlining that these statutes do not implement sect. 5 of art. 25 Const., because they are just unilateral acts, not based on "agreements" as constitutional provision requires²⁹⁰. Indeed, Section 5 has still not been implemented in practice, and twenty years after the adoption

²⁸⁹ See **M. RYNKOWSKI**, *Churches and Religious Communities in Poland with Particular Focus on the Situation of Muslim Communities*, in *Insight Turkey*, vol. 17, 1 (2015), pp. 159-160.

²⁹⁰ **M. RYNKOWSKI**, *Poland*, in G. Robbers, W. Cole Durham Jr., D. Thayer (ed.), *Encyclopedia of Law and Religion*, vol. 4, Brill-Nijhoff, 2016, cit., p. 301.



of Constitution there is not even one statute leading the relationship between the State and churches or religious communities²⁹¹.

Finally, there is the Act of May 17th, 1989, on the guarantees of freedoms of conscience and faith, in which art. 10 states: "Poland is a lay state, neutral in terms of religion and conviction"²⁹² (it is interesting to note that this statute was adopted by the Communist parliament, so if this Act expresses religious tolerance and freedom, the terminology is related to the Communist constitution of July 22nd, 1952²⁹³). This statute sets out the rules for the recognition of the legal status of religious communities by registration at the Minister of the Interior and Administration²⁹⁴ (Originally, the principal requirement to be enrolled in the Official Register of the Churches and cults was the applicant group to have at least fifteen members, now this lower limit has been increased to one hundred members)²⁹⁵.

Consequently, in brief, in Polish Law there are four methods of regulating the legal status of religious organisations:

(a) an international treaty concluded by the State and the Holy See, for the Catholic Church (art. 25, sect. 4, Const.);

(b) for other churches and religious organizations, the statutes adopted pursuant to agreements concluded between appropriate representatives of religious organizations and the Council of Ministers, (art. 25 sect. 5, Const.);

(c) for the Catholic Church (art. 25, sect. 4, Const.) and for other churches and religious organizations, special statutes on the relations between the State and certain religious communities;

(d) an entry in the register maintained by the Minister of Interior and Administration, made upon the request of the interested party and after conducting registration proceedings, according to the Act of 1989 that grants the freedom of conscience and faith and, also, on the Regulation of 1999 for the registration of churches and religion communities.

3 - A legal definition of religion in Poland

²⁹¹ M. RYNKOWSKI, *Poland*, cit., p. 300.

²⁹² I am using the English translation adopted by M. RYNKOWSKI, *Churches and Religious Communities in Poland*, cit., p. 145.

²⁹³ T. BUKSINSKI, *The struggle for the Legal Status of Religion in Polish Constitution*, in *International Journal for the Semiotics of Law*, 25 (2012), p. 578.

²⁹⁴ See M. RYNKOWSKI, *Poland*, cit., pp. 302-303.

²⁹⁵ See A. LICASTRO, *Il diritto statale delle religioni*, cit., pp. 55-56, note 129.



The Act of June 13th, 2003 offers protection to foreigners in the Republic of Poland also defining religion²⁹⁶, as amended on May 29th, 2008, in art. 14, sect. 2, lets. a), b) and c):

“...the notion of religion shall include particularly:

- having theistic, non-atheistic or atheistic convictions,
- participation or refraining from participation in religious ceremonies, exercised in public or in private, individually or collectively,
- other acts of religious character, expressed convictions or forms of individual or collective behaviours, resulting from or related to religious convictions”.

This normative notion qualifies the refugee status, taking into account the persecution for religious reasons, protected by the Geneva Convention of 1951. Thus, according to the Polish definition, “the concept of religion shall in particular include holding theistic, non-theistic or atheistic beliefs”²⁹⁷. It should be noted that this definition is very close to the concept of religion expressed by the European Court of Human Rights (ECHR), which has a liberal approach to the definition of beliefs, considering within this notion doctrines such as scientology, druidism, pacifism, or atheism²⁹⁸. Indeed, in the *Guidelines for Review of Legislation Pertaining to Religion or Belief* published by the Organization for Security and Co-operation in Europe in 2004, is stated: “The ‘belief’ aspect typically pertains to deeply held conscientious beliefs that are fundamental about the human condition and the world. Thus, atheism and agnosticism, for example, are generally held to be entitled to the same protection as religious beliefs” (sect. A, par. 3). So atheistic, agnostic, sceptic beliefs are ratified by art. 9 of the ECHR, but it is further emphasized that these “beliefs” (or in the French text, “convictions”) denote “views that attain a certain level of cogency, seriousness, cohesion and importance”²⁹⁹. In this perspective, according to the Court of ECHR,

“[...] freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a

²⁹⁶ See **M. RYNKOWSKI**, *Poland*, cit., p. 300.

²⁹⁷ See **N. DOE**, *Law and Religion in Europe*, cit., p. 24.

²⁹⁸ For case-law references, see **N. DOE**, *Law and Religion in Europe*, cit., p. 21.

²⁹⁹ See *Campbell and Cosans v. United Kingdom*, n. 7511/76, 7743/76 (1982), par. 36.



democratic society, which has been dearly won over the centuries, depends on it³⁰⁰.

Nevertheless, this “liberal” legal definition of religion does not fit in the entire legal system in Poland: “[...] its content and, above all, its position in the legal system suggest that the legislator was forced to invent a definition but did not intend to create a generic definition applicable to the whole legal system”³⁰¹. The Democratic Polish Constitution provides a different definition of religion. In fact, the term “religion” is used to identify the “phenomena associated with experiencing and manifesting reality recognized as supernatural”³⁰², and it seems to rule out therefore any atheistic beliefs. As the Constitutional Tribunal emphasized: “freedom of religion is recognized in the Constitution very broadly as it encompasses all religions and all religious associations”³⁰³.

Furthermore, as above mentioned, the Polish Constitution includes the principle of equal rights for all religious organizations (“churches and other religious organizations shall have equal rights” (art. 25, sect. 1) without suggesting a “hierarchization”³⁰⁴ between churches and religious organizations, as this distinction has only a traditional and symbolic significance. Generally, “churches” are Christian religious communities (e.g., Roman Catholic Church, Protestant Reformed Church, Pentecostal Church, ...) and “religious organizations” are non-Christian religious

³⁰⁰ See *Kokkinakis v. Grecia* n. 14307/88 (1993). This decision “breaks the wall of silence” of the Court about the art. 9 of the ECHR, see **S. FERRARI**, *La Corte di Strasburgo e l'articolo 9 della Convenzione europea. Un'analisi quantitative della giurisprudenza*, in **R. MAZZOLA**, *Diritto e religione in Europa. Rapporto sulla giurisprudenza della Corte europea dei diritti dell'uomo in materia di libertà religiosa*, il Mulino, Bologna, 2012, p. 27. About the case law of ECHR in religious issues see **M. PARISI**, *Linee evolutive dell'interpretazione giurisprudenziale dell'art. 9 della Convenzione di Roma. Sviluppi e prospettive per il diritto di libertà religiosa nello spazio giuridico europeo*, in N. Fiorita, D. Loprieno (Ed.), *La libertà di manifestazione del pensiero e la libertà religiosa nelle società multiculturali*, Firenze University Press, Florence, 2009, p. 247 and ss.

³⁰¹ **M. RYNKOWSKI**, *Poland*, cit., p. 300.

³⁰² **P. STANISZ**, *Law and religion in the workplace: Poland*, in M. Rodriguez Blanco (ed.), *Law and Religion in the workplace*, Proceedings of the XXVIIth Annual Conference, Granada, 2016, p. 323 ss.

³⁰³ Judgment of Constitutional Tribunal of 16 February 1999.

³⁰⁴ Instead, according to the contrary legal interpretation of Małajny, the wording of art. 25, sect. 1 of the Constitution “may suggest certain hierarchization” in that it divides the subjects at issue into “better ones (churches) and worse ones (other religious organizations)”, **R.M. MAŁAJNY**, *Regulacja kwestii konfesyjnych w Konstytucji III RP (refleksje krytyczne)*, in R. Tokarczyk, K. Motyka (eds.), *Ze sztandarem prawa przez świat. Księga dedykowana Profesorowi Wienczysławowi Józefowi Wagnerowi von Igelgrund z okazji 85-lecia urodzin*, Kraków, Zakamycze, 2002, p. 289.



communities (Muslim Religious Community, Karaite Religious Community, ...). Actually, the "religious communities" organization is stated by the 1989's act that grants the freedom of conscience and religion: "[...] set up in order to profess and spread religious faith, having their own organization, doctrine and cultic rituals"³⁰⁵ (art. 2 p. 1). Therefore, the three features that characterize a "religious community" are: having a personal organization, a doctrine and some rituals. Nevertheless, it is clear that this is a circular definition, because the phrase "religious community" is referred to a "religious faith", and, consequently, the doctrine of a religious community has to be a "religious" doctrine. But the issue of what "religious" actually means in law remains open.

So, the question is: when can a faith be considered "religious"? An answer can be deduced by analysing the procedure for the registration of religious organizations in Poland made by the Minister of Interior and Administration.

4 - Two cases-law about the meaning of religion

Between 1989 and 2016 One hundred and sixty-four religious organizations and five inter-church organizations were registered. This may seem a large number in Poland, however about 50 applicants were refused and not only because they did not respect formal criteria, but also for substantial reasons³⁰⁶. Firstly, the Minister may refuse the registration if the aims of the religious organization are against the limitations contained in article 9 par. 2 of the European Convention of Human Rights, such as public order or security. Secondly, a test set by the Minister may determine if the applicant has or not a religious character, regarding the "doctrine" of the group, because a group without a religious character cannot be registered as a religious organization, and this evaluation depends on an administrative process. This is the criterion adopted by the administrative will regarding the recognition of religious organizations' *status*.

There are two very interesting cases-law about this second issue³⁰⁷.

³⁰⁵ I am using the English translation adopted by **P. STANISZ**, *The Status of Religious Organizations in Poland: Equal Rights and Differentiation*, Third ICLARS Conference "Religion, Democracy, and Equality", The International Consortium for Law and Religion Studies, Richmond (Virginia, USA), 21st-23rd August 2013, p. 5 (unpublished).

³⁰⁶ **M. RYNKOWSKI**, *Poland*, cit., p. 303.

³⁰⁷ About the two following cases-law, see **P. STANISZ**, *Law and religion in the workplace*, cit., p. 323 ss.



4.1 - The Polish Raelian Movement (1999)

In 1999, the Minister refused to register the Polish Raelian Movement, whose doctrine is contained in Claude Vorilhon's book: "The message given to me by extra-terrestrials. They took me to their planet"³⁰⁸.

The Supreme Administrative Court confirmed the negative decision of Minister. According to the Court, the doctrine of Raelian Movement is more similar to a program of a political party or an association than a religious movement. Moreover, a group cannot be considered "religious" if it declares to have a set of atheistic beliefs in its doctrine. The administrative judges stated that the doctrine of the Movement does not correspond to the common patterns of religion, because the doctrine of the organization does not include any references to the *sacrum*, which should be required in the case of a religious doctrine³⁰⁹.

4.2 - The Church of the Flying Spaghetti Monster (2013)

In 2013, the Minister refused to register the Church of the Flying Spaghetti Monster, after having requested the opinion of various specialists in religious studies about the *religious* features of this group. Those scholars emphasized that the Church of the Flying Spaghetti Monster can be considered as a joke religion and its doctrine "definitely shows the signs of a parody of already-existing doctrines"³¹⁰. In the light of this opinion, the Minister refused to register it and the adherents decided to take the case to court.

The Voivodeship Administrative Court in Warsaw, although admitting that the Minister committed procedural mistakes (by utilizing an out-of-date procedure), confirmed the decision. According to this Warsaw administrative Court, the religious character of a community is determined by its adopted reference to *sacrum* and its goals concentrating on the spiritual needs of adherents³¹¹.

5 - What is the idea of *sacrum* in Polish law?

³⁰⁸ C. VORILHON (RAËL), *The message given to me by extra-terrestrials. They took me to their planet*, AOM Corporation, Tokyo, 1986.

³⁰⁹ Judgment of the Supreme Administrative Court of 22 January 1999.

³¹⁰ See P. STANISZ, *The Status of Religious Organizations*, cit., p. 7.

³¹¹ Judgement of Voivodeship Administrative Court in Warsaw of 8 April 2014.



Both the Courts related the “religious character” of a group to the idea of “sacrum”; and Warsaw Court emphasized the spiritual needs of adherents. In this view, the meaning of religion refers to a doctrine with a sacred idea of the world. It has a legal significance when necessary to determine the legal effect of the term “religion” connected to the public powers, as an atheistic or an agnostic belief is not conceived as a religion. In the Polish legal system the ideas of “religion” and of “sacrum” are characterized by the Abrahamic religious tradition. This consideration is not only due to the fact that in the Constitutional Preamble God is stated as a source of values, but also to some legal dispositions rooted in the Judeo-Christian view of religion and cult.

Art. 53 of the Constitution regarding positive freedom of religion, states

“the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching”³¹², as well as the “possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services”³¹³.

In the Act of 1989 the list of religious rights is more detailed because we can find also, for example, the right to enter the priesthood or to become a nun or a monk, the right to remain silent in matters pertaining to one’s religion or convictions, or the right to be buried in accordance with one’s religion principles or convictions regarding religion; and especially art. 19, sect. 2 of the Act contains a list of a religion’s prerogatives, such as defining religious doctrine, dogmas and principles of faith and liturgy, organising public worship, rituals and religious gatherings, ruling its own affairs by applying its own law, exercising spiritual authority and managing its own affairs in a free manner, as well as appointing, educating and employing the clergy³¹⁴.

This list of provisions pertaining to the extent of religious freedom is uncommonly wide. Historically, it depends on the experience of the communist period when these rights were not respected, but from a legal perspective, it is due to the meaning of religion in Poland and to the ways into which religion can be manifested.

³¹² For the English translation used see *supra* note 17.

³¹³ *Ibidem*.

³¹⁴ See **P. STANISZ**, *Religious jurisdiction in Poland*, in R. Potz, W. Wieshaider (Ed.), *Religious Adjudication and the State. Proceedings of the XXVIth Annual Conference (Vienna, 13-16 November 2014)*, Editorial Comares, S.L., Granada, 2015, p. 171.



As in this list of religious rights and prerogatives within these legal provisions there are a lot of elements related to the Abrahamic tradition, seems to be very difficult to separate Polish culture from the Catholic or Christian tradition.

6 - Conclusion

In the Polish legal system, there are two notions of religion:

(a) a legal notion of religion, concerning refugee status in the Polish territory, which also includes atheistic beliefs, contained in a statute approved by the Parliament, but not appropriate for the entire legal system;

(b) a Constitutional idea of religion which cannot be extended to atheistic organizations and which fits into the entire legal system except for the aim of the Act that offers protection to foreigners in Poland. Indeed, the Constitutional provision regarding the equal rights of religious organizations does not pertain to communities that do not have a religious character. In this view, the concept of religion is related to the ideas of *sacrum* and of spirituality (maybe a traditional sense of *sacrum* and of spirituality), and it invokes *the* God or *a* god not of this world.--

Therefore, in Poland the meaning of religion is questionable and, paradoxically. The statute's provision about religion is more "guarantist" in protecting civil rights and civil liberties than the Constitutional disposals on it.

In my opinion, this causes an unequal treatment in religious issues between people within the same nation. Indeed, in Poland a citizen cannot be considered as "religious", even if he has the same atheistic belief used to confirm the refugee *status* of a foreigner for religious persecution. This case is clearly against art. 32 of the Polish Constitution:

- "1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.
2. No one shall be discriminated against in political, social or economic life for any reason whatsoever"³¹⁵.

There is no doubt that this controversial character of the "meaning" of religion in Poland can be literally considered as discriminatory in the light of the principle of religious freedom.

³¹⁵ I am using the English translation adopted by the Polish *Sejm's* official website: <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>



ABSTRACT: This article examines the meaning of religion in the Polish legal system. In Poland there are two concepts of religion: a notion of religion contained in a statute which also includes atheist beliefs, not suitable for the entire legal system; and a Constitutional idea of religion which is related to an Abrahamic concept of God. So, in Poland the meaning of religion is controversial, and this controversial meaning of religion causes discrimination in religious issues within the same nation.



Maria Cristina Ivaldi

(Researcher in Law and Religion, University of Campania "Luigi Vanvitelli",
Department of Political Sciences "Jean Monnet")

**The meaning of 'Religion' in French case law.
The judgements of the *Conseil d'État***

SUMMARY: 1. Introduction - 2. Emerging issues regarding the French system of separation in the most recent context - 3. The *Conseil d'État* as advisor of public authorities on the 1905 Act - 4. The *Conseil d'État*'s judgements from the late 1980s to the end of the first decade of the 2000s - 5. The *Conseil d'État* arrangement in the latest decisions - 6. Interlocutory concluding remarks.

1 - Introduction

In France the Separation of Churches and State Act of 9 December 1905 (1905 Act)³¹⁶, generally, prohibits the State from recognizing or founding any religion (Article 2, first paragraph). In the same way, beginning from the Constitution of 1946, (now Constitution 1958, Article 1, first paragraph)³¹⁷, the French form of secularism - *laïcité* - is expressly recognized as a constitutional principle, without further specification³¹⁸.

However, religious liberty is recognized in compliance with Article 10 of the 1789 Declaration of the Rights of Man and the Citizen³¹⁹, which

³¹⁶ *Loi du 9 décembre 1905 concernant la séparation des Eglises et de l'État*. English versions of the norms quoted in the text are available from several institutional French websites (e.g. www.conseil-constitutionnel.fr). For other laws and decisions cited see www.legifrance.gouv.fr, the official website of French law. Concerning the 1905 Act, for the contemporary English version and a historical-legal perspective of the doctrine, see **O. GUERLAC**, *The Separation of Church and State in France*, in *Political Science Quarterly*, vol. 23, n. 2, 1908, (also available on www.jstor.org/stable/214135), pp. 259-296.

³¹⁷ Constitution 1958, Article 1, par. 1, "France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs".

³¹⁸ The *Conseil constitutionnel*, with its decision of 19 November 2004, no. 2004-505, concerning the provisions of Article 1 of the Constitution whereby "France is a secular republic", also specified for the first time that it forbids persons to profess religious beliefs for the purpose of non-compliance with the common rules governing the relations between public communities and private individuals (www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2004505DCen2004_505dc.pdf).

³¹⁹ *Déclaration*, i.e. a text of constitutional value as included in the Preamble of the French Constitution.



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”. The 1905 Act also specifies that the Republic ensures freedom of conscience and guarantees freedom of worship (Article 1)³²⁰.

The space reserved for religion in France can be inferred from the relationship between the recognition of both religious freedom and principles of separation and secularism³²¹. A significant outcome of this is the existence of a sharp and severe distinction between the public sphere and the private sphere. The religious fact discloses only to the private sphere. Moreover, the French State cannot provide an express legal definition of religion as well as of *laïcité*³²². In other words, the legal order limits itself to recognize and describe behaviours to which legal consequences are connected. That was the case, for example, of the *loi tendant à renforcer la prévention et la répression des mouvements sectaires portant atteinte aux droits de l’homme et aux libertés fondamentales*, 12 June 2001, no. 2001-504, that, of course, doesn’t identify what a sect in fact is, regulating only those conducts legally relevant³²³.

Although it is true that religions, with some exceptions³²⁴, do not have a specific legal status, it is equally true that the 1905 Act provides some

³²⁰ Freedom of worship explicitly limited in the interest of public order here and in other parts of the same Act. Concerning the relationships between religious freedom and secularism see **Y. GAUDEMET**, *Liberté religieuse et laïcité en droit français*, in *Le droits de l’homme en évolution. Mélanges en l’honneur du professeur Petrus J. Pararas*, Sakkoulas-Bruylant, Athènes-Bruxelles, 2009, p. 243.

³²¹ For a general overview of French laws concerning religion F. Messner, J.M. Woehrling, P.H. Prélôt (eds.), *Traité de droit français des religions*, 2^e ed., LexisNexis, 2013, 2002 pp., and F. Messner (ed.), *Dictionnaire. Droit des religions*, CNRS Edition, Paris, 2011, 790 pp.

³²² *Laïcité* is, in fact, a polysemous term susceptible to different interpretations. See **J. BAUBEROT**, *Laïcité 1905-2005, entre passion et raison*, Le Seuil, Paris, 2004, *passim*.

³²³ Concerning the measures directed to reinforce the prevention and repression of sectarian (cultic) movements see, *amplius*, **M.C. IVALDI**, *Alcune considerazioni sulla regolamentazione dei movimenti a carattere settario nell’ordinamento francese*, in *Stato, Chiesa e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), n. 29/2012, pp. 1-31. See also the *Mission interministérielle de vigilance et de lutte contre les dérives sectaires* (MIVILUDES), established on 28 November 2002, replacing the *Mission interministérielle de lutte contre le sectes* (MILS) created in 1998, with a dual task of monitoring and combating sectarianism and with the obligation to submit annually a report to Prime Minister (www.derives-sectes.gouv.fr).

³²⁴ For exceptions see the applicable law in some overseas regions and, above all, in the departments of Alsace and Moselle (*Bas-Rhin, Haut-Rhin and Moselle*), where a system of recognized cults is still in force. See also the dossier *Les exceptions au droit des cultes issu de la loi de 1905*, edited by the Direction de l’information légale et administrative, (2015) at



guidance. First, this Act chooses to use the term “cult”³²⁵ rather than “religion”³²⁶. The form of worship association - envisaged for not Catholic entities, due to the opposition from Catholics, as a result, subject to the Association Act 1901 (1901 Act)³²⁷ and later to the diocesan associations paradigm since 1924³²⁸ - is a first special regulation compared with ordinary law, especially from a taxation point of view. Nevertheless, it is always possible to constitute associations regulated by the 1901 Act, and as subsequently specified in the Article 4 of the Public Practice of Religions Act 1907 (1907 Act)³²⁹. In other words, according to these and additional provisions, there is a separation between Church and State in France but, at the same time, there is an organised public system of regulations of cults, with rooted competences within the French administration³³⁰. The role of the Ministry of the Interior should also be underlined. Within the subdivision of public liberties, the Central Bureau of Cults is charged with relations with representatives of the religions present in France and application of the 1905 Act regarding the policing of the cults.

www.vie-publique.fr/politiques-publiques/etat-cultes-laicite/droit-local-cultes. Regarding the French-administred territories outside of the European continent see the *Tableau synthétique du droit des cultes applicable en outre-mer*, edited by the *Direction des libertés publiques et des affaires juridiques, Sous-direction des libertés publiques, Bureau central des cultes*, reported in **OBSERVATOIRE DE LAÏCITÉ**, *Rapport annuel 2016-2017*, (Avril 2017, 448 pp.), at *www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2017/04/laicite_rapport_annuel_2016-2017_0.pdf*, pp. 175-176. The Observatoire was set up in 2007 with the task of assisting the Government in direct action respecting the principle of secularism in public services, including the publication of studies, analysis, research and an annual report.

³²⁵ As specified conveniently by **R. LIOGIER**, *Laïcité on the edge in France: between the theory of Church-State separation and the praxis of State-Church confusion*, in *Macquarie Law Journal*, vol. 9, 2009, p. 26, nt. 3, the French term «“culte” refers to the ensemble of religious practices of a specific worship and not to the subordinated, devaluated kind of religious groups that are named “cults” in English (the French word for “cult” being “secte”)». Simultaneously the phrase *association cultuelle* refers to an organization that supports religious worship, whereas *association culturelle* refers to an association promoting culture.

³²⁶ About the desultory use of the term “religion” by the French public authorities see **A. BOYER**, *Comment l’État laïque connaît-il les religions?*, in *Archives de sciences sociales des religions*, n. 129, 2005, pp. 37-49.

³²⁷ *Loi du 1er juillet 1901 relative au contrat d’association*.

³²⁸ Regarding this topic see **J. FOYER**, *De la “séparation” aux associations diocésaines*, in *Revue des sciences morales et politiques*, 1994, pp. 147-166, and **L. NOËL**, *Le statut de l’Église de France après la séparation: “l’affaire” des associations diocésaines*, in *Revue diplomatique*, 1980, pp. 5-69.

³²⁹ *Loi du 2 janvier 1907 concernant l’exercice public des cultes*.

³³⁰ *Amplius infra* par. 2. For a historical perspective, see also **A. SAMMASSIMO**, *L’amministrazione dei culti in Francia*, in *Stato, Chiesa e pluralismo confessionale*, cit., n. 30/2013, p. 1 ss., to which is postponed also for the quoted doctrine.



2 - Emerging issues regarding the French system of separation in the most recent context

The 1905 Act originally referred to the religious context of the period, or to the previously regime in force of recognized religions - *régime des cultes reconnus*³³¹ - (Catholic Church, Protestant Church, Reformed Church, and Judaism) that it replaced. It thus referred to entities with to which there were no definition problems, as doing reference to a well-known and shared sociological substrate assumed by the law.

Conversely, the present, in which the 1905 Act now operates, results profoundly different, due to both the presence of traditional religions, previously non-existent in the Metropolitan French, (*e.g.* Islam³³² and Buddhism) and the appearance of new religious movements, which require legislation specifically designed only for the communities present at the beginning of the 20th century³³³.

This new religious context also reveals possible discrimination among “cults”, especially regarding religious buildings, through the refusal to fund the construction of places of worship for these new beliefs, on behalf of the secular state, while cultural heritage maintenance funds are allocated for places frequented by Catholics, Protestants and Jews³³⁴.

It is this increasingly significant presence that gave rise to the public Institutions’ intervention beginning from the 1980s, with special reference to, though not exclusive, to Jehovah’s Witnesses. It should be also noted, incidentally, that in 2005 - precisely on the 100th anniversary of the promulgation of the 1905 Act - it was established a commission³³⁵ with the

³³¹ See **R. HERMON-BELOT**, *La genèse du système des cultes reconnus: aux origines de la notion française de reconnaissance*, in *Archives de sciences sociales des religions*, n. 129, 2005, p. 1 ss.

³³² Another argument is for Algeria, first colony (1830-1848) and later part of France, until 1962. The 1905 Act finds formal application also in those territories, but is mitigated by a series of implementing decrees issued in derogation, which allow the maintenance of personal status to the native Muslims. See, *amplius*, **F. DE LELLIS**, *L’Algeria coloniale e la legge di separazione delle chiese dallo stato*, in *Africa*. n. 3-4, 2004, p. 387 ss.

³³³ See A.L. Zwillling (ed.), *Minorités religieuses, religions minoritaires dans l’espace public*, Presses Universitaires de Strasbourg, Strasbourg, 2014, *passim*.

³³⁴ **B. CHELINI-PONT**, **N. FERCHICHE**, *Religion and the Secular State: French Report*, in J. Martínez Torrón, W.C. Durham (eds.), *Religion and the Secular State: National Reports*, Publicaciones Facultad Derecho Universidad Complutense, Madrid, 2015, p. 325.

³³⁵ The *Commission de réflexion juridique sur les relations des cultes avec les pouvoirs publics* - established by the former Minister of the Interior and future President of the French Republic, Nicolas Sarkozy, under the chairmanship of Jean Pierre Machelon - published its first report on September 2006 (www.ladocumentationfrancaise.fr/var/storage/rapports-publics/064000727.pdf, 83 pp.).



purpose of verifying the possibility of amending the rules governing the exercise of the cults and their relationships with public authorities, considering the changes in religious landscape occurring in the previous century³³⁶.

Therefore, despite the impossibility of providing an explicit legal definition of religion, the Administration and the Judiciary, has often been invested in issues that such a definition postulated, especially in respect of tax exemption, places of worship and cemeteries.

As above mentioned, the system of separation did not eliminate all religiously competences charged by the Ministry of the Interior, that enacted many circulars³³⁷.

Both the Administration and the Judiciary have intervened on issues related to 1905 Act, but it is above all the Judiciary that, through the recognition of cultural associations, in some ways prepared a derogatory regime for religious entities above all in terms of tax relief.

It is also worth mentioning the important regulation on chaplaincy in public institutions, such as schools, hospitals and prisons, financed by the State, that the 1905 Act provides for, despite the simultaneous ban on supporting any religion or "cult". This is all in accordance with the balancing operated by the legislator between principle of separation and recognition of the religious freedom (1905 Act, Article 1 and Article 2).

3 - The *Conseil d'État* as advisor of public authorities on the 1905 Act

The *Conseil d'État* (hereafter referred to a CE) appear, above all in the case of correct application of the 1905 Act, in discharging the dual functions of

³³⁶ The latest amendment of the main legal instrument for implementing the principle of secularism - *i.e.* 1905 Act - dates to 2015 (*cf.* Article 13, Government ordinance, 23 July 2015, no. 2015-904, *portant simplification du régime des associations et des fondations*, amending Articles 9, 10, 13, 21, 22, 23 of 1905 Act).

