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The Universal Constitutionalism in an Age of Religious Diversity. Western Secularism Tested by "New" Cultural Conflicts *

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1 - Introduction

Under the pressing process of immigration, in recent years many Western constitutional democracies have moved from a number of creeds sharing, more or less, a common Christian background, to today's variety of different religions, ethnicities and cultures. These legal systems have now to deal with an era of unprecedented religious diversity producing paradoxes that stress the issue of secularism. On one hand, the proliferation of different *nomoi* groups¹, brought by the mighty flux of migration, increases the cultural and religious pluralism. On the other, it raises widespread demands for recognition of religious organizations and relative precepts in the public space. We are in other words witnessing the deconstruction of traditional Western "religious uniformity"².

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¹ As Ayelet Shachar calls them, **A. SHACHAR**, *The puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority*, in *Harvard Civil Rights – Civil liberties Law Review*, 2000, n. 35, p. 394.

² **N. COLAIANNI**, *Eguaglianza e diversità culturali e religiose. Un percorso costituzionale*, il Mulino, Bologna, 2006, p. 205 (my translation).



At the same time, the phenomenon of globalisation is leading “to an increasing blurring of the line between the public sphere and the private sphere”³. Religious creeds are becoming more and more “deprivatised”, in a sense, seeking a greatly increased role in the public space as well as the political arena, in the other. As a result, the reconciliation of constitutionalism and religion through secularism is becoming increasingly difficult and, at times, harshly contested. The debate about the presence of religious signs (crucifix, headscarf, *niqab*, *kirpan* etc.)⁴ and places of worship in public spaces, including urban spaces⁵, are clear examples of that. In many Western Countries – like Canada, US, Italy, Spain, Switzerland, Germany, Holland, Denmark, Greece and so on – this debate has become a target of bitter political criticism⁶ and, after the 9/11 World Trade Center tragedy, deep popular resentment⁷.

³ **S. MANCINI**, *The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty*, in *European Constitutional Law Review*, 2010, n. 6., p. 7.

⁴ See, among many others, **C. CARDIA**, *Identità religiosa e culturale europea. La questione del crocefisso*, Allemandi & C., Torino, 2010; **I. RORIVE**, *Religious Symbols in the Public Space: In Search of a European Answer*, *Cardozo Law Review*, 2009, n. 6, p. 2669; **M. HILL**, **R. SANDBERG**, *Is Nothing Sacred? Clashing Symbols in a Secular World*, in *Public Law*, 2007, p. 503.

⁵ For example, a controversy about the construction of Minarets was subject to legal and political controversy in Switzerland during the 2000s. In a November 2009 referendum, a constitutional amendment banning the construction of new minarets was approved by 57.5% of the participating voters. Only four of the 26 Swiss cantons, mostly in the French-speaking part of Switzerland, opposed the initiative. This referendum originates from action on 1 May 2007, when a group of right of centre politicians mainly from the Swiss People's Party and the Federal Democratic Union, the Egerkinger Komitee, launched a federal popular initiative that sought a constitutional ban on minarets.

⁶ See, among many others, **S. MANCINI**, *Il potere dei simboli, i simboli del potere. Laicità e religione alla prova del pluralismo*, CEDAM, Padova, 2008.

⁷ Many know about the plan to build a Muslim Community Centre two blocks away from Ground Zero in New York. In this case, on August 2010 several hundred people protested for weeks about the plan, claiming to “Stop Islamisation of America”. After skirting the controversy for weeks, President Barack Obama said that a nation built on religious freedom must allow it. Obama told an intently listening crowd gathered at the White House Friday 13 August, 2010, observing the Islamic holy month of Ramadan: “as a citizen, and as President, I believe that Muslims have the same right to practice their religion as everyone else in this country”; “that includes the right to build a place of worship and a community centre on private property in lower Manhattan, in accordance with local laws and ordinances”, he said. (See **B. OBAMA**, *Ramadan at White House Iftar Dinner*, in www.whitehouse.gov, August 13, 2010. See **THE ECONOMIST**, *Hallowed ground. A Row Over a Planned Muslim Community Centre*, June 10th, 2010). Nonetheless, according to some polls over half of American people do not want an Islamic Centre to be built near Ground Zero.



Although the relationship between religious and secular rules varies a great deal from one country to another, all secularised democracies and relative systems of relationship State-Churches have led to those controversies: either the “integral – rigid – secularism” models (as stated in France); the multicultural ones (such as the Canadian system); or “the confessional secular model, which incorporates elements of the polity’s mainstream majority religion, and projects them as part of the polity’s constitutional secularism (e.g., Italy’s or Bavaria’s adoption of the crucifix as a secular symbol of national identity)”⁸. Under the persisting phenomena of immigration and globalization, all these models seem now to have serious shortcomings. This explains the intensive process of updating the (secular) law in this matter. In 2001, for example, the Portuguese Parliament approved a new Act regulating freedom of religion⁹. France has just redefined its relation, including the financial aspects, with Islam¹⁰. In 2006 Spain implemented new laws for financing religious creeds¹¹. Norway has hanged its ecclesiastical regime, in which there is

See **S.G. STOLBERG**, *With Remarks on Mosque, Obama Enters Risky Debate*, *The New York Time*, 2010, 14 August.

⁸ **S. MANCINI, M. ROSENFELD**, *Unveiling the Limits of Tolerance: Comparing the Treatment of Majority and Minority Religious Symbols in the Public Sphere*, in *Benjamin N. Cardozo School of Law Working Paper*, 2010, n. 309, p. 3. More specifically, Susanna Mancini and Michel Rosenfeld affirm that “under current constitutional practice there are five different models for managing the relationship between the state and religion. These are: 1) the militant secularist model bent on keeping religion completely out of the public sphere (e.g., French and Turkish “*laïcité*”); 2) the agnostic secularist model which seeks to maintain a neutral stance among religions but does not shy away from favouring religion over atheism and other non-religious perspectives (this is close to current American constitutional jurisprudence); 3) the confessional secular model, which incorporates elements of the polity’s mainstream majority religion, primarily for identitarian purposes, and projects them as part of the polity’s constitutional secularism rather than as inextricably linked to the country’s main religion (e.g., Italy’s or Bavaria’s adoption of the crucifix as a secular symbol of national identity); 4) the official religion with institutionalized tolerance for minority religions model (e.g. the United Kingdom, Scandinavian countries, Greece), and [5] the *millet* based model in which high priority is given to collective self-government by each religious community within the polity (e.g., Israel)” (*Ibidem*).

⁹ **A. TORRES GUTIÉRREZ**, *El derecho de libertad religiosa en Portugal*, Madrid, Editorial Dykinson, Madrid, 2010, pp. 212 ff., espec. pp. 224-236; **S. FERLITO**, *La legge portoghese di libertà religiosa*, in *Il Diritto Ecclesiastico*, 2003, n. 1, pp. 70 ff.

¹⁰ See the Programme vie politique, culturelle et associative. Mission: Administration générale et territoriale de l’Etat (in *www.finances.gouv.fr*).

¹¹ **M. BLANCO FERNÁNDEZ MARÍA**, *La financiación de las Confesiones religiosas en el Derecho español: régimen vigente y perspectiva de futuro*, IUSTEL, 2007, n. 13, pp. 12 ff.; **I. MARTÍN DÉGANO**, *Los sistemas de financiación de las Confesiones religiosas en España*, *Revista catalana de pret públic*, 2006, n. 33, pp. 113 ff.; **I.C. IBÁN**,



no longer an established Church¹². In Canada, after the 2006 Supreme Court's sentence about *Multani's* case¹³ – which dealt with freedom of religion guaranteed in the Canadian Charter of Rights and Freedoms¹⁴ – according to some polls up to 91% of Quebecers of all origins disagree with the Court's decision allowing the *kirpan* at school. As a consequence, the Quebec Government established a Co-Chairs Consultation Commission – made up of Gérard Bouchard¹⁵ and Charles Taylor¹⁶ – on “Accommodation Practices Related to Cultural Differences”¹⁷, which set up an original normative conception of secularism and religious integration. They called it “interculturalism”, significantly conceived as an alternative to the “traditional” Canadian multiculturalism¹⁸ based on the reasonable accommodation principle¹⁹.

These are clear demonstrations of the fact that many – and perhaps many important – legal instruments created for carrying out

Desamortización, confesionalidad, libertad religiosa. Una constante: el sistema de financiación de la Iglesia en España, in *Quaderni di diritto e politica ecclesiastica*, 2006, n. 1, pp. 83 ff.

¹² Besides, “the Norwegian Church will be allowed to elect its own leaders, and the ties between state and church will be loosened”; **E. GRAN**, *Norway's Loosens Church-State Bond*, *Humanist Network News*, 2008, 24th April.

¹³ *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6.

¹⁴ Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982, (U.K.) 1982, c. 11.

¹⁵ One of the leading Quebec sociologists.

¹⁶ As influential political philosophers, Taylor's essays on multiculturalism and the politics of recognition have in effect become central within the debates on multiculturalism and the politics of recognition.

¹⁷ See Consultation Commission on *Accommodation Practices Related to Cultural Differences*, *Building the Future: A Time for reconciliation*, 2008. The full Report is available both in French and in English at www.accommodements.qc.ca/. See also **G. ROCHER**, *Rapport Bouchard-Taylor. Une majorité trop minoritaire?*, in *Le Devoir*, 2008, p. A 7.

¹⁸ **L.B. TREMBLAY**, *The Bouchard-Taylor Report on Cultural and Religious Accommodation: Multiculturalism by Any Other Name?*, in *EUI Working Paper LAW*, 2009, n. 18, p. 6. See also **C. TAYLOR**, *Multiculturalisme: Différence et démocratie*, Flammarion, Paris, 2009.

¹⁹ For the basic comment over the principle of “accommodation” see **M.C NUSSBAUM**, *The attack on Equal respect*, *Journal of Human Rights and Capabilities*, 2007, n. 8, pp. 337-357; **D. LOPRIENO**, **S. GAMBINO**, *L'obbligo di “accomodamento ragionevole” nel sistema multiculturale canadese*, in G. Rolla (ed.), *L'apporto della Corte suprema canadese alla determinazione dei caratteri dell'ordinamento costituzionale canadese*, Giuffrè, Milano, 2008, p. 217; **S. GAMBINO**, *Laicità dello Stato. La ricerca di un dialogo difficile ma necessario: le opportunità offerte dalle esperienze costituzionali comparate e dalle relative giurisprudenze*, in N. Fiorita, D. Loprieno (eds.), *La libertà di manifestazione del pensiero e la libertà religiosa nelle società multiculturali*, Florence University Press, Firenze, 2009, p. 21.



secularism in “monocultural” societies (where there was at least a consensus over the basic constitutional law) do not meet any more the needs of a changed Western multicultural community; precisely because those instruments have been clearly tailored on traditional creeds’ requirements and, therefore, they are not able to meet the demands of current age of diversity.

After brief considerations about the freedom of religion principle, deeply connected with the conceptions of *separation* and *collaboration* between the secular State and Churches (par. 2), in this article I will analyse three case-studies, France (par. 3), Canada (par. 4) and Italy (par. 5). In particular, I will point out to some specific legal approaches, namely the French *laïcité* as well as the *dual-system* and *joint governance* approaches and relative instruments which have traditionally carried out secularism in France, Italy and Canada. Examples of these instruments are *le droit commun* (France), the ecclesiastical law (Italy) and arbitral tribunals (Canada) that, especially in family law, allow disputes to be arbitrated using religious jurisdictions.

In an increasingly globalised perspective²⁰, incorporation of cultural minority groups into mainstream political processes remains crucial for liberal, democratic and secularised democracies²¹. Yet, as in the past, even in a contemporary constitutional system, questions related to secularism seem to consist in the imperative balance between the *universal* need for a peaceful coexistence and the equal protection of *specific* religious-cultural rights: not only the rights of a group to be *different*, but also the individual rights *within* these groups, considering that individual rights include equality for *all* before the (secular) law. From here stems the more pressing tension – or dilemma – between “unity” and “diversity”²².

In addition, as opposed to the past era, what the current democracies are facing is the lack of overlapping consensus over the basic constitutional laws: namely the meaning and the scope of freedom of religion, secularism, the separation Church-State, equal treatment and the rule of law. Because individuals often come to adopt their basic values by very different ways, the understandings of the nature, scope and force of such laws are likely to be affected by competing and,

²⁰ Z. BAUMAN, *Does Ethics Have a Chance in a World of Consumer?*, Harvard University Press, Cambridge-Mass, 2008, pp. 150 ff.

²¹ W. KYMLICKA, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Clarendon Press, Oxford, 1995, p. 50.

