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The Legal Dimension

In: Muslims in the Enlarged Europe – Religion and
Society. Muslim Minorities, V.2,
(Eds. Marechal, S. Allievi, F. Dassetto, J. Nielsen), Brill,
2003, 219-254

However, these conceptions and relations are less rigid than we normally imagine: they move, evolve, according to the tensions to which they are subjected, the impetus due to the social and political climate and the changes going through them. One of the privileged channels of this evolution is the jurisprudential dimension, namely the interpretation of the law in the face of a concrete case: this dimension is of special interest to us when the case in question is Islam. This aspect will be examined in the last chapter of this part of the report, with particular reference to those sensitive and crucial, from the juridical points of view, problems for both actors—Islam and the state—represented by personal status and family law. These issues include some of the most evident motives of conflict with Islam on which emphasis is placed, including by the mass media, and on which social debate is produced: polygamy, divorce and repudiation and connected rights, and other issues related to the status of women and the family law.

CHAPTER SIX

THE LEGAL DIMENSION

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1. INTRODUCTION

Islam is a religion which has yet to find a stable place in state-religion relations in Western Europe. In this chapter of the report, we intend (a) to examine if, under the great variety of national systems, there are shared elements of such an importance as to justify the statement that there exists a common model of state-religion relations in the European Union (sections 2–5); (b) to survey and describe the problems which, in the field of state-religion relations, have been posed by the settlement in Europe of numerous and consistent Muslim communities, including an evaluation of the answers that have been and are being given to these problems in some countries of the European Union (section 6); (c) to formulate some observations on the scenarios that are appearing in relation to the insertion of Islam in the model of the relations between state and religions characteristic of Western Europe and, in a now not too distant perspective, of the whole of Europe (section 7).

2. THE TRADITIONAL CLASSIFICATION OF THE SYSTEMS OF STATE-CHURCH RELATIONS

The traditional approach to the subject of the relations between states and religious faiths starts off from the identification of three distinct models: a) systems based on the conclusion of concordats and agreements between states and religious faiths; b) systems characterised by a state church or a national church; c) systems where there is a separation between states and religious faiths.¹

¹ For a synthetic introduction to the system of relations between state and religious faiths in force in the countries mentioned in this paragraph, cf. European

Countries with a concordat

Portugal, Spain and Italy are the three 'concordat' countries, defined thus due to their relations with the Catholic church (which is the majority church) which are regulated by a concordat. This definition, exact in the past, today requires correction as both Italy and Spain (and, in the future Portugal as well, if the new law on religious freedom is put into effect)² have made agreements with other religious faiths alongside the concordats with the Catholic church.³ The degree of autonomy enjoyed by the religious *faiths* in the state legal system and the extent of collaboration the state grants them depends on the stipulation of these concordats; the faiths that have concluded an agreement or a concordat enjoy more than the others, as will be seen in greater detail in the fourth section of this chapter.

Germany is another state with a 'concordat' where however (unlike the three countries mentioned above) there exists a substantial equilibrium of forces between Catholics and Protestants: therefore at the top of the pyramid we find not one but two churches. The relations with religious faiths are often regulated by concordats and agreements stipulated with the *Länder* (new agreements have recently been concluded with some *Länder* which used to be part of East Germany)⁴ but the fundamental distinction, on the subject of relations between state and religious faiths, lies between the faiths that are considered corporations of public law and all the others. The former are given the right of collecting the ecclesiastical tax from their faithful; they also enjoy a particularly wide internal independence, also extended to the social institutions connected to them (consequently denomi-

Consortium for Church-State Research, 1994, 1995; Robbers, 1996. For the historical origins of this system see Basdevant Gaudemet & Messner, 1999.

² Cf. Law 22nd June 2001 no. 16 "Lei da Liberdade Religiosa", in *Diário da República*, n. 143, 22 June 2001, in particular, articles 45-51.

³ In Italy the churches represented by the Tavola Valdese (Valdiansians), the Christian churches of the Seventh Day Adventists, the Assemblies of God in Italy, the Union of Italian Jewish Communities, the Christian Evangelical Baptist Union of Italy, the Lutheran Evangelist church in Italy, the Italian Buddhist Union and the Christian Congregation of Witnesses of Jehovah in Italy (the last two agreements have not yet been approved by Parliament); negotiations are under way for the stipulation of an agreement with the church of Jesus Christ of Latter-Day Saints, with the Orthodox Archdiocese of Italy and other religious groups. In Spain, agreements have been reached with the *Federación de Entidades Religiosas Evangélicas de España*, the *Federación de Comunidades Israelitas de España* and the *Comisión Islámica de España*.

⁴ On these agreements cf. A. Hollerbach, 1999.

national schools or hospitals can have an organisation other than that imposed by state law on the corresponding lay institutions).

Within the European Union, concordats are also in force in Austria and, in France, in the dioceses of Metz and Strasbourg, where the concordat stipulated between Pius VII and the French Republic in 1801 is still in force.

Looking beyond the borders of the European Union, concordats with the Catholic church (and sometimes agreements with other religious faiths) are in force in Estonia, Lithuania, Latvia, Poland, Hungary, Slovakia, Croatia, Yugoslavia, the Principality of Monaco, the Republic of San Marino, Malta, and in some Swiss cantons.⁵ These are obviously agreements of different natures and scope but their number and growth in recent years lead us to believe that this model of relations between states and religious faiths is not only firmly established but also in a phase of expansion.

Of all the 'concordat' countries, Spain is the only one that has concluded an agreement of a general nature with the Muslim communities.

Countries with a state church

The countries of the European Union that feature the system of a state church or national church (Finland, Denmark and, with some peculiarities, England) are all concentrated in northern Europe. The constitutions⁶ of these countries recognise a specific church as the state church: on the one hand this implies a particularly penetrating control by the state over this church (in England for example, the head of state is also the head of the church and appoints its bishops), on the other it ensures the state church is in a position of privilege regarding public funds, religious education, religious assistance in public institutions and in other sectors of the legal system.⁶ It has been asked why these particularly close bonds between the

⁵ On these agreements cf. the contributions collected in the section of the *Quaderni di diritto e politica ecclesiastica* 1999/1 on "I concordati di Papa Wojtyła". For the relative texts cf. Martin de Agar, 2000.

⁶ This last statement is only partially apt for the church of England, the privileges of which are more formal than substantial. It should be recalled that the Church of England is not, strictly speaking, a state church but a church "established by law" and that the United Kingdom does not have a written constitution (but there exist measures with a constitutional value: cf. Lyall-David McClean, 1995).

state and the church have survived precisely in that part of Europe which is most exposed to the process of secularisation. The sociologists who have studied this phenomenon reply that the secularisation of society has reduced the push towards the secularisation of the institutions which is, on the other hand, a characteristic of other countries [Bauberot, 1995]: as the independence of the state and of politics is no longer put at stake by the church and religion, the system of the state church has been able to survive, even if the advantages connected with this qualification have progressively been reduced.

The difficulty of reconciling the privileges enjoyed by the state church with the principles of religious freedom and equality could well lead to significant changes in the near future. The Church of Sweden ceased to be the church of state in 2000, following a general reform of the system of the relations between the state and religions in force in that country;⁷ the Church of Norway is on the way to follow the same path;⁸ in England, the Prince of Wales has shown intentions that could lead to some form of disestablishment on the model of what has taken place in Wales and in Northern Ireland. More generally, it appears significant that none of the countries soon to enter the European Union (Estonia, Poland, Hungary, Czech Republic, Slovenia, Bulgaria, Cyprus) have a system of a state church, which on the contrary is explicitly excluded in the constitution of Estonia (art. 40); a similar clause also appears in the constitution of Lithuania (art. 43).

