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JIHAD NAMMOUR

**STATE AND RELIGION**  
**Comparing Cases of Changing Relations**

A conference report

With original contributions by  
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Beirut 2011

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## Preface

THEODOR HANF

According to a widely accepted typology, relations between state and religion can be broadly divided into three categories: first, systems with an established (i.e. a state or a privileged) religion; second, systems of strict separation between state and religion and, third, mixed systems. In today's world, a limited number of cases of the first category exist: Iran and Saudi-Arabia in the Muslim world, the U.K., Denmark, Norway and Finland in the European West. Cases of full separation are not much more numerous, the most prominent being the US, France and Turkey. The third basket is clearly the biggest. It includes very different arrangements such as defining the doctrine of a particular religion as the principal source of legislation, reserving the presidency to a member of a specific religious community, formal contracts between the state and religious institutions, and concordats that define various rights and forms of cooperation.

In modern history, change from one form of relations to another one has sometimes been a by-product of revolutionary political change, such as in France and, more recently, Iran. More often, however, change has taken more subtle forms. In the last few decades, students of political change in various parts of the world have focused on two opposing trends: Secularisation is one, (re-)vitalisation of religion the other. Both trends tend to impact on state-religion relations, although not automatically and immediately. Agnostics may happily live in systems of established religion without challenging the system, and believers may become more pious without questioning an existing wall between state and religion. But when that is not the case, it can trigger change in relations between state and religion.

This volume presents 12 cases of change in relations between state and religion and explores and analyses the respective determinants. Although the cases are drawn from a variety of regions - four from Europe, three from the Middle East, one from Africa and three from Asia -, the choice does not seek to be representative, but rather to give an idea of the variety of cultures and religions affected by such processes of change. With one - successful - exception, the contributions are not rooted in a theoretical framework. Instead, the volume is an attempt to provide, by means of a deliberately "naive" comparison, an overview of the variety of processes of change in the relations between state and religion as they exist in the world today and of forces driving such processes. As such, it constitutes a body of data and other material that may provide the basis for what is surely a necessary and desirable effort at some future date to provide a systematic explanation of these phenomena.

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## Overview of the contents

*Matthias Koenig* compares Germany and France, a comparison between two cases that for some time has been the subject of increasingly detailed analysis by historians, political scientists and sociologists of religion. Koenig demonstrates that the two ideal types of cooperation and separation, as determined by their respective legal statuses, do not properly reflect reality. He discusses the relations between state and religion against the backdrop of the complex relationship with and dependence on the emergence and development of the modern nation-state. This approach explains the continuity and persistence of the resulting institutions, regardless of tremendous social changes, in particular the religious diversification caused by the growth of Islam in the two countries. At the same time, it is possible that the dynamism of the new cultural diversity may prove to be a source of a rediscovery of European tradition.

*Coralie Hindawi* analyses the most recent round in the secularism debate in France and comes to the conclusion that the label is false. In reality the debate is about integrating Islam, i.e. the acceptance of a culture about which previously little was known in France. The result of the debate is a gradual recognition and acceptance of religious actors, both Muslim and Christian.

*Albert-Peter Rethmann* looks at the modern Czech Republic. With the collapse of the communist system in 1989, persecution of the Catholic Church ceased. Nonetheless, relations between state and church are characterised by considerable tension whose deep historical roots go back to the suppression of Protestantism in the Counter-Reformation. The Czech national movement was both anti-Austrian and anti-Catholic. One consequence was that even under communism the Catholic Church was not identified with the nation, as, for instance, in Poland. Even though Catholicism is the largest denomination today, only one quarter of the population is Catholic. The new democratic state has still not reached a decision on the restitution of church property confiscated by the communist regime. Despite this conflict, relations between the state and the churches, Catholic and other, are marked by cooperation in a number of areas: there is religious instruction in state schools and pastoral care in hospitals; there are theological faculties at state universities, and, as long as the question of the restitution of property has not been settled, state subsidies.

*Dominik Hanf* investigates the genesis of a relationship between the European Union and the religions. He analyses the first broad public debate in Europe on such relationships, which took place in and around the convention on the European constitution. The immediate topic was an *invocatio dei*, demanded by the pope, churches and politicians in some member states and uncompromisingly rejected by others, in particular French secularists - a heated, yet ultimately symbolic debate. "Policy on religion" lies within the competence not of the European Union, but of the member states. That said, the European Union politics regulations have had various, as a rule unintended, consequences for religion. Finally, of fundamental significance is the fact that all EU member states recognise the European Human Rights Convention of the Council of

Europe, which includes the right to religious freedom, and accept the decisions of the independent European Court of Human Rights.

*Udo Steinbach* points out that although Turkey defines itself as a secular state, it does not recognise the separation of state and religion: it has a state religion that is subject to strict state control. This regulation reflects the consensus among the country's Kemalist elite. However, with the revival of political Islam in the past four decades this consensus is being questioned, a development that a series of military interventions and bans on political parties has not been able to prevent. In the 2002 and 2007 elections, the Justice and Development Party (AKP) received a third and almost half of all votes cast, respectively, giving it a comfortable parliamentary majority both times. Unlike its predecessor parties, the AKP does not question the constitutional principles of the republic, but strives to gain recognition for religion in society, as in other democratic states. The AKP does not see a contradiction between Islam and democracy, and is making an effort to prepare Turkey for membership of the EU. Economic progress and social development are the drivers of greater democratisation. At present it is impossible to gauge what the consequences of this process will be for both the Kemalist system and the Islamist movement.

*Boutros Labaki* presents a historical overview of changes in relations between the state and the religious communities in Lebanon. As determinants of change he identifies the influence of outside powers on the one hand and demographic developments on the other. The Tanzimat reforms in the Ottoman Empire introduced greater equality for all subjects. A quota system for political representation of the religious communities was established in the autonomous region of Mount Lebanon. This system was retained by the Lebanese Republic during the French mandate. The expansion of the country's territory to its current borders resulted in equilibrium between the Christian and Muslim communities. When the country gained independence in 1943, the formula for power-sharing between the communities agreed in the National Pact meant limited political hegemony for the Christians. After the wars of 1975-1990 the formula was adjusted to take account of demographic changes. Although there is still parity between Christians and Muslims in parliament and government, the constitutional changes of 1990 reduced the competences of the Maronite president and appreciably increased those of the Shiite speaker of the parliament and de facto in particular the Sunni prime minister. The Christians felt they had been marginalised, but the withdrawal of the Syrian troops in 2005 has potentially opened up the possibility of a new equilibrium.

According to *Layla Al-Zubaidi*, the overthrow of the Baath regime by the US-led alliance triggered significant changes in relations between state and religion in Iraq. Since then, there have been heated clashes, in particular over the role of religion in the constitution and over the law on personal status. The lines of conflict run not only between the Shiites, who long felt suppressed, and the Sunni, who now feel marginalised, but also between the religious parties and those with more secular policies. The constitutional debate produced a compromise. As in the previous constitution, Islam is the official state religion, but Iraq is not defined as an Islamic state. Islam is defined as

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basic source of legislation - a compromise between a source and the source. Laws are deemed to be unconstitutional when they contradict not only the fixed elements of the rulings of Islam, but also the principles of democracy. The practical significance of these formulations will only become apparent in future legislation and subsequent judicature. The Constitutional Assembly took months to agree on these formulas. To date, the country's politicians have not been able to agree on a personal status (family) law. Consequently, Law No. 188 of the (first) Republic of Iraq of 1959 is still in force. It was, and still is, one of the most progressive laws of its kind in the Arab world. It replaced the old shari'a courts with courts made up of government officials who apply the law of the state (minimum age for marriage, restrictions on polygamy, prohibition of marriage without the explicit agreement of the woman, extension of women's rights to divorce and to receive compensation payments). Last, but not least: the law applies to all religious communities. The debate on a new law continues: whereas religious leaders want a new law, judges and secularly-minded persons do not. Ultimately, the result will depend on whether the future direction of the Iraqi state increases divisions between the different communities or strengthens the institutions of central government.

*Manfred Sing's* looks not at a single country, but at Islamic arguments for a secular state as developed from liberal concepts of shari'a. He views as fallacious the assumption that the stronger a state's commitment to shari'a, the higher the level of religiosity will be. The greater the extent to which religious law is applied as state law, the more it will become state law, just like any other, i.e. an instrument of the state with religious overtones. Sing is also of the opinion that this process affords the state religious legitimacy. However, this also raises problems: controls on behaviour are more likely to promote the appearance of religiosity as the moral foundation of behaviour. The more a state enforces religious behaviour, the more superficial religiosity becomes. These considerations have motivated some contemporary Muslim teachers to develop arguments for a secular state. In Abdullah Na'im's view, the idea of an Islamic state is a dangerous illusion. It is against the nature of both shari'a and the state for the state to impose shari'a. He holds that Islamic norms are a religious duty only for individual Muslims. Khaled Abou El-Fadi takes the view that the Quran recommends not control or domination, but exhortation and teaching. Mohsen Kadivar attempts to reconcile human rights and Islam. This is possible if shari'a norms are rational, just and better than earlier obligations. All three of the schools of thought presented are unquestionably minority positions, but they do open up interesting possibilities of development in Muslim thinking on the topic of state and religion.

*Ayo Obe* analyses violent religious conflict in Nigeria. It is particularly frequent in the central belt of the country, where autochthonous Muslims and Christian immigrants from the south meet: migration conflicts in the guise of religious conflicts. Other conflicts are triggered by attempts to introduce shari'a in the north of the country, in particular hudud, the class of punishments fixed for certain crimes. This contradicts the principle of religious freedom as entrenched in Nigeria's federal constitution. Notwithstanding, shari'a laws have been introduced in 11 federal states. As a rule, the driving forces are populist politicians, who create high expectations that cannot be fulfilled -

these laws do not make life easier for the almost universally poor population of northern Nigeria. It remains to be seen whether, having let the genie out of the bottle, it is possible to put it back in.

*Clemens Jürgenmeyer* looks at the stability of the secular republican system in India. In recent decades opposition has taken the form of the Hindutva project, whose goal is a state rooted in a Hindu cultural ethos and, hence, hostile to religious minorities such as Muslims and Christians. After initial success, the Hindu nationalist party has lost support, whereas the republican system has held its own. A major reason for this is Hinduism itself, which is a very diverse, fluid culture. Although Hindus make up four fifths of the population, they are not a homogeneous bloc. According to the constitution, India is a secular state. Indian secularism is not anti-religious, but calls for a religiously neutral state that respects all religions. In the final analysis, the non-homogeneity of the Hindu culture is the essence of the Indian spirit.

*Leslie Tramontini* examines the transformation of the conflicts in Malaysia from the initial focus on ethnic, then religious, and now socio-economic cleavages. At the time of independence the ethnic groups formed a compromise: immigrant groups - the Chinese and the Indians - would be granted citizenship, and the Malays would be privileged citizens. Islam was recognised as the state religion, with the guarantee of full religious freedom; the Malays would be given preference in civil service appointments and access to education. The constitution defined Malaysians as Muslims who spoke Malayan and practised Malayan customs. After violent unrest in 1969 the New Economic Policy was introduced, a policy of affirmative action that gave Malays numerous preferences with the goal of reducing economic inequality between the ethnic groups. The policy's success has been patchy. Since the 1970s there has been a growing movement to introduce the shari'a and turn Malaysia into an Islamic state. The governing party takes the view that Malaysia is already an Islamic state. Since then, parties have been fighting over which represents the true Islam. At the last parliamentary elections the governing party lost its two thirds majority. The opposition coalition of Islamists, Chinese and Malayan reform parties agreed on a political platform of combating corruption and reforming the policy of affirmative action. It remains to be seen whether, as a result, ethno-religious conflicts will take a back seat to conflicts between economic interests.

*Franz Magnis-Suseno* studies the question of whether Indonesia could turn to Islamism. The evidence is contradictory. On the one hand the state is undoubtedly secular - not in the sense of denying religion any role in the country, but in the sense of religious freedom and friendly cooperation between the state and religious communities. On the other hand in Indonesia there has always been a more fundamental current of Islam with the goal of an Islamic state. The election results since the overthrow of the Suharto regime show that this goal attracts fewer supporters today than at the founding of the republic. The pillars of the secular state are a traditional culture of tolerance, in particular on Java, a strong nationalism rooted in shared historical experiences, and the state ideology of Pancasila, which does not reserve a special role for any one religion. The main currents of Islam, both traditionalist and modernist, accept

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this approach. Despite this, in the two decades since the restoration of democracy tensions between Muslims and Christians have been growing: from administrative obstacles to building churches, through arson attacks, to two regional civil wars. There are signs of creeping fundamentalism. Bookshops are full of Salafist literature, student activists are forming groups at state universities, and local authorities are passing Islamist regulations. Only small groups of extremists actually resort to violence. But the growth of a more uniform, Arab-influenced Islamic identity and greater social separation from other religious groups is impossible to overlook. The future development will ultimately depend on whether Indonesian democracy succeeds in containing corruption and creating prosperity, thereby furnishing concrete evidence of the advantages of a pluralistic society.

### **Determinants of change and persistence: a provisional conclusion**

The 12 case studies provide ample evidence for the diversity and complexity of the determinants of change or persistence. Military intervention can lead to changes in the relations between state and religion, though not necessarily in the direction that the interveners may have intended. Massive immigration can upset historically entrenched, institutionalised relations and force adjustments against the will of the powers that be. Internal demographic shifts can lead to changes in the balance of power in a country. The overthrow of a regime may lead to the reappearance of long-hidden cleavages. One by-product of creating a supranational economic community is the emergence here and there of new legal regulations. Economic and social change can transform traditionally conflictual relations between ethnic and religious groups. Finally, changes in the social role of religion in processes of democratisation are also complex.

The inductive approach to our topic has not resulted in any particularly surprising generalisations. One striking point is that the leading topic in western sociology of religion, viz. the secularisation of religious behaviour, features only in European case studies. In all other cases, the focus is on whether religion is being instrumentalised in political power struggles or not. There can be little doubt that relations between state and religion play a crucial role in the political analysis of numerous (relatively) young states.

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Stephan Leder not only put the handsome rooms of the Orient Institute at our disposal, but also actively participated in the debates.

Last, but not least I express my debt to Samir Farah and the Friedrich Ebert Foundation, Beirut. Without their financial support we could not have come together to discuss the topic whose results are presented here.

# Path Dependence and Institutional Change in State Policies toward Religion. A German-French Comparison

MATTHIAS KOENIG

The intention of the organiser is to proceed inductively. This approach is difficult for me to pursue, given my disciplinary background: most sociological research is explicitly or implicitly theory-guided. In fact, the seminar's topic, "factors contributing to change in state-religion relations" has become the focus of a vast body of literature at the interface of political science and historical sociology. There already is some knowledge on which we can cumulatively build: for instance, Anthony Gill has emphasised the interests of political and religious elites as determinants of greater or lesser regulation of the religious field,<sup>1</sup> Christian Smith has shown how professionalisation was a driving force in the secularisation of public institutions in the United States in the nineteenth century.<sup>2</sup>

In the following, I aim to provide some analytical tools for thinking about continuity and change in state policies toward religion. I shall do so by means of comparison between France and Germany, two countries that are often compared and contrasted. They are treated as falling into different types of polity (etatist vs. corporatist), nationhood (civic vs. ethnic) and church-state relation (secularist vs. cooperative). I will focus more on Germany than France because the programme already includes a specific presentation on France.<sup>3</sup> The main thesis is that both countries are currently witnessing struggles over state policies towards religion that are part of broader transformations of nation-statehood.

I would like to develop this thesis in three steps. First I shall consider the theoretical deficits of the classical secularisation theory and argue for an institutionalist approach at the level of middle range theory. Against this background, I shall sketch an historical and comparative analysis of the emergence of religious policies and their institutionalisation within the process of state and nation building in Western Europe. And finally, I shall look at recent institutional changes in religious policy arising from the transformation of the relation between nation and state in an increasingly transnational context.

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1 Anthony Gill, *The Political Origins of Religious Liberty*, Cambridge University Press, New York, 2007.

2 Christian Smith, *The Secular Revolution: Power, Interests, and Conflict in the Secularization of American Public Life*, University of California Press, Berkeley, 2003.

3 Coralie Hindawi, *Assessing the Nature and Impact of 'laïcité' in Contemporary France*, below.

## I. Theoretical considerations

Secularisation theory is the predominant paradigm in the social sciences. Of course, it has been subject to various criticisms that have largely focused on the degrees of religiosity within society, at the individual and communal level, during the process of modernisation. However, its theoretical core has remained intact; it lies in the assumption of functional differentiation, according to which political institutions and practices have been progressively separated from religion in the course of modernisation

To understand contemporary changes, one has to go beyond the classical theory that revolves around the assumption of functional differentiation as a linear and inevitable process. This theory suffers from three deficits:

It does not give systematic attention to actors and their interests.<sup>4</sup> To compensate for that deficit, Mark Chaves suggests conceiving of secularisation (or laicisation) as a variable referring to the scope of religious authority in the political arena. Explaining the specific patterns of secularisation in a given society then requires an historical analysis of the struggles between religious and political elites.

Its second deficit is its lack of attention to the institutional environments within which these struggles take place and through which this differentiation process occurs. The theory of secularisation does not question but rather takes for granted the institutional framework of modern nation-statehood as articulated in the institution of citizenship through which individuals are linked to a territory, are granted rights, and are given a collective identity. Now, it has been noted that biblical narratives have impregnated idioms of modern nationalism. Furthermore, the construction of national identities drew upon confessional uniformity that was achieved in waves of religious cleansing in post-reformation Europe. And during the nineteenth century, identity formation was interwoven with contests between secular and religious camps and with 'cultural wars' between Protestants and Catholics. Capturing different patterns of differentiation and understanding the politics of religious diversity therefore require careful analysis of historical configurations of state, nation and religion, which often lack precision in sweeping accounts of modernisation.

Finally, the theory of functional differentiation has tended to ignore the cultural construction of the 'secular', which Charles Taylor has magisterially exposed in *A Secular Age*.

To sum up, differentiation theory is ill-equipped to grasp the interplay of actors' interests within a specific institutional environment. We should move beyond the grand narratives of modernisation and adopt a more nuanced explanatory model of secularisation. It is necessary to adopt a middle range institutional approach to examine country-specific institutional arrangements of nation, state and religion. This ap-

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4 Mark Chaves (1994), "Secularization as Declining Religious Authority", *Social Forces*, 72. The article builds on contributions by David Martin (1978) and Karel Dobbelaere (1981).

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proach takes into account highly aggregated models (or ideal types) emphasising different state-religion relations in Europe. The dominant approach, inspired by legal scholarship, is the typological differentiation between separation, cooperation and state-church regimes.

However, as the French-German comparison shows, this typology suffers from three interrelated deficits. First, whereas the separation model is usually exemplified by the French system and the cooperation model by the German system, respectively, these models in fact correspond to the two countries only partially. Thus, they do not take into account the fact that both countries have mutually observed each other, a fact emphasised in recent studies of *histoires croisées*. Such a comparative and cross-national work sheds a light on how French policies of separation affected Germany, and how the German *Kulturkampf* resonated in France.

Second, the country-specific arrangements, far from articulating clear-cut models, resulted from a contingent historical process of conflict, negotiations, and institutional stabilisation. These institutional arrangements gave way to a path dependence that should be looked into. This mechanism of path dependency explains the stability of these arrangements and their resistance to change.

And third, the country-specific approach overlooks the current institutional change in religious policy.

## II. Mechanisms of historical path dependency in France and Germany

In the following, I will examine the formation and the stabilisation of the two types of political institutions we have already mentioned: the separation and the cooperation regimes. Before doing so, however, I need to analyse why the French and German arrangements, though highly contingent in their beginnings, were eventually stabilised.

France is misunderstood in Germany as an example of anticlerical and antireligious secularism. Following recent French historiography, we can present another picture, that of an arrangement or a compromise that was the result of the struggle of groups who held very different conceptions of secularism. This compromise emerged against the backdrop of revolution, the end of '*La France toute catholique*', the struggles between republicans and monarchists, the "war of the two Frances" as Emile Poulat put it. This struggle was particularly strong in the educational field, where it was conducted by Jules Ferry and Ferdinand Buisson. It is also referred to as the battle between the two civil religions, one Catholic and one secular. Charles Fauvry, a Huguenot writer, founder of the journal *La Religion Laïque*, stated: "The main idea is to define religion, to substitute Catholicism and prepare for the coming of the new socialist man".

From this perspective, it becomes clear that the separation law of 1905 runs against the grain of anti-clerical secularism, represented by Emile Combes' *laïcité de combat*, but is the result of a compromise better represented by a more liberal *laïcité*

*de compromis*. Submitted by Protestant Louis Mejean, and strongly influenced by Jean Jaurès and Aristide Briand, the law broke with the repressive religious policies of Combes (forced expulsion of religious orders and the religious education ban) and respected the internal autonomy of Catholic churches by proclaiming state neutrality and guaranteeing religious liberties. It laid the ground for the twin toleration.<sup>5</sup>

As a compromise formula, the law of separation offers multiple possibilities of interpretation, as the ongoing controversy has shown. It was, in sum, a highly contingent and instable pattern that stabilised over time.

Likewise in Germany the Weimar constitution laid down an arrangement that is still largely valid today. Like the French separation law, it bears the signs of historical contingency, and was also closely connected to the issue of national education and the project of nation building. In his Heidelberg speech, for instance, Ernst Troeltsch famously said that the German Empire's major deficit was the confessional division of the nation.

German constitutionalists at the beginning of the twentieth century were discussing the relation between state and religion against the backdrop of Bismarck's *Kulturkampf* and the French or American models of separation. Liberals and social democrats expected the acceptance of separation. In their Erfurt party program, the Social Democrats opted for a radical separation policy that they were unable to enforce in the Weimar Constitutional Assembly. They were faced with demands put forward by the churches and the conservative parties who wanted to defend the church's autonomy, especially with regard to schools. This specific and contingent constellation of actors and interests led to a compromise formula in the Bonn Basic Law. Some Social Democrats criticised this constitution written "in the shadow of Cologne Cathedral" because it placed too great an emphasis on Christianity as a moral basis, while Catholic bishops complained that the constitution showed insufficient respect for Christian ideas. Here again, we find a highly contested and instable compromise that with time became stabilised enough to become a model of state-church relations.

Given the historical contingency and instability of their beginnings, it is interesting to see how these arrangements on both sides of the Rhine gradually institutionalised and stabilised. This question becomes even more interesting when one takes into account the fact that the conditions that originally gave these arrangements their plausibility no longer exist. After the erosion and decline of belief, and the dissolution of the confessional milieus in the 1960s, there is no longer a need for the pacification of relations between two opposing camps.

How can one explain the persistence of these arrangements, despite their contingency and the disappearance of the conditions that originally gave them plausibility? The most obvious explanation is provided by the theory of path dependence. It can explain the persistence of these arrangements by independent institutional fac-

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5 Alfred Stepan, "Religion, Democracy, and the 'Twin Tolerations'", *Journal of Democracy*, Volume 11, Number 4, October 2000

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tors. Path dependence refers to three social mechanisms that can be explained in economic terms as increasing rates of return.

The first mechanism is that these arrangements have their own carrier group. This is especially true in the spheres of law in which the elites (judges, professors and lawyers) have a professional interest in maintaining the arrangement. A good example of this mechanism is provided by Germany's reunification. Once again, the principle of separation between state and religion was put on the discussion table in the interests of harmony between East and West Germany. But instead of adopting this solution, we witnessed the extension of the West German model to the former East German *Länder*, notwithstanding their general religious scepticism. The interests of the professional elites in West Germany explain this choice and they expressed their perspective quite clearly during the discussions.

A second, equally important mechanism is the religious community's attachment to the specific legal framework. The corporatist legal forms that religious communities take in Germany (and to a lesser extent and in a more moderate form in France) create incentives to use this form: not only to maintain it, but also to expand it. In Germany, there is nowadays an increase in the number of actors that are recognised as corporations under public law. This multiplies the number of people who support the institution and who are interested in preserving it. The mechanism is reproductive. In this sense, the recognition of the newly organised Islamic community as a public corporation would actually stabilise state-church relations. By contrast, if such recognition is not achieved, the institution (or legal framework) could possibly lose its legitimacy.

A third conceivable mechanism of institutional reproduction is the self-generating legitimacy of the institution in that the *Staatkirchenrecht* (the law regulating state-church relations) is recognised as a "national tradition" (instead of a contingent compromise). This is probably the reason why the SPD abandoned the option of radical separation in its Godesberg program (1959). This recognition as a "national tradition" creates an overarching consensus for maintaining it.

A similar transformation occurred in France, where today *laïcité* is recognised as a national heritage. In 2005, the country celebrated the centenary of the "law of separation of 1905"; many conferences, films and books dealt with this topic throughout the year. The only other celebration of similar proportions was the two hundredth anniversary of the French revolution in 1989.

Despite a changing context and new circumstances, that of religious diversification, a new and expanding presence of Islam, there has not been any institutional change; quite the contrary, the contingent arrangements have been confirmed as deeply rooted national models. This quality makes their revision highly unlikely, even if this is now and then proposed in the public discourse.

In the same way as Muslim organisations in Germany are working to be recognised by the state as a corporation in public law, an Islamic representation was created in France in accordance with French tradition.

Despite the mechanisms of path dependence, both countries are witnessing transformations and changes in their policies that can be seen as small departures from the original model, but certainly not forms of radical path breakdown.

There are two variants of (non-radical) institutional change: First, the reinterpretation of key concepts and arrangements by new groups who have their own ideas. This is tantamount to institutional conversions. Second, the occurrence of a new situation that needs a new answer, which leads to the inclusion of additional elements in an existing arrangement, i.e. institutional amalgamation. To better understand these two variants of institutional change, we need to take a closer look at the broader conditions surrounding them.

### **III. A changing context: secularisation, pluralisation and transnationalisation**

The classical model of the nation-state has been deinstitutionalised in the post-war period by the development of what is called a post-Westphalian international system. Two transformations have had a direct effect on the institution of citizenship: the decoupling of state membership and human rights; and the decoupling of state membership and national identity.

The decoupling of state membership and human rights is due to the transnational diffusion of human rights ideals in the post-war period and their institutionalisation in international organisations, both inter-state and non-governmental. This has established a charismatic status of “universal personhood” to which rights are attached independently of formal state membership or nationality. Even though a strong version of this thesis is controversial, a weaker version can reasonably be defended. For, the human rights discourse provides new repertoires of contestation and justification for both individuals and states, which influences domestic politics and their dynamics.

The decoupling of state membership and national identity is also related to the transnational discourse on human rights. This has led to the development, or specification, of rights of equality and non-discrimination. The focus has shifted from abstract individual rights to that of minority rights and cultural identity. This imposes on states a proactive approach to promote the identity of ethnic, national, linguistic and religious minorities on their territory. This concept of a right to cultural identity has taken hold in transnational human rights discourses, as demonstrated by the international convention on the protection of the rights of all migrant workers and members of their families (1990), the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), and a variety of activities of the Council of Europe and the OSCE. This process has been further strengthened by European integration.

These changes in international cultural settings now directly affect the mechanisms of institutional reproduction, outlined above, and, thus, open the scope for institutional change. These changes find their way to the carrier groups and interact with the changing patterns of social reproduction. As the relevance of European and

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International law grows, the legal discourse changes and its emphasis shifts from state interests (the initial backdrop of the French and German national arrangements) to individual rights, and moves towards a reinterpretation of existing institutions. The signs of appropriation and reinterpretation are clear in France, as expressed in terms such as *laïcisation de la laïcité*, of *laïcité positive* or *laïcité ouverte*. In Germany, we find more talk of religious constitutional law and a controversy over extending the category of corporation under public law. Islamic organisations have asserted their rights of cultural identity and religious liberty since the 1990s, which shows an appropriation of human rights discourse within the national arrangements.

With the decline of the state's charisma, historically contingent arrangements are reinterpreted as national systems. In France, this has become particularly clear since the 1990s. Since then, *laïcité* defines the public sphere as the sacred core of the nation in which religion is seen as pollution. This approach explains the headscarf controversy and the law prohibiting ostentatious religious symbols.

In Germany, the judgement of the German Federal Constitutional Court that cleared the way for German ratification of the Lisbon Treaty (June 30, 2009) also seems to have considered the state-church relation as a core identity of the state, one that cannot move to a higher level of competence, viz. that of the European Union.

Without downplaying the well-known differences between Germany and France, I have tried to emphasise the similar dynamics of path dependence and institutional change in both countries.

Overall, there is insufficient knowledge about the secularisation of the public sphere in European nations and about the contingent compromises in each country on the relation between state and church. The institutional logic of nation-state religious policy has a certain degree of path dependence, but it is also increasingly subject to change on account of national, European and more global dynamics. These new arrangements of cultural diversity that draw on the discourse of human rights could be a source of innovation in the European tradition.

## Discussion

A debate over methodology started the discussion. Some participants reacted positively to Matthias Koenig's suggestion of a *theory-guided approach* that would build on existing research and hypothesis. Such an approach could help avoid "methodological nationalism" or "national assumptions" that colour scientific theories. To achieve that it is extremely important to be aware of the fact that theories of national self-description are closely interrelated with the emerging social science.

Theodor Hanf defended the more flexible, inductive, *naïve approach* chosen for the seminar. He added that hard facts like those presented by Matthias Koenig could be interpreted in a naïve way. One could retain from his presentation the hypotheses

that change is directly linked to actors' interests and to the ways institutions respond to such impulses.