³³⁷ Among the most recent circulars are: circular 19 February, 2008, relative à la police des lieux de sépulture (NOR/INT/A/08/00038/C); circular 23 June, 2010, *relative au support institutionnel de l'exercice du culte, les associations cultuelles régies par la loi du 9 décembre 1905 et les associations exerçant un culte sous le régime de la loi du 1^{er} juillet 1901*, (NOR/IOC/D/10/16585/C), with the Ministry of the Economy; circular 21 April 2011, *relative à la désignation d'un correspondant "laïcité" dans chaque préfectures et installation d'une conférence départementale de la liberté religieuse* (NOR/IOCK1103788C) and circular 29 July 2011, *relative aux édifices du culte* (NOR/IOC/D/11/21246/C). All available at www.circulaires.legifrance.gouv.fr.



advising public authorities as well passing judgement on public administration³³⁸.

Nevertheless, it is also worth recalling the study activity of the CE which is realized through the drafting of reports, studies and thematic dossiers, frequently regarding the focus of this research³³⁹.

Exercising its consultative function on issue referred by the Minister of the Interior, the CE, opinion 14 November 1989, no. 346040³⁴⁰, states a general principle according to which any group, regardless of the purpose pursued, has the right to arbitrarily choose the applicable legal regime even though the statute claimed requires a simple declaration to the administrative authority.

It is the case, for example, of the worship associations (association cultuelles), where, possibly, the legal nature will be appreciated *ex post* at the time of application for admission to benefit provided by the 1905 Act (title IV). In fact, the legal form chosen by the association must comply with the object and nature of the activity in practice carried out under the statute.

In pointing out that worship associations must conduct activities “exclusively for worship”, the CE also identifies those activities relating to the acquisition, lease, construction, accommodation and maintenance of worship buildings, as well as the support and training of worship ministers and other people who collaborate to the exercise of worship. These are specifications that this Institution will maintain even in the exercise of its jurisdictional function. There is therefore still no explicit definition of what a “cult” is, except for the reference to the common concepts of worship buildings and ministers.

³³⁸ With its dual function, both jurisdictional and consultative, the CE ensures that French public administration remains strictly within the law. *Amplius* see *The Conseil d'État. The complete presentation* (2017), on [//english.conseil-etat.fr/content/download/67555/616460/version/1/file/Pdf_complet_versionanglaise-18p.pdf](http://english.conseil-etat.fr/content/download/67555/616460/version/1/file/Pdf_complet_versionanglaise-18p.pdf), where it is specified that “the Conseil d'État is also determined to play a role in the globalisation of the law” (p. 1).

³³⁹ For example: **CONSEIL D'ÉTAT**, *Dossier thématique: Le juge administratif et l'expression des conventions religieuses*, 25 November 2014, at www.conseil-etat.fr/content/download/36549/316965/version/4/file/dossier_thematique_convictions_%20religieuses.pdf, 18 pp. and, more generally, **CONSEIL D'ÉTAT**, *Un siècle de laïcité, Rapport public 2004*, La documentation Française, Paris, 2004, 479 pp. (also at www.conseil-etat.fr/content/download/367/1129/version/1/file/rapportpublic2004.pdf), report made on the centenary of the 1905 Act.

³⁴⁰ Opinion available on ConsiliaWeb database (at www.conseil-etat.fr/Decisions-Avis-Publications/Avis/ConsiliaWeb).



4 - The Conseil d'État's judgements from the late 1980s to the end of the first decade of the 2000s

It is necessary to point out that the number of CE pronouncements, in its jurisdictional function, on the 1905 Act is conspicuous. At the moment, the web-portal of French law³⁴¹ records 108 judgements of CE, covering 110 years of jurisprudence; 67 among them are related to worship associations³⁴².

Some of the decisions made since the late 1980s³⁴³, below will be under consideration. Those should be underlined for their contribution to the formulation of a functional notion of worship³⁴⁴.

A first pronouncement of the Council of State to be remembered is the judgement 17 June 1988, no. 63912. In this judgement there is a refusal to give permission to accept a bequest to the *Union des athées*³⁴⁵, on the assumption that having as its purpose, in accordance with the statute, the grouping of persons who regard God as a myth, it cannot benefit from the prerogatives reserved to worship associations which, on the contrary, are set up to subsidize the expenses for the maintenance and exercise of public worship. In other words, the notion of worship is closely linked to that of

³⁴¹ www.legifrance.gouv.fr. Generally see **E. TAWIL**, *Du gallicanisme administratif à la liberté religieuse: le Conseil d'État et le régime des cultes depuis la loi de 1905*, Presses Universitaires d'Aix-Marseille, Aix-Marseille, 2009, *passim*.

³⁴² CE's Judgements can be read also on the *ArianWeb* database, at [//www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/ArianeWeb](http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/ArianeWeb). Access to a selection of 290 judgement in English is available at [//english.conseil.etat.fr/judging](http://english.conseil.etat.fr/judging), always at the date of issue of the present contribution. Several press releases, the newsletter and the 2016 Annual Report are also available in English.

³⁴³ The temporal choice is explained by that change in the French religious landscape and by the sectarian question already observed (*supra*, par. 2).

³⁴⁴ Important help is provided by sociology, by means of its authors, also for the purposes of the legal definition of the term "worship" and, on this path, the same for "religion". In the sense of the test see, **D. KOUSSENS**, *La religion "saisi" par le droit. Comment l'État laïque définit-il la religion au Québec et en France*, on *Recherche sociographique*, LII, 2, 2011, pp. 811-832, especially p. 813, and **P. ROLLAND**, *La religion, objet de l'analyse juridique*, 2013, at [//halshs.archives-ouvertes.fr/halshs-00872395](http://halshs.archives-ouvertes.fr/halshs-00872395), pp. 1-12.

³⁴⁵ [//atunion.free.fr](http://atunion.free.fr). This case has been discussed at a supranational level. See also the European Commission on Human Right, *Report*, 6 July 1994, no. 14635/89 - which does not accept the French distinction between religious and philosophical convictions, in order to benefit from a more favourable statute, considering it discriminatory, as well as, the *Interim resolution* DH(97)476 and the *Final resolution* RSDH(2001)5, adopted by the Committee of Ministers on 17 September 1997 and on 26 February 2001, respectively, all available on HUDOC database (at [//hudoc.echr.coe.int](http://hudoc.echr.coe.int)).



God and on the legal level religion can benefit from a statute that is above that reserved for other beliefs³⁴⁶.

The judgements 17 January 1993, nos. 112392 and 115474 - relate to local offices of associations of Jehovah's Witnesses³⁴⁷. In both cases, the pronouncements concern, on the one hand, the places where the associations provided by law (1905 Act and 1901 Act, as amended by 1907 Act) may meet gather to publicly practice worship; on the other hand, they concern the concept of reunion for worship celebration - also outside the formalities provided for in Article 8 of Right of Assembly Act (1881 Act)³⁴⁸, which is still in force - while these activities are supervised by the authorities in the interest of public order.

For the CE, places of worship are the premises intended exclusively for the public exercise of a cult, if they are managed according to one of the modalities envisaged by 1905 Act³⁴⁹. Similarly, the notion of celebration of a cult belongs not only to ceremonies of a religious character, but also to Bible lessons and debates.

In those circumstances, the CE concludes, in both cases, that the two groups of Jehovah's Witnesses have the status of worship associations. For this reason, the respective premises cannot be considered as privately occupied and therefore have the right to tax exemption. These decisions show a reversal from the previous jurisprudence of the same CE which, by decision of 1 February 1985, no. 46488, had not agree that the *Association les Témoins de Jéhovah de France* has this status because of the object and nature of some of the clauses present in the statute. This reversal was also subsequently confirmed, as can be inferred from the CE Assembly's opinion of 24 October 1997, no. 187122³⁵⁰ and from the following judgements, CE, 23 June 2000, no. 215109 e no. 215152³⁵¹. Precisely, in the Assembly's opinion

³⁴⁶ See **P. ROLLAND**, *Qu'est-ce qu'un culte aux yeux de la République?*, in *Archives de sciences sociales des religions*, n. 129, 2005, p. 3.

³⁴⁷ Respectively, the Association Agape of Laval and *Congrégation chrétienne des Témoins de Jéhova* of Puy.

³⁴⁸ *Loi du 30 juin 1881 sur la liberté de réunion*.

³⁴⁹ Cf. Article 25 of the 1905 Act and Article 4 of the 1907 Act.

³⁵⁰ Opinion on a lawsuit filed by the Administrative Tribunal of Clermont-Ferrand concerning the *Association locale pour le culte de Témoins de Jéhovah* of Riom, and relating to, also in this case, the release from realty tax.

³⁵¹ Judgements regarding the *Association locale pour le culte des Témoins de Jehovah de Clamency* and of *Riom*, eligible for the exemption provided by the Article 1382 of the General Tax Code, by their exclusively worship nature and the affirmed non-existence of behaviours threatening public order. For a doctrinal insight see **G. GONZALEZ**, *Les témoins de Jéhovah peuvent constituer des association cultuelles*, in *Revue trimestrielle des droits de l'homme*, 48, 2001, pp. 1208-1219.



no. 187122/1997 the CE states that the meaning of “worship exercise” is the “celebration of ceremonies organized for the fulfilment by persons who are united by a religious belief, certain rites or certain practices”. Nevertheless, the CE Assembly states that, to recognize the status of worship association, it is necessary that the exercise of worship be the exclusive object: circumstances that must be appreciated both by statutory provisions and real activities. Other activities are therefore excluded, unless they relate directly to the practice of worship and have a strictly ancillary function (*i.e.*, the acquisition of premises, their maintenance, the training of worship ministers, *etc.*).

The opinion also states that the freedom of worship is enshrined in Article 1 of the 1905 Act with the only restrictions imposed on the public interest and that any possible conflict with the public order of some of the activities of an association is, as such, of obstacles to the enjoyment of the statute of worship association. It is a position that CE will have way to specify soon with the judgement, 28 April 2004, no. 248467, relating to the *Association culturelle du Vajra triomphant*³⁵².

This judgement refuses to the association to recognize the worship quality, for the acceptance of donations, and is related to the demonstrated disturbance of the public order. This situation is supported by the presence of criminal proceedings proposed against the founder of the Aumism³⁵³, for facts not independent of worship activities, and for serious and intentional violations of the town planning legislation, committed by other two associations, which refer to the same worship and have the same statutory references.

A final pronouncement of this phase is the decision CE, 4 February 2008, no. 293016³⁵⁴, which specifies the concept of a place of worship, already outlined in the previous interventions, and always for the purposes of the exemption from taxation. The CE states that this exemption is provided for by the 1905 Act, only in respect of buildings belonging to worship associations and in relation to the premises for the exercise of worship. In other words, the exemption applies only to the premises used for the celebration of ceremonies organized in view of the fulfilment, by

³⁵² For a comment see **C. LECLERC**, *Le statut d'association culturelle et les sectes*, in *Revue française de droit administratif*, 2005, pp. 565-576 and **T. DAUPS**, *Ordre public et associations culturelles*, in *Annuaire droit et religions*, 2005, pp. 129-147.

³⁵³ For more information about Aumism and his history, from an internal point of view, see [//aumisme.org](http://aumisme.org). This is a movement included in the list referred to in the Parliamentary report Guest-Guyard, *fait au nom de la Commission d'enquête sur le sectes*, 22 December 1995, no. 2468 (www.assemblee-nationale.fr/rap-enq/r2468.asp).

³⁵⁴ Judgement concerning the *Association de l'église néo-apostolique de France* ([//e-n-a.org](http://e-n-a.org)).



people gathered by the same religious belief, of certain rites or of certain practices, as well as to the immediate and necessary dependencies of the premises for this exercise³⁵⁵.

5. The *Conseil d'État* arrangement in the latest decisions

This last phase of judgements is characterized by even more decisive intervention by the CE, which, ruling on litigation, tends to be in accordance with an interpretation even more inclined to determine a new equilibrium of the different interests involved. In other words, it can be stated that these decisions, more than just saying something directly about religion, redefine the boundaries of separation and secularism, renewing the exegesis of the 1905 Act, while at the same time mitigating the funding bans³⁵⁶ and tending towards a definition of a new balance between religious freedom and neutrality.

A first group of 5 judgements - CE, 19 July 19, 2011, nos. 320796, 309161, 308817, 315518 and 308544 - summarizes, on the local level, provisions to concretize the free exercise of the worship³⁵⁷. Three of the judgements concern cases relating to Islam and the other concern cases relating to the Catholic Church. Nevertheless, the norms for resolution of cases are always those of Articles 1, 2, 13 and 19 of the 1905 Act.

³⁵⁵ In the present case, there were three halls located in the basement of a worship building, used for the Catechism or the rehearsals of the Liturgical choir. Not being used for the celebration of ceremonies, rituals or practices does not allow them to be considered as premises in respect of which the detaxation is foreseen by the 1905 Act.

³⁵⁶ Regarding funding, see **J.M. WOEHRLING**, *L'interdiction pour l'État de reconnaître et de financer un culte. Quelle valeur juridique aujourd'hui?*, in *Revue du droit public*, 6, 2006, p. 1645; **H. FLAVIER**, *Le financement public des cultes en France et le principe de laïcité*, in *Revue du droit public*, n. 6, 2010, p. 1597; **P.H. PRELOT**, *Le financement public des cultes: vers une participation à la réalisation de l'intérêt général*, in F. Faberon (ed.), *Liberté religieuse et cohésion sociale: la diversité française*, PUAM, Aix-en-Provence, 2015, p. 387 - as well as of the same Author, in English - **ID.**, *Public funding of religions: the situation in France*, in F. Messner (ed.), *Public Funding of Religions in Europe*, 2015, Ashgate, London, p. 75, and **É. BOKDAM-TOGNETTI**, *Le financement des cultes dans la jurisprudence du Conseil d'État*, in *Les Nouveaux Cahier du Conseil constitutionnel*, n. 53, p. 33.

³⁵⁷ For doctrinal insight see **E. GEFFRAY**, *Loi de 1905 et aides des collectivités publiques aux cultes*, in *Revue Française de Droit Administratif*, n. 5, 2011, pp. 967-986, and **M.C. ROUALT**, *Les collectivités territoriales, la laïcité et l'aide au culte*, in *Revue Lamy des collectivités territoriales*, n. 73, 2011, (on line at www.observatoire-collectivites.org/IMG/pdf/Les_collectivites_territoriales_s_la_laicite_et_l_aide_au_culte.pdf), p. 10 ss., especially with regard to the previous case-law concerning.



In summary, on the one hand, there are pronouncements regarding the use of a worship emphyteutic lease for the construction of a mosque (no. 320796, *Mme Vayssière*³⁵⁸), the provision of space for the ritual slaughter of animals (no. 309161, *Communauté urbaine du Mans*³⁵⁹) or for a place for the exercise of worship (no. 315518, *Commune de Montpellier*). On the other hand, the pronouncements concern the public funding of an organ in a church (no. 308544, *Commune de Trélazé*) or of a lift to reach a Basilica (no. 308817, *Fédération de la libre pensée du Rhône*).

The legal framework within which the CE moves is the recognition of a constitutional principle of secularism - as such not to hinder the granting of certain aids to activities or equipment dependent on cults - and of the regulations of the 1905 Act, which prevent public authorities from providing direct or indirect help in worship.

By decision no. 320796/2011 the CE puts an end to the question about the possibility of using the emphyteutic lease for the construction of places of worship. As noted in the doctrine³⁶⁰, this is an ancient practice, now recognized by Article L1311-2 of the General Code of Local Authorities³⁶¹, which permits a property belonging to such a public community to be the subject of an administrative emphyteutic lease also “in view of the destination to a cultural association of a public worship building”.

It is important to stress that the CE expressly recognizes the prevalence of the application of the specific rules of this contract, not applying the provisions of the 1905 Act, prohibiting the financing of cults, by resolving the perplexity highlighted by the doctrine about the coordination between the two rules³⁶².

The *ratio* underlying is to try not to discriminate the settled religious group in the French, behind the 1905 Act, which cannot benefit from the

³⁵⁸ Available in English at [//arianeinternet.conseil-etat.fr/arianeinternet/getdoc.asp?id=002&fonds=DCE_EN&item](http://arianeinternet.conseil-etat.fr/arianeinternet/getdoc.asp?id=002&fonds=DCE_EN&item).

³⁵⁹ Available in English at [//arianeinternet.conseil-etat.fr/arianeinternet/getdoc.asp?id=078&fonds=DCE_EN&item](http://arianeinternet.conseil-etat.fr/arianeinternet/getdoc.asp?id=078&fonds=DCE_EN&item).

³⁶⁰ In this sense, N. BEN AYED, *Les collectivités territoriales et le culte*, in *La Gazette*, 8 octobre 2012, p. 53 (www.seban-associes.avocat.fr/wp-content/uploads/2015/08/pub_laicite.pdf).

³⁶¹ As amended by government ordinance 21 April 2006, no. 2006-460.

³⁶² For the doctrine prior to the judgement in comment, see S. TISSOT-GROSSRIEDER, *De l'usage du bail emphytéotique pour la construction d'une mosquée*, in *AJDA*, n. 44, 2010, p. 2471 ss.; M.H. PACHEN LEFEVRE, C. FONTAINE, *L'assouplissement des baux culturels*, in *La Gazette*, 9 février 2009, p. 50 ss. (www.seban-associes.avocat.fr/wp-content/uploads/2015/08/pub_bauxculturels.pdf), and ID., *Le recours au bail emphytéotique pour la construction d'édifices religieux*, in *Contracts publics*, n. 108, 2011, p. 59.



most favorable provisions, as is the case of worship buildings, planned for the religious groups then present³⁶³.

Also, the judgement no. 315518/2011 concerns places of worship. In this case, object of the lawsuit, is municipal resolution directing to the constructing of a multipurpose room, which was subsequently made available to an association of Franco-Moroccans, for a renewable one-year.

In this case, another provision, Article L2144-3 of the General Code of Local Authorities, comes to the aid. It contemplates the possibility, under certain conditions, of municipal premises being used by associations, trade unions or political parties. For the CE, in accordance with the principle of neutrality and equality, it may be permitted to provide such a service, even for the exercise of worship, as long as it is not free of charge - otherwise it would constitute aid for worship prohibited by the law - and the premises are not destined to this purpose exclusively and permanently so that it would constitute a worship building.

If the first two decisions soften the prohibition of funding placed on public institutions through some textual forecasts of the General Code of Local Authorities, the three subsequent judgments relate to the direct disbursement of sums of money, for the realization of works or for the purchase of relevant goods concerning, in various ways, the exercise of worship. In other words, here, the CE directly and openly confronts the prohibition on the financing stated in the 1905 Act through its reinterpretation of the rules using the local public interest category.

Judgement no. 309161/2011 - also referring to Islamic worship - concerns financing for the accommodation of premises, not used by the *Communauté urbaine du Mans*, with a view to obtaining a health clearance for the establishment of a temporary slaughterhouse, intended to operate the days of the 2003 *Aïd-El-Kébir* feast.

For the CE, Articles 1, 2, 13 and 19 of the 1905 Act are not an obstacle to a territorial collectivity, within the framework of the competences provided for by law or its statutes, to build or acquire equipment or to permit its use to allow the exercise of practices, falling within the free exercise of worship. For this to be legitimate, however, many conditions must be respected.

³⁶³ The general framework of the financial competition of the territorial collectivities is the one provided by the 1905 Act. These communities can only support the maintenance and preservation costs of buildings, destined for the public exercise of a cult, of which they remain or have become owners on the 1905 Act, or they may contribute to the cost of the worship associations for repair work of cultural buildings. Outside of this it is forbidden to make aid for the exercise of worship (Article 19).



Such activities or practices must be in conformity with public order³⁶⁴, and the conditions of use must respect the principle of neutrality and the principle of equality. It is precisely in this pronouncement that CE overlooks the concept of local public interest that will be used and developed more fully even in its subsequent administrative jurisprudence from the two judgements made on the same date and relative to the Catholic Church.

In judgement no. 308544/2011 the CE emphasizes the existence of a public interest in the acquisition and installation of an organ in a church, with the aim of developing artistic teaching and organizing cultural events. For this to be legitimate, however, it is necessary that the agreement between the municipality and the assignee - if the owner of the worship building is the same municipality - or the owner of the worship building allows a use that complies with the needs of the first. Circumstance which excludes the free character and, therefore, the aid to worship forbidden by the law³⁶⁵.

The last ruling of the group - CE, no. 308817/2011³⁶⁶ - concerns the contribution paid to install a lift, intended to facilitate access to persons with reduced mobility to the Catholic Basilica of Fourvière. The funds were granted by the town council of Lyon to a state-approved foundation, a provision contested by the *Fédération de la libre pensée et de l'action sociale du Rhône*³⁶⁷. In this case, the concept of local public interest is linked to the importance of the building for cultural influence, tourist or economic development of the territory, which justifies the intervention of the local collectivity if it is not destined directly to the exercise of worship, remaining irrelevant the circumstance that the intervention is likely to also benefit the people who practice the worship.

³⁶⁴ In this case in respect of public health and hygiene.

³⁶⁵ See also the interesting references to the 1907 Act, especially in the part where it does not necessarily imply that all the objects installed in a church are destined exclusively for worship.

³⁶⁶ For doctrine in English see the case notes of **C. CIANITTO, M. TIRABASSI**, *Fédération de la libre Pensée et de l'action sociale du Rhône et MP v. La Commune de Lyon: (No 308817): Conseil d'État (Council Estate, France): 19 July 2011*, in *Oxford Journal of Law and religion*, vol. 1, issue 1, 2012, p. 301.

³⁶⁷ For the web-portal of the Federations of free thought see [//federations.fnlp.fr](http://federations.fnlp.fr) and [//fnlp.fr](http://fnlp.fr) for the *Fédération nationale de la libre pensée*. For an history of free thought, see also www.fnlp.fr/news/430/17/Histoire-de-la-Libre-Pensee.html, where is specified that the purposes include the "return to a close respect of the 1905 Act and the repeal of all anti-secular provisions".



The work of clarification and interpretation³⁶⁸ of the 1905 Act continues the following year with the four decisions of 4 May 2012, nos. 336462, 336363, 336464 and 336465 through which the CE details the notion of worship activities. All are proposed because of appeals submitted by the *Fédération de libre pensée du Rhone*, as in the previous case³⁶⁹. They essentially concern subsidies provide by the municipal institutions (Lyon) and the departmental (Rhône) and regional (Rhône-Alpes)³⁷⁰ to the *Communauté Sant'Egidio France*, for the organization of the XIX International Meeting of Prayer for Peace, which took place in Lyon between 11 and 13 September 2005.

Always in the frame of the 1905 Act, that generally prohibits to public institutions from funding any expenses involved in religious observance, the CE focuses on non-worship associations that also have worship activities, on the contrary, funding for the recurrence of three conditions. For this to be legitimate, it is necessary that the activities or manifestations to be realized do not have a worship nature, that they present a local public interest and that it is guaranteed, especially by contract, that the subsidy will not be used to finance the worship activities of the non-worship association.

In the present case for the CE, the *Communauté Sant'Egidio France* is not a worship association nor can any of its activities be regarded as a worship activity, as it has as its objectives the promotion of non-political actions in favour of the weaker part of the population, peace and development and respect for human rights. The circumstance that it relates to a religious - the Catholic Church - or that, for example, its members, in the margins of associative activities, without connection to worship, gather to pray, is not sufficient to determine that the association has a worship status.

In parallel, for CE, not even the XIX International Meeting of Prayer for Peace, would be of such a status³⁷¹ as the fact that religious personalities

³⁶⁸ In this sense, the CE is expressed in the statement announcing the publication of the five judgements of the 19 July 2011, available at www.conseil-etat.fr/subActualites/Communiqués.

³⁶⁹ These Federations are very active, as evidenced by the many complaints presented. (see also, *infra*, especially the judgements CE, 9 November 2016, nos. 395122 and 395223 and CE, 25 November 2017, no. 396990).

³⁷⁰ Municipality and urban community respectively. It is anticipated that all grants were deemed to be legitimate except that of the Lyon urban community to which the law does not provide any competence in this field.

³⁷¹ The CE speaks of an event that has given rise to a set of roundtables and conferences that - in the spirit of the first Assisi meeting of 27 October 1986, wanted by Pope John Paul II - encourages a humanism of peace.



are among the participants or that some conferences have themes related to religion, would not be relevant, as no religious ceremony was being contemplated and the organizing association had limited itself to predict that, in their free time, the participants who wished to gather for prayer would do so in worship buildings of their choice

The judgement concludes by stating that the event has respected the principle of equality of worship and highlighted - given the number of participants, their importance, also international - the positive return to the image of the city, usefully contributing to the economic life of the territory and giving the subsidy a character of public interest.

In the judgment 15 February 2013, no. 347049, the CE decides about the distinction between worship activities and cultural practice. In confirming the principles resulting from jurisprudence of the *Fédération de la Libre Pensée du Rhône*³⁷², about public financing of worship, the CE is entitled - for the first time after 2011 - to rule on the illegality of funding. In this case the conditions already outlined would not have been complied with, which would allow the exclusion of the unlawfulness of the subsidy under Article 2 of the 1905 Act.

The procedure originated from the appeal of three grant resolutions, taken by the Permanent Committee of the Limousin Regional Council, for the organisation of the seven-yearly ostention³⁷³ in 2009. It deals with resolutions concerning the granting of benefit to non-worship associations that also conduct worship activities³⁷⁴. For CE, in this case, there are ceremonies that have a worship quality yet also have a traditional and popular nature as well as a cultural and economic interest.

About the allegation proposed by recurring associations, concerning the alleged non-compliance of Article 2 of the 1905 Act with Articles 9 and 14 of the European Convention on Human Rights, on discrimination against access to cultural activities and cultural activities, the CE states the following. Firstly, Article 2 of the 1905 Act is not an obstacle to the subsidization of cultural events even if its organizers carry out worship activities or the same events take place during religious celebrations. Secondly, "the practice of a cult cannot be assimilated to a cultural practice" and the prohibition of subsidies *ex* Article 2 had pursued, for more than a

³⁷² Cf. CE, 19 July 2011, no. 308817 and CE, 4 May 2012, no. 336462.

³⁷³ Ostensions, that - as stated in the judgement - consist in the presentation to the veneration of the believers, in some communes of Limousin, of the relics of saints who lived in the region or who are particularly honored by members of the Catholic clergy. They materialize in processions that conclude with the Eucharist.

³⁷⁴ Resp. *Associations Grande confrérie de Saint Martial, Confrérie de Saint Eloi en Limousin and Comité des ostensions de Saint-Victorien*.



century, “the legitimate aim of ensuring, considering the relationship between cults and the state in France, the public neutrality regarding worship”.

Close the review - concerning mainly pronouncement on worship associations - the judgement 17 February 2016, no. 368342³⁷⁵ and 10 February 2017, no. 395433³⁷⁶.

The first judgement does nothing more than reiterate the prohibition of public funding of associations that are not worship associations but are also engaged in worship activities, except under the conditions set out in the jurisprudence of the Fédération la libre pensée du Rhône of 2011 and 2012 while the second and final judgment states that the condition of legitimacy of the administrative emphyteutic lease is that the recipient must be a worship association.

6 - Interlocutory concluding remarks

Before, briefly, summarizing the previously examined decisions, it is worth reiterating, as authoritatively sustained³⁷⁷, that by interpreting the conditions of access to the statute of the worship association, the CE defines the notion of worship and, mediately as well as implicitly, that of religion. It is a minimal and functional definition that allows to gather under the “worship” label a *corpus* of beliefs and religious rites³⁷⁸.

From the jurisprudence previously examined, a general framework emerges, which almost always starts from the balance between the free practice of worship - with the respect to the public order, ensured by Article

³⁷⁵ Applying these principles, the CE states that funding by a French Region a work on a Catholic building, which takes the form of a decentralised cooperation agreement, does not go against the 1905 Act. This case, concerned the collaboration with the restoration works of St. Augustin Basilica of Annaba, in Algeria. Basilica built from 1881, both a place of worship for many believers and a historical monument that receives every year several visitors.

³⁷⁶ Available in English at [//arianeinternet.conseil-etat.fr/arianeinternet/getdoc.asp?id=410&fonds=DCE_EN&item](http://arianeinternet.conseil-etat.fr/arianeinternet/getdoc.asp?id=410&fonds=DCE_EN&item). Cf. *supra*, same par., CE, 19 July 2011, no. 320796. On this topic see also O. DIDRICHE, *Précisions sur les conditions de légalité d'un BEA "culturel": l'affectataire doit être une association culturelle*, in *AJCT, Actualité Juridique Collectivités Territoriales*, n. 6, 2017, p. 347.

³⁷⁷ R. SCHWARZ, *Un siècle de laïcité*, Berger-Levrault, Paris, 2007, 204 pp., especially p. 18 ss. The Author - former president of one litigation section of CE - analyses more than 450 judgements on the application of the principle of secularism.

³⁷⁸ In this sense D. KOUSSENS, *La religion saisi par le "droit"*, cit., p. 825.



1 of the 1905 Act - and the principle of separation as specified by the same Act.

In summary, the notion of worship is closely linked to that of divinity³⁷⁹ and consists of “celebration of ceremonies organized for the fulfilment by persons who are united by virtue of a religious belief, certain rites or certain practices”³⁸⁰. Nevertheless, it is necessary to include not only religious ceremonies but also lessons and debates on biblical themes³⁸¹, as well as all activities related to this object, such as the acquisition, rental, construction, arrangement and maintenance of worship buildings or the sustenance and training of religious ministers and other people who participate in the practice of worship³⁸².

