

**Silvio Ferrari**

**State and religion in Europe: the decline of old models.**

1. *The passage from religious to cultural and ethical pluralism.* Europe is in the middle of a process of transformation which can be defined as the passage from religious pluralism to cultural and ethical pluralism, often characterized by a strong religious foundation. Due to this transformation, the traditional systems of relations between States and religions do not work smoothly any more and, after a period of relative stability, they have entered a phase of transition. The direction of this change is sufficiently clear but it is hard to pinpoint its point of arrival with similar precision.

Religious pluralism is a well-known fact in Europe. For centuries Europe had been split up into Catholic, Protestant, and Orthodox communities, with dividing lines which frequently crossed the same town or the same region. But this pluralism was contained within a shared horizon, defined by the reference to the same sacred books (Old and New Testament) and the same interpretative corpus (Patristic). Of course, Jewish and Muslim communities have been living in Europe for a long time: but the Jews were faced quite early on with the alternative between assimilation or persecution (and they chose the first, without avoiding the second), and the Muslims were confined to a peripheral region of Europe after the Catholic “reconquista” of Spain in the fifteenth century. As a consequence, religious pluralism in Europe has predominantly been intra-Christian pluralism and the religious conflicts which divided Europe after the Great Schism and above all the Protestant Reformation did not create insuperable cultural divisions. It is true that the relations between man and woman, citizen and State, State and religion were and partly still are conceived in a different way in the Catholic, Orthodox, and Protestant countries, but this difference did not become so huge as to generate incompatibility and to prevent mutual understanding. The unification process of Europe, with all its shortcomings, is the proof that a shared notion of citizenship exists.

This common horizon has become progressively weaker. Two factors – the first internal and the second external to Europe - have played an important role in this weakening process and have paved the way to the birth of a culturally and ethically pluralistic society.

The first factor is immigration, which brought into Europe an increasing number of people who do not know and do not share some central features of the European cultural heritage<sup>1</sup>. The way political or family relations are conceived or, at a more day-to-day level, the way people dress or what they eat mark a difference between a part of these immigrant groups and the majority of Europeans. It is not only a difference of religion, but something larger which concerns lifestyles, beliefs, values, behaviour: in a nutshell, a cultural difference.

Second, there is individualism, which questions assumptions that used to be taken for granted<sup>2</sup>. Secularisation had already weakened the control historical Churches exercised on the central passages of human life, birth, marriage, death, and so on: now the way these experiences are conceived and lived is in the process of changing. The range of possibilities has become far larger and the individual is in a position to make choices which were unconceivable only a few years ago. Europe is moving towards the coexistence of different ways of procreating, marrying and dying which correspond to the different ethical views of individuals and which enjoy the same legal legitimacy. The debate on bioethics all over Europe and the recent reform of family law in a number of European countries show that the historic Churches have largely lost their capacity to lead the public debate on central ethical issues and to influence the corresponding political decisions (although there are exceptions, and I am thinking of Italy, which should not be overlooked).

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<sup>1</sup> See the researches conducted under the umbrella of IMISCOE (*International Migration, Integration and Social Cohesion*), a research program that collects 450 scholars coming from 23 European research institutions.

<sup>2</sup> “The changing nature of churchgoing in modern Europe” è underlined by Grace Davie, who highlights the passage “from a culture of obligation or duty to a culture of consumption or choice. What until somewhat recently was simply imposed (with all the negative connotations of this word), or inherited (a rather more positive spin), becomes instead a matter of personal choice” (*Is Europe an exceptional case?*, in *State and Religion in Europe*, Istanbul, Center for Islamic Studies, 2006, p. 26).