²² S. BENHABIB, *The Claims of Culture: Equality and Diversity in the Global Era*, Princeton University Press, Princeton, 2002, esp. pp. 105 ff.



therefore, contested fundamental reasons and worldviews²³. This poses a crucial question: can the “machinery” of contemporary constitutionalism recognise and accommodate cultural-religious diversities²⁴?

As I will try to demonstrate, that tension may be resolved by establishing clear lines between nonnegotiable constitutional rights and practices that may be governed by different – religious-cultural-ethnic – *nomoi* groups. This also involves clear definitions of (secular-neutral) institutions and rules that everybody is (and can be) expected to share, preventing constitutional democracies from the risk of sectarian social segmentation as well as the “refeudalization of law”²⁵ (conclusion).

2 - Relation-Collaboration between the State and Churches in Constitutional Democracies

Historically speaking, in the context of liberal constitutionalism two kinds of liberty have been affirmed. From the individual’s point of view, the “freedom of religion”. From the State’s point of view, the “freedom from religion”. These two liberties produced two kinds of separations. The former – freedom of religion – has become a corollary of the separation of creed/s from political power, Church-es from State. The latter – freedom from religion – supported the separation of secular law from Churches²⁶. In any case, freedom of religion must be guaranteed *within* the territory of the State and *from* the authorities of the State, without any religious discrimination. Hence, these two liberties involve two key elements of a liberal constitutionalism system: first, the freedom of conscience and religion; second, the separation between States and Churches and, *viceversa*, Churches and States, which implies the *autonomy* of both spheres.

As basic egalitarian commitments, this also explains the reason why those two liberties, and the relative separations, must be recognised in all liberal constitutional systems. Although the relations between religious organizations and secular rules vary from one

²³ W. KYMLICKA, above n. 21, p. 128.

²⁴ J. TULLY, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge University Press, Cambridge, 1995, p. 99.

²⁵ A. SUPIOT, *Homo juridicus. Essai sur la fonction anthropologique du Droit*, Édition du Seuil, Paris, 2005, p. 54.

²⁶ L. FERRAJOLI, *Principia iuris. Teoria del diritto e della democrazia*, Laterza, Roma-Bari, 2007, vol. 2, p. 316.



democracy to another²⁷, the freedom of religion is guaranteed in an integration model, like the French *laïcité de combat*, in multicultural systems, as in Canada, in the confessional secular model, like in Italy, and in countries with the official or dominant-majority Church, such as the United Kingdom, Scandinavian States and Greece. In this sense, what really changes is the degree of influence of religious rules over the State (secular)'s law.

The State may be more or less receptive to religious cultures' requests for legal control over "their internal affairs"; so the number of specific set of rules regulating the relationship State-Churches may be more or less remarkable. We are just referring to what, in Italian and English juridical language, is called ecclesiastical law, which is in effect a result of relations between the State and the main Churches (Catholicism in Italy and Spain, Anglicanism in England, Orthodoxy in Greece), as well as between the State and minor religious denominations. But, as mentioned before, since the liberal constitutionalism implies autonomy of religious groups from secular power – for examples, the articles 7 of Italian Constitution declares that State and the Catholic Church are independent and sovereign within their own spheres²⁸; while article 8 affirms that denominations other than Catholicism have the right of self-organisation –, we would better consider this set of rules as a result of *collaboration* between the secular institutions and such creeds. In this manner, Silvio Ferrari – an eminent Italian scholar on ecclesiastical law – affirms that, considering this point of view, every system of relationships State-creeds may well be analysed in light of the paradigm of *collaborazione selettiva* (selective collaboration)²⁹.

²⁷ S.C. VAN BIJSTERVELD, *Church and State in Western Europe and in the United State: Principles and Perspectives*, in *Brigham Young University Law Review*, 2000, p. 989.

²⁸ G. CATALANO, *Sovranità dello Stato e autonomia della Chiesa nella Costituzione repubblicana*, Giuffrè, Milano, 1974, p. 14; V. TOZZI, *Società multiculturale, autonomia confessionale e questione della sovranità*, in *Il Diritto ecclesiastico*, 2001, n. 1, p. 124; S. DOMIANELLO, *Le garanzie di laicità civile e libertà religiosa, nel matrimonio, al bivio: fidarsi di più della rischiosa attuazione degli antichi diritti di democrazia o delle promesse di un nuovo diritto convenzionale di "classe"*, in A. Fuccillo (ed.), *Multireligiosità e reazione giuridica*, Giappichelli, Torino, 2008, p. 235.

²⁹ S. FERRARI, *Lo statuto giuridico dell'Islam in Europa occidentale*, in S. Ferrari (ed.), *Islam e Europa. I simboli religiosi nei diritti del Vecchio continente*, Carocci, Roma, 2005, Part I, p. 30. See also F. MARGIOTTA BROGLIO, *Il fenomeno religioso nel sistema giuridico dell'Unione Europea*, in F. MARGIOTTA BROGLIO, C. MIRABELLI, F. ONIDA, *Religioni e sistemi giuridici. Introduzione al diritto ecclesiastico comparato*, il Mulino, Bologna, 2000, p. 236.



Such collaboration can range from a minimum to a maximum: in some States it is very intensive, so is the influence of religious institutions over secular law. This becomes evident when analysing the specific legal instruments that aim at carrying out the collaboration with religious *nomoi* groups in particular matter, such as family law.

In Italy, for example, there are *Patti lateranensi* (Lateran pacts), stated in the Constitution in order to regulate the collaboration-relation between the State and the Catholic Church³⁰; but there are also the *Intese* (agreements or mini agreements) regulating the collaboration between the State and denominations other than Catholicism³¹. It is interesting to note that the article 7 of the Italian Constitution states that amendments to Lateran pacts must be “accepted by both parties” (State and Catholic Church). Similarly, the article 8 concerning denominations other than Catholicism affirms that their relations with the State are regulated by law, based on agreements “with their respective [religious] representatives”. As some scholars have demonstrated³², in a political and socio-cultural context like this, there is room for a sort of “ecclesiastical citizenship”³³, which strongly affects the definition of liberty of religious conscience that the secular law implies. To simplify, in this case the religious liberty may be directly influenced by “holy writs”, or religious rules, in the ecclesiastical sense of the term.

Instead, in France normally the State’s law is not affected by religious precepts. Or, at least, their influence over the secular law is very low, principally because the citizenship (*la citoyenneté française*) is tailored on national identity (*les principes fondateurs de la République*) implying the national egalitarian ethos. This aims at integrating the diversity in the Republic’s general principles, called *droit commun*. From here stems the “integral” or “rigid secularism”, as Charles Taylor and

³⁰ Significantly, the 1984 Agreement between the Holy See and the Italian Republic, which modifies to the 1929 Lateran Concordat, “reaffirm that the State and the Catholic Church are each in their own way independent and sovereign and committed to this principle in all their mutual relations and to reciprocal collaboration for the promotion of man and the good of the Country” (article 1).

³¹ Literally, article 8 of Italian Constitution affirms that “Their [Denominations other than Catholicism] relations with the State are regulated by law, based on agreements [called *intese*] with their respective representatives”.

³² See in particular N. COLAIANNI, *Soggettività religiosa e diritto*, in *Diritto romano attuale*, 2002, n. 7, pp. 129-152; ID., *Diversità religiose e mutamenti sociali*, in G.B. Varnier (ed.), *Il nuovo volto del diritto ecclesiastico italiano*, Rubbettino, Soveria Mannelli, 2004, p. 154.

³³ For this conception see E. FRIEDBERG, *Trattato del diritto ecclesiastico cattolico ed evangelico*, in F. Ruffini (ed.), Fratelli Bocca Editori, Torino, 1893, p. 381; C. MIRABELLI, *L'appartenenza confessionale. Contributo allo studio delle persone fisiche nel diritto ecclesiastico italiano*, CEDAM, Padova, 1975, p. 232.



G rard Bouchard (*inter alia*) call it, which tends to relegate religious differences to the background, in the private sphere. Nevertheless, one must stress that the model of *laicit   la fran aise* does not imply that in France there is no collaboration between the State and religious *nomoi* groups. That's a simple caricature or, at least, a truncated version of the French secularism. In education, for instance, many religious institutions are sponsored by the State: namely, the State normally supports, financially speaking, religious schools more than Italian or German Governments do. How can this be explained? In France this is largely due to the fact that, as *nomoi* groups, religious organizations are very important for both social stability and political legitimacy: their role remains crucial for the liberal-democratic State, in the French sense of the expression. But this also shows that, even if less marked than in Italy, Germany, Greece or Spain, in France a sort of collaboration – even indirect – between the State and religious denominations has taken place from time to time.

In other words, in France there is nothing comparable to the Italian or Greek ecclesiastical law. But, this does not mean that there are no legal instruments fulfilling the collaboration. Rather, it states that if in Italy the collaboration State-Churches is performed through the ecclesiastical law, in the Hexagon it is carried out by the general principle of secular law, *le droit commun*, which includes rights concerning the freedom of thought, conscience and religion, in the French sense of the terms. That is to say, rights affirming freedom to change religion or belief and to practice the relative observances, either alone or in community with others.

In the light of these last considerations one may argue that even in the Canadian context the practical sense of freedom of religion could be (we are not saying "is") influenced by the religious organizations and their rules. For example, in the 2006 famous *Multani's* decision³⁴, the Supreme Court held that the banning of the *kirpan* in a school environment is against Canada's Charter of Rights and Freedoms as well as in contrast with the principle of reasonable accommodation. This, on the other hand, implies the right for everybody to manifest their religion, which includes wearing a religious symbol. In this sense, an adherent to the Sikh creed has the right to wear a *kirpan*; precisely because "To be a Sikh is to wear a kirpan". As ten years before a US Ohio Court had similarly affirmed, *kirpan* remains a religious symbol

³⁴ Supreme Court Of Canada, *Multani v. Commission scolaire Marguerite-Bourgeois*, [2006] 1 S.C.R. 256, 2006 SCC 6, par. 79.



that manifests a religious belonging: for the Sikh precepts, in no way could it be considered or adopted for use as a weapon³⁵.

From a different perspective, however, one could say that, in practice either the Canadian Judges or the US Ohio Court allowed some people to implement the Sikh rule in the public sphere. More specifically, they allowed people's religious behaviours, governed by the Sikh rules, in the public space, which is quite the same thing. Yet, this different point of view shows us that, compared with other constitutional systems, in Canada and in US³⁶ what really changes are specific legal instruments fulfilling the collaboration State-creeds. So if in Italy one has the *Intese* and Lateran Pacts, and in France there is *le droit commun* stated by the *loi* of Parliament, in Canada and in US the collaboration with the religious *nomoi* groups is generally made on a case-by-case basis and by the Tribunals – and relative jurisprudence –, which in fact play an important role in accommodating the diversities. Here is an approach structured by a deliberative and reflexive procedure, where the religious and cultural differences “must be freely displayed in public life”, in accordance with the model of “open secularism”³⁷. This prevents marginalization that “can lead to fragmentation favourable to the formation of stereotypes and fundamentalisms: the State aims at protecting “rights and freedoms and not, as in France, a constitutional principle and an identity marker to be defended”. The “neutrality and separation of the State and the Church are not perceived as ends in themselves but as means to attain the fundamental twofold objective of respect for moral equality and freedom of conscience”³⁸.

Now, if all of this is true, why in the Western constitutionalism systems must the State collaborate with creeds and their institutions? For historical reasons, some scholars may answer. More precisely, for

³⁵ Court of Appeals, *State of Ohio vs Dr. Harjinder Singh*, Judge J. Painter, 1997.

³⁶ Where there is what Mancini and Rosenfeld call the “agnostic secularist model which seeks to maintain a neutral stance among religions but does not shy away from favoring religion over atheism and other non-religious perspectives (this is close to current American constitutional jurisprudence)”. See S. MANCINI, M. ROSENFELD, *Unveiling the Limits of Tolerance* above n. 8, p. 3.

³⁷ As BOUCHARD-TAYLOR Commission called it, above n. 17, pp. 140-141.

³⁸ ID. As L.B. TREMBLAY notes (above n. 18, pp. 21-22, note 69), open secularism has much in common with the notion of secularism elaborated by Canadian Supreme Court in *Chamberlain c. Surrey School District* No. 36, [2002] 4 S.C.R. 710. In this case the Court argues that the concept of “strict secularism”, as used in a 19th century statute, “reflects the fact that Canada is a diverse and multicultural society”. Instead, nowadays the secularism must ensure that each group is given as much recognition as it can consistently demand while giving the same recognition to others” (par. 19).



historicization process of some values, including the religion rules codified in the State (secular)'s law³⁹. This view is in fact more or less supported by some thinkers⁴⁰. Nevertheless, I believe that there is another reason – perhaps more important –, deeply related to the human rights discourse, in particular to the right of religious liberty, in the individual and collective sense of the expression. A right that includes the freedom to manifest, either alone or in community with others and in public or in private, religions or beliefs, their teachings, practices and observances.

