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ECHR: THE PITY OF A SECULAR GOD AND THE STRENGHT OF A RELIGIOUS CONSTITUTIONALISM

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Abstract

After seventy years from the final textual approval of the ECHR we are experiencing a not so short period of continuous decreasing appeal for International (multilateral) conventional law and for the European Union, particularly. It followed a different phase of optimism about the European integration: at the same time, the federalist part of the European parliament battled hard to include the ECHR in the framework of the institutive treaties. The attempt to conceive a European space of fundamental human rights, even wider than the proper European Union's membership, has partially failed, but the special need of it still stands tall in the material governance of Europe, in her internal legal orders and the spiritual developing of a European popular collective common sense. Regarded both as a programmatic conventional act owning a specific formal jurisdiction and as the result of a theoretical legal process, the ECHR perfectly shows a dual positive medal: the Christian religious thought about mankind and the person herself, her rights combined into a sympathetic net of human relationships, and the democratic implementation of a still ongoing rationalist fulfilment for progressive social development. This double coin is probably based on the Western conception of individuals but it can survive to its ideological limits by an intercultural effective interpretation, well oriented to rethink the traditional contribution of many legal cultures (particularly included the Eastern European communitarian and radical geographical identity). Seventy years ahead, we are still looking for what we thought we had found and we had not: the untouchable but indispensable horizon of a synthesis between freedom and responsibility.

I. RELIGIONS, CONSTITUTIONALISM, POLITICAL THEOLOGY

It is widely recognized by public law theorists that the process of backing up a social progressive framework for the concrete protection of human rights has in

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its own historical development a symbolic religious root, based on a subtle but changing representation of what Canon law scholars used to call "natural law"[1]. That theory is still hard to be correctly defined, but, undoubtedly, this doctrine has produced a large typology of cultural and juridical effects: a universal conception of dignity, a clarification of the limits and the types of the public repression, sanction and violence, the ambition to build an egalitarian order of law and jurisprudence.

This complex and often contradictory evolution was almost completely included in the wave of post-war Constitutions and this conclusion is well shown by Christian Fritz[2], mainly but correctly by a methodological point of view, in his seminal work *American Sovereigns: the People and America's Constitutional Tradition before the Civil War*. The core object of his analysis was absolutely a step-by-step reconstruction of the different phases in American public law since the Revolution from the most conflicted episodes of United States' modern history. The same narrative intention to reproduce a constitutional conception of the statehood and individual rights was clearly represented in Martha Nussbaum's *Liberty of Conscience: in defence of America's Tradition of Religious Equality*[3]. If we divide the peculiar State context from the dogmatic issues, we can acquire primary epistemological instructions.

The cultural objective of Fritz was to distinguish the history of Constitutions from the ideology of constitutionalism: the first one is primarily (but not exclusively) descriptive, including detailed reports of the preparatory passages and a norm-by-norm exegesis of texts, resolutions and amendments; the second one is primarily (but not exclusively) prescriptive, by elaborating a functional theory of the government, the separation between law and religions, the punishments, the political *mechanics* of social justice[4].

Even in Martha Nussbaum's hermeneutical approaches, it is possible to underline specific references to a typical (and, somehow irenic, defended) legal constitutional tradition and to achieve scientific and methodological broadenings and in-depth analyses, too. The liberty of conscience could therefore get the status of a paradigm civil liberty in the relationships between a disciple and his group, a citizen and his State, a relative and his family, a learner and his scholastic training. The protection of the liberty of conscience reveals herself as what we yearn for considering: a unit of measurement for individual (and collective) freedom[5]. This kind of public legal protection should not become a

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[1] The connections between theology and Canon law, even considering the special newness of the most recent developments, find a fresh reconstruction in Consorti P., *Diritto canonico e teologia: ancora separati in casa?*, in *people.unipi.it*, 14th August 2017.

[2] Fritz C., *American Sovereigns: the People and America's Constitutional Tradition before the Civil War*, Cambridge University Press, Cambridge-New York, 2008.

[3] Nussbaum M., *Liberty of Conscience: in defence of America's Tradition of Religious Equality*, Basic Books, New York, 2008.

[4] Chilton A., Versteeg M., *How Constitutional Rights Matter*, Oxford University Press, Oxford-New York, 2020, 67; Patberg M., *Constituent Power in the European Union*, Oxford University Press, Oxford-New York, 2020, 146-147.

