

A CHRISTIAN OR A LAIC EUROPE? MOVING BEYOND A FALSE DICHOTOMY

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Abstract:

In order to assess the debate concerning the constitutional recognition of Christianity in Europe, we need to pose the more general question of the role (if any) of the symbolic function of the modern democratic constitution in relation to religion. In the present paper, we differentiate between three stylized understandings of constitution-making, namely communitarian, liberal and discursive. Our argument is that the discursive "model" of the symbolic function of the constitution combines the merits and avoids the demerits of communitarianism and liberalism.

Keywords: European constitutionalism, democracy, religion, Habermas, Rawls, communitarianism.

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Introduction

The failure of the “Treaty establishing a Constitution for Europe” has given a fresh impetus to the advocates of introducing a reference to Christianity in the Preamble of the future European Constitution: Angela Merkel’s renewed plea is a prime example of this positioning.¹ According to it, a stronger anchorage into the Christian dimension of the European identity would not merely reflect the realities of the European historical and legal-constitutional traditions, but it would also offset the lack of solidarity and concrete motivation for furthering the European political project. The fiasco of the Constitutional Treaty is yet another confirmation that a European polity founded on private economic interest or on abstractions such as procedural democracy and constitutional patriotism is unworkable. Thus, the spiritless European political body would need a transfusion of religious blood: the constitutional recognition of Christianity is, as the argument goes, a necessary step in this direction.

In order to clarify the issue of the desirability of introducing a reference to Christianity in the European Constitution, we need to tackle the general question of the function and purpose of a constitution in modern democracies. A modern democratic constitution fulfils normally a plurality of functions out of which three are almost always present. The first is the organization of the state powers and the repartition of institutional competencies. The second is defining and specifying the relations between individuals and the public authority. This includes catalogues of individual rights but also of duties and responsibilities - for instance the contribution to military defence and other public expenses. Third, a constitution can have a symbolic function in that it is also “a kind of deposit that reflects and fosters values, ideals and symbols shared by a particular society.”² While the first two functions are in principle accepted by the main currents of contemporary political-legal thought, the third symbolic one is subject of deep controversy. The debate concerning the recognition of Christianity by the European Constitution is about how to conceive its symbolic function: in the first place, is it desirable? If so, should it include references to secular values or also to Christian religious values? Then, what could be the legal, political and symbolic consequences of making a reference to Christianity in the European Constitution?

1 In a recent speech delivered on the 25th of May, 2006 (www.radioklassik.de).

2 Weiler, J. H. H., *Un’Europa cristiana. Un saggio esplorativo*, prefazione di Augusto Barbera, 2nd ed., Biblioteca Universale Rizzoli, 2003, 55. To our knowledge, this work has not yet been translated into English. All translations from Italian are ours.

In this paper, we advance the distinction between three stylised conceptions of constitution-making (communitarian, liberal and discursive) and analyze what they entail for the question of the constitutional recognition of Christianity in Europe. First, communitarianism regards the communal identity and the values of community as foundational for the constitutional project: a constitution is supposed to reflect a pre-political identity and a set of communal goods.³ This stance has been recently adapted and applied to Europe by J. Weiler in his *Un'Europa Cristiana*. According to this view, the European Constitution should emerge out of the European identity and, therefore, mirror the Christian dimension of this identity. Weiler interprets the constitutional recognition of Christianity as having at least three positive consequences: - it can enhance a fruitful interaction between the Christian (and, more generally, religious) discourse and democratic discourse; - it entails that the Christian discourse can have a direct impact on the legal decision-making; - it would have not only integrative effects for the European Christians, but also for other religious persons in virtue of the implicit recognition of the general salience of religion for people's life (Section I).

Second, we broadly delineate the liberal conception of constitution-making relying on the influential view of John Rawls.⁴ Despite their differences, political liberalism and laicism conceive the relation between democratic and religious discourse as a zero-sum game and are generally unfavourable to making ethical-religious references in the constitutions (Section II). Third, we outline and defend a discursive conception of constitution-making which, in our view, combines the merits and shuns the demerits of the previous ones. Consonant with the liberal view, the discursive “model” argues that the notion of a *direct impact* of the religious discourse on legal-political decision-making is democratically illegitimate. However, in agreement with the communitarian conception, religion is not regarded as a “conversation-stopper” (Rorty),⁵ but as potentially providing semantic and motivational resources for democratic discourse and practice under certain conditions. Since a historically embedded constitution is not necessarily a strict legal document, it could in principle fit in a symbolic function as long as this does not have discriminatory

3 See, for instance, Taylor, Charles (1989), *Sources of the Self: The Making of the Modern Identity*, Cambridge: Cambridge University Press; Sandel, Michael, 1998, *Liberalism and the Limits of Justice*, Cambridge: Cambridge University Press, 2nd edition and Sandel (1996) *Democracy's Discontent*, Cambridge: Harvard University Press.

4 See esp., Rawls, John (1999) *The Law of Peoples*, with *The Idea of Public Reason Revisited*, Harvard University Press and Rawls (2005), *Political Liberalism*, Harvard University Press.

5 Rorty, Richard (1994), “Religion as a Conversation-Stopper,” *Common Knowledge*, 3. See also, Rorty, Richard and Vattimo, Gianni (2005), *The Future of Religion*, Polity Press.

effects. Nonetheless, given the current European situation, the constitutional recognition of the “Christian roots” is not recommendable: the unilateral reference to Christianity could have discriminatory effects that weaken the conditions of the realization of inclusive discursive practices. While our answer to the specific issue of the constitutional recognition of Christianity coincides formally to the laicist one, it is crucial to emphasize that the discursive stance should be seen as being far away from a self-congratulatory laicism that denies the relevance of Christianity for the European history and the possible salience of the public manifestation of religion. The discursive perspective has different broader consequences for conceiving the European “model” of interaction between religion and democracy in a way that departs from the dichotomy of laic Europe/Europe with a Christian soul.⁶

I.

In the following comparative analysis of the three stylized models of constitution-making, we examine: (a) their understanding of the constitution and of its role in a democratic society; (b) their views on the salience (if any) and content of the symbolic function of the constitution in relation to religion (c) what they entail for the debate on the constitutional recognition of Christianity in Europe.

(a) Communitarianism grants a foundational importance to the

⁶ Our discursive conception combines elements from two views that are situated between liberalism and communitarianism, namely deliberative democracy and republicanism. For *deliberative democracy* in relation to religion, see especially, Habermas, Jürgen (2005), *Zwischen Naturalismus und Religion*, Suhrkamp Verlag and (2003), “Faith and Reason,” in *The Future of Human Nature*, Polity Press and Waldron, Jeremy (1993), “Religious Contributions in Public Deliberations,” in *San Diego Law Review*, 30, 817-847. For republicanism on religion, see Taylor, Charles (2002), *Varieties of Religion Today. William James revisited*, Harvard University Press and Viroli, Maurizio (2002), *Republicanism*, New York: Hill and Wang and (1996), *Etica e religione nella tradizione repubblicana: aspetti storici e teorici*, Torino: Fondazione Giovanni Agnelli. For the development of the dialogical perspective, see also Tataru-Cazaban (2005) “Biserica_ i stat: elemente pentru o etic_ a dialogului într-o societate pluralist_,” Colocviul interna_ional Religious Freedom in the Romanian and European Context, Ministry of Culture and Religious Affairs/the State Secretariat for Religious Affairs and Conscience and Freedom Association, Bucure[ti], Carp, Radu, ed. (2005) *Un suflet pentru Europa: dimensiunea religioas` a unui proiect politic*, Editura Anastasia, Preda Radu, “Cultura dialogului sau despre o alt` relație Biserica` - stat”, in Cristian B_dili_, Tudorel Urian, Nostalgia Europei. *Volu[m] în onoarea lui Alexandru Paleologu*, Polirom, 2003, pp. 148 – 163 and Baconski, Teodor (2001), *Puterea schismei. Un portret al restinismului european*, Editura Anastasia, Bucuresti. See also the contribution of Bogdan Tataru-Cazaban, Anca Manolescu, Radu Preda and Radu Carrp at <http://www.revista22.ro/>, iulie, 2006, “The Role of Religion in the New European Polity-Building.”

communal identity and values of the historical community.⁷ Being built on an active and deep agreement about the good, a democratic regime is understood as a "lived constitutive community" (Sandel). According to Taylor's :

“[t]he condition for a successful [democratic] participatory model is a strong identification with the fate of the community. [...] This identification can perhaps best be described in this way: it exists where the common form of life is seen as a supremely important good, so this continuance and flourishing matters to the citizens for its own sake and not just instrumentally to their several individual goods. The common life has a status of this kind when it is a crucial element in the members identity, in the modern, Eriksonian sense of the term; hence my use of “identification.” Unless there is a common sense of a determinate community whose members sense a bond between them from this common allegiance, an identification with the common good cannot arise.”⁸

