

# THE CHALLENGES OF 'NEW RIGHTS' AND MILITANT SECULARISM

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## 1. A subtle hostility

In recent speeches, the Holy Father has reiterated his concerns about freedom of religion, making an insightful distinction between the different situations in the East and the West of the world: whereas in a number of Eastern countries violence, persecution and repression overtly threaten that freedom, in the West a more subtle form of hostility is spreading. In his discourse for the Message for the Day of Peace, 1 January 2011, Pope Benedict XVI remarked that:

It is painful to think that in some areas of the world it is impossible to profess one's religion freely except at the risk of life and personal liberty. In other areas we see more subtle and sophisticated forms of prejudice and hostility towards believers and religious symbols.

And in his Address to the Diplomatic Corps, 10 January 2011, His Holiness Pope Benedict XVI explicated that:

Turning our gaze from East to West, we find ourselves faced with other kinds of threats to the full exercise of religious freedom. I think in the first place of countries which accord great importance to pluralism and tolerance, but where religion is being increasingly marginalized. There is a tendency to consider religion, all religions, as something insignificant, alien or even destabilizing to modern society, and to attempt by different means to prevent it from having any influence on the life of society.

Whereas in some regions freedom of religion is utterly repressed by means of violence, in many others it is rather a sophisticated form of prejudice and disparagement against religion which in fact undermines the capability of fully enjoying that liberty.

Europe shows the most extreme example of the Western approach to religion.

Even a first-glance overview of contemporary legal trends in Europe reveals an ever-spreading distrust towards religion, religious institutions and their role in public life. A diffuse sentiment that religion is in contrast with the basic values of a modern liberal society occasionally evolves into attempts to marginalize the religious dimension of life from the public discourse. In

European liberal democracies, formal direct attacks against religious freedom seldom occur; more often freedom of religion is a secondary target, a victim of actions, the main purpose of which is to expound individual rights, especially 'new rights'. In other words, in western countries dangers for freedom of religion often derive as side-effects of a zealous attitude towards individual rights, especially towards 'new rights'. That is why hostility towards religion is more sophisticated and subtle: religion is portrayed and perceived as a hindrance to the full accomplishment of the human rights project, a major component of our contemporary liberal societies.

## 2. A freedom under strain

To introduce ourselves to the challenges that freedom of religion is confronted with in western liberal democracies, let us muse over the following dilemmas.

Can a faith-based charitable organization or a religious university take religion into account when hiring and firing staff, faculty or counselors? Or is it a form of unpermitted discrimination under liberal principles? Can religious festivities be celebrated in public schools? What about religious displays in schools and public buildings? Can a Catholic charity be required to place children for adoption with same-sex couples? Is a Christian hospital obliged to provide abortions?

Similar questions are no longer pure theoretical. Clashes between freedom of religion and other values considered as fundamental in liberal societies have multiplied in recent years. Hereinafter some real examples taken from the practice of judicial bodies and other human rights institutions.

The first example is taken from the field of *education*.

In the United Kingdom, a panel of nine Justices of the Supreme Court determined that a criterion in an over-subscription policy of a faith school which gave priority to those regarded as 'Jewish by birth' constituted racial discrimination. In fact, a couple of years ago, the British Supreme Court<sup>1</sup> condemned a Jewish faith school in London for unlawful discrimination, because the school – which is always consistently oversubscribed – adopts an over-subscription policy giving preference in admissions to Jewish children. One of the applicants was not admitted to the school on the consideration that the child was not recognized as Jewish by the competent religious authority,

<sup>1</sup> R. (on the application of E) v. The Governing Body of JFS and the Admission Appeal Panel of JFS and others [2009] UKSC 15.

for he was not a descendent from a Jewish mother, nor had he converted following the official rules and procedures.

In a word, according to the reasoning of the British court, when an applicant is not admitted to a Jewish School for the reason that he is not Jewish, the school is discriminating on the ground of race.

Difficult to imagine a more obnoxious defamation for a Jewish institution.

Should this orientation be confirmed and possibly imitated in other countries, freedom of religious education would be seriously undermined. The possibility of selecting teachers<sup>2</sup> and students on a faith-based orientation is an essential element of that freedom. However, as has been said, the threat is subtle and sophisticated, because it does not have *prima facie* the appearance of a direct attack to freedom of religion. Freedom of religion is rather thwarted by a misconstrued understanding of the right not to be discriminated against for ethnic or religious origins. In fact in the British Supreme Court decision, religious schools are reported as potential discriminators. If they want to preserve their religious character they are suspect institutions, acting close to the border of unlawful discrimination.

Other clashes between freedom of religion and the principle of non discrimination occurred in the UK in the field of *faith-based welfare services*.

For example, the High Court was recently asked to deal with the problem of Catholic charitable providers of services offering adoption services only to married couples, while refusing the same service to other couples, same sex couples included. Is this policy covered by freedom of religion or is this rather an impermissible form of discrimination on the ground of sexual orientation? More generally, do non-discrimination rules apply to private bodies as well as to public institutions? And what about publicly funded charities? The case brought before the High Court<sup>3</sup> was in the end answered in the sense that under certain conditions and under the supervision of a public institution, Catholic charities can continue to follow a policy of refusing to consider same sex-couples as potential adoptive parents. But the problem has not been definitively settled and new cases in different forums are likely to be presented again.

Another sensitive issue is *conscientious objection*. In those countries where abortion, euthanasia, contraception, medical assisted reproduction, same sex

<sup>2</sup> The problem looms in ECHR 20 October 2009, n° 39128/05, Lombardi Vallauri v. Italy. But in the end the decision is taken on procedural aspect.

<sup>3</sup> [2010] EWHC 520 (Ch), Catholic Care (Diocese of Leeds) and the Charity Commission for England and Wales and the Equality and Human Rights Commission.

marriage or civil partnership are legally permitted, conscientious objection is necessary to effectively safeguard the freedom of religion. In recent times, however, sharp criticism to conscientious objection have been raised and a request for strict regulation of this right has been advanced in view of guaranteeing the full protection of individual freedom of choice in matters which are sensitive and controversial from the ethical point of view. In particular, restrictions to conscientious objection have been proposed in a Draft resolution of the Council of Europe,<sup>4</sup> in order to ensure free access to medical care services, including abortion, euthanasia and artificial fertilization. The final document approved by the Assembly<sup>5</sup> eventually rejected the original proposal and restates the right to conscientious objection. In particular the Council of Europe secures the right to refuse to perform abortions, human miscarriage, euthanasia, or any act which could cause the death of a human foetus or embryo, while at the same time acknowledging the necessity of a regulation in order to ensure that patients are able to access lawful medical care in a timely manner.

Nevertheless, the discussion on conscientious objection goes on in different contexts and involves legal and administrative professions as well as medical ones.

Another British case<sup>6</sup> helps us to better understand the point: a Christian woman was a registrar for births, deaths, and marriages. With the introduction of civil partnerships for gay and lesbian couples in the UK, she was required to officiate over civil partnership ceremonies. After several attempts to change her position and to arrange her tasks on an informal basis, she was in the end forced to leave her job. Leaving the job, she made several claims – most importantly, that she was forced to quit on account of religiously-based discrimination. In the Court of Appeal, her claims were rejected, because the Court held that her

<sup>4</sup> Council of Europe, Parliamentary Assembly, doc. 12347, 20 July 2010 and doc. 12389, 6 October 2010, Women's access to lawful medical care: the problem of unregulated use of conscientious objection.

