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European Energy Security

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EDITORIAL

Reflecting on successes and failures of European integration and the birth pains accompanying both the process of enlargement and deepening of the EU, several things stand out with enough clarity and immediacy. The aim of the EU is to enhance the internal integration providing the EU with a reformed, more flexible and up-to-date legal framework which would help overcome the frictions and inefficiencies gravely felt in European decision-making and deliberative machinery. Despite the disappointments brought by the process of ratification of the Constitutional Agreement for Europe and the current tension over the Lisbon Agreement, there seems to be a substantial degree of determination to bring Europe onto another level. The energy devoted to the process of negotiations and the stubbornness and zeal exhibited by the representatives of the EU clearly exceed the limits within which we could attribute them to the sheer caprice of European leaders. The long-term concentrated effort of a number of prominent European politicians must be perceived as a signal pointing towards the widely acknowledged importance of the process. The value of the new legal and normative framework for Europe does not lie in a conclusion of the agreement *per se*. The outcomes and changes that the next step in integration is expected to deliver are what is at stake here, and this is what we must realize when weighting the pros of existing drafts against their cons.

What is it exactly that we gamble with while arguing over the details of the future shape of Europe? What values and norms constitute the core of Europe to come? On the first plan, we can certainly speak of economic progress and prosperity, political stability, evening out of the bumps on the road of European decision-making. However, with a closer look, it all comes down to the crucial long-standing principles of European liberal democratic political order – democracy, legitimacy, democratic inclusiveness, equality of individuals, equal respect, and toleration.

The EU has long been troubled by the threat of a democratic deficit. It is quite clear that without closing the gap between the European institutions and citizens this challenge cannot ever be overcome. It seems that formal measures, like the adoption of the system of direct elections to the European Parliament, the gradual expansion of its powers, or the introduction of the notion of European citizenship, have not brought the desired fruits. Only recent social turbulence that many countries, including France, Denmark, the Netherlands, or the UK, have experienced, has called attention to possible gist of the problem – the increasing value pluralism of European societies.

Democratic inclusiveness can only be achieved when all citizens of the EU can consider their cultural, religious, or secular values, being provided with equal respect and equal consideration in the EU. Needless to say, this does not necessarily

imply a positive recognition and measures adopted indiscriminately with regard to all claims raised. Neither does it require a kind of toleration without boundaries. We are quite certain that there have to be some limits of what is and what is not to be tolerated in Europe, which claims to acknowledge and recognize and which not. Hence, right now, Europe seems to be in search of a mechanism of how to decide on issues of value pluralism, the search which always ultimately comes back to the starting point – the quest for a European identity. Thus, we must ask what traditions and norms are to be compatible with European identity, how we should ensure that the cultural and religious differences are reconciled so as to provide the individuals with a strong sense of belonging to European citizenship, not being excluded based on value pluralism. We must think about how to organize our public deliberations, how to create a single European public sphere within which the citizens will be able to debate freely, and form critical public opinion which would provide legitimacy to the institutions of integrated Europe. We must ask which values and practices are to be part and parcel of our public reason, and which are to be expelled beyond the boundaries of what is tolerable in Europe.

Now, the aim of this issue is to address these very central questions of current European discourse. In what follows, the authors ask to what extent should individuals or groups be entitled to exemption from the law on the basis of ethical or religious beliefs. To what extent should public institutions, public services and the public sphere in general treat citizens differently according to such beliefs? Should Europe seek consistency in the ways different countries tackle such issues? If so, how? What values should underpin the negotiation of cultural diversity in our 21st century horizons?

The focus of the questions results from the fact that the articles published here all grow out of the papers presented at the conference *Values and Diversity: Culture, Religion, and the Law in Contemporary Europe* held at University of Western Bohemia in Pilsen, Czech Republic in August 2008, organized with the support of the 6th Framework Programme of the EU and stemming out of the EuroEthos Research Project. The conference dealt with numerous issues ranging from exemptions from the law based on religious or secular values, the public use of religious symbols, issues of medical treatment and bioethics, cultural conflicts, civic disobedience and conscientious objection, up to more general questions of public discourse under the conditions of value pluralism, and republican approaches to political community.

The first article, by José Felix Lozano Aguilar, Pedro Jesús Pérez Zafrilla, and Elsa González Esteban is a good example of the debate that has been echoed in a number of European countries, considering the limits of tolerance with regard to the use of religious symbols in public universities. Next, Alan Coffee discusses the republican perspective on freedom of thought, conscience, and religion, which

supplements another element to the debate on the public sphere and its values. Kostas Koukouzelis contributes to the strand of discussion opened in the first article with a text contemplating mainly the issue of the public use of religious symbols (the headscarve debate in France) against the backdrop of the formation of the European public sphere and equality. The Central European mode of the value pluralism debate is introduced by the paper co-authored by Magda Petrjánošová, Claire Moulin-Doos, and Jana Plichtová which analyses liberal and restrictive critical secularist approaches of the Slovak and German state toward the issue of reproductive rights regulation. The focus on religious pluralism with respect to state policies is present in the comparison of Slovak and Italian environment developed by Jana Plichtová, Dino Costantini, and Magda Petrjánošová. Finally, Harald Christian Scheu adds yet another point of view on the issue of value pluralism by situating the problem within the legal framework of a cultural conflict definition and the questions of its legal resolution within both national and international jurisprudence.

The papers represented in this volume mirror the focus and thematic plurality of the conference. They have been selected not only based on criteria of academic excellence, but also with the aim to mirror the spectre of issues bound to be debated with regard to contemporary social and ethical issues that have acquired top political relevance all over Europe. While some of the papers comprise the immediate Central European perspective, others while not geographically situated into Central Europe still debate questions of cross-European outreach and relevance that resonate with similar intensity all across the EU.

I would like to express many thanks to the editors of *Politics in Central Europe* for their support for the idea of a conference-based issue. I would also like to gratefully acknowledge the editorial assistance of David Šanc.

Lenka Strnadová
Visiting editor

ESSAYS

The Limits of Tolerance in Public Universities¹

José Felix Lozano Aguilar, Pedro Jesús Pérez Zafrilla and Elsa González Esteban

Abstract: *In this article, our aim is to reflect on the legitimate ways that religious pluralism may be managed in the state-owned public university environment. To do this, it will be necessary to take into consideration the essential characteristics of the origin of the university. The second point in our work will be to clarify the concept of tolerance and its difference from neutrality, which will allow us to carry out the reflection and subsequent discussion with rigour. For our third point, we will describe the essential characteristics of the religious conflicts that can be found in our European universities and how they are being managed.*

Following a critical analysis of these cases, we will present a proposal of criteria to be used in evaluating the religious practices in state-owned public universities based on the theory of discourse ethics. Finally, in the conclusion we will indicate some new lines of research and the path that public institutions may follow in managing religious conflict.

Keywords: *discursive ethics, toleration, public universities, dialogue, ethical values*

Introduction

Today, universities are spaces where plurality, diversity and multiculturalism are lived intensively on a daily basis, and this is also true of the conflicts and problems derived from them. Thus, we can find that there are problems with religious symbolism in buildings (Germany) or on symbols belonging to publicly-owned universities (University of Valencia), such as groups demanding that they be able to show their religious identity on campus or in their departments.

Without doubt, conflicts of this type which appear in the university are even more complex – if that is possible – with regards to those that may occur in other public

¹ We acknowledge the support of the European Commission's 6th Framework Programme and the EuroEthos Research Project.

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places, such as hospitals. This complexity is due to a series of factors derived from the history and the very function itself assigned to the university. In terms of their history, as we will point out later, we find that although the universities were first established by the Catholic Church, today public universities are governed by the secular values and principle characteristic of democratic governments. For this reason, they must combine an inherited tradition with a respect for the rights and liberties of different people and their diverse concepts of what is right. In terms of its functions, the university is a forum for critical reflection on social problems, and therefore must indiscriminately give a voice to the different contributions that – from the various perspectives – can be made to this reflection within the current context of interculturality.

The analysis of conflicts related to tolerance in the university thus turns out to be of fundamental importance: in the first place, because they affect an institution of great relevance to the development of society; in the second place, because the challenges of peaceful co-existence within diversity that are seen on our campuses today may be an incentive to try out new solutions for these conflicts that allow this institution to function better; and in the third place, because the proposals originating from the university may serve as models for other public environments.

The process for solving these problems in the university must include the analysis of the functions themselves which are assigned to this nearly thousand-year-old institution. This will be the first step in our research. Following that, we will explore the concept of tolerance in depth in order to recover its original meaning, tied more to that of recognising identity than to simple indifference. Only thus will the implementation of tolerance within the institution of the university be of practical use. In this way, we will be able to address specific cases which have appeared in this environment and how they have been resolved. As a solution to these problems, we propose some principles derived from discourse ethics that focus on the necessary deliberation between the two sides under symmetrical conditions. The values of civil ethics (Cortina, 1986, 1997, 2001, etc) – freedom, equality, solidarity, respect and dialogue – are the core values of the university, and their empowerment is one of the key functions of the University. At the same time, these values are the tools for the solution of cultural conflict.

The University – Origin and Challenges

“The university is the second-oldest institution in the western world with an unbroken history, after the Roman Catholic Church.” (Iyanga, 2000:7). In the late sixth century and beginning of the seventh, the first cathedral-based schools appeared. Their task was to educate the secular clergy and to attract young people to the parish, to whom they then had to teach Scripture, as well as reading, writing

and arithmetic. Beginning with these schools, an unbroken evolution began that gave rise – in a way that was almost natural – to the world’s first university, the University of Bologna, in 1088. This was followed by Oxford University in 1167, the University of Paris in 1170 and the University of Salamanca in 1230. More recently, in the American tradition, the most prestigious universities have also had their origins and goals tied to religion, and to a large extent have continued the European tradition. Harvard, Yale and Dartmouth were founded by Congregationalists; William and Mary, and Columbia by the Anglicans; Princeton by the Presbyterians; and Brown by the Baptists. The creation of all of these was inspired by the idea of religious service.

This religious origin has greatly influenced the development of the institution of the university and, although it is quite true that it has not determined its evolution, it has left an important mark on its institutional ethos. The process of the rationalisation and “disenchantment” of the world begun in the Enlightenment has also arrived at the university and, in particular, at the public universities of western culture, religious influence is limited and with a tendency towards decreasing. This is the context in which the conflict between maintaining the religious symbolism and traditions that are part of the institution’s history and the secularity of the state and of public spaces arises.

The Mission of the University

In our opinion, in order to respond to that dilemma, it is necessary to reflect seriously on what the university’s mission – the social aim that gives it meaning – is (Barber, 1991; Cortina, 1993, 1998). The mission of the university has always been to seek and share information and to provide education for professionals. Spanish philosopher Ortega y Gasset understood the mission of the university to be the education of cultured people, where “culture” meant “the vital idea system of each time” (Ortega y Gasset, 1930:322). That is to say that the university must be at the service of life and offer a solution to social problems. To put it in the words of Coit Gilman, founder of Johns Hopkins University: “Make for less misery among the poor, less ignorance in the schools, less bigotry in the temple, less suffering in the hospitals, less fraud in business, less folly in politics” (Harkavy, 2006:10). If we focus on this last point, it is clear that the impact of the university on the development of democracy is unquestionable. Along these lines, Harkavy (2006:9) – following American pragmatic tradition – states that: “The goal for universities, I believe, should be to contribute significantly to developing and sustaining democratic schools, communities and society”. The role of the university in the development of society goes beyond these specific objectives and presupposes a reflection on the ideal of humanity that we want. In the words of Nussbaum: “Our campuses

are producing citizens, and this means that we must ask what a good citizen of the present day should be and should know” (Nussbaum, 1997:3).

Carrying out this mission requires the development of particular functions that authors such as Ortega (1930), Jasper (1923) and Reed (2004) have put into four basic groups: education, basic research, cultural reproduction and professional training. These four functions are undergoing important transformations, some of which threaten the mission of the university.

Education

Educating people continues to be the fundamental objective of the university and higher education centres. Even when there are risks and problems resulting from the commodification of higher education (Odin – Manicas, 2004; Newman – Couturier – Scurry, 2004; Reed, 2004), this continues to be its stated purpose.

In the model of the liberal university, “*Bildung*” is understood as a complex process of maturation in which the critical appropriation of knowledge – and not the mere transmission of knowledge – is promoted. This model, which starting point is the search for truth and knowledge for its own sake, has been losing ground to the model of instruction in which the university must transmit information in order to educate professionals capable of finding high-paying jobs in the market. Knowledge has become a valuable commodity that is bought and sold on the market (Reed, 2004).

The move from education (*Bildung*) to instruction in the universities is a process that causes their role as social actors to deteriorate and has a negative impact on the fight against global social problems. These problems, among which are religious conflicts, ecological challenges, peace, the strengthening of democracy, etc., now seem to be foreign to the university and they find no place there, nor are they considered to be a task suitable to institutions of higher education.

Research

Many profound changes are also taking place in the field of research. To address this topic in detail would go beyond the objectives and space of this work, but it is worth pointing out at least one aspect that has a key social impact. It is the strong tendency towards commodification of university research that is putting the goals and means of research into danger “Today, however, the growing influence of the market in higher education means that the search for truth is rivalled by a search for revenues.” (Newman – Couturier – Scurry, 2004:4).

These changes in the field of research lead us to situations of risk that we should observe with caution if we want research to continue to be at the service of advancing science and improving the lives of people. The statement by Reed sums this risk

up very well: “The pursuit of knowledge for its own sake is a precondition for the integrity of basic research” (Reed, 2004:25).

Social Commitment

One of the most oft-repeated criticisms of our European universities over the years is that of having been at the edge of society, of being closed in and only concerned with their own problems, neglecting their concerns for the common good. The lack of a decisive commitment to the most serious social problems – pollution, defence of human rights, and the generation of a constructively critical culture – has been criticised by civil society.

The role of universities in the discussion of global problems is decreasing. Their contribution to the solution of public issues is marginal and, in large part, considered something “extra” and not an essential part of their mission. Many people and university administrators understand that making a contribution to democracy and social justice is a second-order objective. We are, indeed, in agreement with Barber (1923), and we believe that the university must play a key role in the development of society in all of its dimensions: economic, political, social and cultural.

Without doubt, one way to develop a society is – as Kant stated (1784) more than 200 years ago – to encourage the public use of reason. The university has traditionally been a forum for debate and social innovation and rational discussion has been one of its defining characteristics. Today’s tendency seems to be moving in the other direction, and the universities are no longer “serving as home of open debate about critical but controversial societal issues” (Newman – Couturier – Scurry, 2004:218).

The commitment by the university to society implies that society will take on its role as the centre of discussion and critical debate on topics of social relevance. Thus, then, the debate on religious symbols and traditions in the university is important for at least two reasons. The first is because it is necessary to analyse up to what point the presence of institutional religious symbols and practices make rational debate, social coexistence and religious pluralism difficult. The second reason is that the academic institution is a good space for social innovation, and perhaps the specific solutions that we can experience in the university regarding religious activities, traditions and symbols may establish the pattern for addressing these issues in other social environments.

Tolerance vs. Neutrality in Public Institutions

In order to understand the way that tolerance should be shaped in the university environment, we must first analyse what the characteristic elements of tolerance are in the modern era and this can only be done relative to the concept of neutrality.

Certainly, both concepts – “tolerance” and “neutrality”- have occupied a central place within the scope of political theory since the birth of the modern era, with its range of application being the problem of social stability. Nevertheless, in terms of its development, in reality there has been an evolution in the meaning of the term “tolerance” that will affect the relationship between the two. This change in meaning is what explains to us that – although in the beginning it was the concept of “tolerance” that enjoyed more protagonism in the public sphere – in the contemporary period “neutrality” is pre-eminent, with tolerance being relegated to the scope of personal relationships.

In the Middle Ages, we find societies built around a single concept of good – usually a religion – shared by the great majority of citizens and serving as a basis for political legitimisation and social self-comprehension. However, this way of thinking broke with the abrupt appearance of the Protestant Reformation and the moral and religious pluralism it brought. The blood-filled wars of religion of the sixteenth and seventeenth centuries were the most evident proof that, from that time on, those who governed could no longer base their decision on the dictates of one religion, because, obviously, none was held in common. Likewise, neither could they devote themselves to imposing a particular doctrine on the whole of society, because that could only have been accomplished through the annihilation of those groups contrary to that religion, thereby prolonging the situation of war that the political power was charged with stamping out.

Thus, the concept of political legitimacy took a radical turn. In modern times, it could no longer base itself on a concept of truth in particular, but rather on the capacity for maintaining a situation of peace that would stop the warring between different creeds. This was the idea of that period’s social contract theoreticians such as Locke and Hobbes. However, this new way of understanding the idea of legitimacy has a clear reference: religious tolerance. If the person who governs cannot base his decisions on a particular religion, it will be understood that he must be tolerant with the various different religious faiths present in society. At that time, there was talk of “tolerance” but not of “neutrality”. Hence, Lock’s titling of two of his essays as *An Essay Concerning Toleration* and *A Letter Concerning Toleration*. In this sense, we can say that the meaning of neutrality is included in tolerance itself, though it had a specific meaning that – strictly speaking – distinguishes it from neutrality in its current meaning and explains why one and not the other was used in the field of theory.

Tolerance does not mean that he who governs should be neutral between the different churches so much as it must recognise the liberty of conscience of all citizens in choosing their particular faith. That is to say, what underlies this approach is a differentiation of functions: that which concerns the application of laws, and

that which affects spiritual issues. Thus, two spheres are distinguished: the public (political) and private (the conscience of the citizen). He who governs must devote himself to keeping the peace and to protecting the rights of citizens – such as their freedom and their property – but must never intervene in those issues concerning faith, such as what the true religion is (Cortina, 2003). This is so because decisions about faith fall within the natural human right to freedom of conscience: each person can – through his conscience – discern what the true religion is (given that the pluralism of doctrines makes it impossible to determine this publicly); hence also Locke's conception of churches as freely-formed collectives whose members have the freedom to change religion if they understand that the other religion is the true religion.

Thus, tolerance appears when differentiating between the public and the private sphere, in such a way that he who governs cannot legislate on subjects that affect the conscience (and the natural freedom) of citizens. He who governs cannot decide which religion is the true religion, and for this reason must respect the existence of different churches, as long as none of them interferes in the public sphere reserved for state activities, for example, requiring obedience to a foreign sovereign. However, the respect toward churches – which may be understood as neutrality – is conditioned on the respect that is due to citizens' freedom of conscience. This is the original meaning of tolerance which, as we can see, implies the idea of neutrality (Wilson, 1996). The State must be neutral between the different churches and therefore may not impose any one upon the rest of society. However, it should not impose any, not because otherwise it would not maintain equality among the groups, but rather because doing so would violate the natural right of individuals to freedom of conscience, invading the private sphere that does not concern it. At the base of all of this lies the individual and his rights, not equality among groups.

It is during current times that the relationship between neutrality and tolerance has made a slight shift towards differentiation. In fact, we can say that now the benefits that the idea of neutrality represents for political theory have been discovered. Proof of this change is the significant fact that contemporary political philosophers speak of "neutrality" and not "tolerance." It is thus since currently tolerance and neutrality seem to be applied in two different scopes: neutrality seems to be more a virtue of the institutions and tolerance a virtue applied to citizens. The State, as well as the university, must be neutral among the concepts of good, while the citizen must be tolerant towards those who think differently than he does. The most evident example of this new paradigm is represented by contemporary liberal authors such as Rawls (1993), Audi (2000) and Galston (1991), with the former being the author whose idea of neutrality will influence the rest, and thus worthy of special attention. Rawls makes neutrality among comprehensive doctrines the backbone

of state action within a context of moral pluralism, such as the current democratic societies.

Focusing now on the idea of neutrality, in the first place, the concept cannot be understood in an absolute sense (Meckled-García, 2001). One may be neutral, yet always in regard to something in particular, and neutrality may be achieved depending on that with regard to which one wishes to be neutral. For example, the State may remain neutral between Catholics and Protestants, but perhaps not between Catholics and cannibals. In this sense, Rawls understands that a reasonable pluralism – not merely any pluralism – must exist within democracies. In other words, society must include only reasonable comprehensive doctrines, which are those recognising the prioritisation of the demand for justice over the ideals of the good life. The political notion of justice may only be neutral within these reasonable comprehensive doctrines which allow for peaceful coexistence within a context of moral pluralism.

In this case, how is neutrality to be understood? Rawls (1993) distinguishes among several connotations of neutrality. He mentions, on the one hand, the neutrality of effect, and on the other, justificatory neutrality. The former establishes that the State must avoid any action which may favour or prejudice the development of one doctrine over another. Rawls takes a clear stand against this alternative, working from the understanding that any action taken by institutions may lead to consequences for the development of one doctrine or another, but that this influence is in fact inevitable, given that the State can not fail to act when faced with certain situations. For this reason, Rawls comes down on the side of justificatory neutrality, in which the institutions must not hope to favour or prejudice any doctrine present in society through their actions. It would, of course, be different – as we have just seen – should a concrete act result unintentionally in support or condemnation of a doctrine. For example, the manner of deciding the day of the week on which a university exam will be held may be a “majority rules” situation. Yet, if the majority select a Friday (given that the majority of the students are Christians), this would not be discriminatory to other groups such as Jews or Muslims, as the professor’s intention was not to defend the interests of the Christians, but rather to decide the date of the exam through a democratic procedure. This would be one way to express neutrality within the context of the University. One could say perhaps that the outcome is not a neutral one, but the fact remains that in public affairs, it is not always possible to reach decisions which satisfy everyone, as in cases such as abortion (Williams, 1999; Van Wyck, 1987).

Let us now look at the issue of tolerance. Currently, it is understood as a simple indifference to the Other. “To tolerate” has come to mean something along the lines of “consenting to” or “accepting” the beliefs of others. Nonetheless, this is

a mistaken idea which stems primarily from use of the term in everyday language. Within theory, the expression “tolerance” occupies a place superior to that of mere “indifference” (Meckled-García, 2001). It is true that while neutrality has an active sense with regards to state actions, tolerance has a passive connotation and refers to that which we ought to respect in others and against which we can do nothing. As I have said, though, this sense of passivity ought not to be confused with mere indifference towards that which is not approved (Giner, 2002). As we have seen, it was originally understood more as the State’s refusal to oppress certain beliefs. Today – as it is applied to individuals – the word must be seen as respect for that which is different, not because it is inferior, rather the opposite, because it is believed to possess a supreme value. Religious tolerance is not indifference to religion; rather it is the admission that it possesses a supreme value. For this reason, religion must remain outside the political arena and not be imposed upon others (Carey 1999). Thus, today as well, a tolerant citizen is not one who looks upon others with indifference or doubts; it is a person who recognises an absolute value in himself and in his opting for a good life (Cortina, 1995).

Analogously, tolerance as it is applied within the university emerges from the recognition of distinct identities, and of the value of contributions made by different communities. Only in this way can the university as an institution adequately fulfil its mandate to educate a citizenry which is tolerant, within a context of moral pluralism. The typology of conflicts which we will discuss below constitutes a fair example of the need to implement this new focus, which we will develop further on.

Religious Conflicts in European Universities

The various religious conflicts at European universities which have made it into the media and the courts – whether national or European – present quite different typologies. One could say that there are three sorts of religious conflicts which are well-documented by specific philosophical or legal studies in the national presses of EU countries.

The first type of religious conflict is one related to religious symbols worn by students or professors. The second is connected to religious symbols which are permanently located in the buildings or on the identifying symbols of the university institution. Finally, the conflict also surfaces in relation to guarantees of religious practice in public centres.

It should be pointed out that when addressing the difficulty which stems from the first two types of conflict (religious symbols, whether worn, or permanent) one should differentiate between those which are inarguably religious and those whose religious origin has been secularised or which have taken on other significance. The crux of the conflict lies, therefore, on the one hand, on how one understands

the principle of neutrality meant to be exercised by the university as a public institution, and on the other, on the exercise of tolerance and freedom within the democratic principles of coexistence.

The cases stemming from the use of religious symbols by students and professors best documented within a university setting occurred in Belgium, France, Great Britain, Switzerland and Turkey, with some of the cases leading to judgments by the courts (Alenda – Pineda, 2006; Llamazares, 1998, 2005; Contreras – Celador, 2007).

As far as the specific cases of conflicts derived from the existence of permanent religious symbols, we could point to those which occurred in Germany, Italy and Spain (Alenda – Pineda, 2006; Llamazares, 1998, 2005; Contreras – Celador, 2007). The central point of the debate lies in the fact that the presence of these symbols could compromise the right to freedom of conscience of those persons who do not identify with the religion of the symbols exhibited. Given that we are speaking of public spaces in which the State must guarantee the secular or non-confessional principle, confusion may arise between the State's aims and those of religion. In public universities, the decision has been reached generally that it is the centre itself which must decide to uphold or withdraw the permanent religious symbols, due to their autonomous nature.

With regard to the tension at universities over the practice of religion, various debates have emerged within the public universities in Spain, and in certain cases even reached the point of requiring the State's intervention. By religious practice, we refer, according to Contreras Mazarío to: "the positive guarantee, or legal duty to act, which the State, and public powers establish for the full and effective practice of religious freedom by persons, members of centres or establishments who may find themselves in a position of dependency or subject to those in which their physical freedom is limited or cut off" (Contreras, 2000:111). Taking into account this characterisation of religious practice in public centres, it should be pointed out that in public university educational centres do not produce a level of dependency which would impede or limit the exercise of religious rights or freedoms. For this reason, each university centre must respond to the demands and they may do so in a positive or a negative manner. As Contreras put it: "(...) religious practice must not be obligatory for university centres, rather it ought to only be discretionary, and if established should be voluntary for the personnel of the university and for its students" (Contreras, 2000:157–158).

Thus, in Spain there is no legal norm for the university sphere which addresses the core question, which is to determine whether these centres fall within the category of public centres obliged to provide said religious presence, or whether it is a matter of the autonomy of each centre (Contreras – Celador, 2007). When the tension is such that it has led to a judicial resolution, jurisprudence has been extremely

varied in its pronouncements. For example, it was negative in the matter of a group of professors and students at Carlos III University in Madrid who requested a place prepared for religious practice, as the tribunal understood that the decision was within the discretion of academic authorities, who could respond either positively or negatively. The decision to guarantee and/or promote religious practice falls to the university governing centres, which possess full autonomy.

The landscape here is varied. For example, the aforementioned Carlos III University has opted to refuse, while other universities including University of Huelva and Rey Juan Carlos University in Madrid have maintained a position which is, in principle, in favour of the Catholic Church. A third, more interesting response – in our opinion – came from Barcelona’s Pompeu Fabra University, where a common “meditation” or “meeting place” has been set up, with the intention of encouraging and responding to the multiculturalism and the pluralism of religious beliefs (Contreras – Celador, 2007).

Evaluation Criteria from the Ethics of Discourse

The suggested discursive ethic affirms that “only those norms that can (or could) meet with the acceptance of all concerned in practical discourse can claim validity.” (Habermas, 1983:103). This ethical perspective considers dialogue not only as a medium, but also as a criterion for evaluation of real communication situations. Dialogue is therefore not only the procedure used to convince others and achieve one’s subjective interests, but also the only rational medium available to locate the path of correctness and inter-subjective truth (Cortina 1985).

In the first place, one must acknowledge that institutions of higher learning must commit to the liberal education of students. As Nussbaum writes: “Liberal education in our colleges and universities is, and should be, Socratic, committed to the activation of each student’s independent mind and to the production of a community that can genuinely reason together about a problem (...)” (Nussbaum, 1997:19). In other words, the task of the university is not only the education of good professionals but also of good citizens. In the second place, the university must educate from within a deeply rooted cosmopolitanism which assumes that we are speaking from specific cultures, languages and religions, but this must be done with the conviction that we can make ourselves understood to any being who is communicatively competent (Cortina, 2001). We must accept the moral and religious pluralism in society, and mould the students so they are able to live and co-exist in this *Lebenswelt*. In the third place, one must recognise that in authentic civic ethics, the relation among the (religiously inspired) ethics of maximums and the ethics of minimums, must be complementary rather than exclusive (Cortina, 2001; Conill, 2007). Fourthly, it is important to acknowledge that the existence and public expression of one’s own

cultural and religious concepts are themselves valuable and are an inherent right of citizenship (PNUD Report, 2004). Finally, we must understand the process of secularisation as a learning process in which secularism learns from that which is religious and vice versa (Conill, 2007).