Alsace-Lorraine was briefly discussed as a potentially interesting case study for an *histoire croisée* between German and French concepts of nationalism and state-church relations because this region switched from French to German to French sovereignty in the period in which these concepts were defined in both countries. Inanna Hamati-Ataya - chairman for the session - wondered how the French subjective definition of the nation (citing Ernest Renan's definition "plebiscite de tous les jours" or a plebiscite every day) and the German objective definition played out in Alsace-Lorraine. Theodor Hanf explained that Alsace actually suffered from the bitter differences between the two national approaches. Interestingly enough, even though the territory was admonished to abandon its German traditions ("quitter les modes allemandes") when it was reintegrated to France in 1918, the rules of *laïcité* still do not apply to it, and the concordat still determines state-church relations there. Matthias Koenig warned against the tendency to essentialise the civic and ethnic national models by identifying them with a specific country. He added that civic and ethnic elements were found in both countries. There is actually an interplay between the two models and the two national narratives. In many respects the two countries are a mirror image of each other: each justifies its own arrangements by caricaturing the other. The German president Johannes Rau illustrated this point in a speech in which he argued against the French case.

The discussion allowed Matthias Koenig to clarify some points he made in his lecture, namely the way Islam is challenging the existing systems in Germany and France and how it can be accommodated. Islam actually falls under two policies in both states: *religious policy* that is tied to state-church relations and *integration policy* that is linked to national self-descriptions.

Islam challenges the templates that exist in both countries, which were devised to settle disputes between church and state. These templates simply might not apply to Islam because of its different institutional makeup. A French Representative Council of Islam (Conseil Français du Culte Musulman) was created thanks to the efforts of the Minister of Interior. But since its establishment, it has been characterised by ethnic conflict and internal differences. Such a situation is not very problematic in France because corporative institutions are not central to religious arrangements. On the other hand, such an outcome would be very problematic in Germany where such corporative institutions are more formalised and central in the system. Austria is a similar case. The Muslim community was recognised in 1979 using a template that dates back to the Austro-Hungarian Empire. Following the reform of the integration policy, new Muslim groups such as Turks are unhappy with the system because it has already established their representatives and because religious groups are privileged.

Stefan Leder considered that result very problematic, and added that one sees it in the Eastern *Länder* of Germany, where religious indifference is a majority phenomenon and things have not changed since reunification. Moreover, many immi-

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grants have no religious background. So this process of creating religious public corporations builds up pressure on certain groups to assimilate into a religious model that they do not agree with.

The difficulty of applying existing templates to Islam is increasingly recognised as problematic. Matthias Koenig is sceptical of a short-term solution, but he believes that failure to solve the problem of accommodating Islam in the medium term would delegitimise the whole system. So the existing corporations and social actors have a vested interest in accommodating Islam. This dynamic has already proven to be effective during the integration of the Eastern *Länder* of Germany. Moreover, federal institutions have a vested interest in finding ways to promote the integration of Muslim immigrants.

When asked about the meaning of integration in Germany as opposed to France, where people are expected to conform to the secular model, Matthias Koenig answered that the approach was undoubtedly different. Germany recognises its Christian heritage and its interest in maintaining it. But this does not mean that it expects immigrants to become Christian. Things are more complex, as the example of the headscarf controversy shows. Students who wear a headscarf are tolerated everywhere. The German Federal Constitutional Court was asked to consider whether a teacher in a public school had the right to wear one. It upheld the right, but added that legislators were free to enact laws in such matters. Consequently, each Land can pursue its own policy. A group of *Länder* adopted legislation trying to exclude nuns' garb from a possible ban on headscarves; others did not change their laws. A third group preferred a strict ban in public schools. These arrangements reflect the local choices and weight of political parties. The dynamics are much more complex because actors are numerous, varied and operate on different levels: courts, parties and groups who may or may not mobilise.

# French Secularism on the Move? Assessing the Nature and Impact of the Debate on 'laïcité' in Contemporary France

CORALIE HINDAWI

The French model is presented as unique. There is much pride in this “particularism”. The sense of uniqueness is reinforced by the fact that *laïcité* and *laïque* are not easy to translate. Their English equivalent, secularism and secular, do not reflect the particularities of the French noun and adjective. The approach we will be following is not that of a specialist but of a lawyer who was brought up in the system.

We will look at the main features of *laïcité* and try to assess the nature of the debate on laicity that has been going on for about 20 years. We will also be examining its latest developments that are based not so much upon a collective debate as upon provocative presidential statements that have generated reactions. Then we will try to assess if there are any notable changes in the definition of the concept, where these changes could be emerging, and in what direction this multifaceted debate is going.

## I. *Laïcité*: Its meaning and legal definition

*Laïcité* was conceived in France at the turn of the twentieth century. By definition, it represents a regime of strict separation between state and religion, as it was expressed by the law of separation of church and state, passed on 9 December 1905. With this law, the French republic guaranteed the free exercise of religion. Moreover, it stopped recognising any religion. This meant that it no longer funded religious organisations and it stopped paying the salaries of clergymen, except for some chaplaincies in schools, hospitals, and prisons. It also prohibited placing any religious symbol on public buildings or in any public place, except churches, cemeteries, memorials and museums.

In 1946, the preamble to the new constitution reaffirmed the principle of freedom of thought and belief and guaranteed “the organisation of free and *laïque* public education at all levels”. This constitution defined France for the first time as an “indivisible, *laïque*, democratic and social republic” (article 1). The same wording was used in the first article of the constitution of 1958. This double reference to the principle of *laïcité* within the constitutional text gives it the highest legal value and establishes it as one of the key features of the French Republic.

The principle is given fundamental importance without being properly explained or defined. To compensate for the lack of a legal definition, various definitions have been proposed. There is a general consensus that this principle rests on three pillars: religious neutrality of the state, freedom of thought and pluralism.

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Due to its *religious neutrality*, the state is expected not to interfere in religious matters. It also translates as a duty of strict religious neutrality within the civil service. This means that civil servants are not allowed to show any conspicuous sign of religious identity because they're perceived as representatives of the state. Religious neutrality also has important effects in the field of education, as does the second pillar, the *freedom of thought*. The third pillar is *pluralism* understood as the duty of state to protect religious currents from persecution. Religious freedoms are guaranteed within certain limits as defined by law, and as long as they respect public order. *Laïcité*, is conceived as favouring neither the state nor religious movements. It is a balanced principle.

## II. Overview of the contemporary debate

The debate over *laïcité* has always centred on education. Its most contentious aspect was the relation between the state and private schools, which were predominantly Catholic.

The contemporary public discussion that started in the late 1980s has witnessed a shift from a Catholic-centred debate to a Muslim-centred debate. The first debates on relations with Islam in metropolitan France were sparked by what was perceived to be an increasing number of women wearing headscarves in public schools. Since 1989, the Council of State, France's highest administrative court, has had to rule on several occasions on girls wearing headscarves at school, but it had not laid down a clear principle that could be used by educators and school principals. So the issue was left to schools to decide. Educators and principals felt that the state's institutions had failed to provide them with a clear answer and left them with the burden of solving some highly sensitive and polemical issues, including in some cases how to deal with refusals to participate in sports or to be examined by a teacher of the opposite sex.

The debate was also nurtured by a context in which in some places, particularly in the suburbs, one could witness growing societal pressure on young women (what to wear, how to behave, etc.).

There have also been other, probably rarer, yet much publicised incidents in which some patients refused to be treated by doctors of the opposite sex in hospital emergency rooms, or some young women requested virginity certificates or hymen repair operations.

The recurrence of such cases shocked public opinion, even though numerically they were not very important. However they got a lot of media attention and highlighted difficulties concerning the integration of Muslims. This increased pressure on state institutions to find a solution to these problems. The government commissioned several reports on the subject. In early 2002 Régis Debray handed the minister of

education his report on “teaching the religious phenomenon in secular schools”,<sup>6</sup> also known as the *Rapport Debray*. This was followed by that of François Barouin, “for a new *laïcité*”, handed to the government in May 2003.<sup>7</sup> Then there was the Stasi Commission’s report in December 2003,<sup>8</sup> as well as a report released by the Council of State in 2004. All these reports were written in an atmosphere that was somewhat hostile to, or at least not well-informed about and possibly fearful of Islam. The successive reports generally acknowledged this, and made many suggestions on how to overcome fear, ignorance and inequalities. They admitted that there were important differences in historical context between the time the principle of *laïcité* was developed and the present circumstances, and that adjustments were necessary.

### III. Changes in the debate and the evolving situation of Islam in France

On 28 May 2003, the French Council of the Muslim Faith<sup>9</sup> was established with the support of the minister of interior, who at that time was Nicolas Sarkozy. This new body is considered to be representative of French Muslims, even though it has no special legal status. By law, it is an organisation like any other. Nevertheless it is the main interlocutor of the French government in Muslim affairs: it is involved in the construction of mosques, the halal food market, the training of some imams and the development of Muslim chaplaincies in prisons and the army.

Following the publication of the Stasi report, in 2004 the French parliament enacted a law on secularism (*laïcité*) and conspicuous religious symbols in schools. This law bans the wearing of “ostentatious” religious symbols in government-run primary and secondary schools. This was one of the many recommendations of the Stasi report.

Following another proposal of the Stasi commission (that had insisted that sectarian tendencies were enhanced by the failed integration of huge parts of the French youth with a foreign background), a new body was created to fight more actively against discrimination: the High Authority for the Struggle against Discrimination and for Equality, better known by its acronym, Halde<sup>10</sup>.

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6 Rapport Debray, « Enseignement du fait religieux dans l'école laïque », February 2002.

7 Rapport Barouin, « Pour une nouvelle laïcité ».

8 Headed by Bernard Stasi, the commission included Régis Debray among its twenty wise men or “sages”.

9 Conseil français du culte musulman.

10 Haute Autorité de Lutte contre la Discrimination et pour l'Égalité.

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## IV. Recent developments

Following these changes of 2004, two new reports were commissioned: the Rossinot Report (2006) on “Secularism within the Civil Service”, the Machelon Report (2006) on “Relations of Religion with Government”. And a survey of *laïcité* was established (though it is still not operational).

Among the many propositions that were made in these reports, one caused quite a stir: allowing the use of public funds for the construction of mosques.

While new ideas were introduced into the public debate, the election of a new president of the republic brought about a change in the way religion was addressed by the highest representative of the state. This shift in the public discourse is very apparent in the public declarations of President Nicolas Sarkozy since 2007 at the Lateran Palace in Rome, in Riyadh, and in Paris. Not only did the president did not refrain from speaking of his faith, but he also acknowledged and insisted on the necessity of recognising France’s Christian roots and called for a dialogue with France’s “great religions”. At one point Nicolas Sarkozy also stressed the importance for the thinking of a politician to be enlightened by all spiritualities existing in his country.

The president also coined two new expressions, that of “positive *laïcité*” and that of “open *laïcité*”. This terminology implied that *laïcité* had not been open and positive towards religion up to now, and that there should be a dialogue between state and religion. This sparked a new debate and many protests, in particular from individuals and organisations defending their understanding of laicity.

A recent agreement with the Holy See on the recognition of diplomas has also triggered protests because it has been perceived as formal recognition of a religious authority. Similarly, the president’s affirmation of his faith has been interpreted as a breach of the religious neutrality of the state and its representatives.

## V. Assessing the nature and impact of this debate

Over a century after the foundation of the *laïque* regime, and about 20 years of debate on the question of how to apply laicity in a changed French society, one can make a short assessment of the situation. There have been many incidents, some cases brought before administrative courts and the Council of State, and a literal burgeoning in reporting activity (especially in the last eight years). Two elements in public perceptions have changed. The rise of communitarian practices is now recognised as linked to the failed integration of French youth with an immigration background. And there is general recognition of the wide disparity in the availability of religious places in France for the different religious communities (Catholics are privileged by history and the other religions, in particular, but not only, Islam, conversely disadvantaged).

Against this background, some concrete steps have been taken: a council that is supposed to represent French Muslims was created (2003), a law prohibiting ostensible religious signs in schools was enacted (2004), and a new administrative body in charge of fighting discrimination and promoting real equality was created (2004).

My assessment of the debate summarised here and its impact on the relations between state and religion in France is that an important part of the debate on the integration of Islam has been falsely labelled “debate on laicity”, whereas it does not necessarily have to do with laicity, but with the acceptance by the French of a new culture that they are not familiar with. Some tend to view many issues related in some way to Islam or to the behaviour of certain Muslims as religious issues concerning the whole state, when this is clearly not the case: women wearing headscarves at work or in general, the new *niqab* debate, arranging women-only opening hours at certain sports facilities such as swimming pools, organising meat-free meals at school, etc. are all issues that have nothing to do with the relationship between state and religion. You cannot use laicity as a pretext to prevent such measures or arrangements.

I am unsure about how to assess whether it was necessary to adopt the law forbidding headscarves at school and whether this was the wisest option (it will keep the very girls who are under pressure to wear a headscarf out of public schools), especially as the law was adopted without including the other recommendations of the Stasi Commission, which could have given it a different, more neutral, tone (i.e. add a Jewish and a Muslim official holiday, arrange for alternative school meals for children who do not eat pork). Basically, it is not a departure from the principle of laicity, but at most an extreme version of it. It does have some positive aspects, and defines clear rules that have to be applied.

What seems most likely to change laicity is the subtle, creeping recognition of religious actors in France (Muslims and the Catholic church); the proposals to officially accept this evolution and thereby bring the French state to recognise the major religions present in France today; and the proposal for public bodies to finance religious sites. In this respect, we may well already have, and certainly would have, a clear departure from the *laïque* principle.

## Discussion

Thomas Scheffler started the round of questions by introducing two dimensions that could explain the choice of a particular principle to organise state-church relations: the influence of a church on society and the trans-national dimension of churches. He translated that into two questions: How does the law on separation between state and church deal with the political power of the Catholic Church in French society, and how does it deal with that extra-national dimension of the church? These questions were largely intended for discussion.

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Matthias Koenig noted that the three pillars of *laïcité* mentioned by Coralie Hindawi support Silvio Ferrari's claim that there is a common European model of state-church relations. France actually shares many elements with other European countries. The particularity of the French case lies in the highly ideological nature of the notion of *laïcité*, not in the characteristics of the system. One finds many corporatist and cooperative elements within the French system, especially at the local level. There is a discrepancy between the ideological level and the practical level. At the ideological level, people pay homage to the public discourse, but at the practical level they deal with religious matters. Layla Al-Zubaidi added that the example Mathias Koenig gave shows that local institutions have a good knowledge of how to treat social affairs that have a religious dimension to them (such as funerary rites, healthcare, care for the elderly, etc). But the lack of acknowledgement of these matters prevents the knowledge from trickling up to higher levels of government and of being shared. So without an acknowledgement of the social aspects of religion, one cannot produce better integration policies.

The discussion allowed Coralie Hindawi to elaborate on two points made earlier: the centrality of the figure of President Sarkozy in the recent departures from *laïcité*, and the dimension of national identity in the *laïcité* debate. She believes that President Sarkozy has widened the debate and has taken the public discussion to places that were supposed to be free from state intervention. Inanna Hamati-Ataya doubted that President Sarkozy's views on religion were dissimilar from his approach to colonialism or wealth. Behind his call not to be ashamed of these matters ("approche décomplexée"), one actually finds a white, male, Catholic, bourgeois discourse that oddly enough goes challenged. Matthias Koenig wondered if there were any institutional consequences to such behaviour or discourse, and questioned whether there was a departure from the way *laïcité* is expressed, with its blend of dogmatic discourse and its selective cooperation in religious matters.

On the second point, Coralie Hindawi explained how the debate over *laïcité* is a cover for a debate over French identity. One finds a lot of intolerant and even racist interpretations of national identity and *laïcité*. But measures that might seem intolerant are sometimes not. This is true of the recommendations of the Stasi commission. When it advised the government to ban the headscarf from schools, it went against 20 years of jurisprudence. In fact, the commission leaned towards allowing headscarves in schools. But after its consultations, it realised that much pressure was exerted on Muslim girls to wear a headscarf and so it decided to recommend that it be banned from public schools.

Some participants discussed the definition of the concept of *laïcité*. Matthias Koenig agreed that there was a lack of clarity at the descriptive level. But he was struck by the speaker's reference to its "real significance". He believes it is more about its normative significance. Boutros Labaki wondered if there were social and political conditions for *laïcité*. Could it have happened without the religious homogenisation of France that preceded it? The same could be said about Turkey. *Laïcité* is practically the secularisation of one religious identity. This is quite clear in France,

where nine out of twelve holidays are Catholic (something the president of the Representative Council of Jewish Institutions pointed out). The baptism of Clovis was celebrated as the birth of the nation. And most churches are property of the state, which relieves the Catholic Church of the burden of maintaining them. There are also other examples in which one finds direct or indirect subsidies to Churches (the example of chaplaincies, religious schools, etc.).

Several participants were interested in the growth of confessional schools in France and the impact they could have on integration. Inanna Hamati-Ataya remarked that it is not a coincidence that so much of this debate is centred on schools; they are part of what Louis Althusser calls the “ideological state apparatus” and part of the machine reproducing the paradigm.

Theodor Hanf insisted on putting things in a more historical perspective. In 1905, when the law on the separation of church and state was enacted, the Catholic Church was very strong and could well be perceived as a threat to the republic. But today, this is not the case. France has witnessed the slimming down of religiosity, interestingly enough less in mixed Catholic and Protestant regions than elsewhere. On the point of history, Patrick Mc Greevy, dean of the faculty of arts and sciences at the American University of Beirut, remarked that history has been ignored in the debate over state-church relations. It is as if everyone was pretending that the past did not happen. The immigrants are mostly from countries that were previously part of the French empire at the time when nationhood and church-state relations were being defined in France. On this point Boutros Labaki remarked that even for one of the most adamant promoters of *laïcité*, the French statesman Léon Gambetta, it was never a commodity meant for export (“la laïcité n’est pas un produit d’exportation”); at the same time as Jesuits were banned in France, they were subsidised in for example Lebanon.

To illustrate the ambiguity of *laïcité*, Theodor Hanf gave the example of the French prefect who for the commemoration of Veteran's Day asked that communion be left out of the Mass so as to keep the ceremony completely “*laïque*”.

# Looking for Redefinition: Church-State Relationship in the Czech Republic after 1989

ALBERT-PETER RETHMANN

To understand the relationship between state and church, it is necessary to look at the history of Bohemia. We will concentrate our reflection on the development of the relationship between the Catholic Church and the state, because it is the church with the largest number of members in the Czech Republic. The last census indicates that about 27% of all Czechs belong to the Catholic Church (2001); only about 2-3% declared that they belonged to one of the Protestant churches.

The situation of the Catholic Church cannot be properly understood without looking at the historical conflict between Catholics and Protestants in Bohemia. To better comprehend church-state relations, we look at the self-perceptions of churches and states in different Central European countries. We find two opposing situations and models of church-state relations, which are best represented by two countries: Poland and the Czech Republic.

The Polish Catholic Church is a good representative of the first model of church-nation relationship: that of the identification between Church and nation. The Polish Church is deeply rooted in the Polish people for historical reasons: it was the sole institution that held the nation together during the three divisions of Poland, especially during the long period of the third Polish division (1795-1918). At that time, Poland was a nation without a state. It was divided between Russia, Prussia and Austria-Hungary. Very symbolically, the Cestochova pilgrimage became the place where people could express their Polishness in songs, prayers, spirituality and culture.

This model of unity of church and nation also exists between Croatia and Croats, and for similar reasons. An opposing model is represented by the Czech Republic. Here, the relationship is one of conflict between nation and state on the one hand and the church on the other. This relationship was also defined by history.

## I. The conflictual relations between state and church in Czechoslovakia

Czechoslovakia was established as a state after the First World War. It had to define itself in relation to Austria-Hungary through a self-perception based on detachment and difference. This involved a confrontation with the Catholic Habsburg dynasty, which dominated the history of Austria-Hungary, and therefore of Bohemia as a part of this Empire, for more than 300 years. The confrontation with the Habsburgs included a confrontation with the Catholic Church itself. Tomáš Garrigue Masaryk, the first president of Czechoslovakia, supported this mood and movement against the Catholic Austrian Habsburgs. Amongst other things he supported the renewed ven-

eration of Jan Hus, a figure who was “rediscovered” and reinterpreted as the leader of a specific Czech form of Christianity. This figure symbolises a defeat that was a historical trauma for many Czechs. Three years after the beginning of the Thirty Years’ War, an Austrian Catholic army led by the Habsburgs vanquished the Protestant army and killed all the main Protestant commanders in the Old Town Square in Prague (1621). This was the definitive end of the Protestant movement in Bohemia, the end of Jan Hus and his followers. This time was also the beginning of the re-catholisation of Bohemia, a process that was connected with the expansion of the Habsburg Empire and of Germanification; German became the main language in science, culture and administration. For many Czechs today, this marked the loss of their independence, their freedom and, worse, their identity. The Jesuits played an important role in the Counter-Reformation. As mentioned above, the systematic support of German as an administrative and an academic language went hand in hand with the reassertion of Catholicism in Bohemia after the Battle of White Mountain in 1620.

Independence from the Habsburg Empire in 1918 gave the Czech people the possibility of liberation from “Catholic foreign infiltration”.

Today a colossal monument to Jan Hus stands in Prague’s Old Town Square, in the place of the former statue of the Virgin Mary, a symbol of the baroque Counter-Reformation. Jan Hus’ statue bears witness to and is the symbol of the renewed self-consciousness and self-confidence of the First Republic of Czechoslovakia (1918-1938).

Another fact that reflects the deep resentment towards the Catholic Church is the exodus of half a million believers and priests from the Catholic Church and the founding of the Hussite Church at the beginning of the twentieth century (8 January 1920). The biggest Protestant Church during the First Republic was the “Evangelical Church of Czech Brethren” with about 230,000 members. The number of people who did not belong to one of the churches increased to about 700,000. The Catholic Church had about 8.2 million members, corresponding to 82% of the whole population.

During the Second World War many Christians were active in the resistance movement. The Catholic Church supported the national movement against Nazi Germany and that influenced the situation of the Church after the war: the Church emerged stronger, but that did not last long.

Following the communist putsch in February 1948, the Catholic Church once again became the target of the political regime and probably its main enemy. The terror against the Catholic Church culminated in 1950: diplomatic relations with the Vatican were severed, all male orders were disbanded, and female orders were banned from accepting new members. The majority of nuns were forced to live in “concentration convents”. The Greek-Catholic Church was prohibited and its members were asked to “return” to the Orthodox Church. Several show-trials were organised in Prague and other regions of Czechoslovakia against representatives of orders, bishops, active priests and catholic lay-people. Many were sentenced to death.

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In order to control the Church, the communist regime opened a seminary for future priests controlled by the regime (secret police and collaborators), and a Catholic theological faculty with a very limited enrolment. Furthermore, the state organised and supported a priest movement, the Movement of Catholic Clergy, loyal to the regime.

Around 1968, there was a period of relative political opening of society and state; pressure on churches and religious communities diminished. In the 1970s, male religious orders were again suppressed and a new organisation loyal to the regime was founded: the "Association of Catholic Clergy *Pacem in Terris*". During this period, the church was also active underground to some extent. There was a revival of religious life in these underground structures. The Salesians of Don Bosco, Franciscans, Dominicans and some spiritual movements were very dynamic. The study of theology intensified and theological literature was published as *samizdat* (i.e. unofficial and prohibited).

Catholics also participated in political resistance to the regime. Of the initial 242 signatories of *Charta 77*, the official document of the democratic resistance movement, some 30 were Christian personalities. Throughout the 1980s, Catholic Christians publicly demanded respect for human rights and religious freedom. In 1987, a great spiritual movement within the Czech Catholic Church was launched, the "decade of spiritual renewal of the nation", to prepare for the thousandth anniversary of Saint Adalbert's martyrdom. In 1988, two auxiliary bishops were appointed for the archdiocese of Prague. A year later bishops were appointed in Leitmeritz and Olomouc, Saint Agnes of Bohemia was canonised (12 November) and on 17 November the communist regime in Czechoslovakia fell.

There is an interesting aspect to the relationship between Church and state in Czechoslovakia: the state continued to support the Church financially from 1948 to 1989. In this the communist state was following a custom begun in the eighteenth century under the Habsburgs. By doing so, it was financing its most dangerous enemy. This is only surprising at first sight. By paying the salaries of priests, the regime held an instrument that could be used to coerce or lure priests. When priests collaborated or were at least silent, they got their regular monthly wage; otherwise they were deprived of it. Many priests lost their authorisation to work as priests because they were active in their pastoral work or organised meetings the government did not approve of.

## II. The repositioning of the Church after 1989

After the fall of the communist regime, the Church was one of the few institutions that people had confidence in. Many Christians expected a new possibility of cooperation between church and State.

Let us look at the period that followed. In 1991, a little bit more than 39% of all Czechs declared themselves Catholic. In 2001, the percentage dropped to 26.8%. This decline reflects the recent developments in relations between church and state in the Czech Republic. It influences the self-definition of both sides and the behaviour of the state towards religion and especially towards the Catholic Church.

Let us first look at the political situation in 1989 and the position of the church in the liberated state of Czechoslovakia. During the communist period the political landscape was dominated by the Communist Party (KSČ), which accorded itself a “leading role in society”. Two other parties were allowed: the Czechoslovakian Peoples Party (ČSL) and the Czechoslovakian Socialist Party. Both parties collaborated with the Communist Party within the framework of the “National Front”.

Following the Velvet Revolution of 1989, many political parties emerged: the Czech Social-democratic Party (ČSSD), the Civil Democratic Party (ODS), the Communist Party of Bohemia and Moravia (KSČM), the Civil Democratic Alliance (ODA), the Liberal Union (US) and the Christian Democratic Union - Czechoslovakian Peoples Party (KDU-ČSL).

The last party, the KDU-ČSL, increasingly understood itself, especially after Josef Lux became leader (1992), as a party that supported the interests of the Church, or more precisely, backing political positions close to the interests of the Catholic Church’s hierarchy. According to the Archbishop of Prague, Cardinal Miloslav Vlk, this party was “the only party in the coalition which is engaged in the restitution of the property of the church”. This is an important topic because it still strongly influences the relationship between state and churches in the Czech Republic.

Today, the Church is present in society, although it does not try much to influence the different parties. But it regularly publishes statements on the developments within society and in politics.

Since 1993, the voice of the Church has been heard less often. Some Catholic representatives expressed their positive opinion regarding the integration of the Czech Republic into EU and NATO (1997).

On 17 November 2000, a document and position paper on social issues in the Czech Republic was presented to the public under the title “*pokoj a dobro*” (Peace and ). Produced by the Czech Christian Academy, it was commissioned by the Czech Bishops’ Conference. This critical and rich document was much discussed in the mass media and at different levels, including members of the political elite such as Vladimír Špidla, currently an EU commissioner, and Václav Klaus, currently president, and at the time Speaker of parliament.

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### III. The legal framework of church-state relations

Finding an official way to regulate the relation between state and church has been a permanent problem since the Velvet Revolution. A basic agreement was only reached in summer 2002.

The Velvet Revolution chose institutional and legal continuity instead of a clear break with the preceding legal order. During the transition period, reforms were gradually implemented by the existing parliament and within a constitutional continuity. This was unfortunate for the Catholic Church. However some fundamental changes were made. According to Law 16 of 1990, the state could no longer interfere in the internal affairs of the Church. The freedom to practice the priesthood was recognised and the state no longer intervened to allow or prohibit a priest from carrying out his tasks. On the other hand, the Church continued to receive financial support: the state paid the salaries of priests and financed matters relating to the cult and the cost of the Church. This is less true in practice than in principle: the public sums granted to the Church only cover part of its costs. These unresolved financial questions create an ongoing tension between the state and the Church, and there does not seem to be any will to resolve them. The Czech church does not have enough means to finance its activities and there has been no restitution of the properties confiscated by the communist regime, except for some 170 buildings, including the seminary of Olemouc. The issue of restitution of ecclesiastical property has gradually become a political instrument used by politicians to win anticlerical votes.

Nevertheless, there were some positive developments in state-church relations. Law 163 of 1990 permitted departments of theology in public universities. The first part of Law 308 of 1991 "On the freedom of the religious faith and the position of churches and religious communities" defines freedom of religion, the second defines the legal position of registered churches and religious communities and the third part formulates the rules for registration. The same year a new regulation concerning faith schools was passed by the direction of the ministry of schools, youth and sports.

Of special importance in this regard is the decision of the Czech parliament to integrate the Charter of Basic Rights and Freedoms into the constitution of the Czech Republic (1993).

During the drafting of the Czech constitution following the break-up of Czechoslovakia, the Czech Churches prepared a common text on the position of the churches and religious communities. They underlined the special and unique character of churches and religious communities as institutions of public utility. This text was a first step towards a concordat or a similar agreement. After the proclamation of the Czech Republic (1993), the Archbishop of Prague, Cardinal Vlk, appealed several times to Prime Minister Václav Klaus for direct negotiations on an official church-state agreement. But these initiatives did not produce any palpable results. The state bears responsibility for this. In their declarations, officials vacillate between two positions: the idea that the Church holds an important and irreplaceable role in society

(Václav Klaus in 1992) and the idea that the Church is merely a club or association (Václav Klaus in 1994 and 1995).

In 1998 the recently elected social-democrat government invited the churches to dialogue and discuss contentious issues. Two commissions were set up to deal with the position of churches within a democratic state, the registration of churches, their financing, and the restitution of their property.