Greece, where the Orthodox religion is constitutionally defined as the dominant religion (art. 3), is often grouped amongst the countries with a state church. From a strictly legal point of view, this association is not without justification: the state exercises considerable control over ecclesiastical life (even if not to the extent of the countries in northern Europe) and the Orthodox church enjoys a position of privilege comparable to that of a church of state. But these points of contact must not let us forget that Greece has social, cultural, economic and religious characteristics that greatly distinguish it from the countries of northern Europe: the Greek model is

actually the typical model of Orthodox countries, where the church conceives of itself as a national institution and religion is understood as the synthesis of the whole history and culture of a people.⁹ It is possible that precisely Greece will become the point of reference for many countries of central and eastern Europe which, in the next few years, will have to construct a system of state-church relations that is compatible with the rules of the European Convention on Human Rights and, at the same time, respects the Orthodox tradition which distinguishes them: for this reason the debates and conflicts which have arisen around the prohibition of religious proselytism in the Greek Constitution (the object of repeated sentences of condemnation by the European Court of Human Rights),¹⁰ the elimination of the indication of religious affiliation from identity cards (established by the Greek government but firmly opposed by the Orthodox church)¹¹ and, more in general, the recognition of Orthodoxy as the dominant religion (contained in the Greek Constitution but absent from that of other countries with an Orthodox majority, such as Cyprus or Romania) must be carefully followed.

It is superfluous to note that in none of these countries is Islam qualified as a state religion, national religion or dominant religion.

Separatist countries

The other countries in the European Union are, technically speaking, separatist countries: France, the Netherlands, Belgium and Ireland have not stipulated agreements with the religious faiths nor have they recognised churches of state. But, from a strictly legal point of view, the 'separatist countries' category is a residual category, without an identity of its own: if it is true that the separatist countries are distinguished by the fact of regulating the legal position of religious faiths through unilateral state regulations, it is equally true that this feature is also present in those countries that recognise a state church. More in general, the separation of church and state has

⁹ On this model cf. Perentitis, 1994.

¹⁰ Cf. Anastase N. Marinou, 1994. More in general on the question of proselytism see Stahnke, 1999. On the sentences of the Court of Strasbourg which have condemned Greece in relation to the prohibition of proselytism cf. Evans, 1997.

¹¹ On this issue, see the news contained in *Il Regno-attualità*, 14/2000, p. 450 and 16/2000, p. 558.

⁷ On this reform cf. the contributions by R. Schöft, R. Persenius & L. Friedner in nos. 2-6 (1995-1999) of the *European Journal for Church and State Research*.

⁸ Cf. "Norvegia: Chiesa-Stato. Un nuovo ordinamento", in *Il Regno-attualità*, 15 aprile 2002, p. 234.

become a very wide notion which lends itself to extremely diversified applications: it is difficult to find many resemblances between the law of a country that opens its constitution with the invocation of the Holy Trinity, as is the case in Ireland, and that of a country (France) which has amongst its fundamental principles the secular status of the state. Similar differences can be easily found in all the sectors in which the discipline of relations between the state and religious faiths is articulated: the ministers of religion are paid with public funds in Belgium but not in the Netherlands; religion is taught in state schools in the Netherlands but not in France and so forth. In particular it is not possible to state that the separatist countries are more 'secular' than those with concordats or those with a state church: this statement could perhaps apply to France, but certainly not to Ireland and, on close examination, not even to Belgium.

Similar reservations on the usefulness of the notion of separation emerge in relation to the countries which, in a more or less near future, will join the European Union: the Hungarian (art. 60) and Croatian (art. 41) constitutions proclaim the separation of the state from the church but this has not prevented the Hungarian and Croatian states from stipulating agreements with the Catholic church; the same situation will be repeated in Slovenia if the talks currently under way reach a successful conclusion.¹²

The juridical discipline of Islam reflects the variety of forms and systems which is characteristic of these countries.

3. THE INSUFFICIENCY OF TRADITIONAL CLASSIFICATION

The reservations expressed regarding the utility of the category of 'separatist countries' lead to a more general question: is the traditional division into three of the European countries into concordat states, separatist states and states with a church of state still useful to analyse and explain the current evolution of relations between states and religions? The answer is negative: this triple division is culturally and legally obsolete.

From the first point of view, it appears subordinate to a concep-

tion of Western Europe divided, generally, into Protestant countries (with a church of state), Catholic countries (that is, with a concordat) and 'secular' countries (represented by separatist France). But it is not at all certain that these distinctions are still significant.¹³ After the levelling caused by decades of secularisation and after the Second Vatican Council, is the border between Catholic and Protestant countries still a real watershed? Or, as the French historian François-Georges Dreyfus has maintained [Dreyfus, 1993], is Europe a cultural entity corresponding to peoples who have as their credo the symbol of Nicea-Constantinople (which includes the *filioque* refused by the Orthodox)? If so, this Europe would bring together the Catholic and Protestant countries but would exclude the Orthodox ones (as well as the regions inhabited by Muslims). Or again, if we do not want to accept such an extreme interpretation (which would push Greece out of Europe), does the real line of demarcation not run today between secularised Europe and Europe where (old and new) religious traditions maintain a certain importance, at times fuelling identity tensions around which nationalist and xenophobic impulses coagulate? And is the debate on the 'jaicité' which has been underway in France for several years not a sign of the doubts and uncertainties that surround this notion in its own elective country?

From the more specifically legal point of view, the triple division into countries with a concordat/separatist countries/countries with a church of state attributes an excessive importance both to the source (bilateral or unilateral) of the law regulating the relations between the state and churches and to their formal qualification (presence/absence of a church of state). These elements had a certain significance in the second half of the 19th century, when the conclusion of a concordat or the emanation of a law of separation meant a clear choice of position and entailed a series of consequences in all sectors of the legal system. But this situation has been superseded for some time now. There is no concordat in Belgium but the juridical position of the Catholic church is not inferior to that of the same church in a country with a concordat such as Spain; and the Church of England, although the 'official' church of England, receives from the state much less than, for example, Protestant churches in Germany do. A classification based on the form assumed by state-church

¹² In Slovenia an agreement with the Evangelical church is already in force, signed on 25th January 2000.

¹³ Cf. in this sense Ferrari, 1996.

relations or on the tools adopted to regulate them appears unsuitable to reflect their real content and to constitute a reliable interpretative model.

Lastly, it is necessary to ask, after 1989, what the present borders of Western Europe are and if it does not already extend to some countries which were behind the 'iron curtain'. The examination of the constitutions, fundamental laws and decisions of the Constitutional Courts shows that in the countries of central and eastern Europe, relations between states and religions are being modelled along lines that are not dissimilar from those which have been prevalent in western Europe for the past few decades. It must not be taken for granted that this process is easy and painless: in countries with an Orthodox tradition, in particular, there prevails a conception of the state-church relations which in some points does not adapt well to the Western model. But the example of Greece, although with the elements of conflict that have been brought to the light, indicates that a reconciliation is possible.

4. THE EUROPEAN MODEL OF THE RELATIONS BETWEEN THE STATE AND RELIGIONS

Beyond the epistemological limits that have been highlighted in the previous section, the uncritical insistence on the distinction between countries with a concordat/separatist countries/countries with a church of state raises another problem. It prevents the principal question being asked: does a European, or at least Western European model, of state-church relations exist?

The affirmative answer to this question is based on the observation that there are some common principles underlying the various national systems. More precisely, the existence of a European model of relations between states and religions is based on three principles which, in different forms and with different force, recur in the juridical systems of each country.

The protection of the individual rights of religious freedom

Many of the countries in Western and Eastern Europe have signed art. 18 of the Pact on Civil and Political Rights or art. 9 of the

European Convention on Human Rights; in addition, the member states of the European Union have signed a Charter of Fundamental Rights that contains a ruling of a similar content (art. 10). The words of art. 18 of the Pact, of art. 9 of the Convention and of art. 10 of the Charter are not identical, so that it is not indifferent that one state has signed one document rather than another. But at the level of the definition of theoretical models, the differences between these rules are not decisive: all contain a central nucleus aimed at guaranteeing the respect of the freedom of thought, conscience and religion and the recognition of the right to manifest, individually or together with others, in public or in private, one's religion or conviction, with the sole limits laid down by the law and necessary to protect some fundamental values, such as public order, health and public morals, the rights of others and fundamental liberties.