[5] A traditional and still interesting overview could be considered Ruffini F., *La libertà religiosa. Storia dell'idea* (1901), Feltrinelli, Milano, 1991.

paternalistic control – the power against the individuals or their own ethical, religious, ethnic, sexual, geographical or linguistic identities, otherwise, the protection will be easily changed into a hidden way to conform to social multiplicities by imposing a common, undistinguished, civil fictitious variety.
This overall scenery obviously reaches the highest levels of complexity while referring to a still not perfectly designed kind of international jurisdiction, because the material ancestries of constitutionalism – cultural, religious, ethical, even literary – need to establish a generally agreeable basement for a multitude of contracting parties, almost of them usually unknown by the time of the first drawing up.
It inevitably points at one of the most lasting criticisms against the national experience of constitutionalism; in the words of Jeremy Waldron the idea of drafting a fundamental layout of rules (so strictly defined or guaranteed to be safe even from the intervention of the supreme power), even in multilateral relationships, is completely inadequate to cause a popular self-government[6]. Social interests and individual rights are constantly mediated by a bureaucracy, enforceable parts of the public power in its proper modern declensions: legislation, administration, jurisdiction[7].
The axiology of Constitutions crosses other surfaces of difficulties when we try to check it out while talking about the possibility of an international association of States not based on a binding common regulation but on a general agreement, somehow complementary and competitive in comparison with the national constitutional contexts of rules.
This kind of theoretical issues was peculiarly faced by Canon law and Christian theology scholars during medieval centuries[8] and it had a first symbolical anchoring in the conception of the German jurist Carl Schmitt[9]. Even though the main basement of the notion of political theology was clearly sketched out since Augustine and Aquinas, Schmitt faced polemically the supremacy of international mutual law, described by Hugo Grotius[10], and the cosmopolitan moral view of Immanuel Kant[11], adopting a model of public law doctrine concentrated on the traditions, the customary rules and the regulative force of the decision. Political theology started to describe in a rough way the mode of theological principles related to politics and the law, but typically in national

[6] Waldron J., *Constitutionalism. A Skeptical View*, in T. Christiano, J. Christman, edds., 2009, Wiley-Blackwell, Malden-Oxford-Chichester, 2009, 279.
[7] Federalist legal orders can reduce the distance between the expression of social interests and their punctual material reinforcement. Considering this perspective in a relevant territorial case study, Chizzoniti A. G., *Religione ed autonomie locali. Il senso di una ricerca*, in A. G. Chizzoniti, ed., *Religione ed autonomie locali. La tutela della libertà religiosa nei territori di Cremona, Lodi e Piacenza*, Libellula, Tricase, 1-24.
[8] It captured a common sense with specific correspondences in the Modern Age. About this point, Ventura M., *Il diritto canonico e la sfera pubblica nell'età secolare*, in *Daimon*, 2012, 35-52.
[9] Schmitt C., *Political Theology: Four Chapters on the Concept of Sovereignty* (1922), University of Chicago Press, Chicago, 2004.
[10] Schwobel C. E. J., *Global Constitutionalism in International Legal Perspective*, Martinus Nijhoff, Leiden-Boston, 2011, 1-14.
[11] Cavallar G., *Kant and the Theory and Practice of International Right*, University of Wales Press, Cardiff, 2020, 25-28.

sovereignty. The ambition of post-World War conventions was the opposite: to describe a consensual form of command adopted to back and support fundamental human rights in a pacific climate of international relationships. Regarded as one of the greatest acquisitions of these phases, ECHR was probably the aftermath of hopes, material conditions and a sort of creative enthusiasm in the legal doctrine at the time. And it was not a failure, but a success, even if the enlargement of human rights protection has been partially stopped by the more exclusive experience of the European Community and the cruel survival of many civil wars and conflicts around the continental European territory.