Following the previous general considerations, we will move on to the specific implications which the ethics of discourse can contribute to the ordering of a religious plurality within the space of a public university.

In our opinion, the primary criterion to be followed in the case of religious tension is the predominance of good arguments, those which are rationally based, as opposed to arguments stemming from power, manipulation or imposition. To put it in Habermas' words: "In a secular state, only those political decisions are taken to be legitimate as can be impartially justified in the light of generally accessible reasons (...)" (Habermas, 2006:129).

(1) Working from these criteria, we can affirm that within the University campus *there should be no permission given for religious expression nor demonstrations which cannot be justified equally for religious, non-religious, or otherwise religiously oriented citizens*. There must certainly be no allowance made for behaviour which leads to confrontation, hatred or intolerance toward specific religious or secular points of view, to the strengthening of others or to the imposition of one over the others.

(2) The second criterion which can be derived from the ethics of discourse is what one could call the fomenting of autonomy. For the ethics of discourse, the stakeholders are those who have the right to participate in dialogues about norms affecting them; and it is assumed that these same affected people may legitimately defend their positions. The *mündiger Bürger* – or citizen possessed of reason – is the one who must choose his options in life. In the ethics of discourse, paternalism and imposition have no place. Actions stemming from this second criterion will be numerous and the objective of all of these will be the stimulation and strengthening of moral judgement as well as the rational capacity to shape the will according to universalisable principles. Specifically, *the university institution must take the initiative in generating a rational debate in which preferences may be expressed and beliefs and lifestyles critically evaluated*. For this to happen, it is crucial to guarantee freedom of expression and to simultaneously avoid the discrimination or stigmatisation of world-visions or lifestyles by any one religion. In this respect, the initiative at Pompeu Fabra University mentioned in this article seems like a good example to us.

(3) One of the basic tenets of the ethics of discourse is the symmetry among interlocutors in practical discourse. This symmetry is both the ideal and a criterion for evaluating the practical discourses within a real communication community.

Steps must be taken in two stages in order to seriously contemplate the symmetry of interlocutors: the individual and the contextual. At the level of the individual, the symmetry of participants requires measures which increase its capabilities not only its abilities (Sen, 1999); and at the contextual level, we must ensure the material, social and political conditions so that people may participate in the discourses affecting them. This principle then will be concretised within the sphere of the university, on the one hand, by *guaranteeing equal access to those mediums of expression and equity through the use of public space and resources*. In our view, access to these resources – which permit equal opportunity in the use of rights and freedoms – must be socially equal and non-proportional, as a proportional division of the resources will only strengthen the dominant credos (Habermas, 2006). On the other hand, at an individual level, the *university must commit itself to the promotion of cognitive or epistemic acts, and civic virtues aimed at resolving conflict in the public sphere through dialogue* (Habermas, 2005; Cortina, 2001). This encouragement must develop through extracurricular activities, and more importantly, in our opinion, through the introduction of specific materials on the ethics and rights of citizenship in each degree programme. The formation of critical attitudes and civic courage must be achieved in all possible spaces (Cortina, 2001).

(4) The final criterion we will refer to is the importance of dialogue, both as a means of searching for consensus and as an end. The best known way of settling disagreements is through dialogue, not violence. Authentic dialogue signifies recognition of the interlocutor's dignity and implies a renunciation of violence and oppression. Thus, even when dialogue is not the quickest or most effective procedure for making collective decisions, it remains the most legitimate, given that it is grounded in the essential principle of respect for personal autonomy and the plurality of opinions. Dialogue is also the end, in the sense that it is an *ethos*, a moral form of life which manifests itself in all areas of human activity (Cortina, 1995). Working from this criterion, we may affirm that the University must create spaces for permanent dialogue among the various religious faiths and must make an effort to avoid any sort of authoritarian pretensions or violent actions against any one faith or atheist group.

In our opinion, these are the arguments and criteria which through the ethics of discourse we may use for the management of religious and cultural conflicts at the university. By referring to Rawls (1971), and particularly through Sen's (1999) and Nussbaum's (1997) focus on capabilities, one finds support for these criteria. Nonetheless, given that our purpose is to propose normative criteria, we have opted for a strong philosophical basis.

“After all, whether the liberal response to religious pluralism can be accepted by the citizens themselves as the single right answer depends not least on whether

secular and religious citizens – each from their own respective angle – are prepared to embark on an interpretation of the relationship of faith and knowledge that first enables them to behave in a self-reflexive manner toward each other in the public-political sphere”. (Habermas, 2006: 155).

Conclusion

The university has been, and remains, an institution which is central to society. Its evolution and development have been closely linked to the economic, cultural, political and social development of each country. Today, it finds itself in an important process of transformation and the challenges which it faces are both diverse and important. It should be mentioned that among these tests is the attempt to foster harmonious coexistence among the various cultural and religious groups.

The university is a centre of knowledge and of mainstream education in our societies. Its task is the education not only of good professionals but also of responsible citizens. This means that they must manage the religious conflicts arising on our campuses. In order to address pluralism, it is necessary to find criteria and norms with a solid base and which can be shared by all. In our opinion, the ethics of discourse is a source of foundation building and of solid, practical criteria.

At least three relevant conclusions may be extrapolated from our research. The first is that the university has been – and remains – a forum for learning and social innovation, as well as a space of coexistence and common education. Secondly, the university must opt for an actively “neutral” attitude in the face of the diverse religious and secular views, through which all may learn from the rest and not merely settle for an attitude of tolerance and indifference toward the meaningful proposals offered by the various religions and philosophies.

In the third place, it is important to explain that by using the ethics of discourse as a foundation, we may extract a solid rational basis for the criteria which will frame the peaceful and constructive coexistence among the many religions. The primacy of rational arguments, the encouragement of autonomy, the search for symmetry and the consideration of dialogue as the mechanism used for conflict resolution, are all criteria which we may use for addressing religious conflicts and for the construction of a common *ethos* in a globalised world.

We believe that the construction of a common *ethos* requires a continuation of work in a double sense: the elaboration of a rational discourse about religious and atheist pluralism in institutions of higher learning, and the implementation of specific acts and innovative initiatives in mutual education, through which the students (and citizens) may be encouraged to develop a critical attitude and civic courage.

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Dr. José Félix Lozano Aguilar, (*Universidad Politécnica de Valencia*) is senior Lecturer for Business Ethics in the Polytechnic University Of Valencia. He received a scholarship from the Germany government (DAAD) in Erlangen-Nürnberg University. He is autor of the book *Códigos éticos para el mundo empresarial* (2004). He has published several articles in *Journal of Business Ethics*, *Science and Engineering ethics*. He is member of the executive committee of the ÉTNOR Foundation.

E-mail: jlozan@dpi.upv.es

Pedro Jesús Pérez Zafrilla (*University of Valencia – Spain*) is a Postgraduate Fellow at the Department of Moral Philosophy. He developed three foreign researches, at the University of Maryland (US) in 2006 and at the University of Oxford in 2007 and 2008. He is member of the Editing Council of the *Philosophical Review Dilema*.

E-mail: p.jesus.perez@uv.es

Dr. Elsa González Esteban is senior lecturer of Ethics, Applied Ethics and Political Philosophy at the University Jaume I (Castellón, Spain). Scholarship from the Education Spanish Ministry in Notre Dame University (USA) and Pittsburgh University (USA) and a post-doctoral scholarship in the London School of Economics and Political Science (Grant Britain). He is member of the committee of the ÉTNOR Foundation (Castellón).

E-mail: elsa.gonzalez@fis.uji.es

Inclusivity and Equality: Freedom of Thought, Conscience and Religion within Republican Society

Alan Coffee

Abstract: Balancing citizens' freedom thought, conscience and religion with the authority of the law which applies to all citizens alike presents an especial challenge for the governments of European nations with socially diverse and pluralistic populations. I address this problem from within the republican tradition represented by Machiavelli, Harrington and Madison. Republicans have historically focused on public debate as the means to identify a set of shared interests which the law should uphold in the interests of all. Within pluralistic societies, however, a greater attention must be paid to the background social conditions that may disrupt the deliberative process and lead to factionalism and instability. This includes certain changes in perspectives by both religious and secular citizens.

Keywords: *freedom, conscience, religion, republicanism, diversity, pluralism*

Introduction: “an empire of laws”

It was when the Tarquin dynasty was overthrown, according to Livy, that Rome became a free nation. No longer would the Romans be subject “to the caprice of individual men” – which was the mark of slavery – but instead they would be governed by “the overriding authority of law” (1960: 105). In order to preserve their freedom under the law, Livy pointed to two essential features of government: the law must treat everyone equally and act in the interests of all. What this meant was that, first, the law was to apply to all citizens alike and admit “no relaxation or indulgence” towards those who might wish to circumvent its provisions by using influence or privilege or claiming special circumstances (1960: 108). The strict application of the law’s terms, however, was not sufficient. Where the burdens of complying with the law’s provisions fell disproportionately on some citizens rather than others, the situation was regarded as oppressive. Where such inequalities were proven, the law was subsequently changed.¹ In short, no one was to be above the law and neither was anyone to fall below the protection of the law.²

¹ See Livy’s account of the Revolt of the Debtors (Livy 1960: 129–131). Oppression by unjust laws imposed by one’s fellow citizens was regarded as no less an evil than the threat of slavery by foreign enemies.

² See Machiavelli’s *Discourses on Livy*, 1970: 183, 231–2.

Since this time, republicans have regarded the character of their laws and their supreme authority in regulating the relationships between citizens as definitive of their distinctive political position.³ In Harrington's words, a republic is to be an "empire of laws and not of men" (1992: 21). Notwithstanding this proviso, however, the fact remains that laws are inevitably drawn up by men. This presents the citizens of a republic with the problem of settling upon an appropriate set of laws that meet the dual requirements of treating everyone equally whilst serving all their interests. In part, this challenge is one of determining what the relevant interests are that ought to be served by the law. The interests of the population, Harrington observes, are diverse and diverse interests are apt to give rise to diverse ideas about the way in which people want to be governed. Differences of opinion and interest between the citizens will arise even amongst relatively homogenous societies, since what is in the private interests of individuals will not necessarily reflect what is in the shared interests of the citizens. Republicans have long argued that the shared, or common, interests of the people ought to be arrived at through public discussion usually through a deliberative process of some sort which, in the modern context, typically refers to debate in the public sphere and a parliamentary democracy. Deliberation is, of course, no guarantee of consensus or agreement: as Harrington observes "reason is nothing but interest" and so as outlooks, opinions and interests within the population diverge, so the difficulties involved in reaching an agreement are magnified.

One particular area in which the citizens of a number of European countries are currently engaged in determining the extent of their shared interests concerns the exercise of an individual's freedom of "thought, conscience and religion". In the pluralistic and socially diverse context which characterises many European populations, the challenge is to ensure that the expression of citizens' religious and ethical beliefs are consistent with the authority of a legal system which meets Livy's requirements of equality and inclusivity. In the language of the *European Convention on Human Rights*, we might characterise this issue as balancing the "freedom to manifest one's religion or beliefs" with the limitations by law "necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others" (Article 9). Since the law must represent the common interests of the citizens and treat them equally, the ideal situation is for the law to take one general form which applies to everyone alike. However, where this is not possible compromises may have to be made. Where matters of conscience and religion are concerned, the stakes can be high and citizens may feel that where a ruling does not adequately accommodate their beliefs, they are faced with a choice between complying with the law and remaining in good standing with their conscience or with their church.

³ See also Pettit 1997: 174–6; Skinner 1998; Laborde – Maynor 2008: 1–12.

It has never been entirely straightforward for legislators to strike the balance between governing in the interests of all and protecting the interests of a few. However, the pluralism of modern European states has added to the difficulties involved. A number of trends within contemporary European states have contributed to this pluralist context. The enlargement of European Union, for example, has brought together citizens from a diversity of nations, ethnicities and religious traditions. Migrants from non-European backgrounds have, in addition, brought new cultural perspectives, beliefs and values which are not always reflected in the existing legal or institutional structures of the nations in which they live. Thirdly, the demands of secular legislation have, at times, also come to be seen as being at odds with historical religious privileges and the expectations of those who hold certain religious beliefs. This diversity has brought to light a number of disputes about the limits within which one can manifest one's religion with the result that traditional solutions have come under pressure and must now, perhaps, be rethought. To take a perennial example, one might think of the *affaire du foulard* in France where the state's commitment to *laïcité*, or secularism – a doctrine that was shaped in the wake of the disestablishment of the Catholic Church in 1905 – has since the late 1980s been challenged by Muslim students.⁴ Whereas the students regard the wearing of headscarves in state-run schools to be an essential feature of their freedom of conscience and religion, the official line has been that this practice is incompatible with the secular nature of the state's public sphere.

A second illustration, concerns the controversy that surrounded the *Sexual Orientation Provisions of the Equality Act* that came into force in the United Kingdom in 2007, making it illegal for providers of goods and services to treat members of the public differently based on their sexual orientation. Although this legislation is aimed at commercial and government providers, included within its scope are the undertakings of registered charities. Religious activities themselves are not directly affected (church membership or the appointment of ministers can still be restricted because of sexual orientation). However, where religious organisations are involved in charitable work they must comply with the provisions. Specifically mentioned as falling within the act's scope are the operation of adoption and fostering agencies. This has caused church-affiliated agencies to object that their employees would be required in the course of their work to go against their religious and ethical convictions. Placing children for adoption with gay couples, it was argued, was incompatible with the workers' beliefs about the nature of the family as an essentially heterosexual institution. Without a special exemption from the act, the agencies protested, they would be forced to close. No exemption, however, was granted.

⁴ For the history of this debate from a republican perspective, see Laborde 2005.

Differences of belief or interests between citizens do not concern republicans so long as they can be accommodated within a legal system which meets the conditions outlined above. Where differences cannot easily be reconciled, however, republicans fear that not only may the interests of individual citizens be harmed but that there is a risk that factions and divisions may develop with the potential to undermine the stability of the republic itself. The strength of feeling on certain religious or ethical issues, it is sometimes feared, may lead citizens to demand legal exemptions, special treatment or even the establishment of parallel legal systems. There would then be a danger that the authority of the law – which Livy pointed to as the essence of a free state – may become weakened to the point that the allegiance of the citizens shifted to alternative sources of power (such as one's church, for example).

Rather than regarding controversies of the kind described above as clashes between a kind of freedom (of conscience) and the limitation to be placed on this freedom by laws which uphold this and other freedoms for all – as the wording of Article 9 suggests – republicans understand the issue at stake to be one of 'domination.' I explain this term in detail below, but the basic idea is that where a citizen is dominated, either by the government or by other citizens, he or she has a claim to be protected by the law. In Section II, I set out the formal criteria by which cases of domination are to be assessed. Where citizens believe themselves to be dominated, it will be against these criteria that their case for protection and redress will be determined. Any test for domination, however, I will argue, is inevitably applied within a social and political context. This being so, when the formal considerations by which matters of domination are assessed are applied in concrete situations, they run the risk of being influenced or obscured by tacit forms of bias within the minds of the arbitrators.

Non-Domination and Public Reason

Republicans regard the central mandate of the government to be to promote what is called 'non-domination' (Pettit 1997).⁵ The notion of domination governs the relationships both between the state and the citizens and amongst the citizens themselves, placing restrictions on what others (including the state) can do any individual whilst at the same time entitling each person to a voice in the political processes by which the terms of those restrictions are set. Where either condition has not been met then a person is said to be dominated, a state which is incompatible with the status of being a citizen.⁶ It is as individuals that citizens have the right not to be dominated. However, what constitutes domination within a given society is something which is decided collectively through public discussion in which both individuals and bodies representing group interests may participate.

⁵ Priestley uses the term 'oppression' rather than domination (1993: 13).

⁶ Pettit 1997: 51–58.

The restrictions on what can be done to an individual are usually expressed as a maxim taking the following form: nobody may interfere in the interests of another citizen without being forced to respect that person's relevant interests. This condition is designed to hold together two principles. First, every citizen is said to know his or her own interests best. No one should be able to interfere in another person's life without having to respect the ideas and opinions – or as it is often put, to “track the interests” – of the person suffering that interference. This idea is familiar as the ‘harm principle’ of standard liberal theory (Mill 1974). However, republicans are not required to track *all* a person's interests, but only what are deemed their “relevant” interests. If all the personal interests of every citizen had to be taken into account, there would inevitably be clashes between conflicting sets of interests. In light of this, it is not just any interests we may happen to have that others must track, but only those interests we share with all other citizens as members of the same political community. These are our ‘avowable’ rather than our private interests and represent the common good. Individuals are not dominated, republicans argue, when others are forced to track those of their interests that form part of the common good. If citizens are to have any exemption or special treatment under the law, what they must demonstrate is that the interest of theirs that has been compromised is an interest which is (or ought to be) one which the citizens share.

The common good does not refer to a substantive ideal such as a set of religious beliefs or a national outlook – there is, in any case, little chance of this sort of comprehensive perspective being shared in a pluralist Europe. Rather, it is said to follow from the one fundamental interest we are all said to share in being free from arbitrary external interference (Priestley 1993: 12). The freedom to practice one's religion unimpeded is considered a part of this presumptive aim as much as any other form of civic freedom: “civil liberty is... on the same footing with religious liberty. Just as no people can lawfully surrender their rights to govern themselves or dispose of their property as they see fit, so no one can be expected to give up their freedom to decide for themselves what mode of religion to practice” (Price 1992: 33). However, republicans do not enshrine these freedoms as ‘inalienable rights’ which have to be balanced against the inalienable rights of others. Instead, social freedom is held to be realisable only within an appropriate institutional structure in which each individual citizen is treated as an equal and given a voice, and where any curtailment of a person's freedom is only ever justified for a strictly limited set of reasons over which all citizens have a say in defining.⁷ When republicans claim that the citizens should deliberate about where to draw the line between individual

⁷ Price and Priestley do refer to ‘natural’ or ‘unalienable’ rights. This language echoes Lockean natural rights language, but serves much more loosely simply as an expression of the importance attached to republican freedom rather than to a set of personal rights. See Pettit 1997: 101.

freedoms (thought, conscience or religion) and the limitations necessary to maintain stability, then, it is this notion that they have in mind: determining the extent of our 'relevant' interests which everyone else must track.

The concepts involved in the republican ideal of citizenship are illustrated through the language and imagery of the Roman ideal. To be a slave on the Roman model was to be within the power of someone else – a master, or a *dominus* (hence the idea of being 'dominated'). The master, or dominating power, had the power to interfere in the life of the slave at will and according to his or her own discretion, or *arbitrium* (hence 'arbitrary' interference). Citizens had no master and, therefore, nobody had arbitrary power over them. This is not to say that citizens could do anything they liked or that nobody could interfere in their affairs at all, only that this interference could not be arbitrary – at anyone's will and discretion. The coercive and interfering power of the law, however, was not considered arbitrary so long as it conformed to the conditions stated above, namely that it answered to the interests that each of the citizens share and that every citizen was given a voice in coming to settle upon what these interests were.

Citizens come to identify their common interests through the institutions and forums of civil society and democratic processes of government. The purpose of these processes is to frame laws that will enable individuals to live independently, as citizens *sui iuris* and possessing a significant degree of personal freedom consistently with the fact of their living together within a republic. Traditionally, the ideal of non-domination, rather than reflecting the ideas and interests of the powerful or the majority, has been taken to imply a strong protection of the vulnerable and marginalised sections of society.⁸ As a contemporary illustration we can point to some of the policies adopted by the Spanish Socialist Party (PSOE) under José Luis Rodríguez Zapatero since coming to power in 2004. Operating explicitly within a republican framework, the Spanish government has introduced legislation to protect women from domestic violence, to equalise gender opportunity in the workplace, to recognise same-sex marriages and to grant legal status to 700,000 illegal migrants.⁹ These measures were designed to answer to the shared interest that all citizens have in avoiding domination and protecting their freedom and independence, although the specific measures themselves were sometimes highly controversial and rejected by significant proportions of the population.

Republicans are able to advocate controversial policies whilst maintaining their stance that the law must act in the shared interests of all the citizens by appealing to the fundamental interest each person has in not being dominated. In Price's terms, listed above, this means that we have an interest in preserving our ability to decide

⁸ See both Price 1992 and Priestley 1993.

⁹ Pettit 2008; Coffee 2009.

how to pursue our goals, dispose of our property and exercise our consciences free from the threat of arbitrary control by others. In order to ensure that the law itself tracks this most general shared interest, republicans typically require that in public discussion about what the content of the laws should be, citizens restrict themselves to employing only language, values and ideas that are accessible to all members of the community and which no one would have a good reason to reject. Coercive and intrusive laws, on this approach, are justified not by the fact of everybody's agreement, but by the lack of anyone's reasonable rejection. Philip Pettit – the most prominent contemporary defender of republicanism – argues that something will “represent a common interest of a population just so far as co-operatively admissible considerations support its provision” (2001: 156). Co-operatively admissible considerations, he adds are those which “anyone in discourse with others about what they should jointly or collectively provide can adduce without embarrassment as relevant matters to take into account.”¹⁰ By placing this restriction on the manner in which debate is conducted, it is argued, individuals are prevented from advocating their private or sectarian interests ahead of those they share in common with others. In this way, blatant self-interest in debate is ruled out – we cannot claim that everyone else ought to pay tax, for example, except for us. Also ruled out, on Pettit's formulation, however, are direct appeals to the particular moral or religious commitments which some people have, but which others in the community cannot be expected to endorse. Public considerations do not define the content of our common interests, but only control the manner in which we identify what those interests are. Once we implement a set of procedures which ensure that these conventions and considerations are used and upheld, then, says Pettit, everything else is “up for grabs” (1997: 201).

If we apply these conditions to the requirements of the *Equality Act*, a general case can be made that to suffer discrimination in the form of being refused goods or services, or to be offered these on terms different from other members of the population, on the grounds of sexual orientation is to be dominated. For a supplier of goods or services to treat someone this way, is to exercise a form of arbitrary control – since this treatment is not forced to track their interests, or, since the idea of sexual orientation is general, to track the common interests of the population. In other words, all citizens, and not just homosexual ones, have an interest in not being subjected to discrimination of this sort. There is no intention by the act to compromise religious freedom and so faith-based activities are excluded from the act's scope. However, when religious organisations operate as charities (for which there is state support), they are deemed to be breaching the shared interest of not

¹⁰ Pettit attributes this formulation to Habermas. As I read him, however, Pettit's restrictions on what is eligible for public deliberation are much narrower than those that Habermas allows. See Habermas 2006.

being discriminated against because of one's sexual orientation and so are bound by the provisions.

For a counterclaim by the agency workers to be successful, on this account, they would need to show that they were also dominated to the extent that the state had arbitrarily interfered with their freedom to manifest their religion and that their interests freely to exercise their freedom of thought, conscience and religion had not been tracked. They would also have to show, using language and arguments which were accessible to all, that this was an interest they shared with other citizens, even non-religious ones. In the case of the agency-workers, for example, references to the idea of marriage as a Christian institution or their conviction that their work was a response to their Biblical faith would be inadmissible. Muslim students attempting to make their cases about the importance to them of wearing the *hijab* would face the same difficulty. As we have outlined the concept of what constitutes a collectively admissible consideration, then, this may often be a very demanding standard to meet for religious or ethically motivated claimants.

I will not attempt to determine what the right outcome should be in these cases. Rather, in the next section I will consider whether such an idealised form of deliberative process based upon only "co-operatively admissible considerations" can, in fact, uncover all and only instances of the shared and collective interests of the population and, so, whether it could ever serve as an effective test for domination. I will conclude that on its own it cannot, and that to force people to deliberate solely according to these conditions is itself a dominating act which unfairly burdens some parties to the discussion. If they are to apply their restrictions to the content of public deliberation without prejudice or domination, I will argue, republicans must at the same time pay close attention to the social context in which the discourse takes place, and to the dispositions displayed by the participants on all sides.

Social Domination and the Status Quo

Although we have said that equality before the law is a founding principle of republicanism, we should note that this requirement protects only those individuals who have been recognised, or included, as citizens. Historically, the proportion of the population who qualified as citizens was often comparatively small. In Roman times, of course, slaves were by definition excluded. However, even a writer as influential as Kant was content to restrict the franchise of citizenship to include only adult propertied males (1991: 78). Nowadays republicans allow no such exclusions, adopting instead a "principle of inclusivity" which sets the boundaries of qualification for citizenship as widely as possible and which, ideally, should include all those who live under the authority of a given law or its institutions (Pettit 1996: 286). Driving this commitment to inclusiveness is a more general normative

principle, often regarded as indispensable for any plausible modern political theory – the equal moral worth of all individuals.¹¹ Pettit puts it this way: “any plausible political ideal must be a political ideal for all.”¹² By this, republicans mean that (1) all social groups are to be included fully as citizens; and (2) that the members of each group are given an equal or fair value for their citizenship.

However, as things stand, not all social groups do get a fair value for their citizenship. Some sections of society are underrepresented legally and politically or have on average lower incomes and poorer access to social resources than the rest of the population. Any group of citizens suffering these kinds of social disadvantages, of course, would have a good case to claim that they are being dominated and so to seek the protection of the law and, perhaps, some redress or compensation. The members of these social groups, however, may regard themselves as dominated in a less clear-cut manner than over their access to economic or political resources. They may believe that their beliefs and moral convictions are not understood or accepted the mainstream of society and that the state’s principle institutions are unwilling or unable to accommodate them on the same basis as individuals belonging to other social groups. Muslim girls, for example, even where they support a principle of separation between church and state, may feel that the burden they suffer by abandoning the *hijab* is more onerous than school officials or public administrators realise, and that there is no equivalent role in other religions to that played by their headscarf. For this reason they may believe that they have been picked out under legislation that does not track their interests, or indeed, represent the common interests of the group and that they are, for this reason, dominated. Where citizens are genuinely dominated they have grounds to claim protection under the law including being exempted from certain of its conditions. The difficulty is, however, that where citizens are misunderstood, or even stigmatised or viewed in a stereotyped manner, then their ability to influence public debate or to make their case about domination in arbitration tribunals will be severely hindered.

The requirement that parties are required to make their cases using only considerations which no one could reject is intended to remove this difficulty, by ensuring both that parties only bring matters of acknowledged public interest to the forum, and that their case is heard according to the same impartial standard. Actual discussion, however, inevitably take place in a particular cultural context of ideas and concepts within which common practices and a widely shared sense of social legitimacy are made possible. Given the presence of this social context, it seems highly possible that cultural factors, in the form of subtle historical perspectives, shared conceptual schemes and complex sets of interrelated norms, will shape and

¹¹ See, for example, Raz 1986: 194, Dworkin 1977: 180, Kymlicka 1989.

¹² Pettit 1997: 96.

constrain the manner in which the deliberative and contestatory processes which are said to protect citizens from being dominated will in fact operate. The effect of these cultural background commitments, I will argue, can be remarkably difficult to identify by those who are under their influence. As a precondition to debate, then, the requirement that all parties stick the ideal of public discourse proposed by republicans such as Pettit is more onerous and more complicated to enforce and apply than is often supposed.

It is often easier to illustrate this point using examples from a different historical context, since we are no longer influenced by the particularities of that debate. Here we can use Kant's restriction of citizenship to men as a paradigm example. For the most part, Kant is meticulous in his articulation of moral and political freedom in strictly universal terms. Freedom is seen as "the only original right belonging to every man by virtue of his humanity" and based on "innate equality" and "a human being's quality of being his own master" (1996: 30). Despite this reasoning, however, Kant nevertheless somewhat casually restricts this freedom – freedom being dependent on citizenship, he says – in this way: "the only qualification required by a citizen (*apart, of course, from being an adult male*) is that he must be his own master... and must have some property" (1991: 78, my italics). Of course, Kant was only exposing his tacit acceptance of at least part of the socio-cultural and legal background of his time. However, whilst it was unimaginable for Kant that women could be independent citizens, so it is equally unimaginable for us that they should not be. The lesson we can draw from this, is that it may be no less hard for us to break out of our own background conceptual assumptions. If this is so, then the danger is that when our own marginalised, stigmatised or alienated groups attempt to speak out on other issues which matter to them, we may hear them with the same sort of prejudice that Kant displayed.