<sup>5</sup> Council of Europe, Parliamentary Assembly, resolution 1736 (2010), The Right to conscientious objection in lawful medical care.

<sup>6</sup> *Ladele v Islington LBC* [2010] 1 WLR 955 (CA). A similar view was held by the European Court of Human Rights, in *Pichon and Sajouns v. France*, 4 October 2001, n° 49853/99 where the Strasbourg Court considered 'the main sphere protected by Article 9 is that of personal convictions and religious beliefs'. In that case it was determined that a prohibition against pharmacists conscientiously objecting on religious grounds to the sale of contraceptives was permissible. The pharmacists, the Court insisted, could 'manifest [their] beliefs in many ways outside the professional sphere'.

inability to maintain her job as a registrar while excluding herself from civil partnership ceremonies did not impact on her religious belief. The list of the actual and potential clashes between ‘new rights’ and freedom of religion could be continued. In some cases, the problem has been dealt with at the legislative level. For example in some non-discrimination laws and regulations exceptions and exemptions allow religious organizations to disregard the legislation when legal requirements conflict with the tenets of religious doctrine, or would require such organizations to forfeit any portion of their autonomy.<sup>7</sup> This solution is welcome in its practical effects, but it cultivates nonetheless the sentiment that religion is at odds with the basic principles of modern societies, in particular with human rights and non discrimination principles.

How does it come about that contemporary legal discourse hints that freedom of religion – the first and most fundamental of human rights<sup>8</sup> – is an impediment to other human rights? And in contrast: how come that human rights are invoked to limit freedom of religion and to put it under strain?

It is worth noting that these problems are relatively new. Until the sunset of the 20<sup>th</sup> century almost no controversies on freedom of religion are reported in European forums: the first case ever when the European Court of Human Rights was asked to solve a problem of freedom of religion was *Kokkinakis versus Greece*, in 1993,<sup>9</sup> concerning the prohibition of proselytism for minority religious denomination. What are the peculiarities of the new generation of rights that cause tensions with the freedom of religion?

<sup>7</sup> See for example Council of Europe, Parliamentary Assembly, Resolution 1728 (2010), *Discrimination on the basis of sexual orientation and gender identity*, par. 17. Similar exceptions and exemption can be retrieved in several legislation on non discrimination, at the international and national level.

<sup>8</sup> Pope Benedict XVI, *Address to the Diplomatic Corps*, cit., saying that freedom of religion ‘is indeed the first of human rights, not only because it was historically the first to be recognized but also because it touches the constitutive dimension of man, his relation with his Creator’. The idea that freedom of religion is ‘the cornerstone of the structure of human rights and the foundation of every truly free society’ is recurrent in the teachings of Pope John Paul II. See for example the *Address of His Holiness John Paul II to the Fiftieth General Assembly of the United Nations Organizations, New York, 5 October 1995*. In general on this point see Università Cattolica del Sacro Cuore, Centro di Ricerche per lo studio della dottrina sociale della Chiesa, *La libertà religiosa negli insegnamenti di Giovanni Paolo II (1978-1998)*, Milano, Vita e Pensiero, 2000.

<sup>9</sup> ECHR 25 May 1993, n° 14307/88, *Kokkinakis v. Greece*, concerning the freedom of proselytism.

In the last ten to fifteen years some deep changes have been taking place in the fields of human rights that call for a more accurate conceptual analysis. In order to better understand the tensions between 'new rights' and freedom of religion, I would like to examine the conceptual matrixes of 'new rights' – which are (i) the right to privacy and (ii) the non-discrimination principle – and to assess the impact that they produce on an idea of public space, deeply marked by a call for 'neutrality'. In its turn the State leaning to neutrality is at the origin of the present pervasive secularism, which is generally considered as the only institutional framework compatible with multi-religious society. Finally I will discuss the relationship between secularism and freedom of religion, showing that the two concepts are not necessarily related to each other.

The scope of my enquiry is primarily directed to the European context, although the same analysis could be repeated in all Western countries as well as in the domain of international institutions.

### 3. 'Rights under privacy'

Where the end of the Second World War ushered a 'new world'<sup>10</sup> – whose most expressive emblem is the Universal Declaration of Human Rights of 1948 – likewise the end of the Cold war started a new era, under the sign of *new rights*,<sup>11</sup> at least in western countries. To be sure, in North America, the 'rights revolution' began some decades before; in Europe, a pervasive rights discourse has landed more recently although it has not taken a long time for Europe to gain a vanguard position in the race.

What kind of rights are the new rights? What needs do they intend to answer?

Each generation of rights has its own hallmark. The first generation aimed at the protection of the human person towards the abuses of political power; the second generation was rather concerned with the economic and social conditions for human development. The new generation of rights is permeated with the idea of individual autonomy, independence and capacity of deliberative choices.

<sup>10</sup> M.A. Glendon, *A World Made New* (Random House 1991) on the origin of the Universal Declaration of Human Rights. Likewise some people speak of the 'age of rights' referring to the reconstruction of western countries after the Second World War: N. Bobbio, *L'Età dei diritti* (Torino, Einaudi, 1990), A. Cassese, *I diritti umani oggi* (Roma, Laterza, 2005) 28 f.

<sup>11</sup> For those who are interested in the phenomenon of 'new rights', they can refer to a wider analysis that I have conducted in 'The age of new rights', in [www.nyustraus.com](http://www.nyustraus.com).

As a matter of fact most of the rights of the new generation originate in the idea of privacy, one of the most prolific legal concepts of our times, interpreted as the protection of the person's 'independence in making certain kinds of important decisions'.<sup>12</sup> At its origin, privacy used to be the right to keep certain personal facts and information from the public view; however, privacy eventually evolved into a new right, i.e. the rights to be able to engage in certain conduct without restraints. Whereas old privacy meant freedom from undue interference, new privacy aims at securing a positive liberty, to behave following one's personal preferences and choices. Here is to be found the attractive side of privacy rights: in the spotlight of privacy, the individual appears liberated from all constraints and empowered to be the master of his own life.

The aspiration of new rights that mushroom under the umbrella of privacy may be described using Sir Isaiah Berlin's words in his essays on Liberty:<sup>13</sup>

The "positive" sense of the word "liberty" derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men's acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own, not by causes which affect me, as it were, from outside. I wish to be somebody, not nobody; a doer – deciding, not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human role, that is, of conceiving goals and policies of my own and realizing them.

There is a strict connection between the high value that privacy confers to the individual as master of her life and the fact that many 'new rights' are an offspring of it. For this capacity of valuing the autonomy of the individual, privacy is becoming one of the passepartouts for new rights – the other being the principle of non-discrimination (see *infra* par. 4 and 5).

After their first debut in cases on contraception and abortion,<sup>14</sup> privacy rights are now blooming on the fertile soil of bio-ethical disputes, regarding

<sup>12</sup> M. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 Calif. Law Rev. (1989), 521 highlights a clear distinction between old privacy and new privacy: 'Where the contemporary right of privacy is the right to engage in certain conduct without government restraint, the traditional version is the right to keep certain personal facts from public view', at 524.

<sup>13</sup> I. Berlin, Two Concepts of Liberty (1958), in *Four Essays on Liberty* (Oxford, Oxford University Press, 1969), 8.

