RELIGION AND EUROPEAN LAW: TWO MYTHS

Marcello Neri

Articolo in pubblicazione – Tenere riservato

In the course of Western modernity, Catholic theology has granted an almost exclusive privilege to philosophy as far as the public reasoning of belief is concerned. This, to the point of creating a specific discipline to «to give an explanation to anyone who asks you for a reason for your hope» (1Peter 3,15; NAB-RE). Such theological branch goes today by the name of fundamental theology.[1] The efforts made by Catholic theology in this area are surely of value – not only in regard to faith, but also to understanding the democratic development of modern societies. Fundamental theology has being able not only to assert itself within secular universities, but also to keep alive the best of European modern philosophy at the time when philosophical reason itself was beginning to question its own *raison d'être*.[2]

Confronted with the weakening of philosophical reason,[3] Catholic fundamental theology undertook to demand of that reason to be a force able to challenge meaning and scope of religious belief[4] - and not simply to play with it in order to draw from the faith's symbolism cues to survive its own weakening.[5]

Yet, such lavish effort done by the theological reason does not seem to have produced the hoped-for outcome – namely, that of a recognized participation into the European cultural and public discourse. As today, fundamental theology remains an internal matter of Catholic faith. The main reason for this failure, in my opinion, should be sought in a substantial misunderstanding that has characterized this theological discipline since its beginning. The misunderstanding concerns the exclusive priority given to the philosophical reason as interface for the public argumentation of Catholic belief. This theological blind-alley becomes clear the moment one asks about which kind of reason actually shapes the European public life. Indeed, the organization of this space has never been entrusted to the theory of philosophical reason, but rather to the practice of legal reason.[6]

As today, Catholic fundamental theology lacks a programmatic interlocution with law:[7] because it is precisely law that orders European human coexistence and,

---

[1] Cf. Verweyen, *Gottes letztes Wort*.
[2] Cf. Appel, *Tempo e Dio*.
[3] Cf. Vattimo, *La fine della modernità*; Vattimo-Rovatti, *Il pensiero debole*; Vattimo, *Dopo la cristianità*.
[4] Cf. Sequeri, *Il Dio affidabile*.
[5] Cf. Deibl, *Menschwerdung und Schwachung*.
[6] Cf. Ferry, *La Raison et la Foi*.
[7] Cf. Neri, *Fuori di sé*, pp. 77-124.

therefore, actually decides the position/place of religion and belief within it. To be clear: not so much law as theory (i.e., philosophy of law), but rather law as practiced by judges' ruling.[8] Such legal inconsistency of Catholic theology can be seen in its silent indifference in relation to the status change of religious freedom implied in some recent rulings by the European Courts. In these judgments, religious freedom seems to become a subordinated right to other (more protected) rights (as freedom of enterprise, expression, or policies for public administration). Yet, theology should be worried about this legal reconfiguration concerning religious freedom within the structure of fundamental human rights. It should, but it does not.

Catholic theology seems to be oblivious to what is happening with religious freedom inside the legal order of European public life. Rather, it is legal scholars who are taking charge of this matter – if only by reporting a paradigm shift that has important consequences for the exercise of the right to religious freedom within the European Union.[9]

European Union and Religion

Religion entered relatively late into the political dynamics that led to the supra-national entity we now call European Union. It was with Delors' presidency of the European Commission that the relation between European Community and representatives of churches and religious groups entered in a new phase. «The November 5 (1990) meeting would fundamentally change relations between European institutions and religious communities. If, until then, religion had been the domain of private interest of civil servant, after this date the Commission set up a regular dialogue with representatives of churches».[10] The meeting referred to was attended by representatives of some European Protestant and Anglican churches and senior officials of the European Community – including the president of the Commission Jacques Delors.

It was in this occasion that Delors, describing task and possibilities of the European Community in view of the ratification of the Maastricht Treaty, designed the place (and role) for religions within the European project: «It was also necessary to be aware that we could no task the European Community for more than it could give. It did not have the answer to everything. Jacques Delors shared his fear of seeing the European Community, in absence of any other plan, becoming the miracle cure or the scapegoat. Compared to Japan and the United States, the European model

---

[8] Cf. McCrudden, *Quando i giudici parlano di Dio*.

