

THE PROMOTION OF RELIGIOUS TOLERANCE AND NON-DISCRIMINATION AS A FUNDAMENTAL FACTOR TO ENSURE *TRANQUILLITAS ORDINIS*

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1. European experience: from religious wars to religious freedom, as a pillar of social harmony

Speaking – with historical objectiveness – of the religious factor as an instrument to ensure *tranquillitas ordinis* can be embarrassing for us Europeans. In fact, for many centuries, religious struggles in Europe have slowed down the emergence of categories such as freedom, tolerance, non-discrimination, which are fundamental for social peace, as we intend it today.

A historical trajectory, from the autumn of the Middle Ages¹ to the French Revolution, shows the causes of this.² During the Renaissance, religious truth became darker and was no longer a cohesion factor as it was during the *res-publica christiana*. During the 15th century it seemed a breaking element of pacific social harmony. I will now mention two names. Dominican friar Girolamo Savonarola, in Florence, disgusted by the decadence of customs, preached the end of the world. In Basel, humanist Sebastian Brant announced storms and catastrophes in his satiric work *The Ship of Fools* (*Das Narren Schiff*, 1494), “because the Antichrist, sitting in the big nave, has sent his herald scattering lies around”. The disappearance of Christian truth would bring further heresy, as it had happened during the previous Middle Age. But the fracture brought by Luther in the early 16th century – in relation to a key issue of faith such as free will – resulted in a wider break-up that revolutionized the institutional conceptual basis of Church and State irreversibly. Religious struggles drew the borders of our Countries with blood. Entire nations embraced the Reformation. New State Churches were created in reformed Countries in opposition to the Papacy. Each sovereign – in order to appease the society that he governed – chose between Catholic or Reformed religion and guaranteed such religion on an exclusive basis.

¹ J. Huizinga's essay remains fundamental, *L'autunno del Medio Evo*, 1919, Italian translation with *Introduction* by E. Garin, Florence 1966.

² For a longer treatise see O. Fumagalli Carulli, *A Cesare ciò che è di Cesare a Dio ciò che è di Dio*. *Laicità dello Stato e libertà delle Chiese*, Milan 2006.

As a consequence of two opposite conceptions of man and justice,³ there is a contrast between two different ways to ensure tranquillity of order. According to Luther (who took to the extreme some of St. Augustine's passages about man as a sinful creature hurt by Original Sin and saved by faith alone, not by works) the Prince could do anything, including the use of force and violence (a religious version of the "fox" or "lion" in Machiavelli's *The Prince*), and could violate divine commandments,⁴ if it were necessary to ensure exterior tranquillity, because such tranquillity would allow Christians to devote themselves totally and exclusively to their inner life.⁵ According to Erasmus of Rotterdam⁶ – who followed Thomas' philosophy of Man (which derived from the Aristotelian one), as a creature inclined to social life, and of political community, as an instrument to develop and improve the person due to his/her works – wisdom and goodness, which are typical of every man, should be present in their maximum degree in the Prince who called upon to govern the political community, because he should imitate the Divine Providence.

Confessional Absolutism of the 17th century is the son of Luther,⁷ more than Erasmus. In the name of one religious denomination, it consolidates its own legal order as the only authority to govern society also with reference to the spiritual aspects. We are in the presence of a "strong" State, which guar-

³ The protestant conception (although less radically than Calvinism) excludes any kind of merit based on works and denies the State any limitation; the Catholic conception continues to maintain the existence of objective justice and natural law.

⁴ Luther said: "Although in this case the imperial majesty would act unjustly and exceed its duty and its oath, the imperial authority, and the duty of obedience on the part of its subjects, are not abrogated ... an emperor and prince breaks all God's commandments and still remains emperor and prince".

⁵ The external world, pervaded by evil, coincides with the political world in Luther's view. It is the "left hand kingdom". The law of the State that governs it is not grounded on *caritas*, but on power. It is addressed to the *homo exterior*. What prevails is the *necessitas* imposed by the evil both of man as an individual and of the community (the "Mr Omnes" of Luther's burning invectives). The Real Kingdom in which the Christian can take refuge is the "Right hand kingdom": an interior, purely spiritual kingdom, guided by the *lex caritatis*, addressed to the *homo interior*, which is perceivable only through faith and thus requires a continuous conversion. Commenting on Psalm 82, Luther writes: "For where God's word is protected and supported so that it can be freely taught and learned, and if the sects and false teachers are not given license and not defended against those who fear God, what greater treasure can there be in a land? God must certainly live there, as if in God's own temple".

⁶ O. Giacchi, *Lo Stato laico*, Vita e Pensiero, Milan 1978, p. 43.