The main issue for the state was the question of registration of churches. Act 3 of 2002 on Freedom of Religion and on the Status of Churches regulates the position of churches, their registration and the responsibility of the ministry of culture. However, no solution was found to the financial problems of the churches, an issue that is increasingly discussed by the state and churches, but find less and less support among ordinary people. This new law defines a two-step registration: before a church or religious community can request official registration it must meet a first set of criteria (for instance, a minimum of 300 members). In order to obtain additional specific rights (teaching religion at schools, pastoral access in state institutions, financing by the state, performing marriages), a church must have existed for at least 10 years and must have a membership equal to at least 0.1 % of the population of the Czech Republic.

The prominent churches in the Czech Republic, the Catholic Church and the major Evangelical Churches, protested against this law, because they saw in it a new legal instrument to narrow the freedom of religion. Furthermore, this law does not provide the possibility for churches to establish institutions under their own jurisdiction (e.g. Canon Law), especially institutions in the field of social work and charity. Hence, existing charitable establishments such as Caritas and Diaconia would have to be re-established as public benefit corporations under Czech law (which is a costly procedure). Finally, the churches protested against being reduced to organizations that are subordinate to the state, have to be registered by the state, and have to publish a yearly report on their activities.

Another change in state-church relations concerns ties with the Vatican. The social-democrat government also began talks with the Catholic Church on a treaty between the Czech Republic and the Vatican. They discussed various topics such as the protection of monuments, cooperation in the field of education (schools) and public health. This treaty was signed in 2002, but it is still awaiting ratification by the Czech parliament. The advantages agreed with the Vatican would be extended to the Protestant Churches.

Finally, there is the issue of the restitution of confiscated property. In 2008, an agreement was signed between the state and the churches according to which the Catholic Church will get 80% of its property back and compensation for the properties that cannot be handed back. Once compensation has been paid, the state will end the financing of the priests' salaries. The object of this agreement is to enable the churches to finance their activities by their own means and to be independent of the state. This financial autonomy would allow the state to end its financial support of the Church.

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## IV. Fields of cooperation

Special agreements exist with regard to the pastoral work in public institutions such as prisons and the army. In both cases this work is an ecumenical cooperation between the Catholic Church and the Ecumenical Council of Churches.

There have been chaplains in the army since 1998. They give help in situations of crisis and difficulties and support the democratic traditions within the army. The Bishops' Conference (Catholic) and the Ecumenical Council of Churches (Protestant) present their candidates for the chaplaincy jointly. The main chaplain serves between four and eight years. The military chaplains are officers and are paid by the army. In 2008, there were 28 military chaplains. As for prisons, the pastoral service comes from an ecumenical initiative. In 1994 The Bishops' Conference, the Ecumenical Council of Churches and the state signed an agreement to organise this chaplaincy and to have it financed by the state.

Among Czechs there is much resentment towards churches, especially the Catholic Church. Nevertheless there are some fields of Christian institutional activities which are highly appreciated: pastoral care and service in prison and army, pastoral work with marginalised people (e.g. the disabled) and the hospices.

A majority within the Czech society resents or is fearful of church power within the state. This could be linked to the influence of politicians who follow their own interests and agenda. This might explain why the state has still not proceeded with the restitution of church property and still has not signed the bilateral agreement with the Vatican. Once this is done, the Catholic Church would have the same rights as all the other churches and religious communities.

## Discussion

One of the most striking features of the Czech case awoke the interest of many participants: the extreme secularisation of Czech society. Several participants wanted to understand the dynamic behind it. Theodor Hanf remarked that religiosity in the Czech Republic was among the lowest in Europe (a similar case is that of the Eastern *Länder* of Germany), but that this was not due to a formalised anti-clerical or anti-religious ideology. In the Czech Republic one does not even find an ideology similar to that of *laïcité*. Boutros Labaki noted that the weak position of the church is due to the fact that it is encountering many hostile forces that have inherited their stand from the communists and the nationalists before them. But what could explain the extent of secularisation of Czech society? Could it be the degree of industrialisation, that of scientific progress or any other factor?

Albert-Peter Rethmann answered that he does not believe that the extent of this secularisation can be explained by a national resentment towards the Catholic Church dating back to the seventeenth century. One finds no continuum, but rather a

two-century break between Jan Hus' religious movement and his rehabilitation and his transformation into a national figure.

As for the anticlericalism of the communists and the early nationalists, they surely explain the perception (or the misrepresentation) many Czechs have of the supposed strength of the Church or the danger that it represents. But it does not explain the extent of the secularisation of society. One has to look for other factors. Perhaps one clue can be found in Bohemia and southern Silesia. In these formerly predominantly German regions, the German-speaking population was expelled after the Second World War. These regions were very Catholic. Following the expulsion, they became amongst the most non-religious regions of the Czech Republic. This is due to the fact that their social structure was disrupted and the regions lost their cultural identity. So religion could be linked to identity and social stability. Another factor is Czechs' distrust of organised religion. Without support for institutions, religious faith and practice cannot stabilise, and this could be the reason for their decline and loss of meaning.

The mention of the Sudeten Germans triggered renewed interest from several German participants. One recalled that hostility towards Sudeten Germans and the Catholic Church were effective tools for mobilisation during the early years of the Czech Republic. He wanted to know how effective they were today. Another participant wanted to know if work was being done between German and Czech Catholics similar to that between German and Polish Catholics. Another person asked about the pope's visit, because Pope Benedict XVI is not only the head of the Church, but also German.

Albert-Peter Rethmann explained that bishops are very open with Sudeten Germans. There are regular meetings between the two people. However, there are also many groups on both sides that do not favour contacts between Czechs and Sudeten Germans. So relations are actually much more positive within the Church than within secular groups. Moreover, basic agreement has been reached in property issue and there is no question of restitution of property to expelled Germans and their descendants.

Hostility towards the Church is still an efficient mobilising tool because the Catholic Church is still perceived by many as being much stronger than it really is. Most of the properties that were handed back to it are actually more of a burden than a gift because they are very costly to maintain. But there is some appreciation for the work the Church is doing, especially in hospices but also through its humanitarian work abroad. The Church's biggest challenge today is to engage in public discussion instead of retreating into its own world.

Pope Benedict XVI's visit was interesting. He preached in Italian, not in German. The only time he spoke German was when he greeted people in Brno in their languages. Interestingly enough, President Václav Klaus accompanied the pope everywhere, notwithstanding his criticism of religion in general and Catholicism in particular.

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Matthias Koenig added that beyond the particularities of the Czech case, there are many common elements with other countries. He believed that Albert-Peter Rethmann's presentation shows the importance of observing the church as a social actor and highlights the role of political parties in relations between state and church. So a triangular approach to the relations between state, Church and society could yield more results than one limited to bilateral relations between state and church.

# The European Union and Religion: An Emerging Relationship?\*

DOMINIK HANF

## Introduction

The most recent debate on the reform of the European Union - a debate which started already a decade ago and came, for the time being, to an end with the entry into force of the Treaty of Lisbon<sup>1</sup> - included in the early stages a fierce debate on the question whether or not the new "constitution" should contain an explicit reference to God ("nominatio dei") and/or to Christianity.

It is safe to say that this question was the only issue amongst the many ideas for reform which triggered a wider public debate. On one side of the scale, one could find the representatives of many Churches - including, in a very prominent position, Pope John Paul II.<sup>2</sup> The opposite camp was largely occupied by French politicians defending their concept of "laïcité" as a fundamental constitutional principle which France could not compromise ; they received vocal - although probably not very effective - support from Turkey, where many feared that such a reference was aimed at, or would lead to, frustrating their country's accession to the Union. In addition, many "ordinary citizens" joined the debate, proving thereby (against a widespread misconception) that people do indeed engage with the European Union.

At the end of this debate, a "European compromise" was struck. The reformed preamble avoids a reference to God - unacceptable for the "laïcist" side led by France - but states that the member states, when setting up the European Union, were *inter alia* "drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law".<sup>3</sup>

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\* Special thanks go to *Jihad Nammour* for his conference report, which I gratefully used as starting point for the present text, and to *Ciara Murphy* for careful reading and language editing.

1 1 December 2009. As a result, the reformed Union operates on the basis of the European Union Treaty (TEU) and the Treaty on the Functioning of the European Union (TFEU) which are available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0001:01:EN:HTML>.

2 "Ecclesia in europa" (28 June 2003), in: *Istina* XLIX (2004), 104ff.

3 In the preamble to the Union Charter of Fundamental Rights (originally adopted in 2000) that conflict had been resolved by means of "creative" translation. While most versions state that the Union is "conscious of its spiritual and moral heritage" (in French: "patrimoine spirituel et moral"), the German version reads "in dem Bewusstsein ihres geistig-religiösen und sittlichen Erbes".

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To many, this compromise - giving in to mainly French and Belgian demands, but nonetheless constituting substantial progress compared to the (then) *status quo* - was proof of the inability of the European Union to accept its own history<sup>4</sup> and to engage in an open and constructive relationship with religion.

This illustrates that one could already question the very existence of a relationship between the European Union and religion. As we will see, such a relation does in fact exist. It is however shaped by the specific nature of the European Union, on the one hand, and by the considerable divergences in the conception of the relationship between public power and religion, on the other. The latter can furthermore at times be considerably influenced by the European Union.

In the following discussion, we shall first briefly outline the nature of the European Union and how it works (I.) before assessing the consequences thereof with regard to its relationship with religion (II.). The third section analyses how the European Union actually deals with religion (III.). The final section provides a short summary (IV.).

## I. The nature of the European Union

The nature of the European Union has been a subject of passionate debate among both political scientists and public lawyers ever since the founding of the first European Community back in 1951. For the purposes of the present paper, it is sufficient to note that the Union is a kind of federation or "functional federal state".

On the one hand, the European Union has many features of a fully-fledged federal state: a solid set of own powers, a stable institutional decision-making structure and a largely "federalised", compulsory conflict-resolution mechanism. Although decision-making remains to a large extent consensus-based, and implementation decentralised, thus leaving the member states considerable say in Union politics, the states cannot easily escape the consequences of decisions once they have been taken at Union level.

On the other hand, these federal features remain limited in two respects. First, the Union cannot itself expand its own powers (as this requires an approval of all its members) and membership remains voluntary. Secondly, the scope of Union powers is limited to some functionally defined areas: market and monetary integration, on the one hand, and increasingly internal and external security, on the other.

It is thus only with respect to these areas that the European Union can be likened to a (consensus-based and federal) state. In other fields, it generally has no power to act. However, Union measures taken in the field of its own competences can at

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4 On the "Christian roots" of the European Union see the contributions in M. Greschat/W. Loth (eds), *Die Christen und die Entstehung der Europäischen Gemeinschaft* (Kohlhammer, Stuttgart 1994).

times, and do in fact often, affect incidentally matters which the member states have kept within their own sphere of powers.

Finally, two further elements need to be considered.

First, the European Union, in principle, only accepts as members those states which adhere to and conform with the principles of the Council of Europe. This extends, in particular, to respect of the European Convention of Human Rights, which includes the right to religious freedom. This Convention, which is ultimately interpreted by an independent European Court of Human Rights, applies, in contrast to the competences of the European Union, to all areas of public power and hence also applies to fields in which the member states of the Union have retained their power to act.

Second, one should also bear in mind that the founding states of the Union opted for an incremental and functional (economic) integration of states, since the outright creation of a new political union proved to be impossible. This explains why European integration is to a considerable extent legal integration - i.e. the creation and application of common rules. Unearthing the relationship between the European Union and religion requires therefore an analysis of the relevant legal rules which have been established by the Union.

## **II. Consequences for the European Union's relationship with religion**

The specific character of the Union as a "functional federal state" has two major implications for its relation with religion.

First, the European Union lacks power to conduct its own "religion policy". This area remains with the member states and they appear not to be ready to change this distribution of powers in the foreseeable future. The Union cannot therefore develop its own comprehensive "overall approach" towards religion.

Second, the relationship between the EU and religion is therefore largely confined to the - incidental - consequences of Union law and policies which do not target "religion" specifically. Identifying the essence of this relationship requires thus a careful "screening" of the many fields in which the Union acts and legislates nowadays, in order to detect its "religion-related" elements.

The research question is thus: how does the European Union deal with "religious" issues in the course of its operation in mainly economic, but increasingly also other policy fields? Given the rather wide scope of Union activities - and considering that "religion" can also be given a rather broad meaning - this constitutes indeed a major empirical task.

Third, the European Union reinforces indirectly the effects of the European Convention of Human Rights concluded within the framework of the Council of Europe through its admission and membership requirements. As noted, these rights - includ-

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ing religious freedom - are not confined a specific subject areas but condition any use of public powers by the signatory states. Hence, the interpretation of this Convention can have a direct impact on the relations between state and religion in the current and prospective member states.

### III. How does the European Union deal with religion?

There are two approaches to analysing this question. The first refers to the substance of European Union law and policies that have an incidental effect on religion (1.). The second concerns the substantive and procedural arrangements allowing for the representation and defence of "religious interests" in the decision-making process of the European Union (2.).

In addition, one would also have to inquire as to how the European Convention of Human Rights impacts on member states' arrangements for the relationship between state and religion (3.). As already noted, this question needs to be addressed since the European Union amplifies the effects of that (Council of Europe) convention, which it has "internalised" *inter alia* through its rules on membership.

#### 1. EU rules having an incidental effect on religion

As already observed the delimited yet considerable scope of Union powers - taken together with the fact that "religion" is not an overly narrow concept - opens a huge field of research to scholars aiming at identifying those Union rules and principles incidentally affecting religion. Such an extensive analysis ought to include both European Union legislation and case law, which goes beyond the bounds of this analysis.

Some examples will however suffice to understand the ways in which the EU can impact on religion.

##### (i.) European Union legislation

Many fields of European Union legislation (i.e. acts adopted by the EU institutions when implementing the objectives set out in the EU Treaties) can incidentally affect religion.

Examples include regulation of working time, data protection (prohibition of recording the religious affiliation or information which may reveal religious belief), media law (advertising during the broadcasting of church services), animal protection (ritual slaughter), tax law (VAT breaks for donations to churches), state aid control (subsidies for churches), but also the "side-effects" of some aspects of research and development policy.<sup>5</sup>

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5 An attempt to collect these norms has been made by C. Schmidt-König in G. Robbers (ed.), *Religion-Related Norms in European Union Law* (University of Trier, 2001, last up-

These incidental effects of Union regulation on religion can be, and are in fact often, taken into consideration by the legislator. A good example is provided by the Union legislation related to slaughter of animals, which has included since its inception in the late 1960s, exceptions for “religious rites”. When the concept of animal protection acquired a “constitutional status” in 1999, the related “religious exception” became also part of the EU Treaties.<sup>6</sup>

One relatively recent development is the mandate given to the European Union to develop a non-discrimination policy.<sup>7</sup> This includes the elimination of “religion or belief” as a criterion to differentiate among individuals<sup>8</sup> and has led some observers to qualify that task as the first “religion-targeted” policy of the EU.

Its first implementation, in the field of employment relations, has consequently raised concerns relating to traditional - often constitutionally protected - practices which grant specific rights to the churches in the member states. In particular, the application of a requirement of religious affiliation, loyalty and observance when hiring, sanctioning and firing church employees was likely to be challenged by the non-discrimination principle. Without a specific derogation, its application would probably have imposed on the churches a difficult duty: to justify, on a case by case basis, whether or not (or to what extent) every single function within the church - including jobs offered by its numerous social and economic undertakings - effectively needs to be fulfilled by a true believer.

This vital concern for the churches was accommodated in the relevant legislation.<sup>9</sup> It states that the particular nature or context of an occupational activity might genuinely require specific characteristics: thus, “in the case of occupational activities within churches and other public or private organisations ... based on religion or belief”, workers can be required “to act in good faith and with loyalty to the organisation’s ethos”.

dated in 2009). This compilation is available online at <http://www.uni-trier.de/fileadmin/fb5/inst/IEVR/Arbeitsmaterialien/Staatskirchenrecht/Europa/EU-Bestimmungen/Englisch/EnglischVolltext.pdf> .

- 6 See now Article 13 TFEU: “In formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.”
- 7 See Article 19 TFEU (introduced in 1999 by the Treaty of Amsterdam): within its scope of powers, the Union “may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.
- 8 Which the Union has to observe “in defining and implementing its [own] policies and activities”, too (see Article 10 TFEU).
- 9 See Article 4 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal of the EU, L 303/16 et seq.

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This recognition is, however, limited in three ways. First, it does not fully derogate from the non-discrimination principle but “merely” constitutes a - far reaching but refutable - presumption in favour of those traditional national arrangements establishing that jobs carried out for the churches do in fact require employees’ “good faith” and “loyalty”. Second, the recognition is drafted as a “grandfather clause” protecting only already existing church-related practices and rights. Third, the exception is neither based on nor dependent upon the (collective) freedom of religion of the churches: it relates exclusively to and is thus governed entirely by the state-church relationship as established in the law of the different member states of the Union.

This case illustrates that the Union’s mandate can incidentally - but significantly - impact on religion. It also demonstrates that undesirable effects need then to be addressed at Union level, which requires in practice broad political support from all the member states. Since national approaches and traditions in the field of state-religion arrangements vary greatly, the Union tends to refer back to the national arrangements instead of setting its own rules.

#### **(ii.) Union case law with “religious” implications**

In the jurisprudence of the European Court of Justice (ECJ) one can find a series of cases that have some form of “religious” implication.

Some of them suggest that European Law adopts a positive attitude towards religion since the ECJ decided in favour of the applicants - be they a Catholic missionary,<sup>10</sup> a follower of the “Baghwan Community”<sup>11</sup> or “Scientology”.<sup>12</sup> On closer inspection, however, the judgments rely on a different and “non-religious” rationale: in order to make the rules on free intra-Union movement as effective as possible, they must have wide application, while simultaneously limiting the member states’ discretion to interfere with them. In other words, the benefit for “religion” is a mere byproduct of the Union’s “current” operation.

The ECJ has also accepted to protect an individual’s religious freedom where it conflicts with Union measures - although this question has so far arisen in only one case.<sup>13</sup> This reflects the Union’s obligation to respect the European Convention of Human Rights (see below).

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10 Case 300/84 *Van Roosmalen* (1986) ECR 3097: extensive interpretation of the concept “self-employed” allowing the individual to rely on favourable Union rules in the field of social security.

11 Case 196/87 *Steymann* (1988) ECR 6159: extensive interpretation of the concept “service provider” entitling the individual to obtain a right to stay in the host state.

12 Case C-54/99 *Eglise de scientology* (2000) ECR I-1335: requiring a prior authorisation for intra-EU investments (here: from Scientology International based in the UK to Scientology France) excessively restricts the free movement of capital.

13 Case 130/75 *Prais* (1976) ECR 1598 on the question of whether an entrance examination (“conours”) for prospective Union staff could be organised on Saturday without violating a Jewish applicant’s fundamental rights. The ECJ found that such a religious impediment

More interesting in the present context are those cases in which the ECJ has had to deal with attempts to challenge national “religion-inspired” rules on the basis of EU law.

In a series of cases, plaintiffs argued that member states’ prohibition of Sunday trading would overly restrict the economic freedom to trade goods within the Union. After some hesitation, the ECJ dismissed such claims, establishing that such rules do not aim at restricting trade and but at ensuring “that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics”.<sup>14</sup>

In 1990, the question arose whether or not the strict - constitutionally protected - Irish ban on abortion could, in certain cases, be considered to breach EU law. The ECJ avoided tackling the question by taking the view that the particular case in question (concerning the distribution in Ireland of information on UK-based “abortion services” by a student association) fell outside the scope of EU law.<sup>15</sup> The Court nevertheless qualified “medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out” as a service (which could thus in principle be traded freely across member states as long as restrictions are not recognised by the Union to be justified on specific public policy considerations). As a result, the Irish government subsequently requested - and received - a guarantee that EU law would not impinge on Irish abortion legislation.<sup>16</sup>

As can be seen from these few examples, the European Union can impact on religion. It does so only incidentally, even in the case of non-discrimination policy, but nevertheless at times in a (potentially) significant manner. “Ordinary” Union policy can in fact challenge some traditional national arrangements relating to religion and state-religion relationships. In order to be able to respond to such challenges, some member states have requested both substantive and procedural safeguards.

## 2. Substantive and procedural safeguards

Two kinds of safeguards have more recently been set up: specific Treaty clauses aiming at protecting the status of churches and religious communities as defined by national laws and practices (i.) and procedural arrangements which would allow that “religious” interest are better represented in the decision-making process of the Union (ii.).

would in principle need to be considered by the Union, but dismissed the claim in this particular case.

14 Case C-145/88 *Torfaen* (1989) ECR I-3851.

15 Case C-159/90 *Grogan* (1991) ECR I-4685.

16 See Protocol No. 35 (of equal rank with the EU Treaties): “Nothing in the Treaties ... shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland.”

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**(i.) Recognising the - national - status of churches**

As European integration became progressively broader and deeper, the likelihood of incidental conflicts between Union policies and national religion and (in particular) church-related arrangements, increased. This, and not least the perception of the Irish abortion case, led in 1997 to a formal recognition in the founding Treaties of the Union of the role churches and religious communities play at the national level.<sup>17</sup>

Again, and as observed in the context of the Union's implementation of non-discrimination policy, this recognition does not imply a distinct Union approach towards religion and/or churches.<sup>18</sup> Churches are "mediated" through the member states' approaches: the Union has to respect the national choices made with regard to the status of churches and/or religious communities.<sup>19</sup> Although this does not offer them full immunity from Union law and principles, the latter need to take the churches' and/or religious communities' existence and particular legitimacy duly into account.<sup>20</sup> Since 2009, it is clear that non-respect of that obligation by the Union can be sanctioned by the ECJ.<sup>21</sup>

**(ii.) A "religious channel" in the decision-making process of the Union?**

Decision-making in the Union is highly process-based, "legalistic" and consensus-driven. Procedures such formal and informal consultations and hearings that often take place at very early stages of the actual decision-making process play a considerable role and can indeed shape policy outcomes. Reversing such preliminary decisions later in the process remains possible, but normally only at great political cost. Hence the particular importance of "lobbying" and of institutionalised dialogue with the Union institutions.

"Religion" has managed to establish two channels to represent "its" interests. On the one hand, churches and religions communities have established - and in some cases long-standing - interest representations in Brussels.<sup>22</sup> On the other hand, the

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17 See now Article 17.1 TFEU: "The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States."

18 Their "status" is recognised by the Member States (Article 17.1 TFEU) while the Union recognises only their "identity and specific contribution" (Article 17.3 TFEU).

19 This is why the national State-Religion arrangements can also be considered to be protected by Article 4.2. TEU which states that the Union shall respect the national identities of its Member States (see Article 4.2 TEU).

20 Note that "parity" considerations led to an extension of that recognition to "the status under national law of philosophical and non-confessional organisations" (see Article 17.2 TFEU).

21 Since 1999, the relevant text was "only" laid down in a declaration annexed to the Treaty (with uncertain legal value).

22 E.g. the Commission of the (Roman Catholic) Bishops' Conferences of the European Community (COMECE) was created in 1980. An indicative list of representations can be found online at <http://www.droitdesreligions.net/rddr/dialogue.htm>

Treaty distinguishes them since 1999 from “ordinary” pressure groups: “Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations”.<sup>23</sup>

The example of the Union’s non-discrimination policy, which duly recognises the particular nature of employment in churches, suggests that these channels can be - and are often - effectively used.

### 3. Impact of the European Convention of Human Rights

Although not yet itself a member of the European Convention of Human Rights (ECHR),<sup>24</sup> the European Union acts as “amplifier” of the rights established therein, which it had first indirectly (yet effectively) integrated,<sup>25</sup> then formally recognised<sup>26</sup> and finally even fully incorporated into the EU Treaty.<sup>27</sup> As a membership requirement, respecting the Convention - which includes religious freedom - is not only imposed on the Union itself but also upon its member states.<sup>28</sup>

Gross restrictions on individual and collective use of religious freedom (e.g. refusal to authorise/legally recognise religious communities,<sup>29</sup> outright ban on holding services, interference in theology and religious teaching,<sup>30</sup> and internal organisa-

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23 Article 17.3 TFEU. See also the European Commission’s White Paper on European Governance (25 July 2001, COM/2001/0428 final, 25 July 2001, Official Journal C 287/1) stressing the churches’ importance for involving civil society concerns. As already noted, “recognition” refers to the member states’ choices - the Union does not have such competence on the basis of Article 17.3 TFEU. In practice, the institutional dialogue is organised by the “Bureau of European Policy Advisers” working directly for the president of the European Commission (which both initiates and monitors most of the Union legislation), see [http://ec.europa.eu/dgs/policy\\_advisers/activities/dialogues\\_religions/index\\_en.htm](http://ec.europa.eu/dgs/policy_advisers/activities/dialogues_religions/index_en.htm).

24 This is likely to change in the years to come. The EU Treaty (Article 6.2 TEU as amended by the Treaty of Lisbon) and the Convention (see Article 17 of its Protocol No. 14, which entered into force on 1 June 2010) create the legal bases for the membership of the Union in the ECHR.

25 Since the 1970s through (i.) case law of the ECJ as general principles of Union law (starting with Case 29/69 *Stauder* (1969) ECR 419), including religious freedom as stated in the *Prais* case mentioned in footnote 13) above and (ii.) a commitment of its political institutions (see Joint Declaration by the European Parliament, the Council and the Commission of 5 April 1977, OJ 1977, C 103/1).

26 Former Article 6.2 TEU introduced by the Maastricht Treaty.

27 Through the Union Charter of Fundamental Rights (see Article 6.1. TEU), which “confirms the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms” (see Declaration No. 1 attached to TEU).

28 See Article 49 TEU (accession requirements) and Article 7 TEU (suspension of membership rights in case of violation of Union values).

29 Eglise Métropolitaine de Bessarabie/Moldova (2001).

30 Manoussakis/Greece (1996).

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tion,<sup>31</sup> prohibition of proselytising<sup>32</sup>) are generally considered to be incompatible with the Convention. This can affect established national rules and practices, in particular those intended to protect state churches, official religions and other predominant churches or (non-)beliefs.<sup>33</sup>

However, the European Court of Human Rights (ECtHR) has hitherto generally sought to interpret the ECHR in such a way as to keep, as far as possible, the different national conceptions of the state-religion relationship intact - be they religious or (rather more often) secular in orientation. States are left with a wide margin of discretion, in particular when there is little convergence among the different national approaches with regard to the problem at hand.<sup>34</sup> Limitations imposed on individual or collective religious freedom can *inter alia* be justified on public policy grounds, e.g. to protect citizens from abusive religious indoctrination or to guarantee plurality of beliefs and/or the religious neutrality of the state. The ECtHR has thus e.g. accepted the Turkish ban on the Islamic headscarf in universities<sup>35</sup> and the expulsion of pupils from schools in case of non-respect of such a prohibition in France.<sup>36</sup>

Although the ECtHR has so far generally displayed great respect for established national state-religion arrangements, the Convention has a potential impact to influence the latter considerably - in particular if the Strasbourg judges were to give more weight to states' duty of religious neutrality (as a recent controversial case on crucifixes in classrooms suggests<sup>37</sup>).

## IV. Summary

Although the European Union does not have specific powers to deal with religious issues, let alone to regulate the relationship between churches and its Member States, nevertheless its relationship with "religion" is undeniable. It stems from the fact that the definition and implementation of Union policies, although not specifically aimed at religion, can have incidental yet considerable effects on it.

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31 Hasan & Chauch/Bulgaria (2000).

32 Kokkinakis/Greece (1993): such prohibitions may however be justified under certain circumstances.

33 Note that Article 9 ECHR protects both freedom *of* and freedom from religion and lends thus support to the "laicist" side, on the one hand, and to those seeking recognition of religion in the public sphere, on the other hand.

34 A./Turkey (2005).

35 Sahin/Turkey (2005).

36 Dogru/France (2008).

37 Lautsi/Italy (2009): religious symbols affect the "negative" freedom of non-believers and the requirement of pluralism in public schools (currently re-examined by the ECtHR's Grand Chamber at Italy's request).

So far, the Union - be it its legislative or its judicial branch - has displayed respect for both religious freedom and the national choices on the relationship between state and religion. This is not just a consequence of the limited scope of Union powers but also the result of positive - constitutional, legislative and judicial - decisions taken by the Union. The need to integrate these aspects into Union policies and decisions has been formally recognised over the past years, not least as a result of successful “religious interest representation” in Brussels and in some member states. The EU Treaty contains now a formal commitment to religious freedom, to respect churches’ (national) status, to their significance for the Union, and to a regular dialogue between churches and the Union decision-making institutions.

Since the Union’s scope of action is likely to expand over the years to come, both in scope and depth, it is also likely that its impact on religion will intensify too. “Religious interest” will, hence, need to be organised accordingly in order to ensure that it is heard and incorporated into policies elaborated within the - complex yet increasingly important - political system of Union.

Such horizontal and vertical integration might in turn have consequences for - and even at times shape - national debates on different aspects of the relationship between state and religion, in particular if one considers that established national traditions in this respect (e.g. crucifixes in classrooms) might also be challenged on the basis of a more activist interpretation of the ECHR by which all members of the Union have to abide (May 31, 2010).

## Discussion

The extremely complex and technical topic of church-state relations within the European Union (EU) raised many questions from the participants, some very general and others very specific. Matthias Koenig opened the discussion with an example that showed the full complexity of the interplay between national and European levels (including both the EU and the Council of Europe). The Stasi commission that was set up by the French President in 2003 to examine the possible applications of the principle of *laïcité* invited Jean-Paul Costa, a judge at the European Court of Human Rights (ECHR), to ask how the ECHR would react to its recommendations were they to become law.