An important corollary is that the constitution should not be seen as comprised of a set of abstract principles concocted overnight, but as organically emerging from a pre-existing collective identity. This does not amount to denying pluralism and espousing the notion of a pre-established harmony in a complete sense – a harmony that is to be simply mirrored by the “communitarian constitution.” There is a variety of social roles and ideals of life and there is still disagreement and debate, constitutional or not. The communitarian’s point is just that disagreement takes place between discursive collective interpretations of shared values which *should* and *can* be resolved by “digging deeper” into what community’s identity really is and ought to be.⁹ Engaging in discursive practices entails a search for the deepest commitments of the community (and, simultaneously, of the individuals), so

7 The most important “communitarians” are considered Alasdair MacIntyre, Charles Taylor, Michael Sandel and Michael Walzer. For a good general analysis, see Mulhall Stephen and Smith, Adam (2002), *Liberals and Communitarians*, Blackwell, Oxford. It is worth noting that all these authors have a complex relation to communitarianism which cannot be detailed here. See especially, Sandel (2005) “The Limits of Communitarianism” in Sandel, Michael (2005) *Public Philosophy. Essays in Morality and Politics*, Harvard University Press, 252-262; Taylor, Charles (1999), *A Catholic Modernity? Charles Taylor’s Marianist Award Lecture*, edited and with an Introduction by James L. Heft, S. M., Oxford University Press; for MacIntyre, see Aurelian Crăiutu’s (1998) “Cuvânt înainte” to *After Virtue. A Study in Moral Theory*, Romanian transl., Humanitas, 5-21.

8 Taylor (1985), “Alternative Futures: Legitimacy, Identity and Alienation in Late Twentieth Century Canada, in Cairns Alan and Williams, Cynthia (eds.), *Constitutionalism, Citizenship and Society in Canada*, Toronto: Toronto University Press, 213f.

9 See Forst, Rainer (2001), “The Rule of Reasons. Three Models of Deliberative Democracy,” in *Ratio Juris*, Vol. 14, 347-378.

that a justifiable answer can be presented as the most adequate expression of the common ethical character. Ideally speaking, the achievement of a “common mind” (Taylor)¹⁰ should be reflected in the constitution.

This short analysis is not meant to imply that communitarianism rejects individual rights. True, in *After Virtue*, MacIntyre espoused the Aristotelian ideal of the intimate, reciprocating local community bound by shared ends, where people merely take on and fulfill socially attributed roles and fulfill socially given roles.¹¹ And in the *Spheres of Justice*, Michael Walzer pointed to the Indian caste system “where the social meanings are integrated and hierarchical,”¹² as an example of a non-liberal society that is just according to its internal criteria. However, the communitarian early musings about alternative societies to the constitutional-democratic ones have proved just as unconvincing as MacIntyre’s idea that human rights and unicorns are equally figments of imagination. The pre-modern *Gemeinschaft* conception of an all-encompassing community that members “unreflectively” support seemed ill-suited for complex and large democratic societies. Thus, in their more recent writings, the communitarians’ understanding of constitution-making presupposes also human rights.¹³ Yet communitarians are keen on pointing out that individual rights and, more specifically, human rights, can be justified, interpreted and efficaciously applied not as liberal-universalist abstractions, but only as embedded in their historical-ethical contexts. Furthermore, the emphasis on the symbolic function and communal values as the normative core of democracy makes communitarians less worried than liberals about majoritarianism and more concerned about an increase in juridified politics (see Sandel on the “procedural republic,” 1984 and Taylor on the “politics-as-judicial-review”).¹⁴ Concerning the place of the constitution, in the communitarian view the constitutional document is not the Archimedean point of the democratic society. Instead, it is part of broad historical processes characterized by the collective identification with and participation into the communal good

(b) By now it should not come as a surprise that, for communitarianism, the symbolic function of the constitution as expressing the communal good is foundational. And, therefore, it should

10 Taylor (1993), “Modernity and the Rise of the Public Sphere,” 229.

11 MacIntyre, Alisdair (1985) *After Virtue*, Notre-Dame: University of Notre Dame Press, 2nd edition, Romanian transl., Humanitas, 1998.

12 Walzer, Michael (1983), *Spheres of Justice*, Oxford: Blackwell, 313.

13 See, for instance, Sandel, Michael (2005), *Public Philosophy. Essays in Morality and Politics*, ed. cit. and Taylor, Charles (1999), *A Catholic Modernity? Charles Taylor’s Marianist Award Lecture*, ed. cit.

14 Taylor, Charles (1992), *Ethics of Authenticity*, Harvard University Press, 114.

not come as a surprise that the symbolic function of the constitution as expressing this communal good is considered foundational. As long as religion plays an active historical role for a significant part of the demos, there should be a strong constitutive bond between it and (constitutional) politics. Hence, if religion is part of the collective and individual identity, the constitution should reflect and enhance it.¹⁵

However, communitarianism points out that the arrangements vary according to the historical context. These arrangements can move from the constitutional recognition of a state-religion to the strict constitutional separation between state and religion but the wide acceptance of an active presence of the religious discourse in the social and political public sphere.

(c) The communitarian stance has been recently adapted and applied to Europe by Joseph Weiler in his *Un’Europa Cristiana*. Weiler’s passionate plea for the constitutional recognition of Christianity is based on a specific interpretation of communitarianism. In Weiler’s view, the constitution should be seen as derivative from a particular ethos and historical identity. In a characteristic passage, he claims that “...the catalogues of the fundamental rights present in Constitutions express the ethos of those communities that formulated them.”¹⁶

While in Europe the constitution-makers could have very well chosen a “minimalist-functionalist method” that only limits and regulates political power and enlists catalogues of rights, the fact is that both the European Charter of Fundamental Rights and the project of the European Constitution opted for an explicit symbolic function.¹⁷ And, given that the European history cannot be, descriptively speaking

15 For communitarians, the would-be liberal neutrality with respect to ethical frameworks (religious and secular) neglects the importance they can have for people’s non-political and political identities. In Sandel’s conception, the liberal interpretations of governmental and constitutional neutrality towards religion in view of protecting individual freedom “may miss the role that religion plays in the lives of those for whom the observance of religious duties is a constitutive end, essential to their goal and indispensable to their identity,” in Sandel, Michael (1990) *Freedom of Conscience or Freedom of Choice?* In Hunter, J.D. and Guinness, M. (eds.) *Articles of Faith, Articles of Peace: The Religious Liberty Clauses and the American Public Philosophy*, Washington, D.C.: Brookings Institution, 89.

16 Weiler, *Un’Europa Cristiana*, 55.

17 The symbolic function of constitution is sometimes not explicit in Preambles. The Austrian, Dutch, Italian, Belgium and Finish constitutions have only brief and formal Preambles. Weiler argues that the identity function *always* models the understanding of the first two more “instrumental” functions of constitutions (Weiler: 56). However, he also claims that a constitution can legitimately gloss over the symbolic function. This suggestion seems to be incoherent. Since a constitution is supposed to make explicit and transparent the bases of a political community, it is not sure why Weiler argues that its symbolic function or “real ground” can legitimately remain hidden.

understood by ignoring its Christian dimension and historical memory is crucial for building a European “ethic community,” the exclusion of a reference to “Christian roots” would represent a “thunderous silence” (“*silenzio tuonante*”).

Furthermore, as the European constitutional traditions either follow a laicist model or recognize in various ways Christianity, a fair European Constitution should reflect this plurality. Put differently, here Weiler's argument is that adopting a Constitution which does not acknowledge Christianity would be discriminatory towards the European constitutional traditions that recognize it. As a consequence, the preferable constitutional solution for Europe is the Polish one since it accommodates both the laic and religious sensibilities by integrating the opposite “Greek” and “French” constitutional arrangements.¹⁹

In Weiler's hands, the communitarian's critique of the laicist claim to neutrality acquires a specific pluralistic dimension. True, often Weiler sounds as if Europe had a prevalent Christian identity or at least a prevalent “Christian-constitutional” identity. Yet, at other points he appears to support the notion of an Europe as a sort of pluralist association of different but *equally legitimate* systems - French, Greek and so on -, which in themselves are based on value consensuses. Thereby, Weiler moves away from an “ideal-typical” communitarianism that looks for a consensus attained by digging deeper into the existing traditions towards a more pluralist solution. Weiler interprets the necessity of recognizing Christianity in the European Constitution as entailing that Christian discourse can shape unmediatedly legal decision-making: European courts of justice would be thus entitled to reach decisions in *hard cases* by invoking Christianity or Christian arguments.²⁰ This view is agonistic in that it does not envisage any criteria for “mediating” between the laic and the Christian discourse: sometimes the laic discourse gains the upper hand, some other times the Christian one.²¹

18 E.g., the Greek, Spanish, Maltese, German, Irish or Polish constitutions.

19 See Weiler, *Un'Europa Cristiana*, 70-73. According to the Preamble of the Polish Constitution “...[w]e, the Polish Nation - all citizens of the Republic, Both those who believe in God as the source of truth, justice, good and beauty, As well as those not sharing such faith but respecting those universal values as arising from other sources, Equal in rights and obligations towards the common good... Hereby establish this Constitution of the Republic of Poland as the basic law for the State...” (to be found at: http://www.oefre.unibe.ch/law/icl/pl00000_.html).

