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RELIGIOUS AND BELIEF IDENTITIES
THE EUROPEAN PARADIGM OF THE SECULAR STATE

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Abstract: The paper deals with the religious phenomenon, which includes within itself "religion" and "non-religion", and focuses in particular on the Western (euro–atlantic) constitutional theory and practice. Such inclusion is the outcome of political and normative development over the centuries, a development which emphasises the progressive advancement of the role of "non-religion" and its contribution to the establishment of the secular paradigm of Western constitutionalism, formalised in national and well as in international and supranational sources of positive law and case law in Europe. The secular paradigm may be read through a plurality of definitions, whose common ground is best indicated with reference to the principles of cultural pluralism and of state's neutrality in both "religion" and "non–religion".

Il contributo tratta del fenomeno religioso, il quale racchiude in sé sia la "religione", sia la "non–religione", e approfondisce in particolare la teoria e la prassi costituzionale dell'area occidentale (euro–atlantica). L'assetto inclusivo sopra indicato rappresenta il portato di un'evoluzione politica e normativa che si è svolta nel corso di secoli. Tale sviluppo ha condotto all'acquisizione da parte del fenomeno "non–religione" di un ruolo essenziale nell'identificazione del paradigma secolare del costituzionalismo euro-occidentale, quale formalizzato nelle fonti europee di diritto positivo nazionale, internazionale e sovranazionale. Il paradigma secolare è suscettibile di più di una lettura, condividendo però i principi del pluralismo culturale e della neutralità dello stato in materia tanto di "religione", quanto di "non–religione".

Keywords: The religious phenomenon,"religion" and "non–religion", The religious phenomenon and the law, Western paradigm of the secular state, Neutrality as safeguard of pluralism

Parole chiave: Il fenomeno religioso, "religione" e "non-religione", il fenomeno religioso e il diritto, il paradigma occidentale dello stato secolare, neutralità come garanzia del pluralismo

1. Introduction: the religious phenomenon, between "religion" and "non–religion"

The connection between a state and the religious phenomenon is part of the main qualifications to be given a polity(1).

Further qualifications refer to a state's political and legal framework, entailing its identification (or not) as a constitutional democracy, or to its legal tradition, that makes of it a common law or a civil law (or other) jurisdiction, or to its ideological foundation, that indicates (among alternative solutions) a liberal and social democratic polity, or to its economic orientation, based (or not) on a social market economy. Furthermore, all such qualifications primarily depend on a state being consistent (or not) with the fundamental features of a system belonging to the Western community shaped by euro-atlantic constitutionalism(2). The classification as "secular" is then but one of the ways that, among others, contribute to characterise a state with regard to its non-identification with any one religion or with any specific religious denomination and, more generally, with reference to its neutrality to the religious phenomenon *per se*.

All the definitions proposed above are quite general and, perhaps, generic, and to some extent more intuitive and part of mainstream narratives than scientifically accurate and adequate. They do require, in fact, further and more detailed explanations. And yet, they provide a useful starting point for a much needed wider articulate analysis that,

(1) The issue is certainly and primarily relevant in nation-states and may be relevant also in a subnational or in a supranational perspective. In the first case, the specific qualification of a unitary state or of a federal union also applies to all of its territories, although some distinction in regulations is admitted (an example is the specific *régime* in force in Alsace Lorraine, partially different from the rest of France; another example is the mandatory teaching of religion in public schools in Alto Adige/Südtirol, whereas in the rest of Italy it is optional). In the United States, freedom of religion as regulated by the federal Constitution's First Amendment has been incorporated into state law through interpretation by the Supreme Court. Elsewhere, limiting the reference to a well-known example, religious difference and its impact on the respective distinct legal settings proved to be determinant for the post-independence partition between India and Pakistan in 1947. In the second perspective, the European Union's approach to the issue is framed in order to be compatible and reflect the distinct models of regulation of member-states (as will be dealt with at a later stage in the paper).

(2) On the methodological requirement of indicating the specific constitutionalism the research is dealing with see Toniatti (2019).

among other advantages, is meant to focus the proper distinction from other pertinent categories. Therefore, the definition of what a 'secular state' is, of what it is not, and how it is distinct from other qualifications based on factors of the same nature – such as "theological state", or ""confessional state", or "atheist state", and the like - requires a wider and deeper approach(3).

Another indicator of inadequacy of an unspecified definition of the "secular state" is provided for by the requirement of including also the non–religious element within the boundaries of the legal regulation of the religious phenomenon, although the said approach may appear to be contradictory.

It is our understanding, in fact, that the religious phenomenon includes — or, at least, may be regarded as inclusive of — also its opposite, the phenomenon of "non–religion".

Religion and non–religion are a two-sided polysemic concept that is better dealt with scientifically through an interdisciplinary approach, inclusive of the legal perspective. It is this last perspective, in particular, that suggests a unitary consideration of both faces of the same phenomenon inasmuch as the phenomenon, in its integrity, contributes to the definition of the main features of a state that, invariably, is the host polity accommodating both religious and beliefs identities.

In a context of pluralism and freedom, in fact, religion interacts, coexists and conflicts with its own ontological opposite (or denial) and with indifference to itself — the wide and heterogeneous space of anti–religion, non–religion, or a–religion, as represented by atheism, agnosticism, rationalism, scientism, and the like — and such interaction, coexistence

(3) On the ambiguity of the concept of secularism see Bottoni (2022). The evaluation, as such and in general, is to be largely shared and yet it is our opinion that the category needs not being discarded but, rather, that it requires contextualisation, as, for instance, with regard to the secular state being the appropriate framework for hosting an equal and balanced regulation of religious and belief identities (see the Final Remarks in this paper). A useful reference is the *Dèclaration universelle sur la laicité au XXI siècle*, which the Author herself recalls and quotes for its being suitable for consideration as "a key element in democratic life (art. 6)", and for being "defined as the harmonisation (art. 4) of three principles: respect for the freedom of conscience and its individual and collective manifestation (art. 1), the State's and public institutions' autonomy from religion or belief (art. 2), prohibition of discrimination against individuals (art. 3)". A critical evaluation has been elaborated also on the concept of "neutrality" ("that faces the 'danger of turning into an *empty*' signifier, or, alternatively, a word too *full* of meanings", in Palomino (2011, p. 656).

and conflict perform a pivotal role in the intellectual, spiritual and political life of any free society. The same relationship may be described also in the reverse order, of course (although, historically, non–religion has become legally relevant *per se* at a later historical stage than religion).

Quite obviously, dealing with "religion" and "non–religion" is — again — an oversimplification for both phenomena: each term, in fact, bears a reference to a very large plurality of "religions" and — so to speak — "non–religions", such plurality witnessing, by itself, the richness of human creativity and the capacity of the human mind to explore the highest and loftiest realms of inner consciousness as well as the most precise construction of rational worldviews.

The mutually interrelated dual framework of analysis is the outcome of the present stage of evolution of a process of secularisation of the normative setting of public institutions, a process that is quite slower and gradual than the parallel process of secularisation of society in the Western euro–atlantic legal tradition and, more in particular in Europe, that is the *focus* of the present paper.

Religion, in fact, has characterised the genetic code of social life and of institutional establishments through centuries of historical evolution and, with rare individual exceptions, has exercised a tight control of European culture for centuries.

The relevance of "non–religion" follows "religion's", historically: logically, in fact, a negative definition — a definition of what one is not — rather than an affirmative one — a definition of what one is — is a symptom of structural weakness, of somehow painful uncertainty, ultimately of a non–identity and it is doubtfully a preferential voluntary choice. Therefore, "non–religion" has started to be conventionally referred to as "beliefs", that is to be semantically regarded as an affirmative identity: "non–religion" thus becomes a "belief", although the noun itself has not achieved the same degree of an easy and immediate understanding as "religion" (and, perhaps, "non religion").

Historically, then, religion has somehow achieved the dominant position in setting basic social standards and has, for a long time, pre–empted competing alternative factors of identity: while, at the present stage of development of secularism, both religious and beliefs identities are to be considered as equally contributing to qualify the

connection between the state and the religious and the non–religious phenomenon.

In the next paragraphs, religious and beliefs identities will be dealt with in the objective or institutional sense, in order to elaborate on the specific qualification of a polity(4).