<sup>14</sup> An insightful historical narrative of the right of privacy is in Mary A. Glendon, *Rights Talk* (New York, USA, 1991) at 48 ss, showing how John Stuart Mill's *On Liberty*

the edges of life. On this ground, a whole new generation of rights is developing as an outcome of the value of individual privacy: the right to have a child and the right to abortion, the right not to be born and the right to die, the right to receive and the right to refuse medical treatment. The list could be continued with all the rights concerning family life: the right to marry and the right to divorce, the rights of children and the rights on children. In a word, all contemporary controversial issues involving moral disputes are placed in the domain of privacy and are shaped in terms of individual rights.

So, what do all these new rights have in common?

There is one main feature of the new generation of rights that deserves attention.

They all reflect a voluntarist conception of the human person. 'I will, therefore I am', could be the motto of the new rights.

All new rights capture an important component of human agency, that is the capacity to make some fundamental decisions concerning the good life without undue restraint. The strength and the merit is that they want to protect the individual from all forms of coercion on the part of public and private powers. The intent of new rights is to empower and emancipate every individual from all forms of paternalism and alienation. To this purpose new rights emphasize the individual capacity of free-choice, an important component of human freedom and human personality, indeed.

More problematic is undoubtedly to assess whether the emphasis of new rights on an autonomous and self-directed man captures a thorough image of human experience. Sometimes, in reading cases and legislation concerning new rights one wonders whether the holder of the rights is treated as a real person, or rather as an abstract image of an airy individual, made of a pure will, living in a no-man's land, unencumbered and disentangled. After all every personal deliberative choice is a process that takes place in a given context made of personal, social, cultural, relational conditions that wittingly or unwittingly play a role for a decision to ripen. Most privacy rights focus on freedom of choice and autonomy while concealing other dimensions of human experience: dependency, factual constraints and social conditions, needs and relationships, to name but a few. The result is often times a reductive legal image of the human subject, where the rights holder appears somehow artificial, misrepresented.

influenced the case law of American courts, even up to the Supreme Court, with the decisions of *Griswold v. Connecticut*, 381 U.S. 479 (1965) on contraception and *Roe v. Wade*, 410 U.S. 113 (1973) on abortion.

The question is momentous and subtle, because an abstract individual has the appearance of an independent subject freed from all constraints, but as a matter of fact might be an easy prey of all sorts of insidious undue power. A nuance of idealism and utopian dream looms in the picture of an individual defined only by his own pure free will. The tendency of privacy rights to focus too narrowly and exclusively on free will requires attentive consideration because it may jeopardize the very promise of liberation that those rights entail.

Moreover this conception of individual, understood as totally autonomous, self-sufficient, capable of self realization does not need God. Better, as has been said,<sup>15</sup> God is not necessarily eliminated, but is made irrelevant:

What does occur, however, is something much more cunning than the denial of God. Cornelio Fabro has summed it up well: 'If God does exist, He does not matter'. God has nothing concrete to do with man. God is now extrinsic to human cares and human problems: within this ambit, man is his own measure, his own master, the source both of the formulation of his plans and of the energy needed to bring them into being, the origin even of the ethical intention implicit in all he does. Thus, even if God does exist, within the ambit of human problems it is as if He did not. In this way, a division between the sacred and the profane comes into being, as though there could exist something outside the 'temple' of God that is the entire cosmos.

This conception of human person is now affecting all the West. 'New rights' under *privacy* spring from a reductive conception of the person and spread a *libertarian*<sup>16</sup> culture of human rights, which started in the US in the sixties and now affects all western democracies as well as the international practice of human rights. The dignitarian tradition of human rights based on an integral understanding of the human person is now overtaken by new rights, even in those European countries where it used to be deeply rooted, both in social life and in the national constitutions.

#### **4. Non discrimination and the 'new equality'**

At a careful consideration, one cannot help noting that a second legal principle fuels the development of 'new rights': privacy always goes hand in hand with non discrimination and in the international language of human rights privacy and non discrimination rhyme with each other. They are the twin

<sup>15</sup> L. Giussani, Religious awareness in modern man. Notes for committed Catholics, *Communio, International Catholic Review*, Washington DC, USA, 1998, Ch. 3.

<sup>16</sup> Mary Ann Glendon, *Rights Talk*, cit, at 48 f.

cornerstones of contemporary human rights practice, and their intimate kinship is mirrored – for example – by the frequent use in cases brought before the European Court of Human Rights of art. 14 on non discrimination in conjunction with art. 8 on the right to privacy, as the very bases of free choice rights. And if we turn our attention to the European Union, it is impossible not to be struck by the insistence on non discrimination as a human right.<sup>17</sup> Suffice it to recall that in the EU Charter of fundamental rights, recently vested with formal legal status, the whole of chapter III deals with equality and non discrimination and that a number of directives<sup>18</sup> implement the principle in different fields of social life, as well as a significant number of cases dealt with by the European Court of Justice.

In order to catch the connection between the principle of non discrimination and the 'new privacy rights' it is useful to consider that non discrimination originates in the idea of equality, but it conveys a specific understanding of it which fosters uniformity rather than differentiation.

In fact, whereas for centuries the Aristotelian idea of equality – that likes (and only likes) should be likely treated – was highly valued as capable of removing inequalities while respecting diversities, nowadays a diffuse sense of dissatisfaction surrounds this approach. The general principle of equality is being replaced by a more complex, nuanced and sophisticated body of legislation on non discrimination. In the most recent non discrimination codes, the principle of equality is unfolded in many and multiform ramifications – different grounds of non discrimination are enumerated, different instruments are articulated such as direct and indirect discrimination, affirmative and positive action, and so on – and each practical situation is provided with an appropriate rule, and if necessary with exceptions to the rules as well. One of the most pristine expression of this trend is the UK Equality Act of 2010, which counts more than 200 provisions.<sup>19</sup> Considering this evolution one might expect that the capacity of the legal principle of non discrimination to reflect and respect diversity is enhanced and at the same time all unlawful disadvantages are removed and outlawed. After all, the most challenging task of equality in our contemporary multicultural society is precisely to ban discrimination without jeopardizing diversity. Unfortunately,

<sup>17</sup> For an overview of the European legislation on non-discrimination see S. Fredman, *Discrimination Law* (Oxford, Oxford University Press 2002); C. Favilli, *La non discriminazione nell'Unione Europea* (Il Mulino, Bologna, 2008).

<sup>18</sup> The most relevant are Directive 2000/43/EC on racial discrimination and Directive 2000/78/EC on non discrimination in the workplace.

<sup>19</sup> [www.equalities.gov.uk/equality\\_act\\_2010.aspx](http://www.equalities.gov.uk/equality_act_2010.aspx).

as a matter of fact, equality as non discrimination fosters uniformity over diversity and standardization over differentiation. Under non discrimination, Europe is moving steadfastly towards a society ‘indifferent to differences’.

A wide range of examples could be taken from the context of non discrimination on the grounds of race, sex, nationality, sexual orientation, and age, for instance.

Even language suggests an ongoing transformation in the idea of equality: in fact, European institutions manifestly prefer ‘non-discrimination’ to ‘equality’. The slippage in linguistic usage hints at a conceptual move from *equality* as modulation of law according to the varieties of real life to *non-discrimination* as uniformity.