II. JURISDICTIONS AND FUNDAMENTAL HUMAN RIGHTS AGAINST THE WALL: TRANSLATING THE DIFFERENCE

One of the finest technical *inventions* of the ECHR was absolutely the prevision of proper jurisdiction. It is probably still not a perfect setting of last resort appeal and the causes of that are quite evident; for sure, there is an objective intricacy in the techniques of exhaustively compiling complaints from the internal legal order point of view, but it is hard to deny that signatory Countries are not always doing their best to carry out the rules of the Convention[12]. Citizens themselves are often floored in relating to the stratified tendency of the jurisprudence and the system of the ECHR seems hanging between more coercive forms of international inter-State regulations (including the EU, more institutionally developed and probably sometimes perceived as a pedantic and small-minded structure) and the universal but vague wire fence of non-governmental organizations and *soft law* programmatic charters[13], deprived of efficacy and effectiveness. It did not forbid the affirmation or, at least, the slow but solid configuration of many crucial turning points in leading cases debated by the Strasbourg Court.

A very first arrangement form of how to intend the nature of this human rights jurisdiction was fixed in an already remote judicial controversy (*Handyside vs. United Kingdom*)[14]: it was a complex situation concerning the relationships between family law and the religious and cultural education given to the kids in their childhood. On the side of the main instances, however, the Court clarified that her intervention was subsidiary, not able to establish new rules substituting State legislations or their different judiciary levels. It was a clear functional argumentation just in order to articulate the modalities of the legal proposition to the Court herself, without determining but avoiding the currency of conflicts

[12] Kiestra L. R., *The Impact of the European Convention on Human Rights on Private International Law*, ASSER Press, the Hague, 2014, 248-271.

[13] van Aaken A., Motoc I., Vasel J. J., *Introduction: the European Convention on Human Rights and General International Law*, in A. van Aaken, I. Motoc, edds., *The European Convention on Human Rights and General International Law*, Oxford University Press, Oxford-New York, 2018, 8-11.

[14] *Handyside vs. United Kingdom*, 7th December 1976. Considering the relationships between the international jurisdictions in the European public sphere, not only related to the membership of EU, Macrì G., *L'Europa fra le Corti. Diritti fondamentali e questione islamica*, Rubbettino, Soveria Mannelli, 2017.

between the international conventional jurisdiction and the internal ones. And this cornerstone is still unbeaten: the Court does not admit a common and undistinguished way to relate to her for the purposes of an immediate and direct decision[15].

This cautious orientation was kept in mind in many subsequent cases conceiving the role of the Court in a pared-down profile to cut flagrant violations and to leave a blank space of characteristic fulfilment in internal national orders: an even-tempered solution useful to follow up the orientations of European States contracting parties and legislators. The claims of social and religious minorities stressing the system of the Convention are fittingly limited, but the fluctuating implementational legislative national instruments are widely left untouched.

The theme of education was usually considered in a secular point of view, trying to safeguard a certain level of cultural pluralism and uniform discipline. In *Osmanoğlu and Kocabaş vs. Switzerland*, the request of declaring a scholastic swimming program as a violation of the religious freedom of parents and their educational obligations, due to the presence of both male and female disciples in an almost uncovered sport uniform, was easily warded off[16]. And that kind of request, justified by an alleged Islamic recommendation to avoid the ostentation of female young bodies, seemed too extreme even because this was not the case of proper nudity, but simple equipment of bathing suits for swimming. The educational role of inter-sexual attendance and participation has in addition specific and peaceful formative effects. The State should tolerate and even promote cultural differences if this normative promotional framework does not worsen an unbiased level of protection in fundamental human rights: a stronghold even heavier than the recognized subsidiary level of the Court. Three recent decisions, anyway, openly limit the national demand of speciously controlling religious minorities.

In *Metodiev and Others vs. Bulgary*, the European Court of Human Rights was steadfast and resolute to blame the Bulgarian system of public registration for religious associations[17]. The requested compliances actually appeared too much oppressive, including a sort of general commitment of producing analytically faith beliefs and detailed liturgical procedures: it is obviously an unessential encumbrance for a religious statute.

In *Stavropoulos and Others vs. Greece*, the situation was almost perfectly symmetrical, not concerning an invasive public obligation for religious associative phenomena (apart from their formal legal denominations), but an administrative State praxis noticeably indulging in a favourite position for the national recognized predominant religious belonging (the Orthodox Church, in that case)[18]. The Court declared illegitimate the annotation of the omitted

[15] A long lecture about the problem of effectiveness in international jurisdictions and concerning the inconveniences of a direct judicial claim against States in Nicholson R., *Statehood and the State-Like International Law*, Oxford University Press, Oxford-New York, 2019, 92-122.