Indeed, one must underline that in the liberal constitutionalism context the individual rights and the cultural rights are inextricably linked to each other. This upholds the rights of people to live in freedom, to hold any faith or none, to change religion, and to enjoy freedom of expression. This, by any fair definition, includes freedom to dispute with the tenets of any religion. It protects people, not religions or any other set of creeds, for it is not systematically possible to protect religions or their followers from offence without infringing the right of individuals. It means that the collaboration between secular constitutional democracies and Churches must face limits, in order to prevent public authorities from bringing in secular law religious rules that infringe human rights – including a person's rights within the religious community – and cause discriminations towards minority groups⁴¹.

In other terms, the State collaborates with these kinds of *nomoi* groups because they are important for individuals in developing their

³⁹ **ID.**, p. 126: "In short, these values could serve as the fundament of a renewed ethic of collective life. A caution is in order. The promotion of common values must in no way infringe the necessary diversity of individuals and groups. What we must bear in mind are a few historicized values that tally with the singular experience of the key collective interveners or ethnic groups. At the same time, this restriction ensures that common values will be more than abstract ideals or empty conventions, that they will, to the contrary, have a direct relationship to thought and action, and that they will inspire commitment and lead to social projects".

⁴⁰ See, for example, **L.B. TREMBLAY**, above n. 18, p. 19, who admits the historicization thesis, but he sees in it two difficulties: 1) "it gives us no reason to assume that a society committed to multiculturalism cannot have such common values. Since they depend on historicization processes, their existence and specific content are matters of fact. So, it is an empirical question whether such common values actually exist in a multicultural society"; 2) "the historicization thesis gives us no reason to assume that the collective identity of a society committed to interculturalism is substantively any thicker than the one we may find in a society committed to multiculturalism".

⁴¹ **R. RUSTON**, *Theologians, Humanists and Natural Rights*, in M. Hill (ed.), *Religious Liberty and Human Rights*, University of Wales Press, Cardiff, 2002, p. 14.



personality and identity. This also implies that these religious groups are not important *per se*, unless one wants to support the organic conceptions of the Nation-State, based on dominant culture or the largest national group, accepting its language, its symbols and, why not, a daily dose of discrimination towards denominations other than the dominant ones. For these reasons, secular authorities must pay attention to the crucial role played by legal instruments carrying out that collaboration.

From time to time, these instruments have been, more or less, able to create not only conditions for a proper “interaction” – an “overlapping consensus”, in John Rawls’ words⁴² – between religious groups and public authorities, but also an acceptable balance between universal principles of Western liberal constitutionalism and ethnic-cultural-religious differences, avoiding sectarian social segmentations. These very legal instruments have in other words been able to ensure a proper balance between right of religious-cultural community to self-organisation and the equal protection of (individual) human rights. Nowadays these same legal instruments seem instead to play the role of a “*re nudo*”. They do not work as well as in the past, precisely because immigration and today's national multicultural societies see masses of people that come to western countries with their religious identities and, sometimes, with a global perspective. Immigrants aim at exercising the rights of freedom of religion, as guaranteed by the constitutional legal systems, but some of them often want to reshape these systems too on the basis of their religious-cultural principles. This explains how the current age of diversity has contributed to underline the link between the State and some “new” religious-cultural communities – of which immigrants are part –, stressing at the same time the issue of secularism.

In this respect it is interesting to note that, due to increasing levels of immigration from the 1970s to the present, the proportion of “non-Judeo-Christian” faiths grew about three to fourfold, changing the religious landscape of many important western countries, and increasing their religious market share. Even when “new” religious creeds are not “increasingly numerous” as much as often portrayed, they remain “increasingly visible”⁴³: the fervent religious behaviour of

⁴² A notion stated especially in his *Political Liberalism*, New York, Columbia University Press, 1996, pp. 133-168. See also **S. MAFFETTONE**, *Introduzione a Rawls*, Laterza, Roma-Bari, 2010, pp. 111-132.

⁴³ **R.S. WARNER**, *Approaching religious Diversity: Barriers, Byways, and Beginnings*, in *Sociology of Religion*, 1997, p. 193.



their adherents creates an impression of prominence beyond the actual size of these groups.

In any case, this shows that recent changes in immigration patterns have increased diversity, which complicates the century old tension between universal principles – launched by the English (1689), American (1787) and French (1789) Revolutions – and cultural-religious belongings. This is clearer when underlining the fact that in today's religious context the traditional legal instruments carrying out the conception of secularism have lost much of their descriptive abilities, as well as the capability to govern the demands of "new" multicultural societies. In particular, they do not meet Islamic requirements, simply because they do not take into account the specific – theological and historical – characteristics of Muslim creeds.

Moreover, the current processes of immigration and globalization are showing that there is no longer an overlapping consensus over the traditional constitutional "values": namely the meaning and the scope of freedom of religion, the equal treatment, the universality of laws, the rule of law, the democracy, the State neutrality and the separation of Church and the State. This is because people, as well as "new" *nomoi* groups, tend "to adopt these values by often very different routes": their nature, scope and force are likely to be affected by competing and contested fundamental reasons. As a result, many Western democracies are now facing increasing difficulties in reconciling "liberal constitutionalism" with secularism⁴⁴.

This is evident in those States which continue to appeal to Christian "culture" as part of national identity. For several reasons, though, this tension is even clearer in legal systems adhering to a rigid secularism, based on a "stricter" separation between the State and Churches, as the recent debate in France on the principle of *laïcité* has clearly shown⁴⁵. And it is not surprising that this debate has been primarily raised by the "question" of Islam(s)⁴⁶.

⁴⁴ S. FERRARI, *Individual Religious Freedom and National Security in Europe After September 11*, in *Brigham Young University Law Review*, 2004, 2, p. 377.

⁴⁵ P. JENKINS, *God's Continent: Christianity, Islam and Europe's Religious Crisis*, Oxford University Press, New York, 2007, pp. 41 ff.; M.D. REED, *Western Democracy and Islamic Tradition: The Application of Sharia in a Modern World*, in *American University International Law Review*, 2004, 19, p. 485; H. PENA-RUIZ, *Dieu et Marianne. Philosophie de la laïcité*, PUF, Paris, 2005, pp. 127 ff.; G. KEPEL, *Les banlieues de l'Islam. Naissance d'une religion en France*, Seuil, Paris, 1991; See also G. MACRI, *Islam. Rappresentanza degli interessi religiosi e diritto comune europeo*, in V. Tozzi, G. Macrì (eds.), *Europa e Islam. Ridiscutere i fondamenti delle libertà religiose*, Rubbettino, Soveria Mannelli, 2009, pp. 46-47; G. Robbers (ed.), *State and Church in the European Union*, Nomos, Baden-



3 - The *laïcité à la française* Tested by a Deprivatised Religious Process

Closely linked to the concept of citizenship, in France the principle of *laïcité* indicates not only a historical process of emancipation of the State's institutions from religious authorities, but also a moral-pedagogical goals, "actively pursued by the State and fostered by the French political-philosophical tradition"⁴⁷. This explains the role of public schools, historically conceived as an important place to set about the values endorsing the *République's* general principles, including those referring to the French secularism.

Since the 1789 Revolution and, above all, the period of Third Republic, this principle of *laïcité* has in fact been used as a "machinery of governance"⁴⁸; as a way for promoting the ideal of French national-republican tradition, deeply connected with some universal notions, such as *citoyenneté* and human rights⁴⁹. This is clearly stated in the 1789 *Declaration des droit de l'homme et du citoyen*, in the 1958 Constitution, in the 1905 law⁵⁰ on "separation" of the State and Churches⁵¹, and in the Preamble of the 1946 Constitution⁵². These are very important legal instruments capable of giving a solid character to the famous René Rémond's statement: since the Great Revolution, unable to ignore each other, the spheres of "religion and French nation have often opposed each other"⁵³. In this sense, the public school has been normally

Baden, 2005; B. Maréchal, S. Allevi, F. Dassetto, J. Nielsen (eds.), *Muslims in the Enlarged Europe: Religion and Society*, Brill, Leiden-Boston, 2003.

⁴⁶ Indeed, in France the proportion of people who regularly attend religious services has declined steadily in recent years. According to the latest European Social Survey (ESS) conducted in 2008 and 2009, over with over half of respondents never going to services. However this habit does not involve Muslims, who are most regular attenders among the French inhabitants polled in the ESS. See **THE ECONOMIST**, *Europe's irreligious. In which European countries are people least likely to attend religious services?*, August 9th 2010.

⁴⁷ **C. MANCINA**, *La laïcità al tempo della bioetica*, il Mulino, Bologna, 2009, p. 18.

⁴⁸ **H. PARIS**, *Communautarisme et laïcité*, in *Revue Politique et Parlementaire*, 2006, n. 108, p. 60.

⁴⁹ **E. ZOLLER**, *La Laïcité aux Etats-Unis ou la Séparation des Eglises et de l'Etat dans la Société Pluraliste*, in E. Zoller (ed.), *La Conception Américaine de la Laïcité*, Dalloz-Sirey, Paris, 2005, p. 4.

⁵⁰ Loi du 9 décembre 1905 concernant la séparation des Eglises et de l'Etat.

⁵¹ **B. BASDEVANT-GAUDEMET**, *Droit et religions en France*, in *Revue de droit international et de droit comparé*, 1998, n. 2, p. 341.

⁵² **J. ROBERT**, *Les fondements juridiques de la laïcité*, in *Revue Politique et Parlementaire*, 2006, n. 1, p. 7.

⁵³ **R. REMOND**, *Religion et société en Europe. Essai sur la sécularisation des sociétés européennes aux XIX^e et XX^e siècles (1789-1998)*, Seuil, Paris, 1998, p. 53.



regarded as an important tool for the national identity⁵⁴, whose affirmation is necessarily grounded on proper “training of *citoyen républicain*” (republican citizen)⁵⁵. One example of that is the debate over the presence of Islamic headscarf in public schools.

As Gerb Baumann says, “the French revolutionaries turned the cathedral of Paris into a Temple of reason, and the French state elite have kept reinventing this civil religion of One Reason for All. It is as if the French Republic, which replaced dynastic absolutism with the absolute value of citizenships, has declares ethnic and religious loyalties illegal for all time”⁵⁶. From here stems, for instance, the “confession of French national faith, written by the Minister of Education”⁵⁷, François Bayrou, and published in France’s most established newspaper, *Le Figaro*, on September 21, 1994⁵⁸: its purpose was in fact the decision that schoolgirls of Muslims faith must be barred from wearing headscarves at school.

This trend started in the late 1980s, when the question of (Islamic) religious symbols flowed into the Kherouaa’s case, issued by the State Council on of November 2, 1992, and, after that, into all circumstances underpinning the 2004 famous *Loi n° 2004-228, 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*. As one can easily argue from this title, enforcing the French secularism⁵⁹, the 2004 Act forbids to wear conspicuous religious symbols – which manifests a religious belonging – in public (i.e. government-operated) primary and secondary schools. This *Loi* is in fact an amendment to the French Code of education, which expands some principles affirmed in the existing law: mainly the freedom of conscience, separation of States and Churches, and the equal respect of all faiths and beliefs. These are principles that have to be understood in the light of French *laïcité* implying the “rigid” separation of State from religious activities. As Patrik Weil remarks, even the “1905 law of separation between Church and the State was built against the influence, indeed domination, of the

⁵⁴ G. GEY, *Free Will, Religious Liberty, and a Partial Defence of the French Approach to Religious Expression in Public Schools*, in *Houston Law Review*, 2005, n. 1, p. 18.

⁵⁵ T. JEANTET, *L'école et la laïcité*, in *Revue Politique et Parlementaire*, 2006, n. 1, pp. 29 ff.

⁵⁶ G. BAUMANN, *The Multicultural Riddle: Rethinking National, Ethnic and Religious Identities*, New York-London, Routledge, 1999, p. 51.

⁵⁷ G. BAUMANN, *The Multicultural Riddle*, p. 52.

⁵⁸ F. BAYROU, *Directive aux Chefs d'Établissement*, in *Le Figaro*, September 21st, 1994, p. 3.

⁵⁹ J. SAYAH, *La laïcité réaffirmée: la loi du 15 mars 2004*, in *Revue du droit public*, 2006, n. 4, pp. 922-927.