Corresponding to this jurisprudence, a place of worship, managed according to one of the ways provided by law (Article 25 of the 1905 Act and Article 4 of the 1907 Act), is one that is exclusively intended for the public exercise of worship³⁸³ in the sense just stated. It is a qualification that also extends to the immediate and necessary dependencies of the premises destined for that exercise but not to the other premises which, while being in the same building, are destined for other uses³⁸⁴.

With regards to the requirements for the existence of a worship association, it is necessary in the first place the existence of an exclusive purpose of worship (Articles 19 of the 1905 Act). Existence that should be assessed both in regard to the statute and in relation to the activities concretely exercised³⁸⁵.

Another obstacle to the recognition of this qualification - to be evaluated *ex post*, for example, for the acceptance of a bequest - is the possible contrast with the public order. Contrast that can be detected, for instance, in the presence of criminal proceedings against a founder of a group, for facts related to worship activities, and for serious and intentionally committed infringements of the town planning legislation, perpetrated by other associations, which refer to the same worship and have the same statutory references³⁸⁶.

Particularly, in relating to the prohibition on the financing of activities concerning the exercise of the cult, the CE's jurisprudence seems

³⁷⁹ CE, 17 June 1988, no. 63912.

³⁸⁰ CE, 24 October 1997, no. 187122.

³⁸¹ CE, 13 January 1993, nos. 112392 and 115474.

³⁸² CE, 24 October 1997, no. 187122.

³⁸³ CE, 13 January 1993, nos. 112392 and 115474.

³⁸⁴ CE, 4 February 2008, no. 29301, which excludes from the tax benefit the premises used for catechism or liturgical chorus tests.

³⁸⁵ CE, 24 October 1997, no. 187122.

³⁸⁶ CE, 28 April 2004, no. 248467.



to work further, balancing between the constitutional principle of secularity (*laïcité*) that not preclude the granting of certain aid to activities or equipment dependent on religious groups, and the provisions of the 1905 Act which prevent public authorities from determining direct or indirect assistance to worship.

In fact, on the one hand, it allows the use of certain instruments provided by other legal norms or considering them prevalent on the 1905 Act³⁸⁷ or by providing a conforming interpretation³⁸⁸. On the other hand, it recalls the jurisprudence concerning the *Fédération de la libre pensée du Rhône*³⁸⁹, relating Article 2 of the 1905 Act. In order not to incur the prohibition of financing of associations, that are not worship associations but are also engaged in worship activities, it is necessary that the activities or events to be carried out have no worship status, are of a local public interest and that is guaranteed, especially by contract, that the subsidy is not used for founding the worship activities. Nevertheless, the principle about the distinction between worship activities and cultural practices remains valid³⁹⁰.

The trend must now be assessed in the light of others CE pronouncements on religious subjects as well as the corresponding activities of the other French institutional bodies, especially the legislative ones.

The arrangement provided by the CE - firstly with the 2011 and 2012 judgements - on one hand, puts in place a series of *de facto* adjustments to the legislation concerning Church-State separation, which considers the new instances that have emerged in the current French religious landscape, trying to overcome the inequality of the so-called "starting points" concerning religious groups not present at the beginning of the 20th century³⁹¹. On the other - on issues regarding the Catholic Church - the CE makes important distinctions between what is related to what is not properly regarded as worship, by formulating the notion of local public interest, not disregarding, at the same time, the historical, cultural and economic value of certain places or manifestations, if the conditions set out

³⁸⁷ CE, 19 July 2011, no. 320796 and CE, 10 February 2017, no. 395433, concerning Article L1311-2 of the General Code of Local Authorities.

³⁸⁸ CE, 19 July 2011, no. 315518, concerning Article L2144-3 of the General Code of Local Authorities.

³⁸⁹ CE, 19 July 2011, no. 308817 and CE, 4 May 2012 nos. 336462, 336363, 336464 and 336465 and, more recently, CE, 17 February 2016, no. 368342.

³⁹⁰ CE, 15 February 2013, no. 347049.

³⁹¹ Incidentally, it should be noted that in France, as well as elsewhere, the work of the higher courts should be mentioned for having achieved an evolutionary interpretation of the rules in force which considers the principles of liberty equally guaranteed at national and supranational and international level, in redefinition of living law.



in its own jurisprudence are satisfied. All this, trying to engage in dialogue the opposing positions of associations related to religious groups and those in favor of a narrow secularism. It is a jurisprudence that has been echoed by other institutions to provide more reliable coordinates, especially to local administrators, who are sometimes resistant this innovative interpretation of the 1905 Act³⁹².

It is obvious, as has been observed on several occasions in this essay, that there is no explicit definition of what religion is - *rectius* "cult" - given the normative framework of the principles of separation and secularism. Moreover, it is an operation that also, *rebus sic stantibus*, remains formally precluded to the legislator, as is also the case of the procedure that has accompanied the promulgation of the already evoked law concerning measures directed to reinforce the prevention and repression of sectarian (cultic) movements, no. 2001-504³⁹³.

In fact, beyond contributing to providing even an implicit definition of what can be defined as a religion³⁹⁴, the jurisprudence in question helps to better circumscribe the contours of what secularism is, in a more open and liberal sense, as well as in the affirmed formal respect of the principles of neutrality and equality before the law.

It remains to be seen how this kind of inclusive and pragmatic secularism, most attentive to the demands of the groups and only indirectly to those of individuals³⁹⁵, which seems to be pursued by the CE - at least in the application of the 1905 Act - can harmonize with the more opposing and political type of secularism pursued by the legislator.

³⁹² Cf. **OBSERVATOIRE DE LA LAÏCITÉ**, *Laïcité et collectivités locales*, (2016), 16 pp. available at www.laicite.gouv.fr; **MINISTERE DE L'INTERIEUR**, *Gestion et construction des lieux de culte. Guide pratique*, La documentation Française, Paris, 2016, 142 pp., and **MINISTERE DE L'INTERIEUR ET MINISTERE DE L'AGRICULTURE**, *Aïd-el-kebir. Modalité d'organisation et d'encadrement de l'abbatage. Guide pratique*, La documentation Française, Paris, 2016, 97 pp., and **MINISTERE DE L'INTERIEUR ET MINISTERE DE L'AGRICULTURE**, *Guide pratique de recommandations pour les abattoirs temporaires d'ovins lors de L'Aïd al Adha*, 2017, 38 pp., available at [//agriculture.gouv.fr/sites/minagri/files/documents/pdf/AID_guide_cle8cfd5d.pdf](http://agriculture.gouv.fr/sites/minagri/files/documents/pdf/AID_guide_cle8cfd5d.pdf). See also **CENTRE NATIONAL DE LA FONCTION PUBLIQUE TERRITORIAL**, *Les fondamentaux sur la laïcité et les collectivités territoriales*, 2015, 129 pp. available at www.cnfpt.fr/sites/default/files/lioret_laicite.pdf.

³⁹³ *Amplius*, M.C. IVALDI, *Alcune considerazioni*, cit., p. 2 ss.

³⁹⁴ However see **SENAT**, *Rapport d'information fait au nom de la délégation aux collectivités territoriales et à la décentralisation sur le financement des lieux de culte*, 17 Mars 2015, no. 345 (www.senat.fr/rap/r14-345/r14-3451.pdf) where the expression of emerging religions and new religious movements is used (p. 23), including also Jehovah's Witnesses (p. 36), previously listed as a sectarian movement in the above-mentioned Guest-Guyard parliamentary report of 1995 (*supra*, par. 4).

³⁹⁵ Indeed, see *infra* for the CE's pronouncements concerning burkini.



For instance, it is evident that legislator clearly tends to penalize the most symbolic forms of religious faith by individuals, as is the case with the laws *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*, 15 Mars 2004, no. 2004-228³⁹⁶ and *interdisant la dissimulation du visage dans l'espace public*, 11 October 2010, no. 2010-1192³⁹⁷. This is especially the case with Muslims, specifically those belonging to the female gender³⁹⁸, and it appears as «la réponse "logique" à tous les problèmes liés aux actes terroristes, au "vivre ensemble" et aux problèmes "d'intégration" en

³⁹⁶ Law applying the principle of secularism to regulate the wearing of signs or clothing manifesting a religious affiliation in public schools. For a comment see, **M.C. IVALDI**, *Verso una nuova definizione della laicità? La recente normativa a proposito dei segni religiosi nella scuola in Francia*, in *Il Diritto ecclesiastico*, 2004, p. 1133 ss., and, *amplius*, **P. CAVANA**, *I segni della discordia. Laicità e simboli religiosi in Francia*, Giappichelli, Torino, 2004, *passim*.

Regarding the display of religious symbols in school, particularly the Islamic headscarf, originally, both as advisor of the Government, (CE, opinion, 27 November 1989, no. 346893) and in exercise of judicial function (among others see judgements CE, 2 November 1992, no. 130394; 10 Mars 1995, no. 159981; 20 May 1996, no. 170343 and the 21 judgements on this issue of 27 November 1996) the CE provides that the display of religious symbols by students, worn with the purpose of expressing belonging to a religion, are not in themselves incompatible with the principle of secularism insofar as they constitute an exercise in the freedom of expression and the manifestation of religious beliefs (especially opinion, no. 346893/1989). However - after the coming into force of the law no. 2004-228 - the CE seems to reverse the trend, applying the principle of secularism to regulate the wearing of signs or clothing manifesting a religious affiliation in public schools, as explained by judgement on the *niqab* of 27 June 2008, no. 286798, confirming the refusal to grant French citizenship by defect of assimilation as the applicant has "adopted a radical practice of her religion, incompatible with the essential values of the French community, principally the belief in the equality of the sexes".

³⁹⁷ Law banning face-concealment in public spaces. On this topic see. **E. BOUDIER**, *Des libertés à la répression: un renversement à peine voilé de la laïcité*, in *La Revue des droits de l'homme*, 11, 2017, p. 1 ss. (available at [//revdh.revues.org/2910](http://revdh.revues.org/2910)), **A. FERRARI**, *Il "burqa" e la sfera pubblica in Europa*, in *Quaderni di diritto e politica ecclesiastica*, 1/2012, p. 3 ss. For doctrine in English see, *amplius*, **P.E. NILSSON**, *Unveiling the French Republic: National Identity, Secularism, and Islam in Contemporary France*, Brill, Leiden, 2017, *passim*. Cf. also **CONSEIL D'ÉTAT**, *Etude relative aux possibilités juridiques d'interdiction du port du voile intégral, Rapport adopté par l'assemblée générale plénière du Conseil d'Etat le jeudi 25 mars 2010*, 46 pp. (available also in English at www.conseil-etat.fr/content/download/1910/5758/version/1/file/etude_voile_integral_anglais.pdf), for which there were no legally unchallengeable basis for a general ban on the full veil as such.

³⁹⁸ **S. HENNETTE-VAUCHEZ**, *Genre et religion: le genre de la Nouvelle Laïcité*, in S. Hennette-Vauchez, M. Pichard, D. Roman (eds), *La loi et le genre. Études critiques de droit français*, C.N.R.S. Éditions, Paris, 2014, p. 715, nt. 2. For this Author «la "Nouvelle Laïcité" est inégalitaire non seulement parce qu'elle tend à distinguer l'Islam des autres religions, mais encore parce qu'elle pèse de manière toute particulière sur les femmes musulmanes».



France»³⁹⁹. In this regard, authoritative Italian doctrine speaks of narrative secularism, which would take part in public debates, articulating the legislative conjugation of secularism according to the political problems of the moment⁴⁰⁰.

As for the Administration, signs of further *apaisement* are those that appear to come from the current interior minister, Gérard Collomb - competent as already noted also in religious matter⁴⁰¹ - who, in a note to prefects on 5 September 2017⁴⁰², prefigures the establishment of an interfaith and informal instance⁴⁰³ of dialogue and concord between the authorities of the main religions; instance to be convened only if needed⁴⁰⁴. After all, this Minister has already shown, in several public interventions, his commitment in favour of a *laïcité de liberté*⁴⁰⁵.

Concerning the relationship between freedom of religion and secularism, it is worth mentioning, in conclusion, some further recent interventions by the CE, that concern the 1905 Act though do not relate directly to the worship associations. On the one hand, the interventions involve religious symbols worn by individuals, on the other hand, they

³⁹⁹ E. BOUDIER, *Des libertés à la répression*, cit., p. 2.

⁴⁰⁰ A. FERRARI, *De la politique à la technique: laïcité narrative et laïcité du droit. Pour une comparaison France/Italie*, in B. Basdevant-Gaudemet, F. Jankoviak (eds.), *Le droit ecclésiastique de la fin du XVIIIe au milieu du XXe siècle en Europe*, Peeters, Leuven, 2009, p. 333 ss. For this Author the narrative secularism would create a strong division between the defenders of an open versus a strict or closed secularism. This idea is revived and deepened by D. KOUSSENS, *La religion "saisi par le droit"*, cit. p. 826 and V. AMIREUX, D. KOUSSENS, in the paper with the emblematic title, *From Law to Narratives. Unveiling Contemporary French Secularism*, in *RECORD, Working Paper Series*, n. 13, 2013 (www.recode.info/wp-content/uploads/2013/02/Fin_RECORDER-19-Val%3%A9rie-Amiraux-David-Koussens-Final_fin.pdf), especially p. 2 ss.

⁴⁰¹ *Supra* par. 2.

⁴⁰² The news, unpublished, as it turns out, is reported with excerpts from the document by several online press agencies including the Catholic www.la-croix.com and the Muslim www.saphirnews.com.

⁴⁰³ Instance to be added to the existing framework of relations with the religious representatives.

⁴⁰⁴ The initiative, unknown at national level, which follows two local examples, should take effect by December 2017. We refer to the models of *Marseille Espérance* and of *Concorde et Solidarité* of Lyon, latter launched by Collomb himself - then mayor of the city - following an attack on the synagogue of Duchère in 2002.

⁴⁰⁵ Inferred also from his settlement address where he stated, towards the end, verbatim: «je reprendrai la laïcité telle que défendue par Aristide Briand [Rapporteur of the 1905 Act] - dans la loi de 1905: "il disait que cette loi est une liberté. La liberté de croire ou de ne pas croire. La liberté pour celles et ceux qui croient de pratiquer librement leur religion tant qu'elle ne fait pas obstacle à la loi de la République". C'est ainsi que nous concevons la liberté des cultes».



involve the principle of neutrality prohibiting public institutions from displaying religious signs or symbols.

In fact, in seeking greater effectiveness of the right of individual religious freedom, by using the principle of proportionality, the CE intervenes - as judge responsible for granting interim relief in urgent matters⁴⁰⁶ - with order 26 August 2016, no. 402742-402777⁴⁰⁷, regarding the prohibitions on wearing *burkini*⁴⁰⁸ on public beaches, adopted by some majors of seaside towns⁴⁰⁹.

On the assumption that any restrictions to fundamental liberties - such as the freedom to come and go, religious freedom and individual freedom - must be justified by serious risks of infringement of public order, the CE considers that, in the present case, no evidence was brought that the risks of breaches against peace and good order existed, on the beaches, in relation with the clothes worn by some people⁴¹⁰.

Subsequent decisions concern all of Article 28 for which - with exceptions⁴¹¹ - "it is forbidden, in the future, to erect or to put up any religious sign or symbol on public buildings or in any public place".

⁴⁰⁶ Article L521-2, Code of Administrative Justice.

⁴⁰⁷ Available in English at [//arianeinternet.conseil-etat.fr/arianeinternet/getdoc.asp?id=369&fonds=DCE_EN&ite](http://arianeinternet.conseil-etat.fr/arianeinternet/getdoc.asp?id=369&fonds=DCE_EN&ite). See also, the ensuing and conforming order CE, 26 September 2016, no. 403578.

⁴⁰⁸ A swimsuit used by women that covers the whole body except face, hands and feet. For a doctrinal insight, see **N. Hervieu**, *Burkini: Entretien croisé des Professeurs Stéphanie Hennette-Vauchez et Joël Andriantsimbazovina sur la décision du Conseil d'Etat. Liberté de religion et ordre public*, in *La Revue des droits de l'homme*, 2016 (at [//revdh.revues.org/2514](http://revdh.revues.org/2514)); **G. CASUSCELLI**, *La farsa del burkini: ma c'è un giudice a Parigi!*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 27/2016, p. 1 ss., and **D. FERRARI**, *I sindaci francesi contro il "burkini": la laicità a ferragosto? A prima lettura di alcuni recenti orientamenti giurisprudenziali*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 31/2016, p. 1 ss.

⁴⁰⁹ The mayors of Villeneuve-Loubet and Cagnes-sur-Mer. In both cases, municipal provisions prohibited bathing access to "to any person not having a proper attire, respectful of morality and of the principle of secularism", thereby prohibiting in those same places - as is read in the CE's orders - "banning clothes demonstrating an obvious religious affiliation".

⁴¹⁰ For the CE, moreover, the concern and worries resulting from recent terrorist attacks, in particular the attack that took place in Nice of 14 July 2016, were not sufficient to legally justify the mayor's order. See also the available press release in English at [//english.conseil-etat.fr/Activities/Press-releases/The-Council-of-State-orders-a-decision-banning-clothes-demonstrating-an-obvious-religious-affiliation-to-be-suspended](http://english.conseil-etat.fr/Activities/Press-releases/The-Council-of-State-orders-a-decision-banning-clothes-demonstrating-an-obvious-religious-affiliation-to-be-suspended).

⁴¹¹ *I.e.* buildings used as places of worship, on burial grounds in cemeteries, on funeral monuments and on museums or exhibition halls.



Firstly, with the two judgements of 9 November 2016, nos. 395122⁴¹² and 395223⁴¹³ (*Fédération de la libre pensée de Seine et Marne* and *Fédération de la libre pensée de la Vendée*), the CE intervenes concerning the Christmas crib⁴¹⁴. Starting from the assumption that the crib can assume a plurality of meanings, the CE rules that the display of Nativity scenes by a public authority in a public space is lawful, only if it has a cultural, artistic or festive purpose, but not if it expresses a public recognition or a preference for a religion.

Given the importance of the location of the display criteria, the CE distinguishes two situations: 1) inside public buildings, where public administrations and services are located, a Nativity scene cannot be displayed, unless specific circumstances demonstrate its cultural, artistic or festive purpose; 2) on other public properties, given the festive nature of such displays in relation to the end of the year celebrations, Nativity scenes can lawfully be displayed, unless they constitute an act of proselytism or the expression of a religious opinion.

On this occasion the CE affirms that Article 28 of the 1905 Act must be interpreted - *rectius* reinterpreted - as a norm

“whose purpose is to ensure the neutrality of public persons regarding religions, them from setting up, in a public location, a sign or emblem demonstrating the recognition of a religion or marking a religious preference”⁴¹⁵.

This is a precedent that will also be recalled in judgment, 25 October 2017, no. 396990, which originated - like many others before - by a complaint proposed by a local federation of free thought, in this case, concerning the

⁴¹² Available in English at [//arianeinternet.conseil-etat.fr/arianeinternet/getdoc.asp?id=403&fonds=DCE_EN&item](http://arianeinternet.conseil-etat.fr/arianeinternet/getdoc.asp?id=403&fonds=DCE_EN&item).

⁴¹³ Available in English at [//arianeinternet.conseil-etat.fr/arianeinternet/getdoc.asp?id=405&fonds=DCE_EN&item](http://arianeinternet.conseil-etat.fr/arianeinternet/getdoc.asp?id=405&fonds=DCE_EN&item).

⁴¹⁴ Jurisprudence particularly noted in a critical sense: **L. DUTHEILLET DE LAMOTHE, G. ODINET**, *La crèche entre dans les Tables*, in *AJDA*, 2016, p. 2375; **T. HOCHMANN**, *Le Christ, le père Noël et la laïcité, en France et aux États-Unis*, on *Nouveaux Cahiers du Conseil constitutionnel*, n. 53, 2016, p. 53; **S. SLAMA**, *Jésus revient au Palais Royal ou quand le Conseil d'État fait obstacle à la séparation de l'État et de l'étable*, in *Revue des droits de l'homme*, 11, 2017, p. 1 (available at [//revdh.revues.org/2951](http://revdh.revues.org/2951)), and **D. FERRARI**, *Natività e laicità: i presepi in Francia tra religione e secolarizzazione*, in *Stato, Chiesa e pluralismo confessionale*, cit., n. 17/2017, p. 1 ss.

⁴¹⁵ Criticizes the use of the expression “demonstrating the recognition of a religion or marking a religious preference”, **S. SLAMA**, *Jésus revient au Palais Royal*, cit., p. 2, for whom this intentional element is not absolutely the result of the 1905 Act, because its article 28 merely prohibits «le fait “d'élever ou d'apposer” à l'avenir des signes ou emblèmes religieux, sans prescrire de rechercher si l'installation en question exprime l'adhésion d'une autorité publique à une religion».



placement by a municipal council⁴¹⁶, of a statue depicting John Paul II, in a square dedicated to him.

Without going into detail concerning the procedure, the CE makes a distinction between the statue - gift of a Russian sculptor - and its placement under another structure constituted by an arch, surmounted by a cross. Excluding the relevance of certain proposed arguments - such as the artwork character of the set of the structure or the theory that the cross would constitute the expression of a strong local Catholic tradition - the CE states the only removal of the cross, which the character of a sign or religious emblem, prohibited by the 1905 Act, must be recognized.

It should be noted that these further pronouncements seem to confirm the trend already detected toward the prohibition of funding of religion, in the sense of a new re-reading of the 1905 Act, that will give rise to other tensions⁴¹⁷. Perhaps, such pronouncements will allow for additional interventions concerning the expression of religious fact that will go even further toward a softening of the relevance of the border between the public sphere and the private sphere, while at the same time remaining formally within the principle of separation.

⁴¹⁶ Resp. *Fédération morbihannaise* and conseil municipal de Ploërmel.

⁴¹⁷ A re-reading that would be inspired by the jurisprudence of Supreme Court of the United States of America founded on the First Amendment that developed the so-called Lemon test as specifying by T. HOCHMANN, *Le Christ, le père Noël et la laïcité*, cit., p. 53 ss. This Author criticizes the «"interprétation constante" donnée par une juridiction suprême à l'article 28 de la loi de 1905; interprétation qui admet, dans certaines circonstances, la possibilité pour une personne publique d'installer des signes ou emblèmes religieux dans un lieu public en violation du principe de laïcité garanti aussi bien par l'article 1er de la Constitution que par les principes fondamentaux reconnus par les loi de la République». Interpretation, against which a priority preliminary ruling on the issue of constitutionality should be proposed.



Maria Luisa Lo Giacco

(Professor of Law and Religion and Canon law at the University of Bari,
School of Law)

The meaning of 'Religion' in the Italian Constitutional Court Jurisprudence

SOMMARIO: 1. Introduction - 2. The meaning of religion in the first jurisprudence of the Constitutional court - 3. What are the boundaries of religion? - 4. Conclusions.

1 - Introduction

Scholars in many different fields have often asked what features a social phenomenon should have so it can be considered to be a religion, but in the juridical field it has been stated that looking to define a religious confession is not a worthwhile venture, and even less so trying to define a religion. It is as if the attempt to outline a concept of religion is an unwanted meddling in a sphere of life that cannot be reduced to legal categorization, almost as if the State claims the right to "prefigure a stereotype of religion"⁴¹⁸.

Virtually all legal systems deal with religions in various ways, but only with difficulty can we find any criteria according to which a social phenomenon can be qualified as religious.

Even those who deal with international law point out the lack of a definition of religion and they emphasize that, even though there are a large number of acts that protect freedom of religion, none of them explain what is actually meant by the word "religion"⁴¹⁹.

This issue has been under examination for many years and in many countries. For example, American jurisprudence and its scholars - with a law system characterized by the separation of Church and State - in its early period considered as religions exclusively those which were monotheistic,

⁴¹⁸ **S. DOMIANELLO**, *Giurisprudenza costituzionale e fattore religioso. Le pronunzie della Corte Costituzionale in materia ecclesiastica (1987-1998)*, Giuffrè, Milano, 1999, p. 65. **M. TEDESCHI**, *Le minoranze religiose tra autonomia e immobilismo del legislatore*, in R. Coppola, C. Ventrella (eds.), *Laicità e dimensione pubblica del fattore religioso. Stato attuale e prospettive*, Cacucci, Bari, 2012, p. 75, wrote that "the State must not classify a group as a religious one, because the group autoqualifies itself [...] Religions are social groups with religious purposes".

⁴¹⁹ See **T.J. GUNN**, *The Complexity of Religion and the Definition of "Religion" in International Law*, in 16 *Harvard Human Rights Journal* (2003), pp. 189-215.



and only later were atheistic, moral and philosophical beliefs included in the definition of religion. This interpretation was confirmed by the Supreme Court in the 1960s⁴²⁰.

There is no real definition of what religion is from the point of view of the law, and this is the case also in Italy. This lack of definition could be justified by the non-religious essence of the contemporary legal system which must take a step back when it comes to giving a definition to words that are linked to the religious sphere.

A direct look at the Italian experience would seem to show that the State's presumption to identify a concept of religion is incompatible with secularism. In fact, the secular state by definition should not be able to define religion and the religious. However, the very definition that the Constitutional Court has given to Italian secularism makes it a necessity for the State itself to know whether a social reality can be defined as a religion, and whether a certain fact or behaviour can be qualified as religious. The well-known judgment n° 203 of 12 April 1989⁴²¹, which for the first time stated the "supreme principle of secularism of the State", defined it not as "the State's indifference to religions, but the guarantee of the State for the safeguarding of freedom of religion, under confessional and cultural pluralism"⁴²². To be not indifferent to something you must know what that something is and, "under the confessional and cultural pluralism" in Italy, recognizing religion is not easy.

Even the guarantee of equal freedom for all religious confessions which Article 8 of the Italian Constitution specifies, requires a compass to guide jurisprudence in the difficult task of understanding if a group is a

⁴²⁰ See **L.J. STRANG**, *The Meaning of "Religion" in the First Amendment*, in 40 *Duquesne Law Review* (2001-2002), pp. 181-240. See, also, **G.C. FREEMAN, III**, *The Misguided Search for the Constitutional Definition of "Religion"*, in 71 *Georgia Law Review* (1983), p. 1553, nt. 157; in Freeman vision, there is a list of eight characteristic that all religions possess, though each religion may not have all characteristics: "1. A belief in a Supreme Being; 2. A belief in a transcendental reality; 3. A moral code; 4. A worldview that provides an account of man's role in the universe and around which an individual organizes his life; 5. Sacred rituals and holy days; 6. Worship and prayer; 7. A sacred text or scriptures; 8. Membership in a social organization that promotes a religious belief system".

⁴²¹ This sentence, like the others cited in this paper, is published in the Italian Constitutional Court official website (www.cortecostituzionale.it).

⁴²² We have a very wide bibliography on the principle of "laicità". For an approach that moves from jurisprudence, see **S. SICARDI**, *Il principio di laicità nella giurisprudenza della Corte Costituzionale (e rispetto alle posizioni dei giudici comuni)*, in *Atti della tavola rotonda su "Rigore costituzionale ed etica repubblicana"*, Università degli Studi di Roma "La Sapienza" (26 maggio 2006), (<http://archivio.rivistaaic.it/materiali/convegni/200611foggia/relazione%20Sicardi.pdf>). For a theoretical approach, see **P. STEFANI**, *Il problema giuridico della laicità nella società multiculturale*, Aracne, Roma, 2013.



religion or not⁴²³, though unfortunately this compass is not to be found within the Constitution.

2 - The meaning of religion in the jurisprudence of the first Constitutional court

The Constitution, indeed, uses many words related to religion without giving them any actual definition. We find several references to religion, for instance in the article of law that affirms the equality of all citizens without regard to their "religion" (Article 3); elsewhere the Constitution uses words like "religious faith", "cult", "rites" (Article 19), or it protects the "purpose of religion or of worship" of bodies and organizations (Article 20). However, when the Constitution of the Republic wants to legislate on organised religion it identifies this as the Catholic Church (Article 7) and "religious confessions" (Article 8). This short list of the references to religion that we can find in the Constitution shows that the writers of the Constitution preferred to get the definition of religion, religious, cult and rites etc. from the social context of their time, rather than trying to identify the features of religion. At that time the Italian social context was rather clear and reassuring in that in Italy, in the mid-1950s, religion was essentially the Catholic Church while other religions which were historically present in the country, especially Judaism and Evangelicalism, were considered in a subordinate position to that of the Catholic Church. They were defined, by Law n° 1159 of 24 June 1929, as "admitted cults", terminology that was the fruit of the ideology, which permeated Italy at that time.

This was still the "definition" of religion in 1956, the year that the Italian Constitutional Court issued its first ruling. In that same year, Cesare Magni devoted a large part of his book *Avviamento allo studio analitico del diritto ecclesiastico* to the legal definition of "Religion" and "Religious". Magni asserted that religion, in its broader sense, can be defined as a "belief in the existence of transcendent powers, personal or impersonal, acting in the world"⁴²⁴.