Clemens Jürgenmeyer wanted some clarification on the relation between European norms and member state norms in matters of religion; could one say that the general European rule is to leave matters to the national government, and that the EU’s interventions are residual? He also wanted to know how effective the human rights channel was in these matters.

The issue of religious lobbying was briefly discussed. A Danish student said that the Catholic Church has been seen lobbying in Brussels on many occasions and said that there was a debate in Denmark on whether there should not be more Prot-

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estant lobbying to counterbalance it. Dominik Hanf answered that there was all sorts of lobbying in Brussels, and that this is considered normal in the European Union, just as it is across the Atlantic. Lobbying is regarded as a legitimate way to ensure that a group's rights and interests are taken into account. The Catholic Church has a structural advantage over the Protestant denominations because of its centralised and trans-national structure. This allowed it to set up the Council of European Bishops' Conference of Catholic bishops several decades ago.

The provision in the Treaty of Amsterdam that gives positive recognition to churches (Declaration 11 of the Annex to the treaty), came about because of the lobbying of the Catholic Church and at the insistence of the German Chancellor, Helmut Kohl.

Udo Steinbach added that the issue of relations between state and church in the European Union has probably become more complex following the admission of several Orthodox countries that have a specific tradition of state-church relations. Previously the only Orthodox member was Greece, a country that has often been condemned by the European Court of Human Rights for religion-related issues. Now Bulgaria and Romania are also members. Europe is less religiously homogenous than one might think, even in its "Christian heritage". Dominik Hanf finished by illustrating the problems Greece faced in this regard with its education policy, its identity cards (that stated religion), etc. He also gave the example of Mount Athos, which was granted extra-territorial status (through a special provision in the Greek accession treaty to the EEC in 1979) to protect its special status and its religious rules that could be judged discriminatory by Europe.

# Religion and State in Turkey

UDO STEINBACH

Turkey is in a revolutionary stage in its development. It is currently undergoing what seems to be its second revolution since the abolition of the sultanate and the establishment of the republic in 1923. No one knows what the final outcome of this present revolution will be. Some believe a European Turkey is emerging. Others think we're witnessing *taqiye* (dissimulation) and the final outcome will be an Islamic republic. There is a controversial discussion going on right now about the meaning and the outcome of the current "deepening" of democracy. The discussion regained intensity a couple of months ago after a long stalemate. It revolves around two central themes that are very closely related: Islam and Turkishness.

The ruling party, the Justice and Development Party (*Adalet ve Kalkınma Partisi*, or AKP), claims that they are taking Turkey towards "real democracy". By this they mean that up to now Turkey's government was not truly democratic, but more of a "democratic arrangement" between its elites (political, economic and military). This is interpreted as a failure of democratisation. Since 1923, the state has played a strong role in democratisation. It focused on two issues: the religious question (the relationship between state and religion) and the Kurdish question (the relation between the state and the Kurdish ethnic group). A third issue that was taboo was the Armenian issue, but even on this one significant progress has been made, both in foreign policy (as regards Armenia) and domestically (concerning the relation between the state and Turkish-Armenians).

The two central issues that the state has been concerned with, i.e. the religious and Kurdish issues, pertain to the relation between state and society.

The Turkish Republic defines itself as a secular state. Since its inception, it has worked to exclude public expression of religion: it has striven to establish a public space free of Islam. This is the main reason why it banned the wearing of headscarves in public spaces. Turkish secularism does not mean separation of state and religion. There is no such separation in Turkey. The state controls religion. The Directorate of Religious Affairs (*Diyanet İşleri Başkanlığı*) commonly known as *Diyanet* was established in 1924 for this purpose, and to make sure that Islam did not disturb the Kemalist project of modernisation, understood as Europeanisation or westernisation. This approach was inherited from the Young Turks. They sought to Europeanise Ottoman society and they believed that this could only be done if Islam is controlled.

Accordingly, instead of promoting separation, the state, in its secularisation project, did quite the contrary; it established Islam as a state religion. To be more precise, it recognised Sunni Islam as the state's religion, ignoring the fact that about 20% of the population is Alevi (a Shiite group). Alevis are not represented in *Diyanet*, but then neither are other religions. These other religious minorities are mentioned in different laws and addressed by state institutions (such as the General Directorate

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for Foundations), but they do not enjoy an independent legal status. They are victims of the unitary concept of the Turkish national state as Turkish-speaking and (Sunni) Muslim. Turkish nationalism and an enlightened Sunni Islam (as represented by *Diyanet*) are the two pillars of the Turkish Republic.

## I. Changes after the Second World War

In 1949, Turkey joined the Council of Europe; it became a member of NATO in 1952. It is in association with the European Community (since 1963), and aims to join the European Union. Through these intergovernmental organisations it has securely anchored itself to Europe and the West. At the same time, the Turkish Republic is facing two revivalist movements: Kurdish nationalism and Islamism.

With the expansion of the Kurdish national movement, Turkey discovered that it was not a nation made up exclusively of Turks: between 20 and 25% of its population is Kurdish. The birth of the *Kurdistan Workers' Party* (PKK) started a cycle of terrorism and repression. The Kurdish movement made it impossible to deny the existence of a distinct Kurdish population, even if it was denied political representation.

The second revivalist movement is that of Islam. Since the rebirth of political Islam in the form of a fundamentalist movement in the 1970s, there has been an unbroken political tradition of a new party being formed each time its predecessor was banned by the state for promoting an Islamist agenda. Most of these Islamic parties were headed by Necmettin Erbakan: from *Milli Görüş* (National View) to *Milli Nizam Partisi* (National Order Party), to *Milli Selamet Partisi* (National Salvation Party), to *Refah Partisi* (Welfare Party), to the *Fazilet Partisi* (Virtue Party), which was banned in 2001 at the same time as Necmettin Erbakan was barred from politics.

In 1980, a military coup re-established the (military and civil) Kemalist elite, which resorted to the old tactics of manipulating and instrumentalising religion. They tried to present their policies as a synthesis between Turkishness and Islam in order to fight the leftist movement and fundamentalism. This reaffirmed the definition of the state and the Turkish people laid out in the 1920s. During that period, the Kemalist elite kept the Islamic movement in check. In 1980, Necmettin Erbakan and his party, the *National Salvation Party* were banned from politics. After his return to politics, his new party, the Welfare party, became the largest party in Parliament (1996) and formed a coalition government. A year later, he was forced out of power by the military and then his party was banned. The Kemalist elite used other tactics, too, in order to curb the influence of Islamists: among others, they changed the school system to reduce the time required for a religious education in religious schools. This was a tough blow for Islamists. Nevertheless, the Islamic revival movement learnt its lesson: Islam had no chance as long as it sought to subvert the secular definition of the state.

As for the Kurdish revival movement, the Kemalist elite fought it with other, mainly military tactics. In 1999, the arrest of Abdullah Öcalan, founder and leader of the PKK, dashed hopes of “solving” the Kurdish question by creating a Kurdish entity.

## II. The Rise of the Justice and Development Party (AKP)

In 2002, one year after its establishment, the *Justice and Development Party* (AKP) got 34.4% of the vote, which translated to a nearly two-thirds majority of MPs in the Turkish Parliament (365/550). As a result, the AKP, which was founded in 2001 by reformist members of *Fazilet* (Virtue) Party, was the sole political force to deal with. How can one explain the rapid progress of this party and why had the Kemalist elite not prevented it, as it usually did? There are two groups of reasons: external and internal.

The external reasons are mostly socio-economic. After the total collapse of the Turkish economy, the ruling elite proved that it could not handle the economy in an open society. Turkish society had pluralised. Turgut Özal had liberalised the economy, the country was developing and Anatolia was no longer lagging economically. Many of its cities such as Denizli, Gaziantep, Malatya, Konya, Trabzon and Kayseri were developing so quickly that they were dubbed the “Anatolian Tigers”. These economic changes had an impact on Turkish society. The European Union also had an influence on the country’s political and economic changes, but that goes beyond the scope of this study.

The internal reasons were equally important. The Islamic party had witnessed an important change in its self-perception. Following the ban of the *Fazilet* (Virtue) Party, there was an important discussion on how the party should be re-established and how the risk of dissolution could be minimised. The choice was made not to undermine the basic principles of the Republic, but to put Islam back into the public space without modifying the constitution. The party was re-established by Erbakan’s pupils. Its leader, Recep Tayyip Erdoğan was not able to assume a prominent governmental role because he had been banned from politics. So Abdullah Gül became prime minister to secure a change in legislation that would allow Erdoğan to take over the position. Abdullah Gül is quite representative of the country’s important social and economic changes. He hails from Kayseri, which in 30 years has grown from a small city to become one of the Anatolian Tigers.

Many elements distinguish the AKP from its forerunners. It does not see a contradiction between Islam and democracy, or between Islam and EU membership. Quite the contrary, it has made many efforts geared towards European integration. It was admitted to the *European People’s Party* (EPP) as an observer member, a move that strengthens the impression that the AKP is an Islamic equivalent of the Christian Democrats.

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Since its massive parliamentary victory, the party has been pushing for democratic and economic reform; hardly any element of the legal system has been left unaffected by the various reforms it has introduced. Slowly but surely, the classic Kemalist stances have been weakened and taboos overcome. The government took important steps in policy towards the Kurds: it recognised their identity, their language, and that there was a Kurdish problem that had to be dealt with.

In the 2007 parliamentary elections, the AKP got 46.6% of the vote. Its electorate expanded beyond its Anatolian and religious base. Notwithstanding the notable increase in its support, the party lost its two-thirds majority because of the electoral system. Nevertheless, it kept a comfortable majority (341/550) and entered a delicate political phase: it had to choose who was to be the next president. The AKP had to announce its candidate by March 2007 and in a heated and polemical atmosphere chose Abdullah Gül. This sparked much controversy within Kemalist factions because his wife wears a headscarf. His election to the presidency meant that a woman in a headscarf was to move into the most sacred of places for the Kemalists: the presidential palace. Threats were heard from the general staff of the Turkish armed forces that the army would interfere if the AKP threatened the country's *laïcité*. Two court cases also created a stir: the Ergenekon and the AKP cases.

In 2007, an official investigation was launched into the Ergenekon organisation, named after the mythical land from which the Turkic tribes hailed. This organisation was accused of conspiring against the Turkish government and the AKP. It was charged with preparing terrorist activities and deceptive operations so as to allow the military to intervene and take over. Its members are said to include security personnel, former generals, intellectuals and journalists (i.e. the editor of *Cumhuriyet*, a daily newspaper).

In 2008, the chief prosecutor addressed the Constitutional Court, indicted the AKP for being a 'hotbed of anti-secular activities' and asked the Court to disband the party and bar 71 senior AKP administrators (including the president and prime minister) from politics for a period of five years. The judiciary, like the military, is a Kemalist *chasse gardée*. The court accepted the indictment and opened the case: the threat against the party and the government became quite serious. The Constitutional Court found the AKP guilty of anti-secular activities. However, it did not get the qualified majority to disband the party (seven out of eleven judges). The AKP survived by one vote (although it had obtained 47% of popular support a couple of months before). What triggered the case was the AKP's attempt to lift the headscarf ban and allow women to wear a headscarf in universities.

### III. How are things evolving?

One can only speak in catch-phrases when trying to assess the change Turkey undergone these last few years. It has undoubtedly engaged in an irreversible process. The Kemalist elite has been weakened and has not been able to block this process.

The military has been pushed to the sidelines and the country is functioning in a more democratic fashion. There is increasing discussion about how to solve the Kurdish problem in a democratic fashion.

Two fundamental questions remain. How will the Islamic movement survive Europeanisation? And how will these important changes the country is undergoing affect its Kemalist heritage?

A discussion is underway about a draft constitution that will explicitly refer to human rights in its preamble. If this constitution is open to Kurdish demands, it will touch on the very identity of the Turkish state, one that is defined in its constitution. So how will the Kemalist heritage evolve, with its six principles or “arrows” (republicanism, populism, secularism, revolutionism, nationalism and statism)?

As for secularism, the headscarf is still hotly debated and it has symbolically re-entered the public sphere in the figure of the president’s wife. Islam is increasingly visible within society, and it has shown itself to be compatible with modernism. The headscarf issue has raised the question of redefining Turkish secularism. In this process, the future of *Diyanet* is uncertain. As society grows stronger, the role of *Diyanet* is increasingly being questioned. Should it be enlarged to include other religions or should it disappear?

There are also many open questions on the future of the relationship between the European Union and Turkey. Turkey is complying with an increasing number of conditions of membership of the European Union, but will the European Union accept it as a member? What is certain is that Prime Minister Recep Tayyip Erdoğan calmly accepted the EU’s statement that the process was not yet finished.

Another new development is Turkey’s increased involvement in the Middle East. Some of its recent political stands and its foreign and even domestic policies have given it a greater respectability in the Arab and the Muslim world.

## Discussion

Turkish religious policy aroused the interest of several participants.

“How could Turkey be so successful in controlling religion?” The question that started the discussion had several dimensions to it: institutional, social and political. Udo Steinbach reminded the participants of the centrality of Diyanet in the Turkish state’s control of religion. Through this institution, the government controls Muslim institutions, manages Muslim endowments (*waqf*), and holds the financial resources of Sunni Islam in Turkey. Islam is a state-run religion. This can be viewed as an Ottoman heritage. If *Şeyhülislam* (*sheikh al-islam*), the highest authority that governed religious affairs in the Ottoman Empire, was not acting the way the sultan wanted, he was assassinated. Kemalism devised a more refined way of controlling religion. But the lack of autonomy for religious authorities is as strong. Matthias Koenig commented that at the institutional level there is a clear distinction between the Turkish

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and French versions of *laïcité*. In the Turkish case there is no “twin toleration” between state and religion.

A participant noted that at the social level there were many Muslim religious subcultures in Turkey. Around the Fatih neighbourhood in Istanbul, for instance, a *salafi* movement is quite visible with its distinctive dress code, marriage habits, and own mosques. In all other countries, similar movements are expanding, but this is not the case in Turkey. Another participant mentioned the growing movement of Fethullah Gülen. Stefan Leder pointed out that religious groups lack the necessary power resources in Turkey to be structural rivals of the state; there is no potential competition between state and religious authorities.

Udo Steinbach remarked that in many issues, it is more accurate to speak of the relation between state and society rather than between state and religion.

The emphasis on Islam as a component of Turkish identity leaves other religions (mainly Christians and Alevis) out of the state’s scope. At first sight this may seem to give them greater autonomy, but it actually leaves them in a very precarious situation in which they have problems preserving their institutions and real estate. But there have recently been some signs of change: a Greek-Orthodox seminary was to open, the pope was received, etc. But the role of *diyanet* remains problematic. Its authority to build mosques and teach Islamic doctrine has been disputed by Alevis.

The discussion also touched on the AKP’s identity and programme as well as on the future of Turkey within Europe and the military’s role in Turkish politics.

Several participants were intrigued by the AKP: Did it have a hidden Islamic agenda? Coralie Hindawi asked whether Turkish Islamic forces have changed their strategy or gradually accepted the republic’s constitutional principles. Matthias Koenig wondered if one could compare the evolution of Turkish Islamists with that of European Catholics in the nineteenth and twentieth centuries, interpreting it as a process of “moderation through inclusion”.

Udo Steinbach noted that these were open issues, and that there were conflicting views on them. Up to now, the AKP has taken several positive steps toward solving the problems hindering democracy.

Dominik Hanf raised the question of European integration and its effect on a country that has been negotiating European membership since 1963. Udo Steinbach remarked that the process of integration has been going on for over 46 years, while it took most European countries a couple of years to achieve this goal. This process has reinforced Turkey’s membership in the Council of Europe, which has made a deep impact on the country. Islam has been reinterpreted for greater compatibility with European and democratic values. Turkey’s Europeanisation is very far advanced. It undoubtedly has a “vocation Européenne”. The question one should be asking is: Does the European Union (EU) have a vocation for Turkey? The EU has to express clearly what it wants. Anchoring Turkey to Europe was central to the Kemalist project. Today, this project enjoys less support. Some people speak of a neo-Ottoman approach. Turkey is increasingly dealing with Syria, Iran, Israel, Palestine

and Iraq. Since the AKP came to power, relations with Syria have been restored, relations with Iraqi Kurds are being reconsidered, and business is done with Iranians. Turkey's new orientation towards this region is clear in domestic and foreign policy.

The discussion included several questions on the evolution of the role of the military in Turkish politics. Theodor Hanf wondered what the dynamics were within the Turkish military, "what is happening in this black box?" Is there a dynamic similar to that in Pakistan where the military tried to emulate the Turkish example, but a younger generation of officers had different views? Udo Steinbach explained that the military in Turkey enjoyed much domestic support because it successfully defended the country from foreign interference and occupation. Its interventions in Turkish politics also enjoyed international support; NATO applauded when the military took over in the 1980s. But a majority of Turks are fed up with the threat of military intervention. This is one of the reasons behind widespread popular support for the AKP. But the threat is still there and this encourages the prime minister to adopt a conciliatory approach towards the military: he agreed with their plans of intervention in Iraq and has put constitutional reform on the backburner.

# Religion and State in Modern Lebanon

BOUTROS LABAKI

The Lebanese political entity in its present frontiers was established on 1 September 1920 by General Gouraud, the French High Commissioner. At that time, France had a League of Nations mandate over a portion of the Ottoman Empire that included Lebanon.

To understand the relation between state and religion in Lebanon, it is crucial to look back at the last decades of Ottoman rule in the region.

## Lebanon in Ottoman times (1830-1918)

A religious community is not only a religious organisation, it is a group of people sharing the same faith, but also a religious organisation, courts, schools, hospitals, medias, and for some, political parties in times of peace and militias in times of war. Religious communities also have international relations, with their diasporas and with foreign religious authorities: the Vatican for the Catholic communities, the Ecumenical Patriarchate for the Greek-Orthodox, Saudi Arabia and Al-Azhar for the Sunni community, Najaf and Qom for the Shiite community. They also fulfil a diplomatic function. Religious communities are also basically a kinship network, intra-communal marriage is the norm and intercommunal exogamy is minority behaviour (even if tending to increase between Christian communities).

When discussing the interactions between the state and religious communities in Lebanon, it might be more accurate to speak of the relationship between the *state and religious social groups* and not *state and church*, because of religious communities' multidimensional character.

One could go back very far in history to monitor these relations, but the 1830s seem to be a good start because that decade marked the beginning of important changes affecting this relationship, changes that are still relevant today. During that period, Lebanon was under Egyptian rule; the governor at the time was Ibrahim Pasha, the son of the Egyptian ruler Muhammad Ali.

The Ottoman Empire was entering a new period in its history, that of political reforms known under the name of *tanzimat* (1839-1876). That period witnessed the creation of elected councils in cities and provinces, and an increasing equality between Muslim and non-Muslim communities. Many of these reforms were imposed by the European powers and were supported by elements of the Ottoman elites (including some Lebanese figures), as factors of modernisation and strengthening of the Ottoman Empire.

The *Tanzimat* started with the proclamation of the *Hatt-ı Şerif* of Gülhane in 1838. In this edict, the Ottoman Sultan Abdülmejid committed himself to many reforms, in-

cluding greater equality between his subjects of all religions.<sup>1</sup> This edict was followed up by the *Hatt-ı Hümayun* in 1856, which announced a new series of reforms that had some implications for relations with religious communities (freedom of worship, rights of repair of religious buildings, spiritual immunities, oath of allegiance, etc.).

The Ottoman state was both a sultanate and a caliphate: the sultan held political and religious power, just like the Caesaropapism of the Byzantine Basileus, who was at the same time head of the church and the empire. The Ottoman sultan was the ruler of all his subjects, regardless of their religion, and he was the religious leader of his Sunni subjects. This implied that the relations between the state and its subjects differed from one community to another. In the following we shall look at relations for the Muslim and Christian religious communities.

The Sunni Muslims enjoyed state support and were the dominant group. Their religion was that of the state. Their juridical affairs were conducted by the Hanafi courts, which were the state's official courts.

The Twelver Shiites had their own religious organisation, partly hidden, partly apparent. They paid the *khums* (the religious tax) to their clergy, and thus provided the clergy with independent means. They had no official courts and had to submit to Sunni Courts. However, when a conflict erupted between members of the community, they preferred to settle things in their own "courts", which had characteristics of both judicial and arbitrational courts. They also had their own schools and *waqf* (religious endowment). They were considered by the Ottoman state as heretics that should convert to Sunni orthodoxy. Nevertheless, their political leaders were part of the Ottoman apparatus and many notables in this community exercised political or administrative functions.

The Druze community is an offshoot of Ismaili Shiite Islam. Its status was similar to that of the Shiites. The authorities tried to convert them to Sunni Islam, build mosques in their towns and provide religious teachers. They too submitted to the Sunni courts, but in practice preferred their own hidden courts. Their leaders had an important local function: that of collecting taxes for the ruler and providing him with soldiers. For a long time, the governors of Mount Lebanon were Druze.

As for the Christians, according to *sharia* law they were *ahl al-dhumma* or *dhim-mis*. They were allowed to practice their religion, but were subject to certain conditions and a specific tax. On the other hand, they enjoyed a certain degree of communal autonomy. This autonomy differed according to the region they inhabited and the community they belonged to. In the coastal cities and in the plains they submitted mostly to the Ottoman system, while in the mountains they enjoyed more autonomy.

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<sup>1</sup> "These imperial concessions shall extend to all our subjects, of whatever religion or sect they may be; they shall enjoy them without exception".

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The Ecumenical Patriarch of Phanar held high rank in the Ottoman state, and the Lebanese Greek Orthodox community was (and still is) headed by the Orthodox Patriarch of Antioch, whose seat is Damascus. There was only one district in Lebanon in which the Greek Orthodox notables had civil power, namely Koura.

As for the Maronite community, its Patriarch was not officially recognised, but was tolerated. The religious community had courts and properties. Its notables were tax collectors and local leaders. Amongst them were Druze converts who became Maronites as a result of power shifts between the communities in the seventeenth and eighteenth centuries.

In this period the Greek Catholics were a small, yet dynamic emerging community, with the same legal and social structure as others.

The *Hatt-ı Şerif* and the *Hatt-ı Hümayun* changed relations between the Ottoman state and its Jewish and Christian subjects, mainly due to pressure from Europe. At a local and social level changes also reflected the shifting balance of power between the different communities. This period saw a strong drive for modernisation: Ottoman legislation evolved rapidly with the adoption of maritime commercial law, a land code, criminal law, commercial law and civil law (the *mecelle* or *majalla*, a mix of Napoleonic civil law and *shari'a* law). The administrative system also witnessed many changes, including the introduction of elected officials and a quota system for the representation of religious communities. In Mount Lebanon, the first representative councils were created in 1840 and 1860, and both featured such a quota. The protocols of 1860 and 1864 established Mount Lebanon as an autonomous province with an Ottoman Christian governor designated by the sultan with the approval of five foreign powers.

The surrounding territories that were later incorporated into the Lebanese state were parts of Ottoman provinces with local councils (*meclis-i umumi* or *majlis al-'umumi*) under *wilaya* law also featured communal quotas. These councils in turn elected the members of the House of Representatives (*meclis-i mebusan* or *majlis al-mab'usan*) in Istanbul. The first House of Representatives convened in 1877 and was dissolved in 1878. It was re-established in 1908 following the Young Turk revolution. The city of Beirut had two deputies in the House of Representatives, one Sunni and one Greek-Orthodox.

At that time, each community in Mount Lebanon enjoyed the support of an external power: the Sunni were supported by the Ottoman state, the Maronites by the French, the Greek-Orthodox by Russia and the Greek-Catholic by Austria. This type of relationship continues to some extent even today.

## Lebanon under French mandate (1920-1943)

When the Ottoman Empire collapsed, its territories in the Arab East were divided between Great Britain and France. Lebanon was part of the French mandate. When the state of Greater Lebanon was proclaimed in 1920, the territory of Mount Lebanon was extended northwards, southwards and eastwards to regions with predominantly Muslim populations. Owing to this expansion, the percentage of its Christian population fell from approximately 80% to 55%. At this time, the caliphate was abolished by Mustafa Kemal, leaving the Sunni population without a spiritual leader.

The Lebanese constitution that was drafted in 1926 (and that has been amended several times since) is undoubtedly deist. Art. 9 on religious freedoms "renders homage to the Almighty". The Ottoman judicial system did not change much. Muslim *shari'a* courts became Lebanese and were split into two after 1926 (Decree 3503) with the creation of the Shiite Jaafarite courts. Decree 60 LR of 1936 recognised the various historic communities of Lebanon.

Public offices were distributed in theory among different communities. The quota system was maintained in the elections of representatives (now called deputies). It was introduced into the administrative system, where it gradually expanded. The newly established state was under Christian political hegemony, but efforts were made to integrate Muslim communities politically and socially: Muslim notables were integrated in the political system, public schools were opened in predominantly Muslim regions, and taxes were lowered in these regions. During that period, the Maronite Patriarch played an important political role.

## The age of independence

In 1943, the country declared independence and parliament amended the 1926 constitution to that effect. This same constitution was revised in 1990 in order to modify the communal power-sharing formula.

The country's independence was accompanied by the "national pact", a gentlemen's agreement that distributed the prominent political positions between the different communities. It was decided that the presidency of the republic would be reserved to Christian Maronites, while the premiership went to the Muslim Sunnis. Soon the agreement was extended to include the Speaker, which was reserved to Shiites, and then the deputy premiership and deputy Speaker were reserved to Greek-Orthodox Christians.

During the first decades of independence other changes were legislated pertaining to the relations between state and communities. In 1959, the Ottoman family law, a codified version of Sunni Hanafi *shari'a* law, ceased to apply to non-Muslim communities; the Lebanese Parliament passed a civil law in matters of family law that was not recognised by the Muslim communities. That same year, a new rule was in-

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troduced under which the principle of parity between Muslims and Christians should be followed in recruiting civil servants.

Following the 1975-1990 wars, the power-sharing formula was modified by the Taif Agreement (1989); this was followed by the appropriate constitutional amendments (1990). These amendments reflected the demographic change in the country (the Muslim community had grown to about 56% by the 1980s), the military defeat of the Christian militias, and the Arab and American support for the Muslim groups. The principle of parity between Muslim and Christians replaced the formula of six Christian MPs for every five Muslim MPs. The president of the republic was stripped of many of his powers (including dismissing the prime minister and ministers, vetoing legislation and dissolving parliament). Under the constitution, the Council of Ministers exercised executive power, but in practice the prime minister centralised and exercised most executive powers. Moreover, a great number of state institutions are directly linked to him. The powers of the post of Speaker were also augmented (in practice rather than in the constitution). At the same time, the Christians were marginalised. Their leadership was either exiled or jailed. Gerrymandering ensured that three quarters of the Christian MPs were elected by Muslims. The key posts within the public administration passed from Christians to non-Christians. As for the rest of the public administration, the quota system was abolished and there was a drastic diminution of Christians within them. Moreover, Christian areas were mostly excluded from development schemes. This increased the mobilisation of the Christian community and left the clergy in a position of leadership.

The year 2005 marked an important change in the relationship between the state and the religious communities. Following the withdrawal of Syrian troops and the return of the Christian leaders, the country entered a new phase of re-equilibration between Christian and Muslims.

## Discussion

The Lebanese system intrigued several German participants who wanted to know the mechanics of the system. Boutros Labaki explained in greater detail the complex Lebanese personal law system, with its multiple legislations in family law, its various religious courts, and its various asymmetrical elements. The state finances the Muslim courts, while Christian religious authorities finance the Christian courts. The jurisdiction of Muslim courts is larger than that of Christian courts; it includes inheritance law, while for Christians these matters fall under the jurisdiction of civil courts. For many Christian communities, appellate courts are situated abroad: for Lebanon's six Catholic communities, the highest court is the Rota in Rome, for the Greek-Orthodox it is in Damascus. The Lebanese state nevertheless applies the judgments of these foreign jurisdictions.

Dominik Hanf wanted to know if the Lebanese system allowed the creation of new communities. He pointed out that in Belgium that was not possible. Boutros La-

baki replied that in the 1990s, two communities were instituted, the Alawites and the Copts. And the French High Commissioner recognised a civil community ("*communauté de droit commun*") in the 1930s, but it has yet to be organised.

When asked about the possibility of secularisation and deconfessionalisation, Boutros Labaki described the national debate over these issues as a joke. The Kataeb (the largest Christian party up to the 1980s) initiated the debate, but changed its mind in the 1970s because the demographic growth of Muslim communities had shifted the balance in their favour. He added that no one speaks of social integration that comes gradually through intermarriage. This is what happened in Germany between Protestants and Catholics, and in Lebanon between the different Christian communities. Things cannot be changed from above. As for the quota system, it is not peculiar to Lebanon. Unfortunately, the country has inherited a hang-up, a complex, from French republicanism that explains its discomfort with the quota system. If the quota system can solve political problems and spare the country a civil war, then it is worth keeping even if it is discriminatory at an individual level. Theodor Hanf believed that there was once a chance for a fundamental change in 1976. The national unity government discussed a definitive solution. The Kataeb party suggested total secularisation. Kamal Jumblatt, head of the national movement was enthusiastic about it. But the alumni of the *Maqassed* schools (Sunni religious schools) mobilised against it. Theodor Hanf added that as long as there is a legal impediment to intermarriage, one cannot expect social integration.

