RELIGION AND THE RULE OF LAW: RELIGIOUS FREEDOM AS A FUNDAMENTAL ELEMENT TO GUARANTEE EQUALITY

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This article deals with the different perspectives on the separation between religion and State in the Western and Islamic worlds. A discussion of pluralism and Religious Freedom is made. The author also tackles the incompatibility between the "Theocratic State" and constitutionalism, and the "method of relationship" between dominant values. Andò makes reference to the relationship between Islam and the territory, and the political unity of the Islamic world. Points are made with regards to freedom of religion in Israel, freedom of religion as positive freedom, freedom of religious confessions, and the defence of religious minorities seen as a defence of ethnic identity. The author also deals with the problem of how to protect religious minorities, the freedom of religion as a negative freedom, the freedom of religion and freedom of conscience, and the freedom to change religious faith. Claims regarding identity (also with a religious background) and their tolerability are also discussed. Andò makes reference to the different values of constitutionalism under Christianity and Islam, and to freedom of religion and the Afghanistan lesson. The author ends the article with a discussion of the possible evolution of Islam towards a more "open" model of society.

1. Introduction[1]

After the fall of the Berlin wall and the collapse of the Soviet Empire, the West saw the development of a debate on the end of

[1] This text is a re-elaboration of a lecture delivered on the occasion of the Conference on "Religious freedom, democratic process and international warranties of Human Rights" which was held at Ischia (Naples) on the initiative of the University of Malta in December, 2001. A summary of the lectures given in this Conference was also published in the *"Rassegna Parlamentare"*, Rome, 2002.

bipolarism and on possible new global conflicts[2]. Amongst the various hypotheses, that of religious conflict pitting Christianity against Islam, found great support. It was being held that the post Cold-war world would no longer compare political and military blocs and view them in competition, but rather it would bring about a conflict between civilisations which would create widespread political instability and very high human costs. The "new wars", which are no longer regulated by the principles and mechanisms of international law, involve, in this context, massive violations of human rights. The facts seem to tally with this point of view. The years following 1989 did not see a new world order take shape but have, nevertheless, seen the spread of a great disorder produced from religious conflict. Ethnic cleansing, the massive exodus produced from civil wars and humanitarian emergencies, the terrorist attacks and above all, in the latter instance, the 11th September attacks on the US, have shown that organised violence has therefore escaped from the control of States and of the international community.

However, even if, as Mary Kaldor states, wars are becoming "private", as regards their form, they are not "private" with regards to their effects since, these are not merely limited to the military parties at war. The new wars, therefore, involve huge humanitarian losses. They strike the civil population. Traditional war had only military targets. Above all, war was a conflict between opposing armies. New wars, on the other hand, are aimed at instilling panic in the civilian population, to induce them to abandon the territory on which they live. These are wars which tend to create a monoethnic State, and which therefore tend to cancel every situation of multiculturalism. This has represented, for instance, a fundamental characteristic of many communist satellite States of the Soviet Union, and also of the Soviet Union itself. A paradigmatic situation in this sense is that produced in the Balkans: so much so that reference is being made to "balkanisation" to define the phenomenon which leads

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[2] *Vide* in this regard Fukuyama (*La fine della storia*, Milano, 1992; *La vocazione sociale del liberalismo*, Ideazione, January-February 2000) and Huntington (*Lo scontro delle civiltà*, Milan, 2000) which rebuts many of Fukuyama's contentions; *vide* Kaplan, *The Coming Anarchy*, "Atlantic Monthly", February 1994, vol 273, n°2, p.44; Lewis, *The Roots of Muslim Rage*, "Atlantic Monthly, September 1949, p.24; AA.VV., *La guerra del terrore*, "Quaderni speciali di Limes", settembre 2001.

to the destruction of multiethnic States and to the multiplication of minorities which are all willing to be recognised as sovereign States[3].

It has been said that religion plays an important part in these "new wars". This appears to be indubitable. However, it is not evident if religion were only a pretext or if it were the real reason for war. However, even if war did not have religion as its target, that is, the persecution of the infidels, wherever they may be found, there is no doubt that religion plays an important role in the claims to identity which have characterised the post-1989 conflicts. Therefore, after more than two and a half centuries from the Treaty of Westphalia, does religion return to being at the centre of geo-political conflicts?

Historians, in future, will have to determine whether we are on the brink of an escalation in religious conflict, in the traditional sense of the term, and hence of a conflict based on the incompatibilities of various visions of man, God and society or perhaps whether what we have before us is a radical change in the traditional relation of religion, politics and society, and also between the public and the private domain. All this may be the inevitable consequence of the process of, not only economic but also cultural, globalisation. It is not our aim to deal with the consequences of the process of

[3] It is important to note that Kaplan's famous article about the inevitable international anarchy (*The Coming Anarchy,* cit.) had been preceded by a reportage on the war in ex-Jugoslavia (*Lo Spettro dei Balcani* (1993), Milano, 2000), where the genesis of the ethnic conflict was described. It is also important to remember, however, with regard to this latter book, Kaplan did not really give any weight to the enthusiastic approval of the then President Clinton, since he attributed them to Clinton's intention to utilise the crude description of the massacres in the Balkans as an argument against a direct commitment in the USA in the area (*vide* Franzinetti's review on "L'Indice", n.6, 2000). On the Balkan war, there is already ample bibliography. With regards to the concept of "balkanisation", apart from Kaplan's works, it is also advisable to consult the following: AA.VV., *Delle guerre civili*, Rome, 1993; AA.VV., *L'Ultima crociata? Ragioni e torti di una guerra giusta*, Rome, 1999; "Dossier Balcani", in *Limes*, 1, 2001; Jonigro, *L'esplosione delle nazioni. Il caso jugoslavo*, Milan, 1992; Libal, *Das Ende Jugoslawiens. Selbstzerstoring, Krieg und Ohnmacht der Welt*, Wien, 1993; "Il richiamo dei Balcani", in *Limes*, n.3, 1995; Martelli, *La guerra di Bosnia. Violenza dei miti*, Bologna, 1997; Dowen, *Balkan Odissey*, London, 1996; Perez-Reverte, *Territorio comanche*, Aguillar, Altea, Taurus, Alfagura (1998); Brancati, *La Bosnia dentro*, Roma, 1996; Riva-Ventura, *Jugoslavia. Il nuovo Medioevo*, Milano, 1992; *La guerra dei dieci anni*, edited by Marzo Magno, Milano, 2001.

globalisation on the cultural identity of the various peoples. Our aim is to tackle the problems of freedom of religion, within the ambits in of a globalised world[4].

In the same way, it is not of much use to ask why in such a short period of time after the triumph of the liberal democracies, there developed such a clash between different faiths and civilisations. There are several causes for this disorder. One such cause is that after the collapse of communism, the conflict between the different religions has substituted the conflict between various political ideologies. This mobilisation towards a Holy War among many Islamic populations risks to become highly contagious. Many Islamic political leaders explain Holy War as being a war which gives back to Islam the honour which had been lost with the demise of the Ottoman Empire (as Bin Laden said after the terrorist attacks). From this point of view, such leaders are enemies of the Western world, in the same way that they are enemies of the Arab governments which want to collaborate with the West. In this sense, the Holy War becomes the condition which guarantees the unity to the Islamic people.

One thing is sure: the fact that the bipolar order which reigned until 1989, had frozen the world, and hence left everything more or less in the same way it was in the Yalta negotiations. The Cold War order has in other words guaranteed unity within the blocs and the balance of power in such as a way as to ward off the third world war and many local conflicts, but it could not warrant the real development of democratic cohabitation in states where there was no freedom or development, or, as has always happened, there was neither the one nor the other.

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[4] The matter is amply dealt with by Kurtz, in *Gods in Global Village. The world's Religious Perspective*, Thousand Oaks, 1995 (Italian translation: *Le religioni nell'età della globalizzazione*, Bologna, 2000); for the religious conflicts as "new wars" *vide* Ivergensmeyer, *The New Cold War: Religious Nationalisme confronts the States*, Berkeley, 1993. *Vide* moreover, on the cultural changes after the cold war, Griswald, *Cultures and Societies in Changing World*, Thousand Oaks, 1994; and on the changes in the legal regimes *vide* Held *et al.*, *Global Transformations*, Oxford, 1999; Ferrarese, *Le istituzioni della globalizzazione*, Bologna, 2000; Jayasuriya, *Globalization, Law and the Transformation of Sovereignty: the Emergence of Global Regulatory Governance*, in "Indiana Journal of Global Studies", vol.6, 1999.

2. The Separation between the State and Religion; the different perspectives of the Western and Islamic worlds

In an international scenario characterised by disorder and the explosion of fundamentalisms, which tend to render irreversible the conflict between the West and Islam, the question of the secular character of the State becomes relevant again. The secular character of the state is being here understood as the neutrality of the State with regards to religious convictions. This neutrality has been the condition which was necessary to achieve a State, which is constitutionally based on the rule of law, on the division of powers and the protection of rights. The fact that the State does not declare a particular religion as a State religion, whilst not discriminating against followers of another faith, constitutes a decisive factor guaranteeing the equality between the citizens. There is real religious freedom whenever religious faith is guaranteed within the limits of the laws of the State: therefore, when a *par condicio* between the different religious beliefs is guaranteed. There is, therefore, a precise relationship between the secular character of the State and the principle of equality[5].

The events which occurred after the collapse of communism indicate that with the end of the political, ideological and military allegiances, capable of unifying peoples which are divided on everything – from religion, cultural traditions, to language – the world has become more violent, also as a consequence of the extension of local conflicts. The violation of human rights, in the nineties, has appeared not as the way of victoriously conducting a war, but as the aim of war. Religious rifts have frequently been at the basis of civil war. Pondering the relationship between religion and human rights, would mean, therefore, realising the existence of a conflict – between religion and rights – which is ancient, and in many regions is still unresolved, because religion and fundamental rights both refer to man and his relationship with the world, and prescribe duties, such as the moral and material growth of the individual, which could be in conflict between themselves[6].

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[5] *Vide* Mortati, *Istituzioni di diritto pubblico*, Volume II, Padova, 1976, p.1516.

[6] *Vide* Perry, *The Idea of Human Rights*, New York, 1998, p. 13.

It would therefore be an error to face directly or indirectly the problems related to religious freedom, with a unilateral attitude. It would not be useful, from this point of view, to only concentrate our attention on theocratic regimes or anyway on those states where there has been the creation of the so-called "Religious State". The problem of the freedom of worship is being posed also in developed societies, that is, societies of solid democratic traditions, which are increasingly facing the problems of multiculturalism on the basis of ethnicity. Therefore, the freedom of worship becomes again a problem in a world of interdependence and integration, for a number of reasons: for the reflex effects that the existence of religious States (above all in Islamic States) is having on the system of relationships between the States and also for the problems which the multiplicity of fundamentalist movements create for peace and international security.

Therefore, the problem of the relationship between Islam and the State is being posed in specific terms with regards to the general problem of the relationship between the State and religion. Since from the Islamic point of view, the supremacy of religion over the State is the condition to realise the political unity of Islam.

The problem of religious freedom, however, is a problem which is also being faced by the West, which has affirmed a kind of regulation of the relationship between state and Church based on secularisation. The advent of multiethnic societies poses new problems of compatibility between religion and cultures. The traditional principles of the secular state, even in its most open expression, are not enough, for example, to respond to the claims for social welfare, which are coming from new minorities. We are being faced with a religious multiculturalism which is different to that to which we were accustomed in Europe. The West is facing new minorities which are demanding to be recognised as having a collective identity, starting from respect to their religion to refusing the dominant cultural models of the societies in which they are living. They also refuse the advantages which would be offered by an immediate social integration. The State's decisions, with regards to religious conflicts become even more difficult, if societies express strong tensions between ethnic groups, especially if these minorities want to affirm their own cultural particularity. Neutrality vis-à-vis religion, on which the lay state has prided itself, is not sufficient. Cultural

relativism is not able to adequately protect the common good. The mere separation between the State and the Church is not enough to bring into being an acceptable integration amongst many, perhaps too many, diversities.[7]

3. Pluralism and Religious Freedom

State support to activities inspired by religious beliefs, which the State guarantees, does not represent, therefore, a form of undue intervention in religious affairs. Such support is sometimes inevitable, and this is true above all in the cases of the poorest religions. In other words, religion may represent a factor of social integration in multiethnic societies. Also the action carried out by the State in aid of religious beliefs may contribute to the solution of many social problems. The collaboration between public powers and religion enables a better functioning of some public services, and also the ease of access to such services on the part of members of minority religions which would otherwise be hostile towards the state. Frequently, for an immigrant, the State is identified with the public apparata and the political convictions prevalent among the ruling classes.

The relationships between the State and religion have been the object of secular disputes which relate to the question of the juridical regime which would be the best to warrant, on the one hand, the freedom of worship, and on the other, the sovereignty of the State, that is, its supremacy with regards to every particular religious organisation.[8] The process of emancipation of religion from the domain of the monarch, runs parallel to the process of founding the modern State which constitutes the overcoming of the absolutist patrimonial monarchy which extended its dominion to every aspect of social life. All that which fell within the territory controlled by the

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[7] On the crisis of the new concept of tolerance, particularly "modern and post-modern tolerance", *vide* Walzer, *On Toleration*, New Haven and London, 1997, (Italian translation *Sulla tolleranza* [1997], Roma-Bari, pp. 124 e ss). *Vide* also Jordan, *The development of Religous Toleration in England*, 4 vol., Cambridge, 1932-1940; Hayd (edit.), *Toleration: An Elusive Virtue*, Princeton (N.J.), 1996.

[8] On this point, *vide* Ceccanti, *Una libertà comparata. Libertà religiosa, fondamentalismi e società multietniche*, Bologna, 2001.

sovereign was subject to his dominion, and hence, also the religion (*"eius regio, eius religio"*). Even religion belonged to the monarch.[9] That model of the State has now been surpassed and this took place through the great revolutions of the bourgeoisie. However, the end of the *ancien regime,* whilst involving a gradual redistribution of power through the affirmation of new social classes, also produces an accelerated process of the recognition of civil rights. The freedom of religion in this context is presented as an essential component of liberty of conscience, which does not tolerate limitations and which may not accept interference on the part of religion in the organisation of social and political life.

Various criteria of classification have been utilised to define the systems of relationships between the State and religions achieved in various countries, in different periods. With reference to the experience gained in our times, that is after the end of the Second World War, it may be affirmed that the a great number of States are refusing the "extreme" models of regulation of the relationship between the Church and the State based on either the fusion of Church and State (the Religious State) or on the antagonism between the two. Such antagonism may even lead to the absolute denial of the freedom of religion and to the persecution of the believers. In today's world, State and religion, particularly in the Western world, tend to be autonomous and independent. The attitude of the State when faced with religion, however, may sway from total indifference to very intense forms of co-operation, whereever there is a dominant religion. The State may allow a religion to freely organise itself without demanding public resources or else it may sustain in various ways a religious practice valuing positively the fact that its own citizens have religious convictions and express them by organising themselves towards this end.

If the various forms of this collaboration which may be more or less intense between the State and the Church are taken into consideration, it can be said that the real difference in a matter of religious freedom, is constituted through the various ways through which religious freedom, is, in some way, disciplined by the State. In

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[9] Hardt-Negri, *Empire*, Harward,2000 (Italian Translation, *Impero,* Milano, 2001) p.100.

particular, in a matter of religious belief, it is important to establish the parameters of the freedom of organisation which every religion enjoys. This freedom of organisation may be similar for all needs or it may be different, regard being had to the social relevance of one particular religion, but not to such an extent that it would involve a discriminatory approach against any particular religion or bring about difficulties which may render difficult the practice of a particular religion. There could be religious minorities which enjoy a less favourable status with regard to the larger religions, but this situation need not necessarily be to the extent of prejudicing freedom of religion.