Without doubt, the Author - and it couldn't have been in any other way - obtained his definition of religion from the cultural and social context of the age in which he lived. His reference to "impersonal powers" was necessary in order to encompass the Far Eastern traditions which Magni identified in Hinduism, Buddhism, Jainism and Chinese universalism,

⁴²³ See P. CONSORTI, *Diritto e religione*, 2^a ed., Laterza, Roma-Bari, 2014, p. 90.

⁴²⁴ C. MAGNI, *Avviamento allo studio analitico del diritto ecclesiastico*, Milano, Giuffrè, 1956, p. 77.



while those religions which believe in a personal God, “who created the world from nothing thanks to his only and free will, and who is over all things”⁴²⁵ are the monotheistic religions of Judaism, Christianity, Islam and Zoroastrianism. Evidently, he had in his mind the great religions of the world. Two years later, Pietro Gismondi, in his paper on the religious interests within the Constitution, identified in religion the “essential and primordial expression of human spirituality”⁴²⁶. He believed that religions are hallmarks of the nation and that they “reflect the history of the people among which they were born and the peculiarities of their civilizations”. He also insists on the legal character of religions, that they can be religions only if they have rules and an organization⁴²⁷. Magni looked for a definition of religion within their theology while Gismondi focused on their institutional aspects.

If this is the idea of religion that we can find in legal scholarship, what is the earliest definition of religion that we can find within the jurisprudence of the Italian Constitutional Court? In its first years of activity, the Constitutional Court did not see any need to identify a definition of religion. In fact, until the end of the Nineteen-Seventies, the Court was principally involved in justifying the privileges of the Catholic Church over other religions. Such privileges were necessary to protect the “religious feelings” of the majority of the Italian people⁴²⁸.

In Judgment n° 125 of 28 November 1957, the Court dealt with the question of the constitutionality of the crime of contempt against symbols or persons of the Catholic Church, which was more severely punished than contempt against symbols or persons of other religions. In the opinion of the Court, the special consideration reserved to the Catholic Church was justified by “the importance of the ancient uninterrupted tradition the Catholic Church has always had in the Italian population, almost all Italians being Catholic”. Also in the Judgment n° 79 of 17 December 1958, the Constitutional Court deemed the crime of contempt lawful because it is a crime against the “religion of the State”, even if the State was formally non confessional. In the judges’ opinion, with this formulation, the legislator didn't want to give “importance to a formal qualification of the Catholic religion, but to the circumstance that almost the entire Italian population

⁴²⁵ C. MAGNI, *Avviamento allo studio*, cit., p. 87.

⁴²⁶ P. GISMONDI, *L'interesse religioso nella Costituzione*, in *Giurisprudenza Costituzionale*, 1958, p. 1222.

⁴²⁷ P. GISMONDI, *L'interesse religioso*, cit., pp. 1222 e 1230.

⁴²⁸ See A. ALBISETTI, *Il diritto ecclesiastico nella giurisprudenza della Corte Costituzionale*, III ed., Giuffrè, Milano, 2000, pp. 24-26.



professes Catholicism". In the Court's opinion, "there can be no distance between social reality and legal principles"⁴²⁹.

Judgment N°58 of 6 July 1960, ruled that the wording of the oath established by Article 404 of the code of criminal proceedings, then in effect, was constitutional. That wording contained an explicit reference to a commitment to truth before God, but the judges wrote that "it corresponds to the conscience of the Italian people, who are believers; so, allowing that the swearer believes in God, it is consistent with any religion, also for the non-Catholics". Actually, the Court didn't examine the question as related to Article 19 (protection of religious freedom), but with respect to Article 21 (freedom of thought), since it expressly asserted that, according to the Constitution, religious freedom is only a positive freedom, a freedom to believe: "atheism begins where religious life ends". The Court, even if it doesn't say so, in this judgment shows itself to have a precise idea of what religion is: it is a religious idea that believes in the existence of God. It is clear that the model of religion in the mind of the Court is the Catholic one to which almost the entire Italian population belongs, (as we can read in the grounds for the judgment). In fact, the Court states that, so conceived, the wording of oath would satisfy all religions, including the non-Catholics, but this statement is not correct in that some religions prohibit their adherents from taking any type of oath. In fact it was rescinded after only three years.

Judgment n° 85 of 25 May 1963 originates from the refusal of a Pentecostal Christian to take an oath, for religious reasons. A citizen, Christian but not Catholic, refutes the theory that the oath would be consistent with his religious faith. At this point, the Court has to change the level of argumentation and it argues that in reality the oath is not an act of worship, but it expresses "an appeal to general religious values"; so precluding the hypothesis that the State, imposing the oath, interferes in religious affairs.

The Court, with these judgments, gave a definition of religion and worship, supporting a Catholic interpretation of them, perhaps unwittingly, perhaps not, but anyway echoing the definition given by Gismondi, which is that religion identifies itself with nation.

In judgment n° 39 of 13 May 1965, that once again concerns the constitutionality of the criminal laws protecting religions, the Court justifies the fact that contempt against the Catholic Church receives a heavier sentence than that against other religions. It considers that the law "can treat in a different way the various religions on the basis of their different

⁴²⁹ **M. VENTURA**, *La libertà di religione o di credo: il percorso costituzionale*, in **AA.VV.**, *Per i sessanta anni della Corte costituzionale*, Giuffrè, Milano, 2017, p. 26.



importance in the public sphere". From this perspective, the Catholic confession is "practised by the majority of the Italian people, and for that a different criminal protection is constitutional, because it looks more carefully at the "religious feelings of the Italian people".

We may say that, according to Constitutional Court jurisprudence of that time, religion was synonymous with Catholicism, which permeated the culture and was socially perceived as the religion of Italian people. Similarly, we can say without exaggeration that the Constitutional Court, in its first fifteen years of activity, supported the markedly Catholic sentiments of the society of time⁴³⁰, favouring the protection of collective religious freedom (especially that of the Catholic church) rather than individual freedom. In Constitutional Court jurisprudence, religion appears as an institutional reality rather than a response to people's spiritual needs.

In the mid-Seventies a small change in jurisprudence came about with some judgments in criminal matters expressing the need for the legislator not to be limited to protecting the religious feelings of Catholics, but also to be concerned with the protection of the religiosity of others.

In judgment n° 117 of 2 October 1979, the Court changed its opinion regarding the oath and it noted that, while in 1960 it had denied "the prevailing religious essence" of the oath, in hindsight "it has a clear religious meaning". The wording of the oath, that appeals to our responsibility towards God,

"in everyday language evokes a commitment to tell the truth in front of a supernatural and supreme Being, who is transcendent, omnipotent and omniscient [...] in front of a God who can read inside people's hearts and who judges their behaviour".

It is interesting to note that Italian Constitutional jurisprudence doesn't give a definition of religion, but it ventures onto the more treacherous ground of defining God. It defines God, in accordance with the Catholic vision, as a Supreme Being, omnipotent, omniscient and the judge of humankind. Notwithstanding this, the sentence declares that the part of oath's wording that refers to divinity is unconstitutional and it expressly admits that atheism is an expression of religious freedom, protected by Article 19 of the Italian Constitution.

In the late 1980s, even the crime of blasphemy is interpreted in a new way. The court is conscious of the difficulty of continuing to justify the

⁴³⁰ See G. DALLA TORRE, *Giurisprudenza costituzionale e dottrina ecclesiasticistica. Saggio di analisi*, in R. Botta (ed.), *Diritto ecclesiastico e Corte costituzionale*, Edizioni Scientifiche Italiane, Napoli, 2006, p. 97.



punishability of this behaviour given the fact that it would offend "the religion of almost all Italians", or because it would protect "the religious feelings of the majority of Italian population". After judgment n° 925 of 28 July 1988, blasphemy remains punishable but it becomes "immoral behaviour", a "bad habit for many people"; the Court underlines the need for the legislature to intervene "to tackle inequalities in the treatment of different religions".

The Court continues to use concepts such as "religion", "religious act", "conscience", "religious feelings" taking their meanings for granted or rather, adapting their definitions to those given by the prevailing culture.

3 - What are the boundaries of religion?

Of note was a change of perspective in Constitutional jurisprudence towards the end of the last century. A few years before this, in 1984, with the reform of the Concordat between the Catholic Church and the State, the principle of the Catholic religion as the sole religion of the Italian State, was considered no longer in force, but the meaning of religion was still an open question.

In 1986, Francesco Finocchiaro published the first edition of his textbook, studied in the following decades by generations of professors and students, in which he felt the need to give a definition of religion, and he formulated it as follows: religion

"has its own original complete conception of the world, which empowers not only the relationship between man and God, but those existing between man and man, giving rules governing not only the social life of an entire group, not only the relationships between the group and the other communities, but also the behaviour of the individual belonging to the group, when he acts within other social communities such as, for example, the civil community"⁴³¹.

The most authoritative Italian scholarship of the mid-1980s regarded religion as a theistic system, which has an original interpretation of human events, and that has a system of moral and legal regulation of relationships between people, between people and God, and between the religion and other communities, especially the State.

Some years later, the Court had to decide on the constitutionality of some tax laws that facilitated the religious activities of organizations and

⁴³¹ F. FINOCCHIARO, *Diritto ecclesiastico*, 10^a ed., Zanichelli, Bologna, 2009 (but we can find the same definition in the first edition of the book).



associations, and it questioned the meaning of the phrase “religious association”. In judgment n° 467 of 19 November 1992, the Court underlined that in general the law does not give a definition of the various aims of organizations, whether political, cultural, sports or even trade unions, however, this “does not mean that we cannot, and we must not deduce the meaning of the phrase ‘religious association’ from all of the laws”. Continuing its argument, the Court asserted that in order to define an association as “religious” it is not sufficient that it qualifies itself as such, but it is necessary that its real nature is evaluated in the light of “criteria that can be deduced from the whole legal system”. Associations “shall demonstrate their religious essence and their religious character [...] according to criteria that in the law of the state qualify the aims of religion and cult worship”.

The Court, with this judgment, distanced itself from its previous attitude of accepting the definitions of religion and religious as what was commonly believed. It asserted the necessity of identifying a definition of religious within national law, and this definition is to be deduced from laws regarding religious entities, that is a religious association is that which has a purpose of religion or worship.

However, we find no explanation of what this religious purpose may be; we find only the reference to the discipline of ecclesiastical organizations, which, from our point of view, is disappointing. Indeed, the legislature defines the content of religious activities for practical reasons, essentially related to the fact that certain activities carried out by religious entities receive a favourable tax treatment. Thus in Law n° 222 of 20 May 1985 which governs Catholic organizations, charitable activities, assistance and education are not defined as religious activities, while the agreement with the Valdese Board of Methodists etc. considers them as religious. If we applied to the Islamic religion the definition of “religious activities” of Law n° 222 of 1985, we would have to exclude from them the *Zakat* (ritual charity) and the *Hajj* (pilgrimage), which are not only religious acts but also are mandatory for Muslim believers. It is therefore impossible to derive a definition of what is “religious”, valid for all, from an examination of legislation in the field of religious bodies and entities.

A broader attempt to define what religion is, was made by the Constitutional Court in judgment n° 195 of 27 April 1993, which considered the constitutionality of a regional law concerning the construction of places of worship, and focused on the definition of “religious confession”. The Court, after having excluded the possibility of resorting to the criterion of



self-qualification, tried to draw up "a sort of identikit"⁴³² of the religious confession. It stated that the existence of a confession must be established in the light of criteria such as previous public recognition, a statute that clearly expresses its characteristics and, finally, general respect. However, this is like a dog biting its tail, because the problem is that, in a multicultural society, we often do not have a general respect for what a religion is. This is anyway only a partial attempt, because, as we have already mentioned, the definition concerns religious confessions rather than religion. In fact, religious confession is only a *species* of the *genus* religion.

In the same period, the Court perceived the necessity of rethinking the law that punishes blasphemy and it explained that in Paragraph I of Article 724 of the Italian penal code that religion is the object of protection. As we have said, in judgment n° 925 of 1988, the Court declared the legitimacy of the crime of blasphemy "secularizing" it into rude behaviour, but in judgment n° 440 of 18 October 1995, the Court underlined the differences existing between religion and "good manners", and blasphemy was brought back to its real nature, it could not be considered only as immoral behaviour or as a rude act. The Court wrote that "religion and its believers are always different from good manners and from polite people"; then, examining the text of Article 724, para. I, it affirms "blasphemy against a deity [...] can be punished independently of the fact that the deity is from one religion or from another".

The issue of defining what religion is and what deity means still remained unresolved. The same Court underlined this problem in the judgment n° 346 of 16 July 2002, where it wrote that there is "there is a lack, in the law, of clear legal criteria that are useful to define religious confessions".

A favourable occasion for the Court to express itself on this topic came with judgment n° 52 of 16 March 2016. The case was about the Italian government's refusal to begin negotiations for the drawing up of an agreement with an atheist organization, the UAAR (Union of atheists, agnostics and rationalists). The government had refused to start negotiations, by asserting that atheism is certainly protected by Article 19 of the Constitution, but atheism does not allow organizations that we can define as a "religious confession", which, according to the Italian government, is "an act of faith devoted to the divine and lived in common among many people who make it manifest to society through a particular institutional structure" (note 5 December 2003 of the Presidency of the

⁴³² P. MONETA, *Effetti della giurisprudenza della Corte costituzionale sul piano legislativo e interpretativo*, in R. Botta (ed), *Diritto ecclesiastico e Corte costituzionale*, cit., p. 264.



Council of Ministers, quoted in Council of State, Sect. IV, 4 December 2011, n° 6083⁴³³; which does not enter into the merit of the definition of religious confession, but merely asserts that such an assessment cannot be regarded as unquestionable even if it involves "undoubted practical difficulties", and affirms cannot even be "characterized by wide discretion").

The Court, in judgment n° 52 of 2016, does not deeply go into considering if an organization of atheists can be defined as a religious confession. It merely underlines that, in the absence of a definition of confession, the same Court had pointed out criteria that "in legal experience are used to distinguish religious confessions from other social organizations". It observes that the fact that the Government denying the character of confession to the UAAR association has had no other effect than to deny the opening of negotiations for an agreement with the state. Since in the Court's opinion such negotiations are remitted to the broad political discretion of the Government, the Court does not go into the merits of the matter. The ruling of the Court states that the government has broad freedom in deciding whether and with what religious confession to begin negotiations for the drawing up of an agreement, but it does not tell us if, and for what reasons, an association of atheists can be considered as a religious confession. It really was a missed opportunity. The United Sections of the Court of Cassation, in judgment n° 16305 of 28 June 2013⁴³⁴, - that is at the origin of the appeal decided by the Constitutional Court with the judgment n° 52 of 2016 - affirmed that

“if legal consequences derive from the conventional notion of religion, it is inevitable and necessary for those who are delegated with the responsibility of defining it, must do so, otherwise the recognition of rights and possibilities related to this definition remains entrusted to their arbitrariness”.

The Court of Cassation emphasizes that there should be no further procrastination in finding a definition of religion, because legal consequences are linked to that definition, above all the opportunity of asking the government to open negotiations to draw up an agreement as according to Article 8 of the Constitution⁴³⁵. The Constitutional Court decided, however, not to take note of the urgency, in a judgment that marks

⁴³³ The Sentence in OLIR- *Osservatorio delle libertà ed istituzioni religiose* (https://www.olir.it/ricerca/getdocumentpdf.php?lang=ita&Form_object_id=5713).

⁴³⁴ In OLIR (<https://www.olir.it/documenti/?documento=6134>).

⁴³⁵ See **A. LICASTRO**, *La Corte costituzionale torna protagonista dei processi di transizione della politica ecclesiastica italiana?*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), n. 26 del 2016, p. 27.



“one of the most timid moments - if not of true regression - of Constitutional jurisprudence in ecclesiastical matters”⁴³⁶.

4 - Conclusions

To find an answer to the question on what religion is, we have to turn back to scholarship. Silvio Ferrari tried to elaborate a definition, making a distinction between "religion" and "belief"; the first offers to believers a transcendent reality, answering the fundamental questions of human existence, it has a moral code and engages the faithful, especially through acts of worship. Belief, which can be atheist, agnostic, philosophical, pacifist, animalist, vegan, and so much more, offers an interpretation of natural reality, but it does not invite you to believe in an "Ultimate Reality, an Absolute, or a Vital Force"⁴³⁷. If it is true that it is almost impossible to identify a paradigm of religion, because there are realities that escape definition, we do however have the tools to elaborate a definition, starting from the religions already existing in our society⁴³⁸.

The first observation to be made is that, looking at reality, religion does not always correspond to the model of religious confession, and the difference between them is played out on the level of organization of its rules and regulations. A religious confession must be organized and it must have a juridical organization, while religion pervades the culture and therefore it forges the identity of the person.

Italian Constitutional jurisprudence is therefore called to make a cultural effort - as it has done in the past, for example, when it stated the supreme principle of "laicità" (secularism) - to try to give a meaning to the word "religion". It is an effort necessary in a society characterized more and more by the presence of different cultures. It is a necessity if we want to create a pacific coexistence. Religion and culture are in fact two closely related phenomena; we can say that there is a "interpenetration between religion and culture"⁴³⁹. In culturally homogenous societies, such as was

⁴³⁶ V. PACILLO, *La politica ecclesiastica tra discrezionalità dell'Esecutivo, principio di bilateralità e laicità/neutralità dello Stato: brevi note a margine della sentenza della Corte Costituzionale n. 52 del 10 marzo 2016*, in *Lo Stato. Rivista semestrale di Scienza costituzionale e Teoria del diritto*, IV (2016), n. 6, p. 249.

⁴³⁷ S. FERRARI, *La nozione giuridica di confessione religiosa (come sopravvivere senza conoscerla)*, in V. Parlato, G.B. Varnier (eds.), *Principio pattizio e realtà religiose minoritarie*, Giappichelli, Torino, 1995, p. 35.

⁴³⁸ S. FERRARI, *La nozione giuridica di confessione religiosa*, cit., pp. 31-32.

⁴³⁹ M. RICCA, *Laicità interculturale. Cos'è?*, in G. Macrì, M. Parisi, V. Tozzi (eds.), *Diritto e religione. L'evoluzione di un settore della scienza giuridica attraverso il confronto fra quattro libri*,



found in the Italy of the last century, there was no question of understanding what a religion was. Nowadays the categories mix and “cultural difference frequently assumes the same features as religious identity. In so doing, it claims nothing but its own space within the public space, that is, along the same paths that all subjects of law tread every day”⁴⁴⁰. Multicultural society requires jurists to better understand what the boundaries of religion are, because without understanding this, it is impossible to govern and prevent conflict.

Plectica, Salerno, 2012, p. 61.

⁴⁴⁰ **M. RICCA**, *A modest proposal: An Overgrown Constitutional Path to Cultural/Religious Pluralism in Italy*, in *CALUMET - intercultural law and humanities review*, 3 (2/2016), p. 10 (<http://www.windogem.it/calumet/index.asp?lang=eng>).



Chiara Lapi

(Researcher in Law and Religion at the University of Pisa,
School of Law)

The Meaning of 'Religion' in Irish Case Law

"The soul ... has a slow and dark birth, more mysterious than the birth of the body. When the soul of a man is born in this country there are nets flung at it to hold it back from flight. You talk to me of nationality, language, religion. I shall try to fly by those nets".

(James Joyce, *A Portrait of the Artist as a Young Man*, 1916).

SUMMARY: 1. Introduction - 2. The Irish Case - 3. The Meaning of Religion in Irish Case Law - 4. Conclusions.

1 - Introduction

The analysis contained in this paper focuses on the issue of the meaning of religion in Irish case law. It concerns Irish case law of the Republic of Ireland, which was born in 1921 from the war of independence between Ireland and British Empire, with Dublin as the capital.

Moving from the articles of the Irish constitution, which regard three specific issues, controversial in the contemporary Irish society - abortion, primary school education and blasphemy - the analysis of some judgments, mainly enacted by the Supreme Court of Ireland, allow to enter in the fascinating and controversial path which judges undergo when they have to decide such delicate issues.

Given the importance of Catholic religion in Ireland, my research was guided by a principal question: do judges have the capacity to broadly interpret the meaning of religion, or is Catholic religion still influential and able to condition the judgements concerning the above mentioned three issues?

The interpretation of the meaning of religion depends on many variables, such as judges, political scenarios, personal beliefs and nationality of the people involved. So, the meaning of religion in Irish case law has certainly undergone a dynamic process moving from a strictly



Catholic perspective to a more open and respectful one of different religious (and non-religious) values.

What is religion? Is it moral? Is it philosophy? Is it politics?

2 - The Irish Case

The Constitution of Ireland, enacted on 1st July 1937, is the fruit of a complex historical-political process where the element of religion plays a crucial role. The years, which preceded the 1937 Constitution, were characterized by violent conflicts between Ireland and Great Britain.

Many scholars reckon that the history of Ireland is the history of a colonized land, which makes it unique in the European continent⁴⁴¹. Indeed, since the twelfth century, when King Henry II of England conquered the Irish lands (1171), Ireland was under the control of Britain⁴⁴². However, it was especially during the sixteenth century, because of the fractures within the religious panorama due to the Protestant reform, that the control of British monarchy on Ireland became stronger⁴⁴³. In 1534 King Henry VIII exited from the Church of Rome, founded the Anglican Church becoming its chief and, in 1541, proclaimed himself king of Ireland⁴⁴⁴. The attempts of the Irish Catholics to rise up against the British supremacy continued over a century until they were defeated by the army of Oliver Cromwell (1649-1653) and William of Orange who became king of England, Scotland and Ireland after having beaten the last Catholic king, James II Stuart (1688-1690), on the Irish battlefields⁴⁴⁵.

After these events, the British monarchy extended its domain in Ireland by the *Plantation*, a method of colonization through the transfer of Protestant Scottish and English farmers and merchants to some zones of Ireland, such as Ulster, Dublin and Cork⁴⁴⁶.

⁴⁴¹ J.P. MONTAÑO, *The Roots of English Colonialism in Ireland*, Cambridge University Press, Cambridge, 2011; K.L. CAMPBELL, *Ireland's History. Prehistory to the Present*, Bloomsbury, London, 2011.

⁴⁴² J.O'B. RANELAGH, *A Short History of Ireland. Third Edition*, Cambridge University Press, Cambridge, 2012, pp. 44-45.

⁴⁴³ L. BULFERETTI, *Nuove questioni di storia moderna*, vol. I, Marzorati, Milano, 1964, p. 331.

⁴⁴⁴ R. TURVEY, *Conflict and Reformation: the Establishment of the Anglican Church. 1529-1570*, Hodder Education, London, 2015, pp. 27-29.

⁴⁴⁵ E.F. BIAGINI, *Storia dell'Irlanda dal 1845 a oggi*, il Mulino, Bologna, 2014, pp. 9-10.

⁴⁴⁶ J. ANDREWS, *Plantation Ireland: a review of settlement history*, in T. Barry (edited by), *A History of Settlement in Ireland*, Routledge, London and New York, 2000, pp. 140 ss.



Another significant year on the ground of the relationships between British monarchy and Ireland is 1800, the year in which the Act of Union, which sanctioned the parliamentary union between Ireland and Great Britain, was approved. From that time on, the Irish were represented by the Parliament of Westminster. This act was also important on the religious ground since it sanctioned the unification of the Church of England and that of Ireland under one only denomination, the United Church of England and Ireland, which was Protestant and was established as the official church of the country⁴⁴⁷.

This situation continued for more than one hundred years with the unrest among the Irish people, especially of the Catholics who had to bear many discriminations, such as the ban to present themselves as candidates in the election for the Westminster Parliament. In 1919, the growth of nationalist movements, who craved the independence of Ireland from the British Empire, led to the outbreak of the War of Independence⁴⁴⁸.

During the years of the War of Independence, the political figure of Eamon de Valera, who had an active role within the national party of Sinn Féin, emerged. The Sinn Féin deputies had taken an oath not to seat ever within the Westminster Parliament, and therefore, in 1919 they gathered in Dublin in order to assemble the Irish Parliament, confirmed the Declaration of Independence of 1916⁴⁴⁹ and elected De Valera as the head of government.

The War of Independence, which ended in 1921, caused the political and geographical division between the two different states of Northern Ireland with Belfast as the capital and Southern Ireland with Dublin as the capital. The Anglo-Irish Treaty of Peace, signed on 6th December 1921, assumed that the six counties of Ulster would remain part of the United Kingdom as autonomous provinces of North Ireland, while the remaining 26 counties of the South would form the Free Irish State. While the North had a Protestant majority, the South had a Catholic majority⁴⁵⁰. Southern Ireland, thanks to De Valera and other members of Sinn Féin, adopted the

⁴⁴⁷ C. GARCIMARTÍN, *Religion and Secular State in Ireland*, in <https://www.iclrs.org/content/blurb/files/Ireland.pdf>, p. 403.

⁴⁴⁸ M. HOPKINSON, *The Irish War of Independence*, McGill-Queen's University, Montreal, 2004.

⁴⁴⁹ The Sinn Féin radical party, taking advantage of the difficulties of England during the Second World War, on 24th April 1916 (the so called "Easter Rising"), seized the central door of Dublin and proclaimed the Republic. J.P. CARASSO, *La polveriera irlandese. Lotta di classe o lotta di religione?*, traduzione italiana di F. Brunelli, Bertani, Verona, 1970, p. 49 (Original title: *La Rumeur irlandaise*, Editeur Champ Libre, Paris, 1970).

⁴⁵⁰ G. MARCHESI S.J., *I vescovi dell'Irlanda e del Canada "ad limina apostolorum"*, in *La Civiltà Cattolica*, 2006, IV, p. 375.



Free State Constitution of 1922 which declared the separation between church and state, without making any reference to the Catholic Church and its doctrine⁴⁵¹.

On the contrary, a strong recognition of the Catholic Church was contained in the Constitution of 1937 where Article 44.1.2° declared:

“The State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the faith professed by the great majority of the citizens”. “In that sense Article 44 did identify Catholicism with the Irish nation”⁴⁵².

Eamon De Valera, who is considered the father of this Constitution, wanted that it was not a mere change of that of 1922, but a completely new Constitution which emphasized the border between Irish people and the British crown⁴⁵³. In order to give more political value to this Constitution, it was put before the electorate on July 1th 1937⁴⁵⁴. Indeed, while the Constitution of 1922 was approved also by the English Parliament, this instead had to be the only and full expression of the Irish people’s will. In the Constitution of 1937, religion becomes an identity marker. There was the need to build a strong identity of a state born only 15 years before as an independent entity after centuries of British colonization⁴⁵⁵. What better tool than religion to achieve this goal?⁴⁵⁶

To this regard, it should be noted that it is not only the Catholic religion but rather the concept of “religion” to be taken as a matter of convenience. Indeed, Article 44 of the Constitution is entitled “Religion” and protects the freedom of conscience, free profession and practice of religion without endowing any religion. Moreover, the same Article assumes “the right, for every religious denomination, to manage its own

⁴⁵¹ C. GARCIMARTÍN, *Religion*, cit., p. 404.

⁴⁵² C. TOWNSHEND, *Ireland. The 20th century*, Arnold, London, 1999, p. 147.

⁴⁵³ D. MORGAN, *Constitutional Law of Ireland*, Round Hall Press, Dublin, 1985, p. 27.

⁴⁵⁴ The outcome of referendum of 1th July 1937 was 685,105 votes for and 526,945 against. The difference between the votes for and the votes against was minimal, but it was sufficient to allow the Constitution to be adopted. The Constitution is in operation from 29th December, 1937. It is written both in English and in Gaelic. The translation in Gaelic of ‘Constitution of Ireland’ is ‘Bunreacht na hEireann’, which literally means Ireland’s ‘basic law’. C. TOWNSHEND, *Ireland. The 20th century*, Arnold, London, 1999, p. 145.

⁴⁵⁵ S.Ó. TUAMA, *Revisiting the Irish Constitution and De Valera’s Grand Vision*, in *Irish Journal of Legal Studies*, vol. 2(2), pp. 58-61.

⁴⁵⁶ J.R. SEUL, ‘Ours is the Way of God’: *Religion, Identity, and Intergroup Conflict*, in *Journal of Peace Research*, vol. 36, no. 5, 1999, pp. 553-569.



affairs, own, acquire and administer property, [...] and maintain institutions for religious and charitable purposes"⁴⁵⁷.

In 1972, the "special position" clause was abolished by the Fifth Amendment of the Constitution in 1972⁴⁵⁸. The Catholic Church did not become the State religion and Ireland never concluded a concordat with the Catholic Church⁴⁵⁹. In addition, the Supreme Court underlined that the establishment of a religion "would be impossible to reconcile with the prohibition of religious discrimination", provided by the Article 44.2.3⁴⁶⁰.

However, Catholicism has always had a symbolic and political power which other religions has never had in Ireland. De Valera, in 1943, when he was *Taoiseach* (first minister) of the government, chose the day of Saint Patrick, the saint patron of Ireland⁴⁶¹, to pronounce his famous discourse on the ideal Ireland which he dreamed of.

He wrote as follows:

"[...] that Ireland which we dreamed of would be the home of people who valued material wealth only as the basis of right living, of a people who were satisfied with frugal comfort, and devoted their leisure to the things of the spirit - a land whose countryside would be bright with cosy homesteads, whose fields and villages would be joyous with the sounds of industry, with the romping of sturdy children, the contests of athletic youths and the laughter of comely maidens, whose firesides would be forums for the wisdom of serene old age. It would, in a word, be the home of a people living the life that God desires that man should live"⁴⁶².

