

Dušan Rakitić\*, LLM (Harvard University)

## SECULARITY AND RELIGIOUS NEUTRALITY IN THE CONTEXT OF DEMOCRACY ORIGINS AND CONCEPTS

*The paper aims to reflect on utility of principles of future articulation of church state relations in democratic political systems, particularly in Western democracies, especially with regard to the requirement that the state and law be secular. Secularity was born and grew in the shelter of the Christian philosophical tradition, not only because that tradition assumed respect for human dignity and fundamental freedoms, but also because the Christian doctrine of two empires served as fertile ground for decoupling of politics and religion. Modern day Western democracy also grew with its roots in Christian heritage and tradition. Consideration is given to the arguments contained in the concept of post secular society, proposed by Habermas, and in the theses of Pope Benedict XVI, which both suggest that secularity is not an end in itself, as well as that religion provides inner bonds of the society, in terms of identity, solidarity, values, political motivation, that are indispensable for the ability of a society to enjoy democratic process. Particular attention is given to understanding the encounter between Western democracy and Islam, as well as to the question whether secularization of Western democracies can proceed further, or should it backtrack, if democratic standards attained in the West are to be preserved and furthered? Out of the three actualized paradigmatic models of secularity in developed democracies of the West – those of France, the U.S., and Germany – key legal aspects of the last two, which both recognize the role of religious organizations in public life, are also considered. The findings shall be employed for a practical purpose: determining which concept, secularity or religious neutrality of the state, can be more useful for conceiving church state relations in democratic political systems, political those belonging to the Western type of democracy, in the future.*

Key words: Secularity. Neutrality. Post secular. Church state cooperation. Corporative Religious freedom.

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\* Lecturer, University of Belgrade Faculty of Law, drakitic@ius.bg.ac.rs.

## 1. INTRODUCTION

The objective of this paper is to reflect on relative utility of principles of articulation of church-state relations in democratic political systems in the future, especially with regard to the requirement that the state and law be secular. Particular consideration is given to understanding the encounter between Western democracy and Islam, as well as to the question whether secularization of Western democracies can proceed further, or should it backtrack, if democratic standards attained in the West are to be preserved and furthered? The findings shall be employed for a practical purpose: determining which concept, secularity or religious neutrality of the state, can be more helpful for resolving these dilemmas, both in theory and in practice.

In the second part a conceptual and historical background of secularity shall be presented, including a differentiation between French *laïcité* and the American concept of separation of church from state, as well as an assessment of the interplay between concordats and secularism. In the third part a selection of theoretical and real-life developments that are deemed indicative of the direction in which secularity may evolve in the future is provided. The fourth part entails a presentation of key elements of contemporary German and U.S. systems of church-state relations, not only because both cases stand on the opposite end of spectrum of actualized models from the exigencies of strict secularism, but also because the concept of religious neutrality of the state is emphasized in both systems.

## 2. SECULARISM CONCEPTUAL AND HISTORICAL BACKGROUND

A claim by Casanova seems to provide a useful perspective on secularism and secularity. He asserted that secularism “is not an end in itself”, but instead “a means to some other end, be it democracy or equal citizenship or religious pluralism”. The instrumental character of the phenomenon Casanova referred to as secularism led him to the conclusion that secularism “ought to be constructed in such a way that it maximizes the equal participation of all citizens in democratic politics and the free exercise of religion in society”, as well as that “one cannot have democracy without freedom of religion.”<sup>1</sup> The latter claim presupposes that majority, or a significant percentage of citizens in subject political community, are believers.

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<sup>1</sup> J. Casanova, “The Secular and Secularisms”, *Social Research* 4/2009, 1062.

### 2.1. Terminological disambiguation: secularism, secularization and secularity

The idea of secular state was born and grew side by side with the concept of individual rights. It emanated from the United States of America and the French Revolution to modern-day democratic countries. The human rights' claim to universal validity generated a similar claim of secularity.

On the philosophical and sociological plane, the process of *secularization* is associated with modernity, as well as with the decoupling of politics from religion. Furthermore, in states with the republican form of government, i.e. in those in which sovereignty was not embodied in a constitutional monarch, secularity of the state, i.e. its separation from the church, amounted to assertion of that state's sovereignty.<sup>2</sup>

Some authors emphasize that secularization as a process may only qualify a society at large, and not a particular state,<sup>3</sup> probably because states usually may or may not be regarded as having attained the quality of being secular (lay). It is widely accepted that modern-day secularization began in Europe and has remained a predominantly European phenomenon. Notable authors have perceived the fact that secularity, stripped down to the requirement of separation of church from state, is peculiar to modern Western democracies of Christian tradition.<sup>4</sup> Certain authors regard Christian tradition as the precondition of secularization, having regard to the doctrine of two separate kingdoms – the spiritual and the worldly government.<sup>5</sup>

Allegiance to secularity is pervasive in modern-day democratic societies. However, the understanding of its contents diverges between two distant meanings – while most societies claim that their political communities are secular simply because they are separated from religious influence, some societies require that political life and exercise of public authority remain completely blind to the existence of religion, while other conceive secularity primarily as reduction of religion to private sphere.