20 Weiler, *Un'Europa Cristiana*, 81-83.

21 Among the communitarian writers, probably MacIntyre emphasizes most the “agonistic dimension.” According to him, “the moral standpoint and the patriotic standpoint are systematically incompatible,” MacIntyre (1984), “Is Patriotism a Virtue?” Lindely Lecture. Kansas: University of Kansas philosophy Department, 5. For MacIntyre, the loyalty to a particular community cannot be combined with the loyalty to universal moral principles; the argument of a combination of *Moralität* and *Sittlichkeit* he thinks to suffer from a “conceptual confusion,” in MacIntyre, *ibidem*, 19.

Weiler understands the salience of the constitutional recognition of Christianity also as referring to the relation between religious and democratic discourse in terms of a fruitful interaction. Adopting the secular perspective of a citizen and constitutional theorist, he suggests that religious sources have cognitive potentials that can be re-appropriated by democratic secular discourse and thought. Weiler builds his view of the constitution on the basis of a specific understanding of the formation of the individual and European identity that takes its cue from Catholic documents such as the Encyclicals *Redemptoris Missio*, *Centesimus Annus* and *Fides et Ratio*.²² His argument based on copious citations from the encyclicals is that identity and alterity make sense only insofar they assert themselves in their specificity. Given that, people should not attempt to hide identity differences: it is only on the premises of me affirming my identity as Polish or Spanish that I can recognize your identity as a German or English.²³ To assert is not to impose by force: as it is mentioned in the encyclical, the Church proposes, but it does not impose itself; the altera pars has the right to say “no” to the attempt of persuasion undertaken by the Catholic part.²⁴

The Catholic model of the identity-building is supposed to ground a much-desired answer to the question of the specific identity and *telos* of the European Union left suspended by the current Preamble.²⁵ The goal of the European Union cannot be the protection of human rights since this would not distinguish it from, say, US, Japan or Australia. In contrast, the *telos* of the European polity is the assertion of a specific identity that – as things stand - has an important Christian dimension. In Weiler’s view, Europe should not fear or be ashamed to assert its Christian distinctiveness: quite the reverse, it needs to be driven by the notion that, like the Catholic Church, *Europa proponere, non imponere*.²⁶

22 All the Encyclicals can be found at www.vaticano.com

23 Weiler, *Un’Europa Cristiana*, 149.

24 Weiler, *Un’Europa Cristiana*, 150.

25 See Weiler, *Un’Europa Cristiana*, esp. 148-154.

26 Weiler, *Un’Europa Cristiana*, 132. Finally, Weiler adds an argument that is based on a disenchanted diagnosis of the current situation of the European project. Weiler disagrees with the narrative of the economic beginnings of Europe and the gradual adoption of political and moral dimensions. Quite the reverse, Europe began as a political-moral project to be realized (at least initially with economic means). The paradox is that while EU has successfully become a market, its citizens turned into consumers uninterested by the *res publica*. A way to counteract this uni-dimensionality is to actively take advantage of the semantic richness and motivational potential of the Christian tradition - which would mean, again, that the Christian heritage should be explicitly assumed by the European constitution.

II.

(a) In the liberal view, a democratic constitution has generally two main functions: first, to make explicit a catalogue of individual or subjective rights; second, to organize the state powers, the repartition of institutional competencies as well as of a normally minimal set of duties and responsibilities of the citizens.²⁷ The individual rights are “natural” or “given” limits to the state whose role is to protect and enforce them.

The main aim of the constitution is to ensure the protection of individual liberties, namely of a framework of rules that guarantees the greatest equal liberty for all. The state is a “necessary evil” or a “night watchman” that enforces a stable legal framework for the good functioning of the market and the full manifestation of individual liberty. Even when the state provides also social and cultural rights, these are seen as instrumental to the protection of subjective liberties.

The “ideal-typical” communitarian view regards the constitution as the expression of a deep consensus on values and common goods; in contrast, the liberal view generally starts from the acknowledgement that the fact of ethical-religious pluralism is definitional for contemporary large democracies. This explains to an important extent the liberal emphasis on the principles of neutrality and the separation between state and religion.²⁸ The liberal stance is objected by communitarians for being inimical to religion as it treats it as a “private hobby” (Carter)²⁹ and not as a “constitutive end” of one’s identity (Sandel). Nonetheless, a liberal would argue that it is liberalism and not communitarianism that grants religious matters their required importance. Given that religious issues can be of great relevance and that people hold different religious beliefs, the liberal position based on the neutrality of the state is the most appropriate in that it leaves individuals to choose for themselves. According to Rawls, “[p]olitical

27 Cass Sunstein, for instance, summarizes the liberal model in the following way: “[s]elf-interest, not virtue, is understood to be the usual motivating force of political behaviour. Politics is typically, if not always, an effort to aggregate private interests. It is surrounded by checks, in the form of rights, protecting private liberty and private property from public intrusion,” in Sunstein (1991), “Preferences and Politics, in *Philosophy ad Public Affairs*, 20, 4.

28 These principles are not identical and may even go in *opposite* directions. For instance, one can argue that the realization of neutrality implies not a strict separation between state and religion, but the active involvement of the state in sponsoring historically dispossessed but relevant religious communities. In this view, the state is to be seen not as favoring a religious community at the expense of other communities but as intervening with the view of ensuring fair preconditions of the building of stable identities and the realization of individual and collective autonomy.

29 Carter, L. Stephen (1987), “Evolutionism, Creationism, and Treating Religion as a Hobby, *Duke Law Journal*, 977-996.

30 Rawls (1999), *The Law of Peoples*, 127.

liberalism does not dismiss spiritual questions as unimportant, but to the contrary, because of their importance, it leaves them for each citizen to decide for himself or herself.³⁰ For Rawls, the successful search for justifiable principles of justice that can regulate the conflicts arising between incompatible conceptions of the good is premised on the capacity to find reasons which “transcend” them.³¹ These reasons can be called neutral and moral insofar they are acceptable independently of the various conceptions of the good. They give the legitimacy of the fundamental principles of justice and cannot be subject to any fundamental reasonable disagreement.

Hence, while communitarianism banks on value agreement that is to provide the substance of the constitution, political liberalism relies on a moral agreement as the “free-standing” core of the liberal constitution.³² This is to say that, in Rawls’ view, the “constitutional essentials” are *pre-determined* by the liberal conception of justice: these essentials have independent standing and normative priority as compared to the results of the democratic political dialogue.³³

Concerning the place of the constitution, this represents a sort of Archimedean point of the democratic-liberal polity. Rawls’ phrasings are suggestive: “...a democratic constitution is a principled expression in higher law of the political ideal of a people to govern itself”³⁴ and, further, the expression of this ideal is to be permanently “fixed” by means of the constitution. Rawls’ wording is striking: “...by a democratically ratified constitution with a bill of rights, the citizen body fixes once and for all certain constitutional principles...”³⁵ Thus, the political-democratic discursive practices are considered principle-interpreting rather than principle-generating; they are primarily a medium of the application of the general principles of justice.³⁶ It is not surprising that Rawls takes the Supreme Court as an “exemplar of public reason”³⁷ that “guards” and

31 For Rawls, “...the problem of political liberalism is: How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical and moral doctrines?” in Rawls (2005) *Political Liberalism*, XXV.

32 As Rawls puts it, “...the object of consensus, the political conception of justice, is itself a moral conception. And, second, it is affirmed on moral grounds...” Rawls (2005) *Political Liberalism*, 147. On the other hand, Rawls still maintains the sharp distinction between moral doctrines and political liberalism by claiming that the latter does not take any stand on moral issues. See later, for criticism.

33 For a complexification of this interpretation, see for instance Rawls’s answer to Habermas’ claim that the constitutional essentials are “predialogical” and ahistorical. Rawls denies both accusations (Rawls, 2005, “Reply to Habermas,” in *Political Liberalism*, e.g. 384n).

