

## **II. RAWLSIAN RELIGIOUS FREEDOM – SOME NEW QUESTIONS IN EUROPE**



## JOHN RAWLS AND THE LIBERAL ALTERNATIVES TO SECULARISM<sup>1</sup>

In one of his last works, “The Idea of Public Reason Revisited”<sup>2</sup> (PRR hereafter), John Rawls takes up the question of the relations between religion and democracy in a way that could provide alternatives to the French ideology of laicity or secularism. “How is it possible”, he asks, “for citizens of faith to be wholeheartedly members of a democratic society who endorse society’s intrinsic political ideals and values and do not simply acquiesce in the balance of political and social forces? ... How is it possible – or is it – for those of faith, as well as the nonreligious (secular), to endorse a constitutional regime even when their comprehensive doctrines may not prosper under it, and indeed may decline?” (PRR: 149)

One of the main concerns of Rawls’s paper is to show, using the same method as *A Theory of Justice*<sup>3</sup>, that it is better to try and transform an insoluble conflict between religious and political values into a question of justification: what arguments in favour of these irreconcilable values are admissible in the political debate? The institution and practice of the secular state are not called into question by Rawls who reminds us, like Tocqueville, that these constitute one of the great achievements of American democracy, the separation between church and state guaranteed in the First Amendment having allowed both democracy *and* religion to flourish.<sup>4</sup> It is rather the modes of public justification of the secular state that must be changed in order to reach a fully democratic consensus, even with hostile

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<sup>1</sup> This paper was published in French in the journal *Raisons politiques*, n° 34 (2009), Presses de Sciences Po, p. 101- 125.

<sup>2</sup> “The Idea of Public Reason Revisited” *The Law of Peoples with ‘The Idea of Public Reason Revisited’*, Harvard UP, 1999: 131-180. The first formulation of Rawls’s idea on public reason is found in *Political Liberalism* (PL), Columbia University Press, 1993 and 1996 .

<sup>3</sup> *A Theory of Justice* (TJ), Harvard University Press, 1971 and Oxford University Press, 1999 for the revised version (from which all quotations are taken).

<sup>4</sup> “On my arrival in the United States the religious aspect of the country was the first thing that struck my attention. . . In France I had almost always seen the spirit of religion and the spirit of freedom marching in opposite directions. But in America I found they were intimately united and that they reigned in common over the same country. . . Everyone attributed the peaceful dominion of religion in their country mainly to the separation of church and state. I do not hesitate to affirm that during my stay in America I did not meet a single individual, of the clergy or the laity, who was not of the same opinion on this point.” (Tocqueville, *De la démocratie en Amérique*, I, II, ix: 341-42) Quoted by Rawls, PRR, note 76 p.167.

religious minorities. In other words, and paradoxically, *the secular state must be defended on grounds other than those of secularism and laicity.*

We shall therefore examine the solution that Rawls provides to this problem. But first, we must take a detour and recall the classic positions of liberalism on tolerance toward intolerant religions in order fully to appreciate the changes made by Rawls's position and why secularism is not an acceptable solution in his version of liberalism.

### **An irresolvable conflict?**

Is the problem raised by religious minorities in the contemporary context any different from that of the Wars of Religion of the 17<sup>th</sup> century, which led to the birth of classical liberalism with Locke's *Second Treatise of Government* (1690) and his *Letter Concerning Toleration* (1689)?

### ***Islam at the core of the debate***

An argument often heard is that the problem is new, since it arises from the fact that contemporary multicultural policies finds themselves competing with religions or beliefs that are not compatible with liberalism because they do not share a common and easily identifiable cultural heritage with it, on women's rights and equality, on the right to exit from one's religious community, on free speech and toleration for other religions, for example. If democratic states had retained a common religious identity, that of the Christian tradition, they would not have the integration problems they currently face. In particular, Islam and its varied traditions, from the Maghreb to the Middle East, from southeast Asia to sub-Saharan Africa, is a source of divisions and conflicts because, on the whole, it calls for a submission of the individual to the community that is inherently incompatible with liberalism. Only a moderate and "liberal" Islam could integrate, and existing Islam is far from being that. As well as the growing numerical weight of populations practising religion, who, as a result, are resistant to contemporary secularism, it is above all the non-European, non-Christian and largely Muslim character of the beliefs and practices that seem to create the main problem for integration. National identity is threatened, and this threat has unfortunately been exploited politically. It has become impossible to protect dispassionately the rights and liberties of citizens who are separated from and even brought into conflict with the rest of the population, not only by their socio-economic condition and culture, but also by their faith and religious practices.

The question of *equality* between religious and non-religious citizens has become insoluble in the very name of the defense of individual freedom, in particular freedom to escape the grip of religion. *Certain religions, more compatible with democracy, are more equal than others.* Respect for religious pluralism is admittedly a central feature of a free society, along with tolerance toward minorities, but it reaches its limit in the refusal to permit a religion to dictate its values to the whole of society and to call into question people's religious autonomy. In this case,

religious allegiance and the customs and ideologies that accompany it apparently entail both political threats against democratic institutions and the refusal or impossibility of integration, because of the absence of autonomy and the total submission demanded, it seems, of the members of religious communities. Confronted by unfamiliar cultural phenomena, divided between the concern to preserve national identity and the wish to respect the equality of citizens despite their different allegiances, contemporary democracies, particularly in continental Europe, seem incapable of abandoning universalist intellectual frameworks and historical principles that all predicted the advance of secularization. They seem helpless in the face of the return of religion.

This failure has several consequences, all of them serious. It can lead to *authoritarianism*, with the forcing of religious minorities to submit to legal sanction through illiberal State action, as, for example, in France with the March 2004 law on the wearing of religious emblems in schools and, in the Netherlands and France, the recent 2010 ban on the full Islamic veil, laws which have been criticized as an attack on religious freedom. It can also lead to *relativism*, to tolerance mixed with indifference toward religious communities and to the acceptance of their separate existence. This was the path taken, until the terrorist attacks of July 2005, in the United Kingdom in the name of liberalism as the only attitude compatible with individual freedom, even the freedom to submit to religious authorities or to requirements seemingly from another era, such as the wearing of the Islamic scarf (*hidjab*) or full veil (*niqtab*), which shock contemporary sensibilities. Only a *modus vivendi* between communities that tolerate each other without sharing common values seems to be compatible with liberalism. But, by adopting this stance, liberal democracies refuse to commit themselves to and defend their own values and leave defenceless and without authority the very principles of the constitutional state, making the establishing of a stable political consensus impossible.

Is there a middle path between the coercive use of state power and the fragility of a *modus vivendi* that the action a few terrorists was enough to blow to pieces?<sup>5</sup> The problem, in reality, perhaps does not stem solely from the cultural differences conveyed by Islam, but also from the way of envisaging the integration of religious minorities in a secular state. More than the supposed impossibility of Islam to integrate, it is probably liberalism's inability to comprehend the religious phenomenon that, for Rawls, gives rise to the problem.

### *The need to question liberalism*

The political challenge that liberal and pluralist democracies must face, in the current multicultural and multi-ethnic context, is, according to Rawls, the need to change their attitude toward religious citizens. Instead of defending the secular

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<sup>5</sup> The debate on citizenship has raged in the United Kingdom since the 2005 bombings in London, perpetrated by apparently well integrated, young British Muslims. Subsequently the Labour government has introduced citizenship ceremonies with a high normative content for new arrivals and made an effort to transform the religious ghettos, especially in the north of England.

state on the basis of arguments such as those of secularism or laicity and to propose, as the only route to integration, the “liberalization” of religions and the emancipation of citizens as individuals in regard to religious beliefs and customs that are sometimes in conflict with democratic principles, Rawls’s solution seems primarily to insist that liberal argument in favour of secularism should call itself in question. Three basic changes, he believes, are needed.

Firstly, it should stop demanding that a political consensus should require agreement on shared philosophical, moral or religious values, hence his concept of “political” liberalism which, in contrast to “comprehensive” liberalism, limits its demands to the political domain instead of applying, as a “comprehensive” doctrine, to all aspects of existence.<sup>6</sup> The consequence of this is that the appeal to *truth*, whether religious or philosophical, is excluded from the political debate and that the only allowable arguments are “public reasons”, i.e. reasons that are independent of religious doctrines and are comprehensible in purely political terms. Secularism and its positivist epistemic underpinning are therefore unsuited to this role. Rawls uses the term “public reason”<sup>7</sup> to cover all forms of admissible justification and reasoning and he insists on the fact that *secular arguments have no intrinsic validity*, because “secular philosophical doctrines do not provide public reasons”. (PRR, p. 148)

Next, political liberalism has to take seriously the doctrine of *pluralism* characteristic of democracies instead of assuming that secularism is the sole conception capable of defending the secular state. It has to accept defending its principles on the basis of a dialogue which is admittedly limited to politics, but which presupposes understanding and recognizing the other. Tolerance as indifference is insufficient and insulting for religious minorities. It is important that contemporary liberalism abandons the arrogant *monism* of the Enlightenment, which hoped to demonstrate the universal truth of its principles. By relying on the irreducible character of individual freedom as human finitude and the impossibility of any final truth without however falling into relativism, it is able to reveal the true source of religious tolerance. Indeed, by accepting that political consensus around the principles of the constitutional state and the defence of fundamental rights cannot be imposed, it will be in a position to enter into dialogue with religions instead of excluding them from the public arena, and thus rethink the separation of church and state without repudiating it<sup>8</sup>.

Lastly, liberalism must agree to understand the phenomenon of religion, particularly Islam, rather than confine itself to the indifference and ignorance that often result from the secularization of society. There is a visible decline of

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<sup>6</sup> See PL, p. xvii.

<sup>7</sup> See PL, p.213.

<sup>8</sup> The positions defended by Rawls should be compared to Habermas’s position in “Religion in the Public Sphere”, *European Journal of Philosophy*, vol.14, n°1 (April 2006): 1-25, Oxford, Blackwell, that similarly criticizes secularism.

liberalism into permissiveness that makes it incapable of generating genuine tolerance involving the recognition of and debate or discussion with the other. Understanding religions, and the constraints they impose on people even if they are in conflict with its values, is an essential step that liberalism must take and from which it must draw new intellectual resources. Rawls sets an example in this respect in his analysis of the compatibility between Islam and liberalism.<sup>9</sup>

Citizens' mutual knowledge of one another's religious and non-religious doctrines expressed in the wide view of public political culture recognizes that the roots of democratic citizens' allegiance to their political conceptions lie in their respective comprehensive doctrines, both religious and nonreligious. In this way, citizens' allegiance to the democratic ideal of public reason is strengthened for the right reasons. (PRR, p. 153)

Now, in this process, it is clearly Islam and its "non-European" and "unassimilable" character that are the initial obstacles. Yet, here we are dealing with two myths. Islam is not a religion that is foreign to Europe; it was, on the contrary, one of its components during the golden age of Umayyad culture in Spain and of the Ottoman empire in Greece and the Balkans, and it remains, of course, a quantitatively significant element in European societies. Islam is rather the "repressed" of a Europe which in the not-so-distant past included it. Islam, moreover, is not, in principle, inassimilable, as is clear from Rawls's analysis of Islamic societies in his *Law of Peoples*<sup>10</sup>, since it is founded on a basis common to the three great religions of the Book. Again, there needs to be the political will to understand it in its specificity and its history, to comprehend the phenomenon of religion instead of denying it. Herein lies one of the ways of making it evolve.

Indeed, just as liberalism needs to evolve and justify its principles convincingly, so too do religions need to change in contact with democratic societies and become more "liberal" in their turn by fully participating in the political consensus and by altering, not the content of their doctrine, but the type of arguments that they agree to use to defend their viewpoints. Both liberalism and religious doctrines should call themselves into question and submit to the demands of "public reason", of public political dialogue. For Rawls, it is this process of public justification and deliberation that is the key to success of this twofold self-interrogation.

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<sup>9</sup> See PRR, p. 151 note 46, where Rawls analyzes the work of Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation*, Syracuse, Syracuse University Press, 1990. On Rawls and Islam, see also *The Law of Peoples*, op. cit., p. 75-78.

<sup>10</sup> See *The Law of Peoples*, op. cit., p. 75-78, on «Kazakhstan as an imagined example of a decent hierarchical society».