2. The interaction between law and the religious phenomenon

The law, and constitutional law in particular, cannot avoid being highly sensitive to religion and the religious phenomenon at large for several reasons.

Historically, in Europe, after centuries of brutal repression of religious minorities, heresies and alternative spiritual movements, the original ground for testing the earliest public attitudes of acceptance and tolerance for diversity from official mainstream values and institutional allegiance has been provided by the law on religion, thus marking a sort of hierarchical priority of freedom of religion among other fundamental rights(5). The constitutional law of the religious phenomenon in the era of modernisation is, therefore, intrinsically inspired by a pluralist approach inasmuch as it is expected to reflect the intrinsic pluralism of the religious phenomenon itself. Recognition and protection of religious freedom paved the way for establishing a wider and deeper pluralist recognition of fundamental rights.

In general, religion is perceived as being able to provide final answers to crucial questions concerning the meaning of personal human life and, indeed, of life *tout court*. For all the people who share their faith in those answers, religion is, therefore, a strong factor of social

(4) Religious and belief identities in the subjective sense, as referred both to individuals and to communities within the secular state, are not considered in the present paper.

(5) Reference is to the "preferred position doctrine" reserved to 1st Amendments values (inclusive of the two — no establishment and free exercise — religious clauses) of the federal Constitution of the United States and elaborated by the Supreme Court. The historical origins of migration of religiously motivated communities from Europe to the new continent may appear to explain the elaboration of such category and justify a stricter judicial scrutiny. European history (before and after the treaty of Westphalia, at least as far as the *Shoah*) would support the adoption of the same doctrine, although systematically there are no indicators of a hierarchy of constitutional rights and freedoms.

aggregation, unshaken self-identification and firm loyalty, all features that the state — and, generally, public power — basically wants for itself.

Religion is a spiritual source that supports and motivates individual and collective attitudes, choices and decisions. Religion is also a social organisation that has the authority of imposing a set of rules that are not only meant to regulate strictly spiritual experiences and ways of life but also daily and routine activities such as family organisation, food and clothing, communitarian systems of values and general social orientations (Piciocchi 2024).

In the end, religion is a complex, polyhedric social phenomenon, hardly subject to control from the outside — if not by another competing religion, through individual and, sometimes, mass conversions —- and a virtual alternative to the state from the point of view of being a competitive system of sources of law and provider of essential social services. Although virtually not less antagonistic — as represented by the exceptions of totalitarian and authoritarian ideologies, aiming at capturing the inner consciousness of individuals and masses —, beliefs appear to be less amenable to non–state references of loyalty and deference, thus showing to be more manageable by the state.

The law, therefore, has to face the religious phenomenon and to establish itself as the *exclusive* law–making authority and source of shared values of the community and yet it also has to cope with the need of accommodating — to some degree, depending on contingent circumstances — the effectiveness as well as the pervasiveness of the presence and role of religion in society.

In our time, religion and the state, in fact, share the interest in building a policy of mutual accommodation that requires, from both sides, flexibility, capacity of adaptation, perception of people's consent, mutual adjustments and concessions not primarily in setting the general framework of reference, such as the constitution and the highest religious sources, but in the respective interpretation, implementation, and *de facto* evolution.

Generally speaking, in the Western liberal tradition, the process of secularisation has historically achieved for the state the capacity of setting the boundaries of religious law within the free conscience of

individuals under the concept of freedom of religion. The free exercise of religious freedom is thus the general rule, applicable to all individuals and their respective communities, as long as such exercise does not violate state's systemic values.

The same historical secularising dynamic has affected the role of religions: fundamental loyalty to the state has been mediated through the achievement of a role — although to varying degrees limited — in the private sphere of individuals, also making use, mostly when accepted by the state, of the conscientious objection clause as an exemption from the enforcement of state general rules that result incompatible with their spiritual vision. Thus, religious law — instead of state law — may be legitimately observed when allowed by the state law on religion(6).

What the state's law on religion is must be eventually drawn, therefore, not only from constitutional declarations and general rules as interpreted according to changing historical circumstances but also from implementing legislation, case law and, when applicable, explicit bilateral agreements (Piciocchi *et al.* 2021)(7). Judicial rulings, in particular, are extremely important as courts are able to operate as institutional sensors of the degree of social acceptance and compliance with the current regulation either of state law or religious law. At the same time, constitutional declarations and general rules do not lose their relevance as they are the immediate expression of the political will to regulate the religious phenomenon in the polity.

The interdependence between the law and the religious scenario at a given time represents a delicate balance. And changes within the latter may — or ought to — imply changes of the former as well, either enlarging the scope of religious freedom or — as the case may be — restricting it, when non-compliance with state law becomes more visible and the challenge to its supremacy more serious. Normative changes, therefore, may reinforce the polity, on the one hand, but, at the same

(6) The rule of exemption based on conscientious objection is applicable also to beliefs, on the foundation of philosophical and ideological (non–religious) ground: see, for instance, the Charter of Fundamental Rights of the European Union, which significantly regulates the right to conscientious objection in the context of the freedom of thought, conscience and religion in art. 10, second paragraph ("The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right").

(7) Agreements between state and religious institutions may be classified as instruments introducing forms of "consensual legal pluralism" (Toniatti 2021, p. 55).

time, may affect the "essential content" (*das Wesensgehalt*) of a new religious presence in society.

The dynamics here indicated have developed and are still developing in many parts of Europe, thus setting a new and different scenario with regard to the features of the religious phenomenon: this different and more plural situation is due, in part, to a practice of religious conversions and, mainly, to notable massive immigration not only of isolated individuals but also of families, a circumstance that raises the issues of maintaining social customs and raising children in observance of their traditional values, often quite distinct from the ones experienced in the new countries of residence. New religions include Islam, in its various schools, and others from (Mediterranean and sub–Saharan) Africa and from the East; and all of them, regardless of their areas of origin — and whether practiced for their strictly spiritual meaning or just for its contribution to the new communities' cultural identity — have a role in making the current European religious scenario more complex and less consistent with the autochthonous historical legacy.

A consequence of such developments that needs being taken in consideration is that the religious component of the religious phenomenon tends to be able to capture an exclusive public interest, to the detriment of its non-religious element, due also to the relevance of "inter-faith dialogue" as an instrument for managing the coexistence of diversities. On the background of such scenario, a proper *focus* on the requirements of the secular state and of preserving its constitutive balanced features requires to be noticed and strengthened.

In the following paragraphs the evolution of the legal setting of the religious phenomenon will be briefly described in order to highlight some of the models to be found in the European (national, international and supranational) constitutional space.

3. Origins and evolution of the European paradigm of the secular state

European history could hardly be conceived without a recurring reference to the religious phenomenon as a structural part not only of the

cultural heritage of the continent but also as a distinguishing feature of its political and institutional setting.

The observation holds true whether applied to the Nordic deities such as Odin, Thor and Freya dominating over the Valhalla; or to the spiritual beings venerated by the Druids in their esoteric ceremonies; or to the ancient Greek or Roman pantheon that has generated world famous mythological figures and inspired so much artistic work that, somehow paradoxically, ensures their living presence in present day culture. Political power and leadership regularly invoked divine support and the religious caste regularly conceded supernatural protection, as needed.

Beyond the historical time of ancient paganism, Christianity managed to emerge as the official religion of the Roman empire, first, and then the winner over competing faiths, with the exception of the early Jewish diaspora in European territories. Both Judaism and Christianity, in spite of their origin from the Eastern Mediterranean region, found a favourable environment for planting a new root, the former, and expanding over the whole continent, the latter.

Later in the Middle Ages, a proliferation of sects and heresies — when not violently suppressed — developed into schisms in northern Europe as well as in the East, eventually broke the unity of (religious and political) Christianity — except for the military confrontation with a rising Islam — and affected the duality of spiritual and secular power, the latter nevertheless continuing for centuries to style itself as the Holy Roman Western empire inherited by the successors of Charlemagne.