Since the position of neutrality of the State with regard to religion represents an essential element of the modern Constitutional State, this condition must not be subject to any derogations if we are to warrant the "freedom of conscience". It is thus evident that the ideological pluralism must not only be immediately accepted as an inevitable *de facto* situation, but has to be recognised at law. The Constitutional rule of law, in fact, whilst recognising ideological pluralism, not only guarantees to all citizens, full freedom of religion, but remains in an equidistant position with respect to every particular ideological conviction or vision of the world. That is, it refrains from identifying itself with a particular ideology so that each individual feels free to look for his own truth either individually or in groups and also to spread it so a large consensus is formed in favour of his truth.

Thus pluralism, obviously not only ideological pluralism, is the defender of equality[10]. If ideological pluralism is an indispensable element of the Constitutional State, therefore it has to be acknowledged that, for religion to be free, it requires the rule of law. Therefore, it needs the freedom to decide on its own the methods of organisation, which would be most consonant with the spiritual dimension of the human being. From this fact, there ensue two consequences: on the one hand, if every vision of the world had to be recognised by the State as legitimate, no religion could be utilised

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[10] Haberle, *I diritti fondamentali nella società pluralista e la Costituzione del pluralismo,* in Luciani (*ed.it.*), *La democrazia alla fine del secolo*, Roma-Bari, 1994, p.95.

by the State to oppress the other; on the other hand, religious extremism constitutes one of the most powerful enemies of a pluralist society, because where religious extremists are in power, there may be no rule of law.

4. Incompatibility between the "Religious State" and constitutionalism. The "method of relationship" between dominant values

Religious totalitarianism, therefore, to the extent that it denies cultural pluralism, inevitably denies political pluralism. Religious totalitarianism, leads to political totalitarianism. This means that religious freedom should be guaranteed in the context of fundamental rights, and hence be subject to those limits necessary for the exercise of these rights.

This problem of how to concretely realise religious freedom, in the context of other human rights, is being faced both in multicultural societies which have to deal with intolerant religions, and in societies which are culturally unified and in which there is one dominant religion.

As I have already stated, the acceptance of supremacy of one's religion is not so obvious in the countries where there are no significant religious minorities. Undoubtedly, many citizens originating from Islamic States, in which there was no significant form of organised religious dissent, have escaped to the West also to escape the dictatorship of the reigning religion in their countries.

In a recent book, which has been quite famous in Italy, the President of Iran, Kathami[11], an innovator who believes in social and constitutional reforms, has explained that the Religious State and democracy, are not incompatible. He holds that Iran and the new Constitution approved in 1994 and 1995 have incorporated the basic principles of the Western concept of democracy, in that the Constitution attributes to the people the decision on the nature of the State and consents electoral competition between political parties, and allows also access to Parliament to the parties which represent

[11] Kathami, *Religione, libertà e democrazia*, Roma-Bari, 1999.

non-Muslim minorities. Even the establishment of one religious State, therefore, if decided by the people – according to Kathami – may be compatible with democracy understood as a possibility of the people to choose the government which it prefers.

However, the situation is different if democracy is understood as a process in which the liberties of the minorities and the majorities are both equally protected. The fact that the people may decide whether and how religion may interfere in politics – and it is here that Kathami's reasoning shows its limits – it does not mean that the people, or the majority of the people, may legitimately set out the religious rights of the minority which does not identify itself with the State religion, and hence in the supremacy of religion on politics[12].

The freedom of religion, like the other fundamental freedoms, is such only if it is not subject to the discretion of the majority which tends to decide for all. The reference which Kathami makes to the model of Western democracy as a model which is followed in Iran, is true if it refers to the mechanisms of the constitutional organs. It would, however, appear to be totally unfounded, with regards to the relationship "between authority and liberty", which is the basis of a concrete guarantee of the exercise of fundamental rights. In other words, the values lying at the basis of the laity of the State, that is, of the refusal of the State to sustain a particular religion with the aim of warranting the equality between believers and non-believers, and the freedom of worship understood as the freedom to form one's own conscience and to express it even through one's religious faith, are not subject to the discretion of any majority. This is a problem which is at the centre of discussion even in the West.

It is a matter of understanding the ultimate ends of democracy with particular reference to the value of "substantial democracy"[13]. Therefore, the problem is not one of realising a democratic result which anyway responds to the sentiments of the majority, but on how to realise such a result with regards to the forms and ways through which to realise democracy in a pluralistic society. The idea

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[12] *Vide* Mayer, *Islamic Law and Human Rights: Comundrums and Equivocations*, in Gustafson and Juviler (Editors), *Religion and Human Rights: Competing Claims?*, Armonk, 1999, p. 190.

[13] *Vide* on this point Ferrajoli, I diritti umani, cit., pp. 285 ff..

of realising democracy by collecting a wide and unanimous consensus favouring a leader and his political thought contrasts with a real culture of rights. This presupposes the exercise of the rights of the majority in a constant respect of the rule of law. The dictatorship of the majority would not be less hateful than that by a single person. Having considered all this, it would therefore be a matter of establishing how to promote democracy and especially, who has to distribute the resources in order to guarantee rights. In other words, in whose hands is social transformation to be trusted? "Substantial democracy" is the democracy which is after the ends and not the means used. The peril of the method is that small *elites* which have in their hands great political power and financial resources, may decide at their discretion how to distribute the power between the members of a community without accepting any social control, and frequently without accepting political dissent.[14]

There are two ways of confronting the crisis of democracy on the international level: one is that of creating a global governance. The other would be that of extending the rule of law in those States where there has been formed a concept of democracy based on the power pursued and obtained by a restricted oligarchy. It is therefore, necessary to accustom public opinion, to a culture or practice of democracy, which takes into consideration not only the final result of politics but also the manner in which such result would have been obtained. Popular will has to be realised not in any way, but in the way provided for in the laws. Therefore, nowadays, the most arduous task of democracy is that of protecting the individuals particularly against the *elites* which govern them by providing effective systems which limit their power. Such systems would be directly accessible by the largest possible number of citizens and social groups.[15]

To guarantee the rule of law, to create a well-ordered State based on the respect of the rights, it is not sufficient to give a voice to the people if there are no rules that limit the political power, and

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[14] *Vide* Dahrendorf, *Dopo la democrazia, Interview* edit. Polito, Roma-Bari, 2001, p.9.

[15] The two positions have been respectively represented by Held (*Models of Democracy*, Cambridge, 1996) and by Dahrendorf (*Dopo la democrazia ibid.,*). *Vide* also, on this point, Sbailò, *Tra Jihad e Mc World*, Conference held at Catania 20th October 2000, and published in appendix to Cicchitto, *Il G8 di Genova. Mistificazione / demistificazione*, Bergamo, 2002.

if the supremacy of the rule of law is not guaranteed and the fundamental rights are not protected against all the forms of abuse of power.

To achieve this objective, the State must be neutral when faced with a religious and political ideology and, hence, must guarantee cultural pluralism. This does not exclude the fact that it deals with values amply shared by society which belong to one or more religions. Therefore, the State has to consent to the formation of values which serve the whole society. But this does not mean that the State does not have its own unquestionable moral values. These values normally are those which are shared by the majority of the citizens. The State has to be capable of interpreting its own society in such a way as to guarantee an effective protection to those values which enjoy the highest level of social consensus. The State does not have to impose on society those values which are extraneous to it or which it refuses to adopt. This means that in a pluralist society, the values which the State has to interpret do not refer to a single cultural model[16]. The force of the liberal-democratic State can be identified in the ability of the State to consider that the existence of the various cultural differences is a richness. Thus the number of religious cultures, wherever they exist, must be all guaranteed in the respect of the laws of the State. A religious culture may be of the majority, but this does not mean that it can dictate the conditions to which the other religious cultures have to be subjected. Laity hence needs democracy: but the contrary is not true, because democracy, in some cases, may also accept a position of non-neutrality when faced with religious multiculturality[17]. And in most cases, this is a mistake.

If laity was to be identified in a complex of methodological principles at the basis of which lie the institutional rules, it is clear that it cannot only consist in a series of negative attitudes through which the State refuses to adopt a religion as its own. Laity has a positive value to the extent to which the State favours the learning about and the spread of the various cultures. In this sense, the freedom of religion is the most important of the cultural freedoms[18].

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[16] *Vide* Onida, *Il problema dei valori nello Stato laico*, "Diritto ecclesiastico" 1995, I, pag. 677.

[17] *Vide* Onida, op. cit, p. 679.

[18] *Vide* Häberle, cit., 1994, pp. 93 ff..

From this point of view, the history of the construction in the West of the constitutional rule of law is marked by inevitable choices whichever the cultural environment in which this kind of State has been realised.

The Western model of religious freedom cannot be well analysed if it is not related to the evolution of the State constitutionally based on the rule of law, which, recognises the supremacy of the fundamental rights even with respect to the sovereignty of the State. The warrant of the liberties through the limits of the authority is derived from this acquisition and in this context, there is the development of the protection given to the minorities in general and to religious freedom in particular.

Religious freedom, which is inseparable from freedom of thought and conscience is to be included in the category of the inviolable rights, which has as a unifying element: the concept of the dignity of man[19]. If the freedom of religion is one of the forms of expression of human dignity, every disparity between the religious faiths may involve a differentiation even between individuals. In this sense, the pluralistic democracy in the State constitutionally based on the rule of law constitutes the "organisational consequence" of the dignity of man, which is expressed in the different fundamental rights of the individual. This means that the dignity of man and the form of the State may not be considered separately. If therefore, pluralist democracy is inseparable from the political status of the citizens, the democratic and fundamental freedoms are an undeniable expression of the dignity of man.[20]

5. Religious freedom in the West and in the Islamic States

The juridical regime of religious freedom in the West in the last fifty years, on the basis even of the inclinations prevalent in the international community, has evolved towards a unique model of religious freedom, organised, as has been said, on the basis of the

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[19] *Vide* Barile, *Diritti dell'uomo e libertà fondamentali*, Bologna, 1984, p. 54 ff..

[20] *Vide* Donnelly, *Human Rights and Human Dignity. An Analytic Critique of Non Western Conception of Human Rights* in "Am. Pol. Sc. Rev." 1982, p.303; Barbera (Editor), *I fondamenti filosofici del costituzionalismo*, Roma-Bari, 1997, pp. 61 ff.

principle of religious neutrality of the State. The religion of the State tends to be cancelled from the Constitutions[21] almost everywhere in the West and in Europe it was held to be incompatible with the international protection accorded to the religious freedom of the Strasbourg Court (January 2000)[22].

The Constitutions approved after World War II, recognise in the fundamental rights, the foundation of the new constitutional orders. These Constitutions based their legal order on the unconditional protection of the human being. This objective has been pursued on the international level through a voluminous production of international documents from the Universal Declaration of 1948 to the European convention of 1950, and the international covenants approved by the UN in 1966, and above all that on the civil and political liberties adopted by the General Assembly of the UN in 16/ 12/1966, which protect the human person both on the general level and with dierct reference to the various situations in which this is realised or expressed.

If religious freedom, like the other fundamental rights, is inviolable, and has a universal value, it is still important, however, to ask whether this freedom, as on the other hand, the other fundamental rights, may be interpreted and guaranteed differently in the various regional realities. The problem is to adapt such rights to different geopolitical and cultural contexts. If the rights are univeral, is a relativist approach acceptable? It is important to understand what is the meaning of a universal character. If we refer to the universality of rights, and we consider especially the Universal Declaration of human rights and other documents approved by the UN, there is no doubt that the Western interpretation of the rights

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[21] It is the case of Sweden, one of the four States of the EU which Constitution established the existence of a Church of the State (the other are the UK, Denmark and Finland) whose constitutional law on the form of Government in Art. 9 of the transitory provisions recalled Art. 4 of the Succession Law of 1810, where it was laid down that the King had to profess the religion of the State. With the constitutional revision of 2000, the existence of the Church in Sweden has been omitted.

[22] The Supreme Court of Strasborg has passed judgement on the privilege given to the local ecclesiastical Communities to demand taxes. *Vide* Ceccanti, *Una libertà comparata. Libertà religiosa fondamentalista, società multietnica*, cit., pp. 71 ff.

is the prevailing one. However, this interpretation does not work for all the peoples. It is important not to forget that nowadays, in the General Assembly of the UN, the Western States are a minority with regards to the rest of the world. Things stood differently in the 1950's when the Universal Declaration of Human Rights had been approved by the General Assembly. Many documents approved by the United Nations until the 1970's represent the Western culture. Therefore, we have to interpret these documents in such a way as to render them applicable in all the regions of the world. We have to try to distinguish from within the documents what it essential and what is not essential. There is no doubt that there is a nucleus of the human rights which refers to being human, which deals with man as he is at birth, and therefore is not conditioned by the environmental conditions which frequently render problematic the application of the international documents[23].

This core is nonetheless characterised by the centrality of the human person with respect both to political institutions and to religions. This finds its most profound expression in the Western Constitutional tradition. It is important to query to what extent the

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[23] With reference to the religious freedom, this means that, on the one hand, it needs to know to extract from the international documents the most essential characteristics, and on the other hand, that it needs to know how to proceed to an evolutionary interpretation of the sacred texts. These texts indicate the ideal models of society which have to be adapted to particular cultural contexts. This goes both for the Bible and the Koran which is a mix of Hebrew, Judaism and Christianity. For this to be achieved, the procedures of juridical control on the international or European level are not very useful. It would be much more useful to favour strict dialoge between the various religious beliefs. The NGO's in this sense may have an important role, moving away from the concept that human dignity is not the same in the various civilisations. With reference to the freedom of religion, however, the distances between the various civilisations run the risk of becoming even greater because religion evokes concepts dealing with the destiny of mankind and of the relationship of man with the supernatural world. These differences may produce very serious intolerances and conflicts, which are capable of reducing the spaces of religious freedom. And for such reasons, the mechanisms of protection of religious freedom and of those liberties which to some extent are linked to such liberty, have to be efficiently protected to avoid that the attacks on liberty jeopardise the prospect of broadening the actual borders in the world of rights and democracy. An approach which is excessively relativist to the problems of religious freedom risks to annihalate its inviolable character.

Islamic State may go ahead in recognising this core that is to accept the inspiring philosophy of the Western constitutionalism? Will the introduction in the Islamic Constitutions of models and constitutional organisations of the type recognised in the Western Constitutions lead those societies to the recognition of political and religious pluralism? Obviously, it is not a matter of merely declaring the centrality of the human being in the constitution. It is a matter of identifying in this centrality a series of consequences particularly in the form of inderogable limitations of power – let us consider the separation of powers and the rigidity of the Constitution – which tend to guarantee a strong protection of human rights.

From this point of view, however, the more serious difficulty to impose with respect to human rights in the Islamic territories lies in the particular relationship which subsists between the religious dimension and the political-territorial dimension.

It is important to ask whether Islam may ever accept that at the centre of the universe lies man, rather than Allah, understood as the supreme power.

Whilst the Biblical God is not conceivable without man, in Islam God has nothing in common with man and his historical dimension[24]. Islam fights the world as long as this is not totally subjected to one God. Islam refuses the intrusion of history and politics, or rather, refuses history and politics as autonomous dimensions with respect to the Koranic revelations[25].

The Islamic State may foresee forms of political democracy which are more or less complex. It may prescribe a legitimisation of power through popular investiture (it is a principle accepted in the Arab Charter of Human Rights of 1998). And it might also foresee equality; however, it may not put believers and non-believers on the same scales with reference to the fruition of political liberties, even if it

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[24] Observed the Sheikh Bakri (interviewed by the *Corriere della Sera* of the 9th October 2001) *"Democracy is man who wants to substitute God, who wants to impose the law of men."* He also added that the Muslims' first problem should be that of knowing how to protect the law of God against any law of men; to choose always the sovereignty of God between the sovereignty of men and the sovereignty of God.