Going on to the examination of constitutional rules, the picture does not change. All the constitutions of Western countries contain at least one provision that protects the freedom of religion according to ways and within limits which, explicitly or in the interpretation by the different Constitutional Courts, replicate those outlined by the articles mentioned. The same is now valid for the countries of Central and Eastern Europe, the constitutions of which present similar rulings. The constitutions of Romania (art. 29), Hungary (art. 60) and the Czech Republic (art. 15 and 16 of the Charter of fundamental rights and liberties, which is part of the constitutional system), to restrict ourselves to only a few examples amongst the many that could be given, contain provisions that match those of Italy or Germany.

Going one step further down, to the level of ordinary laws, differences begin to emerge that are not negligible in the way religious freedom is protected (or not protected) in the individual national systems. If in Greece the opening of a place of worship of a minority faith is subject to the authorisation of the Orthodox Metropolitan (decr. 1369/1938, art. 41, par. 1), in France it is an offence to celebrate a religious marriage that has not been preceded by the civil one: at this level, each country has its skeletons in the cupboard and it is difficult to establish which are the most cumbersome. But these differences do not seem to be composed according to a precise model, except under one point: the tendency of some states to introduce by legislation a distinction between religious faiths and 'sects', subjecting

the latter to an unfavourable juridical regime.¹⁴ This distinction, which presupposes a definition of religion which is very difficult to formulate in legally correct terms, has been accepted in Belgium, France and Germany and tends to inspire legislative policy in other countries, causing choices which do not always appear coherent with the protection of religious freedom.

Drawing a first conclusion from the observations that have been made in this section, it is possible to state that a unitary notion of religious freedom has taken form in Western Europe and is spreading to other parts of the Old Continent. It is probably possible to go further and extend this consideration to the whole of the West. The Constitution of the United States, through the 'free exercise clause' in the First Amendment, protects religious freedom in equally full terms and the interpretation that this clause is given by the Supreme Court is not very dissimilar from that which has inspired the European Constitutional Courts. This is proven by the fact that in some particularly significant sectors—conscientious objection to military service and health treatment, the consideration of the religious element in fostering and adopting minors—the solutions which have been reached on both sides of the Atlantic are not different. The notion of religious freedom that has been sought to be identified—born from the encounter of Christian roots and the secular roots that form the historical and cultural identity of Europe—is an acquisition that probably defines today the whole of the West, even if its specific applications record differences which are not negligible both between Europe and the USA and between the individual European countries.

Underlying this notion of religious freedom lies the idea of the pre-eminence of the individual conscience, namely the right of each person to take the decision on religion that he/she deems in compliance with his/her own conscience in absolute freedom, without this choice entailing any negative consequences on juridical grounds. This conception is the origin of at least two consequences that it is opportune to specify for the reflections that they have on the legal status of Islam and other religious groups in Europe. In the first place, in both Western and Eastern Europe, amongst Catholics, Protestants and the Orthodox, the apostate, the atheist and the wor-

¹⁴ Cf. in this regard the contributions collected in Champion & Cohen, 1999.

shipper of a minority religion is not subject, due to their religious or conscience choice, to any decrease of the civil and political rights due to all citizens.¹⁵ This implies that each individual not only has the right to adopt a religion, but also to leave it or change it: the person who leaves the religious group they belong to (even in the event of having belonged to it since birth) exercises a right that the state is obliged to guarantee for everyone, including the religious group that is abandoned.

In the second place, religious freedom must respect some fundamental values that art. 9 of the European Convention of Human Rights identifies in public order, health and public morals, in the rights and freedoms of others. The member of a religious community that violates these limits with his/her acts, writings or words, will be punished like any other individual and cannot invoke obedience to a precept of his/her religion as a cause for impunity. But these limitations of freedom only concern the manifestations of a religion and not belonging to a religion: no-one can be punished for the sole fact of belonging to a religious group.

The lack of competence of the state on religious matters and the independence of religious faiths

The idea that the state does not have the competence to intervene in religious matters also has its roots in Christian doctrine and, at the same time, in liberal thought. It corresponds to the conception—dating back to the theory of Gelasius of the two swords but *in nuce* already present in the Gospel text—that humanity is governed by two authorities, the religious and the secular, each of which has its own order and competence for regulating the relations within it.¹⁶ At the same time, this idea reflects the secular character of the contemporary state, already expressed by Talleyrand in a famous speech

¹⁵ This last statement is not fully valid in the countries—for example Denmark, Great Britain and Norway—where some authorities of the state have to profess a given religion: however these are measures which, whilst having a very great symbolic value, concern an extremely limited number of individuals.

¹⁶ Even if, according to the traditional Christian concept, the order of spiritual matters precedes that of temporal matters. Cf. in this regard the writings of Francesco Ruffini collected in *Relazioni tra Stato e Chiesa*, Bologna, il Mulino, 1974.

of 7th May 1791 with the affirmation that "religion is a private question over which the state cannot exercise its control".¹⁷

The lack of competence of the state on religious matters finds its most evident juridical acknowledgement in the recognition of independence and autonomy of the religious faiths: sometimes this recognition is included in the constitutions, as in Germany (art. 140), Italy (art. 8), Ireland (art. 44) and, amongst the countries soon to join the European Union, the Czech Republic (art. 16 of the Charter of fundamental rights and liberties), Bulgaria (art. 15) and Poland (art. 26); at times it is contained in the rulings of the Constitutional Courts, as in the case of Hungary (see decision 4/1993); it almost always recurs in the concordats and agreements stipulated between the states and some religious groups,¹⁸ as in the case of Spain, and, outside the borders of the European Union, Poland and Croatia. But even in countries where a similar recognition is absent—the northern European countries in particular, where there is a system of national church or church of state—the autonomy of the religious faiths is increasingly considered a consequence of the principle of collective religious freedom and, therefore, a limit before which the authority of the state must stop.

The most important difference that, from the point of view of the autonomy of religious faiths (or the lack of competence of the state on religion), can be found in European countries concerns the extension of this independence: in many countries it concerns the doctrinal profile, that is, the capacity of freely defining the system of belief, as well as the organisational profile, the power of having its own juridical system and self-government; in others, it only covers the former of these profiles. But even in countries of the second group (mainly those of northern Europe), the public authorities appear increasingly less inclined, even when they have the juridical possibility, to interfere in the internal organisation of the religious faiths: thus in England the ordination of women to the clergy is first approved by the General Synod of the church of England and then becomes

law by British parliament and in Sweden the reform of church-state relations evolves in parallel steps taken by the action of Parliament and that of the Synod of the Church of Sweden. It would certainly be a mistake to overlook the fact that in some countries of the European Union the bishops are appointed by the head of state and the ministers are considered civil servants. But in general, it is possible to state that not only doctrinal but also organisational independence of the religious faiths tends to be asserted increasingly widely: the history of the Church of England or of the Church of Norway¹⁹ throughout the twentieth century clearly shows the progress made in this direction even in countries that have kept closer links between state and church.

As will be seen shortly, the autonomy of religious faiths is graduated: some of them enjoy a more extensive and greater autonomy than others. But what it is important to underline now is that this principle of independence, while not exclusive to religious faiths, is not asserted to the same extent and intensity in relation to organisations of a secular nature. Evidence of this lies in the fact that the state's collaboration with secular organisations is often subordinate to the democratic structure of their internal system, whilst a similar requisite does not occur with reference to the organisations of a religious nature: or, the fact again that freedom of opinion is guaranteed by the state within many social formations but not religious communities, where the dissident has only the right of withdrawal. The contemporary secular state stops at the threshold of religious faiths and passes this limit only in cases of particular gravity (when an offence is committed within the community, for example): but in general the elaboration of the doctrinal heritage and (within the limits indicated above) the internal organisation of religious faiths is widely removed from the control of the public authorities. Confirmation has recently been given of this with the sentence of the European Court of Human Rights in the Hassan and Tchaouch case against Bulgaria, where it is stated that "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which art. 9 [of the European Convention on Human Rights] affords".²⁰

¹⁷ It is clear that, although converging in the affirmation of lack of state competence on religious matters, the liberal conception moves from presuppositions that are very different from the Christian conception. This is the origin of the instability of the synthesis between Christian and liberal values on which the current model of relations between states and religions is based in Europe.

¹⁸ Cf. supra par. 2.

¹⁹ Cf. in this regard Rhodes, 1991 in particular pp. 317 ff.; Askeland, 2000.