## The critique of secularism and the neutrality of the state

Why cannot secularism or laicity serve as the model for liberalism to resolve the problems raised by the return of religion?

### *Secularism and public reason*

Let us not forget, first of all, that the concept of laicity is specific to French political history and has no equivalent elsewhere.<sup>11</sup> Liberalism speaks rather of *secularism* to designate a political ideal instrumental in the protection of citizens' freedom and of their religious beliefs, an ideal that also helps ensure civil peace through the separation of church and state, which is the best answer to religious conflict. The problem is to justify the secular state in the new multicultural and multi-denominational context. The transformation that liberalism needs to undergo does not call into question the secular state; rather, it calls into question its justification, whether monist or pluralist. Yet, says Rawls, "I define secular reasons as reasoning in terms of comprehensive nonreligious doctrines. Such doctrines and values are too broad to serve the purposes of public reason. Political values are not moral doctrines... (that) are on a level with religion and first philosophy" (PRR, p. 143). In particular, secularism was inspired by the Enlightenment and 19<sup>th</sup> century positivism and is therefore too overly dependent on specific comprehensive doctrines to play a role. It would be "a grave error, says Rawls, to think that the separation of church and state is primarily for the protection of secular culture; of course, it does protect that culture, but no more than it protects all religions" (PRR, p. 166).

Historically, liberalism, since its beginnings in the 17<sup>th</sup> century, has defended a relatively pragmatic version of secularism that requires the state to stay clear of religious conflicts, to adopt a measure of neutrality and to appeal to values on which the majority of the population can agree. This version has never required religion to be an entirely private matter that would have no role in public affairs or moral influence on the deliberations of legislators, but rather that this role be regulated and filtered so as not to offend the convictions of minorities, whether believers or non-believers, and thus to respect the equality of people's different conceptions of the good. Faithful to the principle of counter-powers, it is more a matter of neutralizing the weight of religions than excluding them from the political debate. For example, in the United Kingdom, the state aspires to neutrality or fairness in its treatment of religions, even though there is an "established church", which is nonetheless not a state religion. In the United States, "the various religions have been protected by the First Amendment from the state", Rawls reminds us, "and none has been able to dominate and suppress the other religions by the capture and use of state power" (PRR, p.166) The project of the liberal secular state is therefore part of the fight, central to liberalism, against "the tyranny of majorities",

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<sup>11</sup> Jacques Zylberberg, 'Laïcité, connais pas: Allemagne, Canada, Etats-Unis, Royaume-Uni', *Pouvoirs*, vol.75, 1995: 37-52. See Jean Baubérot, *La laïcité, quel héritage?*, Geneva, Labor and Fides, 1990, and Cécile Laborde, *Critical Republicanism*, 2008.

even secular ones. *This is the paradox of liberalism*. It is part of the fight against a state that would transform itself into a mouthpiece for majorities instead of keeping to its limited role. The secular state is fundamental for the defence of the equal liberty of citizens, even those who belong to minority religions. But despite its pragmatism, liberalism cannot avoid the question of the justification of secularism, which proves to be as important as its practice.

Now, this justification is based, as for French laicity, on *monism*. It has been shaped by the influence of Christianity – Protestantism in the United States, the Roman Catholic church in France. It is the mirror image of Christian (Catholic) universalism. Without going as far as French laicity, liberal secularism also lays claim to the neutrality of the secular state, but does not try to eliminate religion from the public sphere. The secular state claims to be *neutral* as regards the various religions and, by virtue of the separation of church and state, to be the guarantor of the non-intervention of religion into the public sphere and legislation, and the defence against hegemonic attempts by specific churches. But, by creating a public sphere open to all, by defending religious tolerance and the equality of the various religions, classical liberalism has certainly sought to ensure civil peace, but also to dilute the power of religion and to accelerate progress toward modernity, thereby destroying, at least in part, its claim to neutrality. We must therefore revisit, with Rawls, the claimed axiological neutrality of the secular state as regards the various religions.

Historically, he writes, one common theme of liberal thought is that the state must not favor any comprehensive doctrines and their associated conceptions of the good. But it is equally a common theme of critics of liberalism that it fails to do this and is, in fact, arbitrarily biased in favor of one or another form of individualism (PL, p. 190).

### *The axiological neutrality of the secular state*

Neutrality is a problematic political concept, for if it means abstaining from intervening, it is incompatible with political action. Neutrality as abstention in fact favours the strongest side, as neutrality in wartime clearly shows. There is therefore no absolute neutrality in politics, for that would be absurd.

But an initial form of political neutrality, Rawls tells us (PL, p. 191), can be *procedural*, limited to the procedures followed. Legislation and the resolution of conflicts between religious groups or between religious groups and the state or between individuals would involve following a procedure that would not appeal to moral values, but only to political values such as neutrality, impartiality, consistency in applying the law and equal treatment of the parties in conflict. This, for Rawls, is precisely the sense of “public reason”. Thus the fact that the French 2004 law on the *hidjab* is addressed to the three main religions and treats them equally, as well as even a minority religion in France such as Sikhism which had never previously had any integration problem, would in this way prove the neutrality of the state. But the apparent impartiality of the procedure does not conceal the fact that it was Islam

which was targeted, since the wearing of religious emblems does not have the same value for other religions. Neutrality of procedure is certainly necessary, but it is not an adequate guarantee of the equal treatment of citizens.

Another way of approaching the neutrality of the state, says Rawls, is to consider it in relation to the *aims* of public policies and to the values they embody. Such aims are not neutral, in particular the attempt by the secular state to justify the need to isolate the public sphere from the influence of religion. Neutrality of aims here makes no sense since a democratic regime is committed to the defense of equality of rights and opportunities, of equal freedom for all citizens, whether religious or not, and of a “substantial” conception of justice that brings it into conflict with all kinds of religious or philosophical convictions.<sup>12</sup> But its means could be neutral if they ensure equal opportunities for all to achieve their moral and religious goals, if the state does not actively favour one ideology over another and if measures are taken to eliminate or offset these influences. This is a legitimate demand addressed to the secular state by religious minorities who need to be protected from each other.

Finally, neutrality concerns the *effects* of public policies that must be neutralized and not favor any particular religious group. Here it is clearly impossible to speak of neutrality, since when such policies aim at cooperation and civil peace which are, admittedly, “neutral” values in the sense of being independent from any specific religion, they will have considerable impact on the chances of success of some religions compared to others. For example, if adherence to a religion enables integration to succeed more easily, as in the case, say, of liberal Protestantism, it will have a greater chance of flourishing than if it were in conflict with the surrounding public culture. Similarly, says Rawls, “if a constitutional regime takes certain steps to strengthen the virtues of toleration and mutual trust, say by discouraging various kinds of religious and racial discrimination (in ways consistent with liberty of conscience and freedom of speech), it does not thereby become a perfectionist state of the kind found in Plato or Aristotle, nor does it establish a particular religion as in the Catholic and Protestant states of the early modern period. (PL, p. 195). However, it indirectly favors religions that are already under the influence of these values. It is not neutral in regard to the effects of democratic policies and cannot have the same consequences for all religions. As Rawls emphasizes, the real problem is that of religious minorities which see their doctrines threatened and perhaps destined to be destroyed by democratic principles, such as religious freedom, male-female equality or the free choice of marriage partner. The promise of neutrality cannot entirely justify the institution of the secular state.

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<sup>12</sup> In regard to the confusion over the use of the term “procedural justice”, see Rawls’s clarifications in *Reply to Habermas*. PL., p. 421- 433.

### *Liberal pluralism and the critique of monological reason*

In defending his view of secularism and his critique of neutrality, Rawls takes his inspiration, in fact, from another liberalism, historically very significant since Locke and Montesquieu, which has resurfaced in contemporary liberalism and for which the justification of secularism and the secular state must be made in a pluralistic way, respecting the diversity of arguments and establishing the dialogue that define the public culture of a democracy.<sup>13</sup> It is this respect for pluralism, the refusal to impose a common doctrine, which is the source of the legitimacy of the democratic state in regard to its citizens and their religious or other beliefs, and not an implausible axiological *neutrality*. Instead of excluding religion from the public debates in the name of neutrality, the real equality of citizens would be better respected despite their different religious affiliations, if an “ethics of discussion” were to develop leading to the “intelligent conversation between the religious and the secular”<sup>14</sup>. That such a conversation leads progressively to the secularization of society is a possibility, but that does not mean that secularism is the only condition for the resolution of conflicts nor that these are less intense in an increasingly less religious society. Just as the recognition of the plurality of values does not lead to relativism, defining national identity as multicultural and multi-ethnics does not destroy it, but rescues it from destructive claims to racial, ethnic, cultural and religious homogeneity.

Democratic pluralism therefore takes seriously the irreducible diversity of religious beliefs and rejects both the Christian path of “the common ground”, because of its ethnocentric undertones, and the anti-religious path of militant secularism.<sup>15</sup> It pragmatically accepts the possibility of the public expression of religious freedom and of recognizing the contribution of religion to the common normative model if that allows better integration and greater equality of treatment of citizens, whether religious or not. And much more clearly, it recognizes the impossibility of neutrality and of the ultimate reconciliation between the values and world views defended by the various religions. Pluralism thus becomes a democratic ideal in its own right, rather than threatening social implosion. “This pluralism is not seen as a disaster but rather as the natural outcome of the activities of human reason under enduring free institutions” (PL, p. xxvi).

### **The role of public reason: Rawls’s solution**

We can now consider the main characteristics of Rawls’s conception of the relations between liberal democracy and religion.

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<sup>13</sup> On religious pluralism, Islam and contemporary democracies, see the excellent book by Reza Aslan, *No god but God*. London, Random House, 2005, p. 262

<sup>14</sup> Charles Taylor, “Modes of Secularism” in R. Bhargava (dir.), *Secularism and its Critics*, Oxford, 1998. See also Habermas, “Religion in the Public Sphere”, *op. cit.*

<sup>15</sup> See Jean Baubérot, *La laïcité: quel héritage? De 1789 à nos jours*, Geneva, Labor Fides, 1990

### *Public reason and religion*

A very important initial consequence of Rawls's liberal pluralism is that his critique of monological reason leads him to modify *the relation of reason to religion*. Doing so involves first of all that humanity exists in an irreducible variety of cultures, ways of life and values and that human reason should consequently be conceived as "communicational" and "dialogical", in Habermas's formulation, and no longer as universal and "monological". If there is political consensus, it can only be polyphonic and multicultural, and certainly not monological. Seen from the standpoint of public reason, the religions are "reasonable" doctrines if they are capable of presenting admissible arguments in the political domain and if they stop appealing to "the truth". Linked to the critique of monological reason and to the recognition of the pluralism of values, religious affiliation makes sense and ceases to give rise to fear. It is no longer the unthinkable, even if it remains difficult to understand. The key point is Rawls's contention that the religions as a whole should be viewed as "reasonable" doctrines, as being capable of understanding the ideal of *public reason*. The ideal of public reason comes from Kant. Rawls reminds us (PL, p. 213, note 2). "The public use of our reason", Kant writes, "should always be free" so that we can progressively create an intellectual community of "scholars", free citizens of the kingdom of ends, exercising "the freedom of the pen". This ideal is not only good for our society, for ourselves, but it is also good for advancing human reason.

"Reason depends on this freedom for its very existence. For reason has no dictatorial authority; its verdict is always simply the agreement of free citizens, of whom each one must be permitted to express, without let or hindrance, his objections or even his veto."<sup>16</sup> "This freedom will carry with it the right to submit openly for discussion the thoughts and doubts with which we find ourselves unable to deal, and to do so without being decried on that account as troublesome and dangerous citizens."<sup>17</sup>

Religions that adhere to public reason are therefore "reasonable" because they are "reasoning": they are able to put forward arguments in public discussion and to participate positively in the most important debates around the public good. A complete change of attitude in the treatment of religions in the public sphere is then involved. compared to secularism, which, in its militant versions, dismisses any reasonableness in religious doctrines and practices. This is why the doctrine of secularism is unable to provide the foundations for a stable political consensus.