Theories about the entitlement to the crown "by grace of God" and the establishment of national churches — headed by the king or queen and founded over the mandatory affiliation of members of the reigning dynasty — have provided further fuel to the characterising presence of the religious phenomenon in European institutional history. In spite of the opposition by both the empire and the Roman Catholic church, the era of the nation state flourished. The political engineering of the post–Westphalian sovereign state included the fundamental unity of the nation (often allegedly based on ethnic or racial ground under the term "national"), of language (thus endangering the survival of less spoken idioms), and also of religion: this was originally achieved through the

principle "*cujus regio ejus et religio*" that assumed and, rather, created religious homogeneity of a polity's citizens. It is to be stressed, nevertheless, that, while by itself undoubtedly a manifestation of tolerance, such arrangement was confined within the boundaries of the Christian faith and was not inclusive of other religious communities, such as — in spite of their own well established European presence — the Jews, who experienced bot only endless persecutions but also heavy legal discriminations until the end of the 18th century, when the Enlightenment started a new phase of emancipation and Jews were gradually granted full citizenship and a previously unexperienced freedom in the practice of their religion as well as in participation to general civic affairs (although antisemitism continued to be expressed socially).

The French revolution gave impulse to the early stage of a process of secularisation. The *Déclaration des Droits de l'Homme et du Citoyen* (1789) did not acknowledge any special status to the religious phenomenon, referred to, and somehow only indirectly, exclusively by its art. 10[(8)]. Religious freedom was listed among individual fundamental rights. Over time, freedom *of* religion generated also freedom *from* religion in order to accommodate also the worldviews of rationalists, agnostics and atheists, groups that are a substantial part of the European population and cultural legacy[(9)].

The French emancipation of Jews, promoted by a 1791 statute that put an end to their legalised discrimination was progressively followed by other jurisdictions and a post–revolutionary setting of a limited religious pluralism beyond Christian denominations was inaugurated in Europe. Nevertheless, and with the exception of periods of transition, the historical heritage of the nation–state in Europe shows a prevailing

(8) See the text: ""Nul ne doit être inquiété pour ses opinions, *même religieuses*, pourvu que leur manifestation ne trouble pas l'ordre public établi par la loi" (italics added).

(9) For a rare provision establishing a regulation for atheism — namely, the freedom to conduct atheistic propaganda — see art. 52 of the 1977 USSR Constitution ("Citizens of the USSR are guaranteed freedom of conscience, that is, the right to profess or not to profess any religion, and to conduct religious worship or atheistic propaganda. Incitement of hostility or hatred on religious grounds is prohibited. In the USSR, the church is separated from the state, and the school from the church"). The formula "freedom to conduct […] *atheistic* propaganda" replaced "freedom of *antireligious* propaganda to be found in the text (art. 124) of the 1936 Constitution (italics added) that had introduced freedom of conscience, that meant freedom to believe or not believe in religion. Freedom of conscience was ensured by separating the church from the state, "and the school from the church".

presence of one religion only at the same time, that is the Christian faith in one of its confessional expressions, showing a distinct degree of presence in the public space, that is quite higher in Eastern Orthodox experiences and in countries having — or having previously had — a national established church(10).

It is not a coincidence that the systematic study of such issues has traditionally been named "state and church relations" — church(es) performing the role of an institutional filter of religion(s) —, rather than "state and religions", as it appears more appropriate and more widely practiced nowadays.

Furthermore, a growing emphasis on the concept of equal citizenship gradually implied the achievement of legal irrelevance of individual religious affiliation in the public area, thus setting a typical feature of Western societies, namely, the separation between religious freedom of individuals and the secular public space: religious pluralism, in

(10) The change of *status* of a given religion may be fairly difficult to acknowledge, as evidenced by a number of cases decided by the Italian Constitutional Court on the Criminal Code (art. 734) that made it a crime to use language "blaspheme in public, with invectives or offensive language, against the Divinity, Symbols, or Persons venerated in the Religion of the State". When the code was adopted in 1930, the then constitutional text (Article 1 of the Albertine Statute) proclaimed the Roman Catholic religion as "the religion of the State". After the adoption of the republican Constitution (1948), a new Protocol between the state and the Catholic church proclaimed that "the principle that the Catholic religion is the only religion of the Italian State, originally stated by the Lateran Pacts, is considered to no longer have any effect". The new *status*, therefore, could not uphold the said criminal law provision. Nevertheless, the Court found different grounds for not invalidating it, writing that "the Catholic religion was no longer the religion of the State as a political organization, but rather that of the State as society" (judgement no. 79 of 1958); or, later, that "the object of legal protection was no longer Catholicism as the religion of "nearly the entirety" of Italians, but rather 'religious sentiment', a basic element of religious freedom, which the Constitution recognizes as common to all people" (judgement no. 14 of 1973). Eventually, in judgement no. 440 of 1995, the Court concluded that the pre-eminence of the principle of equality to be implemented in a constitutional context of secularism demanded a declaration of unconstitutionality for those parts of the provision that effectively violated the principle. The Court then divided the blasphemy provision into two parts: the first outlawing invectives and offensive language against a generic Divinity, not ascribed to any particular religion, the contents of which could be filled in by the religion of any believer, and the second outlawing invectives and offensive language against the Symbols and Persons venerated in the religion of the State. The Court struck down only the latter part of the provision, limiting its declaration to the words "Symbols, or Persons venerated in the religion of the State", and added that the resulting rule "provides non-discriminatory protection of an interest that is common to all the religions that today characterize our national community, in which a variety of different faiths, cultures, and traditions must coexist".

fact, entailed the non–identification of the state with any one religion or any one religious denomination only. Any investigation on issues of state and religion relationship in individual jurisdictions should always include constitutional provisions on the principle of equality and non-discrimination, with specific regard to religion as a previous recurrent factor of discrimination.

In other words, individual religious freedom in Europe- inclusive of freedom *from* religion as well — incorporates within its normative content also the principle of separation between state and religion, although the understanding of the said principle is not uniformly settled and, consequently, is subject to distinct margins of normative implementation by European nation–states.

Quite distinct the framework of the normative setting established in the United States of America: in fact, since the time of the historical revolution, in some states and since the adoption of the Bill of Rights (1791), the principle of religious freedom was explicitly expressed by the "free exercise clause" of the First Amendment that left very little discretion to the federal law-maker as to setting limits while a larger discretion was acknowledged to (and effectively exercised by) the judiciary(11).

To this extent, a comparison with the European experience is feasible, although, indeed, not really easy. But such a comparison becomes much more complex when one considers that the breakaway from the United Kingdom entailed a separation also from its formula based on an official state religion that required a religious test for all holders of a public office(12), so that the "no establishment clause" — and the con-

(11) The text of the First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof […]".

(12) See: "In England, religious tests were used to "establish" the Church of England as an official national church. The Test Acts, in force from the 1660s until the 1820s, required all government officials to take an oath disclaiming the Catholic doctrine of transubstantiation and affirming the Church of England's teachings about receiving the sacrament. These laws effectively excluded Catholics and members of dissenting Protestant sects from exercising political power. Religious tests were needed, William Blackstone explained, to protect the established church and the government "against perils from non-conformists of all denominations, infidels, turks, jews, heretics, papists, and sectaries" (Brownstein, Campbell). In the United Kingdom "when judges are sworn in they take two oaths/affirmations. The first is the oath of allegiance and the second the judicial oath". An oath may be substituted by an affirmation. For both, "Other acceptable forms of the oaths above" are: Hindu (Members of the Hindu faith

sequent prohibition of a religious test — is to be read against such scenario[13].

Because of quite a different position as to the presence of established religions in the European public space, no comparison with the United States system is even attempted here and the following paragraphs will focus on the plurality of arrangements that in Europe have been developed in order to set the basic normative background of religious freedom.

Over time and due to a new era of European states' social policies, secularisation meant also that religiously inspired institutions in the field of health care, social assistance, and education as well as their influence in family life gradually lost their formerly important role in favour of public institutions, of secular private commitment and religiously neutral conceptions. The social state in Europe is also a secular state. The state aims at fulfilling its welfare tasks, not because of a voluntary charitable religiously motivated commitment but out of constitutional or legislative obligations to citizens.

The development of contemporary mainstream European constitutionalism has gradually led to a normative setting centred on a few features related to freedom of religion inspired by the secular state's neutrality to any one religion: freedom of and from religion of individuals and communities, freedom of religious establishments to perform

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will omit the words "I swear by Almighty God" and substitute the words "I swear by Gita"); Jew (Members of the Jewish faith use the oaths above although some may wish to affirm); Muslim (Members of the Muslim faith will omit the words "I swear by Almighty God" and substitute the words "I swear by Allah"; Sikh (Members of the Sikh faith will omit the words "I swear by Almighty God" and substitute the words "I swear by Guru Nanak"), in https://www.judiciary.uk/.

