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Robert Schuman Centre for Advanced Studies
RELIGIOWEST

Dynamic Law and Religion in Europe.
Acknowledging Change. Choosing Change

Marco Ventura

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Choosing Change**

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EUI Working Paper **RSCAS** 2013/91

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Abstract

The process through which European States and institutions have responded to the social and cultural mutation in the European religious landscape has been met with increasing criticism. Depending upon the interests and the agendas at stake, European instances have been blamed for being too weak or too strong in their policies affecting religion, for being biased either in favor or against religion and ultimately for an insufficient commitment to worldwide religious liberty. This paper aims at responding to criticism through a three-step approach. First, it will highlight the peculiarity and salience of developments in European law and religion, based on the four projects that drove the interaction of law and religion in the European integration process: the human rights project, the single market project, the secular project and the religious project. In this part, I will suggest that, prior to any discussion on the direction that Europeans should take in the future, it is necessary to acknowledge Europe as an extraordinary laboratory of equality and diversity, allowing for an extremely dynamic interaction of law and religion to develop. Second, the paper will underline the concoction of human rights and single market in the making of European dynamic law and religion, and will study the implications thereof. Third, the paper will point at the emergence of a threefold pattern of clashing forces and ideas: the secular versus the religious; States versus Europe; and majorities versus minorities. I will observe that a defensive strategy has fuelled the threefold divisive pattern, consecrating a paradigm increasingly at odds with the dramatically changed picture of beliefs and convictions in Europe, I will argue that the disconnection between the old, dominant paradigm and the various European realities, means that a new paradigm is badly needed. I will conclude that Europe needs the courage to honor its inclination towards a dynamic, constantly evolving interaction of law and religion. This will imply acknowledging change as a key feature of the European experience with law and religion, and, once again, 'choosing change' in order to enhance religious pluralism, reassess the role of the State as the 'neutral and impartial organizer of the practising of the various religions, denominations and beliefs,' (European Court of Human Rights, 2001) assert the European Union as 'impartial' and 'not aligned with any specific religion or belief' (EU Guidelines on the protection and promotion of freedom of religion or belief, 2013), and encourage actors involved in religion and belief to reinvent structures and actions.

Keywords

Religious freedom; Church and state relations; Law and religion

Introduction

In recent decades, Europe has emerged as a controversial playfield in the global interaction of law and religion. A twofold process of socio-legal transformation has made Europe a particularly challenging case.

European countries have undergone massive religious change in society¹, resulting in a seemingly contradictory picture. On the one hand, social and cultural secularization has increased²: traditional religious practice has fallen, the number of those who declare themselves as ‘unaffiliated’ has grown, commonly shared social habits have no connection with the divine or with any established religious teaching. On the other hand, religion is still a powerful ingredient of collective identity and competing ideologies, many Europeans do still engage in traditional or new forms of religious practice, and in many ways and contexts, churches and faith communities play an influential political role. European religious membership has grown more diverse, partly, but not only, because of immigration. Significant variations from place to place, and from context to context, make the picture even more complex: rural and urban Poland, the university milieu in London, Strasbourg or Barcelona and *banlieux* in Paris, Marseille or Rome, cosmopolitan Istanbul and Berlin and Anatolian and Bavarian villages, belong to the same Europe, whilst simultaneously displaying a stark contrast in their relation to religiosity. The very definition of the religious identity of Europe is hardly possible, notably because of the rich and complex history of the continent, of its constant multi-cultural reshaping – like in the last decades – and of its internal diversification, embracing nations as different in their sense of Europe as Britain, Russia, or Turkey.

The apparent contradiction in the advent of a Europe that is at once secular and multi-religious is the result of a fundamental mutation in Western religiosity. If religion has survived secularization, religion is not today what it used to be in the past. Law and religion expert Fred Gedicks has described the mutation in the following terms:

‘There is the God whose death was widely predicted, and there is the God who today is alive and well, but they’re not the same God. The God who died is the God of Christendom, who bound together Western society with a universal account of the world that did not survive the advent of postmodernism; this God, indeed, is dead. The God who remains alive is the one adapted to postmodernism.’³

Philosopher Charles Taylor has observed an analogous shift, in the passage from ‘a society in which it was virtually impossible not to believe in God, to one in which faith, even for the staunchest believer, is one human possibility among others.’⁴

If ‘God is back’⁵ in the West in general, and in Europe in particular, this God has multiple visages and meanings, thus shaping an extremely diverse, and contrasted picture.

¹ See G. Davie, *Religion in Modern Europe: a Memory Mutates* (Oxford: Oxford University Press, 2000).

² For the purpose of this paper, I understand secularization as a cultural and social process, the itinerary and driving forces of which are still very much uncertain. See C. Taylor, *The Secular Age*, (Cambridge, Mass.: The Belknap Press of Harvard University Press, 2007). Taylor illustrates three modes of secularity: 1) the retreat of religion in public space; 2) the general regression of religion as a type of belief and practice; 3) the social and cultural challenge to religion. For a critique of theories of modernisation and secularization see G. Davie, *The Sociology of Religion* (London: Sage, 2007). For a history of secularization in Europe after the French Revolution see R. Rémond, *Religion et Société en Europe. La sécularisation aux XIXème et XXème siècles, 1780-2000* (Paris: Seuil, 2001).

³ F. M. Gedicks, ‘God of Our Fathers. Gods for Ourselves: Fundamentalism and Post-Modern Belief’. In William & Mary Bill of Rights Journal 18 (2010) 4, pp. 901-914, at p. 902 (although mainly referring to the US, the author applies his analysis to the West in general, thus including Europe in the picture).

⁴ C. Taylor, *The Secular Age*, (Cambridge, Mass.: The Belknap Press of Harvard University Press, 2007) p. 3.

Europe poses as an extraordinary laboratory of ‘multiple modernities’, according to the paradigm suggested in 2000 by Israeli sociologist Shmuel Eisenstadt⁶. Europe is also a peculiar example of a ‘post-secular’ space. For sociologist and philosopher Jürgen Habermas, the post-secular features a process of complementary learning between religious and secular worldviews and practices⁷. According to social scientists Massimo Rosati and Kristina Stoeckl⁸, the post-secular global society also includes the following four dimensions: the co-existence of secular and religious worldviews and practices; the de-privatization of religions; religious pluralism as opposed to religious monopoly; and the concept of ‘the sacred’ understood not only as an immanent and civic force, but also as a heteronomous transcendent force.

Against the background of such fundamental social and cultural mutation, European countries have also considerably changed their public policies and the law concerning religion. In the almost seventy years since the end of World War II, Italy, Portugal and Spain stopped being official Catholic States, the constitutional status of Roman Catholicism was reformed in Ireland, establishment in England and Norway was considerably mitigated, the national Lutheran church in Sweden was disestablished, and communist countries moved from State atheism to State neutrality and religious freedom, sometimes reestablishing Orthodoxy as the State religion. Almost everywhere, the status of minorities has improved, if only formally. Freedom of conscience, religion and belief is now enshrined in the national constitutions, and in many cases, is rigorously enforced.

Church and State experts have agreed since the mid 1990s that the constitutional traditions⁹ of EU countries have evolved towards a common pattern featuring four elements: freedom of religion or belief; non-discrimination on religious grounds; the autonomy of religious organizations; and cooperation between States and faith communities.¹⁰

Political and legal change in the States’ various approaches to religion in Europe was not limited to domestic change. It was also the result of the deliberate self-limitation of national sovereignty to the benefit of European convergence and integration. Through the process of European construction, an increasingly larger group of sovereign States with well-established and extremely sensitive patterns of Church and State relations, accepted to share not only a set of principles, but also a supranational jurisdiction. This affected the regulation of religion in two ways: explicitly, on account of the protection of freedom of conscience, religion and belief under the system of the European Convention of Human Rights (ECHR) of 1950, adjudicated by the Strasbourg Court (European Court of Human Rights, ECtHR); and implicitly, because of the impact upon religion caused by the realization of the single market via the European Community, the European Union (EU) and EU law, also providing for the supranational jurisdiction of the Luxembourg Court (Court of Justice of the European Union, CJEU). Since the Helsinki Act of 1975, the Conference, then Organization, for Security and Cooperation in Europe, has also contributed to the building of Europe as an area of religious freedom¹¹.

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⁵ J. Micklethwait and A. Wooldridge, *God is Back: How the Global Revival of Faith is Changing the World* (New York: Penguin Press, 2009).

⁶ See S. N. Eisenstadt, *Comparative Civilizations and Multiple Modernities*, 2 Vol. (Leiden: Brill, 2003).

⁷ J. Habermas, ‘On the Relations Between the Secular Liberal State and Religion’. In H. de Vries and L.E. Sullivan (eds), *Political Theologies. Public Religions in a Post-secular World* (New York: Fordham University Press, 2006) 251– 260.

⁸ M. Rosati and K. Stoeckl (eds), *Multiple Modernities and Postsecular Societies* (Farnham: Ashgate, 2012).

⁹ Reference to ‘constitutional traditions’ is based on Article 6, Section 3 of the Treaty on the European Union, as amended by the Treaty of Lisbon of 2007, stipulating that ‘fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.’

¹⁰ In this sense, see S. Ferrari, ‘Conclusions’. In *Religions in European Union Law* (Milano: Giuffrè, 1998) p. 145.

¹¹ See G. Barberini, *Sicurezza e cooperazione da Vancouver a Vladivostok. Introduzione allo studio dell’Organizzazione per la Sicurezza e la Cooperazione in Europa (OSCE)* (2nd ed., Torino: Giappichelli, 2004) (for an historical overview of

The process through which European States and institutions have responded to the social and cultural mutation in the European religious landscape has been met with increasing criticism. Depending upon the interests and the agendas at stake, European instances have been blamed for being too weak or too strong in their policies affecting religion, for being biased either in favor or against religion and ultimately for an insufficient commitment to worldwide religious liberty¹².

This paper aims at responding to criticism through a three-step approach. First, it will highlight the peculiarity and salience of developments in European law and religion, based on the four projects that drove the interaction of law and religion in the European integration process: the human rights project, the single market project, the secular project and the religious project. In this part, I will suggest that, prior to any discussion on the direction that Europeans should take in the future, it is necessary to acknowledge Europe as an extraordinary laboratory of equality and diversity, allowing for an extremely dynamic interaction of law and religion to develop. Second, the paper will underline the concoction of human rights and single market in the making of European dynamic law and religion, and will study the implications thereof. Third, the paper will point at the emergence of a threefold pattern of clashing forces and ideas: the secular versus the religious; States versus Europe; and majorities versus minorities. I will observe that a defensive strategy has fuelled the threefold divisive pattern, consecrating a paradigm increasingly at odds with the dramatically changed picture of beliefs and convictions in Europe, I will argue that the disconnection between the old, dominant paradigm and the various European realities, means that a new paradigm is badly needed. I will conclude that Europe needs the courage to honor its inclination towards a dynamic, constantly evolving interaction of law and religion. This will imply acknowledging change as a key feature of the European experience with law and religion, and, once again, ‘choosing change’ in order to enhance religious pluralism, reassess the role of the State as the ‘neutral and impartial organizer of the practising of the various religions, denominations and beliefs,’¹³ assert the European Union as ‘impartial’ and ‘not aligned with any specific religion or belief,’¹⁴ and encourage actors involved in religion and belief to reinvent structures and actions, in order for ‘new wine’ to be poured into ‘new wineskins.’

1. The four European projects impacting on law and religion

Four European projects have shaped the interaction of law and religion in the Old Continent after World War II: the human rights project, the single market project, the secular project and the religious project.

The four projects gradually emerged during the Cold War period. In the process, they interacted with each other and constantly developed within the national as well as in the supranational sphere. They consisted of deliberate actions and unintended effects, of planned strategies and spontaneous developments. This paragraph will first examine the resistance and reinvention of the ‘do ut des’ mindset, by virtue of which privileged religious actors compromised with secularized, capitalist Europe, and supported Western governments in the anti-communist fight. Against this background, the development of the four projects took place. Second, the paragraph will describe the emergence and multifaceted features of the four projects. Third, the fundamental effect of the four projects will be illustrated, namely the building of a European laboratory of religious equality and diversity.

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OSCE, taking into account the religious dimension). See at <http://www.osce.org/odihr/44455> for the current involvement of OSCE in the promotion of freedom of religion or belief.

¹² In this sense see K. Thames, ‘Making Freedom of Religion or Belief a True EU Priority,’ EUI Working Paper, July 2012.

¹³ European Court of Human Rights. *Refah Partisi and Ors v. Turkey*. Decided on July 31, 2001. Appl. No. 41340/98, 41342/98, 41343/98 and 41344/98. At para 51.

¹⁴ Council of the European Union, ‘EU Guidelines on the protection and promotion of freedom of religion or belief’ (24 June 2013). At para 7.

1.1. The 'do ut des' mindset

In 1966 the European Commission of Human Rights ruled on the case of Grandrath. This case, and its judgment represented pivotal moments in the law and religion background against which the four European projects developed.¹⁵

In the wake of the erection of the Berlin Wall, a German Jehovah's Witness, Albert Grandrath, was condemned to six months of prison for refusing to serve, first in the army, because of his religious beliefs, and then in the civil service compulsory for objectors to the military service, alleging that the civil service was incompatible with his duties as a religious minister.

In November 1964, while serving his second month in prison, the then twenty-six years older Albert Grandrath applied to the European Court of Human Rights, the judiciary body in charge of adjudicating claims of violation of the European Convention of Human Rights of 1957. He sued the Federal Republic of Germany for having violated his freedom of conscience, thought and religion (Article 9 of the ECHR), his right to conscientious objection to the military service (Article 4) and his right not to be discriminated against on grounds, inter alia, of religion (Article 14). According to the procedure of the time, the competent body of the Court, the European Commission of Human Rights, examined the application. The Commission's Report of 12 December 1966 rejected the application. The Committee of Ministers of the Council of Europe confirmed the Report on 29 June 1967.¹⁶

Beyond the technical terms of the contention, Albert Grandrath's application asked a fundamental question. The application formulated the question in the following way:

'The detention of hundreds of Jehovah's Witnesses as criminals could not be justified just because they were obliged by their conscience to refuse to participate in a service which they considered indirectly to favour war. By holding this opinion, the Jehovah's Witnesses did no harm to others, not even to the state. On the contrary, it would be highly satisfactory to the state if there were more people of the same kind, even if this meant that the number of soldiers was slightly reduced. In the Western world of today, freedom of conscience was accepted as being a fundamental freedom prevailing on any considerations regarding the public interest. However, by failing to exempt Jehovah's Witnesses from service, the German authorities let the public interest prevail.'¹⁷

Grandrath's contention comprised three key questions. First, could the right of a believer to regulate his or her conduct to his or her religious principles be limited, and to what extent? Second, since a Jehovah's Witnesses' minister was denied exemption from civil service while Lutheran and Catholic ministers were not, was it legitimate that minority believers and religions were less protected than majority believers and religions? Third, were believers and religions in conflict with the public interest to be granted fundamental rights and to what extent?

The German government gave a negative reply to the three questions. The government said no to an unlimited right to conform one's conduct to religious precepts; no to the extension to Jehovah's Witnesses of the same 'special privileges' granted to the ministers of the Evangelical Lutheran Church and of the Roman Catholic Church; and no to the possibility to derogate from the public interest for the sake of a specific group of believers. Indeed, public interest was the reason why the German government discriminated in favour of Lutherans and Catholics, who served the general good and were thus entitled to privileges.