When minorities contest laws and practices in such a way as to go against the background values and received opinions of the dominant group, there is a possibility that decisions will not be settled not according to 'the best reasons' objectively conceived, but by the (arbitrary) strength of prevailing public opinion. Whilst professing to be impartial, the contestatory process takes place against a baseline of accepted norms and *de facto* institutional practices similar to what Cass Sunstein calls "status quo neutrality", or the taking of current ways of life as the neutral order of things (1993: 3–7).¹³ Rather than the criteria of public reason acting as a neutral

¹³ Cecile Laborde also uses the idea of status quo neutrality in a republican context of multicultural debate. Laborde, however, refers to the unreflective acceptance of "some background institution or distributive pattern for granted and, as a result [failing] to provide an impartial baseline from which" to discuss current issues of domination etc. (2008: 13). I am referring here, however, to the unreflective acceptance of normative or conceptual ideals as representing a 'neutral' order of things and so failing to provide a baseline about what counts as a 'co-operatively admissible consideration'.

and non-sectarian standard by which disputed cases of domination can be adjudged against the common interest, the danger is that republicans will simply be applying the standards of the ruling elite or the dominant social group. For example, where Catholics and secular French officials have made their peace with the 1905 disestablishment of the Church and the resulting requirements of *laïcité*, and take this settlement to be the baseline for discussions about the role of religion in the public and private spheres, Muslims may well wonder if and how they have been included in this arrangement. Similarly, where English Christians believe that not only is the secular elite hostile to their point of view but that on the pretext of using only neutral language they are also required to present their own arguments in the very secular terms to which they are opposed, they may also come to see themselves as disenfranchised and dominated.

The danger of minorities being unable to express their own alienation in terms that can be understood or accepted by the dominant powers is real. However, we should remember that in cases such as the *Equality Act*, the legislation had been designed with the intention to protect another vulnerable, historically marginalised and underrepresented group, namely those discriminated against on the grounds of their sexual orientation. In drawing attention to the dangers faced by one set of dominated citizens through the imposition of a certain set of deliberative standards, we must be wary of falling into an opposite (but surely equal) danger of appearing to legitimate the oppression of others by those very citizens that may subsequently result. There can, therefore, be no question of republicans adopting the sort of ‘difference-politics’ or ‘soft-multiculturalism’ that has often been criticised for protecting group practices as part of a policy of recognising religious or cultural identities even where these practices have the potential to dominate their own group members or other sections of the community.¹⁴ Some cultural groups, for example, may fail to educate women within their families above a certain age, or may not allow them to learn the host nation’s language if it is not their first language, on the rationale that within their culture women have no need for an education or language skills. Since it cannot be an avowable common interest shared within the community for individuals to be denied an education which serves as the foundation of one’s independence, then regardless of cultural practices, this seems to be an obvious case of domination against which republicans must legislate.

We have ruled out, then, both an appeal to the theoretical ideal of a set of collectively admissible considerations and the relativistic acceptance of different cultural or religious standards. The question then remains whether citizens can indeed break the deadlock in disputes over matters of conscience where both sides appear to have

¹⁴ See, for example, critique of multiculturalist approaches that appear to overlook this danger in Galeotti 2004, chapter 7.

a legitimate claim to seek protection from becoming dominated in a manner which does not itself invite further domination.

Conclusion: “refining and expanding the public outlook”

Where citizens reach a state of deadlock over matters of conscience or belief there is a risk of this leading to the formation of mutually hostile sectarian groups, or factions, which threaten the stability of the political community by fostering and nurturing loyalties other than to the institutions of the state. Under these conditions republican worry that individuals may trade their freedom as citizens under the law for the patronage of sectarian leaders who promote only a narrow range of group-specific interests in exchange for the support of a section of the community. Such allegiance is said to weaken not only the cohesion of the state but also the authority of the law.¹⁵

Because of the intensity with which they are held, matters of religion and conscience are often said to have an obvious potential to give rise to factions. The dangers of mismanaging the differences between citizens on matters of conscience – whether by doing nothing to contain these divisions or by further entrenching them through heavy-handed action – then, are great. However, as James Madison, in his analysis of the problem of factionalism, notes these are by no means the only, or even the most significant, cause of social division (Hamilton et al., 1987: 124).¹⁶ The risk of factions developing between groups committed to pursuing divergent interests, he argues, is an inevitable consequence of our social freedom, including the exercise of personal conscience and economic activity. Since the most fundamental duty of the state is to uphold the freedom of the citizens, he reasons, the causes of factions can never be eliminated. In other words, Madison believes that there is no prospect of a socially or religiously homogenous community persisting in freedom which will not face the challenges posed by factional division. Since the causes of factionalism cannot be eradicated, he suggests that republicans must instead focus on moderating its effects. His diagnosis, I believe, shows what would be required for republicans to address the tensions brought about by religious and ethical differences in our own time.

Madison believes that the law itself can have only a limited role in controlling the effects of social factions for the same reason that Harrington noted, namely that the laws are made by people, and whoever they may be, people are susceptible to the temptation to legislate in their own favour (1987: 125). Even if enlightened lawmakers were able to set aside their own interests and perspectives, he adds, the indirect

¹⁵ Miller 2008: 138; Machiavelli 1970: 153–164.

¹⁶ The unequal division of property is said to be the “most common and durable source of factions”.

effects and remote consequences of their decisions would be so complicated and difficult to foresee that almost any proposed law would be seen as conflicting with the interests of one section of the community.¹⁷ Since the tendency for citizens to see things from their own perspectives is so strong, then the solution according to Madison can only be this: “to refine and enlarge the public views” (1987: 126). It would, he argued, be possible to create a broader and more inclusive perspective of what is in the common interest which commands the loyalties of these various groups. The purpose of this enlargement and refinement is twofold: to bring local and sectional interests into the wider public view; and, at the same time, to instil a desire within parochial groups to consider the public good ahead of their own (1987: 126–7).

Both sides to the process of enlarging of people’s views are necessary. This means, first, that minority interests must be both expressible and able to be heard by the wider community. I have argued that the standard republican commitment to public debate based on the principles of public reason and collectively admissible considerations fails on this count since it is unable to incorporate the interests of those social groups whose interests are not easily expressed in its terms. However, sectarian groups – religious and non-religious alike – must, for their part, take responsibility for restricting their demands to those that fall within the idea of the common interests of the political community. Encouraging and enabling each group to exercise such a restraint, of course, is not easy but where the first condition of ensuring that everybody’s interests are heard in public discussion has been met, then the chances of achieving this second condition will be greatly enhanced.

The question then remains, how are republicans to ensure that the voices of each group within society are heard? Rather than enforcing a common standard of what is to count as an admissible consideration for debate, the argument here is that on all sides of a dispute, the citizens should come to adjust their outlooks so that they no longer regard their opponents as not having any legitimate claim to be taken seriously in public debate. In the context with which we are concerned, what is required is this. Religious groups must enlarge their perspectives to accommodate certain ideas which accompany the idea of living in a pluralistic society, such as the diversity of opinions other than their own and the separation of secular from sacred society. In part, this will entail an acceptance of the priority that public reason and collectively admissible considerations have in political discourse over exclusive religious arguments. In the same way, however, the perspectives of secular citizens must be similarly enlarged so that they come to see religious practice as a valid form of life in this same pluralistic political landscape rather than regarding them

¹⁷ Richard Bellamy makes a similar point regarding the difficulties of attempting to legislate in this way in pluralist societies (2008: 169–70).

as, for example, relics of a bygone age with no inherent claim to a place in modern society.¹⁸ The religious views on homosexuality and women's dress that we have discussed, then, may be thought flawed by non-religious citizens but they should not be dismissed as illegitimate candidates for discussion.

Exactly how this public enlargement of perspective is to be brought about, however, is a matter on which republicans have never been very precise. Madison had in mind deliberation by elected representatives from each group, chosen for their wisdom, patriotism and commitment to justice.¹⁹ It would be wonderful if such representatives could reliably be found. In their absence, more promising contemporary republican solutions might include the enabling of wider forms of public conversation based on the operation of a lively civil society, access to the media for marginalised groups, localised forums for debate and direct contact between citizens from the various sections of society who might otherwise have very little social contact.²⁰ Whatever the means, however, if republicans are to ease the tensions between religiously and ethically divided citizens whilst retaining their commitment to public debate as the means of upholding freedom and avoiding domination, then the outcome must be the preparedness of the citizens to enlarge their own outlooks about the range of ideas that are admissible within the deliberative process itself.

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¹⁸ Habermas 2006: 13–6.

¹⁹ Madison believed the alternative to representatives was direct participatory democracy in which each person voted for his (or, later, her) own preferences.

²⁰ See, for example, Young 2000 (chapter 5).

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Alan Coffee has previously taught political philosophy at the University of Hertfordshire. He is currently at Birkbeck College, London.

E-mail: a.coffee@philosophy.bbk.ac.uk

Neutrality, Religious Symbols and the Question of a European Public Sphere¹

Kostas Koukouzelis

Abstract: In the last two decades there has been an on-going, fierce debate in members and candidate members of the European Union concerning the use of religious symbols in the public sphere. The exemplary case is, without doubt, the case of the Muslim headscarves, a case that emerged particularly in France and Germany, but also in other places, such as the Netherlands and Turkey. Taking stock mainly from the French example we shall focus on the main normative justification of the prohibition of religious symbols, that is, the principle of laïcité conceived as state neutrality. The latter should not be interpreted as secularism, that is, a strict separation between private and public space. Laïcité as neutrality should neither be seen in a moralistic way nor privatize religious identity. Part II will examine the jurisprudence of the issue commenting on cases recently adjudicated by the ECtHR. The Court, unfortunately, recognizes a ‘margin of appreciation’ to member states, when the prohibition of religious symbols constitutes a form of both direct and indirect discrimination. Finally, in part III, we will argue that neutrality should be interpreted as real not formal equality towards both religious and non-religious beliefs. Freedom of conscience is intrinsically connected to its public manifestation, which makes the public sphere constitutive of subjectivity. This cuts across the private/public divide and resists the insistence of multiculturalists on collective rights. The task of instituting a European public sphere is a struggle for equality not for common cultural identity.

Keywords: *difference, neutrality, headscarves, religious symbols, public sphere, Europe*

I. Common values and religious symbols

The European Union derives its strength from common values of democracy and human rights, which rally its people, and has preserved the diversity of cultures and languages and the traditions which make it what it is.

The Schuman Declaration (Fontaine, 2000:7)

¹ Many thanks to Panayiotis Flessas, Dimitris Kyritsis, Leda Lakka and an anonymous referee of this journal for helpful comments on an earlier draft of this article.

The passage just quoted describes in a nutshell one of the fundamental common assumptions about the EU's derivation of its moral and political legitimacy. Its references and use of notions like 'common', 'values', 'democracy', 'human rights' for example is characteristic of a certain way of evaluating the project of European 'integration'. Nevertheless, what is missing from this formulation is whether what is described above as a plane of common presuppositions has *already* taken place or *is about* to be materialized as a task. In other words, there is an inherent ambiguity about whether what is described is indeed a *fact* – the *reality* of common values of democracy and human rights – or a *value* – the same common values waiting to be *realized*. This ambiguity is no mere theoretical pretension of the demand for more theory, but it is rather irreducibly *constitutive* of the European project. There are significant and diverse implications, which follow from whichever of the two horns of this dilemma one ascribes to.

The problem of religious symbols in general and the affair of the Muslim headscarves in particular, as presented in most European countries, although particularly in France, provides us with an example of conflictual cultural identity politics, and the issues deployed in it – the overlapping representations of gender, class, ethnicity and race, and mostly religious identity in the nation-state context – are crucial in the context of the ambiguity of the European project we identified above. The recently imposed complete ban of religious symbols in French public schools puts the issue of equality, difference and identity under renewed pressure. While traditional countries of destination regarding immigration, like the US and Canada, have been dealing with cultural clashes and accommodation of 'non-western' religions for decades, rising immigrant populations pose a new dilemma for European countries, forcing society and politicians to rethink their established cultural identity. Multiculturalism puts the stakes for a coherent and fair liberal politics extremely high, not the least because European liberal democracies have to take a stance on how they treat the emergence of new fundamentalisms and whether they compromise liberty or perhaps deepen their conception of what liberalism truly demands.²

Neutrality has been the standard answer of the liberal, democratic state to religious and cultural difference. Its classic justification can be found in J. S. Mill's thesis that power must not be exercised over people for non-neutral reasons (Mill 1962), and much earlier in John Locke's plea for toleration and his insistence that the state must stay clear of the so-called care of the souls (Locke 1983 [1689]).

² Historically speaking, it is important to point out here that contemporary multiculturalism is a phase in the return of post-colonial people to the metropolis. It is the meeting point of the normative history of the West and the counter-history of its realization; see Bhabha 1990: 218 and Emmer 1993.

It also constitutes a fundamental thesis in contemporary liberal legal and political philosophy, which broadly shares the view that ‘a neutral state is one that deals *impartially* with its citizens and remains neutral on the issue of what sort of lives they should lead’ [Jones 1989, 9].³ Nevertheless, the interesting thing is that neutrality is equally claimed by both the proponents and the opponents of the ban of religious symbols in European countries.⁴ Such a thing makes us realize that there is an important element of truth regarding the question of the character and nature of what is actually ‘common’ in Europe.

However, the argument of this article can only be described as a modest and primarily a negative one. If the justification of the French law on the ban of *all* religious symbols, including Muslim headscarves, and other European states’ treatment of the issue is based on some conception of neutrality, then it would be an important task for us to clarify what neutrality is not and what it should not be. The confusion on the issue might stem from neutrality’s Janus-faced nature: it may be a device of inclusion for minorities who understand neutrality as the equal right to pursue their way of life as they see fit; but it may also be a device for exclusion, via strengthening the necessarily particular boundaries and sense of collective self of the dominant group. Accordingly, in the next part (II), we will focus on the French case trying to give a brief account of the French notion of *laïcité* and its interpretation as strict separation between state and church (secularism). This particular interpretation will be linked to a certain, i.e. perfectionist, interpretation of it, which, allegedly, tries to emancipate young students. Furthermore, we will also consider a libertarian interpretation of *laïcité*, that is, conceived as privatization of religious identity. Part III will provide us with an overview of the problematic and conflicting treatment of religious symbols by European countries and mostly by the European Court of Human Rights [ECtHR]. In the end, we shall conclude that should neutrality be a fundamental value embodied in the *European Convention of Human Rights* [ECHR], its interpretation has to (a) be unified as a core common value in the EU and (b) take the form of a specific conception of equality appropriate in a public sphere that is constitutive of subjectivity.

³ State neutrality is advocated by contemporary liberal thinkers. Rawls especially places the foundation of state neutrality on the key distinction between the ‘right’ and the ‘good’ prioritizing the former in relation to the latter. Briefly, the ‘good’ responds to the question ‘how should we live whatever the circumstances?’, whereas the ‘right’ responds to the prior and independent question ‘under what circumstances is it possible to live as we should?’ Rawls subscribes then to ‘neutrality of aim or justification’, which is the claim that the justification (rather than the effect) of state action has to be neutral (Rawls 1988: 260–264). For more on liberal neutrality see among others Goodin and Reeve 1989.

⁴ The principles of state neutrality together with equality of respect and freedom of religion form constitutive elements of the interpretation of *laïcité* as the Stasi Commission reported to the French National Assembly when it justified its proposal for the law banning all religious symbols from public sphere.

*On the ban of headscarves in French public schools:
laïcité and neutrality*

After several years of indecisive mutterings, during which school principals were keeping the courts busy by expelling scarf-wearing girls, 9/11 put the matter in more pressing terms, with the wearing of the headscarves being depicted as an imminent threat to the French Republic, an islamization of its education.⁵ All parties, with very few exceptions, coincided politically on the same position: keeping young Muslim women out of public school *because* of the cultural (religious) distinctiveness of their dress. The immediate justification was that wearing headscarves challenges the national principle of secular education and French citizenship. Only the absolute rule of *laïcité*, by which the young women should abide, could save these women from the tyranny of their fathers! As a consequence of that, and after much controversy, the French National Assembly passed legislation, which prohibits all symbols and clothing that draw attention to [*manifestent ostensiblement*] the religious affiliations of pupils in the public primary, middle and high schools.⁶ This included big Christian crosses and Jewish skullcaps (kippas).

In France, *laïcité*, a principle that has a long and revealing tradition that dates back to the years of the Revolution, has its roots back in a 1905 law that institutes officially the separation between state and church and remains active until the 80s as a fundamental constitutional principle (Troper 2000: 1267). Generally speaking, the meaning of the separation between state and religion is that the state has to be *laïc*, that is, neutral in a very specific way. The principle of *laïcité* takes the meaning of a strict separation between state and church (Haarcher 2004: 5). This conception of the principle is translated into a polemic attitude against any religion. It becomes then an anti-religious doctrine and *laïcité* equals in that sense secularization, which transforms the strict separation of state and church into state's own 'combat neutrality' (Poulter 1997: 50).⁷ Thus, whereas some young Muslims thought that their freedom of religious practice, indeed their religious identity, should be respected in its public manifestation, the French state banned exactly this 'public manifestation'

⁵ Nevertheless, the Conseil d'État's decision of 27 November 1989 annulled the exclusion of three Muslim girls arguing in favor of a 'liberal' conception of neutrality: neutrality for students means 'freedom of conscience', which allows them to express their religious affiliations even in the classroom. The carrying of the veil was, according to the court, an expression of fundamental religious liberties and goes hand in hand with the equality of all religions (William 1991). The judicial emphasis on the rights of students is of pivotal importance as it was abandoned, later on, in the adoption of the law by the 'republican' conception of neutrality.

⁶ No. 2004-228.

⁷ Seyla Benhabib, for example, seems to share such a view when she defines *laïcité* as 'public and manifest neutrality of the state toward all kinds of religious practices, institutionalized through a vigilant removal of sectarian religious symbols, signs, icons, and items of clothing from official public spheres' (Benhabib 2004: chapter 5); on the history of *laïcité* in France see Baubérot 2003.

on grounds that this goes against the French commitment to the principle of state neutrality in the sense of strict separation or ‘combat neutrality’. Since the French revolution religious freedom becomes one of the most important legally protected rights, but the movement from the religious to the nation-state left in place a one-way, assimilative politics of identity.

To be clear, the normative justifications of this legislative initiative, which are at the same time interpretations of the principle of *laïcité*, were mainly two: (a) the ban on all religious symbols contributes to the protection and respect of individual autonomy and human dignity of the students by actually creating more space for freedom for those who within public schools want to criticize and transgress the narrow religious and cultural identity imposed on them by their families and narrow traditions; (b) citizens of a secular state *must* accept the shared, that is, public and secular identity if they want to be part of such a community, and this contributes to the maintenance and stability of the public order. The point of this conception of neutrality that follows from it, is to create a *neutral public space* free from the influence of religious belief, a ‘space’ that young people might occupy in order to constitute and reconstitute their ideas and values free from intimidating and conflictual manifestations of religious faith. But is this what this public ‘space’ achieves in the end or does it threaten cultural difference by either assimilating or completely neutralizing it? Is this a retreat for the liberal, democratic state and a serious inability to understand the challenges posed by both pluralism and multiculturalism? Let us turn to these two normative justifications. The first justification of the prohibition corresponds to a ‘perfectionist’ interpretation, and the second justification is based on a ‘libertarian’ interpretation of the principle of *laïcité* as neutrality in public sphere.⁸

IIa. The ‘perfectionist’ interpretation of *laïcité*

The ‘perfectionist’ argument that is implied by the first normative justification refers to the aim of emancipation and is mainly grounded on its respect and protection of individual autonomy as an intrinsic part of the ‘good’ (Raz 1986). Thus, autonomous choices are, as a matter of principle, tolerated, whereas non-autonomous ones are not. But such a view makes the unwarranted assumption that Islamic headscarves are *prima facie* symbols of young girls’ subordination and patriarchal tyranny. Nevertheless, this is only partly true, because many Muslim girls wear their headgear voluntarily. The issue then becomes one of how one distinguishes voluntary from non voluntary submission, and whether one respects such a voluntary submission, one that arguably might impair the possibility of the girls’

⁸ Similar categorizations are used by Anna Elisabetta Galeotti (2002: 115–136) and more recently by Cecile Laborde (Laborde 2005), who follows mainly R. Audi’s exposition in Audi 1989.

future free choices. The ‘perfectionist’ would clearly not consider such choices autonomously made, and therefore should not have to respect them.⁹ Moreover, this opens the path for a wider range of state interference. For example, why does the state’s ‘perfectionist’, arguably paternalistic, intervention not apply to other, comparably ambiguous, family decisions to transmit traditional values and beliefs, such as sending children to religious catechism? Where would the state’s judgment on what constitutes an autonomous choice have to stop?¹⁰

To be sure, this effort does not stand far from a politics of assimilation. Let us see how such an assimilation is justified, although assimilation and neutralization in the above sense can, under conditions, support each other.¹¹ This kind of French-republican laicity and neutrality, because it seems to justify the claim that the freedom to manifest one’s religion publicly potentially *violates* the freedom of others, because it allegedly functions as propaganda, proselytism or intimidation, postulates at the same time a conception of civic identity, the identity of the French citizen as a counter-system to religion. Having its roots in the 1789 Declaration of the Rights of Man and Citizen the French nation builders try to emancipate students by claiming that emancipation, and unity in the public realm are the outcome of the constitution of a national identity, the constitution of a homogeneous people [*peuple*]. Such an enterprise has to be carried out by the triadic ‘reason-science-progress’ (Morin 1990: 38, Laborde 2005: 315–316). Indeed, the principle of laicity became a way to forge unity in a diversified society.¹² This is an important point, because the French-republican conception of neutrality considers school as a separate space where the particularisms and factual constraints of life are suspended. But *laïcité* aims to emancipate children from the confines of their social backgrounds and to transform believers into true citizens. This presupposes that students are not treated as equal individuals and citizens who enjoy freedom of religious conscience and expression, but as individuals-in-the-making bereft of any cultural trace, and the school as the laboratory of the future. The school, under this conception of laicity, is exactly the institution whose purpose is to form them *and* establish unity in a diversified

⁹ J. S. Mill has made clear that a freedom to enslave oneself cannot be respected (Mill 1962). Arguably, this was one of the mistakes French feminism committed when defended the ban of religious symbols as an effort to emancipate young women; see, for example, A. Vigerie and A. Zelensky, ‘La cardes, puisque féministes’, *Le Monde* 30/5/2003.

¹⁰ To be more precise here, I do not mean that it is illegitimate for perfectionists to be worried about the power relations *internal* to a specific group. W. Kymlicka clearly rejects internal restrictions infringing fundamental rights. What I object to is that autonomy can be enforced in such a way. Indeed, many non-Muslims tend to conformist ways of life, yet they should not be ‘forced to be free’.

¹¹ We are referring to the legitimacy of assimilation and not to political inclusion, which is exactly the real question we are supposed to answer here.

¹² Note here that in France the whole issue of headscarves was largely put in terms of what it means to be ‘French’ nowadays. However, the same issue arised lately in Britain around ‘Britishness’.

immigrant society.¹³ But this conception of *laïcité* might function exactly, as Rawls has acutely stated, as a ‘comprehensive doctrine’ that simply replaces in a crude way the old substantive view of the ‘good life’ defined by religion by a new vision of the ‘good’ defined secularly by reason and scientific progress creating another, although secular now, comprehensive doctrine (Rawls 1993: xviii, 175, also Taylor 1998). The school, as an extension of the public sphere, is transformed into secular catechism.

The ‘perfectionist’ argument presented here can be also stated in different, although quite similar to the preceding view terms: the law banning religious symbols is normatively justified in the name of the protection of human dignity. The normative justification of the French law can be depicted that way should one adopt an interpretation of the headscarf as an a priori symbol of women’s oppression. Through such an interpretation one can defend an *objective* violation of human dignity and discard the *subjective* criterion of its definition. This definition of human dignity takes us at the heart of the foundations of the system of rights. In the conflict between an objective and a subjective definition of an offence against human dignity the opposition is between an individualist, liberal conception of rights, which guarantees respect for self-determination and makes the individual the ultimate judge of her own dignity, and a communitarian conception, which makes community’s conception the objective criterion of an offence against human dignity. This second view places human dignity in opposition to freedom of conscience. It presents, in other words, human dignity not being possessed by the individual herself, but as translated into a legal obligation to respect one’s own freedom, and not exclusively other people’s freedom. Such a view opens the path for ‘objective’ (moral, philosophical, religious) conceptions of human dignity, which simply mask conceptions of human dignity formed by the majority. Nevertheless, rights are *subjective* and cannot be defined by democratic majority as they constitute exactly a guarantee protection against it.¹⁴ The liberal conception of rights argues that the offence has to be substantiated through the subject’s consent. In our case, if Muslim girls do not think that their wearing of the headscarves constitutes a violation of their human dignity it is not possible for the law to intervene. This does not mean that the rejection of perfectionism and its paternalistic flavor is simply the whole story here. Rights should refer to further non-subjective conditions of the possibility of their exercise. However, in the following section we shall see why non-interference just is not enough.

¹³ This is how the Debray Commission, established by the French National Assembly in the summer of 2003 for studying the affair of the headscarves and recommending state policy, justified its recommendation for a law that bans all religious symbols (Debray Report 2003, Vol. 1: 30). A detailed analysis of both the theory and politics of the French state can be found in Joppke 2007.

¹⁴ The effort to ‘objectively’ define human dignity leads to ‘legal moralism’; see the classic debate between H. L. A. Hart and Lord Devlin in Hart 1963.

IIIb. The ‘libertarian’ argument: neutrality as privatization of identity

A further consequence of the interpretation of *laïcité* as ‘combat neutrality’ is that the secular state demands that what is to be tolerated has to remain strictly private vis-à-vis a public sphere, where, on the contrary, the same rules apply to all. Here the institution of the private/public divide is of utmost importance, something not so straightforward in the ‘perfectionist’ argument, and the public education system is arguably included in such a public sphere, indeed it is an extension of it. What is now protected is a thinner conception of liberty (negative liberty), that is, one’s right to individual choices and preferences, which should not be violated. In this sense, differences are understood as being themselves reducible to differences between particular individuals. A neutral public space then is supposed to be ‘blind to differences’ exactly by trying to be anti-discriminatory in its treatment of citizens. Early modernity is to be blamed for that, which recognizes only a species identity, the identity proper to human species, but demands the definition of humanness (nature, substance, reason etc.) in terms of common traits. Following this approach the values of abstract/universal humanism were incorporated in the 1789 Declaration of the Rights of Man, which recognizes the same and equal rights to all.¹⁵

But now the problem becomes one of how to determine what counts as actually trespassing in the public sphere – a particularly thorny problem in the course of drawing the line between what constitutes a public, ostentatious manifestation and a neutral, discreet dress symbol! Notice here the inherent weaknesses of such a law in the case of the ban of all religious emblems in France. Such a law is first of all unable to determine *which* emblems go against the norm and second determine firmly *who* is constrained by the norm itself. In the first case it is extremely difficult for the law, which wants to pick up ‘ostensible manifestations’, to determine which article of clothing or hairstyle (or indeed beard) violates the norm. This would entail an effort to *determine the students’ intentions* on the basis of size, color and shape of clothing or style of appearance. Why is it a scarf and not a bandana, why is it a beard and not a moustache? This is clearly a major retreat in the liberal character of law.

Evaluating the case of the ban of religious symbols in public education we are faced with a paradox in the French-republican conception of culture. In principle, the creation of a neutral public sphere does not denote an ethical life, but constitutes the ‘bond’ between identity and administration. It is now a ‘neutral’ culture that unifies; a de-centered perspective based on a human rights discourse, ‘sensitive’ to difference and social equality. This means that cultural identities can in principle be preserved instead of being assimilated. Nevertheless, this does not escape cultural

¹⁵ For the problems such an abstract universalism focused on identity has caused to democratic citizenship see particularly Renault & Mesure 2002. Kant remains an exception to this as he sees subjectivity in a non-reductive to any empirical content way.

identity politics, for there is an inherent paradox here. On the one hand, one has to belong to such a group in order to participate in the public sphere,¹⁶ while on the other, as soon as cultural identity becomes the defining factor for participation, it becomes *depoliticized*. Cultural identity is *included* only to get *excluded* in terms of a neutral culture. This is a strategic move: it preserves cultural pluralism at the expense of making it politically irrelevant. There is a clear logic of inclusion/exclusion inscribed here. This is also the case with the Muslim girls. At a first level their identity is included, but only to be excluded, that is, ‘neutralized’ at a second level.