What I have said confirms that today we are faced with something more than simple religious pluralism: we have to deal with a veritable cultural and ethical pluralism. But to understand this new challenge properly, we need to take into consideration its most interesting feature. This cultural and ethical pluralism is by no means a result of the dissolution of the religious dimension in contemporary society: on the contrary, it is frequently characterized by a strong religious connotation or, at least, takes place in a context still dominated by the “*revanche de Dieu*”<sup>3</sup>. On the one hand, the decline of the historical Churches’ power to speak on behalf of the whole European society has been balanced by the development, within these same Churches, of new groups and movements, like the Pentecostals and the “Born Again Christians” in the Protestant field and movements like “Communion and Liberation” and the Opus Dei in the Catholic one. They all are motivated by the aim to manifest their strong religious identity in all fields of human life and, consequently, they want to affirm the religious foundation of ethical, cultural and political choices. On the other hand, the distinction between religion, ethics, culture and politics which had been accepted – willingly or unwillingly - by most Christian Churches is not part and parcel of the heritage of many religious communities which have arrived in Europe in the last forty years, starting with Islam and some of the new religious movements. Consequently, cultural and ethical choices are frequently justified through a direct reference to religion. The affair of the Islamic headscarf is a good example: what had been regarded, until a few years ago, as an ethnic custom is now perceived primarily as a religious expression. But there are equally clear examples in the Catholic field: in Italy the distinction between religion and politics is much weaker now than when the Christian Democrat party ruled the country. At that time providing Italian political life with a Christian orientation was the task of those laymen who were engaged in politics; after the end of the Christian Democrat Party, the same task has been taken up by the bishops, who did not hesitate to give very precise and stringent political indications regarding the referendum on artificial fertilisation and registered partnerships.

The final outcome of this mix between religion, culture, ethics and politics has been that negotiation and compromise are much more difficult today than in the past: when ethical and cultural choices are directly connected to the will of God, they tend to become non-negotiable.

2. *The legal impact of the passage.* What are the legal consequences of this transformation of the European religious landscape? What is its impact on the systems of relations between States and religions? Today the traditional legal mechanisms which regulated the different areas where human activity takes place do not seem to work properly: confronted with a pluralism which is at the same time cultural, ethical and religious such mechanisms have difficulty in granting the freedom of social communities without falling into the anarchy of particularisms. This difficulty can be explained by thinking how these mechanisms were born. They started taking shape as a way of putting an end to the wars of religion of the sixteenth and seventeenth centuries. The central question was then how to make possible the coexistence in the same country of subjects with a different religious faith: it was religious, not cultural and ethical pluralism and the problems it raised could be solved through the neutralization of the impact of religion on public life. Although the (never complete) secularization of the public institutions did take place only beginning in the nineteenth century, the theoretical solution had been found much earlier with Grotius’ “*etsi Deus non daretur*”. This approach shifted the centre of gravity of religion from the public to the private life and at the same time moved the centre of gravity of law from divine law to natural law based on reason. In other words, in order to make peaceful coexistence possible between Catholics, Protestants, Anglicans and so on, politics, the law, the economy and the other areas of public life had to be secularized, placing them under the exclusive control of reason and freeing them from the control of religion. But this solution, which granted the religious peace of Europe for a long time, cannot be easily applied today: first, because the connections between religion, ethics and culture make the repetition of the process of secularization much more difficult; and second, because the assumption that religion is a private matter which should not influence public choices is exactly what is being questioned now. It is necessary to find legal mechanisms which take into account the new public role of religions. But how is it possible to do so without falling into “*communautarisme*” which erodes the hard core of shared principles and values and risks endangering social cohesion?

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<sup>3</sup> It is the title of a book by Gilles Kepel (*La revanche de Dieu. Chrétiens, juifs et musulmans à la reconquête du monde*, Paris, Seuil, 1991). See also José Casanova, *Public Religions in the Modern World*, Chicago, Univ. of Chicago Press, 1994.

The answer to this question has varied from State to State, according to their different history and tradition. But these answers have some common features. First, the legal discipline of Church-State relations is in constant flux all over Europe. There are many examples of these changes: in Portugal a law on religious liberty was enacted in 2001 and a new concordat with the Catholic Church was concluded in 2004; in Spain the financing of religious communities and the teaching religion in public schools were reformed in the last three years. In France three official reports were published at short intervals and prompted a number of legal reforms, some of which are still in progress; the Debray report on teaching religion in schools (2002), the Stasi report on laïcité in the Republic (2003) and the Machelon report on the relations of religious communities with the State (2006). In Italy new agreements with minority religions were signed (2007) and in Romania a new law on religious liberty was approved (2007)<sup>4</sup>. Outside the European Union things are no different: in many public schools of Russia, the old homeland of State atheism, classes of Orthodox culture were started in the last years<sup>5</sup> and in Norway the decision has been taken to abandon the old system of the State Church (2006)<sup>6</sup>. These changes are too many and too close in time to be explained as simple coincidences: one has the impression that the socio-religious transformations of Europe have at last been noticed by the national legal systems, which have entered a process of adaptation of their content to the new situation.