For the benefit of easier understanding, a terminological differentiation should be made between *secularism*, as a doctrine requiring strict

<sup>2</sup> Patrice Canivez, "Le concept de laïcité", *L'Europe à venir: sécularisation, justice, démocratie* (eds. Emilian Cioc, Ciprian Mihali), Actes de l'Université d'été du réseau OFFRES (Cluj, 3-13 septembre 2006), Cluj Napoca, Idea Design & Print, 2010, 3-13, 5.

<sup>3</sup> P. Canivez, 42, 43.

<sup>4</sup> Vincent P. Pecora, *Secularization and cultural criticism: religion, nation, and modernity*, The University of Chicago Press, Chicago-London 2006, 9.

<sup>5</sup> Ronan McCrea, "How to Hobble Religion", Aeon, 17 June 2013, <http://aeon.co/magazine/society/ronan-mccrea-secular-europe/>, 13 October 2015.

separation of state and church, and *secularity*, understood as quality reached at certain level of separation of church from state.<sup>6</sup> If such terminological differentiation is adopted, the reason for claiming that *secularism* has plenty of meanings ceases, since it becomes possible to ascribe the existence of multitude of models of church-state relations to varied assessments of what level of *secularity*,<sup>7</sup> perceived as quality of a concrete legal system, is required in a particular political community.

## 2.2. Two paradigms of church-state separation: the USA and the French Republic – similarities and differences

Full-fledged secularism prescribes that churches and religious communities should be treated by the state as any other citizens' associations gathered around phenomena of thought and conscience. Such approach is championed by the United States of America and France, though the two differ greatly in respect of origins of their present-day standards.<sup>8</sup> Both

<sup>6</sup> On the differentiation between secularism and secularity see more Sima Avramović, Dušan Rakitić, "Understanding secularity in a post communist state: case of Serbia," *Oesterreichisches Archiv für Recht und Religion* 2/2012, 284–314.

<sup>7</sup> In the academic literature there are definitions of *secularism* and *secularity* that are more or less different or more elaborated than those offered in this paper, e.g. for Casanova *secularism* denotes "a whole range of modern secular worldviews and ideologies that may be consciously held and explicitly elaborated into philosophies of history and normative ideological state projects..." José Casanova, "The Secular and Secularisms", *Social Research* 4/2009, 1051; Kosmin relies on a markedly different set of meanings: "Since *Secularity*... involves individual actors' personal behavior and identification with secular ideas and traditions as a mode of consciousness. *Secularity* ... involves organizations and legal constructs that reflect the institutional expressions of the secular in a nation's political realm and public life." Barry A. Kosmin, "Contemporary Secularity and Secularism", *Secularism & Secularity: Contemporary International Perspectives* (eds. B. A. Kosmin, A. Keysar), Institute for the Study of Secularism, Trinity College, Hartford 2007, 1.

<sup>8</sup> The French philosophical and constitutional tradition is proud of the concept of *laïcité*, which assumes complete independence of church and state from each other, ordering the state not to recognize or support or fund any exercise by the church of a function that belongs to the realm of public authority (public education, civil status, etc.). While the idea of separation of church from state was for the first time brought forward by the French Revolution, the 19<sup>th</sup> c. France continued to adhere to the concordat system, where as *laïcité* was brought into life only in 1905, with the enactment of the *Loi relatif à la séparation des Eglises et de l'Etat*. In the United States, the constitutional grounds for separation of church and state were established only due to a novel interpretation of the First Amendment within the Bill of Rights, that had originally served as a safeguard against the federal government's meddling into establishment of religion at the level of states. It was only in 20<sup>th</sup> c. that the predominantly Protestant elites among the politicians and the judiciary pushed towards an interpretation that would require strict separation of church and state at all levels of governments, as a safeguard against the perceived threat that Catholicism may seek establishment in predominantly Catholic states. "Separation of Church and State", *The Boisi Center Paper on Religion in the United States*, Boston Col

political communities were founded on civic, rather than on ethnic identity of their citizens. This may have required that building of political identity and loyalty in both cases be focused on the state, and, consequently, that the church be accorded as little influence as possible in the realm of political life. Furthermore, the constitutional systems of both countries were the first among the modern-day constitutions to promote and purport to protect individual rights due to their intrinsic value, and not merely as key safeguard against overreaching by the government. Finally, since the form of government of both countries is republican, secularity of the state in both cases has been perceived in the historical perspective as one of the cornerstones of their sovereignty, in contrast to traditional religious legitimacy of most monarchical governments.