[25] *Vide* Baget Bozzo, *Di fronte all'Islam. Il grande conflitto*, Genova, 2001 pp. 45 ff., pp. 51 ff..

does not admit of religious coercion. In fact, even if there is no duty to conversion, Islam denies at the roots any form of religious pluralism in the moment in which it admits that whoever lives in the Islamic political space – where "the word of the Prophet resounds" – has to be subject to the laws of Allah.

For this reason, the principles of separation of powers may not be cultivated within Islamic doctrine, as an "organisational technique" of the State to simplify the processes of decision-making and certainly not to defend the sphere of individual rights. The interpretation of the principle of the separation of powers is strictly tied to the way in which public power is perceived and utilised. In the West, the legitimisation of power comes from the quality of investiture, but also from the quality and the efficiency of the limits to which it is subjected. In Islamic states, power is legitimate only if it is derived from the people, independently from the form in which the people expresses itself, and particularly from the relationship between authority and freedom.

6. The relationship between Islam and territory. The political unity of the Islamic world[26]

However, the relationship between religion and the State in the Islamic religion cannot be understood outside of the relationship between Islam and its territory. The territory of Islam is a territory in which only one God and only one law – the *Shari'a* – reigns. The unity of Islam is based on these elements.

The Islamic nation is tied to the religious experience. The Islamic people are the people who participate in the Koran revelation. This is a situation diametrically opposed to the Western situation, where the national State, in many cases, develops through the antagonism between the Church and the State. The State is created, therefore, when religion is "neutralised".[27] But this is possible after there have

[26] Dupret, Berger, Al – Zwaini, (Editors), *Legal Pluralism in the Arab World*, The Hague, London, Boston 1999.

[27] Reference is being made here to the famous analysis by Schmitt to the processes of "neutralisation".*Vide* Schmitt, *L'epoca delle neutralizzazioni e delle spoliticizzazioni* [1929], in *Le categorie del "politico"*, by Miglio and Schiera, Bologna, 1972, pp. 167-183.

been formed the great national monarchies, which are an antithesis both to the papacy and to the empire (particularly in England and France). The European "peoples" claim their identities in Christian world; they identify themselves as part of Christianity, and they claim their loyalty in favour of the Christian culture. However, this does not prohibit the existence of clear national demarcation lines between different peoples belonging to Christianity.

The parameters within which the nation State develops are therefore already set, in the West, outside the religious field. In Islam, on the other hand, the social identity is concentrated around the *umma,* the Islamic community. The *umma* is not a nation, in the European sense of the word. It is the community which is identified in the Koran revelation. Therefore, there is not the development of a national sentiment independent of a religious one. The exceptions in this regard are few. National identity has developed wherever there has been a glorious imperial pre-Islamic past – Egypt – or where there is an ethnic tradition clearly distinct from the Arab tradition – Turkey and Iran[28]. With the exception of Turkey, even in these cases, the legitimacy of politics is seen only through the *umma.* In fact, neither in Egypt nor in Iran, has there been the formation of a lay nation State in the Western sense of the word.

The conditions necessary to realise the Western type of a secularised state were reached, when these Empires had extended so much, that religious authorities could no longer control political and social systems of such great complexity. This would have had to involve a sharp distinction between the sacred and the temporal dimensions of power, as had already happened in the West. In fact, in the West judgements used to be passed "in the name of God" but their legitimisation was derived from the role which the jurists had in the interpretation of Roman Law (in the case of the continent) or

[28] In Islam, "the religious community is the fundamental unity and includes the various States which have been formed in the course of history"; *vide* J. Vatikiotis, *Islam: Stati senza nazione,* Milan, 1998, pp. 54 ff.; and also Nataloni, *Per un'analisi del concetto di popolo nell'Islam,* Milan, 1988; Massignon, *L'Umma et ses synonymes,* in "Revue des études islamiques",1941-45. With regards to Islamic Law in force in the Islamic States, *vide* Anderson, *Islamic Law in the Modern World,* London, 1959; Schacht, *Islamic Law in Contemporary States,* in "American Journal of Comparative Law", 1959, pp.133 ff..

from Common law (in the case of England)[29]. It is not the reference or otherwise to divinity which makes the difference between a lay State and a religious state but the mechanism with which the juridical norm is developed. In secularised law, such mechanism is rational and highly foreseeable in its function, whilst in the theocratic law, where the principle of authority prevails over the procedural element, that mechanism works in an unforeseeable manner.

Nonetheless, in Islam, the legitimisation of juridical and political decisions has always had a religious matrix. In Islam, the "lay" power emancipates from religious power, in the sense that religious power is incorporated in the lay power as a "dynastic" element. In this context, there prevails, a tribal mechanism. The sultan exercises his authority in the field of the *umma,* which is formally subjected to the Caliph. However, the sultan exercises this authority through inheriting, by way of dynasty, the legitimacy acquired by his predecessors from the religious authority. Certain States, therefore, were born in the Islamic sphere. However, these States did not constitute a nation, in the Western sense of the word. The Western attempt at creating national States to defuse the Islamic danger has failed and it could not not fail. The State, in the Western state of the word, in the hands of the Islamic politician, constitutes only an instrument of personal power, tribal or familiar. The Islamic equivalent of the Western State is the Koran law. This defines the "neutral" sphere of the juridical and administrative decisions.

In the West, on the other hand, the nation State is a political concept which is distinct from the juridical concept of the State. This is the reason why in a Western State, nobody may be accused of political dissent. The relationship between Islam and the territory is born outside the formation of the modern concept of the territorial national State. The latter, as has been known, developed in Europe starting from the end of the War of the Hundred Years (1453). It is a process which is concluded with the peace of Westphalia, in 1648, when, with the "neutralisation" of religion, the State began a process of becoming increasingly secularised. This process has not occurred in Islam, where there has never been a real battle between

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[29] *Vide* Weber, *Sociologia del diritto* [1922], *Economia e Società* III, Milan, 1995, pp 94 ff. and pp.120 ff..

the highest ranks of religious Islamic hierarchy and the political leaders.

To understand this, a reference has to be made to three fundamental concepts of Islam: *dar al-Islam*, *dar al-harb* and *dar al-sulh*. Such concepts revolve around the concept of dwelling (*dar*)[30]. The first indicates the dwelling of Islam, that is, the area which has seen the imposition of the Koran law, and coincides with the area in which there has been Islamic preaching. The message of Mohammed is not spread by apostles but rather through warriors. In *dar al-Islam* all the pagans have to be converted, whilst Jews and Christians (*ahl al-kitab*, the "people of the book", the monotheists) may preserve their own religion, but they have to recognise the supremacy of Islam in the sphere, as could be said in Western terminology, both in public and private law. The second concept, however, deals with the dwelling of "war", which is understood as the inevitable conflict with whoever refuses to acknowledge the supremacy of Allah. The third concept represents the dwelling of "peace". The concept was elaborated after the period of conquests and was use to indicate those nations which had not been conquered, but with whom there had been the establishment of bilateral peaceful relationships.

The territorial element, therefore, was not optional but essential to Islam. The contrast with the West therefore, appears strictly tied to the importance of the territorial element. The Christians and the Jews are however considered as non-believers to fight. These are only accepted if they are in Islamic territory and formally accept Koran Law. But Christianity – understood as a geopolitical field formed in the context of Christian tradition – however, is considered as an adversary. Holy war – *jihad* – becomes anyway a duty for the Muslim. The term *jihad*, in reality, means an effort, or rather, tension, towards the spreading of Islam, but also in the interior tension to try to draw the deepest meaning of the Book, therefore not simply stopping at a conformist superficial reading of the Book. This second meaning of the term jihad which the political leaders have attached

[30] Schacht, *An Introduction to Islamic Law*, Oxford, 1964, cap.18°; Abel, voci "*Dar al-harb*" e "*Dar al-Islam*", in "The Encyclopedia of Islam", new edition, Leiden – London, 1960; D'Emilia, voci "*Dar al-harb*" e "*Dar al-Islam*" in "Novissimo Digesto italiano", vol.V.

to it, has been comprehensibly sacrificed to the other meaning which was and is functional to an expansionistic policy of Islam[31].

At this point, it is important to understand the extent to which the territorial –expansionistic element is essential to Islam and how this is reflected in the relationships between Islamic states and Western states. Special reference will be made to the relationship between Western society and Islamic immigration. On this basis, it is possible to make the following analysis. On the "internal" plane, it is difficult to practice religious tolerance, which does not offer integralism and extremism a direct or indirect support. It deals with an objective risk, and this is due to reasons, as has been held, tied to the complexity of the Islamic world. In Islam, in fact, the "Community", tends to be more important than the individual. Wherever, the larger part of the individuals of a community dissents in the convictions and the behaviours of a member, he remains, anyway a "brother', who has the right to be judged exclusively in an Islamic "territory" – both in the physical and juridical sense. The delivery of a terrorist brother to the authorities of a secularised State is equivalent, from the point of view of Islam, to the acceptance of organised military presence of infidels within the Islamic territory. Therefore it is an act of weakness and betrayal. It is difficult to dialogue on an individualistic level with Muslims. All the arguments tend to boil down to "we/you". But can a Western secularised State persecute a community? It is not enough to say that "complicity" and "silence" are crimes and the "brothers" who help the "brothers who err" are punishable. There are forms of complicity and silence which lie at the end of the extreme limits of legality without trespassing them. These forms are not possible in the West because of our culture of privacy and individual responsibilities. Beyond a certain limit, we cannot go against our culture and our principles, because otherwise our own civil cohabitation would become impossible. In the case of the Islamic Communities it is not possible to protect the "territory".

Evidently, from the "internal" Islam, (from the Islamic Communities which live in the West) comes to the West a request for institutional recognition. In other words, the community forms a

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[31] Castro, *Gihad,* in "Digesto", IV ed., priv., civ., 9-1993.

separate block until it is not completely integrated in the nation, with the full rights of citizenship of its members, and until its own leaders are not recognised as part of the national establishment. At that point, the members of the community which violate the laws of the nation in which they live, automatically break the pact between the community and the State and, are hence, denounced to the community itself. However, up to which point may the national community recognise institutionally an Islamic community without jeopardising its own interest and its own identity?

Is it conceivable that in certain zones, the consumption of alcohol is prohibited, or the women are forced (even non-Islamic women: and in the last analysis, the Muslim wants the respect of his own law more than the conversion) to dress in a certain way? And, on the other hand, up to which point may the Islamic community accept integration, without jeopardising the spiritual foundations of its own existence? Of course, today the problem does not seem to be an issue: Muslim women travel on our same buses with their head covered and does not even dream of telling the other to do the same. But this happens, because the Muslim lives in a status of double affiliations.

The situation is comparable on the "external" plane. The Islamic nations live in a condition of double affiliation: to the international community and to Islam. A convention at international law cannot be so strong as to prohibit an Islamic nation to go against the "national" Islamic law, or rather, against the Koranic principles or against the duties of solidarity with regard to the Muslims. It may be also said that even the Western countries lead a double – or sometimes triple or quadruple – affiliations: to the international community, the regional communities, and the bilateral pacts. In reality, all the various "affiliations" of the Western nations are formed within in the framework of a unique international law and in the ambit of the recognition of the supremacy of human rights over any positive norm. However, the same cannot be said for Islam.

The affiliation of Islam is most important to the recognition of natural rights and to the respect of international law. Even in this sphere, there is the demand for acknowledgement of collective identity. This demand is complicated by the fact that Islam has absorbed and re-elaborated within itself the model of the nation-State, by utilising it also as an instrument for the resolution of the ethnic-religious conflicts developed within itself (reference is being made to the Iran-Iraq war, which may be seen also as a gigantic

conflict between Shi'ites and Sunnis). Even here, to which point may the reciprocal recognition between Islam and the West be furthered? If in the field of the Islamic civilisation there were a State-guide, all would be simple. But there do not seem to be the conditions for the birth of such a State.

7. Freedom of religion in Israel

The concept of territory in Islam considered so far and the relationship between territory and Islamic nationhood, which is central in Islamic culture, leads us to measure the distance between Israel and the Arab world as regards this matter. The conflict between these two worlds has obviously not arisen just because of a dispute over land (Palestine), but because of a different idea of nationhood, which makes the coexistence of two such culturally different nationalities in the same territory incompatible[32].

The Israeli state model is nearer to that of the West, because there is a national unit considered the premise for a state. The Jewish people constituted a nation before they became a state – a widespread nation. As such they were represented in the political language of the eighteenth and nineteenth centuries, when a solution to the Jewish problem was still in the distant future. In this sense – in the nineteenth century sense – it is possible to speak of a Jewish nationalism, which, as is normal in the West, has produced juridical ethnocentric phenomena. The nation has its own cultural dignity and foundation regardless of the religious element. Moses is a national hero as well as a prophet. On the other hand, there are

[32] Notwithstanding the fact that Islam and Orthodox Judaism share an element that, in a certain sense, makes freedom of religion not very dynamic. This is the idea of the "incarnation of the sacred word", and its indisputable nature (cf. besides, pp. 31-32), with which is connected "the acceptance of the Book as the great universal code for the moulding not only of relationships of cult and belief, but all forms of political and social life" (Pace, *Il regime della verità, il fondamentalismo religioso contemporaneo*, Bologna, 1990, pp.16 ff.). This position of Orthodox Judaism in Israel has gradually been tempered over the years. On this point cf. Pirronello, *Sistemi giuridici comparati*, Milano, 1998, p.344 and for a wide view of the topic, Ceccanti, *Una libertà comparata*, cit., p.15, and the bibliography cited.

orthodox Jewish groups opposed to the creation of the State of Israel[33]. The internal political conflict in Israel, which ethnic and religious differences play no small part in fuelling, has affected the way the laws of the State of Israel are expressed[34].

While as regards Islam, there is a multiplicity of States, none of which corresponds with a national unit, but whose legitimacy depends on the essential territorial dimension of the *umma,* in the Jewish experience there is only one national state, with which the Jewish world identifies, without considering the territorial element, in the sense that since 1948 Jews have tended to feel they are "Israelis" even if they have a different citizenship[35].

The case of Israel, therefore, is emblematic of religious freedom. The very concept of a Jewish State, in fact, has always been extremely secular within the Zionist movement. Yet, this does not prevent the Jewish State from finding the elements of its identity in biblical history. This has led to a situation that is in some ways paradoxical. In accordance with the wishes of its founders, in particular Ben Gurion, Israel does not have a written Constitution[36]. It was thought

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[33] Cf. on these problems: Balbi, *Hatikvà. Il ritorno degli ebrei nella terra promessa,* Bari, 1983; Moscato, Tàut, Warshawski, *Sionismo e questione ebraica,* Roma, 1983; Stein, *The Balfour declaration,* London, 1983; Vidal-Naquet, *Trial and error: the autobiography of Chaim Weiwann, Harper and brothers,* New York, 1949.

[34] Cf. Catane, *Qui est juif? Le jugement de janvier 1970 de la Cour Suprème d'Israel,* Paris, 1990.

[35] As regards political life in Israel, for a general picture, cf. Rulli, *Lo Stato di Israele,* Bologna, 1998, who gives a very precise report, in particular of the tensions preceding the assassination of Rabin; Klein, *Israele. Lo Stato degli Ebrei,* Firenze, 2000. Cf. for various aspects of the Israeli social system Benjamin, *The role of parties in Israeli democracy,* Gainesville, Florida, 1955; Arazi, *Le système électoral israélien,* Genève, 1963; Arian, *Ideological change in Israel,* Cleveland, 1968; Klein, *Le système politique d'Israel,* Parigi, 19813; Arian, *Politics in Israel: the second generation,* Chatam (N.J.), 1985; Asher, Shamir (ed.), *The elections in Israel: a critical account of its Parliament executive, and judiciary,* New York, 1963; Dror, *Nine main characteristics of governmental administration in Israel,* School of Economic and Social Sciences, Jerusalem, 1965; Dror, Gutmann (eds.), *The Government of Israel,* School of Economic and Social Sciences, Jerusalem, 1964.