[9] Cf. Marchei, *La libertà religiosa nella giurisprudenza delle Corti europee*; Ninatti, *La libertà religiosa nel bilanciamento con altri diritti di fronte alle Corti europee*.

[10] Leustean, *Does God matter in the European Union?*, p. 1.

seemed like a permanent quest for a balance between the flowering of individuals and solidarity between the constituent parts of society. On the political and economic level that involved the acceptance of the market and the recognition of possible state intervention. Given all this, concluded the President, we must recognize that "the European Community lacks a heart and soul».[11]

In this void, internal to the legal and economic architecture of the European Community, Delors identified the proper space for a constructive contribution to the realization of Europe as a community of communities by churches and religions. In 1992, a year after the Maastricht Treaty, Delors highlighted again the indispensable contribution by churches and religious communities to the success of the economic and political process of the European Community: «We are now entering a fascinating time – perhaps especially for the young generation – a time when the debate on the meaning of the European construction becomes a major political factor. Believe me, we won't succeed with Europe solely on the basis of legal expertise or economic know-how. It is impossible to put the potential of Maastricht into practice without a breath of air. If in the next ten years we haven't managed to give a soul to Europe, to give it spirituality and meaning, the game will be up. I invite the churches to participate actively in it».[12]

After more than three decades, what remains of Delors' legacy regarding the relation between religions and, today, the European Union?[13] What role did churches and religious communities play in this crucial time? To answer these question would be complex, and it would require more than the length of an article. However, they do deserve here some attention as well.

Certainly, Delors was disappointed by the resistance and claims moved by the Catholic Church, led at that time by pope John Paul II. Resistance to be just one, among others and equal with the others, of the «democratic subjects» called to the crucial task of giving a spirituality to the European institutions. Of course, between the Catholicism of Wojtila and that of Delors there was a chasm, rooted in the different histories of the two personalities – but which cannot be explained only by reason of them. Between the Catholic pope and the Catholic president of the European Commission, the divergence concerned precisely how the public and civil dimension of Catholicism had to be realized.

Wojtila proposed a militant and intransigent version of Catholicism in front of political institutions, aimed at a juridical translation of the moral principles of

---

[11] Leustean, *Does God matter in the European Union?*, p. 2.
[12] Quoted by Leustean, *Does God matter in the European Union?*, pp. 3-4.
[13] Cf. Matlak, *Le projet religieux de Jacques Delors, trois décennies plus tard.*

Catholic doctrine (followed on that by his successor Benedict XVI).[14] Delors, on the other hand, declined Catholicism as an instituting force running through the whole of the European project – institution and societies. Instituting force which should operate as critical instance within European dynamics, in order to avoid that European institutions constitute themselves as ultimate and self-sufficient interpretation's agent of social reality. John Paul II aimed to constitutionalize Christianity within the European Union; while Delors sought to open processes of permanent dialogue with churches and religious communities as spiritual drive in the construction of the European model of democratic civilization.

«Delors' vision was close to that presented by Schuman: Christianity was to be visible in the axiology of European integration, but it was not to give it an official identity. Both believed that values derived from Christianity could also be shared by nonbelievers. Delors, probably because in the '80s and '90s religiosity had become a less obvious choice, went further than Schuman: he wanted to give to the European Union an open channel for special contacts with churches, in order to accompany the intensification of European integration».[15]

Between constitutionalized Christianity (John Paul II) and Christianity as instituting force (Delors), the Treaty establishing the European Union ends up taking a different path. On the one hand, in the preamble there is a reference at the contribution of religions to the construction of what Europe has become. Such religious contribution is located in the past; furthermore, it is expressed in general terms with no specific reference to Christianity; and finally it is not exclusive. «DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law (…)».[16] Far too little for what pope John Paul II expectations.