In the United States, the role of religion in public and social life is considered to be far stronger than in Europe, though it is also receding under the pressure of strict secularism.<sup>9</sup> France does not accord to churches and religious communities a role in political affairs, nor in the exercise of public functions. Several reasons for the perceived discrepancy may be conceived. Philosophical and constitutional discourse in the United States has never abandoned the religious provenance of basic human rights and fundamental freedoms, whereas in France these were perceived from the outset as phenomena based on human rationality. Pope Benedict XVI put forth another explanation: the US model of church-state relations assumed independence of church from state and vice versa, and abstention of the church from political institutions, but also abstention of the state from cultural and social life, as well as facilitation of church's role in those realms by the state.<sup>10</sup>

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lege, Boisi Center for Religion and American Public Life, 10, [https://www.bc.edu/content/dam/files/centers/boisi/pdf/bc\\_papers/BCP\\_ChurchState.pdf](https://www.bc.edu/content/dam/files/centers/boisi/pdf/bc_papers/BCP_ChurchState.pdf), 13 October 2015. On the more origins of *laïcité* see more Patrice Canivez, "Le concept de laïcité", *L'Europe à venir: sécularisation, justice, démocratie* (eds. Emilian Cioc, Ciprian Mihali), Actes de l'Université d'été du réseau OFFRES (Cluj, 3-13 septembre 2006), Cluj Napoca, Idea Design & Print, 2010, 3-13; "Church and State Issues in the United States", *Encyclopedia of Religion and Society*, Willam H. Swatos Jr. (ed.), Hartford Institute for Religion Research, Hartford Seminary, Altamira Press, Walnut Creek 1998, <http://hrr.hartsem.edu/ency/csrelations.htm>, 13 October 2015.

<sup>9</sup> Joseph Ratzinger – Pope Benedict XVI, Marcello Pera, *Without Roots, The West, Relativism, Christianity, Islam*, Basic Books, New York 2007, 107-120.

<sup>10</sup> "This is a separation that is conceived positively, since it is meant to allow religion to be itself, a religion that respects and protects its own living space distinctly from the state and its ordinances. This separation has created a special relationship between the state and the private spheres that is completely different from Europe. The private sphere has an absolutely public character. This is why what does not pertain to the state is not excluded in way, style or form from the public dimension of social life". Joseph Ratzinger – Pope Benedict XVI, Marcello Pera, *Without Roots, The West, Relativism, Christianity, Islam*, Basic Books, New York 2007, 111.

Canivez proposed a historical perspective on the differences between the French model of applied secularism – *laïcité*<sup>11</sup> – and the Anglo-Saxon concept of religious tolerance. The Anglo-Saxon concept of religious tolerance developed in, and spread from England which, in spite of having a state church, recognized religious pluralism. Canivez referred to such religious pluralism as to one that has been arrived at *a posteriori*, in contrast to the model of *laïcité* which *a priori* enables religious pluralism in a society. The same author points out that the Anglo-Saxon model of religious tolerance serves well the present-day Islamic states, which resort to it in order to enable religious pluralism in their societies while at the same time preserving Islam as their official faith.<sup>12</sup> While a state church has never existed in the United States, the same concept of religious tolerance seems to have fitted perfectly the model in which religion played a recognized role in public and social life.

### 2.3. Interplay of rigid secularism and concordats

The secularist standpoint is opposed to execution of concordats on both formal and content-related grounds. The fact that concordats are bilateral international treaties to which the counterparty of the state is the Holy See contravenes secularist view that a state should not enter into official relations with any religious organization. The problem is aggravated by the fact that the Holy See represents the Roman-Catholic Church on the global level, so that by entering into a concordat, a state not only recognizes the international personality of the Holy See, and, by way of implication, the international personality of the Roman-Catholic Church, but it also acquiesces to the transnational authority of the Holy See and its power to represent even the Roman-Catholic Church and its members on that state's own territory. Substantive grounds for the secularist *a priori* rejection of concordats concern the fact that the typical subject matter of modern-day concordats revolves around endorsement and financing of certain social activities of the Roman-Catholic Church by the state.