Rawls starts off his argument with a distinction between what is reasonable and what is true. Religions consist of doctrinal beliefs, dogmas, dictates and rituals, all of which lay claim to the truth. But they are also the work of reasoned argument, not of course in the sense of a universal capacity to seize hold of the truth, but

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<sup>16</sup> Kant. *Critique of Pure Reason*. transl. Kemp-Smith. London. Macmillan. 1968. A 738/ B766. p. 593.

<sup>17</sup> Kant. *op. cit.*, A 752/B780. p. 602.

simply of the attempt to produce valid reasons in public debate and acceptable arguments for defending their positions, however incompatible and incommensurable these may be from one religion to another. Through this minimalist and discursive conception of human reason as *reciprocity* (PRR, p.132), Rawls incorporates religion into public dialogue. Admittedly he limits himself to those religions which are willing to provide their reasons in terms comprehensible to other people on the basis of what he calls their *duty of civility* (PRR, p.135), which requires using reasons other than religious ones out of respect for others. For example, when combating the right to abortion, appealing to arguments drawn from religious commandments is ruled out. This distinction excludes fanaticism and extremism, but includes traditionalist communities (Rawls often refers to the Quakers and their pacifism). Public reason therefore stems from the communication and justification effort, which remains a possibility among religions and between religions and non-religious views... if and when they are reasonable. For Rawls, "reasonable" here simply means being willing to use public reason, to respect the duty of civility and to recognize religious diversity.

His line of argument is based on a second distinction. One must also understand that religious or moral values are distinct from the reasons and arguments that support them. Here again, Rawls insists that the debate does not concern values, for that would be an infinite debate that would inevitably go further than politics, but the *arguments* used. Indeed, what is universally communicable and can provide the basis for a political consensus are not religious values themselves or the conception of good that they support, but the type of reasons and arguments they deploy.

The *domain* in which such public reason operates is, for Rawls, essentially that of the allegiance to the public conception of justice, leading to a political consensus. Settling the most difficult moral questions such as genetic engineering, the right to abortion, assisted suicide, gay marriage, etc., as well as the interpretations of the Constitution that these questions entail and which lie outside the purview of Congress, requires that public reason alone be used by the various groups and citizens' representatives. Such questions cannot be settled, for political liberalism, by appealing to a particular moral or religious doctrine, but only to the shared conception of the rule of law and justice embodied in the Constitution. The problem lies in correctly interpreting it, and this is where public reasons comes in. The arguments inspired by religious belief must be expressed in reasoning that everyone can understand and recognize as valid, even if not everyone is in agreement with their conclusions. Thus for Rawls, religions are reasonable doctrines if they agree to provide reasons that go beyond their specific doctrines and thereby demonstrate their awareness of belonging to a wider political community.

The key to political liberalism's principle of active toleration in Rawls's sense is found here, in this protection of the diversity of ways of thinking and this recognition of their capacity to discuss, deliberate and exchange arguments. It is through this forum that citizens, whether religious or not, exercise their own reason, recognize other people's reasons even if they do not share them, become initiated into citizenship and gradually lose the feeling of powerlessness and paralysis

characteristic of individualistic societies. Political consensus should be conceived as the result of the debates of a permanent *deliberative* assembly, as a process of ongoing integration and certainly not as a definitive conclusion (PRR: 138). In this way, Rawls respects the spirit of liberal pluralism, which sees truth only as a collective, continually reworked process. Similarly, political consensus is a shared task in which everyone, both communities and individuals, commits themselves and are thus constituted as citizens belonging to the same *politeia*.

Rawls defends a relatively “narrow” view of public reason, in that the range of valid reasons for public debate is fairly limited and that religious arguments are excluded from the main political debates, with the risk, pointed out by Rawls’s critics, that religious citizens may feel themselves alienated and deprived of their religious identity once they broach the most important issues for them, such as education, family, procreation, bioethics, etc. This was why in the new, 1999 version of public reason, he added the following *proviso* (PRR: 144). Religions can use arguments drawn from their own religious doctrines in public debate, for example on the right to abortion or the rejection of homosexual marriage, if they agree eventually to present properly political arguments that can be understood by everyone, even if not everyone accepts them, in other words, public reasons. The benefit of this limited addition of religious or philosophical reasons is to make other citizens aware of what citizens of faith do think and thus to create the conditions for a genuine pluralist dialogue between religions, in conformity with liberal pluralism. It is this pluralism, and not the privatization of religion, that for Rawls, is the sign of real democracy and of real respect for citizens’ equality. Since the truth of their beliefs is not threatened, and that it is only the reasonable and publicly communicable character of their arguments which is at issue, religious citizens should feel themselves treated no differently from non-believers, who are equally obliged to respect the *duty of civility*.

Secular consciousness is not in itself sufficient for cooperation and civic harmony. One must also learn to view religious conflicts as “reasonable disagreements”, which is certainly a tall order. Doing so presupposes a critical evaluation of the limits of reason itself, hence a rejection of scientism and naturalism as well as of dogmatic rationalism, which are comprehensive doctrines in the same way as religions. It also presupposes a recognition of the *logos* characteristic of religions and of the place of religion in modernity. Rawls has no confidence in secularism leading religions to modernity, but rather in a democratic pluralism which opens up the political arena more widely to religion by imposing the *duty of civility*, which necessarily transforms religious doctrines and takes them out of the private sphere. Stability is established when the public use of reason has become standard in the public sphere, not when neutrality reigns. Secularism for Rawls is therefore very much one of the likely results of the democratic process, but certainly not its condition.

### *The “moral” basis of political consensus*

The second noteworthy consequence of Rawls’s liberal pluralism is his revival of the ideal of citizenship and civic friendship. Citizenship is a very great responsibility, and one must not forget that it is not only passive but also *active*, even if one chooses not to participate. It results, Rawls reminds us, in the shared participation in the power to constrain all other members of the body politic taken collectively (PRR: 137) The *principle of reciprocity* requires that each person think about how the other will accept or reject the legislation in question and that he give priority to fair terms of cooperation. Instead of seeking hegemony for their beliefs and principles in the public sphere, and particularly within legislation, religious citizens should learn to view themselves as part of a larger whole than their religious community and consider the consequences of their choices for those who do not share their convictions. This is the only way to achieve a political consensus that is neither the result of illiberal state action nor a simple *modus vivendi* among religions and between religious and non-religious citizens, a consensus, Rawls says, “for the right reasons” (PRR. p. 150).

But, in order to reach such an awareness, it is essential to win people’s “hearts and minds” and not to be satisfied with the passive acceptance by religious minorities of the existing balance of power, in other words with a mere *modus vivendi*. Here Rawls enters dangerous territory and appears to distance himself from liberalism. He seems to reject contemporary conceptions of democracy such as competition between interest groups and to suggest that, in order to last, democracies in the current context need a political consensus that could almost be described as substantive and “republican”: a consensus can only be stable if citizens recognize the validity of the political principles to which they must be subjected. Only a “thick” moral consensus, Rawls seems to be saying, around political values such as equality, freedom and the rule of law, can produce a lasting agreement. The insoluble problem that Rawls comes up against is that a substantive consensus of this kind, even on liberal values, is excluded by liberalism, for it can only result from the intervention of the coercive power of an illiberal state. Yet in *Political Liberalism* Rawls clearly stated:

“If we think of political society as a community united in affirming one and the same comprehensive doctrine, then the oppressive use of state power is necessary for political community... A society united on reasonable form of utilitarianism, or on reasonable liberalisms of Kant and Mill, would likewise require the sanctions of state power to remain so. Call this ‘the fact of oppression’” (PL, p.37).

How can this dilemma be resolved ? By conceiving of the very justification of democracy in a democratic way, respecting the freedom and equality of the citizens concerned, whether religious or not, as well as their rationality and their moral character. Integration cannot be imposed, but must be justified. It is the method of justification that will exhibit its integrative virtues and play the main role in constructing democratic and pluralistic citizenship.

Democratic political consensus is generally envisaged as agreement on shared Judeo-Christian moral values, which underlie the values characteristic of democracy. This occurred, for example, in the debate on the Preamble to the European Constitution project, with the inclusion of a reference to the Christian values of European peoples. Such a political consensus is all the stronger when the peoples concerned have a common history and share a religious heritage. But this has the twofold disadvantage of deepening differences and of leaving the field clear for a single doctrine to regulate the public sphere. For Rawls, this would amount to allowing the oppressive power of the state to be exercised over minorities, in contradiction with political liberalism. If a consensus on common values is established, it is as a possible *result* of a psychological and political process, not as a prerequisite. Such a consensus has no inherent moral content, since agreement adds nothing to existing shared values. In this sense it has no integrative power and no impact on religious minorities because it fails to recognize either their role or their equal dignity.

Conversely, the political consensus aimed at by the secular state can be a simple *modus vivendi* without any moral content other than the need to accommodate differences and to coexist. It is a straightforward compromise between the opposing forces, but one that of course has many advantages. Moreover, it should come as no surprise that this is the preferred solution for extremist religious groups, which thus do not need make a moral commitment to the secular state and to swear allegiance to its principles. Indeed, for fundamentalist communities, a straightforward compromise is preferable to an agreement or consensus that would require recognizing the values of the other or at least finding some common ground, for doing so would be a betrayal of the purity of the faith. The paradoxical conclusion that we come to with Rawls is that combating extremism and fundamentalism requires engaging in dialogue around values over and beyond pragmatism and neutrality.

The whole problem thus becomes that of the meaning of this moral basis of public justification. Four points are important for clarifying what is involved in a democratic consensus that is neither authoritarian nor purely pragmatic.

First, if the justification does not result from the application of a specific moral doctrine and does not question the truth of religious beliefs, as secularism in fact does by seeking to replace or eliminate religion from the public sphere, it is not in conflict with the neutrality of the secular state. No specific doctrine can provide this basis of understanding without contradicting the principle of equal freedom for all. It is clear that such a position clashes head-on with the usual conception of secularism. Nevertheless it follows logically from the analysis of democratic pluralism that we have offered.

Next, for Rawls, political consensus should be “moral” in the precise sense that it is reached through a process that reflects what Rawls call the moral powers of citizens, namely their capacity of having a conception of the good and a sense of justice. It is not moral in the sense that it is based on a specific doctrine or on shared values as for communitarians, but that it is the work of citizens who view themselves as moral persons – something which is extremely important for gaining

the allegiance of deeply religious people. One of the most shocking aspects of secularism and laicity for believers, namely the equivalence between secularism and axiological neutrality and the disappearance of moral concerns, is thereby overcome. Public justification treats citizens as moral persons whatever their religious affiliation and thus recognizes in practice their *equal dignity* as interlocutors instead of imposing a common doctrine without dialogue and recognition or inclusion. "Being designed to reconcile by reason, justification proceeds from what all parties to the discussion have in common" (TJ, p. 508). So what they have in common are arguments and reasons, not values, given the fact of reasonable religious pluralism.

Consequently, for Rawls, the only possible justification for the neutrality of the state must be procedural and not substantial. It takes place through difficult and often painful discussion, yet which is constitutive of pluralist and "deliberative" democracy (PRR: 138). This is the only solution that takes account of the pluralism of values without falling into relativism, in a way which the different religions can understand, and that respects the equality of citizens, whether religious or not. Although the convictions underlying the demands of minority religions are not universally valid, they must at least be communicable or capable of being framed in such terms that they can be justified and recognized as valid even if they are not shared. "Justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view" (TJ, p. 19).

The goal aimed at, he says, is an *overlapping consensus* (PL: IV). Because the arguments overlap, the political values of tolerance, respect for minorities, religious freedom and equality of religious rights can be justified even for some citizens, whose sole form of reasoning is religious. Involved in the public debate, they can understand and accept the priority of political decisions over their own religious values, as in the example of the right to abortion, on the basis of an overlap between the political values put forward and their personal values, something that is completely different from agreement on shared values. The important thing is that at least some overlap exists. Rawls gives the example of consensus on the U.S. Constitution, which can be created from varying ideological starting points (PL, p. 158- 164). The condition for the integration of religious minorities is that they can express the terms of the political consensus in their own culture and that the content be clearly normative and not devoid of substance. There are no universal values, only values that can be at least partially transposed from one culture to another. This assertion is the most problematic, but also the most innovative aspect of this liberal conception of political consensus between various religions and communities and the secular state. The separation of church and state is exemplified in the separation between political values and religious values even within the same individual consciousness.