Second, a certain convergence of the Church-State systems of the European Union countries is visible. This is not the consequence of any direct intervention by the EU, which has no competence in this field, but it is due to the growing EU presence in other areas, which have indirectly influenced the national legislations concerning religious communities<sup>7</sup>. An analogous role has been played by the European Court of human rights both within and outside the EU borders: some anomalies of national legal systems, such as the need to obtain the authorization of the Greek Orthodox Church to build a place of worship in Greece, have been removed through the decisions of the Strasbourg court<sup>8</sup>. Finally, the constitutions of the post-Communist countries, which since 1989 have had to build their systems of State-Church relations *ex novo*, at the beginning were influenced by the United States and the international organisations (OSCE, Council of Europe Council, etc.) that played a significant role in their preparation; but after a few years this influence decreased and the most recent laws – particularly those on religious freedom and associations- are closer to traditional European models<sup>9</sup>.

But, without further stressing what these legal reforms have in common, the real question concerns the direction they are going to take. Do they follow a definite course and is it possible to identify it?

3. *The transformation of the Church-State systems in Europe.* Although this classification is outdated and does not answer the needs of contemporary societies, we can start with the distinction between countries in which Church and State are separated, countries where concordats and agreements with religious communities have been concluded and countries which adopted the system of Church of State. The first fact to emerge from a legal analysis of these models is the decline of the latter. On the one hand, all the post-Communist countries – even those with a strong Lutheran tradition- avoided endorsing the Church of State system in their new constitutions and some of them went so far to exclude this option also for the future. On the other hand, Sweden gave up its Church of State, Norway is in the process of doing so, Iceland passed a law that strengthens the independence of its National Church and Finland modified the system of State Church in its central component, transferring the power

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<sup>4</sup> See Gerhard Robbers (ed.), *State and Church in the European Union*, Baden-Baden, Nomos, 2005. See also the contributions published by the *European Journal for Church and State Research*.

<sup>5</sup> On the reform of the State-Church systems in the post-Communist European countries see Silvio Ferrari, W.Cole Durham, Jr., Elizabeth A. Sewell (eds.), *Law and Religion in Post-Communist Europe*, Leuven, Peeters, 2003.

<sup>6</sup> See Ingvill Thorson Plesner, *State and Religion in Norway in Times of Change*, in *European Journal for Church and State Research*, 2002, pp. 263-270.

<sup>7</sup> The same happened in other legal fields. For example, the European Union has no competence in family law: nevertheless the national legal systems of the EU member States became closer.

<sup>8</sup> See Charalambos Papastathis, *Changes in Greek Law on Worship Places*, in *European Consortium for Church and State Newsletter*, July 2007, p. 6.

<sup>9</sup> See Silvio Ferrari, *Church and State in Post-Communist Europe*, in Silvio Ferrari, W.Cole Durham, Jr., Elizabeth A. Sewell (eds.), *Law and Religion* cit., pp. 411-27.

to appoint bishops from the head of the State to the faithful of the Lutheran Church<sup>10</sup>. Extending the analysis from North to South-East Europe, this conclusion is confirmed. The legal systems based on a constitutionally dominant religion, which represents the Orthodox *pendant* of the Protestant Church of State<sup>11</sup>, show a parallel decline: the example of Greece, whose constitution defines the Greek-Orthodox religion as the dominant religion of the country, has not been imitated by any of the post-Communist countries where the Orthodox religion is the majority religion<sup>12</sup>. The English system of established Church fares a little better, because the Church of England quickly understood the need to accept religious pluralism and chose to exercise its prerogatives and political power in favour of all religions existing in the country: the Anglican bishops who are by law members of the House of Lords frequently act as representatives of the different religious communities and not only of the Church of England<sup>13</sup>. But it is still open to question whether, in the long run, this strategy will succeed in balancing the demands for “disestablishment” which are regularly voiced by important sectors of English public opinion. Why are the systems with a Church of State, a dominant or an established Church declining? The most convincing answer is that they do not fit a religiously fragmented society, particularly if religious membership is no longer a private choice only but also a public expression of identity. The State choice to have an official religion presupposes a religiously homogeneous country: when people are divided among different faiths, the State adoption of one of them becomes a weakness because it prevents a part of the citizens from fully identifying with the public institutions. In conclusion, the process of transformation of the European religious landscape shows that the new religious, ethical and cultural pluralism has outdated the systems of Church-State relations which are characterised by the legal identification of the State with one religion.