A practical consequence of the secularist opposition to concordats is the fact that the United States have not yet entered into a treaty with the Holy See on a specific issue that may be regarded as falling within the typical concordat subject matter, whereas France has only recently – in 2008 – executed one that may be subsumed under the concept of a concordat (on recognition of diplomas issued by institutions of higher education). A piece of palpable evidence that the pure secularist approach does

<sup>11</sup> On the meanings of *laïcité* see more Christian Joppke, “State Neutrality and Islamic Headscarf Laws in France and Germany”, *Theory and Society*, 4/2007, 313–342.

<sup>12</sup> Patrice Canivez, “Le concept de *laïcité*”, *L'Europe à venir: sécularisation, justice, démocratie* (eds. Emilian Cioc, Ciprian Mihali), Actes de l'Université d'été du réseau OFFRES (Cluj, 3–13 septembre 2006), Cluj Napoca, Idea Design & Print, 2010, 5.

not prevail in Europe is the fact that most European countries have entered into concordats with the Holy See, and that those instruments remain in force. Secularist opposition to concordats is not gaining ground on the global plane either, since the number of non-European countries that have entered into concordats, or about to do so, has been steadily increasing after the Second Vatican Council.

### 3. CHALLENGES TO STRICT SECULARISM

#### 3.1. The concept of post-secular society proposed by Habermas

The 2011 *Lautsi* judgment of the Grand Chamber of the European Court of Human Rights,<sup>13</sup> upholding the placement of crucifixes in public schools, judging by its effect, stands in line with a significant development in the thinking Habermas, who began to emphasize the role of religion in modern society, particularly by popularizing the concept of *post-secular society* in relation to developed Western democracies.<sup>14</sup>

Habermas pronounced the grounding significance of Judeo-Christian tradition for the concepts of democratic government and the imperative of human rights protection.<sup>15</sup> According to Habermas, only the concept of an ideologically neutral, i.e. secular state has non-Christian roots – in the philosophy of Enlightenment.<sup>16</sup>

<sup>13</sup> The Grand Chamber admitted that the presence of crucifixes gave greater visibility to Christianity in schools, but found that its effects did not amount either to compulsory teaching of that religion, or to violation of the rights of parents to ensure education and teaching of their children in conformity with their own religious and philosophical convictions. *Lautsi and Others v. Italy* [GC], no. 30814/06, §74–76 ECHR 2011.

<sup>14</sup> “A ‘post secular’ society must at some point have been in a ‘secular’ state. The controversial term can thus only be applied to the affluent societies of Europe or countries such as Canada, Australia and New Zealand, where people’s religious ties have steadily been lapsed, in fact quite dramatically so in the post War period. These regions have seen the more or less general spread of an awareness that the citizens are living in a secularized society. In terms of sociological indicators, the religious behavior and convictions of the local populations have since by no means changed to such an extent as to justify labeling these societies ‘post secular’. Here, trends towards de institutionalized and new spiritual forms of religiosity have not offset the tangible losses by the major religious communities”. Jürgen Habermas, “Notes on a post secular society”, 18 June 2008 <http://www.sig-nandsight.com/features/1714.html>, 13 October 2015.

<sup>15</sup> “Universalistic egalitarianism, from which sprang the ideals of freedom and a collective life in solidarity, the autonomous conduct of life and emancipation, the individual morality of conscience, human rights and democracy, is the direct legacy of the Judaic ethic of justice and the Christian ethic of love... And in light of the current challenges of a post national constellation, we continue to draw on the substance of this heritage.” Jürgen Habermas, *Time of Transitions*, Polity Press, Cambridge Malden 2006, 150–151.

<sup>16</sup> “The history of the Christian theology in the Middle Ages – particularly late Spanish scholasticism – belongs, of course, in the genealogy of human rights. But the

While examining the source of legitimacy of the modern constitutional state, which has been left without the legitimacy of a sovereign monarch, Habermas assumes that the democratic process may be conceptualized “as a method by which legitimacy may be generated out of legality”, as well as that “a ‘constituted’ (rather than a merely constitutionally tamed) state authority is juridified (*verrechtlicht*) to its very core, so that the law completely penetrates political authority.”<sup>17</sup> Human rights, for Habermas, are essential for such legitimation of the modern secular democratic political community. The legitimation presupposes active participation of citizen in public affairs, i.e. citizens need to be motivated by their political virtues. Habermas remains optimistic vis-à-vis the capability of the liberal state to reproduce “its motivational preconditions out of its own secular resources”, but only on an *a priori* level, under the assumption that solidarity among members of a political community is secured by that community’s cultural values having been homogeneously permeated by the principles of justice<sup>18</sup>. It may be inferred that if cultural diversity stands in the way of equal acceptance of core principles of human rights and justice in the society, then the very fabric of solidarity among the members of that political community is endangered. Another threat for the modern democracy is seen by Habermas: external factors leading to depolitization of citizens, such as the modernization which causes citizens to act solely on their own interest, market forces, etc.<sup>19</sup> Both religion and religious communities serve strengthening solidarity of citizens, but their realm is being threatened by the other two major media of societal integration – markets and power of the state.<sup>20</sup> For Habermas, a *post-secular* society is not only one that “merely acknowledge[s] publicly the functional contribution that religious communities make to the reproduction of desired motives and attitudes”, but also one in which “universalistic system of law and the egalitarian morals” are “connected to the ethos of the community from within, in such a way that one follows consistently from the other”. The necessity of such a connection for Habermas is peculiar to the liberal state, due to the exigency for political in-