⁷ Luther stated that a government had to be hard and serious to force and oblige the evil-minded and that the world could not be governed without bloodshed.

antees social peace with the sword and, at same time, is *ab-solutus*, absolved from any obedience to any other authority, whether civil or religious. There is no freedom for those who profess a religion different from the king's; at the most (but not always) there is tolerance.⁸ The Territorial Church – an instrument of the State (and this would also be the case in the Catholic States, as shown by the Declaration of the Clergy of France of 19 March 1682) lost its freedom. The sole limit to the action of the absolute Prince was his own conscience.⁹ Once the unity of faith was broken, interventions of control and limitation by the Papacy decreased in value also in the Catholic States, where the Catholic Church had no option but to convene a Concordat with the State, in the guise of the exchange of privileges.¹⁰

When, in the middle of the 18th century, Enlightened Absolutism replaced Confessional Absolutism, the State took primacy over the Church not in the name of a “defence of the faith”,¹¹ but in the name of principles of reason, set free from any tie with the supernatural. The State – only the State (not the Church) – was considered as a teacher of civilization, according to the enlightened idea of “unstoppable progress”, which became a political programme centred on the autonomy from transcendence, and which was ready to rebel against it. Religious peace was challenged by the heavy interventions of the enlightened sovereign during the entire life of Church: the Church's properties were confiscated, monastic orders were suppressed, theological teaching was placed under control, and the kings continued to interfere in the appointment of ecclesiastical offices, in the meetings of the clergy and even in bishops' communications with Rome.

⁸ In order to recall the paradigmatic nation, in France the merciless repression of the Huguenots leads in 1685 to the revocation of the Edict of Nantes (granted by Henry IV in 1598 in favour of Protestants): Protestants were not only deprived of freedom but even of tolerance, since the public exercise of Protestantism was suppressed. Although Pope Innocent XI didn't agree with the revocation – all the more so since he was trying to ensure religious tolerance for English Catholics by their king, James I – his opinion didn't count in the eyes of those who governed, since the inexorable logic of confessionalism proper of Absolutism were others.

⁹ What derives is the absolute separation in assessing the State's action between spiritual and political order: an approach that was very successful from the 18th century onwards and became one of the postulates of the modern elaboration of the lay State.

¹⁰ In the leading nation (historians speak of *Europe Française*), the alliance between throne and altar is consecrated for the first time in the Concordat between Leo X and Francis I in 1516.

¹¹ It is a *ius circa sacra* which is so important in the confessional absolutism to be demanded by the kings as “bones of their crown”.

During the French Revolution, the distinction between the temporal and the spiritual order – which was dear to the followers of the Enlightenment and not contrary in itself to Christian dualism (“Render therefore unto Caesar the things which are Caesar’s; and unto God the things that are God’s”) – turned into a violent struggle of Caesar against God, in the name of a *laïcité* that was very different from the distinction between Caesar and God, which was at the origin of Christian civilization. The “intellectual revolt” (as it was called by Daniel-Rops),¹² which had started three centuries earlier, was accomplished in the “Declaration of the Rights of Man and of the Citizen” (20 August 1789) with its lights and shadows: human rights were in the first place, before the rights of the State, but at the same time the “struggled separation” of State and Church began and would result in a violent eradication of any Christian root from the society. In a short time, during Terror, the words “*liberté, égalité, fraternité*”, although coinciding with a great Christian teaching, covered unprecedented violent episodes against anything – being transcendent – that was outside of the “*raison-raisonnante*” or, as the case may be, the new cults (the Goddess of Reason, the Supreme Being). The Civil Constitution of the Clergy (voted by the National Constituent Assembly on 12 July 1790) attacked every religious power.¹³ The Pope lost his authority over the bishops. The bishops lost their authority on their clergy. Parish priests become in practice dependant on their electors.

The trajectory of the separatist *laïcité* ends in a climate of a greater *détente* compared to the Thermidor: after abandoning the Jacobin severity and the Civil Constitution of the Clergy’s repeal (18 September 1794), the idea to relegate the Church to the private realm became more and more popular and is today triumphant. At the end of the French Revolution, the *laïque* State appeared on the European scenario as a reaction to the confessional State and was declined in two ways: either antireligious (“struggled separation”) or a-religious (“quiet separation”). A new declination of these two key categories was embraced inside and outside of Europe¹⁴ over the years.

¹² H. Daniel-Rops, *La Chiesa delle rivoluzioni*, in *Storia della Chiesa del Cristo*, vol. VI-I, *Di fronte a nuovi destini*, It. transl., Turin 1966.

¹³ Please note that it was not discussed in the Convention, a turbulent assembly dominated by the intense feelings of the lower classes, but in the Constituent Assembly, where the three classes were represented and the debate took place in relative harmony.

¹⁴ Napoleon abandoned the principle of a single State religion and laid the groundwork for religious freedom. His Concordat (1801) became a model for the post-confessional Concordats: they too outline a model of *laïcité* that does not fight against or ignore the religious factor but considers it the subject of freedom agreements. Today this

Quite heterogeneous forms of secular State were implied in the Concordats of the Conciliar and Post-Conciliar Age.¹⁵ Concordats were no longer designed as exchanges of privileges, but rather as instruments for cooperation in order to promote mankind and the interest of the Country (this is the wording of the Concordat with Italy and Poland).

It would be interesting to recall the specific development of the concept of secularism in America, from the moment when – to say it with Tocqueville’s words – “*La démocratie, comme en Amérique*” was established. But it would be too long to do so here.