¹⁵ See M. Ventura, 'La virtù della giurisdizione europea sui conflitti religiosi'. In: Mazzola R. (ed.): *Diritto e religione in Europa* (Bologna: il Mulino, 2012) pp. 295-305 (for a detailed analysis of the Grandrath case).

¹⁶ European Commission of Human Rights, *Albert Grandrath against The Federal Republic of Germany*. Decided on December 12, 1966. Appl. 2299/1964.

¹⁷ Ibid., at para 9.

The Commission unanimously dismissed the application on freedom of conscience, thought and religion (Article 9 ECHR): no violation was found since, based on the actual circumstances¹⁸, the civil service would not have prevented Albert Grandrath from discharging his tasks as minister or from practising his religion as a believer:

‘the nature of the compulsory service which would have been imposed upon the Applicant would have been such as to leave him sufficient time to perform his duties towards his religious community.’¹⁹

Instead judges parted ways in their decision on discrimination according to Article 14 ECHR. The majority accepted that distinctive treatment was legitimate when based on objective reasons:

‘[depending on the] grounds on which the difference is based (...), certain differentiations may be legitimate and therefore not precluded by Article 14’²⁰.

In the Grandrath case, the Commission accepted, first of all, the general principle that exemption from compulsory military service was limited, in order

‘to prevent a large-scale evasion of the general duty to perform military service’²¹.

Second, the majority of the Commission accepted the argument advanced by the German government that exemption was granted based on general criteria that bore no specific religious or denominational color:

‘(...) the law laid down such criteria that those ministers – and those only – whose functions require their constant and continual attendance at their ministerial office, would be exempt from compulsory service. The significance of the German law is that the real basis of the distinction made by it is in the function performed by different categories of ministers and is not according to the religious community to which they belong.’²²

Such criteria, the Commission found,

‘must be considered to be reasonable and relevant, having regard, on the one hand, to the necessity of maintaining the effectiveness of the legislation regarding compulsory service and, on the other hand, the need of assuring proper ministerial service in religious communities.’²³

The Commission also found that the application of the principle to the Grandrath case was correct:

‘The German courts, when considering that the Applicant did not hold a function equivalent to that of an ordained Evangelical or Roman Catholic minister, have arrived at a reasonable conclusion.’²⁴

1.2. The four European projects on religion

The Grandrath case encapsulated, at an early stage, the four European projects on religion. The projects developed as the result of the deliberate strategy of actors, of the unintentional effects of European politics, of the impact of legal integration, and of occasional initiatives.

The human rights project consisted of building a liberal-democratic Europe through a shared set of fundamental rights and a common system of adjudication of the same rights. In order to make his case, Albert Grandrath resorted to both the set of rights and to the European judiciary, in the hope of

¹⁸ The Commission accepted the objection by the German government that Albert Grandrath could not claim he was a minister since he had a full-time employment as a painter’s assistant.

¹⁹ Ibid., at para 31.

²⁰ Ibid.

²¹ Ibid., at para 40.

²² Ibid., at para 40.

²³ Ibid., at para 40.

²⁴ Ibid., at para 40.

overturning the German courts' ruling. He did not succeed, but he became an early witness to the project.

The single market project consisted of the construction of a community of States partially renouncing their sovereignty in certain domains in favour of a stronger common economy and better relations amongst the European nations. The free circulation of capitals, persons, goods and services was meant to drive the project. Albert Grandrath did not conceive his struggle in terms of European Community law and policies. However, his reference to the 'Western world of today' and his claims of equality conveyed an implicit advocacy of a common religious market, where the privileges of a protectionist view of traditional, mainstream churches would be replaced by a common standard for all believers and religion, within a free exchange paradigm.

The religious project consisted of the advocacy of religion as an essential ingredient for individual and collective life within European society. This was amply witnessed in the Grandrath case, although the religious project of the mainstream German churches, supported by the State, differed considerably from the religious project of Jehovah's Witnesses like Albert Grandrath. In general, mainstream churches promoted religion through their association to the State, their national discourse, and their ties with the social majority. Minorities, however, promoted religion through their creative dynamism, international support, internal cohesion and emphasis on individual choice in matters of faith.

The secular project consisted of disentangling fundamental rights, their adjudication, as well as State policies, from a religious choice of the kind that had dominated Europe under the Westphalian pattern of established churches and, in Catholic countries, of established Catholicism. Neutrality and objectivity in approaching religion could be the new established faith. A key passage of the the Grandrath decision consisted of the dismissal by the European judges of the applicant's religious subjectivity in favour of a detached, rational, objective appreciation of the case. This announced a new era in church-state relations. State authorities could no longer support one established faith based on the truth thereof: they had to justify their option in rational, secular terms. Grandrath's self-perception and the religious claim which came with it needed to be assessed, and dismissed, according to 'objective standards'. This applied, in particular, to Grandrath's assertion that the religious functions were his main activity, to which the European Commission of Human Rights responded:

'The question as to whether in a particular case the religious functions were the principal activity had to be decided according to objective standards. It was of no importance if a person *considered* his religion to be his principal task.'²⁵

The European judges anticipated the overlapping of the secular project and of the religious project, when they legitimated the 'do ut des' approach, based upon which Germany refused to extend to Jehovah's Witnesses the same privileges reserved to Lutheran and Catholic ministers. The European judges justified the German 'do ut des' pattern in purely political, secular terms, as an 'exchange of mutual benefits' sanctioned through agreements between the government and the relevant churches:

'It should be observed that the substance of these agreements was an exchange of mutual benefits between State and Church ("do ut des"). This could imply that, while the State agreed to exempt ministers from compulsory service, the Church agreed to give the State some influence on the appointment of holders of ecclesiastical offices or to provide the armed forces with ministers in order to satisfy the religious needs of the soldiers.'²⁶

The secular project resulting from the German association of traditional Christianity to the State in terms of 'mutual benefits' entailed a fundamental split between religions and communities subservient to the political alliance of interests between civil authorities and ecclesiastical authorities on the one hand, and uncompromising believers on the other. This spectacularly emerged in the Grandrath case,

²⁵ Ibid., para 12. Italics in the original.

²⁶ Ibid. 650, par. 12.

when the judges explained that the reason why faith brought Albert Grandrath to prison, that is, the reason why Jehovah's Witnesses' ministers could not be exempted from the civil service, was that

'Jehovah's Witnesses were not willing to accept favours from the State.'²⁷

In 1966, in the Grandrath case, the four projects could be handled by the European judges, without clashing with the German government's views. The European and the national could coincide, thus rewarding those States that embarked upon the human rights project and the single market project. The secular project and the religious project could also peacefully coexist, provided that uncompromising believers and faiths were left out in the cold. However, the potential for collision was already there. The Danish judge Castberg, one of those who expressed a dissenting opinion on the discriminatory nature of the German measure, advanced reservations on the compatibility with the European Convention of Human Rights of a system based on a privileged status granted to established churches. He wrote in his opinion:

'It may not be excluded that a legal differentiation in favour of established churches can go so far or have such an odious character that Article 14 is thereby violated, but this is certainly not in the present case.'²⁸

There was a basic harmony between Bonn and Strasbourg in 1966, and indeed between the four projects. The past Nazi and Fascist threat, and the present Communist one, pushed Western Europeans to share the projects. However, Justice Castberg could not 'exclude' that some day conflict would replace harmony. Europe did not go against Germany in 1966; 'certainly not in the present case', in Justice Castberg's own words. In the following years, however, the four projects would compete. Conflict would oppose Europe and the States, the secular and the religious; majorities and minorities, founding a fundamental threefold pattern of division at the heart of European law and religion. On 9 May 1989, the involuntary prophecy by Justice Castberg would be fulfilled, when the same Strasbourg Commission reported a violation of religious freedom by a member State to the Convention with an established Church for the first time (for the case of *Darby v Sweden* see below Paragraph 2.2. 'European human rights v. domestic Church and State').

1.3. The European laboratory of equality and diversity

In 1974 Harold Berman published his book 'The interaction of law and religion', warning against the danger of an increasing secularization of the law in the West.²⁹ This champion of the legal salience of religion in the Cold War time could not imagine that the publication of his book would coincide with the first explicit encounter between religion and the law of the then European Community. The UK Home Office had denied Yvonne Van Duyn, a member of the Church of Scientology in the Netherlands, access to Britain as a pastoral worker on the grounds that her organization pursued "socially harmful" activities. Mrs. Van Duyn applied to the Court of Justice, claiming that the measure infringed the principle of free circulation of workers within the European Community. On 4 December 1974, in Luxembourg, the Court of Justice of the European Communities dismissed Mrs Van Duyn's application.³⁰

Two crucial issues were at stake. First, an issue of competence and sovereignty opposed European authorities – in the relevant case, the Court of Justice – to the States, and in particular to the British

²⁷ Ibid, 654, par. 12.

²⁸ Ibid., at para 48.

²⁹ H. J. Berman, *The Interaction of Law and Religion* (Nashville, TN: Abingdon Press, 1974).

³⁰ Court of Justice of the European Communities. *Yvonne van Duyn v. Home Office*. Decided on December 4, 1974. Case 41-74. References to court cases do not follow any established legal style. This is meant to facilitate readers who are not familiar with the legal code. Unless otherwise indicated, full text of quoted cases can be found in the website of the relevant court.

government. If European judges accepted that they were competent to decide on Mrs. Van Duyn's application, this meant that religious activities could fall under the European regulations concerning employment and circulation of workers, thus limiting national sovereignty with regard to the assessment of legitimate or inadmissible religious practice. This would have been an historical step for Europe. Until then, only international politics and imperial arrangements within the British, Ottoman, Russian and Austrian Empires had challenged the monopoly of nations and States in religious affairs. More recently, churches and faith communities had struggled for that monopoly to be relinquished in the interest of their organizational autonomy³¹. Mainstream churches, in particular, had renounced some privileges in exchange for increased freedom. Now, the European integration process brought a challenge of a different kind to the national and State monopoly on religion, and the legacy in Europe of the Westphalian model.

Second, an issue of equal treatment between religion and non-religion and between different religions was at stake. The Court of Justice was called in to assess the difference of treatment between scientologists and other believers, whose admission to Britain was not hindered, and between British scientologists who were free to work for their organization and foreign European scientologists, who were not. In this sense, the decision also anticipated the struggle around the political and legal definition of who is entitled to be recognized as a religion or faith community and who is not, this ultimately resulting in the debate on anti-sect provisions.

In the event, the judges claimed their jurisdiction in the case, assuming that the Court of Luxembourg was adjudicating Mrs. Van Duyn's rights under the principle of free circulation of people, a fundamental component of the law of the European Community. For the first time, the judiciary of the European Community claimed the power to rule on domestic conflicts on religion, although only in an implicit and indirect way.

Having affirmed its competence, the Court of Justice upheld the British ruling. European Community law, according to the judges of Luxembourg, meant that

‘a member state, in imposing restrictions justified on grounds of public policy, is entitled to take into account, as a matter of personal conduct of the individual concerned, the fact that the individual is associated with some body or organization the activities of which the member state considers socially harmful but which are not unlawful in that state, despite the fact that no restriction is placed upon nationals of the said member state who wish to take similar employment with these same bodies or organizations’.³²

The structural and substantial dilemma that would haunt European law and religion for the following four decades was on the table. On the structural side, were European institutions entitled to interfere with domestic regulations on religion?³³ And, on the substantial side, did religion deserve special treatment? Were believers and faith communities entitled to special protection? And then, was equality to be strictly applied, so as to prohibit any distinctive treatment in favor of one specific denomination? Or rather, was differentiated treatment, like in the Grandrath case, acceptable under European law?³⁴

The twofold dilemma encapsulated the conceptual complexity of law and religion, the broad field where the rich phenomenology of religion meets the law in its multiple expressions: formal and informal law, law as the expression of civil authorities, at the local, national or supranational level, as

³¹ See J. Rivers, *The Law of Organized Religions* (Oxford: Oxford University Press, 2010) (for an example of this process in the United Kingdom).

³² Ibid., at para 24.

³³ I argued for a positive answer to this question, both as a matter of fact and as a necessity in the development of European pluralism in M. Ventura *La laicità dell'Unione Europea. Diritti, mercato, religion* (Torino: Giappichelli, 2001).

³⁴ An introduction to the issue in M. Ventura, ‘Religious Pluralism and Human Rights in Europe. Equality in the Regulation of Religion’. In Loenen M.L.P. and Goldschmidt J.E. (eds.), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Antwerpen-Oxford: Intersentia, 2007) pp. 119-128.

well as the product of religious authorities and of God himself.³⁵ In 1974, the emergence in the Van Duyn case of a European jurisdiction on religion-based litigation, further to the prerogatives of the European Court of Human Rights, coincided with Harold Berman's statement that the interaction between law and religion belonged to the present and the future of the West as much as it belonged to its past.

The four European projects were apparently independent from one another and aimed at rolling on parallel tracks. Instead, as the difficult reconciliation of equality and diversity testified, they inevitably ran into each other.

The secular project unfolded its ambiguity: it was at the same time pro-religion- insofar as, through the disentanglement of religion and government, it provided for religious autonomy and for the State's neutrality and impartiality in religious matters – and anti-religion - insofar as neutral, disentangled European policy makers and legislators could not ground their action on any given religious teaching, whilst faith communities were prevented from using the State to enforce their laws.

In turn, the religious project was also inherently contradictory. If peace in Europe and the fight against communism united religions, churches and faith communities, this was in the name of a system – liberal, capitalist democracy – which challenged the deepest tenets of traditional religion. The European religious project faced the dilemma: religion had to adjust and change in order to remain consistent with society, for example by prompting or even only by accepting religious freedom or by ordaining women; or religion would claim it did not yield to modernity, thus accepting an increasing gap between official doctrine and real practice, between insulated hardliners and the average faithful, and between those who believed and those who belonged³⁶.

Against the background of such a reshaping of the secular and of the religious projects, the European interaction of law and religion changed as the result of the intermingling between the human rights project and the single market project. This will constitute the subject of the next paragraph.

2. Human rights and the single market

Since World War II, law and religion in Europe have been reshaped as the result of the interaction of the four European projects. Amongst the four, the human rights project and the single market project have affected law and religion in a peculiarly complex way. This paragraph aims at looking at the process through which European human rights and the single market have transformed not only the legal structure, but also the legal mindset in its approach to religion. First, the paragraph will deal with the Cold War pattern and legacy; second, it will illustrate the impact of European human rights on domestic Church and State regulations; third, it will examine the single market's multiple and contradictory effects on the regulation of religion.

³⁵ See R Sandberg, *Law and Religion* (Cambridge: Cambridge University Press, 2011). Also see N. Doe and R. Sandberg (eds), *Law and Religion: New Horizons* (Leuven: Peeters, 2010), F. Messner, 'Du droit ecclésiastique au droit des religions: évolution d'une terminologie'. *Revue de droit canonique* (1997) 47/1 pp. 143-160 (for the shift from Church and State to law and religion understood as a broad field of regulation and knowledge). Also see M. Ventura, 'Diritto ecclesiastico e Europa. Dal church and state al law and religion'. In G.B. Varnier (ed), *Il nuovo volto del diritto ecclesiastico italiano* (Soveria Mannelli: Rubbettino, 2004) pp. 191-216. And M. Ventura, 'Diritto ecclesiastico'. In Melloni A. (ed.): *Dizionario del sapere storico-religioso del Novecento* (Bologna: il Mulino, 2010) vol. 1, pp. 718-739.

³⁶ See G. Davie, *Religion in Britain since 1945. Believing without Belonging* (Oxford and Cambridge MA: Blackwell Publishers, 1994) (for the distinction between believing and belonging as pertaining to the British context).