Catholic Church in public affairs. It was a victory for a majority of French citizens educated in the Catholic faith, but who wanted the Catholic Church to be put in its place, out of public education and public influence”⁶⁰.

Yet, since 1905, and especially in the last ten years, the French religious landscape has changed, increasing the diversity of creeds. Hence, in this new religious context, the principle of freedom of conscience it is often perceived as protecting “the individual against the intrusion of religious group. In fact, in the relationship between the individual, the religious group and the State, the latter appears in France as protecting the individual against any pressure of the religious group, as opposed to the U.S., where the individual relies more on the religious group as a protector against any intrusion of the State”⁶¹.

The 2004 Act, then, makes clear the peculiar feature of French strict secularism, by which the France State conveys and promotes the ideals of the *République* into civil society. Ideals codified in some legal instruments, such as those referring to citizenship and fundamental rights, including the fundamental and *sacro-sainte* right to freedom of thought, conscience and religion⁶². These legal instruments are in fact able to impart French constitutionalism system a specific “national identity”, which has been a significant factor in bringing on the *Great Revolution’s* values and relative juridical evolutions.

As the *Conseil constitutionnel* affirmed in the 2006 case, the “French constitutional identity” is based on the peculiar principles, such as equality in electoral matter (article 3 Const.), national language (article 2 Const.), the ban of discrimination (article 6 of *Declaration of the Rights of Man and of Citizens 1789*) and – last but not least – the principle of secularism (article 1 Const.)⁶³.

Moreover, as stated by the same Constitutional Council in the 2004 decision concerning the *Treaty* establishing a Constitution for Europe, the principle of *laïcité* “refuses to recognise rights to a set of persons on the basis of their religious, ethnic or cultural identity”. This principle is linked with the national egalitarian ethos, by which the French secular State treats all citizens equally, refusing to associate

⁶⁰ P. WEIL, *Why the French laïcité Is Liberal*, in *Cardoso Law Review*, 2009, n. 6, p. 2704.

⁶¹ P. WEIL, *Why the French laïcité Is Liberal*, p. 2705.

⁶² B. MATHIEU, *La liberté d’expression en France: de la protection constitutionnelle aux menaces législatives*, in *Revue de droit public*, 2007, n. 1, p. 236.

⁶³ Constitutional Council, Decision n. 2006-543 del 30 novembre 2006, cons. 6 (in *www.conseilconstitutionnel.fr*).



them in cultural or religious categories⁶⁴. This also explains the fact that it is forbidden by law to collect statistics referring to “racial or ethnic origin”. Hence, when in 2009 a Government’s diversity commissioner, Yazid Sabeg, set up a group of researchers to gather information for measuring the “diversity in the Hexagon”, many thinkers saw this “ethnic and religious data” as an assault on the “*principes fondateurs de notre République*”: that is to say, an assault on France Republic’s secular principles⁶⁵.

Nonetheless, this banning cannot remove the fact, which even the casual tourist notices, of how multi-ethnic and multi-religious France is at the moment. Similarly, this prohibition cannot eliminate another important circumstance: only few non-whites people have top jobs in France. Thus, as Patrick Lozès, a Beninese-born activist says, in this country many do not like it when an immigrant describes himself as black or Islamic, because they say that skin colour and religious belonging do not count in the light of a Republic’s absolute values. In reality, it appears an “absolute” hypocrisy: many – if not the majority of – immigrants remain blacks and Muslims in the eyes of the French police or employers⁶⁶.

This last consideration underlines the eminent socio-economic factor that one has to take into account in order to understand the practical way the *laïcité* performs. The economic and social conditions affecting the neo religious *nomoi* groups, manly composed of Muslim immigrants, leads their members to consider the universal conceptions of citizenships and human rights as instruments for submitting minorities to the majority’s law. The uniformity of human rights and citizenship may be regarded – in effect, they have been regarded – as synonym of inequality, and their universality as a legal mean for concealing the *inégalités de fait* (*de facto* inequalities). The aforementioned issue about headscarves makes it very clear.

⁶⁴ Constitutional Council, Decision n. 2004-505 DC, 19 November, 2004, cons. 16, in www.conseilconstitutionnel.fr. (my translation); see **M. CALAMO SPECCHIA**, *Il Conseil constitutionnel da “gardien” de la souveraineté nationale a “concierge” europe?*, in *Diritto pubblico comparato ed europeo*, 2005, II, pp. 678 ff.

⁶⁵ SOS Racisme, for examples, collected over 100,000 signatures for a “Campagne contre la statistique ethnique [Campaign against ethnic statistics]”. Not only would this be anticonstitutional, they said, because classifying people by race and religion would also encourage discrimination (See www.sos-racisme.org/Campagne-contre-la-statistique.Html).

⁶⁶ **THE ECONOMIST**, *To Count or Not to Count. A New Effort to Gather Data on Ethnic Origins is Stirring up a Fuss*, March 26th 2009.



3.1 - The French Rigid Secularism. Freedom (of Religion) *through* the State

In fact, the problems raised by the relationship between French secularism and some neo religious *nomoi* groups could be interpreted as an external manifestation of deeper and broader claims for increasing immigrants' capacities to evoke their beliefs in both public spaces and political arena. Thus, these claims have often seeped through in religious creeds – such as Islam – and their relative precepts, which give them strong religious nuances. And it is not surprising that this controversy is more pronounced in the field of education⁶⁷ that, as Gerd Bauman demonstrates⁶⁸, since the Great Revolution has been considered as a “bastion” of the *laïcité à la française*⁶⁹.

On the other hand, however, this also explains why many young Muslim immigrants – of first, second and third generation –, who do not feel represented by the *République's* values (some time they perceive them as “foreign values”), have decided to wear the veil. This is because they consider the religious practice (wearing a headscarf) as a mean for claiming visibility against the secular rule, perceived by the same persons as an obstacle in the path of “mother” cultural identity. Furthermore, recent researches have clearly underlined that many times the religious behaviour is used as a mean for affirming “a different French identity⁷⁰ grounded in an assertive Muslim traditional ethic⁷¹”.

So, depending on the point of view, the same young French women – who wear the headscarf – are often defined either as victims oppressed by religious archaic culture or “partners in crimes” of Islamic fundamentalism. Similarly, one can note that in France, on one hand, immigrants are much more likely to be observantly religious than a few decades ago and, on the other, a public concern about the “Islamic

⁶⁷ **D. CUSTOS**, *Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004*, in *The American Journal of Comparative Law*, 2006, p. 398.

⁶⁸ **G. BAUMANN** above n. 56.

⁶⁹ **R. REMOND**, *L'invention de la laïcité, De 1789 à deman*, Bayard, Paris, 2005, p. 93 (my translation). See also **J. BABEROT**, *Laïcité 1905-2005, entre passion et raison*, Seuil, Paris, 2004, pp. 13 ff.

⁷⁰ **M. LAMONT, A. MORNING, M. MOONEY**, *Particular Universalism: North African Immigrants respond to French Racism*, in *Ethnic and Racial Studies*, 2002, n. 25, p. 390.

⁷¹ In effect, “a number of French women turned to books and conferences on Islam to inform themselves about a culture with they were somewhat familiar because it was their parents”; **M. LAZREG**, *Questioning the Veil, Open letters to Muslim Women*, Princeton University Press, Princeton, 2009, p. 88.



issue" has rapidly increased in recent years, even when those fears are not justified.

In particular, the French legislator believes that, because of immigration and the process of globalization, the republican principle of *laïcité* is now under "attack". The French secularism has been threatened in recent years and, therefore, it needs to be reaffirmed. In fact, such principle is considered by all political parties as the common good superior to any religion: it is capable of preserving public order as well as the neutrality of the public space, enabling different religions to coexist harmoniously. In Françoise Chirac's words, "the *laïcité* is the privileged place for meetings and exchanges, where everyone can come together bringing the best to the national community"⁷². Thus, the principle of secularism must be reaffirmed by proper policy actions and, if necessary, translated into new legal instruments. The mentioned Act of March 15, 2004, is one of them⁷³.

Despite its shortness and simplicity, this Act underlines a meaningful connection between the French secularism and the neutrality of the public (school) space. It states that "primary and secondary public school's students are prohibited from wearing symbols or clothing that conspicuously evince a religious affiliation"⁷⁴. With this Act, then, the principle of *laïcité* becomes the symbol of (1) the neutrality of specific public institutions (the public schools) and (2) the neutrality of the whole State's sphere, including persons who live, act, study and work in areas related to it.

This particular inflection of the principle of *laïcité* is also reflected in a more recent initiative of the 2009 National Mission for Information on the Islamic *burqa*, that drafted a bill approved by the French National Assembly on 13 July 2010⁷⁵. This Act aims at forbidding *burqa* in all public areas, including urban ones, such as bars, stores, supermarkets

⁷² J. CHIRAC, *Discours relatif au respect du principe de laïcité dans la république palais de l'Élysée mercredi 17 décembre 2003* (in *www.cndp.fr*, p. 14; my translation).

⁷³ J. VALADE, *Rapport*, n. 219 (2003-2004), *fait au nom de la Commission des Affaires Culturelles, déposé le 25 février 2004, sur le Projet de Loi Laïcité - Port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*, esp. Title III, *La réaffirmation de la laïcité: une ardente obligation républicaine*, a), *La laïcité a besoin d'un message politique clair*; B. BASDEVANT-GAUDEMET, *Commentaire de la loi du 15 mars 2004*, in *Quaderni di diritto e politica ecclesiastica*, 2004, n. 2, pp. 407 ff.; *Conseil d'État* (State Council), *Rapport public 2004*, (2004) 55 *Études et documents du Conseil d'État*, pp. 272 ff.

⁷⁴ Article 1, Loi n° 2004-228 du 15 mars 2004 (my translation).

⁷⁵ S. HUET, *La loi antiburqa adoptée sans opposition à l'Assemblée*, in *Le Figaro*, July 14, 2010, p. 1. See also S. MANCINI, *La sciocca caccia alle streghe velate*, in *Reset*, July/August 2010, p. 32.



and so on, precisely because this practice clashes with the “basic values of our [French] Republic, as expressed in our [French] motto: ‘Liberty, Equality, Fraternity’”⁷⁶.

Yet, all these initiatives demonstrate the difficulty of the French secularism model to face today’s religious geography. It is as if, instead of affirming a harmonious coexistence, the “classical legal instruments” implementing the principle of *laïcité* alimments serious, pressing tensions between secular law and some religious *nomoi* groups; *in primis* the Muslim ones. For example, according the Collective Against Islamophobia, all these bans are clear manifestations of discrimination against women’s individual rights – rights of girls wearing the headscarf in public schools and rights of women wearing *burqa* in open spaces – and, therefore, against a particular religious belief, the Islam. In other words,

“the principle of *laïcité*, which has no other purpose than guaranteeing the neutrality of the State, freedom of religion and respect for pluralism, has been betrayed by the State itself that adopted, during the 21th century, the laws of exception”⁷⁷.

In reality, in France the principle of *laïcité* has always been linked with the role of the State in the society. In this legal context, individuals have acquired freedom, including freedom of religion, *through* the State and not *from* the State. In the name of republican universal principles, the State has always had the responsibility of safeguarding the common-wealth. This, at the same time, has marked the difference between the French strict secularism and the Anglo-Saxon conception of multicultural “secularization”. This latter includes a process “that takes place spontaneously in society, producing” the spontaneous collaboration of religious groups in public sphere: here the search for unity and continuity would not be justified by a nation-building assimilationist project, but by the anxiety of a minority cultural group for its survival. On the contrary, the *laïcité* affirms “a State activity, rejecting religion from public space”: in this case the State must give precedence to unity and continuity, fostering assimilation of all citizens

⁷⁶ French National Assembly, *Rapport d’information fait en application de l’article 145 du règlement au nom de la mission d’information sur la pratique du port du voile intégral sur le territoire national*, 26 gennaio 2010, (my translation). See also Conseil d’État (State Council), *Etude relative aux possibilités juridiques d’interdiction du port du voile intégral. Rapport adopté par l’assemblée générale plénière du Conseil d’Etat*, March 2010, spec. pp. 7 ff.

⁷⁷ Collective Against Islamophobia, *Le bilan de la loi du 15 mars 2004 et de ses effets pervers* (in [www. islamicite.org](http://www.islamicite.org), p. 3; my translation).



to one common culture. That is the main reason why some scholars see the French *laïcité* as a form of “militant secularism”, in which the State’s neutrality toward religion is linked with the idea of “State’s ethical function”, based on “Nation’s values”⁷⁸.