(13) Both First Amendment religious clauses are further reinforced by the "no religious test clause» ("no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States", art. VI of the federal Constitution). It is interesting to notice that "At the time the United States Constitution was adopted, religious qualifications for holding office also were pervasive throughout the states. Delaware's constitution, for example, required government officials to "profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost." North Carolina barred anyone "who shall deny the being of God or the truth of the Protestant religion" from serving in the government. Unlike the rule in England, however, American religious tests did not limit office-holding to members of a particular established church. Every state allowed Protestants of all varieties to serve in government. Still, religious tests were designed to exclude certain people — often Catholics or non–Christians — from holding office based on their faith".

their spiritual mission under a normative condition of compatibility with state law, save limited exceptions provided by state law, separation between state and religion and between state and religious institutions, save a few national cases of state official religion as regulated by state's legislation, differentiation between the private and the public sphere under the principle of state neutrality with regard to all individual denominations.

The historical evolving scenario suggests the relevance of further systemic features shared by European jurisdictions: the religious phenomenon has been present and relevant throughout European history; its presence and relevance has been constantly adapted at different stages; the religious phenomenon shows two faces, the first appearing as closer to political power, willing to accept mediations with the state in order to preserve or to receive some advantages and employed — to varying degrees — as an instrument of government, the second more authentically an expression of a thoroughly spiritual dimension, quite distant from any worldly power, more militant and reluctant to any sort of compromise with the neutral sphere of non–religion and with the very notion of recognition of the supremacy of state law. Hence, because of the variety of religious approaches and attitudes, the need for flexibility and adaptation.

At the present stage of historical development, secularism may thus be interpreted both as a defensive attitude by the state from undue intrusion into its public affairs as well as the assertion of a form of ideal self–determination of a polity(14): reference to secularism as a sort of "civil religion" is meant to emphasise that the sphere of "non–religion" does have its own (non–metaphysical) high ethical values, among which the equal constitutional recognition and protection of religious and belief identities.

(14) On the ground, nevertheless, one has also to recall the hypothesis suggesting an interpretation of secularism as a form of aggression by the state against all religions, or against one religious denomination in particular.

4. Normative diversities within the European constitutional paradigm

A short survey of European sources of positive law — international, supranational and national — gives evidence to the main features of the constitutional accommodation of both religious and belief identities within the framework of the secular state.

4.1. *Reading European international and supranational sources of law*

The specific provisions of the European Convention for Human Rights and Fundamental Freedoms (ECHR, 1950)[15] and of the Charter of Fundamental Rights in the European Union (CFREU, 2009)[16] provide a standard of the shared understanding of the constitutional status and regulation of religious freedom by member-states, although national differences are not at all missing non marginal only, and the case–law of the two Courts is quite relevant for making that shared understanding more specific.

In both normative sources, freedom of religion is dealt with in conjunction with freedom of thought and conscience: while thought *per se* seems to recall a rather intellectual side of human life and activities, religion and conscience do appear to share a solid reference to a rather spiritual dimension, inasmuch as the latter covers the area of non–religion and concurs to emancipate the individual from dogmas and ethical standards of behaviour deriving from an external authority above

(15) See ECHR, art. 9 ("*Freedom of thought, conscience and religion*"): 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

(16) See CFREU, art. 10 ("*Freedom of thought, conscience and religion*"): 1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. 2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right".

individual conscience. Freedom of conscience sharing the normative context with freedom of religion entails the codification of freedom *from* religion. Thus, finding the combination of religion and conscience in the same normative text does suggest that religion is perceived as a thoroughly subjective reality — just as conscience — and that it loses any claim to a higher status of its own over individual conscience. And the inclusion in the same context of thought as well confirms that each one of them — thought, conscience and religion — is equally regarded as an essential component of the human existential condition.

Nevertheless, religion deserves further rules expressly addressed to it: freedom to change religion or belief entails, once again, the supremacy of the individual over his/her religious community or ideological group; freedom to manifest religion or belief, in worship, teaching, practice and observance is rather related to historical practices of individual and collective repression that the processes of modernisation and secularisation have hopefully defeated and, furthermore, refers to subjective choices of the individual.

The collective dimension of religion emerges with regard to the "either alone or in community with others and in public or private" clause: in this case, without undermining the individual right, the emphasis is on the collective exercise of freedom of religion (and conscience and thought). The collective perspective is extremely important and, nevertheless, religious minorities in Europe can only rely on the Framework Convention for the Protection of National Minorities, inasmuch as it deals also with the religious component of the identity of national minorities but without providing *ad hoc* instruments of judicial adjudication(17).

As it happens with all fundamental rights, freedom of religion as well — just as freedom of conscience and thought — may be subject to limitations. The CFREU (art. 52) concentrates in a single provision such limits, that are of a formal nature ("they must be provided for by law") or of a substantive one: "they must respect the essence of those rights and freedoms"; furthermore, limitations are "subject to the principle of proportionality", and "may be made only if they

(17) All the more relevant is, therefore, the role of those forms of soft control that are performed by the Advisory Committee (Topidi 2021; van der Ven 2008).

are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

The ECHR (art. 9) appears to be more selective with regard to the object of limits, as they may be addressed only to "freedom to manifest one's religion or beliefs" and are not meant to target the soul or mind of individuals; furthermore, the provision reserves the limits to the law and introduces substantive limitations as well: they must be "necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others". Quite a sweeping set of potential constraints, that a state party to the Convention may be tempted to employ for targeting one particular religious community as a whole — for instance, for the protection of a constitutional "public order" — without being found in violation of the Convention. Of course, the application of such general clauses is entrusted to their interpretation by the ECtHR. As often and repeatedly indicated by the case law, the ECHR is "a living instrument that must be interpreted in light of present-day conditions".

The Treaty on the Functioning of the European Union (TFEU), introduces also a principle of parallelism in the relational framework of the Union with the spheres of religions and beliefs: in fact, art. 17 has a preliminary general normative statement on the conformity of the EU's relational framework with the same pattern of its member-states(18); and it further qualifies a parallel attitude of mutually cooperative and consultative nature between the institutions of the EU and those spheres(19).

Both normative sources establish a dual model of definition of the principle of secularism: the ECHR with regard to the safeguard of religious and belief identities against violations by member-states, whereas CFREU adds its protection not only against violations by the

(18) See art. 17, 1st paragraph: "The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States"; and, 2nd paragraph: "2. The Union equally respects the status under national law of philosophical and nonconfessional organisations".

(19) See art. 17, 3rd paragraph: "Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations".

member-states in the field of application of EU law but also against violations by the institutions of the EU themselves (the Council of Europe not having governmental responsibilities and not being liable of such violations).

Furthermore, the EU is bound to observe a parallel attitude of cooperative attention with regard to both religious and belief identities, thus introducing a further structural element of a European constitutional paradigm of secularism.

4.2. *Reading international law*

The combination of "thought, conscience and religion" within the same provision and under the same regulation was initially introduced in sources of planetary international law adopted within the United Nations system: the main reference is to the Universal Declaration of Human Rights (1948)[20] and to the International Covenant on Civil and Political Rights (ICCPR, 1976)[21].

Religious and belief identities are legally protected also in those areas of fundamental rights that have provided past experiences of discrimination on the ground of religion and belief, such as the field of family law[22] or education of children[23] and, more in general, with

(20) See art. 18: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance".

(21) See art. 18: "1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others".

(22) For example, see art. 16 of the Universal Declaration: "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during and at its dissolution".

(23) For example, see art. 2 of the Universal Declaration: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

regard to the principle of equality and the general prohibition of discrimination[24].

Other relevant sources of planetary international law — sponsored by the United Nations — confirm the normative framework of protection of freedom of religion as one of other related fundamental rights: this is the case of the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief[25] and the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[26].

All such sources of international law show to be inspired by the same dual approach, based on a combined equal protection of religious and belief identities within the same normative framework.

4.3. *Reading European states' constitutions*

A reference to the written constitutional sources of member states of the European Union allows to gain the proper understanding of a full sight of the historical, political and cultural variety of the old continent with regard to the distinct handling of the issue of religious and belief identities during the respective process of individual states' nation-building. In the present circumstance, it is advisable to leave aside, with a few exceptions, the constitutional sources of other European states, in particular of those states that, although members of the Council of

(24) As established by art. 18.4 of the ICCPR: "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions".