34 Rawls, (2005), *Political Liberalism*, 232.

35 Rawls (2005), *Political Liberalism*, 232; my italics, CU.

36 Forst (2001), “The Rule of Reasons...,” 351-352.

37 Rawls (2005), *Political Liberalism*, VI: 6, 231-240.

applies the “constitutional essentials.” This is to say that the substantive criteria of legitimacy which are incorporated in the constitution are not at the disposal of democratic majorities.³⁸

(b) What are the implications of such a conception for the general issue of the desirability of a symbolic function of the constitution? Having in view that entering the domain of constitutional essentials means abstracting from ethical particularities, it is not surprising that political liberalism is adverse to the idea of a substantial symbolic function. The “constitutional essentials” need to ensure first and foremost the principle of neutrality. Or, if in a pluralistic society one religion is recognized constitutionally, a liberal’s concern is generally that this can have legal discriminatory consequences for non-religious members and for members of other religions and cults. For clarity’s sake, it is worth emphasizing some differences but also an important commonality between political liberalism and laicism (The latter is defined as conceiving public sphere as religion-free and, more generally, as free from any particular set of values).³⁹ Political liberalism is distinguished from laicism in two ways. First, it does not attempt to hole up religious differences in the private sphere, but it allows for the public manifestation of religion under certain conditions.⁴⁰ In his later works, Rawls introduces the “wide view of public political culture.”⁴¹ In Rawls’ view, that the constitution is neutral to people’ choice of their religion does not mean that religion is “somehow <privatized>; instead, it is not “politicized” (that is, perverted and diminished to ideological means).⁴² According to Rawls’ view of the public political culture, comprehensive doctrines, religious or nonreligious, may be introduced in public political discussion at any time, provided that they become “reasonable.” This happens when people who support them also sustain what Rawls calls “the proviso,” namely the readiness to present “in due course proper political reasons – and not reasons given solely by comprehensive doctrines – ...that are sufficient to support whatever the comprehensive doctrines introduced are said to support.”⁴³ Put differently, in opposition to Weiler’s view, for Rawls the public manifestation of religion is legitimate as long as decision-making is based

38 Forst (2001), “The Rule of Reasons...,” 352 and Rawls (2005), *Political Liberalism*, 423f.

39 See, for instance, Baubérot, Jean (2001), “Laicization, History of, », in Smelser, J. Neil and Paul B. Baltes (eds.), *International Encyclopaedia of the Social and Behavioural Sciences*, , Oxford, Uk; New York: Elsevier 8238-8242 and Troper, Michel (2000), “ French Secularism”, in *Cardozo Law Review*, 21.

40 Rawls (1999), *The Law of Peoples*, 152.

41 Rawls (1999), *The Law of Peoples*, 126.

42 Rawls (1999), *The Law of Peoples*, 127.

43 As examples of reasonable religious views, Rawls refers to “Catholicism since Vatican II, and some forms of Protestantism, Judaism, and Islam are example of this,” Rawls (1999), *The Law of Peoples*, 127, n.5.

exclusively on purely political-secular reasons.

Second, in contrast to laicism, Rawls argues for the possibility of a functional contribution of religion to democracy. This stance is largely rooted in Rawls' belief in an "overlapping consensus." According to it, all reasonable comprehensive doctrines – namely those ones that are allowed to manifest themselves in the political public sphere –, overlap so that they all agree on the validity of the basic principles of justice.⁴⁴ Given this agreement, the comprehensive religious and secular frameworks can be functional to the maintenance of a liberal-democratic regime in that they provide a solid anchorage for the support of the "constitutional essentials": this is what Rawls designates as the "social roots of democracy."⁴⁵

On the other hand, Rawls' specific understanding of the overlapping consensus is at the root of a commonality between political liberalism and laicism, namely their rejection of a dialogical relation between religious and democratic discourse. While the comprehensive doctrines as part of the public culture provide the anchorage for the "constitutional essentials," there is a strict separation between them. Religion can be functionally useful, but it is completely irrelevant for public political reason.⁴⁶ By severing strictly public reason (the domain of the right) from non-public reasons (the domain of the good), Rawls rejects "all variations of the basic essentials of a democratic regime"⁴⁷ and claims that constitutional essentials are to be established "*once and for all*."⁴⁸ Put differently, for Rawls "the introduction into public political culture of religious and secular doctrines, provided the proviso is met, does not change the nature and content of justification in

44 Rawls (2005), *Political Liberalism*, 482-483.

45 Rawls (1999), *The Law of Peoples*, 145.

46 Rawls rules out the dialogue at the level of the constitutional essentials, but not at the level of other political matters. According to Rawls, "[m]any if not most political questions do not concern those fundamental matters, for example, much tax legislation and many laws regulating property; statutes protecting the environment and controlling pollution; establishing national parks and preserving wilderness areas and animal and plant species; and laying aside funds for museums and the arts." (Rawls, 2005, *Political Liberalism*, 214). In these cases, the restrictions "imposed by public reason may not apply to them; or if they do, not in the same way, or so strictly" (215). In our view, the distinction between primary and secondary political issues is problematic. As Greenawalt justly notes, "[t]his position faces a kind of technical difficulty. Ordinary issues are deeply intertwined with constitutional issues and issues of basic justice. More fundamentally, the grounds for such a sharp distinction between the two kinds of issues are not convincing," Greenawalt, Kent (1998) "Has Religion Any Place in the Politics and Law of Liberal Democracy?", in *Proceedings of the American Philosophical Society*, Vol. 142, No. 3, 378-387: 383.

47 Rawls (2005), *Political Liberalism*, 375.

48 Rawls, (2005), *Political Liberalism*, 232 (my italics, CU)

public reason itself.”⁴⁹ The methodological corollary is that political liberalism should not be concerned with the potential contribution of religion to democracy. Since this is at most functional, it is the subject of disciplines such as sociology or political science: “(w)hile a conception of public reason must recognize the significance of these social roots of constitutional democracy and note how they strengthen its vital institutions, it need not itself undertake a study of these matters.”⁵⁰

What are the implications of such a conception for the general issue of the desirability of a symbolic function of the constitution? Having in view that entering the domain of the constitutional essentials means abandoning ethical-religious particularities, it is not surprising that a Rawlsian political liberalism tends to be adverse to the idea of a substantial symbolic function of the constitution. If in a pluralistic society a specific religion is recognized constitutionally, a liberal's concern is generally that this can have legal discriminatory consequences for the non-religious members and for the members of other religions.

(c) In their critiques of Weiler's proposal, Cvijic/Zucca (2004) and Menendez (2005) support a liberal view which does not envisage the possibility of a non-zero-sum game between the democratic and the religious discourse and is deeply sceptical about the constitutional recognition of Christianity in Europe⁵¹. Both Menendez and Cvijic/Zucca maintain the root-problem of Weiler's conception of the European constitution-making and identity lies with his communitarianism. Menendez agrees with Weiler that, descriptively speaking, the European history cannot be properly understood without a reference to Christianity. But does this entail that Christianity should be mentioned in the European Constitution? It is one thing to acknowledge the historical importance of Christianity and another thing to assume that the European identity is homogenous and, furthermore, that the European Constitution should mirror it. Once we reject Weiler's supposed essentialist and determinist conception of the relation between the European identity and constitution, there is little left, if anything, of his position. Whereas one may point out that these critics overstate Weiler's emphasis on the homogeneity of the European identity, it remains that, from a liberal perspective, the recognition of Christianity in the European Constitution is objectionable because, in conditions of plural

49 Rawls (1999), *The Law of Peoples*, 153.

50 Rawls (1999), *The Law of Peoples*, n. 52, 154.

51 Cvijic, Srdjan and Zucca Lorenzo (2004), “Does the European Constitution need Christian Values?,” in *Oxford Law Review, Oxford Journal of Legal Studies*, vol. 24, No. 4, pp. 730-748 and Menendez, Augustin Jose (2005), “A Christian or a Laic Europe? Christian Values and European Identity,” *Ratio Juris*, vol. 18, no. 2, 179-205.

democracy, it would most likely lead to legal and other discriminatory consequences.

III.

(a) According to the discursive view, two main functions of the constitution are the enlisting of individual and communicative liberties and, second, of the principles of the organization of the state power.⁵² The individual or subjective liberties secure the private autonomy of the citizen. These are considered enabling rights and not – as in the liberal conception – limiting conditions of the sovereign power. On the other hand, the communicative liberties constitute the political autonomy and refer to the rights of political participation. As Habermas points out, subjective and participatory rights are not in an instrumental or subordinate relation of subordination to each other, but in one of co-implication: the discursive perspective regards the abstract system of rights as being developed in a politically autonomous manner by citizens in the context of their own particular traditions and history. In his critique of the static “ontology” of liberalism, Habermas refers to liberalism’s tendency to neglect historical and dialogic dimension of the individual rights formation: “[i]ndividual private rights cannot be even adequately formulated ... if those affected have not first engaged in public discussions to clarify which features are relevant in treating typical cases as alike and different and then mobilized communicative power for the consideration of their newly interpreted needs.⁵³ By means of the notion of co-implication, the discursive perspective strikes a middle way between the communitarian concern with the historical embeddedness of rights and liberalism’s propensity towards abstract universalism. (Here I put aside Rawls’ “communitarian move”).⁵⁴ On the one hand, the communitarian belief in a homogenous set of values is no

