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Atheism as Part of Religious Phenomenon: Questions and New Challenges to Secularism

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Abstract [En]: The (re) emergence of religion within modern societies, that are characterized with a great diversity, is challenging secularism. Within this context, atheism, and other forms of nonbelief, are on the rise as well.
Starting from a traditional issue, that is the definition of religion, this paper aims to analize atheism as one part of the religious phenomenon. But, if freedom of religion means also freedom from religion, this does not mean that atheism and religions must always be treated in the same manner. Instead, the protection of the theistic and atheistic positions, specially as organized groups, must be reasonably adapted to their peculiar features. Europe and Italy provide some good case-studies.

Abstract [It]: In uno scenario globale caratterizzato da società sempre più diverse e complesse, il significativo ritorno della religione nella sfera pubblica, in atto già da alcuni anni, pone nuove sfide al concetto stesso di laicità. All'interno di questo contesto, l'ateismo e le altre forme anche nuove di non credenza, piuttosto che defilarsi sono ovunque in crescita. A dimostrazione di come il fenomeno religioso sia molto (e sempre più) complesso.
Muovendo da un recente caso giudiziario canadese, che mette insieme i tanti nodi problematici attorno a ciò che è religione e ciò che non lo è, il presente lavoro dopo una prima parte più generale, nella quale si ripercorrono le difficoltà registrate a diverse latitudini nella definizione stessa di religione (che investono anche il piano dei poteri, politico e giudiziario), si analizza il ritorno della religione nella sfera pubblica e si colloca l'ateismo all'interno del fenomeno religioso (come libertà dalla religone), nella seconda parte offre un sguardo più specfico sull'ateismo (e sulla non credenza) all'interno del quadro europeo e italiano illustrando anche alcuni recenti casi giudiziari. Con l'obiettivo di insistere sulla riconducibilità dell'ateismo all'interno di un concetto ampio di fenomeno religioso che, tuttavia, non si traduce in una identica disciplina della relagione e dell'ateismo: anzi, la tutela delle posizioni teistiche e non teistiche, soprattutto nella prospettiva dei gruppi e delle associazioni, deve ragionevolmente adattarsi alle diverse e peculiari caratteristiche delle stesse.

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1. Introduction

In a recent ruling by the Canadian Federal Court of Appeal, a self-styled "Church of atheism" has been denied charity tax status on the ground that it cannot be considered as a religion, even though the appelant claimed to have a minister, 10 commandments, and a worshipful relationship to the "sacred texts" of what it calls "mainstream science"[1].

The Court has riaffirmed that:

"for something to be a 'religion' (…) either the Courts must have recognized it as such in the past, or it must have the same fundamental characteristics as those recognized religions. These fundamental characteristics are not set out in a clear 'test'. A review of the jurisprudence shows that fundamental characteristics of religion include that the followers have a faith in a higher power such as God, entity, or Supreme Being; that followers worship this higher power; and that the religion consists of a particular and comprehensive system of faith and worship"[2].

In this case, Judges agreed with the appellant that the requirement that the belief system has faith in a higher Supreme Being or entity and reverence of said Supreme Being is not always required when considering the meaning of "religion" [3]. Nonetheless, it is with respect to the third element that the appellant's submissions must fail. It did not demonstrate that its belief system is based on a particular and comprehensive system of doctrine and observances.

It is important to underline that, after clearly stating that section 2(a) of the Canadian Charter of Rights and Freedoms and Rights ("Everyone has the following fundamental freedoms: (*a*) freedom of conscience and religion") does protect the rights of atheists and that a Minister cannot interfere with the practice of their beliefs in Atheism[4], the Court found that the Minister's refusal to register the appellant as a charitable organization "does not interfere in a manner that is more than trivial or insubstantial with the appellant's members ability to practise their atheistic beliefs. The appellant can continue to carry out its purpose and its activities without charitable registration"[5].

This judgment seems to comprehensively pinpoint all the major issues relating to atheism: is it a religion? What count as religion? Which branch of government is entitled to decide on these issues? Political branch or Judicial one? All topics which, today, are gaining momentum.

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[1] Canada Federal Court of Appeal, *Church of Atheism of Central Canada* v. *Minister of National Revenue*, 2019 FCA 296, 2019, 29, 11.

[2] *Syndicat Northcrest v. Amseleum*, 2004 SCC 47, [2004] 2 S.C.R. 551, at paragraph 39.

[3] The appellant rightfully pointed to Buddhism as being a recognized religion that does not believe in a Supreme Being or any entity at all (*South Place Ethical Society, Barralet and Others v. A.G.*, [1980] 1 W.L.R. 1565, at page 1573).

[4] *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at paragraph 70.

[5] *Church of Atheism of Central Canada* v. *Minister of National Revenue*, cit., at paragraph 16.

Furthermore, as part of the democratic process, atheists (and agnostics) and the believers are equally entitled to have their views heard and respected within the context of politics? What does it mean? For instance, could atheists claim exactly the same protection and guarantees as believers do?

Actually, answering these traditional questions presupposes answering an upstream question: is it possible to define religion? Yet, despite the intense debate amongst scholars from different fields, such as sociology, philosophy, theology and law, it still remains an open question.

This article consists of two parts: the first (par. 1-4) tries to address more general issues, as the definition of religion, the return of religion in the public sphere on one hand, and the rise of atheism on the other hand, and where atheism must be located; the second part (par. 5-6) is more specific and tries to examine atheism from European and italian perspectives, even through some interesting legal cases.

2. An Eternal Question: Is It Possible to Define Religion?

Almost a century ago, Max Weber argued that "to define religion, to say what it is, is not possible at the start of a presentation such as this. Definition can be attempted, if at all, only at the conclusion of the study"[6]; seventy years later, Brian K. Smith stated the opposite: "to define is not to finish, but to start"[7]. In America, which is the most diverse Western society[8], the debate on this issue is very lively.

Someone argued that "neither religion in general nor any one of the religions (...) is in itself an intelligible entity, a valid object of inquiry or of concern either for the scholar or for the man of faith"[9]. In a more recent study, Brian Leiter argued that a proper definition of religion must be based on "features that all and only religious beliefs have"[10]. Yet, elsewhere, Leiter notes that neither "categoricity" nor "insulation from evidence" – the two criteria that he says as "matter" for the purpose of evaluating the claim for tolerating religion as such[11], are unique to religion[12]. As noted by Micheal Mc Connell, this is all rather confusing and inconsistent: probably, "it is futile to draw up a list of features descriptive of religion and only of religion. What makes religion distinctive is its unique combination of features, as well as the place it holds in real human lives and human history"[13].

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[6] M. WEBER, *The Sociology of Religion* (1922), Beacon Press, Boston, 1963, 1.
[7] B.K. SMITH, *Reflections on Resemblance, Ritual, and Religion*, Oxford University Press, New York-Oxford, 1989, 4-5.
[8] P.H. SCHUCK, *One Nation Undecided. Clear Thinking about Five Hard Issues That Divide Us*, Princeton University Press, Princeton, 2017, 316.
[9] W.C. SMITH, *The Meaning and End of Religion* (1962), Fortress Press, Minneapolis, 1991, 12.
[10] B. LEITER, *Why Tolerate Religion?*, Princeton University Press, Princeton-Oxford, 2012, 27.
[11] In Leiter opinion, "those who genuinely conduct their lives in accord with the categoricity of the moral demands they recognize are overwhelmingly religious", and religious beliefs, "in virtue of being based on 'faith', are insulated from ordinary standards of evidence and rational justification, the ones we employ in both common sense and in science", B. LEITER, *Why Tolerate*, cit., 34.
[12] B. LEITER, *Why Tolerate*, cit., 38 and 46.
[13] M.W. MC CONNELL, *Why Protect Religious Freedom*?, 123 THE YALE LAW JOURNAL, 2013, 784.

Some scholars suggest that we should "abandon the search"[14]. Finally, there is who, drastically, asserts that "for constitutional purposes, any answer to religious questions is …*religion*"[15].

It is probably true what Courtney Miller has reminded us: that searching for a unique and unanimously accepted definition of religion is "an undertaking bound for failure". [16]

Even in Italy, finding a definition for a "denomination" is tradionally a crucial issue. In the absence of statutory definitions, the literature has proposed different theories. The so-called "self-assessment", according to which, in order to recognize a denomination, the self-assessment of its members is enough. The "social recognition", based on a given "quantitative", "sociological" or "historical" criterion[17]. Other theories rely on more objective criteria to classify a group as a denomination: believing in a transcendental reality (not necessarily in God), capability to answer fundamental questions on men's origin and destiny, providing a moral code, to create an existential interdependence between the faithful and this transcendental reality (manifested, amongst other things, with worship), and having at least a minimal an

14 See G.C. FREEMAN III, *The Misguided Search for the Constitutional Definition of 'Religion'*, 71 THE GEORGETOWN LAW JOURNAL, 1982-3, 1549–59. See, recently, A.A. JAMAL, J.L. NEO, *Religious Pluralism and the Challenge for Secularism*, 7 JOURNAL OF LAW, RELIGION AND STATE, 2019, 1-12, 11.

15 D. LAYCOCK, *Religious Liberty as Liberty*, 7 JOURNAL OF CONTEMPORARY LEGAL ISSUES, 1996, 313–56, 329.

16 C. MILLER, *'Spiritual but Not Religious': Rethinking The Legal Definition of Religi*on, 102 VIRGINIA LAW REVIEW, 2016, 833-894, 841. L.H. TRIBE, *American Constitutional Law*, The Foundation Press, New York, 1978, 827–28, arguing for a dual definition of religion hinging on the particular Religion Clause in order to circumvent the definitional dilemma. Even Supreme Court Justices have weighed in on this side of the debate. See *Board of Education v. Grumet*, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring) ("It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular Clause (…) But the same constitutional principle may operate very differently in different contexts."). See also C. CROCKETT, *On the Disorentiation of the Study of Religion*, in T.A. Idinopulos, B.C. Wilson (edited by), WHAT IS RELIGION? ORIGINS, DEFINITIONS, AND EXPLANATIONS, Brill, Leiden-Boston-Köln, 1998 1-13: "Religion does not have a home or a place in any one of the commonly demarcated spheres of human activity, which is why the attempt to locate a determinative space of religion has become impossible"; P. BEYER, *Religion in the Context of Globalization. Essay on concept, form, and political implication*, Routledge, London-New York, 2013; W. Cole Durham Jr., S. Ferrari, C. Cianitto, D. Thayer (edited by), *Law, Religion, Constitution. Freedom of Religion, Equal Treatment, and the Law*, Ashgate, London, 2013; S. Ferrari (edited by), *Routledge Handbook of Law and Religion*, Routledge, London-New York, 2015; T. JEREMY GUNN, *The Complexity of Religion and The Definition of 'Religion' in International Law*, 16 HARVARD HUMAN RIGHTS JOURNAL, 2010 189-215, 190: "the absence of a definition of a critical term does not differentiate religion from most other rights identified in human rights instruments and constitutions. However, because religion is much more complex than other guaranteed rights, the difficulty of understanding what is and is not protected is significantly greater".