[16] *Osmanoğlu and Kocabaş vs. Switzerland*, 10th January 2017.

[17] *Metodiev and Others vs. Bulgary*, 15th June 2017.

[18] *Stavropoulos and Others vs. Greece*, 25th June 2020.

christening in civil birth certificates not surprisingly commenting that the lack of baptism is irrelevant to exercise political liberties related to citizenship.
The Strasbourg Court sometimes indirectly but keenly evaluates also the internal religious rules, but that kind of intervention is not an attempt to establish a legal tedious interference against the everyday life and the customary rules of religious groups. This side of her jurisdictional activity is more correctly linked to the idea of not permitting that inside and beyond the constitutional coverage of the religious freedom exercised in an associate form a systematic violation of individual rights could rise substantially uncensored.
In *Tothpal and Szabo vs. Romany* the jurisdictional syndicate was directed to a disciplinary corrective measure against members of an Evangelical schismatic religious movement and it will be probably considered a leading case, if regarded looking at the conspicuous fragmentation in Protestant and Lutheran churches nowadays in Europe: a branch of patrimonial, succession law and statutory controversies. In it, the strongest influence is in a certain way physiologically practised by the prevailing groups against the low profile schismatic ones[19].
It is not formally recognizable, but the substantial challenge into the decision activity of the Court is to analyze the difference and, above all, the swerve between the cultural-religious internal rules and the conventional interpretation of fundamental rights: the religious rule is protected, too, at least in her possibility to be kept safe from a public act of control, suppression and intrusiveness. This huge type of freedom is not an open way to make the religious norm or tradition stronger than the legislative discipline of limits and incentives, otherwise, it could create an enclave hostile to mutual safeguard and social evenness.
The real dilemma is rather to gather how to *translate* the assumed recognition of difference in order to maximize the standards of juridical protection. A prototype of this unsolvable difficulty is the case *Lautsi vs. Italy*: the court of the first instance condemned Italy for the public exposition in schools of the crucifix – and this verdict was maybe too rude to configure adequately a violation of Article 9 of the European Convention. Surprisingly reforming or overturning her own decision, the Court in the *Grande Chambre* composition established the softened religious nature of the crucifix, already representing a sort of *passive* cultural symbol due to a peculiar national tradition and not to a theological specific and assertive background[20].

[19] The legal and jurisdictional effects of this long-time apparently only religious debate were correctly and in a timely manner dated and underlined in Bigler R. M., *The Politics of German Protestantism*, University of California Press, Berkeley-Los Angeles, 1972, 128-129.
[20] Woodhouse B. B., *Religion and Children's Rights*, in J. Jr. Witte, C. M. Green, edds., *Religion and Human Rights. An Introduction*, Oxford University Press, Oxford-New York, 2012, 299-311. The plausible dualism of these interpretations was predicted commenting a case study of the Italian internal law in Chizzoniti A. G., *Identità culturale e religiosa degli Italiani ed esposizione del Crocifisso nelle aule scolastiche. La Corte costituzionale si interroga, ma non si espone*, in *Osservatorio delle Libertà ed Istituzioni Religiose* (http://www.olir.it), 2005.

III. AN OPEN-ENDED PLOT: FAR AND NOT TOO FAR

It has been noticed that a current social progressive secular approach should include previously unpredicted attention to religious minorities trying to maintain the sense of pity, compassion, solidarity and humility in a post-modern conception of human relationships, even the ones legally relevant[21]. And we have noted that a religious basement is still strong in the living experience of constitutionalism both secularizing theological dogmas and invoking emphatic and sympathetic forms of idealities, values and principles[22]. This process has its own risks in substantive and procedural hermeneutic aspects. In the first sense, it is difficult and not rarely arbitrary to decide useful guidelines to separate the theology and the law, politics and religions, unmemorable habits and concrete religious precepts. On the other hand, even the most secularized Western societies are experiencing a new wave of religious fundamentalism completely untrustworthy by a precise theological point of view, but broadly aggressive in purporting to be also politically relevant and victorious in pretending the avocation of the collective governance[23].