(25) See art. 1: "1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice".

(26) See art. 1: "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity" […]; and art. 2: "Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life".

Europe, have only recently started showing to what extent they effectively share features of Western constitutionalism.

A survey of positive law is useful and even fundamental as long as the expected results are intrinsically limited. Exploring and analysing what the law actually is require a deeper and fairly more sophisticated approach. In fact, assessing the effective legal status of religious and belief identities in a given nation-state needs reference also to legislative sources and to case law, to public policies implementing the dual paradigm of equal recognition of religious and belief identities as well as to the degree of (official and unofficial) influence expressed by religious and non-religious authorities on electoral processes and on legislative proceedings(27), to prevailing patterns of social behaviours (starting with religious believers), to the increase of accepted pluralism in society.

Nevertheless, written sources of constitutional law do express a solemn political and normative formal projection of a fundamental vision of collective self-determination and, consequently, may well be regarded as reliable instruments of analysis and systematic construction to the purpose of this research.

In such a perspective, for instance, it is significant to recall how some countries have chosen to refer to the religious contribution to the legitimacy of the state and have consequently introduced into their constitutional text either a so called "*invocatio Dei*", as in the preamble of

(27) A noteworthy recent case concerns the initiatives taken by the Orthodox Church against the bill introducing same-sex marriage in Greece (enacted in February 2024), the first Orthodox country and the 17th member –state of the EU to do so. The Orthodox Times (Monday March 11, 2024) reports that "In anticipation of the parliamentary debate and vote on the bill regarding the marriage and adoption rights of same-sex couples, the Holy Synod of the Church of Greece has addressed members of the Greek Parliament through a comprehensive seven-page letter. The letter stresses the Synod's appeal to MPs, urging them to consider that the proposed legislation "does not merely address the immediate concerns of specific individuals within the LGBTQ+ community through temporary measures but fundamentally alters the foundational institution of family throughout the country." The Synod emphasizes that the repercussions of this legislation will not be abstract, affecting the rights of future children and the fundamental well-being of Greek society. Among its concerns, the Holy Synod highlights issues of gender neutrality in the parent-child relationship, contending that the bill transforms parents from the traditional roles of father and mother into neutral guardians, prioritizing the rights of homosexual adults over the interests of future children". The text of the letter (in Greek) is available there. Furthermore, MPs who voted in favour of the bill have been excommunicated by the three Dioceses of Corfu, of Pirayus, and of Kythira, as reported by Jurist.org (last accessed March 6, 2024).

the 1937 Irish Constitution[28], of the 1975 Greek Constitution[29], of the 2011 Fundamental Law of Hungary[30] (to which we add the 1999 Constitution of Switzerland as a non-EU member-state)[31].

In other cases, the Constitution makes a more superficial reference to God (*nominatio dei*), as in the preamble of the 1949 *Grundgesetz* of Germany ("Conscious of their responsibility before God and man […] the German people […]") or, in its own way, in the preamble of the Constitution of Slovakia ("[…] mindful of the spiritual heritage of Cyril and Methodius"[…]").

In a different attitude, the preamble of the 1997 Constitution of Poland introduces statements of mediation and mutual accommodation between religious and belief identities: "We, the Polish Nation — all citizens of the Republic, Both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources, Equal in rights and obligations towards the common good […] our culture rooted in the Christian heritage of the Nation and in universal human values […]. Recognizing our responsibility before God or our own consciences […]"[32].

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(28) See the text: "In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Éire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation, And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations"). See also art. 44: "1. The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion".

(29) See the text: "In the name of the Holy and Consubstantial and Indivisible Trinity".

(30) The text of the National Avowal: "God bless the Hungarians […] We, the members of the Hungarian Nation […] hereby proclaim the following: We are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago […] We recognise the role of Christianity in preserving nationhood. We value the various religious traditions of our country. unity of the nation".

(31) The Preamble starts with "In the name of Almighty God!", confirming the opening formula of the previous 1848 constitutional text.

(32) The same accommodating attitude inspires the preamble of the 1991 Constitution of Albania ("and with faith in God and/or other universal values").

In the same perspective, other constitutional documents are to be mentioned that go further into framing a confessional state and provide for the establishment of an official state religion, as, again, in the case of Greece(33), of Malta(34) or of an established church, as in Denmark(35) or of churches, as in Hungary, under a conventional regulation founded on a constitutional provision aiming at establishing forms of cooperation between the state and religious organisations(36).

All such formulas do not prevent the respective constitution from providing for a (rather) full acknowledgement of freedom of religion and belief as well as for a general prohibition of discrimination

(33) See art. 3 in Section II (*Relations of Church and State)*: "1. The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodal canons and sacred traditions. It is autocephalous and is administered by the Holy Synod of serving Bishops and the Permanent Holy Synod originating thereof and assembled as specified by the Statutory Charter of the Church in compliance with the provisions of the Patriarchal Tome of June 29, 1850 and the Synodal Act of September 4, 1928. 2. The ecclesiastical regime existing in certain districts of the State shall not be deemed contrary to the provisions of the preceding paragraph. 3. The text of the Holy Scripture shall be maintained unaltered. Official translation of the text into any other form of language, without prior sanction by the Autocephalous Church of Greece and the Great Church of Christ in Constantinople, is prohibited".

(34) See art. 2. (*Religion*): The religion of Malta is the Roman Catholic Apostolic Religion. 2. The authorities of the Roman Catholic Apostolic Church have the duty and the right to teach which principles are right and which are wrong. 3. Religious teaching of the Roman Catholic Apostolic Faith shall be provided in all State schools as part of compulsory education.

(35) This is the case of the Constitution of Denmark (see Part I. 4: "The Evangelical Lutheran Church shall be the Established Church of Denmark, and) as such, it shall be supported by the State". Consequently, according to Part II: "6. The King shall be a member of the Evangelical Lutheran Church". Furthermore, Part VII, art. 66 states that "The constitution of the Established Church shall be laid down by Statute".

(36) See art. VII: "4. The State and religious communities may cooperate to achieve community goals. At the request of a religious community, the National Assembly shall decide on such cooperation. The religious communities participating in such cooperation shall operate as established churches. The State shall provide specific privileges to established churches with regard to their participation in the fulfilment of tasks that serve to achieve community goals. 5. The common rules relating to religious communities, as well as the conditions of cooperation, the established churches and the detailed rules relating to established churches shall be laid down in a cardinal Act".

on the ground of religion or non-religion, as in Ireland[37], Greece[38], Hungary[39], Malta[40].

(37) See art. 44. 2: "1. Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen. 2. The State guarantees not to endow any religion. 3. The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status. 4. Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school. 5. Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes. 6. The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation".

(38) As stated in art. 5.2: "All persons living within the Greek territory shall enjoy full protection of their life, honour and liberty irrespective of nationality, race or language and of religious or political beliefs. Exceptions shall be permitted only in cases provided by international law". See also art. 13: "1. Freedom of religious conscience is inviolable. The enjoyment of civil rights and liberties does not depend on the individual's religious beliefs. 2. All known religions shall be free and their rites of worship shall be performed unhindered and under the protection of the law. The practice of rites of worship is not allowed to offend public order or the good usages. Proselytism is prohibited. 3. The ministers of all known religions shall be subject to the same supervision by the State and to the same obligations towards it as those of the prevailing religion […]. 5. No oath shall be imposed or administered except as specified by law and in the form determined by law".

(39) See art. VII: "1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to choose or change one's religion or other belief, and the freedom of everyone to manifest, abstain from manifesting, practise or teach his or her religion or other belief through religious acts, rites or otherwise, either individually or jointly with others, either in public or in private life. 2. People sharing the same principles of faith may, for the practice of their religion, establish religious communities operating in the organisational form specified in a cardinal Act. 3. The State and religious communities shall operate separately. Religious communities shall be autonomous". See also art. XV: "1. Everyone shall be equal before the law. Every human being shall have legal capacity. 2. Hungary shall guarantee the fundamental rights to everyone without discrimination and in particular without discrimination on grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status".