52 See Habermas, Jurgen (1996), *Between Facts and Norms*, MIT Press, 1996, esp. ch. 3 and 4.

53 Habermas (1996), *Between Facts and Norms*, 450.

54 Rawls tried to eliminate the universalist presuppositions from his theory. In *Political Liberalism* he argues in a communitarian vein that his conception of the person as impartial citizen provides the best account of liberal-democratic political culture and that his political aim is only to work out the rules for consensus in political communities where people are willing to try for consensus. In the *Law of Peoples*, he allows for the possibility that liberalism may not be always exportable. He delineates a vision of a “decent, well-ordered society,” that liberal societies must tolerate in the international realm. Such a society, he argues, need not be democratic, but it must be non-aggressive towards other communities, and internally it must have a “common good conception of justice,” a “reasonable consultation hierarchy,” and it must secure basic human rights. However, as Bell persuasively notes, “one still gets the sense that the liberal vision laid out in *A Theory of Justice* is the best possible political ideal, one that all rational individuals would want if they were able to choose between the available political alternatives. There may be justifiable non-liberal regimes, but these should be regarded as second best to be tolerated and perhaps respected, not idealized or emulated” (Bell, Daniel, 2001, “Communitarianism” at <http://plato.stanford.edu>)

longer credible in conditions of deep disagreement. Communitarianism also maintains an ambiguous relation between the prevalence given to a particular conception of good and the espousal of the universality of human rights. On the other hand, it is difficult to avoid the impression that Rawls' view of justice as fairness depends on a contentious moral comprehensive view. In discussing Rawls' difference principle,⁵⁵ - but the same goes about homosexuality, abortion, etc. -, Dworkin notes that "Rawls' position is certainly controversial in our [American] community, and some people reject it in favour of a theory of distributive justice that depends more on personal responsibility."⁵⁶

In contrast, the discursive view extends the notion of disagreement not only to ethical-religious matters, but also to "constitutional essentials" and moves towards a more proceduralist understanding of the constitution-making. For our purposes, we do not need to reconstruct the complex debate concerning the relation between substance and procedure.⁵⁷ Suffice it to note that one of the keys to the discursive understanding of constitution-making is the "discourse principle."⁵⁸ This principle is conceived as a procedure that pertains to the general logic of argumentation and persuasion in conditions of fallibilism and deep disagreement. The discourse principle states that "[j]ust those action norms are valid to which all possibly affected persons could agree as participants in rational discourses."⁵⁹ Habermas' understanding of it is shaped by the linguistic and pragmatic turns in that it mainly refers to discursive-procedural "means" of tackling a variety of problems and conflicts - moral, ethical, pragmatic, etc. - problems and conflicts that need to be also tackled by legal means and cannot be any more solved on the basis of the unambiguous guidance of traditional semantic contents.

The implications of this discursive view for the conceptualization of constitution-making are far-reaching. The constitution is neither the reflection of a common identity and set of traditional values nor that of a set of principles of justice that is in essence morally pre-determined.

55 According to Rawls' difference principle, social and economic inequalities are to satisfy two conditions; first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be the greatest benefit of the least advantaged members of society.

56 Dworkin, Ronald (2004), "Keynote Address. *Rawls and the Law*," in *Fordham Law Review*, 72, 1387-1405, 1398. For similar criticisms, see Waldron, Waldron, Jeremy (1993), "Religious Contributions in Public Deliberations," *San Diego Law Review*, 30, 817-847, Forst, Rainer, (2001), "The Rule of Reasons. Three Models of Deliberative Democracy, Habermas, Jürgen (1996), *Between Facts and Norms*, MIT Press, 1996.

57 See esp. Rawls, (2005), *Political Liberalism and Habermas* (1996) *Between Facts and Norms*.

58 In the following, we draw freely on Habermas' view.

59 Habermas (1996) *Between Facts and Norms*, 107.

The rights and procedures “codified” through the constitutional document represent “filters” which make possible and shape the content-provider debate to be carried out by the citizens themselves. This is to say constitutionally relevant reasons are not given by monologic philosophical constructivism (following Rawls) or by collective substantive “choice” (following Taylor) but result from the intermeshing of inclusive discourse practices. In other words, common norms and values are to be justified and interpreted in various contexts through inclusive forms of proceduralized discourse among participants relying on the plurality of the existing semantic contents. Furthermore, the procedures informing discursive practices are not to be “decided” by theoretical fiat, but are to be seen as embedded and continuous interpreted by those interested. Their “core” is not “substantive,” namely external to the notion of fair practice of reason giving. For their “substance” derives from a recursive reflection on what normative justification means, and it is only as criteria of justificatory procedures that they can be applied and have a certain content.

Concerning the issue of the place of the constitution, while for liberalism the constitutional document represents the Archimedean point of the liberal democratic society, for communitarianism and the discursive “model” it has less importance. On the one hand, communitarianism emphasizes that the constitution is the explicit codification of some traits of a broader historical and cultural identity. On the other, the discursive stance regards constitution as part of a larger societal process of the realization of democracy, to wit of an association of free and equal individuals who give themselves their own rules of discourse and action. If *common good* and *identity* are the keywords for communitarianism and *constitutional essentials* for political liberalism, the discursive view places at its centre the notion of *democratic public sphere*. The public sphere is essential to the democratic project in that it refers to a set of multilayered sites where there are formed and articulated common reasonable opinions and interests which have a publicly discernible bearing on political and legal decision-making. Being part of these broader democratic processes, the constitution is seen as a self-reflexive set of rules which is always to be interpreted and applied by means of public discursive and decisional practices in specific historical contexts. The constitutional document and practice simultaneously emerge from the public sphere and is a catalyst of its formation and development.

(b) The discursive “model” does not provide a context-less understanding of the symbolic function of the constitution. On the

positive side, it generally advances several reasons in favour of the desirability of the public manifestation of religion for democratic discourse. These reasons are not to be assessed in abstract, but depending on circumstances such as the existence of certain socio-political conditions. On the *negative* side, the “discursive” perspective maintains that the symbolic function of the constitution cannot be legitimately understood as implying that religious discourse has a direct impact on decision-making. This is what we call the *principle of secular democratic rationale*. The principle has important commonalities with Rawls’ “proviso,” although it does not claim that it is possible and desirable to set up strict “barricades” between right and good.

Before moving to the debate on the European constitution, we need to specify what entails the constitutional recognition of religion from a discursive perspective. First, we sketch the principle of democratic secular rationale (b1); second, we refer to some reasons for seeing the relation between religious and democratic discourse as a non-zero-sum game (b2).

(b1)

According to the principle of secular democratic rationale, *the decision-oriented public sphere constituted of parliaments, courts, local councils, and so on, is the site where only the manifestation of fallible and negotiable secular reasons is generally recommendable; furthermore, only those laws and policies are accepted that are supported by secular democratic reasons.*⁶⁰ Specific religious claims cannot determine decision-making processes in democratic pluralistic societies since those who exercise legislative, juridical and executive power have the obligation to treat citizens in a way that is, as far as possible, fair or impartial. Or, given that people commonly disagree regarding religious questions and since legislators, judges and officials should be as impartial

⁶⁰ This is a reformulation of Audi’s principle of secular rationale, see Audi, Robert (1993), “The Place of Religious Argument in a Free and Democratic Society,” *San Diego Law Review*, 30 and Audi, Robert (2000) *Religious Commitment and Secular Reason*, Cambridge University Press. We cannot enter here a detailed discussion of the differences between our conception and Audi’s. In Audi’s phrasing, the principle of secular rationale demands that only those laws and policies be accepted which are supported by secular reasons. Audi further defines a secular reason as follows: “[a] secular reason is roughly one whose normative force does not evidentially depend on the existence of God or on religious considerations, or on the pronouncements of a person or institution qua religious authority” (Audi, 1993, 692). The basis for introducing the specification “democratic” is that not all kinds of secular reasons can democratically legitimate decision-making, but only secular *democratic* reasons (or democratic reasons *tout court*), namely reasons that have gone through the sluices of discursive practices and proceduralized negotiations taking place in parliaments, courts, local bodies, and so on. For instance, the Nazi or Stalinist ideologies provide secular reasons that make a claim to absolute truth.

as possible, then legislators, judges and officials should not support any lay or public policy unless they have secular democratic reasons for supporting it, namely reasons that could in principle be considered reasonable by all potential participants in discussion while holding on their religious comprehensive doctrines. Taking decisions on common matters on the basis of a religious framework would amount to obliging people who do not adhere to it to abide by its norms, which is contrary to the freedom of religion and conscience.