On the other hand, the Treaty on the functioning of the European Union (article 17) institutionalizes the relation with churches and religious communities. In this way, the dialogue between European institutions and religions becomes embroiled in the bureaucratic mindset of the Brussels' offices. This step goes in the opposite direction to what had been Delors' intuition. In fact, he was well aware that any institutionalization of the European dialogue with churches and religious communities would have reduced their ability to act as instituting force connecting together European social reality and the institutions of the European Union.

---

[14] Cf. Menozzi, *La Chiesa cattolica e la secolarizzazione*.
[15] Matlak, *Le projet religieux de Jacques Delors, trois décennies plus tard*, p.
[16] Treaty on the European Union, Preamble.

It is only with pope Francis that the Catholic Church finds itself with a leadership willing to work in a constructive and friendly way with the European Union. This time, it is on the side of the officials and public servant of the European Union that a lack of interest in this kind of collaboration has to be noticed.

Even with their limitations, the Lisbon Treaties have at least brought about the procedural conditions for a permanent dialogue between the European Union and the religions present in its territories. Thus, creating a place for churches and religious communities within the Union's policies and the European law.[17]

Nor should we forget the long-lasting effects produced by the attacks of September 11, 2001. In fact, they set the stage for the emergence of a new kind of global religion devoid of any cultural tie and mediation.[18] It was in the wake of this event that Huntington could propose his vision of the "clash of civilizations" as a key to understand the global (dis)order after 9/11.[19] His theory turned out to be erroneous as heuristic model in reading the postmodern relation among religion, identity, and political power, but nonetheless it profoundly marked the Western collective imagination.[20]

The generically other, whose unspoken identity is however constructed with reference to the identity marker "Islam", became a problem for the politics of the Union (but also for European law, as we shall see below). It became such problem because the other, by virtue of the Union's liberal values, should have been recognized, respected, and protected in its unquestionable dignity (which includes its otherness as such). At the same time, however, this same other was perceived as threat to those core values. This dilemma appears in all its evidence in the policies regulating immigration (and integration) inside the European Union: «Concepts underpinning the place of religion in immigration law are replicated and elaborated in the Commission's soft law policy instruments on integration».[21]

This so constructed other is perceived simultaneously as an obligation and a danger – without making this second dimension of otherness explicit, because it would contradict the axiological architecture of the European Union. «Requirement on the "other" to respect a constructed set of national or European liberal democratic histories, principles and values, which are automatically considered to be alien to them, puts into question the relationship of such requirements to the very values

---

[17] Cf. Carrera-Parkin, *The Place of Religion in European Union Law and Policy*.
[18] Cf. Roy, *Holy Ingnorance*.
[19] Huntington, *The Clash of Civilizations?*; Id., *The Clash of Civilizations and the Remaking of the World Order*.
[20] Cf. Roy, *Comment penser la religion dans la montée des populisme?*.
[21] Carrera-Parkin, *The Place of Religion in European Union Law and Policy*, p. 18.

they seek to impose – such as cultural and religious pluralism, tolerance and non-discrimination».[22]

In order to resolve this tension, the Union's policies provide for the implementation of intercultural and sometimes interreligious dialogue. Echoing a central insight of Delors' project, this dialogue should be democratic, with an open outcome, and not predetermined (otherwise it would be indoctrination and not dialogue). But at the point of intersection between migration policies and home affairs politics within the countries of the European Union, one can see a shift in the practice of dialogue – exactly in the direction where European values are to be imposed on the other as a compulsory doctrine.

«Where there is a risk that certain religious beliefs and practices might be seen as contradicting European values, the individuals and community or faith representatives in question become the object of policy measures aiming to foster integration through participatory programs that place emphasis on acquiring knowledge of European values, alongside national and European identity, culture and civic competences. Intercultural dialogue is seen as fundamental to this process. However, intercultural dialogue, as conceived within immigration and home affairs approach, materializes as a process that place emphasis of adjustment on one party – wherever this party actually is in our imaginary (i.e. the migrant "other") – rather than the so-called "two-way-process" of mutual learning and development that is proposed in the CBP's on integration and is stressed in much of the policy discourse in the field of integration at EU level».[23]