Since the citizens must be united and homogenous, cultural differences are relegated to the background, in the private sphere. This justifies, for instance, the systematic refusal of French public authorities in giving *nomoi* groups, especially the religious groups, a degree of judicial autonomy in some areas, such as family law disputes⁷⁹. On the contrary, this is affirmed in Italy and Spain with marriage contracts made in accordance with the Catholic Canon Law and the sentence of Ecclesiastical Tribunals, as well as in Canada and England with the Arbitration Tribunals. These are in fact the “religious Courts” ruling with religious precepts, whose sentences are also effective in the civil (secular) sphere, i.e. valid for civil purposes. In practice, in cases like these, the State is more receptive toward autonomy of religious *nomoi* groups and their requests for greater degrees of legal control over their own affairs, especially family affairs⁸⁰. In this case the State gives high priority to collective self-government of each religious community.

4 - Canada’s Open Secularism. The Question of Religious-Based Family Law Disputes

Until recently, in the State of Ontario there was a system of family law that encouraged a wide range of dispute resolution methods, providing alternatives to the adversarial win-lose forum of the Courts. Large numbers of family law disputes were in fact resolved through separation agreements, voluntarily agreed by both parties, without coercion. Thus, the enabling legislation, the *Arbitration Act*, originated in the nineteenth century and updated in 1999, gave Ontario inhabitants

⁷⁸ S. MANCINA, above n. 47, p. 19 (my translation).

⁷⁹ P. PARKINSON, *Taking Multiculturalism Seriously: Marriage Law and the Rights of Minorities*, in *Sydney Law Review*, 1994, n. 16, p. 473.

⁸⁰ A. SHACHAR, above n. 1, p. 395, who underlines that “While this trend is still controversial, it nevertheless looms large on the public policy agendas of many multicultural societies. For example, Canada, Australia, New Zealand, England, and the United States have all been revisiting their family law policies in recent years, exploring different ways in which state law can be pluralistic enough to allow different communities to govern themselves” (ID., note 38).



means of resolving disputes by community law, including religious law that the arbitrator can use in making a decision⁸¹.

In practice, that is a system affirming a sort of “joint governance approach” (JGA) between secular law and religious groups. It is normally used for contested social arenas, such as inheritance matters. In this manner, members of different religious groups may interact with secular law by translating, interpreting and hammering out common resolutions to various disputes. At the same time, by JGA the State can accommodate needs of cultural and religious differences. In other terms, the JGA is based on a more fluid and dynamic conception of judicial power: it establishes not only multi-cultural and multi-religious jurisdictional authorities, but also a further subdivision of authority through the allocation of jurisdiction along sub-matter lines.

The religion-based alternative dispute resolution gives parties the right to choose to have their matters heard by those who understand their religious priorities, who know their traditions and who speak their own – literal and figurative – language. Thus, those advocating for full religious/cultural jurisdiction over family law and inheritance matters believe that *nomoi* groups, especially minority ones, should be able to apply religious laws even when they seriously conflicted with the secular laws or the secular imperative policies. In this case, the State should have little power to act on behalf of the members of a group, even if the community law contravenes with some individual’s rights. This is because the JGA is able to open new horizon in the collaboration-relation between secular constitutional law and cultural-religious groups. It actively encourages cultural dialogue across legal tradition of interpretation, evaluation and judgment.

Besides, the reasons for supporting JGA also include: the swifter time frame for resolution of disputes; the sense of personal agency it

⁸¹ Matters under federal jurisdiction, such as criminal law or civil divorce, cannot be arbitrated, though. In addition, arbitrators can order the parties to do only things they could have agreed to do independently; they cannot order a remedy that is illegal under Canadian law, since parties cannot lawfully agree to break the law. The State’s Courts retain the right of judicial review with respect to the fairness and equity of the process, and the parties cannot waive their right to such review. The State’s Courts can also overturn decisions that are found to be egregious or not in the best interests of children. Ontario is one of seven provinces to adopt a uniform arbitration act developed by the Uniform Law Conference of Canada, a group dedicated to modernizing and harmonizing laws across Canada. British Columbia and Quebec amended their legislation prior to the conference’s report, and they have different provisions. The Arbitration Act applies only to civil matters that are subject to provincial jurisdiction and provincial matters that the Act does not specifically exclude – such as labour law.



gives disputants; the lower cost (both to the State and to the groups' members); and, above all, the fact that many times specialized expertise is needed to deal with issues socially contested, like family matters. In short, the JGA "has the merit of extending the benefits of full and equal citizenship"⁸² to members of *nomoi* groups, while acknowledging their membership to different subgroups.

Despite these potential advantages, however, even Canada's multicultural secular system, which boasts a good experience in dealing with multi-ethnic and multi-religions societies⁸³, new human settlements, primarily made up of Muslim immigrants, are raising the intense debate on the legitimacy of religious arbitral Tribunals and civil effects of their judgments.

In particular, in the early 2000s, after the group called the Islamic Institute of Civil Justice (IICJ) announced that some *Shari's Courts* would begin to pass "judgments", many expressed fear that the use of Islamic family law principles could open the door to the gradual implementation of full *Shari'a* law for all Canadian Muslims. Feminist organizations, for instance, claimed that Islamic religious principles were inherently conservative and prejudicial to women. The arbitrators would base their judgements on Muslim family law, which was in contrast with the internal – and international – constitutional rights. They would erode women individual equality rights that had been affirmed in Canadian law over decades of liberal political action. In addition, Muslim women would not have the knowledge or the strength to assert their own rights when they conflict with the Islamic communal rights⁸⁴.

As a consequence, on June 25, 2004, the Attorney General, Michael Bryant, and the Minister Responsible for Women's Issues, Sandra Pupatello, asked a former Attorney General and former Minister responsible for Women's Issues, Marion Boyd, to conduct a review of the use of arbitration in family and inheritances cases and to examine the impact that the use of arbitration has on vulnerable people, including women, persons with disabilities and elderly persons. This

⁸² S. BENHABIB, above n. 22, p. 128.

⁸³ F. HOULE, *Citoyenneté, espace public et multiculturalisme: la politique canadienne de multiculturalisme*, in *Sociologie et sociétés*, 1999, n. 2, pp. 101.

⁸⁴ See International Campaign Against Shari'a Court in Canada, an independent individuals and members of various organizations, coordinated by Homa Arjomand, who opposed the Ontario Arbitration Act 1991 which recognizes the Islamic Court in Canada "under the pretext of religious freedom, tolerance and cultural sensitivity". They called on all individuals and progressive organizations to join such International Campaign.



initiative was in reality a result of public concern expressed in the media and through groups about the use of Muslim personal law – what often was referred to as *Shari'a* – in arbitrations.

In practice, Ms. Boyd was asked to gather and articulate the concerns of Ontarians and provide recommendations to the Government. In the end, a report was issued⁸⁵ which found that the State's laws do not address the equal rights principle: "tolerance and accommodation of minority groups who seek to engage in alternative dispute resolution must be balanced against a firm commitment to individual autonomy". Therefore, the "*Arbitration Act* should continue to allow disputes to be arbitrated using religious law", if the constitutional individual rights are observed.

"It is important to seek solutions that respect not only the rights of minority groups within Ontario, but also help individuals within that minority exercise their individual rights with ease". In this respect, "if religious law is chosen under the arbitration agreement in a family law or inheritance case",

Boyd's Report proposes Independent Legal Advice, which will certify that the person has sufficient information to understand the nature and consequences of choosing the religious law⁸⁶.

Although the favourable conclusion of Boyd's Report for the use of the *Arbitrating Act* by the Muslim communities, the campaign against *Shari'a* Court led the Prime Minister, Dalton McGuinty, to "assure public opinion". On September 2005, he firmly stated that "there will be no Shariah law in Ontario": "there will be no religious arbitration in Ontario", "there will be one law for all Ontarians", he added. Moreover, to him, religious arbitrations "threaten our common ground". McGuinty promised, then, that his liberal Government would introduce legislation "as soon as possible" to outlaw them. That meant that family matters would be resolved in accordance with Ontario and Canadian ("secular") law only⁸⁷.

It was, however, the Federal Government that on November 2005 first approved the *Family Statute Law Amendment Act*, designed to ensure that all family law arbitrations are conducted only under Canadian law, which includes all provincial Statutes. In addition, the

⁸⁵ M. BOYD, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, December 2004, Accessed November 23, 2006 (in www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/, sect. 4).

⁸⁶ M. BOYD, esp. sect. IV.

⁸⁷ See K. LESILE, *McGuinty Rejects Ontario's Use of Shariah Law and All Religious Arbitrations*, in *Canadian Press*, September 11, 2005.



same federal Government approved an amendment to the *Children's Law Reform Act* in order to determine the best interests of children with respect to custody and access. Thus, on the basis of these amendments to the federal law, in the same period *Family Statute Law Amendment Act* was passed by the Ontario legislator and proclaimed the 14 may 2009. All these Acts actually provide that family law resolutions based on any other laws, including any religious law and not only the *Shari'a*, will have no legal status in Canada. People will still have the right to seek advice from any religious sources in matters of family law. But, such precepts will not be enforced by the Canadian constitutional (secular) democracy.

4.1 - Reasonable Accommodation and "New" Religious *Nomoi* Groups

We would better underline that, when the Canadian legislators were updating the law in those matters, the majority of the Supreme Court ruled (March 2006) in the *Multani's* case. A case that, as said before, was dealing with freedom of religion – guaranteed in the *Canadian Charter of Rights and Freedoms* – and reasonable accommodation; that is to say, one of the most important legal instrument of collaboration between the State and creeds in this context. Indeed, with such decision the Supreme Court stated that "accommodating" a student and "allowing him to wear his kirpan under certain conditions demonstrates the importance that our [Canadian] society attaches to protecting freedom of religion and to showing respect for its minorities"⁸⁸.

This sentence, however, was very negatively received, especially in Quebec, amplifying the public discontent in this province – and, perhaps, in the whole Country. According to some polls, up to 91% of Quebecers of all origins disagreed with the Court's *Multani* decision. Moreover, "it tinged the entire debate on accommodation", which was generally seen as the source of the social crisis⁸⁹. As a consequence, on February 8, 2007, Québec Premier Jean Charest, just in response to this public concern, announced the establishment of the above mentioned Consultation Commission on "Accommodation Practices Related to Cultural Differences". Between January and March 2008, this Co-Chairs – C. Taylor and G. Bouchard – Commission drafted a Report, which

⁸⁸ Supreme Court of Canada, *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6, par. 79.

⁸⁹ TAYLOR-BOUCHARD, above 17, p. 120.



elaborated an original legal conception of secularism and sociocultural integration. It was called inter-culturalism.

This concept is said to serve the needs of today's pluralist society. Taking into account the notion of "open secularism", inter-culturalism is based on "negotiation and the search for compromises that satisfy all parties". It is a way to "benefit fully from cultural diversity" and enhances social cohesion, facilitating integration: "to display one's differences and become familiar with those of the other", it would prevent marginalization that "can lead to fragmentation favourable to the formation of stereotypes and fundamentalisms"⁹⁰. In other words, such conception entails that cultural and religious differences do not have to be confined to the private domain, as the model of the French *laïcité* normally do.

Yet, to its proponents, interculturalism is also thought to be an alternative model to multiculturalism. In reality, according to Luc Tremblay, in the end, interculturalism is anything but a version of traditional Canadian multiculturalism: in Shakespeare's words "it is a rose by any other name"⁹¹. Now, without denying Luc Tremblay's observations, we would nonetheless like to add some remarks. In the light of the our previous considerations, the "new" conception of interculturalism is anything but a different version of *collaboration* that, in the Canadian context, is informed on the basis of traditional multicultural legal system⁹².

In fact, in Canada such controversies stress above all the question of duty of reasonable accommodation. This has emerged not only over religion-based alternative jurisdiction and the *Multani's* case, but also on the whole of Canada's multicultural policies⁹³. In particular, the opposition to the *Arbitration Act*, an Act potentially capable of legitimating the Islamic Courts, shows very well that the legal instrument carrying out collaborations between State-Churches have not created problems until it was used for groups that boasted a long and uninterrupted relation with Canadian constitutional history. An historical process influenced by the "laws" and culture of some

⁹⁰ TAYLOR-BOUCHARD, above p. 89.

⁹¹ L.B. TREMBLAY, above n. 18, pp. 14 ff. Here there is no sufficient time and space to analyse the interculturalism concept: this essay does not have that purpose. Therefore, I would suggest to read the research of Luc Tremblay and, of course, the mentione Bouchard-Taylor's Report.

⁹² W. KYMLICKA, *The New Debate on Minority Rights (and Postscript)*, in A.S. Laden, D. Owen (eds.), *Multiculturalism and Political Theory*, Cambridge University Press, Cambridge, 2007, p. 25.