²⁰ Hassan and Chaush v. Bulgaria, October 26, 2000, n. 62, in www.echr.coe.int/Eng/Judgements.

This principle of lack of competence of the states is also the origin of some major consequences. The most important, in the context of this chapter, concerns the latitude of not only organisational but above all doctrinal autonomy of religious faiths, with the consequence that they cannot be placed outside the law only because their doctrine contains precepts that are in contrast with the laws of the state. To give some concrete examples straight away, this means that a Jehovah's Witness will be punished if he refuses to do military service (at least in those countries where this service is compulsory) but the Christian Congregation of Jehovah's Witnesses cannot be wound up because it advocates the refusal of military service, or it means that a Muslim will meet with penal sanctions if he contracts a polygamous marriage but the same sanction will not be applied to the whole of the Muslim community due to the sole fact of considering such a marriage licit according to its religious precepts. In a democratic society it must be possible to maintain ideals other than those professed by the majority of citizens and even in contrast with the laws currently in force.

This is a delicate point which requires precision in order to avoid dangerous misinterpretations. Preaching violence to reach an objective, even of a religious nature, lies outside the autonomy recognised to religious faiths because it violates the very rules of the democratic game which must be respected by everyone; the same would apply in the case that a fundamental right of the human person protected in absolute terms were at stake (for example if the inferiority of one race compared to another were advocated). But when we remain within the limits marked by the rules of democracy and the respect of fundamental rights and liberties, the affirmation of religious precepts that are in contrast with the laws of the state (punishable when translated into concrete behaviour) comes, in my opinion, within the sphere of the autonomy due to religious faiths.

The selective collaboration between states and religious faiths

In the European Union—but I would say once again in the whole of Europe—collaboration between states and religions is the rule and not the exception. This collaboration may have a different scope, involve different subjects, become materialised in diversified juridical forms: but in the whole of Europe, with the conclusion of the Communist experience, a system of cooperation between the public

authorities on the one hand and religious groups on the other is in force.

Sometimes this collaboration is contemplated and regulated in concordats, or agreements between states and religions; in other cases the forms of collaboration with religions are disciplined by unilateral state laws. On some occasions the two systems—pactional and unilateral—coexist within a single state: in Italy for example, concordats and agreements regulate forms of collaboration between the state and the main religions, whilst unilateral laws regulate this collaboration (normally on a more reduced scale) with the less important religions.

This outline shows that the choice of pact-based or unilateral juridical instruments is scarcely indicative of the inclination of the state to cooperate with religions: countries where agreements do not exist between the state and churches, such as Belgium or Ireland, are distinguished from an equally wide collaboration as Spain or Italy, where concordats and agreements have been concluded. More generally it is correct to state that separatist countries, countries with a church of state or a national church and countries with a concordat all collaborate, to an extent and with an intensity that does not depend on this qualification, with the religious faiths. The explanation for this inclination is to be sought in the fundamental characteristics of the post-liberal state, the genetic code of which contains the tendency to cooperate with all social, religious and non-religious organisations.²¹ Cooperation with social groups is the normal and at

²¹ The contemporary state is a state with an increasingly limited sovereignty, both externally by supranational organisations and multinational companies and internally where, throughout the 20th century, the power of organised groups has grown. This is a process which began in the period between the 19th and 20th centuries and evolved in parallel with the access of increasingly wider masses to the political and social life through the gradual extension to all citizens of civil and political rights, education, the diffusion of means of communication, industrialisation and urbanisation. This path of introduction of the popular masses to public life was to a great extent organised by large-scale organisations—political parties, trade unions, the churches and later opinion and pressure groups—with which the state soon had to come to agreement, yielding to them a part of its sovereignty. The splendid isolation of the nineteenth-century state, which governed society from above under the leadership of an enlightened élite, gave way to the participation of these organisations in the government of public affairs through the mechanisms of consultation, negotiation, mediation, bargaining between the authorities and the most representative social groups. Around the First World War, the theorisation of the plurality of legal systems reflects in the world of law these transformations, giving juridical

the same time compulsory way of governing the contemporary state: religious faiths also fit into this context and the states appear willing to maintain a relationship of collaboration similar to that established with other social organisations.

If things were simply in these terms, the discourse could come to a halt at this stage: the state collaborates with the religions because it collaborates with all the organisations representing social interests. But things do not stand this way: the collaboration of the state with religions presents an element of peculiarity due to the fact that state is not competent to intervene in religious matters, in the sphere, that is, where the religious faiths operate.

From this lack of competence of the state on religion, it follows that the collaboration of the state cannot be subordinate to the adoption, by the religions, of doctrinal contents or juridical structures in compliance with the values on which the state is founded. This has always represented, in Europe, a reason for tension between states and the churches: but these difficulties have become more acute since religious groups—and in particular I am thinking of Islam²² and some of the so-called 'new religious movements'²³—distinguished by principles, structures and behaviour far from the values and rules shared by the majority of European citizens, have appeared in the

citizenship to the idea (that had already taken firm root at a social and political level) that the state was no longer the only *societas perfecta*. (Cfr. in this regard Ferrari, 1989). Since the times of Hauriou and Santi Romano many things have changed but this model of the state founded on the participation of social formations in the exercise of power has survived, overcoming the parenthesis of the totalitarianisms that had deformed (but not denied) its fundamental characteristics and re-emerging from the catastrophe of the Second World War as the surest support of democracy. The strategy followed in the past decades to govern the transformation in a multicultural sense of Western Europe confirms the vitality of this form of state: the difficulties experienced with groups of Muslim immigrants do not derive so much from the absence of the will of European governments to collaborate with these communities as from the fact that they are still lacking in sufficiently representative institutions to establish a solid relationship with the public authorities.

²² On the legal problems raised by the growing Muslim presence in Europe cfr. Shaidt & van Koningsveld, 1995. More recently, see number 1996/1 of the *Quaderni di diritto e politica ecclesiastica*, on "Lo statuto giuridico dell'Islam in Europa", part of the essays in this journal have been published, together with new contributions, in Ferrari & Bradney (eds.), 2000. For the latest development relative to the legal profiles of the Muslim presence in some European countries see Ferrari (ed.), 2000 (the second part of the volume brings together contributions on Belgium, France, Germany and Spain).

²³ Cfr. in this regard the contributions in European Consortium for Church-State Research, 1999.

European juridical space. The public authorities have had to face a difficult alternative: exclude these religious groups from every form of collaboration, risking the violation of the principle of equality and, indirectly, the very rights of religious freedom; collaborating with groups which, at the level of doctrinal statements and/or practical conduct, contradict in the name of their religious precepts the equality between men and women, the respect of the freedom of conscience and religion or other cornerstones of civil coexistence as elaborated within the Western legal tradition.

The answer to this dilemma has been extremely flexible and diversified. From the point of view of interest to us—the collaboration between states and religions—it is however possible to identify a basic line that has guided the action of the Member states of the European Union: the accentuation of the characteristics of selectivity and graduality that has already characterised the ways of collaboration between states and religions.

It has already been said that the European states tend to be willing to collaborate with all religious groups. However, this willingness has never been indiscriminate: it is wider where there is a harmony between the values underlying the religious society and those that form the foundations of civil society and narrower where this harmony does not exist.

Some examples will help to explain this statement better. In almost all European countries, the state collaborates with religions, supporting them financially directly or indirectly, but this economic support is not equal. In Belgium for example only the ministers of the six recognised faiths are paid by the state [Torfs, 1999]; in Spain only the faithful of the religious communities that have stipulated an agreement with the state can deduct the donations given to their religion from their taxes [Sanchez, 1992]; in Greece the Orthodox church receives financial support from the state which is far greater than that received by any of the other religious faiths existing in that country [Papastathi, 1992]. This is no coincidence: the same pattern is repeated whenever the collaboration between the state and religious faiths is at stake. On education, for example, some European states provide for the possibility of religious education in state schools: but not all religions can be taught nor are they all taught on an equal footing. Thus, in Italy only the religions of the six faiths that have stipulated an agreement with the state can be taught and of these, only Catholic teachers are paid by the state; in Portugal only

the teachings of Catholicism and, to a much lesser extent, Protestantism, have citizenship in state schools.²⁴

More generally, it is possible to see the outlines of a pyramidal model that is repeated, although with considerable variants, in many countries of the European Union. At the base of the pyramid is a group of religious faiths which have a very limited collaboration with the state. Normally they can acquire juridical status through the forms established for associations and then they can exercise the essential acts necessary for their existence (for example purchase and sell goods, receive donations, stipulate contracts): but they do not obtain financial support from the state, they do not have access to public means of communication, they cannot teach their doctrines in schools. These religious groups are usually regulated by the general law, i.e. common law that regulates all associations.