The outcome is a consensus that is more than a simple *modus vivendi*, but less than agreement on shared values. It thereby escapes the charges both of relativism and of dogmatism.

Which doctrines might indirectly agree with or be part of such a consensus? Rawls mentions the liberalism of Kant and Mill, Habermas's ethics of communication, utilitarianism, and republicanism (but not civic humanism), as well

as Christianity (except for fundamentalist sects) and Islam. In fact, all religions that agree to reason together could be part of it. But such a consensus is subject to very strict conditions. It presupposes a civic education that develops a sense of justice and the capacity to subject different principles and convictions and public and non-public reason to the method of "reflective equilibrium" (TJ, p. 41- 44), and that insists on knowledge of individual rights and their justification. Above all, it presupposes cognitive capacities that are not necessarily developed to the required degree in all strata of society. It also calls for the development of an analytic and critical frame of mind that may conflict with certain religious traditions.<sup>18</sup> Finally, it can lead to the exclusion of certain doctrines, that are certainly reasonable insofar as they are based on public reasons and arguments, but which cannot develop within the framework of such a consensus, as for example creationism.

### Conclusion

These, then, are the main lines of a possible compromise for cultural and religious pluralism within a democratic political consensus that is itself pluralistic. It demands, if we accept Rawls's argument, that we treat religions as "reasonable" doctrines, secularism being one philosophical doctrine among others and not the ideological foundation of the secular state, and that we shift the debate from the institutions of the secular state and its public sphere to the question of its justification. It emphasizes the integrative character of public deliberation and justification and, in contrary to secularism, it includes religious reasons in the public debate. Finally, it requires citizens to be familiar with different religious doctrines and the reasoning that leads these doctrines to political principles and to uphold the notion that democratic political consensus is ultimately "moral", though in a very precise sense, procedural and not substantial. The basic principle of this demonstration is that the state is not neutral, but actively engaged in a public justification process through which political values can prevail over community values and the limits of the constitutional state are clearly justified when faced with the demands of religious communities. Such a consensus is neither an agreement on common values from which cultural or religious minorities would be excluded nor a simple *modus vivendi* devoid of any integrative power.

But many objections remain.

The most powerful of these is certainly the *fragility* of a such a consensus, which calls for the active participation of citizens of all persuasions in the public debate, with the risk that this debate turns into a clash of interests of various communities, as is already the case in contemporary majoritarian democracy with *single issue groups* and *lobbies* which ignore the common good and seek only to satisfy their sectarian demands. The strongest, most forcefully expressed preferences then prevail, preventing both the priority of the common from being recognized, i.e. the priority of political values over sectarian convictions or interests, and the

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<sup>18</sup> This certainly applies to Islam, whose conflictual relations with rational theology are well known.

pluralism of values from being respected. The fear of divisions and conflicts that pluralism entails is in particular a major obstacle to its public expression. Let us not forget Maurice Barrès's warning and the emotional power that feeds the return of nationalism and xenophobia: "Our profound misfortune is that we are divided, disrupted by a thousand distinct attitudes, by a thousand individual imaginations."<sup>19</sup> A differentiated conception of equality and of citizenship divides society even more, if for example some people appeal to religious and not only civil justice, or if denominational schools are permitted to maintain quotas. Such a conception runs the risk of creating ghettos and communities with their own laws, outside the authority of the state.

In addition, highly developed cognitive capacities are needed to be able to articulate political arguments in the public sphere on the basis of religious principles. Public reasoning is therefore primarily the task of politicians or constitutional judges, certainly not of ordinary citizens. No matter how much Rawls makes a distinction between the idea of public reason and the ideal of public reason in which the citizens become "quasi-legislators" in the sense of autonomy in Kant (PRR, p. 135 note 16), the distance between the two remains unbridgeable.

Now, liberalism may offer an answer to these objections, but on condition of returning to its political foundations in the rule of law and the conception of the constitutional state, which are presupposed in Rawls's argument. Who is the agent of this pluralist political consensus among religious and non-religious views? Ultimately, it no longer is the sovereign secular state, the administrative and executive authority, which is supposed to translate into reality the sovereign will of the nation and its representatives. It is *the rule of law*, expressive of the constitutional state, that requires the state itself to submit to its principles. Both the agents of the state and religious minorities themselves must respect the legal framework, i.e., not solely formal legislation, but the constitutional principles that guarantee its legitimacy. The ongoing public justification of these constitutional principles is the sub-text of any political consensus among religious and non-religious doctrines for Rawls. Between conflicting social and religious groups, there is a mediating authority without which Rawls's analysis would make no sense, namely the constitutional framework, which has a higher authority than that of the legislator and the political majorities that invested it with power, in view of its public justification. It is the existence of the framework of the rule of law that enables us to escape the aporias of parliamentary democracies and to give political values priority over the religious or other values of any majority or minority group. The values to which the legislator lays claim avoid being arbitrary since they conform to fundamental constitutional rights justified by the people themselves, and thus unequivocally apply to religious pluralism and its limits. Moreover, they are publicly declared and known to everyone. For instance, the duty to respect people's physical integrity makes sexual mutilation based on religious tradition illegal. Similarly, people's equality of rights makes forced marriages, divorce by repudiation, polygamy, and so forth illegal. Freedom of conscience guarantees the

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<sup>19</sup> Quoted by Gérard Noiriel, *A quoi sert l'identité nationale*. Marseille, Agone, 2007: 36.

right of the individual to leave his or her original community. If there are cultural and collective rights in a transitional phase, as for example the right for certain communities to retain their language or to use their culture's ecclesiastical justice, this is within the absolutely strict framework of the rule of law. Criticisms addressed to religious pluralism and multiculturalism in the name of national identity point in contrast to regimes and societies where trust in institutions, the rule of law and the Constitution are eroded. This is typical of majoritarian democracies, the focus of Rawls's criticisms, where no public justification of constitutional principles is available to moderate the clash of individual and collective preferences. The "everyday plebiscite" which, in 1882, defined the nation for Renan must be a plebiscite around constitutional principles, not a plebiscite around the traditional values of a specific and transitory community.<sup>20</sup> The deficiencies of the constitutional state rather than religious pluralism must be blamed for the fragility of the political consensus when challenged by vociferous religious communities.

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<sup>20</sup> For a deconstruction of Renan's formulation, see G.Noiriel, *op. cit.*, p. 19-20.

RAWLSIAN RELIGIOUS FREEDOM AND LIBERAL SECULARISM  
COMMENT ON CATHERINE AUDARD'S LECTURE :  
*JOHN RAWLS AND THE LIBERAL ALTERNATIVES  
TO SECULARISM*

Presumably, dear colleges, one of the central statements of Professor Audard's keynote lecture is that, according to Rawls, "the modes of public justification of the secular state [...] must be changed in order to reach a fully democratic consensus, even with hostile religious minorities". "Paradoxically, as she says, *the secular state must be defended on grounds other than those of secularism and laïcité*".<sup>1</sup> I hope that we can make the idea of public justification free from the supposed paradox by certain modifications of the statement, though, of course, it would be an impossible task to fully establish my claim in this short comment.

Firstly, I will assume, that according to Rawls, at least it seems to me, we cannot reach a fully democratic consensus. *A fortiori*, we cannot reach, let me suppose very firmly, any principled consensus with hostile groups of minorities, either religious, or not. Secondly, because this is obviously not an answer to the problem of hostile groups in a democratic society, I will present how Rawls characterizes the distinction between reasonable and unreasonable doctrines, and, thirdly, how we can apply the famous and famously contested argumentation of *A Theory of Justice* for the toleration of the intolerant in order to arrive at a solution of this now enormous danger. "Every citizen has an equal right. I have to repeatedly refer to Rawls verdict, to a fully adequate scheme of basic liberties".<sup>2</sup> However, as I would like to try to show, fourthly, in the example of religious fundamentalism, we sometimes need a cautious, vigilant, "time, place, manner" regulation. Then I take a look at the so-called anti-veil prohibition of the 2004 French law, which was, as Professor Audard said in her lecture, an illiberal, authoritarian, coercive state action. I would like to emphasize, fifthly, the importance of the Rawlsian analysis of the family in understanding the content and limits of parental rights and public education. On the ground of the equal rights of a family, I am going to compare,

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<sup>1</sup> The paper was published in French in the journal *Raisons politiques*, n° 34 (2009), Presses de Sciences Po, p. 101- 125. I refer to the pages of the unpublished English version. see here Catherine Audard: John Rawls and the liberal alternatives to secularism (abbr.: A), p. 239-256. See A 239-240. Emphasis added by Catherine Audard

<sup>2</sup> John Rawls: *Political Liberalism*. (PL) New York, Columbia University Press, 1993. 291.

sixthly, the idea of integration as a liberalization with the idea of integration as a responsibility of reciprocity. Seventhly, thanks to Professor Audard's lecture, my concluding point is that according to a Rawlsian conception of a liberal democracy we have to change our ideal of a European nation.

## 1. Democracy and disagreement

Today in a European society we have different personal philosophies of life because there are several sources or causes of difference between citizens' judgments. In some cases we face with the familiar difficulties in judging, weighting, interpreting evidences, and we always have different total experiences, partly because we are women and men who live in a society with its numerous social and economic positions, its numerous roles and groups, often its diverse culture and identity. Some complications and conflicts can be made less heavy; differences in life prospects can be mitigated; however, as for our most important comprehensive value judgments we cannot eradicate our deep disagreements. This kind of pluralism, in spite of all our open debates, makes our perfect agreement quite unlikely. The fundamental idea of John Rawls was that though a complete democratic consensus is practically impossible, in a fair system of cooperation among free and equal citizens, a well-designed philosophy can narrow our deep disagreement to achieve a partial consensus.<sup>3</sup>

How is it possible, John Rawls and Catherine Audard ask, to reach this kind of consensus?<sup>4</sup> How a wholehearted, sincere, unconditional affirmation of *la volonté générale* is possible for citizens of faith, and we can add, as John Rawls and supposedly professor Audard add, for nonreligious citizens?

A common answer is skeptical. Modern democracies simply hide the conflicts of moral, philosophical, religious doctrines with the help of *ad hoc* truces, *modus vivendi*-like rational compromises and ongoing practical negotiating. Like Rawls, professor Audard does not accept Hobbes's fragile political realism. Liberal democracy must rest on firm moral principles. But since it is not likely that the comprehensive moral views held, for example by Catholics and non-Catholics, get closer in the future, democracy can only promise the reducing of our disagreements concerning the issues of fundamental constitutional principles and basic social justice. It can only promise a consensus that cannot rely on any comprehensive doctrines. Nor on Kant and Mill's liberal philosophy, moreover, nor even, what a betrayal, on the "social contract" of *A Theory of Justice*.<sup>5</sup> According to Rawls, the

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<sup>3</sup> John Rawls : *Justice as Fairness – a Restatement* (JF). Cambridge, Ma.: Harvard University Press, 2001, 2ff.

<sup>4</sup> John Rawls : *The Law of People. (LP) With The Idea of Public Reason Revisited* (PRR), 149, cf. A 239., Joshua Cohen : A more democratic liberalism. *Michigan Law Review*. 1994. 1503-156.

<sup>5</sup> See about Rawls' betrayal. Bruce Ackerman: Political liberalisms. *Journal of Philosophy*. 1994). pp. 364-386.; Allen Buchanan: Justice, legitimacy, and human rights. In Victoria Davion-Clark Wolf eds.: *The Idea of a Political Liberalism*. Lanham, Md. Rowman & Littlefield. 2000. 73-89.

liberal democracy needs a “political”, non-metaphysical, non-philosophical philosophy. It is neither confessional, nor secular. Its law does not refer to a conception of the common good derived from either some religious or some non-religious doctrine of natural law.

Concerning our fundamental constitutional principles and basic social justice we may justify again and again the legitimacy of the liberal democracy’s coercive public power. It is this sphere that Rawls calls “the political”. It is to this political domain of philosophy that Rawls’ constructivist and somewhat queer notions, such as “public (political) culture” or “non-public (non-political) culture” refer. It is also well-represented by the distinctions between on one hand citizens’ free and unlimited, wide and robust public debates taking place in the non-public (non-political) fora of the press, the media, the free speech of the streets, the academic discourses of scientific conferences, the unrestricted research and teaching in universities, or even the spiritual dialogue of churches, cultures, experiments, and, on the other hand, the debates in “public (political) forum”, firstly the discourse of judges in their decisions, secondly, the discourse of chief government officials and legislators, and thirdly, the discourse of candidates for public office.