The principle of secular democratic rationale does not imply that people cannot legitimately express their religious beliefs in the decision-oriented public spaces. This is part of their freedom of religion and expression. However, a liberal political culture needs to *informally* limit such manifestations: if invoking religious arguments in decision-oriented public spaces becomes a common practice, this may undermine the secular character of the political-legal authority. An example may be clarifying.⁶¹ That a minor politician makes use of religious arguments in Parliament is likely to be *per se* unproblematic; but that a prime-minister justifies religiously his policy choices may prove to be at odds with the principles of constitutional democracy. A clearer case is when a judge attempts to invoke religious reasons in adjudicating a case: in such a situation, the judge is to be *formally* constrained not to do so.⁶²

A common objection to the principle of democratic secular rationale is that deep disagreements concern not only religious comprehensive doctrines, but also all sorts of secular reasons.⁶³ If this is so, then it becomes unclear why we would need to exclude religious reasons from processes of decision-making. Yet, this counterargument is misleading. The discursive perspective does not count on a given consensus over semantic contents; instead, it focuses on *processes* of deliberation, persuasion and negotiation whereby reasons become democratically legitimate in the public spheres. In other words, it concentrates on how the legitimacy of reasons emerges performatively out of democratic dialogical and decision-making practices, and not from a pre-existing majoritarian consensus over semantic

61 Here we cannot undertake a differentiated analysis of the relation between the activities of various kinds of public officials and the usage of religious arguments (see Greenawalt, Greenawalt, Kent (1998), *Religious Convictions and Political Choice*, Oxford University Press and Greenawalt, Kent (1995), *Private Consciences and Public Reasons*, Oxford U. Press.

62 Even more, the presence of a Crucifix in a court is not appropriate: though it is a symbol and not an argument, it expresses a potential bias that goes against the necessary impartiality of the act of justice. The question of showing religious symbols in classrooms is partially different because therein one does not take decisions *hic* and *nunc*. For an interesting argument from moderation in the Romanian context, see H.-R Patapievic (2006), "Despre noul fanatism," <http://www.evenimentulzilei.ro/article.php?artid=281584>.

63 Prominent American authors such as R. Audi and Audi, Robert and Woltersdorff, Nicholas (1997), *Religion in the Public Sphere*, Lahman: Rowman and Littlefield. For an effective critique, see Habermas, J. (2005), "Religion in der Öffentlichkeit. Kognitive Voraussetzungen für den <öffentliche Vernunftgebrauch> religiöser und säkularer Bürger:", in *Zwischen Naturalismus und Religion*, 119-155.

contents. That these resulting reasons are secular-democratic becomes clearer if we specify some of the differences between democratic and religious discourse. To this end, we briefly introduce the categorical distinction between conversion, persuasion and conviction. While *conversion* is characteristic to and the aim of religious discourse, *conviction* and *persuasion* are specific to and the goal of democratic discursive practices. Conversion can involve lengthy processes of socialization based on persuasion, constraint, conviction as well as inner and intersubjective processes of spiritual maturation; but, in our understanding, conversion also presuppose an arational "leap" that marks the passage from the current framework of reference into a new religious one. Sometimes this "moment" which occurs in the privileged relation between one or more individuals and a transcendent or sacred reality takes on a deeply mysterious quality: Caravaggio's "The Conversion of Saint Paul" admirably represents the Christian mystical experience of the one's individual rapture and complete blindness in contact with the Absolute Transcendence. But, if it is to acquire a higher degree of generality and to avoid the danger of Euro-centrism, the notion of "conversion" needs to refer only to the different ways of adopting and actively taking part into a set of institutionalized discursive practices that connect an individual or a group of individuals to a transcendent or sacred reality and authority. In the process of conversion, one either embraces a religious *Weltbild* or not: the religious frameworks are not divisible goods like money, solidarity or security⁶⁴. Yet, conversion does not necessarily involve the appeal to an infallible and totalizing truth. Sometimes religious people openly admit that their religious beliefs and understanding are not superior to the others. It remains that, religious frameworks of reference, often enough claim absolute truth and orientating power for one's entire life. And religious institutions are sometimes hierarchical and often try to ensure the stability of the "truth" of the religious discourse (or, at least, of an essential part of it).

In contrast, fallible democratic dialogue aims to convince and persuade people of revisable solutions to conflicts between individual and groups that espouse different comprehensive doctrines. Then, the formal and informal institutional "sluices" leading to the articulation of secular democratic reasons ensure their permanent exposure to inclusive criticism and non-

64 For the notion of a "framework of reference" in this context, see Wittgenstein, Ludwig (1966), *Lectures and Conversations on Aesthetics, Psychology and Religious Belief*, ed. by Cyril Barrett, Basil Blackwell, 1966 (Romanian transl., Humanitas, 2005) and Clark, R. Brian (2002), *Wittgenstein, Frazer and Religion*, Palgrave, Macmillan. In our view, "conversion" can also refer to the process of espousing a secular framework of reference that make a claim to absolute, infallible truth. It is interesting to note that Thomas Kuhn makes use of the term "conversion" to designate the passage from a paradigm to another (see Kuhn, Thomas, 1970, *The Structure of Scientific Revolutions*, Chicago: Chicago University Press, Romanian Transl. Humanitas, 1999).

violent change. Democratic convictions are acquired by means of deliberative argumentation based on open and publicly accountable criteria: non-contradiction, coherence, factual evidence (e.g. in a murder trial), compliance with procedures (e.g. not trying to intimidate or bribe the jury), inclusivism (e.g. inclusion of all affected) transparency and so on, are the benchmarks for building reasonable convictions. Furthermore, democratic acts of persuasion are accomplished by open and inclusive rhetorical practices that are to be distinguished from demagoguery: while the latter's aim is to manipulate the others through lies, threats or sophisms, the former's goal is to make people embrace particular values and principles by means of rhetorical *topoi* and figures of speech.

Surely, religious discourse is a mixed type of discourse that presupposes both argumentation and rhetoric: as such, it comprises fallible and changeable arguments as well as rhetorical *topoi*. But an important *differentia specifica* of the religious discourse is that it presupposes also an appeal to transcendent or sacred experiential sources. Two examples may help us see clearer the distinction between religious and democratic discourse. First, suppose that a town council decides to invest public money in order to build a mosque made by the Gehry. Now, assume also that the majority of citizens in the town and their representatives in the council are deeply Muslim. What are the reasons that can make democratically legitimate the legal constraint on a non-Muslim to pay taxes for such an enterprise? If these are religious (e.g. "Allah has revealed our Imam that we should build a new mosque"), then the constraint is not legitimate as it is not justified on the basis of generally accessible, negotiable and fallible reasons. By contrast, if it is grounded on reasons such as "this enterprise will create new jobs" or "it will boost tourism and economy as many people would come to see Gehry's last architectural <folly>," these may be reasonable claims for justifying the legal constraint also for the non-Muslims. Additionally, if the town council also allocates money to other religious groups to build places of worship and to non-religious associations for their activities, financing a new mosque would appear more legitimate.

Second, for a Catholic, the Pope's exhortation to donate money to children in Africa does not entail an absolute or non-negotiable religious obligation: believers may give more or less money for helping children in Africa or they may choose to help the suffering in other parts of the globe. And believers – as the Catholic Church herself exhorts them – can find autonomous reasonable motifs for helping people in distress. But, from a religious perspective, the obligation to help the other is connected to a non-negotiable religious framework.

(b 2)

While the discourse “model” is critical of the notion that the constitutional recognition of religion entails the direct impact of the religious discourse on decision-making, it argues that it is desirable to express religious arguments in the opinion-oriented public sphere (made of mass-media, schools, religious institutions, prisons, interest groups, etc.) under certain conditions.

The discursive perspective advances several functional and intrinsic reasons in favor of the manifestation of religious discourses in public spaces. At a basic level, the public expression of religious traditions entails that democratic citizens come to know about their reciprocal differences. This is important not least because critical capacity and autonomy are not acquired by hiding particularities in the private sphere, but by comparing, reflecting on and choosing them knowledgeably. Then, exposure to different and sometimes even bizarre ways of living can foster – under certain conditions –, open-mindedness and tolerance. Further, the positive public recognition of religious identity can not only be normatively desirable (especially when it is directed to marginalized groups) but also have functional benefits: political and social recognition can lead to the stabilization of people’s identities and to their increased willingness to integrate in the democratic life of a country. For instance, in Europe, more public recognition granted to Muslims may have positive normative and functional-integrative effects.

On the other hand, the exposure to religious discourse opens up the possibility of *learning*. According to the discursive view, in opinion-oriented public spaces there can take place processes of *democratic selective interpretations of religious semantic contents into secular reasons* through the collective dialogical performance. By “democratic” we refer to inclusive discursive practices – deliberations, acts of persuasion, proceduralized negotiations, etc.⁶⁵ By “selective interpretation” we point out that religious *topoi* can be turned into secular democratic reasons that are liable to influence processes of decision-making *only* if they are *modified* through inclusive discursive practices. The selective democratic interpretation implies the passage from the logic of religious conversion to a logic of conviction and persuasion. Take the Christian *topos* of solidarity as exemplified by the parable of the Good Samaritan and suppose it “expresses” the ethos of a local community. According to the discursive view, the emphasis on solidarity can legitimately shape processes of decision-making (concerning immigrants, the financial aid directed to the Third World countries, etc.) only if it is severed from dogmatic beliefs such as the divinity of Christ and, further, if

⁶⁵ They are to be distinguished from those power asymmetric “mechanisms” whereby religious *topoi* can enter secular discourse (during processes of colonization). Of course, in practice this distinction is often difficult to make

it is liable to be adopted as a secular value by a broader dialogical community than the originating religious one. The point here is not to argue that the public manifestation of religion is legitimate as long as religious people drop their claim to absolute truth; provided that they do not impinge on the liberty of the others, freedom of religion and expression grants people the right to manifest their beliefs (be they absolute or not) in the decision- and opinion-oriented public spheres. Rather, the argument is that, if religious discourse is to have a democratically legitimate impact in the decision-oriented public spheres, it is only after processes of selective interpretation and transformation of original religious *topoi* takes place.