[36] On the Israeli institutional system, cf. Akzin, *The role of parties in Israeli democracy,* Gainesville, Florida, 1955; Arazi, *Le système électoral israélien,* cit.; Arian, *Ideological change in Israel,* cit.; Id., *Politics in Israel,* cit.; Id., *National security and public opinion in Israel,* Boulder (Colo.), 1988; Asher-Arian-Shanir, Michai (eds.), *The elections in Israel,* cit.; Badi, *The government of the State of*

by some[37] that this would produce a legislative hybrid, because while questions of a family nature have remained within the competence of the religious authorities (marriage etc.) in that they are questions of "personal status" not subject to territorial legislation, in the field of civil rights the role of the jurisprudence of the High Court of Justice was fundamental, and here rulings may not be in agreement with the opinions of the most intransigent religious groups – for example, it has permitted some shops to stay open on Saturdays.

From this point of view, however, the situation concerning human rights in Islamic religious states is not comparable with that existing in Israel, which is a secular state that has created an efficient system to protect human rights and above all is the only democratic State in the region (and it is hoped that the conclusion of the Palestinian-Israeli conflict will produce a real Palestinian State organised on the basis of equally democratic institutions). There are certainly grey areas as regards the equality of the sexes in the field of religious freedom[38]. There still appear to be fundamental problems in this

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Israel: a critical account of its parliament, executive, and judiciary, New York, 1963; Birnbaum, *The politics of compromise: state and religion in Israel*, cit.; Friedmann, *Fin du peuple juif?*, Paris, 1965; Kanaana, *Socio-cultural and psychological adjustment of the Arab minority in Israel*, San Francisco, 1976; Schartz, *The Arabs in Israel*, Ann Arbor, 1980; Dror, *Nine main characteristics...*, cit.; Dror-Gutmann, *The government of Israel...*, cit.; Garribba, *Lo Stato di Israele*, Roma, 1988; Isaac, *Israel divided, ideological politics in the Jewish State*, Baltimore-London, 1976.

Klein, *Le caractère juif de l'Etat d'Israel: étude juridique*, Paris, 1977; Id. *Le système politique d'Israel*, cit.; Id. *Le droit istraélien*, Paris, 1990; Id., *Israel: deux fois vingt ans*, Paris, 1990; Merhav, *Storia del movimento operaio di Israele*, Firenze, 1974; Shabtai, *The constitutional and legal system of Israel*, New York, 1957.

[37] *Vide* Goldkorn, *Israele minacciata dagli integralisti*, "L'Espresso", 13.12.2000.

[38] For a historical background of the Jewish State, starting with Zionism, cf. Balbi, *Hatikvà. Il ritorno degli ebrei nella terra promessa*, cit.; Tsur, *Il Sionismo*, Milano, 1977; Segre, *Israele e il sionismo*, Milano, 1980; Barnavi, *Une histoire moderne d'Israel*, Parigi, 1988; Garribba, *Lo Stato di Israele*, cit.; Livinoff, *Lunga strada per Gerusalemme*, Milano, 1968; Eban, *Storia del popolo ebraico*, Milano, 1971. On the national problem and the question of minorities, cf. Catane, *Qui est juif? Le jugement de janvier 1970 de la Cour suprème d'Israel*, cit.; Scharz, *The Arabs in Israel*, cit.; Friedmann, *Fin du peuple juif?*, cit.; Kanaana, *Socio-cultural and psychological adjustment of the Arab minority in Israel*, cit.; Id., *Speak, bird, speak again: Palestinian Arab folktales*, Berkeley, 1989.

field regarding women's rights. The 1948 Declaration of Independence expressly confirms an undertaking to guarantee equal social and political rights to all citizens, without distinction, including distinction of sex. In effect, women have an important role in Israeli society, also from a military point of view (the 1986 law regarding military service provides for obligatory service for women, with opportune provisions as regards maternity). However, there is still serious discrimination against women, which, from this point of view, makes the Jewish tradition homogeneous with the other two monotheistic religions considered, Christianity and Islamism, which place women in a subordinate position to that of men. Even if in Jewish culture particular weight is given to the maternal figure and everything favouring procreation (however, in the State of Israel, abortion is permitted according to articles 312-321 of the 1977 penal code: authorization from a Commission composed of three people, at least one of which must be a woman, is required). The fact remains, however, that women are not recognised as having full formal rights to bear witness in religious courts, courts that are an integral part of the state juridical system. An important step forward was taken in 1951 when a law on equal rights for women forbidding any form of discrimination was passed.

Israel is ahead as regards legislation concerning rape, as early as 1993 the High Court revised the relevant jurisprudence, defining rape a crime against "human dignity", to be punished according to article 345 P.C. 197. Moreover, the legislators intervened in 1980 (reform of 1952 citizenship law) to rectify serious discrimination against women arising from religious precepts and the 1998 Equal Employment Opportunities and the 1996 Equality of Pay Laws, represent steps in the same direction. There are still, however, forms of discrimination, including some regarding religious practices: an emblematic example is the case of "the women at the wall", which began in 1988 and continued for years. A group of women were forbidden to pray at a zone of the western wall reserved for men. It seems to me, however, that recently the legal situation in this field has developed in absolute coherence with the objective of total protection of human rights. Although there is no written Constitution in Israel, besides the High Court, there is another important instrument for the juridical protection of human rights. This is the legal framework defined by two 1994 laws on human dignity and free choice of employment. These texts function as real constitutional

texts in the sense that they are invoked if there is a violation of civil rights[39].

8. Freedom of religion as a positive freedom. Freedom of religious confessions. Defence of religious minorities as defence of ethnic identity

If it is difficult to imagine Islamic communities adhering to the principles of western constitutionalism, it is also necessary to recognise that today also the western concept of freedom of religion is – as has been seen – to a certain extent inadequate as regards the most recent developments in society, characterised by the often turbulent emergence of multiple, often conflicting identities.

The problem of freedom of religion in multiethnic societies is not so much that of permitting the freedom to form a religious conviction – that is of guaranteeing at an individual level freedom of religion – as that of disciplining the collective forms of freedom of religion, in such a way as not to deny or limit it unjustifiably.

The definition of freedom of religion as regards the individual, then, does not constitute a problem because it is a question of permitting every form of faith – whether in God as a supreme being, in a series of divinities, in supernatural powers or in spirits capable of influencing human affairs. Freedom of religion is guaranteed at an individual level as long as the State does not claim that a particular religious faith has a monopoly of the truth.[40]

Freedom of religion thus defined on an individual level – that is, as the individual's search for truth, and his/her consequent freedom of conscience to decide on the acquisition of a particular religious

[39] On Israeli law, cf., for a general background, Waelser, *Israel*, Paris, 1969; Klein, *Le droit israélien*, Parigi, 1990; Schattner, *Histoire de la droite israélienne*, Bruxelles, 1991. On the Constitution and the relationship between secular institutions and religious identity, cf. Shabtai, *The constitutional and legal system of Israel*, New York, 1957; Arian, *Ideological change in Israel*, cit.; Isaac, *Israel divided: ideological politics in Jewish State*, cit.; Birnbaum, *The politics of compromise: State and religion in Israel*, cit..

[40] From this point of view Locke's argumentation has not been surpassed. V. Cortese (ed), *La "lettera sulla tolleranza" di Locke e il problema della tolleranza nella filosofia del seicento*, Torino, 1990; Pareyson, *Introduzione a J. Locke, Due trattati sul governo*, Torino, 1982.

conviction – does not pose particular difficulties. Considered as cultural freedom, clearly it cannot be subject to limits either of an ideological nature or regarding access to the necessary knowledge for spiritual formation, or regarding the individual religious practices by means of which a believer comes into contact with his/her God. Any legislative procedures cannot concern individual conscience.

Freedom of religion is generally limited in its institutional manifestation. Here it is possible that it might come into conflict with other fundamental freedoms. This is a conflict that must be resolved on the basis of those balancing and hierarchical criteria that operate on all the fundamental freedoms and that guarantee their contextual existence, that is their indivisibility. The history of rights is marked by significant interrelationships. The evolution of a particular type of right is conditioned by that of all the others and in turn conditions the others. Changes in one point of the network of rights have repercussions on all the fundamental problems of the laws. When rights as an indivisible whole are spoken of, also with reference to future rights, it is implicit that they are all recorded as a single narrative event[41].

Freedom of religion, in that it inevitably presupposes collective manifestation, would be meaningless – as has already been seen – if it did not include the freedom of religious confessions. It therefore presupposes the protection of religious bodies. Freedom of religious confessions is guaranteed by the State's non-interference in the choice of organising structure by means of which the body carries out its activities, and its neither hindering proselytism and propaganda nor sharing a faith's spiritual values and imposing them on social and political life, thus discriminating between believers and non-believers and compromising equality. All that regards the organisation of collective manifestations of religion is the exclusive competence of the religions themselves, which, however, have to respect the limits imposed by the laws of the State to protect public interests (order and health). The freedom of the religious bodies is also absolute as regards what will be required of believers, with reference not only to individual and collective manifestations of faith, but also of life styles (for example the choice of days for religious activities, of exterior

[41] Viola, *Dalla natura ai diritti. I luoghi dell'etica contemporanea,* Roma-Bari, 1997, pp. 274 ff..

signs of belonging to the religion, of the diet to be followed on certain days of the week or year).

In other terms, the freedom of religious bodies is protected by means of specific limits imposed on the State. These limits are more or less in the same terms as those in art. 8 of the European Convention on Human Rights, in art. 12 of the American Convention, in art. 1 of the Declaration on religious intolerance and in art. 14 of the Convention on the Rights of the Child.

Art. 18 of the Covenant on Civil and Political Rights (hereafter CP Covenant), moreover, with reference to freedom of religion, does not – unlike for the other freedoms – cite "national security" as a possible restriction to this freedom but only "the protection of public safety, order, health or morals", obviously as well as the rights and fundamental freedoms of others. A reading of the preparatory documents reveals that this is not a random difference. Freedom of religion, in effect, expresses values so important for the development of a human being that only the fundamental rights regarding the essential requirements of a human being can limit it (for example physical safety).

General reference to interests of State is not sufficient, therefore, to limit this freedom if such reference does not have a proven bearing on vital interests of human beings as individuals or members of communities in which they realise their personalities (for example, a problem arose regarding the use of head gear in some States for reasons relating to State security). The rights of religious bodies, therefore, are only limited if the protection of other fundamental freedoms is at stake. Obviously the limits regard not only third parties, that is, subjects outside the religious body, but also believers of that religion.

If, in fact, rights constitute a limit to popular sovereignty not permitting the dictatorship of the majority, they cannot but also constitute a limit to social associations, including the religious organisations within which the spiritual development of human beings is realised. If this were not the case it would not be possible to exercise all the fundamental rights constituting a global form of protection for the individual.[42] At this point, what are the limits to

[42] They therefore also operate as limits to the right to the collective identity of minorities protected by the multiethnic State, on the basis of principles of regime. This is the case, for example, of the Italian and German Constitutions, that cannot be modified even by revision of the Constitution.

the freedom of religious confessions in western democratic societies? This question is particularly relevant as regards the protection to be given to minority religions. This is a matter of great relevance today in the western world, given that all societies are tending to lose the monocultural character that distinguished the Nation State to become societies made up mainly of minorities.

It is from precisely this point of view that freedom of religion presents certain fundamental problems, because protection of religious minorities is not separable from protection of ethnic minorities. Religion, in fact, often evokes and synthesises civilisation, culture and also reciprocal rejections. Therefore in some multiethnic societies it is a difficult freedom for minorities, especially where there is not a tradition of real religious multiculturalism and absolute State neutrality as regards religion. The problem arises when there are new minorities and religions different from the traditional ones (that is religions less well known or completely unknown, because they are actually sects, sometimes emerging from traditional religions).

Also in the face of violent affirmations of the right to an identity, there is clearly a need to define not only the concept of religious minority, but also that of minority per se. Often religion has represented the fulcrum of a civilisation, the essence of an identity. In history religious minorities have represented the emergence of the problem of protecting minorities.

In order to find a general juridical basis for minority rights, with reference to international documents, we should look at art. 27 of the CP Covenant, where it is confirmed that

> *"in those States in which ethnic, religious and linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language,"*

They are equally important principles of the same procedure. The guarantee of the multiethnic State to be found in article 2 of the Italian Constitution cannot be at the discretion of the culture or ethnic group of membership, which clearly cannot limit rights that are not even at the discretion of the sovereign State.

On the other hand, in order to define the concept of minority the criteria proposed by Dinstein and Capotorti[43] can be used. There are three elements the presence of which indicates that a social group is a minority. Two of these are objective: inferiority of numbers and/or non-dominant position. The other is subjective: the common will of members of a group of people to preserve their distinct character. This obviously also applies to religious minorities.

It is not important that the members of a minority community have been established for a long time in the territory of a certain State. Obviously it cannot be a question of occasional or episodic presence but must constitute a stable relationship with the national society and therefore it is in the interest of the community members to have a steady relationship with the State enabling them to exercise their rights to freedom of religion –therefore, also refugees, although waiting for the political difficulties that have caused them to leave their country to be overcome, are to be considered minorities. What is meant here is that it is not necessary to have citizenship to be considered a minority. Art 27 of the CP Covenant speaks of "*persons*" and not "*nationals*". When reference to citizenship is intended (for example, as regards political rights) this is expressly stated.

It has been asked whether the right to freedom of religion regards persons who are part of a minority or minority groups as such. There is no doubt that freedom of religion, guaranteed by article 18 of the Universal Declaration, is meaningful if it aims to represent a guarantee for members of religious minorities not only as individuals but also as a group. This does not mean that minorities have an international juridical identity but only that they represent the seat in which freedom of religion can be realised collectively. The reference to minority implies the recognition of the necessarily collective character of that law when one passes from free search for religious truth (which is an individual freedom) to community cult practice – practice which requires organisational activity which must be

[43] Cf. Dinstein, *Freedom of Religion in the Mediterranean Basin*, in AA.VV., *I diritti dell'uomo nel Mediterraneo*, Torino, 1993, p.367; Capotorti, *Encyclopedia of Public International Law, 8* Amsterdam, New York, 1985, p. 385; Dinstein, *Collective Human Rights of Peoples and Minorities*, in "International and Comparative Law Quarterly", 25, 1976, p.110; *Un Secretary General, Definition and Classification of Minorities*, 1950.

protected as such (and which permits the construction of places of worship, proselytising activities, propaganda, religious teaching). Freedom of religion is, therefore, a collective human right and it is automatically protected when recognised in its necessary collective dimension.

All this means that protection of freedom of religion for minorities in most cases is interpreted as the protection of a "general" (linguistic and in a broad sense cultural) ethnic identity. The reference made by article 27 of the CP Covenant to the right of minorities to enjoy their own culture, shows how often the web of connections between ethnic and religious identities is indissoluble. In the light of the above considerations, it appears clear that freedom of religion tends to refer not only to freedom of the spirit or individual freedom but also to manifestations of a right to a collective identity, that is a form of expression of ethnic and cultural identities connoting pluralist societies.

With regard to this, it is worth insisting that the secular State aims at a separation between the State and the Church to guarantee equality and not to prevent a religion from fulfilling its role as a guide of consciences, a role that can be an important factor in social cohesion, where separation of powers, protection of fundamental rights, autonomy of social development are stable values for civilised society (there are very few religions that remain outside the social sphere). The State, therefore, permits religions to carry out works related to solidarity (particularly in the social assistance sector) and education (in the school sector) that fall within the boundaries of their "spiritual position". It is not interested in aggravating the public/private conflict in this field.