In non discrimination legislation words like reasonableness, likeness, difference, rationality, proportionality, similarities, relevant comparator, and so on, all disappear. Non discrimination legislation follows a different path: some relevant diversities in reality are singled out and enumerated – race, sex, gender, religion and philosophical beliefs, nationality, age, disability – with the purpose of rendering them irrelevant before the law. In the new concept of equality those people that fall into the enumerated protected groups are guaranteed that their characteristics do not matter before the law. Diversities are relevant and taken into account to define the scope of non discrimination legislation; however once a given type of diversity is considered by the legislation, uniformity of treatment is guaranteed by the law.

This change has been possible because there has been a significant shift in how the equality principle has come to be justified, with considerably greater emphasis on its role in protecting an individual’s self-identity, and considerably less emphasis on distributive justice.

## 5. New rights and neutral institutions

This turn from equality to non discrimination helps to understand the reasons why privacy and non discrimination are good allies in promoting ‘new rights’: in the perspective of privacy rights, for a full protection of individual autonomy, legislation has to step back from all terrains where a plurality of options are disputed because the only accepted task to be performed by the liberal legal system in ethically controversial areas is to keep all possibilities open and available. Non-discrimination serves this purpose because it postulates that factual differences should not count in front of the law.

Thanks to non-discrimination everyone is made free to make her own choices according to her view of the good life without restriction. If we want each person to decide for herself what she values and how she is going to live in the light of these values, she must be entitled to a set of ‘deliberative free-

doms', allowing her to live following her personal preferences. Non-discrimination is a preeminent tool for the securing of those deliberative freedoms: when non-discrimination is respected everybody can freely engage in (or accede to) one of the options available regardless of colour, sex, race, age or other preferences.<sup>20</sup> Non-discrimination is essential to the liberal project, because it urges the legal system to remove all hindrances to free choice on account of race, religion, sex, gender, personal opinions or social conditions.

A good example to understand the effect of non discrimination on controversial issues is *S.H. v. Austria*,<sup>21</sup> a recent case regarding medically-assisted procreation decided by the European Court of Human Rights. Austrian legislation strictly regulates and almost bans heterologous fertilization and the plaintiffs contended that those limits violated their right to privacy and non discrimination (protected by art. 8 and 14 of the European Convention). The plaintiffs claimed that the decision of a couple to have, or not to have, a child is an expression of the right to privacy (art. 8) and that all limitations on the use of some types of artificial fertilization cause discrimination (art. 14) against couples suffering certain types of impediments to procreation. In the plaintiffs' reasoning, the right to privacy associated with the non-discrimination principle should lead to the removal of all legal barriers to techniques of artificial reproduction, with a view to free determination in reproductive rights being fully respected.

The European Court endorsed the claimants' approach and condemned Austria. The reasoning followed this line: if the right to privacy encompasses 'the right of a couple to conceive a child and to make use of medically assisted procreation for that end', then this right to have a child must be guaranteed without discrimination. In line with this conceptual framework all restrictions on the use of available techniques would exclude some couples from the opportunity of having a baby, deprive them of their 'right to a child', and ultimately amount to discrimination in breach of the European Convention. Accordingly, all technical devices should always be rendered available without limitation in order not to produce discriminatory effects.

<sup>20</sup> S. Moreau, *What is discrimination?*, in *Philosophy and Public Affairs*, 38, n° 2, 2010, 143-79, construing discrimination as a wrong akin to a tort, where the interest protected is precisely the personal capacity for deliberative freedoms.

<sup>21</sup> ECHR, Decision 1 Apr. 2010, n°. 57813/00, *S.H. and others v. Austria*.

The reasoning of the European Court departs from the traditional approach wherein the first step is to appreciate whether a national measure interferes with a right protected by the European Convention, and wherein later steps both involve discussion of whether such an interference might be justified by other general interests necessary to a democratic society and abide by the principle of proportionality. In this case, after the first step, the majority opinion shifted the reasoning towards the non-discrimination principle, which trumped all the other values and interests at stake, like protecting the biological identity of the baby, preventing the exploitation of women, banning selective and eugenic reproduction, for example.

When different views about the good life confront one another, non-discrimination smoothes the discussion. It provides uniform treatment, regardless of all differences, avoiding all judgmental stances in front of personal preferences.

After all, going back to the case on medical assisted fertilization, why should the right to have a baby be granted only to those couples that can overcome their problems by means of homologous fertilization? Why, on the contrary, should other partners be excluded from that right if they happen to need heterologous fertilization?

Non discrimination is a fundamental ally of privacy rights, because it fosters uniformity of treatment, levelling all factual differences.

A legal system giving paramount value to freedom as individual autonomy is bound to appear indifferent to all options at stake. Non discrimination is functional to individual autonomy precisely because it provides a supposedly 'neutral' framework wherein all personal preferences are equally permitted and the personal autonomous choices of the individual are equally secured.

The interaction between non-discrimination and freedom of choice cultivates the ambition of squaring the circle in protecting diversity without inequality: differences in reality should simply not count in the legal realm. Seen through the lens of non-discrimination all differences become indifferent to the law. In this perspective non-discrimination serves the aspiration of liberal society to 'neutrality'.<sup>22</sup>

Equality as non-discrimination furthers the liberal goals of state neutrality, individualism and promotion of autonomy, since it forbids public pref-

<sup>22</sup> M. Sandel, *Democracy Discontent*, in M. Sandel ed., *Justice – A Reader* (Oxford, 2007) 331, pointing out that the liberal self-image requires two basic features: an independent, autonomous, unencumbered self, *and* equal respect. Freedom as autonomy of choices, and equality as non discrimination.

erence being granted to any one group or any one conception of the 'good life' and requires that all individual preferences be treated alike.

In a way *autonomy* and *neutrality* are twin concepts, since the former defines an essential quality of the liberal individual while the latter describes a typical trait of liberal institutions. In between, *non discrimination* is the necessary bridge connecting the individual dimension and the institutional side of the liberal democracy.

Paradoxically, whereas in the 20<sup>th</sup> century equality was the core value of social democracies and liberty the core value of the liberal democracies, so much so that liberty and equality were once considered competing or even antagonist values, in the current post-modern society freedom of choice – the contemporary version of liberty – and non-discrimination – the contemporary version of equality – have complementary effects, supporting one another. They both concur to model the institutions of the post-multicultural state as 'neutral institutions', blinded to all personal preferences, religious ones included.

## 6. The myth of neutral institutions and secularism

So far, our journey through the cultural backgrounds of new rights has shown three fundamental lemmas of the contemporary lexicon of rights: (i) privacy as freedom of choice; (ii) equality as non discrimination; (iii) neutrality as equidistance of legislation and institutions towards different ideas of a good life.

Going back to freedom of religion and to the relationship between State and religion, it is interesting to notice that the same three folded framework underpins the idea of the secular state, *à la française*. Interestingly, the fundamental ideas of the ideology of new rights perfectly mirror the basic assumption of French *laïcité*.

The opening remarks of the Stasi Report of 2003,<sup>23</sup> which eventually influenced the law on secularism in France,<sup>24</sup> read as follow:

La laïcité, pierre angulaire du pacte républicain, repose sur trois valeurs indissociables: liberté de conscience, égalité en droit des options spirituelles et religieuses, neutralité du pouvoir politique. La liberté de conscience permet à chaque citoyen de choisir sa vie spirituelle ou

<sup>23</sup> *Commission de réflexion sur l'application du principe de laïcité dans la République*, Rapport remis au Président de la République le 11 décembre 2003, in <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf>.