fundamental principles that legitimize the ideologically neutral authority of the state are, in the end, derived from the profane sources of seventeenth and eighteenth century philosophy.” Jürgen Habermas, “On the Relations between the Secular Liberal State and Religion”, *Political Theologies: Public Religions in a Post Secular World*, Hent De Vries & Lawrence E. Sullivan (eds.), Fordham University Press, New York 2006, 252.

<sup>17</sup> *Ibid.*, 252–253.

<sup>18</sup> *Ibid.*, 254, 255.

<sup>19</sup> *Ibid.*

<sup>20</sup> Habermas provides the example of one significant transformation of a (Christian) religious concept into a norm that strengthens solidarity within the entire society. “The translation of the notion of man’s likeness to God into the notion of human dignity, in which all men partake equally and which is to be respected unconditionally, is such a saving translation.” *Ibid.*, 258.

tegration of citizens that is in such state much greater than in an authoritarian political community.<sup>21</sup>

The concept of the post-secular society led Habermas to practical normative findings: “The ideological neutrality of state authority, which guarantees ethical freedoms to every citizen, is incompatible with the political generalization of a secularistic worldview. Secularized citizens, ... may neither deny out of hand the potential for truth in religious conceptions of the world nor dispute the right of believing fellow citizens to make contributions to public discussion that are phrased in religious language.”<sup>22</sup>

Habermas neither finds that achievements of secularization are being reversed in what he calls the post-secular world, nor he pleads to be in favor of such reversal. In effect, his thoughts seem to be aimed at saving secularization from itself, i.e. at saving secularism from assuming the role of an ideology or religion. From Habermas’ arguments it may be inferred that a failure of secularized societies to recognize the role of religion in public life would, in fact, undermine viability of the very political communities formed by those societies.

### 3.2. Contemporary Europe – between religion and reason

In his dialogue with Habermas, Pope Benedict XVI called for establishment of “relatedness between secular reason and religion”, aimed at avoiding “pathologies” of both religion and reason. While he singled out the Christian faith and Western secular rationality as “two main partners of this mutual relatedness”, Cardinal Ratzinger stressed the importance of including other cultures in such dialogue. He based his argument on the impotence of secular reason to secure that positive law be just, as well as to support the claim of universal validity of human rights.<sup>23</sup> There are authors, such as Pecora, who also concede the inability of secularism to warrant a solid founding of ethical values of a society.<sup>24</sup>

Having found that secularism in Europe has been aggressive in its struggle against religion, Pope Benedict XVI ascribed most of the symptoms of what in his view was a serious crisis of modern-day Europe to

<sup>21</sup> *Ibid*, 258–259.

<sup>22</sup> *Ibid*, 260.

<sup>23</sup> Cardinal Joseph Ratzinger – Benedict XVI, “That Which Holds the World Together – The Prepolitical Moral Foundations of a Free State”, *Natural Moral Law in Contemporary Society*, Holger Zaborowski (ed.), The Catholic University of North America Press, Washington, D.C. 2010, 15, 20.

<sup>24</sup> Vincent P. Pecora, *Secularization and cultural criticism: religion, nation, and modernity*, The University of Chicago Press, Chicago – London 2006, 44.

secularism, i.e. to Europe's apostasy from its spiritual roots.<sup>25</sup> A helpful perspective on the present-day role of religion, namely Christianity, in the public and political sphere in Europe is McCrea's notion of "residual religious identity" of European public institutions.<sup>26</sup>

The decades-long process of the European Union's transformation from an economic into a political union reached the point at which it needed a legal articulation. The logical instrument for achieving that purpose would have been a constitution. The draft constitution of the European Union was indeed prepared, but became subject of strong disagreements. Among the principal subjects of controversy were references to God and Christian heritage of Europe. The secularist view prevailed and these references were omitted from the Treaty Establishing a Constitution for Europe.<sup>27</sup> The ratification process, and thus the constitution itself, failed, whereas the draft was transformed into the "reform treaty", the Treaty of Lisbon<sup>28</sup>, which did not purport, at least on its face, to be a constitution. In effect, the Treaty of Lisbon transformed the two foundational treaties of the European Union to such extent that these two instruments, taken together with some of the case-law of the Court of Justice of the European Union, encompassed almost all usual traits of a constitution.