The question to be answered is how can we get from the non-public background of the religious and the secular, the Catholic and the non-Catholic views to the idea of public reason. Rawls’ hope is entirely based on the even more unusual distinction between the reasonable and the unreasonable.

## 2. The idea of a reasonable pluralism

“Citizens realize, Rawls introduces the idea of public reason, that they cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines. In view of this they need to consider what kind of reasons they reasonably give one another when fundamental political questions are stake”.<sup>6</sup> Such reasons, which are called “public” ones, try to avoid, he explains, comprehensive doctrines of truth or right. Public reason turn to an idea of the politically reasonable. In public reason only such reasons are admissible which citizens, as citizens, can addressed to each other. So everything depends on what does in this context “reasonable” means.

The term „reasonable” in its normal use means that my statement, my opinion, my claim are weighted appropriately the relevant evidences, and consequently based on good reasons. In this usual sense a reasonable proposition is a reasoned proposition. When reasoned propositions are good, we call them rational. Or they are at least elementarily, minimally, normally rational propositions. In opposite this common knowledge, the concept of reasonable for Rawls is an

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<sup>6</sup> PRR 131-132.

<sup>7</sup> A 240.

inseparable part of a conception of a fair cooperation on a footing of mutual respect among free and equal citizens. So there is a fundamental distinction between a rational proposition which is reasoned on the sense that it is based on good or at least important reasons, and a reasonable one which is a proposal addressed by citizens as citizens, “to offer one another, Rawls claims, fair terms of cooperation according to what they consider the most reasonable conception of political justice”<sup>8</sup>.

There is no conflict between religion and democracy.<sup>9</sup> In reasonable pluralism citizens do not all affirm the same religious or unreligious, philosophical, moral comprehensive doctrine. Religion is reasonable when citizens of faith are reasonable persons. There are many Catholic citizens, but, as a matter of fact, there are many non-Catholic citizens, too, who obviously hold “reasonable” views.<sup>10</sup> Reasonable Catholics, let me paraphrase Rawls, do not regret that they have to live in a constitutional democracy. They do not nurture hopes secretly that the principle of toleration means only a mere *modus vivendi*, implying that one day circumstances will change and things will be different, even if they cannot make everybody think in the same way as they do.<sup>11</sup> A reasonable Catholic realizes that she must accept the fact that her freedom is restricted, in accordance with, as she might say, God’s Will.

The ideal of public reason imposes special obligations on those who hold or apply for public office. “This ideal is realized, or satisfied – Rawls summarizes – whenever judges, legislators, chief executives, and other government officials, as well as candidates for public offices, act from and follow the idea of public reason and explain to the citizens their reasons for supporting fundamental political positions in terms of the political conception of justice they regard as the most reasonable.”<sup>12</sup> In several cases, a Catholic judge can fulfill her obligations without any special difficulties, and when she explicitly refers to religious values and intentionally reveals the roots of her way of thinking, it causes no problem for her to show that her conclusions deriving from those values can be supported by the public moral (political) values shared by the other judges of the court. A Catholic judge, after leaving the religious sphere, can refer to some fundamental constitutional ideas, such as the value of human life and basic human rights, or the protection of the generally accepted moral standards that form the basis of social order as well as

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<sup>8</sup> PRR 136. Cf. PL 48-64.

<sup>9</sup> Cf. A 240 ff.

<sup>10</sup> “A longstanding ambiguity – Father John Courtney Murray, the jesuit priest said - had finally been cleared up. The Church does not deal with the secular world in terms of a double standard – freedom for the Church when Catholics are in the minority – privilege for the Church and intolerance of others when Catholics are a majority”. J. C. Murray, S.J.: Religious freedom. In Walter Abbott, S.J. ed.: *The Documents of Vatican II*. New York. Geoffrey Chapman. 1966. 673.. quoted by PRR 167.

<sup>11</sup> PRR 150.

<sup>12</sup> PRR 135.

the law. Perhaps she cannot convince any or only a few fellow judges in the court. Perhaps her reasoning is fallacious. Nonetheless, if she is in minority, or if nobody else supports her, then, while respecting legal regulations, she can express her sincerely held religious convictions both inside and outside her parish church. Furthermore, she can keep trying later to achieve success in public forum by using reasonable arguments.<sup>13</sup>

### 3. Hostile communities

However surprising it might seem, on Rawls' distinction, liberalism is not necessarily a reasonable comprehensive doctrine. Regardless of whether the admirers of Kant and Mill fight for the full autonomy of human personality expressing our humanity to the largest possible extent, or for the ideal of social development brought about by the realization of a variety of individual personality, the war liberalism is engaged in is one that it cannot be won in a liberal democracy. Militant philosophical liberalism is not a political conception of justice for a liberal democracy. In a liberal democracy, those rejecting a political conception for constitutional essentials and basic justice always represent a threat, even if they do this in the name of an unreasonable liberalism. When aiming to reduce the danger, the silent majority must always assess how a constitutional democracy can protect the culture of free institutions without fostering hysterical feelings towards freedom. Despite what some say, the lesson that Weimar teaches us is not that democracy was not restricted in time. On the contrary, the reason why a horrible disaster of history could take place is because there were not enough reasonable people, neither among believers nor among non-believers, who supported democracy with sufficient determination.

There are members of religious communities who do not sincerely accept the idea of freedom of conscience. They do not attempt to support their pursuits by reasonable arguments acceptable for others. This kind of fundamentalism is not necessarily very dangerous.<sup>14</sup> A believer might turn his back to the world and spend her life doing nothing but praying. Others might devote their lives to astronomy, breeding rabbits, or throwing the javelin. There is hardly anybody who doubts that even the most distorted one-sidedness cannot justify us in revoking equal rights.

However, an unacceptable Catholic view, like the one that occurred in Oklahoma some time ago, is not beyond the reach of our imagination. Catholic fundamentalism can obviously become dangerous. Unreasonable Catholic doctrines becomes dangerous when heroes or martyrs are not satisfied with the denial of the

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<sup>13</sup> See PRR 177-178.

<sup>14</sup> The questions of the supposed reasonable claims of religious fundamentalism see Stephan Macedo : Liberal Civic Education and Religious Fundamentalism : the case of God v. John Rawls. *Ethics*. 1995., 105. 468-496.

terms of reciprocity, with only disregarding the views of the non-Catholics. When they think that it is their high God-blessed duty to actively fight against non-Catholics. When they want to destroy or weaken the requirements of equality. This is the point where it is logical to shout that there is no democracy for the enemies of democracy.

It is true, Rawls argues in the 35th section of *A Theory of Justice*, that citizens who hold intolerant doctrines, not entitled to complain if they are not tolerated, however, we cannot say that tolerant citizens have the right not to tolerate the intolerant except when they sincerely and with reason believe that intolerance is necessary for their own security<sup>15</sup>. Rawls affirms the distinction between restriction and regulation.<sup>16</sup> The clear and present danger rule, the fighting words doctrine, the offence principle, the „captive audience” argument and all the other “time, place, manner” regulation in constitutional law are not restriction of a hostile expression, *irrespective of circumstances*.<sup>17</sup>

#### 4. Rights and regulations

„Each person has an equal right – it is the first principle of justice as fairness - to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.”<sup>18</sup> This is the equal right of their civil rights, with the apt formulation of Hannah Arendt, “the right to have rights”.<sup>19</sup> A religion is a set of comprehensive doctrines for sincerely believed personal obligations, generally within a community of faith. Religious autonomy is covered by the basic liberty of conscience and association which is necessary “to secure the full and informed and effective application of citizens’ powers of deliberative reasons to their forming, revising, and rationally pursuing a conception of the good over a complete life”<sup>20</sup>. If this equal liberty is denied, I quote again Rawls, “social cooperation on the basis of mutual respect is impossible”.

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<sup>15</sup> They “should strive to preserve the constitution with all its equal liberties as long as liberty itself and their own freedom are not in danger” John Rawls : *A Theory of Justice*. Cambridge, Ma., Harvard University Press, 219.

<sup>16</sup> PL 295.

<sup>17</sup> In the constitutional distinction between restriction and regulation Rawls refers to Lawrence Tribe : *American Constitutional Law*. Mineola, N.Y., The Foundation Press, 1978., ch. 12. 2. However, he confessed that he learned a lot from the great constitutional jurists. Harry Kalven’s manuscript about the importance of the detailed strict constitutional analysis of the contexts in content regulation’s cases. See the book later as Harry Kalven: *A Worthy Tradition: Freedom of Speech in America*. New York, Harper and Row., 1987. Cf. PL 295., and 344.

<sup>18</sup> PL 302.

<sup>19</sup> Hannah Arendt : *The Origins of Totalitarianism*. New York, Harcourt. 1951. 298.

<sup>20</sup> PL 335.

The most evident example for this kind of “time, place, manner” regulations is securing public order in the free speech of the streets, especially with the so-called “clear and present danger” rule to prohibit inciting and likely to incite violent lawless action.<sup>21</sup> “So long as the advocacy of revolutionary and even seditious doctrines – Rawls explains - is fully protected, as it should be, there is no restriction on the content of political speech, but only regulations as to time and place, and the means used to express it.”<sup>22</sup> And beyond the „clear and present danger” rules to stop dangerous demonstrations we have a lot of further reasons to regulate the life of organizations, communities and any collective undertakings. “Instituting the basic liberties, just as fulfilling various desires, Rawls emphasizes, calls for scheduling and social organization. The requisite regulations are not to be mistaken for restrictions on the content of speech, for example, for prohibitions against arguing for certain religious, philosophical, or political doctrines, or against discussing questions of general and particular fact which are relevant in assessing the justice of the basic structure of society”.<sup>23</sup> Certainly, one of the important area of the regulations of rights is the rules for students in school.

## 5. Parental rights and public education

According to Rawls family is a part of the basic structure of a well-ordered society. „Citizens must have a sense of justice and the political virtues that support political and social institutions. The family must ensure the nurturing and development of such citizens in appropriate numbers to maintain an enduring society”.<sup>24</sup> Familial autonomy is one of the most important basic liberties. Parental rights are limited only by obligations deriving from children’s rights as *the best interest of the child*, as *parens patriae*, *in loco parentis*.<sup>25</sup> These are the only legitimate purposes of public education.<sup>26</sup>

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<sup>21</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>22</sup> Pl. 336.

<sup>23</sup> Pl. 296.

<sup>24</sup> PRR, 156-157.

<sup>25</sup> These principles refer to the public policy power of the state to intervene against an abusive or negligent parent, legal guardian or informal caretaker, and to act in loco parentis or as parens patriae of any child or individual who is in need of protection. This notion initially invoked by the King’s Bench in the sixteenth century in cases of adults not having control over the mind or intellect. In certain circumstances its effect is lessened to mean only “not legally competent.” The parens patriae doctrine was gradually applied to children as not legally competent persons throughout the seventeenth and eighteenth centuries. This appears in the principle that makes the protection of the best interests of any child the first and single most important concern of the society. For the doctrines of in loco parentis, parens patriae, and the best interest of the child see the seminal study of Joel Feinberg : *The child’s right to an open future. Freedom and Fulfilment: Philosophical Essays* Princeton, Princeton University Press, 1992.

<sup>26</sup> John Stuart Mill at the final chapter of *On Liberty* speculates about the rather bizarre idea that we can imagine a kind of state activity establishing and organizing public schools to substitute the role of the parent. ..An education – Mill writes - established and controlled by the State should only exist, if it exist

Public education can regulate on the one hand offensive conduct in appearance and grooming, in hair-style, in the length of skirts, in the indecent speech or deportment, teaching students to the proper civilized behavior and to the boundaries of a learning cooperation, to discipline as a respect for duties and as a respect for others. At the same time, classroom discussion and any school-sponsored, educationally controlled, state-supported activity, when and where it make possible for students reasoning as free and equal citizens in a good learning atmosphere, teaches matured students to the political values of a fair cooperation. The school can regulate, on the other hand, political, religious and expressive liberty in order to protect the good order against the imminent dangers of „fighting words“ conflicts. However, students „do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate“<sup>27</sup>.