<sup>24</sup> *Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*.

religieuse. L'égalité en droit prohibe toute discrimination ou contrainte et l'Etat ne privilégie aucune option. Enfin le pouvoir politique reconnaît ses limites en s'abstenant de toute immixtion dans le domaine spirituel ou religieux. La laïcité traduit ainsi une conception du bien commun. Pour que chaque citoyen puisse se reconnaître dans la République, elle soustrait le pouvoir politique à l'influence dominante de toute option spirituelle ou religieuse, afin de pouvoir vivre ensemble.<sup>25</sup>

In particular, if in the new rights discourse non discrimination and neutrality are seen as two sides of the same coin, likewise in the field of religious freedom, equality of all religious denominations and neutrality of the public institutions are considered as necessary to each other.

La neutralité de l'Etat est la première condition de la laïcité. ... Pour l'essentiel la neutralité de l'Etat a deux implications.

D'une part, neutralité et égalité vont de pair. Consacrée à l'article 2 de la Constitution la laïcité impose ainsi à la République d'assurer "l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion". Les usagers doivent être traités de la même façon quelles que puissent être leurs croyances religieuses.

D'autre part, il faut que l'administration, soumise au pouvoir politique, donne non seulement toutes les garanties de la neutralité mais en présente aussi les apparences pour que l'utilisateur ne puisse douter de sa neutralité.<sup>26</sup>

To be sure, in the Report, it has been made clear that *laïcité* is a peculiar value of France, deriving from the national history of that country. The Report accounts for other experiences and shows respect for different options entrenched in the constitutional architectures of other countries regarding law and religion. Nevertheless, the French option for secularism has quickly crossed the national borders and is gradually displaying a subtle influence all over the continent. Secularism beckons the European institutions, first of all those which are vested of the power of interpreting the European Convention of Human Rights and through them also all the national institutions of the member states.

Apparently, the European countries found themselves unprepared to handle the new challenges brought about by a general secularization of the national population and by religious pluralism, resulting from the copious

<sup>25</sup> Commission Stasi Report cit., Preamble.

<sup>26</sup> Commission Stasi Report, cit., 2.2. Emphasis added.

flux of immigration of Islamic populations and from globalization. There are still a few enclaves of religious homogeneity, but generally speaking in the new geographical dimensions of the global world and in the new social fabric of multicultural societies, all religious traditions are in a minority position.

Built around the old idea of *cuius regio, eius religio*, many European countries used to have a dominant religion which was followed by the majority of the population – Anglican in the UK, Orthodox in Greece and in many East European Countries, Catholic in Spain and Italy, Protestant in many northern countries, etc. –. Consequently each State used to have a preferred relationship with one religious denomination, be it by means of established churches, or endorsed churches, or concordats. At the end of the 20<sup>th</sup> century, suddenly, any form of preferential treatment has been perceived unwarranted in societies where the social texture is made of religious pluralism and – even most important – of a diffuse secularization.<sup>27</sup> What model could be more suitable to the new environment than the French version of the *laïcité*? At first glance, French *laïcité* proposes a neutral stance towards religion and for this reason offers an appropriate way out to the difficult question of defining the place of religion in post-modern pluralist societies.

The bewilderment caused by the social changes in the European context is clearly exemplified by the European Court of Human Rights case law on religious symbols. In these matters, the European Court has endorsed – until very recently – the French model of *laïcité*, banning the display of crosses and other religious symbols in public buildings and preventing the use of personal religious apparel in schools, universities and other institutional places.<sup>28</sup>

In different situations, the European Court has repeatedly asserted that the presence of religious symbols in public buildings is incompatible with art. 9 of the European Convention of Human Rights, protecting freedom of religion. This jurisprudential trend started with the issue of *personal* religious dress codes and, ironically as it may be, the Court held that the protection of freedom of religion may require

<sup>27</sup> Secularism in the sense described by Ch. Taylor, *A Secular Age* (Harvard University Press, Cambridge Massachusetts and London England 2007) 14 ff, that religion has become one out of many option in western North Atlantic societies.

<sup>28</sup> At a careful reading of a case like ECHR, Arslan v. Turkey, 23 February 2010, n° 41135/98 it seems undisputable that religious symbols and clothes cannot be worn by public functionaries and that within public institutions restrictions to religious ornaments can always be applied.

the prohibition of wearing religious clothes – like the Islamic headscarf – or religious symbols – like necklaces with crosses – in public places. The first controversy on this matter was *Dahlab*, dated 2001<sup>29</sup> and it concerned a Swiss teacher, converted from Catholicism to Islam, who was prohibited to wear the Islamic headscarf when teaching in public schools, otherwise the ‘denominational neutrality’ of the State would be compromised, to the detriment of non believer pupils or pupils of a different faith. Then it was the turn of students wearing personal religious symbols: cases arose in Turkey – with *Şahin* of 2005<sup>30</sup> – and in France – with *Dogru* and *Kervanci* of 2008<sup>31</sup> – in which the Court showed a high degree of deference towards the national tradition of both Turkey and France, where the principle of secularism is deeply rooted in the national Constitution and explicitly considered compatible with the European Convention by the Court. For this reason the Court upheld the decisions of the national authorities to prevent some university students from keeping the Islamic headscarf on while attending classes or even while inside the University. Lastly came the case of the display of crucifixes in Italian schoolrooms:<sup>32</sup> initially the second section of the Court held that the presence of crucifixes infringed the freedom of religion of non believer students, because in a context – like the Italian one – where the great majority of the population show allegiance to one particular religion, the State has the duty to confessional neutrality, in order to keep equidistance from all religions. Then, a few weeks ago the Grand Chamber<sup>33</sup> reversed the judgment.

In this series of judgments there are a number of inconsistencies, starting, for example, with the variable use of the margin of appreciation doctrine,<sup>34</sup> because in some cases the European Court is very deferential to the national institutions, whereas in other cases it is more activist. Some arguments, however, recur in the European jurisprudence. First, the Court shows an insistent

<sup>29</sup> ECHR, *Dahlab v. Switzerland*, 15 February 2001, n° 42393/98

<sup>30</sup> ECHR, *Leyla Şahin versus Turkey*, 10 November 2005, n° 44774.

<sup>31</sup> ECHR, *Dogru v. France*, 4 December 2008, n° 27058/05; *Kervanci v. France*, 4 December 2008, n° 31645/04.

<sup>32</sup> ECHR, *Lautsi v. Italy*, 23 February 2010, n° 41135/98.

<sup>33</sup> ECHR, *Lautsi v. Italy*, 18 March 2011, n° 30814/06.

<sup>34</sup> It is worth remarking that in the Turkish and French cases on the Islamic headscarves the Court simply upheld the secularist choices made by the national institutions, whereas in the first *Lautsi* case concerning the crucifixes in the Italian schools the European Court reversed the position of the national judges.

concern for the position of individuals who do not follow the majority religion. Generally speaking, the position of the historical majoritarian religion is 'suspect' and it is frequently submitted to restrictions in the name of freedom of religion. No doubt the historical presence of a dominant religious denomination in each European country makes the issue of the protection of religious minorities very sensitive. Second, it is often assumed that the only way for freedom of religion to be fully protected in a pluralistic context is to promote the neutrality of state institutions. The result is that in this case law, freedom of religion and neutrality of the state (and even freedom of religion and secularism) tend to overlap.

The seeds of this ambivalence was already planted in the first decision of the European Court of Human Rights on freedom of religion in 1993.<sup>35</sup> Ever since then an identical paragraph connecting democracy, religious pluralism and neutrality/secularism is often repeated in the European case law:

... in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected. ... The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society.