17 See, *ex multis*, C. MIRABELLI, *L'appartenenza confessionale. Contributo allo studio delle persone fisiche nel diritto ecclesiastico italiano*, Cedam, Padova, 1975, 140; S. FERRARI, *La nozione giuridica di confessione religiosa (come sopravvivere senza conoscerla)*, in V. Parlato, G.B. Varnier (edited by), *Principio pattizio e realtà religiose minoritarie*, Giappichelli, Torino, 1995, 19 ss. Recently, see G. ANELLO, Homo Religiosus *in a Globalized World: How Religious Individuals are Actors of Global Law*, (April 4, 2020), available at http://dx.doi.org/10.2139/ssrn.3568583, says: "in a Globalized World human 'religiosity', rather than institutionalized 'religion', is a proper factor for consideration in global law. This assumption is derived from the difficulties involved in finding a global meaning for 'religion' in the legal language. Even though many statutes and constitutions address 'religion' in official documents, the legal interpretation of the notion of religion always depends on the institutional forms that religions have historically and culturally assumed in local legal systems. The substantial ambiguity of the term 'religion' is one of the main reasons why, when 'religion' is mentioned in international legal documents, interpretations of this term reflect conflicts and competing explanations over the definition of what kinds of behaviors are contemplated by the term", 3.

organizational structure. Some decisions of the Constitutional Court, rejecting the "self-qualification", have affirmed that the term "denomination" can derive from various criteria, such as previous public acknowledgments, the statute that clearly expresses the characters, or the commonsense[18].

In the absence of a unanimously accepted definition, the task of giving meaning to the term "religion" inevitably falls to courts[19].

For instance, the Supreme Court of United States has affirmed that a religion, for purposes of the First Amendment, is distinct from a "way of life," even if that way of life is inspired by philosophical beliefs or other secular concerns[20]. A religion need not be based on a belief in the existence of a Supreme Being (or beings, for polytheistic faiths)[21]. Yet, "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion"[22]. This principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause[23]. Based on the latter, the Seventh Circuit Court of Appeals held two times that a prisoner's request to form an atheist study group must be given the same consideration as other religious study groups[24]: Judge Diane P. Wood, first noted that federal courts, including the Supreme Court, have "adopted a broad definition of 'religion' that includes non-theistic and atheistic beliefs, as well as theistic ones". Then, she wrote : we have suggested in the past that when a person sincerely holds beliefs dealing with issues of "ultimate concern" that for her occupy a "place parallel to that filled by God in traditionally religious persons," those beliefs represent her religion[25] (…) We have already indicated that atheism may be considered, in this specialized sense, a religion[26], because "atheism is, among other things, a school of thought that takes a position on religion, the existence and importance of a supreme being, and a code of ethics"[27].

Is judiciary the most appropriate branch to deal with defining what religion is? Probably not. As Asian scholar points out, "definitional tests are often formalistic in that courts select a particular set of criteria and make a decision on the religious freedom claim by simply considering whether the religion, belief, or

[18] Italian Constitutional Court, Judgments no. 467/1992; 195/1993; 346/2002.

[19] R. AHDAR, *Is Freedom of Conscience Superior to Freedom of Religion?*, 7 OXFORD JOURNAL OF LAW AND RELIGION, 1, 2018, 124-142, doi.org/10.1093/ojlr/rwy006, 127 says: "The legal protection of religious freedom necesserly requires courts and tribunals to eventually determine what count as religion or religious belief"; D.H. DAVIS, *Is Atheism a Religion? Recent Judicial Perspectives on the Constitutional Meaning of 'Religion'*, 47 JOURNAL OF CHURCH AND STATE, 4, 2005, 703-723.

[20] See *Wisconsin v. Yoder*, 406 U.S. 205, 215-16, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).

[21] See *Torcaso v. Watkins*, 367 U.S. 488, 495 & n. 11, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961).

[22] *Epperson* v. *Arkansas,* 393 U. S. 97, 104 (1968); *Everson* v. *Board of Ed. of Ewing,* 330 U. S. 1, 15–16 (1947).

[23] *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005).

[24] *Kaufman c. Pugh*, 733 F.3d 692 (7th Cir. 2013).

[25] *Fleischfresser v. Dirs. of Sch. Dist.* 200, 15 F.3d 680, 688 n. 5 (7th Cir.1994).

[26] See *Reed v. Great Lakes Cos.,* 330 F.3d 931, 934 (7th Cir.2003) ("If we think of religion as taking a position on divinity, then atheism is indeed a form of religion.").

[27] *Kaufman v. McCaughtry*, 419 F.3d 678 (7th Cir. 2005).

practice falls within these criteria. In doing so, the courts therefore could be said to risk drawing an arbitrary line between protected and non-protected religions, beliefs, or practices"[28].

The thruth is that definitions, by their nature, include and exclude[29]. Indeed, providing a legal definition of religion that is workable requires that the definition is not too under or over-inclusive. A definition of religion that is under-inclusive "runs the risk of exposing followers of 'foreign', lesser known, or unpopular creeds to harm, or even persecution." Conversely, an over-inclusive definition of religion "may open opportunities for misplacing or abusing benefits which may stem from constitutional protection"[30].

As Kent Greenwalt argued:

"Since the term religion is one of ordinary language that refers to a deep and important social phenomenon, it would be unfortunate if the law's idea of religion differed greatly from ideas of religion outside the law. Although legal applications of a concept need not correspond precisely with how people use the concept in other contexts, it counts in favor of an approach to a basic constitutional concept that it ties to more general understandings. An analogical approach fits our culture's ideas of what counts as religious better than approaches depending on necessary and sufficient conditions, and it remains open to changing understandings about which elements are of greater or lesser importance in deciding whether something is religion"[31].

In this regard, it is important to note that the legal definition of religion needs to be sufficiently conscious of local particularities that shape religion, beliefs and practices. This applies even to religions that are, in

[28] J.L. NEO, *Definitional imbroglios: A critique of the definition of religion and essential practice tests in religious freedom adjudication*, 16 INTERNATIONAL CONSTITUTIONAL JOURNAL OF LAW, 2, 2018, 574-595, doi:10.1093/icon/moy055. The Author critiques the use of definitional tests in religious freedom adjudication, using case law from Malaysia and Singapore, 575. In particular, she argues adopting an overly narrow and formalistic approach to deny constitutional protection to religious beliefs and practices. She employes "case law from these jurisdictions to critique a jurisprudential innovation that originated from the Indian Supreme Court, which is the essential or integral practice test". The latter, in Neo's opinion, "is a variation of the definitional test as it seeks to allocate constitutional protection by drawing distinctions between what are essential practices (and thereby deserving of constitutional protection) and what are not (and not deserving of constitutional protection). Essential practice, depending on how it is defined, thus demarcates what religious practices are protected and what are not. It significantly restricts the scope of religious freedom guarantees since even practices that are accepted as "religious" may not be protected. This test, as such, potentially excludes a wide range of religious practices from constitutional protection", 576.

[29] R. AHDAR, *Is Freedom of Conscience*, cit., 127.

[30] A. SAJÓ, R. UITZ, *Freedom of Religion*, in M. Rosenfeld, A. Sajó (edited by), THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, Oxford University Press, Oxford, 2012, 909, 915.

[31] K. GREENAWALT, *Religion and the Constitution*, Vol. I, *Free Excersise and Fairness*, Princeton University Press, Princeton, 2006, 143 says: "The analogical approach should not be unitary in the sense that whatever amounts to religion in one context automatically amounts to religion in another. But the approach is unitary in the more subtle sense that courts employ a uniform strategy to make determinations about religion. This strategy allows the sensitivity to context that has led scholars to propose different ideas of religion for free exercise and establishment cases, but without the awkwardness that a dual approach involves".

a sense, global in nature. Religious traditions are living traditions and are therefore subject to the influence of local customs[32].

3. Religion in (*Post*)secular Era

Well, question on what religion is and whether it is possible to define it are not new questions. Yet, the context is quite new. As recently pointed out, we live in a post-secular world, where religion has made a surprising comeback[33].

Difficulties arising from religious issues involve both the south and the north of the world, developed and developing countries, as well as established and new democracies. Recent studies concerning Asia demonstrate that "context matters": what may appear controversial in one context may be regarded as banal in another and what is odd in some places may be commonplace in others[34].

A reawakening of religion is evident in Latin America, across Africa and throughout the Muslim world. Even in China, religiosity appears to be on the rise among many sectors of the population[35].

The apparent clear course toward the secularization of society and its institutions has been interrupted by an unexpected "return of religion" in the public sphere, which has sparked off new battles around questions that seemed to be no longer of any interest (the crucifix in school classrooms, the Islamic veil, the building of mosques and so on)[36].

Using the words of Jose Casanova, it is time of a "deprivatization" as well as "repoliticization" of religion[37], that, as noted by Susanna Mancini and Michel Rosenfled, has "triggered a political and institutional struggle against secular constitutionalism" and led to "a two-progged assault on the very legitimacy and viability of the concept at stake. On one hand, costitutional secularism has been attacked as inherently hostile rather than neutral toward religion, on the other, constitutional secularism has been

[32] J.L. NEO, *Definitional imbroglios*, cit., 578.

[33] T. KHAITAN, J. CALDERWOOD NORTON, *The Right to Freedom of Religion and the Right Against Religious Discrimination: Theoretiacl Distinctions*, 17 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 4, 2019, 1125-1145, 1125 doi: 10.1093/icon/moz087.

[34] A.A. JAMAL, J.L. NEO, *Religious Pluralism*, cit., 6. See more in J.L. Neo, A.A. Jamal, D.P.S. Goh (edited by), *Regulating Religion in Asia: Norms, Modes, and Challenges*, Cambrigde University Press, Cambridge, 2019. See, in general, J.L. Neo – B. Son Ngoc (edited by), *Pluralist Constitutions in Asia*, Hart Publishing, Oxford, 2019.

[35] G. ROBBERS, *Church and State Relations in the Constitutions*, in W. Cole Duhram Jr., S. Ferrari, C. Cianitto, D. Thayer (edited by), LAW, RELIGION, CONSTITUTION, cit., 57.

[36] See the recent comprehensive evaluation of the role of religion in international relations, broadening the scope of investigation to such topics as the relationship between religion and cooperation, religion and conflict, and the relationship between religion and the quality of life, Z. MAOZ, E.A. HENDERSON, *Scriptures, Shrines, Scapegoats, and World Politics: Religious Sources of Conflict and Cooperation in Modern Era*, University of Michigan Press, Ann Arbor 2020, in part. *Religion and World Politics: Theory and Evidence*, 1-24.

[37] J. CASANOVA, *Public Religions in the Modern World*, The University Chicago Press, Chigago, 1994, 3-6.

criticized as inevitably favoring one religion (or a set of religions) over others"[38]. Secularism is now an increasingly disputed idea[39]. As recently noted, "in contrast with the predictions of secularization theory, religion is back with a vengeance"[40].