Coming back to Europe – and trying to understand how the anti-discrimination laws arose during the second half of the 20th century – we should start with two highlights of recent history which are not less disgraceful than religious wars: Nazi extermination camps and communist gulags. They led to the massacre of human dignity, showing the grave consequences of the State claiming to be the unchallengeable regulator of life in society. But, as it sometime happens in history, good rises from evil. The international community reacted with the Universal Declaration of Human Rights (1948). Western Europe was the first to reply: it adopted the European Convention on Human Rights (1950) and provided it with a jurisdictional body (European Court for Human Rights since 1959). Human dignity and religious freedom became the pillars of European social harmony and of Western European Constitutions. *Tranquillitas ordinis* is based on the commitment of all, including religious denominations, to protect the human rights and *in primis* religious freedom. The United Nations’ system succeeded the Westphalian system.

model is followed by several non separatist countries (European and non European), which however don’t include France, which with the 1905 Constitution abrogated the Napoleonic Concordat e proclaimed laïcité as a constitutional principle, relegating religion to the private sphere. This new approach also generated the most recent French ecclesiastical policy, currently in the limelight, of the absolute denial of religious symbols or signs in public facilities (Islamic headscarves forbidden at school).

¹⁵The Council (*Gaudium et Spes*, n. 76) is clear: the Church “does not place her trust in the privileges offered by civil authority. She will even give up the exercise of certain rights which have been legitimately acquired, if it becomes clear that their use will cast doubt on the sincerity of her witness or that new ways of life demand new methods”. What matters is its freedom, i.e. “to preach the faith, to teach her social doctrine, to exercise her role freely among men”, being aware that the political community and the Church are both “in their own fields autonomous and independent from each other”; but both “are devoted to the personal and social vocation of the same men”. “The more that both foster sounder cooperation between themselves with due consideration for the circumstances of time and place, the more effective will their service be exercised for the good of all”.

The embarrassment of us Europeans for allowing religious differences to draw the borders of our Continent in blood in the name of intolerance has come to an end. The Pontiffs have taken up the new demand for peace and justice¹⁶ since the early 20th century (from Pius X to Benedict XV and Pius XI), also in light of the fact that *Rerum Novarum* (1891) boosted the Church's social teaching. When on 11 April 1963 John XXIII signed *Pacem in Terris* in front of all the TVs of the world, the Encyclical appeared as a significant milestone of a new manner to deal with world disorder. Along the same line the subsequent Pontiffs strengthened the presence of the Holy See in the International Organizations. At that time Europe was still divided into two blocks. But in the long process of *détente* (in which the CSCE, today OSCE,¹⁷ played a fundamental role) resulting in the fall of the Berlin Wall, Christian religious denominations proved to be the “midwives” of democracy. They spread the culture of fundamental rights and advocated for reciprocal respect of the State's jurisdiction on temporal matters and of the Church's one on spiritual matters also in Eastern Europe. Every post-totalitarian State (including Albania)¹⁸ is more aware of the role played by religious denominations, and even more so when they manage to overcome ancient internal divisions.

Today the centrality of religious freedom, as a human right, in international documents influences domestic law even in those European States which are most proudly separatist.¹⁹ This centrality is shared by Christian Churches, considering that the traditional claim of the *libertas Ecclesiae* gives

¹⁶ A. Canavero, I Papi e la pace nel XX secolo, in *Pacem in terris tra azione diplomatica e guerra globale*, edited by A. Giovagnoli, Milan 2003, pp. 41 f.

¹⁷ See Fumagalli Carulli, 'A Cesare ciò che è di Cesare a Dio ciò che è di Dio'. *Laicità dello Stato e libertà delle Chiese*, p. 119 f.

¹⁸ O. Fumagalli Carulli, *Lo Stato albanese e le comunità religiose*, in *Ius* 2004, p. 35 f.

¹⁹ France, for example, now recognises complete freedom of self-organization to the Church, facilitating the Catholic presence in important sectors such as private education. The special treatment reserved to confessional schools (even though based on a more general policy in favour of the private sector) translated in laws that would have been unthinkable at the time (1905) in which France chose the separation of State and Church in an attitude of anticlerical antagonism rather than respect for religious choices. Today the French private school network covers 16% of the national network and is run by Catholics in 90% of the cases. Of course, the trend proper to the separatist type of relationship models between State and Church aimed at excluding religion from all public facilities remains and even becomes stronger in France, as proved by the wide debate on religious signs and symbols in public schools, which, in the name of separatist *laïcité* now forbids Islamic female students to wear headscarves. But there is a greater awareness than in the past of the positive role of confessional schools.

way to the priority of the claim of religious freedom as a human right, a foundation for the building of a fair social order and an instrument for peace and solidarity between peoples. This exterior peace – as the Churches say – postulates an interior peace. The blessed John Paul II recalled it in his 1993 *Address to the Tribunal of the Roman Rota*. Quoting a prominent Italian jurist, Francesco Carnelutti (“Justice is the condition for peace... People reach this state of mind when there is order in and around them. Justice is conformity to the order of the universe. Law is just when it really serves to put order into society”), he recalled, in the footsteps of Thomas Aquinas and Augustine, that “*omne appetens appetat pacem, in quantum scilicet omne appetens appetit tranquille et sine impedimento pervenire ad id quod appetit, in quo consistit ratio pacis, quam Augustinus definit tranquillitatem ordinis*”.