The question of intermarriage came up on several occasions. A participant wondered if it was not a factor of pacification. Layla Al-Zubaidi remarked that this has not been the case in Iraq, where the incidence of intermarriage between Shiites and Sunnis was relatively high. Boutros Labaki noted that intermarriage between Christians and Muslims was increasing in the 1970s, but since the (1975-1990) wars it has decreased. However, intermarriage between members of Lebanon's 12 Christian communities is one of the factors that justifies referring to them as one group. The other factors of integration are geographical, educational and political. On the other hand, the different Muslim communities have gradually grown apart and one notes less intermarriage amongst them.

Ayo Abe said that the Lebanese political system seemed static. Boutros Labaki thought otherwise. The system has evolved over time. This is true of the power-sharing formula. Theodor Hanf gave an explanation of why things seem so static. The first reason is fear of demographic change. There are no official population figures; the last census was taken in 1932. But there is a high probability that there is a Muslim majority because of a higher birth rate and less emigration. But the demographic progression of Muslims is weakening and their emigration is increasing, narrowing the difference between Christians and Muslims. The speculation over demography and the fear it creates has resulted in a "communal security" dilemma that freezes many issues; it has blocked the transmission of Lebanese nationality through women and it prevents the publishing of reliable electoral rolls. Boutros Labaki added that in 1998 there was a serious attempt to introduce civil marriage, but

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the Sunni religious authorities mobilised against it, and Christian religious authorities later joined them. This reveals a vested interest in leaving the system unchanged. Nevertheless, the Lebanese authorities recognise civil marriages contracted abroad. Layla Al-Zubaidi called it “outsourcing”, and Boutros Labaki noted that it was not a problem in practice.

# Iraq: Religion as Symbolic Battleground of a New Social Order

LAYLA AL-ZUBAIDI

What I will present is not the outcome of academic research, but rather the accumulation of different sources from political think tank analysis to media reporting on the one hand, and my work with Iraqi political actors, civil society, journalists and the judiciary on the other.

Like all countries treated here, Iraq is a complex case and there are many issues that cannot be addressed here. Moreover, Iraq is mainly looked at from the perspective of political science, but under-researched when it comes to social practice, so there are many blank spots in sociological and anthropological research. This, of course, has to do with the current situation in the country as well as with its isolation in recent decades.

So what I have tried to do is to go along with the questions that were raised in the concept-outline of this seminar: What are the changes that occurred in the relations between state and religion? And can we identify some critical moments and factors of change that occurred in the relation between state and religion?

In order to address these questions, I would like to start with some remarks on the dynamics of religion in Iraq and the role of religion in the new Iraqi constitution, and then present the extremely loaded battle around the current personal status law as an example of a critical moment in the changing relationship between state and religion.

## I. Changes in the relations between state and religion

The relationship between state and religion has undergone many important changes since the overthrow of the Baathist regime by the American-led alliance, which have sparked heated debate within Iraqi society. There was much discussion about references to religion in the new Iraqi constitution, the status of religious minorities,<sup>1</sup> as well as a debate over the personal status code.

In trying to explain these changes, Faleh Jabar, an Iraqi analyst and director of the Iraq Strategic Studies Centre in Beirut, makes reference to a trilogy of powerful social forces that have arisen in recent decades and now affect the political and institutional evolution of Iraq: religion, tribalism and ethnicity.<sup>2</sup> According to his analysis,

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1 The status of religious minorities in the constitution will not be addressed in this presentation.

2 Faleh A. Jabar, "The Dilemma of Political Uncertainties." *What can Europe do in Iraq?* 2009, Heinrich Boell Stiftung, <http://www.boell.de/publications/publications-6137.html>

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this rise was dynamically intertwined with a transformation of the middle classes, who were impoverished by the sanctions regime and crippled by the police state, and today see religion, tribe and ethnicity as their only means of mobility.

In 2003, after the fall of the Baath regime, the ministry of religious endowments was dissolved (very much against the resistance of Sunni clerics) and replaced by three religious endowments (Sunni, Shiite, and Christian and other religions) directly answerable to the prime minister. While the ministry was heavily dominated by the Sunni clerical class and funded mainly Sunni mosques, the new endowments receive state funding to maintain the various religious facilities. In addition, the flow of funds for religious institutions was liberalised.

With private and public funding, these institutions suddenly emerged as powerful actors with vast infrastructures, staff, and domestic and regional political connections. While the highest Shiite authority was already in place in the person of its unifying leader Grand Ayatollah Sistani, the Sunni institutions were fragmented and lacked a charismatic figure. The two sides therefore developed in different directions. The Shiite institutions became centres for political agency, information and ideology, while the Sunni institutions, shocked by their loss of power, acted as agencies for recruitment, mobilisation and insurgent activity.

The consequences reflect the different Shiite and Sunni paths. The rise of Shiite institutional religion outshone all other social or political movements of Shiite Islam, and most of the Shiite elites placed themselves under its authority, until they became more independent as more public resources became available and started to claim their share of political power. In the Sunni scene, the opposite happened: it was divided between local and alien Salafis and nationalist Islamists; the decline of the Baathist role in the insurgency ultimately led to a shift to the Salafis. This triggered a rift between Sunni institutional Islam and the Sunni political groups.

I do not want to delve into the sectarian identity politics that emerged in the past couple of years. It was easy for anyone who observed Iraq's slide into civil war to recognise that the American "container vision" of democracy for Iraq, which envisaged three big blocs of Shiites, Sunnites and Kurds, the elections of 2005, which were largely boycotted by the Sunnites, and other factors led to the bloody competition among these blocs, until they splintered into a multitude of factions and interest groups.

## **Deeper roots**

Looking at the changes in the relationship between religion and the state, Iraq looks like a case where war and foreign intervention have caused a major disruption and triggered a clear change in direction. This is partly true, when it comes to the importance of religious parties and the role of religion in the constitution, for example. But it is also important to note that religion as a powerful force did not emerge suddenly in 2003, as often assumed, but start to do so in the early 1990s.

When the Baath Party came to power in 1968, it was strongly identified with secular Arab nationalism. In the wake of the Islamic revolution in Iran, Saddam Hussein made some concessions to the religious establishments and communities - and invented a lineage that went back to the Prophet Muhammad. All in all, however, religion in the public sphere kept a very low profile. The regime was tolerant of religious activity. Fearful of a spill-over from neighbouring Iran, it kept a suspicious eye on Shiite religious activity and cracked down hard on the Shiite Da'wa Party that was founded in the 1950s as a "Shiite" answer to mass parties such as the Communist Party and the Baath Party. At the same time, Saddam Hussein employed a secular tone in order to avoid the impression that his cause was a sectarian one. For example, in a speech in 1978, following a Shiite uprising, Saddam argued that the party must "oppose the institutionalisation of religion in the state and society. Let us return to the roots of our religion, glorifying them - but not introduce it into politics."

In the aftermath of the war against Iran, after the Gulf War defeat and subsequent economic decline, Saddam Hussein's regime was increasingly exposed to pressure and therefore started to court religious and tribal leaders in order to re-establish its compromised legitimacy and popularity within the country and across the Islamic world. Mosque visits increased significantly during the sanctions, and more and more people, tired of the embargo, turned towards ultraconservative Muslim preachers from Iran and Saudi Arabia. In order to counter this influence, the regime began manipulating religion for political ends and abandoned many modernising, secular elements of the Baath ideology. As anti-Western sentiment grew throughout the Middle East, Saddam Hussein also saw in Islam the potential of a propaganda tool in his confrontations with the United States and the United Nations over the Iraqi weapons programmes.

In 1994, the regime started the so-called "faith campaign", which included government sponsorship of mandatory Qur'an studies in schools, encouragement of Baath party officials to take courses in the Qur'an, the building of training centres for Imams (including Saddam College for Iraqis and Saddam University of Islamic Studies for foreigners), the creation of radio stations dedicated to airing Qur'anic lessons, and the banning of alcohol in restaurants. Saddam Hussein promoted an image of himself as a believer and in prayer, and made more and more references to Muslim scripture in his speeches. The "faith campaign" also led to the construction of gigantic mosques. The first one built, called the "Mother of All Battles" opened in 2001. Its Scud-shaped minarets are 37 meters high, a reference to 1937, Hussein's year of birth. In the central structure a page of the Qur'an is encased in glass. Supposedly, Hussein donated 50 pints of blood over three years to mix with ink for the book. All these were strongly symbolic messages that basically identified him with the nation, and the nation with religion.

On the legislative level, the regime permitted a revival of religious and tribal justice, which had been sidelined after the overthrow of the monarchy half a century earlier. If we look at women's rights for example, many of the liberal regulations introduced under the republic were rescinded during the 1990s. Religious authorities

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and tribal tribunals were, for example, granted partial jurisdiction over issues involving personal status, which I will talk about later.

Apart from introducing religion as a political propaganda tool, the campaign also had a very grim side. Numerous women were accused of being prostitutes and executed publicly. Often, the executions were carried out by a paramilitary group headed by Hussein's oldest son, Uday. These men, masked in black, made women kneel in public places and behead them with swords. Human rights reports claim that the faith campaign was also used to kill wives or daughters of dissidents by labelling them prostitutes. Therefore, religious symbols were being mixed not only with political objectives, but also with the instruments of terror of a totalitarian state.

Thus, in effect, the three forces that were restrained, controlled and manipulated by the Baathist regime, were unleashed after its fall.

### **Islam in the constitution**

After the fall of the Baathist regime in 2003, Shiite politicians in particular were quick to articulate their expectation that Islam would be given a significant role in Iraq's new political system. After the popular Shiite cleric Muhammad Baqir al-Sadr was executed in 1980 and rebellions in southern Iraq were brutally repressed in the aftermath of the first Gulf War, a growing number of Shiites regarded the Baath regime as a contemporary manifestation of what is still widely viewed as the systematic repression of Shi'a spirituality by Sunni power elites. According to this worldview, tyranny has a decidedly Sunni flavour, whereas democracy by definition implies greater Shi'ite influence on government affairs.

From the perspective of the majority of Shi'a-influenced political parties, this meant, first, that they must have a powerful presence at the political table, and, second, that the power of (Shi'a) religious norms should also be strengthened, since - again in their view - they are not only binding upon all Muslims, but are also capable of acting as a much more effective barrier against autocracy and tyranny than any merely democratic constitution.

The new Iraqi constitution (approved by a popular referendum in October 2005) makes several references to Islam: it establishes Islam as the official religion of the state, it recognises Islam as basic source of legislation, it recognises Iraq as part of the Muslim world, it guarantees the Islamic identity of its majority, it allows Iraqis to choose their personal status law according to Islamic Law, and it requires that the Federal Supreme Court (the Constitutional Court) include jurists of Islamic Law.<sup>3</sup>

The following is intended to give you some understanding of the most important provisions.

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3 Article 92: "The Federal Supreme Court shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars, whose number, the method of their selection, and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives."

Article 2 declares Islam to be the official religion of the state. This article was also in the old constitution and provoked little debate. It was quite clear to everyone that state funding for religious institutions, religious instruction in schools, and the use of Islamic symbols in public life would have continued anyway, with or without this provision. (By the way, a reference to Iraq as an Islamic state, proposed by Islamist members of the drafting committee, was dropped in the final draft of the constitution. In Article 1 the country is simply called the Republic of Iraq, as it has been since the overthrow of the monarchy in 1958).

A huge controversy, however, broke out around constitutional recognition of Islam as “a fundamental / basic source” of legislation, and specifying that no law can be enacted if it contradicts the “the fixed elements of the rulings of Islam”. The wording gave rise to months of argument between the (primarily Shi’ite) sectarian parties on the one hand and secular and Kurdish parties on the other, and some tensions in the final language reflect compromises in the final draft.

The reference to using Islam as a “BASIC source” of legislation is a compromise between those who wished it to be mentioned as “A source” and those who wanted it to be “THE source.” Such phrasing, however, might be a bit exaggerated (interestingly, this part of the article does not mention Islamic law, only Islam).

More significant is the provision that no law can be passed that contradicts “the fixed elements of the rulings of Islam”. The formula appears to be a compromise between those who wished to protect the “fixed elements”, which would be few in number, given the diversity of the Islamic heritage, and those who favoured protecting the “rulings”, a more specific and legal, not only religious, term.

What is also significant is that the constitution does not consider Islam the only criterion for constitutionalism. Based upon Article 2 of the constitution, a law may be held unconstitutional by the Supreme Federal Court, not only if it contradicts “the fixed elements of the rulings of Islam”, but also if it contradicts “the principles of democracy,” or “the rights and basic freedoms outlined in the Constitution.” This, of course, raises the age-old question of whether Islam is compatible with democracy.

I do not think that this question make much sense. But still, one has to wonder what the “fixed elements of the rulings of Islam” are? How will the Federal Supreme Court resolve a conflict between a constitutional right and the interpretation of such a right under Islamic Law? What if the implementation of the equality principle conflicts a ruling of Islamic law? The impact on future legislation is hence completely dependent on who has authority to interpret the article.

All in all, the 2005 constitution is full of vague phrases that merely stipulate that the details are to be regulated by future legislation. The document is therefore clearly an expression of political compromise. Accordingly, a heavy burden falls on parliament, but also on the judiciary, as legislative acts and judicial interpretation will be needed to determine how these abstract or ambivalent provisions would apply to specific areas of the law. Parliament, according to the constitution, would also be obliged to use Islam as a source for legislation and to avoid violating the principles of democracy on the one hand, and those of religion on the other - whatever these

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might be, considering the diversity of confessions and Islamic schools in the country. As the parliament is dominated by Islamist parties and influenced informally by leading Shia clerics, this gives a hint as to who has the power of interpretation, at least for the moment. As the Supreme Federal Court will also play a major interpretive role, its composition is critical for the meaning of Article 2 in the long term. A Higher Council that includes clerics will probably also be formed to review new legislation to ensure it does not contravene Islam.

All in all, the Shia, Sunni and Kurdish negotiators said there was more or less accord on a bigger role for Islamic law than Iraq had before. But the secular actors strongly opposed subjecting all legislation to a religious “test”. Therefore there is a predominant, and probably accurate, perception, that on balance the religious parties won out. Obviously this was a ploy by the US American ambassador at the time, Zalmay Khalilzad, in order to win concessions from the religious authorities in other areas and thereby speed up the conflict-ridden process of constitutional reform. It was therefore both the weight of the religious parties and a US ‘concession’ towards them that marked the constitutional outcome on the question of Islam. Secular Iraqi civil society strongly criticised that the constitutional process was rushed in a period in which religious forces had the upper hand.

It might be interesting to compare the Iraqi constitution to the Afghan constitution, which has similar phrasing, and which was also enacted with the help of Zalmay Khalilzad, then US ambassador in Afghanistan. It is therefore quite likely that American policies in both cases adopted a pragmatic approach to the constitutional process by acknowledging the strength of the religious forces in Afghanistan and Iraq, very much to the criticism of secular forces that found themselves sidelined.

## II. The struggle over the personal status code

This next section takes a closer look at one facet of the struggle over the role of religion, namely personal status law or so-called family law. As arguments over the new Iraqi constitution continue to rage, driven by fundamental conflicts over the role of religious norms in society, religious parties are demanding a revision of the personal status law on the basis of *shari’a* law.

In an Islamic context, laws relating to family or personal status issues make up the body of legislation based on Islamic law (*shari’a*) that governs matters relating to marriage and divorce, alimony, child custody rights, legal succession and inheritance. In contrast to many other - often theoretical - debates concerning the influence of religion on government and legislature, decisions under personal status legislation have a direct, practical impact on the everyday life of citizens.

Enacted in 1959 by the first republican government after the overthrow of the monarchy, Iraq’s Personal Status Law no. 188 is still in force today. Despite all re-

versals that were enacted in the 1990s, Iraq's family law is regarded as exemplary and remarkable for two reasons.

Firstly, it is a unified law for all confessions that synthesises regulations from a total of 17 different Muslim and non-Muslim communities (only the courts differ for Muslims and non-Muslims). While the law gained its legitimacy from religious sources, it was nevertheless based on an eclectic selection of the most liberal religious rules; it also applied a number of bold interpretations to these rules and even introduced innovations that diverge from *shari'a*. In doing so, it guaranteed women wide-ranging rights.

Secondly, it is a codified civil law that is implemented in state family courts presided over by judges who are civil servants, not clerics.

Therefore it not only encourages and sustains social coexistence, but also acts as a demonstration that it is possible to hold pluralistic societies together using processes of integration - precisely in an area that, throughout the region as a whole, is regarded as a bastion of sectarian autonomy and which, by actively preventing marriages outside the sectarian group, makes a key contribution to perpetuating an exclusive ethno-sectarian sense of identity.

Earlier attempts to establish a civil framework for personal status issues in the 1940s and 1950s were resisted by conservative and religious groups. Following the establishment of the republic and in the wave of desire for modernisation and reform, the law was formulated with the participation of women's rights activists and passed after a committee of judges, lawyers and clerics had approved the draft. Government-run personal status courts replaced the old *shari'a* courts and began to pass judgments based on the codified state law. The minimum legal age for marriage was raised, polygamy was restricted, marriage without the woman's explicit consent was forbidden, and women were granted additional rights in cases of divorce and claims for compensation.

All this provoked violent resistance from the religious establishment. Conservative clerics opposed not only the liberal interpretation of *shari'a*; but also the unification of the personal status law to cover all sectarian communities. Shiite clerics in particular regarded this standardisation as curtailing their freedom to practice Shiite law within their own communities through their own autonomous institutions, and hence as a coercive measure and yet another sign of unwarranted Sunni dominance. In addition, after the Baathist putsch in 1968, which soon brought Saddam Hussein to a central position of power, the legislative process became arbitrary and dependent on the political current. Any law could be modified or annulled by a decree of the *Revolutionary Command Council* (RCC) in the name of Saddam Hussein. This was also the case with the personal status code.

Nevertheless, it has survived until today. In this sense, a "reform" or revision of the law that is currently demanded by religious actors implies the possibility that state courts will be replaced by *sharia* courts and that religious authorities will gain the autonomy to formulate and implement the standards applied to family law within the various religious communities.

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In Iraq, this debate is being conducted in an exceptionally controversial fashion. Underlying the disagreements is a fundamental question: how will the new Iraqi nation define its own people in the future? Iraqi social scientist Sami Zubaida wonders whether in the eyes of the government and before the law Iraqis will be regarded as individual citizens, or whether will they be treated primarily as members of tribal clans and religious or ethnic communities?<sup>4</sup>

Those who demand a more liberal reform of the family law, like feminists, are forced into a Catch-22 situation. There are still many discriminatory clauses in the Law. But women rights activists have to ask themselves whether it is wise to push for legal reform at a highly volatile and charged time, when any kind of questioning of the law is likely to result in conservative changes. Iraqi judges tend to defend the current law. We could argue that this is “path dependence” (the term that Mr. Koenig used in his paper). Of course, the judges have an interest in keeping their positions as civil servants in state family courts, which would become obsolete if they were replaced by *sharia* courts, in which clerics have the say. But there seems to be a deeper fear for social integration and a serious conviction that personal status issues should not be put in religious hands.

Personal status law has now become a symbolic battleground, upon which the ferocious struggle to determine the regulatory foundations of the new social order is being fought out. In this political tug-of-war over personal status issues, what is emerging is therefore not “just” a disagreement about marriage and family-related matters; it is, above all else, a struggle over the relationship between religion and the state.

### **Where is the country heading?**

Today, the country seems to be at a turning point. The last provincial elections showed that old coalition and voting patterns are changing and that Iraqis have become more suspicious of religious and federalist parties. The results signalled increased support for “secular” and nationalist forces that stand for strengthening the institutions of the central state.

Thus, the unifying tendencies of identity politics with their big political, electoral and sectarian blocs seem to have vanished. But in their place, even more precarious cleavages within Shiite and Sunni groups have emerged and the Arab-Kurdish conflict has hardened, which cause the fragmentation that the country is currently witnessing. Much of this is being fought out on the back of minorities, who have increasingly been victims of bloody attacks.

Despite the more national trend observed in the outcome of the provincial elections, it would be wrong to overestimate its sustainability and coherence. The *Da'wa*

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4 Sami Zubaida, “The Next Iraqi State: Secular or Religious?” *Open Democracy*, 13/12/2004, [http://www.opendemocracy.net/conflict-iraqivoices/article\\_1737.jsp](http://www.opendemocracy.net/conflict-iraqivoices/article_1737.jsp)

party, for example is still a party strongly characterised by religion and confessionalism, although its strongman, Prime Minister Nouri Al-Maliki, is hailed by the western press as a promoter of strong state institutions. Few groups or parties are really able to oppose this trend. At this time it is therefore still very difficult to make predictions; the future of relations between state and religion in Iraq remains as uncertain as the future of the country itself.

## Discussion

The discussion allowed Layla Al-Zubaidi to give more details on Iraq's religious minorities: how the constitution treats them and how matters have recently evolved. The constitution recognises the right of religious freedom for all communities. But several legal restrictions remain concerning the *Baha'i* faith (prohibited in 1970) and the *Wahabi* branch of Sunni Islam (prohibited in 2002). There are also some issues concerning Jews of Iraqi origin: if their citizenship has been withdrawn, they cannot regain it. In the 1990s, the personal law status was amended so as to reward Iraqi men who divorce their Iranian born wives. Such discriminations have not been formally revoked. But some people argue that they are overridden by the equality and freedom clauses of the constitution.

As for Christians, Jezides, Sabaens, and the so-called Shabak, they are victims of violence from a different source, and are caught up in the conflict between Arabs and Kurds, as they are concentrated in disputed borderlands between Kurdistan and Arab Iraq. Spectacular bombings in August and September 2009 took hundreds of lives, but daily violence has caused even more casualties. Some violence is attributed to al-Qaïda, which seeks to eliminate social diversity, while other attacks on Christians, such as those in Mosul, are probably related to the struggle between Kurds and Arabs. As a result, many Christians have emigrated and their community has halved to about 400,000 people in less than a decade. The series of attacks against churches has reinforced the demands of Iraqi Christians for asylum in the region or in Western countries. There are many different views on this issue. A participant considered that granting asylum status to Christians would encourage them to emigrate, and that would deprive the country of one of its modernising forces. Layla Al-Zubaidi believed that it could encourage further violence against Christians because they will be increasingly seen as protégés of the West.

The evolution of personal law in Iraq also triggered a lot of interest. Layla Al-Zubaidi remarked that when the unified law was being prepared, some groups sought to introduce a Sunni or Shiite emphasis. But they did not receive much support from clerics. Today, clerics seek and have a greater influence on politics, to an extent that Paul Bremer, then administrator of Iraq, had to take them into account.

The problem with the reintroduction of religious norms is that it opens Pandora's box. It forces people to appeal to them and then introduces the problem of interpreting them. This question is considered by clerics as being their prerogative. The

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forces promoting confessionalism in Iraq today are stronger than before. Even some forces depicted by the foreign press as secular often have a religious or communal agenda.

Theodor Hanf wanted to know if Iraqi Kurdistan had any specific laws regarding personal status. Layla Al-Zubaidi said that the same law No. 188, applies there, but that the local parliament (Kurdistan National Assembly) has powers to modify laws in the Kurdish region. It has enacted amendments to restrict polygamy and to advance women rights. These changes were possible because NGOs have been freer and more active in that region since the 1990s. Moreover, Islamist parties are not very strong in the region. This is probably due to the strong ties between Islam and Arab nationalism prior to the 1958 revolution. A participant noted that the Turkish military had supported Kurdish Islamists against the secular Kurdistan Worker's party (PKK).

The issue of violence also drew a lot of attention, and the discussion went beyond its communal aspect. Stefan Leder mentioned that Iraq was a rentier state, and that the competition to appropriate the state's resources had taken on a communal aspect. In Iraq, the struggle for power and resources became very violent and took on a confessional flavour. Layla Al-Zubaidi went even further by saying that during the worst violence, kidnapping and killings were a business, a lucrative source of income. At times ethnic cleansing motivates this violence, but at times it is about income, or the motives overlap. She gave the example of militias negotiating at Basra airport about which will kidnap which travellers arriving from abroad, and then "sell" them to each other. The violence and the communal dynamic also enjoy cross-border support, mostly from Saudi Arabia and Iran. Layla Al-Zubaidi added that as warlords the heads of the militias generally have no interest in stopping the violence because this would deprive them of their stakes. There are two ways to confront the problem, through violence or through integration. But how does one integrate them? What kind of incentive can they be given? Anyhow, the military solution was preferred (as seen for example in the confrontations between the Iraqi army and the Mahdi Army headed by radical Shiite cleric Muqtada al-Sadr). A participant linked the rise of violence and the decline of the control of bureaucrats over state revenues. He wondered if there was an interest in promoting violence as a cover for manipulating revenues, as in the case of Algeria.

Layla Al-Zubaidi pointed out that the provincial elections have shown that people are fed up with parties that manipulate the religious discourse, probably because of the spread of corruption, the rule of militias, and the level of violence. The biggest problem concerning the Sunni-Shiite divide is that there are no real institutions for a national dialogue. A common platform is missing, despite the existence of a Ministry of National Dialogue. The Iraq Strategic Studies Center in Beirut has a project to bring clerics of all confessions, parliamentarians, ministers and experts together to design a roadmap against ethno-sectarian violence. The issue of federalism was briefly discussed.

Theodor Hanf noted that the lecturer made clear that under Baathism, there were deep traditions covered by a veneer of modernisation. Confessionalism was not pub-

licly expressed, but this lack of expression does not affect behaviour, unless it lasts a long time. He played down culturalist interpretations, pointing out that Assyrian Christians in Iraq are as conservative on gender issues as their Muslim and Arab compatriots and that they retain this conservatism even after two generations in the diaspora. He also stressed that women's rights are relatively new in Europe; in a country such as Switzerland, women were not given the right to vote until 1972 and in Germany and France married women could only open a separate bank account after 1958 and 1965, respectively. Layla Al-Zubaidi added that Iraqi women were integrated into education and the labour market during the modernisation phase. But during the period in which sanctions were imposed on Iraq (1990-2003), this trend was reversed.

# Islamic Arguments for a Secular State? Liberal Concepts of Shari'a

MANFRED SING

The central question we will be looking into is the following: what kind of change happens when the modern state incorporates religious law? How does this affect the state's laws and how does it affect the religious laws. We will be looking into different types of arguments put forward by scholars of Islamic law who want to make a change in this domain. The subject is vast, so we will be sticking to a couple of illustrative examples.

When we study the relations between state and religion, we tend to look at the laws that set up a framework for these relations, defining and regulating them. In countries with a Muslim majority, the question arises: to what extent is *shari'a* part of the state's legal framework?

If one conceives of *shari'a* as religious law, this means that the religious side predominantly defines the two-sided relation between state and religion. However, it is an erroneous assumption that one considers that the more the state refers to Islamic law, the higher the level of religiosity within its society.

To understand why this is erroneous, we should start by distinguishing between *shari'a* and Islamic law. Once a state enacts *shari'a*, this legislation ceases to be "religious" law in its literal sense. It becomes state law like any other law (such as commercial law, administrative law or criminal law). Like any other law, Islamic law has its own style, language and structure and it has its own institutions; they start with the divine legislator and the prophetic lawgiver and end with parliament and courts.

Furthermore, there is no monolithic body called *shari'a*. It actually refers to many different legal practices throughout the world and history; they are labelled Islamic, although they vary from one state to another and from one legal field to another. In family law, for instance, *shari'a* is very present today, while it has very little to say in commercial law. The existence of *shari'a* ruling does not reflect the degree of religiosity in a society, but merely a certain juridical development in a specific sphere.

The central thesis of this paper is that whenever a modern state adopts, codifies and enforces *shari'a* rulings and makes them laws, they take a secular garment and sometimes their meaning changes: *shari'a* becomes a secular instrument, although it maintains its religious overtones. When Islamic law is enacted, it becomes a kind of mediator between the state and religion, providing religious legitimisation for the secular state and its apparatus. This is one of the reasons why *shari'a* is the battleground between political forces, between the proponents of secularisation and those of Islamisation.

The proponents of political Islam consider the application of *shari'a* as an instrument to Islamise society. What they fail to see is that it is equally an instrument that strengthens state law.

Saudi Arabia, for example, was founded as a state based solely on the Qur'an and the *sunna*; one finds no constitution or even laws, but only decrees. However, modern institutions, such as appeal courts, were introduced step by step. This open-ended development led to the introduction of the "Basic System of Rule" in 1991. This example shows that it is not possible to apply *shari'a* without the secular institutions of a modern nation state and that the concept of an Islamic state is quite a paradox.

However, as Abdullahi an-Na'im puts it: "Once the possibility of an Islamic state is conceded, it becomes extremely difficult to resist the next logical step of seeking to implement it in practice, because that would be regarded as heretical or un-Islamic". We will first elaborate on the two features of lawmaking, the dualism of the secular and the religious. Then we will look at two problems that liberals are faced with regarding *shari'a*. Finally, we will look into the propositions that three contemporary scholars of Islamic law have made to solve these two problems and we also discuss possible shortcomings of their solutions.

## I. Dualism of the secular and the religious in lawmaking

The general feature of law is its arbitrariness. It is impossible to solve moral problems by making laws; they can only be fenced in. Ethical questions do not deal with the same categories as legal questions. They deal with what is forbidden, harmful, recommended or preferable. Law on the other hand deals with two categories: "legal" and "illegal". And when it deals with moral issues, it has to translate them into these two categories. To illustrate this point, organ donation is a lawful act in Saudi Arabia. However, many families feel uncomfortable and consult muftis for moral advice in this controversial issue; many muftis issued *fatwas* (Islamic legal opinions) in support of organ donation - because the Saudi state wanted them to do so.