The French Parliament disagrees. „In elementary, intermediate and secondary schools, its approved statute 228/2004 reads, the wearing of signs or clothes, through which students conspicuously manifest a religious affiliation is prohibited“.<sup>28</sup> In conscious, calculated opposite to the jurisprudence of the *Conseil d'Etat*, the wearing of headscarves is hostile provocation from the enemy of *La République Française, irrespective of circumstances*. It is a symbol, *irrespective of circumstances*, of international Islamism, of subversive anti-Western fundamentalism, or with the curious Hungarian legal terminology, of dictatorial symbolism. The question is no freedom of religion, even the socialist Jack Lang rallied round the ban. It is, the liberal philosopher Luc Ferry then educational minister lay down, not about dress code or “no hat in class” policy, not about even evidence of public order disturbance, but the defense of the republic against its enemies in the „conflict of civilization“<sup>29</sup> They are true. One of the meanings of the headscarf that we are here, we are from here, where you like it or not. This is a claim the right to be French and Muslim in the French public sphere.<sup>30</sup> And according to John Rawls, the prohibition is direct political censorship, maybe the French variant of George W. Bush's eloquent slogan, of the war against terrorism.

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at all, as one among many competing experiments, carried on for the purpose of example and stimulus, to keep the others up to a certain standard of excellence“ .„But in general – Mill adds at the end of the paragraph -, if the country contains a sufficient number of persons qualified to provide education under government auspices, the same persons would be able and willing to give an equally good education on the voluntary principle, under the assurance of remuneration afforded by a law rendering education compulsory, combined with State aid to those unable to defray the expense.“ See Mill: *On Liberty*, Ch. 5., para. 13.

<sup>27</sup> *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

<sup>28</sup> Herman Salton: *Veiled Threats? Islam, Headscarves and Religious Freedom in America & France*. Auckland, 2007. 128. See <http://researchspace.auckland.ac.nz>.

<sup>29</sup> Cécile Laborde : *Critical Republicanism : The Hijab Controversy and Political Philosophy*. Oxford, Oxford University Press, 2008, 200.

<sup>30</sup> Laborde, 226.

## 6. Integration and justice for all

„Secular reason, Rawls defines, is „reasoning in terms of comprehensive nonreligious doctrines”.<sup>31</sup> Secularism is a moral doctrine generally grounded on certain first philosophy.<sup>32</sup> A reasonable secular humanism is the same level for public reasoning as a reasonable religious doctrine. The liberal secularism of a secular state, as a neutral official ideology, like religion, cannot be part of public reason in a free country.

According to St. Augustine and the Christian natural law the worldly power is the secular arm of the eternal, spiritual one from which Christendom requires a distance, a separation.<sup>33</sup> Locke's *A Letter on Tolerance* carefully separates the Christian state as the government of Christian citizens from Christian religion. The Enlightenment not only extended this principle of toleration to include the universal liberty of conscience and free thought, but in the ecstatic moments after the destruction of Bastille it transformed the principle into a patronizing attitude of non-religious, scientifically based reason.<sup>34</sup> The French *laïcité* is the heir of the originally universal Enlightenment project. It means liberalization of children in school and integration of immigrants in culture.<sup>35</sup>

Certainly, in a liberal democracy we have a right to limit immigration and naturalization. The state takes responsibility for its legitimate criteria of eligibility which include protecting the public political culture of the public reason. But after the ceremony of inclusion, the equal right to basic liberties cannot permit a second-class citizenship.

## 7. The changing democratic ideal of a European nation

I am a Hungarian. Hungarian people is characterized, let me follow Rawls Millian characterization, by certain reasonable principles, rational institutions, and

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<sup>31</sup> PRR, 143.7

<sup>32</sup> It is not enough for neutrality that a secular argument is „reflective, critical, publicly intelligible and rational” as Robert Audi define it. See PRR, 148.

<sup>33</sup> Charles Taylor: *Modes of secularity*. In Rajeev Bhangava ed.: *Secularism and Its Critics*. Delhi, Oxford University Press, 33, See A 247n.

<sup>34</sup> Jürgen Habermas: *Religious tolerance – a peacemaker for cultural rights*. *Philosophy*, 2004, 5-18.

<sup>35</sup> Integration is conditioned to the hospitality rules, because – as Dominique Schnapper says, „the host society can expect its guests to conform to some extent to local ways and customs”. Dominique Schnapper: *La France de l'Integration*, 1990, 238. See Laborde, 197.

<sup>36</sup> PRR 8-9, 39n38.

shared feelings.<sup>36</sup> The territory, borders and natural resources of Hungary, let me take this as my example, are under the exclusive control of the Hungarian people. The self-legislating people obeys its own laws and government and lives in its own constitutional order protecting the equal basic rights of their own. It is responsible for its own legal order *in perpetuum*, since its authority over them is “unlimited”. The Hungarians live in a constitutional liberal democracy.<sup>37</sup> This means, according to a Rawlsian political conception of justice, that the constitution, of course, ideally, ensures that each citizen has certain basic rights of equal liberty; the legal order gives special priority to these rights; and the goods and rights necessary for their actual practicing must be provided by the social policy and the background institutions of basic economic and social justice.

The imaginary community of Hungary is not merely a group of individual of more or less the same origin and culture. No matter religion, origin or ethnicity, anybody is Hungarian who, as a citizen, can give authorization to the government of Hungary to exercise its sovereignty within some well-defined geographical boundaries, who lives under a determinate political organization and has some determinate political relations with others.<sup>38</sup>

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<sup>37</sup> In Mill's words at the beginning lines of *Considerations on Representative Government*, "a portion of Mankind ... are united among themselves with common sympathies". See LP 36.

<sup>37</sup> LP 14.

<sup>39</sup> Stephan Macedo : What self-governing people owe to one another: universalism, diversity, and The Law of Peoples. The „Rawls and the Law” Symposium. Fordham Law Review. 2004. 2004, 1730.

**COMMENTS ON CATHERINE AUDARD :  
*JOHN RAWLS AND THE LIBERAL ALTERNATIVES TO SECULARISM***

In my comments I would like to compare the legal approaches of some countries as well as that of the European Court of Human Rights (ECtHR), which represent different models of state-church relations. Following Audard's argumentation, the main aspect of this comparison will be to review whether the regulation and the case-law of the selected states and the ECtHR are capable of "abandoning universalist intellectual frameworks and historical principles that all predate the advance the secularization". The subject of my investigation in other word is, whether the selected solutions are liberally secular or try to eliminate religion from public sphere through threaten religious minorities, and whether the later limitations can be accepted as legitimate measures of militant democracy.

*Approaches of church-state realtions*

Let me start with the different approaches of church-state realtions, in order to assess which of these models has led to a greater protection for the autonomy of religious institutions.

**American Disestablishmentarianism**

The disestablishment of religion guaranted by the First Amendment<sup>1</sup> of the US Constitution aimed at liberating of religious institutions from the state. The purpose of this disastablism was not so much to create a more secular public culture, but to free religious expression, and allow the free churches to flourish. In this model religion is free of government support, and free of government control. The structure of American liberty concerning religion was based on pluralism and diversity, because as Rawls pointed out, the aim of the government was to refuse to use state power to impose any particular understanding of the good life upon one's fellow citizens.<sup>2</sup> According to this liberal argument, allowing the goverment to establish religion with exclusive privileges would not strengthen, but weaken religion. The American type of separation of the state and church meant on the one

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<sup>1</sup> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

<sup>2</sup> See John Rawls: Political Liberalism. Columbia University Press. 1993. 29-32.

hand the protection of individuals from compelled support for religions they did not believe in, and protection of religious associations from governmental interference on the other.

Due to the liberal American disestablishmentarianism there have been no sustained calls for local, state or federal government to ban religious symbols from public places or schools. Yet in the context of court appearances, court detention, drivers' license issuance and air travel, U.S. policymakers and courts have authorized laws and practices that interfere with Muslim women's free exercise of their religion, namely, the wearing of hijab, niqab or burqa that conceals the hair or face from view.<sup>3</sup>

For instance the Michigan District Court dismissed a Muslim woman's lawsuit against a car rental company when she refused to unveil.<sup>4</sup> The Supreme Court of Michigan have sided with district Court by adopting an amendment to Michigan Rule of Evidence, which provides that: "The court shall exercise reasonable control over the appearance of parties and witnesses so as to (1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder, and (2) to ensure the accurate identification of such persons." Other states of the US have also laws giving judges authority to control attire.

The US Supreme Court has not directly addressed restrictions on Muslim headscarves or facial veils. In the landmark *Cohen v. California* (1971), the Court threw out the disorderly conduct conviction of a California man who donned a jacket bearing the offensive words "Fuck the Draft" in a court house corridor.<sup>5</sup> The *Cohen* decision rested on the requirements of freedom of expression protected by the First Amendment. The First Amendment also protects the free exercise of religion. If the first Amendment protects jackets worn for political purposes, it could be expected to protect modesty attire worn for religious purposes.

### **French Laïcité and Turkish Secularism**

Unlike the American revolutionaries, their French counterparts declined to separate church from state, instead assumed even greater political control over religion. Inspired by the republican ideology of Rousseau they aspired to a state in which the individual wills of the citizens and the general will were in essential conformity. According to the French conception of citizenship, the citizen does not have an identity independent from the state.<sup>6</sup> Control over religion is essential in this concept, and religious pluralism is a threat to such a function of the state. The separation of church and state would be a mistake in this system, since it would lead to divided loyalties. The state assumed control over elementary education, and

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<sup>3</sup> Anita L. Allen: Veiled Women in the American Courtroom: Is the Niqab a Barrier to Justice? Scholarship at Penn Law. Paper 2010. 329. [http://sr.nellco.org/upenn\\_wps/329](http://sr.nellco.org/upenn_wps/329)

<sup>4</sup> *Muhammad v. Paruk*. 553 F.Supp.2d 893 (E.D.Mich.2008).

<sup>5</sup> *Cohen v. California*. 403 U.S. 15 (1971).

<sup>6</sup> See Michel Troper: French Secularism, or Laïcité. 21 *Cardozo Law review*. 1267. 1268 (2000)

replaced religious instructions in the schools with what was called the tenet of „universal morality”. In November, 1793, the Commune of Paris decreed „that all the churches and chapels of every religion and sect which exist in Paris shall be closed forthwith”.

In 1795, the Convention shifted course and proclaimed liberty for all religions, with certain restrictions and limitations. The Constitution now provided: „No one can be prevented from exercising, comfortably to the laws, the religion of his choice.” But this period of separation did not last. In 1802, Napoleon reestablished Catholicism as the religion of the state. Under the Napoleonic system all four major religions were entitled to financial support from the state. In 1905, however, France formally adopted a constitutional policy called *laïcité*, which remains in place today. This system is often described as separationist, it is subtly different from the American separationism, in that it excludes religion from public influence, and thus is committed to ideological secularism with respect to public matters, rather than to neutrality. This means that France is committed to secularism but not to religious autonomy.

To compare the United States with France, the American culture is less secular than the French one. Certainly, Americans seem to be more religious as individuals than French people, and religion plays a more evident public role.<sup>7</sup> But on the other hand, religious education is funded by the state in France and in much of Europe, and religious symbols are more common in government schools and public settings than in the United States.

The French commitment to secularism (*laïcité*) “refers not simply to separation of church and state but to the role of the state in protecting individuals from the claims of religion.”<sup>8</sup>

In the *Dogru* case at issue was a decision by a state secondary school in France in 1999 to expel an eleven year old Muslim girl for refusing to remove her head scarf during physical education classes. The school’s rule stated that “discreet signs manifesting the pupil’s ... religious convictions shall be accepted in the establishment” but that all pupils must attend physical education classes in “sports clothes.”, but school permitted the students to wear head scarfs when not in physical education classes. This rule was consistent with Conseil d’Etat jurisprudence which held that students should not be allowed: „To display signs of religious affiliation, which, inherently, in the circumstances in which they are worn, individually or collectively, or conspicuously or as a means of protest, might constitute a form of pressure, provocation, proselytism or propaganda, undermine the dignity or freedom of the pupil or other members of the educational community, compromise their health or safety, disrupt the conduct of teaching activities and the educational role of

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<sup>7</sup> Robert Putnam: *American Grace. Tanner Lectures on Human Values. Lecture One: Americans Are Religiously Devout and Religiously Divided, yet Religiously Tolerant. Why?* Princeton University, October 27, 2010.