2. *Tranquillitas ordinis* and world order

Let me broaden our horizon to world order and focus on our emergencies. Nearly 60 years after *Pacem in Terris*,²⁰ what kind of war perturbs the *tranquillitas ordinis* today?

In its 40th anniversary John Paul II brought the Encyclical once again to the world’s attention, pointing his finger against war in Iraq and repeating the “no more war” claim already pronounced by his predecessors (Benedict XV who denounced the “useless carnage”, Paul VI with his invocation at the UN, “*jamais plus la guerre*”).²¹

Already at that time, and even more so today, the end of the Cold War coincided with world disorder marked by new forms of terrorism, including those with an Islamic root, by alarming perspectives of nuclear holocaust, and by local and global fundamentalisms, which were modern “religious wars”.

The international geopolitical context has radically changed. After the fall of communism, two opposite blocks became devoid of purpose. Re-aggregation is multipolar, mainly for economic reasons. In particular the financial factor plays an important role, more negative than positive. It is sufficient to mention here a recent fact: BRICS Countries claim a major role in Bretton Woods Institutions (Summit of 29 March 2012), pointing their finger at the financial disasters of the USA and Europe.

²⁰ For the history of the drafting of the Encyclical and in order to frame it historically see A. Melloni, *Pacem in Terris*, Bari 2010.

²¹ For a detailed analysis of the tormented history of the stances taken in the 20th century by the Catholic Church towards war see D. Menozzi, *Chiesa, pace e guerra nel Novecento*, Bologna 2008. From an American point of view see the fundamental work of G. Weigel, *Tranquillitas ordinis*, New York 1987.

The religious factor may seem irrelevant, for better or worse. But this is not true. It continues to be relevant, either strengthening or, on the contrary, endangering political stability in different ways (depending on the type of democracy which is present in the various political scenarios). Here are some of the key factors: economic situation, reaction to the crisis of Western values, consequence of massive streams of immigrants and asylum seekers, strengthening of religious radicalisms. In Countries where democracy and rule of law are weaker, the promotion of religious tolerance and non-discrimination represents a necessary pre-condition to the complete fulfilment of religious freedom. The risk that should be avoided is that these countries, with a weak democracy, use the shield of tolerance to cover up effective violations of religious freedom, as it had already happened in the age of “tolerated cults”. There are episodes of intolerance even in countries where fundamental rights and liberties are formally guaranteed: the resurgence of anti-Semitism in the Western world, the spread of Islamophobia after 9/11 and discriminations against Christians are constant in the public agenda. One novelty of our times is that in several “hot” conflicts one of the contending parties is not a national State but an ethnic group. The latter, *inter alia*, are defined by their religious affiliation.²² I’m referring to violence that still occurs not only in two BRICS Countries – India and China – but also in Africa (in Nigeria for example). I’m also referring to the resurgence of ethnic-religious tensions in Europe: violence against the Serb-Orthodox Church in Kosovo, discriminations and violence (fortunately only verbal at the moment) against Catholic Croatians in Bosnia. I’m referring, finally, to a return of bomb attacks in Northern Ireland after more than 10 years.

Some questions arise from this scenario, where religion continues to be at the same time the target and the origin of intolerance, discrimination and violence. Are the commitments adopted by the international community and the protection guaranteed in State Constitutions adequate to ensure religion freedom and to combat raising fundamentalisms? What kind of limitations may be imposed to the principle of non interference in the internal affairs of the States? Are the instruments at the disposal of the international community effective or, on the contrary, are they ineffective weapons? Can the promotion of religious freedom, or at least, of tolerance and non-discrimination in a certain way ensure *tranquillitas ordinis*? What can a jurist say in this regard?

²²These are the so-called asymmetric conflicts that have been characterizing the current geostrategic organization after 9/11. V.M. Bishara, L’ère des conflits asymétriques, in *Le Monde diplomatique*, octobre 2001, pp. 20-21.

The need to contrast fundamentalisms is well known to States, the international community and the *media*. Other fundamental limitation of freedom are less known, because they are less eye-catching: these range from very serious phenomena such as hate crimes, to the trend (which is apparently less serious, but equally pernicious in a subtle way) towards marginalization of religion from public debate, to the role of media and education, to the importance of dialogue between and with religions. Let us examine them.

3. Hate crimes

Episodes of overt violence against religious communities – which destabilize the social order – can even result in the murder of their members. These episodes equally affect the North and South of the world, East and West: the tragic events in Toulouse, the recent murder of a woman in California because she was wearing an Islamic veil, the violence against the Christian communities in India and Nigeria. These *in odium fidei* events undermine peaceful cohesion in each State, seriously affecting the victimised community. Moreover they can be seen as seeds of wider conflicts, provoking a reaction even thousands of kilometres away, to the detriment of international stability. One example: the Muhammad cartoon in the Danish newspaper *Jyllands-Posten* brought violence and tension all over the world, also affecting diplomatic relations between States.