Many scholars of Islamic law claim that *shari'a* is very different from other law because it goes back to the divine lawgiver, and it is therefore all-embracing. This claim does not help much in this respect because law remains incomplete and arbitrary since there are always dissenting opinions and controversial issues.

In the process of lawmaking, we find this dualism between religious and secular at three different levels. Let's take the example of the normative definition of life and death. At a first level, we have the different texts that tackle this issue: there are secular texts such as medical, juridical, and economic texts and there are religious texts (Qur'an, *hadith*). At a second level, we find the national institutions. In Egypt, there is parliament on the secular side and al-Azhar on the religious side. At a third level, we have trans-national institutions, such as the Organisation of the Islamic

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Conference in which the states are represented and the Muslim World League composed of religious figures only.

In all cases, the process of lawmaking can take different forms of decision-making: majority and compromise on the one hand versus consensus and authority of reason and knowledge on the other. In the case of majority vote and compromise, decision-making is based on the fiction of equality between people and puts aside the question of knowledge and truth (some people might be more knowledgeable than others, or closer to the 'truth'). In the case of consensus and authority of knowledge, it is based on the fiction of absolute knowledge and therefore presupposes the inequality of humanity. The assumption is that the knowledgeable few can decide for the others and prevent wrong decisions.

Religious law is used for the purpose of legitimisation.

The problem with legitimisation in the era of discussion and democracy is that it can never be absolute. Governments tend to say that they represent the majority as well as reason, but their claim can be contested. As the democratic legitimisation of Arab or Islamic governments is weak (although they have learnt to use elections as a mode of legitimisation), they seek additional legitimisation. Islamic law provides exactly that. It not only represents identity, culture and heritage, but also has the significance of something that is religious and authoritative.

A good example for the overlapping of the religious and the secular are the state muftis. In Egypt, this office was established towards the end of the nineteenth century and had produced over 66,000 *fatwas* by the 1990s.<sup>1</sup> Under British rule and in the post-independence area, the state mufti - with close ties to the khedive and later to the king - played quite a prominent role in demanding reform and modernisation of Islam. In the 1950s and 1960s, he lost his influence. But by the end of the 1970s, his importance increased again, as he became a prominent figure in the fight against Islamism. In general, the Egyptian state mufti welcomes Islamisation, but maintains that it should be done by the proper scholars and authority.

## II. Two problems associated with shari'a becoming state law

*Shari'a* can be looked at as the normative kernel of Islam. Therefore, *fatwas* (legal opinions) and *fiqh* (the science of lawmaking) by which this kernel is constituted are often described as the essence of Islam. Like other religions, Islam is concerned with the moral conduct of believers. When Islamic law is incorporated into state law, it controls the personal affairs and the moral conduct of human beings without an anthropocentric ethical concept or justification. This raises two problems. First, the ruling itself represents the moral (as it comes from God). It becomes morally self-

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1 Jakob Skovgaard-Petersen, *Defining Islam for the Egyptian State: Muftis and fatwas of the Dar al-Ifta*, Leiden, Brill, 1997.

sufficient. However, it is more concerned with the outer appearances of religiosity than with the moral consideration behind a certain act or behaviour. Thus, religion is reduced to a marker of identity and difference, emphasising the outer appearances that it implies, such as the headscarf or fasting during Ramadan. The second problem in applying *shari'a* as state law is that moral conduct no longer depends on the individual's reasonable judgment, but is imposed by the state. What in religious logic is forbidden, harmful, recommended or preferable becomes either legal or illegal, in accordance with legal logic. So the more forcefully the state imposes a conduct the more superficially religious the conduct is.

The emphasis on *shari'a* instead of *kalam* (theology or ethics) has a long history. In the Arab universities, there are faculties of *shari'a*, but no faculties of *kalam*. At the Azhar University, *kalam* is secondary to *tafsir*, *hadith* and *fiqh*. It is not taught as an autonomous subject in either religious or secular universities. Secular universities teach *kalam* and *falsafa* (philosophy) side by side. Most scholars who are interested in *kalam* have graduated not from religious seminars, but from secular universities (faculties of humanities and history). This means that the question "what does it mean to live as a religious person in a modern world?" is generally not answered by a theological-philosophical speculation but by producing a flood of normative material, i.e. *fatwas*.

The conflict between theological speculation and normative production can be traced back to early Islam. It becomes quite apparent with the conflict between the *mu'tazila*, which, to simplify, represents the rational school in Islam versus orthodox Islam. The *mu'tazila school* is of interest to us not as a historical phenomenon, but because of its contemporary reception and relevance. The liberal form of Islam in Indonesia has its roots in the reception of the *mu'tazila*.

The liberal writer Ahmad Amin (died 1954) made the *mu'tazila* popular by publishing a volume (in 1936) in his series on early Islam. He blamed the *mu'tazila* for its own decline and believed that contemporary liberals should learn from its mistakes. He considered the *mu'tazila* a liberal party within Islam and believed that the values that characterised it (rationality, belief in science and progress, openness to other cultures) were desirable for the present time. He thought that its failure came from the fact that it tried to enforce its dogmas, at the time of the *mihna* (the "Islamic inquisition"), and when it failed to achieve its aims, the conservative counterreaction by Ibn Hanbal<sup>2</sup> and his followers washed it away. Ahmad Amin believed that contemporary liberals should learn from their predecessors that the use of force, even for the right reason, ends in failure.

In contrast, Fahmi Jad'an, the Jordanian intellectual writing in the 1990s, blamed the conservative opposition for the disaster of the *mu'tazila*. He considered politics and religion as eternal rivals; whenever the religious circles criticised moral corrup-

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2 His school is considered to be representative of Orthodox Islam. He is one of the most prominent *hadith* collectors, and a reference point of the contemporary Islamic movement.

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tion in society, rejected the state and blew the trumpet for a decisive battle, the state could only oppose them.

Muhammad Abid al-Jabiri made the state responsible for setting up the *mihna*. He describes conservative and liberal Muslims as intellectuals and believes that the state's main aim was to try to co-opt or eliminate intellectuals in its quest for legitimisation, which is exactly what contemporary Arab regimes are doing.

What is striking here is that three Arab intellectuals are convinced that there is a recurring pattern of conflict between the state, liberal intellectuals and conservative-religious scholars. The only point they disagree on is which side should be blamed for the conflict.

This disagreement and the interpretation of the conflict between liberals and conservatives hold another lesson for us: the problem lies in the mutually exclusive desire to dominate the other side (the absence of "twin tolerance", but the shared will to dominate the other). The solution is for politicians and religious scholars to renounce their claim of superiority. The task would then be to find the convenient structure that fosters the coexistence of both sides.

### III. Three arguments for a secular state

Let us look at the arguments of three contemporary Islamic scholars who favour a secular state in countries with a Muslim majority.

Abdullahi Na'im believes that a religiously neutral state cannot enforce *shari'a*. He is systematic and far-reaching in separating religion and state and in distinguishing between politics and government. He calls the idea of an Islamic state a "dangerous illusion". He adds that "the notion that *shari'a* principles can be enforced through the coercive power of the state" is a "belief contrary to the nature of *shari'a* itself and the nature of the state".<sup>3</sup>

Since the state is secular from the very beginning, "consequently, whatever the state enforces in the name of *shari'a* will necessarily be secular, the product of coercive political power and not superior Islamic authority. ... In fact, the notion of an Islamic state is a post-colonial idea that is premised on a European model of the state as a totalitarian view of law, and public policy as the instruments of social engineering by ruling elites". Islamic norms are only "religious obligations for individual Muslims". Abdullahi Na'im considers Islam to mean "that each and every Muslim is personally responsible for knowing and complying with what is required of him or her as a matter of religious obligation". He cites a lot of Qur'anic verses to make this point clear and he questions the binding quality of juridical consensus on successive generations.

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3 Abdullahi Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a*. Cambridge, MA and London, England: Harvard University Press (2008).

This approach tries to solve the dualism of the secular and the religious by separating them in a clear-cut manner, which is easier in theory than in practice. Another problem with this approach is that it not only goes against the dominant idea of the Islamic state, but that it also avoids addressing the problem of legitimisation.

Khaled Abou El-Fadl's main thesis is that Islamic authority should be based on Qur'anic morality. He pleads for a "conscientious pause" when confronted with faith-based assumptions and objections concerning complex problems because one is not allowed to speak for God's law without proper authorisation.

He believes that submission to the laws of God does not mean "blind submission to those who claim to represent God's law, and it does not mean submitting to the contentment and comfort of arrogant self-reference". Instead, the Qur'an admonishes Muhammad not to control and dominate the people but to "admonish and teach" them. In his view, the authority of the Qur'an is persuasive, not dictatorial. Thus, Qur'anic interpretation should be based on honesty, diligence, self-restraint, comprehensiveness, and reasonableness.

He deals with the rulings of Saudi Arabia's Permanent Council for Scientific Research and Legal Opinions that cite a *hadith* saying "Any woman who dies, while her husband is pleased with her enters Heaven". He finds this principle problematic because the husband could possibly be a non-believer. Moreover, this *hadith* contradicts the Qur'an, which states that moral women listen to God, not to their husbands.

He further dwells on *fitna* tradition claiming that women are morally dangerous. It is unclear whether these sentences are mere empirical descriptions or normative statements. He concludes that by "prophesying that women are dangerous and treating them as dangerous, we are never able to realise any reality other than that women are dangerous".

Khaled Abou El-Fadl also questions what he calls the positivism of *shari'a*. "Since no legal system functions in a moral vacuum, serious thought needs to be given to the vision of morality that might guide Islamic law in the contemporary age".

This scholar's approach brings the notion of morality into the debate. However, morality is not only a contentious field, but is also very difficult to translate into the realm of lawmaking.

The Iranian scholar Mohsen Kadivar tries to reconcile human rights with Islam. He says the main problem in contemporary Islam is that it is based on three different kinds of inequalities: Muslim and non-Muslims, men and women, jurist and non-jurist. On the other hand, human rights are based on the principle of equality. Therefore, a traditional approach to *shari'a* can accept human rights only to a limited extent. In order to resolve this contradiction, it is necessary to define fundamental rights in a broad sense that can be separated from contextual and mutable rights. *Shari'a* norms have to fulfil three qualifications: they have to be rational, just and better than earlier solutions. Any specific norm can only be in effect as long as it fulfils these three obligations.

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This approach is similar to that of the *Maqasid el-shari'a*, a discipline that tries to define certain goals, objectives and intentions of *shari'a*.

Although Mohsen Kavidar's definition of intentions and qualifications makes it easier to frame and develop new law in a systematic manner, his approach changes the very nature of *shari'a* as a cultural-historical framework and thus makes the flexibility and arbitrariness of lawmaking visible. This can generate disturbance and opposition in Muslim circles.

Eighty years after the founding of the Muslim Brotherhood, it is still difficult to give an exact definition of political Islam or Islamic state. Different movements and countries have different views on this matter.

Although the dual (democratic and religious) legitimisation is useful for rulers, people can contest it, as the recent example of Iran clearly shows. This contestation is comparable to other forms of dual legitimisation, as in Turkey, where government is based on elections (democratic) and the principle of *laïcité*.

A member of the Saudi *majlis ash-shura*, Ibrahim Bulayhi repeated in many interviews that "we Muslims have become a burden, not only for ourselves but for the whole world. The whole world moves backwards because of our actions". He concluded that terrorists do not fall from heaven but are the fruit of a "one-dimensional culture". In doing so, he implicitly holds education responsible for this negative outcome and lays the relationship between state, religion and education open to discussion. This discussion is an ongoing process, which can lead to new forms of pragmatic, non-ideological answers. The scholars we have looked at are a minority, but they are quite optimistic about the outcome of the discussion. As Abdullahi an-Na'im put it "The paradox that Islam and the state must be separate (that the state must be religiously neutral), yet are unavoidably connected through politics, can only be mediated through practice over time, rather than resolved once and for all by theoretical analysis or stipulation".

## Discussion

The discussion allowed Manfred Sing to restate and summarise his main argument that when a state enacts a religious law, this law changes its character. It ceases to be religious in nature and becomes a law like any other. Even its content is transformed and it no longer functions due to belief but due to law enforcement. Its religious overtones give it a higher authority than secular law in religious societies, and it becomes an instrument of legitimisation. The speaker was asked if this reasoning did not reflect the desire of some scholars to view *shari'a* purely in terms of ethics. It was noted that liberal intellectuals who applied this reasoning usually live in the diaspora, and many of them teach in the United States. Could they put forward the same arguments in Muslim countries? Stefan Leder concurred with this view and said that one has to be cautious when dealing with voices from the diaspora be-

cause their thoughts evolve outside the context of Islamic societies and sometimes have very limited resonance within the intellectuals' society of origin. Commenting on the idea that philosophers are unable to create a mass movement, and this is as true today as it was at the time of the *mu'tazila*, he added that these liberal voices sometimes become effective when they gain the support of the state authorities. But this is a rare occurrence because these scholars usually support the liberalisation of states.

Manfred Sing agreed that the scholars he presented were intellectuals or philosophers who were trying to change Islam from within by working through the Islamic material and expanding the space for discussion. They clearly will not find majority support in their societies. But their approach is actually similar to that of Islamist groups. Like them, they depend on the authority of reason and claim "better knowledge" of the true meaning of *shari'a*. They are using the legitimacy of reason and argument.

Albert Peter Rethmann wondered whether the reference to the will of God was not dependent on a closed and homogenous milieu. He believed that if the society is or is becoming pluralistic, it is necessary to use reason to judge whether a new law is better than an existing law.

Franz Magnis-Suseno noted that Muslims do not have to restrict themselves to the interpretations of the four major *mazhab* (Sunni Islamic schools of thought); they could refer to any of the hundreds that have existed. Another way is to go back to the original text (the Qur'an) and develop new understandings.

Ayo Obe agreed with the speaker's approach and believed that it was validated by the example of Nigeria. It was only after *shari'a* law became written law (within the meaning of the Nigerian constitution) that it became possible to sentence Muslim women to be stoned for adultery. Without such enactment, and the transformation of religious law into criminal law, such a conviction would not be possible. However divine a revelation, it still requires human interpretation to become law. And people differ in their interpretations. Layla Al-Zubaidi argued that every argument provokes a counterargument, but the traditionalists usually keep the upper hand by virtue of the fact that they appeal to tradition.

Theodor Hanf noted that the discussion touches on a very tricky subject, that of the proliferation of ideas within a political system and a political field. The trickiness lies in the fact that it is extremely difficult to predict where the ideas, once they have been expressed, will end. People outside the scholarly world mostly approach ideas in an instrumental way. When they look for arguments, they are rarely interested in the reasoning per se, but rather in the conclusion.

Udo Steinbach linked the 'dualist approach to the secular and the religious in lawmaking' to the ongoing discussion on universality of human rights and their compatibility with Islam. He noted that the opposition to the claim that human rights are universal is rooted in the refusal to take the "blueprint" from the west and the will to perceive these rights within a specific cultural and religious framework. He also men-

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tioned the time variable that calls for the reinterpretation of *shari'a* in the light of new realities and the necessities of the present time.

Most of the discussion focused on the effects of liberal interpretations on Muslim states and societies. Manfred Sing stated that this could only be answered if one sees liberalism in the context of its origins and the context of Muslim majority societies. In a nutshell, liberalism puts forward a worldview in which individuals are central: it is up to them to decide, interpret and “negotiate” with God. When *shari'a* is state law, it is up to the state and the *qadi* (judge) to decide. This approach to *shari'a* offers security by presenting and enforcing one interpretation. If one looks at the way liberal philosophy emerged and evolved, one notices that it started with the Industrial Revolution and progressed at a time when individuals could benefit from their freedom. In the Middle East there are strong forces that are pushing for more freedom, and others that seek protection. To assess the future of liberal interpretations, one should monitor the social forces that support it. The state can also be a force for liberalism when it suits its interests; it can use it to split up corporate groups within society and to atomise society into individuals. As for the outcome in the battle between conservatives and liberals, liberals seek to promote change by working as water does on stone. They are pressuring conservative Islam in its own language, aiming at its dogmatic positions and expecting it to crumble from within. That said, there are different approaches, even within conservative circles, which are not monolithic. The positions of Tareq Ramadan illustrate this diversity. His proposal for a memorandum on capital punishment followed a traditional argument stating that as long as there is no absolute justice, the death penalty cannot be imposed. Tareq Ramadan says that in private many people actually supported his proposal but refused to do so in public.

Political and social restrictions of this nature limit free argument, which in turn seeks to eliminate such restrictions.

# Putting the Unleashed Genie back in the Bottle. The Case of Nigeria

AYO OBE

The title is a reference to the fact that the motives of those who supported the extension of *shari'a* law were more political than religious. But now that political circumstances have changed, there is an unintended fallout: higher levels of expectation.

## An overview of Nigeria

In Europe, Nigeria is generally described as a country divided between a Muslim north and a Christian and animist south. The picture is more complicated than that. Nigeria has been described as more of a geographical expression than a nation. Its population is estimated at 140 million, composed of some 40 to 50 ethnic groups. There are three major ethnic-linguistic groups called the "majority" tribes: the Hausa, the Igbo and the Yoruba. But that is not the whole picture.

Nigeria is composed of six geo-political zones: North Central, North-West, North-East, South-West, South-East, South-South.

For much of its history, the country has been ruled by the military.

Today's constitution (adopted in 1999) forbids the adoption of a state religion. It guarantees freedom of religion, freedom from discrimination (by community, gender, or ethnic group).

Between 1967 and 1970, the country went through a civil war brought about by the desire of the people in the South-East (mainly Ibos) to be independent from the rest of the country. Following the civil war there was an emphasis on the need for the country to be united. Hence, many provisions were made to unite it. For instance, it was decided that the federal character of the country should be reflected in appointments. This means that in the case of vacancies within the public administration, one person should be chosen from the south, one from the north and as far as possible, appointments should be evenly distributed among the six geo-political zones, or the 36 states.

## Religious violence

Religious violence is the kind of news that is much talked about and makes headlines in the media.

In the past 10 years, there have been many cases of violence. They can be divided into four categories according to their causes. In the south, there are different

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kinds of conflicts. In the north, violence tends to have a religious element, with Muslims usually protesting against non-Muslims.

There are many examples of such violence. In 2002, there was the violence surrounding the Miss World beauty pageant held in Nigeria. One newspaper suggested that the Prophet Mohammed would have probably chosen to marry one of the Miss World contestants had he witnessed the pageant. This comment triggered riots that resulted in many deaths and injuries. In 2006, the Danish cartoons caricaturing the prophet Mohammad had a similar effect. Typically, violence is unleashed against non-Muslim symbols or people who are not from the North (even if they are Muslim; for example, a Yoruba who is Muslim could be targeted). This triggers a cycle of tit-for-tat sectarian violence.

The violence is sometimes localised. The Igbo heartland is quite small, its people are better travelled than others, and many are traders. In 1996, a Christian Igbo trader was beheaded because his wife had allegedly desecrated the Qur'an (he had sought shelter in a police station.) The state usually reacts by violently clamping down on the violence and does little else.

Some violence is disguised as religious; this is especially the case in the Middle Belt of the country. To understand that, one needs look at the history of the region.

In 1804, jihad was declared and Uthman dan Fodio, the founder of the Sokoto caliphate boasted that he wanted to dip the Qur'an in the Atlantic. With him, Islam spread farther south. When the British came, some of the indigenous population adopted Christianity. But evangelisation had a limited success. Colonisers did not have much sympathy for indigenous Christians. The British seemed to resent those who mastered their skills (such as language) and preferred to deal with people who in their view represented something more exotic, such as Islam. No side got the upper hand.

In the Middle Belt, the conflicts are not really religious, but between the indigenous population and those who arrived later.

The third source of violence has to do with the attempt to extend *shari'a* law in the north. Many states have sizeable communities of Christians who object to the extension of *shari'a* law beyond the personal and civil, into the social and criminal. This extension is barred by a constitutional provision that protects religious freedom. But attempts to extend *shari'a* law have not been tested in court. President Obasanjo adopted a masterly policy of inactivity. There is no rush to the courts<sup>1</sup> to have *hudud* punishments (including hand amputation and stoning) declared anti-constitutional.

The fourth source of friction is best illustrated by this joke by Emo Phillips that was voted the best joke of all time.

Once I saw this guy on a bridge about to jump. I said, "Do not do it!" He said, "Nobody loves me." I said, "God loves you. Do you believe in God?"

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1 Nigeria does not have a Constitutional Court, only the ordinary court system with the Supreme Court at the apex.

He said, "Yes." I said, "Are you a Christian or a Jew?" He said, "A Christian." I said, "Me, too! Protestant or Catholic?" He said, "Protestant." I said, "Me, too! What franchise?" He said, "Baptist." I said, "Me, too! Northern Baptist or Southern Baptist?" He said, "Northern Baptist." I said, "Me, too! Northern Conservative Baptist or Northern Liberal Baptist?"

He said, "Northern Conservative Baptist." I said, "Me, too! Northern Conservative Baptist Great Lakes Region, or Northern Conservative Baptist Eastern Region?" He said, "Northern Conservative Baptist Great Lakes Region." I said, "Me, too!"

Northern Conservative Baptist Great Lakes Region Council of 1879, or Northern Conservative Baptist Great Lakes Region Council of 1912?" He said, "Northern Conservative Baptist Great Lakes Region Council of 1912." I said, "Die, heretic!" And I pushed him over.

By religion, Muslims are more integrated than Christians. When a new capital was established, there were provisions to build a mosque and an ecumenical centre. The mosque was built very quickly while the ecumenical centre took a long time because of the number of Christian denominations. Religious divisions do not seem to be all that important amongst Nigerian Muslims. There is the *Ahmadiyya* Movement-in-Islam (which regards Ghulam Ahmad as a messiah, rather than a prophet). It was quite popular because at a time when most schools were run by Christians (or the state), it provided modern, western education for Muslims and so brought about social progress. After being banned from pilgrimage to Saudi Arabia, they decided to change their name to *Anwar al-Islam*.

This kind of dispute does occur in the Muslim establishment. But Nigerian Muslims are overwhelmingly Sunni, and the Sultan of Sokoto (descendant of dan Fodio) remains to this day the main religious leader in the Sahel region, and he heads Nigeria's Supreme Council of Islamic Affairs. Like other traditional rulers, however, he does not have any specific constitutional role.

There are rebel groups within Nigeria's Muslim community who are against modernisation and its symbols (such as watches). In Maduguri (North East) for instance, there are groups such as the followers of Maitatsine, or the *Boko Haram* who have provoked riots which end up attacking churches.

## **Dynamics since the establishment of shari'a law.**

*Shari'a* constitutes the personal law in those states that want it (most are in the north). In the north-west, the population is split between Muslim and Christians and some states do not have *shari'a* law because of non-Muslim opposition to it.

When the discussion began over the new constitution, there was a struggle to create a *shari'a* court of appeal (for personal status). Constitutional debates always break down on such issues. The solution found was that three of the 50 judges on

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the Court of Appeal had to be learned in Islamic law so they could hear cases on matters pertaining to Islamic personal law.

Even though it is prohibited to campaign on religious themes, the governor of Zamfara instrumentalised religion, he said he wanted to establish an Islamic state, introduce the criminal aspect of *shari'a* law and extend it to the social sphere with the aim of prohibiting mixing between men and women in public places, on public transport, etc. He passed laws to introduce flogging, amputation and stoning as forms of punishment. All these changes were seen as having a political motive.

## Religion as a controversial and polemical issue

Many issues with a religious dimension can become highly polemical and controversial. This is the case with the presidential elections. Back in 1999, the two candidates for the post, Olusegun Obasanjo and Olu Falae were both Yoruba and Christian (from the south). In the previous elections, which were aborted by the military, the leaders were Muslim. The current president is from the south. Since independence, northern Nigerians have occupied the presidential office for 27 years, more than people from any other region.

By 2000, Islamic laws had been introduced across the North, in 11 of 17 states. In the Zamfara region, a man was sentenced have his right hand amputated for stealing a bicycle. This amputation has very severe consequences on the person's social life because it is a cultural tradition in many communities, including non-Muslim ones, that a lot of things are done with the right hand, such as hand shaking, receiving something or eating from a common dish.

There were two other issues with a religious dimension. When the Pilgrim Welfare Board was established to assist Muslims in the *hajj* (pilgrimage to Mecca), Christians asked for the same benefits and obtained financing for pilgrimage to Jerusalem or Rome. The decision to join the Organisation of the Islamic Conference was equally controversial.

What seems like a religious issue may in fact conceal socio-economic concerns. John N. Paden in his book *Faith and Politics in Nigeria* (United States Institute of Peace, 2008) speaks of the cycle of poverty and shows that poverty was found mainly in the northern states of Nigeria.

## An introduction that might have opened Pandora's box

Politicians supported the extension of *shari'a* law (to the social and criminal spheres) for political reasons, but by doing so they have created higher levels of expectation within the population. Some groups are now demanding its application, others are

using it against politicians, and finally, other groups are using it as a stepping stone for more religious demands.

In one state, the people complained about their governor because he passed a law introducing *shari'a* without enforcing it.

In another state, people took the governor to the *shari'a* court, accusing him of engaging in corrupt practices. Under the Nigerian constitution he enjoys immunity while in office. But those who brought the case said they do not recognise the constitutional arrangement, and believed *shari'a* superseded it, even though he held office by virtue of the same 1999 Constitution. In the end, the judge found him not guilty.

A Nigerian militant Islamist group, *Boko Haram*, seeks to impose *shari'a* law and describes western education and books as *haram*, or religiously prohibited.

The government's reaction to the recent riots and destructions was extremely repressive. Many people were killed, which is why some in government are suggesting that they should regulate preachers and monitor what they are saying.

In general, although those who offered Muslims in the north the prospect of full application of *shari'a* law may have had rather cynical political objectives, many for whom the existing system is evidently not working believe that it offers a different path that might achieve a better, more responsive system. This has proved uncomfortable and even alarming for many of those in power. But it is still too early to say whether the genie can be put back into the bottle.

## Discussion

The discussion allowed Ayo Obe to elaborate on a central point in her presentation: that the religious issue is mostly a diversion. In the last census carried out in Nigeria, religion and ethnicity were deliberately left off the questionnaire. By excluding the most controversial points, the census could gather more accurate data. She then expanded on how religion is experienced in Nigeria. Some people claim that religions such as Islam and Christianity are but a thin veneer covering older indigenous religions. But there is actually a lot of syncretism. During the Yoruba wars (1817-1830), Muslim Yoruba women were free to move around. This was strange for the people in the North, who were equally Muslim, and therefore contested the Yoruba's Muslim identity. But this right accorded to Yoruba women came from their specific culture. Many people in Nigeria are not ready to totally discard beliefs and customs that existed before the spread of Islam and Christianity. This however does not mean that they do not take their religious beliefs seriously. A lot of witnesses in courts refuse to swear on the Qu'ran because this would prevent them from lying. Theodor Hanf remarked that the manner in which a religion progressed could influence how it is practised. He gave the example of Burkina Faso in which a study of the religious itinerary of families showed that those who went to school became Christian, while those who traded with the north became Muslim.

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Ayo Obe remarked that the Fulani-led jihad movement across Western Africa did not spread Islam by conquest in Yorubaland because its progress was halted (their horses were affected by tsetse flies, natural barriers made it difficult, etc.). Consequently, Islam progressed there through trade, assimilation and mixing. Theodor Hanf asked if there were any signs of new tendencies or orientations within Islam in Nigeria. Chad for instance, was traditionally *sufi*, but now one observes *wahabi* influences. Do new Christian Charismatic or Pentecostal denominations have any impact on Muslims? Another professor wanted to know if there were any influences coming from Libya and Saudi Arabia, and if they could explain the radicalisation of some Muslims in Nigeria.

Ayo Obe noted that there is a small Shiite community, but it usually opposes the establishment of an Islamic state, despite the presence of Iranians. There is undoubtedly foreign funding and influence. The Nigerian government has grown wary of it and is now monitoring external organisations. There is Pentecostal expansion in the North that is supported by foreign funding.

Theodor Hanf went back to the lecture's main argument that religious entrepreneurs are a bit afraid of the game they started. He wanted to know what made them believe that announcing the implementation of *shari'a* could be attractive to their constituency. Ayo Obe answered that the popularity of *shari'a* is due to the fact that Muslim Nigerians are attached to their identity and want it reflected in the government. However, this issue is very controversial. When the governor of the central bank (who did Islamic studies in Sudan) talked about introducing Islamic banking, there was a lot of adverse reaction.

# State and Religion in India

CLEMENS JÜRGENMEYER

India is more of a geographic expression than a nation-state. It is the second most populous country in the world (ca 1.12 billion people), and its population is extremely heterogeneous in many aspects: linguistically, culturally, religiously, socially (the caste system), and economically.

It has no fewer than twenty-two official languages, many of which have different scripts and belong to different linguistic families. The majority of Indians are Hindu. They represent 80.5% of the population, i.e. close to 900 million people. With 13.4% of the population, Muslims are the second largest religious group with about 150 million people. Then come the Christians with 2.3% of the population, followed by the Sikhs with 1.9%. The remaining religious groups constitute about 2% of the population and include Buddhists, Parsis, Jains, Jews and others.

With such a diverse society, how can the state organise peaceful relations between all its constituent groups? The answer to that question came with two projects, both going back to the nineteenth century: the Republican project and the Hindutva project.