2.1. The Cold War legacy

For fifty years after World War II, the clash between capitalism and communism pushed the European religious project, and religious actors, to support human rights, the market economy and liberal democracy.³⁷

In Europe, Christianity supported the market economy, while trying to come to terms with the secular project that the consumerist culture conveyed. The achievement of liberal democracies and their financial and commercial goals and principles were the priority: religion fuelled free trade and free markets³⁸. Faith communities, mainly Christians, enjoyed freedom and financial support under the condition that they would back the entire political and economic process. Religion did so by endorsing capitalism, and by repressing those elements within the churches that were tempted to join forces with the enemy.

As witnessed by the German example in the Grandrath case, Christian churches accepted social and political secularization – serving general social goals and compromising on their prophetic vision in exchange for the ‘favours from the State’ – in order to support the free market economy, which in turn protected their liberty in the name of political liberalism and human rights. The ‘do ut des’ pattern was not limited to Church-State relations: it concerned society and religion at large. In 1985, a privileged German witness, Joseph Ratzinger, denounced the yielding of European, and, more generally, Western, Christians to consumerism and the majoritarian relativistic culture:

‘In a world like the West, where money and wealth are the measure of all things, and where the model of the free market imposes its implacable laws on every aspect of life, authentic catholic ethics now appears to many like an alien body from times long past, as a kind of meteorite which is in opposition, not only to the concrete habits of life, but also to the way of thinking underlying them. Economic liberalism creates its exact counterpart, permissivism, on the moral plane.’³⁹

Twenty-five years later the same Joseph Ratzinger, now Benedict XVI, confirmed his judgment on the complex relationship between secularization and religion, between the secular and the religious project:

‘the Church becomes self-satisfied, settles down in this world, becomes self-sufficient and adapts herself to the standards of the world. Not infrequently, she gives greater weight to organization and institutionalization than to her vocation to openness towards God, her vocation to opening up the world towards the other. (...) Secularizing trends – whether by expropriation of Church goods, or elimination of privileges or the like – have always meant a profound liberation of the Church from forms of worldliness.’⁴⁰

At the same time, in communist Europe, religion was targeted and exploited as a convenient scapegoat, as the enemy hindering the political and economical goals. Religion had to be fought against, for the sake of State atheism, as proclaimed in the constitution. A socialist society and

³⁷ I have illustrated my understanding of law and religion during the Cold War in the chapter on ‘Cold Gods’ of: M. Ventura, *From Your Gods to Our Gods. A History of Religion in British, Indian and South African Courts* (forthcoming Eugene OR: Cascade Books).

³⁸ Through the biography of Wal-Mart, the world’s largest corporation, Bethany Moreton has showed how evangelical Christianity nourished America’s commitment to free markets, free trade, and free enterprise. Beyond the US, , in the decades after World War II, Christianity powered capitalism and bolstered an economic vision that sanctified corporate globalization. See B. Moreton, *To Serve God and Wal-Mart. The Making of Christian Free Enterprise* (Cambridge, MA: Harvard University Press, 2010).

³⁹ *The Ratzinger Report. An Exclusive Interview on the State of the Church*. J. Card. Ratzinger with V. Messori (San Francisco: Ignatius Press, 1985) p. 83.

⁴⁰ Benedict XVI, *Address to the Catholics engaged in the life of the Church and society*, Freiburg im Breisgau, 25 September 2011. At http://www.vatican.va/holy_father/benedict_xvi/speeches/2011/september/documents/hf_ben-xvi_spe_20110925_catholics-freiburg_en.html.

economy had to be constructed; the eradication of religion ensued. The end of religion was allegedly conducive to the advent of the new age of equality and prosperity.

In both the capitalist West and the Marxist East, religion had a clear place based on the division of the world. While engaging in de-colonization, Europe dealt with Arab Marxists, who used a socialist version of Islam to prevent the free market from expanding in their land, as well as with Indian religions, which celebrated an unnatural marriage with a socialist secular India that endorsed a planned economy as opposed to colonial capitalistic exploitation⁴¹. Christian churches, in particular, stood for the market. This turned them into the fairly loyal allies of the West and the obvious victims of the East.

It was possible to challenge the pattern. Christian Socialism in general, of the kind Tony Blair was brought up into, and the Liberation Theology in particular, represented this sort of challenge. The Holy See and the Roman Catholic Church endorsed the pattern in politics and theology, through the development of a doctrine of the faith obsessed with Marxist contamination of ecclesiology. However, they were also part of the challenge to the pattern, as witnessed by Paul VI's option for the poor at Puebla in 1968, or by negotiations with the enemy in the Ost-politik, the diplomatic effort aimed at healing the religious persecution in the communist countries⁴². Still the Cold War pattern dominated; it was unavoidable. It pervaded the four projects of human rights, the single market, the secular and the religious.

2.2. European human rights versus domestic Church and State

The European projects of human rights and the single market marched forward together in European integration, though apparently on parallel tracks.

On the one hand, religious freedom was fully embedded in European integration by means of the European Convention of Human Rights. With regard to human rights, religions, and Christian churches in particular, displayed very different historical records and doctrinal experiences. The Catholic Church endorsed religious liberty in the Vatican II Council of 1965, although in a very cautious and peculiar way⁴³. New theology reshaped the interaction of law and religion. In Spain, the Franco regime passed an Act on religious freedom in 1967. The government presented the Act as the natural response of a Catholic State to the Council's endorsement of religious liberty. Against the background of a dictatorial regime, hostile to civil and political freedoms, the Act of 1967 encapsulated European ambiguities in the development of law and religion.

On the other hand, the European single market expressed and spread economic freedom. Freedom in religion and economic freedom were connected under the umbrella of the liberal model of a free society, with the Welfare state mitigating undesired effects without undermining the fundamentals thereof.

The human rights and single market projects combined in designing a new public action, under a neutral and pluralistic State. The European Court of Human Rights emerged in the 1970s as the guarantor of cross-border freedom in opposition to the domestic bias in favor of national churches and religions in public education. In the case of Kjeldsen in 1976, for the first time the Strasbourg Court

⁴¹ See M. Ventura, *From Your Gods to Our Gods* (quoted above at footnote 37).

⁴² See A. Casaroli, *Il martirio della pazienza: la Santa Sede e i paesi comunisti, 1963-89* (Torino: Einaudi, 2000) (for an account from the Secretary of State of the Holy See between 1979 and 1990 on the Vatican diplomatic action in Communist Europe). Also see G. Barberini, *L'ostpolitik della Santa Sede: un dialogo lungo e faticoso* (Bologna: il Mulino, 2007) (for a history of Vatican Ost-politik).

⁴³ S. Scatena, *La fatica della libertà: l'elaborazione della dichiarazione Dignitatis humanae sulla libertà religiosa del Vaticano 2* (Bologna: il Mulino, 2003) (for an account of the background of the Second vatican Council's Declaration on religious freedom).

endeavored to protect different views and imposed upon the contracting States an obligation of neutrality and pluralism:

‘the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. 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 must not be exceeded.’⁴⁴

Six years later, in the case of *Campbell and Cosans*, the same Court applied its own principle in order to declare a violation of the right to education as per Article 2 of Protocol 1 of the Convention⁴⁵, in a case concerning the objection of a family against corporal punishment as traditionally practiced in Scotland.⁴⁶ This was the first violation declared by the Court in a case related to convictions and beliefs.

The fall of the Berlin Wall in 1989 changed the political picture as much as the subsequent explosion of the global market, and the new financial model changed the economic landscape.

A few months before the fall of the Berlin Wall, the European Commission of Human Rights reported that Sweden had violated the religious freedom of Peter Darby, a Finnish citizen of British origin who as a medical doctor practicing in Sweden had been obliged to pay, as part of the general taxes, a church tax to the established Church of Sweden, of which he was not a member⁴⁷. In the admissibility decision, given by the Commission on 11 April 1988, the judges did not concern themselves with the compatibility with the European Convention of a State Church system. Instead, one year later, in the Commission’s Report of 9 May 1989, the approach by Justice Castberg in the *Grandrath* case of 1966 was reiterated and enhanced: a ‘State Church system’ would not as such violate the European Convention, provided that ‘individual’s freedom of religion’ was safeguarded. The Commission wrote:

‘A State Church system cannot in itself be considered to violate Article 9 (Art. 9) of the Convention. In fact, such a system exists in several Contracting States and existed there already when the Convention was drafted and when they became parties to it. However, a State Church system must, in order to satisfy the requirements of Article 9 (Art. 9), include specific safeguards for the individual’s freedom of religion. In particular, no one may be forced to enter, or be prohibited from leaving, a State Church.’⁴⁸

Indeed the Commission found that under the circumstances of the case, Peter Darby’s ‘individual’s freedom of religion’ had been illegitimately restricted. The European Court of Human Rights ruled on the Darby case on 23 October 1990⁴⁹. Following the Commission’s approach in the decision on the admissibility, and ignoring the Commission’s Report, the Court dropped Article 9 ECHR on freedom of thought, conscience and religion, neglected the religious implications of the case, and found a violation by Sweden under Article 14 of the Convention (prohibition of discrimination) taken together with Article 1 of Protocol No. 1 (protection of property).

⁴⁴ European Court of Human Rights. *Kjeldsen, Busk Madsen and Pedersen v. Denmark*. Decided on December 7, 1976. Appl. No. 5095/71; 5920/72; 5926/72. At para 53.

⁴⁵ ‘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’.

⁴⁶ European Court of Human Rights. *Campbell and Cosans v. United Kingdom*. Decided on January 29, 1982. Appl. No. 7511/76 and 7743/76.

⁴⁷ European Commission of Human Rights, *Peter Darby v. Sweden*. Report adopted on May 9, 1989. Appl. 11581/85.

⁴⁸ *Ibid.*, at para 45.

⁴⁹ European Court of Human Rights. *Peter Darby v. Sweden*. Decided on October 23, 1990. Appl. 11581/85.

It was only in the aftermath of the Treaty of Maastricht, in 1993, that, for the first time, the European Court of Human Rights condemned a member State, namely Greece, for a violation of religious freedom⁵⁰. With the Treaty of Maastricht empowering the European Union in the defense of human rights according to ‘common constitutional traditions,’ Europe posed as the champion of religious pluralism, with freedom of conscience, religion and belief covering an extremely wide, and crucial, area of social advancement. The Strasbourg Court expressed this, in the Kokkinakis case, through a formula that became a milestone in the future jurisprudence:

‘freedom of thought, conscience and religion (...) is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned.’⁵¹

European integration was likely to make victims, especially States, reluctant to comply with a greater measure of religious freedom, and mainstream churches uncomfortable with a wider religious market (in the Kokkinakis case, the Greek Orthodox church opposing the Jehovah’s Witnesses’ propaganda) and the obligation for States under the European Convention to be neutral and impartial towards religion. This proved problematic for all countries and much more difficult for Central and Eastern European countries, where the end of communism restored national churches and religions to a position of symbolic and legal privilege.⁵²

During the following year (1994), the same Court gave a more reassuring signal to those who stood for the nationalist vision of religion that had been defeated in the Kokkinakis ruling. The Court upheld the doctrine of the margin of appreciation to a very wide extent, thereby subordinating European to domestic scrutiny, in order to protect Catholic Tyrol in the case of the projection of a film deemed blasphemous by the Catholic Bishop of Innsbruck⁵³:

‘The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. It is in the first place for the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time. In all the circumstances of the present case, the Court does not consider that the Austrian authorities can be regarded as having overstepped their margin of appreciation in this respect.’⁵⁴

The European single market project was pushing marginal believers, by analogy with any new economic actor, to defy traditional monopolists. The human rights project represented a threat to religious monopolies, and to established religions and churches in particular, but also provided monopolists with some defensive tools, such as subsidiarity and the margin of appreciation.

2.3. Religion in the single market

The crumbling of the Berlin Wall opened a new era in relations between the European Union and religion. Political scientist and sociologist Bérengère Massignon dated from the tenure of Jacques Delors as the president of the European Commission (1985-1995), and in particular from Delors’ speech of 1992 to Protestant Churches, the thrust leading to a systematic approach of the European

⁵⁰ European Court of Human Rights. *Kokkinakis v Greece*. Decided on April 19, 1993. Appl. No. 14307/88.

⁵¹ Ibid., at para 31.

⁵² See C. Durham and S. Ferrari (eds), *Law and Religion in Post-Communist Europe* (Leuven: Peeters, 2003).

⁵³ European Court of Human Rights. *Otto Preminger Institut v Austria*. Decided on September 20, 1994. Appl. No. 13470/87.

⁵⁴ Ibid., at para 56.

Union to religion and religious actors⁵⁵. The project ‘A soul for Europe’ conceived during the years 1994-1995⁵⁶, coincided with the framing of an institutional dialogue with religious organizations (see further below at Paragraph 3.2 ‘Selective dialogue’), with experts wondering if and to what extent traditional Church and State patterns like cooperation or bilateral agreements could be exported to the legal system of the European Union⁵⁷.

In the period from the Treaty of Maastricht (1992) to the Treaty of Amsterdam (1997), the European Union added to the language of the single market the language of political goals, common constitutional traditions, non-discrimination, and fundamental rights. Human rights and freedom were no longer the sole preserve of the Council of Europe, the European Convention of Human Rights, and the Strasbourg Court. The European Union was stepping in. Experts and stakeholders started realizing that the human rights project and the single market project were not as parallel as they had seemed in the beginning. They converged. They overlapped. Religion was attracted into the universe of the EU legal system, by virtue of the Union’s expansion into social and political fields⁵⁸.

Still, religion was thought not to enter into the economy, this economy, which remained the focus of the European integration. Open market, free competition, anti-monopolies, free circulation. In all these respects, Europe would have no impact on religion, or so thought the experts and the actors. They were proven wrong⁵⁹.

Anticipated by some cases judged by the Court of Justice of the European Communities in the 1970s (namely the already mentioned Van Duyn case in 1974 and the Prais case in 1976⁶⁰), the impact on religion of the European legal construction of a free market became overt in 1996, when the controversial interpretation of the Working Time Directive of 1993 providing for a minimum weekly rest period, which ‘shall in principle include Sunday,’ led the Court of Justice to annul the provision on the grounds that

‘the Council has failed to explain why Sunday, as a weekly rest day, is more closely connected with the health and safety of workers than any other day of the week.’⁶¹

No matter how marginal the case, and how implicit the reference to religion, this case rung a bell. After all, touching upon Sunday meant touching upon religion.

⁵⁵ B. Massignon, ‘Représentation des communautés religieuses et groupes philosophiques auprès de l’Union européenne’ at <http://www.eurel.info/spip.php?article1595&lang=fr>. More generally, see B. Massignon, *Des dieux et des fonctionnaires. Religions et laïcités face au défi de la construction européenne* (Rennes: Presses Universitaires de Rennes, 2007).

⁵⁶ See T. Jansen, ‘Europe and Religions: the Dialogue between the European Commission and Churches or Religious Communities’. In *Social Compass* 47 (2000). Also see W. Burton et M. Weninger (eds), *Legal aspects of the relation between the European Union of the future and the communities of faith and conviction: The role of these communities and co-operation for common European future* (Brussels, European Commission, Group of Policy Advisers, 2002).

⁵⁷ The project ‘A soul for Europe’ triggered the first attempts to envisage institutional relations between the European Union and religious organizations, notably churches. See H.-J. Kiderlen, H. Tempel and R. Torfs (eds), *Quelles relations entre les églises et l’Union européenne?*, (Leuven: Peeters, 1995). In particular: H. Tempel, ‘Vers une position institutionnelle des Eglises dans l’Union Européenne. L’approche par les droits fondamentaux, l’approche concordataire et l’approche coopératrice’, pp. 11-20. And S.C. van Bijsterveld, ‘Towards an Institutional Relationship between Churches and the European Union’, pp. 21-32.