<sup>8</sup> Joan Wallach Scott: *The Politics of the Veil*. Princeton: Princeton University Press. 2007. at 97-98.

the teachers, or, lastly, interfere with order in the school or the normal functioning of the public serve”.<sup>9</sup>

In this vein, the Conseil d’Etat had annulled strict bans in schools on the wearing of any distinctive religious signs on the basis that they were worded too generally. It also held that a student could not be penalized for wearing a head scarf if it did not amount to an act of pressure or proselytism or interfered with public order in the school. Dogru went to the European Court of Human Rights, and after noting that the school’s rule was consistent with the jurisprudence of the Conseil d’Etat and government policy, the Court held that it did not amount to a violation of Article 9 of the Convention.<sup>10</sup> The Court introduces its reasons by somberly noting that “in France, the exercise of religious freedom in public society, and more particularly the issue of wearing religious signs at school, is directly linked to the principle of secularism on which the French Republic was founded.”<sup>11</sup> “The concept of secularism,” the Court notes, arose “out of a long French tradition,” and was enshrined in the 1905 Law on the Separation of Church and State, “which marked the end of a long conflict between the republicans, born of the French Revolution, and the Catholic Church.” France’s “secular pact,” according to the Court, authorizes religious pluralism, requires state neutrality toward religions, and obligates citizens of faith to “respect the public arena that is shared by all.”

The Court’s reasons also refer to domestic legal developments in France, where the President of the Republic in 2003 established a commission Known as the “Stasi Commission” to inquire into the role of secularism in France. The Commission presented some of its conclusions in stark terms, in a passage quoted by the Court: „Regarding the head scarf, the report states that for the school community ... the visibility of a religious sign is perceived by many as contrary to the role of school, which should remain a neutral forum and a place where the development of critical faculties is encouraged. It also infringes the principles and values that schools are there to teach, in particular, equality between men and women.”<sup>12</sup>

The Stasi Commission’s report led to legislation in 2004 banning students from wearing head scarves in primary and secondary schools.<sup>13</sup> Duly noting the 2004 legislation, the Court went on to characterize secularism as “a constitutional principle” in France, and “a founding principle of the Republic, to which the entire population adheres and the protection of which appears to be of prime importance, in particular in schools.”<sup>14</sup> In other words the Court’s reasoning is saying that a threat to secularism is a threat to the republic, therefore to protect the Republic, France can enact militant measures that shield the secular nature of the public sphere from the exercise of religious freedom. As I mentioned, the Court in the Dogru reasoning made reference to the broader head scarf ban introduced into law in 2004,

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<sup>9</sup> 27 November 1989, no. 346.893 (Conseil d’Etat).

<sup>10</sup> Application No. 27058/05 (2008).

<sup>11</sup> *Ibid.*, para. 17

<sup>12</sup> Stasi Commission, Laïcité et République

<sup>13</sup> For a defence of the 2004 law, see Patrick Weil: Why the French Laïcité is Liberal. 30 *Cardozo Law Review* 2699 (2009); for critique, see Joseph Carens: Démocratie, multiculturalisme et hijab. *ESPRIT*, Jan, 2005, at 54.

<sup>14</sup> *Ibid.*, para.72.

prohibiting students from wearing head scarves on school property. This reference to the 2004 law can be interpreted as a signal to France that the 2004 law would not violate Article 11.<sup>15</sup>

In July 2010 first the French National Assembly, than in September also the Senate voted into law a bill banning the wearing in all public places of full-face veils, such as the burqa or niqab, which are worn by some Islamic women. According to the law, women wearing a burqa or niqab in France will face a €150 fine and will be forced to take citizenship classes. Anyone deemed guilty of forcing a woman to wear a full-face veil will face a €30,000 fine and one year in jail. After the senat vote the presidents of the two legislative houses submitted the law to the Constitutional Council, which approved it in its October decision. However the Council ruled that women could wear burqas in places of worship. It noted that the burqa ban “could not restrict the exercise of religious liberty in places of worship that are open to the public”. The anti-burqa law will become effective in the spring of 2011.

The approach of secularism was followed also by Turkey, after abolishing Islam as the religion of the state. In 1928, the Turkish Constitution was amended to no longer proclaim that „the religion of the state is Islam”. And in 1937, the Constitution was amended to expressly accord constitutional status to the principle of secularism.

Consistent with its constitutional commitment to secularism, the Turkish government has traditionally banned women who wear head scarves from working in the public sector, including teachers, lawyers, parliamentarians and others working on state premises. In late 1970s and early 1980s, the number of university students wearing head scarves increased substantially and in 1984, the ban was extended to prohibit the wearing of head scarves by university students. For instance Leyla Şahin was a fifth year female medical student at the faculty of medicine of the University of Istanbul. The university prohibited her from taking exams or attending lectures while wearing her head scarf. Since all of Turkish courts upheld the ban, the student brought a suit against Turkey. In *Şahin v. Turkey*, the European Court of Human Rights upheld the ban, stating that “in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.”<sup>16</sup> The Court granted Turkey a relatively wide margin of appreciation concerning the necessity of the ban, by stating that „upholding the principle of secularism ... may be considered necessary to protect the democratic system in Turkey.”<sup>17</sup> The Court noted a particular significance that the Constitution of Turkey attaches to the principle of secularism: “this principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect

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<sup>15</sup> See Patrick Macklem: *Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe*. Paper for Workshop on Militant Democracy held at the Center for Human Values at Princeton University in April 2010. Electronic copy available at: <http://ssrn.com/abstract=1660649>

<sup>16</sup> *Şahin v. Turkey*. Application No. 44774/98 (2005). para.97.

<sup>17</sup> *Ibid.*, para. 46.

for human rights, may be considered necessary to protect the democratic system in Turkey. An attitude which fails to respect that principle will not necessarily be accepted as covered by the freedom to manifest religion”.<sup>18</sup>

Judge Tulkens, in her dissenting judgment argues against the majority’s characterization of head scarf ban as a measure against extremist political movements: „Merely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and ‘extremists’ who seek to impose the headscarf as they do other religious symbols. Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant held fundamentalist views.” The Şahin decision of the Court can be discussed in terms of „militant secularism”.<sup>19</sup> Militant secularism, in other words, is an acceptable form of militant democracy.<sup>20</sup>

### **The British Pluralistic Establishmentarianism**

In Britain, instead of the American type of disestablishment, there was a long, slow, evolutionary development from the intolerant and coercive established Church of England to a tolerant, noncoercive arrangement in which the establishment became largely symbolic. The government, for instance gradually ceased to provide financial support for the Church of England – but without the sharp principled break that occurred in the US and in France. While Parliament continued to exercise superintending authority over the Church of England, it also debated measures to extend toleration. This means that Britain unlike the US and France is committed, historically, neither to autonomy nor to secularism.

The head scarf issue also arose recently in England, again in the context of school regulations concerning religious attire. The student population of Denbigh High School is overwhelmingly Muslim; in 2006, approximately 79 percent of its students were Muslim. In recognition of this fact, female students were given the option of wearing a shalmar kameeze, a smock like dress combined with loose trousers, as well as a head scarf of a specified colour and quality. Shabina Begum was a 14 year old student who had worn the shalmar kameeze to school for two years, but, at the start of a new school year, had requested that she be allowed to wear a more modest coat-like garment known as the jilbab, which concealed, to a greater extent than the shalmar kameeze, the contours of her body. The school refused her permission, and eventually she sought judicial review of the school’s decision, alleging that it was in breach of Article 9. The Court of Appeal agreed, finding that she held a sincere belief that her religion required her to wear a jilbab on attaining puberty and that the school’s rules were not “necessary in a democratic society” as required by Article 9 of the Convention.<sup>21</sup> The House of Lords

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<sup>18</sup> *Ibid.* par. 114.

<sup>19</sup> See A. Pedain: Do Headscarves Bite? 63 Cambridge Law Journal 537, at 540 (2004)

<sup>20</sup> See Macklem: *ibid.*

<sup>21</sup> R. (on the application of SB) v. Headteacher and Governors of Denbigh High School. [2005] EWCA Civ. 199.

overturned the Court of Appeal's decision.<sup>22</sup> Lords Bingham, Hoffman and Scott, in separate reasons, held that the regulation did not interfere with Begum's religious freedom, given that she could have attended other schools that permitted the wearing of the jilbab. Lord Hoffman, in particular, ruled that Article 9 "does not require that one should be allowed to manifest one's religion at any time and place of one's choosing."<sup>23</sup> Lord Nicholls and Baroness Hale disagreed, reasoning, respectively, that changing schools was disruptive of her education and was a decision not for her but for her parents to make. All judges, however, agreed that had there been an interference with her right to manifest her religion, the school's policy would have been justified under Article 9 (2).

The reasons offered by the House of Lords echo the European Court's traditional approach to Article 9 that emphasizes reconciliation, albeit with adjustments that factor out the margin of appreciation that the European Court extends to domestic judicial review. But as Patrick Macklem notes, unlike Şahin, the House of Lord's decision in Begum reveals no underlying theme of militant secularism. And unlike Dogru, it reveals no underlying theme of militant republicanism.<sup>24</sup>

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After comparing the discussed models of state-church relations, I conclude that the American and the Turkish system seem to adopt the extrem, almost opposite approaches to religious autonomy, especially in the case of the Muslim veil, while the British as well as the German approach represent a middle way with their tolerant establishmentarianism.

Given the different approaches within Europe, the European Court of Human Rights not ignoring the local context of each of every case is constantly faces with the contradiction between universalism and particularism, but as the decisions of Leyla Sahin and Dogru shows is rather ready to uphold reasonable restrictions on wearing religious symbols in public schools in respect to both teachers and students. By doing this, the judges appear to attach a series of negative stereotypes – sexual inequality, proselytism and religious fundamentalism – which are based neither on an in depth theoretical discussion of this complex and multi-faceted symbol nor on the circumstances of the cases at issue. In the headscarf matter the Court merely presumed – and never actually demonstrated – the connection between the Islamic practice of veiling and the violation of those fundamental principles. One can assume that hypothetical challenges to the 2004 or the 2010 French statutes are currently unlikely to succeed if it would be based on religious expression grounds under Article 9 of the European Convention. Of course the judges in Strasbourg can always argue that the countries of Europe have not

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<sup>22</sup> R. (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School (Appellants). [2006] UKHL 15.

<sup>23</sup> *Ibid.*, para.50.

<sup>24</sup> See Macklem: *ibid.*

been, as yet capable to agree to a common approach, but probably also the Court would be able to contribute to the enforcement of such kind of European consensus.

**REFLECTIONS ON CERTAIN DECISIONS ON THE EUROPEAN COURT  
OF HUMAN RIGHTS AS COMMENTS ON CATHERINE AUDARD : JOHN  
RAWLS AND THE LIBERAL ALTERNATIVES TO SECULARISM**

**I. Introduction**

Freedom of religion and belief has a double nature, it is a general human right, a “cornerstone of the democratic society,” its role is comparable to freedom of expression, and at the same time, a highly important minority right. (Actually, its career started as a minority right.) Minority rights in general might be seen as signs of equal recognition by the majority. In those states where the only recognised minority right beside the equality and non-discrimination is freedom of religion, and also everywhere in case of new – immigrant - minorities whose minority rights confined to non-discrimination and freedom of religion, the latter has a special position. That provides a general protection of identity because there is a significant overlap between religious and other forms of identity, namely ethnic and cultural identities. Consequently, the use of religious symbols in public places indicates not only religious but ethnic and cultural identities at least for a part of the community. Islam identity is more than simply religious, it is the most important expression of the sense of collective, overlapping identity, which has been imbued with a existential significance in case of certain communities. They might see the toleration of use of their religious symbols as signs of their *equal recognition* and the acceptance of their *authentic existence*.

In the post modern Western European societies the identity is a delicate question: there are large immigrant communities and more and more other social groups identify themselves along the lines of a particular identity and in a way or another majority might seem to be disappearing. At the same time the visible signs of the obvious “otherness” on parade reconstitute the feeling of belonging to the majority and the amorphous majority regains its shape by redefining itself against them.