A second group of religions occupies a higher position: they receive support from the state in the form of tax exemptions or subsidies, its ministers can carry out religious ceremonies with civil effects (for example, celebrate marriages), contributions are foreseen to build places of worship and so on. Usually these religions are regulated by special rules, other than the general law for associations and the passage from the first to the second group is subordinate to some form of state control: in Spain and in Sweden this takes place on the registration of these religions, in Italy through their recognition according to the law on admitted religions.

Sometimes, but not always, there exists a third level of the pyramid where the religions that enjoy maximum collaboration with the state are to be found. This is the level of national churches and the state churches, the Catholic church in concordat countries, the Orthodox church in Greece, religious communities with which agreements have been stipulated in countries that provide for this form of regulation of the relations between state and religions: in all these cases specific rules regulate the relations between the state and a particular religion, cutting out, in the context of the collaboration between these two institutions, a sort of made to measure dress which

can be fitted in the best way possible to the needs of the religious group.

What has been described here is only a paradigm or an ideal model that is not applied perfectly to any country in the European Union. In some cases, the legal system currently in force could be better described by distinguishing two or four steps of collaboration, rather than the three levels shown here; in other cases, the distinction between common law of the associations, special discipline for religions, a special law for one religion is not applicable; in addition, the rights and faculties corresponding to the various levels of the pyramid are not the same in all European countries. In any case, however, the collaboration of the state with religions is selective and graduated. On close examination, it can be seen that this selectivity and graduality also concerns the independence enjoyed by a religious group in the state legal system: its extension and depth varies according to the religions, even if this takes place according to criteria which do not always correspond with those that direct the choices in the field of collaboration between states and religions.

The question that must be asked is the following: what are the rules that guide this selection and graduation of the collaboration that the state gives to religions and the independence it guarantees to them? Are these criteria compatible with the principle of the state's lack of competence on religious matters? And are these criteria compatible with the principle of equality confirmed by all the constitutions of the Member states of the European Union?

5. PROBLEMS AND PROSPECTS OF THE EUROPEAN MODEL OF THE RELATION BETWEEN STATES AND RELIGIONS

To answer these questions, the discourse must once again be taken back to a more general level, which concerns all social groups and not just religious ones.

The constitutions of all European states contain rules that guarantee the freedom of associations that pursue licit ends: within this area, each constitution lays down more specific provisions that oblige the state to collaborate with some institutions and associations, at times specifically identified (the political parties, the trade unions, religious faiths and so on), at times identified in more general terms (for example, social groups which foster the development of the

²⁴ Cf. de Sousa e Brito, 1994. Art. 24 of the new law on religious freedom (cf. above, note 2) extends the possibility of teaching religion in state schools to all the registered religious faiths. For a picture of the rules regulating the teaching of religion in the countries of the European Union cf. the volume quoted in the previous note and Messner (ed.), 1995.

human being). This means that once all licit associations are guaranteed a sphere of freedom, the state can graduate its collaboration according to the characteristics of the associations and their objectives: in many countries, for example, voluntary associations and associations which are non-profit-making enjoy a more favourable organisational discipline or tax system than other associations.

The public authorities can thus select and graduate their collaboration with the organisations of a secular nature according to their characteristics and objectives: is a similar criterion also applicable to collaboration with religions despite the state's lack of competence on religious matters?

An answer in the affirmative can be given to this question. The state's lack of competence precludes all interference and therefore all differentiation based on the doctrine or internal organisation of the religious faiths but does not exclude the power to appreciate the external effects of a religion, that is the behaviour that corresponds to the precepts of a religion but which concerns primarily civil coexistence. Even when this is in the context of lawfulness, this behaviour may present a different degree of deservedness from the point of view of the state: behaviour can contribute differently to the development of those values—the dignity of the human individual, democratic coexistence, freedom of conscience, equality and so on—which are the basis for political order and social peace. On this basis it is possible to graduate the collaboration between public authorities and religious faiths and the independence they enjoy in the state system without violating the principle of lack of competence of the state on religious matters.

This is once again a very general indication, translated into provisions which differ greatly from one state to another. Thus the problems connected to the refusal of blood transfusions or military service have kept Jehovah's Witnesses at the lowest level of the pyramid of religions in many European states: however, this is not the case in Italy, where this religion has recently concluded an agreement with the state putting it at the top of this pyramid.²⁵ A similar discourse can be repeated for the Muslim community: in Spain it has concluded an agreement with the state,²⁶ in many other European coun-

tries it continues to be regulated in forms common to groups with which the states have a more reduced collaboration. But, generally speaking, the religious faiths that encourage in their followers behaviour that complies with the principle on which civil coexistence is based enjoy a wider degree of autonomy and collaboration from the state than those religions based on a different constellation of values.

This selection and graduation of autonomy and collaboration (in which the European model of relations between states and religions is substantiated, together with the protection of individual religious freedom) has not been free of criticism: it would actually favour the most important religions from the point of view of the number of the faithful, historical presence in a country and social importance. This is an observation which is essentially accurate because usually a religion that has been present for many years in a country, with a large number of followers and well inserted into the social structures is a religion that has contributed to forming the cultural and social identity of a people and therefore is normally in tune with the rules and values to which it refers. But I do not think that this criticism, although correct in its actual profile, can be agreed with. Each society is in fact based on a nucleus of relatively stable values and principles that form its identity and represent the specific and characterizing contribution that it can offer in dialogue with other societies. The development and evolution of this identity forms the main path for a progress that is not cancelled in the levelling out the differences between the different civilisations.²⁷ This nucleus of shared values does not only form the point of reference, capable of orienting the development of the political and legal system (or, to use another term, the deposit 'of values' without which democracy runs the risk of becoming relativistic and absolutistic at the same time). It also represents the framework which cannot be eliminated within which the values of other groups (cultural, ethnic and religious) which have relations with the majority group and settle permanently within its geographic area, must also find a place. This implies a delicate work of reflection and selection aimed first at identifying values and principles (to a great extent deriving from the encounter between the Christian tradition and that of the Enlightenment, as already mentioned) which form the European identity; then

²⁵ On this agreement cf. Colaianni, 2000.

²⁶ On this agreement and on other problems related with its application, cf. Martínez Torron, 1996; Mollala, 2000.

²⁷ Cf. in this sense Torfs, 1998.

to distinguish inside this what belongs to the deeper nucleus of this identity (and which therefore is not negotiable without disfiguring it) and what appertains to the more superficial layer and is therefore negotiable; lastly to evaluate the ways (which normally are diversified and allow margins of adaptation) of translating these principles and values into the world of law.

In this perspective, the European model of relations between states and religions can be considered a useful tool of integration on condition that some conditions are respected. In the first place, the guarantee of a wide and well defended space of freedom for all religions, including the newest and farthest from the social values traditionally shared. Notwithstanding, obviously, the limit of lawfulness of individual and collective behaviour, this area must guarantee for all religions the possibility not only of surviving but also of developing, ensuring the availability of the legal instruments necessary to guarantee individual and collective religious freedom, as well as the respect of the internal autonomy of the religious group. In more recent years, this rule has not been applied, in my opinion, by all the states of the European Union which, in the face of the diffusion of Islam, and the so-called new religious movements, have at times had recourse to questionable instruments from the point of view of the respect of the rights of freedom.²⁸ This has cast a shadow not only over the action of individual states but, more generally, on the validity of the European model of church-state relations.

It is moreover indispensable to maintain a certain proportion between the collaboration and support that the states offer to the various religions: if the range between those placed at the lower levels and at the higher levels is too wide—as could be the case in Greece today—not only equality suffers, but also individual religious freedom, which is reduced. There exists in fact a relation between individual freedom and equality of religious groups: the greater the inequality between religions, the more limited the freedom of each member of the less favoured religious groups risks becoming.