For these reasons the international community is legitimated – and in my opinion has the duty – to promote the most appropriate initiatives, without any State being allowed to object to the violation of its sovereignty or interference in its internal affairs.²³

Even when hate crimes do not take forms of genocides, war crimes, ethnic cleansing or crimes against humanity, their prevention by the interna-

²³ For the delicate relationship between respect for sovereignty and protection of human rights, restricting the field to semi-official documents, the following reports are fundamental: *The Responsibility to Protect*, of the International Commission on International and State Sovereignty, and *A More Secure World: Our Shared Responsibility*, of the High-Level Panel on Threats, Challenges and Change, as well as the subsequent report of the Secretary General of the UN, Kofi Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All*. Significantly the then Conference for Security and Cooperation in Europe, in its Document of the Moscow Meeting of the Conference on the Human Dimension (1991), after underlining that “*issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern, as respect for these rights and freedoms constitutes one of the foundations of the international order*” affirmed that they “*are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned*”.

tional community prevents consequences that may affect the *tranquillitas ordinis*. Which tools are available to achieve these objective?

Positive examples come from the Organization for Security and Cooperation in Europe. It publishes on a yearly basis a report on hate crimes that have occurred in participating States and illustrates the best practices adopted in response to such crimes. The OSCE supports States in their adoption of appropriate legislation and in training their law enforcement agencies and judiciary in order to fight these crimes more effectively. It raises the awareness of governments and civil societies on these phenomena.²⁴ In several cases the non-fulfilment of the commitments certified by International Organizations does not turn into actual juridical sanctions. Soft law, instead, comes into play and calls upon the sense of responsibility of States and of non-primary legal orders, so that they adopt some form of self-regulation in order to guarantee the common good.

The legitimate intervention of the international community and of other actors does not substitute nor exclude the responsibility of the States: quite the opposite, since it is of primary importance. First of all, they should abstain from committing these kinds of violence themselves. Unfortunately this does not happen in several countries where religious communities are harassed by the police or by other governmental agencies. Their members are jailed, their places of worship are arbitrarily searched, religious publications are censored and visas for missionaries are refused. Secondly, States have a positive obligation²⁵ to guarantee that all citizens are not affected by intolerance and discrimination, even if not deriving from the law or from acts of the public authority. In other words it is not satisfactory that the State merely adopts an appropriate legislation, but it should also assume all the initiatives, including non legislative initiatives, which are necessary to promote tolerance and non-discrimination (such as educational programmes, awareness campaigns and so on). Every time hate crimes occur, we should ask whether the State has done its best to prevent the crime *ex ante*, not only to punish it *ex post*.

²⁴ For a description of the OSCE in this sector see the *Annual Report 2010* (downloaded from www.osce.org/odihr/77665, in particular pp. 44-52) of the Office for Democratic Institutions and Human Rights, which is the Organization's body devoted to the so-called human dimension.

²⁵ On *positive obligation* in the European Convention on Human Rights see J.-F. Akandji-Kombe, *Positive obligations under the European Convention on Human Rights*, Strasbourg 2007, and A.R. Mowbray, *The Development of Positive Obligation under the European Convention on Human Rights by the European Courts of Human Rights*, Oxford 2004.

4. The exclusion of religion from the public space

Nemo repente fit pessimus is an old traditional Church saying. The Shoah teaches us that violence does not suddenly arise but is the tragic final act of a slippery road which starts with mockery and social intolerance, then passes through discrimination also established by law and from there it ends in the most awful violence.²⁶

If early warning is fundamental, it is important to pay attention to several forms of intolerance. One of them is more and more common and shared in Western societies: the trend to exclude religion from the public space. The paradox is that this happens in the name of tolerance or – we should say – of a mistaken idea of tolerance.

I'm referring to the claim, widely shared in many circles, that a democratic and pluralistic society imposes a relativistic approach to various religious beliefs: they should all be considered equally valid and the preaching of absolute truths and non-negotiable principles is considered as a form of intolerance, a refusal of the other, of the person who is different. Therefore strong ideas, such as those which are religiously inspired, are (wrongly) considered as an element of conflict and division. With the excuse of “multiculturalism”, they are relegated to the private realm. In this manner, although we are experiencing a “God is back” trend in our societies (contradicting the “God is dead” prophets), a qualitative secularization is imposed: religion does not disappear but is marginalized. From the marginalization of religion to the marginalization of believers is but a short step. Finally, the reaction of the marginalized may be violent and affect the *tranquillitas ordinis*.