The processes of learning characterizing the relation between the religious and democratic discourse can also occur between different constitutional traditions. As Bell points out, European interpretations of human rights may become “aware” of their “insularism” in contact with Asian ones (and vice versa).⁶⁶ The discursive perspective aims to turn the abstract universalism of the liberal view into a universalism which is more sensitive to the historical context and processes of mutual learning.

At this point it is worth noting a crucial difference between the discursive perspective, on the one hand, and Rawls’ political liberalism and laicism, on the other. The latter outlooks espouse a zero-sum game of the relation between religious and democratic discourse that is tributary to a *metaphysics of emancipation* inimical to difference. This metaphysics imagines that *volonté générale*, public reason or common interest emerge once citizens strip themselves off their differences – either at the entrance in the public sphere (laicism) or the arena of the public reason (Rawls). Here it is worth listening for a moment to a recent apologetic voice of French laicism: “[l]a concorde laïque n’unit pas les hommes que par ce qui les élève au-dessus de leurs particularismes. ...La pensée libre, affranchie des crispations du vécu [sic !]...en mesure de cultiver la double exigence de vérité et de justice, bien précieux d’une humanité réconciliée avec elle-même”⁶⁷. But who is to determine which specific interpretations of the common interest are relevant in the public sphere? The image of a universality and impartiality that would inexplicably come forward in the public sphere once we confine our particularities in the private one pertains to unrealistic political metaphysics

66 Bell, Daniel, 2001, “Communitarianism” at <http://plato.stanford.edu>.

67 Pena-Ruiz, (2003), *Qu’est-ce que la laïcité?*, Gallimard, 270-271. This passage testifies of a Rousseauian vulgate and suffuses with elements of a metaphysics of reconciliatory emancipation. It is interesting to note that Ruiz-Pena’s laicist understanding of the homogenous public sphere is accompanied by a vision of the people as “totalité indivisible” (ibidem: 248) which is supposedly able to “perceive” the universality of the *volonté générale*. But the notion of a homogenous demos and public sphere as a collective individual who mysteriously “seizes” universality is tributary to philosophy of subject that is unsuitable for large, differentiated and multicultural societies.

with normative underpinnings. In contrast, according to the “discursive view,” significant differences and disagreements cannot be so simply left at the door of the public sphere or reason by political or theoretical fiat or, alternatively, be abolished by means of one's master-vision of a completely emancipated humanity: the approximation of the common interest does not surface from the predetermined denial of particularisms and differences in the public sphere, but from intermeshing processes of clarification, dialogue and proceduralized negotiations that take also into account the public expression of these particularisms.⁶⁸

There remains an important objection leveled against the discursive model. The legitimate concern is that, under the cover of advancing a dialogical perspective, a Pandora's box would be naively opened up: the untested ideological belief in the virtues of public dialogue may be the doorway to a strife of gods and demons in the democratic public sphere. Yet, on the one hand, it is not only normatively problematic, but also unrealistic to try to turn back the clock and stifle the affirmation of religion in the public sphere: it is difficult to imagine that people would give up affirming publicly their cultural, ethnic, religious identities or the need to getting public - social, political and even legal - recognition for it, especially when a group is marginalised or suffered a history of oppression.⁶⁹ On the other hand, the implementation of a dialogical model in the opinion-oriented public sphere should be practically pursued only under certain socio-political and cognitive

68 For instance, the interpretation of distributive justice decided on by Rawls by means of his “difference principle” can be influenced by different religious ethics of work and charity. Thus, the distinction between right and good is always to be discussed and negotiated among the members of the polity.

69 Laicism and the full-fledged secularism have been seriously challenged by the fact that religious frameworks of reference have continued to be stubbornly present in the public sphere. From an *empirical* point of view, the value-free secularization hypothesis has proven to an important extent false: “[t]he world today, with some exception... is as furiously religious as it ever was, and in some place more so than ever...” (Berger: 1999: 2, Berger, Peter, ed. (1999), “The desecularization of the world : a global overview,” in Peter L. Berger *The Desecularization of the World: resurgent Religion and World Politics*, Washinton D. C.: Ethics and Public Policy Center, W. B. Eerdmans Pub. Co., 1999, 2). Surely, modernization has had secularizing effects, more in some places than in the others - more in Europe, for instance. Yet it has provoked powerful movements of counter-secularization. Also, secularization on the societal level is not necessarily linked to secularization on the level of individual consciousness; and the erosion of the authority of established religious institutions is sometimes replaced by new organizational forms both in the private and public spaces. For good or bad, religions remain and even have become more active in the public sphere (for Europe, see esp. Davie, Grace, “Europe : the exception that proves the rule?,” in Berger, Peter, ed. (1999), *The Desecularization of the World: resurgent Religion and World Politics*, Washinton D. C.: Ethics and Public Policy Center, W. B. Eerdmans Pub. Co., 1999 and, Davie, Grace, (2000), *Religion in Modern Europe: A Memory Mutates*, *Oxford University Press*; see also Ingelhart, Ronald and Norris, Pippa, *Sacred and Secular: Religion and Politics Worldwide*, Cambridge University Press, 2004. Ingelhart and Norris support the classic hypothesis of the decline of religion in conditions of prosperity and security.

conditions. A fruitful dialogue between religious and democratic discourse is premised on the modernization of faith. In the aftermath of the processes of secularization and pluralization of societies, faith needs to turn self-reflexive. This is to say that, first, in contemporary democracies, religious doctrine has to accommodate itself to the unavoidable competition with other forms of faith and other claims to absolute truth. Second, religious doctrine has to deal with two dimensions of the process of secularization: on the one side, it needs to self-reflexively adapt to a secularized political practice based on the principles of impartiality and separation between state and religion; on the other, religious doctrine encounters the scientific, secular mode of knowing that owes its special authority to an explicit fallibility and a learning process based on long-term revision.⁷⁰ On the other hand, those who reject *de plano* religion would need to become more aware of the fact that religious people also lead a dignified and valuable way of living; furthermore, they would need to become more sensitive to the historical importance and semantic richness of religious traditions.

(c) What does the discursive perspective entail for the debate on the European constitution? Christianity is an important part of the European history and it is likely that it could continue to provide democratic politics with semantic and motivational resources. Thus, there are *prima facie* good reasons for including a reference to Christianity in a Preamble that makes an “overview” of the European heritage. But would such a reference entail discriminatory effects? Here we distinguish between legal, political and symbolic discrimination. First, we have argued that the possibility of constitutional recognition should not be interpreted as having *direct* legal-political consequences, since this would lead to legal discrimination.⁷¹ At this point, Weiler proves to be more Catholic than the Pope: the last Encyclical *Deus Caritas Est* acknowledges, first, the autonomy of the legal political and, second, that religious discourse can have only an *indirect* influence on democratic decision-making.⁷² But, apart from Weiler’s specific interpretation, would a reference to Christianity lead to legal discrimination?⁷³ Not necessarily. Similar references in national constitutions have not

70 More generally on this topic, Habermas, Jurgen (2005), *Zwischen Naturalismus und Religion*, Suhrkamp Verlag and (2003), “Faith and Reason,” in *The Future of Human Nature*, Polity Press.

71 Furthermore, the European political *telos* cannot be interpreted on the model of the *telos* of the Catholic Church, since the latter follows a logic of conversion.