The second result of this process concerns those countries which have a system of separation between the State and religious communities. Separation is a very common word in the constitutions of the European post-Communist countries, perhaps because of the influence of the United States on their preparation. But if these constitutions are considered more closely, it becomes clear that this separation excludes neither recognition nor support of religious communities by the State. It has little to do with the separation affirmed in the French law of 1905, which prevents the State from recognising or subsidising any religious community: on the contrary it is a friendly and cooperative separation, which does not rule out the conclusion of concordats and agreements between the State and religious communities and coexists with constitutional statements which oblige the former to cooperate with the latter<sup>14</sup>. An analogous process of transformation took place in the country which is the symbol of separation, France: today in France there is an Institute, the *Institut européen en sciences des religions*, which is financed by the State and has the mission to train State school teachers about the place and impact of religion in society; there is a Foundation, the *Fondation pour les œuvres de l’Islam en France*, a private law foundation supported by the State and enjoying the status of foundation of public utility, whose task is to promote the building of Muslim worship places; there is a Ministry, the Ministry of Interior, which played a fundamental role in the creation of the Muslim representative institution, the *Conseil Français du culte musulman*. These examples show that even in France separation has become much softer and no longer excludes State interventions in areas which, until a few years ago, were considered outside the boundaries of interest and competence of public institutions<sup>15</sup>. Once more, we need to ask why separation has acquired a different meaning and why even those States which had made it the banner of their religious policy have changed their attitude. This time the answer lies in the new significance acquired by religion and collective religious identities on the political stage. After the decline of the

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<sup>10</sup> On the reform of the State-Church relations in the countries of North Europe see the proceedings of the conference held in Höör (Sweden) in August 2006 in the context of the research program on the notion of “national Church” (*L’année canonique*, v. 48, 2007, forthcoming). See also Lisbet Christoffersen (ed.), *Law and Religion in the 21<sup>st</sup> Century. Nordic Perspectives* (forthcoming).

<sup>11</sup> About the idea of Church-State relations prevailing in the Orthodox countries see the articles published in *L’année canonique*, v. 43, 2001.

<sup>12</sup> In art. 13 of the Bulgarian Constitution, the Orthodox religion is defined as the “traditional” religion of the country (see Jenia Peteva, *Church and State in Bulgaria*, in Silvio Ferrari, W.Cole Durham, Jr., Elizabeth A. Sewell (eds.), *Law and Religion* cit., pp. 47-72; see also Daniela Kalkandjieva, *Traditional Religion vs. Secular Law in Post-Communist Bulgaria Society*, paper given at the Copenhagen conference on “Religion in the 21<sup>st</sup> Century”, 19-23 Sept. 2007), while the Romanian law 489/2006 on the “Freedom of Religion and the General Status of Denominations” recognizes “the important role of the Romanian Orthodox Church” (art. 7).

<sup>13</sup> See Grace Davie, *Is Europe an exceptional case?* cit., p. 30.

<sup>14</sup> For a few examples see Silvio Ferrari, *Church and State*, pp. 417-21.

<sup>15</sup> See Francis Messner, Pierre-Henri Prélôt, Jean-Marie Woehrling (dir.), *Traité de droit français des religions*, Paris, Litec, 2003.

great secular ideologies, religions seem to be the only forces still capable of speaking the language of collective identities, of offering their faithful an interpretation of reality and a sense of membership: all this gives them the power to mobilise significant groups of followers<sup>16</sup>. This power is too important to be ignored by governments which, on the one hand, fear that religion is exploited for creating political and social unrest and on the other hand are tempted to make use of religion to achieve their own goals of internal and foreign policy. All this cannot be attained without meddling with religion, establishing relationships with religious communities, and therefore without giving up strict separation.

Starting from these remarks it is possible to conclude that a process of convergence from the extremities towards the centre is taking shape in Europe. The extremities are constituted by the systems of Church of State on the one hand and of rigid separation on the other: but what is the centre, that is what is the direction this movement has taken? A closer examination of the Swedish case can be of help. In this country giving up the Church of State model did not imply the adoption of separation of State and Church but opened the way to a complex system, where the legal status of the Lutheran Church is defined by a special law and that of the other religious communities is dependent on their registration. This arrangement maintains a special position for the old Church of State and, at the same time, makes it possible to affirm the *laïcité* and impartiality of the State towards all religious communities, also at the symbolic and formal level<sup>17</sup>. Similar models have been adopted by most post-Communist States and, in Western Europe, by those countries which have recently reformed their system of Church-State relations (Austria<sup>18</sup> and Portugal<sup>19</sup>, for example): religious communities can register in different forms and, depending on the type of registration they are able to obtain, they receive different State support. This solution offers a public recognition to religious communities and gives the State some control over them and also the possibility of grading its support according to their importance<sup>20</sup>. Finally, the proliferation of concordats with the Catholic Church and of agreements with other religious communities should be underlined: they satisfy the request of these communities to have a legal status which reflects the particular identity of each of them<sup>21</sup>. In conclusion, the centre of gravity of the European system of Church-State relations seems to be shifting towards a group of national systems which are different but which share some common features: the acceptance of the public statute of religious communities, the recognition of their specific features, a certain degree of State control over them, the selective and graded cooperation of public institutions with religious communities.