The argument coming from the French conception of the liberal state insists on the assumption that secular equality provides a public space for equal freedom whereas religious and cultural differences stay at the level of ‘individual’ life. Muslim girls are not refused the right to practice their religion in private. In that sense neutrality equals privatization of whatever religious beliefs people have – arguably, what is banned is not religious belief but its public manifestation. Difference becomes then, or, more strongly, *it should* become, a private issue (Barry 2001: 24–25). But this conception of the notion of neutrality in law bases its authority on a false conception of impartiality of reason. The state’s role then is primarily a negative one: it should not force minority groups to conform to the dominant culture; law secures non-interference. Minorities then enjoy formal equality before the law, which means that they are not assimilated, but are left free to develop or disappear (Laborde 2005:308–309). Nevertheless, the partiality of such a conception has been pointed out by both liberals and non-liberals. It chiefly conforms to Christian, white males. Instead of being neutral and negative this conception forgets that there are neither neutral procedures, nor neutral values. Neutrality, should it possess a value, cannot but be based on non-neutral institutions (Young 1990:116). Therefore, it is unclear why only students in schools and not also parents entering these public places should be required to remove such ‘ostensible’ signs. In any case, it would be a contradiction in terms to have ‘neutral’ *marks* of ‘identity’. In the end, only ‘pure nakedness’ or indeed ‘pure abstraction’ would probably succeed in fitting into this model. As we tried to argue above, this is a neutral public space in the sense of constituting an ‘empty signifier’, which needs to be filled in some way or another and potentially fosters an increasing intolerance, which favors a process of normalization driven by the dominance of the strongest group, in our case, a conception of what it means to be a ‘proper’ French citizen!¹⁷

The argument here might remind us of Marx’s classic but controversial early essay on the problem of Jewish rights within European secular states (Marx 1975 [1843]).

¹⁶ Here, I have in mind the opposite case of the *sans papiers* in France.

¹⁷ For these objections see Bowen 2004; Bowen rightly says that these are no mere practical problems, but hide a growing intolerance, exactly the opposite of complete indifference, now not based on ‘biological’ inferiority but on a ‘cultural’ one; see Hardt and Negri 2000: 190–192.

Indeed, Marx insists that a declaration of freedom from ‘religious identity’, as in the dismissal of all religious symbols in the case of French *laïcité*, does *not* liberate the individual from the conditions constitutive or reiterative of such identity. To the contrary, it is only *in abstraction* from such conditions that the individual is claimed to have been ‘emancipated’ by the universal state; this is, according to him, a ‘devious emancipation’.¹⁸ Marx’s critique of the constitutional state as such – then the French and North American versions of constitutionalism – sees religion not as the basis but as the phenomenon of secular narrowness itself (Marx 1975 [1843]: 217). Marx argues that religion becomes just a non-political distinction that the state presupposes in order to exist!

To be sure, this might be a proof that ‘identity’ was the only means for modern democracies, taken as nation-states, to constitute themselves as communities. This is not the case anymore (Andersen 2003). Multicultural communities have to base the social ‘bond’ upon something else altogether. In the French-republican paradigm, as we reconstructed it, secular equality oscillates between a ‘particular’ privatized identity, and a public ‘universal’, and abstract one. A fierce criticism of such a conception has recently been put forward by M. Hardt and A. Negri (2000). The ‘paradox’ mentioned above is described now as comprised of three moments: one inclusive, another differential, and a third managerial. The first is the ‘libertarian’ moment: all are welcome within, regardless of race, creed, color, sexual orientation, and so forth. In its inclusionary, juridical moment it is ‘blind’ to differences. But in its cultural moment differences are celebrated! These differences are now cultural and contingent, rather than biological and essential. We say cultural and not political, exactly under the assumption that they are confined to private beliefs and will not create conflicts. Finally, the managerial moment controls what is mainly ‘neutralized’, which is the same as its being naturalized (Hardt and Negri 2000: 198–199). Consequently, the libertarian interpretation of *laïcité* argues that multiculturalism does not create differences, but takes what is given and works with it.

III. Religious symbols in Europe and the *European Convention of Human Rights*

The French case has been indeed the paradigmatic case among countries in the Europe. However, there are many interesting cases and different approaches in other countries such as Britain, Germany, Italy, the Netherlands and particularly Turkey. In most of them the approach is quite different from the French interpretation of the

¹⁸ Note that the ‘deviousness’ mentioned by Marx is not only a moral objection to hypocrisy, something that would confine his criticism within the liberal framework, but a critique of Hegelian dialectics of subreption [*Aufhebung*], liberation through a *medium*, which thinks that it can accommodate real movement and change within itself; see Marx 1975 [1843]: 218.

principle of *laïcité* as ‘combat neutrality’, and some of them adopt an interpretation of neutrality as even-handedness rather than strict separation. In Britain the situation is the opposite than the one in France. British courts have ensured that religion is accommodated in the public sphere, provided there is no threat to security or the proper function of institutions. Muslim headscarves and Sikh turbans have traditionally been allowed in the schoolroom.¹⁹ In Germany, for example, the German Constitutional Court in the *Teacher Headscarf* case upheld a Muslim teacher’s right to wear a headscarf in the classroom.²⁰ Germany conceives state neutrality as ‘open neutrality’ as opposed to French *laïcité* as ‘combat neutrality’. ‘Open neutrality’ means that the state sees its task as assuring that individuals can express and live out their religious convictions not only in private but also in public. Moreover, the state does not identify with any one religion, but all religions in society are treated in an even-handed and impartial way.²¹ Nevertheless, this might even have changed lately since in the spring of 2004 the city of Berlin passed legislation prohibiting all religious symbols. Furthermore, Italy’s strong ties to the Catholic church influence its cultural and legal approach, and although there is official separation of state and church, and symbols are permissible on school property and public offices, recently the highest court upheld the display of crucifixes in schools on the grounds that the crucifix is a symbol of the values at the foundation of Italian society. Finally, there is a typical ‘pillar’ tradition in the Netherlands, which has created self-organization of immigrant groups in closed communities. There are state-subsidized private schools on equal footing with public schools. This ‘pillar’ system, although liberal and tolerant of religious symbols, has caused enormous problems, indeed, a ‘tribalization’ of Dutch society (Maris 2007: 7–10).

The widespread nature of the religious symbols debate and the various political and cultural factors influencing interpretations of neutrality in France and other European countries, give rise to the question of how these national differences will shape the scope of freedom of religion within European human rights law at the regional level. Are contextual solutions important? However, there is already an emerging jurisprudence in a number of cases. In its judgments the ECtHR used both the principles of secularism and neutrality: ‘[...] the Convention institutions have expressed the view that 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’.²² The quotation is taken from a case

¹⁹ Following the 1983 case of *Mandla v. Powell*.

²⁰ *Ludin* Case no. 2BvR 1436/2002 and in the German Constitutional Court BverfG NJW.2003.3111.

²¹ See Joppke, 2007: 326–336; for a good presentation of the different approaches in most of the European countries, but also in Canada and the US, see particularly Barnett 2006.

²² *Refah Partisi (The Welfare Party) and others v. Turkey* (Grand Chamber Judgment), Strasbourg, Feb. 13, 2003.

involving the ban of a political party in Turkey, the *Refah* party. The party was at the time of the ban in government and was the largest one in the country. One of the main arguments was exactly that the party was threatening the principle of secularism enshrined by the Turkish Constitution, because it was allowing women to wear headscarves when entering public institutions. By upholding the ban of the Refah party the Court seemed to interpret the notion of neutrality in the closed, restricted way we analyzed above. Furthermore, in the *Dahlab* case²³ the ECtHR accepted Switzerland's arguments that a teacher's headscarf might both disturb the 'public order' or religious harmony of the school and also influence the pupils in a way that constituted a threat to their – and their parents' – rights according to the ECHR First Additional Protocol, art. 2. This was accepted although there had been no complaints from any child or parents. In this case and in the next one, the lack of emphasis on individual behavior or characteristics making the prohibitions reasonable in practice implies that the Court accepts a general ban on certain expressions of religious self-identification inside public institutions. Once more, the impression that the Strasbourg Court opts for a kind of 'closed neutrality' seems to be clear.

Yet, the most interesting example we have available is the recently adjudicated case of *Leyla Sahin v. Turkey* by the Grand Chamber of the European Court of Human Rights.²⁴ What makes this particular case interesting are the similarities it bears to the French case. In a similar to the French case line of justification the ECtHR held unanimously that there had been no violation of Sahin's freedom of thought, conscience, or religion under the ECHR Article 9 or other article. Article 9 para 1 protects freedom of thought, conscience and religion: '[...] this right includes freedom to change his religion or belief and freedom, either alone, or in community with others and in public or private, to *manifest* [emphasis mine] his religion or belief, in worship, teaching, practice and observance'. Para 2 permits certain restrictions on the basis of public safety, protection of public order, health or morals, or the protection of the rights and freedoms of others.

Quoting explicitly the French National Assembly's law of 2004, which banned 'visible' religious symbols in schools, it stated that the University of Istanbul's regulations, of which Sahin was a student, imposing restrictions on the wearing of headscarves were justified according to the Turkish constitutional principle of secularism, endorsing essentially the normative reasons given by the French state we analysed above. Furthermore, the court also applied the doctrine that the states have a 'margin of appreciation' when called to regulate religious and cultural difference in light of their traditions and best interest. It specifically stated that '[b]y reason

²³ *Dahlab v. Switzerland* (Application no. 42393/98), 15 Feb 2001.

²⁴ *Leyla Sahin v. Turkey* (Grand Chamber Judgment), Application no. 44774/1998, November 2005.

of their direct and continuous contact with the education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course'.²⁵ The questions that are raised here are mainly two: (a) is the ECtHR's treatment of religious symbols according to Article 9 of the ECHR prone to the same criticisms regarding the French interpretation of the principle of state neutrality? (b) is the appeal to the 'margin of appreciation' the right approach adopted by the court? In other words, does it represent the common European values of democracy and human rights and, in the end, what kind of diversity does it preserve?

(a) The *Sahin* case seems that it involves the same notion of neutrality we identified above as 'closed neutrality'. Moreover, what would be interesting here to stress is that, even according to the Court's own jurisprudence, both the French and Turkish laws might be responsible for 'indirect discrimination' against under art. 14 of the ECHR. Direct discrimination according to that occurs when states treat differently persons in analogous situations without providing an objective and reasonable justification. Indirect discrimination though occurs when states fail to treat differently persons whose situations are significantly different.²⁶ The EU Council also operates with such a notion which is defined in a way more suitable to our argument here. Indirect discrimination occurs when an 'apparently neutral provision, criterion or practice' would put persons at a particular disadvantage compared to other persons.²⁷ Drawn on our analysis of the French case, one realizes that the law, although 'neutral' on its face, affects first and foremost manifestations of Islamic identity. This is because the prohibition would not affect more 'discrete' as opposed to 'ostentatious' religious symbols. In the French case religious symbols like necklaces with little crosses on pupils and teachers pass the test. Hence what it is restricted is the rights of persons who by conviction want to wear 'visible' or 'ostentatious' symbols, while those whose religious, or perhaps non-religious, convictions require them to carry only 'discrete' signs or no signs at all are not therefore affected at all.²⁸

(b) In challenging the majority's delegation of decision-making authority to the member states the only dissenting judge in the *Sahin* case called into question the 'margin of appreciation' approach used by the majority. First, the majority claimed that the diversity of practice between member states on the issue of regulating the wearing of religious symbols in educational institutions showed that there was no

²⁵ *Sahin* 2005, para. 121; also Skach, 2006: 188.

²⁶ In this way the Court extended further the notion of 'direct discrimination' in *Thlimmenos v. Greece* 6. 4. 2001.

²⁷ EU Council Directive 2000/78/EC.

²⁸ It is true that within contemporary liberalism there is disagreement on the best way to satisfy the principle of non-discrimination, that is, whether it is best to disregard differences or to take them into account so as to counter the different value that is *socially* attached. We will argue for the latter case.

European consensus and that national authorities are better placed to strike a balance. Nevertheless, first of all, this claim was not really true, because apart from France and Turkey no other contracting state had bans in place on religious symbols at the level of public education. But the appeal to consensus raises further problems: does the Court refer to past or current consensus, and does the Court need to wait until contracting states reach such a consensus over time? This approach is surely relativistic regarding human rights, and seriously undermines the *Schuman Declaration* on common values. Second, the most important objection was that, despite the court's choice to use the margin of appreciation, it was essentially ignoring its obligation to provide the necessary 'European supervision' on such matters. The dissenting judge insisted that the issue was not merely a local one, but one of importance to all member states. European supervision could not, therefore, be escaped simply by invoking the margin of appreciation, as the ECtHR has the task to protect human rights on a *subsidiary* basis.²⁹ What the Court had to do in such a case was to give judgment on the issue of whether collective interests, such as the maintenance of public order, morals – what constitute the 'limitation clauses' in art. 9 para 2 of the ECHR – are violations of freedom of religion and its manifestation. This is indeed an important legal issue, yet it is also an essential aspect of political morality here.³⁰

The force of the 'limitation clauses' like the maintenance and preservation of 'public order' makes sense only within a theory that treats both rights and collective goals as protecting interests. A sufficient quantity then of some particular common interests, 'security' for example, could outweigh interests protected by human rights, as in versions of utilitarianism and other interest-based theories of rights. However, this is not how rights should be viewed. People have rights to specific liberties (religion, expression) and cannot be deprived of them on an inegalitarian basis, such as that their conception of the good life is simply inferior. To be sure, it is absolutely impossible to establish the case that religious symbols *as such* potentially threaten public order, and morals. Oddly, in the *Sahin* case the Court held that secularism must take precedence over freedom of religion. The only way for this particular argument to make sense is that the principle of secularism is perceived as a significant broadening of the 'public order' justification. As such, public order is interpreted as extending to the point where it encompasses deeply held cultural values of secularism in the public sphere, something that undermines any prospect of common values. The focus of rights though should be to guarantee that a political community treats their members *as equals*. It is equality not common cultural identity that unifies. To this fundamental demand of political morality we finally turn now.

²⁹ *Sahin* 2005, dissent, para. 3.

³⁰ For an illuminating take on the different conceptions of the margin of appreciation and more generally on the interpretation of the 'limitation clauses' in the ECHR see especially Letsas 2007: 80–98, 117–119.

IV. Neutrality as equality: the task of instituting a European public sphere

The ECtHR has also expressed its dedication to the principle of neutrality and its relationship to other values: '[t]he Court has frequently emphasized the State's role as the *neutral* and *impartial* organizer [emphasis mine] 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'.³¹ How should we interpret then this principle? Interpreted through the ambiguous conception of French style *laïcité* neutrality is difference-blind and abstentionist regardless of race, colour, and faith. But, according to our argument, it should *not* have the meaning of secularization, that is, a strict separation between state and religion. The consequences of such a misinterpretation were identified above as involving outmoded efforts to integrate difference through creating unity by employing another, non-religious, comprehensive doctrine. Therefore, these efforts violate the very essence of neutrality towards conceptions of the 'good' life. Such a misinterpretation also rests on a false separation of public and private. A neutral state should not privatize religious and cultural identity. What it should protect though is that, whatever process of decision is being made by the individual regarding this identity, must not be a process that is forced or a product of social engineering. Privatization completely neutralizes difference and makes it being exactly non-political by imprisoning it, making people of religious and cultural minorities feeling shame and inferiority not only as individuals but also as members of certain groups that are stigmatized (Galeotti 2002). This approach represents a conception of 'closed neutrality', indeed a kind of 'fundamentalist secularism' that corresponds to an instrumental conception of public sphere.

At its core, freedom of religion encompasses both a negative dimension – no one can be forced, directly or indirectly, to recognize a particular religion or to act contrary to what he or she believes – and a positive dimension – freedom to believe and to manifest one's own religion. Religion is indeed a matter of personal conscience (*forum internum*), yet conscience remains opaque even to ourselves should it not have the absolutely crucial chance to manifest itself in public, that is, to express itself and therefore be *realized* in the world. Without public manifestation private space becomes then only a fortress.³² If freedom of conscience and expression are tightly connected publicity cannot be an external to the individual framework,

³¹ *Refah Partisi v. Turkey*, op. cit., referring to several other judgments where the statement is made.

³² Kant defends such a thesis in his famous essay *An Answer to the Question: What is Enlightenment?* It has been pointed out that Kant does not use the term 'private' as synonymous with individual perspective, or to refer to the merely personal; see Auxter 1981: 306. Auxter uses 'private' to mean that which falls short of the complete development of human capacities.

but becomes *constitutive* of subjectivity having a non instrumental value. Neutrality must be then no longer an alternative system to religion, but rather a regulating principle for the pluralism of both religious and nonreligious (philosophical, ethical) convictions existing in civil society. Freedom of conscience and manifestation becomes then part of individual self-determination and is being translated *both* into a right to difference *and* a right to belong in a certain religious group, community (identity). This interpretation of freedom of conscience and its relation to manifestation is explicitly adopted by art. 9 of the ECHR as mentioned above, which closely links freedom of conscience and manifestation. Clearly this is an approach essentially different from a Lockean in spirit liberalism.

Such a different approach interprets now laicity and neutrality not as strict separation, but as equality, that is equal treatment of both religious and non-religious doctrines. Rights, like freedom of religion and its manifestation are important for our status as free and equal citizens who are responsible for choosing and pursuing our own conception of the good life. In our case, the state must in principle accept publicly visible manifestations of religion, and its ritual expressions in public space. Religion should not be relegated to the private sphere because expression is inherently social due to its crucial characteristic that it *engages* difference by opening it up to communication, be it either rational or of another, symbolic nature. Liberal neutrality through constitutionalism should manage to emancipate not only from religion, but also from any homogenizing force, including the nation-state. An effective process of emancipation cannot be based on a prohibition, but on open expression and manifestation of religious or non-religious beliefs.

However, this particular form of neutrality pertains to the *consequences* of state action, and not only to aim and justification: whatever the state does, the interests of all affected parties ought to be affected in the same way. This form of neutrality corresponds not to formal, but to real equality, which entails positive action on behalf of the state and might include policies of affirmative action (Laborde 2005:328–329).³³ Modern state should not have a negative role (protection and preservation of the *forum internum*) but also a positive role in providing the public space suitable for the subjectivity's responsible expression and development. It is important

³³ Neutrality and equality are intimately connected especially in R. Dworkin's theory of rights. Dworkin argues that a government treats people as equals only if it is neutral towards their conception of the good life. Nevertheless, one has to dig deeper in relation to their interconnection. Accordingly, neutrality of effect is rejected by Rawls because, as he argues, it is virtually impossible for the basic structure not to have influences as to which comprehensive doctrines endure and gain adherents over time (Rawls 1993: 193). I think this approach is misguided as endurance of a religion or culture should not be based on the Darwinian law of the survival of the fittest, but on the free development of human potential, and imprisonment to the private does not constitute such a free development. Unfortunately, further discussion of this version of state neutrality is beyond the scope of this article.

to note here that, according to the conception of neutrality as equality, the school institution should not be an extra-societal refuge, but a mirror of society's pluralism, with the mandate to prepare students for what they will encounter in society.³⁴ In the end, pluralism only makes sense when it is recognized in the public sphere and becomes toothless when confined into the private.

The interpretations of neutrality described above are indeed in opposition to what is nowadays being put forward as multicultural recognition (Taylor 1992, Kymlicka 1995), and the latter has been extremely helpful in making us realize the drawbacks of certain misconceptions of neutrality. Yet, the link of freedom of conscience with its manifestation in public cuts across the private/public distinction and does not make the interpretation of neutrality reductively individualistic.³⁵ Furthermore, the opposition to neutrality as equality is not so clear. Among other things, multicultural recognition works differently for different groups, and multiculturalism is often conceived as differentiated rules for different ethical identities.³⁶ Yet, this is not incompatible with a conception of justice that treats similar cases in a similar way and different cases differently. A theory of rights cannot be blind to differences. Blindness towards differences disappears though as soon as we realize that the bearers of subjective rights constitute themselves *intersubjectively*. This is absolutely crucial as the public manifestation of one's religion should also lead to the public use of one's reason. Such a thing is an exercise of *public*, not just private, *autonomy*. Subjective rights that protect autonomous life cannot in the end be articulated properly if subjects themselves cannot manifest in full range, that is, publicly as embodied persons, their views about the effects of policies on them. Exercising public autonomy helps citizens creating representations of and realize their true and legitimate interests. Private autonomy is guaranteed only by the exercise of our autonomy in the public sphere.

Consequently, the contemporary problem of the treatment of religious symbols in European countries teaches us a bitter lesson about the fragility of our democracies. A politics of the bogus neutrality we described throughout the presentation enforces feelings of powerlessness and exclusion even *within* an inclusionary democratic logic. We have then the 'paradox', akin to the 'paradox' of the French-republican conception of culture, according to which one claims to defend young girls against

³⁴ However, we should draw attention here to the fact that, for example, the removal of the crucifix from classrooms in order not to intimidate non-religious or non-Christian students would be entirely legitimate as a state policy as it involves the school as an institution and not the students themselves. A public institution protects and fosters people's freedom not the other way around. See the *Dahlab v. Switzerland* decision, *op. cit.*, for an example of this point.

³⁵ As communitarians and multiculturalists alike assume it is.

³⁶ The important issue whether this entails recognition of collective rights in addition to individual rights has to be left open here, although to argue for collective rights seems to me highly controversial.

religious fundamentalism, of which sexism is an intrinsic part, by banishing them from school, i.e. making them personally – in their lives, their futures, their flesh – bear the penalty for the injustice of which they are the ‘victims’, and sending them back to the communitarian space dominated by precisely this religious sexism (Balibar 2004: 354). This move opposes a fundamentalist secularism to religious fundamentalism, undermining in the end any prospect for the emergence of a European public sphere. If *domination* comes from *both* ‘public’ and ‘private’, then it is surely natural for them to take the part of their most familiar space. In that sense, religious fundamentalism might indeed be not a pre-modern, but a post-modern state challenge (Bhabha 1990; Hardt and Negri 2000: 147–150).

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Dr. Kostas Koukouzelis received his doctorate from Goldsmiths College, University of London. He is currently a Lecturer at the Philosophy Dept., University of Crete, Greece. He has published on political philosophy, legal philosophy, Kant and cultural theory and some of his articles have appeared in Theory Culture and Society, Philosophy and Social Criticism, and the Journal of Global Ethics.
E-mail: kkoukouzelis@phl.uoc.gr

The Debate over Reproductive Rights in Germany and Slovakia: Religious and Secular Voices, a Blurred Political Spectrum and Many Inconsistencies¹

Magda Petrjánošová, Claire Moulin-Doos and Jana Plichtová

Abstract: *In this paper we analyse the legislation and arguments concerning bioethics and reproductive rights (on the examples of abortion and pre-implantation genetic diagnosis – PGD), as well as the power of different actors' voices in Slovakia and Germany. Our comparative analysis revealed a paradox: In the abortion case study we found a restrictive principle with a pragmatic/liberal application in Germany, and a liberal law with a restrictive application in Slovakia. In the PGD case study we found a liberal approach and dominating critical religious voices in Slovakia; and a restrictive approach and dominating critical secular voices in Germany.*

Keywords: *reproductive rights, abortion, pre-implantation genetic diagnosis, religion, bioethics*

1. Introduction – Different Bioethical “Hot” Topics in Different EU States

In this paper we would like to analyse the debate over and legislative situation surrounding bioethics and reproductive rights issues (on the examples of abortion and pre-implantation genetic diagnosis) as well as the power of different actors' voices in this debate in Slovakia and Germany.

Abortion could be considered a settled political issue in many European countries, with the well-known exceptions of Portugal, Ireland and Poland, which still allow the act only under highly restrictive conditions. The debate seems to lie behind us – having started in the 1970s with clear legislative outcomes today. Nonetheless, a consensus on abortion should not be taken for granted. As we will see, the situation in Germany in the 1990s and in Slovakia nowadays shows that the debate could be reopened at any moment should the balance of power among the leading voices change.

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The European socialist countries have had liberal laws on abortion. After the fall of communist regimes, the transitional period meant also a redefining of these laws and practices, as can be shown in our two case studies of Slovakia and Germany.

Slovakia had a very liberal law on abortion during the socialist era and still does, but its validity has been strongly attacked, especially by a political party promoting the Christian ethos. The importance of conservative forces in the political arena has led to a decline in support for legal abortion during the 1990s and early 2000s, and renders the practical implementation of the law difficult.

Germany experienced a revival of the debate after reunification, when, in fact, an adoption of the overall political and legislative system of the Western part by the Eastern part took place – with the exception of the abortion law. East Germany clearly stated in the Unification Treaty that the West German law on abortion, which was more restrictive, could not be simply adopted as is, and that instead a new law should be debated and a solution found by the end of 1992 at the latest (Czarnowski 1994). Therefore, at the beginning of the 1990s, paragraph 218 of the German penal code (*StGB*) on the termination of pregnancy was reformed. The current formulation in the German law and in judgements by the German Constitutional Court is that abortion is in principle illegal with some exceptions under certain conditions stipulated by the law.

Other bioethics issues play an important role in current debates in Germany, which are far less important in Slovakia, e.g. pre-implantation genetic diagnosis (PGD, for details see part 3) or embryo research. The interests and values voiced in the Slovak and German bioethical debates are of course formulated by many different actors, but interestingly, the opposition against the extended use of newly-available biotechnologies is shaped mostly by secular voices in Germany, while in Slovakia it is mainly the Catholic Church itself and a conservative party promoting the Christian ethos.

2. The Case of Abortion: a Never-Settled Battle?

2.1 Germany: the Paradox of a Restrictive Principle and a Pragmatic Solution

As previously mentioned, the legislation concerning abortion in Germany in force today was adopted in the 1990s following reunification, because East Germany and West Germany had different systems regarding abortion. The Eastern more liberal²,

² In Europe's formerly communist countries (perhaps with the exception of Romania) a higher degree of enforced emancipation of women in terms of their education and employment required some reproductive autonomy and a liberal abortion law.

so-called *term-model*³ (*Fristenregelung*), had to be made compatible with the Western more restrictive *indication model*⁴ (*Indikationsregelung*), dating back to the mid 1970s. Thus, in 1992, paragraph 218 of the German Penal Code (*StGB*) on the termination of pregnancy was highly debated and finally reformed in a way that coupled the term-model with the obligation of prior counselling (*Beratungspflicht*).

The German Constitutional Court (*Verfassungsgericht*) ruled a year later in accordance with its former judgment from 1975 that the Constitution protected the foetus from the moment of conception, but recognized that it is within the discretion of Parliament *not to punish abortion* in the first trimester, provided that the woman had submitted to state-regulated counselling designed to discourage termination and protect unborn life.⁵ The Constitutional Court ruled that human dignity applies to the unborn human life and therefore the Constitution obliges the state to protect the life even of the unborn child. It further asserts: that the unborn child should have legal protection even against its mother; that abortion is wrong in principle during the whole duration of the pregnancy and is, therefore, legally prohibited; that abortion, which is the killing of an unborn child, is not a fundamental right of women; and that the basic legal position of women, however, permits in exceptional situations, that they shall not be condemned and the legislature is to establish such exceptions in detail.⁶ The Parliament passed a new law, the Conflictual Pregnancy Act (*Schwangerschaftskonfliktgesetz*) of 1995, which organized the counselling and established that a woman has to go through counselling and receive authorisation before she can have an abortion. The performance of an abortion remains illegal in principle (Article 218 *StGB*) except under certain conditions (Article 218a *StGB*) when it is performed within the first 12 weeks of pregnancy and the woman receives counselling from her doctor and from an external counselling centre.

The German Catholic Church takes part in this process of counselling and authorisation, which is surprising enough to be mentioned here. Indeed, this cooperative attitude contrasts with the Vatican's position on abortion and also with the position of the Slovak Catholic Church. As a matter of consistency with the Catholic faith, the Vatican did advise the German Catholic Church to refrain from participating in the counselling of women before abortion and in the authorisation; and to apply instead the principle of conscientious objection. The German Catholic bishops decided to ignore the Vatican's admonition and continued with the counselling.

³ The term-model allows an abortion during the first trimester based on the woman's decision.