It is not a suprise that, at least since the beginning of the new millenium, thanks in particular to studies by Jurgen Habermas, a new, very complex and controversial concept[41], has emerged: *post*-secularism. In his "Religion in the Public Sphere"[42], the German philosoper, advancing several critical reflections on the nature of secularism in modern democracy and on John Rawls' political liberalism[43], argued that in a democratic sphere, religions are no longer compelled to exist only as private creeds but are recognized as full participants in political opinion and will formation[44]. Later, Habermas argues that secular persons must recognize that religion possesses a cognitive content that cannot be dismissed as irrational. Religious persons must also accept the legitimacy of scientific reason and the egalitarian principles of modern law and morality. It is necessary, for both religious and secular persons, to rephrase the semantic content of religion in a rational language accessible to non-believers. For Habermas, the explicit contribution of religion to secular reason is that it cultivates "an awareness of what is missing"[45].

Many scholars have attempted to define more precisely the idea of post-secular society, linking it directly to the emergence of societies characterized by a strong pluralism: *post*-secular, therefore, is a concept

[38] S. MANCINI, M. ROSENFELD, *Introduction*, in Id. (edited by), CONSTITUTIONAL SECULARISM IN A AGE OF RELIGIOUS REVIVAL, Oxford University Press, New York, 2014, xvi.

[39] See Z. CALO, *Law, Religion and Secular Order*, 7 JOURNAL OF LAW, RELIGION AND STATE, 1, 2019, 104-127.

[40] R. HIRSCHL, A. SHACHAR, *Competing Orders? The Challenge of Religion to Modern Constitutionalism*, 85 THE UNIVERSITY OF CHICAGO LAW REVIEW, 2, 2018, 425-456, 426.

[41] J.A. BECKFORD, *SSSR Presidential Address Public Religions and the Post-secular: Critical Reflections*, 51 JOURNAL FOR THE SCIENTIFIC STUDY OF RELIGIONS, 1, 2012, 1-19, doi.org/10.1111/j.1468-5906.2011.01625; G. MCLENNAN, *Towards Postsecular Sociology,* 41 SOCIOLOGY, 5, 2017, 857-870, doi: 10.1177/0038038507080441 41; ID., *The Postsecular Turn*, 27 THEORY, CULTURE & SOCIETY, 4, 2010, 3-20, doi: 10.1177/0263276410372239. See also L. ZUCCA, *The Crisis of Secular State – A Reply to Professor Sajó*, 7 INTERNATIONAL JOURNAL OF CONSITUTIONAL LAW, 3, 2009, 494-514, doi.org/10.1093/icon/mop010.

[42] J. HABERMAS, *Religion in the Public Sphere*, 14 EUROPEAN JOURNAL OF PHILOSOPHY, 1, 2006, 1-25.

[43] See, in particular, J. RAWLS, *The Idea of Public Reason Revisited*, 64 THE UNIVERSITY OF CHICAGO LAW REVIEW, 3, 1997, 765-808.

[44] On the clash between Habermas and Rawls theories, see N. URBINATI, *The Context of Secularism: A Critical Appraisal of the Post-Secular Argument*, in S. Mancini, M. Rosenfeld (edited by), CONSTITUTIONAL SECULARISM IN A AGE OF RELIGIOUS, cit.,14 ss.

[45] J. HABERMAS, *An Awareness of What is Missing*, in Id. et al. (edited by), AN AWARENESS OF WHAT IS MISSING: FAITH AND REASON IN A *POST*-SECULAR AGE, Cambridge, Polity, 2010 15-24. Habermas argues that the relationship between reason and religion needs to be reconceived in view of the rise of religious fundamentalism, the postmodern intensification of the dialectic of Enlightenment, and the hegemony of capitalist principles of exchange in a globalized world. Habermas suggests that it is necessary to rethink the genealogy of postmetaphysical reason and to draw from religious resources in order to respond to these challenges. Habermas's proposal, therefore, involves a critical rejection of strands of modern secularism as well as a call for believers and theologians to engage in constructive dialogue with postmeta-physicalthinking.

related to a condition of significant cultural, ethical and religious pluralism in which religious instances as well as secular ones coexist, confronting and colliding with each other[46].

It is true that there is a new religious dynamism worldwide, with many religious figures demanding to be heard. A strong debate arises on the recognition of a wide range of groups that are different from official religions but nevertheless claim the same protection. We can refer to them as *New Religious Movements* (NRMs) which cover a wide spectrum of sects and cults, and comprise a wide array of other innovative groups. As noted by J. Gordon Melton, there is "no single characteristic or set of characteristics to which we could point that new religions shared (not even their newness). What they shared was what they lacked – they were not part of the religious establishment"[47]. Due to their diversity, NRMs resist easy classification[48]. Significant differences exist among their doctrines, goals, practices, and lifestyles [49]. In addition, it is important to point out that list of groups considered under the rubric of "new religions" would differ from country to country and always be under negotiation"[50]. The same is true for the so called *Spiritual but not Religious Groups* (SBNRs)[51]. As noted by Silvio Ferrari "religious diversity has increased dramatically non only through the proliferation of different religious communities living in the same geographic space and the growing presence of unbelievers, but also through the diffusion of

[46] Many scholars argued that the concept of postsecular means a transformation, first of all political, even before the sociological one, of the context in which the political discourse unfolds in contemporary societies. It is a transformation of the secularist perception of political life, see A.A. AMAL, *Considering freedom of religion in a post-secular context: hapless or hopeful?*, 6 OXFORD JOURNAL OF LAW AND RELIGION, 3, 2017, 433-450, doi.org/10.1093/ojlr/rwx046; H. DE VRIES, E. SULLIVAN, *Political Theologies: Public Religions in a Post-secular World*, Fordham University Press, New York, 2006; M. ROSATI, *The Making of a Postsecular Society. A Durkheimian Approach to Memory, Pluralism and Religion in Turkey*, Routledge, London, 2015; I. BIANO, *Laicità, libertà di coscienza e pluralismo religioso. Una prospettiva a quattro temi*, QUADERNI DI DIRITTO E POLITICA ECCLESIASTICA, 2, 2017, 445-458. See also J. BEAUMONT, C. BAKER, *Postescular Cities. Space, Theory and Practice*, Continuum, London-New York, 2011; S. KALTSAS, *Habermas, Taylor, and Connolly on Secularism, Pluralism and the Post-Secular Public Sphere*, RELIGIONS, 10, 2019, 460, (1-19).

[47] J.G. MELTON, *Toward a Definition of 'New Religion'*. 8 NOVA RELIGIO: THE JOURNAL OF ALTERNATIVE AND EMERGENT RELIGIONS, 1, 2004, 73-87. The Author argued, 76: "from the perspective of the various religious traditions operating in the West, we might begin to build a definition of "new religions" as those religious groups that have been found, from the persepctive of the dominant religious community (…), to be not just different, but unacceptably different. See L. MCLAUGHLIN, *Soka Gakkai in Japan*, in I. Prohl, J.K. Nelson (edited by), HANDBOOK OF CONTEMPORARY JAPANESE RELIGIONS, Brill, Leiden, 2012, 269-307. New religions may challenge the "traditional parameters" of religion. "If we if we only look at the elements characterizing these groups that appear more religious, such as doctrines or similiarities to other tradition, we risk overlooking the centrality of other practicies that are vital elements of members' engagment and of the expansion dynamics of these organizations", see E. BAFFELLI, *Contested Positioning: "New Religions" and Secular Spheres*, 30 JAPAN REVIEW: JOURNAL OF THE INTERNATIONAL RESEARCH CENTER FOR JAPANESE STUDIES, SPECIAL ISSUE, 2017, 129-152, 135.

[48] See J.A. SALIBA, *Understanding New Religions Movements*, AltaMira Press, Walnut Creek, 2003.

[49] See K. FARRELL, *New Religious Movements and the Need for Greater Clarity of Religion: Under Title VII*, 18 RUTGERS JOURNAL OF LAW & RELIGION, 2016, 87-120, 116.

[50] J.G. MELTON, *Toward a Definition*, cit., 79.

[51] C. MILLER, *Spiritual but Not Religious*, cit., 840.

'unaffiliated believers' (…) and of believers who, although they remain faithful to their denominational religion, adopt forms of personal spirituality"[52].

4. Atheism and Agnosticism are Increasing as Well

So, is atheism disappearing? Not at all: quite the contrary. In April 2016, National Geographic featured an article titled "The World's Newest Major Religion: No Religion".

In recent years, Australia has seen an increase in the non-believers[53]. By some measures, East Asian societies have the highest proportions of people claiming to be atheists[54].

Recent surveys show that the number of atheists, agnostics, and "no preference" (or "nones") in the United States is rising[55]. Americans who identify themselves as not belonging to any religion has doubled in the past twenty-five years. Thus, atheism's visibility in the United States is on the rise. Books by atheists whose goal is to debunk religion have become bestsellers[56]. Meanwhile, an atheist iPhone application found its way to the top ten book-apps list on iTunes[57]. As recently noted, the atheist is no longer a stranger in America[58]. At the same time, atheists, agnostics and nonbelievers in general still make up a small "minority" in the United States, and they remain disliked, distrusted, and not truly American in the eyes of many[59].

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[52] S. FERRARI, *Religion Between Liberty and Equality*, 4 JOURNAL OF LAW, RELIGION AND STATE, 2, 2016, 179-193, 180.

[53] From 22.3% in 2011 to 30.1% in 2016, according to Australian Bureau of Statistics 2017. 2016 Census Data Reveals "No Religion" is Rising Fast. Available online: http://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/7E65A144540551D7CA258148000E2B85?OpenDocument (accessed on 2 September 2019).

[54] According to the World Values Surveys (WVS), see F. YANG, *Religion in the Global East: Challenges and Opportunities for the Social Scientific Study of Religion*, RELIGIONS, 9, 2018, 305, (1-10), 4.

[55] P.H. SCHUCK, *One Nation Undecided*, cit., 326-7: "These changes are strikingly generational. As Millennials enter adulthood, they become less religiously affiliated than older generations. Nearly a quarter of Generation Xers now claim to have no par- ticular religion or describe themselves as atheists or agnostics, up four points in seven years. Baby boomers also are now more likely to iden- tify as "nones".

[56] See S. HARRIS, *The End of Faith: Religion, Terror, and the Future of Reason*, W.W. Norton & Company, New York, 2004.

[57] Press Release, Jay-Roc Invs., Inc., The Atheist Pocket Debater iPhone App Remains on Top Ten Best Selling Apps List in Book Category on iTunes (July 16, 2010), available at http:// www.prweb.com/releases/iPhone_app/atheist_book_app/prweb3954134.htm

[58] E.G. QUILLEN, *Atheism Exceptionalism: Atheism, Religion and United States Supreme Court*, Routledge, New York, 2018; F.R. HICKEL, *Civil Religion and Religious Independents: Examining the Beliefs of Atheists, Agnostics, and the Unaffilated*, 61 JOURNAL OF CHURCH AND STATE, 4, 2019, 610-636.