Important to note here it is the fact that the difference of the other, constructed by our perception of the religious identity marker "Islam", produces a contradictory tension within the EU values framework itself. This kind of tension implies also the right to religious freedom, to the point that the other may enjoy it only in a limited way. The problem lies in the fact that this fundamental right may suffer such a contraction as to go as far to contradict what the Union affirms in name of its values. This reaction to the imagery of "clash of civilizations" thus ends up producing a self-understanding of the European Union as "master of civilization" (singular, as if there were only one true civilization). It is not explicitly stated that other cultures are lesser, or event that the other's religion is per se a danger, but one moves precisely along these kind of assumptions. The European civilization is imagined as the one desirable for all (the better culture), and the space left to the free exercise of religion is decided by the European bureaucracy with its religious blindness. On

[22] Carrera-Parkin, *The Place of Religion in European Union Law and Policy*, p. 21.
[23] Carrera-Parkin, *The Place of Religion in European Union Law and Policy*, p. 23.

both sides, the Union is presented as a subject that does not need to learn anything from the other, but that can well teach them what it means to be civilized.

It is possible to grasp another inconsistency in the European Union's perception regarding the role of religion when moving from domestic policies to foreign affairs politics. In 2013, the Council of the European Union approved the *Guidelines on the promotion and protection of freedom of religion or belief* that concern the external human right policy of the Union. But the first five articles concern the member states of the European Union too. The full exercise of the right to religious freedom is seen as essential part of democratic coexistence: «The right to freedom of religion or belief (FoRB) is a fundamental right of every human being. As universal human right, freedom of religion or belief safeguards respect for diversity. Its free exercise directly contributes to democracy, development, rule of law, peace and stability. Violations of freedom of religion or belief may exacerbate intolerance and often constitute early indicators of potential violence and conflicts».[24]

As today, one cannot speak of violations of religious freedom by the European Union's home policies. But the fact remains that a one-way dialogue – imposing on the other the European way of life as the better civilization – could be felt by the other as a violation of their own identity and culture (inducing a feeling of resentment in them). In any case, the *Guidelines* call on the member states and the Union itself to ensure the highest level of safeguarding the right to religious freedom: «In line with universal and European human right standards, the EU and its member States are committed to respecting, protecting and promoting freedom of religion or belief within their borders».[25]

This is what the European Union demands from its own procedures, its own domestic and foreign politics, and also from its courts. It is precisely on the practical level of courts' rulings that is possible to make an assessment of how faithful the European Union is to its commitment to the actual exercise of religious freedom within the public life of its territories – human, social, and even imaginary.

Religious Freedom and European Courts

The first legal myth surrounding court rulings on religious freedom is that of neutrality. According to the Merriam-Webster, the adjective neutral means «not engaged on either side». In this sense, a court judgment on matters that imply the free exercise of religion or belief should not be partisan in secular or religious way.

---

[24] The Council of the European Union, *Guidelines on the promotion and protection of freedom of religion or belief*, §1.

[25] The Council of the European Union, *Guidelines on the promotion and protection of freedom of religion or belief*, §5.

When a court ruling imposes a secular stance, it is no more neutral but it takes the side of one of the contenders. Even the so called separation of church and state does not mean erasing the presence of religion from the public sphere in name of secular values. The neutrality of state's institutions acting as impediment of free expression of religious faith is not at all neutral, but it channels an adversarial mind-set against religion and religious practice. A court ruling that moves along this line is not neutral but engaged on one side.

A similar trend can be seen in some recent judgments of the European Court of Justice regarding litigations about wearing the Islamic headscarf in the workplace.[26] In this rulings, the legal concept of neutrality is used to mask the internal contradiction in applying the values of the European Union when faced with the disturbing otherness (with its right to be recognized in its difference, but felt as a threat that has to be neutralized). Such contradictory tension is not resolved neutrally, but requiring the other not to be themselves. Only to the extent that they no longer appear as the other, then they can enjoy their right to work. In the rulings taken into account by Weiler, the European Court ask the Muslim women to sacrifice their religious identity in exchange of the permission to keep their job. Only by giving entirely up one right (religious freedom), these women will be able to enjoy another right (to work). In an indirect way, we meet here the second legal myth – that of balancing, which the courts should observe in their rulings when two rights conflict with each other.