There are various ways leading to the marginalization of religious truth. Let us see some of them.

a) Religious symbols

The first way consists in the removal of every religious symbol from the public space.²⁷ This is not limited to the elimination of religious symbols from public buildings (an issue that involves the relationship between State and religious communities). It is also a phenomenon that affects the right

²⁶ The inclined plane logic which emerged within the OSCE, was taken up by D. Mamberti, *La libertà religiosa: un obiettivo ed un impegno comune*, 29 March 2012 in www.vatican.va

²⁷ For a general description of the topic see V. Pacillo-J. Pasquali Cerioli, *I simboli religiosi*, Turin 2005, and, at the international level, M. Evans, *Manual on the Wearing of Religious Symbols in Public Areas*, Strasbourg 2009.

of the person to manifest his/her religious affiliations, without being a victim of intolerance or discrimination. I'm referring to the possibility of wearing religious attire in public or in the workplace. Significantly, the former UN *Special Rapporteur on freedom of religion or belief*, in a 2010 statement addressed to the Human Rights Council, noticed that “*it is indeed regrettable that societies with high levels of income and education have openly expressed their aversion to see religious symbols in public*”.

It is necessary to avoid any misunderstanding in this respect. It is legitimate to adopt legislation, in line with the principle of proportionality, which bans the wearing of religious attire when this is justified by reasons of security and public order (for example if it is necessary to identify people during demonstrations) or for safety and health-related reasons (the requirement to wear safety helmets that does not allow the wearing of Sikh turbans). On the other hand, laws that forbid *tout court* the wearing of religious attire in the public space or in the workplace are seriously discriminatory.²⁸ The fact that they affect in the same manner believers of all religious communities is not sufficient to exclude their discriminatory nature. In this case, in fact, discrimination does not take place between believers of different religious communities, but between those who wish to manifest their beliefs by wearing these clothes and those who, by wearing them, manifest their political or trade union affiliation. After all, a ban on wearing political or trade union symbols would be considered a serious violation of fundamental freedoms. Why – if not for an anti-religious prejudice – doesn't a similar sensitivity come into play when religious freedom is at stake?

b) Religions in public debate

Another sign of this dangerous marginalization is related to religious interventions in public debates. With the rise of ethical issues (in particular on the beginning and end of life and on sexual behaviour), the voice of religious leaders is heard with annoyance or even with hostility. The Catholic Church is accused of interfering in the temporal order and being intolerant,²⁹ instead

²⁸ With specific reference to the right to wear religious clothing in the workplace see V. Pacillo, *Contributo allo studio del diritto di libertà religiosa nel rapporto di lavoro subordinato*, Milan 2003, especially pp. 198–223, and R. Benigni, *L'identità religiosa nel rapporto di lavoro*, Naples 2008, *passim* and in particular pp. 43–80.

²⁹ G. Dalla Torre identifies this as the only real *punctum pruriens* in the relations between Church and States, in his *Laicità dello Stato, appartenenze religiose e prospettiva canonistica* in L. Gerosa – A. Neri – L. Müller [eds], *Annuario DiReCom. Laicità dello Stato, appartenenze religiose e ordinamento giuridico*, 2008, Lugano pp. 39–48.

of being considered as a contributor of values to the public debate. It is a trend that clashes with the right claimed by the Conciliar Church “to preach faith, to teach her social doctrine, to exercise her role freely among men, and also to pass moral judgment in those matters which regard public order when fundamental rights of a person or the salvation of souls require it” (*Gaudium et Spes* n. 76). Back in time, this vindication was welcomed by secular culture as an evidence of the fact that the Catholic Church had abandoned its triumphalism and had embraced the role of “servant of humanity” (to quote a metaphor used by Paul VI).

This trend also contrasts with international standards. In 1975 European and North American countries committed themselves to consider “favourably the interest of religious communities to participate in public dialogue, also through mass media”.³⁰

Considering that opinions of religious leaders on State laws and on citizens’ behaviour is a legitimate exercise of institutional religious freedom³¹ (unless they incite violence and hatred), the battle is often conducted in an indirect way. A sensational example: some anti-homophobic laws punish religious leaders that criticize homosexual behaviour instead of punishing violence or incitation to violence against homosexuals.³² Paradoxically laws aimed at promoting tolerance and non-discrimination turn into tools of intolerance and discrimination. The misconception from which they stem is clear: historically tolerance was considered as an acceptance by the majority of the minority position; today it happens that the imposition of all points of view is equally legitimate, without any possibility to criticize, on pain of being accused of intolerance and discrimination.³³

³⁰ Principle 16.11 of the Final Document of the Vienna Meeting of the then Conference – nowadays Organization – for Security and Cooperation in Europe. Analogously see art. 6 of the Declaration on the elimination of all forms of intolerance and discrimination based on religion and conviction (proclaimed with a resolution of the UN General Assembly 36/55 of 25 November 1981).

³¹ For canonical profiles see O. Fumagalli Carulli, *Il governo universale della Chiesa e i diritti della persona*, 2003, Milan, for ecclesiastical ones see Id., ‘A Cesare ciò che è di Cesare, a Dio ciò che è di Dio’. *Laicità dello Stato e libertà delle chiese*, 2006, Milano, and *La libertà religiosa in Europa. Considerazioni giuridiche* in C. Alzati [ed.], *Cristianità ed Europa. Miscellanea di studi in onore di Luigi Prosdocimi*, 1994, Rome–Freiburg–Wien, vol. I, pp. 833–845.

³² On the well known case of Pastor Ake Green v. C. Cianitto, *Tra hate speech e hate crime: la giurisprudenza statunitense e il caso Ake Green* in *L’indice penale*, 2008 (2), pp. 743–763.