[59] For example, W.M. GERVAIS, A.F. SHARIFF, A. NORENZAYAN, *Do you believe in atheists? Distrust is central to anti-atheist prejudice,* 101 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 6, 2011, 1189–1206. doi.org/10.1037/a0025882 and L.K. SWAN, M. HEESACKER, *Anti-Atheist Bias in the United States: Testing Two Critical Assumptions*, SECULARISM AND NONRELIGION, 1, 2012, 32–42, doi.org/10.5334/snr.ac found that informal religious privilege is maintained in the US through anti-atheist prejudice, because people in the US distrust those who do not believe in god(s). Adding to the structural mechanisms behind such discrimination, P. EDGELL et al., *Atheists and Other Cultural Outsiders: Moral Boundaries and the Non-Religious in the United States*, 95 SOCIAL FORCES, 2, 2016, 607-638, doi.org/10.1093/sf/sow063 show that prejudice stems from informal tendencies to see atheists as immoral due to US cultural values that connect religion and morality to citizenship and national identity. See also A. PAYNE, *Redefining Atheism in America: What the United States Could Learn from Europe's Protection of Atheists*, 27 EMORY INTERNATIONAL LAW REVIEW, 2013, 661-703, in part. 669-672.

As a result, many atheists are hesitant to reveal their religious views, and those who do risk discrimination and attack. For instance, some Americans identify atheists as not moral as well as unpatriotic people. Atheists are at the top of the list of groups that many Americans find problematic in both public and private life. And the gap between acceptance of atheists and acceptance of other minorities is large and persistent. After all, the United States continues to be a deeply religious nation, and much of American culture is steeped in religion, from their pledge declaring that they are one nation "under God," to their national motto proclaiming "In God We Trust," to their war memorials in the form of Latin crosses[60]. Consequently, atheists are viewed with suspicion and hostility and suffer discrimination and social ostracism. A recent psycological research founded that in the United States, atheists elicit high levels of sociopolitical rejection that is primarily motivated by a lack of trust[61]. Moreover, even in recent years, parents' lack of belief can count against them in custody disputes[62].

Turning our attention to Europe, France has been natural home of atheism and it still is the house of the world's largest populations of atheists[63].

In the UK, a recent survey found that, from 1998 to 2018, the biggest change is the increase in the number of people who are confident atheists: from 10% in 1998 to 18% in 2008 and then 26% in 2018. Agnosticism shows little clear change (from 15% in 1998 to 19% in 2008 and 18% in 2018). There has been a "substantial increase in atheism and in self-description as 'very' or 'extremely' non-religious." Today, more than half (52%) do not see themselves as belonging to any religion, and two-thirds never attend ordinary religious services[64].

Even in Italy, a recent survey by sociologist Franco Garelli demonstrates a rapid increase in the phenomenon of "unbelief" among youngsters (around 28% of the interviewees)[65].

After this brief overview, it is important to underline that, as recently noted by Arif A. Jamal and Jaclyn L. Neo, "the secular state must address religious pluralism not only among different religions, but also between religions and those professing no-religion. As the unaffiliated - the nones - increase in number,

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[60] See C. MALA CORBIN, *Nonbelievers and Government Speech*, 97 IOWA LAW REVIEW, 2012, 347-415, 349. Recently, see R. LAURENCE MOORE, I. KRAMNICK, *Godless Citizenship in a Godly Republic. Atheists in American Public Life*, W.W. Norton Company, New York, 2018.

[61] A.S. FRANKS, K.C. SCHERR, B. GIBSON, *Godless by association: Deficits in trust mediate antiatheist stigma-by-association*, 25 JOURNAL OF EXPERIMENTAL PSYCOLOGY: APPLIED, 2, 2019, 303–316, doi:10.1037/xap0000179.

[62] "Although the religious beliefs of parents are not dipositive in a child custody dispute, they are factor relevant to determining the best interest of a child", *Staggs v. Staggs* (Miss. Court of Appeal 2005, ruling in mother's favour and noting that "while father is an a agnostic and testified that religion is not important to him, mother testified that religion is very important to her".

[63] F. ALICINO, *Atheism and the Principle of Laicité in France. A Shifting Process of Mutual Adaptation*, STATO, CHIESE E PLURALISMO CONFESSIONALE, 32, 2018, 7.

[64] J. Curtice et al. (edited by), *British Social Attitudes: The 36th Report*, London, The National Centre for Social Research, 2019, 27.

[65] See F. GARELLI, *Piccoli atei crescono. Davvero una generazione senza Dio?*, Il Mulino, Bologna, 2016.

they may assert stronger claims against religion as part of what they see to be the realization of the promise of the secular state"[66].

Despite this spread of atheism, there is increasing evidence that atheist and non-religious people face discrimination for openly expressing their beliefs. For instance, a recent psycologists' study argues that there is evidence from around the globe that supports the presence of prejudice against atheists. It also finds that prejudices affect employment, elections, family life and social inclusion[67].

Atheism, as well as religion, is a very complex concept. Even with regard to atheism, the debate over its definition, how it is lived, how it is expressed and the best ways to examine these dimensions could last forever.

Recent developments in the scientific study of religious beliefs and behaviors point to the conclusion that religious disbelief arises from multiple interacting pathways, traceable to cognitive, motivational, and cultural learning mechanisms[68].

There are many variants: hard atheists, who affirmatively deny the existence of God and will assert as much. Soft atheists, who are less focus on attacking religion and more on examining a life without God[69]. Then, a "practical atheism" that represents one of the most interesting aspects, but is also more difficult to interpret. The category of nonbelievers might also include agnostics or atheists who describe themselves as humanist, secular, or of Ethical Culture. These nonbelievers may eschew the term atheist (or agnostic) as a description because, while its definition revolves around the concept of god, their focus is not on the existence or nonexistence of God or gods. They may also avoid those terms because of the stigma associated with them.

There is an increasing debate on religion. In short, in words of Ronald Dworkin's last work: "Does religious freedom concern only God?" [70]. There are always more and more questions to be asked. Which also means that no matter how hard we try to construct complete or even workable definitions, we will always fall short.

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[66] A.A. JAMAL, J.L. NEO, *Religious Pluralism and the Challenge*, cit., 3.

[67] W.M. GERVAIS et al., *Global evidence of extreme intuitive moral prejudice against atheists*, NATURE HUMAN BEHAVIOUR, 1, 2017, doi.org/10.1038/s41562-017-0151. See also L. GIDDINGS, T.J. DUNN, *The Robustness of Anti-Atheist Prejudice as Measured by Way of Cognitive Error*, 26 THE INTERNATIONAL JOURNAL FOR THE PSYCHOLOGY OF RELIGION, 2015, 124–35, that found robust anti-atheist prejudice, suggesting that even where large non-religious populations exist, informal prejudice against atheists was present.

[68] A. NORENZAYAN, W.M. GERVAIS, *The Origins of Religious Disbelief,* 17 TRENDS COGNITIVE SCIENCE, 1, 2013, 20–25. doi:10.1016/j.tics.2012.11.006.

[69] The debate hosted nearly half a century ago by The Canadian Journal of Philosophy is well known: see A. FLEW, *The Presumption of Atheism*, CANADIAN JOURNAL OF PHILOSOPHY, 1, 1972, 29-46; the reply by D. EVANS, *A Reply to Flew's "The Presumption of Atheism"*, ivi, 47-50 and A. FLEW, *Reply to Evans*, ivi, 51-53. Recently, see G. EPSTEIN, *Good Without God: What a Billion Nonreligious People Do Believe*, Harper Collins, New York, 2009; R. ARONS, *Living Without God: New Directions for Atheists, Agnostics, Secularists, and the Undecided*, Counterpoint Press, Berkeley, 2008.

[70] R. DWORKIN, *Religion Without God*, Harvard University Press, Boston, 2013, 90 ss.

5. Religion and Conscience: an Issue still Under Debate…

Atheism and agnosticism also question the suitability of the category of freedom of religion to make everyone, believers and nonbelievers, "feel at home". Indeed, there is an open debate on whether the law should abandon protections for religion in favor of protections for some larger secular category that happens to include religion without being limited to it[71]. In particular, the conscience, defined broadly, to be able to protect the deepest concerns citizens possess in liberal democratic societes, seems to be such category[72].

On one hand, freedom of conscience can be understood as one of the concrete contents of religious freedom. "Freedom of conscience" would be an expression aimed to point out exclusively the freedom to profess one's religious faith externally and to share one's belonging to a specific religious group. There would be no reference to those other dimensions of religious experience, such as freedom of worship and freedom of proselytism. On the other hand, it could be precisely the notion of freedom of conscience that includes religious freedom, if the former is understood as a broad freedom to have or not a religious belief, a table of ethical values, an ideology, a vision of the world and of life involuntary of the whole personality; while the latter would be nothing other than the exercise of freedom of conscience in the specific religious sphere. In this second perspective, for example, freedom of conscience would be referable to the believer as to the non believer, because the non believer too has a conscience, a table of values, to which he claims to be able to freely conform his life to; religious freedom, on the other hand, would concern only the believer, who has a transcendent vision of the world and of life, who has a table of moral values rooted in a positive religion, who equally firmly claims to be able to act in accordance with his religious convictions[73].

The issue of relation between freedom of religion and freedom on conscience is still under debate[74]. It is important noting that some scholars point out the following risk: the conversion of all plausible claims

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[71] C. C. LUND, *Religion Is Special Enough*, 103 VIRGINIA LAW REVIEW, 3, 2017, 481-523, 486.

[72] M. C. NUSSBAUM, *Liberty of Conscience: in Defense of American's Tradition of Religious Equality*, Basic-Books, New York, 2008; R. AHDAR, *Is Freedom of Conscience*, cit., 128: "the latitude for disagreement over its core meaning is narrow certainly much narrower than over the definition of religion". M.L. RIENZI, *The Case for Religious Exemptions – Wheter Religion Is Special or Not*, 127 HARVARD LAW REVIEW, 2014, 1395-1418, with regard to B. LEITER, *Why Tolerate Religion?*, cit. and D. KOPPELMAN, *Defending American Religious Neutrality*, Harvard University Press, Cambridge Mass., 2013, argued that "The most surprising and important lesson of these books is that the case for religious exemptions does not actually depend on treating religion as specially valuable at all. Rather, as both books demonstrate, there are strong reasons to protect acts of conscience — that is, acts based on a person's deeply held beliefs about his or her moral obligations — regardless of whether those beliefs are religious or secular, and regardless of whether religion is accorded special treatment. The books therefore support a strong argument that if any change is necessary to the current regime of religious exemptions, it should be to expand rather than eliminate their availability", 1408.

[73] See G. DALLA TORRE, *Libertà di coscienza e di religione*, STATO, CHIESE E PLURALISMO CONFESSIONALE, 2008, 1-20.