Phenomena like those are well-known in Eastern Europe, especially after the institutional collapse of the Soviet Union: it has implied not only constitutional paradigm shifts in surpassing the socialist heritage, but more unpredictably it has opened a period of strong renewal for ethnic, political and religious identities[24]. After decades of an imposed underground resistance, it raised as one of the most characteristic features in legal and cultural public debate. Where is the turning point between a serious and democratic expansion of the religious phenomenon in a social liberal rule of law and a rowdy disdain against an alternative, subordinate o insubordinate minority cultures?

Many scholars from different personal and intellectual backgrounds are trying hard to combine the universal construction of an international figurative space for human rights, variously counterbalanced by other international and regional associations of States and their legal, commercial, multilateral agreements or informal dominant praxes, and a perceivable but loyal and sincere come back to the inner sensibility of the religious values.

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[21] Consorti P., *The Meaning of "Religion" in Multicultural Societies Law. An Introduction*, in *Stato, Chiese e pluralismo confessionale*, 39, 2017, 1-7.

[22] Looking for a deepened reconstruction of this issue in a post-colonial legal system, Tew Y., *Constitutional Statecraft in Asian Courts*, Oxford University Press, Oxford-New York, 2020, 158-159. Adopting the same methodology, while analyzing the Middle-East in the field of the family law, Lemons K., *Divorcing Traditions. Islamic Marriage Law and the Making of Indian Secularism*, Cornell University Press, Ithaca-London, 2019, 192-194.

[23] Peculiar and paradigmatic national cases in Richard D. A. J., *Fundamentalism in American Religion and Law. Obama's Challenge to Patriarchy's Threat to Democracy*, Cambridge University Press, Cambridge-New York, 2010, 214-215; Ventura M., *Creduli e credenti. Il declino di Stato e Chiesa come questione di fede*, Einaudi, Torino, 2014, 20-21.

[24] An interesting and exhaustive overview in T. Kollner, ed., *Orthodox Religion and Politics in Contemporary Eastern Europe: on Multiple Secularisms and Entanglements*, Routledge, London-New York, 2019.

One of the finest efforts on that point could be considered the work of Asifa Bano Quaraishi, a legal scholar who is facing the opportunity of an Islamic Constitutionalism by enforcing the role of the textual interpretation and the separation between different kinds of jurisdictions and generally public authorities[25]. In the Far East, the same vitality and fruitfulness are shown by Nadirsyah Hosen, an author who is studying the enormous increase of Muslim political parties somehow changing and revolutionizing local religious demography and the traditional regulations of cults, statutes and citizenships[26].
A well-oriented view of what is laboriously and painfully changing even very far from the geographical borders of the contracting parts in the European Convention does not mean to make a contemplative and even worse *exotic* collection of comparative law studies and issues. It should be on the contrary the unique opportunity to understand how a branched out construction, as the ECHR and her jurisdictional dynamics certainly are, could represent an archetypical way to expand the protection of fundamental human rights equalizing and not homologating.
If the main problems of the ECHR system certainly are the absolute scarcity of executive instruments in enforcing the judgments conveyed by the Court and the windy path to establish a complete autonomy of the plea to the ECHR jurisdictional system, these porosities and discontinuities have affirmed a leading style of argumentation and defence for fundamental civil, social and political liberties.
More or less seventy years after the signing of the Convention and the first wave of ratifications, the horizon of the massive basic implementation of rights is still far because too many inequalities and technical uncertainties have made it distant. However, the enhancements due to a constant task could maybe waver, but their arrhythmic oscillation is anyway among us. To be studied, corrected and hopefully changed in something better and strengthening.

[25] A recognized, brief but highly critical, accurate and almost acclaimed, masterpiece of her works probably is Quaraishi A., *Her Honor: an Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective*, in *Michigan Journal of International Law*, XVIII, 2, 1987, 287-320; an even more cutting critique in Quraishi-Landes A., *Legislating Morality and Other Illusions about Islamic Government*, in S. ZM Siddiqui, ed., *Locating the Shari'a. Legal Fluidity in Theory, History and Practice*, Brill, Leiden-Boston, 2019, 176-203.
[26] There was an influential foresight panning shot in Hosen N., *Shari'a & Constitutional Reform in Indonesia*, Institute of Southeast Asian Studies, Pasir Panjang, 2007; a more interdisciplinary approach in N. Hosen, H. Esmaeili, A. Black, edds., *Modern Perspectives on Islamic Law*, Edward Elgar, Cheltenham-Northampton, 2013.