The principal challenges the European Union has faced since the Treaty of Lisbon entered into force – the Greek sovereign debt crisis, the migrant and refugee crisis – originated from the differing perspectives on the nature and level of solidarity that is required from Union's members. One cannot close eyes to the question – whether the European Union may

<sup>25</sup> Pera summarized symptoms of the moral, spiritual and identity crisis of Europe which had been put forth in the exchange of letters between Cardinal Ratzinger and him and presented in their book *Without Roots, The West, Relativism, Christianity, Islam: the Judeo Christian roots had not been mentioned in the Preamble to the European Constitutional Treaty, even though Europe would not have existed without them, the states violate fundamental human rights, especially the right of dignity of a human person (e.g. by allowing cloning), the Judeo Christian religion not only is deprived of social role, but also discriminated against with respect to other religions, the concept of multiculturalism is interpreted so as to require abandonment of the European cultural heritage, political relativism leads to loss of normative perspective on political regimes, whereas pacifism coupled with relativism had made Europeans unwilling to resort to use of force for the purpose of defending the European civilization. Marcello Pera, "Europe, America, and Pope Benedict XVI", 6 February 2006, New York, [http://www.crossroadsculturalcenter.org/storage/transcripts/2006\\_02\\_06\\_Freedom%20without%20Roots.pdf](http://www.crossroadsculturalcenter.org/storage/transcripts/2006_02_06_Freedom%20without%20Roots.pdf), 13 October 2015.*

<sup>26</sup> R. McCrea.

<sup>27</sup> Treaty Establishing a Constitution for Europe, *Official Journal of the European Union* C 310, 16 December 2004.

<sup>28</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, *Official Journal of the European Union* C 306, 17 December 2007; the treaty entered into force on 1 December 2009.

preserve its present form of a political community of its citizens and of the Member States, and, of course, whether it may evolve and strengthen further, if its constitutional basis continues to be deprived of a reference to God, as well as to the religious heritage common to its Member States?

### 3.3. Influence of Islam on the standard of secularity in a democratic society

While Habermas seems to ascribe the phenomenon of a post-secular society primarily to the intrinsic maturing of a liberal political order, other explanations are present as well. One of the most prominent ones interprets the phenomenon as the Western reaction to the rise of political Islam.<sup>29</sup> The call by Habermas for reassessment of the role of religion in public life was in fact partly motivated by the need of accommodating, within the conceptual understanding of the modern secular democratic state, the pretensions of Islam to a significant role in public life.<sup>30</sup> Niall Ferguson devised the term *Eurabia* to illustrate the future of Europe in light of the low birth-rates of its present population and the intensive immigration from the Muslim world, though his predictions have been disputed.<sup>31</sup> Other authors, however, argue that the net result of the influx of Muslims shall be a further secularization of Europe, for Christianity as the incumbent furnisher of values, symbols, traditions and ideas shall need to step back (abandon its “residual political and symbolic roles, according to McCrea), so that stronger secularity may enable better accommodation of Muslims and the necessary religious pluralism.<sup>32</sup>

In order to properly appreciate the pretensions of Islam to a role in public life, one should have in mind that even the basic level of secularity is problematic for many Muslims. In the academic literature several explanations have been offered in respect of it: wide-spread understanding of Islam as unity of religion, law and politics,<sup>33</sup> the lack of supreme

<sup>29</sup> Philip Jenkins, “Europe’s Christian Comeback”, *Foreign Policy*, 12 June 2007, [foreignpolicy.com/2007/06/12/europes\\_christian\\_comeback/](http://foreignpolicy.com/2007/06/12/europes_christian_comeback/) 13 October 2015.

<sup>30</sup> Luca Mavelli, “Europe’s Identity crisis, Islam in Europe, and the crisis of secularity”, *Routledge Handbook of Islam in the West* (ed. R. Tottoli), Routledge, London New York 2015, 193.

<sup>31</sup> Niall Ferguson, “Eurabia?”, *The New York Times*, 04 April 2004, <http://www.nytimes.com/2004/04/04/magazine/04WWLN.html> 13 October 2015; William Underhill, “Dispelling the Myth of Eurabia”, *Newsweek*, 10 July 2009, <http://www.newsweek.com/dispelling-myth-eurabia-81943> 13 October 2015.