In effect, it is generally accepted (except by a few intransigent supporters of laicism) that religion is not only not detrimental to the carrying out of the State's aims but that its presence actually facilitates the welfare State's activities. What is important is that the protection of religion, as of every cultural identity, is not in conflict with fundamental rights; "the right to difference" cannot legitimise illicit behaviour in the name of religion. Moreover, equality between religions cannot legitimise unreasonable claims from minority religions asking to be considered on the same level as majority or dominant religions should public funds be given to religious confessions.

In consideration, above all, of the duty of a State favouring

solidarity to guarantee rights on the basis of a dynamic concept of equality, the veto on discrimination against minorities or between minorities certainly does not imply a mechanical equality of cults. Equality is a criterion based on principles of rational proportionality. It is necessary to consider, for example with reference to the activities set up by a religious body, the social relevance of the religion and on the basis of this to proportion the measures taken to facilitate the exercise of cult activities.

The neutrality of the State cannot put all the religions on the same level and neither can it ignore the fact that the organisational requirements of each religion are different, and that also the number of believers must be taken into consideration. It is in this light that justification can be found for measures favouring the construction of places of worship – through *ad hoc* financing or through town planning channels providing for areas for buildings of worship.

In the face of these problems, the ideological questions traditionally connected with freedom of religion – whether the State should, that is, follow a regime of "confusion" as regards religion, or "rejection" of it – do not seem relevant. Ensuring that religions are given the treatment accorded private associations does not mean denying the social importance of a religion or the important role that it can play to facilitate processes of social integration. The separation of spiritual power from temporal power, not only enables the State to guarantee freedom and equality, but also enables the religion to carry out its mission with greater credibility[44].

What has so far been said here about the meaning of constitutional guarantees of the rights to freedom, which have the function of protecting minorities, as well as persons, above all as regards freedom of spirit (and therefore, of opposing the attempts of the majority to assimilate into their own models of social and institutional life the poorer minorities, thus depriving them of their own cultural and ethnic identities), would seem to be difficult to realise, practically in the face of minorities that are difficult to put into traditional

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[44] Among the many papal declarations regarding this, the following one by Paul VI seems particularly significant: "The church, free and not weighed down by the burden of useless pomp, free of earthly preoccupations, can dedicate itself with zeal to proclaiming the truth and making it bear fruit" (Apostolic Letter *Altissimi cantus*, 1966).

categories and that have very particular requirements in the spiritual field, possibly very different from those of the majority groups. When faced with such situations, it is necessary to give a broad interpretation to the constitutional guarantees. When the religious, social and ethnic èlements are interconnected, it is particularly difficult to reconcile the secular state and equality. It is extremely difficult, especially nowadays, to accept an excessively broad or lax interpretation of national laws, to permit forms of behaviour that have an exclusively religious justification.

In any event however, the fact that new religions which can emerge from within traditional religions can give rise to bizarre rites, does not justify provisions denying them freedom of religion or giving them less space, as long as their activities are not in conflict with laws aiming at the defence of the general interests (that is, they do not present a danger to public order or health) or with the fundamental rights. The recognition of this as a fundamental right, in fact, does not tend to limit the choice of religion to the traditional religions. (The number, like the contents of human rights is in continuous evolution.) In the face of the attacks against human dignity ensuing from the spread of violence, of the biblical exoduses connected with new poverty and new wars, and therefore of the multiplication of new minority communities in various western countries, the interpreter of the law is justified in guaranteeing these communities the necessary conditions for life, including those regarding the spiritual dimension.

In any event, moreover, freedom of religion implies the right to heresy, as heresy can be a new form of religion. The veto on religious discrimination, therefore regards both traditional and atypical religions. Article 2 of the Declaration on Religious Intolerance is explicit in this sense. It identifies religious discrimination in every *"distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect the nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis"*. This is a prohibition that regards both States and persons. In order to conform with the prohibition, States must issue laws ad hoc or, where necessary, annul old national legislation if this unduly affects freedom of religion.

It is clearly one thing to defend freedom of religion as manifested by persons and another to defend it as manifested by institutions. There are many reasons for this, including the fact that it is not

easy to define what constitutes a religious body, above all when it is a question of identifying the essential features of such organisations in a minority community. With respect to this, it is possible to identify a process tending to favour the emergence of "new" religious minorities: what distinguishes a religious minority from a sect? There are two difficulties here: if on one hand, it is unacceptable that the State defines from above the necessary characteristics of an autonomous social formation like that of a religious community, on the other hand it is, however, untenable that every new religious community to be considered such must possess the same organisational characteristics as the traditional Churches[45]. In any event, it is clear that a restrictive definition of the concept of religious body has the effect of limiting individual freedom of religion and, therefore, constitutes an attack from this point of view on the very principle of equality.

The notion of a religious confession, that is to say, cannot be defined *a priori,* once and for all, but should be defined on the basis of the dynamics that the religious phenomenon has at a given historical moment, taking into account a people's religious demands[46]. These are obviously influenced by the relationship between the people and the governing authorities and are therefore a constitutive element of the political regime.

One thing is certain: not every religious belief, no matter how organised and whatever its purpose, can be considered to be a religion[47]. There is no doubt that the fact that a community is bound

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[45] Cf., Ceccanti, cit. p.202.

[46] In this sense Margiotta Broglio's reference to the European Union Treaty (article 6) seems relevant. It refers to the "common constitutional traditions" in order to define at a jurisprudential level a juridical standard of religious confessions, that effectively guarantees freedom of religion to those adhering to a religious minority, and which is obviously not in conflict with the laws of the State. Cf. Margiotta Broglio, Mirabelli, Onida, *Religioni e sistemi giuridici. Introduzione al diritto ecclesiastico comparato,* Bologna, 2000, p.102.

[47] A definition model of the concept of religion that in a certain sense typifies activities not to be considered to belong to religion, is to be found in the Spanish laws. Article 3 of the organic law explicitly excludes from the sphere of protection afforded religions, activities and organisations promoting the study and propagation of "psychic or parapsychological phenomena" or of "spiritualist values...different from religious ones". However, this reference to religious values to distinguish between what is a religion and what is not, risks rendering the definition tautological.

by a common belief which has reference to a transcendental being and is non- profit making, constitutes convincing proof that that community intends to be considered as a religious confession[48].

The main difficulty in this field is that of distinguishing a religion from a sect. With the latter expression small communities practising cults or bizarre rites are intended. They appear to be in opposition with fundamental social values not so much for the philosophical convictions professed as the ways in which the religious activities are carried out. Often it is a question of cults incompatible with the protection of human dignity guaranteed by the law. This problem is also posed by religions "accepted" by the national laws, like that of the Jehovah's witnesses, who, for example, forbid blood transfusions even when without them there is a risk of death.

9. The problem of how to protect religious minorities

The most delicate problem to solve in multireligious and multiethnic societies – as said before – is that of protecting religious minorities, and thereby permitting the ethnic identity to be expressed in its most significant dimension, that is the religious one. The protection of religious minorities seems even more problematic when it is considered that the concept of 'minority' appears to be more difficult to define nowadays, given that minorities are a less stable element[49], less easy to identify than was the case in the past in social systems that were, generally speaking, much more static. The traditional concept of minority, in short, is of little use in managing the present migratory flows. These are fast migration waves that become established in a short time, that do not proceed in time with successive stratifications and which, therefore, do not permit a gradual assimilation by the host community. They spread, in short, rapidly and produce processes of cultural influence tending to divide also the host community, which, as regards cultural homogeneity, does not appear to be able to appeal, as was traditional in the past, to the new arrivals. Often it is the new arrivals that at a cultural level fragment the original society, which tends to become a society of

[48] Cf. Castra, *Osservazioni sulla natura di Scientology*, in "Il diritto ecclesiastico", 1988,3, p.619.

[49] Paparstergiadis, *The Turbulence of Migration*, Cambridge, 2000.

minorities, without a stable majority community able to constitute a cultural reference point for all. The "social majority" is, in fact, made up of individuals with great cultural mobility (the fact that a community starts off as catholic does not mean that it will remain so, given that it is possible to become protestant or Islamic easier than in the past). With these conditions it is difficult to quantify a minority numerically. It is also becoming difficult to quantify the majorities.

The old society was – from a cultural point of view – extremely static and this meant that ethnic groups were always visible. Today this is no longer possible, not only because of the cultural mobility mentioned above, but also because there are persons belonging to more than one group. Considering, therefore, the nature of the current composition of society, the very concept of pluralism risks becoming more than ambiguous, not capable of adequately modulating the protection to be guaranteed by the different groups. The concept of pluralism, therefore, is destined to disappear while that of freedom regarding religion is becoming ever more relevant. It is a question of guaranteeing to each person the possibility to choose a membership and to renounce it when he /she considers it opportune to do so, without suffering negative consequences as regards his/her sphere of freedom (not only religious), without, that is to say, being protected just as a member of the community and thanks to the "membership guarantees" provided by the community. The pluralism that is typical of a static society now risks guaranteeing unmerited status advantages. It is necessary to recognise that today, individual freedom is more important than "institutional freedom" or a system permitting a pluralist society. One wonders whether this state of affairs does not help de-institutionalised religions, which have a great capacity to transmit their message without the support of centralised institutions.

From this point of view it is interesting to make a comparative analysis of the tendencies emerging in the concordatory regimes of some catholic countries, for example Italy, France and Spain[50], where an attempt is being made to loosen the privileged relationship with the prevailing religion. The concordatory regime is the typical regime of a static society which has a reference religion; the more dynamic

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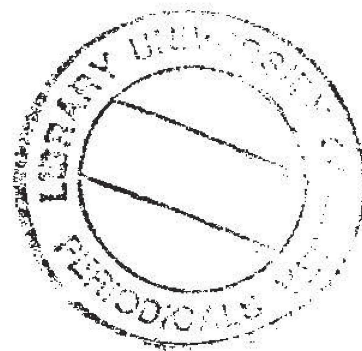
[50] *Vide* Ceccanti, cit..

a society is, the more the concordatory regime has to evolve towards flexible forms of agreement. This happened in Italy with the Craxi government, which defined a new concordatory regime in more liberal terms. The solution, however, is not to open the concordatory regime but to go beyond it, because in a society of religious minorities, if everyone wants a concordat then in the end the concordat will no longer have any value. With respect to this, it is interesting to reflect on the experience of a country like Austria, which, while recognising freedom of religion, in fact limits the concrete exercise of this freedom by means of State-religion agreements which privilege the "historical" religions: Christianity, Judaism and Islamism. This way of interpreting freedom of religion in rigidly "pluralistic" terms, in the sense that the state merely recognises historically existing realities as opposed to defending individual freedom, can turn out to be damaging for the legitimacy of the State itself. In a society like the present one, which is culturally dynamic and very changeable as regards "membership", the recognition of historically defined religious communities will inevitably limit individual freedom. Today more than ever the State must protect the individual, guaranteeing the freedom to change religion or community, without tying him/her to historically defined religions.

The countries which unilaterally discipline religious phenomenon and therefore, although not assuming a hostile attitude of separation to religion, do not, however, have recourse to bilateral or pact regulations to discipline the religious phenomenon, are countries that inevitably guarantee maximum freedom of religion to all religions together and without distinction of equality between them. But they are also the countries in which the credibility of the State as regards the religious phenomenon is the highest, in that the State is seen to be absolutely extraneous to the matter[51].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[51] Cf. Cardia, *Manuale di diritto ecclesiastico*, Bologna, 1999, pp.220 ff..

10. Freedom of religion as a negative freedom. Freedom of religion and freedom of conscience. Freedom to change religious faith

Freedom of religion besides implying positive choices also implies the choice to abstain. Freedom of religion is also expressed by refusal to accept interference from the State or private individuals in the formation of religious convictions or the exercise of cult activities. It therefore includes:

- Freedom of religion, the right not to choose any religion, that is the right to atheism;
- The freedom to change religion, and therefore to refuse any imposition of a religion that is not acceptable;
- The right to reject any form of involvement in activities carried out by or in any event referable to a religion one does not belong to.

With reference to these aspects of "negative" freedom of religion in western and above all European countries, there are consolidated principles that constitute fixed reference points as regards the relationship between State and religion, thanks to constitutional and ordinary judges.[52]

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[52] It is sufficient to remember some of these emblematic decisions:

a. The so-called crucifixion sentence of the German Constitutional Court of 16.5.95, which established the invalidity of article 13, p. 1 sentence 3 of the Bavarian scholastic regulations, which stated that a cross had to be exposed in the classrooms of State schools, on the grounds that freedom of religion and conscience serves "to protect minorities against the State"; and, therefore, if liberty of religion should be interpreted as "the majority's pretension to affirm their liberty of religion against the minority", inevitably freedom of conscience would become its opposite; cf., on this point, Gozzi, *I Diritti dell'uomo e il principio di maggioranza. La sentenza del BverG sul crocefisso*, in Gozzi (ed.) *Islam e Democrazia*, Bologna 1998, pp. 109 ff.

b. The judgement of the Italian Constitutional Court (203 of 1984) on the teaching of religion in state schools, in which it is affirmed that anybody who decides not to make use of religious education cannot be obliged to attend alternative lessons because this imposition would condition the exercise of freedom of religion.

c. The opinion expressed by the French Council of State, interpellated by the Minister of Education Jospin in 1989, about the legitimacy of the suspension from elections ordered by a school Headmaster of Maghribian pupils who wore veils, thus "violating the school's principle of secularity"; the State Council ruled that there are signs of membership of a religion that are to be identified with

What is particularly controversial is the question of the limits set on the possibility of changing religion or refusing any religion. The matter regards the limits of freedom of conscience more than freedom of religion, and the assumption that freedom of conscience is a presupposition of freedom of religion, given that both freedoms are involved in the spiritual choices a person makes. Freedom of conscience is implicitly guaranteed if freedom of religion is guaranteed and if freedom of conscience is guaranteed as a presupposition of all spiritual freedoms, there is no doubt that every believer can change religious faith or refuse any religion.

Considering freedom of religion as freedom of spirit, which presupposes enjoyment of other freedoms of spirit necessary for the formation of a religious conscience and its manifestation (in such ways as not to compromise other inviolable freedoms), it is clear that just as membership of a religious community cannot imply a change in *status civitatis*, neither can it compromise the possibility of assuming different spiritual positions, such as the possibility of changing religious faith or not practising any religion at all. Every limitation in this sense provided for by the law is to be considered a violation of human rights.

As is well known, this subject has been a traditional source of conflict between the Islamic and western worlds, together with the right to direct religious propaganda towards believers of another faith – freedom of propaganda is obviously connected with that of proselytism. Therefore, belonging to a religion cannot therefore be considered as a definitive decision determining a reduction of freedom

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manifestation of belonging to an ethnic identity as regards which the State cannot intervene; on this matter cf. Renzoni Governatori, *L'evoluzione del concetto di laicità dello Stato*, in Gozzi, cit., pp. 135 and ff..

d. The judgement of the Italian Constitutional Court (334 of 1996) on the formula of the oath taken in trials, with which witnesses and parties assumed a precise responsibility by taking oath. In the Court's judgement, although this was not an act of cult, it assumed a religious meaning that violated the freedom of conscience of unbeliever witnesses. To respect liberty of conscience the formula of the oath must be neutral: "the content of the value that the oath assumes can also be religious, but it remains a matter of conscience for the person who swears" (Mirabelli, *La giurisprudenza costituzionale in materia di libertà religiosa: sintesi per una lettura d'insieme*, in *Dall'accordo del 1984 al disegno di legge sulla libertà religiosa*, Presidenza del Consiglio dei Ministri (eds.), Roma, 2001, p.52.

of religion in the relationship between a person and the religion he/she belongs to.[53] There is, moreover, no doubt that freedom of conscience constituting the *prius* logic behind freedom of religion, is recognised from the moment that freedom of religion is recognised. In short, both the individual and the institutional aspects of freedom of religion presuppose full freedom of conscience and the possibility of freely manifesting this. Without freedom of conscience, the formation of a religious conviction based on "free" search for the truth is not possible; just as it is not possible not to give profession of faith a collective dimension.