«The hate that dares not speck in this case, the Elephant in the Room, is European Islamophobia. For years and decades these corporate bodies, on the whole, cared not about Jewish men wearing a Kippah (skullcap) or Christian workers, men and women, who, for example, had a cross visibly hanging round their neck. Indeed, such manifestations were considered a sign of inclusiveness and broad mindedness of the employer. But a Muslim? A Muslim woman who does not hide her faith in the closet? That seems to go too far. The legal euphemism employed to sanitize this ugly prejudice is neutrality – a word which carries a positive vibe. How can we object to a corporation which wants to keep a neutral work place? And it looks even better, and non-discriminatory, if you add to the religious criteria also political and philosophical criteria».[27]

Referring to the Court of Justice's Achbita rulings (Case C-157/15), Weiler advances a second criticism to the judges' decision: that of assessing the meaning of certain religious expression in public (here the wearing of an headscarf by a Muslim woman) from an univocal cultural model of religion (derived basically from Western

[26] Cf. Weiler, *In Iran They Force Women to Wear the Hijab*.
[27] Weiler, *In Iran They Force Women to Wear the Hijab*, p. 188.

Christianity). This homologation to just one standard of religion implies the inability, on the judges' side, to distinguish between (external) manifestation and (essential) practice of religious belief: «A measure that treats all religions equally as regarding manifesting may have very different impact when it comes to the ability to practice one's religion».[28]

To ask a Muslim woman, or a married Jewish woman, to remove the headscarf means to impose on her that she cannot be a Muslim (or Jewish), because wearing the headscarf for her is not an (outward) manifestation of faith, but a practice which makes her personal identity. If a visible expression of religious faith constitutes the moral identity of a person, then the judges have the duty to reach a reasonable accommodation, so that the ruling does not actually denies the core moral identity of that person.[29]

The fact that (almost) any public visibility of religious faith in the workplace is regarded as a mere outward manifestation, and that therefore the prevention of such public visibility does not infringe on the rights to freely exercise religion and to respect one's moral identity, shows how the practical application of the neutrality criterion ends up not being neutral – and furthermore indirectly discriminatory.

According to Weiler, it is the Wabe ruling (Case C-804/18) which best exposes how the Court's use of the neutrality's principle comes into contradiction with the basic values that constitute the identity of the European Union. The litigation concerns a German association running kindergartens and one of its employees, a Muslim woman, wearing the headscarf while working in the kidergarten. The employer, voicing the parents' concern, fired the teacher because of her refusal not to wear the headscarf in the classroom. A decision taken in order to «ensure the individual and free development of the children with regard to religion, belief and politics». The Court's ruling refers both to the *Treaty on the Functioning of the European Union* in matter of cohesion and solidarity, and to the judgment of the European Court of Human Rights in the case Dahlab v. Switzerland (2001) – in which it is stated that freedom of religion and conscience has important relevance for believers and non-believers alike, because it contributes to the pluralism proper to a democratic society and its liberal values.

Given such premises, one would have expected the Court's ruling to be in favor of the teacher wearing the headscarf at the workplace. But that was not the case. The Court ruled indeed in favor of the employer and its decision to fire the teacher. A decision, according to the Court, that did not violate the religious freedom of the Muslim woman. Weiler analyzes the judgment with the following words: «So, if we

---

[28] Weiler, *In Iran They Force Women to Wear the Hijab*, p. 189.
[29] Cf. Taylor-Maclure, *Secularism and Freedom of Conscience.*

want our young and not so young children (as well as their parents – where in fact the prejudices resides) to grow acculturated into this ethos of pluralism indissociable from a democratic society would we achieve this by hiding these differences? By forcing people to conceal their Otherness? By telling Muslim or Jewish, or for that matter Christian teachers that they have to conceal their religion? It seems to me a funny way of understanding pluralism and educating for tolerance (…). No religious symbol, no visibly religious teachers send a subliminal message of toxicity»[30]

To take into account only the burden of negative economic consequences on the side of the employer, and to protect first and foremost its right to freedom of enterprise, is to let a cultural and racial prejudice prevail. Prejudice sanitized by the concept of neutrality and hidden behind the right of doing business – affirmed over a right (religious freedom) that the Union and the European Court of Human Rights hold dear as a fundamental one for democracy and civil coexistence among the many.