⁴ The indication model balances the right of the foetus to live with the objective difficulties of the mother, whose difficulties should be explicitly reasoned.

⁵ BverfGE 88, 203.

⁶ <http://www.servat.unibe.ch/law/dfr/bv088203.html>.

Concerning the right to conscientious objection of physicians, since 1974 the law on abortion has recognised that no one is under obligation to take part in an abortion,⁷ but this does not apply if the woman is in a life-threatening situation or would likely suffer serious damage to her health.⁸ In 1991, the German Federal Administrative Court (*Bundesverwaltungsgericht*) recognised that a job advertisement, published by a municipal hospital, requiring only a physician willing to perform abortions was not a violation of the law stating that no one was under the obligation to perform abortions. Here the court clearly balanced the right to conscientious objection with the need to provide abortions in public hospitals.⁹

It should also be mentioned that legal abortion expenses are covered by statutory health care insurance schemes only if the monthly income of the woman seeking abortion does not exceed a certain limit, if she is under 18, or if the pregnancy is the result of a rape,¹⁰ which does not make it a normal reimbursable medical procedure for everyone.

To sum up, in Germany the Constitution protects life since conception according to Article 1 on Human dignity and Article 2§2 on the right to live that is granted to everyone including the unborn child, according to the Constitutional Court. The Constitutional Court also made it clear that abortion is not a fundamental right of women, but their basic legal position permits abortion in exceptional situations without punishment. Therefore, if the legislature is willing to restrict the possibilities for abortion, there is then no constitutionally secured right to prevent such restriction. On the contrary, anti-abortion forces can rely on favourable constitutional jurisprudence. The Constitutional Court and the law take a principled approach (protection of life from conception on), but in practice are allowing a more flexible solution (abortion is an available option in Germany).

Such a divide between a highly-principled position and a pragmatic softening of the ethical principle is also to be found in the law on embryo research. The law clearly forbids German researchers from producing embryos for research, but nonetheless allows the import of embryos from abroad for the same purpose, “exporting” in this way its ethical concerns. On the one hand, Germany offers in its Constitution and legislation the image of a state with an irreproachable moral position, and on the other hand, it is using more liberal laws abroad to overcome the handicaps created by this strict moral stance.

⁷ §12.1 *Schwangerschaftskonfliktgesetz* SchKG (Conflictual Pregnancy Act).

⁸ §12.2 *Schwangerschaftskonfliktgesetz* SchKG (Conflictual Pregnancy Act).

⁹ 12.13.1991, BverwGE 260,70.

¹⁰ *Gesetz zur Hilfe für Frauen bei Schwangerschaftsabbrüchen in besonderen Fällen* SFHG (Abortion Help in Special Cases for Women Act – http://www.ak-lebensrecht.de/info/gesetz_sfhg.html).

2.2 *Slovakia: the Paradox of a Liberal Law and its Restrictive Application*

Slovakia has a rather liberal law on abortions which allows them before the 12th week of pregnancy and medically indicated¹¹ abortions for even longer (Act No. 73/1986 Coll.). In practice though, obtaining an abortion is rendered difficult, first, because it is not covered by health care insurance and for poorer women can be too expensive, and second, because in some parts of the country it is difficult to find a hospital that actually performs abortions. The reason for this is the (often collectively used) physicians' right to conscientious objection (for further details, see Pietruchová, 2005 and Kliment, 2000/2001). The state has not balanced this right with procedures securing the right of women to get a legal abortion in any conveniently located state hospital. Adding to this difficult implementation, repetitive attacks by conservative forces against the law on abortion are rendering the climate around abortions more uncertain.

The political controversy about abortions started as early as 2001, when a group of conservative members of Parliament from the Christian Democratic Movement (KDH) filed a petition with the Constitutional Court asking it to declare the Abortion Law unconstitutional. According to their view, it is unconstitutional because legalized abortion violates Article 15, Section 1 of the Constitution stating "Everyone has the right to life. Human life is worthy of protection prior to birth".

In such an uncertain context, the political forces defending abortion decided to try to secure abortion more solidly in the legislation. Until then, a simple ordinance by the Ministry of Health allowed medically indicated abortions (especially in the case of genetic damage in the foetus) until the 24th week of pregnancy. In 2003, an amendment was proposed to include the 24th week limit concerning the genetic damage directly into the law. Because of the general situation where Christian politicians and members of Parliament were repeatedly expressing their wish to achieve an abortion ban, the amendment functioned as an endorsement of the idea of legal abortions. The law was passed in the Parliament in the third reading, but then the President returned it to Parliament for further deliberation, where this time it required two-thirds of the votes to pass. Until the end of the electoral period

¹¹ Some authors distinguish **elective abortions** (a decision without medical indications) and **therapeutic abortions** (when the pregnancy is endangering the life or health of the prospective mother, or when the foetus is damaged and would be born ill or malformed). Other authors (e.g. Rogers, Ballantyne, Draper, 2007) understand the term '**therapeutic abortion**' more narrowly, asserting that it is meant only in the case when the woman is in danger. They distinguish it from a **selective abortion**, which is a decision, either without any medical reasons or because of medical knowledge about the foetus' illness or malformation. To overcome this conceptual chaos we are using in this text the terms '**medically indicated abortion**' (the woman is in danger or the foetus is ill) and '**elective abortion**' (a free decision based on various possible reasons).

the returned law was (deliberately) not submitted for a new vote and, according to Act No. 350/1996 Coll. on the Parliament, it wasn't possible to submit the law again during the new electoral period.

In December 2007, a judgment on the constitutionality of the abortion law was finally delivered (PL. ÚS 12/01). The Constitutional Court did not find the act in question to be unconstitutional. In justification of its decision it rejected the interpretation of the Article 15 that the right to life should be applied also to embryos, because the phrase *prior to birth* should not be understood as *the moment of conception*. Secondly, the expression *human life is worthy of protection* should not mean that human embryos are entitled to human rights. Such an interpretation would be inconsistent with women's fundamental human rights, dignity and well-being as declared in the Slovak Constitution as well as in the international declarations and conventions ratified by the Slovak Republic (e.g. Universal Declaration of Human Rights, European Convention on Human Rights, Convention on the Rights of the Child, etc.), and also with the jurisprudence of the European human rights system. The Universal Declaration of Human Rights explicitly proclaims that all human beings are *born* free and equal in dignity and rights. It means that human rights are entitled only to human beings already born, more specifically to those endowed with reason and conscience. Furthermore, the Court explained that the claim of being *worthy of protection* is sufficiently reflected in the protection of the life of the foetus in the first 12 weeks through the care for pregnant women based in other laws, e.g. the Labour Act, etc.

The Constitutional Court also decided that the mentioned ordinance of the Ministry of Health is formally not in accordance with the legislative system of the Slovak Republic, considering that all important societal issues must be addressed by laws and not by other kinds of regulations. With this decision, the Court is not questioning the justification of abortions for genetic reasons, as this is also a subject of a European majority consensus.

3. New Biotechnologies: a Renewed Debate on Reproductive Rights? Example of Pre-Implantation Genetic Diagnosis (PGD)

In current debates in Germany bioethics plays an important role. This is not really true for Slovakia where the discourse is reduced primarily to a political battle between a political party striving to impose the Catholic ethos on the whole population (through changes in legislation), and those who are oriented rather toward a liberal ethos of reproductive freedom. Voices from the nongovernmental sector are polarized between the pro-choice and the pro-life alternative as well.

Concerning our example of pre-implantation genetic diagnosis (PGD), it is an analysis of genetic characteristics of the embryos, performed after in-vitro

fertilization and before the transfer of the embryo(s) to the uterus of the woman. The decision of whether or not to implant the specific embryos is then made based on the result. In a restrictive approach to PGD, such as debated in Germany and (moderately) in Slovakia, only in the case of severe genetic diseases should the implantation not take place. A broader approach to PGD would be a more liberal acceptance of the conditions under which an embryo is rejected.

In general, it is important to note that in Germany, PGD is not legal and in Slovakia, it is not regulated, in other words it is not prohibited and therefore PGD is practiced. Nonetheless, in Slovakia it is not part of the *Catalogue of health care services* (which is a supplement to the law on health care) and for that reason is performed only in private clinics for a fee paid by the patient. A recent Slovak attempt at legally regulating the practice of PGD failed because of powerful Catholic lobbying. This resulted in a situation which is paradoxical from an anti-PGD point of view where there is no control at all rather than a lot of control over a legalized but regulated practice.

3.1 Slovakia: the Powerful Catholic Church Dominates the Debate

In Slovakia, the legal status of PGD is not clear. Although couples have had recourse to PGD for a couple of years,¹² it is not included in the *Catalogue of health care services* and therefore reimbursement of such procedures is impossible (see government decrees No. 776/2004 Coll. and 223/2005 Coll.). Thus, PGD is performed for a fee.¹³ It is an example of a non-decision by which the government breaches one of its basic requirements – to treat all patients equally.

Also in 2005, an amendment of the Penal Code (300/2005) came into force introducing sanctions for unauthorized experimentation done without a justifiable health reason and without the consent of the concerned person. Moreover, testing of any therapeutic method without health reason is prohibited with regard to a) pregnant women, b) minors and people with limited legal capacity c) human foetuses and embryos, d) persons serving a prison sentence and e) soldiers on regular duty and persons on civil duty and foreigners. According to these specifications, a pregnant woman cannot approve of genetic testing of the embryo, because the life of an embryo is taken as an autonomous legal entity and as such protected by the authority of the state. This idea is explicitly expressed in c).

The unclear status of PGD was to be addressed in the Act Regulating the Use of Biology and Medicine in Healthcare, but in 2006 it was withdrawn from

¹² There are several institutions that assist reproduction; however, only one, the private clinic IS-CARE, established in 2000 in Bratislava, offers PGD of embryos.

¹³ Similarly, male infertility and the genetic examination of sperm are not covered. In reality, PGD is therefore accessible only to a minority of wealthy couples.

the government committee hearing because of objections by the (above-mentioned) Christian Democratic Movement (KDH).

According to KDH, withdrawing the act was the only way to safeguard religious values. In notable accordance with the *Evangelium vitae* and *Humanae vitae* by Pope John Paul II., KDH attacks every initiative concerning birth control and the reproductive rights of women. Like the Vatican and like the German Catholic Church (see below), KDH asserts that an embryo is a human being from the moment of conception and must, therefore, be respected and protected as all other human beings. It follows that, because of the surplus embryos that are frozen or discarded, in-vitro fertilization is unethical. Similarly, PGD is morally unacceptable, and considered a form of eugenics.¹⁴

However, evincing a different approach to the matter, the relevant definition in the act that was withdrawn in 2006 characterizes genetic examination of embryos before implantation as a diagnostic method. PGD is justified as enabling couples at high risk of conceiving a seriously ill foetus (potentially requiring termination following prenatal diagnosis) to avoid doing so. As such, it is a method of prenatal diagnosis. The withdrawn act would have regulated medical practice concerning embryos conceived in vitro and in vivo in the same way¹⁵ and defined the permissible limits of PGD. According to the proposal, PGD could not be used in a way which would endanger the health of the embryo or foetus, nor could it be used to determine the sex, except in the case of serious, sex-linked diseases.¹⁶ In summary, the withdrawn act precisely defined when PGD may and may not be used, and gave infertile couples or couples genetically predisposed to having seriously ill children recourse to the technique. The only danger created by the legislative loophole that characterises PGD in Slovakia is that private clinics, in their drive for profit, would recommend PGD when it is not necessary.

It should also be noted that the EU Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (the “Oviedo Protocol”), which was ratified by the Slovak Republic in 1999, does not prohibit any methods of detecting a recessive disease gene or predisposition to an illness. It does not even prohibit screening for genetic diseases. The only limit is that such screenings can only be done for health or related

¹⁴ This argumentation is in a total contrast with the German movement for banning PGD which focused on bioethical issues and the concerns that the profit motive of international companies would drive out consideration of risks, or the danger of misuse.

¹⁵ Further, the authors of the withdrawn act drew a distinction between an “embryo” and a “human foetus”. They defined an embryo as a fertilized egg (zygote), whether in vivo or in vitro. Only when the embryo is in an advanced stage of development (during which the organs necessary for its survival and autonomy after the birth develop) do they consider it a human foetus. This period begins at three months and ends with birth.

¹⁶ “Serious disease” is defined as one which causes invalidity or premature death or is incurable.

research reasons. The medical practice in Slovakia follows the Convention. PGD is used only in the case of clinical need and with the informed consent of the woman and her partner. It is recommended to women over the age of 35 with a history of miscarriages or unsuccessful IVF cycles, and to couples at high risk of transmitting chromosome translocation or a genetic disease linked to the X or Y chromosome.

But the very legitimacy of PGD in the Slovak Republic could be threatened by a specific interpretation of the Article 15 of the Slovak Constitution. As mentioned above, Article 15, Section 1 says “Human life is worthy of protection prior to birth”. If the courts were to adopt the interpretation that human life begins from the moment of conception, as does the German Constitution Court (see above) it could classify PGD as an offence, because of the destruction of presumably defective embryos. A court’s decision could determine whether under Slovak law the embryo is entitled to the same rights as a human being. There is a recent jurisprudence on Article 15, declaring that the embryo does not have human rights (see above), but the judgment was handed down in the context of abortion (and not of PGD), so there is still an element of doubt concerning what the Constitutional Court’s position would be on PGD.

3.2 *Germany: Secular Voices Dominate the Debate*

Germany has one of the most restrictive laws in the world on the protection of the embryo. According to the Federal Embryo Protection Act (*Embryonenschutzgesetz*) of 13 December 1990, which came into force in 1991, life created by artificial fertilization must not be destroyed. Although the Federal Act does not explicitly condemn pre-implantation diagnosis,¹⁷ its interdiction results from Article 2§1, which condemns anyone who uses a human embryo for a purpose other than that of assuring its survival.

The official ban is justified mainly on the grounds of the undesirable social consequences that legalising PGD may have rather than on the sanctity of life or other religiously inspired values. This very restricted overall approach to embryo testing in Germany reflects the great scepticism of the German public towards development of biomedical science (Rendtorff 2002) and the perceived likelihood that it could serve to promote eugenic purposes.

Contrary to this interdiction of pre-implantation diagnosis, prenatal diagnosis is legal and widely practiced in Germany. The prohibition of PGD is therefore inconsistent with the rules for medically indicated abortion (Ludwig – Diedrich – Schwinger 2001). There is no specific legal instrument covering the issue but it is a form of medical activity included in the list of interventions covered by statutory

¹⁷ The term *pre-implantation genetic diagnosis* is not referred to in the law.

health care insurance since 1976. The “Maternity Guidelines” of the Federal Committee of Physicians and Health Care Insurance Funds, without being legally binding, still establish the conditions for prenatal diagnosis to be performed¹⁸ – the foetus can be aborted up to the 22nd week of pregnancy if there are relevant medical reasons. An obvious inconsistency exists: on the one hand, PGD (*in vitro*) is prohibited, while on the other hand, prenatal testing (*in vivo*) and pregnancy termination for serious (mainly) genetic disorders are permitted.

In contrast to Slovakia, where the issue of PGD is not widely discussed (there are only requirements voiced by infertile couples to make it more accessible and reimbursed), in Germany PGD is debated by many. The use of PGD is attacked mainly by secular groups (some feminist and environmental groups, groups representing handicapped people, etc.) and supported mainly by professional groups of medical experts. Civic associations protesting against PGD more generally accuse human genetics of developing into new eugenics. Some of these associations are very ideological and radical, while others are more moderate. The latter ones believe that the research will develop not only new diagnostic methods but also therapeutic solutions aimed at healing. Concerns have also been raised about possible discrimination against disabled persons, who may be seen as a “preventable burden” on the social community if PGD becomes an established procedure. PGD, it is widely argued, may become a method for the selection of the fittest. Moreover some argue that a strict policy against PGD is necessary to avoid genetic consumerism, in which parents can select the desired genetic features of their children.¹⁹

Nonetheless, religious voices are also heard on the issue with a rather foreseeable approach. The German Catholic Church is in line with the Roman Catholic Church doctrine, which asserts that eliminating an embryo is murder and therefore condemns PGD irremediably with no possibility of compromise. In 2003, the Evangelical German Church (EKD) has also declared itself to be against the right to PGD. It argues first, that PGD is incompatible with the dignity of human life as it is based on consumption and destruction of human embryos used as materials for other purposes than its own survival; and second, that the practice of PGD

¹⁸ In the German original *Richtlinien des Bundesausschusses der Ärzte und Krankenkassen über die ärztliche Betreuung während der Schwangerschaft und nach der Entbindung* (»Mutterschaftsrichtlinien«), version of 10 December 1985, most recently amended on 13 September 2007.

¹⁹ Even if legally recognized and widely practiced, prenatal diagnosis is nonetheless still highly criticized by the groups opposing PGD. A network against Selection Through Prenatal Diagnosis, which objects to routine prenatal diagnosis, has attracted hundreds of members including midwives, doctors, representatives of churches, patients and women’s associations. Several alternative genetic advisory services exist in Germany to assist patients in employing other remedies/solutions. Antenatal clinics of churches and women’s associations are strong proponents of a legal claim to alternative consultations for the pregnant woman in addition to human genetics. They aim to safeguard the interests of pregnant women and to assist/help them in making independent decisions.

according to the evaluation of other countries' experiences has shown that the intention to strictly limit its application has not been respected. It also argues that PGD threatens to help assisted reproduction methods develop into a general "quality control" of human embryos. The Evangelical German Church, contrary to the Catholic Church, is therefore not only defending its position from a dogmatic perspective but is also taking into account the actual practice of PGD in countries where it is already performed to formulate its position.

These views are elaborated also in the intellectual debate. Jürgen Habermas, to cite but one prominent German intellectual with large audience in Germany, is a strong opponent of PGD in that he regards it as the harbinger of renewed eugenics. In his book on the future of human nature, Habermas (2002) expresses his fears on a new "liberal eugenics", which would (through DNA manipulation) deprive people of the characteristics of free and equal humans, because they would be born already partly determined by others in their deep self (their DNA profile). In fact, he is using the slippery slope argument (for more details see below), as his fear is that the technological evolution will soon allow future parents and doctors to change some DNA characteristics in the course of PGD. Thus, he is ahead in the debate already envisaging a next possible technological step and his critique is not so much relevant in the current stage of the debate where the question is of implanting the embryo or not, and not of improving it or not.

Conversely, the strongest advocates of PGD are professional groups, such as the Federal Medical Council (*Bundesärztekammer*), which have greater influence on the government initiative than patient groups. They would like PGD to be allowed in some exceptional cases, when justified by some medical conditions, such as monogenetic diseases or parental chromosome defects. They feel PGD should be allowed only for a specific group of patients, in cases where parents have serious and medically grounded concerns about the health of the embryo. This, as PGD advocates argue, would prevent numerous cases of abortion in later stages of pregnancy. Draft guidelines on PGD by the Federal Medical Council considers the method as admissible, if certain clearly-defined indications are present and a rigorous testing procedure has been established. Another line of argument goes with the fact that during every *in vitro* fertilisation, the embryo transfer is conditional upon a variety of factors. For example, an embryo with defects that can be visually detected will not be transferred. The logic should be that if an embryo with visually-detectable defects can be discarded so should an embryo with detected "internal" defects. In any case, only a highly restrictive implementation of PGD is thought possible in the pro-PGD German debate.

The experts are really careful in stating their position. In 2002, in the "Law and Ethics in Modern Medicine Commission" of the German Parliament on

pre-implantation genetic diagnosis, after intensive deliberation a majority of 16 commission members voted in favour of a ban on PGD.²⁰ However, in 2003, in the National Ethical Council “Genetic diagnosis before and during pregnancy”, a majority of 15 members voted in favour of a “limited authorisation of PGD”.²¹

Concerning the position of political parties, the conservative political parties – the Christian Democratic Party (CDU) and the Bavarian Conservative Party (CSU) – are against PGD, while the Green Party (Die Grünen) is mostly against, the liberal FDP is for and the Social Democrats Party (SPD) is mostly for. Concerning the publicly expressed attitudes of political leaders there are diverse positions: Helmut Kohl, the German chancellor at the time of the reopened abortion debate in 1992, was against a softened version of the law on abortion and was part of the coalition who filed a suit with the Constitutional Court; the former president (the president’s position in Germany is rather moral and symbolic) Johannes Rau took a clear position against PGD and any research on embryos; and the actual president, Horst Köhler, who is himself father of a handicapped child and therefore personally concerned with this issue, has no definitive answer and when in doubt holds the protection of life as a guiding principle (*PID, PND, Forschung an Embryonen* 2004).

Finally, when it comes to the public itself, in a study on the attitudes of the Germans towards PGD, the researchers found that a majority of respondents would agree to a restricted legalization of PGD in Germany and, interestingly enough, that religion did not have the influence on the debate that was expected (Finck et al. 2006).

4. Discussion

So far, we have dealt with practices concerning PGD, the legislative limits for it, as well as arguments currently used in the deliberative debate in Slovakia and Germany. Let us now analyse the themes used in the debate in a more general context.

In analysing the debate concerning an abortion when the woman’s life or health is not in danger,²² Bredenoord et al. (2008) distinguished three different possible standpoints. The first one is represented by the understanding of the embryo as a person from the moment of conception, with full human rights and deserving full protection (with the variant that the embryo cannot be considered a person, but still deserves full protection because it has an inherent potential to become a person). Selective abortion is then unacceptable. This is the position of the Vatican.

²⁰ The report recommends the amendment of the German Embryo Protection Act to include PGD explicitly in the existing ban on *in vitro* fertilisation for diagnostic purposes.

²¹ See Genetic diagnosis before and during pregnancy, 2003.

²² Bredenoord (2008) uses the term selective abortion, meaning any abortion in a case when the pregnancy is not engendering the life or health of the pregnant woman (it includes economic reasons but also the case when the foetus is diagnosed with a severe handicap). For conceptual explanations, see also the footnote no. 16.

The second (gradualist) standpoint claims some independent moral status of the foetus, increasing throughout pregnancy. An abortion thus becomes more problematic as the pregnancy progresses and is considered justified only when other interests such as the health of the mother and the prevention of severe harm to the future child override the moral value of the foetus. At the same time, the value assigned to reproductive autonomy is considered important. Finally, the third standpoint claims no independent moral status for the foetus and the people adhering to it have no moral problems with selective abortion if that is the parents' decision (*ibid*).

An analogy can be drawn when thinking about the (in its consequences) similar case of pre-implantation genetic diagnosis (PGD). Either (1) nothing else can be done with all the *in vitro* created embryos than to put them into a woman's womb to make it possible for them to fulfil their inherent potential to become a human being. Then no PGD is meaningful, because no selection is allowed and the primary purpose of testing for disability is to enable parents to terminate the potentially disabled foetus (see also Stainton 2003). This is, again, the position of Vatican and of the German lawmakers.²³ Or (2) PGD is considered to be ethically acceptable, but only when carried out for good reasons, such as preventing the birth of a child with serious genetic disease. The last standpoint (3) reformulates the question of whether to allow selection following PGD and says that when the parents are (will be in the future) able to select from a range of possible children they could have, they (will) have a moral duty to select the best possible child to enable for him/her the best possible starting conditions for his/her life (Savulescu 2001). This is exactly the possible future that Jürgen Habermas (see above) and other PGD critics using the slippery slope argument are afraid of.

Not surprisingly (because it seems to be the golden mean), the public seems to support the second viewpoint. For example, an opinion poll in the U.S.A. from December 2004 (Genetics and Public Policy Center. Reproductive genetic testing: what America thinks, available at <http://www.DNApolicy.org>) shows that most U.S. citizens approve of using PGD to select embryos free from a fatal childhood disease (68 %) or to select with the aim of finding a good tissue match for an ill sibling (66 %). The possible concerns for the embryos are for them outweighed by the aim of avoiding the suffering of a prospective child or aiding another. But a majority (72 %) disapproves of the still hypothetical use of PGD to select embryos based on

²³ The Vatican often uses the argument that a man cannot take life, because it was God who gave it. But this is also the position of some humanitarian thinkers using more elaborated arguments, following the line that everybody has a right to live, even a handicapped child and moreover we cannot judge from outside how terrible or not his/her life is from the viewpoint of the handicapped. To oppose would require accepting the general argument that there can be instances in which an impaired life is worse than no life at all (Hudson 2006), which is in general accepted, if at all, only for a very painful life full of suffering.

genetic characteristics unrelated to health (ibid), which would fall under standpoint no. 3 in our theoretical division.

The problem is, that the distinction between a serious health problem, a mild or treatable disease, and purely a trait is often not clear (Hudson 2006). In discussing which reasons are good enough to select and discard embryos, some evoke the so-called slippery slope argument, implying that once we have allowed some PGD treatments, it is more difficult to ban others in the future. Until now, PGD seems to be used only for serious diseases and especially for severe single gene disorders, because the knowledge of human genetics is still far from perfect. However, in the near future, it may be more frequently used also to select against mild diseases (de Melo-Martin, 2004) with arguments in favour of extending PGD indications being, among others, reproductive autonomy and prevention of harm (Bredenoord et al. 2008).

The discussion on the second position on PGD introduced above, when it is ethically acceptable, but only when done for good reasons, can be further elaborated according to three different evaluation standards based on the quality of life, or the expected health status, of the resulting child. The first is the ‘maximum welfare principle’, which says that one should not knowingly and intentionally bring a child into the world under sub-ideal circumstances. The problem is, once again, that our ability to avoid serious genetic defects thanks to screening (possible today) can in the near future become an ability to influence other traits such as the physical fitness or colour of skin and eyes. But our opinion is, and this is a strong argument against the fears that accompany the slippery slope argument, that we cannot ban a more or less sure possibility of help for genetically impaired parents to be, based on a possible thread of misuse in the unsure future. The second principle, which is in opposition to the first, is the ‘minimum threshold principle’, or, more particularly, the ‘wrongful life’ or ‘worse than death’ criterion. It holds that the only reason not to bring a child into the world is when the child would have been better off not living at all (see also the footnote no. 22). This principle entails a minimal conception of the responsibility of the health care professional and leaves almost absolute space for reproductive autonomy. The third, intermediate principle is the ‘reasonable welfare principle’ and holds that assistance of the health care professional is justified when there is a reasonable chance of having a reasonably happy child (or acceptable life standard – ibid).

5. Conclusion – Inconsistencies in Reproductive Rights and the Diversely Important Voices of Different Actors

Concerning the protection of human life in the cases of abortion and PGD, Germany is acting inconsistently when it treats the two rather similar issues differently. There are basically two consistent options: 1) protect human life from its

very conception and forbid any use of biomedical knowledge (both for the embryos *in vivo* and *in vitro*); or 2) allow testing of embryos (both *in vivo* and *in vitro*) for genetic and other medical reasons (until the end of the first trimester) and use biomedicine as an advantageous tool for those who are asking for it (e.g. parents with hereditary problems).

In Slovakia the consistency of state interventions could not be tested because PGD is not legally recognized. However, evolving rules guiding medical practices with respect to PGD are consistent with those of prenatal diagnostic methods. The same is true about rules agreed on by the Oviedo protocol that was signed and ratified by Slovakia (but not by Germany).

As concerns accountability, the Slovak government displays a serious deficit in its responsibility towards the general public by failing to explain transparently and honestly its interventions and its inactivity (here we mean the use of the power not to decide/legislate – withdrawal of the above mentioned amendment of the Abortion Law as well as of the new act on PGD was not explained at all). Deliberation occurs frequently only within a closed circle of politicians and professionals behind closed doors, the process is not made transparent for the public and the voices of affected patients/clients and the general public are not heeded.

The Slovak government also failed to take appropriate measures to counterbalance the consequences of collective application of conscientious objection²⁴ to performing abortions (for more details, see Plichtová – Petráňošová 2008). As a consequence, although they are in principle illegal in Germany, abortions are more accessible in that country than legal abortions are in Slovakia. This is especially true when taking into account the cumulative factors of poverty and living in an underdeveloped region, which make abortions barely accessible for certain groups of women.

Finally one can wonder about the proper place of religious voices in the debate. Habermas (2002) defends the idea of post-secular societies where religions are accepted as persistent communities in secular societies and religious voices are legitimate actors in the societal debate and in the decision making process. Contrastingly, secular society would be where religious positions are simply left aside and substituted by reasonable way of thinking which is considered superior.