⁹³ T. MODOOD, *Multiculturalism: A Civic Idea*, Polity Press, London, 2007, p. 21.



majority *nomoi* groups, which makes their impact disproportionate on those (immigrant) people who do not feel part of the dominant culture. As Ms. Boyd says, Canada's "secular" law is informed by the combined influence of the Judeo-Christian tradition as well as the Enlightenment, and grounded in English common law. So Canada's legal instruments implementing secularism are more easily embraced by traditional cultural groups than "new" settled minority ones.

For the same reason, to members of traditional groups it is difficult to admit that, rather than "appearing to be secular", Canada's law looks "patently Christian in nature". But this cannot eliminate the fact that, from time to time, "Christian values" – such monogamy in marriage, restrictions around divorce, official holidays and the defined work week – have been codified in the State (secular)'s law⁹⁴. Historians as well as legal scholars have in fact shown the manifold ways in which the secular notion of marriage as a monogamous union based on mutual consent has been heavily influenced by specific traditions, mainly those of the dominant Christian churches⁹⁵. Here is the reason why, as the French *laïcité* case-study, the Canada's case-study, related primarily with the reasonable accommodation model, gives us more universal clues to debate about the constitutionalism. It gives us a different perspective for analysing legal means that have traditionally implemented the collaboration State-creeds in today's western secularised democracies.

It is a fact, for instance, that while the crucial debate over the *Arbitration Act* was taking place in Canada, a similar debate sparked in the UK on its *Arbitration Act 1996*. In this case, the controversy came out on September 2008, when the Islamic Institute of Civil Justice announced that the Muslim Arbitration Tribunal had already used

⁹⁴ Report prepared by **M. BOYD**, above n. 85, p. 47.

⁹⁵ The 1878 case *Reynolds v. United States* (98 U.S. 145) vividly shows this link. See **N.F. COTT**, *Giving Character to Our Whole Civil Polity: Marriage and the Public Order in Late Nineteenth Century*, in L.K. Kerber, A. Kessler-Harris, K. Kish Sklar (eds.), *U.S. History as Women's History: New Feminist Essays*, The University of North Carolina Press, Chapel Hill and London, 1995, pp. 107-121. That link is more evident in latter "Mormon cases" in the, such as *Mormon Church v. United States* (1889), where the Supreme Court expressly stated that "contrary to the spirit of Christianity and the civilization which Christianity has produced in the Western World ..." and again "[b]igamy and polygamy are crimes by the laws of all civilized and Christian countries ...". See **C. WEISBROD**, *The Law and Reconstituted Christianity: The Case of the Mormons*, in **J. MCLAREN, H.G. COWARD**, *Religious Conscience, the State, and The Law. Historical Contexts and Contemporary Significance*, State University of New York Press, Albany, 1999, p. 140; see also **C. WEISBROD**, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, in *Journal of Family Law*, 1988, 26, p. 741.



Shari'a law. Operating alongside the *Arbitration Act*, it was set up by scholars and lawyers at the Hijaz College Islamic University in Nuneaton, Warwickshire. Since it opened its doors (December 2007), this religious tribunals have already resolved more than 100 civil disputes between Muslims across the UK.

Now, it is interesting to note that in this Country the debate was even more inflamed when (February 2008) the Archbishop of Canterbury, Rowan Williams, affirmed that the use of certain aspects of *Shari'a* law seemed “unavoidable”: it is our secular rule of law principle that “advocates embracing *Sharia* Law in the context of family disputes”, he said⁹⁶. After few months, Williams’ argument was also supported by the Lord Chief Justice, Lord Phillips, who stated that there was no reason why *Shari'a* law could not be used for contractual agreements and marital disputes: for example,

“so far as aspects of matrimonial law are concerned, there is a limited precedent for English law to recognise aspects of religious laws, although when it comes to divorce this can only be effected in accordance with the civil law of this country”⁹⁷.

These harsh controversies show us that, under the influence of globalization and the strong immigration phenomenon, in the mentioned “models” of relationship State-religions – namely the French cultural integration model, Canada’s multiculturalism (or interculturalism) system and the English model with the official Church and institutionalized tolerance for minority religions – the dilemma between “unity” and “diversity” has become increasingly complicated⁹⁸. A dilemma dealt with the need of peaceful coexistence in today’s multi-cultural and multi-religious context, by balancing groups’ cultural freedoms with individual’s rights and freedoms. In other words, the tension between accommodating differences and protecting the interests of vulnerable group members within these communities has been brought to the forefront of various countries’ public policies. This is largely due to the current global process towards a multicultural

⁹⁶ **R. WILLIAMS**, *Civil and Religious Law in England: A Religious Perspective. The foundation lecture at the Royal Courts of Justice, February 7, 2008*, in *Ecclesiastical Law Journal*, 2008, n. 10, p. 262. See also **S. BANO**, *In Pursuit of Religious and Legal Diversity: A Response to the Archbishop of Canterbury and the Sharia Debate in Britain*, in *Ecclesiastical Law Journal*, 2008, n. 10, p. 283-309.

⁹⁷ **LORD PHILLIPS**, Lord Chief Justice, *Equality Before the Law, East London Muslim Centre (www.judiciary.gov.uk., July 2008, p. 8)*.

⁹⁸ **BHIKHU C. PAREKH**, *Rethinking Multiculturalism: Cultural Diversity and Political Theory*, Harvard University Press, Cambridge-Mass., 2000, especially chap. 6, *Reconstituting the Modern State*, pp. 179-195.



Western society; a process opposed to a universal conception of “multilevel” denationalized citizenship, or multilevel denationalized constitutionalism⁹⁹, of which the European Union law represents an advanced example.

5 - Collaboration-Relation between the State and Churches in Italy

That dilemma – between unity and diversity – becomes even more complicated when considering matters socially contested, like family law, because, traditionally, “various religious (and national) communities have used marriage and divorce regulation in the same way that modern States have used citizenship law to delineate clearly who is inside and who is outside of the collective. Family law fulfils this demarcating function by legally defining only certain kind of marriage and sexual reproduction as legitimate, while labelling all others as illegitimate”¹⁰⁰. In Shachar’s words, many *nomoi*

“groups operating within a larger political entity possess traditions pertaining specifically to the family that historically have served as important manifestations of distinct cultural identity. These traditions allow the community autonomously to demarcate its membership boundaries, making family law a central pillar in the cultural edifice for ensuring the group's continuity and coherence over time”¹⁰¹.

This explains the reason why, in these matters, religious groups often claim the institutionalization of above mentioned *Joint Governance Approach* (JGA). Or, at least, the institutionalization of *Dual-System Approach* (DSA)¹⁰², by which the parties retain the option of resorting to either secular or religious authorities to grant divorce and separation: so that, once a party has filed for civil divorce, the other party must comply by removing all religious barriers to remarriage.

Yet, some may argue that both the JGA and the DSA nourish the paradox of multicultural vulnerability identities, in particular the negative effects of well-meaning multicultural accommodations on group members bearing disproportionate burdens within their own cultural traditions. At the same time, though, a simple ban of any type

⁹⁹ G. DE BURCA, O. GERSTENBERG, *The Denationalization of Constitutional Law*, in *Harvard International Law Journal*, 2006, n. 1, p. 331.

¹⁰⁰ A. SHACHAR above n. 1, p. 394.

¹⁰¹ A. SHACHAR, p. 395.

¹⁰² S. BENHABIB above n. 22, p. 126.



of family arbitration by faith-based tribunals – a ban reaffirming the classic secular/religious divide – seems to be unsatisfactory, “in part because of its wilful blindness to the intersection of the various affiliations apparent in female group members’ lives – to their state, community, religion, family, and so on”¹⁰³. While this decision may be politically defensible as well as symbolically astute, it does not necessarily provide adequate protection for those individuals most vulnerable to their religious community’s (formal and informal) pressures. The decision may instead push the religious tribunals “underground where no state regulation, coordination, or legal recourse is made available to those who may need it most”¹⁰⁴. From here stems the need to affirm secular legal instruments that give some *nomoi* groups possibilities to regulate these matters in accordance with religious rules, without excluding the monitoring of the State’s authorities. In this judicial context, the intervention of secular authorities is to ensure that, within religious communities, the State’s (basic) constitutional principles are not infringed.

Therefore, taking into account the individual’s fundamental rights, the DSA becomes a mean for creating a forum in which religious obligations are met. For these reasons it needs to be implemented with the *collaboration* of creeds. This explains why this approach is traditionally used in those Countries where there is an intensive collaboration between secular institutions and religious organizations, especially the main ones.

In this case, the collaboration is intensive because the State’s law is framed under the influence that some religious organizations have historically played from time to time, especially in family matters. Hence, while meeting the needs of traditional creeds, the DSA seems incapable of implementing the collaboration with “neo” creeds and communities. More generally, it does not meet the exigencies of a changed “religious geography”. The Italian case-study gives us a clear example of that.

On the basis of 1984 Agreement between the Catholic Holy See and the Italian Republic¹⁰⁵, that modified the 1929 Lateran Concordat, a marriage contracts made in accordance to the Canon Law has civil

¹⁰³ A. SHACHAR, *Entangled: State, Religion, and the Family*, in *Harvard International Law Journal*, n. 49, 2009, p. 133.

¹⁰⁴ A. SHACHAR, *Entangled: State, Religion, and the Family*, p. 137.

¹⁰⁵ F. MARGIOTTA BROGLIO, *Dalla questione romana al superamento dei Patti lateranensi*, in General Director of President of the Council of Ministers, *La revisione del Concordato. Un accordo di libertà*, Roma, Istituto Poligrafico e Zecca dello Stato, 1986, p. 19.



effects, when registered in the State's registers and notify in the local registry office. The marriage registration will not occur if the spouses do not have the age required by the civil law or if there is an impediment that the civil law considers to be insurmountable. The application for registration is made in writing by the Catholic priest in no more than five days from wedding date. In any case, the marriage has civil effects from the moment of its celebration, even if, for whatever reason, the registration was made after the prescribed term¹⁰⁶. In addition, the sentence of annulment of a marriage pronounced by ecclesiastical tribunals is, at the request of the parties or one of them, effective in the Italian (civil-secular) State by the judgement of the competent Court of Appeal¹⁰⁷. This is possible when certain conditions have been ascertained¹⁰⁸: first, the ecclesiastical Court was competent to adjudicate that the marriage had been celebrated in accordance with the 1984 Agreement; second, during the proceedings before the ecclesiastical Tribunal the parties were assured the right to defend themselves; third, the ecclesiastical judicial "rite" was celebrated in a way which does not differ from the fundamental principles of Italian law; finally, other conditions required by Italian law for the validation of foreign States' judgements were guaranteed¹⁰⁹. The ecclesiastical sentence must be enforced by Italian Courts of Appeal in accordance with Canon Law, but the concrete element of the case shall not be re-examined by these Courts, which on the other hand makes provisional

¹⁰⁶ **G. SARACENI, F. UCCELLA**, *Matrimonio concordatario*, in *Enciclopedia giuridica*, 1990, XXI, p. 6.

¹⁰⁷ See **P. MONETA**, *Il matrimonio nullo nel diritto canonico e concordatario*, Cacucci, Bari, 2008; **N. MARCHEI**, *La giurisdizione sul matrimonio trascritto*, in G. Casuscelli (ed.), *Nozioni di diritto ecclesiastico*, Giappichelli, Torino, 2007, p. 151; **G. CASUSCELLI**, *Note in tema di giurisdizione ecclesiastica matrimoniale*, in *Il Diritto ecclesiastico*, 1967, n. 1, p. 219.

¹⁰⁸ **G. BALENA**, *Le condizioni per la delibazione delle sentenze ecclesiastiche di nullità matrimoniale*, in *Rivista diritto e processo civile*, 1991, n. 4, p. 965; **C. CARDARELLO**, *L'ordine pubblico "costituzionale" come limite alla esecutività delle sentenze ecclesiastiche*, in *Il Diritto ecclesiastico*, 1985, n. 1, p. 98 ss.

¹⁰⁹ **B. COSTANTINO**, *Riconoscimento ed esecuzione delle sentenze civili straniere*, in *Enciclopedia giuridica*, 1992, XXI, p. 2; **S. DOMIANELLO**, *Ordine pubblico, giurisprudenza per principi e delibazione matrimoniale*, Giuffrè, Milano, 1989, p. 45; **F. FINOCCHIARO**, *Simulazione unilaterale del consenso matrimoniale e principi di ordine pubblico fra buona fede e dogma della dichiarazione*, in *Giustizia civile*, 1985, I, p. 27; **G. BARILE**, *Principi fondamentali dell'ordinamento costituzionale e principi di ordine pubblico internazionale*, in E. Vitali, G. Casuscelli (eds.), *La disciplina del matrimonio concordatario dopo gli accordi di Villa Madama*, Giuffrè, Milano, 1988, p. 97.



economic measures in favour of one of the spouses¹¹⁰, in case his/her marriage was nullified: these measures are valid until a final (State's Court) decision take place¹¹¹.