The Republican project perceives India as a multicultural, secular republic, the Hindutva project, however, as a nation that can be defined on the basis of one culture: the Hindu culture.

The Hindutva movement has gained prominence in recent decades but it has lately lost momentum, as the results of the elections in 2009 show.

## I. The Republican project

India became independent on 15 August 1947. The Indian National Congress (INC) dominated the political scene back then. The INC believed that India should rest on three principles: democracy, socialism (more like a social democracy) and secularism. And so these principles were introduced into the preamble to the constitution as the three pillars of the state:

“We, the people of India, having solemnly resolved to constitute India into a sovereign socialist secular democratic republic and to secure to all its citizens: *justice*, social, economic and political; *liberty* of thought, expression, belief, faith and worship; *equality* of status and of opportunity and to promote among them all *fraternity* assuring the dignity of the individual and the unity and integrity of the Nation”. This is the only place in the constitution where secularism is mentioned, and it is not defined.

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The state is not based on religious legitimacy, but on the unity of the nation and the equality of all its citizens. The rights of all are recognised, irrespective of caste, sex, profession, race and religion.

Without an explicit legal definition of secularism, the notion can be understood in the Indian context as signifying the religious neutrality of the state. This specific Indian answer to extreme heterogeneity means that secularism is a project against communalism, against putting the interests of one's community first, before the interests of the national community. The neutrality towards various religious groups is positively defined. India does not see itself as non-religious or godless. Its religious neutrality signifies that the state should keep an equal distance from all communities.

Articles 25 to 28 of the constitution uphold the right to freedom of religion. Articles 29 and 30 safeguard cultural and education rights.

Article 25 states that "all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion". Article 27 speaks of the freedom of not paying taxes for the promotion of any particular religion. Article 28 in its first clause states: "No religious instruction shall be provided in any educational institution wholly maintained out of State funds". It then adds, "Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution". And the third clause states: "No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto". Actually, many institutions funded or partly funded by states offer religious education. And the last clause might be explained by the fact that many Hindus send their children to Christian schools because they are among the best.

## II. The Hindutva project

Hindutva means "Hinduness". Vinayak Damodar Savarkar coined the word from Sanskrit in a book he published while in prison: *Hindutva: Who is a Hindu?* (1923). In this pamphlet, the author tries to define what makes an Indian a Hindu and what binds Hindus together in a Hindu nation in opposition to "others", mainly Muslims and Christians. The book has become the "bible" of Hindu nationalists, and the word is used to describe movements advocating Hindu nationalism.

Hindutva challenge the understanding of official secularism. They call the Indian National Congress' secularism a "pseudo-secularism" because they believe that the Indian National Congress (INC) misuses the notion for political considerations,

mainly to get the votes of various religious communities. The INC's policies are seen as pampering minorities and hence of violating the principle of neutrality.

They consider secularism a western import; India should rely on its own culture and history, as it has existed since time immemorial.

The Hindutva project supports a special ideology grounded in cultural or ethnic nationalism. It believes that Hindus consider India as their fatherland (*pitrabhumi*) and holy land (*punyabhumi*), while Muslims and other minorities do not because their religion is foreign to India. The Hindutva project acknowledges that Indian Muslims who are actually "forcibly" converted Hindus see India as their fatherland, but not as their holy land, which is somewhere else. This divergence is rendered by the idea that a Hindu "bows to the East", while a Muslim "bows to the West". There is very little talk of Sikhs, Parsis, Buddhists and other religious minorities; Hindutva considers them as being Hindu, while it perceives Muslims and Christians as foreign.

In this perspective, India is defined as the land of the Hindus. India, Hinduism and, according to some, Hindi (the dominant language of the north) are seen as equivalent. The inner unity of the country is believed to be anchored in an age-old tradition that rests in the common homeland, ancestry, and culture. There is no clear definition of the word culture in Savarkar's booklet for obvious reasons.

The Bharatiya Janata Party (BJP), or Indian People's Party, is the political wing of the Hindutva movement. It refers to the three essentials of Hindu nationalism: one nation, one people, one culture. This idea of a common territorial, genealogical and cultural base is essential. The exclusiveness of its vision leads to the "hinduisation" of the nation, and the nationalisation of Hinduism.

Hindu nationalism first appeared as a challenge to colonial rule. It was rooted in the fear of inferiority, weakness and domination by foreigners such as Islamic conquests (that started in the eighth century and brought the expansion of Muslim communities) and European, mainly British colonialism (that brought missionaries to India). Hindu nationalists feel that they are in danger of becoming a minority in their own country. In their view, Indian Muslims can always cross the border to Pakistan, which is their home country, while Hindus have India as the one and only country to live in.

Hindu nationalists try to organise people along ethno-cultural lines and strengthen the unity of the Hindu people. They perceive India as a Hindu nation, and Pakistan as a Muslim nation. *The* Muslim is constructed as the archenemy, the root of all evil and representing the total negation of the Hindu way of life. The militancy of the Hindu nationalists revealed itself during the Ayodhya campaign, which lasted many years and culminated in the destruction of the Babri Mosque in the north Indian town of Ayodhya in December 1992. The Babri Mosque, allegedly erected in 1528 by the first Mogul ruler Babur, was torn down by a mob of Hindu fanatics with their bare hands. They claimed that the mosque had been built on the site of a temple commemorating the birthplace of the Hindu deity Rama and justified this attack as an act of Hindu self-assertion against Muslim aggression.

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Hindu nationalists consider themselves to be true secularists. They want to remove the special rights of minorities and introduce a uniform civil code (as promised by Article 44 of the constitution). In India each religious community has its own personal laws. The proposal seems very progressive. But leaders of the Muslim minority criticise it because they perceive their personal laws as a question of identity; they believe that removing them threatens their existence as a group. Other religious groups are not very concerned about this issue.

How do these nationalists define secularism? They refer to the principle of *sarva dharma samabhava*, a Sanskrit term meaning “all religions are equal”. They distinguish it from the concept of total neglect of religion (*dharmanirapekshata*). They think that the state should treat all religions as equal. However, Muslims are generally perceived as second-class citizens by Hindu nationalists; they must accept what they are given.

### III. Prospects of the Hindutva project

Will the Hindu nationalist project succeed? As an optimist, my answer is no.

Over half a century ago the movement organised as a political party: the Bharatiya Jana Sangh (founded in 1951), the forerunner of the Bharatiya Janata Party (founded in 1980). It was voted into power in 1998 and voted out in 2004. The movement seems to have peaked; since losing power its support has declined steadily.

India is an extremely heterogeneous country, and this feature is the best guarantee against parties advocating homogeneity. The *Hindutva* movement propagates a common identity. But it is based on a highly questionable and selective interpretation of the Hindu tradition. It tries to instrumentalise religious symbols for political ends. Defining Hinduism as a religion raises serious problems precisely because of its great diversity. One can only say what it is not. It is impossible to find something like a common base or common thread among the different Hindu traditions.

This heterogeneity is also reflected at the level of the individual and complies with multilayered primordialities within an open-ended self. According to this view, identities are not fixed. Their fluidity allows them to change according to the situation. As a result, individuals live with multiple identities encompassing their caste, their religious group, their village and their region. These complex identities reflect the individual's multiple affiliations.

As the Indian Nobel Prize winner Amartya Sen shows in his book *The Argumentative Indian*, there is a long tradition of argument and disputation in India that makes heterodoxy the natural state of affairs.

Indian secularism is defined as neutrality of the state vis-à-vis the various religious beliefs and communities. This is not understood as signifying the prohibition of religion in the state. On the contrary, neutrality is understood as respect for all relig-

ions and toleration of their free profession, practice and propagation. It is undoubtedly very different from the type of secularism practised in France for example.

To be really successful, the politics of Hindutva would need to homogenise a cultural tradition that has evolved over more than 3000 years. Such a cultural revolution is very unlikely. Moreover, the Hindutva ideology actually rests on a foreign concept of cultural or ethnic nationalism. Hence, paradoxically, the West has found its way into the construction of Hindu nationalism, an ideology supposed to emancipate Hinduness from western cultural influence.

The lack of homogeneity that seems to threaten the unity of the country is actually the essence of India's genius and its greatest strength. One might not be able to control it, but one cannot destroy it either.

## Discussion

The Indian version of secularism attracted a lot of interest. Its "openness" caught the attention of Boutros Labaki, who said it was regrettable that it was not better known and felt it should be promoted abroad. Albert Peter Rethmann was interested in its institutionalisation. He wanted to know who guaranteed this secularism and how it was implemented. This allowed Clemens Jürgenmeyer to explain the Indian system of government and the role the Supreme Court and parliament plays in it. He showed that this issue is extremely complex, especially in cases where individual rights conflict with collective rights. He gave the example of the Shah Bano case (1985), in which the court ruled that a divorced Muslim woman who did not have the means to support herself and her children should be paid maintenance by her former husband. This ruling was not possible under the Muslim family law, so the court had to circumvent it and invoke criminal procedure law, which applies to all people regardless of their religion. Many Muslims saw the Supreme Court's decision as an encroachment on their constitutionally guaranteed rights and even of their identity. So the Indian Parliament, at that time dominated by the Congress Party, passed a bill "The Muslim Women Act (Protection of Rights of Divorce)" that circumvented the Supreme Court's decision and reasserted Muslim law in cases similar to Shah Bano. In this example, both parliament and the Supreme Court acted in ways they thought appropriate to reconcile individual and collective rights within a deeply divided society and a democratic and secular framework.

Clemens Jürgenmeyer also spoke of the difficult issue concerning restrictions on religious conversions in certain Indian states. These laws do not categorically prohibit conversions from or to a certain religion, but actually aim at counteracting Christian and Muslim activities to convert people from Hinduism to Christianity or Islam. In this regard, its lack of an organisational structure and its extreme heterogeneity puts Hinduism at a disadvantage.

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A second theme dominated the discussion, that of intercommunal relations. Leslie Tramontini asked if the Hindutva movement had triggered a similar movement within India's Muslim community. Clemens Jürgenmeyer noted that although undoubtedly large, India's Muslim community of 150 million people is by no means linguistically, culturally or politically homogenous, and is spread out across the country. Muslims do not constitute a majority in any state (except for Kashmir), and they usually do not comprise more than 20% of a district's population. They face an additional structural problem dating from the days of India's partition: their elites migrated to Pakistan, leaving them "leaderless". All these factors prevent them from forming a unified and strong representation in the political arena. Instead, there have been many informal arrangements with the Congress Party, which offers Muslims protection in exchange to their support. When asked if they feel that they are treated as second-class citizens, Clemens Jürgenmeyer said that this is certainly the case; Indian Muslims feel like second-class citizens and all indicators prove their disadvantaged minority status. However, the former Indian president, A.P.J. Abdul Kalam, was Muslim, and one of the leaders of the Hindu nationalist Baratiya Janata Party (BJP), Mukhtar Abbas Naqvi, is Muslim, too. Even some Muslims have voted for the BJP in national and state elections, for example in Mumbai. The BJP national electoral victory in 1998 can be viewed as a case of democratic alternation. There is an elite consensus that democracy is the only game in town, and politicians of all shades respect the parliamentary procedures and the Supreme Court's decisions.

However, like many nationalist parties, the BJP is interested in symbolic issues. For instance, it has established more than 20 chairs for Vedic mathematics and astrology in various universities. It had schoolbooks rewritten to reinterpret history in accordance with its ideology. With the emergence of a new coalition government under the leadership of the Congress Party in 2004, these measures have been brought to an end.

Dominik Hanf wanted more details on the way intercommunal conflicts arise and are dealt with. Clemens Jürgenmeyer discussed the 2002 riots in Gujarat (western India), at a time when the state was run by the BJP. The riots were triggered by rumours that Muslims had attacked and set fire to a train in Godhra in which about 60 Hindus - many of whom were pilgrims - died. This was followed by well-orchestrated riots and planned attacks on Muslims: Muslim houses were identified, their doors barred and then set on fire, often with the direct support of the police. There was no intervention by national security forces - at that time the BJP also ruled in New Delhi - so the riots resulted in more than a thousand casualties and some 75,000 refugees, mostly Muslims. In 2008 communal violence erupted between Hindus and Christians in the state of Orissa (eastern India). After a few days, paramilitary troops were sent to restore order. One should note that communal violence does normally not spill over to other parts of the country. In most cases they are restricted to one locality or region. This was even the case with Ayodhya in 1992. Hindu nationalism is actually a north Indian affair. In the southern states there are other ideological constructions, such as Tamil nationalism.

The discussion ended with Theodor Hanf deducing some hypotheses from the Indian example. The choice between ethnic and civic variants of nationalism could depend on the power constellation in countries. Ethnic or religious nationalism is chosen if the national majority group feels threatened. This was the case in Germany where German nationalism was created during the Napoleonic wars. India represents an opposite case in which the Hindu majority is sure of itself and feels no threat to its power. It can thus afford to be generous, electing for instance a Muslim president in an overwhelmingly Hindu country.

# Islamisation or Malayisation? The Tricky Case of Ethnicity in Malaysia's Plural Society.

LESLIE TRAMONTINI

The presentation is based on two recent surveys of Malaysians' attitudes to interethnic and inter-religious coexistence.

Academics have described Malaysia as an ethnocratic system with some multicultural features. Since the country's independence, there has been growing Malayisation, a top-down process, and Islamisation, a bottom-up process.

In the 1980s, Prime Minister Mahathir Mohamad fell into the Islamic stream, becoming one of its more prominent promoters.

In Malaysia, ethnicity has always been politicised. But there is a growing awareness and insistence on Islamic identity.

Mahathir tried to combat the "Sinocisation of the economy" as he called it, and promoted Islamisation. This Islamisation is perceived as Malay ethnic dominance and has negatively affected interethnic coexistence. It has also increased inner-Islamic conflict.

## I. An overview of Malaysia's ethnic diversity and policies

Malaysia is a federation of thirteen states and three federal territories. It is a constitutional elective monarchy: a Council of Rulers (*Durbar*) comprised of nine sultans (who rule nine of the Malay states) elects one of its members as king (with the title of *Yang di-Pertuan Agong*) for a period of five years.

The population of Malaysia is multiethnic. Of its 27 million inhabitants, about 61% are Malays, 23% Chinese and 7% Indian. Ethnic affiliation closely correlates with religious affiliation: 57% of Malaysians are Muslim, 18% Buddhist, 7% Christian and 6% Hindu.

Malay ethnicity is clearly defined. A Malay is a person who professes Islam, speaks Malay and adheres to Malay customs (Art. 160.2 of the constitution). This culturally based definition allows for clear-cut ethnic policies. Malays receive special treatment on the basis of a quota system. Quotas were introduced during British colonial times and are still effective today. When the country became independent and a constitution was drafted (1957), a gentlemen's agreement, locally referred to as the "social contract", provided non-Malays (non-indigenous Chinese and Indian communities) with citizenship in return for their recognising special privileges to the Malays, "the children of the soil" (*Bumiputra*). Article 153 of the Constitution bestows on the king (*Yang di-Pertuan Agong*) the role of safeguarding the special position of

the *Bumiputra* and allows the federal government to protect this group by establishing quotas in the civil service and in education (universities and scholarship).

As for religion, Islam is the official state religion. However, the constitution recognises religious freedom. National holidays include Muslim and non-Muslim holidays (Hindu, Buddhist and Christian). Nevertheless, religious freedom is curtailed by a provision that prohibits proselytisation among Muslims. The state has a dual court system: a secular court system, and a *shari'a* court system (called *Syariah*) that has limited jurisdiction over matters of Islamic law (*shari'a*) and cases concerning Muslims. Other religious groups do not have religious courts that apply their religious laws. Islam is not a federal, but a state matter. Each state within the federation has its own system organising state-religion relations. In states ruled by a sultan, the latter is the head of the Muslim community, and each state issues its own *shari'a* law, which results in many divergences in religious matters. Nevertheless, there is the widespread view that the federal state has a duty to support Islam.

Generally speaking, there is a communal power balance in which the Chinese hold economic power, and the Malays political power. In 1969, the largely Chinese opposition achieved an electoral success in the capital city. This caused panic within the Malay population and its elites and provoked widespread ethnic violence and bloody riots. A state of emergency was declared and parliament was suspended. In 1971, the government launched the New Economic Policy (NEP), a vast socio-economic program planned to reduce or even eradicate poverty. As the Malay group was the poorest, it introduced affirmative action programs favouring Malays that sought to restructure society. The object of the NEP was to change the status quo by reducing economic inequality between the different ethnic groups that threatened the state's stability and cohesion by increasing the share of the *Bumiputra* in the economy to 30% (from less than 2%). Although it failed to achieve this goal, the Malay share in the economy increased dramatically.

The unintended consequence of this policy was to reinforce ethnic awareness.

With increased ethnic awareness came the gradual Islamisation of society. The process was at first bottom up. It was promoted by the Da'wa movement (*dakwah*), a mostly middle-class phenomenon popularised by youth organisations in the 1970s. The movement was driven not only by the Arab (and later Iranian) influences, but also by the grievances of Malays. A general idea gained hold that economic backwardness was a result of failure to adhere to Islamic principles.

## II. Political parties escalating the religious race

There are two dominant parties representing the Malays: The United Malays National Organisation (UMNO) and the Islamic Party of Malaysia (PAS).

The United Malays National Organisation (*Pertubuhan Kebangsaan Melayu Bersatu*) was created in 1946. It cooperated with the British and became the dominant

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party in the ruling coalition (the National Front, *Barisan Nasional*) after independence. It has gradually Islamised in recent decades because of social pressure. This process shows the extent of the mainstreaming of Islamic demands.

The Islamic Party of Malaysia (*Parti Islam Se-Malaysia*) traces its roots to *Hizbul Muslimin*, founded at the end of the 1940s. It has a clear Malay national component, and strives to establish an Islamic state. It has nearly always been in the opposition. The party fights a battle over representation.

In the late 1980s Islamic banking was introduced and an Islamic university was established. Courses on Islam became compulsory. The ruling coalition decided to maintain the purity of Islam. As a consequence of this mission, new laws were issued that gave governments the right to persecute deviant Muslims. *Ahmadiyya*, a religious movement of Indian origin, was declared deviant and its followers were stripped of their Malay privileges. Shiites are also closely monitored. There is a growing pressure to introduce *hudud*, a category of punishment found in Islamic criminal law. Both UMNO and PAS are escalating the religious race. *Barisan Nasional* is caught in a dilemma and is trying to marshal political and theological arguments against the introduction of *hudud*.

When Mahathir was prime minister, he promoted a kind of Islam he called “progressive” He wished to modernise the country without secularising it. His approach was grounded in the doctrine of Islam as *din wa dawla* (religion and state). Widely accepted today as a historic truth, this doctrine is actually a construction of the 1920s, devised as an alternative to the caliphate, which had just been abolished, and gives the state the power to control religion.

In 2003, *Barisan Nasional* issued a declaration in which it called Malaysia an Islamic state. This sparked a heated debate. Claiming to represent mainstream Islam, *Barisan Nasional* suppressed dissenting voices and exposed disunity as a weakness that can be exploited by non-Muslims.

The policy of promoting the Malay language was quite successful. But when the Bible was translated into the Malay language, the state first banned its distribution. The reason behind the ban was that certain words used in the Bible could create confusion (especially the use of the word *Allah taalah* for God) and mislead Muslims. The ban was subsequently described by Abdullah Badawi, then Minister of Home Affairs, as the action of an overzealous bureaucracy and repealed. This incident illustrates that the effects of the instrumentalisation of religion: “They let the tiger loose and now they try to catch it by its tail”.

### III. Conflict between shari’a and state law

The legal system in Malaysia is quite particular. Like many post-colonial states, it has a dual system. Federal civil law is based on common law. Although Islamic law was retained after independence, its scope was limited to a relatively small field.

Under the 1988 amendment of Article 121 of the constitution “all matters related to Islam should be dealt with in Shari’a courts”. The two jurisdictions sometimes overlap and that results in many complications. Article 3 of the constitution defines Islamic law as a matter that falls within the states’ competence. It does not apply at the federal level. Initially, Shari’a was not mentioned as a source of legislation in the constitution.

There has been no fusion of courts, as in Arab countries in the 1950s and 1960s. Islamic courts handle all matters that touch on Islamic law. All courts are in principle subordinate to the Supreme Court, but in reality, the Supreme Court will not override decisions taken by the *Syariah* court.

An illustration of this is the very controversial case of Kartika Sari Dewi Shukarno. Kartika is a female Malay Muslim who was sentenced to six strokes with the cane by a *syariah* court for drinking alcohol in public. There are actually many different *shari’a* legislations in Malaysia (each state having its own), and in only three states is alcohol consumption considered a crime. This ban is only enforced against Muslims. However, under civil law a woman may not be caned. Such a case raises many questions about the conflict between state and *shari’a* law, about equality before the law and non-discrimination.

These problems also arise in cases of conversion. Conversion out of Islam is socially not accepted. But there are legally no grounds under federal law to prosecute those who convert from Islam. Nevertheless, some states within the federation consider these cases as falling under *shari’a* law and try them under apostasy laws. In 1999, the Supreme Court supported this approach by ruling that religious conversions lie solely within the jurisdiction of Islamic courts and not secular courts. A Muslim who wants to convert to another religion must get explicit permission from a *syariah* court, which is not an easy matter. Because of the prominence of the strict *Shafi’i* school of Islam and the ever-growing influence of *Wahabi* thought, *syariah* Courts will most probably not issue such an authorisation. In the 1980s, this would have been easier. Thus, religious freedom is not guaranteed for Muslims.

There is a new tendency to consider *shari’a* as superior to the constitution. But this highlights a fundamental misconception and confusion between *shari’a* and *fiqh*. Every law that is derived from religious texts is automatically a human product. But the interviews that we conducted show that there is widespread ignorance about this. Few people know anything about *ahl al Kitab*. There is general agreement that riots like those of 1969 should be avoided at all costs, and that Muslim unity should be a national priority. Most interviewees agree that the state has the right to control behaviour and conduct.

Worldwide developments affect Malaysia. There is a growing division between fundamentalists and the others, and a worsening of interethnic relations. Islamisation is perceived by non-Malays in ethnic terms. It is a matter of labelling. A rose is a rose by any other name. Non-Malays equate Islamisation with Malayisation. However, Islamisation has affected more Malays than non-Malays. Moreover, the privileges

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that Malays enjoy under the “social contract” were introduced as temporary measures. Their perpetuation is problematic and effects interethnic relations.

Last year’s elections produced signs of change. UMNO won the elections, but lost its two thirds majority, as well as several states. It faces a stronger opposition, the People’s Front (*Pakatan Rakyat*), a coalition of the Islamic PAS and the mainly Chinese Democratic Action Party. This opposition front has called for more social justice, human rights, and anti-corruption measures. There is also a noticeable change in the discourse within the UMNO, as illustrated by its “1Malaysia” campaign that emphasises ethnic harmony, national unity and meritocracy.

## Discussion

A central point much discussed following Leslie Tramontini’s lecture was that of the general effects of the Malaysian quota system. She noted that it created some frustrations among Malaysia’s different ethnic groups. Theodor Hanf gave examples to illustrate the different reactions that it provoked. Wealthy people have no problem getting around it. Chinese companies that cannot win government contracts find other opportunities in the private sector. As for quotas at universities, wealthy Chinese send their children to Singapore and Australia to avoid discrimination. Indians are probably the most frustrated group, regardless of whether they are Muslim or not. They have expressed their discontent in protests and riots.

The main factor of democratisation in Malaysia is the translation of the original ethnic conflict with its religious overtones into a socio-economic conflict.

The opposition of PAS is also very interesting. It does not speak of an Islamic state, but keeps *shari’a* under the carpet, insisting instead on people’s needs. UMNO has succeeded in silencing the ethnic conflict, but it has become more Islamic in its discourse than PAS. There is a lot of bribery in the Malaysian political system, which is financed by petrol. This allows the government to expand the public administration and integrate huge blocks of civil servants who lack the necessary skills so as to ensure their support.

Several participants wanted to know how Islamisation was progressing in Malaysia and to what extent the government controlled it. Thomas Scheffler wanted to know if there was an equivalent of *Diyanet* (a governmental body that controlled Islamic institutions). Leslie Tramontini pointed out that such a body did not exist because religious affairs are managed not at the federal, but at the state level: each member state in the federation has its own religious legislation and policy; each member state appoints its own Mufti; and each member state manages its own religious education policy. As for the Islamisation of society, one can say that it is progressing in many directions. There are several alternative Muslim groups that are tolerated to a certain degree. One also finds a very active feminist NGO called “sisters in Islam”. They say that they want to beat the guys at their own game using the

same weapons. They support a feminist interpretation of the Qur'an. Another example of this Islamisation is the continuing expansion of Islamic banking.

There was some discussion about the figure of Mahathir. Leslie Tramontini believed that he sat between two chairs. He wanted to keep control over the situation and used Islam for this purpose. However, the brand of Islam he was supporting was progressive. He also supported the spread of the "Asian work ethos". How much he wanted Islamisation is debatable. This is well illustrated in the way he managed the introduction of Islamic criminal law in one of the Malaysian states. In 1993, the Kelantan State assembly introduced a *hudud* bill. The law could not be implemented, unless the federal parliament endorsed it. So the ruling party and its leader had to approve or reject the Kelantan *hudud* law. Mahathir found himself in the uncomfortable position of having to use political and theological arguments to limit the effect and the spread of Islamic criminal law. He came up with some absurd "solutions", such as limiting the effects of the *hudud* bill to Muslims only. This runs counter to the principle of equality, which is central in criminal law, as the principle of equality would mean extending it to everyone.

The discussion ended with the consideration that Malaysia is a case in which guest workers (namely Chinese and Indians) became a real demographic threat to the native population. However, this threat was successfully managed and diffused through legal, political and economic measures.

# Will Indonesia Go Islamist?

FRANZ MAGNIS-SUSENO

## Contradictory signals

Since it was founded, Indonesia has been the exception to what generally is regarded as typical for majority Muslim countries: Indonesia is a secular state in the meaning of Professor Hanf's third category, i.e. a "mixed system". Luthfi Assyaukanie<sup>1</sup> calls it a "religious democratic state", a state that gives no preference to any one religion and is not regulated according to the teachings of a certain religion. Thus, it is not an Islamic state. But it also rejects secularism in the sense of *laïcité*, of restricting religion totally to the private realm. Indonesians expect that their "religious democratic state" behaves in a way compatible with religion in general, appreciates religious feast days, and some, especially Indonesian Muslims, expect certain services from the state, for instance in the area of education or of the *hajj* pilgrimage.

Most Indonesian Muslims have always been strongly nationalistic. Even extremist and "hard line" Muslim groups accept that non-Muslims are in full measure Indonesian citizens. While there have always been petty discriminations and sometimes serious tensions among religious groups, non-Muslims have occupied high positions in the political and military hierarchy of Indonesia. There is real religious freedom in Indonesia (again with many local restrictions); nobody complains when every morning at six o'clock, in cities and the Javanese countryside, Catholic church-bells ring for the *Angelus* prayers, and people can change religion without difficulty, including Muslims converting to Christianity.

After the fall of Suharto, Indonesia quickly established a fully-fledged democratic system with free parliamentary and presidential elections and incorporated an almost complete list of human rights into the amended constitution of 1945.<sup>2</sup> Never has there been such a democratic consensus in the country. One particularly remarkable fact is the steady drop in the number of people voting for Islamic political parties<sup>3</sup> - and this in spite of the fact that during the last 30 years the number of Indonesian Muslims doing their religious duties has gone up steadily.

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1 Luthfi Assyaukanie, *Islam and the Secular State in Indonesia*, Institute of Southeast Asian Studies, Singapore, 2009.

2 It should be noted that this was put into effect by the MPR (the People's Consultative Council, which can change the constitution) under the leadership of the former head of Muhammadiyah, Amien Rais, one of the leading Islamic personalities.

3 In 1955, Islamic parties which campaigned fiercely for an Islamic state got a disappointing 42.88% of the popular vote; in the first free elections after the fall of Suharto, when Islamic tenets were observed much more widely than 40 years earlier, all Islamic parties and nationalist parties with an Islamic background (PAN, PKB) together polled only 35.67%; in 2004 they got 39.69% and in the 2009 elections 27.15%.

But there was always another side. From the very beginning of the Indonesian republic there was a radical Islamic wing. It rejected a "secular" republic and during the 1950s, under the name of *Darul Islam*, it fought a guerrilla war for an Islamic state in Western Java and Southern Sulawesi. At the beginning of the 1980s, it tried a comeback, which culminated in the hijacking of a Garuda Indonesia plane to Bangkok in 1981. During the 1980s, about 3,000 Indonesians fought the Soviets in Afghanistan as *mujahiddin*. Later they became a reservoir of potential terrorists.<sup>4</sup> Many of the later terrorists come from the milieu of the old *Darul Islam*; family ties are very important in the terrorist network.

In the last 20 years, after Suharto's shift towards Islam, tensions between Christians and Muslims have grown, culminating in two civil wars in Eastern Indonesia from 1999 till 2002 (with almost 10,000 deaths). There has been a huge increase in - sometimes pogrom-like - attacks on churches.<sup>5</sup> It has become very difficult to build new churches. In general, intolerance among the people is increasing, in particular toward so-called heretical groups within Islam, such as the *Ahmadiyah*. And while on the national level attempts to make Islamic *shari'a* law state law have been resoundingly defeated, more than 100 local and regional administrations have silently introduced *shari'a*-inspired by-laws that make correct Islamic behaviour compulsory.