²⁴ The neutral state must ensure: first, that an effective remedy should be open to challenge any refusal to provide health services (e. g. abortion); second, that an obligation be imposed on the health care practitioner exercising his or her right to religious conscientious objection to refer the woman seeking abortion to another qualified health care practitioner who will agree to perform the abortion; third, that another qualified health care practitioner will indeed be available, including in rural areas or in areas geographically remote from the centre. The exercise of the religious right must not lead to others either being deprived of access to certain services in principle available to all in the concerned state, or being treated in a discriminatory fashion. This is a principle applied in Germany but not in Slovakia.

In Slovakia the debate on bioethics as such is not a proper dialogue, but rather a political battle between one political party (with the support of the Catholic Church) striving to impose the conservative Catholic ethos on all, and those oriented rather toward a liberal opinions on reproductive freedom. Furthermore, the role of these religious actors is nor transparent nor clear, because deliberation is mixed with politics and a lot of decisions are made in a closed circle behind closed doors.

In Germany, the Christian churches are given a strong voice in consultative and deciding instances, and therefore exert influence at crucial points both at the federal level and at the level of the German States (*Länder*). Moreover, numerous members of the political elite openly present themselves (and build their reputation as) members of one of the Christian churches. On the institutional dimension the churches are given preferential treatment as their position is fixed in a constitutional law concerning religion (Art. 140 of the Constitution, and also already in the Weimar Constitution, Art. 137, sec 5, P. 2).

In theory a neutral state should organise the dialogue among different actors. But in practice, in Germany history secured a privileged position to churches and Christian values, as values promoted by the state are not self-generated but dependent on external sources, such as religion (Joppke 2007). Nonetheless, this prominent position of the Christian churches (Evangelical German Church and Catholic Church) means no hegemony over the debate and taken decisions. The Habermasian post-secular equilibrium of secular and non secular voices is in this respect not so much different from the German institutionalised corporatism inherited from history, where different societal voices are given a say.

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Magda Petrjánošová, *Department of Psychology, Faculty of Philosophy, Comenius University Bratislava and Centre of Excellence for Research on Citizenship and Participation, Slovak Academy of Sciences*

Magda Petrjánošová is doctoral candidate in social psychology at Comenius University in Bratislava, Slovakia. Her research interests include social and national identities in different contexts, deliberation about ethically problematic issues and qualitative approaches in general.

E-mail: petrjanosova@fphil.uniba.sk

Claire Moulin-Doos, *Zentrum für Europäische Rechtspolitik an der Universität Bremen.*

Claire Moulin-Doos is doctoral candidate in political science at the University of Bremen. The subject of her thesis is “Civic Disobedience”. She studied Political Science in France (Institut d’Etudes Politiques, Lyon II) and European Law (Master, Centre Européen Universitaire, Nancy II).

E-mail: moulindoos@zerp.uni-bremen.de

Jana Plichtová, *Department of Psychology, Faculty of Philosophy, Comenius University Bratislava; Department of Social and Biological Communication, Slovak Academy of Sciences and Centre of Excellence for Research on Citizenship and Participation, Slovak Academy of Sciences.*

*Jana Plichtová is professor of Social Psychology at the Comenius University. Her theoretical interests include topics like social psychology of democracy, deliberation in small groups, social representations of political and economic phenomena. She is co-author of several papers on social representations of democracy published in *Culture and Psychology*, *European Journal of Social Psychology*, *Bulletin de Psychologie*, *Journal of Community and Applied Social Psychology*. She is editor of several books (e.g. *Minorities in Politics*) and co-author of two books published by Slovak publishers.*

E-mail: plichtova@fphil.uniba.sk

The State, Religious Pluralism and its Legal Instruments in Italy and Slovakia¹

Jana Plichtová, Dino Costantini, Magda Petrájanošová

Abstract: *In this paper we analyse how Italy and Slovakia have dealt in practice with the idea of religious pluralism and what legal instruments they have used to ensure it. The history of state-church relationships in Slovakia has been full of abrupt changes due to political changes; in Italy the development has been more straightforward, but in both countries the Catholic Church has had a privileged position. We offer a few suggestions for how today's increasing religious plurality might be handled in a more transparent and just way, using a rather different legal and institutional framework and thus promoting real religious pluralism.*

Keywords: *religious pluralism, state-church relationship, Slovakia, Italy*

1. Introduction

Europe is becoming a more and more multicultural society. The peaceful coexistence of the different cultures present on its territory is clearly linked to the capability of European states to provide the conditions for equal economic, social, political and symbolic treatment of all minorities. In this sense, an important corollary of its increasing plurality is the fact that the European society is also becoming more and more multi-religious. Thus, the equal treatment of religious groups appears to be a fundamental social and political challenge of today's Europe. But are the European states ready to take it on? And, in particular, do those states that are traditionally mono-religious and without a long history of immigration have the institutional sensitivity necessary to tackle such issues?

In comparing the Italian and the Slovak cases, we will examine two countries of deeply Catholic tradition, with a short history of immigration² or none at all. Though the principles of religious liberty and plurality are constitutionally recognized in both countries, in both countries Christianity is considered to be one of the pillars of national identity. This fact has direct consequences for the institutional

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² After having been a country of emigration for a century, Italy has only recently started to attract a consistent number of immigrants; Slovakia is still waiting for the phenomenon to begin on a large scale.

frameworks adopted to regulate relations with religious groups. In Italy, the Constitutional Court clearly affirmed the general principle of *laicità* as a fundamental cornerstone of the Italian Republic, defining it not as a strict separation regime, as it is in the well-known case of France, but as an active role of the state in promoting and guaranteeing religious liberty and plurality.³ The Preamble of the Slovak Constitution goes beyond this, defining the Slovak nation as “the spiritual heritage of Cyril and Methodius”, the missionaries who brought Christianity to the territory in the 9th century.⁴ In Italy, the practical aspects of the relationship between the state and the various churches and religious groups are regulated by special bilateral legislations: the *Concordato*, for the very peculiar case of the Roman Catholic Church, and the *Intese*, agreements signed with representatives of other faiths. A similar situation exists in Slovakia, with the Basic Treaty regulating the relationship with the Holy See, and the Agreement between the Slovak Republic and the Registered Churches and Religious Societies dealing with all other beliefs.

We will first compare the contrasting geneses of these legal instruments. Secondly, we will provide a brief presentation of how they practically play out regarding equal treatment of different groups. Finally we will try to answer the question whether the present institutional frameworks are apt to serve the needs of the increasing religious plurality of today’s societies or whether this plurality might be better tackled through different instruments.

2. Historical Note on the Development of State-Church Relations in Italy

From the Separation to the Concordat

One may say that the history of Italy as a modern nation-state begins on September 20, 1870, when Italian troops entered Rome, thus putting an end to the temporal power of the Catholic Church. This violent baptism brought a strict, and in many ways hostile, separation in relations between the new born Italian state and the Church, with the latter representing the great majority of Italy’s nationals

³ See Constitutional Court, Sentence n. 203/1989, posing *laicità* as a “superior principle” of the Italian constitutional system. Other relevant sentences are n. 13/1991, n. 149/1995, n. 334/1996, n. 329/1997, n. 508/2000, n. 327/2002. On the active or *positive* concept of *laicità* in the Italian institutional framework, see S. Lariccia, *La laicità delle istituzioni repubblicane italiane*, in “Democrazia e diritto”, n. 2/2006, pp. 89–110.

⁴ The missionaries were sent to Great Moravia (western part of present-day Slovakia was part of it) by Michal III, emperor of the Byzantine Empire, on the request of the Moravian ruler Mojmir in 863. To facilitate the diffusion of Christianity among Slavs the missionaries created the first Slavic alphabet – the Glagolitic alphabet (later Cyrillic) and translated liturgical texts into the Old Church Slavonic language which was then recognized by Pope Hadrian II (868) as the fourth liturgical language. In 894, when the last king of Great Moravia Svätopluk died, the empire was dissolved and in the liturgy Old Church Slavonic was replaced by Latin.

at the time. The new state was unilaterally regulated through the so called *Legge delle guarentigie* (May 13th 1871). The law gave the Pope a personal legal status similar to that of the Italian King and provided the Church with full diplomatic prerogatives, an annual revenue and a solid independence both in organizational and in spiritual matters. No territorial sovereignty of the Church was recognized, as the immunity of Vatican Palaces was just liberally conceded by the Italian State. The Italian State considered this solution as adequate to guarantee both its own recently acquired territorial and political sovereignty and the spiritual independence of the Church, as the motto “a free Church in a free State” expresses clearly. The intentions of Italian legislators were harshly contrasted by Catholic hierarchies, which refused the legitimacy of the Italian regime, excommunicated its representatives, and prohibited believers from taking active part in the political life of the country until 1913.

A first and still partially effective restructuring of this initial separation occurred during the fascist regime. The school system reform of 1923 (the so called *Genitale Reform*), gave a great place to Catholic faith in primary education, making it compulsory and placing it together as its “fundament” and “crowning piece”. The preference given to Catholic faith was a sign of fascist interest towards its *nationalization*, *c'est-à-dire* towards its mobilization as a means of building consensus for the regime itself. On the side of the Catholic Church, fascism – and not only the Italian variant⁵ – was perceived as a possible important ally in the international struggle against the spread of modernity⁶ and of its most redoubtable by-product, atheistic communism. The result of this convergence of interests were the Lateran Pacts, signed on February 11, 1929. The Pacts profoundly modified the post unitary separation regime, recognizing Roman Catholicism as the only religion of the State, as stated in Article 1. The implications of the new confessional form taken by the State touched a wide range of issues, giving the Catholic Church substantial privileges.⁷ At the same time, the State obtained a strengthened link between the Church

⁵ This is well documented by the Concordats signed with Austria and Germany (1933), Portugal (1940) and Spain (1953). See Cardia 2002. The Slovak case is presented hereafter.

⁶ The most notable anti-modern manifesto produced by the Catholic Church is the *Syllabus complectens praecipuos nostrae aetatis errores*, an annex to the encyclical *Quanta cura* (1864). The idea of an equal respect due to all religions (proposition XV to XIX) was considered an error, as that of the independence of the State from religious power (proposition XXXIX). Catholic Church did not definitively abandon Syllabus' anti-liberal positions until 1965.

⁷ Article 34 of the Concordat gave civil validity to Catholic weddings, granting the Church full judicial powers in eventual controversies; article 36 extended compulsory teaching of Catholic religion to secondary schools; article 3 provided religious personnel privileges in relation to the military service; etc. The confessional turn affected the Penal Code too, and in particular its Articles 402–406 and 724: a religious oath was introduced as well as a crime of blasphemy. The code created a crime of “public defamation of religion” that provided for stronger measures in case the offences were committed against the Catholic religion (see Cardia 1996).

and the national army, gained political control over the nomination of bishops and priests, and forbade direct political engagement by all religious personnel.

The Concordat profoundly undermined the principle of equality of all religions, creating a two level system with Catholicism as the privileged state religion on one side and all other faiths perceived as tolerated presences on the other. The discipline of the “admitted groups” was regulated by Law 1159 of June 29, 1929, a law, as we’ll see hereafter, which still has perverse effects on religious freedom and equality in Italy (Leziroli 2004). In the following years, religious freedom was severely restricted in practice. Before the approval of the well-known racial laws that struck Jewish communities in 1938, the Buffarini-Guidi Circular had already banned the Pentecostal Church for being “contrary to social order” and “harmful for the physical and psychological integrity of the race”.⁸ In 1939, it was the Jehovah’s Witnesses’ turn to be declared illegal and in 1940, the same fate befell the Holy Bible Students’ Association.

The Republican Transition

In 1946, the authors of the Italian Republican Constitution inherited from the fascist regime a country where religious liberty was highly compromised. The effort to rebuild its legal preconditions had to confront the societal and political necessities of national reconstruction that advised against contesting the Lateran Pacts and reopening the Roman Question. This was not only for reasons of practical opportunity. A return to the separation regime would not have been fit for a republic whose strong social profile recognizes and guarantees the “inviolable rights of the person” not only “as an individual” but also “in the social groups where human personality is expressed” (Art. 2). At the same time, the State took on not only a duty to formally respect liberty and equality, but also a duty to concretely “remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person” (Art. 3).

Though the Republican Constitution provides for ample guarantees for the individual (Arts. 2 and 3) as well as for religious (Arts. 8, 19 and 20) liberty and equality, the separation regime was not re-established, both for theoretical and practical reasons. After stating that “the State and the Catholic Church are independent and sovereign, each within its own sphere”, Article 7 provides for their relations to be governed by the Lateran Pacts. The possible contrast between the principle of equal freedom of all religions and the special place that Article 7 left to the Catholic Church in the very heart of the constitution was clearly perceived by the founding

⁸ Ministry of Interior, Circular 600/158 of April 9, 1935. The persecution of Pentecostals survived the death of the fascist state, to end only in 1958.

fathers of the Italian republic. The imagined solution to the problem of equality of treatment was built upon the bilateral character of the Lateran Pacts. The idea, expressed through article 8, was that the Republic had to extend the instrument of the agreements to the relationship between the state and all non-catholic groups: the spreading of bilateral agreements would have thus given to all religions the same dignity and privileges enjoyed by the Catholics.⁹

The particular influence of the Catholic Church on Italian political and social life retarded consistently the process of this progressive extension of constitutional protection to religious groups other than Catholicism. On the contrary, a sort of *neo-confessional*¹⁰ mood suggested during the 1950s a *theistic* (Cardia 1996: p.172) interpretation of the constitution, which, having strong political and societal support, enabled a delay in the application of constitutional principles until the 1980s (Cardia 1980, 2002; Lariccia 1981).

The Reform of the Concordat of 1984: Putting Article 8 into Practice

The necessity of a reform gained momentum in the public sphere during the late 1960s. A first proposal of reform was discussed by the parliament in 1967. In 1968, a study Commission (the Gonnella Commission) was formed that led to no result. In the meantime the contradiction between the progressive secularisation of society and the old-fashioned confessionalism of the Concordat became more and more evident. The Concordat, for example, left only to the Church the power to dissolve marriages according to its complicated casuistry. The Fortuna-Baslini Law¹¹ introduced for the first time a limited possibility of civil divorce. The Catholic Democratic Party organised an abrogative referendum in 1974. The defeat of the anti-divorce party showed clearly that Italian society was moving towards secularization faster than the norm.

In 1976, the Catholic Church and the state agreed to open real negotiations. Six drafts were produced, until an agreement was reached on February, 18, 1984. The revised Concordat abolished Article 1 of the Lateran Tract that established Catholicism as the official state religion. However, the new Concordat substantially confirmed the privileged institutional position of the Catholic Church. For example, while abolishing compulsory religion classes in Italian primary and secondary schools, it extended its facultative teaching to nursery schools. These teachers are chosen and can be fired by the Church – in cases of moral conduct contradicting Catholic principles. For example, they can be fired if they get married in a civil procedure, or if they chose to live together with someone without getting married,

⁹ Cfr. Art. 8, comma 2 and 3.

¹⁰ Cfr. Cassazione, Sentence 2651, of October 23, 1964.

¹¹ Law 898 of December 1, 1970.

or if they give birth to a baby out of wedlock but the cost is covered by the Italian State.¹²

Another example comes from the new financing system introduced by the revised Concordat. The new system, based on a voluntary contribution by taxpayers of 8/1000 of their payable personal income taxes, is apparently respectful of individual religious preferences. The procedure for distribution of the funds however, leaves a substantial privilege to the Catholic Church. Even if only 35 % of the taxpayers indicate the Catholic Church as their chosen recipient, 89 % of the funds collected is given to the *Italian Episcopal Conference*, for a total amount of one billion Euros per year.¹³ In addition, the Catholic Church is publicly funded through many other indirect instruments: funding of confessional schools¹⁴ and universities, regional conventions on religious assistance in hospitals, fiscal exemptions on estate taxes, etc.

Regardless of its limits, the revision of the Concordat was an occasion to start putting constitutional principles into practice. The beginning of the negotiations with the Vatican coincides with the opening of parallel negotiations with other groups for the production of the bilateral agreements (*Intese*) provided for by the constitution, but never realized before. Three days after the reform of the Concordat the first agreement was signed with the Waldenses Community. In subsequent years several other agreements were signed, in particular with the Assemblies of God in Italy, the Union of Seventh-day Adventist Churches, the Union of Jewish Communities in Italy, the Christian Evangelic Baptist Union and the Lutheran Evangelic Church in Italy.

On April 4, 2007 the Italian government modified its agreements with the Waldenses and the Seventh-day Adventists and signed new agreements with the Apostolic Church in Italy, the Church of Jesus Christ of Latter-day Saints, the Holy Archdiocese and Exarchate of Southern Europe, the Buddhist Italian Union, the Hinduist Italian Union and the Jehovah's Witnesses. These agreements still require laws to become effective.¹⁵

¹² In 2001, 25,000 teachers, for a cost of 620,000,000 . The data comes from the UAAR website (<http://www.uaar.it>), which contains useful information on this subject.

¹³ Data UAAR 2003, relative to fiscal year 2002.

¹⁴ Public funding of parochial schools, the great majority being Catholic, has been progressively increased, especially after the approval of Law 62/2000, integrating private schools as part of the national educational system. In 2005, the total public contribution to private schools amounted to 500 million Euros (see Ministry of Education, Circular n. 38 of March 22, 2005). This contradicts Art. 33 of the Italian Constitution that permits the existence of private schools, but "at no cost to the state".

¹⁵ On April 18, 2001 Italy opened a procedure – which still has not been completed – in order to reach an agreement with the Italian Buddhist Institute Soka Gakkai. A complete and more detailed list can be found here: http://www.governo.it/Presidenza/USR/confessiononi/intese_indice.html.

3. Historical Note on the Development of State-Church Relations in Slovakia

Czechoslovak Republic (1918–1938)

After the dissolution of the Austro-Hungarian Empire, as one of the successor states, the Czechoslovak Republic had a chance for new state-church relations.¹⁶ The new republic's draft constitution even included separation of state and church, but finally the parliament supported the principle of sovereignty of the state over churches and religious communities (Constitution Charter, § 123). The state took the role of guaranteeing the equality of religious faiths, but also the right to intervene in the internal affairs of churches (through the formulation of norms for the future management of the internal affairs of churches).

In addition, Czechoslovakia was bound by the Saint-Germain Agreement (1919) to guarantee freedom of religion to all citizens irrespective of their ethnicity, language or church affinity. In education the state was inspired by the French concept of a neutral state (*laïcité*) – education must not contradict the results of scientific research, but there were religion classes at schools (Constitution Charter, § 119). Also, the rights of minority churches were protected by the constitution, in the same way as the rights of ethnic and racial (in the language of the period) minorities.

In political life the principle of neutrality and cooperation between the state and the churches worked quite well, except for a few cases. Firstly, there were the political activities of clerics in Slovakia who actively participated in politics (maybe because of the lack of intelligentsia in general) and used their sermons for political goals (see Bušek 1931). Secondly, there was an attempt (supported by politicians) to found a new religious tradition which would compete with Catholicism. This role was supposed to be played by the Evangelical Church of Czech Brethren (formed in 1918 through the unification of the Protestant churches of the Lutheran and Reformed confessions) and by the Czechoslovak Hussite Church (which separated from the Roman Catholic Church in 1920). The Hussite Church drew on the general popularity of Jan Hus and Hussite reformers in the Czech lands and in 1921 had already over half a million members. Later, it even had more than one million members, but it never really succeeded in threatening the dominant position of the Roman Catholic Church.

Some years later (1927/28), a *Modus Vivendi* agreement was signed between the Holy See and the Czechoslovak Republic. The Holy See was bound to let

¹⁶ The Habsburgs' policy of political and cultural allegiance with the Catholic Church had utilised Catholicism as a source of common identity for the multinational state and as protection against both national movements and liberalism (Evans, 1979).

the Czechoslovak government assess the political acceptability of new church dignitaries before appointing them and interestingly, Czechoslovakia was NOT bound to guarantee religion classes in schools or church property. The agreement mainly helped to reach congruence between the borders of the dioceses and the borders of the new state.

The Slovak State (1939–1945)

A radical shift in the church-state relations came when, after the Munich agreement (1938), the territorial and political integrity of the Czechoslovak state was compromised. That is, the Czech and Moravian lands were occupied and thus part of the German Reich (1939), and, in accordance with Hitler's plans, Slovakia became an independent state. Jozef Tiso, a Catholic priest and chairman of the Hlinka's Slovak People's Party (HSLP), became the new Slovak Prime Minister and later President. The ideology of this party – Christian nationalism – conceived nations as God's creations (Tiso 1930/1997). According to it, since religion is above politics, a just government has to conform to its dictates. The integration of the church and state became the cornerstone of the state ideology and helped to justify its politics (Nedelsky 2001). This special relationship could be seen also on a personal level – not only the President, but also several other important functionaries and more than one fifth of the Slovak Diet (parliament) were priests.

Earlier religious (and political) pluralism was fast replaced by the dominance of the Catholic Church, which played an important role in the struggle against ideological enemies – Communists and Liberals. A strong criticism of the principles of liberal democracy and political pluralism can be found in various speeches by Slovak representatives (Nedelsky 2001, Lipták 1999). Tiso himself saw in political pluralism a danger dividing the nation into fighting fractions (Tiso, 1939/1997). Thus, already at the very beginning of the existence of this state, political pluralism was eliminated. All political parties (except for the Communist party which was abolished) had to join the HSLP party, which was later designated by the constitution as the only true national party. The only exceptions were parties representing the German and Hungarian minorities.

In the preamble to the new constitution (from July 21, 1939) Slovakia openly adhered to the theistic principle – the superiority of God and his will over earthly matters. By replacing the sovereignty of the people by that of God, the Slovak Constitution denied the basic principle of liberal democracy (Jelinek, 1976). The representative leadership was later replaced by an authoritarian elite whose main role was to unify the nation, to protect its unity and to govern with a God-given legitimacy (Kirschbaum 1940/1997). This authoritarian ideology was objectified in Article 58 of the constitution according to which the power of Hlinka's Slovak

People's Party is delegated to its leader without popular consent. In 1942 the Diet (the Assembly) passed a law which established the fascist leader principle according to which the party leader had the supreme right to speak for and make decisions on behalf of the party and, thereby, also on behalf of the whole nation (Lettrich 1955). Freedom of thought was of course severely restricted. It was admitted only when it was in harmony with conscience and Catholic convictions.

Under the influence of National Socialism of Nazi Germany the official doctrine of the state – Christian nationalism – incorporated in its teaching the racist principle. Due to this, Slovak nationalism became ethnically-oriented and exclusive rather than Christian and inclusive. Persecution of Roma and Jewish minorities was very severe, violating all provisions of the Charter of civic and political rights (which was part of the Slovak Constitution). Later the parliament passed one of the cruellest anti-Jewish laws in Europe (Kamenec 1991/2007) legalizing persecution, including deportations of Jews, taking away their Slovak citizenship and confiscating their property (May 15, 1942). Not one of the priests who were members of parliament protested. Throughout the period, the Vatican was very well informed and of course knew that the anti-Semitism of the priest Tiso and of several others bishops and clerics in the Slovak government as well as the parliament compromised the Catholic Church itself. Nevertheless, it did not ask Tiso to renounce his presidency or his priesthood. Nor did Vatican cut its diplomatic relations with the Slovak State or protest against the human rights violations and limitations of religious freedoms for Jews. But it intervened several times to try to help Slovak Jews who converted to Catholicism. The efforts of the Vatican intensified during the Second World War and finally it demanded respect for human rights of all Jews, not only those who had converted (Kamenec et al. 1992). Nevertheless, by the end of the war the Slovak State under the Catholic president had deported 70,000 Jews, of whom 67,000 died in Nazi extermination camps.

Communist Czechoslovakia (1945–1989)

After the Second World War when Czechoslovakia was unified once again, the political situation looked quite different. Collaboration by Hlinka's Slovak People's Party (and the Catholic Church) with Nazi Germany weakened their position and strengthened the leftist parties, including the Communist party, whose many members actively participated in the antifascist movement.

After the communist coup d'état in February 1948, the Communist Party of Czechoslovakia (KSČ) was eager to minimize the influence of the Vatican and the power of the Catholic church itself and tried to change it into a national church subordinated to the state and Marxist ideology. First, the Communist party limited political pluralism and outlawed or neutralized all other political parties. Then, having

all the power in parliament it very quickly pushed through several laws that changed the position of churches.

First the parliament passed Laws 142/1947 Coll. and 46/1948 Coll. introducing a land reform which left the churches without any agricultural grounds, gardens or orchards bigger than 5 acres (2 hectares). The laws stipulated financial compensations, but the churches never got any (Kalný 1995, Kaplan 1995). Then came Law 95/1948 on the secularisation of schools. Under it, religion classes still existed and schools were supposed to organise classes for pupils of different faiths through the parishes, but it was all under the auspices of the regional, so-called people's committees ("*národný výbor*"). This new institutional structure was created by the Communist party in order to control daily life in detail, even at the level of small village communities (Hrdina 2006).

In general, the communist strategic plan for the struggle against churches was based on indirect and gradual steps, because the party understood that it is not sensible to try to eliminate religion openly and directly. The KSC's Central Committee worked out a plan to dissolve the churches from inside, including discrediting them in the eyes of the public, using different interests of the church hierarchy and simple clerics, disrupting relationships among different churches by showing preference for some and handicapping others. For the majority Catholic Church the plan did not foresee a separation of state and church but a separation of the Catholic Church from the Vatican, with the idea of using such a church (independent from Rome) in the interest of the regime (Hrdina 2006).

The Communist government succeeded in confusing all its critics (from Vatican as well as from the group of Slovak bishops) by passing of two laws – the Law no. 218/1949 Coll. on financing of churches and the Law no. 217/1949 Coll. on the establishing of the Governmental Office for Religious Affairs. In the first law the state transformed the status of priests into that of civil servants/employees of the state. The state took responsibility to pay their wages, as well as all administration costs, and costs covering religious services, however, only priests who were approved by the state got paid, and the state approved only priests who were Czechoslovak citizens, loyal to the Communist regime, etc. In this way the priests became directly controlled by the state. The second law established an office that had a total control over both internal and external affairs of churches (for more details see Hrdina 2006).

In 1954, the state even officially stopped taking into account personal affiliations to various religions, as they were understood as a completely private matter. However, the regional and district committees of the party continued to monitor all activities of clerics, and were supposed to stop them from trying to persuade any young people to join any churches (Kaplan 1993).

The constitution of 1960 (Law No. 100/1960 Coll.) proclaimed human rights and freedoms, including the freedom of religion, but it also declared Marxism-Leninism to be the official ideology of the state. In practice, religious freedoms were restricted through various decrees by the government and ministries and through court decisions.

Then, in the 1970s, came another step in the effort to compromise the Catholic Church – the establishment of the *Pacem in terris* movement, a union of Catholic clergymen collaborating with the Communist regime. At first, not many were interested, but through oppression and intimidation, some clergymen became members. The movement helped the regime to enforce its interests within the Catholic Church and also became an unofficial representative of the churches in negotiations with the state.

At the end of the 1980s, the churches finally protested against the regime, but from a comparative perspective, we can say that the Catholic Church in Slovakia recovered very slowly from its disintegration. It began to contest the power of the communist regimes much later than the Polish and Lithuanian churches and did it less vigorously. In the Czech lands, where the civic resistance against the communist regime was traditionally stronger than in Slovakia (Charta 77), the Catholic Church was rather passive. Conversely, it was the Charta 77 movement that demanded religious freedom in addition to human rights. Similarly, the movement for democracy in Slovenia and Croatia was mainly inspired by non-religious leftist intellectuals and nationalists (Plichtová 2008).

After 1989

Immediately after the Velvet Revolution, the political elites discussed the separation of the church from the state once again, but again the political will to do so was lacking for several reasons.¹⁷ However, the bill of human rights guaranteeing the “right to profess any religious faith or to be without religious conviction, and to practice religious acts excluding those that contravene the law” was approved unanimously during the first session of the new government. In 1991, the Law on the freedom of religious belief and on the position of churches and religious communities (no. 308 /1991 Coll., later amended by Law 394/2000 Coll.) and the Constitutional Law 460/1992 Coll. provided a legal anchor of for freedom of belief and made possible full restoration of the autonomy of churches and religious communities (for details, see Moravčíková 2003). However, in 1992 a new law

¹⁷ It seems it has been tempting to conduct politics using the support of the churches, especially the Catholic Church. The churches also profit from this silent agreement. Today, they are still paid from the taxes of all taxpayers, regardless of whether they claim any religious affiliation.