It is interesting to note that in the 1984 Agreement, while negotiating for articles related to marriage contract, the Catholic Holy See stated that the "immutable value of Catholic doctrine on marriage", and the relative family's values, "must be reaffirmed" as a fundamental principle of (Italian) society. To this regards, one must underline that in family law the Italian secularised legislation is deeply influenced by the Catholic theological background.

5.1 - The Italian Secularism Tested by the New "Religious Geography"

This explains the fact that, since the 1984, the Italian model of DSA has been used for resolving many Catholic families' disputes, without particular problems. Moreover, this model has resisted to the strong impact made by the law of European Union as well as the law of European Convention of Human Right, and the respective jurisprudences¹¹²: as the 2008 decision of Italian Supreme Court of Cassation demonstrated¹¹³, the dual (State-Catholic Church) governance administration in marriage law updated some of its own provisions in accordance with the neo European "denationalized Constitutionalism"¹¹⁴.

¹¹⁰ **M.C. FOLLIERO**, *Cassazione e delibazione matrimoniale: il lungo addio*, in *Il Diritto ecclesiastico*, 2000, n. 1, p. 772; **G. DALLA TORRE**, *Lezioni di diritto ecclesiastico*, Giappichelli, Torino, 2007, p. 180; **C. MARINO**, *La delibazione delle sentenze ecclesiastiche di nullità matrimoniale nel sistema di diritto internazionale e processuale*, Giuffrè, Milano, 2005, p. 22; **A. LICASTRO**, *Il riconoscimento delle sentenze ecclesiastiche matrimoniali e le nuove forme di cooperazione giudiziaria europea*, in *Il diritto di famiglia e delle persone*, 2000, p. 1262; **F. MOSCONI, C. CAMPIGLIO**, *Diritto internazionale privato e processuale. Parte generale e contratti*, UTET, Torino, 2007, p. 9.

¹¹¹ **R. MARTINO**, *Delibazione di sentenze di nullità del matrimonio*, in N. Picardi (ed.), *Codice di procedura civile*, Giuffrè, Milano, 2004, p. 2615.

¹¹² See for example **R. BOTTA**, *La "delibazione" delle sentenze ecclesiastiche di nullità matrimoniale di fronte alla Corte europea dei diritti dell'uomo*, in *Corriere giuridico*, 2002, n. 2, p. 165.

¹¹³ Corte di Cassazione, Sez. Un. – 18th July 2008, n. 19809, see my comment, **F. ALICINO**, *Delibazione di sentenza ecclesiastica di nullità e limiti di ordine pubblico interno: Le ultime indicazioni delle sezioni unite (A proposito di cassazione, sez. Un., 18 Luglio 2008, n. 19809)*, in *Il Diritto ecclesiastico*, 2008, n. 1-2, p. 309.

¹¹⁴ On this notion see **DE BURCA, GERSTENBERG** above n. 99, p. 331.



Thus, through the mentioned *Intese* (mini agreements) – that is to say the legal instruments carrying out collaboration between State and minority religious groups –, a sort of DSA was established for denomination other than Catholicism (even if with minor impact over the State's law than that regulated by the Lateran pacts)¹¹⁵. In fact, taking into account their specific characteristics, alongside the examples suggested by the 1984 Agreement with Catholic Church, some *Intese* have been drawn up by the Italian Government and some minority religious groups such as the Waldensian Church of Italy (1984), the Assemblies of God (1986), the General Conference of the Church of God – Seventh-Day – (1986), the Jewish Community (1987), *The Christian Evangelical Baptist Union* (1993), the Union Lutheran Church (1993). As one can easily note, all these creeds share a Judeo-Christian root. In this manner, they have been able to interact with the secular State, especially for those sectors infused with Christian “culture”. Similarly, it is important to underline that all these agreements were stipulated in a period that goes from 1984 to 1993: that is before the intensive flux of immigration setting up new *nomoi* groups, including the religious groups that do not feel part of such roots. So, this also explains another, perhaps more important, circumstance: since religions are still multiplying in Italy today, with a wide variety of “neo” creeds and neo communities, the above mentioned legal instruments, like the *Intese*, do not meet any more the needs of a changed “religious geography”. In particular, they do not meet the Muslim needs.

Although Italy has a long and interesting history of Muslim presence, the influx and permanent status of Islamic immigration began only 15-20 years ago. It arrived “unexpectedly”: there was no tradition of a colonial or neocolonial relationship between Italy and Islamic countries¹¹⁶. On the contrary, there is little doubt that the public visibility of Islam has been increasing considerably in recent years: after Christians, Muslims make up by far the largest religious community in Italy¹¹⁷.

¹¹⁵ Article 8 of Italian Constitution.

¹¹⁶ In effect, only a small percentage of Muslims living in Italy come from former Italian colonies in the Muslim world (Libya, Somalia, and Eritrea). The two countries that have contributed the largest number of Muslim immigrants to Italy are Morocco (35%) and Albania (16%). Most other Muslims living in Italy come from Tunisia, Senegal, Egypt, Bangladesh, Pakistan, Algeria, Bosnia and Nigeria, contributing to the image of an extremely diverse community. F. PACI, *L'Islam sotto casa. L'integrazione silenziosa*, Marsilio, Venezia, 2004. See also E. PUGLIESE, *L'Italia tra migrazioni internazionali e migrazioni interne*, il Mulino, Bologna, 2002.

¹¹⁷ Accurate estimates of the number of Muslims in Italy are difficult to obtain, but currently it is estimated that there are about 1.600.000 Muslims living in Italy,



Nevertheless, the structure of the so-called Italian ecclesiastical law remains tailored on the exigencies of traditional creeds. We cannot use it for other (minority) “religions”, especially Islamic groups, which are simply incorporated under the provisions of the 1929 Act (n. 1159) – approved by the fascist regime –, under which a sort of “cold war” collaboration has been affirmed in recent years: a collaboration that, to mention Brian Barry and Seyla Benhabib, was able to establish peace, but no reconciliation; bargaining, but no mutual understandings; “stalemates and standoff, dictated less by respect for the positions of others than by the fear of others”¹¹⁸.

Besides, unlike in the French legal system, in Italy secularism is not expressly enshrined in the 1948 Constitution. However, since 1989 the Constitutional Court has stated that secularism (*laicità*) is one of the supreme principles (*principi supremi*)¹¹⁹ of the Italian legal system¹²⁰. This principle is a result of the combined interpretation of various constitutional provisions: namely article 2 that protects the inviolable rights of man, both as an individual and as a member of the social groups in which his personality finds expression, article 3 guaranteeing equality before the law, article 7 regulating the relationship between the State and the Catholic Church, article 8 stating that all religious denominations are equally free, and article 19 that protects the freedom to profess and promote religious beliefs, individually or collectively. According to Constitutional Court, on the basis of these provisions, Italian secularism does not imply indifference towards religion, but the equidistance and impartiality towards different creeds. In other words, Italian secularism is based on the positive attitude towards *all* religious communities, in a context that, in term of religious differences, becomes more and more pluralistic¹²¹. Here is the main reason why the State must collaborate with religious organizations.

including about 273.000 unregistered immigrants. See Fondazione ISMU 2009 (See www.ismu.org).

¹¹⁸ S. BENHABIB above 22, p. 129. On called “fear of others” see M.C. NUSSBAUM, *Liberty of Conscience. In Defense of America's Tradition of Religious Equality*, Basic Books, New York, 2008, pp. 21 ff.

¹¹⁹ F. FINOCCHIARO, “Principi supremi”, *ordine pubblico italiano e (auspicata) parità tra divorzio e nullità canonica del matrimonio*, in F. Cipriani (ed.) *Matrimonio concordatario e tutela giurisdizionale*, ESI, Napoli, 1992, p. 67.

¹²⁰ See Italian Constitutional Courts, especially Decisions n. 203/1989; n. 259/1990; n. 13/1991; n. 195/1993; n. 421/1993; n. 334/1996; n. 329/1997; n. 508/2000; n. 327/2002.

¹²¹ A. ODDI, *Il principio di “laicità” nella giurisprudenza costituzionale*, in R. Bin, G. Brunelli, A. Pugiotto, P. Veronesi (eds.), *Laicità crocefissa?*, Giappichelli, Torino, 2005, p. 241; S. LARICCIA, *Problemi in temi dello Stato e delle istituzioni civili*, in AA. VV.,



Yet, as we saw in previous case-studies (France and Canada), in today's Italian multicultural context there is no more overlapping consensus about the pillars of constitutional principles, including the principle of *laicità* as stated by the *Corte costituzionale*, because the *neo nomoi* groups usually come to adopt these principles by very different cultural roots. This is more evident when considering the Islamic groups.

Thus, it is not surprising that the first important attempt of Italian Government in finding some new legal instruments encouraging relations-collaboration between the State and Islam(s) was based on the Charter of values for integration and citizenship (*Carta dei valori per l'integrazione e la cittadinanza*)¹²². The *Carta* was in fact elaborated by the Home Office as the basis for a future agreement – significantly called “understanding” – between the State and Muslim organizations. At the same time, though, such *Carta* has become the central issue of a bitter debate. Many, for instance, wonder what is its role and “value” in the Italian juridical context: in brief, what happens to those Islam groups, and their members, that refuse to recognise and, eventually, subscribe such Charter¹²³? This remains a crucial question when considering that the Charter has not been signed by some important Islamic groups, like UCOII (*Unione delle Comunità e Organizzazioni Islamiche in Italia*)¹²⁴: it has in effect been refused by the majority of Muslims who live and work in Italy. Moreover, not only the *Carta* has not been particularly effective, but also it has increased tension between the various

Scritti in memoria di Livio Paladin, Napoli, Jovene, 2004, p. 1251; **S. SICARDI**, *Il principio di laicità nella giurisprudenza della Corte costituzionale (e rispetto alle posizioni dei giudici comuni)*, in *associazionedeicostituzionalisti.it.*, September 2007.

¹²² See **C. CARDIA**, *Introduzione alla Carta dei valori della cittadinanza e dell'integrazione*, in *Home Italian Minister*, s.i.d. 2007.

¹²³ **N. COLAIANNI**, *Una carta postcostituzionale (A proposito di una recente iniziativa in tema di “integrazione”)*, in *Questione giustizia*, 2007, p. 637; **ID.**, *Alla ricerca di una politica del diritto sui rapporti con l'Islam (Carta dei valori e Dichiarazione di intenti)*, in *Stato, Chiese e pluralismo confessionale* (in *www.statoechiese.it*), January 2009, p. 1 ff.

¹²⁴ Union of Islamic Communities in Italy in fact the largest Muslim organization in Italy. It claims to control 80% of the mosques and prayer rooms in the Italian State. This organization, though, does not have public legal status: in any case, it is part of a network which stretches across Europe and is allegedly in contact with the “International Muslim Brotherhood”. UCOII is also part of the similar organization of the French *Union des Organisations Islamiques de France* (UCOIF), which claims to represent one-third of French Muslims and to be close to the International Muslim Brotherhood. See **C. FOUREST**, *Où en est l'Islam de France*, in *Le Monde*, 1 February, 2007.



components of the *Consulta Islamica*¹²⁵ (Islamic Council), a political body set up by the same Italian Home Office to discuss the question of multiculturalism and religious freedom¹²⁶.

Made up by the representatives of the main Islamic organizations, the *Consulta* was established in September 2005. Nonetheless, considering its experience in recent years, one might conclude that even the *Consulta* does not have the right qualities to foster an integration-collaboration that requires a body really capable of representing the multifaceted panorama of Muslims in Italy. In fact, either the *Consulta* or the Charter – but we would better say the whole “governmental Project” regarding the “Islamic issues” – do not take into account the specific (theological and historical) characteristics of Muslim creeds¹²⁷. For instance, they do not take into account the lack of hierarchical structure of these creeds in Italy, where the Muslim presence is, as said before, rather recent. In other words, these attempts make collaboration with these religious communities very difficult to achieve, precisely because they are not able to affirm any legal instrument that gives the State a possibility to conclude an official agreement with Islamic creeds. This may explain the reason why five years later (11th February 2010), the same Ministry of Home Affairs established a new body called *Comitato islamico* (Islamic Committee), which generally operates as consultative body¹²⁸.