Essentially the problem is the visibility of Islam in Europe which is getting more and more obvious. It is not necessary related to recent immigration because the use of Islam symbols might be a product of religious revival of earlier generations. In a continent which have cherished the freedom of religion for centuries the

phenomenon poses a hardly resolvable question. How to react to a complex phenomenon in which certain part of the users of Islam symbols behaves it because of their true religious conviction, their cultural identity, and another part behaves that way because they want to protest against Western culture, to disturb proper operation of public organs or they have been forced to do that. Especially law is in a hard position, if it tries to regulate, - and regulation is not an unavoidable option, - the rule should *presuppose* one of them. If the law presupposes the first variation, the disturbing cases as exceptions might be forbidden. If the law presupposes the second, the outcome might be a general ban in public spaces. In the second case the collateral damages at the expense of a basic human right of certain true believers are too high even if the law is not enforced in public places of worship. Especially if the law defines “in public” broadly, including government buildings, public transportation, private businesses, entertainment venues, and also all streets, markets.<sup>1</sup>

### Intermezzo I

Perhaps because they address a truly global perspective universal human rights texts and bodies are clearly inclusive in that question, two illustrations.

Article 6 of the UN *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* says:

*“the right to freedom of thought, conscience, religion or belief shall include, inter alia”, (c) to make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief.”*<sup>2</sup>

The UN Human Rights Committee states:

*“The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group.”*<sup>3</sup>

### 2. The reasonable accommodation of minority religious freedom in the case law of the European Court of Human Rights

In *Kokkinakis* case, the European Court of Human Rights underlined the identity issue: the freedom of religion is “one of the most vital elements that go to

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<sup>1</sup> Reference to the 2010 French law and to the recent decision of the French Constitutional Council.

<sup>2</sup> UNGA Res. 36/55 of 25 November 1981.

<sup>3</sup> UNHR General Comment 22 Para. 4

make up their identity of believers and their conception of life.”<sup>4</sup> The Court also gave significance to related aspects:

*„While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions.”*<sup>5</sup>

Such formulation might be a point of departure for reasonable accommodation of minority religious practices, but in reality the Court has certainly not accepted the accommodation as a demand towards state parties.

The freedom aspects might lead to obvious cases, as some Jehova Witnesses cases in front of the European Court of Human Rights, for example in which a related but hardly separable issue, the right to try to convince one's neighbour,<sup>6</sup> have been at stake, and the Court has not been in a hard position. The really exciting questions arise if the religious practice in a broader sense is the basis of a legal claim. The paradigmatic case is the *Cha'are Shalom VE Tsedek v. France* case. In that case a Jewish organisation not trusting the thoughtfulness of the authorised practice, has not received an authorisation to perform ritual slaughter following the strictest religious prescriptions but that type of “glatt” meat has been available from Belgium. The Court declined to agree with the complaint emphasising that a body –not the applicant - has got authorisation and the availability of the required meat from other sources.<sup>7</sup> Furthermore,

*“even supposing that this restriction could be considered an interference with the right to freedom to manifest one's religion, the Court observes that the measure complained of, which is prescribed by law, pursues a legitimate aim, namely protection of public health and public order, in so far as organisation by the State of the exercise of worship is conducive to religious harmony and tolerance. Furthermore, regard being had to the margin of appreciation left to Contracting States, ... particularly with regard to establishment of the delicate relations between the Churches and the State, it cannot be considered excessive or disproportionate.”*<sup>8</sup>

Not less than seven judges of the Court presented a joint dissenting opinion underlying that the differential treatment for the minority inside the minority would have been objectively reasonable and proportionate. While they accepted that states enjoyed a margin of appreciation in this area, emphasised that “in delimiting the extent of the margin of appreciation concerned it had to have regard to what was at stake, namely the need to secure true religious pluralism, which is an inherent feature of the notion of a democratic society.”<sup>9</sup> In their view, withholding the approval from the applicant association, while granting it to another body and

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<sup>4</sup> *Kokkinakis v. Greece*, 25 May 1993, Para. 31

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Cha'are Shalom VE Tsedek v. France*, 7 September 2000, Para. 82

<sup>8</sup> *Ibid.* Para. 84

<sup>9</sup> *Ibid.* Joint Dissenting Opinion, Para. 2

“thereby conferring on the latter the exclusive right to authorise ritual slaughterers, amounted to a failure to secure religious pluralism or to ensure a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”<sup>10</sup>

The message of the joint dissenting opinion is clear, religious pluralism should be protected inside the community; the minority special practice should be accommodated, and the freedom of manoeuvring left for the authorities, the margin of appreciation, should be delimited with regard to the weight of the question at stake, and the question which was at stake directly related to religious pluralism, a major value of freedom of religion.

In *Kosteski* similarly to *Cha'are Shalom VE Tsedek*, the Court declined to demand reasonable accommodation from a state party. In *Kosteski* an applicant justified his absent from his work place with celebration of Muslim religious holiday. The applicant was not prepared to produce any evidence that could substantiate his claims with strong evidence of genuine religious objections. The Court concluded that to the extent that the proceedings disclosed an interference with the applicant's freedom of religion, this was not disproportionate and may in the circumstances of this case, be regarded as justified.<sup>11</sup> (The reasoning seems to violate equality; those who belong to a majority religion which religious holidays are free are not requested to prove their strong belief to enjoy free time.)

In *Munoz Diaz* case a social security benefit was denied from a Roma woman who married only according to Roma rites under the Franco regime. The Court observed that civil marriage in Spain, as in force since 1981, was open to everyone, without any discrimination on religious or other grounds. The Court also observed that certain religious forms of expression of consent were accepted under Spanish law, but those religious forms (Catholic, Protestant, Muslim and Jewish) were recognised by virtue of agreements with the State, with the same effects as civil marriage, whereas other forms were not recognised, emphasising that this distinction derived from religious affiliation, which was not pertinent in the case of the Roma community, and that that distinction did not impede or prohibit civil marriage.<sup>12</sup>

So, if religious marriages recognised as civil marriages, and a minority religious marriage rite has a religious affiliation, the lack of recognition would mean discrimination. It is a step forward in the way of accommodation.

## Intermezzo 2

The European Court of Human Rights works as a European quasi constitutional court on human rights, having an ultimate word on them, although it is not allowed declaring that a domestic court decision or legislation is null and void. (The state parties should “domesticate” the binding decisions of ECHR.) The Court

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<sup>10</sup> *Ibid.*

<sup>11</sup> *Kosteski v. Former Yugoslav Republic of Macedonia*, 13 April 2006, Para. 46

<sup>12</sup> *Munoz Diaz v. Spain*, 8 December 2009, Para. 80

time to time reviews its interpretation as societal changes need, as the expectations of the European value community change. One of the most important concepts in the Court' work is margin of appreciation left to national law-makers and courts.

In spite of the common cultural background and values there are significant differences among the European states, they differ in many respects. The Court can not ignore the differences; the legal technique to take them into consideration is margin of appreciation. The Court has to decide, in a given question there is only a single way of protection or there are different alternative ways of protection having equal value. In latter case, the Court should respect the path taken by the national authorities. The Court leaves a narrower margin of appreciation to the national bodies if the right is directly related to the functioning of democracy and pluralism. A wider margin is secured if moral conviction and cultural traditions are highly important in the determination of the choice.

The freedom of religion is a core right of democracy. Consequently, only certain questions can be left to national decision making bodies, but which ones? The answer depends on how much weight is given to a related question, by how its relationship with free practice and religious pluralism is conceived. "The establishment of the delicate relations between state and church" is generally left to national authorities. So, if the problem is seen as a part of state and church relations there is a considerable margin of appreciation left, if the issue is related to the freedom aspects and religious pluralism, the margin can not exist at all.

### **3. The use of religious symbols in public places in the case law**

The decisions in *Dahlab*, *Sahin*, *Dogru* cases demonstrate how the Court has conceived the problem, although they have emerged only in school context.

In *Dahlab* the Court dismissed the application of an elementary school teacher who had converted to Islam and who complained because she was not allowed to wear her Islamic headscarf during the instruction. The Court found that the Islamic headscarf was a powerful external symbol having proselytizing effect under the above mentioned conditions and also accepted that wearing of it was not reconcilable with gender equality. The Court emphasised that in the case of a teacher of state school operating under denominational neutrality, that proportionate restriction is justified.<sup>13</sup>

As far as the elements of the reasoning of the Court are concerned I can accept the reference to the proselytizing effect but only under the special circumstances of the case and that may justify the restriction. In my opinion a school teacher is not a representative of a school and in case of obviously free option self-determination comes first over gender equality. Moreover, the reliance on the big powerful nature of the symbol might be indirect discrimination because the powerful

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<sup>13</sup> *Dahlab v. Switzerland*, 15 February 2001.

symbols belong to Islam and the tiny symbols of other religions seem to be classified separately.

In *Sahin* the Court was ready to accept the prohibition in the case of a university student underlying the margin of appreciation approach.

*„Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance.“*<sup>14</sup>

The Court again accepted that the prohibition was based on equality of sexes,<sup>15</sup> and gave special importance to pressurisation:

*“The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts.“*<sup>16</sup>

In a disturbing way the Court added that the secular way of life in Turkey leads to pressing social needs to prohibit the use of Islam symbols, “especially since this religious symbol taken on political significance in Turkey in recent years.”<sup>17</sup>

There are at least *three* problems with the ruling. Even if a teacher might be seen as a representative of the school (university), a student obviously might not be. The pressurisation argument gives priority to an alleged social fact over the right of an individual in a case where the applicant was obviously a true believer having rational autonomy, although it can be convincing if the special circumstances of the case lead into that direction. Finally, the secular way of life and the political significance as justifications can lead too far, can justify almost everything, for example the complete ban on public use of certain religious symbols. That is the reason why I think the 2010 French law can go through the scrutiny of the Court.

The dissenting opinion presented by judge Tulkens criticises the large margin of appreciation left to the Turkish authorities. She correctly observe that the European supervision seems quite simply to be absent from the judgment, and there is a need for harmonisation of standards in that question. She emphasises that Turkey's specific historical background does not justify properly the state interference, merely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf

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<sup>14</sup> Leyla Sahin v. Turkey, 29 June 2004, Para. 109

<sup>15</sup> *Ibid.* Para. 104

<sup>16</sup> *Ibid.* Para 115

<sup>17</sup> *Ibid.*

and "extremists" who seek to impose the headscarf as they do other religious symbols.<sup>18</sup>

In *Dogru* in which a grammar school girl was the applicant, the Court upheld its approach emphasising the diverse European practice as justification to leave the question to margin of appreciation,<sup>19</sup> and the importance of the protection of rights of others.<sup>20</sup>

The first argument is not convincing a free practice aspect is at stake; a European standard might be justified. The second may refer to possible social conflict and the importance to avoid such phenomenon, but I think concrete signs of a possible wider social conflict would have needed.

Consequently, principal features of the Court's approach are the following: too much attention is given to whether a state-party adopted the principle of secularism; and the illegitimate interference to the free practice is too narrowly interpreted although in *Dahlab* certain arguments might be appreciated. .

#### **4. Is the Court's view on the acceptable nature of interferences reconcilable with the Rawlsian understanding and the Auadardian interpretation?**

I think not. The interferences accepted by the Court go too far, in case of priority of rights versus political good a delicate balance should be set and only extreme cases like *obvious* proselytism, and provocation, imminent terrorist threat or in which there is no reasonable doubt that pressurisation has taken place may justify the interferences. Consequently, the 2010 French law is far from reconcilable with the Rawlsian understanding, and the Auadardian interpretation of the legitimacy of the liberal state and the individual's capacity to decide on his or her complete life.<sup>21</sup>

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<sup>18</sup> *Ibid* Dissenting Opinion of Judge Tulkens, Paras. 1-13

<sup>19</sup> *Dogru v. France*, 4 December, 2008, Para. 63

<sup>20</sup> *Ibid*, Para 64

<sup>21</sup> Here I rely on: Eoin Daly: Religious Liberty and the Rawlsian Idea of Legitimacy: The French *Laïcité* Project between comprehensive and Plitival Liberalisms. *Religion and Human Rights*. Volume 5 (2010) Issue 1, p. 29