(no. 192/1992 Coll.) came into force, which limited the possibilities for official registration of new churches, when it introduced the requirement of 20,000 adult members and supporters.¹⁸ Even if state control over affairs of churches and religious communities was abolished (Law no. 217/1949 Coll.), Law no. 218/1949 Coll. from the Communist period on financing of churches remained valid in a revised form (No.522/1992). According to it, clerics are still paid (like other civil servants) from the state budget.

In Czechoslovakia as in other post-communist countries, the traditional Christian churches quickly resumed much of their power lost after 1945. They re-established their official ties with states (in the case of the Catholic Church, by international agreements with the Holy See), they re-entered public schools and revitalized their pastoral and charitable activities in hospitals and other social institutions. In Slovakia much of their property was returned to them (according to Law no. 282/1993 Coll. on Restitution of property) and they gained many privileges (for details see Moravčíková 2003, Zrinščak 2004).

After the division of Czechoslovakia into the Czech and Slovak Republics in 1993, the new Slovak Constitution came into force. According to Article 1, the Slovak Republic is not linked to any ideology or religious belief. Religious freedom, however, is protected by the detailed Article 24 (freedom of thought, conscience, religion and faith, the right to freely express one's own faith, self-governance of churches and religious communities) and the equal status of different religious beliefs is guaranteed by Article 12 (basic rights and liberties are guaranteed to everyone regardless of sex, race, colour of skin, language, creed and religion, etc.). Article 23 of the constitution guarantees the right to religious education and responsibility for that is delegated to churches and religious communities.

¹⁸ Of the 14 religious groups registered by then, only five could claim 20,000 or more members. This contributed to the perception of the law as arbitrary and discriminatory, putting newer or smaller religious communities at a disadvantage and perpetuating the existing hierarchy of religious organisations. Currently (in 2008), eighteen religious groups are registered and therefore eligible for preferential treatment – the Apostolic Church, the Baptist Union, the Brethren Church, the Czechoslovak Hussite Church, the Orthodox Church, the Reformed Christian Church, the Old Catholic Church, the Evangelical Church of Augsburg Confession, the United Methodist Church, the Greek (Byzantine) Catholic Church, the Roman Catholic Church, the Central Union of Jewish Religious Communities, the Seventh-Day Adventist Church, the Religious Society of Jehovah's Witnesses, the New Apostolic Church, The Church of Jesus Christ of Latter-day Saints, the Bahai Community, the Christian Corps (but among these religious groups the last five named do not accept any payments from the state for their clerics' wages or for administration, and the Seventh-Day Adventist Church accepts only state money for administrative costs). The 20,000 person requirement is the highest numerical threshold for registration in any of the 55 member states in the Organization for Security and Cooperation in Europe (OSCE). In Slovakia, the registration requirement is especially significant because non-registered religious communities are denied legality (and a lot of advantages) as religious organisations.

4. Problems and Perspectives of Religious Freedom and Equality

In November 2000, Slovakia signed a Basic Treaty between the Slovak Republic and the Holy See (hereafter “the Basic Treaty”) regarding the general relationship between the state and the Catholic Church (the text is in the collection of Slovak laws under Notice of the Ministry of Foreign Affairs No. 326/2001). It should be followed by several smaller treaties about specific areas, e.g. conscientious objection. The treaty details a number of duties incumbent upon the Slovak Republic with respect to the Catholic Church, including a number of financial obligations and rights held by the Catholic Church primarily in the field of education in general and in religious education in particular, in all types of schools, in the establishment and administration of its own schools of different stages and in providing space in the public service media (for more details, see Kliment 2001).

Two years after the treaty (also known as a Concordat) was signed, the President of the Slovak Republic signed an agreement with eleven churches and religious communities registered in the Slovak Republic (Law no. 250/2002 Coll.). However, the Basic Treaty with the Holy See is treated, according to a government resolution (Resolution of the Slovak Government No. 1130 of November 28, 2001), as an international agreement on human rights and therefore has precedence over Slovak laws, while the Agreement between the Slovak Republic and the Registered Churches and Religious Societies ratified in 2002 is only a domestic agreement within a traditional contractual framework. Freedom of conscience of those not registered is protected by other legal norms adopted later in Parliamentary Act 365/2004 on equal treatment in specific areas, on protection against discrimination and on changes and amendments to several Acts of Law (the Non-Discrimination Act) and the new amendment to the Labour Code. Since freedom of religion in general was sufficiently protected by the constitution and international documents, it seems perfectly legitimate to question the political sense of signing the Basic Treaty.

Public discussion and protests were launched only after the ratification of the treaty (probably due to the long-standing and unpublicised treaty preparation and very fast ratification by the parliament) when the public learned how the treaty would change the character of relations between the state and the church in Slovakia (Zavacká 2000, 2003).

The situation was completely different when in 2003 the Slovak Republic was preparing for the signature of one of the specific treaties with the Vatican – the Special Treaty on conscientious objection. There was a major outcry against the draft treaty from Slovak and international politicians, organizations and NGOs. There were heated discussions in the media between its defenders and critics ranging from lay argumentation to analyses by lawyers and petitions both against and

for were organised, etc. Finally, the Special Treaty was not signed and the current government (2008) has no intention of doing so.

In Italy, twenty-four years after the revision of the Concordat, the question on the table is whether entering into bilateral agreements has brought the desired equal treatment of the various faiths present in the country. Such a question must be posed keeping in mind that Italian society has profoundly changed since 1948. Whatever the intentions of the republican founding fathers might have been, they were confronted with the needs of a different country. In recent years the religious diversity of Italian society has drastically increased. Italy is rapidly becoming a multicultural country, destined to host an increasing population of non-western origin and varied religious background. According to CESNUR,¹⁹ nowadays 1,124,300 Italians (1.92% of the population) profess a faith other than Catholicism. This number might seem modest, but it increases to 2,663,300 (4.4%) if we count residents instead of citizens. CESNUR uses data from a Caritas survey of 2005 (Caritas/Migrantes 2005). If we confront this data with data from 2007 (Caritas/Migrantes 2007), it is easy to appreciate how rapidly Italy is becoming a multi-religious country:

Table 1: Religious Composition of Immigrant Population in Italy

Religious affiliation of immigrant population	Numerically (2005)	%	Numerically (2007)	%	Increase
Muslims	919,492	33%	1,202,395	32.6%	+ 30.8%
Catholics	629,713	22.6%	685,128	18.6%	+ 8.8%
Orthodox	565,627	20.3%	918,375	24.9%	+ 62.4%
Protestants (and other Christians)	183,898	6.6%	188,254	5.1%	+ 2.4%
Hindus	66,872	2.4%	99,194	2.7%	+ 48.3%
Buddhists	52,940	1.9%	67,978	1.8%	+ 28.4%
Traditional religions (“animists”)	33,436	1.2%	41,366	1.1%	+ 23.7%
Jewish	8,359	0.3%	8,943	0.2%	+ 6.7%
Others	326,003	11.7%	478,419	13%	+ 46.8%
TOTAL	2,663,300	100%	3,690,052	100%	+ 38.6%

¹⁹ See <http://www.cesnur.org/religioni_italia/introduzione_01.htm>.

As the sociology of immigration demonstrates well (Basso – Perocco 2003), the great majority of these persons are going to settle in Italy, thus modifying permanently the religious composition of the Italian population. Such a prospect lends a particular urgency to the issue of actually implementing constitutional commitments to religious freedom and equality. As instruments, the agreements themselves do not seem capable of satisfying this need for several reasons.

The agreements have proved to be very similar in their outcomes, which often have a merely symbolic content. When they recognize the right of people to “profess their faith, and to practice it freely in any form, individual or associated, to propagate it and to exercise its faith in private or in public” – a formula that recurs – they are only reaffirming a right that the Italian Constitution already guarantees for all citizens.

Moreover, the proliferation of such “xerox agreements” (Fiorita 2007; Guazzarotti 2007), seems to have worsened the relative position of the religious communities who have not reached an agreement. These are still governed by fascist law on admitted groups, and are excluded from many direct and indirect benefits,²⁰ of which the most important one is obtaining their potential share of the 8/1000 contribution.

These religious groups’ situation is worsened by the fact that, the complex procedure needed to open an agreement is exposed to political discretionary power both at the beginning (only the government has the right to open the consultative procedure) and at the end (to enter into force, agreements need to be transposed into laws). Any subsequent amendments must follow the same procedure, which can take years to be completed. In addition, since the political decision necessary to conclude a new agreement and enact it as a law has important economic consequences, lobbies close to Catholic Church have created a particularly perverse political obstruction to the recognition of the most numerically consistent minorities. This, together with a cultural preference for religions institutionally organised according to the Church model (*i.e.* with a professional clergy and a centralized organisation) has considerably slowed the process of recognition of many groups, and in particular of non-western religions. This way, the agreement system, instead of recognising and fostering the integration of religious communities in the state, has become an instrument of unpredictable, discretionary governmental power, which acts as a monopoly in the selection of legitimate religious subjects (see Guazzarotti 2002).

Since 1992, a heated discussion has taken place on the necessity of substituting Law 1159/1929 with a new framework law on religious freedom (Nardini – di Nucci

²⁰ This is true not only at a national level. Many regional laws granting funds (especially to build religious structures) or fiscal exemptions to religious institutions, limit their benefits to those groups that have reached an agreement with the state. The Constitutional Court has declared such a limitation unconstitutional (see Constitutional Court, Sentence no. 195/1993; Tozzi 2005).

2001). Proposed new laws have been presented several times since then, the last being in 2007, with no concrete result, but the increasing diversity of Italian society makes the adoption of such a framework law highly desirable.

Conclusions

Both Italy and Slovakia are secular states with a constitutional system that defines their relationships with religious groups as neutral, and thus capable of respecting their autonomy and pluralism. This common constitutional commitment not to be bound to any religion or ideology does not prevent Italy and Slovakia from supporting the activities of the various recognised religious groups directly (from tax income) as well as indirectly (through various tax allowances).

There is no contradiction for a secular state in financing religious groups. Such support is part of the role of a state that respects not only the existence of individuals, but also the existence of social groups. An effort should be made, however, to respect the principle of equal dignity of the different religious groups present in the society. Similarly, this should be achieved by distributing evenly the financial support that the social role of religious groups implies. This is far from the reality in both Slovakia and Italy.

In both countries the Concordat accords to the Catholic Church several privileges not accessible to other churches. The laws on registration of churches as well as the agreements system used in both countries with an aim to guarantee religious pluralism, seems to have strengthened a hierarchical order of religious groups rather than encouraging their equality.

In Slovakia, churches which have managed to register or to sign an agreement live under very unfavourable economic conditions. The Slovak requirement (for registration, see above) of 20 000 adult members, shows the lack of political will to create conditions of real religious freedom including newer and smaller religious groups. Nonetheless, since state support depends only on fulfilment of the registration criteria for churches, the procedure is easier and less dependent on political power in comparison to Italy.

In both cases however, traditional religions seem to be full of apprehension about “newcomers”, with whom they would be obliged to share the financial support from the state. This apprehension is often transformed (by political lobbies close to the interests of traditional churches) into suspicion-building public discourse – e.g. on the so-called sects,²¹ or on the alleged inability of Islam to share democratic values – that often overlap with xenophobic or racist discourse on immigration,

²¹ This is what the new religious communities are consequently called, for more details see Tížik, 2006).

and help spread the *clash of civilisations* doctrine. The threat to democratic values posed by similar political speculation fosters the need for general reflection on the relationship between the state and religious communities which would lead to the state being capable of dealing with increasingly multicultural conditions.

Such a reflection cannot be made here, because it broadly exceeds the scope of this paper. We can, however, indicate at least three points that a further investigation should take into account:

1) Bilateral agreements appear not to be an instrument which is, in itself, sufficient to fulfil the commitment to the protection of religious liberty and equality. The obvious reasons for this are the complexity of its approval process, its submission to political discretionary power and the rigidity of its often symbolic content. If the principle of religious pluralism should be not only proclaimed but also applied, registration of new religious groups should be liberalised. Furthermore, the increasing multicultural structure of our societies suggests the need for a common legislative framework, in which the state is bound to support all religious groups in the same way (i.e. allocating finances proportionally according to the size of the different religious communities).

The bilateral agreement system – and even more evidently the Concordats – appears outdated. There is no need to abolish it, but there is an absolutely urgent need to reconsider its form and contents. At the moment, its contents and structure follows the Concordat, which is not an approach mirroring real religious pluralism and equality. Agreements should be freed from their tendency to be transformed into manifestos, and used carefully only to regulate particularly controversial matters in the relations between religious groups and the state.

2) Citizens without a religious faith should be more adequately considered. As the international conventions on religious liberty already provide for, the affiliation to a religious group should be strictly voluntary and always retractable. No one should be assigned permanently to any religious group, and the possibility of leaving a group should be adequately protected. For the same reason, the state should not, as is the case now, force (or trick) anyone to participate in the support of religious groups they do not intend to belong to. Contributions to the funding of religious groups should be strictly voluntary and individual. From this point of view, it would be just for the state to finance the churches and nongovernmental civic organisations in the same way, by introducing a system of tax income redistribution, in which the citizens themselves can decide which church or secular humanist organization or cultural/educational institute they want to support with their taxes. Such a law would express respect towards all citizens, including those without religious affiliation and atheists, whose freedom and decisions should be protected exactly in the same way as those of believers.

3) Religions recognised by the state have the right to offer religion classes in primary and secondary schools taught by a person chosen and paid by the respective church. Furthermore, these religions have the right to establish schools that are run by the specific church (mainly the Catholic and, in the Slovak case, the Evangelical Church are active), but financed by the state. Given the limits of the agreement system, and from the perspective of a neutral state which will have to face the increasing religious pluralism of our societies, it would be more appropriate to teach religion studies in schools and to practice (or not practice) a specific religion in private.

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Jana Plichtová, *Department of Psychology, Faculty of Philosophy, Comenius University Bratislava; Department of Social and Biological Communication, Slovak Academy of Sciences and Centre of Excellence for Research on Citizenship and Participation, Slovak Academy of Sciences.*

Jana Plichtová is professor of Social Psychology at the Comenius University. Her theoretical interests include topics like social psychology of democracy, deliberation in small groups, social representations of political and economic phenomena. She is co-author of several papers on social representations of democracy published in Culture and Psychology, European Journal of Social Psychology, Bulletin de Psychologie, Journal of Community and Applied Social Psychology. She is editor of several books (e.g. Minorities in Politics) and co-author of two books published by Slovak publishers.

E-mail: plichtova@fphil.uniba.sk

Dino Costantini, *Department of Philosophy, History and Heritage, Faculty of Humanities and Philosophy, University of Trento, and Faculty of Humanities and Philosophy, Ca' Foscari University of Venice.*

Dino Costantini is PhD in Political Philosophy and in Political Science. He studied in Venice, Pisa and Paris. Besides cooperating as Research Fellow to the EuroEthos Project he's lecturer of Sociological Theories at the Ca' Foscari University in Venice. He has worked on Locke's political theory, citizenship and migrations in Europe, French colonial and postcolonial thought and on the politics of memory.

E-mail: iodio@unive.it

Magda Petrjánošová, *Department of Psychology, Faculty of Philosophy, Comenius University Bratislava and Centre of Excellence for Research on Citizenship and Participation, Slovak Academy of Sciences*

Magda Petrjánošová is doctoral candidate in social psychology at Comenius University in Bratislava, Slovakia. Her research interests include social and national identities in different contexts, deliberation about ethically problematic issues and qualitative approaches in general.

E-mail: petrjanosova@fphil.uniba.sk

The Legal Concept of Cultural Conflict and its Application in International and National Jurisprudence¹

Harald Christian Scheu

***Abstract:** Cultural conflicts are a current problem the relevance of which will increase as the proportion of migrants from different cultures will increase as well. The legal concept of cultural conflict is determined by the interpretation and application of fundamental rights and freedoms. The key aspect of a legal notion of cultural conflict is the link between the cultural diversity argument on the one hand and concrete legal claims on the other: Cultural and religious diversity collides with such legal and cultural norms which are considered indispensable by the majority society. Such norms, especially in the field of fundamental rights, are conceived as part of the international ordre public.*

Many cultural conflicts have found an expression in legal disputes before courts. Different cultural standards have been a legal argument in relation to state power, especially in the context of non-discrimination, but also with respect to positive state obligations. Further, there have been a number of cases in which cultural differences influenced the relationship between private individuals. Court practice in Europe, however, has shown that the approach to concrete cases of cultural diversity is quite often inconsistent. In the European migration area the question is becoming more relevant whether besides general human rights principles also concrete issues, such as the wearing of the Islamic scarf in public institutions and private enterprises, should be regulated on the European level rather than on the level of individual states.

Keywords: *cultural conflict, international law, national jurisprudence, fundamental rights, diversity*

1. Introduction

European states are facing significant migration from non-European areas. Restrictive EU migration policy measures cannot effectively prevent a further increase in the number of migrants with different cultural and legal background. The integration of members of distinct ethnic communities, which have developed and stabilized as a result of recent migrant movements, into majority society is currently one of the key challenges in European countries.

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In practice, integration of different cultural and religious communities is a very complex process affecting fields such as schools, employment, access to the social care system, accommodation, but also concrete relations between minority members and the majority population. In the course of integration collisions between different cultural and legal values occur. Those conflicts call for a solution which is in line with the principles of democracy, rule of law and the protection of fundamental rights and freedoms.

In this context we may recall an international conference which was organized by the Austrian EU-presidency in 2006. Selected representatives of major EU institutions and EU member states met in Salzburg under the headline *The Sound of Europe*.² The main topic of the conference was the issue of European identity and the identification with Europe. As expected, the participants of the conference agreed upon the assumption that the main characteristic of Europe is its plurality of traditions and its unique cultural wealth. By means of strong metaphors the speakers put stress upon Europe's ability to bring together variety and unity.

Almost at the end of the conference one of the most famous experts on Islam, Bassam Tibi, raised a question which had been neglected during the event. Tibi reminded the participants of the fact that in Europe there were living about 21 million Muslims, nevertheless, not a single representative of Muslim communities had been invited to the Salzburg conference. To answer Tibi's question whether Islam was a part of European identity and Europe's variety of cultures Dutch Prime Minister Balkenende maintained that European cultural wealth comprises also its Muslim element.³

In his many publications Tibi has systematically stressed that its relation to Islam will be Europe's most crucial issue in the 21st century. With regard to radical Muslims calling for the introduction of Sharia law in Europe and the very sensitive question of future Turkish membership in the EU, Tibi identified two main options: either Europe will manage to Europeanize Islam by getting Muslims in Europe to accept European democratic and human rights values, or Europe will be Islamized (Tibi 2006, 57).

As far as the question of standard European values is concerned, Tibi, already in the 1990s, introduced the often discussed and criticized notion of *Leitkultur*. As major elements of *Leitkultur*, Tibi identified the priority of reason over religious concepts (i.e. the rejection of absolute truth), individual human rights (including

² For further information on the conference, see http://www.eu2006.at/de/The_Council_Presidency/Conference_The_Sound_of_Europe/index.html.

³ The transcript of the final discussion session is available at http://www.eu2006.at/includes/Download_Dokumente/transkript_schlussrunde.pdf.

freedom of religion and the separation of State and Church), pluralism and tolerance (Tibi 1996; Tibi, 1998).

Very soon, however, it became apparent that the concept of *Leitkultur*, originally conceived as a defensive strategy for the protection of Europe's key values, was abused by some actors of the political discourse. Especially within the German debate the exponents of right-winged radical groups claimed a need to limit the manifestations of cultural diversity in order to protect "the leading culture" of German society. This deformation of the term *Leitkultur* was quite astonishing given the fact that Tibi's concept of key values comprises among others the principle of non-discrimination and the fight against racial, ethnic and religious intolerance.

Besides this interesting political and philosophical debate, the issues of cultural diversity have become a topic for discussions also among lawyers in Europe. A number of court decisions in European countries clearly demonstrated that cultural conflicts are not only an abstract philosophical or political notion but concern the application of legal norms as well. European courts on several occasions confirmed the specific legal relevance of certain democratic values and principles.

The major goal of this article is to analyze the legal concept of cultural conflict. In the first part of the study cultural conflicts in the legal sense will be determined in relation to other legal disputes concerning the interpretation and application of fundamental rights. We will focus on the question whether the political and sociological notion of *Leitkultur* has its impact on the legal regulation of cultural conflicts. In the second part of the article we will deal with different forms and levels of cultural conflicts which occur in social and legal practice. The starting point to this analysis will be legal disputes before courts since in court proceedings different cultural interests and their rational arguments can be found in a concentrated form.

2. The legal concept of cultural conflict

Although a number of international human rights documents refer to the term *culture*, there is no legal definition of the term. Article 22 of the Universal Declaration of Human Rights of 1948 which was the first universal human rights document stipulates that everyone, as a member of society, is, among others, entitled to the realization of the economic, social and cultural rights indispensable to his dignity and the free development of his personality.

Cultural rights are further laid down with regard to the status of national minorities. According to the crucial provision of Article 27 of the International Covenant on Civil and Political Rights of 1966, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

However, there is no explicit definition of culture and cultural rights neither in the International Covenant on Civil and Political Rights, nor in the International Covenant on Economic, Social and Cultural Rights which was also adopted in 1966.

The drafting of a definition of the term *culture* falls within the agenda of the United Nations Educational, Scientific and Cultural Organization (UNESCO). As one of the major results in this field we may consider the adoption of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions in 2005. The authors of this convention have solved the impossibility of reducing the complexity of culture into one brief definition by introducing seven different terms: cultural diversity, cultural content, cultural expressions, cultural activities, goods and services, cultural industries, cultural policies and measures and interculturality. According to Article 4 paragraph 1 of the Convention the expression “cultural diversity” refers to the manifold ways in which the cultures of groups and societies find expression, and these expressions are passed on within and among groups and societies. The same provision explains that cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used. However, not even those clarifications contained in the UNESCO Convention can lead to a precise legal definition of the term *culture*.

On the other hand, there is, indeed, a broad range of definitions of culture in the field of social sciences and particularly in ethnology. From an ethnological point of view culture is mostly understood as a complex system of different expressions of material and immaterial activities of a given social group or society. Legal rules are a natural part of those manifestations of culture.

However, not every dispute concerning the interpretation and application of legal rules can be conceived as a cultural conflict since such a broad understanding of cultural conflict would not be applicable in practice. Therefore, there is a need to determine specific elements of culture which most typically appear in legal disputes. Only those cultural differences which may serve as an argument in legal disputes constitute characteristic features of cultural conflicts. In practice, disputed interpretations of the freedom of religion, the right to private and family life, the freedom of expression and the principle of non-discrimination are important examples.

This concept of cultural conflict has been inspired by the works of the Dutch sociologist den Hollander who, in a complex study of 1955, identified three forms of cultural conflict: conflicts between cultures, conflicts within one culture and conflicts which appear inside the human being as a result of different cultural influences (den Hollander 1955, 162). Particularly by analysing the second and third

form of cultural conflict den Hollander made it clear that cultures in this sense are not absolutely homogenous and monolith unities, but conflicts may appear, for example, between conservative and progressive members of the group.

In this context the cultural argument will not always be the major motivation of the participants in the dispute. Conflicts arise rather with regard to selected narrow aspects of culture than on the basis of culture as such. Therefore, den Hollander preferred the terms “religious conflict”, “language conflict” or “ideological conflict” over “cultural conflict”. According to den Hollander the term cultural conflict should be used only in cases where the dominant aspect of the conflict is the collision of a whole set of cultural elements (den Hollander 1955, 162).

In 2000, the link between sociological and legal meanings of cultural conflict was analysed in detail by the Swiss expert on international law, Walter Kälin. According to Kälin cultural conflicts in the legal sense concern such legal disputes over human rights and fundamental freedoms in which members of different ethnic groups raise legal claims against the state by pointing at their specific different culture (Kälin 2000, 24). In other words, the participants of cultural conflicts in disputes with the state claim a right to cultural diversity.

Kälin explained that such understanding of cultural conflicts as a rule derives from the relationship between majority and minority. Not only traditional national minorities who use the argument of cultural diversity in order to claim specific linguistic rights or rights in the field of education and political autonomy are involved. In practice, there is an ever growing number of conflicts affecting members of new minorities, i.e. communities who are the result of recent migration to Europe.

From a legal perspective this concept of cultural conflict seems to be the most useful since it comprises a broad spectrum of situations, such as the building of mosques and minarets, ritual slaughter of animals, religious symbols in schools, religious holidays and the prosecution of criminal acts motivated by cultural traditions. All of those cases may turn into legal disputes before courts, and national and international courts have the task of interpreting fundamental rights with a special view to cultural diversity.

As far as the practical application of cultural diversity in legal disputes is concerned, courts regularly refer to firm legal principles which they consider to be unquestionable. Cultural conflicts, indeed, often lead to a collision between cultural and religious interests of a minority group on the one hand and the key interests and values of the majority on the other hand. Therefore, the idea of *Leitkultur* may be identified within legal concepts as well as in political discourses.

In this context we have to recall the concept of *ordre public* which originally stems from private international law and serves as a defence against undesirable effects of the application of foreign law (Kučera 2004, 193). According to Section 36

of the Czech Act on International Private and Procedural Law,⁴ legal provisions of a foreign state must not be applied in cases in which the effect of such application would be in contradiction to those principles of the Czech legal order which do not allow for exceptions. This so-called public order clause does affect not only the application of foreign law in proceedings before domestic courts (substantive law), but also the issue of recognition and enforcement of foreign court decisions (procedural law) (Týč – Rozehnalová 2002, 639).

It should be remembered that the problem of colliding legal orders and legal cultures has quite a long history in private international law. The confiscations of property which were carried out after the October Revolution in Russia and their recognition by national courts in France and Great Britain may serve as an example. Especially French courts referred to fundamental legal principles and recognized only such acts of confiscation which were based on public interest and the rule of appropriate and prompt compensation (Kinsch 2004, 419).

The concept of *ordre public*, however, is not only a matter of domestic legal orders. The current understanding of crucial legal principles has been significantly influenced by the internationalization and Europeanization of the term public order. Jurisprudence of international human rights bodies, such as the European Commission for Human Rights and the European Court of Human Rights, have significantly contributed to the current understanding of *ordre public*, for example, in the field of family law (Thoma 2007). Besides the national *ordre public* an international *ordre public* may thus be identified which is not based on rules of private law but on the key principles of international human rights law (Kokott 1998).

The term *ordre public* in this sense describes a certain minimum standard which does not allow for exceptions, not even in favour of the respect for cultural diversity. In the practice of cultural conflicts it is necessary to define the scope of those aspects of cultural diversity which can be applied in compliance with public order in opposition to the aspects which have to be refused by European courts. The majority of relevant disputes do not result from the collision of different domestic orders. Most cultural conflicts occur on the territory of one country and involve the claims of members of migrant communities.

3. Categories of cultural conflicts

The concept of cultural conflicts described above becomes apparent in different fields of social life. The problem of cultural diversity affects migrant workers who have been living in the country concerned for only a short period as well as migrants

⁴ Act no. 97/1963 Coll. from 4th December 1963 concerning international civil and procedural law, in reading of successive norms.

who have already gained the citizenship of their new states as well as their children who were already born on the territory of European states. All of those groups are concerned, for example, with the issue of the Islamic scarf in public institutions or the protection of children against forced marriage.

Drawing inspiration from the theoretical works by Hannah Arendt (Arendt 1992, 27) and the Swiss anthropologist Hans-Rudolf Wicker (Wicker 1997, 143), Walter Kälin in his above mentioned study proposed to divide cultural conflicts into three basic spheres. According to Kälin, in the “state sphere” private individuals are confronted with different manifestations of state power (for example, in the course of military service, in criminal proceedings or during the enforcement of sentences). The main element of the “public sphere” is the balance of different private interests (for example, in the field of employment and public schooling), the “private sphere” is the place of close human relations covered by the notion of private autonomy (for example, family ties, friendship or social mechanisms within ethnic and religious communities) (Kälin 2000, 91). Cultural conflicts in the legal sense may occur in all those three spheres.