The mobility of religious faiths along all the levels of the pyra-

²⁸ Concerning the situation of the new religious movements in France, Belgium and Germany cfr. the contributions published in *Consensus et libertés* nos. 57-59, 1999-2000; more specifically on Germany, cfr. Davis, 2000. In relation to Islam, cfr. Basdevant Gaudemet, 2000, pp. 108-10 for some jurisprudential and administrative action on the issue of the *Jouland*.

mid in which they are distributed must also be guaranteed. The European model of state-church relations must be open to the transformations of history: a constant correspondence between social reality and legal reality is essential in order to avoid sudden and traumatic breakdowns which could take place if the system of relations between states and religions were not to reflect, without haste but also without delay, the changes that have already taken place and those under way in the religious panorama of contemporary Europe.

Lastly, it is necessary to reduce the degree of discretionary power enjoyed by the public authorities in establishing the level to which each religion can have access along the hierarchical pyramid mentioned in the previous paragraph, ensuring an effective system of claims against the decisions of the executive power.²⁹

If these conditions are respected, the European model not only has good chances of surviving but also of emerging as a reasonable instrument of mediation between 'old' and 'new' Europeans, contributing towards ensuring the evolution of European society through the integration of communities of more recent immigration.

6. ISLAM AND THE EUROPEAN MODEL OF RELATIONS BETWEEN THE STATE AND RELIGIONS

European Islam has yet to find a precise place within this model. The development of Muslim communities is a relatively recent fact in the majority of the countries of the European Union and only in the past two decades has a set of legal problems linked to their permanent settlement in Europe taken a definite form. The most frequently occurring of these problems are the following:³⁰

- the building of mosques, prayer halls and other places of worship;
- the inclusion of spaces and times for prayer in workplaces and public institutions (schools, universities, hospitals etc.);

²⁹ Cfr. in this regard the ruling mentioned above of the European Court of Human Rights in the case of Hassan and Chaush v. Bulgaria, where a request is made for the registration or state recognition of religious communities to be regulated by clear and verifiable provisions and the absence of means of appeal against discretionary decisions of the executive power is condemned.

³⁰ For an indication of these problems cfr. Vertovec & Peach, 1997, pp. 24-28. Regarding how these problems are dealt with in the European legal systems cfr. Shadiq & van Koningsveld (eds.), 2002.

- the recognition of Muslim religious holidays;
- the supply of *halal* food in schools, hospitals, prisons and in other public institutions;
- the possibility of slaughtering animals according to Muslim precepts;
- Muslim sections in cemeteries and the respect of Muslim religious obligations regarding burial;
- the creation and recognition of Muslim schools;
- the teaching of Islam in state schools;
- the separation of genders in physical education classes in schools;
- religious assistance in the armed forces, prisons, hospitals;
- the possibility of wearing the *hijab*;
- the application, in all or in part, of Muslim family law.³¹

Not all these problems will be dealt with in the following pages. They are aimed above all at identifying a methodology with which to evaluate the possibility of accepting the requests put forward by the Muslim community, bearing in mind the European model of relations between states and religions which we have attempted to define in the first part of this chapter.

It must be observed in the first place that the questions raised by the presence of increasingly large Muslim communities do not require a uniform solution in all the countries of the European Union: when they do not have an impact on the platform of common rights and duties which must be respected in all the Member states, they can be regulated in different terms in the individual national legal systems. This solution is coherent with the method with which the issue of coexistence of different religious groups in the European Union has been dealt with to date and which has to a great extent been left to the competence of the national legislations, and it appears perfectly in line with the Declaration on the status of churches and of non-confessional organisations signed by the Member states of the European Union at the Conference of Amsterdam in 1997, according to which "the European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member states".³²

³¹ In this study the problems connected with Muslim Family Law are dealt with in the contribution by M.-C. Foblets in this volume.

³² The complete text appears in the *Official Journal of the European Communities*, 10th November 1997, no. C 340. The declaration is dated 16th June 1997.

Bearing in mind these observations, a first set of problems can be approached.

In the first place, the *building of Muslim places of worship* must be examined. Although this is an issue which is full of symbolic and emotional values, the building of mosques or other places of Muslim worship does not raise new legal problems and does not require particular efforts of legislative imagination: the disputes raised, almost everywhere in Europe, by the building of mosques are disputes of a political nature or are connected to concerns of a practical nature (traffic management, parking difficulties, etc.: but these are not problems that are any different from those caused by the erection of any other building which is to house a large number of people) or they are caused by the use as places of worship of buildings that do not have the requisites required by the law for this purpose (and this problem should also be solved by the application of general rules, even if the courts of some countries appear reluctant to apply town planning regulations to these places of worship [van Bijsterveld, 1994]). From a more strictly legal point of view, the possibility for the worshippers of any religious group to establish and maintain places where they can meet to practise their faith and hold meetings of a religious nature is explicitly contemplated as an essential part of the right of religious freedom in art. 6 of the Declaration of the United Nations on the elimination of all forms of intolerance and discrimination based on religion or conviction and is recognised, as part of this same right, by all the legislations of the countries of the European Union. The building and maintenance of places of worship belong to those fundamental rights of religious freedom that are due to all people resident in Europe and which cannot be violated directly or indirectly: the provisions of Greek law which subordinate the opening of places of worship of other religious faiths to the opinion of one religious community (the Orthodox church) have been condemned by the European Court of Human Rights with the Manoussakis ruling of 26th September 1996.³³ In the same ruling, the attribution to the public authorities of excessively great discretionary

³³ Cf. Konidaris, 1994. For the ruling cf. European Court of Human Rights, Reports of Judgements and Decisions, 1996-IV, n. 17, p. 1346 ss. More in general on the building of mosques in Greece (where there is a difference in the situation between the areas where Greek Muslims live and those where Muslim immigrants live) cf. Charalambos K. Papastathis, 1998.

power in the process of authorisation necessary for the opening of a place of worship was also declared illegitimate.

Naturally it is possible to discuss whether the public authorities can or even should financially support the building and maintenance of places of worship: but this is another question. Within the European Union there are different rules in force which in some cases (as in Italy and France)³⁴ privilege some religious faiths compared to others (the Muslim community is amongst the latter in both countries), in other cases (more infrequent) they have led to encouraging the building of mosques (as was the case for a certain period in the Netherlands),³⁵ in other cases they exclude every form of financing (this is the situation at present in the Netherlands and in Ireland).³⁶ These different choices come within the scope of the selectivity and gradualness which, within certain limits, can legally distinguish the collaboration of the state with the different religious faiths. As this is a right which directly affects the essential nucleus of religious freedom, this selection and gradualness of the economic support that the public authorities offer the religious faiths must however be based on criteria that are objective as far as possible, such as the numerical consistency of the community requesting financial support to build their place of worship or the non-availability of other places of this type: however, in actual fact these criteria are not always respected.

A similar methodology can be used to approach the problem of *religious assistance in the armed forces, prisons and hospitals*. In this case too there exist well established national rules that can be applied, without substantial modifications, to the Muslim communities. The central

³⁴ In Italy some regional laws lay down economic facilities for the building of places of worship of religions that have stipulated an agreement with the state: a limitation of this type, in the law of the Abruzzo region no. 29/1988 was declared illegitimate by the Constitutional Court with ruling 195/1993. However, not all the regions have adapted to the indications of the Court (cf. Botta, 2000:117–18). In France, Catholic places of worship built before 1905 are owned by the state and granted for use free of charge to the Catholic church: the expenses for their upkeep are therefore paid by the state. To make up for this situation of inequality, at times the public authorities have supported the building of mosques or synagogues (cf. Basdevant Gaudernet & Messner, 1994:128–29; Messner, 1999:102–03).

³⁵ Cf. van Bijsterveld, 1994:136.