The problem of necessary contextual recognition of freedom of religion and freedom of conscience in the international documents mentioned, cannot in any case lead to the consequence that silence on freedom of conscience in some constitutions (like the Italian and Swedish ones) can mean a prohibition against assuming irreligious or antireligious convictions.[54]

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[53] This problem was explicitly dealt with by the Universal Declaration of 1948, which in article 18 affirms the right to freedom of religion, freedom of conscience and freedom of expression, and also provides for the right to change religion. The concept was confirmed in the European Convention on Human Rights (ECHR) (1950), article 9. It was not confirmed in article 18 of the CP Covenant, where the three freedoms are recognised together. There is no doubt, however, that freedom to change religion or to not practise any religion is implicit in freedom of conscience. Freedom of concience in a certain sense covers all the possible choices that an individual can decide to make as regards his/her spiritual state.

[54] This is a matter that in Italy has given rise to great debate since the coming about of Constitution. The formulators of the Constitution were presented with amendments to the text of the present article 19, tending to explicitly recognise freedom of conscience separately from freedom of religion. The "assimilation" of freedom of conscience into freedom of religion (as in the Italian Constitution and the Swedish one before the modification of 2000) may be indicative of a political intention to privilege religion over aetheism, or in any event, a position of spiritual freedom that is not manifested by a choice of religion, in a social context in which there is a widespread majority religion. As observed by Ceccanti (*Una libertà composita, libertà religiosa, fondamentalismo e società multietniche*, cit., pp.10 and 197), however, freedom of thought, conscience and religion constitute an inseparable triad: "different but inseparable dimensions of a single right, which starting from a sphere of interior conviction ends by involving external manifestations connected with it". They are aspects of freedom of the spirit that have a common horizon, that of a personal search for truth. On the basis of this inseparability, doctrine and jurisprudence have included in the protection afforded

11. Claims regarding identity (also with a religious background) and their tolerability

At a stage in international life when alarm signals regarding the public order situation are increasing, there is the risk that tolerance levels as regards immigrant minorities in western countries, which are considered as a threat to social tranquillity, will be further and further reduced – not only by means of new laws, but also by a restrictive interpretation of the existing laws. In this context, religion is justly considered a significant factor in reactions and claims connected with identity. The constitutional State, therefore, is required more and more often to come to terms with difficult tests of tolerance.

The risk is that guarantees of rights will be managed by majority groups in a discriminatory way against the minorities. These guarantees thus lose their essential function as an instrument ensuring equality, and above all when crimes are committed, an entire minority community is persecuted instead of a single individual being held personally liable. This attitude could jeopardise certain fundamental conquests of western society. Emotional reactions from the public, even if understandable, can persuade also

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by article 19 also beliefs such as aetheism and rational agnosticism "not included in the sphere of spirituality". The question of recognition of liberty of conscience has been taken up on various occasions by the Italian Constitutional Court, which in 1984 assumed a position to be considered final on the point. It establishes the limits of freedom of conscience not so much in the laws which are dedicated to religion as in those structural principles that are not susceptible to modification even by means of a constitutional revision (they are the principles of articles 2, 3, 7, 8, 19 and 20). They are principles that recognise a secular pluralist state giving space to the individual and effective equality. In short, the approach to the complex matter of freedom of spirit cannot but be a unified one, given that it is a question of protecting a single value, the moral freedom of the individual. The effective meaning of freedom of religion in a certain sense is conditioned by the forms assumed by freedom of conscience and freedom of thought.

This is the reason why it often happens that freedom of conscience and freedom of religion overlap and are confused and a guarantee of one includes the guarantee of the other.

This approach appears to be shared by all the most recent Constitutions, in declarations of rights and in the documents produced by the international community as regards tolerance and freedom of religion.

those in the state institutions to identify the poor foreigner with an objective cause of social pathology.

The truth is that for many it is becoming more and more intolerable that the rights of Islamic communities living in the west should be guaranteed, when some Islamic movements challenge the West, carrying out terrorist warfare in nations with a strong democratic conscience. However, it is in difficult situations like these that the difference between a democratic State and a state that rejects any form of cultural and political pluralism must emerge. Intolerance can only lead constitutional mechanisms to crisis point because it introduces arbitrary and emotional elements into the functioning of the institutions.

Democracy is bound to defend itself as it always has – democratically – and not by accepting a regression in its collective lifestyle. As has been said, democracy is not a result to be obtained in any way, but a method: it is dialectics between differences; and no strong reaction to terrorist war or organised crime should make it lose the high idea it should have of itself at every moment. This is both the strength as well as the weakness of the secular State. A secular State is a State that accepts the challenge to freedom, fighting it with the arms of freedom.

It is necessary, moreover, to consider that a public affirmation of identity, which, for example is a characteristic of Islamic immigration, is not necessarily in conflict with an acceptance of the cultural and social rules of the host country. This fact emerges clearly from the Observatory of Vienna report published in November, which also deals with Moslem immigration. It analyses the integration processes of these communities into the economic and social fabric of five big European cities.[55]

Where immigration is stable and irreversible enough to indicate that a social model based on multiculturalism exists – and the immigration from Islamic countries has these characteristics – the reception policy should not be an emergency policy, but strategically far-reaching.

There are encouraging signs as regards this matter in the

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[55] *Vide* Margiotta Broglio, *Immigrati islamici, i più rispettosi dei valori europei*, "Corriere della Sera", 19 dicembre 2001.

Observatory of Vienna report. Two aspects seem particularly worthy of attention:

a. The fact that the Islamic faith is structured in an open way, that is to say without absolute, incontrovertible rules dictated by a central authority, permits forms of community membership that favour differing integration models according to the social and political context. The situation would be different in the case of a community guided in some way from the outside by a single moral authority, which, in a certain sense, could become antagonistic to the authority of the sovereign host State.
b. Cultural integration policies are more stabilising with reference to the relationship between the host and hosted communities than mere religious tolerance policies, which aim to fight any form of religious discrimination. With cultural integration policies, the religious phenomenon is not considered a problem to be kept separate from the general management policy for immigrants and minorities (with regard to this it is worth remembering the wise choice made by the United States to open the police force to immigrants, thus favouring social integration of entire communities by giving the new immigrants a non-hostile image of the State). If integration is favoured by wide-ranging reception policies, this will also serve to fight religious discrimination as such, also considering that it is very difficult to separate religion from culture and ethnicity. In short, specific intervention as regards religious questions should be catered for by the reception policy.

There are certainly other problems to be dealt with regarding the rights guaranteed within the hosted community – from the question of family rights, to the role of the women. In my opinion the effort to favour inclusion, an effort regarding social services and cultural openings, for example those permitting religious practices, should not imply the violation of the values and principles characterising the juridical tradition of the host society. It is one thing to permit a minority community to observe the prescriptions of their religion and cultural spiritual values but another to consider that the values and principles underlying the regulations of the host country can be limited by the values and principles of the hosted minority. The conflict between the general law of the State and particular rules like those of religious bodies cannot be overcome by turning to personal statutes defined on the basis of membership of a religion.

This is what Cossiga[56] (former president of the Italian republic) provocatively advocated in a long letter that appeared in *The Corriere,* invoking the centuries – old experience of the Ottoman empire, which was characterised by multiethnic societies, assigning an independent authority the task of managing any difficulties arising in this field.

There is only one constitutional law and the right to an identity of any minority must be guaranteed according to the principles underlying the constitutional law. This seems particularly true today given the present process of internationalisation of human rights, which is producing a real revolution in the sphere regarding State sovereignty. The traditional criteria used to define what were considered the insuperable limits of *domestic jurisdiction* seem to be becoming more and more obsolete. The statuses of citizen and foreigner are becoming more and more similar. Broadening the rights of citizenship is only meaningful if it provides for measures for the protection of human rights, which are more effective, guaranteed above all by the services of the welfare State.

It is not possible, therefore, to accept institutions such as polygamy, that discriminate between the sexes, and nor is it possible to accept the "unequal family" based on the superiority of the man over the woman also in his relationship with the children[57]. All of this is in open violation of the Constitution. Creating differential personal statutes means permitting each individual to choose the most advantageous statute, perhaps even to fail to observe the system of guarantees of the host State. Juridical equality between cultures cannot put values and disvalues on the same level: a judgement of values cannot but be based on the prescriptions contained in the international documents on rights, all founded on the right to equality. This is also because, as has been seen, those who come to the west are often looking not only for work and well being but also a model of society in which the freedom of the individual is better protected than the power of the social group. No argument regarding tolerance, therefore, should lead to the attribution of equal value to antithetic principles characterising different legal systems. Multi-

[56] *Le mie confessioni di cattolico liberale*, "Corriere della sera", 6 novembre 2001.

[57] O'Connor, *The Legal Status of Women: The Journal Toward Equality*, in "The Journal of Law and Religion", XV 2000 2001, p. 29; Yahia al-Hibri, "*Muslim Women's Rights in Global Village: Challenges and opportunities*", ivi, p. 37.

culturalism does not imply the acceptance of any aberration that may be an expression of local culture[58]. Cultural relativism leads to the safeguard and appreciation of many of the differences in culture and tradition produced by history, but not those representing aberrations and excesses[59].

12. Christianity, Islam and the values of constitutionalism[60]

The objective of guaranteeing the unity of constitutional laws as regards the basic values behind them together with the different identities making up society (in short, reconciling the universality of rights with the particularity of the social systems in which they are promoted), is today contextually aimed at by State Constitutions, by international Documents on rights concerning minorities, tolerance, by freedom of religion and conscience, by the jurisprudence of international Courts, (e.g. Strasbourg), and by the constitutional Courts that have interpreted the Constitutions, reiterating what has already been affirmed regarding human rights at the level of common traditions of Western society and customary international law.[61] It is a question of the real situation of interdependence between the various juridical systems guaranteeing the protection of human rights. A real network of jurisdictional, regional, state and international bodies has been formed, which interact amongst each other, assuming the principle of cultural relativism as a necessary guiding criterion to widen the geographic area of the juridical protection of human rights.

A relativist approach, however, cannot bridge the distance that objectively exists between the models of society and political systems of the Islamic countries and those of western countries, with respect

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[58] Cf.. Bonanate, *I doveri degli Stati,* Bari, Roma 1994, p. 177, p. 184.

[59] Onida, (op. cit., p.678) is right, in short, when he affirms that " looking for a criterion that makes it possible to distinguish when the juridical principles of a certain law really express the "values" of a particular civilisation ... from when this is not the case."

[60] Mitri (ed.), *Religion, Law and Society; Christian – Muslim Discussion,* Genève, 1995.

[61] V. Bartole e Olivetti (eds), *La tutela giuridica delle minoranze*, Padova, 1998.

to both the quality of political participation and the quality and extent of the guarantees regarding human rights[62].

The strong correlation between freedom of religion and of conscience and the aims of democracy, understood as a series of limits set on the power of the majority groups in order to safeguard the individual against authority, lead to the question as to whether real democratic societies can ever develop within Islam, that is to say really pluralist societies in which rights are guaranteed even against religion and the State. As regards this point, the evolution in the relationship between Christianity and social transformation processes has, at times, been cited.

I am convinced that the possible evolution of Islamic society and the "religious State" also depends on the type of development that there will be in those parts of the world, where more than a billion

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[62] The problem should not be faced by identifying Islamic society with Islamism or, above all, the Islamic fundamentalism professed by some regimes or minority groups with obvious political motives. It is particularly important to understand whether there are structural elements of the Islamic culture preventing Islam from opening out to modernity and multiculturalism.

This is a task that the West must carry out scrupulously. Above all, they should show that in their own territories they are intransigent about the application of the rules of western juridical civilisation in the face of any emergency regarding claims for recognition of identity.

The "freedom challenge" that the West must honour at home, defending the rights of men and women from countries where every form of cultural pluralism is denied, and where, therefore there is not freedom of religion, will certainly not be taken up (at least in the near future) in Islamic countries. The only way, however, to defend freedom from aggression is to use freedom as an instrument of persuasion, hoping it will be contagious. In short, it will not be through the international courts that the breaches in human rights occurring in many countries will be stopped. Neither economic sanctions nor military action can change culture. Even if there were only one country in the world that systematically violated human rights, there is no doubt that the whole of humanity should feel they were the injured party in that violation. This is the point of view underlying the creation of international courts to judge those responsible for crimes against humanity (which expropropriate from States which cannot and do not want to persecute such crimes of power for centuries considered inseparably bound up with sovereignty), and the justification for military operations of peace enforcement aiming at preventing the commission of crimes against humanity, also in the absence of authorization, and initiatives decided by the UN with every State taking part considered to be operating on behalf of the international Community – the "injured party".

people live, and which are among the poorest areas in the world. Islam seems to be a religion connoting the least developed areas of the world. In the economic geography of the world there is, in fact, a coincidence between development and some religions (Christianity, Buddhism and Confucianism). Islam, on the other hand, is firmly established in the areas of the world where industrial development appears difficult and, in any event, a long way off. In this light, Islam objectively appears as an instrument to react against the wealth of the developed countries, not with competition, but with destabilising practices and warfare. It cannot be denied that such an instrumental use of Islam has been made possible by certain components of the Islamic doctrine, which give particular weight to the conflict between civilisations.

There is no doubt that also in the history of Christianity there have been examples of religious intolerance and cultural integralism. However, the doctrine of Christian states has always distinguished between the kingdom of God and the kingdom of men. Islam, on the contrary, does not accept the distinction between religion and politics, although not adopting a particular State doctrine. In short, in the politics of Islam only the word of the prophet must be heard. It is from this that discrimination between believers and unbelievers arises. Islam considers that the laws of man cannot free people from the laws of God because man cannot confront God. Every form of individualism is, therefore, banned.

On the contrary, Christianity, more than other religions, appears to favour the formation of the models of religious and cultural cohabitation typical of the West. In this sense, the Catholic Church has moved great steps forward in recent decades. Since the second Vatican Council, it has accepted the principle of a multiplicity of parallel paths for the search for truth and therefore models of pluralism, above all in two documents: in Pope John XXIII's 1963 encyclical letter, *Pacem in terris,* (in which there is a positive evaluation of the 1948 Universal Declaration of the Human Rights) but above all in *Dignitatis Humanae,* the declaration on "freedom of religion" elaborated during the second Vatican Council (7.12.1965), where the connection between human dignity and freedom of religious choice (which, therefore, does not tolerate any form of coercion) is defined.

This obviously does not imply that the Church is neutral as regards the various truths, but recognition of freedom of religion is also for

those who do not adhere to the truth or search for it. It was the right and proper recognition of freedom of religion that led, for example, Mons. Lefèvre to break away from Rome after the second Vatican Council.[63]

It is thought by many that Islam will not be able to accept such opening out. The civil law in Islamic countries cannot disregard religious law, which does not evolve and which, therefore cannot historicize, recognising with the passing of time new freedoms produced by social transformations. The freedoms are those written in the Book – it therefore contains an exhaustive list. What is possible for Christianity, that is, to adapt human rights to social changes, and which is one of the characteristics of western constitutional traditions, is not possible for Islam. From this it follows that the very concept of inviolability as regards all the fundamental rights (either everybody is protected or nobody is protected) cannot be accepted in an Islamic State.