⁵⁸ An early witnessing of this awareness could be found in the expert meetings, the proceedings of which were published in: *Religions in European Union Law* (Milano: Giuffrè, 1998); also see A. Castro Jover (ed), *Iglesias, confesiones y comunidades religiosas en la Unión Europea* (Bilbao: Servicio Editorial Universidad del País Vasco, 1999).

⁵⁹ I have outlined this process in my lecture ‘Religious Liberty and Economic Freedom. Does Europe Still Need Both?’ Milano, Università Bocconi, February 27, 2009 (unpublished). More generally see M. Ventura, ‘The Changing Civil Religion of Secular Europe’. In *The George Washington International Law Review* 41 (2010) 4, pp. 947-961.

⁶⁰ Court of Justice of the European Communities. *Vivien Prais v. Council of the European Communities*. Decided on October 27, 1976. Case 130-75.

⁶¹ Court of Justice of the European Communities. *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*. Decided on November 12, 1996. Case 84-94. At para 37.

Not only did the European Union claim the power to interplay religion with politics and rights, and not only did the EU threaten to leapfrog domestic Church and State regulations in the name of fundamental rights; the EU encountered religion in the labor market, which meant that it could potentially do so in every other market. Cases later brought before the Court of Justice showed that the EU law was likely to impact in various ways based on the creativity of the applicants and their respective counsel. By reaching the sphere of religion, EU law was demonstrating how powerful a free, single market could be, and how far it could go. The European legal integration appeared as an unbridled flow, a process, which was not, and perhaps could not, be controlled.

The issue was raised. To what extent could the free market invade culture, society and thus religion? How far could Europe follow, regardless of national specificities and identities? What was still up to the individual States? The economy challenged the institutional architecture as well as the political process. The market imposed its mindset. No longer 'protected' by the external enemy of international communism, European cohesion around liberal capitalism, and the role of religion in such a pattern, were challenged.

Post-colonial anxieties encountered the debate on global economy and politics, in a time during which religion 'parted ways'⁶² with culture and posed as a powerful supranational force. Formerly Western, now pan-European doubts and arguments about how to politically and legally deal with the global economy challenged religious actors to find a new position. A general stance in favor of civil and economic freedom was no longer sufficient. Like any social actor, religious believers were forced to take a stand in the new landscape. What place for global institutions in the new global economic era, what role for Europe, what role for the individual States and regions? Also which limits should be set for the market, if any? How to cope with new technologies in life sciences? Religions and churches were compelled to answer these questions if they were to defend the social respectability they had gained from the defeat of the communists.

The EU legal system had been designed to meet the needs of the market. The market had expanded, as had the European legal system. Religion was necessarily covered by its scope. No competence needed to be directly attributed in the treaties. Religion was concerned, not because of the political determination of European lawmakers; it was, rather, a bottom-up effect. The legal mechanisms, and the market alike, were living organisms that went beyond the political intention of the European founding fathers, policy and law makers: unintended effects were a conspicuous part of the picture, along with the sense that a coherent project was lacking.

In the aftermath of the Treaty of Amsterdam, law and religion expert Louis-Léon Christians observed:

'Religious exceptions or on the contrary the application of the general law to religion coexist without any concern as to their coherence or their overall consistency in terms of a system of regulation of religions'.⁶³

The lack of an attributed competence in the treaties in the domain of religion did not keep European instances, and European law, out of this sphere. Europe discovered that religion was not a matter of competence and could not be treated as such. The European Union could not assert any competence vis-à-vis religion, but could not deny one neither. It was pointless to claim the traditional priority of the State in matters of religion in order to disarm the Union. Religion was concerned because of its pervasive presence in all fields of society. EU law and policies impacted on religion, because of the ubiquitous nature of both religion and the market.

⁶² I refer here to O. Roy, *Holy Ignorance: When Religion and Culture Part Ways* (London: Hurst, 2010).

⁶³ L.-L. Christians, 'Droit et religion dans le Traité d'Amsterdam: une étape décisive?'. In Y. Lejeune (ed), *Le Traité d'Amsterdam. Espoirs et déceptions* (Bruxelles : Bruylant, 1998), p. 214 (author's translation).

In the 1980s and the early 1990s, the European human rights project rose as the enemy of traditional law and religion, and church and state arrangements. The single market emerged in the late 1990s as a much more insidious menace.

The fact itself that the European Union could have an impact, and an impact not driven by human rights protection, represented a big challenge to traditional church/state relationships. But the issue was even more crucial as far as the very nature and meaning of that impact were concerned.

If the market was left free to act, and religion, as it occurred, was affected, religious activities, communities and rights happened to be regulated in a way unknown to European States. Inevitably, a free religious market was set up where competition ruled instead of the privileges granted by European history to the Church of England in London, to the Greek Orthodox Church in Athens, to Catholic and Evangelical churches in German Länder, to the Holy See in Lisbon and Madrid and so on⁶⁴. In Brussels, it was a different story. As a result of the living EU law of free circulation within the single market, the values of equality, non-discrimination, and the impartiality of public actors and policies flourished and transformed the European conception of law and religion. Treating believers as customers and churches as companies undermined the monopolist structure of the European religious market and opened society to new religious actors, also within traditional religions and churches.

Religious liberty had always been subordinated to the role and legal status of mainstream churches. Now, thanks to the free market enhanced by the European Union, thanks to the combination of the human rights and the single market projects, freedom of thought, conscience and religion had the ambition to reach everybody.

As a reminder of the Van Duyn decision of 1974, on the eve of the fall of the Berlin Wall, in 1988, the Court of Justice of the European Communities had already given an example of what its impact on religion might signify. In the Steymann case, the Court had been asked to decide whether a member of a religious community was entitled to a pension for his work. Facing the problem of assessing whether the question pertained to a purely religious matter or whether it had an economic dimension, thus falling within the competence of the Court, the judges stated that

‘Article 2 of the EEC Treaty must be interpreted as meaning that activities performed by members of a community based on religion or another form of philosophy as part of the commercial activities of that community constitute economic activities in so far as the services which the community provides to its members may be regarded as the indirect quid pro quo for genuine and effective work.’⁶⁵

Religion could not claim insulation from the market. Minorities rejoiced and played to the new available tools. In 2000, the Church of Scientology successfully resorted to the EU Court of Justice in opposing French restrictions to the free circulation of capital⁶⁶.

In the case at hand, Scientology had been prevented from transferring capital from its London branch to its Paris branch, on the grounds that such a foreign investment represented a threat to public policy, public health or public security. As a response, the French and the British branches of the organization requested the Prime Minister of France to repeal the relevant provisions laying down a system of prior authorisation for direct foreign investments. Subsequently, the French Conseil d’Etat referred to the EU Court of Justice the question of whether the French system was compatible with the free circulation as provided by the EU law. The Court’s analysis of the case was based on a strict

⁶⁴ See B. Basdevant-Gaudemet and F. Messner (eds), *Les origines historiques du statut des confessions religieuses dans les pays de l’Union européenne* (Paris: PUF, 1999) (for a comparative history of the status of religious denominations in the European Union’s countries).

⁶⁵ Court of Justice of the European Communities. *Udo Steymann v Staatssecretaris van Justitie*. Decided on October 5, 1988. Case 196-87. At para 14.

⁶⁶ Court of Justice of the European Communities. *Association Église de Scientology de Paris, Scientology International Reserves Trust v. The Prime Minister*. Decided on March 14, 2000. Case 54-99.

interpretation of derogations from the fundamental principle of free movement of capital. EU judges held that, in their understanding of national needs, member States are submitted to the control of the Community institutions. The case came within the competence of the EU judges, because they claimed that ‘public policy and public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society,’⁶⁷ the relevant assessment, the judges argued, belonging to them in the case of silence on the part of national courts.

Such a threat, the Court of Justice held, had to be previously determined in order to satisfy the principle of legal certainty: prior authorisation could not be required for every direct foreign investment unless the investors concerned were given a clear indication as to the specific circumstances in which prior authorisation was needed. According to the Court, the French legal provisions from which the restriction suffered by the Association Église de Scientologie de Paris originated were incompatible with such an interpretation. The freedom of the Scientologists prevailed, not in the name of religious freedom, but in terms of economic freedom. In fact, as the European judges concluded, EU law

‘must be interpreted as precluding a system of prior authorisation for direct foreign investments which confines itself to defining in general terms the affected investments as being investments that are such as to represent a threat to public policy and public security, with the result that the persons concerned are unable to ascertain the specific circumstances in which prior authorisation is required.’⁶⁸

Other minorities with strong cultural ties, like immigrant communities from the Indian subcontinent, the Maghreb, Turkey and the Middle East, would take inspiration from this strategy, but with a completely different approach to religion. Jehovah’s Witnesses, Mormons and Buddhists would seek protection under a choice-based conception of religious or economic freedom, while immigrant communities would rather plead for their culturally-based right to diversity.

Human rights and the single market changed not only the legal structure under which law and religion interacted in Europe, but more profoundly the inherent substance of the interaction and the overall legal mindset. National legal cultures were themselves deeply affected⁶⁹. Against this background, religious and political actors reshaped their strategies. Those who feared that their competitive advantage would vanish, deluded themselves with the illusion that a EU ‘hands off’ approach could be devised, preventing the Union from affecting domestic regulation of religion, while allowing for mainstream religious actors to support the European project and lobbying in Brussels. Such illusory non-competence of the European Union in religious affairs, ambiguously combined with a competence of religious actors in European affairs, will be the subject of the next paragraph.

3. The non-competence of the European Union on religion

Confronted with the structural and substantial reshaping of law and religion, which resulted from the four European projects, religious and governmental actors framed a strategy aimed at countering the rise of a free religious market in Europe. This defensive strategy was based on the illusion of combining a non-competence of the European Union in religious affairs, through protectionism, with a competence of certain favoured religious organizations in European affairs, through selective dialogue. This paragraph will study the process through which most experts and actors have embraced the illusory project, and the consequent legal dogma, of a non-competence on religion of the European Union. First, the rise of a European religious protectionism as a response to European

⁶⁷ Ibid., para 17.

⁶⁸ Ibid., para 23.

⁶⁹ See M. Aziz, *The Impact of European Rights on National Legal Cultures* (Oxford: Hart, 2004) (for a study of the impact of human rights on national legal cultures beyond the strict enforcement of international human rights law).

advancements in building a level playing field will be investigated. Second, the framing of selective dialogue will be analyzed. Third, the consecration, via the Treaty of Lisbon, of an overall defensive strategy in European law and religion will be exposed.

3.1. Religious protectionism

Tensions arising from the impact on religion of the four European projects strengthened the threefold divisive pattern of opposing forces: the secular versus the religious; majorities versus minorities; and States versus Europe. By the mid 1990s, it was clear that human rights and the single market offered the historic opportunity to challenge dominant religions and majorities from outside, but also from within, with individual dissidents or defiant groups being empowered in their struggle. Also, human rights and the single market challenged the States, and the traditional State-based conception of sovereignty. These forces challenged religion as such, or at least majoritarian, traditional religion. As a result, religion, majorities and the States found themselves trapped in opposition to the secular, to minorities and to Europe.

Religious groups, majorities and the States joined forces to reverse this trend. Traditional dominant churches accepted the capitalist economy, and European integration only insofar as these did not imply a religious market encouraging new highly competitive actors. It was too late to prevent a deeply secular society of customers from settling in Europe: but religious monopolies could still be reinvented in post-modern terms, and saved. Mainstream churches and religions would not withdraw their support for capitalist liberal democracy as the dogma in politics and the economy of European States and European institutions, inasmuch as they would not cease supporting the European project at large; in exchange European law should help to preserve those religious monopolies that European societies were dismantling through secularization and religious diversification.

Declaration no. 11 annexed to the 1997 Treaty of Amsterdam was the first signal that European religious monopolists perceived EU law in a different, more serious, manner. The Declaration stipulated:

‘The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

The European Union equally respects the status of philosophical and non-confessional organisations.’

Although the norm was not legally binding⁷⁰, the underlying political vision was substantially endorsed, and the defensive strategy was announced: it was necessary to keep national Church and State arrangements out of the sphere of interference of the European Union.

Political deliberation was mobilized in order to counter the bottom-up effect of the human rights and single market projects. Euro-skepticism connecting nationalism and protectionism found a precious ally in conspicuous fractions of religious majorities⁷¹. Mainstream religious interests had to be defended. In Brussels of course, this was to be pursued insofar as more Christian legislation could be forged or more subsidiarity could be achieved⁷²; but, first of all, such interests had to be protected in the individual States, the prerogatives of which now had to be defended in the name of national religious identities. In actual fact, the latter aim was pursued in the interest of those governmental and

⁷⁰ Not being a proper article of the Treaty, declaration n. 11 could not have the same binding force as the primary legislation enacted through the norms of the Treaty. However, some experts argued that declaration n. 11 had a normative force of a different kind. See G. Robbers, ‘Europa e religione: la dichiarazione sullo status delle Chiese e delle organizzazioni non confessionali nell’atto finale del trattato di Amsterdam’. In *Quaderni di diritto e politica ecclesiastica* (1998) 2, pp. 393-397.

⁷¹ The interconnections between political populism and religion in Europe were studied in ‘Who owns religion? Religion between populism and faith-communities’. ReligioWest workshop, 31 May – 1 June 2012.

⁷² See A. Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford: Oxford University Press, 2002) (for a critique of the implementation of subsidiarity in the EU legal system).

religious stakeholders who needed room for their ‘do ut des’ bargaining. This concerned Catholic and Orthodox countries in particular, but also France, where the major political and religious actors resorted to the enhancement of *laïcité* in order to safeguard the peculiar system of recognition of a handful of privileged religions, the governmental stigmatization of other religious players (the allegedly redoubtable ‘sectes’), and the State’s ambition to nationalize and control Islam.⁷³

The formulation of declaration no. 11 could not but be very ambiguous: how could anybody define a field of non-competence corresponding to ‘the status of churches’? With religious organizations nourishing the legitimate ambition to play a part in any aspect of human life, and with their legal status being instrumental to their all-encompassing action, did not the expression ‘the status of churches’ cover everything? And who would draw the line – and how would it be drawn – between the status of churches and their comprehensive range of activities?

The truth was that the principle was inapplicable in the context of the European system of laws, politics and society. Being European institutions and States, constantly interconnected by profound mutual interference⁷⁴, a ‘hands-off’ approach on the part of the European Union was simply socio-legally impossible.

Declaration no. 11 gave voice to a political project to which European law could not bend, or not systematically, at least. Thus, declaration no. 11 placed a fundamental ambiguity at the heart of the various European laws and policies of religion. Ignorant or biased experts and actors conjured, in order to transform the ambiguity into a lie. Instead of exposing the inconsistency between the political project underlying the declaration and its legal impossibility, they concocted an ideal situation and pretended everything was normal, and obvious. The old paradigm and the defensive strategy grew, both rooted in this lie, as was the increasing gap between the vital reality of the interaction of law and religion through European law, and the petrified principle of declaration no. 11, which would ultimately be constitutionalized ten years later, with the 2007 Treaty of Lisbon, at Article 17 TFEU (see below 3.3. Paragraph ‘The defensive strategy’).