³⁶ For the Netherlands cf. *ibidem* (but it is not impossible, in this country, to obtain economic support from the local authorities): in the volume of Ferrari & Bradney (eds.), 2000 there are indications on the current legislation in Belgium, France, Germany and Italy. For Ireland cf. Casey, 1994:195.

nucleus of the right that must be guaranteed lies in the possibility for the Muslim (as for the member of any other religion) in hospital, prison or serving in the armed forces, to receive religious assistance from a representative of their religion: this possibility is generally acknowledged by the legislation of the countries of the European Union. The concrete methods of organising religious assistance vary from state to state and go from the recognition of the simple right of access to the hospital, prison or military structure for a minister, at the expense of the religious faith, to chaplains permanently resident in the public structure and paid by the state. More frequently there is a combination of the two systems mentioned here, the first applied to the minority religions, the second for the more important ones (this is the case of Portugal, Denmark and Italy, for example).³⁷ Once again—if the proportions between the support that the state offers to the different religions are respected and if this difference in support has a rational basis (for example in the different numerical consistency of the various religious groups)—these choices could come within a legitimate scope of the discretionary power of the public authorities.

The question of the *recognition of religious holidays*³⁸ is not as simple. This heading covers the request for absence from work or school on days declared holidays by the religion to which a person belongs. The right to have the time necessary for the activities prescribed by a religion or that of abstaining from work in the fulfilment of a religious obligation is certainly part of the right of religious freedom: but the exercise of this right may have effects that are not negligible on the rights of third parties, for example, when the systematic abstention from a work or school on one day creates problems for organisation of activity at work or school. The problem has been solved in different ways in the various European countries. In relation to the weekly day off some countries (France and Belgium for

³⁷ For Denmark cf. Gardé, 1994:112–114. For Portugal, at least as far as prisons are concerned, cf. de Sousa e Brito, 1994:248 (but now see also art. 13 of the new law on religious freedom). For Italy cf. Musselli & Tozzi (2000). On the more complex situation in Germany cf. Guntau, 2000:285–87.

³⁸ For a general picture of the civil recognition of religious holidays in the countries of the European Union cf. European Consortium for church-state Research, 1998. Where not otherwise mentioned, the information in the following lines comes from this volume.

example)³⁹ do not accept the request, put forward by various religious groups of being able to abstain from work or school on a day other than Sunday.⁴⁰ This has created some tension with members of the Adventist religion who refused to send their children to school on Saturdays. Other countries, such as Italy and, to a certain extent, Spain, have on the other hand, recognised the right for Jews and Adventists to abstain from work (except in order to ensure essential services) and school on Saturdays.⁴¹ The Netherlands have generalised this right so that every worker has the right to abstain from work on the day they prefer, independently of religious affiliation and on the grounds of a simple written communication to be given to the employer [van Bijsterveld, 1994:132-33]; parents can have their children exempted from school attendance when this prevents them fulfilling religious obligations [van Bijsterveld, 1994].

In the first instance, the requests of the Muslim community should find a reply similar to that given in these countries to the claims of the same type put forward by other religious communities, in order to avoid unjustified differences of treatment. There could be deviation from this line only where differences emerge in the actual situation, linked for example to the type of request (in relation to the weekly holiday, the Muslims only request having the time necessary to fulfil their religious duties, unlike other religious groups that request abstention from work for the whole day: this is the case of Jews and Adventists), the number of people to whom this exemption should apply (higher in the case of Muslims than in that of Jews and Adventists) or the day on which it falls (Friday, which is a 'full' working day, rather than Saturday, when many productive and scholastic activities are suspended). It is easy to note that these elements play in the opposite direction: some facilitate, others complicate the acceptance of the Muslim requests. In this situation it could be opportune to encourage the implementation of some solutions of a compromise. The agreement between Spain and the *Comisión Islámica*

de España lays down (art. 12) the possibility for Muslims to suspend work from 1.30 p.m. to 4.30 p.m. every Friday, subject to agreement with the employer,⁴² and to abstain from school during the same period. In England, the problem tends to be solved pragmatically: following the trend of U.S. jurisprudence (but applying it in more restrictive terms), the courts admit the possibility to abstain from work on the holiday laid down by one's religion (or at the times necessary to fulfil worshipping obligations) if, concretely, the organisation of work allows accepting this request without imposing additional obligations on the other workers or generating tension in the management of the company [Bradney, 1993; Slaughter & McClean, 1993:241].

A similar reasoning can be repeated in relation to the question to *abstain from work and school on the days on which other Muslim holidays fall*. In Italy, this right has been recognised, as well as to Jews, to Buddhists and Jehovah's Witnesses;⁴³ in Austria this possibility does not exist,⁴⁴ in the Netherlands the problem is dealt with in the context of the collective labour contracts; in Germany the legislation of some *Länder* allows, on some religious holidays, the members of that religion to abstain from work and school (this rule also applies to members of some non-Christian religions) [Hollerbach & de Frenne, 1998:135]. In this case, the request from the Muslim community does not present any particular features that differentiate it from that put forward by other religious groups: there seems to be all the more reason to put it into the context of the solutions already adopted in the individual countries of the European Union.

The request by Muslims to obtain *halal* meat in the canteens of public institutions raises a more complex problem. In this case something more than the introduction of an exception to a general rule (as in the case of the weekly day off) is being asked of the public authorities: they are being asked to take on a positive service (the supply of food that complies with a religious precept) to allow the

³⁹ For France cf. Guinezanes, 1993:88-89; jurisprudence tends to apply this rule with a certain flexibility (cf. *ibid.*, pp. 89-90). For Belgium cf. Torfs, 1993:72-74.

⁴⁰ But each country has its particularities. In Greece, for example, this rule is applied: however, if the company works continuously throughout the week, the employee is entitled to ask for his day off to be fixed on the day that is a holiday according to his religion (cf. Mantakias, 1993:153-54).

⁴¹ The relative discipline is contained in the agreements stipulated by the Italian and Spanish states with these religions.

⁴² The need for an agreement of this kind is also contemplated in the *acuerdos* that recognise the possibility for Jews and Adventists to abstain from work on Saturdays. On the provisions of these agreements, cf. Garcia Pardo, 2000:293-99.

⁴³ Cf. the agreements mentioned *supra*, n. 3.

⁴⁴ But in Portugal the employer and the employee can agree to replace the optional holidays of the local patron saint and "Mardi Gras" by a different holiday: cf. de Sousa e Brito & Teles Pereira, 1998:361. For Austria cf. Potz, 1998:328.

fulfilment of a religious rule that could be respected even in the absence of that service (as it is sufficient not to consume religiously forbidden foods). In this case the respect of the religious freedom of Muslims (or of Jews, for example) requires that food that is not forbidden by religious rules is available in the canteens of public institutions: a fuller implementation of religious freedom could suggest the supply of food prepared in the respect of religious rules (for example *halal* or *kosher* meat).

As always, the situation in Europe is highly diversified. In some countries (France, for example) neither *halal* (for the Muslims) nor *kosher* (for the Jews) meat is provided in public canteens, but only food (for example eggs or fish) that are normally acceptable for the members of these religions.⁴⁵ In other countries (Italy, for example), the agreement with the Union of Jewish Communities lays down under art. 7 the possibility for Jews in hospital, prison and barracks to observe their food obligations with the assistance of their religious community and without costs for the public institution: this means that the institution does not provide *kosher* food but admits that it can be brought from outside and consumed in the canteen at the expense of the Jewish community. In the Netherlands, the law obliges the prison director to do everything possible to provide the prisoners with food that meets their religion or conviction (and the new Italian prison regulations establishes the same thing);⁴⁶ furthermore, again in the Netherlands, the food requirements of Jews, Muslims and Hindus serving in the armed forces must also be respected [van Bijsterveld, 1994:131]. In Spain, art. 14 of the agreement with the Islamic Commission establishes that, in schools and public institutions, the utmost must be done to adapt food to Muslim religious precepts.⁴⁷ Again there are different solutions, some dictated by concerns of an organisational type, and the fear of creating 'food ghettos' which slow down the process of integration, others more sensitive to the problems of religious freedom (even if formulated with a certain vagueness): however, both appear compatible with the basic

principles on which the European model of relations between the states and religions are based, at least as long as the Jew or the Muslim can obtain food in a public canteen that does not go against their religious beliefs.