Turning to the second legal myth, that of balancing, one could examine the recent ruling of the European Court of Human Right in the case Eloise Bouton v. France (N. 22636/19). An exponent of the Femen movement (Eloise Bouton), shirtless and with the body tattooed with slogan, made a performance on the altar of a Parisian Catholic Church, staging the abortion of Jesus, in protest against the Vatican's position concerning abortion. What is of interest in this ruling is the evaluation done by the Strasbourg judges of the French courts application of the balance between freedom of expression (Bouton) and freedom of religion (the Catholic faithful present in the church at the time of the performance). At all levels of judgment, the French judges were well aware of this conflict between two basic rights. Since there is no crime of offense against the "religious sensitivity" in the French legal order, the judges resorted in their rulings to that of "sexual exhibition".

«The argument on which the sentence by the different levels of judgment rests, later reiterated by the French government in its defense before the Strasbourg Court, is not so much in the desire to limit Bouton's freedom of expression, but rather in the need to sanction a sexual exhibition inside a place of worship – thus protecting the religious sensibility of the faithful».[31]

In the French courts' balancing act, it is the place (of worship) where freedom of expression is exercised that led to the decision of giving precedence to the right of religious freedom over the one of expression. The Strasbourg Court disagrees with the French ruling, because «in striking the balance, the French judges did not take

---

[30] Weiler, *In Iran They Force Women to Wear the Hijab*, p. 192.

[31] Ninatti, *La libertà religiosa nel bilanciamento con altri diritti di fronte alle Corti europee*, 128.

into account the fact that at that time there was no liturgical celebration in progress (only the rehearsal of the Christmas choir), that the performance had been short, and that Bouton, once invited to leave, did not resist».[32]

The Strasbourg Court review of the balancing between two basic rights raises serious questions about its application of this principle when religious freedom is implied. Following Ninatti's reasoning, a first problem concerns the place where a political opinion is freely expressed. It is not a generic public space, but a 1) Catholic church; 2) on the altar; 3) in front of the tabernacle. According Catholic understanding, the church is a place for celebrating the divine liturgy, whether in communal or individual form; and liturgy is considered «the source and the summit of Christian life», according to Vatican II. The place chosen by Bouton for her political performance is then per se a liturgical space where the free exercise of Catholic faith reaches its symbolic apex.

That is, the "building-church" has a sacredness of its own, so much so that in case of profanation it has to be re-consecrated. Then, also without any ritual celebration, the altar is the liturgical place remembering the sacrifice of Jesus Christ on the cross. Finally, the tabernacle enshrines the real presence, in time and space, of the Christian incarnate God. This is the place that Bouton picked not by chance for her performance. It is even the religious symbolism of this liturgical space that had given to Bouton performance its full meaning.

The Strasbourg Court's ruling seems to disregard these aspects that define the essential identity of the place "catholic church-building" – and its meaning for the free exercise of religious faiths by Catholics. Moreover, with this ruling any place of worship risks to lose its religious specificity, since it is actually equated with any other place open to the public. The (un)balancing act puts in place by the Strasbourg judges lets become essentially secular a place that, from the perspective of religious freedom, is instead sacred.

«Without going so far as to hold religious freedom "the poor relation" within the rights provided for in the Convention, it appears how the status of that freedom in a certain sense – rather than being the subject of a true balancing acts – ends up converging inside other fundamental rights, and within that legal framework must find its own space. How much space today it actually manages to carve out for itself still remains an open question».[33]

---

[32] Ninatti, *La libertà religiosa nel bilanciamento con altri diritti di fronte alle Corti europee*, 129.