<sup>32</sup> R. McCrea.

<sup>33</sup> Gudrun Krämer, “Islam is religion and state: secularity in traditional Muslim society”, *Islam and the Secular State*, International Fund of Imam al Bukhari, Friedrich Ebert Foundation, Tashkent 2003, 192, [http://library.fes.de/pdf\\_files/bueros/zentralasien/50123\\_3.pdf](http://library.fes.de/pdf_files/bueros/zentralasien/50123_3.pdf), 13 October 2015.

authority in Islam, preventing parallelism between spiritual and worldly governments,<sup>34</sup> association with foreign (Christian) colonial occupation in the Middle East.<sup>35</sup>

On the other hand, it is clear that many Muslims are fully integrated in Western secularized societies, that the majority of the global Muslim population positively relates to the idea of democratic governance, as well as that voices of a number of reformist Islamic thinkers, vying for reassessment of the traditional critical attitude towards secularism, have been noted.<sup>36</sup> Hashemi, and Asad before him, pointed out the fact the two leading paradigms of liberal democratic secularism – the concepts of secularism in the US and France – have come into being as social constructs, resulting from idiosyncratic experiences of the two societies.<sup>37</sup> Hashemi has relied on these examples, as well as on his broader thesis against “false-universalisms” of Western political practice, to support his claim that Islam still needs to conceive its own, indigenous variety of secularism.<sup>38</sup>

The magnitude of the tension between Islam and secularism is well illustrated by poor success of democracy in the Muslim world. Statistical sensitivity of acceptance of democracy by a certain religion inevitably points primarily to secularism, since that quality is the lens through which any religious perspective conceives democracy. According to a 2015 survey by Freedom House, out of 124 electoral democracies in the world, only 12 (i.e. 10%) are countries with a Muslim majority, although out of the total of 195 countries surveyed, there are 50 countries with a Muslim majority (25%), while Muslims make up approximately 23% of the global population;<sup>39</sup> moreover, among 87 countries assessed as “free” by the same Freedom House report, only 2 (i.e. slightly more than 2%) are those

<sup>34</sup> On the absence of supreme authority in Islam see Stanislav Prozorov, “On the Issue of Supreme Authority in Islam”, *Islam and the Secular State*, International Fund of Imam al Bukhari, Friedrich Ebert Foundation, Tashkent 2003, 176–179.

<sup>35</sup> John L. Esposito, “Rethinking Islam and Secularism”, *Guiding Papers Series*, ARDA – The Association of Religion Data Archives, 3, 5, <http://www.thearda.com/rrh/papers/guidingpapers/esposito.pdf>, 13 October 2015.

<sup>36</sup> *Ibid.*, 20; John L. Esposito, “Islam and Secularism: Exploring the place of religion in secular society”, *Arches Quarterly*, 2/2008, 8–9, [http://www.thecordobafoundation.com/attach/Arches\\_issue\\_03\\_Web.pdf](http://www.thecordobafoundation.com/attach/Arches_issue_03_Web.pdf), 13 October 2015.

<sup>37</sup> Nader Hashemi, *Islam, Secularism, and Liberal Democracy*, Oxford University Press, Oxford – New York 2009, 176–177; On the pluralism of meanings of secularism and the perceived opportunity for Islam to formulate its own concept of secularism see Talal Asad, *Formations of the Secular – Christianity, Islam, Modernity*, Stanford University Press, Stanford 2003.

<sup>38</sup> N. Hashemi, 176–177.

<sup>39</sup> “The Future of the Global Muslim Population – Projections for 2010–2030”, Pew Research Center, January 2011, 13–15, [http://www.pewforum.org/files/2011/01/FutureGlobalMuslimPopulation\\_WebPDF\\_Feb10.pdf](http://www.pewforum.org/files/2011/01/FutureGlobalMuslimPopulation_WebPDF_Feb10.pdf), 13 October 2015.

with a Muslim majority – Tunisia and Senegal.<sup>40</sup> The global Muslim population is projected to grow by 73% by 2050, and to reach parity with the number of Christians at that time, whereby each denomination would make up approximately 30% of world population.<sup>41</sup>