Of course, cultural conflicts may be described in other ways as well. For the purposes of this article we will categorize cultural conflicts according to the question against whom the members of ethnic communities claim their rights based on cultural difference. In the sense of traditional human rights concepts the individual is the subject of concrete rights and freedoms in relation to the state. As for the civil and political rights, the relation between the individual and the state is characterized by the prohibition of state interference with the protected interests of the individual, such as life, dignity, personal freedom, private and family life and the freedom of expression. In the field of social standards (employment, housing, health care) the protection of human rights may also imply positive obligations of the state towards the individual. Furthermore, members of ethnic and religious communities often claim their right to cultural diversity in relation to other private individuals and institutions, sometimes even against the members of their own families.

3.1 Cultural conflicts and the prohibition of discrimination

With a view to the prohibition of direct discrimination, international standards are very clear. According to Article 1 paragraph 1 of the International Convention on the Elimination of All Forms of Racial Discrimination the term of racial discrimination comprises “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

Further provisions on non-discrimination can be found, for example, in the International Covenant on Civil and Political Rights (Articles 2 and 26) and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR – Article 14 and Additional Protocol No. 12). It follows from these norms that not every difference in treatment constitutes discrimination.⁵ The competent authorities have to examine whether the criteria for a variation are reasonable and objective and if the aim of a concrete measure is to achieve a purpose which is legitimate under the Covenant. Since issues relating to the legitimacy of a purpose and proportionality of a state measure are very complex, international monitoring bodies tend to recognize a certain margin of appreciation in favour of national courts (Čechová 2007, 166).

In legal practice, cases concerning the issue of indirect discrimination are even more difficult to solve than questions of direct discrimination. In cases of indirect or hidden discrimination a state measure seems to be neutral on its face, but, in reality, it has completely different impacts on the members of the majority and a concrete minority. The main features of indirect discrimination have been defined in particular with respect to equality of men and women. But the standards set up by international and national judicial bodies are mostly applicable also where the status of minority and migrant community members is concerned.

The UN approach towards indirect discrimination was rather inconsistent from the very beginning. Whereas, for example, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women already in the 1990s considered indirect discrimination to be a violation of international obligations, the UN Human Rights Committee has only very lately recognized the concept of indirect discrimination and conceded that indirect discrimination amounts to a violation of the International Covenant on Civil and Political Rights.⁶

Also the approach chosen by the European Court of Human Rights was rather ambivalent. Only in 2001, the Court acknowledged that a general state policy which has disproportional impact on a concrete social group may be considered discriminatory. At the same time, the Court added that pure statistical irregularities would not serve as sufficient proof of discrimination (Henrard 2007, 43).

The inconsistent approach of the European Court of Human Rights has become apparent in the case concerning the complaint of Roma children against the Czech Republic.⁷ In that case the applicants claimed that their assignment to special schools resulted in discrimination with respect to the right to education. They

⁵ Human Rights Committee, General Comment No. 18: Non-discrimination (10.11.1989).

⁶ Althammer et al. v Austria, Communication No. 998/2001 (CCPR/C/78/D/998/2001).

⁷ Application No. 57325/00.

alleged a violation of Article 14 of the ECHR and Article 2 of the first protocol to the ECHR.

The key problem of this case which affects several aspects of cultural diversity was the question of how to prove indirect discrimination. Whereas according to official statistics Roma children made up to 80–90% of all pupils in special schools, the Czech Republic maintained that the ethnic criterion had no influence on the assignment of pupils to those schools. In February 2006, the Chamber of the European Court of Human Rights reached the conclusion that official statistics were not sufficient evidence of indirect discrimination and that consequently there had been no violation of the ECHR in this case.

A different approach was applied by the Grand Chamber of the European Court of Human Rights (seventeen judges) to which the case was referred according to Article 43 of the ECHR. In its judgment of November 13, 2007 the Grand Chamber found that as soon as a *prima facie* evidence of different treatment is identified it is upon the state to present legitimate reasons for that differentiation. With regard to very clear statistics showing the proportion of Roma children in Czech special schools the Grand Chamber accepted a shift of the burden of proof from the complainants to the Czech Republic and ruled that the differentiation between Roma and non-Roma children had not been based upon reasonable arguments. Therefore, the Czech Republic was responsible for the violation of the applicants' rights under the ECHR.

The final judgement of the Grand Chamber in the case of Roma children against the Czech Republic will have enormous impact on future cases concerning indirect discrimination. The new standard regarding the burden of proof will be of particular relevance for those ethnic and migrant communities which are on the periphery or edge of the society and are facing social and economic marginalization. Statistics showing significant disadvantages of such groups may be taken as an indicator of indirect discrimination in individual cases.

Other cases of indirect discrimination against members of different religious groups concern the issuing of official documents. The largest Islamic organisation in Germany Milli Görüs (IGMG) informs on its web page that German authorities in quite a number of cases refused to issue identity cards to Muslim women who attached to their applications photographs showing them with the Islamic headscarf.⁸ The authorities referred to a governmental regulation according to which the applicant had to attach a photo without headdresses.⁹ Although the relevant provision

⁸ <http://www.igmg.de/muslime-recht/bekleidungsgebote-und-erziehungswesen/fotos-in-ausweispapieren.html>.

⁹ Verordnung zur Bestimmung der Muster der Reisepässe der Bundesrepublik Deutschland (BGBl. I 2000, 1165).

granted a certain margin of appreciation to the authorities, some of them did not use their discretion in favour of Muslim applicants.

The Administrative Court in Wiesbaden already in 1984 held that a headdress does not prevent the clear identification of a person. According to the Court the principle of religious freedom calls for the consideration of the specific needs of different religious communities. Therefore, the granting of a legal exception concerning the Islamic headscarf was regarded as a necessary measure.¹⁰ In 1989 the Administrative Court in Berlin reached a similar conclusion stating that freedom of religion comprises the respect for religious traditions and customs, including religious norms regulating clothing in public.¹¹

Despite those leading cases discussions about headscarf photos of Muslim women continued on the level of administrative bodies in Germany. In 2003 the competent authority in the town of Baunatal refused to issue a passport to a German national of Turkish origin who attached a headscarf photo. When the applicant appealed to the Administrative Court in Kassel, the Court confirmed that freedom of religion did apply in such a case. The Court ruled that the administrative authority was under a legal duty to issue the document.¹² The town of Baunatal was reluctant to accept this conclusion and used further legal remedies. The higher instance, i.e. the Administrative Court for the Federal Country Hessen, however, ruled in line with the lower instances and confirmed the right of Muslim women to attach headscarf photos to applications for identity cards and passports.¹³

The general prohibition of headscarf photos is a typical example of indirect discrimination because, though neutral at its face, it has a disproportional effect on the members of a religious community. German courts rightly considered the problem of discrimination in the light of the principle of religious freedom. A strict prohibition of headscarf photos amounts to a violation of human rights.

3.2 Cultural conflicts and positive state obligations

The reference made to cultural diversity in practice does not serve only as a defence against state interference, but also as an argument in favour of positive state obligations. Kälin in his above mentioned study listed cases in which Muslim migrants to Switzerland and other European countries raised concrete claims with regard to the execution of punishments. The authorities had to solve issues such as the right of prison inmates to attend the regular Friday Prayers. As regards the Friday Prayers the Swiss Federal Court did not interpret religious freedom as a limitation

¹⁰ Verwaltungsgericht Wiesbaden, 10.7.1984 (Az. VI/1 E 596/82).

¹¹ Verwaltungsgericht Berlin, 18.1.1989 (Az. 1 A 146/87).

¹² Verwaltungsgericht Kassel, 4.2.2004 (Az. 3 G 1916/03).

¹³ Verwaltungsgerichtshof Hessen (Az. 7 TG 448/04).

of state interference, but as a basis for positive state obligations (Kälin 2000, 123). If the authorities grant prison inmates the possibility to attend the Friday Prayers, in practice this means a number of positive measures, such as the preparation of suitable facilities and additional guards. Also the question whether to grant prison inmates the right to food prepared according to religious norms falls within the category of positive obligations.

Thomas Lemmen argued that Muslim spiritual care in state institutions should comprise the compliance with prescriptions concerning food, the preparation of a certain space for spiritual events, the attendance at the Friday Prayer and consultations with Muslim clerics. However, Lemmen at the same time criticized German prison authorities which delegate the issue of Muslim spiritual care to members of official Turkish organizations working under the surveillance of Turkish consular offices in Germany (Lemmen – Miehl 2001, 55). Indeed, it is doubtful whether the involvement of official representatives of foreign states in the solution of problems regarding ethnic and religious communities is a suitable measure, especially in situations when those states definitely do not meet the criteria of democracy and cultural pluralism in all aspects.

The line between passive respect for cultural autonomy on the one hand and the need for active contributions in favour of different cultural communities on the other hand cannot always be drawn precisely. The principle of state neutrality in religious matters and the concept of positive measures overlap in a number of areas, such as the construction of mosques and the setting up of cemeteries according to Muslim norms. In the Czech Republic the construction of mosques has not been dealt with by courts so far, but the two mosques in Brno (1998) and Prague (1999) caused, at least at the beginning, several protests by the local population (Tretera 2005, 114).

The majority of mosques in Germany, indeed, are not an eye-catching place and neutral observers would hardly recognize sacred architecture in a backyard building. However, the construction of representative mosques in the Oriental style, sometimes together with minarets, has led to excitement in some European states. It is understandable that the construction of mosques became an important topic of the so-called German Islam Conference (*Deutsche Islam Konferenz*) which was established in 2006 by the Federal Ministry of the Interior as a discussion forum dealing with the integration of Muslims. 15 representatives from German state bodies and 15 members of Muslim communities participate in this formal dialogue presided by the German Minister of the Interior.¹⁴ At its third meeting in March 2008, the German Islam Conference agreed that the construction of new representative mosques

¹⁴ Further information available at http://www.bmi.bund.de/nn_1018358/Internet/Content/Nachrichten/Pressemitteilungen/2006/Einzelseiten/Islamkonferenz__Kurzinformat.html.

is a very important step towards the integration of Muslims since those mosques are symbols of the permanent presence of different religious communities.

However, the concrete decision on the construction of a mosque, which falls within the competence of administrative authorities, is in legal practice more complicated than a general political declaration. Very often the local population, potentially affected by mosques and minarets, uses the available legal remedies in order to prevent the construction of mosques.

Jurisprudence of German courts is not consistent in this matter. In 1992, an administrative court examined a case in which the neighbour used legal remedies against the decision of the local authorities to permit the construction of a mosque in a residential quarter of the town. The neighbour alleged that the operation of the mosque would lead to a dramatic increase of traffic since the town was not prepared for such an object. The administrative court found that the disturbance caused by the operation of a mosque would not be substantial and that religious freedom in this case prevailed over the interests of the neighbours. The second instance, i.e. the Federal Court of the Federal Country of Baden-Württemberg, however, repealed this judgment as it considered the disturbance caused by the Morning Prayer to be disproportional. The final decision in this case had to be given by the German Constitutional Court which agreed with the arguments of the Muslim community. The Constitutional Court found that the neighbours had to accept such degree of disturbance which was usual for the surrounding area of religious buildings. The negative consequence of the operation of the mosque would be very limited (only three months per year and only 30 minutes per day) (Muckel 2004, 55).

Whereas discussions about mosques have become more emotional in the past years, the traditional battle field of cultural conflicts can be found in public schools. Disputes concerned, for example, the Islamic scarf and the use of religious symbols in class rooms as well as dispensation of Muslim pupils from swimming lessons and excursions. Conflicts have occurred in states which in line with the policy of *laïcité* enforce a strict separation of state and church as well as in states in which schools openly impart religious values. In the field of education the collisions of different cultural concepts obviously cannot be avoided (Kälin 2000, 140). In such situation legal solutions should be based upon the right balance between the interests concerned.

The issue of the Islamic headscarf in public schools has been discussed in a number of European countries. Whereas France applies the principle of *laïcité* and strictly forbids the wearing of the Islamic scarf and other religious symbols by teachers and pupils in public schools, the approach of other states is more liberal. In Austria Muslims were recognized as a religious society already in 1912 and since then the use of Islamic symbols in public institutions is a legal right. The Islamic

scarf today is a natural part of clothing for many young Muslim women in Austria (Schmied 2008, 197). A generous approach in this context is also typical for Scandinavian countries.

The situation in Switzerland and Germany is more complicated. In 1997 the Swiss Federal Court dismissed an action by a Muslim teacher in Geneva who was not allowed to wear the Islamic headscarf at school. The Court reached the conclusion that the Islamic scarf was a very strong religious symbol which may offend the religious feelings of pupils. At the same time the Court stressed the importance of state neutrality which, in the area of public education, prevails even over religious freedom.¹⁵

The case of the Muslim teacher continued before the European Court of Human Rights which in February 2001 found that the prohibition of the Islamic headscarf was not in contradiction with religious freedom laid down in Article 9 of the ECHR. According to the European Court of Human Rights the measure applied by the Swiss authorities was in accordance with a legal provision, served a legitimate purpose and was proportional to this purpose. The Court further explained that in this concrete case pupils aged four to eight years had to face the headscarf of their Muslim teacher and this could have easily influenced their future attitude to questions of religion.¹⁶

Already in 1988 the problem of the Islamic scarf had been dealt with by a German administrative court which explained that the wearing of the headscarf may have a religious significance and fall within the notion of religious freedom. However, as far as the wearing of the headscarf in public schools is concerned, the Court held that such manifestation of religious conviction by the teacher collides with the negative religious freedom of the pupils not to be confronted with such symbols (Kälin 2000, 151). This judgment left quite a broad space for further clarifications since in practice it may be disputable whether a symbol in a given situation interferes with the rights of the pupils. In the following years jurisprudence of German courts was inconsistent.

A leading judgment was issued by the German Constitutional Court only in 2003. The Court had to solve a case in which a German national of Afghan origin sued the federal state of Baden-Württemberg because she was refused the post of a teacher at primary schools. The competent school authorities argued that the applicant used the Islamic scarf as a religious and political symbol which is not in compliance with the principle of state neutrality in school matters. Before the Constitutional Court the applicant alleged that her religious freedom had been infringed by this

¹⁵ BGE 123 I 296.

¹⁶ Dahlab v Switzerland (application No. 42393/98).

decision. The Court reached the conclusion that the wearing of the headscarf can be forbidden only by an explicit legal provision. As in the concrete case the authorities did not refer to such an explicit ban on the headscarf the approach of the school authorities towards the Muslim teacher was illegal.¹⁷ As a reaction to this judgment, several federal countries (e.g. Baden-Württemberg and Nordrhein-Westfalen) very soon adopted new laws explicitly prohibiting the wearing of the headscarf by teachers. Other federal countries did not follow this example and kept applying a more liberal approach. Therefore, in Germany today there is no uniform regulation of this problem, but the situation differs according to the legislation adopted on the level of federal countries.

In one of its leading cases the European Court of Human rights dealt with the question whether also students may be forbidden to wear the headscarf at public universities in Turkey. In the case *Leyla Şahin v. Turkey*¹⁸ the applicant, a student of medicine, had been punished by the university for not respecting the ban on the headscarf laid down in Turkish laws. In 2005 the Grand Chamber of the European Court of Human Rights found that in this concrete case the restriction on religious freedom was in line with the ECHR since secularism in Turkey is a guarantee of democratic values and the democratic system as such. According to the Court the ban on the headscarf does not only protect the individual against arbitrary interference by the state, but also against pressure exercised by Extremist movements within the community. Those considerations of the Court do not mean that all contracting parties to the ECHR have to ban the headscarf in public schools. However, a ban which is motivated by the protection of traditional democratic values will not be regarded as a violation of human rights and freedoms.

3.3 Cultural conflicts and the horizontal effect of human rights

Cultural conflicts in the private sphere regularly lead to very complicated disputes. Collisions of different private interests occur most typically in the field of employment and in the family. At work, like in public schools, there have been conflicts relating to the Islamic scarf. Employees also used the argument of cultural diversity in the context of religious holidays and dispensations from certain obligations.

In 1990 the competent court in the Swiss town of Arbon ruled in favor of a Turkish applicant who had been dismissed by her employer due to the fact that she had been wearing the headscarf at work. The Court found that the employee had been exercising her religious freedom in a manner which did not lead to the violation of her obligations set out in the employment contract (Kälin 2000, 178).

¹⁷ 2 BvR 1436/02.

¹⁸ Application No. 44774/98.

A similar case was handled by German courts in different ways. In 2001 the competent court in Frankfurt dealt with the case of a Turkish Muslim who in the 1990s had been working as a shop assistant in a German supermarket.¹⁹ At the beginning there had been no legal problems as the woman concerned did not wear any religious symbols at work. However, in 1999 she informed her employer that in the future she would need to wear the headscarf as this was prescribed by religious norms. When she insisted on this standpoint she was dismissed from her work.

Before court the plaintiff explained that the employer had not proven any economic disadvantages linked to the headscarf. According to the Muslim woman the clients readily accepted a shop assistant wearing the Islamic headscarf. The Court in Frankfurt, however, did not refer to concrete economic losses but stressed the employer's right to define the public presentation of the company and its public image. The Court added that religious freedom is no absolute right and does not prevail over the principle of freedom of contract guaranteed by the German Constitution. In this case of conflicting constitutional principles the Court considered the termination of the employment contract to be the most suitable solution.

This judgment was overturned by the Federal Labor Court ("Bundesarbeitsgericht"). Though accepting the argument that the collision of constitutional principles has to be solved by balancing the conflicting values, the Federal Labor Court reached the conclusion that freedom of religion is of special importance.²⁰ With a view to this importance the Court demanded a clear proof that the wearing of the headscarf had been influencing the economic results of the supermarket. As such evidence could not be presented by the defendants the Court decided that the dismissal of the employee was illegal. This judgment makes it clear that the right to cultural diversity may be used as a legal argument not only in cases in which the state is the employer, but also in relations between private individuals. In other words, in cases of cultural diversity there is a horizontal effect of human rights.

With regard to the situation inside migrant communities the sphere of family life is under a very strong influence of cultural diversity. On the one hand, international and national human rights standards provide for broad private and family autonomy. This autonomous space, however, does not mean that the state has to remain completely passive with respect to family matters. According to international norms for the protection of children, i.e. especially the UN Convention on the Rights of the Child of 1989, states have the obligation to interfere in favor of the children's best interest whenever their rights are being violated or endangered by their own parents. This approach can be generalized: in principle, private and family autonomy ends where fundamental rights of family members are at stake (Scheu 2008).

¹⁹ LAG Hessen, 21.6.2001 (3 Sa 1448/00).

²⁰ BAG, 10.10.2002 (2 AZR 472/01).

In the framework of family relations concrete manifestations of cultural diversity concern the problem of forced marriage, child marriage, crimes in the name of honor and disputes over child education. Different forms of forced marriage are a part of social reality not only in quite a number of non-European countries, but also in Europe. The current dimension of the problem is demonstrated by a resolution of 2005 in which the Parliamentary Assembly of the Council of Europe expressed its concerns over issues of forced marriage and child marriage which occur particularly in migrant communities. The Parliamentary Assembly harshly criticized those states which had been tolerating the phenomenon with a view to respect for diverse cultures and traditions.²¹

The Council of Europe Committee on Equal Opportunities for Women and Men contributed to this discussion by pointing at the necessary balance between the respect for general human rights on the one hand and the respect for cultural diversity on the other. The Committee stressed that cases of human rights violation never fall within the notion of private and family autonomy.²²

In a very similar way also the European Parliament of the European Union in 2004 adopted a Resolution on the Situation of Women from Minority Groups in which it called upon the EU member states to effectively protect Muslim women from human rights violations, such as the practice of genital mutilation and forced marriage. The European Parliament recommended the member states to recognize those forms of persecution as legitimate reasons for granting asylum.²³

There is no doubt that different activities linked to forced marriage and child marriage constitute criminal acts under the penal law of European states. The prosecution of those acts, however, remains a huge problem. Only exceptionally have the criminal courts dealt with cases of forced marriage. There are only vague estimations regarding the real extent of the problem. Children and young women who are forced into marriage by their own parents mostly do not contact the state authorities due to fear, shame and lack of confidence. A study carried out by the Council of Europe concluded that in European states there have been very few court decisions concerning forced marriage. The author of the study also criticizes the light punishments of the convicted offenders (Rude-Antoine 2005, 9).

In 2005, after the intervention of social workers, a 17 years old girl in Norway opposed her parents who had decided that she should marry a man from northern Iraq. Her father and her brother were indeed sentenced by the competent criminal court to 10 and 8 months imprisonment respectively. However, the Muslim girl lost contact

²¹ Resolution 1468 (2005), Forced marriages and child marriages.

²² Doc. 10590 (20.6.2005), rapporteur: Rosmarie Zapfl-Helbling.

²³ European Parliament Resolution on the Situation of Women from Minority Groups in the European Union (2003/2109(INI)).

with her family and social community.²⁴ This is a huge dilemma. The state which rightly interferes in favor of community members and protects them from violence caused by their own families, is, at the same time, not able to guarantee lasting family ties which, from the perspective of the protected individuals, are key elements of their private and family life. In other words, the protection of human dignity and personal freedom is guaranteed at the price of the destruction of family ties.

In Germany, a rather recent court case has caused a lot of media and public attention. In this case a German national of Moroccan origin had married a Moroccan national according to Islamic law. When her husband began to physically mistreat her, the wife applied for an immediate divorce. As the spouses were living in Germany the case was dealt with by the competent German court.

In German law the only ground for divorce is the breakdown of marriage. The relevant legal rules provide for two conclusive presumptions for the failure of marriage: firstly, if the spouses have been separated for one year and both of them agree to divorce and secondly, in disputed cases, if the spouses have been separated for three years. Apart from this combination of failure and consent German law provides for an exception in such cases in which the spouses have been separated for less than a year, but the continuation of the marriage would result in unreasonable hardship to the petitioner owing to cause attributable to the other spouse.

In the case concerned the petitioner referred to this exception clause. The competent judge in Frankfurt, however, dismissed her petition as the judge found that in Moroccan culture, to which the spouses belonged, it was not unusual for the husband to use physical violence against his wife. The judge, indeed, explicitly quoted from the Koran according to which the husband stands over his wife and has the right to beat her. The judge concluded that the lasting of the marriage would not be an unreasonable hardship under these circumstances. Therefore, according to the judge, divorce would be possible only if the period set out in German law was respected.²⁵

It is no surprise that this decision has evoked a wave of protests and criticism not only among German lawyers. Some comments even found that a German court for the first time admitted the priority of Koran over the German Constitution. Of course, there was not such an excess because in the case concerned the wife had already been protected by a court decision ordering the husband to leave the dwelling and to avoid meetings and contacts with the applicant. The debate, however, showed that cultural conflicts appeal to a broad public and are a highly topical from the perspective of legal norms and court disputes.

²⁴ <http://www.aftenposten.no/english/local/article1044225.ece>.

²⁵ <http://www.sueddeutsche.de/,tt514/deutschland/artikel/778/106672>.

4. Conclusions

With a view to the intensive philosophical and political debate about the integration of members of different cultural communities in Europe it was the goal of this article to present the legal dimension of cultural conflicts. We have identified cultural conflicts as a current problem the relevance of which will increase as the proportion of migrants from different cultures will increase as well.

In the first part of the study we focused on the legal concept of cultural conflict which is determined by the interpretation and application of fundamental rights and freedoms. The key aspect of a legal notion of cultural conflict is the link between the cultural diversity argument on the one hand and concrete legal claims on the other. In practice, members of migrant communities very often refer to the freedom of religion. In cultural conflicts, cultural and religious diversity collides with such legal and cultural norms which are considered indispensable by the majority society. Such norms, especially in the field of fundamental rights, are conceived as part of the international *ordre public*.

In the second part of this contribution we have analyzed different situations in which cultural conflicts found an expression in legal disputes before courts. The focus was on cases in which members of minority communities brought legal claims linked to cultural diversity. Different cultural standards have been a legal argument in relation to state power, especially in the context of non-discrimination, but also with respect to positive state obligations. Further, there have been a number of cases in which cultural differences influenced the relationship between private individuals.

Court practice in Europe has shown that the approach to concrete cases of cultural diversity is quite often inconsistent. In the European migration area the question is becoming more relevant whether besides general human rights principles also concrete issues, such as the wearing of the Islamic scarf in public institutions and private enterprises, should be regulated on the European level rather than on the level of individual states. Would it be desirable to adopt a general European solution for problems concerning the status of members of different ethnic and religious communities?

In this context it needs to be remembered that there is not even a common European approach towards traditional national and linguistic minorities. As a matter of fact, legally binding conventions, such as the Council of Europe Framework Convention on the Rights of National Minorities, did not lead to legal solutions accepted by all European states. There are still different standards of national minority protection in Europe. A common political and legal approach toward the problematic issue of new cultural and religious communities is therefore not very likely to be found.

Without political consensus on this difficult matter no international or European convention on the solution of cultural conflicts will be adopted.

Cultural conflicts thus remain first of all in the hands of domestic courts in European countries and, in exceptional cases, in the hands of the European Court of Human Rights. Those judicial bodies interpret legal principles in different ways although the key to a legal solution of cultural conflicts should always be the determination of the right balance between the respect for cultural diversity on the one hand and the protection of crucial democratic values on the other hand. As far as cultural conflicts are concerned, the road to common standards is still very long.

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Harald Christian Scheu is associate professor at the Department of European Law at the Faculty of Law of Charles University in Prague. He specializes in international and European human rights law and European constitutional law.

E-mail: scheu@post.cz

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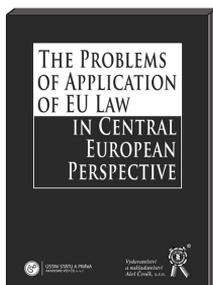
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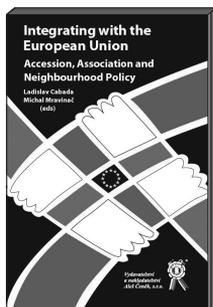
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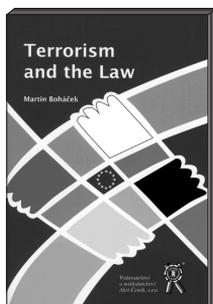
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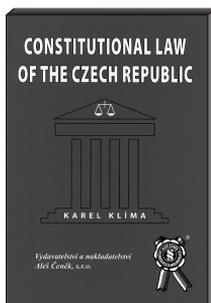


Terrorism and the law
Martin Boháček (ed.)

Terrorism is a very important topic for politicians, lawyers, criminologists, and economists at the present time, but also for common people. It is one of the most serious felonies. The University of Public Administration and International Relations, Prague (VŠVSMV) can offer various fields and specialisations which can tract view problems of terror from various perspectives. Therefore, it held an international conference entitled "Terrorism and the Law" in the English language on March 11, 2006, a rather symbolic date, and its Proceedings can help the reader to find answers to some hot questions in interdisciplinary research.

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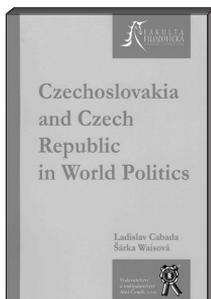




Constitutional Law of the Czech Republic
Karel Klíma

The General Part of the textbook deals with the general theory of the Constitution, primarily with the theory of constitutional law, modern constitutionality, and the form and content of the constitution. In addition, it elaborates upon the constitutionality of the European Union and the Council of Europe. The Particular Part addresses the Czech Constitution, its development and structure, and its relationship with international law and the European Union. It focuses on substantive and procedural constitutional law (elections, functioning of Parliament and the workings of the Constitutional Court of the Czech Republic).

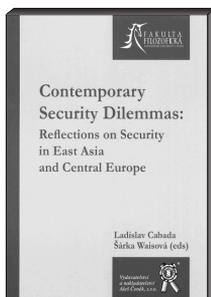
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Czechoslovakia and Czech Republic in World Politics
Ladislav Cabada, Šárka Waisová

The goal of the book is to help to understand the evolution of Central Europe and the role and position of Czech Republic in world politics. This book devotes a significant amount of space to the historical development of Czech and Czechoslovak politics and of Central European region. We believe that in order to understand the functioning and future development of (Central) Europe, a basic understanding of its societal, economic and political processes is an imperative. The book can offer the general information about the past political, societal, economic and historical processes in Czech Republic and Central Europe, and can open the space for future, deeper interest about the issue.

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Ladislav Cabada, Šárka Waisová (eds)

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