³³ The paradoxical nature of the norm against intolerance which becomes intolerant in itself is well described by M.A. Casey, *The Puzzle of Intolerant Intolerance* in *Solidarity: The Journal of Catholic Social Thought and Secular Ethics*, 2011 (1). M. Sina [ed.], *La tolleranza religiosa*, Milan 1991 reviews the history of the evolution of the concept of religious tolerance.

c) *Religious inspired behaviours*

Another facet of the exclusion of religion from the public sphere is hostility toward religiously-inspired behaviours. Especially in our pluralistic societies – where laws cannot reflect the religious and moral convictions of all citizens – conscientious objection has to be the rule, not the exception. Accordingly the right to conscientious objection is recognized by most relevant international documents. Let us see some of them. The Helsinki Final Act (1975) of the CSCE already provided for the right of the individual “to profess and practice ... religion or belief acting in accordance with the dictates of his own conscience”. In an interpretative way, the UN Human Rights Committee’s *General Comment no. 22* of 30 July 1993 (Article 18 of the ICCPR) considered conscientious objection as a projection of religious freedom. Article 10 of the Charter of Fundamental Rights of the European Union (“Freedom of thought, conscience and religion”) represents an explicit recognition of the close tie between conscientious objection and religious freedom. The second paragraph reads as follows: “The right to conscientious objection is recognised in accordance with national laws governing the exercise of this right”.

The path from general principles to actual legislation is long and tortuous. Today conscientious objection to compulsory military service (where military service is still compulsory) is generally recognized.³⁴ The same recognition should be expected in relation to other ethically sensitive issues: abortion, same-sex marriage or civil union, child adoption by homosexual couples, research on human embryo and so on.³⁵ But this is not always the case. On the contrary, exterior manifestation of religious convictions is often seen as a problem rather than a manifestation of pluralism, which should welcome.

5. Role of *media* and education

The media play a major role in the promotion of tolerance and non-discrimination. Promoting knowledge and understanding of religions, portraying them correctly and giving them the opportunity to express their point of view means introducing people to an important aspect of existence, also creating an atmosphere of appreciation. The Italian law on public serv-

³⁴ In this regard see ECtHR (Grand Chamber), *Bayatyan v. Armenia*, Application No. 23459/03, sentence of 7 July 2011. N. Hervieu, *Liberté de religion (Art. 9 CEDH): Reconnaissance conventionnelle du droit à l’objection de conscience* in www.statoechiese.it comments on this sentence by the Court of Strasbourg.

³⁵ For a complete and specific examination of conscientious objection and of the different conscientious objections see L. Navarro Valls-J. Martínez Torrón, *Conflictos entre Conciencia y Ley: Las objeciones de conciencia*, Madrid 2011.

ice broadcasting is a positive example of this: the law imposes on RAI (the Italian State-owned public service broadcaster) to include in its programming some slots assigned to religious communities who then self-manage these slots.³⁶ It is necessary to avoid any misunderstanding also in this respect. Religious freedom and the promotion of tolerance and non-discrimination do not imply the right of the religious communities to be immune from criticism or adverse comments. But a critical analysis, also from a theological point of view, is quite different from incitement to discrimination and violence against a religion and its believers. Between these two extremes there is no *consensus* at international level on the wide spectrum of expressions. Namely there is no agreement on how and where the frontiers between freedom of expression and religious freedom should be drawn.³⁷

Reality is often discouraging. It is sufficient to examine the media or surf the Internet or watch some TV programs or videos on YouTube to find incorrect portrayal and negative stereotypes that lead to hostility and prejudice against religions as well as irreverent behaviour and the provocative portrayal of religious symbols.³⁸ There is a discriminatory peculiarity: the Quran's desecration is promptly and indignantly abhorred but when Christian symbols are targeted and there is a complaint about it, then it is considered censorship.

The recent Report of the Group of Eminent Persons of the Council of Europe³⁹ evidences how delicate is the balance between freedom of expression

³⁶ Art. 6, law 14 April 1975, n. 103.

³⁷ The relation between freedom of religion and freedom of expression was the specific subject of Resolution 1510 (2006) of the Parliamentary Assembly of the Council of Europe and was subsequently examined in detail by the Venice Commission in the *Report* adopted during the 76th Plenary Session. See also *Blasphemy, insult and hatred. Finding answers in a democratic society*, Strasbourg 2010. Possible limitations to the freedom of expression in order to promote and protect tolerance and non-discrimination, not only religious, are included in the legislation on *hate speech*. Cfr. A. Weber, *Manual on hate speech*, Strasbourg 2009.

³⁸ For example, *How to desecrate a host* is the title of a few videos found on YouTube showing HostDesecrator – this is the graphic name of the user that uploaded them – burning a host, writing the name of Muhammad on another one or freezing another with dry ice, taking care to mention that they are consecrated hosts. Are these behaviours a legitimate expression of freedom of expression or are they acts of intolerance? A few more examples can be found in G. Kugler [ed.], *Report 2011 of the Observatory on Intolerance and Discrimination against Christians in Europe*, Vienna 2011, pp. 32-35.