[74] See R. AHDAR, *Exemptions for Religion or Conscience under the Canopy of the Rule of Law*, 5 JOURNAL OF LAW, RELIGION AND STATE, 3, 2017, 185-213; M. SCHWARTZMAN, *What If Religion is Not Special?*, 79 THE UNIVERSITY OF CHICAGO LAW REVIEW, 4, 2012, 1351-1427.

(religious or non religious) into matters of conscience allows courts to treat them as mere matters of conscience, as it were. For instance, wheter with a well-argued religious claim the court is made fully aware of how profound and difficult a quandary the religious believer is in, by contrast, a claim of conscience seems far less compelling[75]. From here, further questions arise: is freedom of conscience sufficent on its own to bear the weight and the range of claims commonly advanced as religious liberty violations[76].

It is probably useful to continue considering atheism within religious area, because the questions that atheism answers concern religion. Even in those States that are deeply influenced by one traditional religion, as Italy with Catholic Church, academic literature has given a proper contribute to achieve such a result. Carlo Cardia in his book *Ateismo e libertà religiosa*, published in 1973, has been one of the first who argued that atheism is closely related to religion[77]: they both are parts of religious phenomenon cause both try to answer to questions on the meaning of existence and infinity. Thus, if religious freedom wants to be full and true, it must ontologically be inclusive of the freedom of atheism in everything the latter really needs. That's because each religious binding is in itself an anti-atheistic binding, and viceversa[78]. Few years later that important book, a "milestone" Judgement of the Italian Constitutional Court (reasons of Judgment by Professor Leopolod Elia), stated that the idea that "atheism begins where religious life ends" has been already outdated by the prevailing opinion that includes the protection of the so-called freedom of conscience of non believers in the wider freedom of religion ensured by art. 19, which would also guarantee (similarly to freedoms of association and thought ensured by artt. 18 and 21 of the Constitution) the corresponding "negative" freedom"[79].

On the contrary, if atheism as well as agnosticism, are not embraced within religious area, then they fall into the category of nonreligious views and, as a consequence, for instance, the government would have no problem to promote and teach them[80]. But, if the government cannot make positive assertions about religious truth, it would be unfair to allow it to make negative assertions[81].

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[75] P. HORWITZ, *The Agnostic Age: Law, Religion and Constitution*, Oxford University Press, New York, 2011, 184.

[76] R. AHDAR, *Is Freedom of Conscience*, cit., 124.

[77] C. CARDIA, *Ateismo e libertà religiosa*, De Donato, Bari, 1973.

[78] C. CARDIA, *Conclusioni. Evoluzione sociale, ateismo, libertà religiosa*, QUADERNI DI DIRITTO E POLITICA ECCLESIASTICA, 1, 2011, 213-225, 215. See also, P. FLORIS, *Ateismo e Costituzione*, ivi, 87-111; N. FIORITA, F. ONIDA, *Anche gli atei credono*, ivi, 15-32.

[79] Italian Constitutional Court, Judgment n. 117/1979.

[80] K. GREENAWALT, *Religion and the Constitution*, cit., 148-50.

[81] As K. GREENAWALT, *When Free Exercise and Nonestablishment Conflict*, Harvard University Press, Boston, 2017, 192, noted: "It is important (…) to understand that the constitutional principle covers negative assertions as well as positive ones. School teachers can no more say 'there is no God' or 'Jesus was just an ordinary person' than they can say 'Jesus Christ was the son of God'. When the question is what schools must, or should, allow student groups to do, the general principle, as we have seen, is that they must ordinarily treat religious groups similarly to nonreligious ones". M.W. MCCONNELL, *Why Protect Religious Freedom*, cit., 809: A state that is neutral toward religion is different. Such a state may

6. Freedom *of* Religion as Freedom *from* Religion

Freedom of religion or belief is traditionally conceptualized as relating to two domains of human activity: the *forum internum*, that is the realm of inner belief where persons hold the right to believe or not to believe, and the *forum externum* that concerns the external manifestation of religious beliefs through a wide range of activities including worship, practices, rites, rituals, teaching, preaching, and publication[82]. Thanks to international human rights law, it is possible to affirm that most liberal democracies consider the freedom of belief to be extended also to the freedom to not believe, thereby protecting atheism and agnosticism. In other words, freedom of religion is not just the freedom *of* religion, but even freedom *from* religion[83]. When the freedom relates to the *forum externum* any limit can only be allowed if prescribed by law, justified on a narrow range of public interests, and is "necessary, proportionate and not excessive". Nonetheless, in some areas of the world, the scenario is different. For example, in some jurisdictions non-religious rights are merely unrecognised but actively opposed[84]: it is the case of certain asian countries such as Afghanistan, Indonesia, Malaysia[85] (only the Constitution of Vietnam explicitly extends freedom of religion to the freedom not to follow any religion[86]) or Egypt and South Arabia[87].

promote ideas consistent with democratic republicanism, but will not promote religion over irreligion or the other way around". The issue is relevant in Italy: see Italian Constitutional Court, Judgment n. 203/1989, further footnote no. 107.

[82] J.L. NEO, *Religious Freedom*, in H. Lau, A. Schwartz (edited by), THE OXFORD HANDBOOK OF CONSTITUTIONAL LAW IN ASIA, Oxford University Press, Oxford, (forthcoming). See also D. NOVAK, *What is religious freedom?*, in W. Cole Durham Jr., J. Martinez-Torron, D.D. Thayer (edited by), LAW, RELIGION, AND FREEDOM CONCEPTUALIZING A COMMON RIGHT, ROUTLEDGE, London, (forthcoming) 2021. F. M. GEDICKS, *Religious Freedom as Equality*, in S. Ferrari (edited by), ROUTLEDGE HANDBOOK OF LAW, cit., 133-144.

[83] See, Z. CALO, *The Secularity of Law and the Freedom From Religion*, in W. Cole Durham Jr., J. Martinez-Torron, D.D. Thayer (edited by), LAW, RELIGION, AND FREEDOM, cit., (forthcoming) 2021.

[84] D. CARPENTER, '*So Made That I Cannot Believe': The ICCPR and the Protection of Non-Religious Expression in Predominately Religious Countries*, 18 CHICAGO JOURNAL OF INTERNATIONAL LAW, 2017, 216–244; A.G. NIXON, *'Non-Religion' as Part of 'Religion' Category in International Human Rights*, RELIGIONS, 11, 2020, (1-18), 2.

[85] A.G. NIXON, *'Non-Religion'*, cit., d., 3: "Malaysian Atheists were targeted by government officials after a picture was posted on the Malaysian Atheist Republic Facebook page, outing many hidden members. Atheist Republic is the biggest atheist group on Facebook, supporting some of the most vulnerable atheists in the world. The Malaysian government requested that Facebook ban Atheist Republic pages but the request was denied by the company. The Malaysian branch was accused by the Malaysian government of attacking religions in an aggressive way. A deputy minister in the prime minister's department claimed that there was no place or rights for atheists in Malaysia or their constitution, a claim later disputed by lawyers. Another cabinet minister proclaimed that 'atheism is a very dangerous ideology' that was being 'spread by social media' and that the government would 'hunt them down'. The minister claimed that Malaysia has freedom of religion, but not freedom from religion".

[86] Constitution of Socialist Republic of Vietnam, art. 24. See J.L. NEO, *Religious Freedom*, cit., (3).

[87] J.L. NEO, B.G. SCHARFFS, *Law and Politics of Freedom of Religion in Comparative Perspective*, 47 UNIVERSITY OF WESTERN AUSTRALIA LAW REVIEW, 2020, 1-14, 4 : "The Cairo Declaration on Human Rights in Islam, promulgated as a competing normative framework to universal human rights law, conceptualises 'religious freedom' not in the formulation commonly found in other human rights documents, but in terms of non-compulsion. Article 10 of the Declaration provides that 'Islam is the religion of unspoiled nature' and that it is 'prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism'. Such restrictions on the right to choose one's religion clearly violates the internal freedom or forum internum of persons, which is widely considered in international human rights law to be inviolable".

Within the *forum externum*, or it could be considered as a third autonomous category, there is a so-called "institutional" forum, whereby the religious groups, as a organized structures, claim to play a peculiar role in the public sphere and debate[88].

If we look at european juridisctions, while freedom of religion, both in *forum internum* and *externum*, cover undoubtedly freedom of non believers, more controversial might appear the extension to them of the same guarantees ensured to religious associations on institutional level, i.e. in the field of their relationships with the State.

6.1. The European Perspective

The importance of freedom of thought, conscience, and religion is of paramount importance to all human beings, including those who are parts of a religious majority, religious minorities, those who reject religion, and those for whom it is not an important part of how they identify themselves[89].

The Council of Europe's European Convention on Human Rights, that is broader than European Union, provides the right to freedom of religion and belief (article 9) and protects everyone from discrimination based on religion and belief (article 14).

The European Court of Human Rights, in its landmark case *Kokkikanis vs Greece* in 1993, ruled that "as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it"[90].

A definition of religion or belief does not exist at European level. Neither Member States do generally provide a definition in their constitutions or legislations, leaving this task to the courts[91].

It is interesting to note that the UK, which recently left the European Union, has adopted in 2010 the Equality Act expressly stating that "Religion means any religion and a reference to religion includes a reference to a lack of religion. Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief"[92].

Nevertheless, the European Union recognizes the value of religion.

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[88] G. DALLA TORRE, *Libertà di coscienza*, cit., 9.
[89] J.L. NEO, B.G. SCHARFFS, *Law and Politics,* cit., 12-13.
[90] See also CEDU, 29 march 2007, *Spampinato vs Italia*. See G. VAN DER SCHYFF, *Does the European Convention on Human Rights guarantee a right to freedom 'from' religion?,* in W. Cole Durham Jr., J. Martinez-Torron, D.D. Thayer (edited by), LAW, RELIGION, AND FREEDOM, cit. (forthcoming).
[91] N. DOE, *Law and Religion in Europe. A Comparative Introduction*, Oxford University Press, New York, 2011, 21.
[92] See N. COLAIANNI, *L'Europa di chi non crede*, STATO, CHIESE E PLURALISMO CONFESSIONALE, 5, 2019, 2.

The Treaty of Lisbon, which entered into force in 2009, singles out the defense of fundamental rights as a cornerstone of the whole European legal system. Respect for human dignity, freedom, democracy, equality, the rule of law and human rights, including the rights of people belonging to minorities, are considered "common to the Member States in a society characterized by pluralism, discrimination, tolerance, justice, solidarity and equality between women and men"[93].

The European Union's commitment to the principle of non-discrimination was (re)affirmed in December 2000 with its Charter of Fundamental Rights. Whereas Article 10 of the Charter recognises the right to freedom of thought, conscience and religion, Article 21 prohibits discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation in all areas, where EU law is applicable. Since the entry into force of the Lisbon Treaty in December 2009, the Charter has the same binding legal value as the Treaties.