[33] Ninatti, *La libertà religiosa nel bilanciamento con altri diritti di fronte alle Corti europee*, p. 141.

The right to religious freedom, once embedded (in non-discrimination) and subordinated (to the rights of free enterprise and expression), seems to be undergoing a major weakening within the legal practice of the European Union. This trend contradicts the core assessments that one can find in the first, and as today only, *Report* presented by the Special envoy for the promotion of freedom of religion or belief outside the European Union. In fact, this *Report* avoids both embedment and subordination, opting for a process of equalization among fundamental rights. Herein, religious freedom keeps its own specificity within the democratic play of fundamental rights, because the right to religious freedom is seen as privileged status' indicator of all other basic rights: «Freedom of religion or belief is about freedom of thought, conscience and religion or belief. It is no more or less important that other human rights, but serves as litmus test for all of them. It is an essential element for equal citizenship. Freedom of religion or belief is a universal human right for all, and its protection has to be inclusive and apply beyond the specific reference to a religious minority or religious minorities in general».[34]

It should be clear that the factual use of the two legal myths of neutrality and balancing by the hand of the European Courts brings about an inconsistency within the Union's set of basic values which shape its political and cultural identity.

Back to Theology

This inconsistency may have serious consequences for the European project pursued by the Union. Embedment and subordination of the right to religious freedom, together with the use of the principles of neutrality and balancing by the Courts, have certainly repercussion on the constructive participation of churches and religious communities to the spiritual configuration of the European Union.

The trend that can be ascertained in the rulings of the European Courts in matter of religious freedom implies a kind of marginalization of this fundamental right within the values' framework of the European Union. «Secularism should not become the state religion – explicitly or implicitly. The state should not try to promote an original secular order in which the public sphere is cleansed of all religious residue. This is not only a dystopian understanding of neutrality, but it is not really "neutrality" – at least in no satisfactory sense of the concept».[35]

If religion becomes a marginalized right, as far as the implementation of European liberal values is concerned, then there is the risk that religion may become an instrument in the hand of the illiberal politics suggested by the many populisms in

---

[34] Special envoy for the promotion of freedom of religion or belief outside the European Union, *Report*, p. 4.

[35] McCrudden, *Quando i giudici parlano di Dio*, p. 203.

Europe. Such political exploitation of religion by populisms may gain the support amid the resentment of the believers, who feel marginalized and misunderstood by the institutions of the European Union. With the consequence that the relation between the European Union and religions could become a kind of vicious circle: where every public expression of religion is felt as a threat to the core values of the European Union.

Above all, it is Catholicism that must pay extreme attention to this siren song that draws it toward the anti-European positions proposed by political populism. To be caught in such anti-European affection, would mean for European Catholicism to find itself on the threshold of a dramatic contradiction – due to the political use of Catholic religion as ethnic-cultural marker against the difference of the other by the populisms of our continent.

Catholic theology cannot remain inert in front of this political dynamics of exploitation, which risks to leading the European Catholic Churches into a dead end. Nor can it further postpone a serious interlocution with European law, in order to achieve a meaningful collaboration between the judges' task and the insights that theologies of different religions can offer them for a better understanding of the religious meaning of certain practices of belief.

But the task of theology within the European public sphere, ordered by legal reason, is not limited to this. In the structure of fundamental theology, the starting point is even religion and the religious experience of human beings. If this theological discipline would get out of its philosophical fixation, as well as of its apologetic reasoning, accepting the challenge posed by European legal reason, it could draw its own place in the public debate on the meaning that religion could have for human experience and for a democratic form of human coexistence.

It is, after all, a matter of joining the legal scholar on this topic: «The importance of religion (…) lies in the fact that it is fundamental for human beings to make sense of their lives in a broader way».[36] Delors' insight was precisely to grasp the relevance of this religion's function for the European institution as well.