³⁹ The Report, entitled “*Living Together*”: *Combining diversity and freedom in 21st-century Europe*, was presented to the Ministers Committee in 2011.

and religious freedom. The Report mentions the possible clash between these liberties as a risk to the fundamental values of our democracies.

Voluntary professional standards and self-regulation codes of conduct can prevent intolerant discourse against religions, in order to ensure that *media* are respectful of religions. The adoption of these standards and codes – instead of (or in addition to) the approval of repressive *ad hoc* laws – can exclude criticism on censorship and on the limitation of the freedom of expression and in practice may give the best results. Another Italian example: our journalists adopted a self-regulation chart (the so-called Charter of Treviso) in order to preserve under-age crime victims. The results are better than those of the law protecting the secrecy of investigations.

The role of education, especially at school, is equally important because it acts at the roots of the phenomenon. Mingling with students belonging to different religions is in itself a great help in understanding the unity of humankind. Moreover, it is important for schools to teach the various religions, permitting each student to manifest and tell his/her belief. Educational programmes should be developed and strengthened in order to promote a better understanding and respect of the different cultures, ethnic groups and religions.⁴⁰ These programmes should also teach higher values such as the dignity of every person and the solidarity between members of the human family. The education to respect human rights is no less important, both in school and in any professional training (of judges, lawyers, armed forces, law enforcement agencies and so on...).

6. Dialogue with and between religions

I started my paper by mentioning the lights and shadows of the European experience. Let me finish on a bright note: Article 17, Paragraph 3, of the Treaty on the Functioning of the European Union provides that “*recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue*” with churches and religious societies or communities.

Therefore, in Europe, the acknowledgment of religion’s public role also passes through the dialogue between religions and public authorities. There

⁴⁰ An international document that can serve as a reference for teaching about religions is the ODIHR-Advisory Council of Experts on Freedom of Religion or Belief, *Toledo Guiding Principles on Teaching About Religions and Beliefs in Public Schools*, Warsaw 2007. Although it wasn’t officially adopted by the OSCE, it was mentioned both in a sentence by the European Court of Human Rights and in a Report of the *Special Rapporteur on freedom of religion or belief* of the United Nations.

are two consequences that I would like to point out. First of all, the European Union recognises the unique features of religious communities as opposed to other actors present in our societies: it does not assimilate them as mere NGOs – as it did in the past (for instance during the activities of the European Convention’s Presidium), upsetting John Paul II⁴¹ – and it takes into account their historical, cultural and numerical relevance. Secondly, a dialogue between the EU and the religious communities is foreseen that is not restricted to issues pertaining to religious freedom but also open to any matter of common interest. Article 17 of the TFEU exist today thanks to the dialogue – during the European integration process (from Maastricht Treaty to Amsterdam Treaty) – between the Christian communities that I mentioned as a positive aspect of the contemporary European experience.

Broadening the horizon to the dialogue between all religions (including non-Christian ones), it is legitimate to ask what is the best kind of dialogue in order to ensure *tranquillitas ordinis*. Today we see initiatives coming from religious communities, and at the same time we see others that are adopted by national governments or International Organizations. The first seem to be more fruitful than the latter, even when they involve religious communities with very different values. Despite significant divergences, the Islamic-Catholic dialogue – started after the letter *A common world* signed by 138 Muslim personalities – is proving to be fruitful. We cannot say the same about the Alliance of Civilizations, promoted by the UN Secretary General to promote confidence and understanding between different societies, in particular between Western and Islamic societies. Initiatives promoted by the political community – although laudable – appear to be reduced to high-level programmes and meetings that have nothing to do with reality. On the other hand, neo-jurisdictionalism is a risk that affects such initiatives – as I pointed out in one of our previous Sessions.⁴² Neither the States nor the international community have the competence to dictate the timing and methods of inter-

⁴¹ In his traditional address to the Diplomatic Corps on 10 January 2002 John Paul II stated that “with some regret, I have noted that, no explicit mention was made of communities of religious believers among the partners who are to contribute to the reflection on the ‘Convention’ instituted at the Laeken summit last month”. The bitter reference concerns the fact that religious communities, unlike other institutions such as NGOs, were not explicitly mentioned in the list of members of the civil society whose voices were to be heard, but were included in a vague “etc.” at the end of the list.

⁴² O. Fumagalli Carulli, Freedom of conscience and religion as fundamental human rights. Their importance for interreligious dialogue, The Pontifical Academy of Social Sciences, 15th Plenary Session, 1-5 May 2009, *Catholic Social Doctrine and Human Rights*, Acta 15, pp. 314 f.

religious dialogue, which is a matter for religions. The actors of the inter-religious dialogue, in fact, should only be the religious communities. The political community has the duty to create the right atmosphere to develop the dialogue, also intended as an instrument for *tranquillitas ordinis*.

In my opinion, this dialogue is also one of the preconditions for peace ensuring *tranquillitas ordinis*, as Benedict XVI told politicians at the Reichstag in Berlin (22 September 2011), referring to Salomon's story (*The First Book of Kings*).