This idyllic vision clashed with a reality characterized by a great economic crisis, which fostered many people to emigrate both to the UK and in other Anglophone countries⁴⁶³. The Constitution of the De Valera contains a project of society, which is planned before hand on paper. It is a

⁴⁵⁷ G. WHYTE, *Religion and the Irish Constitution*, in *The John Marshall Law Review*, 30:725, 1997, pp. 728-729.

⁴⁵⁸ L. MUSSELLI, *L'Irlanda dal confessionismo al separatismo? Note sul referendum del 7 dicembre 1972*, in *Il Politico*, vol. 38, no. 3, pp. 591-602.

⁴⁵⁹ S. FERRARI, *Islam and the Western European Model of Church and State Relations*, in W.A.R Shadid, P.S. Van Koningsveld (eds.), *Religious Freedom and the Neutrality of the State: the Position of Islam in the European Union*, Peeters, Leuven, p. 6.

⁴⁶⁰ *Campaign to Separate Church and State v. Minister for Education* [1998] 3 IR 321.

⁴⁶¹ M. CRONIN, D. ADAIR, *The Wearing of the Green. A History of St Patrick's Day*, Routledge, London and New York, 2006. From a Catholic perspective, St Patrick had, among his merits, that of converting the Celts to Christianity in 432 A.D.

⁴⁶² É. DE VALERA, "Radio Broadcast, March 17, 1943", in M. MOYNIHAN, *Speeches and Statements by Éamon de Valera*, Gill & Macmillan, Dublin, 1980, pp. 466-468.

⁴⁶³ E.F. BIAGINI, *Storia*, cit., pp. 139-140.



misleading and static society where every person would have to stay at his/her position.

In this framework, the feminine gender is identified only with the reproductive function and “segregated within the domestic spaces”⁴⁶⁴. Indeed, according to Article 41.2.2° of the Constitution, the State has “to endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect their duties in the home”. Nevertheless, this paternalistic building of the State forgot the real conditions of those women who, in that period, were engaged “to organise the strike in the building industry, their homes having been darkened by care and anxieties created by a system of working conditions which ought long ago to have been condemned as inhuman”⁴⁶⁵.

By the Catholic Church, there was the awareness to sustain and support a political project where the moral principles of Catholicism, such as the bans of divorce, contraception and abortion, helped to build and maintain the collective identity of the Irish people⁴⁶⁶. Within this pattern, Ireland Catholicism was “lay as well as clerical”⁴⁶⁷.

The preamble⁴⁶⁸, Article 6⁴⁶⁹ and Article 44⁴⁷⁰ emphasize the transcendental elements of Catholic religion: indeed, they contain references to “Holy Trinity”, “Divine Lord”, “Jesus Christ”, and “Almighty God”.

The Irish case law has taken into account the references to God and to Christian religion contained in the Constitution. Indeed, some judgments

⁴⁶⁴ L. FARANDA, *Dimore del corpo: profili dell'identità femminile nella Grecia classica*, Meltemi, Roma, 1996, p. 101 (My translation).

⁴⁶⁵ T. MURRAY, *Socio-Economic Rights and the Making of the 1937 Irish Constitution*, in *Irish Political Studies*, vol. 31, No. 4, 2016, p. 521.

⁴⁶⁶ It is meaningful that the Eucharistic Congress took place in Ireland in 1932. Some foreign delegations, such as the Canadian one, underlined that “the resurrection of Ireland” as “a Catholic nation” was the proof of the existence of “a Divine Providence”. C. TOWNSHED, *Ireland*, cit., pp. 148-149.

⁴⁶⁷ L.J.Mc. CAFFREY, *Irish Nationalism and Irish Catholicism: A Study In Cultural Identity*, in *Church History*, vol. 42, No. 4 (Dec., 1973), p. 533.

⁴⁶⁸ “We, the people of Éire, [...] do hereby adopt, enact, and give to ourselves this Constitution [...] in the Name of the Most, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Éire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial [...]”. S. FERRARI, *Dio, religione e Costituzione*, in *www.olir.it (Osservatorio delle libertà e delle istituzioni religiose)*, 2004, p. 2.

⁴⁶⁹ “All powers of government, legislative, executive and judicial, derive, under God, from the people [...]”.

⁴⁷⁰ “The State acknowledges that the homage of public worship is due to. It shall hold His Name in reverence, and shall respect and honour religion”.



of the Supreme Court stress that the Constitution is founded on “Christian beliefs”⁴⁷¹ and the Irish people are “Christian people”⁴⁷².

Articles 40-44 deal with “fundamental rights” as “personal rights” (art. 40), “family” (art. 41), “education” (art. 42), “private property” (art. 43) and “religion” (art. 44).

However, throughout the years, the situation changed (as in other European countries)⁴⁷³ and is continuing to change and the authority of Catholic religion started to be questioned. As a matter of fact, many laws inspired by Catholic principles changed: homosexuality and contraception were legalized in 1997, divorce in 1993, also because of the pressure from the Strasbourg Court and the EU institutions played a significant role in the liberalization of many of these laws⁴⁷⁴.

According to the last census 2016, Ireland has seen a decrease of Catholic people from 2011 (the year of the previous census) to 2016, although it still remains a predominantly Catholic country.

Indeed, the number of no-religion people grew. In addition, the number of Muslim, Orthodox and Hindu people increased significantly in the same period (2011-2016)⁴⁷⁵.

Ireland has a common law system with a written constitution⁴⁷⁶.

3 - The Meaning of Religion in Irish Case Law

One of the most interesting issues which has always represented an arena of clash between Catholic conservative values and progressive, liberal values is abortion. The judgement of the Supreme Court *Mc Gee v Attorney General*, in 1974, was a clear signal that Catholic morals started to be questioned. Indeed, the Supreme Court assumed that contraception within a married couple was licit since it was an expression of the marital

⁴⁷¹ *Norris v. Attorney General* [1984] IR 36, 64.

⁴⁷² *Quinn's Supermarket Ltd. v. Attorney General* [1972] IR 1, 23.

⁴⁷³ **M. VENTURA**, *Dynamic Law and Religion in Europe. Acknowledging Change. Choosing Change*, in RSCAS 2013/91 (Robert Schuman Centre for Advanced Studies. Religio West), pp. 1-3.

⁴⁷⁴ **R. Mc CREA**, *Ireland*, in M. Hill QC (edited by), *Religion and Discrimination Law in the European Union. La discrimination en matière religieuse dans l'Union Européenne*, Published by Institute for European Constitutional Law, University of Trier, on behalf of the European Consortium for Church and State Research 2012, pp. 181-189.

⁴⁷⁵ <http://www.thejournal.ie/census-2016-statistics-3326599-Apr2017>.

⁴⁷⁶ **T. RIMOLDI**, *I rapporti Stato-chiesa nell'Europa dei quindici*, in *www.olir.it* (Osservatorio delle libertà ed istituzioni religiose), p. 10.



privacy⁴⁷⁷. The lawyer of Mary McGee, the woman who claimed to import condoms from England, was Mary Robinson. She was a leading figure, President of the Republic of Ireland from 1990 to 1997, and strongly active in upholding the civil rights of non-Catholic people⁴⁷⁸.

Nevertheless, some Ireland conservative thinkers considered the concept of marital privacy a danger, especially because the Supreme Court of the United States, in the famous case *Roe v Wade* (1973), had recognised the right to abortion as a consequence of the marital privacy⁴⁷⁹.

The Ireland lawyer William Binchy argued that “the concept of privacy espoused by the US decision is a time bomb which, changing attitudes, may yet explode in a manner which most of our citizens [...] would deeply regret”⁴⁸⁰. On the wave of these dreads, he and others conservative people promoted the Pro Life Amendment Campaign (1981)⁴⁸¹. This movement brought, in 1983, to the introduction by a referendum⁴⁸², within the Constitution, of the Eighth Amendment which acknowledges “the right to life of the unborn, with due regard to the equal right to life of the mother” (article 40.3). This amendment has the effect to provide “that the right to life of a pregnant woman is equal with that of the foetus she carries”⁴⁸³.

For many years, in the lack of a legislation which implemented this article⁴⁸⁴, judges have had to decide how to balance the right to life of the unborn and that of the mother. How can this balance be realized when the two rights are in conflict?

⁴⁷⁷ *Attorney General v X* [1992] 2 IR. **S.Mc GUINNESS**, *Attorney General v X. Commentary*, in **M. ENRIGHT, J. McCANDLESS, A. O'DONOGHUE**, *Northern/Irish Feminist Judgments. Judges' Troubles and the Gendered Politics of Identity*, Hart Publishing, Oxford and Portland, 2017, pp. 369-373.

⁴⁷⁸ **E.F. BIAGINI**, *Storia*, cit., pp. 203-208.

⁴⁷⁹ *Roe v Wade*, [1973] 410 US 113. **C. HUG**, *The Politics of Sexual Morality in Ireland*, Palgrave Macmillan, Basingstoke (UK), 1998, p. 146.

⁴⁸⁰ **C. MEEHAN**, *A Just Society for Ireland? 1964-1987*, Palgrave Macmillan, Basingstoke (UK), p. 166-167.

⁴⁸¹ **F. O'TOOLE**, *Why Ireland became the only country in the democratic world to have a constitutional ban on abortion*, in *www.irishtimes.com*.

⁴⁸² Some scholars defined this referendum, with 67% of voters in favour of “the right to life of the unborn” and 33% against, as a “second partitioning of Ireland”. **T. HESKET**, *The Second Partitioning of Ireland? The Abortion Referendum 1983*, Brandsma Books, Dublin, 1990.

⁴⁸³ **I. BACIK**, *The Irish Constitution and Gender Politics: Developments in the Law on Abortion*, in *Irish Political Studies*, vol. 28, No. 3, 2013, p. 3.

⁴⁸⁴ Only in 2013, the Ireland legislator issued the *Protection Of Life During Pregnancy Act*. See below.



Some examples of judgments which I have selected for the purpose of this paper show that the positions of the jurisprudence on the abortion waver between pro-life and pro-abortion perspectives.

In Ireland, in the '80s, two associations who did not share the ban of abortion, Open Door Counselling and Dublin Well Woman Centre, were providing women with information on abortion facilities in the United Kingdom. The Supreme Court, in 1988, assumed that "assisting pregnant women in Ireland to travel abroad to obtain abortions, inter alia by informing them of the identity and location of a specific clinic or clinics"⁴⁸⁵ was contrary to the right to life of the unborn, established by Article 40.3.3. of the Irish Constitution⁴⁸⁶.

The practice to divulge information about abortion services in the UK existed also in the University students' environment, albeit with some variations compared with activity of the aforementioned feminist agencies⁴⁸⁷. Indeed, fourteen student union officers planned to distribute guides containing information on abortion in the UK for the 1989-90 academic year⁴⁸⁸. Both High Court and Supreme Court prohibited them from propagating this kind of information⁴⁸⁹.

The first case in which the Supreme Court of Ireland allows a woman to have an abortion concerns a fourteen year old pregnant rape victim. Her parents took her to England in order to practice the abortion, but they had to go back to Ireland since the High Court of Ireland issued an injunction which forbade the girl from travelling abroad to interrupt her pregnancy. For this reason, she threatened to commit suicide. In the judgment *Attorney General v. X* (1992) the Supreme Court assumed that a woman had a right to an abortion under Article 40.3.3 if there was "a real and substantial risk" to her life and the possibility of suicide represents a risk for life. Therefore, the minor "X" could have the abortion. This right would not exist if there was a risk to her health but not her life; however, it did exist if the risk was the possibility of suicide⁴⁹⁰.

⁴⁸⁵ **D.A. GOZDECKA**, *Rights, Religious Pluralism and the Recognition of Difference. Off the scales of justice*, Routledge, Abingdon (Oxon), New York, 2016, p. 124.

⁴⁸⁶ *The Attorney General (and the relation of the Society for the Protection of Unborn Children Ireland Ltd) v Open Door Counselling Ltd and Dublin Well Woman Centre Ltd* [1998].

⁴⁸⁷ **R. LAWSON**, *The Irish Abortion Cases: European Limits to National Sovereignty?*, in *European Journal of Health Law*, 1/1994, p. 171.

⁴⁸⁸ **N. WHITTY**, *Law and the Regulation of Reproduction in Ireland: 1922-1992*, in *The University of Toronto Law Journal*, vol. 43, No. 4, pp. 870-871.

⁴⁸⁹ **I. BACIK**, *The Irish Constitution*, cit., p. 386.

⁴⁹⁰ Abortion is constitutionally permissible "if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother,



In the wake of this decision, a popular referendum (25th November 1992) voted two new amendments to the Constitution to limit the effect of the right of the unborn: the right to travel out of the state to obtain abortion and to distribute information about abortion. Because of the possibility to go abroad to obtain the abortion, many women, who decide to interrupt their pregnancy, nowadays usually move from Ireland to England. If it is recognized that an Irish woman can have an abortion abroad, why does the law not allow to exercise the same right within the Republic of Ireland and even punishes the woman who ends the pregnancy with a prison sentence?⁴⁹¹

In 2012, the Supreme Court would have had the possibility to interpret “the right to life of unborn” (Art. 40.3.3) in order to help a woman and her future child to live in dignity, but it refused to do it. The case concerned baby O⁴⁹², a seven months foetus brought by a Nigerian woman who received a deportation order from Ireland to Nigeria. The woman questioned the validity of the deportation order arguing that the baby whom she beard had the right to be born in Ireland where the infant mortality is lower and the standard of living is higher than in Nigeria. The Supreme Court assumed that “the right to life of the unborn did not extend to ensuring the health and well-being of Baby O, or even to ensuring a safe delivery”⁴⁹³. So Baby O, the “child (the eventual Irish born child) travelling without a passport migrating in utero”⁴⁹⁴, could not be born in Ireland since he/she was not an Irish woman’s child.

Some months after the Baby O judgment, Ireland was the theatre of a grave event. Savita Halappanavar, a woman of Indian origin, asked that her pregnancy was terminated since she was going to miscarry. The lack of legislation meant that the only applicable criterion for admitting abortion was that established by Supreme Court in the case *Attorney General v. X*: abortion is permissible only if there is a “real and substantial risk to the life of the mother”. Therefore, in the case of Savita, the decision was in the hands of doctors who reckoned to refuse to practice abortion since the foetal heartbeat was still present and she was not in “a real and substantial risk”

which can only be avoided by the termination of her pregnancy, such termination is permissible”.

⁴⁹¹ **F.R. MARTINEZ**, *In Europa l'aborto è un diritto?*, in M. Cartabia (a cura di), *Dieci casi sui diritti umani in Europa: uno strumento didattico*, il Mulino, Bologna, p. 53.

⁴⁹² *Baby O and anor V. Minister for Justice, Equality and Law Reform*, IESC 44 (2002).

⁴⁹³ **S. MULLALLY**, *Gender, Culture and Human Rights: Reclaiming Universalism*, Hart Publishing, Oxford and Portland, Oregon, 2006, p. 151.

⁴⁹⁴ **D.J. SHANDY**, *Irish Babies, African Mothers: Rites of Passage and Rights in Citizenship in Post-Millennial Ireland*, in *Anthropological Quarterly*, vol. 81, no. 4, 2008, p. 817.



of her life. Nevertheless, some days later, the foetal heartbeat stopped. The dead foetus was removed and Savita died from septicaemia⁴⁹⁵. Doctors justified their refusal not only arguing that there was not any danger for Savita, but also that Ireland is “a Catholic country”⁴⁹⁶. This second element makes the event even more complex: Catholic morality is still capable of determining the recognition of civil rights.

In 2013, the long-awaited law was enacted with the telling title of “The Protection of Life During Pregnancy Act” which assumes that the abortion is allowed when there is a real and substantial risk for the life of woman arising from a physical illness or from a suicidal ideation, certified by a panel of medical practitioners⁴⁹⁷.

Nevertheless, this act did not change the situation since it recognized the right of abortion only in limited circumstances. Furthermore, “Miss Y case” shows that, not even in the presence of the woman's suicide threat, did the Irish authorities allow to practice the abortion⁴⁹⁸. Miss Y was a young asylum seeker who, once arrived in Ireland, discovered to be pregnant as a result of a rape. She immediately asked to end her pregnancy: otherwise, she preferred to die. Since doctors refused to practice the abortion, she refused food and fluids. However, the High Court ordered to sedate and rehydrate her and the child was born through a birth caesarean⁴⁹⁹.

For the aforementioned reasons, nowadays, the issue of abortion is still strongly debated and many committees push to abolish the Eighth Amendment⁵⁰⁰.

Primary education is also to be taken into consideration when analysing the meaning of religion in Irish case law. In this case, the article

⁴⁹⁵ **K. HOLLAND**, *Savita. The Tragedy that shook a nation*, Transworld, London, 2013.

⁴⁹⁶ **M. ENRIGHT**, *Savita Halappanavar: Ireland, Abortion and the Politics of Death and Grief*, in <http://criticallegalthinking.com>, 14 November 2012. “The Irish Times describes the exchange between Savita, her husband and a hospital consultant. The consultant said: ‘As long as there is a foetal heartbeat we can’t do anything [...]’”. He said it was the law that is a Catholic country. Savita said: ‘I am neither Irish nor Catholic’ but they said there was nothing they could do.

⁴⁹⁷ **C. MURRAY**, *The Protection of Life During Pregnancy Act 2013. Suicide, Dignity and the Irish Discourse on Abortion*, in *Social and Legal Studies*, vol. 25, 2016, pp. 13-15.

⁴⁹⁸ **M. ENRIGHT**, **F. DE LONDRAS**, “Empty Without and Empty Within”: the Unworkability of the Eight Amendment after Savita Halappanavar and Miss Y, in *Medical Legal Journal of Ireland*, 20(2), 2014, pp. 85-92.

⁴⁹⁹ For a detailed description of facts, see **K. HOLLAND**, *Timeline of Miss Y case. HSE draft report tracks Ms Y’s care from her arrival in Ireland in March to her discharge after Caesarian section in August*, in www.irishtimes.com.

⁵⁰⁰ **H. McDONALD**, *Ireland to hold abortion referendum weeks before pope’s visit*, in www.theguardian.com.



of reference within the Constitution is Article 42 where, in paragraph 4, we read

“The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation”.

This article has to be read together with article 44.2.4^o, which assumes that “Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations [...]”.

Despite these quite neutral constitutional provisions, in practice, the majority of schools are Catholic and there is not a parallel public system of non-denominational schools organized by the State⁵⁰¹. Indeed, as the judgement *Crowley v. Ireland* (1980) clarified, the formula “The State shall provide for free primary education”, contained in Article 42.4 of the Constitution, means that “the State is not obliged to educate in public schools, but only to adopt all means needed to guarantee that all children receive free primary education”⁵⁰².

In more recent years, the Supreme Court has followed an interpretation, which seems to privilege the parental choice rather than to assure a “special position” to Catholic schools⁵⁰³. Indeed, in *Campaign to Separate Church and State v Minister for Education* (1998), judges underline that “State financing of religious education was justified as a form of support for parental choice, making no reference to any ‘rights’, or other status of religions, as educator, per se”. In addition, the Education Act, enacted in 1998, protects “the diversity of educational services provided in the State” giving power to the boards of management which represent the different interests involved within the education system, as those of parents and teachers⁵⁰⁴.

Moreover, the judgment of the High Court *O’Shiel v Minister for Education* (1999) is important on the ground of a more pluralistic understanding of the society. Indeed, the request of a group of parents that the State fund a primary school, which operated according to the

⁵⁰¹ C. GARCIMARTÍN, *Religion*, cit., p. 415.

⁵⁰² C. GARCIMARTÍN, *Religion*, cit., p. 416.

⁵⁰³ E. DALY, *Religion as public good and private choice in Irish constitutional doctrine*, in www.academia.edu, p. 6.

⁵⁰⁴ T. RIMOLDI, *Istruzione e religione in Irlanda dall’indipendenza alla Costituzione dell’Eire*, in N. Fiorita, A. Viscomi, (a cura di), *Istruzione e libertà religiosa. Le scuole delle organizzazioni di tendenza*, Rubbettino, Soveria Mannelli (CZ), 2011, p. 153.



pedagogical theory of the Austrian theorist Rudolf Steiner, is considered as consistent with the Constitution. Indeed, the State had rejected the request of this group of parents saying that it had already financed fifteen Catholic schools. The High Court assumed that “The State’s defence, based on the sufficiency of the local Catholic schools, would, if accepted, render worthless the guarantee of freedom of parental choice, which is the fundamental precept of the Constitution”.

As some scholars observe,

“in the context of education, the State support for religious schools is now understood by the Irish case law simply as facilitating and vindicating parental choice, rather than expressing any public status for religion as such. This demonstrates that the Irish case law has evolved towards a more liberal understanding of religion and its relation to the State”⁵⁰⁵.

This is consistent with Article 42 of the Constitution which recognizes that the primary and natural educator of the child is the family⁵⁰⁶.

Another article which is fundamental to reason on the meaning of religion in Irish case law is Article 40.6.1 since it constitutionalised the crime of blasphemy⁵⁰⁷. It is a limit to freedom of speech, contained in the same article within the section dedicated to fundamental rights.

De Valera, while preparing the draft of the Constitution, asserted about blasphemy: “no new offense had been created [...] the offense of blasphemy is one at common law”⁵⁰⁸. It meant that the article on blasphemy “protected only the beliefs of the Church of England, and for fifty years there were no prosecutions for blasphemy in Ireland, a majority Catholic country”⁵⁰⁹.

Only in 1999, did the Supreme Court dealt with this offense, holding that the blasphemy law was unenforceable since a clear definition of blasphemy was lacking. Indeed, “the common law offense of blasphemy could not have survived in a situation where there was no officially established religion”⁵¹⁰.

⁵⁰⁵ E. DALY, *Religion*, cit., p. 10.

⁵⁰⁶ D. DEVINE, *Welcome to the Celtic Tiger? Teacher responses to immigration and increasing ethnic diversity in Irish schools*, in *International Studies in Sociology of Education*, vol. 15, 1, 2005, 1-22.

⁵⁰⁷ Art. 40.6.1.i.: “The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law”.

⁵⁰⁸ P. O’HIGGINS, *Blasphemy in Irish Law*, 23 MOD. L. REV. 151, 158 n.46 (1960).

⁵⁰⁹ K. JACOB, *Defending Blasphemy: Exploring Religious Expression Under Ireland’s Blasphemy Law*, in *Case Western Reserve Journal of International Law*, vol. 44, No. 3 (2012), p. 819.

⁵¹⁰ *Corway v Independent Newspapers*, [1999] 4 IR 484-485 SC.



To fill the legislative gap, ten years after this judgment, the Senate passed the Defamation Bill on 2009 which provides that a “person who publishes or utters blasphemous matter” shall be liable on conviction to a fine not exceeding €25,000. The rules contained in this act brought the police to investigate the famous actor Stephen Fry - who branded God as an “utter maniac” - for blasphemy⁵¹¹.

4 - Conclusions

The interpretation of the meaning of religion depends on many variables, such as judges, political scenarios, personal beliefs and nationality of the people involved. So, the meaning of religion in Irish case law has certainly undergone a dynamic process moving from a strictly Catholic perspective to a more open respect of different religious (and non-religious) values.

It is true that “Ireland will remain culturally Catholic” since “four centuries of history have left her with no other choice”⁵¹². Nevertheless, many social changes, due to different factors as immigration and economic crisis, make the influence of religion much more fluid. Moreover, the Catholic Church lost its authority in Ireland as it was also involved in the scandals of child sexual abuse⁵¹³.

It is probable that, some weeks before the Pope’s planned visit, a referendum on whether to repeal the ban on abortion will take place. In addition, another referendum on the controversial law on blasphemy does not seem to be very fast⁵¹⁴.

Maybe, the answer of Irish people to these consultations will underline the need of a more freedom of conscience. Maybe, James Joyce would feel free by those nets which, when he wrote “A Portrait of an Artist as a Young Man” in 1916, did not allow him to fly, as nationality, language, religion⁵¹⁵.

⁵¹¹ <https://www.nytimes.com/2017/05/09/world/europe/irish-police-investigate-but-dont-charge-stephen-fry-for-blasphemy.html>.

⁵¹² L. J. Mc. CAFFREY, *Irish Nationalism and Irish Catholicism: A Study In Cultural Identity*, in *Church History*, vol. 42, No. 4 (Dec., 1973), p. 534.

⁵¹³ P. CONSORTI, *La reazione del diritto canonico agli abusi sessuali sui minori. Dal silenzio assordante alle linee guida*, in *Daimon. Annuario di diritto comparato delle religioni*, 11/2012, pp. 161-163.

⁵¹⁴ L. LUCIANI, *Irlanda: referendum sull’aborto e non solo, una società in evoluzione*, in www.pressenza.com.

⁵¹⁵ T.F. HALLORAN, *James Joyce. Developing Irish Identity. A Study of the Development of Postcolonial Irish Identity in the Novels of James Joyce*, Verlag, Stuttgart, 2014.



Adelaide Madera

(Professor of Law and Religion and Canon Law at the University of Messina,
School of Law)

The Meaning of 'Religion' in English Case Law

SUMMARY: 1. Introduction - 2. The English religious landscape and its connected system of legal protection - 3. The meaning of religion under Charity Law: the process of evolution from the *Segerdal* to the *Hodkin* case - 4. The meaning of "belief" under Equality and Human Rights Law - 5. The recent case of the Temple of the Jedi Order - 6. Conclusions.

1 - Introduction

The present paper analyzes the problem of the definition of religion in English case law. Giving a legal definition of religion and identifying its parameters is challenging. It can therefore be considered an "undertaking bound for failure"⁵¹⁶: such a topic is more widely developed in other fields of study⁵¹⁷, but the sociological notion does not exactly lend itself to defining "what courts ought to protect"⁵¹⁸.

At the same time such a legal definition of religion, as clear as possible, plays a key role. This is due to the increasing weight recognized in modern legal systems to the collective dimension of religious freedom. Such a notion (and the related "binomial confessions-sects")⁵¹⁹ is not a mere academic question. It has a substantial impact on the state recognition of a "religious" status to groups and allows them to enjoy a specific juridical regime⁵²⁰. For this reason States, if they wish to maintain a strict attitude of deferential abstention ("hands-off" approach), are obliged to provide a definition of religion. However, there is a high risk of offering over- or under-inclusive solutions⁵²¹. Moreover, even though the possibility of a self-

⁵¹⁶ See **C. MILLER**, "Spiritual but not Religious": Rethinking the Legal Definition of Religion, in *Virginia Law Review*, vol. 102, 2016, p. 841.

⁵¹⁷ See **R. N. BELLAH**, *Religious Evolution*, in *American Sociological Review*, vol. 29, 1964, pp. 358-374.

⁵¹⁸ See **N. TEBBE**, *Nonbelievers*, in *Va. L. Rev.*, vol. 97, 2011, p. 1135.

⁵¹⁹ See **G. CAROBENE**, *Problems on the legal status of the Church of Scientology*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), 21/2014, p. 1.

⁵²⁰ See **A. LICASTRO**, *Il diritto statale delle religioni nei paesi dell'Unione Europea*, Milano, Giuffrè, Second Edition, 2017, p. 64 ff.

⁵²¹ See **S. FERRARI**, **I.C. IBAN**, *Diritto e religione in Europa occidentale*, Bologna, il



qualification seems to be the best option, it is not exempt from the risk of encouraging frauds. This is because “sham religions” might exploit this opportunity to enjoy the benefits recognized to religious groups.

For all these reasons, State approach should be founded as far as possible on neutral standards in order not to intrude into ambits that should be strictly regulated by religious groups.

2 - The English religious landscape and its connected system of legal protection

Evolution in the religious landscape in England is in progress; the last one has been described by some Authors as “three-dimensional” (Christian, secular and religiously plural)⁵²². In any case, some trends are palpable: a gradual and continuous decrease in affiliation to traditional churches; an increase of atheism; a rise of faiths connected with immigration (Islam). A high number of minority religious groups also belong to minority ethnic communities, giving rise to intricate connections between race, religion and culture. Minorities show a greater loyalty to their culture and their religion, while majority churches experience the attitude of “believing without belonging” in the faithful⁵²³.

In the search for a balance between the interest of minority groups to safeguard some key aspects of their culture and their religion and state concern for social cohesion, the English approach is very distant from the policies of assimilation (such as the French one) and it has traditionally opted for a more pluralistic and permissive model. However, such a policy raises concerns in those who are worried about the risks of religious fundamentalism, community segregation, and the vulnerability and powerlessness of “minorities within minorities”⁵²⁴.

The present day legal framework mirrors these basic changes: even though the Church of England is still the established state religion and as such enjoys a more favourable status than other denominations and maintains its entanglement with the public sphere, there has been, from the 18th century onwards, a gradual process of improvement of the legal

Mulino, 1997, p. 68.

⁵²² See **M. NYE, P. WELLER**, *Controversies as a Lens on Change*, in *Religion and Change in Modern Britain*, L. Woodhead, R. Catto (eds.), Abingdon, Routledge, 2012, pp. 34-54.