72 See *Deus Caritas Est*, at www.vaticano.com. If this happens in practice it is a matter that we cannot discuss here.

73 See Cvijic, Srdjan and Zucca Lorenzo (2004), “Does the European Constitution need Christian Values?,” in *Oxford Journal of Legal Studies*, vol. 24, No. 4, pp. 730-748. Menendez, Augustin Jose, “A Christian or a Laic Europe? Christian Values and European Identity,” *Ratio Juris*, vol. 18, no. 2, June 2005, 179-205.

represented a limitation of the rights of the citizens. For instance, in a recent Norwegian case (European in broad sense), the Supreme Court rejected the appeal of Lutheran pastor against the law on abortion, pointed out that the existence special constitutional ties between the national Church and the State cannot be interpreted in the sense of limiting the liberty of the citizens.⁷⁴ More importantly, having in view the enhancement of the principles of neutrality and the separation between state and religion in the current development of the European Conventions and case-law, it seems unlikely that a “weak” reference to Christian roots would lead to discriminatory legal consequences.⁷⁵

However, such an inclusion may foster discriminatory political and symbolic consequences. It is worth referring briefly to the case of Turkey. Weiler insists that his plea for the inclusion of Christianity does not imply in the least the principled exclusion of Turkey. This country may be left out for various reasons; but excluding it because of the European Christian identity would mean, according to Weiler, infringing the principles such as pluralism, neutrality and human rights. Yet, first, this is at odds with Weiler’s understanding of the European polity and constitution-making. If the constitution is supposed to mirror a historical identity and build an ethical community whose past and present are marked by Christianity, then this becomes a potentially important argument for leaving out Turkey as an extraneous supplement undermining the specificity of Europe. Furthermore, Weiler needs to take more into consideration that many Christian democrats and Catholics do reject the entrance of Turkey on the basis of an appeal to Christianity and its unmediated relevance for the

74 For other examples, see A. Ferrari (2005), Ferrari, Alessandro, *Religions, Secularity and Democracy in Europe: for a New Kelsenian Pact*, Jean Monnet Working Paper 03/2005. n.41 (pages are not provided).

75 One needs to question also Weiler’s constitutional argument. First, the largest part of the constitutions of the member states refers to religion and not to a religion. Second, often references to a specific religion or a religious confession are of an organizational type, and not of a symbolic one: for instance, the mention to the Catholic Church in the art. 7 of the Italian Constitution has the function of defining the relations between State and Church, and not to define the identity of the Italian people. Therefore, the constitutional tradition is an argument against and not for the introduction of Christianity. Furthermore, Weiler takes for granted the existing constitutional traditions: even if Weiler’s reading of the current constitutional arrangements were right, there is no intrinsic reason why the reflection on the European Constitution should lead to the almost *mechanical addition* of different European-constitutional arrangements and not be based on a *critical reflection* on them. Weiler simply takes the state-religion and laic model as equally justifiable versions of interpreting the principle of neutrality in accordance with diverse historical traditions, namely of what he calls the “agnostic state.” In contrast, a conception of impartiality based on the recognition of religious traditions in the public sphere and the requirement to protect minorities (religious, sexual, etc.) would find questionable both the strict laic and state-religion model represented more or less by France and Greece.

European politics. The constitutional recognition of Christianity might enhance their position and lead to an “alienation” of the Turkish citizenry. Furthermore, could a reference to “Christianity” lead to symbolic discrimination?⁷⁶ Weiler tackles this issue by advancing a model of identity/alterity. However, that identity and alterity make sense only to the extent that they manifest each other as identity and alterity is a claim that not too many would contest. The problem is that Weiler draws far-reaching consequences from this basic statement. In an astute way, he turns upside down the objection that the inclusion of Christianity in the Preamble may lead to the “symbolic discrimination” by Muslims or other religious minorities. Quite the opposite, he argues, it would be an offence to assume that the other, say, a Muslim, would be humiliated by one’s affirming her Christian identity. The other would be offended not by its public manifestation, but by the presumption that she would not be up to recognize, discuss and tolerate the difference. This is an interesting turn of the argument that cannot be so easily dismissed as “utter sophism”(Cvijic/Zucca). After all, it is part of a “non-pathological” development of individual and group-identity to be accompanied by the reciprocal recognition of differences. In the hypothesis that the European polity would be characterized by reciprocal recognitions and a consensualist political culture that includes the existing religious groups, there should be no problem to include “Christian roots” in the Preamble and, say, leave out a reference to Islam, as the past contribution of Islam to the European civilization, albeit very important, is comparatively less central. Yet this applies to a situation where there are neither structural economic inequalities nor legal and symbolic discriminations.

This is not the case of Muslims in Europe. For those young Muslims who are unemployed, live in French suburbs and lack social recognition, Weiler’s turns of argumentation may indeed seem “utter sophisms.” Surely, Weiler is probably justified in noting a certain Christophobia. But one may ask: what about islamophobia? While there is a lengthy and informative inquiry into the roots of Christophobia, there is not a single word about Islamophobia in *Un’Europa Cristiana*. Or, it is worth noting that Islam is

⁷⁶ We cannot enter here in the difficult issue of defining “symbolic discrimination.” See Greenawalt, Kent (1995), *Private Consciences and Public Reasons*, Oxford University Press, and Perry’s critique, Perry, Michael J. (1997) *Religion in Politics: Constitutional and Moral Perspectives*, Oxford University Press.

the fastest growing religion in Western Europe⁷⁷. This is also part of the “social-historical reality” that Weiler often likes to resort to. And if a constitution is not only anchored in the past but is also a future-oriented project, it follows that the symbolic recognition of Islam along with the other two monotheisms would need to be taken into consideration more seriously.

Mentioning the three monotheisms in the Preamble of the European Constitution could have beneficial symbolic effects that point beyond Europe. In the current global contexts where the politicization of religion is a major source of conflict and violence and the Islam is often seen as “the enemy,” the symbolic recognition of Islam along with Christianity and Judaism within the framework of a democratic and largely secular political entity would represent a “model” that shuns away from the political-theological one which characterizes, to various degrees, the politics of the United States, Israel and Palestine⁷⁸. Nonetheless, the overwhelming majority of the Europeans would regard this idea as a plain extravaganza. While the notion of a multiple reference to the three monotheistic religions is preferable from a normative point of view, it is also manifestly unrealistic. If this is so, and if the unilateral reference to Christianity would probably have discriminatory effects, it is ultimately recommendable not to grant constitutional recognition to Christianity.

Instead of conclusion

We have set out from the debate concerning the recognition of Christianity and posed the more general question of the role (if any) of the symbolic function of a constitution. We have differentiated between three stylized understandings of constitution-making. First, communitarianism regards the constitution as emerging from broader historical processes and expressing a specific set of goods. In his adaptation of the communitarian argument to the European constitution, Weiler considers that the constitutional recognition of Christianity is

⁷⁷ We could mention two other arguments. First, it is doubtful that Muslims can be simply considered as a “religious minority” in Europe (see especially, Talal Asad, “Muslims as a <Religious Minority> in Europe,” in his *Formations of the Secular*, Stanford University Press, 2003, 159-181. Second, the Preamble refers in general to Europe and not the European Union. If one looks even fugitively at a map of the number of Muslims in Europe, they turn out to be much more than people commonly think (see, www.bbc.com).

⁷⁸ For Bush's instrumentalization of religious discourse for electoral purposes, see Habermas, J. (2005), “Religion in der Öffentlichkeit. Kognitive Voraussetzungen für den <öffentliche Vernunftsgebrauch> religiöser und säkularer Buerger.”, in *Zwischen Naturalismus und Religion*, 120.

indispensable for the European polity. He interprets it as entailing: first, the direct impact of Christian discourse on decision-making; second, the enhancement of a more general dialogical relation between religious and democratic discourse; and, third, as functionally providing motivational and spiritual sources for the furthering of the European project. In contrast, Rawls' political liberalism is inimical to the inclusion of a substantial symbolic function of the constitution. Since it takes "constitutional essentials" as given, a substantial symbolic function is both pernicious - as it would probably lead to legal discriminatory consequences -, and superfluous - as religious semantic sources are non-consequential for the political public reason. Third, the discursive "model" is favourable to the symbolic function of the constitution as long as it does not lead to discrimination. In agreement with liberalism, the discursive perspective argues that only secular democratic reasons can directly shape decision-making. However, the discursive model advances a variety of reasons as to why the manifestation of religion in the opinion-oriented public spaces may be beneficial for democracy under certain conditions (the modernization of faith, the impartiality of the state, etc.) Concerning the inclusion of a reference of Christianity in the European Constitution, we have claimed that it may be preferable to recognize all three monotheisms. Since this seems unlikely and the unilateral recognition of Christianity may entail symbolic and political discriminatory effects, it is recommendable to refrain from mentioning Christianity in the European Constitution.

However, the discursive "model" envisages a public role for religious traditions and an interactive relation between the legal-political authority and the various religious institutions. It can be argued that this model is already at work at the level of the Europe. In spite of certain vacillations⁷⁹, the European legal-political "model" as far as it can be distilled from documents such as the European Convention for Human Rights (art. 9.1.), the Charter of the Fundamental Rights of the European Union (art. 10), the ECHR case-law and some new governance mechanisms, legitimizes the manifestation of religion in the democratic public sphere and suggests that religious traditions represent a significant contribution to democratic pluralism and even a valuable asset for the nonreligious polity members. Furthermore, the "Treaty Establishing a Constitution for Europe," even if for the moment without legal status, includes the notion of an "open transparent and regular dialogue" between the Union and the churches and religious organisations (art. I-52) that is already enhanced by the European Commission.

However, the question of the legal and political content of a desirably discursive relation between democracy and religion at the level of the European Union remains yet to be defined more clearly.