(40) See art. 40 ("*Protection of freedom of conscience and worship*"): 1. All persons in Malta shall have full freedom of conscience and enjoy the free exercise of their respective mode of religious worship. 2. No person shall be required to receive instruction in religion or to show knowledge or proficiency in religion if, in the case of a person who has not attained the age of sixteen years, objection to such requirement is made by the person who according to law has authority over him and, in any other case, if the person so required objects thereto: Provided that no such requirement shall be held to be inconsistent with or in contravention of this article to the extent that the knowledge of, or the proficiency or instruction in, religion is required for the teaching of such religion, or for admission to the priesthood or to a religious order, or for other religious purposes, and except so far as that requirement is shown not to be reasonably justifiable in a democratic society". See also art. 45 on prohibition of discrimination: "[…]

An investigation into the legislative enforcement or judicial safeguard of such provisions might find some (occasional or recurring) inconsistencies, but in these cases there is an obvious domestic problem of effective respect for the very supremacy of the constitution.

The liberal approach is shared by Denmark in spite of the virtual definition of "confessional state" derived from the Constitution(41). The same is to be said with regard to the Constitution of Switzerland as well(42).

In other words, even the establishment of official state churches or religions, or the fact of mentioning *the* Divinity (not *any* Divinity, as, more often than not, the reference, although implicit, is to Christianity) in the constitutional preamble — indeed, a very solemn source — does not imply any form of inconsistency with the adoption of a secularly oriented dual approach to the protection of belief identities as of religious ones.

For instance, in Finland, although the Constitution establishes a reservation to parliamentary legislation for regulating the Evangelical Lutheran Church (as well as of the Orthodox Church), freedom of religion and conscience is thoroughly provided for all, irrespective of any religious affiliation(43).

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the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity".

(41) See the Constitution of Denmark, art. 67 ("The citizens shall be entitled to form congregations for the worship of God in a manner consistent with their convictions, provided that nothing at variance with good morals or public order shall be taught or done"), art. 68 ("No one shall be liable to make personal contributions to any denomination other than the one to which he adheres"), art. 69 ("Rules for religious bodies dissenting from the Established Church shall be laid down by Statute"); and art. 70 ("No person shall for reasons of his creed or descent be deprived of access to complete enjoyment of his civic and political rights, nor shall he for such reasons evade compliance with any common civic duty").

(42) The Swiss Constitution establishes that (art 8 "*Equality before the law*") 1. Every person is equal before the law. 2. No person may be discriminated against, in particular on grounds of origin, race, gender, age, language, social position, way of life, religious, ideological, or political convictions, or because of a physical, mental or psychological disability"; and that (art 15, "*Freedom of religion and conscience*") 1. Freedom of religion and conscience is guaranteed. 2. Every person has the right to choose freely their religion or their philosophical convictions, and to profess them alone or in community with others. 3. Every person has the right to join or to belong to a religious community, and to follow religious teachings. 4. No person may be forced to join or belong to a religious community, to participate in a religious act, or to follow religious teachings".

(43) See respectively Chapter 6, section 76 ("The Church Act Provisions on the organisation and administration of the Evangelic Lutheran Church are laid down in the Church Act. The legislative procedure for enactment of the Church Act and the right to submit legislative proposals relating to the Church Act are governed by the specific provisions in that Code") and Chapter 2,

The dual approach — combining the equal recognition and protection of religious and belief identities coupled by and reinforced by the prohibition of discrimination — is expressly adopted in the Constitution of Belgium(44), of The Netherlands(45), of Romania(46).

Some constitutional texts emphasise the separation between state and religion(s) as the proper scenario for safeguarding the equal protection of "freedom of conscience, religious and other beliefs", as in the 1991 Constitution of Slovenia(47) and in the Constitution of Bulgaria(48).

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section 11 ("Everyone has the freedom of religion and conscience. Freedom of religion and conscience entails the right to profess and practice a religion, the right to express one's convictions and the right to be a member of or decline to be a member of a religious community. No one is under the obligation, against his or her conscience, to participate in the practice of a religion".

(44) See to this extent art. 11 ("Enjoyment of the rights and freedoms recognised for Belgians must be provided without discrimination. To this end, laws and federate laws guarantee among others the rights and freedoms of ideological and philosophical minorities").

(45) See art. 6 1 ("Everyone shall have the right to profess freely his religion or belief, either individually or in community with others, without prejudice to his responsibility under the law. 2. Rules concerning the exercise of this right other than in buildings and enclosed places may be laid down by Act of Parliament for the protection of health, in the interest of traffic and to combat or prevent disorders") and art. 1 ("All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted").

(46) As provided by art. 29 ("1. Freedom of thought and opinion, as well as the freedom of religious belief, may not be restricted in any way. No one can be forced to adopt an opinion or to espouse a religious belief contrary to his/her convictions. 2. Freedom of conscience is guaranteed; it must be expressed in a spirit of tolerance and mutual respect. 3. All religions are free and organized in accordance with their own statutes, under the terms defined by the law. 4. All forms, means, acts, or actions of religious enmity are prohibited in the relationship between the cults. 5. The religious sects are autonomous in relation to the state and enjoy its support, which includes measures facilitating religious assistance in the Army, in hospitals, penitentiaries, asylums, and orphanages. 6. Parents or guardians have the right to ensure, in accordance with their own convictions, the education of minor children for whom they are responsible".

(47) See art. 7 ("The state and religious communities shall be separate. Religious communities shall enjoy equal rights; they shall pursue their activities freely"), art. 14 ("In Slovenia everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status, disability or any other personal circumstance. All are equal before the law"), and art. 41 (under the head of "freedom of conscience", stating that "Religious and other beliefs may be freely professed in private and public life. No one shall be obliged to declare his religious or other beliefs. Parents have the right to provide their children with a religious and moral upbringing in accordance with their beliefs. The religious and moral guidance given to children must be appropriate to their age and maturity, and be consistent with their free conscience and religious and other beliefs or convictions").

(48) See art. 11.4 ("There shall be no political parties on ethnic, racial or religious lines, nor parties which seek the violent seizure of state power").

The same pattern of protection of freedoms of thought, conscience, religious creed and faith applies to the Constitution of Slovakia(49). The Constitution of Slovakia is to be mentioned also as it expressly protects the freedom to atheism(50).

A special regulation is provided on some matters related to (non–) religion, as, for example, the priority of civil marriage in Belgium and Slovenia(51); or the constitutional prohibition of religious political parties, as in Bulgaria(52), or the safeguard of conscientious objection against the performance of military service "if it is against his conscience or religious creed", as established by the Constitution of Slovakia (art. 25).

The Constitution of Greece, nevertheless, expressly denies any field of recognition for conscientious objection, explicitly when founded on religious ground and, supposedly, on non–religious ground as well (art.

(49) See art. 24: "1. The freedoms of thought, conscience, religious creed and faith are guaranteed. This right also encompasses the possibility to change one's religious creed, or faith. Everyone has the right to be without religious creed. Everyone has the right to publicly express his thoughts religious creed. Everyone has the right to publicly express his thoughts. 2. Everyone has the right to freely express religion, or faith alone or together with others, privately or publicly, by means of religious services, religious acts, by observing religious rites, or to participate in the teachings thereof. 3. Churches and religious communities administer their own affairs, in particular, they constitute their own bodies, appoint their clergymen, organize the teaching of religion, and establish religious orders and other church institutions independently of state bodies. 4. Conditions for exercising of rights under paragraphs 1 to 3 may be limited only by law, if such a measure is necessary in a democratic society to protect public order, health, morals, or the rights and freedoms of others. See also art. 37: "1. The freedom of conscience, the freedom of thought and the choice of religion and of religious or atheistic views shall be inviolable. The State shall assist the maintenance of tolerance and respect among the believers from different denominations, and among believers and non-believers. 2. The freedom of conscience and religion shall not be practised to the detriment of national security, public order, public health and morals, or of the rights and freedoms of others".

(50) This last rule goes beyond what formerly established by the socialist Constitution of Czechoslovakia of 1960 (art. 32: "Freedom of confession shall be guaranteed. Everyone shall have the right to profess any religious faith or to be without religious conviction, and to practise his religious beliefs in so far as this does not contravene the law. (2) Religious faith or conviction shall not constitute grounds for anyone to refuse to fulfil the civic duties laid upon him by law").