... the principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention.<sup>36</sup>

There is a common assumption in European law as well as in the dominant culture that in a multicultural society the effective protection of freedom of religion requires strict State neutrality, hence secularism. Freedom of religion and secularism are often used as synonyms and the conceptual distinction be-

<sup>35</sup> This connection between freedom of religion and neutrality in Kokkinakis (1993) is correctly pointed out by N. Hatzis, *Neutrality, Proselytism, and Religious Minorities at the European Court of Human Rights and the U.S. Supreme Court*, in 49 *Harvard ILJ Online* 120 (2009).

<sup>36</sup> ECHR, *Refah Partisi*, n° 41340 to 41344/98, 13 February 2003, par. 91 and 93. The same expression can be found in several decisions concerning freedom of religion starting with Kokkinakis.

tween the two of them blurs, so much so that even when the European Court has decided in favour of the presence of crucifixes in the Italian schoolroom, it could not help repeating the same conceptual framework that

‘art. 9 of the Convention which guarantees freedom of thought, conscience and religion, including the freedom not to belong to a religion’, ... imposes on Contracting States a ‘duty of neutrality and impartiality’.<sup>37</sup>

Secularism or *laïcité* are not even mentioned in the European Convention. However, according to a great part of the European culture, freedom of religion is not thinkable outside a secular framework.

### 7. Neutrality or neutralization of religion?

Be as it may for the relationship between freedom of religion and secularism, the question arises whether ‘neutral secularism’ has proved to be the best institutional architecture to protect freedom of religion in multi-cultural societies. After all the value protected by the Convention, the Charter of fundamental rights of the European Union and by the national constitutions is freedom of religion, whereas secularism has only, if any, an instrumental value. Unlike the French constitution, where secularism is an entrenched principle, in the rest of the continent the final goal is the protection of freedom of religion, and the institutional arrangements between state and religion play a mere handmaiden role and should change according to their capacity to better protect freedom of religion. Whereas freedom of religion is a non-negotiable value, because it is entrenched in the very nature of human dignity,<sup>38</sup> the framework of the relationship between the distinct sphere of political power and religious institutions are susceptible to adaptation to different and changing historical contexts. Different countries with different traditions are likely to have different institutions in the sensitive area of religious freedom and a considerable range of church-state configurations may be consistent with genuine religious liberty. The institutional framework varies from place to place and over time. In this perspective, secularism is but one of the possible options to protect freedom of religion in a given context. Secularism is not a necessary condition for freedom of religion to be fully respected, nor is it always the optimal political option for religious freedom. In some cases it might also be detrimental to freedom of religion. We should keep in mind that freedom of religion is

<sup>37</sup> ECHR, *Lautsi v. Italy*, 30814/06, 18 March 2011, par. 60.

<sup>38</sup> *Dignitatis Humanae*, par. 2.

the *telos* and the framework of the relationship between church and state is the tool. Consequently, the second should be shaped, and restlessly re-shaped and adapted, to social changes in order to preserve an integral freedom of religion, which is the fundamental value to be protected.

As has been demonstrated,<sup>39</sup> historical experience has shown that insistence on State blindness towards religious diversity easily slips into marginalization of religion. One cannot easily assume that the more strictly is applied the principle of state neutrality, the more religious liberty will be enhanced. On the contrary, at some point insistence on rigid neutrality creates insensitivity and even 'subtle hostility' to religion.<sup>40</sup>

In fact, the problem with secular neutrality towards religions is that it is not a neutral principle, but rather a 'neutralizing' one.

Although many variations of secularism have been articulated and in fact secularism is a polisemic word, in the legal practice secularism boils down to strict 'neutrality', leading to insensitivity – if not distrust – towards the religious fact. To be more precise, different models of secularism have been distinguished, and the strict French interpretation is, in theory, considered an extreme interpretation of an idea that is susceptible to a wide range of modulations. Some speak of a dichotomy between open and protected secularism, others of positive and negative secularism, others of formal and substantive neutrality, for example.<sup>41</sup> Secularism is nowadays a polisemic word, the content of which may be very diverse. In so far as it tends to draw a line of distinction between the political power and the sphere of religion, secularism is healthy<sup>42</sup> and necessary. The problem with the idea of secularism arises because in practice secularism tends to conflate in 'neutrality' and when the model of 'neutral secularism' is followed, religion is always quarantined, marginalized or privatized. Strict neutrality is often presented as the rational,

<sup>39</sup> W. C. Durham Jr., Perspectives on Religious Liberty: a Comparative Framework, in J. D. van der Vyver and J. Witte jr (eds), *Religious Human Rights in Global Perspectives* (Martinus Nijhoff Publisher, The Hague, Boston, London, 1996) 1–44, at 24.

<sup>40</sup> J. Finnis, Religion and State, in *The Collected Essays of John Finnis*, forthcoming OUP Oxford 2011, vol. V, ch. 4, at 97 demonstrates that freedom of religion as freedom from coercion and violence in religious matters does not imply state neutrality: the two ideas are conceptually distinct.

<sup>41</sup> A. Barbera, *I sei volti della laicità*, in [www.forumcostituzionale.it](http://www.forumcostituzionale.it); D. Laycock, Formal, Substantive and Disaggregated Neutrality towards Religion, 39 *DePaul L. Rev.* 993 (1990).

<sup>42</sup> His Holiness Pope Benedict XVI has frequently referred to the necessity of a healthy and positive distinction between civil society and religion. See for an overview of all His intervention on this point G. Feliciani, *La laicità dello Stato negli insegnamenti di Benedetto XVI*, in [www.statoechnese.it](http://www.statoechnese.it).

scientific, enlightened position: a sort of common ground shared by all, religious or non religious people alike. But, if tested in historical experience, this enlightened secularism<sup>43</sup> has not proved to be scientific or neutral towards religions, but rather inimical to them, because it pretends to embody a rationalistic attitude to social life that contrasts with what is considered to be the ‘irrationality’ of the religious views.

Again the point had already been captured years ago:<sup>44</sup> under such a secularism...

...God is reduced to a more or less private option. He becomes a pathetic psychological consolation, or a museum piece. For a man who feels keenly the brevity of his life and the many tasks to be accomplished, such a God is not only useless, but even harmful: He is the ‘opiate of the people’. A society informed by such a mindset may not be atheistic formally, but it is atheistic *de facto*.

In truth, such a God is not only useless, not only harmful; He is not even God. A God who does not pertain to human activity, to his construction, to his path towards human destiny, is at best a waste of time; and in the end, a god of this sort should be dispensed with, eliminated. The formula, ‘If God does exist, He doesn’t matter’, bears within itself the logical conclusion, ‘God does not exist’.

The real enemy of authentic religiosity, in my view, is not so much atheism as it is the secularism outlined above. If the sacred is irrelevant to the concrete domain of our daily efforts, then man’s relationship with God is conceivable only as something totally subjective. Consequently, human reality is left to itself. Our problems and concerns are then at the mercy of sheerly human criteria, which, in practice, are readily subsumed by the powers that be.

In our postmodern societies, one can’t help pointing out the fallacy of secular neutrality: in a world like the western one, where the deepest cleavages are between believers and non believers – and not, as it is often assumed, between believers of different faiths – state secularism means in fact an endorsement of one of the options at stake,<sup>45</sup> precisely the secular one.

<sup>43</sup> J. Davison Hunter, *Culture Wars: The Struggle to Define America* (New York 1991).