In line with the EU Charter, the EU Council Directive 2000/78/EC of 27 November 2000 (the Framework Directive) establishes a general framework for equal treatment in employment and occupation and prohibits direct and indirect discrimination, harassment, instructions to discriminate and victimisation on grounds of religion or belief[94]. The Framework Directive does not include a definition of the terms 'religion and belief'. In the *Samira Achbita case*, the Luxemburg Court points to recital 1 of Directive 2000/78 where reference is made to fundamental rights as protected in the European Convention on Human Rights and the Charter of Fundamental Rights of the EU. Based in these references, the Court states:

'In so far as the [European Convention on Human Rights] and, subsequently, the Charter use the term "religion" in a broad sense, in that they include in it the freedom of persons to manifest their religion,

[93] Art. 2, European Union Treaty.

[94] According to Art. 1, "The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment". According to Article 2, that is focused on the concept of discrimination, "1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1. 2. For the purposes of paragraph 1: (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice". See L. WADDINGTON, M. BELL, *More Equal than Others: Distinguishing European Equality Directives*, 38 COMMON MARKET LAW REVIEW, 3, 2001, 587-611.

the EU legislature must be considered to have intended to take the same approach when adopting Directive 2000/78, and therefore the concept of "religion" in Article 1 of that directive should be interpreted as covering both the forum *internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public"[95].

6.1.1. Freedom *from* Religion as Individual Right

In the light of the foregoing, it is important to mention a recent Judgment of European Court of Justice on interpretation of European Directive 2000/78/EC. After reading an advertisement for a job that was published, a German citizen (Mrs Vera Egenberger), who was non believer, applied unsuccessfully for a fixed term post of 18 months with the *Evangelisches Werk für Diakonie und Entwicklung e.V*. This is an association which exclusively pursues charitable, benevolent and religious purposes, is governed by private law, and which is an auxiliary organisation of the *Evangelische Kirche in Deutschland* (the Protestant Church in Germany). The post advertised entailed preparing a report on Germany's compliance with the United Nations International Convention on the Elimination of All Forms of Racial Discrimination. *Vera Egenberger* had many years of experience in this field and was the author of a range of relevant publications. According to the offer of employment, applicants had to belong to the Protestant church or a church belonging to the Working Group of Christian Churches in Germany. Ms Egenberger was not called to an interview. The applicant claimed that she was not appointed to the post because of her lack of confessional faith. Since she considered that she had been discriminated against on grounds of religion, she sued *Evangelisches Werk* in the German courts[96].

The European Court of Justice started by finding that, under the directive, the right of autonomy of churches (and other organisations whose ethos is based on religion or belief), on the one hand, and, on the other hand, the right of workers, *inter alia* when they are being recruited, not to be discriminated

[95]European Court of Justice, Judgment no. 203/2017, *Case C-157/15*. A. PAYNE, *Redefining Atheism*, cit., in his Conclusion, said: As the United States struggles to develop a new framework for handling religious liberty, it would be prudent to look to other examples developed on the international scene. In particular, the European system provides useful insights due to Europe's demographic similarities with the United States' future population–namely a large and growing atheist and non-religious population. The European framework for protecting religious liberty has drawn heavily on the principles developed by the international community since 1940, but has applied them to a population more equally divided between thereligious and non-religious", 701. "The stigma against atheists is unlikely to disappear in the near future and cannot be solved by legal means alone, but as the framework for protecting religious freedom and the freedom of conscience adapts to a changing America, it is important that the rights and liberties of atheists and nonbelievers receive the necessary protection. Europe can offer a new perspective on dealing with the liberty interests of atheists, and the United States must take heed of these important lessons. The failure to do so could result in a situation where millions of Americans lose their rights to freely follow the dictates of their own conscience and become victim to the trampling of a religious majority motivated by a persistent stigma", 702-3.

[96] P. FLORIS, *Organizzazioni di tendenza religiosa tra Direttiva europea, diritti nazionali e Corte di Giustizia*, STATO, CHIESE E PLURALISMO CONFESSIONALE, 12, 2019, 1-32.

against on grounds of religion or belief must be subject of an assessment aimed to ensure a fair balance between them.

According to the Court, in the event of a dispute, it must be possible for such a balancing exercise to be the subject to review by an independent authority, and ultimately by a national court. Thus, where a church (or other organisation whose ethos is based on religion or belief) asserts, in support of an act or decision such as the rejection of an application for employment with it, that by reason of the nature of the activities concerned or the context in which they are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church (or organisation), it must be possible for such an assertion to be the subject of effective judicial review. The court hearing the case must ensure that, in the particular case, the criteria laid down by the directive for striking a balance between the possibly competing rights are satisfied. The Court observes in this respect that, in principle, it is not for the national courts to rule on the ethos as such on which the purported occupational requirement is founded. They must nevertheless decide, on a case-by-case basis, whether the three criteria concerning a 'genuine, legitimate and justified' requirement are satisfied from the point of view of that ethos. Consequently, the national courts must ascertain whether the requirement put forward is necessary and objectively dictated, having regard to the ethos of the church (or organisation) concerned, by the nature of the occupational activity in question or the circumstances in which it is carried out. In addition, the requirement must comply with the principle of proportionality, that is to say, it must be appropriate and not go beyond what is necessary for attaining the objective pursued[97].

6.1.2. Atheistic and Non-Believers Associations

It is important to point out that the contemporary religious pluralism is challenging the principle of secularism, and its historically different declinations.

It is necessary to rethink the political and juridical tools with which neutrality towards religions and separation of church and state can still ensure freedom and equality.

How the States would manage their relationships with religious groups, play a crucial role, especially for the religious minorities.

[97] European Court of Justice, Judgment no. 257/2018, in Case C-414/16, *Vera Egenberger v. Evangelisches Werk fur Diakonie und Entwicklung e.V*. It must be concluded that, where a church or other organisation whose ethos is based on religion or belief asserts, in support of an act or decision such as the rejection of an application for employment by it, that by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it must be possible for such an assertion to be the subject, if need be, of effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of Directive 2000/78 are satisfied in the particular case.

Unlike the believers, who claim their collective dimension as essential element of their faith and therefore the use to organize themselves, non believers traditionally are mostly individualists. Nonetheless, in recent years, the non-believers as organized groups or associations are increasing. Thus, even relationships between State and these organizations is a new challenge for secularism.

In this area, it is interesting to look at provisions of art. 17 of TFEU, which states:

1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

2. The Union equally respects the status under national law of philosophical and non-confessional organisations.

3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations."

Paragraphs 1 and 2 confirm the principle of non-interference of the EU law with national legislations for what concerns religious confessions and philosophical organizations. The European Union does not mandate the harmonization of religious issues at European level. For our purposes, a more meaningful provision is the innovative paragraph 3, whereby religious denominations and philosophical and non-confessional organizations are equally acknowledged.

The European institutions are still in a learning process regarding the application of this new provision of The Lisbony Treaty. Even the exact meaning of Article 17, especially parag. 3, is still under debate.

It is evident that European Union's will is to respect the status, under national law, of churches, religious associations or communities, and philosophical and non-confessional organizations. These are competences of national authorities on the basis of their respective constitutions and legal systems which reflect their diverse cultural traditions. EU respects this autonomy and diversity and strives to respect the principle of subsidiarity. Art. 17, parag. 3 seems to achieve the goal of a unitary consideration of churches and atheistic organizations, based on a broad concept of religious phenomenon, with particular regard to the process of participatory democracy at European level. Thus, European institutions, in implementing the dialogue referred to art. 17, should avoid discriminating against certain groups, including against certain religious groups or against the non religious community[98].

In 2013, the European Commission published the dialogue implementation guidelines stipulating that the topics covered are to be related to the EU agenda and agreed on by both parties, and that participating organisations must be recognised or registered at national level and adhere to European values.

[98] *Ex plurimis*, see F. MARGIOTTA BROGLIO, M. ORLANDI, *Art. 17 TFUE*, in A. Tizzano (edited by), TRATTATI ISTITUTIVI DELL'UNIONE EUROPEA, Giuffrè, Milano, 2013, 454; D. DURISOTTO, *Unione europea, chiese e organizzazioni non confessionali (Art. 17 TFUE)*, STATO, CHIESE E PLURALISMO CONFESSIONALE, 23, 2016, 1-39.

Participating churches or associations are also encouraged to register with the European Transparency Register, which already includes about 50 of these organizations. The guidelines followed a decision of the European Ombudsman on the European Humanist Federation's 2011 complaint against the Commission, when it had refused to hold a dialogue on human rights in the light of exemptions for religious organisations in the Employment Equality Directive (2000/78).

The European Ombudsman admitted that the Union's institutions have a certain margin of discretion in giving concrete follow-up, through dialogue, to the principle of "participatory democracy"[99]. In particular, the Ombudsman agreed that the Commission has a wide margin of discretion both when defining its political priorities and when identifying the subjects with whom establish a dialogue pursuant to Article 17 TFEU. In the case, however, the Ombudsman rejected the Commission's arguments: a dialogue directly linked to European legislation represents a constructive action and cannot be considered capable of calling into question the status of confessions and philosophical organizations at national level[100]. According to the Ombudsman, therefore, a case of "maladministration" occurred and, therefore, the Commission was invited to clarify, also through the development of specific guidelines, the criteria for application of art. 17 par. 3.

As confirmed by art. 17, par. 1-2 TFUE, the status of religious groups and therefore the relationships between them and the State are left to the national laws. Only a few of these expressly recognize a specific position to atheistic groups[101].

In particular, the German case is very interesting. In Germany, the status of non-denominational organizations is established directly in the Constitution, which affirms the principle of equality between religious denominations and atheistic organizations: article 137, paragraph 7, of the Weimar Constitution (1922), which has been incorporated by art. 140 of the *Grundgesetz*, states that "associations pursuing a

[99] Decision of European Ombudsman, par. 33: The Ombudsman further pointed out that the EU institutions necessarily have a margin of discretion when deciding upon the precise manner in which participatory democracy is made effective. However, they should always ensure that they can justify objectively how they have exercised that margin of discretion [17].

[100] Decision of European Ombudsman, par. 48. It is the Ombudsman's considered opinion that, except in the most extreme cases, open dialogue is positive. It is furthermore his view that, unless the Commission were to demonstrate that a particular dialogue would be contrary to the Union's core values, as set out in Article 2 TEU [19] , the Commission is free to engage in an open and frank discussion. Conducting a dialogue on an issue dealt with in existing legislation cannot but constitute constructive action. In particular, it cannot, in itself, call into question "the status under national law of churches, religious associations or communities, and philosophical and non-confessional organisations"; par. 49. In this respect, the Ombudsman finds that the Commission was wrong to argue that, by engaging in the dialogue proposed by the complainant, it would go beyond the "spirit" of Article 17 (1) and (2) TFEU. By rejecting the complainant's proposal for a dialogue seminar, on the grounds that this would go beyond the spirit of Article 17 (1) and (2) TFEU, the Commission failed to implement Article 17(3) TFEU properly. This constitutes an instance of maladministration.