The two most important Islamic documents regarding human rights: the Universal Islamic Declaration of Human Rights, produced by the Islamic Council of Europe (1981), and the Cairo Declaration on Human Rights in Islam (1990) produced by the Islamic Conference organisation, provides for freedom of the spirit, but within the limits of Islamic law.

Limited forms of tolerance are provided for as regards other religious minorities (in as much as this limited tolerance is provided for by the Book and does not arise from the recognition of the potential expressed by human dignity and the cultural freedoms connected with it)[64]. In any event, tolerance towards other religions does not imply the recognition of the freedom of conscience of Moslems, who cannot change religion (art. 10 of the Cairo Declaration), nor does it legitimise proselytising activities aimed at Moslems, which is a penal offence.

As far as absence of coercion is concerned, it is to be said that Islam and Christianity in principle agree (that is, no act of religion can be the result of a State order). However, as long as Islam prevents

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[63] The first break was in 1970. In 1976 Lefèvre was "suspended" and in 1988 excommunicated.

[64] Catalano, *Libertà religiosa e diritti fondamentali nelle società pluraliste*, in " Diritto ecclesiastico", 1997, I, p.608.

Moslems from changing religion and forbids proselytising and propaganda from other religious faiths among Moslems, as long as it provides for the dictatorship of the Islamic religion in its "own" territories, then coercion is implicit.

Islam, in short, continuing to reject pluralistic cultural models even today, seems to be unwavering in its denial of the complete equality of believers, of other faiths and of believers and unbelievers in matters relating to the exercise of political rights or rights of citizenship. This implies not only the impossibility of changing religion, but also limitations to the right of marriage founded on religion (a Moslem woman cannot marry a non-Moslem) and, therefore, discrimination between men and women. In this light certain marriages are also illicit. The dignity of man is promoted in virtue of the Islamic dogma revealed by God, not by laws decided by man and consequently subject to adaptations to local changes. Where the Constitution in Islamic countries insists, for example, on the Islamic nature of the legal system, the possibility of realising a pluralist secular society is excluded from the start; if it is necessary to turn to the Book for all the rules (with at the most a reinterpretation or adaptation) in order to organise not only the life of the believer and the religious community but also political and civil society, no change is possible. It has happened in the Islamic religion – the religions of the Book have in common the idea of the "indisputability" of the sacred text[65] – that the absolute and coeval nature of the Book has been transferred to interpretations of it, which are necessarily changeable.

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[65] Cf. *retro,* note 32 and pp.31-32. As Ceccanti rightly points out (op. cit. p.126), a very important consequence of the Christian concept of the revelation is that rights not being subordinate to a law – like the Islamic one – unchangeable in time, are organised on the basis of open catalogues. This is one of the characteristics of contemporary constitutionalism. With regard to this, Ceccanti rightly cites, as an emblematic declaration, the one included in article 2 of the Italian Constitution with reference to "inviolable rights", in article 10.1 of the Spanish Constitution where it refers to human dignity and rights of the person, and in article 16 of the Portuguese Constitution which refers both to rights not explicitly mentioned in the text and to those of the international sphere. The prevailing rule is therefore that of an "open list" of fundamental rights. Among others, cf. in this point Barbera, *Commento all'art.2 Cost.*, on *Commentario della Costituzione* (a cura di G. Branca, 1, Bologna 1975; Baldassarre, *Libertà. 1) Problemi generali*, in "Enc. Giur.", vol.19, Roma, 1990.

There are various interpretations in fact of the same revelation, and this is one of the privileged grounds of religious fanaticism. It confuses the interpretation of the Book with the Book itself and claims to have exhausted all the possibilities of interpretation. The Catholic Church has been able to fight against its own fanaticism appealing to the principle of authority: nobody, not even the Church could think of harnessing papal teaching to give it their own interpretation. In Protestantism the principle of *"Sola Scriptura"* blocks the way to any form of integralism. It is true that in Protestantism many fundamentalist sects have arisen, but these do not have political weight because of the radical individualism of the faithful.

In favour of the realisation of a constitutional legal system in an Islamic environment, there is certainly the fact that Islam, as has been said, lacks technical indications as to forms of State (and, in fact, in Islamic countries very different political regimes have come into being)[66]. These choices regard the people, not the religion. The ideal form of State for the religion is the one wanted by the people. There exist, therefore, various forms of State because there is no single interpretation of Islam. The religion only establishes the parameters of the ideal state – it does not define particular matters which are to be subsequently resolved by the interpreters of the sacred texts. If the form of State is not supported by the consent of the people, it will not last long[67]. However, the problem of the secularisation of Islam does not only regard the absolute nature of the Book. It is necessary to ask whether Islam will ever be able to accept spiritual freedom in a non-institutionalised dimension, that is in its individual dimension (which constitutes the most meaningful connotation of the secular nature of the State) and above all whether it will ever be able to accept the freedom of conscience that implies the right to adhere to a religion, but also to change belief and religion as art. 18 of the Universal Declaration sanctions. It is a question of constraints not only represented by cultural connotations of Islam, but by real obstacles that the Constitutions of many Islamic countries pose to the real supremacy of the fundamental rights. Despite the international documents signed by Islamic countries regarding the

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[66] Baget Bozzo, op. cit., p. 94 and p. 108.

[67] Cf. Khatami, cit.

protection of human rights, as well as the "Charter" of human rights contained in the Constitutions of these countries, the path followed in this field by individual countries is anything but linear. There are enormous contradictions in this field between attitudes of acceptance and rejection, due also to the increasing power of fundamentalist movements, which fight for the restoration of the Koran, using the Koran as an arm against the West.

Islam and constitutionalism certainly co-exist in countries that have been under modernisation for some time, that have clearly and exhaustively confirmed the fundamental rights in their Constitutions or documents that have constitutional value[68].

However, the supremacy of the Constitution is still in the distant future for many Islamic countries, as is the realisation of real political democracy. In many countries there is a form of government which does not accept a relativist approach to the different religions and different ideologies. The religious foundation of Islamic society is the real obstacle to the realisation of a constitutional democracy in the form in which it exists in western countries, The principles of equality and freedom affirmed at a constitutional level are disregarded at a political level: an attempt has been made to remedy this with the introduction of welfare, to be understood as an effort to transfer the realisation of these principles from the political to the social sphere.

It is clear that on this basis, the neutrality of the State as regards religion cannot be guaranteed, neither in the sense of non-identification of the State with a religious body nor in the sense of active neutrality or the State's positive intervention to guarantee citizens the possibility of freely manifesting their religious convictions, that is to say to guarantee equality between individuals and between communities professing different religions.

In my opinion, real penetration of principles of constitutionalism – as expressed by the principal documents produced by the international Community regarding human rights – into the Islamic countries will not be easy. A process of secularisation of Islamic societies is necessary and this will be slow and difficult. However,

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[68] Cf. Arjomand, *Religion and Costitutionalism in Western History and in Modern Iran and Pakistan*, Albany, 1993.

the international Community's attitude as regards the protection of the rights of minorities, whatever the political regime of power in a State, must be convincing but also intransigent.

It is not just a question of insisting on the observation of the international constitutional documents signed also by the Islamic countries, but of moving to the defence of the right to freedom of religion, which constitutes a general principle of customary international law because of the contemporary existence of two elements: the States' general and continuous practice and l'*opinio iuris ac necessitatis*[69]. It is a question of a point of view, shared, as has been seen, by a large number of constitutional charters and numerous international papers. In this sense, the 1948 Universal Declaration – a point that cannot be sufficiently emphasised – gives freedom of religion wide-reaching and precise protection. Moreover, it is certainly more unambiguous than the 1966 pacts, as regards the fact that freedom of religion is one of the expressions of freedom of conscience.

The argument according to which the Universal Declaration does not create juridical obligations for member States does not appear, in the light of what has been said here, very effective. The Universal Declaration cannot be read without reference to the UN Charter. Articles 55-56 of the UN Charter express the wish for real protection of human rights; to this end, in fact, States are required to intervene in collaboration with the UN. That is to say, States are obliged to intervene actively in favour of human rights. From this point of view, there is no doubt that the human rights incorporated in the 1948 document constitute an interpretation of the human rights clauses present in the Charter. The very general principles of the Charter have gradually been applied more precisely to successive documents. The charter only includes precise mechanisms for the application of some principles.

13. Freedom of religion and the Afghanistan lesson

Another interesting consideration from the point of view of the relationship between a religious State and a democratic legal system

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[69] Cf. Carobene, *Sulla protezione internazionale della libertà religiosa*, in "Diritto Ecclesiastico", 1998, I, p. 379.

can be made in the light of the recent events in Afghanistan and the military operation "Enduring Freedom". As is well known, in that country, a religious caste – the Talibans – imposed on the population a model of society and government founded on a merciless fight against every form of modernity. It is also known that that government was suspected by the international Community of serious responsibility for the attacks on the Twin Towers in New York in September 2001 because of the explicit cover given in recent years to the terrorist activities of Bin Laden and his organisation. The military operations against terrorism led the allied countries to operate against the Taliban regime, occupying Afghanistan and causing the collapse of that government, whilst being helped in this by local military and political forces, the so-called "Northern Alliance". The Taliban government fell. It remains to be seen, however, whether there is now freedom of religion in the country or whether the new State is more tolerant as regards freedom of religion and more open to political and cultural pluralism, the absence of which had brought about the consolidation of the Taliban regime. Now that the military campaign which brought about the fall of the Taliban regime and the flight of Bin Laden and his organisation has ended, one wonders whether the restoration of a political system, which although of a still uncertain nature is recognised by the international Community and depends very largely on the backing of the allied occupation troops, has brought about the restoration of that freedom on which freedom of religion itself depends. In particular, it needs to be understood whether the new regime is, in this sense, different from the old one, and whether the Afghan community sees the interference of the West as unjustified or as a necessity for the protection of freedom. It is a question of understanding whether the mujahedeen, who are now in power, and above all the population that supports them really want freedom. In short, how is the present situation interpreted by the Afghan Islamic community? Is there now more freedom of religion so that the juridical and social position of non-Moslems is more protected?

In short the Afghan situation could become a test case. The difficulty lies in understanding whether the Islamic community feels free, and lays claim to this freedom, or whether there are feelings of rancour as regards the guarantors of the new political situation because they have interfered in an internal affair in the Islamic world (the struggle between the "northern alliance" and the Taliban) and

have therefore humiliated the entire Moslem world. The importance that Islamic culture attributes to the nation, as an element of identity transcending membership of the single States, precludes any form of transversalism between civilisations even to guarantee fundamental human rights. From the Islamic point of view, therefore, any type of humanitarian interference in their territory is intolerable.

It is my impression that the Islamic community can accept deep internal divisions as well as military conflict, but cannot accept being saved by the West to become freer. It is not the first time that there have been wars inside Umma, but these were struggles resolved from within, without destroying the constituent value of the community. A struggle between believers confirms the total indestructible character of the community. If, on the contrary, the unity of the community is broken by an unbeliever claiming to resolve the conflict, inevitably the founding values of Umma are substituted by others.

Bearing this in mind, it would not appear that the mujahedeens' culture will change because they conducted a military campaign with the West against the Talebans. It is to be remembered that many of the enemies of the West in the Afghan war were allies of the West when the Afghans fought against the soviet troops occupying the country.

I do not believe that a constitutional State, or a real democracy in the sense intended by Dahrendorf, that is a regime "giving voice to the people now and then", is being constructed in Afghanistan. Building a real democracy it is not enough to give voice to the people[70]; it is necessary to permit change without violence, that is, respecting the democratic method and fundamental rights; in short, guaranteeing the majority principle but opposing certain majority pretensions in conflict with the fundamental rights. Military intervention like that in course in Afghanistan can create political stability and thus contribute to international tranquillity. However, military intervention alone cannot lead to nation building or to the creation of a constitutional State. Neither military troops nor a guiding power can create the conditions for the formation of a widespread democratic conscience. This is a task that the

[70] Dahrendorf, *Dopo la democrazia*, cit., p.4.

international Community can carry out by means of efficient institutions spreading democracy everywhere. It is a question of creating democracy within States to realise real democracy at an international level.

The truth is that the protection of human rights is not always the real reason for a peace operation. Often it is a question of reaction because the sovereignty of a state has been violated. In this context the restoration of the legitimate government does not always solve the problems under discussion, given that the right to self government is not, in itself, a sure guarantee of human rights.

However, rights must first of all be claimed. It is necessary to avoid approaching this matter with a Eurocentric point of view. The list of inviolable rights is not the same for everybody. What is necessary to arouse is a widespread interest in rights, a peremptory demand for rights, not moving however within the logic of the classical doctrine of natural law. That is to say, a universal value cannot be given to the principles elaborated by the West in this field. There does not exist a list of natural laws long enough to be able to contain all the possible interpretations of concepts like human dignity and freedom. What must have universal value is the principle of tolerance that represents the necessary foundation for every form of multiculturalism.

In short, there is a need to proceed with a different (non Euro centric) approach for the identification of a minimum nucleus of human rights, to be considered fundamental for any written constitution, and the violation of which could legitimise a reaction from the international Community[71].

It is a question of identifying ideal ethical criteria to identify the fundamental nature of the needs and expectations that are vital for all people, wherever they live. There are many very different criteria that can be used to define this rigid nucleus of fundamental rights. However, taking into consideration the indications of the international charters on rights it would seem possible to suggest that the four criteria proposed by Ferrajoli – equality, democracy, peace and protection of the weakest[72] – have a sufficient universality

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[71] The question has been widely dealt with in recent years by Luigi Ferrajoli. In particular, cf. *Diritti fondamentali*, cit., pp.5 ff. and pp.279 ff..

[72] Ferrajoli, cit., pp.298 ff.

to be referable to the widest range of cultures. The opportunities for realising the minimum objectives of fundamental rights should be historicized. This is particularly true in the case of social rights, the realisation of which is limited by the resources available. It is a question of making the demand for services compatible with the wealth of each country, but also of supporting at an international level an effort to establish wellbeing and a culture of rights in the underdeveloped areas.

Only in this way can the vital relationship between equality, democracy and peace be safeguarded. And from this point of view, if in this world of globalisation the State is not the instrument of internal pacification – but often, for the reasons given so far, an obstacle – it is the international Community that must provide for the creation of the conditions necessary for development. It is an aspect of the internationalisation of fundamental rights that they should be defended also with arms when it is a question of permitting their affirmation as a negative freedom, but that they should also be promoted through initiatives directly undertaken by the international community when it is a question of guaranteeing them as positive freedom[73].

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[73] With regard to this Ferrajoli rightly observes that the history of constitutionalism is the history of this progressive broadening of the public sphere of rights: "the extension of the constitutionalist paradigm to international law is also a part of this history". Just as the extension of the sphere of fundamental rights came about by institutional fractures, such as the American and French revolutions, also in the history of international relations there have been, as has been shown here, fractures which have permitted the extension of the sphere of rights. The establishment of the UN and the international charters on human rights mark, in fact, the destruction of the *ancien régime* founded on the principle of the absolute sovereignty of the States. The new frontier of rights has been brought about by their internationalisation; that is to say, rights coming into being as limits to the power of political majorities have gradually become limits to sovereignty and, therefore the power behind it, that is, the fundamental constitutional contract. As has been shown, the fundamental rights legitimise new powers above the States (they have a constituent function), and these powers limit with their authority the space traditionally given to domestic jurisdiction. From being rights affirmed by the Constitutions, the fundamental rights become supernational rights, that is, they are no longer rights depending on citizenship but rights of individuals irrespective of their citizenship. In short, the supremacy of human rights keeps the state monopoly of the law within ever more restrictive limits. Traditionally inside single States this has been the main task of constitutionalism, which today

The problem is not so much that of establishing what must necessarily be included in the *status* of citizenship, dealt with by Marshall[74] as a catalogue of rights (civil, social and political), as of guaranteeing the freedom of human society necessary for the production of integration processes among citizens who recognise they have certain bonds and pacts freely assumed and which also legitimise the democratic State. If human society is imagined as a place of interactive exchanges, organised on the basis of prevalently shared values, and, therefore, of mutual ties, it is clear that the rights to be protected cannot be defined once and for all without taking into account the composition – also ethnic – of the society.[75]

From all this it follows, in short, that equality and not citizenship, is the basic principle on the basis of which the fundamental rights should be assigned to all persons. Only in this light do the fundamental rights, from rights affirmed by the Constitution, become supra-national rights, that is, no longer rights depending on citizenship but rights of the individual, regardless of their different citizenship[76].