The questions connected with the request to introduce the *teaching of Islam into state schools* is far more complex. In order to fully understand the complexity of the problem, some general remarks must first be made that illustrate the legal discipline of the teaching of religion in state schools in force in the countries of the European Union. In some of them (for example in France) there is no teaching of this type. In secondary schools, the presence of chaplains, to teach religion, is contemplated and in fact these chaplains are active in 52% of French middle schools and in 62% of lycées;⁴⁸ however, none of them teaches Islam.⁴⁹

In other countries, the teaching of religion is non-denominational. This is the case of Great Britain where the doctrine of a specific religion is not taught but a syllabus devised at local level by the representatives of the various religions, by teachers and by the community: under art. 8(3) of the *Education Reform Act* of 1988, this syllabus must attribute special importance to knowledge of the Christian faith, but also supply some notions of the other main religions practised in the United Kingdom, including Islam.⁵⁰ Something similar takes place in the Netherlands: religious education is a compulsory subject in primary schools and is taught in non-denominational terms, bearing in mind the various religious situations, including Islam.⁵¹ However, these non-confessional forms of religious education are considered with mistrust by wide sectors of the Muslim community, which fear a certain relativistic drift [Pisci, 2000:171].

In other countries the teaching of religion in state schools is of the confessional type. In Italy the teaching of the Catholic religion is contemplated in all schools. The pupils can choose whether to

⁴⁵ Cf. Swerry, 1998:101.

⁴⁶ Cf. Basdevant-Gaudemet, 1994:110. In France (as in Germany and other European countries) Muslim religious teaching is often given in the courses on "Langues et Cultures d'origines": but this solution, juridically improper, has given rise to many controversies.

⁴⁹ For a detailed description of this system cf. Ockelton, 1995.

⁵¹ Cf. van Bijsterveld, 1994:134. Schools can also offer (and support financially) denominational religious teaching, attendance of which is not compulsory for pupils: in this context in 1992, Islam was taught in four towns.

⁴⁵ Since 1991 it has been possible to obtain *halal* meat in the French Armed Forces (cf. Basdevant-Gaudemet, 2000:113).

⁴⁶ Art. 11 of Presidential Decree no. 230 of 30th June 2000: "In the formulation of the food tables, the obligations of different religious faiths should be taken into consideration as far as possible".

⁴⁷ No similar provision is contained in the agreement with the *Federazione delle Comunità Ebraiche di Spagna*.

up integration in the country where they were going to live. In order to remedy this difficulty, the *Islamische Religionspädagogische Akademie* was founded in June 1998 with the task of training teachers of Islam for state schools [Potz, 1999:72]. It is too early to assess the prospects of this experiment (the first steps of which appear positive, however) but it is certain that this road—although not an easy one and which will take a long time to cover—seems to be the only one capable of giving a permanent solution to the problem of the training of teachers of Islam in European schools.⁵⁷

A second condition is the presence of one or more institutions with a sufficient degree of representation of the whole Muslim community. The need for a similar institutional structure is particularly pressing in countries where the choice of teachers, syllabi and religious textbooks is the task of or must be approved by representatives of religious communities. The case of Spain is emblematic: the possibility of teaching Islam is seriously limited by the contrasts that separate the Muslim organisations belonging to the Spanish Islamic Commission [Morilla, 2000: 257–59]. Similar difficulties have been encountered in Belgium: it is hoped that the recent (December 1998) election of a body named the Executive of Muslims in Belgium can provide a solution to this problem [Lo Giacco, 2000]. In any case, these experiences show that it is opportune to wait for a certain sedimentation, including organisational, of the Muslim communities before proceeding with the definitive legal structuring of the teaching of Islam in state schools.

7. CONCLUSIONS

From the observations made in the previous paragraph, it is possible to draw some conclusions.

In the first place, the presence of the Muslim communities does not pose legally unsolvable problems or, on close examination, particularly new ones. On the grounds of experience matured with other

religions, the legal systems of the European countries have the necessary instruments to deal with and solve many of the questions that have been shown in the previous paragraph. The newness and the complexity of the 'Muslim question' does not depend on legal questions but on other factors: on the number of Muslims (much higher than that of the members of any other non-Christian religion), the rapidity with which the Muslim communities have grown up, the absence of stable organisational structures with a wide representation or (to mention elements which are not exclusive to the Muslim community) the radical nature and fundamentalism with which a part of Muslims experience their religious faith, applying the precepts to areas which Western culture is used to considering extraneous from the religious dimension.

In this situation, there are things that not only can but must be done immediately. These are reforms aimed at ensuring for Muslims those fundamental freedoms without which the inequality between the various religious communities inherent in the European system of the relation between state and religions becomes oppressive. In actual fact, the term reform is not exact: it is not a case of innovating but of applying rules that already exist. On the subject of building places of worship, the availability of separate sections in cemeteries, spiritual assistance, ritual slaughtering, the supply of food that does not go against religious obligations and freedom of dress, the legislation of European countries does not have to be modified (except in particular points) but to be applied with equity and fairness.

The need to ensure from the present time these fundamental freedoms is all the more pressing as there are other sectors where a complete levelling of the Muslim community with the other religions, characterised by a longer presence in Europe, will take longer; the teaching of Islam in state schools is an example of this; questions connected with the personal status and family law could provide others. In these sectors, the phase of experimentation and research has not yet come to an end: it is opportune to encourage the attempts that are being made in some European countries in order to have a database allowing more meditated decisions to be taken.

This dynamic appears coherent with the European system of state-religion relations, distinguished by a base of rights and freedoms immediately available for all and by progressively more important facilitations available in correspondence with the process of integration

⁵⁷ In this sense the project of establishing a Faculty of Muslim Theology at the University of Strasbourg must be mentioned (cf. Messner, 1997:72–77; Prelo, 1999:114–16). A training programme has also been developed for the leaders of ethnic and religious minorities, including Islam, in the Netherlands: cf. van Bijsterveld, 1999:58.

of the religious communities in the system of fundamental values of the West. However, this dynamic is not neutral. It presupposes the capacity and the will of the European Muslim communities to adapt to the model of religious institution accepted in the West: this implies, in particular, the construction of a centralised structure (for example, forming national federations of local Muslim communities) and the acceptance of the distinction between spiritual and temporal, religion and politics introduced into the West by Christianity and revived (exasperated to some extent) by liberal thought in the past two centuries. This is a long and complex process of transformation but not devoid of precedents in European history of the past two centuries.

For all these reasons, Islam represents a particularly significant test bench for the European model which we have tried to outline in the first part of this chapter: hence the importance of finding solutions which, without distorting the European identity and legal tradition, allow the 'new Europeans' of Muslim faith and culture to make their contribution to the construction of a common house.

CHAPTER SEVEN

MUSLIM FAMILY LAWS BEFORE THE COURTS IN EUROPE: A CONDITIONAL RECOGNITION

Marie-Claire Foblets

1. INTRODUCTION: PUTTING MUSLIM FAMILY LAWS INTO PRACTICE IN EUROPEAN COUNTRIES. A THORNY QUESTION

Islam in Europe is a new reality. In this paper we have a particular interest in Muslim family law. The way Muslim families organise their life in Europe raises questions that have occupied many lawyers for a number of years. How to take into account family institutions which are foreign to our legal traditions? What effect does the law produce when a Muslim family tradition turns out to involve values which infringe, for example, principles established under human rights conventions?

We will focus here exclusively on those aspects of the question, which have arisen since the 1960s and 1970s in connection with mainly labour immigration of Muslim communities in Europe. The analysis focuses on the way in which courts and tribunals have taken Muslim family law into account in later years.

When called to intervene in cases involving private persons who remained citizens of countries in which Muslim law is applies, judicial and administrative authorities in European states may sometimes be compelled to apply rules derived from Muslim law. In other cases they have to handle the question which effects to grant under local (*lex fori*) law to arrangements made in accordance with Muslim law. These institutions may be unknown in Europe, or significantly differ from corresponding institutions as they have developed in Western legal tradition [Bensalah, 1994; Rude-Antoine, 1997]. Overall, the question of putting family laws into practice in Europe which draw their inspiration from Islam—whether dowry, repudiation or consent to marriage—raises a number of questions that affect the position of an increasing number of families in Europe.¹

¹ For several years many authors have taken an interest in the question of the