⁵²³ See **G. DAVIE**, *Believing without Belonging*, Oxford-Cambridge (Mass.), Blackwell, 1994.

⁵²⁴ See **M. MALIK**, *Minorities Legal Orders in the UK. Minorities, Pluralism and the Law*, London, The British Academy, 2012.



treatment of other religious groups “from persecution to tolerance and latterly to accommodation”⁵²⁵. The recent legal acts encourage the recognition of an appropriate *quantum* of religious liberty to all religious groups (even though minority groups still complain they do not play on a level field of complete equality). Nowadays the protection of religious freedom seems increasingly intertwined with the safeguarding of equality and human rights⁵²⁶: minority religions view recent legal statutes as an opportunity of further amelioration of their legal treatment; on the contrary, some voices of Christian opinion feels “marginalised” and “penalized” by such new legal narrative implementing “equality and diversity”⁵²⁷.

Finally, the peculiarity of a common law system, where case law has a predominant role, as it goes to integrate and change the rules introduced by the legislator, should not be overlooked.

3 - The meaning of religion under Charity Law: the process of evolution from the Segerdal to the Hodkin case

There has never been a common legal definition of religion in English law, because of the number of world religions, social changes, and the various legal contexts. In England, there is no formal system of recognition or registration of groups as “religion”. However, religious groups can obtain certain advantages, such as tax benefits, registering as religious charities. The Charity Commission recognizes the “advancement of religion” as a charitable purpose. However, in order to obtain such a status, religious charities are required to demonstrate that they carry out their activities for the public benefit. Approved forms of religion traditionally enjoyed the support offered by charity law, but from the nineteenth century onwards English courts have had to cope with religious pluralism and they have recognized that the idea of “religion” can incorporate non-Anglican forms

⁵²⁵ See **M. HILL**, *Reasonable Accommodation: Faith and Judgement*, EUI Working Papers, 2016, p. 1; M Hill, R. Sandberg, N. Doe (eds) *Religion and Law in the United Kingdom*, Netherlands, Wolters Kluwer, Second edition, 2014, pp. 26-27.

⁵²⁶ The 1998 Human Rights Act seems to incorporate the guarantees offered by the ECHR into English law. The Equality Act 2010 prohibits unlawful harassment, victimization and direct and indirect discrimination at work founded on religion or belief; it is the legal tool by which Great Britain fulfills its obligations under EU Directive 2000/78. See **P. EDGE, L. VICKERS**, *Review of Equality and Human Rights Law Relating to Religion and Belief*, Equality and Human Rights Commission, 2015, p. 28.

⁵²⁷ See **A. DONALD, K. BENNETT, P. LEACH**, *Religion or Belief, Equality and Human Rights in England and Wales*, Manchester, Equality and Human Rights Commission, 2012, p. 112 ff.



of Christianity⁵²⁸, non-Christian religions such as Judaism⁵²⁹, less widespread religious groups (Hindu, Sikh, Bahai, Zoroastrian and Jain groups)⁵³⁰, and also some Buddhist groups (notwithstanding the traditional Judeo-Christian centric concept of deity adopted by the English judiciary), rejecting atheism from the ambit of the accepted religious realities⁵³¹.

Most recent case law concerns new religious groups, such as the Church of Scientology, and their attempts to have their buildings registered as places of worship under the Places of Worship Registration Act 1855, just to enjoy the more favourable conditions offered by the State to religious premises⁵³².

According to the Segerdal case (which arose from an attempt by the Church of Scientology to have a chapel registered as a place of worship under the Places of Worship Registration Act 1855), Scientology is more a philosophy of the existence of man and of the concept of life, rather than a religion; it does not involve “religious worship” as such, since it is not connected with “reverence or veneration of God or of a Supreme Being”⁵³³.

Such a theistic definition of religion has been repeatedly underlined in subsequent cases⁵³⁴ and also when the Charity Commission decided to reject the application of Scientology to obtain the status of a charity⁵³⁵.

⁵²⁸ See *Thornton v Howe* (1862) 21 Beav 14 (UK).

⁵²⁹ See *Re Michel's Trust* (1860) 28 Beav 39 (UK).

⁵³⁰ See **P.W. EDGE**, *Religion and Law: An Introduction*, London, Ashgate, 2006, p. 107.

⁵³¹ See *Re South Place Ethical Society* ([1980] All ER 918 (UK)). According to Judge Dillon, in the decision *Re South Place Ethical Society*, religion “is concerned with man's relations with God, and ethics are concerned with man's relations with man. The two are not the same, and are not made the same by sincere inquiry into the question: what is God?; besides, religion is about faith in a god and worship of that god”.

⁵³² Worship meetings of over 20 people are allowed only in buildings (other than private residences) registered as places of worship (Places of Religious Worship 1812s.2 (UK)); registration is required to hold religious marriage ceremonies; buildings registered as places of worship are exempt from the planning controls concerning buildings of special value for conservation purposes (Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 1994 art. 4).

⁵³³ See *R v Registrar General, Segerdal and another*, in *All England Law Reports*, [1970] 3 All ER.

⁵³⁴ In 1974 the Immigration Appeal Tribunal stated that Scientology cannot enjoy the privileges accorded in the immigration law to the ministers of religion.

⁵³⁵ In 1999 it stated that “it is accepted that Scientology believes in a supreme being”, but “the core practices of Scientology, being auditing and training, do not constitute worship as they do not display the essential characteristic of reverence or veneration for a supreme being”. Scientology's application was also rejected because the Commission underlined that its benefit would have been enjoyed only by elected members and not by the public as a whole. According to previous case law, in fact, “[...] a benefit will not be recognised for the public as a whole if it relies upon metaphysical causation, for instance



A recent ruling, nevertheless, addresses the question whether a building of the Church of Scientology can be registered as a “place of meeting for religious worship”, so that a civilly valid marriage ceremony can be solemnized there⁵³⁶.

Such a decision reverses the traditional British approach to the concept of religion. Lord Toulson, who wrote the leading judgement, provided a detailed description of the idea of religion⁵³⁷: from this definition, religion might be described as a system of beliefs transcending sensory perception or scientific data, that is respected by a group of believers (so the associational nature of religion is emphasized), which aims at explaining mankind’s position in the universe and its relationship to the infinite, and to teach its followers how they should live their lives in accordance with the spiritual principles linked to the belief system. Within this concept of religion, which develops the functional role of the belief system in the adherent’s life and his “ultimate concern”⁵³⁸, Scientology can clearly be considered a religion, its spiritual leaders can hold religious services and its premises can be registered as places of worship.

Following this ruling, religion cannot be limited to faiths worshipping a supreme God because doing so would also mean excluding Buddhism, Jainism, Taoism, Theosophy and part of Hinduism from the religious sphere; this assumption would even cause an undue interference with intricate theological issues.

prayers by cloistered nuns to benefit the world as a whole” (*Gilmour v Coates* [1949] AC 426 (UK). However, a public advantage can be recognised also to a small religious group, as the Commission traditionally starts from the assumption that advancing any religion is advantageous, and then assesses the public importance of such a benefit. See **A. VAN ECK DUYMAER VAN TWIST**, *Religion in England*, in *Mit welchem Recht? Europäisches Religionsrecht im Umgang mit neuen religiösen Bewegungen*, a cura di K. Funkschmidt., Berlin, Evangelische Zentralstelle für Weltanschauungsfragen, 2014, pp. 74-90.

⁵³⁶ See *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77, 11 December 2013.

⁵³⁷ “I would describe religion in summary as a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind’s place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system. By spiritual or non-secular I mean a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science. I prefer not to use the word “supernatural” to express this element, because it is a loaded word which can carry a variety of connotations. Such a belief system may or may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind’s nature and relationship to the universe than can be gained from the senses or from science. I emphasise that this is intended to be a description and not a definitive formula”.

⁵³⁸ See *Note, Toward a Constitutional Definition of Religion*, in *Harv. L. Rev.*, vol. 91, 1978, pp. 1066-67.



Such a decision offers therefore a solution for the particular case of those religions (such as Buddhism), which previous case law preferred to qualify as “exceptional cases” rather than expanding the meaning of religion to include non-theist beliefs⁵³⁹.

By its very words, it seems that the English court has been deeply influenced by an examination of some foreign Court decisions in order to face the problem posed by the Church of Scientology: such decisions develop an “analogic” approach, whereby the belief system in question is compared to other belief systems already accepted as “religions”. Some of the standards adopted in such rulings, in order to identify a “religion”, as the involvement of the transcendent factor of belief systems and the observance of particular standards or codes of conduct by adherents, have been applied to this English ruling⁵⁴⁰.

⁵³⁹ In fact, Lord Toulson added that “The evidence in the present case shows that, among others, Jains, Theosophists and Buddhists have registered places of worship in England. Lord Denning in *Segerdal* [1970] 2 QB 697, 707, acknowledged that Buddhist temples were “properly described as places of meeting for religious worship” but he referred to them as “exceptional cases” without offering any further explanation. The need to make an exception for Buddhism (which has also been applied to Jainism and Theosophy), and the absence of a satisfactory explanation for it, are powerful indications that there is something unsound in the supposed general rule”. See **K. BROMLEY**, *The Definition of Religion in Charity Law in the Age of Human Rights*, in *The International Journal of Not-For-Profit Law*, vol. 3.1, 2000, p. 41.

⁵⁴⁰ See Court of Appeals of the United States, 3rd Circuit, *Malnak v. Yogi*, 592 F.2d 197 (1979); High Court of Australia, in the *Church of the New Faith v. Comm'r of Pay-Roll tax* (Victoria) (1983) 154 CLR. In the first decision, Judge Adams of the Third Circuit has suggested a test for religion consisting of three parameters. He has identified the task of religion as providing a comprehensive belief system: as opposed to an isolated teaching, it supplies an all-embracing set of beliefs that “addresses fundamental and ultimate questions having to do with deep and imponderable matters”. Such basic questions include: “the meaning of life and death, man's role in the Universe, [and] the proper moral code of right and wrong”. Uniting these two ideas, religion can be defined as a comprehensive belief system that focuses on the fundamental questions of human existence, such as the meaning of life and death, man's role in the universe, and the nature of good and evil; the requirement of a comprehensive belief system addressing fundamental questions is stressed, as it provides an acceptable starting point to define the concept of religion.

Finally, a religion can often be recognized by the presence of “any formal, external, or surface signs that may be analogized to accepted religions” (formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions). Cfr. **B. CLEMENTS**, *Defining Religion in the First Amendment: A Functional Approach*, in *Cornell Law Review*, vol. 74, 1989, pp. 532-558.

In the second decision, the Court had to decide “whether the beliefs, practices and observances which were established by the affidavits and oral evidence as the set of beliefs, practices and observances accepted by Scientologists, are properly to be described as a religion”. It stated that: “We would therefore hold that, for the purposes of the law, the



There is a further significant point. Once Scientology had been included within the meaning of a religion, if its chapel could not have been registered under the Places of Worship Registration Act because its services do not involve the kind of veneration which the Court of Appeal in *Segerdal* considered essential, the result would have been to prevent Scientologists from being married anywhere in a form which involved use of their own marriage service.

They could have held a service in their chapel, but it would not have been a legal marriage, and they could have had a civilly valid marriage on other “approved premises” under section 26(1)(bb) of the Marriage Act, but not in the form of a religious service, because of the prohibition in section 46B(4) of the Marriage Act 1994⁵⁴¹. They would therefore have been under a double exclusion and discrimination, not only compared to atheists and agnostics, but also to most religious groups. The result would have been illogical, discriminatory and unjust. When Parliament prohibited the use of any “religious service” on approved premises in section 46B(4), it did so on the assumption that any religious service of marriage could lawfully be held at a meeting place for religious services by registration under Places of Worship Registration Act.

4 - The meaning of “belief” under Equality and Human Rights Law

Under Charity Law, on the basis of which the recognition of the status of religion involves the enjoyment of some financial benefits, a more reluctant approach has been adopted towards nontraditional belief systems by the judiciary; however, under Equality and Human Rights Law, UK courts have found that most beliefs deserve protection and are not prone to questioning the legitimacy or worth of a person’s most authentic beliefs unless they conflict with human dignity.

criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion”. So, the Court held that Scientology can be granted the status of religion.

⁵⁴¹ Section 26(1)(bb), as inserted by section 1(1) of the Marriage Act 1994, permits marriages to be solemnized on the authority of a superintendent registrar on “approved premises”. Under that provision, marriages can now take place in hotels or elsewhere.

The form of marriage on approved premises is governed by section 46B, as inserted by section 1(2) of the 1994 Act, and sub-section (4) provides: “No religious services shall be used at a marriage on approved premises in pursuance of section 26(1)(bb) of this Act”.



Such an approach is broader and more coherent with the most recent legislative trends (aimed at managing a multicultural social context), on the grounds of which the definition of religion was re-assessed in the light of the *European Convention on Human Rights*, the Strasbourg jurisprudence⁵⁴² and the EU Directives⁵⁴³. According to this trend, both “philosophical” and “religious” beliefs deserve a wider protection, which cannot be limited to established religions⁵⁴⁴: so the category of belief includes all claims of conscience, even the deeply held secular ones.

Under Human Rights and Equality Law, The UK courts tend to implement the principles derived from the Strasbourg Court cases to determine whether a religious or a philosophical belief merits protection under equality legislation or Article 9 ECHR, thus weakening the boundary between religion and conscience.

⁵⁴² See *Arrowsmith v United Kingdom* (1978) 3 EHRR 218; *H v UK* (1992) 16 EHRR CD 44; *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293; *Chappell v United Kingdom* (1987) 53 DR 241. In the last case the ECtHR recognised Druidism as a religion under Article 9. The Charity Commission has also identified Druidism as a religion (*Application for Registration of the Druid Network*, 21 September 2010). Otherwise, the Commissioners did not recognise the Pagan Federation (*Application for the Registration of the Pagan Federation*, 2012) or the Gnostic Centre as charities for the promotion of religion (*Application for the Registration of the Gnostic Centre*, 16 December 2009).

⁵⁴³ Section 3 (2) (a) of the Charities Act 2011 states that “Religion” includes a religion which involves belief in more than one god and a religion that does not involve belief in a God. Under the Equality Act 2010, religion means “any religion” and belief means “any religious or philosophical belief”; atheism is also included. The Explanatory Notes (para. 52) accompanying the Equality Act 2010 follow Strasbourg jurisprudence in explaining that a “philosophical belief” must “be genuinely held; be a belief and not an opinion or viewpoint based on the present state of information available; be a belief as to a weighty and substantial aspect of human life and behaviour; attain a certain level of cogency, seriousness, cohesion and importance; and be worthy of respect in a democratic society, compatible with human dignity and not conflict with the fundamental rights of others”.

⁵⁴⁴ See *Farrell v South Yorkshire Police Authority* [2011] EqLR 934 (ET), where the Employment Tribunal held that the claimant’s belief in a New World Order - “a secret satanic ideology to enslave the masses and claim control of the world’s resources” - was not a belief deserving protection. It was “wildly improbable” and did not reach the required standards of cogency or coherence. See *Hashman v Milton Park Dorset Limited* [2011] EqLR 426 (ET), where the Employment Tribunal held that belief in the sanctity of life and anti-fox-hunting are qualified for protection. On the contrary, the House of Lords has held that pro-hunting views are not under the protection offered by Article 9 ECHR (*R (Countryside Alliance) v Attorney General* [2008] 1 AC 719). See also *Alexander v Farmtastic Valley Ltd and Others* [2012] EOR 222, in which case the Employment Tribunal held that beliefs about the treatment of animals that embodied vegetarianism and aspects of Buddhism were protected beliefs; *Streatfield v London Philharmonic Orchestra Limited* [2012] EqLR 901, where the Employment Tribunal granted humanist beliefs protection under the Equality Act 2010.



According to these decisions, a belief must be genuinely held; it must be a belief and not an opinion or viewpoint based on other information⁵⁴⁵; it must reach a certain level of cogency, seriousness, cohesion and importance⁵⁴⁶; it must be considered worthy of respect in a democratic society; it has to be coherent with human dignity and it must not be incompatible with the fundamental human rights⁵⁴⁷. A philosophical belief should have a similar position or cogency as a religious belief is equipped with, but it does not need to be shared by others⁵⁴⁸. A “one-off belief”, that is to say, a belief that does not fully rule a person's existence, may nevertheless be admitted to the protection reserved to religious beliefs⁵⁴⁹.

5 - The recent case of the Temple of the Jedi Order

Following its traditional strict approach, in 2016 the Charity Commission rejected an application to be granted the status of religion from a group self-qualified as the Temple of the Jedi Order (TOTJO). TOTJO is an entirely web-based organization and the Jedi are almost exclusively an online community. The information provided on the TOTJO's website and produced in support of the application, which includes the content of the sermons and transcripts of the Live Services which are founded upon the Jedi Doctrine and recite the Creed (adopted from the Prayer of St. Francis of Assisi) were taken into consideration.

In its ruling, the Commission stated that although the group makes “sermons”, transcripts of “live services” and a “creed” available on its website, and has its own calendar of special days and other forms of

⁵⁴⁵ For example, the thesis, founded on current research concerning the effects on children, that single-sex couples should not be allowed to adopt, was considered as an opinion rather than a belief in *McClintock v Department of Constitutional Affairs* [2008] IRLR 29.

⁵⁴⁶ In some cases a belief was dismissed on these grounds and the House of Lords has questioned the appropriateness of this enquiry by courts (*R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246). According to the *Arrowsmith* case, the House of Lords accepted that pacifism was a protected belief in this case.

⁵⁴⁷ Thus, a religious belief, which involves exposing others to torture or inhuman punishment, would not obtain protection (*R (Williamson)*).

⁵⁴⁸ See *Grainger Plc v Nicholson* [2010] ICR 360: in this case, the Employment Appeal Tribunal held that a belief in man-made climate change, and the connected moral imperatives, could be considered, if genuinely held, as a philosophical belief for the purposes of the Employment Equality (Religion or Belief) Regulations (SI/2003/1660).

⁵⁴⁹ See *Grainger*, where pacifism and vegetarianism are one-off beliefs in this sense, but both have been qualified as protected beliefs.



“religious” practice, its activities did not have the required elements of “worship” to be considered as religious⁵⁵⁰.

Besides, the Charity Commission held that Jediism “lacked the necessary spiritual or non-secular element” to be qualified as a religion.

The absence of a belief system was emphasized: the Commission stated there was not sufficient evidence that “moral improvement” was central to the beliefs and practices of Jediism and it did not have the “cogency, cohesion, or seriousness” to be classified as a belief system.

Finally, the Commission held that a religion must also have a positive beneficial effect on society in general and feared that, otherwise, Jediism might, in part, have an “inward focus” on its members.

6 - Conclusions

The lack of a clear definition of religion leaves a lot of discretionary power in the hands of judges. The government trend is aimed at allowing the courts and tribunals the task of facing the definitional issues as they turn up. In fact, “given the wide variety of different faiths and beliefs in this country”, it was not considered appropriate for the government to assess the legitimacy of particular religions or beliefs⁵⁵¹.

Courts feel uncomfortable about giving a legal definition of religion. Even so, the judiciary is encharged to determine the range of the concept on a case-by-case basis, according to the context in which the question arises.

Case law witnesses the long process of evolution concerning the meaning of religion in the English legal system. In the past, it was connected to a set of shared values and to its national Christian identity. Multiculturalism, globalization and secularism have led to a weakening of such a traditional approach, in view of the new needs of coping with religious diversity and plurality. Such needs are the tip of the “iceberg” of the difficult balance between state secularism and the social demands of religious accommodation. At the same time, the English legal system has accepted the idea that religions are not static and cristalyzed sets of value.

⁵⁵⁰ “Although these publications borrow from the prayers and texts of world religions, in the context of TOTJO the Commission is not satisfied that the ‘Live Services’ on the website, the published sermons and the promotion of meditation evidence a relationship between the adherents of the religion and the gods, principles or things which is expressed by worship, reverence and adoration, veneration intercession or by some other religious rite or service [...]. In particular, it is significant that Jediism may be adopted as a lifestyle choice as opposed to a religion”.

⁵⁵¹ See Government consultation on implementing EU Directive 2000/78 (para 13.5).



Moreover, it recognizes their more flexible and dynamic dimension, which is the effect of the social and cultural context they interact with.

The primary advantage of the most recent “functional” and, at the same time, “analogic” approach is that it offers more objective and tangible elements for courts to focus on while assessing whether a belief or practice is religious. This approach attempts to articulate more open definitional guidelines and to provide a concrete methodological structure to judicial analysis, in order to determine which belief systems can be qualified as religions. In this way, it tries to minimize penalization of non-traditional religions and to resolve the contradictions of the previous definition. Some borderline cases concerning newer forms of “faiths”, on the other hand, are qualified as undeserving of legal protection.

A broad perspective notwithstanding emerges, aimed at including, rather than excluding, belief systems, in order to provide protection to a wide array of belief systems. This approach seems to leave a margin of flexibility⁵⁵², giving the courts the possibility of distinguishing sham claims. It should mitigate future excessive judicial fluctuations, depending on the predilections of single courts⁵⁵³. In any case, such a qualification is not sufficient to admit that a “religious” behaviour deserves an accommodation if there is a violation of criminal law⁵⁵⁴.

Under Charity Law, specifically, the legal notion of religion is prone to favor organized religion over individualized personal approaches. Even so, religion might occur also outside an institutional framework. Thus, it risks excluding religious beliefs that are not held by a group. The Courts have now overturned theism as a defining feature of religion and today incorporate even nontheistic belief systems. The judiciary should take a step further, to recognize that the presence of an organized group is not a prerequisite for legal protection. At the same time, the emphasis given to the metaphysical dimension of religion seems to reject belief systems grounded in the physical world (e.g. secular humanism, atheism), which do

⁵⁵² It also takes into consideration, even though with some caution, the self-perspective of the same groups: “A fifth and perhaps more controversial, indicium (see *Malnak v Yogi*) is that the adherents themselves see the collection of ideas and/or practices as constituting a religion” (p. 174).

⁵⁵³ It is in fact similar to the one developed by Judge Adams in *Malnak v. Yogi*, which is strictly constructed by comparing religious and nonreligious belief systems.

⁵⁵⁴ See *R v Taylor* [2001] EWCA Crim 2263 (23 October 2001) (UK), and *R v Andrews* [2004] EWCA Crim 947 (5 March 2004) (UK), cases concerning the religious use of drugs by Rastafarians. The courts stated that, even though Rastafarianism is a religion, and that the drugs were aimed at religious purposes, the legal prohibition is consistent with Article 9(2) ECHR. Cfr. R. Sandberg (ed.), *Religion and Legal Pluralism*, Burlington (VT), Ashgate, 2015.



not include any transcendent factor, as religions. However, in this regard, a deeper analysis of new forms of spirituality and the option to offer them legal protection seems to impose itself as a future task for the judiciary.

Moreover, such a trend would be in harmony with the new social need to satisfy the expectations of religious pluralism in a religiously neutral framework. It would avoid the risk, on one hand, of creating an excessively open system, which would make religious beliefs and ways of life or even “sham religions” all equal. On the other hand, it would prevent using anachronistic parameters. It also might try to minimize the risk of a pervasive judicial interference into theological matters which courts are not equipped to weigh up⁵⁵⁵.

Such an overcoming of the “obsolete patterns of inclusion/exclusion”⁵⁵⁶, drawing “lines between religious and nonreligious belief systems”⁵⁵⁷, will surely have a positive impact on the recognition of other groups as religions. It would, in fact, not only cover the claims of those who complain of discrimination under the Equality Act 2010, but also include the purposes of Charity Law.

ABSTRACT: The present paper analyzes the problem of the definition of religion in English case law. Case law witnesses the long process of evolution concerning the meaning of religion in the English legal system. In the past it was connected to a set of shared values and to its national Christian identity. Multiculturalism, globalization and secularism has led to a weakening of such a traditional approach, in view of the new needs of coping with religious diversity.

⁵⁵⁵ See *MBA v. London Borough of Merton*, [2013] EWCA Civ 1562.

⁵⁵⁶ See **G. CAROBENE**, *Problems on the Legal Status of the Church of Scientology*, cit., p. 15.

⁵⁵⁷ See **C. MILLER**, “*Spiritual but not Religious*”: *Rethinking the Legal Definition of Religion*, cit., p. 853.



Enrica Martinelli

(Researcher in Law and Religion and Canon Law at the University of Ferrara,
School of Law)

The meaning of 'Religion' in Hellenic case law

SUMMARY: 1. Introduction - 2. Hellenic case law: "prevailing religion" and "known religion" - 3. The meaning of religion in Hellenic case law - 4. Conclusions.

1 - Introduction

To correctly explore the meaning attributed to the concepts of religion and religious confession in Hellenic jurisprudence, I consider it essential to account for some peculiarities of the Greek legal system that constitute elements of particular interest in comparative legal studies. On the one hand, continuous evolution and stratification of legal sources can be observed and, on the other, the singular link existing between the Eastern Orthodox Church of Christ and the Hellenic Republic and the consequent, significant importance of Orthodoxy in the legal framework of the latter⁵⁵⁸.

⁵⁵⁸ Although it is not completely anomalous within Europe, the Greek situation does have some unusual characteristics. In terms of the relationship between the State and religious confessions, Greece can be placed alongside Denmark, Great Britain and Sweden. In relation to one of the possible relationships between the State and the religious phenomenon, it has been observed that: "Il modello della separazione [...] può pertanto ricevere applicazione sia attraverso un principio di indifferenza dello Stato, sia attraverso un principio di collaborazione [...]. Nella seconda ritroviamo tutte quelle carte costituzionali che segnano un superamento del modello dianzi esaminato, ed esprimono piuttosto un aspetto più consono alla configurazione e agli orientamenti dello Stato sociale...in un quadro di neutralità che si fa tuttavia parziale per quelle confessioni storicamente maggioritarie nella rispettiva tradizione nazionale. Non si esclude pertanto che vengano previsti regimi preferenziali per alcune confessioni riconosciute [...]. Tale preferenza assume contorni giuridici più marcati quando certe confessioni coincidono col riconoscimento di chiese nazionali". See **G. DE VERGOTTINI**, *Diritto costituzionale comparato*, 4^a ed., vol. I, Cedam, Padova, 2004, p. 349. **T. RIMOLDI**, (*I rapporti Stato-Chiesa nell'Europa dei Quindici*, in *www.olir.it*, January 2005, p. 2) writes: «[...] è possibile ricondurre i tipi fondamentali di sistemi di relazioni, almeno basandosi sulla posizione che le Chiese hanno nei diversi ordinamenti giuridici, a tre grandi gruppi. Un primo gruppo è caratterizzato dal fatto che una o, più raramente più Chiese, hanno assunto il ruolo di 'Chiesa di Stato' o di "Chiesa stabilita". A questo gruppo appartengono la Danimarca, la Finlandia, la Grecia, l'Inghilterra, e la Svezia». See also **F. MARGIOTTA BROGLIO**, *Il fenomeno religioso nel sistema giuridico dell'Unione Europea*, in **F. MARGIOTTA BROGLIO**,



On this point, it is clear that the Hellenic legal system displays *heterointegration*⁵⁵⁹, through the subsumption of the fundamental dogmas of the Orthodox faith in the regulatory order, and even within the constitution introduced, with strong symbolic value, by the Preamble which invokes the Holy, Indivisible and Consubstantial Trinity⁵⁶⁰.

The jurisprudence that will be examined⁵⁶¹ reveals the permeation of the religious precept in the legal one, to the extent that, in some cases, it does not seem to realize the objective lack of balance that this causes in terms of protecting the declinations of the right of religious freedom of individuals and of non-orthodox confessional communities living within the territory of the State⁵⁶².

The reading of the verdicts of the *Άρειος Πάγος* (Court of Cassation, hereinafter *ΑΠ*) of the *Συμβούλιο της Επικρατείας* (Council of State, hereinafter *ΣΤΕ*) like those of lower jurisdictions, reveals that, alongside a

C. MIRABELLI, F. ONIDA, *Religioni e sistemi giuridici. Introduzione al diritto ecclesiastico comparato*, il Mulino, Bologna, 2004, p. 88 ss.; C.K. PAPASTATHIS, *Stato e Chiesa in Grecia*, in *Stato e Chiesa nell'Unione Europea*, a cura di G. Robbers, Giuffrè, Milano, 1996, p. 79 ss.

⁵⁵⁹ The phenomenon characteristically indicates the integration of the legal system through resorting to different systems from the one to be completed, that is, different sources from the dominant one, the law. See F. MODUGNO, voce *Ordinamento giuridico (dottrine)*, in *Enciclopedia del diritto*, vol. XXX, Giuffrè, Milano, 1980, p. 725 ss. In relation to the Hellenic Republic, there is talk of "incorporazione di norme di diritto confessionale nelle leggi statali" A. LICASTRO (*Il diritto statale delle religioni nei Paesi dell'Unione Europea. Lineamenti di comparazione*, Giuffrè, Milano, 2012, p. 25) which appropriately highlights how the Statutory Charter of the Church of Greece is also state law (Law no. 590 of 1977).