The basic assumption of declaration no. 11 was flawed by the partial and partisan point of view of the mainstream churches: they were right to believe that their domestic status was worth protecting from any European interference, although some internal dissenting voices denounced this attitude as counterproductive for the autonomy, freedom and credibility of churches. But what about new or marginal religious actors? Freezing their ‘status’ amounted to preventing them from resorting to European instances and instruments in their struggle for better legal conditions and a better competitive position. On the face of it, declaration no. 11 was an impartial rule, protecting every religious organization. In reality, it was a protectionist and discriminatory rule, only securing the *acquis* of mainstream churches, and empowering governments in their ‘do ut des’ religious policies, to the detriment of disadvantaged religious actors⁷⁵. The assumption was inherently wrong that the protection of the ‘status of religious organizations’ under domestic law applied to a dispassionate, unbiased domain – where all religious organizations shared the same needs and were happy to coexist

⁷³ The French tension with law and religion in the early 2000s was reflected in the Rapport Stasi de 2003. See Commission de réflexion sur l’application du principe de laïcité dans la République. Rapport au Président de la République. At <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/034000725/0000.pdf>.

⁷⁴ This is the lesson we draw from the seminal work by N. Doe, *Law and Religion in Europe. A Comparative Introduction* (Oxford: Oxford University Press, 2011).

⁷⁵ I have advanced the thesis of a protectionist approach to European law and religion for the first time in M. Ventura *La laicità dell’Unione Europea* (quoted above at footnote 33). The thesis was further developed in M. Ventura, ‘Protectionnisme et libre-échange. La nouvelle gestion juridique de la religion en Europe’. In *Conscience et liberté* 64 (2003) pp. 122-132. Also see M. Ventura, ‘La liberté de conscience dans la régulation publique de la religion. La compétition européenne’. In J.B. Marie and P. Meyer-Bisch (eds.), *Un nœud de libertés. Les seuils de la liberté de conscience dans le domaine religieux* (Bruxelles: Bruylant – Zurich: Schulthess Verlag, 2005) pp. 133-157.

on the same footing – and not, as it went, to an area of conflicting strategies and competing interests.⁷⁶ On the contrary, no win-win situation was possible, especially not against the background of the European structural unbalance in favor of mainstream religious groups.

Witnessing the intermingling of the religious and the secular projects, non-religious organizations succeeded in achieving, through declaration no. 11, the same status as churches and religious associations or communities. In fact, Section 2 of the declaration extended the protection of Section 1 to ‘philosophical and non-confessional organizations’. In order for governments to retain their domestic control on religious affairs to the greatest extent possible, and for mainstream churches to safeguard their advantages under national law, the unprecedented and paradoxical price was paid of leveling religious actors and philosophical and convictional actors, including atheistic associations. The norm intended to consecrate the competitive advantage of mainstream churches: it ended up accepting that religious and non-religious organizations had the same European constitutional status.⁷⁷ In turn, non-religious organizations that took pride from opposing formally or informally established religions, followed the path of the enemy and renounced their differences, thus undermining their credibility.

Ironically, the leveling of the religious and the non-religious in Section 2 of declaration no. 11 consecrated the pattern of dichotomy between the religious and the secular. Again, Europe and member States were part of the same trends, and influenced each other. In 1997, the preamble to the post-communist Polish Constitution drew an analogous line between believers in God and non-believers:

‘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 - Poland,
Beholden to our ancestors for their labours, their struggle for independence achieved at great sacrifice, for our culture rooted in the Christian heritage of the Nation and in universal human values (...)’.

3.2. Selective dialogue

With the turn of the millennium, the financial uncertainties, the events of 9/11, and the spreading of the ‘clash of civilizations’ rhetoric added confusion and tension to the mix⁷⁸. Why should Europe open the market to religious actors, like Muslims and ‘sects’, who allegedly threatened its civilization? Why

⁷⁶ The European Court of Human Rights, instead, developed an interest-based analysis of disputes, especially in the area of conflicts between majorities and minorities and dissidents and leaders. In this regard, the Court gave a momentous decision in 1981, when it ruled that ‘although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.’ European Court of Human Rights. *Young, James and Webster v. United Kingdom*. Decided on August 13, 1981. Appl. No. 7601/76 and 7806/77. At para 63. In the *Sindicatul case*, the Grand Chamber warned that ‘regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole’. European Court of Human Rights. Grand Chamber. *Sindicatul Păstorul cel Bun v. Roumania*. Decided on July 9, 2013. Appl. No. 2330/09. At para 132.

⁷⁷ Italian Church and State expert Francesco Margiotta Broglio made this argument in: F. Margiotta Broglio, ‘In Europa il Vaticano è declassato’, in *Limes* (2000) 1, pp. 153-162. Also see F. Margiotta Broglio, ‘Il fenomeno religioso nel sistema giuridico dell’Unione europea’, in F. Margiotta Broglio, C. Mirabelli, F. Onida, *Religioni e sistemi giuridici*, (Bologna: il Mulino, 2000), pp. 7-251.

⁷⁸ See R. Torfs, ‘Religious Freedom and Church and State Relationships after 11 September 2001’. In *European Journal of Church and State Research* (2001) pp. 1-12.

should Europe stick to old-fashioned liberalism, now that boisterous globalization challenged Fukuyama's prophecy on the worldwide triumphant liberal democracy and the free market⁷⁹? The drafting of the Constitution for Europe of 2004, incorporating the EU Charter of Fundamental Rights (the 'Charter of Nice') of 2000, expressed the mounting tension. The process that had led Western European countries to embrace States' religious neutrality clashed with claims that Europe needed to acknowledge its Christian identity⁸⁰.

In the event, John Paul II's call that the Christian, or the Judeo-Christian heritage of Europe should be proclaimed in the Constitution was dismissed. However, mainstream churches, with the help of some governments, had succeeded in obtaining an article of the Constitution, namely Article I-52, which reiterated Declaration 11 annexed to the Treaty of Amsterdam, though now with a legally binding force. The article stated that

- '1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
2. The Union equally respects the status under national law of philosophical and non-confessional organisations.'

Religious actors and philosophical and non-confessional organizations, again on the same footing, succeeded not to have themselves included in the general category of social actors, thus preserving the specificity of religion and religious or non-religious actors.

In 2005, the French voted against the Constitution for Europe, sensing that it threatened their national sovereignty as well as their secular legacy. The year before, France had passed the Act prohibiting, 'en application du principe de laïcité', visible religious signs in State schools⁸¹. Both the French and the Dutch also voted against the European Constitution as it was meant to favor the Anglo-Saxon conception of capitalism.

The political principle shaped in 1997 in the Treaty of Amsterdam, was completed by an additional clause, through which the European Union recognized that the churches had a say in the European construction. Section 3 of Article I-52 framed a dialogue between the Union and the churches, stating that:

- '3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.'

Translating the process of institutionalization of relations between religious representatives and the EU bodies, and the Commission in particular, the article enabled religions to counter a religion-free market and a God-free Europe in two ways: they could influence EU legislation and policies in their content and method through 'dialogue'; at the same time they could claim that EU provisions they disliked would not apply to them on the grounds of the national priority preventing the EU law from impacting on the 'status of religious organizations' under domestic law.

Despite the intent, the real impact of the provision on 'dialogue' risked being a double-edged sword. Enshrining in the Treaty the domestic priority and framing an institutional space for the lobbying action of wealthy churches favored the big actors. However, the norm on 'dialogue' potentially included all religious and non-religious actors, and moreover on the same level, thus representing one more step in the direction of the free religious market loathed by European

⁷⁹ See F. Fukuyama, 'The End of History'. In *The National Interest* 16 (1989) pp. 3-18.

⁸⁰ Formal acknowledgment of Christianity as a fundamental ingredient of Europe was advocated from a European public law perspective in J.H.H. Weiler, *Un'Europa Cristiana: un saggio esplorativo* (Milano: Rizzoli, 2003). Contra see S. Cvijic And L. Zucca, 'Does the European Constitution need Christian Values?' In *Oxford Journal of Legal Studies* 24 (2004) 4, pp. 739-748.

⁸¹ France, Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse.

mainstream churches. In order for the norm to fulfill the role that mainstream churches and their governmental allies had in mind, it would have been necessary to institutionally engage with only a selected number of religious organizations. Contrary to the general principle framed in Section 3 of Article I-52, the main actors envisaged not dialogue *tout court*, with all actors on all issues, but selective dialogue, with privileged actors only, on carefully chosen issues. The Presidency of the EU Commission opted for this approach in the framing of the dialogue, first through the ‘cellule de prospective,’ and then via the ‘group of policy advisers’⁸².

‘Selective cooperation’ was widespread in European Church and State relations, an evolution of the Westphalian pattern of establishment⁸³. Within the European Union framework, however, the human rights and single market projects had produced a system of rules inherently hostile to anti-competitive hindrances. Would relations and the ‘dialogue’ between EU bodies and religious representatives therefore depart from the dominant national model of ‘selective cooperation’ and lay down a more egalitarian practice?⁸⁴

3.3. The defensive strategy

In the human rights project, the margin of appreciation was meant to prevent undesired effects resulting from European harmonization. The Lautsi case on the Italian display of the crucifix in State schools perfectly expressed this tension⁸⁵. In 2009, a violation by Italy was found when the Strasbourg Court issued a judgment without taking into account the margin of appreciation⁸⁶; two years later, the Grand Chamber applied a wide margin of appreciation and reversed the decision:

‘The Court takes the view that the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State. The Court must moreover take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development.’⁸⁷

Although not enforceable because of the non-ratification of the Constitution, Article I-52 of the Constitution for Europe was meant to counter the egalitarian bottom-up effect of the European free market of religion through the top-down effect of the national primacy guaranteeing religious rents and identities. Against such a complex and contentious background, the attempt to simply stop change through the inclusion in the treaties of a domestic priority on the status of faith communities, while at the same time nourishing the ambition to engage in a meaningful dialogue with religious and non-religious bodies was a macroscopic illusion.

⁸² See B. Massignon, *Des dieux et des fonctionnaires* (quoted above at footnote 55) (for an account of how the European Union developed institutional relations with religious representatives).

⁸³ Silvio Ferrari has identified ‘selective cooperation’ as one of the features of European constitutional traditions in law and religion. See S. Ferrari, ‘Church and State in Europe, Common Pattern and Challenges’. In *European Journal of Church and State Research* (1995) pp. 149-159.

⁸⁴ The question was discussed in particular during a symposium convened in 2001 by the Group of Policy Advisers at the European Commission. See Symposium on ‘Legal aspects of the relation between the European Union of the future and the communities of faith and conviction. The role of these communities and co-operation for a common European future.’ Brussels, 13 November 2001 (based on the author’s personal recollection of the symposium).

⁸⁵ For a presentation of the case, see M. Ventura, *Religion and Law in Italy* (Alphen aan den Rijn: Wolters Kluwer, 2013) pp. 119-121.

⁸⁶ European Court of Human Rights. *Lautsi v. Italy*. Decided on November 3, 2009. Appl. No. 30814/06. See M. Lugato, ‘The Margin of Appreciation and Freedom of Religion: Between Treaty Interpretation and Subsidiarity.’ In *Journal of Catholic Legal Studies* 52 (2013).

⁸⁷ European Court of Human Rights. Grand Chamber. *Lautsi v. Italy*. Decided on March 18, 2011. Appl. No. 30814/06. At para. 68.

The construction of a single market and human rights-oriented Europe had a double religious implication. On the one hand, the unintended construction of a free religious market was triggered, which threatened confessional monopolies, governmental policies and religious nationalism. On the other hand, religion began to oppose the free market model and global economy more generally as anti-human, discriminatory, unjust and opposed to human dignity. In the first case, the free market triggered a competition between concurrent religious actors. In the second case, the competition rather occurred between religion as such and the market economy itself. In both cases, the relationship of religion to liberal democracy, and the interconnected evolution of religion and politics in Europe was at stake, along with the unfolding of the human rights and the single market projects.

The European interaction of law and religion was again a unique laboratory, opposing the defensive strategy of the main religious and governmental stakeholders to the vitality of European religions and societies. Ronan McCrea translated such tension in public law terms:

‘The law of the single market views religion in the marketplace in two distinct ways, recognizing it as both an economic choice that can be facilitated by the economic liberties of the Single Market, and an intimate, non-economic phenomenon that requires protection from those same liberties.’⁸⁸

European courts were at the forefront. In particular, the Court of Justice of the European Union was confronted with the clash between the defensive strategy commanding a religious exception, on the one hand, and the advancement of a European conversation and standard, on the other. EU experts Sergio Carrera and Joanna Parkin explained that the defensive strategy aimed at having religion

‘play in the realm of European citizenship and fundamental rights (...) as an exception from fundamental freedoms, in particular the freedom of movement rights that form the basis of European citizenship as enshrined in Article 20 of the Treaty on the Functioning of the EU (TFEU).’⁸⁹

This ambition, the authors explained, could also be very partially fulfilled in the context of EU law, and in particular in the case law of the Court of Justice:

‘A study of the case law of the Court of Justice in Luxembourg reveals that an accommodation of religious perspectives through recognition of notions of ‘morality’, ‘public order’ and ‘public policy’ could be used (under certain circumstances) as grounds for granting exceptions to EU free movement law and freedoms, with the Court acknowledging that member states have some leeway in deciding questions of public morality. Even so, this degree of leeway is limited by the requirement to comply with the general principles of EU law, such as those of non-discrimination and proportionality.’⁹⁰

After the failure of the 2004 Constitution for Europe, the preparation of the ‘Reform’ Treaty took place in a period of new tensions for European integration. The half-hearted accession of new member states, the case of Turkey, the global economic turmoil, the crisis of international markets resulting in the credit crunch, security concerns and the relevant impasse of liberties, corresponded to increasing conflicts in the religious sphere. The Islamic challenge, the spread of ‘alien religions’, strife within the main Christian churches, political and populist exploitation of religion, religion-based nationalism, racism and violence, responded to the economic crisis. Both sides of the coin, namely religion and the economy, stirred criticism and skepticism against the free market economy and competition. Religious freedom issues increasingly came to feature the intermingling of global economy, security concerns and disputes on sovereignty.

⁸⁸ R. McCrea, *Religion and the Public Order of the European Union* (Oxford: Oxford University Press, 2010) p. 144.

⁸⁹ S. Carrera and J. Parkin, ‘Mapping the Field of Religious Diversity in EU Law and Policies within the European Commission’, *Religare Summary* No. 1 / May 2011, p. 3.

⁹⁰ *Ibid.*

Cases judged by the Court of Justice of Luxembourg which implied the connection between the global market, the war on terror, new boundaries of sovereignty and religion, underlined the dynamic interconnection of the human rights and the single market projects, as well as of the religious and the secular projects. This became blatant in the case of *L'Organisation des Modjahedines du peuple d'Iran* of 2006⁹¹ and in the *Kadi* case of 2010⁹², in which the response to Islamic terrorism and the free circulation ethos spectacularly clashed.

Witnessing the increasing overlapping between the human rights and the single market projects, between the Court of Justice of the EU and the European Court of Human Rights, judges increasingly struggled with the notions of the 'national margin of appreciation' and the 'emerging European consensus', as well as with the intermingling of market and politics, cultures and ideologies, the free market and human rights.

Because of its peculiar constitution and bill of rights system, the UK was affected by the European reshaping of law and religion more than any other Western country. If the implementation of Articles 9 and 14 ECHR prompted adjustments in the case law, notably through the House of Lords' cases of *Aston Cantlow* in 2003 and *Begum* in 2006⁹³, EU law in the field of equality and non-discrimination legislation had a tremendous impact⁹⁴. In the *ASLEF* case, the Strasbourg Court found itself confronted with the task of adjudicating labor law, and in particular of deciding to what extent ideological allegiance to the group (a trade union, in the relevant case) could bind the individual⁹⁵. Later British cases demonstrated the ongoing struggle, finding it extremely hard to strike a balance between faith-based claims and public policy requirements⁹⁶.