[101] See A. Orioli (edited by), *Non Believers' Europe. Models of Secularism, Individual Statuses, Collective Rights*, Nessun dogma, Milano, 2019.

philosophical ideology will have the same status as religious communities". Both religious and "philosophical" organizations (*Weltanschauungsgemeinschaft*, which also include humanistic and atheistic organizations) can obtain the status of pulic law corporations (*Körperschaft des öffentlichen Rechts*, often abbreviated as KdÖR). Since Germany is a federal State, each Lander is entitled to grant such status (KdÖR). Religious communities and atheistic associations recognized as KdÖR benefit some peculiar rights, including: the possibility of taxing their members (provided for by art. 137, paragraph 6, Weimar Constitution), organizational autonomy, the possibility of having officials, and so on.

Thanks to such equal legal treatment between religious denominations and philosophical organizations, the Land of Lower Saxony has signed a special agreement with the local atheistic federation (*Freireligiösen Landesgemeinschaft Niedersachsen*) wherby Lander granted to atheistic organization particular benefits that are specific for its needs.

The use of "agreed" legislation, that is normally reserved for relations between states and religious denominations, represents an absolute peculiarity in the European panorama and constitutes a further sign of the equality between atheistic associations and churches in Germany[102].

7. Italian Perspective: the Constitutional Framework

Pointing the spotlight on Italian jurisdiction, two recent legal cases are interesting because they higlight how the approach toward freedom of religion of atheists and agnosticists differs depending on the sphere it interacts with: in other words, such freedom seems to work differently when it relates to the *internum* and *externum forum* from when it aspires to play a role in institutional grounds.

First of all it is worth briefly recalling the italian context[103].

It is common knowledge that the italian case is truly unique in the world due the presence of Holy See within the city of Rome and, as a consequence, the prominent role played by the Catholic Church. The historical bonds between the Italian State and the Catholic Church are based on the fact that Catholicism is considered not only a specific religion, but also a cultural expression of the core national heritage.

The core meaning of Italian Contitution is based on Articles 2 and 3 whereby the rights of human being, as individual as well as social person, are recognized and ensured and a general principle of equality (without distinction, among others, on religion) is established.

[102] S. COVEGELINA, *Il trattamento giuridico dell'ateismo nell'Unione europea*, QUADERNI DI DIRITTO E POLITICA ECCLESIATICA, 1, 2011, 51-85, 82-3.

[103] Recently, see P. FARAGUNA, *Regulating Religion in Italy*, 7 JOURNAL OF LAW, RELIGION AND STATE, 1, 2019, 31-56.

In terms of Article 19, "Everyone has the right to profess freely their religious faith in any form, individually or in association, to disseminate it and to worship in private or public, provided that the religious rites are not contrary to public morality".

After the already cited Judgmnet n. 117/1979, tha Italian Constitutional Court affirmed that freedom of conscience is a right regarding to religious experience. Such right, ensured by articles 2, 3 and 19 of the Constitution, represents an aspect of the human dignity, that art. 2 Const. recognised as inviolable (Judgment no. 334/1996).

Therefore, the freedom of the atheist (internum forum and externum forum) is generally recognized as an exercise of freedom of religion. As a consequence, the principle of equal treatment requires that all people have the right to receive the same treatment, and no one shoud be discriminated against on the basis of his unbelief.

Then, article 20 Const. proctects all kind of religious associations from discriminatory interventions due to their religious nature.

The relationship's framework between State and religious groups is established by articles 7 and 8 Const. Article 7, Section 1, taking explicitely into account the historical relevance of the Catholic Church, affirms that both the State and the Catholic Church are independent and sovereign, each within its own sphere; Section 2 states that their relationships are regulated by the Lateran Pacts signed in 1929. The "bilateral principle" has been constituzionalized [104].

With regard to religious denominations different from the Chatolic one, art. 8 states that they are "equally free" before the law (Sect. 1) and free to organized themselves in accordance with their own statues, to the extent that these are not in conflict with the Italian legal system (Sect. 2). According to art. 8, Section 3, the relationships between the State and non-Catholic denominations "shall be regulated by law on the basis of agreements with their respective representatives"[105].

The combination of all these provisions, and the Constitution as a whole, establish the peculiar features of the Italian principle of secularism (*laicità*[106]) that, despite it is not expressly mentioned in the constitutional text, has been recognized by Constitutional Court, in its historical Judgment n. 203/1989, as an "overridding principle of the State" [107].

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[104] *Ex multis*, see A.C. JEMOLO, *Premesse ai rapporti tra Chiesa e Stato*, Giuffrè, Milano, 1965; S. LARICCIA, *I capisaldi del dibattito dottrinale sugli articoli 7 e 8 della Costituzione*, POLITICA E DIRITTO, 1, 1996, 29-47; G. DALLA TORRE, *Il fattore religioso nella Costituzione. Analisi e interpretazioni*, Giappichelli, Torino, 2003.

[105] See C. Mirabelli (edited by), *Le intese tra Stato e confessioni religiose: problemi e prospettive*, Giuffrè, Milano, 1978; G. CASUSCELLI, *Concordati, intese e pluralismo confessionale*, Giuffrè, Milano, 1974.

[106] It is important to point that the equivalence of the expressions *secularism* and *laicità* is imperfect.

[107] See N. COLAIANNI, *La lotta per la laicità: Stato e chiese nell'età dei diritti*, Cacucci, Bari, 2017; M. D'AMICO, *Laicità costituzionale e fondamentalismi tra Italia ed Europa: considerazioni a partire da alcune decisioni giurisprudenziali*, RIVISTAAIC.IT, 2, 2015; recently, A. DI GIOVINE, *Stato liberale, Stato democratico e prinipcio di laicità*, DIRITTO PUBBLICO COMPARATO ED

Such principle does not imply "indifference toward the experience of religion", but represents "the state guarantee that religious freedom will be safeguarded, in a framework of denomiational and cultural pluralism"[108]. Thus, Italian "*laicità*" is based on two components which complete each other, one "negative" and one "positive". The former is useful to "guarantee the neutrality of the State (and of all public institutions) in relation to different religious beliefs", favoring the free unfolding of pluralism; the latter responds to the need to "shape the legislation in relation to the peculiar characteristics of the individual religious communities"[109].

7.1. The "UAAR" 's Activism: Propaganda of Religious' Thought (Court of Cassation, Sec. I^, ord. no. 7893/2020)

In this regard, a very recent Judgment of Italian Court of Cassation, delivered on April 17th, 2020, is of great importance. A districtual Court of Appeal had banned the "Unione Atei, Agnostici e Razionalisti" (hereafter UAAR), an atheistic and agnostic italian organization, from affixing a manifest whereby the letter "D" has been crossed out from the word "Dio" (God): therefore, the only visible letters were *i* and *o*. The meaning of word "io" in italian language is *I* (i.e, *ego*, *self*). Then the message went on as follows: "10 million Italians live well without D. Whereas they are discriminated, the UAAR is next to them". According to the Court of Appeal, it was just an offensive message towards all religions denominations with no real propaganda of atheism.

The Court of Cassation's opinion has been different. Indeed, art. 19 and art. 21 of Italian Constitution allow the most wide-ranging forms of propaganda and dissemination of thought, even religious one. Only the expressions that constitute an offence towards other religions shall be prohibited by the law. But the offence must be clear, direct and serious. In the case, the Court has recognized the UAAR's message as lawful expression of freedom of thought. By the right to profess religious thoughts, that must be equal

EUROPEO, numero speciale, 2019, 215-250; F. OLIOSI, *Libertà religiosa, laicità e confessioni di minoranza: il difficile bilanciamento tra pluralismo e democrazia nell'ordinamento giuridico italiano*, ARCHIVIO GIURIDICO FILIPPO SERAFINI, 1, 2020, 243-287.

[108] Constitutional Court, Judgment n. 203/1989. Deciding a case concerning the teaching of Catholic religion in public schools, that was mandatory until the 1984, when the modification of Concordat introduced an opt-out clause, the Court has clarified the outlines of the discipline regulating religious instruction and the principle of secularity by establishing: 1) the optional nature of the lessons on the Catholic religion, 2) the compatibility of the rules of the Rome Agreement with the principle of secularity, 3) the individual right to participate in religion classes or not, 4) the duty of the secular State to protect the self-determination of citizens and to respect the freedom of conscience and the educational responsibility of parents, guaranteed under Articles 19 and 39 of the Constitution, and 5) the evident discrimination against students who do not avail themselves of religion classes if attendance of lessons on another subject is compulsory for them. Instruction in Catholicism is optional, only becoming compulsory once a student has chosen to follow the lessons. Consequently, in the case of non-attenders, the alternative constitutes solely a situation of non-obligation.

[109] L. D'ANDREA, *Eguale libertà ed interesse alle intese delle confessioni religiose: brevi note a margine della sent. cost. n. 346 del 2002*, QUADERNI DI DIRITTO E POLITICA ECCLESIASTICA, 3, 2003, 667-685, 671.

for both believers and non believers, atheists cannot be discriminated against in the profession of thought[110].

It is interesting that the Court has used a broad concept of discrimination, which is directly derived from European law[111].

7.2. The "UAAR"' s Activism: Is Possible for Athesistic Association to Conclude an Agreement with the State?

Few years earlier, the same association (UAAR), whose statutory denies the status of religious denomination, has requested the Government to launch negotiations aimed at the conclusion of an agreement pursuant to article 8 (sect. 3) of the Constitution. The Government denied this request, due the evident non-religious status of the claimer.

The UAAR appealed that decision to Administrative Court (TAR) which has recognized the Government's decision as a free political act, as such not justiciable[112]. The Council of State, as a Court of Appeal, ruled the opposite, and therefore considered the Government's denial subjcet to review of courts. The case arised to Supreme Court of Cassation.

For our purposes, it is important to note that all these Courts questioned what a religious group or denomination is. In particular, rejecting the appeal judgment, the Court of Cassation asserted that the preliminary assessment concerning the classification of the applicant (UAAR) as a religious group amounted to an exercise of technical discretion by the administrative authority, and was as such subject to judicial review. Considering the first section of article 8 of the Constitution, which, as already seen, guarantees equality before the law to all religious faiths, in relation to the third paragraph, which stipulates that relations between the state and faiths other than the Catholic Church shall be governed by Concordat, the Court of Cassation held that the conclusion of an agreement also pursues the goal of achieving equality between religious faiths. For that reason, it concluded that the eligibility of a belief system to stipulate an agreement with the state cannot be left to the absolute discretion of the executive branch, as this would otherwise encroach upon the principle of equal freedom for religious groups.

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[110] Court of Cassation, Sec. I^, ord. no. 7893/2020. On this Judgment, see N. COLAIANNI, *Propaganda ateistica: laicità e divieto di discriminazione*, QUESTIONE GIUSTIZIA, June 10, 2020; M. CROCE, *Opportune (e ovvie) precisazioni della Cassazione in tema di propaganda del non credere*, QUADERNI COSTITUZIONALI, 2, 2020, 401-404; J. PASQUALI CERIOLI, "*Senza D". La campagna Uaar tra libertà di propaganda e divieto di discriminazioni*, STATO, CHIESE E PLURALISMO CONFESSIONALE, 9, 2020, 50-56.