⁵⁶⁰ ΣΥΝΤΑΓΜΑ ΤΗΣ ΕΛΛΑΔΑΣ "Εις το όνομα της Αγίας και Ομοουσίου και Αδιαίρετου Τριάδος". The Preamble to the Constitution of Greece "constitutes a matter of different institutional significance, because, as it is widely believed, this reference is of a symbolic and not a normative nature". See C. PAPAGEORGIΟΥ, *Religion and Law in Greece*, Kluwer Law International BV, The Netherlands, 2015, p. 30. See also Δ. Θ. ΤΣΑΤΣΟΣ, *Συνταγματικό δίκαιο*, Σάκκουλας Αντ., Αθήνα, 1992, p. 592 ss. The Greek constitution, approved by the Fifth Constitutional Assembly and which came into force in 1975 - after the fall of the regime of the Colonels in July 1974 - was subjected to review in 1986, in 2001 and in 2008, without the maintenance of the Preamble ever being questioned. For the different constitutional review operations see Δ.Θ. ΤΣΑΤΣΟΣ, Ε. ΒΕΝΙΖΕΛΟΣ, Ξ. ΚΟΝΤΙΑΔΙΣ (επιμ.), *Το νέο Σύνταγμα. Πρακτικά Συνεδρίου για το αναθεωρημένο Σύνταγμα του 1975/1986/2001*, Σάκκουλας Αντ., Αθήνα-Κομοτηνή, 2001; see V. PERIFANAKI ROTOLO, *Cenni sulla revisione della Costituzione greca del 2001*, in *Diritto Pubblico Comparato ed Europeo*, 2002-2, p. 469 ss.

⁵⁶¹ Following the more plentiful production of jurisprudence on individual religious freedom over the last decade, the jurisprudence on the subject being considered here appears rather scarce; in fact, it is legitimate to have the impression of a substantial lack of debate on the issue.

⁵⁶² Γ. ΣΟΤΗΡΕΛΗ, *Η "αναπτυξη της θρησκευτικής συνειδήσης" στην Προκρουστεια κλίνη της "Επικρατούσα Θρησκεία"* in *Νομικο Βήμα*, 43 (1995), p. 986.



slightly sluggish requirement to guarantee cultural and religious pluralism in the Hellenic social structure, the Greek judge still has a strong preoccupation to safeguard and outline the position and role of the Greek-Orthodox Church in its relations with the Republic and with citizens⁵⁶³, aware that Orthodoxy represents the incarnation, not only of the historical and cultural identity, but also the ethnic identity, of the Greek people⁵⁶⁴.

2 - Hellenic case law: “prevailing religion” and “known religion”

This situation is undoubtedly the result of a dramatic historical experience, emotional connections and structured ideological convictions that shine through in the argumentations of the Greek courts.

In the first place and regardless of the religious issue that emerges, Greek jurisprudence does not miss the opportunity to outline the consolidated and unquestioned interpretation of the provisions of Art. 3 par. 1 *Σύνταγμα* (significantly placed among the fundamental principles of the legal system), which attributes the role of “predominant religion” to the Eastern Orthodox Church of Christ⁵⁶⁵.

⁵⁶³ On the other hand, in its approach to the different aspects of the legal discipline of the religious phenomenon, the Greek magistracy cannot neglect a precise choice of the constituent. As has been observed: “[...] the system of unity between State and Church was in essence maintained in the present Constitution - despite the declared intention on the part of the government which was then in office, but also of the opposition parties - to proceed with a constitutional separation of the two institutions”. **C. PAPAGEORGIOU**, *Religion and Law in Greece*, cit., p. 44.

⁵⁶⁴ On this point, the President of the Episcopal Conference of Greece and Archbishop of Athens, Mons. Nikolaos Foskolos, stated, in an interview with the international news agency Zenit: «[...] for most Orthodox Greeks, anyone who isn't Orthodox is not really considered Greek. The other Christian confessions and other religions are officially called “foreign religions” “ξένα δόγματα”». The text of the interview can be consulted online on the website (<https://it.zenit.org/articles/la-chiesa-cattolica-in-grecia-tra-luci-e-ombre/>).

⁵⁶⁵ In the fundamental law in force the provisions on the structure of official relations between the State and the Orthodox Church are, for the first time included, not in Art. 1, but in Art. 3. The recognition of the Eastern Orthodox Church as prevailing has remained unchanged in each of the numerous constitutional texts that have followed on from each other since 1821, the year that the Greek War of Independence against the Ottoman Empire began. See the Constitutions of Epidaurus (§ a', 1822), of Astros (§ a', 1823), of Troizina (Art. 1: “Religion of the Territory”, 1827), of the year 1844 (Art. 1-2), the year 1864 (Art. 1-2), the year 1911 (Art. 1-2), the year 1927 (Art. 1), the year 1952 (Art. 1-2). On this point see **Κ.Θ. ΖΩΗ, Γ.Ε. ΛΑΣΘΙΩΤΑΚΗΣ, Π.Θ. ΓΙΑΝΝΟΠΟΥΛΟΣ**, *Η ιστορική εξέλιξη των διατάξεων του Συντάγματος (1822-2001)*, Ινστιτούτο Ελληνικής Συνταγματικής Ιστορίας και Συνταγματικής Επιστήμης, Σάκκουλας Αντ. Ν., Αθήνα - Κομοτηνή, 2003.



The jurisprudential interpretation of this requirement has at most a declaratory flavour, based on the quantum criterion of the “religion professed by the overwhelming majority of the Greek population”⁵⁶⁶, but it often diverges, specifically tracing this prevalence back to the fact that from the early centuries of its appearance until the present day, the Orthodox Christian confession has been identified with the history and actual existence of Hellenism⁵⁶⁷.

This peculiar symbiosis between the secular and the religious settings, underlined by the reference of Art. 3 par. 1 of the fundamental Law to unity in the dogma and the immutable observance of the “[...] holy apostolic and synodal canons, like the holy traditions”⁵⁶⁸, has consolidated the interpretation of jurisprudence according to which the precept constitutionalizes the sacred canons (as defined by the seven Ecumenical Councils, from 325 to 787 A.D., the local synods and the Fathers of the Church), formally integrating them into the list of hierarchically higher-level state sources⁵⁶⁹.

The *ΣτΕ*, first in 1967 and also following the promulgation of the current constitution, actually stated that not only the sacred canons relating

⁵⁶⁶ See Administrative Court of Appeal of Athens, judgment no. 1700 of 1983.

The domestic Constitutional Court has also, in the past, made reference to the “religious sentiment of the majority of citizens”; for example on the constitutional legitimacy of criminal legislation to protect the religious phenomenon of 1930. See judgments no. 125 of 1957; no. 79 of 1958; no. 39 of 1965; no. 14 of 1973. On this point see **O. FUMAGALLI CARULLI**, “A Cesare ciò che è di Cesare, a Dio ciò che è di Dio”. *Laicità dello Stato e libertà delle Chiese*, Vita e Pensiero, Milano, 2006, pp. 103-104.

⁵⁶⁷ Hence, the Chania Administrative Court of Appeal, judgment no. 115 of 2012 which refers to the verdicts of *ΣτΕ* no. 3768 of 2009; no. 2176 of 1998; no. 3356 of 1995; no. 3533 of 1986. See also the judgment of the Heraklion Court of First Instance, judgment no. 87 of 1986. It has also been authoritatively stated in doctrine that: “The prevailing religion is prevalent because it is inextricably connected with the traditions and the majority of Hellenes”. See **C.K. PAPASTATHIS**, *Greece: A Faithful Orthodox Christian State. The Orthodox Church in the Hellenic Republic*, in **J. MARTÍNEZ-TORRÓN, W. COLE DURHAM JR.**, *Religion and the Secular State. Interim National Reports* (Issued for the occasion of the XVIIIth International Congress of Comparative Law, Washington, D.C., July 2010), The International Center for Law and Religion Studies, Brigham Young University, Provo, Utah, 2010, p. 344. See also, **Π.Δ. ΔΑΥΚΤΟΓΛΟΥ**, *Συνταγματικό δίκαιο. Ατομικά δικαιώματα*, Εκδόσεις Σάκκουλα Α.Ε., Αθήνα, 2012, pp. 376-377.

⁵⁶⁸ “[...] όπως εκείνες, τους ιερούς αποστολικούς και συνοδικούς κανόνες και τις ιερές παραδόσεις”.

⁵⁶⁹ *ΣτΕ*, judgment no. 2176 of 1998; no. 3356 of 1995. Both Hellenic jurisprudence and doctrine have dealt extensively with the issue of the “constitutional coverage” offered to the sacred canons and the sacred traditions by the provision in question. In fact, the subject takes on crucial importance due to the significant legal implications on the internal freedom of the Orthodox Church.



to dogmatic subjects but also those relating to administrative issues have been constitutionalized⁵⁷⁰, thus establishing the subjection of the ordinary legislator who, according to this interpretation, “cannot revise or amend basic canonical institutions pertaining to ecclesiastical administration, meaning all the canons that have been established in a stable and long-standing manner within the Church”⁵⁷¹.

In addition to the concept of predominant religion, the jurisprudence offers just as clear an interpretation of the concept of “γνωστή θρησκεία”, that is, “known religion” of which Art. 13 par. 2 *Σύνταγμα* guarantees protection and freedom of worship within the limits of respect for public order and good customs.

The consolidated jurisprudence of the *ΣτΕ* denies that the requirement of the renown of a confession, or a religious creed, depends on a previous formal recognition of the civil authority or the Orthodox religious authority⁵⁷².

A religious confession can be defined as being known if, on the one hand, it professes clear and evident dogmas and truth of faith, which are taught publicly and are accessible to anyone interested in them⁵⁷³, and has known institutions and aims and, on the other, celebrates its rites in an unhidden way⁵⁷⁴.

⁵⁷⁰ In actual fact this contrasts with its previous orientation according to which the supreme administrative judge had denied that the constitutional coverage of Art. 3 par. 1 also extended to the sacred canons of a dogmatic nature. The distinction between doctrinal sacred canons and administrative sacred canons is also extraneous to the Orthodox Church which has never recognised or applied this differentiation within its own *corpus canonum*. On this point see, among others, **Κ.Γ. ΠΑΠΑΓΕΩΡΓΙΟΥ**, *Πορίσματα από την εκκλησιαστική νομολογία του Συμβουλίου της Επικρατείας του έτους 1987*, in *Αρμενόπουλος Επιστημονική Επετηρίδα*, 17 (1996), ΔΣΘ, Θεσσαλονίκη, p. 35; **Σ.Κ. ΟΡΦΑΝΟΥΔΑΚΗΣ**, *Οι ιεροί κανόνες και το Σύνταγμα (Αντισχόλιο ή η «άλλη» ερμηνευτική προσέγγιση)*, in *Αρμενόπουλος*, 35 (1981), ΔΣΘ, Θεσσαλονίκη, pp. 82-83.

⁵⁷¹ See **C. PAPAGEORGIOU**, *Religion and Law in Greece*, cit., p. 47. See also **C.K. PAPASTATHIS**, *Stato e Chiesa in Grecia*, cit., p. 83.

⁵⁷² *ΣτΕ*, judgment no. 310 of 1997; no. 493 of 1997.

⁵⁷³ “Κατά την έννοια των ανωτέρω συνταγματικών διατάξεων, “γνωστή θρησκεία” είναι εκείνη της οποίας τα δόγματα, η λατρεία και τα διδάγματα αυτής εκτίθενται δημοσίως και ασκούνται φανερά, δεν χρησιμοποιεί δε προς επικράτησίν των μέσα ανελεύθερα και δη αντίθετα προς το ελεύθερον πνεύμα της ανεξιθρησκείας, ως είναι ο (αθέμιτος) προσηλυτισμός”. Thus *ΣτΕ*, judgment no. 1842 of 1992.

⁵⁷⁴ “[...] δεν είναι γνωστή εκείνη, της οποίας η λατρεία είναι κατά μέρος έστω μυστική και η διδασκαλία κατά μέρος έστω απόκρυφη”. See Court of Heraklion, judgment no. 87 of 1986. See also: *ΣτΕ* judgment no. 494 of 1997; no. 4600 of 2005; no. 1920 of 2014; Athens Court of Appeal judgment no. 5018 of 2011; Court of Athens, judgment no. 17115 of 1988. It is interesting to observe how this definition from jurisdiction was fully quoted by Law 4301/2014 entitled “*Organization of the Legal Form of Religious Communities and their*



3 - The meaning of religion in Hellenic case law

In the jurisprudence-based reconstruction of the pre-requisite of notoriety it is actually irrelevant that the dogmas of the religious confession express a position considered heretic by the prevalent religion in Greece⁵⁷⁵, just as it is not significant that the rites are officiated in private places not equipped for worship or not open to the public or rather in other public spaces⁵⁷⁶.

Likewise, the *ΣΤΕ* specified that, for constitutional purposes, it is not significant that the religious movement does not contemplate the appointment of religious ministers or that it does not recognize the ministry, according to the meaning officially attributed to the term in the Orthodox Church. The provision of the qualification of religious leader, officiant or religious minister is to be established based on the statutory autonomy of the religious confession itself⁵⁷⁷.

organizations in Greece” which in Art. 1 refers to the “known religion” as to a “religion that has no hidden beliefs but clear dogmas and its worship is free and accessible to everyone”.

⁵⁷⁵ A religious confession “ανεξάρτητα από τον χαρακτηρισμό τους ως αιρέσεως έναντι της Ανατολικής Ορθόδοξης Εκκλησίας, αποτελούν γνωστή θρησκεία κατά την έννοια του άρθρου 13 παρ. 2 του ισχύοντος Συντάγματος” Thus, the Court of first instance of Thessaloniki, judgment no. 1080 of 1995 which refers to the decision of the *ΣΤΕ* (in plenary session) no. 2105 of 1975.

⁵⁷⁶ Athens Court of Appeal, judgment no. 5018 of 2011. However, it is to be observed that, despite this, the restrictive administrative procedure connected with the granting of the permits and licences for opening non-Orthodox buildings for worship is still considered constitutionally compatible. In fact, the *ΑΠ* ruled on this point with its decision no. 20 of 2001 stating that the system of permits for opening places of worship actually aimed to protect public order and that the provisions of Law no. 1363 of 1938 and its implementing decree of 20.5-2.6.1939 are not in contrast with Art. 13 par 1 and Art. 13 par. 2 *Σύνταγμα* or with Art. 9 of the European Convention on Human Rights, in terms of controlling the requirements envisaged by the Fundamental Charter. See also *ΣΤΕ*, judgment no. 1920 of 2014 and no. 1411 of 2003. However, it is necessary to point out the recent legislative openness displayed through the suppression of the need for authorisation from the local Orthodox ecclesiastical authority to open non-Orthodox buildings for worship (see Art. 27 Law no. 3467 of 2006).

⁵⁷⁷ The principles referred to in the text are clear in the decision of the supreme administrative judge on the exemption from military service of a “religious officiant” of a known confession: “Τέλος για την απαλλαγή από την στράτευση αρκεί το ότι ο ενδιαφερόμενος είναι θρησκευτικός λειτουργός γνωστής θρησκείας (δόγματος ή θρησκευματος), χωρίς να απαιτείται όπως το συγκεκριμένο δόγμα έχει τύχει εγκρίσεως ή αναγνώρισεως με πράξη της Πολιτείας ή της Εκκλησίας, ενώ είναι αδιάφορο αν οι θρησκευτικοί λειτουργοί αυτού στερούνται ιερωσύνης υπό την καθιερωμένη στην Ορθόδοξη Εκκλησία έννοια του όρου αυτού”. Thus *ΣΤΕ*, judgment no. 494 of 1997. Where present, religious ministers of the known confession, are to be subject to the same supervision and bound to the same obligations envisaged by Art. 13 par. 3 *Σύνταγμα* for religious ministers of the prevalent religion.



The relevant requirements for the celebration of the rite and any issue relative thereto shall also be subject to autonomous discipline, according to the precepts imposed by the creed professed by the same confession, naturally within the limits of the constitutional ban on proselytism, respect for public order and good customs⁵⁷⁸.

In relation to the limits contemplated by Art. 13 par. 2 *Σύνταγμα*, the Hellenic judges offer an overall interpretation that identifies them in the “set of principles and fundamental, cultural, social, economic and moral conceptions that prevail in Greece and govern peaceful and tranquil coexistence and society”⁵⁷⁹.

Both in the literature offered by the ordinary courts and by the *ΣτΕ*, the requirements mentioned above and no others decide which religious group enjoys constitutional guarantees to be set forth as the “known confession” and which one, on the contrary, remains excluded because of the secrecy of the dogmas and teachings and because of the hidden setting in which the rites are celebrated. Hence a movement that is professed to be religious cannot be likened to a known confession, rather to a sect or a secret and illegal society⁵⁸⁰.

In fact, from this perspective, it is interesting to note that, although the jurisdictional bodies seek to maintain a neutral position towards all known religions in order to prevent discriminatory treatments to their detriment, the attitude of Hellenic judges can be harder when a religious movement makes an attempt to join the constitutionally protected category.

⁵⁷⁸ *ΣτΕ* (in plenary session), judgment no. 919 of 1970 and judgments no. 494 of 1997; no. 4600 of 2005; no. 1920 of 2014.

⁵⁷⁹ “[...] η δημοσία τάξη και τα, εις την γενική έννοια αυτής περιλαμβανόμενα χρηστά ήθη, υπό την έννοια του συνόλου των θεμελιωδών, πολιτειακών, κοινωνικών, οικονομικών και ηθικών αρχών και αντιλήψεων που κυριαρχούν στην Ελλάδα, ρυθμίζουν την ειρηνική και ήρεμη συνύπαρξη και συμβίωση”. Court of Athens, judgment no. 17115 of 1988.

⁵⁸⁰ *ΣτΕ*, judgment no. 1842 of 1992; Court of Heraklion, judgment no. 87 of 1986. The Council of State, in its decisions, has ruled as “known religions” Methodists (judgment no. 2274 of 1972), Seventh Day Adventists (judgment no. 2004 of 1991; no. 1952 of 1992), Mormons and Evangelical Churches (judgment no. 2058 of 1957 in Plenary Session; no. 2275 of 1962), Jehovah’s Witnesses (judgment no. 2105 of 1975; no. 2106 of 1975), the Apostolic Church of God (judgment no. 1842 of 1992), the Church of Jesus Christ of Latter Day Saints (judgment no. 549 of 1991), the Church of Christian Brothers (judgment no. 749 of 1971), the Apostolic Church of Pentecost (judgment no. 2155 of 1966; no. 2226 of 1969), and Old Calendarists (judgment no. 1444 of 1991 in Plenary Session).

Jewish and Muslim religions are the only groups considered, by law, to be a “legal person of public law” (“Νομικό Πρόσωπο Δημοσίου Δικαίου”). All other known religions, including the Roman Catholic Church, are considered “legal persons of private law”. See **C. PASTATHIS**, *Greece: A Faithful Orthodox Christian State. The Orthodox Church in the Hellenic Republic*, cit., pp. 371-372, and extensively **Κ.Γ. ΠΑΠΑΓΕΩΡΓΙΟΥ**, *Εκκλησιαστικό Δικαίον. Θεωρία και Νομολογία*, Εκδόσεις Μπαρμπουνάκη, Θεσσαλονίκη, 2013, p. 166 ss.



On this point, a verdict of the Court of Heraklion is particularly significant, rejecting the application made by the “Christian Church of Jehovah’s Witnesses of Crete” to be included in the list of known religions. According to the Cretan judge, the “Christian” denomination for the confession in question is false and misleading and represents an act of proselytism of millenarianism which cannot be considered a known religious confession, rather a political or social organization whose principles contrast with public order and good customs⁵⁸¹.

To conclude its logical and argumentative stance, the Court of Heraklion proposes a definition of the ontological concept of religion with all evidence based on the model of monotheist confessions of the Old Testament.

“[...] Religion, as we know, is the system of teaching by revelation of the existence of an almighty and superior entity, who rules the things of the world according to his wish and to whom honour, worship and adoration are due. Christianity is the religious confession of Christians based on the preaching and teaching of its founding God, Jesus Christ, as set forth in the New Testament and as interpreted by the Apostles, the Fathers and the Synods”⁵⁸².

Therefore, while the confession of the Jehovah’s witnesses is a known confession⁵⁸³, according to the Cretan judge, “Jehovah’s Witness Christians” abuse the adjective, misleading believers and implementing behaviour that amounts to the crime of proselytism⁵⁸⁴.

⁵⁸¹ “Μάρτυρες του Ιεχωβά: Απόρριψη αίτησης για αναγνώριση σωματείου με την επωνυμία “Χριστιανική Εκκλησία των Μαρτύρων του Ιεχωβά Κρήτης” γιατί ο τίτλος του είναι απατηλός και αποτελεί προσηλυτιστική ενέργεια του χιλιασμού. Ο χιλιασμός δεν αποτελεί γνωστή θρησκεία αλλά πολιτικοκοινωνική οργάνωση της οποίας η δράση, αποκαλύπτεται στα χιλιαστικά έντυπα που κυκλοφορούν και αντίκειται στη δημόσια τάξη και τα χρηστά ήθη. Τα κύρια σημεία του δόγματος των χιλιαστών, από που ξεκινά και που αποβλέπει. Αξιόποινη η δράση των χιλιαστών”: Court of Heraklion, judgment no. 87 of 1986.

⁵⁸² “Θρησκεία, ως γνωστόν είναι σύστημα διδασκαλίας εξ αποκαλύψεως περί της υπάρξεως παντοδυνάμου και υπερτάτου Όντος, που ρυθμίζει κατά τη θελησή Του τα του κόσμου και σ’ Αυτό οφείλεται πάσα τιμή, λατρεία και προσκύνηση. Χριστιανική δε Θρησκεία ή Χριστιανισμός είναι η θρησκεία των Χριστιανών, που εδράζεται στο κήρυγμα και τη διδασκαλία του ιδρυτού της και Θεού Ιησού Χριστού, όπως παραδόθηκε στην Καινή (Νέα) Διαθήκη και ερμηνεύθηκε από την Ιερά Παράδοση δηλ. υπό των Αποστόλων, των Πατέρων και των Συνόδων”.

⁵⁸³ This has been indicated various times by the *ΣτΕ*. Among many, see judgments no. 2105 of 1975; no. 2106 of 1975; no. 2484 of 1980; no. 1411 of 2003.

⁵⁸⁴ The legal situation of “Jehovah’s Witness Christians” was later solved (first by the Court of first instance of Athens, judgment no. 520 of 1989 and then by the *ΣτΕ* with decision no. 490 of 1999) through their identification with the confession known as Jehovah’s Witnesses for the substantial identity of dogma and beliefs.



In practice, there is no doubt that the compression of the enjoyment of the right of collective religious freedom is already essentially comprised in the actual concept of “known religion” since the ascertainment of the subsistence and contents of the pre-condition required by Art. 13 par. 2 *Σύνταγμα*, does not exclude a margin of discretion⁵⁸⁵ by the relevant judicial authority.

4 - Conclusions

In conclusion, it appears that Hellenic jurisprudence is still marked by a trend towards ideological selectivity.

Although more recent verdicts lean towards the recognition of the religious freedom of believers of religions other than the Orthodox one in its multiple declinations⁵⁸⁶, it is impossible not to notice how the verdicts examined appear to see the need to protect the ethnic and cultural identity of the Greek population and tend to underline how the Greek Orthodox

⁵⁸⁵ This discretion, under certain aspects, resounds with that recently granted by the Italian Constitutional Court to the Government through judgment no. 52 of 2016. On the opening of negotiations with the Union of Rationalist Atheists and Agnostics for the purpose of stipulating the agreement as per Art. 8, paragraph 3 of the Constitution, the judges of the Palazzo della Consulta did in fact state that: «[...] in una situazione normativa in cui la stipulazione delle intese è rimessa non solo alla iniziativa delle confessioni interessate, ma anche al consenso del governo, quest'ultimo “non è vincolato oggi a norme specifiche per quanto riguarda l'obbligo, su richiesta della confessione, di negoziare e di stipulare l'intesa” (sentenza n. 346 of 2002). Ciò deve essere in questa sede confermato, considerando altresì che lo schema procedurale, unicamente ricavabile dalla prassi fin qui seguita nella stipulazione delle intese, non può dare origine a vincoli giustiziabili» (point 5.2 of the “Considerato in diritto”). The judgment is published in numerous journals including *Foro italiano*, 2016, I, cc. 1940 ss. (with comments by **G. AMOROSO** and **A. TRAVI**). See also **M. MIELE**, *Confessioni religiose, associazioni ateistiche, intese. A proposito di Corte cost., 10.3.2016, n. 52*, in *La Nuova Giurisprudenza Civile Commentata*, 10 (2016), second part, p. 1368 ss.

⁵⁸⁶ For example, on the subject of mixed marriages (Athens Court of Appeal, judgment no. 5018 of 2011); civil service to replace compulsory military service (*ΣτΕ*, judgment no. 494 of 1997); child custody to a Jehovah's Witness parent in case of divorce (Court of Thessaloniki, judgment no. 1080 of 1995); right to confidentiality regarding professed faith (*ΣτΕ*, judgment no. 3356 of 1995); exoneration from the teaching of the Orthodox religion in schools (*ΣτΕ*, judgment no. 3356 of 1995; no. 2281 of 2001; no. 582 of 2011). It is to be noted that the exoneration is reserved for students of other religions, since for Orthodox Christian students compulsory attendance of this subject, like the recitation of the morning prayers and participation in the liturgies envisaged by the school calendar, by constant and univocal jurisprudence of the Council of State, are considered unavoidable consequences of belonging to a precise religious community.



religion represents a sort of 'drive belt' of ethnic and religious values and the instrument for transplanting 'Orthodox awareness' in citizens⁵⁸⁷.

The voice of the Hellenic courts, from this point of view, is monophonic: "επικρατούσα θρησκεία" does not mean either the official religion or the State religion⁵⁸⁸ but, based on the text of the constitution, it is granted special concern and a favourable policy that does not stretch to the other religions. In particular, the prevalent religion is given a public tribute in all state manifestations, pre-eminence in national feasts and the determination of the calendar of the feasts; and its teaching in public schools is guaranteed for a sufficient number of hours per week so as to fulfil the right of Greek society to perpetuate Orthodox faith, worship and traditions to the new generations⁵⁸⁹.

In the jurisprudential interpretation, this is essentially due to the fact that Orthodoxy continues to be identified with the dimension of national identity interwoven into the history of the Greek people and constitutes at the same time "the greatness relative to Greek civilization that continues to live in symbiosis with the Orthodox tradition"⁵⁹⁰.

Because of these such vibrant statements, their strong symbolic and evocative value and the constantly underlined need to preserve and transmit the values of national awareness based on the Orthodox Christian doctrine, the Hellenic courts appear to be inclined towards singular religious patriotism.

⁵⁸⁷ This is the opinion of the constitutionalist **Γ. ΣΟΤΗΡΕΛΗ**, *Η "αναπτυξη της θρησκευτικής συνειδήσης" στην Προκρατούσα κλίση της "Επικρατούσα θρησκεία"*, cit., p. 982.

⁵⁸⁸ A different interpretation of the jurisprudence based on the consideration that the legal meaning of the term "prevalent" is that of the "official religion of the Greek State" is provided by **C.K. PAPANATHANAS**, *Stato e Chiesa in Grecia*, cit., p. 79.

⁵⁸⁹ *ΣτΕ*, judgment no. 2176 of 1998; no. 3356 of 1995.

⁵⁹⁰ "[...] ο ελληνικός πολιτισμός εξακολουθεί να τελεί σε οργανική σχέση με την ορθόδοξη παράδοση": Chania Administrative Court of Appeal, judgment no. 115 of 2012. The peculiar link between Hellenism and Orthodoxy is indicated by the concept of "Helleno-Christianity", with a rather wide interpretation that also includes the intellectual and spiritual heritage that has contributed to shaping modern Greek identity until the present day. The bonds of Greek society and Orthodoxy are maintained through a variety of institutions (Church, State, Education, Courts) and cultural and religious activities. Orthodoxy is not only a religious tradition, but also a whole culture and way of life; as an essential component of Greece's heritage and an all-embracing notion that holds together and cements Greek society. See **T. STAUNING WILLERT**, *A new role for religion in Greece. Theologians challenging the ethno-religious understanding of Orthodoxy and Greekness, in Innovation in the Orthodox Christian Tradition?: The Question of Change in Greek Orthodox Thought and Practice*, ed. T. Stauning Willert, L. Molokotos-Liederman, Farnham, Ashgate, 2012, pp. 183-205.



It is certainly possible to note the logical and legal consistency of reasoning in the jurisprudence examined, revealing the trace of an intensely perceived historical memory that still recognises the common thread of the ethnic and cultural identity of the Greek people in the survival of a common religious confession, a common language and common traditions.

ABSTRACT: In order to correctly explore the meaning that the concepts of religion and religious confession have for Hellenic case law, the paper considers it essential to account for some peculiarities of the Greek legal system: the unique bond between the Eastern Christian Church and the Hellenic Republic and the remarkable significance of the Orthodox religious precept in the regulatory framework of the latter.