Religion is a counterfactual way of living in the world, which is able to open up alternative visions as well as imagining a different human order. Protecting the possibility of such otherness is the role played by religious freedom inside the political, institutional, and legal dynamics of the European Union. «The importance of religious freedom for non-believers is the possibility it offers to develop and create a broader visions of the world and our place in it. The openness of different worldviews is a condition of our concrete self-understanding».[37]

---

[36] McCrudden, *Quando i giudici parlano di Dio*, p. 199.
[37] McCrudden, *Quando i giudici parlano di Dio*, p. 199.

The legal marginalization of religious freedom, which seems to be taking place in the rulings of the European Courts, risks to narrow the field of future possibilities for the institutions of the European Union, as well as weakening its spiritual drive which in necessary, next to legal expertise and economic know-how, to politically accomplish the European project.
The legal scholar seems to be aware of this – are theologians aware of it too?

Bibliography:

Appel, Kurt: *Tempo e Dio*. Aperture contemporanee a partire da Hegel e Schelling. Brescia: Queriniana 2018.

Carrera, Sergio – Joanna, Parkin: *The Place of Religion in European Union Law and Policy*: Competing Approaches and Actors inside the European Commission, in: *Religare Working Paper* 1/2010, pp. 1-46.

Deibl, Jakob: *Menschwerdung und Schwächung*. Annäherung an ein Gespräch mit Gianni Vattimo. Wien: Vienna University Press 2013.

Ferry, Jean-Marc: *La Raison et la Foi*. Paris : Pocket 2016.

Huntington, Samuel: *The Clash of Civilizations?* In: *Foreign Affairs* 72/3, pp. 22-49.

Huntington, Samuel: *The Clash of Civilizations and the Remaking of the World Order*. New York: Simon&Schuster 1998.

Leustean, Lucian N.: *Does God matter in the European Union?*, in: Leustean, Lucian N. (ed.): *Representing Religion in the European Union: Does God Matter?*. London and New York: Routledge 2013, pp. 1-32.

Marchei, Natascia: *La libertà religiosa nella giurisprudenza delle Corti europee*, in: *Stato, Chiese e pluralismo confessionale* 33/2019, pp. 46-80.

Matlak, Michal : *Le projet religieux de Jacques Delors, trois décennies plus tard*, in: *Revue Esprit* 3/2022.

McCrudden, Christopher: *Quando i giudici parlano di Dio*. Fede, pluralismo e diritti umani davanti alle Corti. Bologna: Il Mulino 2019.

Menozzi, Daniele: *La Chiesa cattolica e la secolarizzazione*. Torino: Einaudi 1993.

Neri, Marcello: *Fuori di sé*. La Chiesa nello spazio pubblico. Bologna: EDB 2020.
Ninatti, Stefania: *La libertà religiosa nel bilanciamento con altri diritti di fronte alle Corti europee*. Note a margine del caso Bouton e L.F. c. S.C.R.L., in: *Stato, Chiese e pluralismo confessionale* 5/2023, pp. 121-141.
Roy, Olivier: *Comment penser la religion dans la montée des populisme?*, in *Études* 2023/11, pp. 67-76.
Roy, Olivier: *Holy Ignorance*. When Religion and Culture Part Ways. New York: Columbia University Press 2010.
Sequeri, Pierangelo: *Il Dio affidabile*. Saggio di teologia fondamentale. Brescia: Queriniana 1996.
Treaty on the European Union, in: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF (access 20/10/2023).
Treaty on the Functioning of the European Union, in: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF (access 20/10/2023).
Vattimo, Gianni: *La fine della modernità*. Milano: Garzanti 1985.
Vattimo, Gianni – Rovatti Pier Aldo (ed.): *Il pensiero debole*. Milano: Feltrinelli 1983.
Verweyen, Hansjürgen: *Gottes letztes Wort*. Grundriβ der Fundamentaltheologie. Düsseldorf: Patmos 1991.
Weiler, Joseph H.H.: *In Iran They Force Women to Wear the Hijab* – Are We to Prohibit It? A Brief Comment on the Hijab Cases before the CJEU, in *Quaderni costituzionali* 2023/1, pp.187-194.