This analysis of the European pattern of Church-State relations seems to confirm Jonathan Fox's conclusion: modernisation does not imply Church-State separation but a moderate involvement of States with religions<sup>22</sup>. This statement should be more precisely defined, as State involvement with religion is the consequence of the particular modernisation that is taking place today in Europe, characterised by pluralism and public role of religions. These are the two main engines of today's transformations, as confirmed by the examination of the most important fields of State-religion relations. For example, if the teaching of religion in State schools is taken into consideration<sup>23</sup>, there is a quite evident conclusion: everywhere in Europe – including Russia, the other post-Communist countries and France - States regard the teaching of religion as part of their educative task. The models are different and range from the denominational teaching of a specific religion to non-denominational information about different religions: the difference is not negligible but, in both cases, the old dogma which assigned to the family and the Church – and not to the school - the task of providing religious education seems to be outdated. Even a secular State cannot afford to ignore the importance of religion as an instrument for understanding today's world. On the other hand, in the countries where, until a few years ago, only one religion could be taught in State schools – Portugal, Spain, Italy, etc. - it is now possible to teach more religions, according to the demands of the students and

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<sup>16</sup> See Enzo Pace, *Perché le religioni scendono in guerra?*, Roma-Bari, Laterza, 2004, pp. IX-X.

<sup>17</sup> See Lars Friedner, *State and Church in Sweden*, in Gerhard Robbers (ed.), *State and Church in the European Union* cit., pp. 537-52.

<sup>18</sup> See Richard Potz, *State and Church in Austria*, ibidem, pp. 391-418.

<sup>19</sup> See Vitaliano Canas, *State and Church in Portugal*, ibidem, pp. 439-68.

<sup>20</sup> See Lars Friedner (ed.), *Churches and Other Religious Organisations as Legal Persons* Leuven, Peeters, 2007.

<sup>21</sup> The last one was signed on October 25, 2007, between the Holy See and Bosnia-Herzegovina. More in general see the contributions published in *Quaderni di diritto e politica ecclesiastica*, 1999/1.

<sup>22</sup> See *World Separation of Religion and State into the 21st Century*, in *Comparative Political Studies*, 2006, 39, 5, pp. 537-569.

<sup>23</sup> See Jean-Paul Willaime et Séverine Mathieu (dir.), *Des maîtres et des Dieux. Ecoles et religions en Europe*, Paris, Belin, 2005; Robert Jackson, Siebren Miedema, Wolfram Weisse, W. Jean Paul Willaime (eds.), *Religion and Education in Europe: Developments, Contexts and Debates*, Münster, Waxmann, 2007.

their parents. Pluralism has left its mark and has opened the school doors to religious minorities which had previously been excluded.

But this involvement too has to face the individualism and pluralism that characterize contemporary society and affect also the legal systems that have been including for a long time a certain degree of State involvement in religious matters. Teaching of religion in public schools is a good example of this influence. In those countries where, until a few years ago, only one religion could be taught (Portugal, Spain and Italy for example) it is now possible to teach a number of different religions according to the requests of the students and their parents. Moreover, these requests can change from year to year. Pluralism and individualism have left their mark and have opened the school doors to some religious minorities that in the past had been excluded. At the same time individual choices, which in the past were limited to the demand to be exempted from the teaching of religion, have now gained a central importance. This trend is confirmed by an exam of the systems that some European countries adopted to finance religious communities: they have enlarged the number of the religious communities that can enjoy State support and, at the same time, have structured this support in ways that give a central place to individual choices (the tax-payer has the right to indicate the religious community that should be supported and, as in the previous example, can change this choice every year).

A good injection of pluralism and individualism in the legal systems that are emerging as the new centre of gravity of the Church-State relations in Europe is desirable: it could contribute to frame the State “moderate involvement” in ways that are compatible with democracy. If this path is not followed, it is likely that the European model of Church-State relations declines and is replaced by other models, closer to the separation of the United States or the neo-confessionism of some Eastern European States.