In the first instance, the paper sets out to show how the role of the “predominant religion” attributed to the Eastern Orthodox Church of Christ by art. 3 par. 1 *Σύνταγμα* is uniquely interpreted by jurisprudence and goes beyond the mere quantum criterion of the “religion professed by the overwhelming majority of the Greek population” but specifically leads back to the fact that the Orthodox Christian confession has been identified with the history and actual existence of Hellenism.

Furthermore the paper considers the interpretation offered by the Greek judge of the concept of “known religion” of which art. 13 par. 1 *Σύνταγμα* guarantees freedom within the limits contemplated by legislation.

Finally, the paper sets out to show how the decisions of the Hellenic judge grasp every opportunity to underline how Orthodoxy is identified with the national identity interwoven into the history of the Greek people.



Cristiana Maria Pettinato

(Researcher at the University of Catania, School of Law)

The meaning of 'Religion' in Maltese legal system

SUMMARY: 1. Introduction - 2. The meaningfully conditioning of catholic thoughts in the school and in the family life - 3. Conclusions about the meaning of religion in Malta.

1 - Introduction

The Republic of Malta, is a Southern European island country in the Mediterranean Sea, with the smallest national capital in the European Union, of which is a member since 2004, and member of Eurozone since 2008⁵⁹¹. In order to decode the meaning of religion in Malta, we must consider the fact that the country is an interesting example of the paradoxical coexistence of outdated confessionism and the unstoppable contemporary tendency to move towards cultural and religious pluralism. The centrality assigned to the Catholic Church does not affect the freedom of other confessions.

Malta has always had a tight relationship with religion. On one hand, we find the ancient story of Saint Paul shipwrecked in the bay between Mistra and Mgiebah, described in the Acts of Apostles in 28,2, where the Apostle defines the indigenous as "barbarians showed us extraordinary kindness". This event has been interpreted as a sign of blessing and divine predilection for the island⁵⁹². On the other hand, there is the presence of St. John's Knights of Jerusalem (The Order of Malta). For this reason Malta enjoys the privilege of a long Christian legacy and effectively become an Archdiocese in 1964⁵⁹³.

The Maltese religious population is composed more than 90% by Christians, generally belonging to the Roman Catholic Church, which is

⁵⁹¹ **M. HARWOOD**, *Malta in the European Union*, Routledge, London-New York, 2014.

⁵⁹² The Saint Paul tale could be used as symbol of opening to outsider and overcoming the fear of difference and cultural and religious prejudice, **A. GRIMA**, *Critical Mediterranean Voices*, in **S. GALEA, A. GRIMA**, *The Teacher, Literature and the Mediterranean*, Sense Publisher, Rotterdam, Boston, Taipei, 2014, pp. 103-104.

⁵⁹³ file:///G:/Malta/Malta,%20Religion%20and%20Social%20Profile%20_%20National%20Profiles%20_%20International%20Data%20_%20TheARDA.htm; <http://www.catholic-hierarchy.org/diocese/dmalt.html#details>.



also the main faith and the traditional religion of the State⁵⁹⁴, as found in Article 2 of Malta's Constitution, adopted on 21 September 1964⁵⁹⁵.

2 - The meaningfully conditioning of catholic thoughts in the school and in the family life

In Malta, religious freedom and freedom of conscience are incorporated in the same framework of legal protection. In fact, Article 40 of the Constitution states that "All persons in Malta shall have full freedom of conscience and enjoy the free exercise of their respective mode of religious worship." Article 45 recognizes the so-called principal of *equality at law*. This principle means that the government does not make any kind of discrimination - a sort of equality in front of the law - yet it does not mean that the government cannot make "normative differentiation" with regard to religious issues⁵⁹⁶.

In many aspects of life in Malta, there is very strong the influence dictated by the presence of a State Church, involving an anachronistic action of the Catholic Church's interference in temporal matters - an aspect that in many other Western countries has been marginalized. However, more can be said with regard to this aspect. At first glance, a legacy of *jus commune* appears to survive on the island, due to the fact that the same legal system makes use of civil law and Canon law at the same time. The "hybrid"⁵⁹⁷ Maltese legal system refers to Canon law, specifically with

⁵⁹⁴ P.W. BARKER, *Religious nationalism in Modern Europe. If God be for us*, Routledge, London- New York, 2009, p. 150. About the deep religious culture in Malta see J. BOISSEVAIN, *Ritual escalation in Malta*, in AA. VV., *Religion, Power and the Protest in Local Communities. The Northern Shore of Mediterranean Sea*, ed. by E.R. Wolf, Mouton Publishers, Berlin, New York, Amsterdam, 1984, pp. 163-184.

⁵⁹⁵ Constitution of Malta art. 2: "The religion of Malta is the Roman Catholic Apostolic Religion. But there is more. The authorities of the Roman Catholic Apostolic Church have the duty and the right to teach which principles are right and which are wrong. Religious teaching of the Roman Catholic Apostolic Faith shall be provided in all State schools as part of compulsory education" (in <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8566&l=1>). For a complete informations about Maltese legal system see J. DRAKE, P.G. XUEREB, E. BUTTIGIEB, *Malta in Information Sources in Law*, edited by J.R. Winterton, E.M. Moys, Bouker Saur, London, Melbourne, Munich, New Providence, N.J., 1997, pp. 307-320.

⁵⁹⁶ A. BETTETINI, *Report su Religion and Secular State: Malta*, in *Religion and the Secular State: Interim National Reports - The XVIIIth International Congress of Comparative Law (Washington D.C., 25 july-1 August 2010)*, under the direction of J. Martinez Torrón, W. Cole Durham Jr., Published by The International Center for Law and Religion Studies, Brigham Young University, Provo-Utah, 2010, pp. 494-504, specially p. 496.

⁵⁹⁷ See K. AQUILINA, *Rethinking Maltese Legal Hybridity: A Chimerich Illusion or a*



regard to marriage (see the marriage act. Art. 21). At times, it might seem that there is a limited space for a dualistic vision of the relationship between Church and State.

Pushing towards a more in-depth understanding of the legal structure of Maltese society, we must look at the educational system, influenced by the dominant Catholic thinking. According to the country's Constitution (Article 2), amended in 1974⁵⁹⁸, the duty to handle the education of young people in Malta, choosing ethics principles that contribute to found the legal system in the country, is attributed to the Catholic Church. This kind of confessionality has a special social sense, because reflects the real composition of the Maltese population: in fact the majority of Maltese citizens belong to that religion, but it doesn't mean it's a system closed to other religious option.

Currently, according to the Agreement between Malta and the Holy See in 1989⁵⁹⁹, there is the obligation to teach catholic religion, with the same status as other teachings, however national law requires, in every school, a Religious counselor (ex Art. 3 of the Agreement)⁶⁰⁰, who is different from the religion teacher, and who is also an integral part of school structures. This role does not attempt to add religious information, but rather tries to facilitate the spiritual and religious aspects to be expressed in the school setting⁶⁰¹.

However, new contemporary imprinting on Maltese institutions have had a strong influence, therefore in 2011 the Ethics Education Program

Healthy Grafted European Law Mixture?, in *Journal of Civil Law Studies*, vol. 4, 2011, pp. 261-283.

⁵⁹⁸ Act n. LVIII 1974 n. 4 (in <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=27324&l=1>).

⁵⁹⁹ http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19930218_santa-sede-rep-malta-scuole_en.html.

⁶⁰⁰ Agreement between the President of Maltese Episcopal Conference and The Minister of Education of the Republic of Malta, Art. 3: "L'animazione religiosa e la guida morale degli studenti, come parte essenziale della loro educazione religiosa, sarà assicurata da "Religious Counselors" nominati dal Vescovo Diocesano nel cui territorio è situata la scuola ed aventi lo "status" di "Counselor in the Education Department" o uno "status" ad esso equipollente. Essi svolgeranno la loro attività educativo-pastorale secondo le direttive della Conferenza Episcopale Maltese; Articolo 4: L'"Education Officer (Religion)" sarà un ufficiale del Governo scelto tra i ministri ordinati della Chiesa Cattolica. Egli dovrà avere l'approvazione, non revocata, della Conferenza Episcopale Maltese".

⁶⁰¹ C. BORG, *Catholic Hegemony in Malta: State Schools as sites of Cultural reproduction*, in *Rethinking hegemony*, edited by T. Clayton, James Nicholas Publishers, Albert Park, 2006, pp. 65-67.



was founded in order to develop a more mature individual moral outlook and sensibility based on pluralistic values⁶⁰².

This initiative appears to be a realistic attempt to oust the Catholic Church from its monopoly on public education, denying the power to issue the moral rules of an entire country, as established by Constitution art. 2. The introduction of ethics in addition to religion offers a chance to build a “common ethical ground for an increasingly pluralistic society”⁶⁰³.

In my opinion, we should highlight the offer set forth by the Archbishop of Malta to the possibility that the same Catholic schools host the teaching of the Muslim religion⁶⁰⁴. A debate broke out⁶⁰⁵ and Archbishop Scicluna insisted saying “the Catholic ethos is one of inclusion that respects the religious freedom of Catholic parents as well as that of parents of other faiths”⁶⁰⁶. However, pursuant to Article 47 (5) of the Education Act the parents of any minor have the right to ask that their children to be exempted from religion lessons, although no alternative has been offered yet, and the students sit out the lessons alone or receive free lessons.

Another relevant test of the communion between religious and secular elements is the incorporation of the Faculty of Theology in the University of Malta following the Agreement between The Government and the Holy SEE in 1995, included in Article 84 of the Education Act. Academic degrees and diplomas conferred by the Faculty of Theology will have canonical and civil value.

The study of Canon Law only exists in this Faculty in the Department of Pastoral Theology, Canon Law and Liturgy. There is no faculty similar to our Ecclesiastical law, or comparative law studies, in the Faculty of Law.

⁶⁰² The purpose of the Ethics Program are first to develop a mature individual moral outlook and sensibility based on values that are uncontroversial in principle; second to make mature and informed moral judgments based on the values, in a pluralistic society; third to respect the integrity of those who think differently; Fourth: values of this kind correspond with democratic behavior.

⁶⁰³ *Religion as an identity totem*, in www.maltatoday.com.mt/comment/editorial/76361/religion_as_an_identity_totem#.WSfzyLhkbyY.

⁶⁰⁴ **J. PISANI**, *The Archbishop and Muslims* (in <https://yforc.wordpress.com/2017/03/18/muslim-lover/>).

⁶⁰⁵ **K. SANSONE**, *Debate on whether Islam should be taught at secondary schools heats up 'Exposure to other faiths helped foster tolerance'* (in <https://www.timesofmalta.com/articles/view/20170326/local/debate-on-whether-islam-should-be-taught-at-secondary-schools-h>).

⁶⁰⁶ **P. COCKS**, *Archbishop reassures Church schools 'will always remain Catholic'* (in http://www.maltatoday.com.mt/news/national/75533/watch_archbishop_reassures_church_schools_will_always_remain_catholic#.WS).



The monopoly of Catholic Church in the field of family life⁶⁰⁷ has been quite thoroughgoing until the Marriage Act in 1975, which provides for the introduction of civil marriage on the anglo-saxon model⁶⁰⁸. This reform produced a discrimination between catholics and non-catholics, because only the second type of citizen could contract a civil marriage in a religious form, and it would be valid from both, the religious and the civil viewpoint. So catholics had to celebrate two marriages until 1993 when the Marriage Agreement between Malta and the Vatican provided the recognition of the civil effects of canonical marriage⁶⁰⁹.

According to this Agreement, Church tribunals took precedence over the civil courts, only if the spouses are agree to choose a court, civil or ecclesiastical. This norm doesn't exist in others concordats. This prevents civil separation from taking place if annulment proceedings have already begun.

The Marriage Act was amended in 1995, and became definitively pluralistic, incorporating both the anglosaxon system both the canonic one. Registration of decisions delivered by Ecclesiastical Tribunals are now effected by the Court of Appeal, which delivers a decree declaring the decision enforceable in Malta, after a procedure similar to Italy (*delibazione*) art. 24 Marriage Act. This was a first step to re-engage a civil jurisdiction over marriage⁶¹⁰.

⁶⁰⁷ **A. ABELA**, *Relationship Education for Families in Transition between Different Cultural Value Systems. A Maltese perspective*, in H. Benson, S. Callan (eds.), *What works in relationship education: Lessons from academics and service delivers in the United States and Europe*, Doha International Institute for Family Studies, Doha, 2009, pp. 149-160.

⁶⁰⁸ "Civil effects are recognized for marriages celebrated in Malta according to the canonical norms of the Catholic Church, from the moment of their celebration", and "The Republic of Malta recognizes for all civil effects the judgements of nullity and the decrees of ratification of nullity of marriage given by the ecclesiastical tribunals and which have become executive". Generally see **R. FARRUGGIA**, *International Marriage and Divorce Regulation and Recognition in Malta*, in *Family Law Quarterly*, Vol. 29, No. 3 (Fall 1995), pp. 627-634; **ID.**, *The influence of Roman Catholic Church in Maltese Family Law and Policy*, in **AA. VV.**, *The Place of Religion in Family Law*, ed. by J. Mair-E. Orüci, Intersentia, Cambridge, 2011, pp. 187-206.

⁶⁰⁹ **A. BETTETINI**, *L'Accordo 3 febbraio 1993 tra la Santa Sede e la Repubblica di Malta sul matrimonio: brevi annotazioni*, in *Il diritto ecclesiastico*, I, 1997, pp. 103-115. See the Chapter 255 Marriage Act art. 2 (in <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lo&itemid=8749&l=1>).

⁶¹⁰ **A.S. PULLICINO**, *The Church-State Agreement on the Recognition of Civil Effects of Marriage and Declaration of Nullity Delivered by Ecclesiastical Tribunals*, in *Forum, A Review of the Maltese Ecclesiastical Tribunal*, No. 1, Vol. 6, 1995; Art. 24 Marriage Act, Chapter 255 Laws of Malta 1975, emended in 1995: "Registration of a decision as is referred to in article 23 shall be effected by the Court of Appeal. (2) A request for such registration shall be made by application filed in the registry of the said court, and which shall be served on the



The big change came in 2011 when divorce was introduced by a referendum and then with the Law n.218 2012, with the approval of a Catholic group (Kattolici)⁶¹¹.

In 2014 a third Additional Protocol has been added to the Concordat of 1993, allowing that an ecclesiastical tribunal will no longer prohibit a civil tribunal from declaring the same marriage to be null, for all civil purposes even on the same grounds of nullity. It appears a jurisdictional competition in place of the previous exclusivity.

Another strong wound to Church jurisdiction concerning marriage was produced in 2014 when the Civil Unions Act Chapter 550 of Laws of Malta⁶¹² was promulgated, defining equality among different types of families that already existed in social life on the island, opening the doors to same sex adoption⁶¹³.

Despite these new open viewpoints to secularist social transformations, Malta remains the stronghold of pro-life beliefs, deeply rooted in the local Catholic culture, even more than in Italy or in the other Catholic countries in Europe.

As a matter of fact, Malta is the only country in Europe where abortion is prohibited under all circumstances. Abortion is a crime pursuant to Articles 241-244, the Criminal Code of Malta, Chapter 9 of the Laws of

Director of the Public Registry and where it is presented by one only of the spouses, on the other spouse. (3) The respondents shall have a right to file a reply within twelve working days of the service upon them of the application. (4) Together with the application, the applicant shall file (I) One of the parties in the marriage is domiciled in, or a citizen of, Malta; (II) The Tribunal was competent to judge the case of nullity of the marriage insofar as the marriage was a Catholic Marriage; (III) The right of action and defence of the parties have been safeguarded in a manner substantially not dissimilar to the principles of the Constitution of Malta; (IV) In the case of a marriage celebrated in Malta after the 11th August, 1975, there has been delivered or transmitted to the Public Registry the act of marriage; (V) There does not exist a contrary judgment binding the parties pronounced by a court, and which has become final and definitive, based on the same grounds of nullity" (in <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8749&l=1>).

⁶¹¹ "Referendum is Catholics' chance to be protagonists in their own church" (in <https://web.archive.org/web/20110711065554/http://maltatoday.com.mt/news/referendum-represents-chance-for-catholics-to-become>).

⁶¹² Chapter 550, Civil Unions Act: art. 4.(1) Save as provided in this Act a civil union, once registered, shall *mutatis mutandis* have the corresponding effects and consequences in law of civil marriage contracted under the Act (in <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12172&l=1>).

⁶¹³ First gay adoption in Malta was given by FAMILY Court in 13 July 2016 (in <http://www.independent.com.mt/articles/2016-07-15/local-news/Malta-s-first-child-adopted-by-a-gay-couple-parents-appeal-the-public-to-educate-others-6736161027>; <http://www.timesofmalta.com/articles/view/20160713/local/court-gives-go-ahead-for-adoption-by-gay-couple-in-first-for-malta.618685>).



Malta. That said, current politics are now more inclined to legislate assisted pregnancies rather than legalize abortion.

In the evolution of the Maltese awareness as a modern country, increasingly distant from the catholic principles and, at the same time, inclined to the protection of human rights, we find Bill n. 113 of 2015, introducing an ideal change on the vilification of religion by creating a balance between two equivalent rights in a multicultural society: freedom of speech and freedom of worship⁶¹⁴.

By decriminalizing the vilification of religion, the Maltese government eliminates the no longer tolerable difference between the Roman Catholic Church and others, while also granting protection, which was previously restricted only to the Catholic religion⁶¹⁵, to a whole range of civil rights and liberties that the Constitution of Malta and the European Convention on Human Rights impose. But there is a Legal objection raised by the Curia and some jurists about the danger of circumventing the Constitution's rule which expressly establishes on "public morality or decency" in Articles 38, 40, 41, 42⁶¹⁶.

Due to the reduced number of members of others religions, the problem of regularization, by agreements or a general law, has not yet developed in Malta.

With regard to family life the marriages entered into according to the rites or usages of a different church, or religion, are recognized as civil marriages by art. 17 Marriage Act, if such churches or religions are generally accepted, or if the Minister responsible for public justice declares them as recognized by law⁶¹⁷.

⁶¹⁴ **T. ZAMMIT CUTAJAR**, *Freedom of Speech and Defamation*, *Times of Malta*, (February 11 2016); *Religion and Free Speech: It's Complicated*, *Index on Censorship* (1 March 2013) (in <https://www.indexoncensorship.org/2013/03/free-expression-and-religion-overview/>).

⁶¹⁵ **K. AQUILINA**, *Religion Needs Protection*, *Times of Malta*, July 22 2015, in <http://www.timesofmalta.com/Articles/view/20150722/opinion/Religion-needs-protection.577592>; **I. MARTIN**, *Vilification of Religion laws to be more reflective of today's society* (2nd February 2016), *Times of Malta* (in <http://www.timesofmalta.com/Articles/view/20160202/local/vilification-of-religion-to-be-decriminalised-to-be-more-reflective-of.601041>).

⁶¹⁶ The Curia opposed this solution, arguing that Articles 163 and 164 should not be repealed and eventually should be amended only to establish there it should be no difference between the sanctions imposed on those vilifying the Roman Catholic religion and those vilifying any other religion or non-belief. See CONFERENTIA EPISCOPALIS MELITENSIS, *Position Paper on the Decriminalization of the Public Vilification of Religion and Pornography*, 7th August 2015 (in https://www.um.edu.mt/__data/assets/pdf_file/0008/273095/POSITIONPAPER-AUGUST2015.pdf).

⁶¹⁷ Article 17[2] of the Marriage Act - Chapter 255 of the Laws of Malta (in <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8749&l=>).



Based on the terms in Article 8 of the Education Act (Chapter 327 of the Laws of Malta), the Minister of Education has the power to issue a licence to open a private school with religious orientation (In 1997 was established the first Muslim school). Very recently a controversy has arisen between The Moviment Patrijotti Maltin and Laiq Ahmed Atif, Ahmadiyya Muslim Community President, about the articulated proposal to remove Christian education from school and to allow Muslims to receive lessons in Arabic. The main argument to contest the proposal was the impossibility to understand what they are saying, with the danger of introducing extremist ideas contrary to Maltese way of life⁶¹⁸. But the extraordinary news is that Archbishop Scicluna welcomes the idea of opening Catholic schools to Islam, as I said before⁶¹⁹.

In any case, religious minorities enjoy the same freedom as the Catholic Church and no recognition procedure is currently required. Many rules of the Penitentiary Regulation of 1995, emended in 2016, are directed to guarantee religious freedom to all confessions⁶²⁰.

3 - Conclusions about the meaning of religion in Malta

Religion in Malta is not only a bond with past memory, tradition, the island's peculiar history, but it is also a guide for the present, through personal and community practice and through the shaping of national identity⁶²¹ thanks to the educational system, but it is also a guide for the future, even if perhaps in a new pluralistic view. However, the current situation in Malta, full of peculiarities, embodies a detachment from the concept of secularism adopted in western society⁶²². Basically, Malta

⁶¹⁸ P.L. GANADO, *Patrijotti hold protest over teaching of Islam in Church schools* (in <https://www.timesofmalta.com/articles/view/20170402/local/patrijotti-hold-protest-over-teaching-of-islam-in-church-schools.644249>).

⁶¹⁹ See *retro* p. 129.

⁶²⁰ Subsidiary Legislation 260.03 Prisons Regulations, 1st October, 1995, art. 40-45, Religious and moral assistance (in <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=9674&l=1>).

⁶²¹ For a sociologic reconstruction of the idea of identity Z. BAUMANN, *Intervista sull'identità*, a cura di B. Vecchi, Laterza, Roma-Bari, 2008; about juridic consequences G. PINO, *Identità personale, identità religiosa e libertà individuali*, in *Quaderni di diritto e politica ecclesiastica*, 1/2008, pp. 119-151. About Maltese religious identity A. ABELA, *Shaping a National Identity*, in *International Journal of Sociology*, 35/4, 2006, pp. 22-25; D.A. GADZDECKA, *Rights, Religious Pluralism and the Recognition of difference: off the Scales of Justice*, Routledge, London-New York, 2015, pp. 59-60.

⁶²² About the birth of secularism in Europe: H. LÜBBE, *La secolarizzazione. Storia e analisi di un concetto*, Freiburg-München, 1965, ed. it by P. Pioppi, il Mulino, Bologna, 1970, p. 19;



signifies a strong civil recognition of religious principles in a modern formal constitution, in a period when all the pluralistic countries try to lighten any residual religious content from their legal systems, in order to allow for coexistence in the absence of contrasts that are ideologically aimed. It appears that Malta is an ancient State that derives its authority from God, or a paternalistic and ethic State, and not a modern, democratic and secularist State, which founds its legitimization not only by the equal political participation of all citizens, but also an open and neutral space for multicultural dialogue⁶²³. Malta would appear as a fundamentalist State, as a “subtle theocracy”⁶²⁴, anchored to the medieval theological myths, in which religious reason replaces the public reason who only can satisfies all citizen needs⁶²⁵. The Maltese political class still feels that it is a categorical imperative to align political choices to the religious beliefs of the majority of the country’s citizens. However, the weight behind the numeric criterion of the majority is still too strong. We live the time in which individuals use religion as an identification of the stability of their identity, be it ethnic or

G. PRETEROSS, *Prefazione a E.W. BÖCKENFÖRDE, Diritto e secolarizzazione. Dallo Stato moderno all’Europa unita*, Laterza, Bari, 2007, pp. VI-VII; **W. MÜLLER**, *La grande secolarizzazione e il tramonto della Chiesa dell’Impero*, in **W. MÜLLER, J. BECKMANN, L. COGNET, P.J. CORISH, O. KÖHLER, H. RAAB, B. SCHNEIDER, B. STASIEWSKY**, *La Chiesa nell’epoca dell’Assolutismo e dell’Illuminismo. Storia della Chiesa*, vol. VII, ed. J. Jedin, Prefazione **L. MEZZADRI**, Jaca Book, Milano, 1972, new ed. 2007, pp. 527-590. Alcuni cenni al criterio della maggioranza, superato dalle pronunce della Corte Costituzionale italiana 925/1988 e 440/1995, in **D. LOPRIENO**, *La libertà religiosa*, Giuffrè, Milano, 2009, pp. 153-154. About the italian doctrine of secularism: **C. CARDIA**, voce *Stato laico*, in *Enciclopedia del Diritto*, vol. XLIII, Giuffrè, Milano, 1990, p. 874 ss.; **M. VENTURA**, *La laicità dell’Unione europea. Diritti, mercato, religione*, Giappichelli, Torino, 2001, pp. 106-107; **O. FUMAGALLI CARULLI**, *A Cesare ciò che è di Cesare, a Dio ciò che è di Dio*, Vita e Pensiero, Milano, 2006; **A. RIGOBELLO**, *Laicità e secolarizzazione*, in **AA.VV.**, *Lessico della laicità*, a cura di G. Dalla Torre, Studium, Roma, 2007, p. 197 ss.; **G. DALLA TORRE**, *Metamorfosi della laicità*, in **AA.VV.**, *Laicità e relativismo nella società post-secolare*, a cura di S. Zamagni, A. Guarneri, il Mulino, Bologna, 2009, p. 143 ss.; **G. FELICIANI**, *La laicità dello Stato negli insegnamenti di Benedetto XVI*, in **AA.VV.**, *Aequitas sive Deus, Studi in onore di Rinaldo Bertolino*, vol. I, Giappichelli, Torino, 2011, p. 239 ss.; **P. CAVANA**, *Laicità e libertà religiosa nella giurisprudenza della Corte di Strasburgo*, in *Res publica*, vol. 8, 2014, pp. 87-110; **A. FUCCILLO**, *Esercizi di laicità interculturale e pluralismo religioso*, Giappichelli, Torino, 2014.

⁶²³ **J. HABERMAS**, *Religion in the public sphere*, in *European Journal of Philosophy*, vol. 14, 2006, pp. 1-25, p. 5 and p. 24.

⁶²⁴ The expression is in **A. SCIBERRAS**, *Poll: Secular State or Subtle Theocracy? Article 2 of the Constitution of Malta?* (in <http://andrew-sciberras.blogspot.it/2009/08/poll-secular-state-or-subtle-theocracy.html>).

⁶²⁵ **J. RAWLS**, *The Idea of Public Reason Revisited*, in *The University of Chicago Law Review*, n. 3, 1997, p. 766: “In short, it concerns how the political relation is to be understood. Those who reject constitutional democracy with its criterion of reciprocity will of course reject the very idea of public reason”.



cultural, specifically in the contest of a forced migration due to war, poverty, or negation of the fundamental rights in their native countries. The construction of the modern State that occurs through the interruption of the bond between religion and violence - due to the modern virtue of tolerance - is perhaps a concept that should be reassessed as an attitude (tolerance) and as a practice (toleration). Today, pluralism is the new reality, which replaces tolerance⁶²⁶ and equality at the same time. This term embraces these concepts in an afterthought of the political choices that takes into account the different visions of the life, tightly connected to a religious option or a belief. However, it is quite evident that religion cannot be ousted from political discourse, due to its important role in a citizen's private life, sometimes also a greater motivation to participate in civic life (electoral battles on family issues or bioethics), and limiting religion to the inner courts could be dangerously short-sighted. Religion is a very human experience and contributes to the birth of a personal and collective conscience, and as a result the birth of a civil, complete and pacific living.

We should also note that Maltese society is developing, like many others in the Western world, leaving behind a recent fundamentalist age, and now trying to update a rather anachronistic legislation, in the pursuit of a balance between Catholic traditions and new pluralistic needs. In conclusion, divorce and the reform of vilification of religion are, for example, the mark of a new modern country ready to now accept the secularist influence, in which the meaning of religion is opening, not only, to traditional religious thoughts, but also all kind of beliefs, not strictly connected to a church. Malta offers protection to these beliefs based on human rights. Proof of the balance that has been reached today is evident in the lack of important leading cases regarding religious issues, in internal Courts as well as in front of the European Court of Human Rights, with the exception of the support to Italy in the famous matter of the crucifix - deeming the crucifix to be a symbol of European identity and heritage. It is quite likely that the reason behind this balance is found in what the Acts of Apostles say about the Maltese population, defining these people as having a "rare humanity" and "extraordinary kindness", and this quality is wonderfully expressed in the current work of the Archdioceses. I believe that thanks to some corrections to the Constitution, the great limit is the art. 2, the Maltese legal system can reach a perfect fusion of different cultural

⁶²⁶ "Lo Stato moderno non deve conoscere più tolleranza, ma solo libertà": **F. RUFFINI**, *La libertà religiosa. Storia dell'idea (1901)*, Feltrinelli, Milano, 1967, p. 11; for a modern reflection about tolerance: **M. WALZER**, *Sulla tolleranza*, Laterza, Roma-Bari, 1998; **M. D'ARIENZO**, *Actualité de la tolérance*, in *Revue d'éthique et de théologie morale, Le Supplément*, n. 227, 2003, p. 103 ss.



components. The country could still remain anchored to its origins and identity, yet without appearing as a legacy of the ancient *Respublica sub Deo* and the unique experience of *jus commune*.

ABSTRACT: The meaning of religion in Malta is strictly connected to the peculiar confessional setting of his legal order. At the base of this setting there is the art. 2 of the Constitution which confers only to the catholic church the role of country's moral guide. But despite the anachronistic nature of this norm, the republic of Malta is opening to the reality of a balanced religious and cultural pluralism.