Britain foreshadowed a conflict that concerned Europe as a whole. Key cases, like *Lombardi Vallauri v Italy*⁹⁷, *Obst v. Germany*⁹⁸, *Schuth v Germany*⁹⁹, *Sindicatul v Romania*¹⁰⁰ and *Fernandez Martinez v Spain*¹⁰¹ followed the same contentious path, with the interaction of law and religion revealing growing tensions on diversity and equality, and on the autonomy of religious organizations¹⁰².

⁹¹ Court of Justice of the European Communities. *Organisation des Modjahedines du peuple d'Iran v. Council of the European Union*. Decided on December 12, 2006. Case T-228/02.

⁹² Court of Justice of the European Union. *Yassin Abdullah Kadi v. European Commission*. Decided on December 30, 2010. Case T-85/09. The Court annulled Commission Regulation (EC) No 1190/2008 of 28 November 2008 (...) imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, in so far as it concerned Mr Yassin Abdullah Kadi.

⁹³ See M. Ventura, *From Your Gods to Our Gods* (quoted above at footnote 37).

⁹⁴ Article 10 TFEU prescribed that 'In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

⁹⁵ European Court of Human Rights. *Associated Society of Locomotive Engineers & Firemen (ASLEF) v. The United Kingdom*. Decided on February 27, 2007. Appl. No. 11002/05.

⁹⁶ European Court of Human Rights. *Eweida and Ors v. The United Kingdom*. Decided on January 15, 2013. Appl. No. 48420/10, 59842/10, 51671/10 and 36516/10.

⁹⁷ European Court of Human Rights. *Lombardi Vallauri v. Italy*. Decided on October 20, 2009. Appl. No. 39128/05.

⁹⁸ European Court of Human Rights. *Obst v. Germany*. Decided on September 23, 2010. Appl. No. 425/03.

⁹⁹ European Court of Human Rights. *Schüth v. Germany*. Decided on September 23, 2010. Appl. No. 1620/03.

¹⁰⁰ European Court of Human Rights. *Sindicatul Păstorul cel Bun v. Roumania*. Decided on January 31, 2012. Appl. No. 2330/09. The Grand Chamber reversed the decision in European Court of Human Rights. Grand Chamber. *Sindicatul Păstorul cel Bun v. Roumania*. Decided on July 9, 2013.

¹⁰¹ European Court of Human Rights. *Fernández Martínez v. Spain*. Decided on May 15, 2012. Appl. No. 56030/07.

¹⁰² See W. C. Durham Jr., 'Religion and the World's Constitutions'. In W. C. Durham Jr., S. Ferrari, C. Cianitto, D. Thayer (eds), *Law, Religion, Constitution. Freedom of Religion, Equal Treatment, and the Law* (Farnham: Ashgate, 2013) (on the current challenge to autonomy of religious organizations).

In the *El Majjaoui* case of December 2007¹⁰³, free circulation and human rights also came before the European Court of Human Rights, making it evident that the articulation of the two tracks, namely free circulation and free belief, and economy and human rights, was growing increasingly problematic.

At a late stage of the negotiation of the Treaty of Lisbon, President Sarkozy preached the necessity of removing competition from the catalogue of the goals and principles of European integration. In the event, he managed to secure the deletion of the word ‘competition’ from Article 3, Paragraph 3 of the Treaty on European Union as amended by the Treaty of Lisbon. A ‘highly competitive social market economy’ was still listed amongst the aims of the Union, but the step was remarkable anyway: the Union no longer aimed at establishing a ‘system ensuring that competition in the internal market is not distorted’ (Article 3 of the Treaty establishing the European Economic Community as amended by the Treaty of Maastricht). President Sarkozy championed a ‘pragmatic’ perspective as opposed to a ‘theological’ approach, making competition an end in itself. In his speech at La Bourget, on 27 June 2007, he said:

‘I believe competition is essential to ensure the best quality/price ratio and stimulate service and innovation. But I’m going to face up to my responsibilities. I refute a theological, ideological approach making competition an end in itself. When competition is constructive, I am for it. When it runs counter to an efficient economic policy, I want the issue raised. Who can explain to me the benefits of competition in the electricity sector if it results in prices rising far higher than long-term cost prices? In economics, my only ideology is pragmatism.’¹⁰⁴

The same approach applied in the field of religion, in two ways tightly linked to the defensive strategy of mainstream churches and national governments.

Firstly, a more competitive religious market was opposed on grounds that in the field of religion competition wouldn’t be ‘constructive.’ Not surprisingly, President Sarkozy was very active in championing a French nationalistic understanding of religion in the public sphere, based on a protected market vision.¹⁰⁵ He encouraged rethinking traditional *laïcité*, acknowledged French Christian roots, endorsed the struggle against sects, the ban on Muslim headscarves in public schools and a centralized – state controlled – organization of the Muslim communities. By virtue of its nationalist flavor, *laïcité* was, more than a European exception, a European thermometer. It was no coincidence that a few months after Sarkozy’s speech in Le Bourget, the Strasbourg Court accepted the France’s ban on the headscarf, and other religious signs, in public schools, by analogy with the Turkish case law of the same Court¹⁰⁶.

Secondly, religion thwarted competition and the market as a concurrent set of meanings, as an end in itself, as a competitor in providing humankind with an encompassing sense. President Sarkozy countered competition on the same level, by standing against the ‘theology’ of competition. On February 2009 the Roman Catholic Commission of the Bishops’ Conferences of the European Community (COMECE), the Evangelical Church in Germany (EKD) and the Church of England welcomed the initiative of several Members of the EU Parliament, to ask the Parliament to adopt a Written Declaration ‘on the protection of a work-free Sunday as an essential pillar of the European Social Model and as part of the European cultural heritage.’ The rationale for such a step was in that

¹⁰³ European Court of Human Rights. *El Majjaoui & Stichting Touba Moskee v. The Netherlands*. Decided on December 20, 2007. Appl. No. 25525/03.

¹⁰⁴ At http://www.ambafrance-uk.org/spip.php?page=mobile_art&art=9183.

¹⁰⁵ N. Sarkozy, *La République, les religions, l’espérance* (Paris: Cerf, 2004). J. Baubérot, *La laïcité expliquée à monsieur Sarkozy* (Paris: Albin Michel, 2008) (for a critique of Sarkozy’s understanding of *laïcité*). Also see Jean Baubérot, *Laïcité 1905-2005, entre passion et raison*, Paris, Le Seuil, coll. « La Couleur des idées », 2004 (for a retrospective analysis of the 1905 *loi de séparation* and its legacy); and Jean Baudouin, Philippe Portier (dir.), *La laïcité, une valeur d’aujourd’hui. Contestations et renégociations du modèle français*, Rennes, Presses Universitaires de Rennes, 2001 (for an analysis of French model and experience of separation of Church and State).

¹⁰⁶ European Court of Human Rights. *Dogru v. France*. Decided on December 4, 2008. Appl. No. 27058/05.

‘the economic and financial crises have made us more aware of the fact that not all aspects of life can be subject to market forces. Unrestrained consumption is neither a model for a sustainable economy, nor a healthy concept for human development.’¹⁰⁷

The credit crunch of 2008 and the subsequent crisis made Europe grow more skeptical about competition and the auto-regulation of the market. Accordingly, Europeans also grew more skeptical about a free religious market in which different faiths and believers would enjoy the same chance to compete for shares of society and power. In a time of radical change, religion emerged as a key component of collective identity, the national heritage, and local culture. This justified political and legal privileged treatment of religion, as opposed to non-religion, and of ‘our religion’ – the traditional religion of the country or the religion of insulated minorities – as opposed to ‘their religion’ – the religion of the ‘other’, and in particular the religion of outsiders, marginal and migrants.¹⁰⁸

In the first decade of the third millennium, Italy represented a powerful example of the tension between the neutral religious market and the protection of the majoritarian, monopolistic religion, in the name of identity, history and culture¹⁰⁹. Taking inspiration from the Italian Republican Constitution of 1948 and from the Vatican II Council (1962-1965), in the Villa Madama agreement of 1984, the Holy See accepted that Italy was no longer a Catholic State. From 1989 to the 2000s, the Italian Constitutional court defined the Italian State as a secular State, neutral and impartial towards all religions and faiths, regardless of their majority or minority status. The Constitutional court ruled that

‘the State’s approach to different religious denominations must be equidistant and impartial, with no regard for the quantitative more or less widespread membership of this or that religious denomination nor for the bigger or smaller social reaction to the violation of the rights of one denomination or the other.’¹¹⁰

However, in 2011, the Italian government, and the large international coalition supporting it¹¹¹, had the European Court of Human Rights uphold the display of the Roman Catholic crucifix in classrooms of Italian State schools, based on the opposite argument, that the crucifix had to stay where it was because the majority so desired, in the name of the culture and identity of Italy. The Court further found it compatible with the Convention that ‘the country’s majority religion’ enjoyed a ‘preponderant visibility in the school environment’.¹¹²

The gap between the illusionary domestic priority and the dream of keeping religion out of the market on the one hand and the all-embracing reality of conflicting faith-based claims on the other, increased. The defensive priority of most European governments and mainstream churches reacted to religious and legal change.

¹⁰⁷ See at <http://www.olir.it/areetematiche/83/news.php?notizia=2049&titolo=Bruxelles%3A-nbsp%3Bdichiarazioni+della+COMECE+a+proposito+della+Working+Time+Directive+dell'Unione+e...>

¹⁰⁸ This dynamic has been investigated in the workshop ‘Who owns religion? Religion between populism and faith-communities’. ReligioWest workshop (quoted above at footnote 71).

¹⁰⁹ For Italian law and religion in general and for developments in the last decades see M. Ventura, *Religion and Law in Italy* (quoted above at footnote 85). For a critique of the post 1984 dispensation in Italy and in the Roman Catholic Church see M. Ventura, *Creduli e credenti. Il declino di Stato e Chiesa come questione di fede* (Torino: Einaudi, 2014).

¹¹⁰ Constitutional court of Italy, 20 Nov. 2000, No. 508, Quaderni di Diritto e Politica Ecclesiastica (2000) pp. 1041-1042, at para 3 (author’s translation). More details in M. Ventura, ‘The Rise and Contradictions of Italy as a Secular State’. In P. Cumper and T. Lewis (eds), *Religion, Rights and Secular Society. European Perspectives* (Cheltenham: Edward Elgar, 2012) pp. 126-146.

¹¹¹ See P. Annicchino, ‘Winning the Battle by Losing the War: The Lautsi Case and the Holy Alliance between American Conservative Evangelicals, the Russian Orthodox Church and the Vatican to Reshape European Identity’. In *Religion & Human Rights* 6 (2011) 3 pp. 213-219.

¹¹² European Court of Human Rights. Grand Chamber. *Lautsi v. Italy*. Decided on March 18, 2011. Appl. No. 30814/06. At para. 71.

Declaration 11 annexed to the 1997 Treaty of Amsterdam wasn't legally binding. Art. I-52 of the 2004 Constitution for Europe didn't come into force due to the failure of the ratification process. In 2007, the Treaty of Lisbon enacted the same norm through Article 17 of the Treaty on the functioning of the European Union (TFEU) replacing the Treaty establishing the European Community (TEC):

- '1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
2. The Union equally respects the status under national law of philosophical and non-confessional organisations.
3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.'

In 1997, before the Treaty of Amsterdam, European governments and the leaders of the mainstream churches realized that the single market project was likely to reshape the rules of the game, which provided for the 'do ut des' mindset to be preserved. They started devising a reaction, which was only fully realized ten years later, with the Treaty of Lisbon, and with Article 17 TFEU in particular.

In its comment on the Treaty of Lisbon, the UK Library of the House of Commons illustrated the many weaknesses of the provision on dialogue, but underlined the new potential for a more effective and productive practice of institutional consultation:

'the extent to which these fears are well-founded will depend on how the Union interprets "dialogue," on the degree to which religious leaders are consulted about draft proposals, and on how open and transparent this process is. The Church [of England] would join the many organisations that currently lobby the EU and others that are consulted (sometimes routinely) by the Commission in the course of its pre-legislative discussions. The difference in this case is that the specific dialogue with the Church would be a treaty-based requirement.'¹¹³

Since 2007, the principle of a domestic priority over the European initiative and competence in religious affairs has been the key element in the approach to law and religion in Europe, widely shared by governmental and religious actors, EU officers and experts. The gap has widened between the socio-legal reality and such illusionary domestic priority, coming with the ancillary illusion of keeping religion out of the market. The simultaneous ambition of maintaining a dialogue between the European Union and religious and non-religious organizations has only increased the gap. For decades, the threefold divisive pattern opposing the secular versus the religious, majorities versus minorities and States versus Europe, has fueled such a discrepancy. In the next and final paragraph of this paper, I will challenge the paradigm of European law and religion based on the threefold pattern and argue for a paradigm shift, reconciling the European political project and the new socio-legal and religious landscape of the Old Continent.

4. From the old to a new paradigm

This paper suggests that, after WWII, Europe has developed as an extraordinary laboratory for the interaction of law and religion, thanks to the vibrant combination of four projects. The human rights project, the single market project, the secular project and the religious project have intermingled and competed in the remaking of both religious laws and civil law on religion in Europe, which, in this paper, are construed as the all-encompassing field of law and religion.

The projects have threatened national and mainstream religious interests, triggering a protectionist reaction. The illusion of the EU non-competence on religion and selective dialogue between the EU and religious and non-religious organizations were forged as the cornerstone of the defensive strategy. Underlying the strategy, a threefold pattern of conflicting ideologies, interests and actors has come to

¹¹³ House of Commons – Library, *The Treaty of Lisbon: amendments to the Treaty establishing the European Community* (Research Paper 07/86, 6 December 2007) p. 23.

dominate law and religion in contemporary Europe: the secular versus the religious; States versus Europe; and majorities versus minorities. Especially after the fall of the Berlin Wall, the attack on the Twin Towers and the bombings in Madrid and London, this paradigm has grown divisive and disconnected from the socio-legal, and religious reality of Europe.

This final part suggests that it is time to move beyond the old paradigm and to choose change. The first paragraph will focus on the necessity of ridding ourselves of the old paradigm and of the threefold divisive pattern. The second paragraph will argue in favor of acknowledging change and choosing change, thus allowing for a consistent set of laws and policies on religion to be developed. To this effect, as the third paragraph will explain, religious initiative is crucial. Governmental and religious or non-religious actors, and European civil society as a whole, cannot avoid responding to the Gospel's invitation to pour new wine in new wineskins, if Europeans want to be consistent with the continent's legacy of dynamic interaction of law and religion.

4.1. Beyond the threefold divisive pattern

Legitimizing the defensive strategy presented above (paragraph 3.3. 'Defensive strategy'), the threefold pattern of opposition between the religious and the secular, between religious majorities and minorities, and between the national and the European, has gained a paramount role in the two last decades. Experts have simplified and codified the pattern as the illustration of their clear vision and efficient knowledge. Actors have adopted it as a formidable tool to protect and advance their respective agendas.

In his separate concurrent opinion on the Lautsi case ruling, in which the Grand Chamber of the Strasbourg Court declared that the display of the crucifix in Italian State schools did not infringe the European Convention of Human Rights, Judge Bonello saw the reversal of the first ruling as a fundamental redress of a mismanagement of the threefold pattern. The Maltese judge saluted the ruling as the success of religion over secularism, of the national priority over top-down European standardization, and of the majority over minorities' arrogance.