<sup>44</sup> L. Giussani, *Religious awareness in modern man*, cit. ch. 3, p.

<sup>45</sup> See for example, W. Cole Durham and A. Dushku, Traditionalism, Secularism, and the Transformative Dimension of Religious Institutions, *Brigham Young Law Review* (1993), 421, at 463; J.H.H. Weiler, *Un’Europa Cristiana* (Milano Rizzoli 2003) at. 82 ff and his hearing before the Grand Chamber in the Lautsi case, on 30 June 2010 available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=870705&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA39864>.

The example of religious symbols is a telling one: religion is not forbidden, but its recognizable presence is forbidden in public spaces. However, a naked wall deprived of all symbols is not silent: it does take sides within competing visions of life. A State renouncing all religious symbols is no more impartial or neutral than a State that permits some specific symbols to be displayed. It suggests that a vision of life without God is the most respectable one. In the end, neutrality means privileging one vision of the world over other ones, pretending that this is neutrality.

Many other examples could be provided. Another terrain where marginalization of religion is becoming incontrovertible concerns religion classes in public schools.

In fact, the regulation of religion classes is following a trajectory, a kind of parabola, the starting point of which was the provision of mandatory classes of the majority religion in public schools; the intermediate step is the possibility of attending religious or ethical classes on a voluntary basis,<sup>46</sup> and the final end seems to be the abolition of all teaching concerning religion in European public schools.

The Grzelak case versus Poland is a good illustration of this trajectory. Nowadays, in Poland classes of religion are offered on demand. Parents or students can ask to be enrolled in a class of a religion that they prefer or a class of ethics. The classes of religious or ethical teaching are provided if a minimum number of students apply. So, religion is an optional subject and religion classes may refer to any religion or to ethics, depending on the students' preferences. The case of Grzelak concerned the problem of marks on official reports. The applicant complained that his report contained no mark corresponding to the line of religious teaching, because whereas he had requested a class of ethics, the school did not receive enough applications to provide the class. According to the plaintiff, in Poland, where the large majority of the population is Catholic, the absence of a mark for religious/ethics would be understood as an indication that he did not follow religious classes and consequently he was likely to be regarded as a person without religious beliefs. The Court held that 'the absence of a mark for religious/ethics...amounted to a form of unwarranted stigmatization of the applicant' and issued a finding of violation of art. 9 on freedom of religion.

<sup>46</sup> This was the rationale in ECHR, *Folgero v. Norway*, 29 June 2007, n° 15472, requiring Norway to concede student a full exemption from the teaching of KRL – Christianity, religion and Philosophy.

So, what should Polish schools do in order to comply with the decision of the Court? In my opinion there is no way out. Either all public schools are obliged to organize all sorts of religious or agnostic ethical classes that are requested by every single student, despite costs and financial burdens, or religion classes are bound to be abolished. All things considered the second option is the more likely.

The evolution of freedom of religion in a secular neutral context leads to the disappearance of religion.

In fact, secularism is not neutral towards religion; it is rather a neutralizing element of the religious presence in the public space. Sooner or later, maybe through incremental steps, secularism becomes inimical to religion. It might seem a paradox; but it is a paradox demonstrated by historical experience.

This is even more evident in the European context, where state action is pervasive in all spheres of social life. European secularism is much more than American non establishment, because of the different conception of state-society underneath:<sup>47</sup> a typical expression of the continental cumbersome state – a legacy of the Leviathan and of the Hegelian state – European secularism is one of the faces of the ‘pantheistic state’ to recall a famous expression of fr. Luigi Sturzo,<sup>48</sup> the other being confessionalism:

Lo stato laico, per conquistare la sua completa autonomia da ogni altro potere, si è andato orientando sempre più verso una specie di ‘confessionalismo’ proprio, al quale la Chiesa serve secondo i casi di contrapposto o di presupposto, di termine di lotta ovvero di elemento costruttivo.

Where public regulation of social life is more pervasive, the secular stance of the public institutions reduces the space of religious liberty: the cases recalled in the opening pages of this presentation are clear examples of that. In those cases, a detailed regulation of non discrimination and a multiplication of individual rights come to clash with the spaces of religious liberty, imposing cumbersome constraints on religious schools and religious based charity providers, for example. A *prima facie* neutral regulation becomes in practice a hostile religious one.

The paradox is that in Europe secularism tends to generate a confessionalisation of the State, be it ‘secular confessionalism’ or ‘religious confessionalism’. For this reason in the context of European secularism religion is gradually pushed back to the borders of social life, reduced to a private fact and above all reduced to a mere belief: one out of many beliefs that

<sup>47</sup> L. Diotallevi, *Una alternativa alla laicità* (Rubbettino, Soveria Mannelli, 2008); G. Dalla Torre, *Le laicità e la laicità*, in F. D’Agostino (ed), *Laicità cristiana* (Milano, 2007), 18.

<sup>48</sup> L. Sturzo, *Chiesa e Stato. Studio sociologico-storico* (Bologna, Zanichelli, 1958).

belong to the private sphere of the individual. Privacy, neutrality, non-discrimination impinge upon freedom of religion to the point of assimilating it to one of the new rights under privacy.

## 8. Second Lautsi and beyond

The decision of the Grand Chamber on the crucifixes in Italian schools<sup>49</sup> brings a positive note to the grey landscape of freedom of religion in the secularist European context.

The message of the decision is clear: the presence of a religious symbol in a public building like a school does not necessarily infringe the freedom of religion of non-believers nor that of other believers. This turn must not be underestimated: the European Court of Human Rights who in recent years has become famous all over the world for promoting French-style *laïcité* in public schools and public life, striking down Muslim headscarves and other religious symbols as contrary to the message of tolerance, respect for others, and equality and non-discrimination that a democratic society must maintain, in a case like *Lautsi* suggests a new policy that respects the rights of religious and secular groups alike to express their views, but allows governments to reflect democratically the traditional religious views of its majority. Freedom of religion does not necessarily require a 'wall of separation between church and State' – to recall a famous image of the US Supreme Court<sup>50</sup> – and we could add, neither does it require a white and naked wall in public buildings. This position brings something new.

Similarly, it is no exaggeration to remark the reasonableness of the Court argument that the mere display of the crucifix is not capable of affecting religious liberty of students, and that gives a great relevance to the educational context of Italian schools: it is the concrete analysis of the factual context that shows elements like the openness of the scholastic environment to other religions, the absence of any form of indoctrination or coercion or proselytizing tendency and the critical method of teaching, that induce the Court to conclude that no infringements of the rights protected by the Convention occurred. The shift from a 'Cartesian-like' syllogistic reasoning, to a broadened form of reasoning where context, facts, and experience have due place has made the difference.

<sup>49</sup> ECHR, Grand Chamber, 18 March 2011, *Lautsi v. Italy*, n° 30814/06.

<sup>50</sup> *Everson v Board of Education* 330 US 1 (1946). Starting from this decision the U.S. Supreme Court applied a strict Jeffersonian doctrine and dismantled the previous state legislation which instead endorsed a 'mild' separation.

Nevertheless, one cannot overlook that in the Court's reasoning old-fashioned elements of doctrine based on the idea of state neutrality occasionally emerge. In a way, the decision is important because it breaks the trend towards the identification of freedom of religion with state *laïcité*; but a new doctrine alternative to the old secularist interpretation of freedom of religion is still to be crafted. In fact, the decision of the Court was taken on the grounds of freedom of education (art. 2, Protocol n. 1 to the European Convention) rather than straightforwardly on the basis of freedom of religion (art. 9). This shift suggests that the Court has not been able to reverse the previous decision on the ground of freedom of religion: an alternative doctrine to *laïcité* is still missing.