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has wider horizions thanks to the introduction of human rights in constitutional law. As Barbera rightly observes, "constitutionalism, which arose to limit the power of the State and protect the rights of man, can perhaps be used to construct a supernational power to protect the rights of man" (Barbera (ed.), *Le basi filosofiche del costituzionalismo*, Roma-Bari, 1998, p. 41). Only in this way, in fact, can the coercive forms of intervention decided by the international Community through UN resolutions be justified. We are coming to a concept of international law "constructed as a set of relationships between national legal systems". The foundations of this new international law are still fragile; the laws concerned are still "hypothetical laws". However, there is no doubt that since 1989 there have emerged new authorities, above all the UN, capable of declaring "international law" and ensuring – with coercive measures – that its precepts are observed (Barbera, cit., p. 49).

[74] Cf. Marshall, *Cittadinanza e classe sociale* (1950), Torino, Utet, 1976.

[75] Cf. Barcellona, *Quale politica per il terzo millennio*, cit., pp. 155 ff.

[76] This is a reading of the rights of citizenship that encounters resistance and will encounter in the future as the phenomenon of mass immigration increases in the wealthy countries. The problem obviously regards social rights, which are the rights by which a society of "materially" equal individuals is realised. If, however, this approach to the question of fundamental rights is rejected, that is, an approach that considers fundamental social rights apply to everybody, we will inevitably move towards a paradoxical situation: the growth of interdependence may mean an increase in inequality. Greater interdependence should, on the contrary, mean

None of this will be realised in the near future in Afghanistan. The new "leaders" do not seem to be more receptive to innovations than the old ones. It does not seem likely that the decision to make an Islamic country like Afghanistan with populations in very remote conditions, more secular, will come from above. A secular Islam in that country would not suit the new ruling class of the State but neither would it be accepted by the community as a whole, in that they would see the bonds determining social cohesion as unnatural and, therefore, the very social identity of that population under discussion.

In short, to guarantee rights to minorities, it is necessary to establish an efficient system of *check and balance*, to prevent abuse of power and to subject all citizens without distinction to the law[77]. Today, as Dahrendorf points out[78], the real battle is to extend the borders of the rule of law, rather than to have rulers elected by the people, that is to create democratic institutions.

The truth is that we live in a time, above all after the events of 11th September, in which to organise an efficient crusade against fundamentalist terrorism, that is to organise a global crusade against this new global threat, a wide consensus of States, populations and cultures is necessary. This means that it is necessary to pay the price in terms of the sacrifice of some values and principles regarding the fundamental freedoms to prevent terrorism from finding objective allies. Countries where a real culture of rights has never developed (this is the case of Afghanistan) or where there have always been obscurantist regimes in power (like Saudi Arabia) need to be soothed in order to make them faithful allies. It is not possible to give orders to or impose checks on these governments to make them defenders

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an extension of the application of fundamental rights. In this sense, interdependence should be a factor leading to new development and which permits equality and citizenship to be independent. The more forms of integration grow and diversify in the world, the more political importance and protection positive human rights should acquire. Unfortunately this is denied by many laws on immigration, which follow a pattern based on the opposite of what is supported here, centred on the "chauvinism of well-being" (Habermas, *Morale, Diritto, Politica*, Torino, 1992, p. 136).

[77] Cf. Dahrendorf, *Dopo la democrazia*, interview ed. Polito, Roma-Bari, 2001, p.8 ff..

[78] Id, cit., p.9.

of rights. Therefore, it will not be possible to impose anything regarding freedom of religion on the mujahedeen now in power in Afghanistan. It is necessary to work in the long term so that together with development there might evolve a culture of rights which considers freedom of religion and cultural pluralism a resource and not a threat to pacific civil cohabitation. It is a question of realising, in short, a real State of culture, in the sense in which Haberle speaks of this, in a place where until now the relationship between the elite in power and the people has been based on the economic exploitation of the people and the formation of a consensus on the basis of power myths and, above all, on the duty to fight against the unbelievers.

14. The possible evolution of Islam towards a more "open" model of society

As already said, there are some aspects of Islam that put it in conflict with modernity and in particular with the constitutional rule of law; on the other hand, however, it should be pointed out that these are not irreversible aspects of Islamic doctrine. They appear, however, to be the result of the social conditions in which Islam operates. The lack of development in the conditions in which millions of people who believe in Islam live certainly favours the affirmation of positions of social doctrine of an anti-modern type.

These positions, however, have been taken up by many religions. Christianity has already been mentioned. It should be remembered that at the dawn of the industrial revolution both Catholics and Protestants practised penal persecution of witchcraft. At the height of the industrial revolution, in many countries Catholicism had anti-modern connotations. Until the beginning of the twentieth century the dominant catholic culture considered that the primary role of the woman was a domestic one.

An analysis of 2000 years of Christianity shows, in short, that in its name there have been wars, violence and crusades against modernity. Forms of intolerance have also strongly characterised Christianity and in some periods of its development the Christian faith was identified with military policies and with a policy of conquest – not only of Islamic "unbelievers" but also of other Christians (the Latin kingdom of Constantinople). All this, however, has not prevented the development of Christianity towards the acceptance of distinctive modern forms.

This could also happen as regards Islam. It is difficult to demonstrate that the Islamic religion imposes war or terrorist violence as a natural instrument to increase the area of influence of that religion. It is significant that scholars of the Islamic faith oppose such an interpretation of jihad, which, in their opinion, means an interior moral struggle to improve the relationship between man and Allah and not military action to spread the law of Allah. The very fact that these scholars contest the latter interpretation of the Islamic faith would imply that it is a question of opinion. In any event it is the political regimes that give an interpretation of the Book that suits their dreams of political power. However, if millions and millions of people share this political opinion, there is no doubt that the religion becomes a considerable factor in the destabilisation of international relations.

The anti-modern impulse of sectors of Islamic politics could turn out to be a transitory factor and not of such importance as to fuel an epochal conflict between religious civilisations.

Today there are good reasons for conflict between underdeveloped and developed countries. The economy of globalisation makes them deeper, above all by increasing the gap between poverty and wealth and secondly by highlighting the difference between wealth, that can become established in any part of the world (thanks to freedom of trade), and deprivation confined in its areas of origin as a consequence of the laws limiting movement of people and immigration.

Islam, however, does not appear bound to remain with its anti-modern impulses. It rather appears that it could pass through an evolutionary process leading it to full acceptance of the modern world and the rules of development.

The problem is the time that a modification of Islam and its modernisation might take. One of the strengths of Islam, as has been pointed out, lies in the absence of hierarchical structures, at least since the end of the ottoman Caliphate. The religious system is widespread. This propagation does not resemble that of the protestant reform which, all things considered, entrusted each believer with the task of interpreting the word of God: Islam entrusts doctors of religion and ministers with the task of propagation.

There is no doubt that the fact that there is not a hierarchy, but an oligarchy or religious elite, favours the spread of forms of cultural conservatism because it permits the Islamic communities that live

in the west to adapt to the civilisation of the host country, without being inhibited by orders from an unquestionable authority. However, the power of the widespread clergy seems to be undermined and opposed by the presence of sects and confraternities, which could even lead to a sort of Lutheran reform of Islam. These are groups that construct their own interpretation of the divine word and often work towards modernisation. Examples of this are to be found in the role of the sects in the modernised Islamic countries: Turkey, Iraq, Syria, Senegal, Morocco and partly in Libya. In some cases, such as Pakistan, an aspiration has been formulated for a Lutheran reform in Islam. This reform gives priority to the individual rather than to the Moslem, or as the root of the word reflects, to those who are at the service of something.

The problem of coexistence with Islam, therefore, is not one of religion, but rather of social and economic development. The West obviously has an important role in this. The aid and support policies should be increased and modified. The new maxim should be that of the Nobel Prize winner Amartya Sen: "Development is liberty. There is no growth without democracy."

It is necessary to permit free circulation of cultures to confront fundamentalism, also where there is apparently great cultural unity. This is the difficulty we must come to terms with.

If Islam can generate fundamentalism, with reference not only to the religious dimension of cohabitation, but, necessarily also to the organisation of political and social life (in the form of a rejection of corrupting modernity), it is necessary to fight fundamentalism by means of development and multiculturalism. It is necessary to do this both where the fundamentalists constitute a threatening minority and where they have taken power, trying to shut off the society from any external cultural influence.

15. Conclusions

If the hoped for acceleration of the development and secularisation of society should not occur, and if Islamic politics should consider that the history of civilisation is all written in the Book and that no power democratically chosen by the people can disregard the book, then it is unlikely that the Islamic state will be able to adapt to the social changes that involve every country in the world of interdependence.

If Islam cannot distinguish, in short, between the social relevance of religion and its superior position to any public power, inevitably even the most radical of the reform processes will not produce a real democracy, but only its form without the contents. The substance of democracy is made up of the limitation of power by the rigidity of the Constitution, institutional political pluralism, the system of social autonomy and the protection of human rights, which cannot be attacked by public power.

It is a question of verifying, in short, whether the conditions will be created in which the majority principle without precise limits does not systematically become a religious dictatorship of the majority.

I believe that only if the conditions for real economic development are created will it be possible for there to be in these countries a democratic rule of law that promotes the protection and culture of rights.

There is no doubt that attacks like those carried out on 11th September in American territory or in recent months in Israeli territory by the suicide bombers who decide to die to fight the distant enemy (USA) or the nearby enemy (Israel) indicate decisive aspects of Islamic culture that certainly make the creation of really developed societies in Islamic countries difficult. It is necessary to bear in mind, however, that the populations that the suicide fighters come from are among the most forsaken populations on earth – people without a future[79].

In short, if the Islamic religion can induce individuals to sacrifice themselves to gain a privileged position in the world to come, it would not seem that this religion, practised by hundreds of millions of people in so many states with so many different political regimes, can in itself be against a peaceful, well ordered world. The identification of

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[79] From this point of view the questions asked by Galli della Loggia (editorial in "Corriere della Sera", 3rd December 2001) as regards the candidates for suicide queueing up at the recruitment centres seem particularly pertinent. "In the face of these facts it becomes impossible not to wonder what it is, what ethical message, what symbolic structure has a culture that produces so many aspiring slaughterers. What is human life? The very fact that the religion in these countries prepares so many human beings for suicide and homicide or in any event is unable to stop them, constitutes an evident denial of the very concept of human rights".

jihad with terrorism is forced. Terrorism is born of a culture of violence and alienation, not a particular religious faith. It is the desperate gesture of those who consider all the world an enemy and feel totally isolated in the world. It is born of the paranoia of isolation. Obviously terrorism is another thing if it occurs in the course of military conflict between peoples of different religions and ethnic origins. In this case terrorism represents a way of waging war that violates the international conventions regulating war. However, it is not possible to talk about recourse to gratuitous violence.

It is a fact that according to the western point of view, the same people often pass from being terrorists to freedom fighters: the case of Afghanistan teaches us this if the attacks against the Twin Towers are compared with those originating from the same environment against the soviet occupiers.

There now seems to be no doubt that the Islamic society, therefore, can become a developing society, give life to a free market and, therefore, accept the rules of pluralism at every level. That is to say, it can give life to a peaceful society and be part of a peaceful world, recognising the supremacy of rights, starting with the right to peace.

This is the great challenge that will have to engage the world of development and rights. Taking into consideration the development of poor Islamic countries, where hatred against the wealthy West makes people blind as to the responsibilities of the ruling classes of some rich Islamic countries, means eliminating every form of confusion between religion and politics and destroying the arguments of those who want to identify the West with cultural colonialism and economic exploitation, thus increasing the limits of tolerance and freedom of religion.

It is a question of widening the frontiers of the rule of law before dealing with those of the democratic state. This is a task that is becoming more and more urgent as the process of globalisation goes ahead. The world is becoming more united and the opportunities for meeting but also for disagreeing are increasing. Freedom of religion has never before been such a necessity as well as a value. More effort is required. It is no longer – if it ever was – a purely spiritual matter.

After the collapse of the great political ideologies, the world has taken up religious matters as a point of conflict. A step backwards? No, because we know that we can no longer enlightenedly look at religion as the "past" of humanity. Religion regards cultural identity, history, the values of millions and millions of people.

A really secular approach to the religious problem must make us recognise that it cannot be expelled from human life, for reasons that are connected with the depth and the complexity of human nature. Perhaps a part of the west – the most educated and developed – has for too long a time and with too much superficiality cultivated the illusion that the religious dimension is only the reflection of other – social, economic and political – dimensions or else something limited to the interior life of the individual. The same part of the West thought that once the great ideologies fell, history would as if enchanted, dissolve, and a period of serene and infinite progress would open up for humanity.

Western culture woke up with a jolt when faced with the ethnic-religious conflicts that broke out in ex Yugoslavia and understood that it would pay dearly for that superficiality.

Guaranteeing freedom of religion today means guaranteeing everybody the possibility of maintaining and cultivating their own identity in a world in which without identity or roots, one is destined to be in a subordinate position. In some cases, however, this guarantee can be in conflict with the western concept of religious tolerance and seriously put to the test the foundations of constitutionalism, as happens in the confrontation between Islam and the West. This, however, means neither that constitutionalism is obsolete nor that on the contrary there is hope only for those that blindly accept the values of the West. Constitutionalism is not obsolete for the simple reason that its basic principles – the central position of the fundamental rights, the limits to sovereignty and division of power – are more alive and relevant than ever. There is, in fact, today, the need for an application of the principles of constitutionalism on a global scale, not only in the relationship between citizens and the State, but also in the relationship between international political organs and human society. Secondly – and this is the most important point – it is not necessary to identify western constitutionalism with the institutions with which it has been realised – that is to say the nation state and its various parts – either internal, like the national institutions, or external like the interstate and intergovernmental organisations. The multiplication of "informal" meetings of superpowers on one hand (the G8) and the development of equally "informal" movements on the other (the no-globals) make it possible to see the possibility – or rather the necessity – of widening the horizons of constitutionalism. The problem of congruity between the

decision makers and the environments where the decision will have effect, no longer regards national states, but the world community in its various parts: national, continental, local, regional, transnational and so on. It is necessary to look for ideas and proposals to face old problems – the conflict between peoples and religions – with new instruments, not tied to a specific phase of western juridical and political civilisation, that of national States; as well as face new problems – the multiethnic society, the proliferation of identity problems and the multiplication of the possibilities of cultural and territorial affiliation for every individual and every community – with the old spirit of tolerance and love of reason that distinguished the European civilisations.

To paraphrase Vico, I would say that in an important part of the western establishment, there has been the tendency, since the fall of communism, to manifest apparent respect and attention for the "other", but at the same time to assume oneself to represent "the rule for the universe" and to consider defined once and for all the limits and characteristics of civilisation, to think that one's own civilisation comes "before all the others" in all fields, and to consider one's own paradigms and criteria of evaluation as old "as the world". By remembering Vico's lesson, it is hoped that European culture will remain faithful to itself and that neither the "arrogance of nations" nor the "arrogance of scholars" will triumph[80].

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[80] *Vide* Vico, *Princìpi di Scienza nuova* [1744], in *Opere filosofiche*, Firenze, 1971, "Elementi" (o "Degnità"), III e IV, pp. 432-433.