As for religion and secularism, Judge Bonello wrote:

'Removal [of the crucifix] would have been a positive and aggressive espousal of agnosticism or of secularism – and consequently anything but neutral. Keeping a symbol where it has always been is no act of intolerance by believers or cultural traditionalists. Dislodging it would be an act of intolerance by agnostics and secularists'¹¹⁴.

As for considerations of majorities and minorities, Judge Bonello was adamant, in opposing Ms Lautsi's claim that her minority's needs weighed more than the majority's:

'All the parents of all the thirty pupils in an Italian classroom enjoy equally the fundamental Convention right to have their children receive teaching in conformity with their own religious and philosophical convictions, at least analogous to that of the Lautsi children. The parents of one pupil want that to be "non-crucifix" schooling, and the parents of the other twenty-nine, exercising their equally fundamental freedom of decision, want that schooling to be "crucifix" schooling. No one has so far suggested any reason why the will of the parents of one pupil should prevail, and that of the parents of the other twenty-nine pupils should founder. The parents of the twenty-nine have the fundamental right, equivalent in force and commensurate in intensity, to have their children receive teaching in conformity with their own religious and philosophical convictions, be they crucifix-friendly or merely crucifix-indifferent. Ms Lautsi cannot award herself a licence to overrule the right of all the other parents of all the other pupils in that classroom, who want to exercise the same right she has asked this Court to inhibit others from exercising.'¹¹⁵

¹¹⁴ European Court of Human Rights. Grand Chamber. *Lautsi v. Italy*. Decided on March 18, 2011. Appl. No. 30814/06. Judge Bonello, Concurring opinion, at para. 2.11.

¹¹⁵ *Ibid.*, at para. 3.5.

Finally, Judge Bonello found that the litigation, and the judgment were intrinsically connected to the opposition between Europe and individual States, and in particular, Italy in the relevant case. Thus, he argued for the strongest deference to be paid by a supranational court to the ‘cultural continuum of a nation’s flow through time’:

‘A court of human rights cannot allow itself to suffer from historical Alzheimer’s. It has no right to disregard the cultural continuum of a nation’s flow through time, nor to ignore what, over the centuries, has served to mould and define the profile of a people. No supranational court has any business substituting its own ethical mock-ups for those qualities that history has imprinted on the national identity. (...) A European court should not be called upon to bankrupt centuries of European tradition. No court, certainly not this Court, should rob the Italians of part of their cultural personality.’¹¹⁶

As powerfully witnessed by Judge Bonello, since the end of communist regimes in Europe, the threefold pattern of opposing forces has stirred the strategies and the debate. The new configuration of European societies and legal developments in Europe, however, has come to challenge the very foundation of the pattern.

The majority-minorities scheme has retained the power to influence collective feelings, in Europe, but the identity and features of the members of majority and minority groups have drastically changed, especially with regard to the place of the religious element in the social and political dynamics. Cohesive and energetic minorities, coinciding with a faith community or representing a fraction within a religious denomination, could be stronger than traditional majorities. The religious identity of traditional majorities has also changed, featuring a dissociation between religious practice, individual belief and allegiance to religion as an identity marker.

Similarly, the confrontation between State authorities and European authorities has been very real, but there again, the difference between the two levels of governance and sets of institutions has grown very nuanced in terms of political dynamics and law making. The non-competence of the European Union on religion has always been an illusion. The attribution of competences could be strict on paper, but when it came to religion, an omnipresent and transversal factor, a rigid delimitation of matters and fields of competence was immaterial. Disavowing the very mindset of Article 17 TFEU, Sections 1 and 2, political and legal developments in the European Union, have resulted in a multilevel and pluralistic regulation as well as in shared competence and cooperation between member States and the Union, in religion sensitive areas like social inclusion, culture, education, human health, equality and non discrimination. In this sense, EU experts Sergio Carrera and Joanna Parkin have underlined that an examination of EU legislation and both formal and informal European policies in the fields of citizenship and fundamental rights, non-discrimination, immigration and integration, social inclusion and education and culture, demonstrates that

‘there is a complex and heterogeneous patchwork of EU normative approaches delineating the relationship between religion and the EU.’¹¹⁷

The reality of EU law and religion has exposed the incongruity of the pattern of opposition between the Union and the member States. Cooperation between German judges and European judges has offered a remarkable example of the potential for a new mindset, when the EU Court of Justice, upon deferral for preliminary ruling by the German judiciary, clarified that, in order to assess an application to grant refugee status on grounds of religious persecution,

‘(...) Directive 2004/83 must be interpreted as meaning that the applicant’s fear of being persecuted is well founded if, in the light of the applicant’s personal circumstances, the competent

¹¹⁶ Ibid., at para. 1.1. and 1.2.

¹¹⁷ S. Carrera and J. Parkin, ‘The Place of Religion in European Union Law and Policy, Competing Approaches and Actors inside the European Commission’, Religare Working Document No. 1 / September 2010, p. 33.

authorities consider that it may reasonably be thought that, upon his return to his country of origin, he will engage in religious practices which will expose him to a real risk of persecution.¹¹⁸

The distinction between the secular and the religious has also grown extremely problematic. Religious groups have not accepted being confined within an allegedly purely religious sphere separated from the secular: they have claimed an active role within the public sphere, often in their capacity as providers of social services, education and public ethics. Even prayers or gatherings in buildings of worship, such as those for Muslims, could not be reduced to a merely religious domain, or a specific exercise distinct from life as a whole. In heavily secularized societies, where Taylor's challenge to the normality of religion is paramount (see above, 'Introduction'), this has inevitably made for the definition of the secular and the religious to be tentative and for the two to constantly intermingle. The increasing interaction between civil laws and religious laws has contributed to blurring the line between the secular and the religious, as has the rise of a new kind of religious membership, based more on culture and politics than on faith. The ambition of associations of atheists, agnostics and humanists to represent the growing share of 'unaffiliated' Europeans and to be recognized the same status as religious denominations has also witnessed the inextricable relation of the secular to the religious.

The threefold divisive pattern has thus become extremely powerful, due to its symbolic force and social drive, while growing increasingly disconnected from a reality, in which a porous border has encouraged the mixing of the secular and the religious, States and Europe and majorities and minorities.

The rich and vibrant interaction of law, politics and religion in the European space has progressively exposed that the threefold divisive pattern did not come close to portraying, let alone governing, an unruly reality. The gap between the dominant narrative and action based on the pattern and the real dynamism of European societies beyond the boundaries between the religious and the secular, majorities and minorities, and the national and the European, has had a paralyzing effect. The rhetoric of religion contributing to European cohesion has prevailed over real achievements. Illusions have superseded projects.

Article 17 TFEU acknowledged and celebrated the threefold pattern. Sections 1 and 2 split the world of belief into religious and non-religious organizations, while prioritizing domestic regulations over EU law and policies, and therefore favoring those majorities that enjoyed an advantageous competitive status under domestic law, to the detriment of minorities. By this very fact, Article 17 TFEU has also come to encapsulate the weakness of the old paradigm.

It came as no surprise that when crucially tested on the impact of EU law on religion, equality and non-discrimination, Article 17 failed to provide effective guidance on the articulation of the national and European competences, as well as on the development of a meaningful dialogue between EU authorities and religious and non-religious organizations¹¹⁹.

Following up on Declaration no. 11 annexed to the Treaty of Amsterdam, and anticipating Article 17 TFEU, the Employment Equality Directive of 2000 included a religious exception, purportedly meant to shield religion and domestic law from the threatening 'equalitarian' and 'secularist' European Union:

¹¹⁸ Court of Justice of the European Union. *Bundesrepublik Deutschland v Y and Z*. Decided on September 5, 2012. Cases C-71/11 and C-99/11. At para 80.

¹¹⁹ See M. Ventura, 'Libertà religiosa e divieto di discriminazione nel diritto dell'Unione europea'. In *Il Diritto Ecclesiastico* (2010) 3-4, pp. 481-490. On the impact of EU anti-discrimination law on religion in employment, see L. Vickers, *Religion and Belief: Discrimination in Employment. The EU Law*. Report to the European Commission, Directorate General for Employment, Social Affairs and Equal Opportunities – Unit G2, issued on 12 January 2007.

‘This Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief (...) to require individuals working for them to act in good faith and with loyalty to the organisation’s ethos’,¹²⁰

The norm disregarded the real heart of the matter – disputes amongst believers within religious groups, inevitably crossing the border between religious laws and civil laws – and endorsed the threefold pattern. Thus the Directive analyzed the issue in terms of conflict between the religious (to be exempted from the general law in recognition of its specificity) and the secular (to be kept out of the sacred space of religious employment), between the States (supposedly protecting the religious) and the European Union (supposedly threatening the religious in the name of equality), and between majorities (mainstream religious groups that deserved protection) and minorities (challenging the religious leadership and the untouchable religious laws which came along with them). Therefore, the religious exception carved out in the Employment Equality Directive proved inefficient in arbitrating real conflicts on employment within religious organizations. Its major consequence was to discourage believers from engaging in legal pluralism and articulating religious and secular litigation. The huge potential of the Court of Justice of the European Union was thus left unexploited. In turn, litigants were implicitly directed towards the European Court of Human Rights, the role of which in this field became crucial, as witnessed by the cases mentioned above (see paragraph 3.3. ‘The defensive strategy’), and notably by the Grand Chamber ruling of 9 February 2013 in the *Sindicatul case*, asserting both the applicability of fundamental rights (and notably article 11 ECHR, freedom of association) within religious communities, and the right of religious communities to autonomy and to a fairly high degree of protection against interference on the part of States¹²¹.

The incongruity of the old paradigm and the illusion of Article 17 TFEU and the religious exception of the Employment Directive were exposed in 2013, when the European Ombudsman decided against the rejection by the EU Commission of the proposal from the European Humanist Federation for a seminar to examine issues of human rights, equality, and non-discrimination arising from the exemptions for ‘churches and other public or private organisations the ethos of which is based on religion or belief’ in Article 4 of the Employment Equality Directive of 2000 and related matters. This decision underlined the intrinsic weakness of Article 17 TFEU, and, by implication, of the old paradigm based on the three divisive patterns. In his Decision on 25 January 2013, the Ombudsman found

‘that the Commission was wrong to argue that, by engaging in the dialogue proposed by the complainant, it would go beyond the “spirit” of Article 17 (1) and (2) TFEU. By rejecting the complainant’s proposal for a dialogue seminar, on the grounds that this would go beyond the spirit of Article 17 (1) and (2) TFEU, the Commission failed to implement Article 17(3) TFEU properly. This constitutes an instance of maladministration.’¹²²

Apparently, the decision concerned the failure by the Commission to fully implement Section 3 of Article 17. In reality, the whole contradictory structure of the article was at stake. The rejection of the proposal from the European Humanist Federation was the natural consequence of the illusion nourished by the EU non-competence on religion as well as by the religious exception framed in the Employment Directive. By denying humanists access to ‘dialogue’, the Commission had followed the ‘defensive strategy’ commanding deference to the threefold divisive pattern. Logically, the Commission had countered the humanist offensive against exceptions to EU equality law in favor of religious employers. Sticking to the threefold pattern, the Commission had intended to protect the States, and their preference for mainstream churches, from the risk of a difference-blind European

¹²⁰ Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, art. 4.

¹²¹ European Court of Human Rights. Grand Chamber. *Sindicatul Păstorul cel Bun v. Roumania*. Decided on July 9, 2013. Appl. No. 2330/09.

¹²² European Ombudsman, Decision on the inquiry into complaint 2097/2011/RA, 25 January 2013, at para 49.

equality agenda; also, the Commission had instinctively shielded the religious from the secular and the (religious) majority from the (secularist) minority.

By disavowing the Commission, the European Ombudsman pointed in the right direction. If Europe had to move on, being faithful to the vital tensions springing from the four European projects, it was necessary to go beyond the defensive strategy and the old paradigm. It was necessary to depart from the approach perpetuating the patterns of opposition and drawing an increasingly impossible line between the religious and the secular, the States and Europe, the majority and minorities. Not an illusionary ambition, but consistent laws and policies were needed.

4.2. Consistent religious laws and policies

Having inherited the developments described above, Europeans are now confronted with the dilemma: should they hold firm to the threefold divisive pattern, and to the old paradigm, no matter how great their distance from reality? Or should they try to reformulate their paradigm so as to renew their project and reconcile laws and policies to the real picture of beliefs and convictions in Europe?

The first option is certainly reasonable. Discrepancy between legal principles and reality can be a sensible way to cope with social conflicts, especially in the controversial area of law and religion, where it has always taken a lengthy, painful process in order for God-given principles and legal tools to develop along with social change. Many legal and religious traditions have a long record in this regard. It is possible to change without acknowledging change. It is possible to change without choosing change and even by denying change.

However, this paper argues that in the present context, it is preferable by some distance for Europeans to acknowledge change and to choose change. In the context of this paper, acknowledging change is both about gaining awareness of the fact that change in law and religion is a fundamental feature of European developments, and about recognizing that Europe is faced with failures demanding change. In turn, choosing change involves engaging in the steps that can lead to a European consistency in addressing conflicts arising from the dynamic interaction of law and religion. Choosing change is about empowering the civil society and limiting the State's action to what is strictly necessary; it is about assessing civil institutions at all levels, and their policies, ideology and powers; it is about requiring actors to legitimize their claim for liberty and prerogatives through responsible engagement with their own principles, precepts and internal/external conflicts, in the interest of society as a whole. Ultimately, choosing change is about recognizing critical social issues and reacting to them through a better interaction of law and religion and consistent laws and policies¹²³.

Acknowledging change and choosing change is co-terminus with going beyond the threefold divisive pattern. The secular and the religious, in all their varieties, are condemned to co-exist and indeed they can fruitfully co-exist, although not without tensions; State law and European law cannot claim exclusivity or superiority in such a fluid field: coordination and competition, overlapping and inconsistencies are inevitable; and finally, legal regulation of religion should be disentangled from a rigid understanding of categories such as majority and minorities, culture and religion.

Choosing change as a new paradigm, as opposed to the defensive attitude of the old paradigm, is inherent in the acknowledgment that adaptation to new circumstances and willingness to take

¹²³ For a critique of excessive reliance on change in law and religion see M. O. DeGirolami, *The Tragedy of Religious Freedom* (Cambridge MA and London: Harvard University Press, 2013), pp. 100-106. The author rather warrants the following types of change: "changes that resemble growth rather than the grafting of new shoots, changes that imitate what is already existing rather than replacing it, changes that respond to some local or particular defect rather than those with more general and comprehensive aims, changes that proceed gradually with the possibility of readjustment, changes whose consequences can be reasonably anticipated—these are the types of change favored by the person disposed toward custom" p. 101.

responsibility in terms of evolving history is a fundamental feature of the European laboratory of law and religion, especially after World War II¹²⁴.

Europe has embraced change as a fact, and change as a principle: not only has Europe changed in its law and in its religion to a remarkable extent over the last sixty years when compared to the rest of the world, but Europeans have understood change as a value, as an instrument and as a goal. In its ambivalence, the expression ‘religious pluralism’ has encapsulated the pro-change stance: Europeans accept change as a matter of fact, while valuing and promoting it as a means for further achievement. Thus, European religious pluralism designates both the factual, objective development of Europe as an area in which multiple faiths and convictions coexist and interact, and the political project aiming at supporting and enhancing the plurality of beliefs as an essential ingredient for a better Europe. Rather than being just a matter of fact, belonging to the very pluralist history of the Continent and to the transformation which occurred in the last decades as a result of massive immigration, European religious pluralism is a project demanding constant development in the structure and substance of law and religion.