Why is it so difficult to abandon secularism? I would like to highlight some cultural obstacles that make a re-conceptualization of freedom of religion difficult. Some of them come from the general legal doctrines and hamper the departure from the pivotal idea of neutrality: one of these is the reduction of equality to non discrimination, that cultivates the imperative of uniformity of treatment and neutrality of the State – as has been shown in the previous pages. Another is the reduction of religion to belief. Under the influence of the meta-value of privacy, religion is often reduced to its anemic ghost: it is treated as a simple matter of belief, thought, conscience and opinion and its capability of informing all aspects of human experience fades. Consequently, the specific characteristic of religion in social life are ignored.

In a more general sense, other obstacles derive from common bias against religions, like the shared idea that religions are inclined to violence,<sup>51</sup> both physical and moral violence, war and coercion; or the common opinion that religion belongs to the sphere of sentiment and irrationality<sup>52</sup> and in general is hardly compatible with the basic values of liberal democracies.<sup>53</sup>

<sup>51</sup> This bias has been recently confuted by W. Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (OUP, Oxford 2009).

<sup>52</sup> Here one can't help cheering the insistence of the Holy Father about the mutual interdependence of faith and reason. Just to mention one of his most famous interventions on this issue, see Lecture of the Holy Father, Aula Magna of the University of Regensburg, 12 September 2006, Faith, Reason and the University Memories and Reflections.

<sup>53</sup> Mc Crudden, *Multiculturalism, Freedom of Religion, Equality and the British Constitution*, University of Oxford Legal Research Paper Series, n° 72/2010, describing a post relativistic approach to multicultural societies, where all cultures should respect some basic liberal values.

All these, and many more factors cultivate distrust towards religion. And in a way secularism is the constitutional translation of distrust towards religion.

How to recover reciprocal trust, a benevolent attitude of State towards religion and above all a form of cooperation between State and Church, while preserving their autonomy and distinctiveness?

Overcoming the State distrust is crucial for the integrity of freedom of religion. As has been demonstrated, history shows that the best institutional regime for protecting freedom of religion is not secularism, but a model<sup>54</sup> based on a distinction of state and churches and yet retaining a benevolent attitude towards religion. A regime where religious peculiarities are not simply tolerated, but taken into consideration, accommodated, protected and supported, because they are valuable to the society. A regime where issues such as financial subsidies to churches, recognition of religion as part of the local and national culture, display of religious symbols, support to educational religious institutions and religious based charities, respect for dietary restrictions, holidays and all sort of special needs are taken into account by the state institutions.

Such a benevolent attitude and healthy cooperation between state and religion is a *conditio sine qua non* for freedom of religion. Better: it is a *conditio sine qua non* for freedom of public religion.<sup>55</sup> But such an approach can only ripen if religion is perceived as an essential ingredient for social flourishing. As some important social studies<sup>56</sup> show, it is necessary to prove that religion is crucial to thriving societies and peace and to human flourishing. Put slightly differently, a *favor religionis* can develop if 'religion is not a problem to be solved but a resource' – as Pope Benedict XVI said in Westminster Hall to the British leaders.<sup>57</sup>

Here a concurring responsibility is required.

On the one hand, a new understanding of the relationship between the state and religion is to be discussed and considered on the part of public institutions and legislatures. The social challenges of multi-religious societies call for a new sympathetic gaze towards religious realities. After all, many voices are saying that without religion in the public space, social life is impoverished.

<sup>54</sup> W. C. Durham jr., *Perspectives on Religious Liberty: a Comparative Framework*, cit.

<sup>55</sup> J. Witte, *Freedom of Public Religion*, 32 *Capital University Law Review* 499 (2004).

<sup>56</sup> I refer to the contribution of A.D. Hertzke, *Religious Freedom in the World Today: Paradox and Promise*, pp. 108–133 of this book.

<sup>57</sup> Pope Benedict's address to Politicians, Diplomats, Academics and Business Leaders Westminster Hall, City of Westminster, Friday, 17 September 2010.

On the other hand, a renewed self-understanding of religious life is equally necessary. Privatization of religion is not due only to bad legislation. As Joseph Weiler said a few years ago, Christians in Europe are in a ghetto: but there are internal walls as well as external ones to this ghetto. Sometimes religious people lock themselves into private rooms, so that legislation reducing religion to private belief reflects a western style religiosity, strictly separated from other dimensions of life.

In western countries, the 'wall of separation' had been built and is firmly established; and paradoxically enough it has been established with the co-operation of Christians themselves.

Interestingly, this problem is not new and had already been pointed out since the *Pacem in terris*, in 1963:

It is no less clear that today, in traditionally Christian nations, secular institutions, although demonstrating a high degree of scientific and technical perfection, and efficiency in achieving their respective ends, not infrequently are but slightly affected by Christian motivation or inspiration.

It is beyond question that in the creation of those institutions many contributed and continue to contribute who were believed to be and who consider themselves Christians; and without doubt, in part at least, they were and are. How does one explain this? It is Our opinion that the explanation is to be found in an inconsistency in their minds between religious belief and their action in the temporal sphere. It is necessary, therefore, that their interior unity be reestablished, and that in their temporal activity Faith should be present as a beacon to give light, and Charity as a force to give life.

How can we overcome the distrust between state and religion and its constitutional codification, which is the 'neutral secularism'?

Once again Pope Benedict XVI has indicated the way. In the address at the *Collège des Bernardins* in 2008<sup>58</sup> he has shown the contribution of religion to public life. He did not simply state that religion is valuable for social life; he has shown the truth of this statement with the example of the spiritual, cultural, social and economic reconstruction of the European continent in the Middle Ages, which spread incrementally starting from the monasteries.

... amid the great cultural upheaval resulting from migrations of peoples and the emerging new political configurations, the monasteries

<sup>58</sup> Meeting with representatives from the world of culture, address of His Holiness Benedict XVI, Collège des Bernardins, Friday 12 September 2008.

were the places where the treasures of ancient culture survived, and where at the same time a new culture slowly took shape out of the old. But how did it happen? What motivated men to come together to these places? What did they want? How did they live? First and foremost it must be frankly admitted straight away that it was not their intention to create a culture nor even to preserve a culture from the past. Their motivation was much more basic. Their goal was: *quaerere Deum*.

And in front of the *Sagrada Familia*, in Barcelona the Holy Father in November 2010<sup>59</sup> indicated the same method, in a different context:

In this place, Gaudí desired to unify that inspiration which came to him from the three books which nourished him as a man, as a believer and as an architect: the book of nature, the book of sacred Scripture and the book of the liturgy. [...] *In this he accomplished one of the most important tasks of our times: overcoming the division between human consciousness and Christian consciousness, between living in this temporal world and being open to eternal life, between the beauty of things and God as beauty.* Antoni Gaudí did this not with words but with stones, lines, planes, and points.

From a genuine search for God, small spots of renaissance and beauty once commenced, and still commence today; small spots that in the middle age eventually affected the whole continent; small spots that still may give birth to a renewed civilization.

<sup>59</sup> Holy Mass with Dedication of the *Sagrada Familia* and the Altar, Homily of the Holy Father, Barcelona, November 7, 2010. Emphasis added.