(51) See the Constitution of Belgium (art. 21: "A civil wedding should always precede the blessing of the marriage, apart from the exceptions to be established by the law if needed") and of Slovenia (art. 53: "Marriage is based on the equality of spouses. Marriages shall be solemnised before an empowered state authority").

(52) See art. 11.4 ("There shall be no political parties on ethnic, racial or religious lines, nor parties which seek the violent seizure of state power").

5.4): "No person shall be exempt from discharging his obligations to the State or may refuse to comply with the laws by reason of his religious convictions".

Education is a substantive area that has traditionally been of very special concern for both religious and beliefs identities, in all jurisdictions: the Constitution of Belgium offers a very articulate regulation in the field, established in order to accommodate many if not all sensitivities and priorities(53).

The principle of "separation" is referred to — as in other constitutional texts — in the 2007 Constitution of Montenegro(54). The principle of "secularism" ("*laicité*") is expressly mentioned quite seldom: this is indeed the case of the 1958 Constitution of the 5th Republic in France(55). Other cases not in the EU — expressed through the notion of separatism — are provided by the 2008 Constitution of

(53) See article 24 § 1. Education is free; any preventive measure is forbidden; the punishment of offences is regulated only by the law or federate law. The community offers free choice to parents. The community organises non-denominational education. This implies in particular the respect of the philosophical, ideological or religious beliefs of parents and pupils. Schools run by the public authorities offer, until the end of compulsory education, the choice between the teaching of one of the recognised religions and nondenominational ethics teaching. § 2. If a community, in its capacity as an organising authority, wishes to delegate powers to one or several autonomous bodies, it can only do so by federate law adopted by a two-thirds majority of the votes cast. § 3. Everyone has the right to education with the respect of fundamental rights and freedoms. Access to education is free until the end of compulsory education. All pupils of school age have the right to moral or religious education at the community's expense. § 4. All pupils or students, parents, teaching staff or institutions are equal before the law or federate law. The law and federate law take into account objective differences, in particular the characteristics of each organising authority that warrant appropriate treatment. § 5. The organisation, the recognition and the subsidising of education by the community are regulated by the law or federate law".

(54) See art. 14 ("*Separation of the religious communities from the State*"): "Religious communities shall be separated from the state. Religious communities shall be equal and free in the exercise of religious rites and religious affairs".

(55) See art. 1 ("France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion"). Previously, reference is to be made to the 1946 Constitution, which for the first time explicitly adopted the term (art. 1: "*La France est une République indivisible, laïque, démocratique et sociale*"). The policy of state secularism was started through the 1905 Law of Separation of Church and State, still in force. Its main consequences were to terminate the 1801 Concordat, to disestablish the Catholic church, and to declare state neutrality in religious matters.

Kosovo[56], of the 2006 Constitution of Serbia[57] as well as of the 1982 Constitution of Turkey[58].

The principles are present — although only indirectly — in the 1948 Constitution of Italy, in which secularism and separation are derived from the respective "independence and sovereignty" of the state and the Catholic Church, "each within its own sphere" (art. 7) as well as from the recognition that "All religious denominations are equally free before the law" and that "Denominations other than Catholicism have the right to self-organisation according to their own statutes, provided these do not conflict with Italian law" (art. 8). Moreover, the same provision establishes a conventional method for regulating their mutual relationship ("Their relations with the State are regulated by law, based on agreements with their respective representatives").

The Constitution of Spain contains the principles of secularism and separation in the form of an express denial of an established state religion (art. 16.3) which states that "No religion shall have a state character"[59].

Nevertheless, the Spanish state self–qualifies itself as not indifferent to the underlying religious reality of society and, consequently, the Constitution mandates that "the public authorities shall take into account the religious beliefs of Spanish society and shall consequently

(56) See art. 8 ("*Secular State*"): "The Republic of Kosovo is a secular state and is neutral in matters of religious beliefs".

(57) See art. 11 ("Secularity of the State"): "The Republic of Serbia is a secular state. Churches and religious communities shall be separated from the state. No religion may be established as state or mandatory religion".

(58) See I. Form of the State, II. Characteristics of the Republic, art. 2: "The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble".

(59) The same form of denial belongs to art. 10 of the 1991 Constitution of Albania ("Article 10 1. In the Republic of Albania there is no official religion. 2. The state is neutral in questions of belief and conscience, and also, it guarantees the freedom of their expression in public life. 3. The state recognizes the equality of religious communities. 4. The state and the religious communities mutually respect the independence of one another and work together for the good of each of them and for all. 5. Relations between the state and religious communities are regulated on the basis of agreements achieved between their representatives and the Council of Ministers. These agreements are ratified by the Assembly. 6. Religious communities are legal entities. They have independence in the administration of their properties according to their principles, rules and canons, to the extent that interests of third parties are not infringed").

maintain appropriate cooperation relations with the Catholic Church and other confessions"(60).

Both the Italian and Spanish cases are based on the principle of secularism and separation and their explicit mentioning of the Roman Catholic church is not to be regarded as the acknowledgement of its previous *status* as the official state religion but as an even more conscious determination to have that previous official *status* openly and solemnly overcome(61).

Lastly, it is to be recalled that the principle of separation and secularism may not be the object of a constitutional revision in Portugal(62), in Turkey(63), and, as it results from the interpretation of the Constitutional Court, also in Italy(64).

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(60) See also Chapter 2 ("*Rights and Freedoms*"), whereby (art. 14) it is declared that "Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance". Furthermore, the open formalisation of the dual approach, rooted in the principle of equality, is expressed in art. 16: "1. Freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law. 2. No one may be compelled to make statements regarding his or her ideology, religion or beliefs".

(61) The same mode of regulation — rule on separation and yet explicit naming of one specific denomination under the condition of equality with other religions — has been adopted in the 1991 Constitution of North Macedonia (art. 19: "The freedom of religious confession is guaranteed. The right to express one's faith freely and publicly, individually or with others is guaranteed. The Macedonian Orthodox Church and other religious communities and groups are separate from the state and equal before the law. The Macedonian Orthodox Church and other religious communities and groups are free to establish schools and other social and charitable institutions, by way of a procedure regulated by law").

(62) See art. 288: "Matters in which revision shall be restricted Constitutional revision laws shall respect: […] the separation between church and state […]".

(63) See "IV. Irrevocable provisions art. 4: The provision of Article 1 regarding the form of the State being a Republic, the characteristics of the Republic in Article 2, and the provisions of Article 3 shall not be amended, nor shall their amendment be proposed".

(64) Although not explicitly stated in the text of the Italian Constitution, the Constitutional Court has qualified the principle of secularism as an "overriding principle of the secularity of the State, which is one of the aspects of the form of State outlined in the Constitution of the Republic"; and has further resolved that "values of religious freedom imposing a dual prohibition: a) that citizens be discriminated against on religious grounds; and b) that religious pluralism limits the negative freedom not to profess any religion". Therefore, being a supreme principle of the constitutional order, the principle of secularity is under the guaranty of the Constitutional Court and — as part of the 'eternity clause' of the Constitution – is further protected against revision of the constitutional text (decision n. 1146, 1988).

5. Final remarks

A cursory examination of positive constitutional law of nation-states in Europe – and, most notably, of member states of the European Union (with some evidence drawn also from other nation-states as members of the Council of Europe) - appears sufficient to confirm the main assumption of our reasoning, aimed at stating that there is a European constitutional paradigm of state secularism and at observing that, in spite of religious references - implicit or explicit, whether to Christianity at large or even to specific denominations – and with only occasional references to undetermined philosophical worldviews, such paradigm entails offering an equal accommodation to both religious and belief identities. The secular state is the proper framework for equally hosting and safeguarding all religious identities in a scenario of increasing pluralism as well as of non-religious philosophical, ethical and ideological sets of values. Both perspectives – religious pluralism and secular beliefs, as shared constitutional principles - are better guaranteed by a neutral institutional environment.

The statement and the observation above are not the result of a mere joint photographic reading of the various texts, as if they would uniformly bear the same words and normative content, but, rather, are the outcome of their comparative interpretation through and in spite of their diversities. The comparative method of interpretation of constitutional law requires — even more in this material field — an approach that must be carefully mindful of the historical origins, of the political developments and of the social and cultural context that underpin the current legal setting of the religious and non–religious phenomenon in the individual countries and in their shared European international and supranational sources of law.