The most spectacular evidence of the European inclination for a change in the sphere of law and religion, in the sense of religious pluralism, is the shared sovereignty and the conversation between national States and European instances¹²⁵. Within the respective competence and prerogatives, but with a high degree of flexibility, the Council of Europe, the European Union, and the Organization for Cooperation and Security in Europe have engaged in a dialogue with the member States, the result of which is a set of remarkable achievements, at the heart of which is a supranational jurisdiction heavily impacting on religion, by virtue of the European Courts, the European Court of Human Rights and the Court of Justice of the European Union¹²⁶. This is indeed a unique achievement, largely ignored or underestimated by observers, especially by those who indulge in comparing the work of the European courts to the US Supreme Court’s case law on religion, without acknowledging the fundamental difference in the underlying legal and social structure¹²⁷.

Because of their inevitable exposure to European dynamic law and religion, European courts reflect the inclination towards change that permeates the interaction of law and religion in Europe. The European Court of Human Rights has witnessed this, in its historical decision, *Association Les Témoins de Jéhova* of 2011, the first ever violation declared by the Court against France on grounds of Article 9 on freedom of thought, conscience and religion. On that occasion, the Court took stock of the historical reasons that shaped the French system of Church and State relations, but imposed a requirement of consistency and found a violation, based on the principle that law is not given once and

¹²⁴ See M. Ventura, ‘Wie wirkt sich die europäische Integration auf die Religion aus?’. In G.E. Rusconi (ed), *Der säkularisierte Staat im postsäkularen Zeitalter* (Berlin: Duncker & Humblot, 2010) pp. 281-290.

¹²⁵ See in general N. Walker (ed), *Sovereignty in Transition* (Oxford: Hart, 2002). More specifically in law and religion: S. Van Blijsterveld, *The Empty Throne. Democracy and the Rule of Law in Transition* (Utrecht: Lemma Publishers, 2002).

¹²⁶ I have argued for the ‘virtues’ of the European jurisdiction on religion in M. Ventura, ‘Law and Religion Issues in Strasbourg and Luxembourg: The Virtues of European Courts’, *Religio West*, Kick Off Meeting Conference Paper, November 2011. For an extended analysis see M. Ventura, ‘La virtù della giurisdizione europea sui conflitti religiosi’ (quoted above at footnote 15) pp. 293-362. For a reelaboration, published in Russian, see M. Ventura. ‘Pravo i religiia vne natsional’nykh granits: polozhitel’noe znachenie Evropeiskogo suda po pravam cheloveka’ (‘Law and Religion Beyond National Borders: The Virtue of the European Court of Human Rights’). In *Gosudarstvo, religiia, tserkov’ v Rossii i za rubezhom* (State, Religion, and Church in Russia and Worldwide) (2013) 2, pp. 175-211.

¹²⁷ This theme was discussed in the workshop on ‘The European Court of Human Rights and the US Supreme Court Case-Law on Religion in the Public Space. A comparison.’ A joint initiative of the FP7 research programmes *Religare* (KU Leuven) & *Religio West* (UEI), the Law Faculty of the University of Milan, hosted by the Department ‘Law & Anthropology’ of the Max Planck Institute. Halle, 4-6 October 2012. Also see the ‘Judging Faith workshop: an international dialogue on the jurisprudence on religion in courts’, which took place on September 20-21, 2013 at Berkeley Law, UC Berkeley.

for all, and that excessive rigidity should always be avoided. ‘Law,’ the European judges wrote, ‘has to adapt to a changed context’¹²⁸.

If acknowledging the European inclination for change in law and religion is the precondition for understanding the European dynamism in the field, choosing change is a necessity in the light of serious problems and systemic failures in the European regulation of religion. If a minimum standard of religious liberty and State impartiality is to apply, Hungary will have to revise its overly-discretionary law on registration of religious denominations; France will have to rethink its hands-on approach to Islam and to relinquish its prevention of ‘sectarian’ activities, often a biased discriminatory interference with regard to marginal faith communities; Belgium will have to reform its uneven system of public funding and public teaching of religion; Germany, Austria and Switzerland will have to revise their Church tax system; Italy, Portugal and Spain will have to seek greater legal consistency with the constitutional mandate to establish equal freedom for all religious denominations. All over Europe, the freedoms and rights of Jews, Muslims, atheists, and new religious movements and the balance between individual and collective rights in churches will have to be seriously reassessed.

If Europe wants to choose change, the problematic role of the State, and its attitude towards religion, is crucial. Successfully urging the Strasbourg Court to establish the compatibility with the Convention of the display of the crucifix in Italian State schools, the governments of Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta and the Republic of San Marino warned against confusing the neutrality of the State with ‘secularism’. There is a huge diversity of Church-State arrangements in Europe, these States argued, and more than half the population of Europe ‘lives in non-secular States’¹²⁹. European pluralism is incompatible with the imposition of a secular state, they held:

‘To extend it to the whole of Europe would represent the “Americanisation” of Europe in that a single and unique rule and a rigid separation of Church and State would be binding on everyone.’¹³⁰

This position is flawed with the old paradigm’s binary mind, entailing the confusing dichotomy opposing the neutral to the secularist State¹³¹, as well as with the inability to take into account the European conversation, the mutual influences, and the impossibility to crystallize identity, let alone socio-legal developments. While the suppression of cultural, religious, national and regional diversity in Europe is highly undesirable, and deeply contradictory with European history and the European project, a European consistency is a compelling necessity. EU dialogue with religious and non religious organizations, European initiatives in favor of worldwide freedom of religion and belief¹³², intercultural policies within the Council of Europe¹³³, the OSCE Toledo guidelines on religion in education¹³⁴, the very condition for these seeds to fructify is a constant, realistic assessment of the

¹²⁸ European Court of Human Rights. *Association Les Témoins de Jéhova v. France*. Decided on June 30, 2011. Appl. No. 8916/05. At para 66. Author’s translation from the official French version (‘le droit doit savoir s’adapter aux changements de situation’).

¹²⁹ European Court of Human Rights. Grand Chamber. *Lautsi v. Italy*. Decided on March 18, 2011. Appl. No. 30814/06. At para. 47.

¹³⁰ Ibid. A deeply contrasting view is in L. Zucca, *A Secular Europe. Religion in the European Constitutional Landscape* (Oxford: Oxford University Press, 2012).

¹³¹ See L. Zucca, *A Secular Europe* (quoted above).

¹³² See Parliamentary Assembly of the Council of Europe, Resolution 1928 (2013), ‘Safeguarding human rights in relation to religion and belief, and protecting religious communities from violence’. See Council of the European Union, ‘EU Guidelines on the protection and promotion of freedom of religion or belief’ (24 June 2013).

¹³³ See Council of Europe, ‘White Paper on Intercultural Dialogue’, 2008.

¹³⁴ For more information on the Toledo Guidelines and the debate on the place of religion in European public school, see M. Ventura, ‘An Inclusive Approach to Religion in Public Education. The Legal Dimension’. In *Historia Religionum*. An

mutual interference between State actors and religious and non-religious actors, and a incessant quest for consistency all across Europe. Not an ideological bias or a totalitarian design, but the dynamic interaction of law and religion in Europe has brought the European Court of Human Rights to develop its doctrine on the neutrality and impartiality of the State, the core of which is that

‘The State’s role as the neutral and impartial organiser of the practising of the various religions, denominations and beliefs is conducive to religious harmony and tolerance in a democratic society.’¹³⁵

The prospect of Europe playing a worldwide role for the promotion of freedom of religion or belief, depends on the constant effort to assess problematic situations within Europe and redress violations of fundamental rights. Without a European consistency in religious laws and policies, Europe lacks the credibility and authority to denounce and counter violations in other parts of the world. No consistency is possible in this field, without a basic reflection on the role of the State. This is why the 2013 EU Guidelines on the promotion of freedom of religion or belief could not avoid starting from an extremely strong assertion of the European Union as ‘impartial’ and ‘not aligned with any specific religion or belief.’

‘The EU does not consider the merits of the different religions or beliefs, or the lack thereof, but ensures that the right to believe or not to believe is upheld. The EU is impartial and is not aligned with any specific religion or belief’¹³⁶.

Self-appointed champions of international religious liberty like the United States and France, and other global players such as Israel, the Holy See, Saudi Arabia, Iran and Turkey, risk exploiting religion in their foreign action in order to avoid coping with an unsatisfactory domestic record. Their inability to redress internal failures is often conducive to confusion between national and religious interests¹³⁷. By acknowledging change and by choosing change, Europe would embrace the opposite approach: Europeans should address their own internal failures and seek consistency in European religious laws and policies, in order to be a legitimate and a credible international promoter of freedom of religion and belief¹³⁸.

4.3. New wine in new wineskins

Acknowledging and choosing change in European law and religion is not just a challenge for Parliaments, governments and civil institutions. It is the endeavor of civil society as a whole. More specifically, and decisively, it is a challenge for European faith communities and authorities, and for non-religious organizations interested in religion and belief.

Religious laws have always changed, through a complex, often mysterious, process of reconciliation of their immutable sources with their responsive interaction with social and historical contexts. It is time, once again, to undergo religious change not as imposed by outside, but as an inherent necessity for every serious follower of God.

The call by Pope Francis for a renewal of ecclesiastical structures is a reminder that far from sticking to a defensive legal conservatism, believers must take the initiative to constantly reshape the

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International Journal 4 (2012) pp. 89-100. Also see M. Ventura, ‘For the sake of children: involving or opposing religions in education?’. In A.C. Emilianides (ed), *Welfare of the child and beliefs of the parents* (Nicosia: University of Nicosia Press, 2010) pp. 117-127.

¹³⁵ European Court of Human Rights. *Refah Partisi and Ors v. Turkey*. Decided on July 31, 2001. Appl. No. 41340/98, 41342/98, 41343/98 and 41344/98. At para 51.

¹³⁶ Council of the European Union, ‘EU Guidelines on the protection and promotion of freedom of religion or belief’ (24 June 2013). At para 7.

¹³⁷ See the reflection on politics of religious freedom at <http://blogs.ssrc.org/tif/the-politics-of-religious-freedom/>.

¹³⁸ I have developed this concept, with regard to Islam in Europe, in M. Ventura, ‘Church-State Relations and Islam’. In A. Yildiz and M. Tumay (eds), *Islam, Human Rights and Secular Values* (Ankara: Liberte Yayin Grubu, 2012) pp. 197-210.

interaction of law and religion. New wine in new wineskins, the Pope argued, is what the Gospel asks Christians to contribute through¹³⁹:

‘In the Christian life, even in the life of the Church, there are old structures, passing structures: it is necessary to renew them! And the Church has always been attentive to this (...) It always allows itself to be renewed according to places, times, and persons. The Church has always done this! From the very first moment, we remember the first theological battle: was it necessary to carry out all of the Jewish practices in order to be Christian? No! They said no! The gentiles could enter as they are: gentiles (...) Entering into the Church and receiving Baptism. A first renewal of the structures (...) And so the Church always goes forward, giving space to the Holy Spirit that renews these structures, structures of the churches. Don’t be afraid of that! Don’t be afraid of the newness of the Gospel! Don’t be afraid of the newness that the Holy Spirit works in us! Don’t be afraid of the renewal of structures!’¹⁴⁰

European integration has witnessed an extraordinary process of creative re-invention of religious representation, from a vast range of religious traditions (including for instance European Buddhists) and religious institutional typology (including Roman Catholic religious orders). In particular, COMECE (for the Roman Catholic Church) and CEC (for the Orthodox and Protestant Churches) have developed new forms of interaction with secular powers as well as new resources for theological and ecclesial advancement¹⁴¹. European Islam is also benefiting from the dynamic interaction of law and religion in order to rethink religious organization, advocacy and political representation. Beyond mere lobbying, all religious and non-religious organizations have engaged in a historical renewal of their institutional presence, in order to cope with European law and policies¹⁴².

Inter-Christian Ecumenical and interfaith initiatives have struggled with the question French sociologist Jean-Paul Willaime already formulated in 1999, namely whether European integration would encourage ecumenism (whether it would be ‘œcuménogène’) or instead, whether it would kill ecumenism (whether it would be ‘œcuménicide’). The latter, Willaime anticipated, would occur if protectionist governments and religious organizations joined forces to oppose the European open society, a risk that Willaime equated to a ‘process of re-establishment’ (‘procès de re-confessionnalisation’).¹⁴³

The religious struggle entailing the pouring of new wine in new wineskins demands that Europe acknowledge and choose change, thereby embracing religious pluralism and standing for the neutrality and impartiality of the public sphere. Archbishop Rowan Williams has underlined that the secular public sphere provides religion and faith communities with an unprecedented opportunity to flourish and interact:

‘There has to be a ‘civil space’ for religious communities to meet each other. This is in some ways a distinctively modern challenge. There have been many pre-modern societies in which diverse faith communities live alongside one another in varying degrees of sympathy or harmony; but there was generally a single dominant religious presence, allied with political power. In this perspective, what the neutral or secular modern state makes possible is a deeper and more

¹³⁹ Jesus’ reference to new wine in new wineskins is found at Matthew 9:14-17, Mark 2:21-22 and Luke 5:33-39.

¹⁴⁰ Pope Francis, Homily on 6 July 2013. At <http://www.news.va/en/news/pope-francis-the-holy-spirit-renews-our-lives>.

¹⁴¹ See in particular the effort of CEC to develop a European ecclesial engagement in human rights. See E. Kitanović (ed), *European Churches Engaging in Human Rights* (Bruxelles: Church and Society Commission of Conference of European Churches, 2012).

¹⁴² Again, European developments were tightly linked to national experiments. For instance, European dialogue with religious organizations took inspiration from the British experience. See in particular the document Home Office Faith Communities Unit, ‘Working Together. Cooperation between Government and Faith Communities’, February 2004.

¹⁴³ J.P. Willaime, ‘Unification européenne et religions’. In A. Castro Jover (ed), *Iglesias, confesiones y comunidades religiosas en la Unión Europea* (quoted above at footnote 58) pp. 27-54.

empathetic encounter between religious discourses and systems. The secular public sphere provides the space for civil argument¹⁴⁴.

Being 'impartial' and 'not aligned with any specific religion or belief,' the European Union provides space for the cross-fertilization of the civil and the religious normativity. At the heart of the process of socio-legal and religious renewal, stratification of sovereignties and articulation of laws in Europe allow for the European laboratory to test legal pluralism and experiment connections between the law of the land and religious legal orders. As the *Religare*¹⁴⁵ and the *Religio West*¹⁴⁶ projects attest, the re-articulation of the civil and religious laws and politics is the ultimate challenge not only for Europe, but for the whole Western World, the future of which will depend on the courage to cross borders, and to push forward the dynamic interaction of law and religion.

¹⁴⁴ R. Williams, Chevening Lecture at the British Council, New Delhi, 15 October 2010. At <http://rowanwilliams.archbishopofcanterbury.org/articles.php/569/archbishops-chevening-lecture-at>.

¹⁴⁵ The *Religare* project (2010-2013) was a EU funded Collaborative Project focusing on 'Religious Diversity and Secular Models in Europe. Innovative Approaches to Law and Policy'. The project examined realities of religions, belonging, beliefs and secularism in Europe, including the legal rules protecting or limiting the experiences of religious or other belief-based communities. In particular the project analyzed how and why communities or individuals do not conform to State law requirements, rather turning to their own legal regimes or tribunals.

¹⁴⁶ *ReligioWest* is a research project funded by the European Research Council and based at the European University Institute. It aims at studying how different Western states in Europe and North America redefine their relationship to religions, under the challenge of an increasing religious activism in the public sphere, associated with new religious movements and with Islam. At <http://www.eui.eu/Projects/ReligioWest/Home.aspx>.

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