A special case was the anti-pornography law of 2008: it was prepared sometime around 2000, but only published by the respective parliamentary commission in 2006. This first text was blatantly sectarian. It would have forced 60% of Indonesian women to change the way they dress while working, going to the market, or attending a reception. Strong protests led to a total remake. The grossly sectarian passages have been removed. Nevertheless, at the beginning of this year the pro-Islamist governor of West Java used the law to demand that traditional *jaipongan* dancers cover up their shoulders.

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4 See Yunanto, S. et al. *Militant Islamic Movements in Indonesia and South-East Asia*, Friedrich-Ebert-Stiftung/The Ridep Institute, Jakarta, 2003.

5 The Forum Komunikasi Kristiani lists 938 churches (up to 1 June 2004) that were closed by violent attacks, many of them destroyed or burned down, since 1945: two churches during the presidency of Sukarno; 456 under Suharto, most of them after 1990; and the rest under the following three presidents. Excluding approximately 250 churches that were destroyed during the civil war in Sulawesi and the Molukkas (where mosques were also destroyed), you still have 688 churches that were attacked in that period. Altogether, there have been six pogrom-like attacks on churches in which a number of churches in a certain area were systematically attacked and usually destroyed (Surabaya, Situbondo, Tasikmalaya [1996], Rengasdengklok [1997], Jakarta/Ketapang [1998; this was followed two weeks later by Christian riots in Kupang that lead to the expulsion of Muslim Bugis people] and on the island of Lombok [2000]; the worst case was in Situbondo, Eastern Java, where all 25 Christian churches in and around the city were systematically burned to the ground).

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There is a silent movement toward “thick Islam”,<sup>6</sup> as an Indonesian observer expressed it, meaning that for people in general their Islamic identity becomes more important. In all that they do they want to express themselves as being Muslim: in their family life, while eating, playing sports, in their modern professional life and in their recognition by neighbours and others. This does not mean that they become negative or aggressive. It just means they want to say “I am a Muslim, I want to live as a Muslim, and I want you to acknowledge this”. This can go further. There are movements to build special “Muslim villages” (“villages” in the sense of middle-class apartment housing projects in big cities), indicating a tendency to exclusivity. It can mean openness to Islamic teachers who insist that Muslim children should not associate with non-Muslim children. This is often deplored by Muslims themselves as sectarian; people still like to stress that they can easily communicate with neighbours without regard to religion (“we played soccer together”). The number of women wearing Islamic headscarves and even *burqas* - something not seen in Indonesia until a few years ago - is steadily increasing.

In Indonesia, there are about 14,000 *pesantrens* (traditional Islamic boarding schools, most of them associated with the big traditionalist *Nahdlatul Ulama* organisation) registered by the department of religions, and possibly some 25,000 more unregistered ones. Generally they are regarded as not extremist. But if only 50 of them taught jihadist ideology and, say, send out 20 *santris* every year into society, this could mean that every year 1,000 young men and women enter society with a mindset that views terrorist activities positively.

This raises the question whether Indonesia will stay a democratic state where human rights, religious freedom and pluralism are guaranteed. Or will it succumb to a *salafi* ideology which, in the end, would mean an end of democracy and religious freedom?

## How Indonesia came about

To answer this question we need to look at the development of Indonesian Islam over the last century. Especially important is the question of the creation of Indonesia itself.

We can proceed from the fact that Indonesia is probably the most plural country on earth; a glance at a map makes one wonder how this collection of more than 1000 inhabited islands could become one country. In 2009, Indonesia has about 240 million people. A century ago, at the beginning of the nationalist movement, the population of the Dutch East Indies was less than 50 million inhabitants. Almost 60% of all Indonesians live on the island of Java (i.e. more than 130 million people, making Java/Madura, with more than 1000 inhabitants per square km, one of the most

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6 Achmad Munjid, “Thick Islam and deep Islam”, *Jakarta Post* 16 August 2009; the author is president of the *Nahdlatul Ulama* Community in North America.

densely populated places on earth). Indonesians speak hundreds of languages. The Javanese, the original inhabitants of Central and Eastern Java (now about 96 million) are the biggest ethnic group, followed by the Sundanese (Western Java) and then the Madurese (also on Java and the small island of Madura). On Sumatra alone you have about 20 different native languages. More than 85% of all Indonesians regard themselves as Muslim, about 10% are Christian (one third of them Catholic) and 1.5% are Hindu (the original inhabitants of the island of Bali); the rest are Buddhists, Confucians and adherents of indigenous and some other small religions.

This situation in the Dutch colony of the East Indies confronted the indigenous people with three questions: Why should we stay together? What would be the relation of the dominant island of Java and of the Javanese to the non-Javanese and to the outer islands? And what should be the position of Islam as the religion of the great majority in an independent Indonesian state?

The first question was answered by the nationalist movement: we want to stay together, we feel we are one nation because of our common experiences: the insults, injustice and brutality of colonial suppression and our fight for independence which involved four years of armed struggle against the Dutch after World War II.

The second question was answered by one of the most important decisions nationalist young Indonesians took in 1928 (the "oath of the youth"), namely to choose the Malay language, spoken as mother tongue by less than 5% of all Indonesians, instead of the Javanese language as national language. This choice not only gave Indonesia an excellent national language, but a language that did not lend itself to any hegemonic use.

The third question was solved by *pancasila*. On day after the proclamation of independence (17 August 1945), Indonesians gave themselves a constitution which stipulated that Indonesia belongs to all Indonesians regardless of their religion; thus, it did not give Islam any special status. This is formulated in the five principles the constitution says Indonesia is based on, i.e. *pancasila*,<sup>7</sup> whose first principle is "belief in one God", a formulation that expresses that Indonesia is supportive of religion without singling out one specific religion (which, of course, would have been Islam). It should be noted that *pancasila* was unanimously accepted by a representative congress (PPKI), almost all the members of which were Muslim.

What made Indonesians accept such a wise pluralism? I believe that two factors accounted for this: a traditional culture of tolerance and pluralism, and Indonesian nationalism.

Indonesians were always used to a great plurality of cultures, customs and religious beliefs. They could live together and traded among themselves through the islands because they respected these plural identities. History taught them that it pays to be tolerant and have an open attitude. Islam itself (as Hinduism and Buddhism before it) entered Indonesia mostly in a peaceful, osmotic process, respecting local

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7 First formulated by Sukarno on 1 June 1945

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customs, even when they seemed not to comply with Muslim law. Accordingly, till this day the strongly (but not fanatical) Muslim Minang in Western Sumatra hold on to their matrilineal social structure. Similarly, for most Javanese the best known figures from ancient times are not the friends of the prophet or the rightly guided first caliphs, but the heroes of their shadow plays which are all taken from the Indian epics Mahabharata and Ramayana. The Javanese, specifically, retain many pre-Islamic, mainly Hindu, customs and beliefs and stress that what is decisive for the religious quality of a person is not his or her obedience to formal religious law, but refinement of, and obedience to, one's inner feeling.

## Indonesian Islam, nationalism and democracy

But in my opinion, it is Indonesian nationalism that holds the key to Indonesia's later development, including the development of political attitudes of Indonesian Islam. Most Indonesians were, of course, Muslims, without question, although their religiosity and cultural orientation varied considerably. I will skip over the quite important (and in Indonesia fully acknowledged) role Christians and Hindus played during the struggle for independence and later in Indonesian politics.<sup>8</sup> A short survey of how Indonesian Muslims positioned themselves towards nationalism will show that "the history of Islamic political thought in Indonesia is the history of progress and transformation towards moderation".<sup>9</sup>

For our purposes it is useful to note that there are two streams of Islam in Indonesia: mainstream Islam, which consists of very different forms, and a much smaller extremist stream. They have always existed in Indonesia, but whether they appear on the surface depends largely on the political constellation.

## Mainstream Islam

Within mainstream Islam, we can distinguish, using the terminology of Clifford Geertz, between *abangan* or "Muslim nationalists" and *santri* or "nationalist Muslims". "Muslim nationalists" are primarily Indonesian nationalists who also happen to be Muslim. Both Sukarno and Suharto were nationalists who were also Muslim. "Nationalist Muslims" on the other hand have a strong Islamic identity. They feel Muslim, but they are also Indonesian nationalists. *Abangan* (literally "the reds", as Clifford

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8 I may mention that the second Indonesian prime minister (1947-48), Amir Sjarifuddin, was a Protestant, as was Tahi Bonar Simatupang, Army Chief of Staff (1950-1954), while the most powerful Indonesian after President Suharto was the Catholic General Benny Murdani, Commander in Chief of the Armed Forces from 1983-1988.

9 Assyaukanie, op.cit. n. 57

Geertz famously described them,<sup>10</sup>) only exist, of course, among the Javanese. They were only slightly touched by Islam, most of them did not fully comply with Islamic duties (like praying, fasting, etc.), and their religious identity was defined more by older Hindu and original Javanese traditions. Many of them were decidedly anti-*santri* (Muslims in a more formal sense). Outside the Javanese the "Islamic nationalists" were fully Muslim, but Islam did not determine their political attitudes. The Islamic nationalists (together with the non-Muslims) made sure that in 1945 Indonesia did not become an Islamic state (Indonesia's constitution of 1945 makes no reference at all to Islam: it guarantees the same human and civil rights to Indonesians regardless of their religious orientation).

The *santris* (meaning literally people that went through the Islamic boarding school system, the *pesantrens*) felt strongly Islamic, wanted to build an Islamic state and an Islamic society, but they were Indonesian nationalists nevertheless. There are still two big groups among the *santries*: the "traditionalists", most of them organised in *Nadlatul Ulama* (NU) since 1926, and the "modernists" ("modernists" because they were strongly influenced by the Islamic renewal movement initiated by Al-Afghani and Muhammad Abduh at the end of the nineteenth century in Egypt), whose organisation *Muhammadiyah*, founded in 1912 in Yogyakarta, has mild Wahabist leanings.

The decisive parameters were set in 1945, when Indonesia declared independence from the Dutch, and gave itself a constitution. The Muslims (abbreviation for the "nationalistic Muslims") had to, and did, accept that an Islamic state was out of the question. All agreed on the five principles of *pancasila*, which imply that Indonesia is a religious state, where religion plays an important role, but where all religions enjoy equal recognition.

Now the most important point is that the Muslims from the very beginning were both nationalists and democrats. In fact, the strongly Islamic *Masyumi* party which always fought for an Islamic state, was the strongest force supporting Western style democracy during the first 20 years of the republic (in 1960, under Sukarno's "guided democracy" *masyumi* was outlawed). And they were all in a strong sense Indonesian nationalists. For the Muslims, nationalism and democracy was compatible with the ideal of an Islamic state. What they meant by "Islamic state" was a state where all citizens, regardless of religion, had the same rights, but only a Muslim could be head of the state and where Muslims had to live according to Islamic *shari'a* law.

In the (free) elections of 1955, Islamic parties only got a disappointing 43% of the vote, which ended their dream of an Islamic state elected by an Islamic majority. When Suharto took over from Sukarno in 1966, political Islam was given no room. Suharto used *pancasila* to build a state ideology. The state, in this perspective, was strongly religious, but guaranteed religious freedom and did not allow one religion - Islam - a dominant role.

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10 Clifford Geertz, *The Religion of Java*, The Free Press, New York, 1960.

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But while the older *masyumi* generation rejected the new system, a younger *santri* generation accepted the new order. They wanted to work together with the government. Luthfi Assaukanie calls their idea the "religious democratic state" (as opposed to the older ideal of the "Islamic democratic state").<sup>11</sup> Equal recognition of non-Muslims was no longer a problem for them. Some of them, especially Nurcholish Madjid with his "Islam yes, Islamic parties no", and Abdurrahman Wahid - who from 1999 till 2001 was Indonesia's fourth president - went much further. The young Nurcholish famously declared that secularisation was the logical implication of a religion that acknowledged a transcendent God. Thousands of young Muslim intellectuals went to his *Paramadina* evening lectures where they were introduced to an open, inclusive, secular Islam. Abdurrahman Wahid went still further. He rejected all state intervention in religious affairs, supported total religious freedom and gave religion within a secular state the function of ethics. Wahid was later head of the 40 million-strong NU for 15 years. During this time a whole generation of NU youth grew up which enthusiastically embraced contemporary ideas of democracy, religious freedom and pluralism.

After Suharto fell, leading NU and *Muhammadiyah* figures declared that they did not support the idea of an Islamic state. Former *Muhammadiyah* head Amien Rais presided over the inclusion of a full list of human rights in the Indonesian constitution. The results of the first free elections after the fall of Suharto in 1999 were a shock for those Muslim politicians who had again raised the issue of an Islamic state (an "Islamic democratic state" according to Assaukanie). Their parties only received 16% of the popular vote, and all Islam-based political parties together got only 36%. Again it was shown that the majority of Indonesian Muslims are "Islamic nationalists" who will not vote for Islamic parties. The elections in 2004 and 2009 confirmed this fact.

There are a considerable number of Muslim intellectuals and youth - both of NU and *Muhammadiyah* background - who support liberal positions, some of them calling themselves "liberal Muslims".<sup>12</sup> They stand for pluralism, liberal democracy and secularism and fiercely defend religious freedom. They are a relatively small minority but they are out in the open.<sup>13</sup> Although disliked by middle-of-the-road Muslims, they do open the eyes of the Muslim community to alternative ways of interpreting Islam.

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11 Ibid.

12 For instance *Jaringan Islam Liberal* (JIL, "Network of Liberal Islam"), founded in 2001 by Ulil Abshar Abdallah, with its famous centre in Jakarta at Utan Kayu 68A.

13 Last year, I attended a seminar organised by the JIMM (*Jaringan Islam Muda Muhammadiyah* network of *Muhammadiyah* youth) that discussed questions of hermeneutics, multiculturalism, religious pluralism, democracy, gender equality and civil society. Although sharply criticised by some older *Muhammadiyah* people, this three-day conference took place at the *Muhammadiyah* University in Malang and was opened by the rector of the university. Cf. Ghazali, Abd Rohim, Zuly Qodir, Amad Fuad Danani, Pradana Boy (ed.) *Muhammadiyah Progressif: Manifesto Pemikiran Kaum Muda*, Jaringan Islam Muda Muhammadiyah (JIMM), Lembaga Studi Filsafat Islam (LESFI), Jakarta, 2007, in which young

Summarising, we can say that the whole mainstream of Indonesian Islam is deeply reconciled with *pancasila*, with Indonesia's "religious democratic state", in which Islam has no constitutional and legal special position, but as the majority religion enjoys strong support from the state, especially through the ministry of religion. Indonesia's mainstream Islam was always strongly nationalistic. What quite easily unites Muslims, Christians, Hindus and Buddhists is the challenge of guiding Indonesia through all kinds of difficulties. As long as ideology does not suddenly become a bone of contention, economic issues, welfare, the eradication of corruption and pride as Indonesians vis-à-vis other states (especially Malaysia and Australia) are issues that really interest people.

Since Indonesian mainstream Islam never had difficulties with democracy (interestingly, reservations about "western" democracy came from the Java-based secular nationalists and communists who in the 1950s supported Sukarno's guided democracy), there are reasons to be optimistic about the future of democracy in Indonesia. This does not mean that Indonesia will become less Islamic. Quite the opposite, the classical *abangan* seem to have mostly disappeared (or gone under water), but the majority of fervent Muslims are still "Muslim nationalists", as are even the "nationalist Muslims", precisely because they too are nationalists and have long got used to Indonesia's *pancasila* brand of a secular state.

## Creeping fundamentalism?

Now we need to look at the relatively small group of Indonesian Muslims who have always striven for a fully Islamic state and society. In the 1950s, a *Darul Islam* movement launched a rebellion in Western Java and Southern Sulawesi with the aim of establishing an Islamic state. They rejected the Indonesia of 1945 as "kafir" (heathen). They were finally subdued in the 1960s. Most of today's terrorists are third generation *Darul Islam* people. "Converted" terrorists point to the importance of family networks for the jihadist movement. The people behind the short spat of terrorism in the early 1980s, including the aircraft hijacking to Bangkok, came from the same *Darul Islam* background.

During the 1970s, the writings of Abul Ala Maududi, Hassan al Banna and Sayyed Qutb began to be read by Muslim students at the big secular state universities of Indonesia, which became hotbeds of Islamic fundamentalism. These students were autodidacts and thus did not get their understanding of Islam from the *kiais* or the

Muslim intellectuals both of NU and Muhammadiyah background discuss daringly "progressive" theological positions. Novriantoni (ed.) *Septah 'Kata Kotor': Sekularisme di Asia*, Jakarta, 2006; the highlights are Siti Musdah Mulia's article on gender and Goenawan Mohammad's article on secularism.

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state-run Islamic universities (IAIN, UIN), which generally taught a more open, pluralistic Islam.

During the 1980s, about 3,000 Indonesians joined the *mujahiddin* that fought the Soviets in Afghanistan. After their return, they became a reservoir of potential terrorists. Following the democratic opening after the fall of the Suharto regime in 1998, extremists and radicals were able to openly propagate their hard-line Islamic agenda for the first time since the 1950s. Bookshops were flooded with Islamic literature, much of it propagating a fundamentalist, hard-line, intolerant brand of Islam. Islamic-inspired terror movements landed their first coup with the Christmas bombings in 2000, when within an hour 30 bombs exploded close to Christian churches in an area stretching about 2,500 km (from Medan and Batam to Lombok), killing 17 people and injuring more than 100.<sup>14</sup>

It is difficult to estimate how far this often *salafi*-inspired Islam siphons off support from the moderate, mainstream NU and *Muhammadiyah*. Muslims of both groups view the following two organisations with strong suspicion: the PKS (the Justice and Welfare Party, *Partai Keadilan Kesejahteraan*), a political party that proclaims that it is interested not in an Islamic state, but in an Islamic society, and *Hizbuth Tahrir*, a Middle-East based, non-political and non-violent organisation (outlawed in many Islamic countries) that wants to restore the caliphate. The development of PKS is interesting. PKS had its basis among students of the big secular universities. In the elections of 1999, when it campaigned on a strongly Islamic basis, it got 1.36%. In the 2004 election campaign, it avoided any Islamic goals, concentrated on social justice and the eradication of corruption, won 7.34% of the votes and became the strongest party in the capital Jakarta with 22%. But in the 2009 elections, although it became the strongest Islamic party with 7.88%, it won far less than its projected 18 to 20%, and lost Jakarta to the Democratic Party of incumbent president Susilo Bambang Yudhoyono. Have they peaked? In the 2009 elections Islamic and Islam-inspired parties got their worst results ever with 27.15% of votes cast.

Thus, there is a purist exclusivist undercurrent in Indonesian Islam. A deeper Islamic awareness in general is reflected in growing intolerance towards others in Indonesian society. Reacting to this current, in the last four years more than 100 local

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14 These bombings were only possible with superb planning and logistics. This was the reason why the Indonesian Peace Forum, founded by Muslims a few hours after the bombings, believed that it was impossible that they were planned and executed without support of the only institution in Indonesia that had the necessary network comprising the whole of Indonesia, transportation facilities and access to bombing materials. The Christmas bombings were never seriously investigated by the police. Only after the (first) Bali bombers were caught did it transpire that these bombers were also connected to the Christmas bombings. After this bombing, the police took a completely different attitude; within a relatively short time they solved the bombings and caught the bombers. Since then they have solved every terrorist attack within an astonishingly short time. This proves that they could have easily found who was behind the Christmas bombings, but obviously their hands were tied.

and district administrations have introduced *shari'a*-inspired by-laws, thus making society more Islamic. The use of Islamic attire, especially among women, has increased dramatically. More and more women wear headscarves and even the formerly unknown whole body *hijab* is now quite a common sight.<sup>15</sup>

Behind this there is a growing focus on religiously defined identity.<sup>16</sup> More and more Muslims (and some Protestants too) want to make a statement in every situation that they are Muslims (or Protestant Christians).<sup>17</sup> This does not mean that all are intolerant, narrow minded, or anti-pluralistic. But it does mean that for them religion is the overriding factor in their motivation. From this preoccupation with religious identity it is only a small step to a worldview in which values that are not explicitly legitimised by their respective religion do not count. Thus there is the danger of a myopic view of people (one is reminded of Rorty's "metaphysical liberal" who only behaves positively towards others if he can find a rational reason<sup>18</sup>).

## The future is open

In which direction will Indonesia develop? Will Indonesia's still somewhat shaky democracy stabilise and become a solid democracy in which human rights, religious freedom and pluralism are no longer questioned? Or will Indonesia slowly move towards a more Arab Islam that forces upon Muslims uniform "Islamic" behaviour, where Arabic street names replace indigenous Indonesian names, where religious freedom is increasingly limited, where it will become increasingly difficult to build churches, Hindu *puris*, or Chinese *klentengs*, and where the freedom to change one's religion, or at least to leave Islam, will be eroded?

There is no doubt that Indonesia is undergoing an internal Islamisation. This began under Suharto who suppressed political Islam, but promoted the practice of Islamic piety. Most Muslims seem now to fulfil their religious duties, and are proud of it. A growing number of Muslims want to show their Islamic identity through their Islamic attire. Things Islamic are in. The bookshops are full of books about Islam, about the right way to pray and to fulfil one's Islamic duties. There are now housing projects exclusively for Muslims.

But this alone does not answer our question. That extremist Islam is much more in evidence than it was 15 years ago does not necessarily prove that its numbers have increased. As pointed out earlier, Indonesia has always had Muslim extremists

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15 Ironically, since the wives of shot or captured terrorists appeared on television always in a full veil leaving only slits for the eyes, such attire is now associated with terrorism, and women appearing in it in public places complain that other people obviously mistrust them.

16 See Achmad Munjid, *op. cit.*, n. 62

17 While many Muslim begin every kind of public appearance with an "*Assalamalaikum*", in the past ten years many Protestants have taken to opening their speeches with "*Shalom*".

18 Richard Rorty, *Philosophy and the Mirror of Nature*, Basil Blackwell, Oxford, 1989.

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and they have never influenced other people much. But they now use the country's new democratic freedom to propagate their ideas.

But will this growing Islamisation mean a creeping *salafisation*? This would mean that groups like *Hizbuth Tahrir* would slowly subvert traditional NU and *Muhammadiyah* Islam. Both organisations are in fact very worried that precisely this could happen. They are also extremely suspicious of the above-mentioned PKS.<sup>19</sup> This party works intensively with high school students and sends them weekly letters, creating in the process Islamic cadres. On the other hand the popularity of PKS has peaked. After getting into office in several places around Jakarta they have lost their innocence in the eyes of the people.

Indonesian non-extremist Muslims still fall into two categories: Either nationalist Muslims who want Indonesia to become an Islamic state, but in a soft sense, or Muslim nationalists who do not want the state to take on a specific Islamic identity (although they expect from the state certain services, most of which are channelled through the department of religion). Thus Indonesia clearly falls into the basket of mixed systems. Strict secularism, in the French sense is advocated by only a small number of liberal Muslims (like JIL, *Jaringan Islam Liberal*, "Network of Liberal Islam") and they are much resented by mainstream Muslims (not to speak of the extremists). But the number of nationalist Muslims has been decreasing steadily. Religious parties are now much weaker than they were 50 years ago and have lost further ground since 1999. A growing number of Indonesians, while practising Muslims, associate their state and political outlook with nationalism and not with Islam. The great majority of Indonesians are convinced that in Indonesia members of all religions should be treated equally.

Some research has produced worrying results. The number of Muslims supporting certain elements of *shari'a* law, including *hudut* law, is relatively high.<sup>20</sup> But this does not automatically mean that they support an Islamisation or Arabisation of Indonesian society. It may be that they are just worried about the general moral decline and consider these Islamic sanctions more effective at reining in moral decline, in much the same way as in some Western countries a considerable number of people support the re-introduction of the death penalty for certain crimes.

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19 Several times, Muslim friends compared PKS with PKI (the old communist party). Some said that *Hizbuth Tahrir* uses Leninist tactics. What they mean is that they try to take control of other Islamic organisations in a subversive way; "First they sweep the ground around our mosque, then they sweep inside our mosque, then they provide the *chatib* (the Friday preacher), and then they take over our mosque," a Muslim friend told me. The comparison with the communists is extremely problematic since 44 years ago Muslims in Eastern Java killed several hundred thousand "communists" after the 1 October 1965 coup.

20 A national survey conducted in 2005 by *Lembaga Survei Indonesia* (LSI) found that 48% of all Indonesians supported stoning for adultery, 38% support the cutting off of a hand for theft, while 8.9% supported the kind of terrorism that took place in Bali.

The future development of Indonesia will probably depend not so much on developments within Islam as on two other factors. The first is whether our present system of pluralistic democracy will deliver in terms of justice, peace and prosperity. When Indonesians see and experience that their open democratic system gives them hope at least for the future of their children they will not allow it to be hijacked by fundamentalists. But if poverty does not decrease, and half of the population continues to just get by, while at the same time a growing middle class becomes richer and richer, people might lose faith in democracy.

The second point is no less decisive. Politicians, particularly parliamentarians, are currently held in very low esteem. They are regarded as lazy, self-serving and corrupt. Politics is perceived as "money politics". This cannot continue without severely damaging the democratic political system.

In other words, if Indonesian politics make people feel that things are going the right way, and corruption in the political process is reduced, Indonesia has, in my opinion, a very good chance to develop into a stable, strong, pluralist and prosperous democracy. The Javanese describe their ideal society as "*adil makmur, gemah ripah loh jinawi, tata tentrem kerta rahaja*"<sup>21</sup> which means "just, prosperous, abundantly rich, well ordered, peaceful, prosperous and wealthy".

They, and their countrymen in general, do not expect a perfect society. But Indonesians hope it can fulfil their basic needs.<sup>22</sup> This demand of the people can clearly be fulfilled. Thus the future of Indonesia depends very much on the integrity and expertise of the Indonesian leadership.

## Discussion

Some participants were interested in comparing Malaysia and Indonesia. Leslie Tramontini noted that there were some similarities between the two countries with regard to inner-Muslim conflicts. Franz Magnos-Suseno stressed the differences, noting that one finds greater pluralism and more open-mindedness among Indonesia's Muslim intellectuals and liberals and even mainstream Muslims. He also added that one finds stronger cross-communal ties in Indonesia and gave the example of the trusting relations that were established between Christian leaders and the leadership of *Nahdlatul Ulama* (NU) that helped defuse an inter-communal crisis in East Java which could have degenerated into a pogrom. Christians also have good relations with the other big Islamic organisation, *Muhammadiyah*. These relations did not exist in the 1960s. The future of inter-communal relations in Indonesia depends on

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21 Quotation from President Sukarno's address on Independence Day 1963 titled *Gesuri* ("Gema Suara Revolusi Indonesia", i.e. "Echo of the Voice of the Indonesian Revolution).

22 Which for most Indonesians are the following five items: *sandang* (clothing), *pangan* (food), *papan* (accommodation), plus basic education and basic medical care.

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building and maintaining such relations of trust. Almost 60% of Indonesians live in Java, which is where one finds the best relations between Christians and Muslims. Since the Christmas bombings, NU militias protect churches on Easter and Christmas. One young Muslim militiaman was actually killed during the Java bombing when he carried a bomb out of a church. Theodor Hanf added that among fundamentalists, one finds as many Protestants as Muslims. This is more true among Calvinists than Lutherans. Like their Muslim counterparts, they tend to prohibit alcohol, games and prostitution; but they do not require the headscarf. There are also some problems with Pentecostal groups.

The influence of foreign issues on domestic ones was also discussed. For instance, one can observe an increasing number of public anti-US and anti-Israeli manifestations across Indonesia. A participant wanted to know to what extent they were instrumentalised. Franz Magnos-Suseno believed that some topics and incidents affect the Muslim community throughout the world, and that Indonesia is no exception. These issues leave the Muslim community feeling that it is under attack and suffering unjustly. As for mobilisation, one usually finds *hizbut tahrir* behind it. Theodor Hanf recalled that in 2003, the day Israeli tanks were going into Jenin, a policeman who belonged to the antiterrorist squad told him that Bin Laden was his hero. The spill-over of international events has undoubtedly progressed, and on the news Palestine is mentioned almost daily.

Stefan Leder wanted to know if there was a link between social issues and religious issues, knowing that welfare is important and religion addresses the question of social justice. Welfare can be used in the political game quite effectively to strengthen political support. It sometimes is linked to foreign countries. Franz Magnos-Suseno believed that Islamic parties had not profited from that up to now. Usually, political parties help a lot before elections and very little after that. This has encouraged a very cynical view of politics.

The relationship between state and religion was also addressed during the discussion. Manfred Sing remarked that during the constitutional debates in 1945, the "seven words" that were removed from the Jakarta Charter that became the preamble were not the only change. In addition to the obligation for Muslims to live according to Islamic law, two other expressions were modified because of their Islamic undertone: the preamble was not called *Muqaddima* and the expression *Allah* was replaced by God. *Shari'a* was not mentioned in the constitution, but since the country's democratisation, there has been a build up of Islamic demands. Did this affect personal status? Franz Magnis-Suseno replied that Suharto had actually created a Muslim judiciary; religious courts (*Pengadilan Agama*) exist alongside civil courts, and it is up to people to choose between them. At the national level, there has been no change. But the special territory of Aceh, for instance, introduced *shari'a* (*syariah*) by-laws in 2001. Its regional legislature unanimously passed a law that allows adulterers to be stoned. However, its current governor, Irwandi Yusuf, a former member of the insurgency movement (GAM), opposes this type of punishment. No one knows what the outcome of this issue will be.

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