The mutual consistency between the distinct normative orders is extremely relevant, as national systems are bound to respect the European secular paradigm just as the latter is bound to be the outcome of the attitude of "like minded" nation-states (as the preamble of the ECHR acknowledges)(65) and of "the constitutional traditions common to member states"(66).

(65) The words in the French official version are "*animés d'un même esprit*".

(66) The well-known formula was first expressed by the Court of Justice in its judgment in *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11-70, 1970 and is now included in art. 6, paragraph 3 of the treaty on the European

In fact, the European secular paradigm of equal accomodation of religious and belief identities corresponds to the "European consensus" that the ECtHR so frequenty refers to when interpreting the text of the provisions of the ECHR and that is sufficient to acknowledge that, in a specific circumstance, there is no "national margin of appreciation" that allows more than one interpretation of the same provision without a violation of the conventional rule.

That there is a European secular paradigm suited to judicial enforcement, however, does not imply that the substantive content of 'secular' necessarily has the same meaning in different national contexts and in any specific circumstance.

A well–known and controversial case provides a good example of the reasoning of the ECtHR(67): the Grand Chamber, while recognising that there is no uniform interpretation of a specific provision(68) and that no European consensus is detectable in the field due to different national normative setting(69) and case law(70), on the ground of the

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Union where the constitutional traditions common to the Member States as well as "the fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms […] shall constitute general principles of the Union's law".

(67) The judgement is in *Lautsi and Others v. Italy* (Application no. 30814/06) decided in 2011.

(68) The provision is in article 2 of Protocol No. 1: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".

(69) In its overview of law and practice in the member states of the Council of Europe with regard to the presence of religious symbols in state schools, the ECtHR remarks how "In the great majority of member States of the Council of Europe the question of the presence of religious symbols in State schools is not governed by any specific regulations (at 26). In fact "the presence of religious symbols in State schools is expressly forbidden only in a small number of member States: the former Yugoslav Republic of Macedonia, France (except in Alsace and the *département* of Moselle) and Georgia. It is only expressly prescribed – in addition to Italy – in a few member States, namely: Austria, certain administrative regions of Germany (*Länder*) and Switzerland (*communes*), and Poland. Nevertheless, such symbols are found in the State schools of some member States where the question is not specifically regulated, such as Spain, Greece, Ireland, Malta, San Marino and Romania" (at 27).

(70) The Court, in fact, also refers to specific case law: "The question has been brought before the supreme courts of a number of member States. In Switzerland the Federal Court has held a communal ordinance prescribing the presence of crucifixes in primary school classrooms to be incompatible with the requirements of confessional neutrality enshrined in the Federal Constitution, but without criticising such a presence in other parts of the school premises (26 September 1990; ATF 116 1a 252). In Germany the Federal Constitutional Court has ruled

'doctrine of the national margin of appreciation', has explained that the normative content of the provision is mainly to rule out religious indoctrination of students(71).

The Court accepts the main argument put forward by the defendant Italian government on the alleged national tradition of identification of its civic values with the crucifix, beyond the strictly religious meaning of the symbol(72).

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that a similar Bavarian ordinance was contrary to the principle of the State's neutrality and difficult to reconcile with the freedom of religion of children who were not Catholics (16 May 1995; BVerfGE 93,1). The Bavarian parliament then issued a new ordinance maintaining the previous measure, but enabling parents to cite their religious or secular convictions in challenging the presence of crucifixes in the classrooms attended by their children and introducing a mechanism whereby, if necessary, a compromise or a personalised solution could be reached. In Poland the Ombudsman referred to the Constitutional Court an ordinance of 14 April 1992 issued by the Minister of Education prescribing in particular the possibility of displaying crucifixes in State-school classrooms. The Constitutional Court ruled thate the measure was compatible with the freedom of conscience and religion and the principle of the separation of Church and State guaranteed by Article 82 of the Constitution, given that it did not make such display compulsory (20 April 1993; no. U 12/32). In Romania the Supreme Court set aside a decision of the National Council for the Prevention of Discrimination of 21 November 2006 recommending to the Ministry of Education that it should regulate the question of the presence of religious symbols in publicly run educational establishments and, in particular, authorise the display of such symbols only during religious studies lessons or in rooms used for religious instruction. The Supreme Court held in particular that the decision to display such symbols in educational establishments should be a matter for the community formed by teachers, pupils and pupils' parents (11 June 2008; no. 2393). In Spain the High Court of Justice of Castile and Leon, ruling in a case brought by an association militating in favour of secular schooling which had unsuccessfully requested the removal of religious symbols from schools, held that the schools concerned should remove them if they received an explicit request from the parents of a pupil (14 December 2009; no. 3250), (at 28).

(71) The aim of the provision is "to safeguard the possibility of pluralism in education, it requires the State, in exercising its functions with regard to education and teaching, to take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that the States must not exceed" (at 62).

(72) See: "The Government, for their part, explained that the presence of crucifixes in State-school classrooms, being the result of Italy's historical development, a fact which gave it not only a religious connotation but also an identity-linked one, now corresponded to a tradition which they considered it important to perpetuate. They added that, beyond its religious meaning, the crucifix symbolised the principles and values which formed the foundation of democracy and western civilisation, and that its presence in classrooms was justifiable on that account" (at 67).

Consequently, on the one hand, it is acknowledged that "by prescribing the presence of crucifixes in State-school classrooms — a sign which, whether or not it is accorded in addition a secular symbolic value, undoubtedly refers to Christianity — the regulations confer on the country's majority religion preponderant visibility in the school environment" (at 71); but, on the other hand, "that crucifix on a wall is an essentially passive symbol and this point is of importance in the Court's view, particularly having regard to the principle of neutrality. It cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities (at 66). There is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed" (at 66)".

In this case, a balanced accommodation of both religious and beliefs identities is achieved by allowing the mandatory exhibition of the crucifix on the wall of public schools' classrooms, while acknowledging that the crucifix — being a religiously "passive symbol" — is suitable to be given also a non-religious meaning in conformity with distinct national traditions(73).

The European constitutional paradigm of the "secular state" tends being rather flexible and quite far from having a uniform punctual definition. Indeed, it is completely different from a "theological state", where there is no distinction between state law and religious law; from a "confessional state", characterised by the state being potentially subject to clericalist dominance as to civic policies; or from an "atheist

(73) See the statements in the concurring opinion of Judge Power: "Neutrality requires a pluralist approach on the part of the State, not a secularist one. It encourages respect for all world views rather than a preference for one […] The presentation of and engagement with different points of view is an intrinsic part of the educative process. It acts as a stimulus to dialogue. A truly pluralist education involves exposure to a variety of different ideas including those which are different from one's own. Dialogue becomes possible and, perhaps, is at its most meaningful where there is a genuine difference of opinion and an honest exchange of views. When pursued in a spirit of openness, curiosity, tolerance and respect, this encounter may lead towards greater clarity and vision as it fosters the development of critical thinking. Education would be diminished if children were not exposed to different perspectives on life and, in being so exposed, provided with the opportunity to learn the importance of respect for diversity".

state", whose main ideological value is denying the existence of any metaphysical deity.

Neutrality is likely to be the main synonymous feature of "secularism" with regard to religious pluralism and non–religious worldviews (Kis 2012, p. 318), taking into account that — as the Italian Constitutional Court has aptly commented with words suitable to have a more general European meaning - "the principle of secularity […] does not imply the indifference of the State to religions but rather a guarantee of State protection of the freedom of religion, in a regime of confessional and cultural pluralism"(74).

It is important to stress once again, as already suggested, that in the Western legal tradition the European constitutional paradigm of the "secular state" is the present stage of development — only quite recently achieved — of a rich and complex historical and cultural process of modernisation, that is likely to have its origins in the ideological impact of the universal worldview of the French revolution on the structure of the Westphalian nation–state. However, the equal and balanced accommodation of religious and belief identities is to be qualified as a shared constitutive value not only on a theoretical ground but — and, perhaps, mostly — as a pragmatic arrangement inspired by the need of managing otherwise serious conflicts.

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(74) The statement by the Italian Court describes a situation quite close to the regulation in the 1st Amendment to the Constitution of the United States, that combines both the "non-establishment clause" and the "free exercise clause", although it distances itself from "the wall of separation doctrine".

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