[111] EU Directive 2000/78 supra footnote no. 95. See N. COLAIANNI, *Propaganda ateistica*, cit.

[112] TAR Lazio, Rome, Judgment no. 12539/2008.

After Court of Cassation Judgment, the case has returned before to TAR – at merit stage. The latter judge has considered the Government's refusal reasonable due the "commonly accepted" interpretation of religion, as a set of beliefs and acts of worship that bind the life of an individual or a community, with what they believe being a superior and divine order[113].

Actually, the Court of Cassation Judgment raised a major constitutional problem. The President of the Council of Ministers, acting in his own right and on behalf of the Italian Government, appealed the Court of Cassation decision before Constitutional Court in a jurisdictional dispute between branches of state (ex art. 134 Const.). In Government's opinion, in relation to religious matters, it should be absolutly free to decide to engage or not in negotiations ex art. 8, sect. 3, on the basis of its own political assessments. Therefore, in the case of UAAR's request, Government's refusal to launch negotiations is a political act, as such not subject to judicial review. In essence, the Governement asserted a political question[114].

Thus, the Constitutional Court has been asked to rule that it was not for the judicial branch to assert that the ordinary courts had the power to review the refusal by the Council of Ministers to launch negotiations aimed at the conclusion of an agreement pursuant to Article 8 (3) of the Constitution.

The Constitutional Court, with a very debated Judgment - no. 52/2016[115]- accepted the application by the President of the Council of Ministers and overturned the court ruling, concluding that the decision

[113] See Tar Lazio, Roma, Judgment no. 7068/2014, p. 4.4 Law.

[114] On political question doctrine, see in American literature: A. TYLER, *Is Suspension a Political Question?*, 59 STANFORD LAW REVIEW, 2, 2006, 333-413; F. SCHARPF, *Judicial Review and the Political Question: A Functional Analysis*, 75 THE YALE LAW JOURNAL, 4, 1966, 517-597, doi:10.2307/794865; J. MULHERN, *In Defense of the Political Question Doctrine*, 137 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 1, 1988, 197-176, doi:10.2307/3312167; J. CHOPER, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE LAW JOURNAL, 6, 2005 1457-1523; L. HENKIN, *Is There a "Political Question" Doctrine?*, 85 THE YALE LAW JOURNAL, 5, 1976, 597-625. doi:10.2307/795454; A. HUQ, *Removal as a Political Question*, 65 STANFORD LAW REVIEW, 1, 2013, 1-76; R. A. EPSTEIN, *The Political Question Doctrine*, in Id. (edited by), THE CLASSICAL LIBERAL CONSTITUTION, Boston, Harvard University Press, 2014, 133-144. On the Italian literature, see at least, A.M SANDULLI, *Atto politico ed eccesso di potere* (1946), in Id. (edited by), SCRITTI GIURIDICI, III, Jovene, Napoli, 1990, 25 ss.; P. BARILE, *Atto di governo (e atto politico)*, ENCICLOPEDIA DEL DIRITTO, *ad vocem*, Giuffrè, Milano, 1959; E. CHELI, *Atto politico e funzione di indirizzo politic*o, Giuffrè, Milano, 1961.

[115] *Ex plurimis*, see G. LANEVE, *Conflitti costituzionali e conflitti di giurisdizione sul procedimento relativo alla stipula delle intese ex art. 8, comma 3, Cost.; riflessioni a partire da un delicato (e inusuale) conflitto tra poteri, tra atto politico e principio di laicità*, RIVISTAAIC.IT, 2, 2017, 1-39; G. DI COSIMO, *Carta bianca al Governo sulle intese con le confessioni religiose (ma qualcosa non torna)*, STATO, CHIESE E PLURALISMO CONFESSIONALE, 2, 2017, 1-8; M. CROCE, *Alla Corte dell'arbitrio: l'atto politico nel sistema delle intese (Osservazione a Corte cost., sent. n. 52 del 2016)*, GIURISPRUDENZA COSTITUZIONALE, 2, 2016, 560-569; A. POGGI, *Una sentenza "preventiva" sulle prossime richieste di Intese da parte di confessioni religiose?*, FEDERALISMI.IT, 8, 2016, 1-12; I. NICOTRA, *Le intese con le confessioni religiose: in attesa di una legge che razionalizzi la discrezionalità del Governo*, ivi, 1-8; A. RUGGERI, *Confessioni religiose e intese tra* iurisdictio *e* gubernaculum*, ovverosia l'abnorme dilatazione dell'area delle decisioni politiche non giuristiziabili*, ivi, 7, 2016, 1-10; A. PIN, *L'inevitabile caratura politica dei negoziati tra il Governo e le confessioni e le implicazioni per la libertà religiosa: brevi osservazioni a proposito della sentenza n. 52 del 2016*, ivi, 1-8; S. LARICCIA, *Un passo indietro sul fronte dei diritti di libertà e di eguaglianza in materia religiosa?*, NOMOS – LE ATTUALITÀ NEL DIRITTO, 1, 2016, 1-28; S. PRISCO – F. ABBONDANTE, *Intendersi sulle intese*, STATO, CHIESE E PLURALISMO CONFESSIONALE, 3, 2018, 1-32. See also M. Parisi (edited by), *Bilateralità pattizia e diritto comune dei culti. A proposito della sentenza 52/2016*, Editoriale Scientifica, Napoli, 2017; F. ALICINO, *La legislazione sulla base di intese. I test delle religioni "altre" e degli ateismi*, Bari, Cacucci, 2013.

in question was a discretionary matter for the executive, which could be held accountable for it as a political matter before Parliament, but not before the courts.

Elsewhere I have disagreed with such conclusion of the Italian Constitutional Court: in my opinion, whether or not to start negotiations to achieve an agreement cannot be an exclusive prerogative of executive branch since the principle of secularism is deeply rooted in the question[116]. But this is not too relevant here. Instead, one point is important: that is the specific role of agreements with religious denominations (art. 8, sect. 3).

It is true, as stated by the Court, that the agreements are a specific tool created by Constitution to extend the principle of bilaterality to the non-Catholic denominations[117]. However, this only partially addresses the role of agreements. Indeed, these have also a substantial value. They are tools for meeting the specific needs of different religions"[118]. Such needs are strictly related to the specific condition of the believers that preach conceptions about the very nature of human existence transcending the limits of "strict rationality" and breaking through a peculiar dimension, different from the one the State and its legal system belongs to. These needs differ from those of secular subjects, such as atheistic and/or agnostic organizations, even though they shall be considered in the same guise as religious subjects since they, as well, express a comprehensive existential conception of the world, of ethical values, or of the individual's approach to the fundamental questions. A religious denomination assumes a minimum of rites and symbols that claim forms of respect and protection from adversarial offenses, that no atheists or agnostics group assumes[119].

8. Conclusion

While still holding that freedom *of* religion is also freedom *from* religion, atheism and religion, both individual and collective, have different characteristics, first of all because only the latter involves interests and needs that belong to an order distinct from the civil order[120]. Believers and nonbelievers are both part of the same phenomenon, but they remain different.

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116 G. LANEVE, *Conflitti costituzionali e conflitti di giurisdizione*, cit., 31-39.

117 Constitutional Court, Judgment n. 52/2016, p. 5.1.

118 As argued by G. PEYROT, *Significato e portata delle intese*, in C. Mirabelli (edited by), LE INTESE TRA STATO, cit., 66-67, the agreement is a "tailored dress" and not a "pret-a-porter. As highlighted by A. RUGGERI, *Confessioni religiose e intese*, cit., 8, if the agreement is not a condition of "equal freedom", it certainly raises its level of guarantee and effectiveness.

119 P. FLORIS, *Ateismo e Costituzione*, cit., 101-102.

120 P. BALCEROWICZ, *Logic in religious an non-religious belief systems*, 84 INTERNATIONAL JOURNAL FOR PHILOSOPHY OF RELIGION, 1, 2018, 113-129, argued that: "despite an oft repeated claim that faith-based religions and reason-anchored scientific or philosophical world-views are ultimately similar, the structural differences between religious and non-religious belief systems are clearly determinable and concern the treatment of the primary set of values (axioms, dogmas etc.), i.e. their modifiability and extendibility. The first-level rationality can be frequently seen at work within most religious belief systems and is necessarily operative within any consistent non-religious system at the level of derived

John Dewey has distinguished between religion and religious. The adjective is a broader concept than the noun. Religion, although difficult to define, still refers to a set of beliefs and practices tied to an institutional organization, while religious identifies an attitude that addresses life, an orientation of life towards a sense of security and peace. This kind of orientation is a religious quality. Regardless of its cause, what is worth is the result into each human experience[121].

It's necessary to remember that theism and atheism constitutes two opposites of the same human experience and both deserve to be protected at the same time. But the protection of the theistic and atheistic positions must be reasonably adapted to their peculiar features.

Secularism is increasingly called upon to face off with this super as well enriching diversity, but it must be understood, in the words of Augusto Barbera, as a "method", a rule for all faiths and doctrines to coexist and dialogue with each other, what lays down the foundation for coexistence itself in a democratic society[122].

secondary statements, subsidiary beliefs or demonstrated truths respectively. This is the stage where religion and a consistent non-religious theory, e.g. scientific theory, differ merely qualitatively, i.e. in the degree in which logic and reason are exercised in order to bring the consistency of secondary statements derived from the set of primary statements or primitive notions (dogmas, axioms etc.). However, it is only the second-level rationality that entails the readiness to change the set of primary statements, i.e. axioms, and is observable in consistent non-religious systems alone, such as axiomatic systems, science etc., whereas it is by definition absent in all religious belief systems which do not allow for any formally acknowledged transformation of the body of dogmas solely on the basis of inconsistencies demonstrated by logic and argument. Such a significant change within the set of primary statements that is characteristic of the second-level rationality can be termed a paradigm shift. Accordingly, the second-level rationality marks a crucial structural and qualitative difference between religious and non- religious systems. And this is a stage where the essence of religion and the nature a consistent non-religious belief system significantly diverge", 127-128. See also P. FLORIS, *La proposta di legge in materia di libertà religiosa nei lavori del gruppo di studio Astrid. Le scelte operate nel campo della libertà collettiva*, STATO, CHIESE E PLURALISMO CONFESSIONALE, 20, 2017, 5.

[121] J. DEWEY, *Religion* Versus *the Religious* (1934), in Id. (edited by), A COMMON FAITH, Yale University Press, New Haven, 1960, 1-28, in part. 9-13. See also G. ANELLO, Homo Religiosus *in a Globalized World*, cit., who refers to term "Religiosity".

[122] A. BARBERA, *Il cammino della laicità*, in S. Canestrari (edited by), LAICITÀ E DIRITTO, Bonomia University Press, Bologna, 2007, 33-91. See also Z. CALO, *Law, Religion and Secular Order*, cit.