¹²⁵ In reality, for the same purpose, a number of political bodies have been set up in the last years: for example, the *Consulta giovanile per il pluralismo religioso e culturale* (Youth Consultative Council for Religious and Cultural Pluralism), the *Osservatorio sulle politiche religiose* (Observatory on Religious Policies), as well as a number of commissions set up under the Prime Minister’s Office, like the *Comitato per l’Islam italiano* (Committee for the Italian Islam); made up of 19 members, this Committee has been established (February 2010) by the Home Office and it is defined as a consultative body. See E. PFÖSTL, *Muslim Integration in Italy*, this essay is due to be published in 2011.

¹²⁶ Decree of 10 September 2005, *Decreto istitutivo della Consulta*, in *Gazzetta Ufficiale*, 26 October, 2005.

¹²⁷ R. ALUFFI BECK-PECCOZ, *The Legal Treatment of the Muslim Minority in Italy*, in R. Aluffi Beck-Peccoz, G. Zincone (eds.), *The Legal Treatment of Islamic Minorities in Europe*, Peeters, Leuven, 2004, p. 133.

¹²⁸ The Islamic Committee was established by the same Ministry of Home Affairs. It is made up of 19 members, who are experts of Islam. They are mainly representatives of Islamic organizations, professors teaching Muslim law and Islamic culture, ecclesiastical law as well as journalists and scholars in Islam. They come up with proposals to help facilitate integration of immigrant Muslims into Italian society. The Ministry of Home Affairs listens to their views on some of the current topics such as Mosques, Imam training, mixed marriages, civil rights, *burqa*, and so on.



In any case, it still remains very difficult for the Italian State to find Islamic representatives for eventually stipulating an agreement (*Intesa*) with Islamic communities – as requested by article 8 of the Constitution – and, consequently, regulating relations-collaborations with them¹²⁹. This means that, due to the fragmentation of Islamic religion as well as the laws that traditionally implement the collaboration between State-Churches in Italy, at the moment the Italian State has no legal means to officially collaborate with the Islamic communities.

6 - Conclusion

The solutions elaborated to solve the dilemma between the rights of religious-cultural differences and the equal protection of human rights do not easily fit in with the traditional legal instruments and relative secularism models, mainly informed on the basis of substantially “mono-cultural” Western societies. While these models ensure the decentralization of States’ power and potentially greater diversity in the public sphere, they do not necessarily promote the interests of all group members, including those who are part of neo religious groups, usually made up of immigrants. As a result, the same policy, which seems attractive for some religious and cultural perspectives, can systematically be seen as a disadvantage as well as discriminatory towards other communities. To better comprehend this tension, it is necessary to analyse the highly dynamic set of interactions-collaboration that may take place between groups (their specificities), the State (its competences), and the individuals (their fundamental rights, including the fundamental rights of religious liberty).

Similarly, one cannot understand the multiculturalism paradox if one does not comprehend the overlapping affiliation that exists between the secular State, the religious-cultural group and individuals who are, at the same time, citizens of the State and members of a religion. Thus, recognizing this wider network of forces and influences, one can begin to account the State’s attempts for encouraging relation-collaboration with minority – and often marginalized – communities, in

¹²⁹ R. GUOLO, *La rappresentanza dell’islam italiano e la questione delle intese*, in S. Ferrari (ed.), *Musulmani in Italia. La condizione giuridica delle comunità islamiche*, il Mulino, Bologna, 2000, p. 67; A. SPREAFICO, A. COPPI, *La rappresentanza dei musulmani in Italia*, XL Edizioni, Roma, 2006.



an increasingly “flat world”¹³⁰ at the age of diversity; a world dominated by an increasingly religious-cultural diversity.

Yet, as in the past, even nowadays all these issues seem to merge into the need of finding a balance between “unity” and “diversity”, which also involves the crucial question of how to guarantee the interests of vulnerable group members within these communities. To this respect, some scholars suggest that, instead of choosing a polarized approach, contemporary constitutional systems must *in primis* seek to understand that individuals stand at the intersection of various identities. They are not only members of a cultural-religious collective, but they also have dimensions of gender, ability, age and so on. It is necessary, then, to refuse the tendency to compartmentalize individuals’ identity into single-axis categorizations¹³¹. On the contrary, constitutional democracies should adopt an intersectional perspective permitting to understand multiple, and potentially conflicting, nuanced dimensions of their identity. At least, this makes possible to comprehend that, although there are no magic formulae for resolving that dilemma as a whole, we need to rethink some legal instruments that have carried out the collaboration State-Churches until now. Even because incorporating cultural minority groups into mainstream political processes remains crucial for a liberal-democratic constitutional system¹³².

In this sense, we can rethink the legal instruments implementing religion-based arbitrations, by a “renewed” joint governance approach, creating a forum in which it is possible to meet specific religious obligations without infringing universal individual constitutional rights. This, for example, is well demonstrated by the 2007 decision of Supreme Court of Canada, *Bruker v. Marcovitz*, which clearly stated that recognizing “the enforceability by civil courts of agreements to discourage religious barriers to remarriage, addressing the gender

¹³⁰ T.L. FRIEDMAN, *The World is Flat: A Brief History of the Twenty-First Century*, Straus & Giroux, Farrar, 2005; see also M.R. FERRARESE, *La Governance tra politica e diritto*, il Mulino, Bologna, 2010, p. 108.

¹³¹ For example, Will Kymlicka uses the “multiculturalism” as an umbrella concept to cover a wide range of policies, “designed to provide some level of public recognition, support or accommodation to non-dominant ethnocultural groups”. These policies are mostly concerned with immigrants, racial and ethnic groups and religious groups. They only indirectly deal with other kinds of non-dominant groups, such as women, gays and lesbians, disabled, and others. W. KYMLICKA, *Multicultural Odysseys. Navigating the New International Politics of Diversity*, Oxford University Press, New York, 2007, p. 16.

¹³² R. COPPOLA, *La Chiesa e la laicità*, in *Stato, Chiese e pluralismo confessionale* (in www.statoechiese.it), May 2010 p. 11.



discrimination those barriers may represent and alleviate the effects they may have on extracting unfair concessions in a civil divorce.”¹³³ Hence, the Marcovitz’s sentence underlines the intersection between multiple sources of authority and identity, demonstrating the possibility of employing a standard legal recourse – damages for breach of contract, in this specific example – in response to specific gendered harms.

In other terms, if resolutions by religious Tribunals fall within the reasonable margin of discretion that any “secular judge” would have been permitted to employ, there is no reason to discriminate against those Tribunals solely for the reason that the decision-maker used a different tradition to reach a permissible resolution. This implies that the religious Tribunals cannot breach the basic protections to which each person is entitled by virtue of his equal citizenship status. More specifically, this means that, where needed, the parties to a dispute brought before the religious Tribunal should be allowed to turn it to the civil system. In this case, the

«joint-governance framework offers us a vision in which the secular system may be called upon to provide remedies in order to protect religious women from husbands who might otherwise cherry-pick their religious and secular obligations as they see fit. This is a clear rejection of the simplistic “your-culture-or-your-rights” approach, offering instead a more nuanced and context-sensitive analysis that begins from the ground up. This requires identifying who is harmed and why, and then proceeding to find a remedy that matches, as much as possible, the need to recognize the (indirect) intersection of law and religion that contributed in the first place to the creation of the harm for which legal recourse is now sought»¹³⁴.

¹³³ *Bruker v. Marcovitz* [2007] 3 S.C.R. 607. In this case, a Jewish husband made a contractual promise: he would remove barriers to religious remarriage in a negotiated agreement; which was in fact incorporated into the final divorce decree between the parties. Hence, this obligation became part of the terms that enabled the civil divorce by a secular Court. However, once the husband had the secular divorce, he failed to respect such contractual promise, claiming that he had undertaken a moral obligation rather than legal one. The Court was not in a position to force the husband to implement a civil promise with a religious dimension. Yet, the Canadian Judge imposed the husband to give his ex wife monetary damages, precisely because he had violated the contractual promise. The Supreme Court significantly added that, the husband’s behaviour had, on one hand, harmed the wife’s individual rights and, on the other, affected the general public interest, as stated in Canadian laws.

¹³⁴ A. SHACHAR, above n. 103, p. 147.



In this respect, we can argue that, allowing members of *nomoi* groups to use a non-State Tribunal may nourish the conditions for promoting a more dynamic interpretation of the tradition, as endorsed by religious authorities themselves. In other words, such a (joint governance) system could plant the seeds for organic reform that improves people's position within both their own communities and the wider (multicultural) society. It permits a degree of regulated interaction between religious and secular sources of law, so long as the baseline of citizenship-guaranteed rights remains firmly in place. A person adhering to a specific group may become a sort of "agent" of renewal of his own religious traditions and of the larger political communities to which he belongs as citizen. The state system, too, may be "transformed" – the *transformative accommodation* approach¹³⁵ – from strict separation to regulated interaction between secular law and religious law.

For all these reasons,

«a qualified recognition of the religious tribunal by the state may generate conditions that permit an effective, non-coercive encouragement of more egalitarian and reformist changes from within the tradition itself. The state system, too, is transformed from strict separation to regulated interaction. It is no longer permitted to categorically relegate competing sources of authority to the realm of unofficial, exotic if not outright dangerous "non-law." By bringing these alternative dispute resolution forums into the limelight, the regulated interaction approach discourages an underworld of unregulated religious tribunals and offers a path to transcend the either/or choice between culture and rights, family and state, citizenship and islands of "privatized diversity"»¹³⁶.

Yet, as Seyla Benhabib rightly affirmed, even under the JGA system, which leads to a transformative accommodation approach, we first need to establish clear lines between non-negotiable constitutional rights and practices (or activities) that may be governed by different *nomoi* groups.

The JGA system "for dividing and sharing authority promises to establish more than one set of standards that would jointly govern or coprevail in a contested arena", permitting "to replace the dominant all-or-nothing division of authority with a more fluid and dynamic

¹³⁵ A. SHACHAR, *Multicultural Jurisdictions: Cultural Differences And Women's Rights*, Cambridge University Press, Cambridge, 2001, pp. 117-145.

¹³⁶ A. SHACHAR, above n. 103, p. 144.



conception of power and jurisdiction”¹³⁷. But, even in this case, we have to consider that as “citizens we need to know when we reach the limits of our tolerance”, learning “to live with the otherness of other whose ways of being may be deeply threatening to our own”. From here stems the importance of establishing the constitutional (basic) principles that provides the framework within which the different communities can live and work together. Only in this case the JGA may contribute to the improvement of the protection of women’s equality and dignity under both systems, affording them the opportunity to express their commitments to both. «Otherwise, multiculturalism may simply become a recipe for the “balkanization of distinct communities”»¹³⁸.

In other terms, without specifying what Charles McIlwain called the essential qualities of constitutionalism¹³⁹, it is very difficult to solve the dilemma between unity and diversity. In fact, these qualities, and the relative principles, still remain crucial for avoiding the refeudalization of the law and establishing an “areligious” conception of secularism, which neither favours nor disadvantages any religious or non-religious creeds¹⁴⁰.

Abstract

Under the pressing process of immigration and globalisation many Western constitutional democracies have moved from a number of religions, sharing a common culture, to today's age of diversity. As opposed to the past, the current democracies are facing the lack of overlapping consensus over the basic constitutional laws: namely, the meaning and the scope of freedom of religion, secularism, the separation Church-State, equal treatment and the rule of law. This is because individuals often come to adopt their basic values by very different ways. The nature, scope and force of such values are likely to be affected by competing and, sometimes, contested fundamental values and worldviews. From here stems the pressing tension – or dilemma – between “unity” and “diversity”.

¹³⁷ A. SHACHAR, above n. 1, p. 424.

¹³⁸ S. BENHABIB, above n. 22, p. 128.

¹³⁹ CH. MCILWAIN, *Constitutionalism. Ancient and Modern*, Great Seal Books Cornell University Press, New York, 1958, p. 28.

¹⁴⁰ S. MANCINI and M. ROSENFELD, *Unveiling the Limits of Tolerance*, above n. 8, p. 22.



This essay starts with general considerations about the freedom of religion principle, strictly related with the “separation” as well as “collaboration” between secular States and Churches; then the author analyses three case-studies (France, Canada and Italy), pointing out some specific legal approaches. In particular he focuses the analyses over the French “droit commun”, the Italian ecclesiastic law and the Canadian arbitral tribunals that, especially in family law, allow disputes to be arbitrated using religious jurisdictions.

Keywords: religion, immigration, constitutionalism, secularism, laïcité, ecclesiastical law, arbitral tribunals.