#### 4. RELIGIOUS NEUTRALITY OF THE STATE AND CHURCH-STATE COOPERATION

If the constitution and laws of a state put emphasis on its secular quality, then by definition such state is neutral vis-à-vis religious matters. If, however, secularity is not the primary concern of the state in its approach to church-state relations, the only alternative concept that has proven viable in modern democracies is the system of cooperation between state on one hand and churches and religious communities on the other. Each and every cooperation involves close encounter, arms-length negotiations, exchange of goods or value in some form, or thoughts between the cooperating persons or entities. That is the reason why the secularist stance sees in church-state cooperation an immense threat to the very essence of secularism: state neutrality vis-à-vis religion. The pro-cooperation side does not stop at merely rejecting such claim. Instead, a reverse view is proposed: in order to be able to remain neutral in relation to religion, a state has no other option than to embark upon cooperation with churches and religious communities. Acknowledging that the concept is complex, but much less problematic than the attribute “secular”, Leigh has identified four possible aspects of neutrality: even-handed treatment of all religions, so that no religion is favored over others, strictly equal treatment, equal respect of religions, which, according to Leigh, “permits differences in treatment by the state in situations either where fundamental rights are not engaged or where differences in treatment can be justified”, and objective treatment, which denotes anything between indifference towards religions and deeming them irrelevant.<sup>42</sup>

State neutrality comes to the fore in legal systems and societies which recognize the role of religion in the public realm. The two most relevant approaches to state neutrality vis-à-vis religion are those that can

<sup>40</sup> “Freedom of the World 2015 – Highlights from Freedom House’s annual report on political rights and civil liberties”, Freedom House, [https://freedomhouse.org/sites/default/files/01152015\\_FIW\\_2015\\_final.pdf](https://freedomhouse.org/sites/default/files/01152015_FIW_2015_final.pdf), 13 October 2015.

<sup>41</sup> “The Future of the World Religions: Population Growth Projections 2010 2050”, Pew Research Center, 2015, [http://www.pewforum.org/files/2015/03/PF\\_15.04.02\\_ProjectionsFullReport.pdf](http://www.pewforum.org/files/2015/03/PF_15.04.02_ProjectionsFullReport.pdf), 13 October 2015.

<sup>42</sup> Ian Leigh, “The European Court of Human Rights and religious neutrality”, *Religion in a Liberal State* (eds. G. D’Costa, M. Evans, T. Modood, J. Rivers), Cambridge University Press, Cambridge – New York 2013, 38–39.

be perceived in the U.S. and in Germany.<sup>43</sup> Notable academics argue that the two approaches to neutrality are gradually converging.<sup>44</sup>

#### 4.1. Neutrality of state and church-state cooperation in Germany

Eberle singles out the pervasiveness of the German approach, in the sense that constitutional provisions on church-state cooperation and freedom of religion and conscience affect all legal relationships, both public and private.<sup>45</sup> The complexity of positive law on the subject, even at the constitutional level, is coupled by the existence of a corresponding standalone academic discipline – the *Staatskirchenrecht*, which has formed part of the studies of public law since the second half of 18 c.<sup>46</sup>

According to Robbers, state neutrality vis-à-vis religion proclaimed by the German Basic law has several meanings: it “requires the state not to identify with a church; ... the state is not allowed to have any special inclination to a particular religious community...”, nor it can be inclined to atheism; “the state is not allowed to take decisive action in the affairs of religious communities...”, while positive neutrality “obligates the state to actively support religion and to provide for the space religion needs to flourish”; furthermore, according to Robbers, “neutrality does not mean neutrality in respect of specific values”, so that “state neutrality is not violated when the state takes up values and concepts that have been developed in the religious sphere.”<sup>47</sup> Several of the meanings which Robbers attributed to the concept of neutrality are satisfied by specific principles, which that author identified as key to the German system of church-state relations, in addition to separation, cooperation and neutrality: tolerance, parity, pluralism, institutionalism (freedom of faith is regarded as corporative right, exercised through religious communities) and openness to religion.<sup>48</sup> Koriath and Augsburg assert that neutrality is the basic principle of the relationship between state and religion in Germany, which is

<sup>43</sup> For two recent comparative studies of the two examples see Edward J. Eberle, *Church and State in Western Society: Established Church, Cooperation and Separation*, Ashgate, Farnham 2011; Claudia E. Haupt, *Religion – State Relations in the United States and Germany: The Quest for Neutrality*, Cambridge University Press, Cambridge – New York 2012.

<sup>44</sup> C. E. Haupt, 6.

<sup>45</sup> E. J. Eberle, 25, 29.

<sup>46</sup> Brigitte Basdevant Gaudemet, “Histoire du droit ecclésiastique en Europe, une discipline universitaire”, *L’enseignement du droit ecclésiastique de l’État dans les universités européennes* (eds. J. M. González dell Valle, A. Hollerbach), Peeters, Leuven – Paris 2005, 9–26.

<sup>47</sup> Gerhard Robbers, *Religion and Law in Germany*, Kluwer Law International, Alphen aan den Rijn 2010, 86–87.

<sup>48</sup> G. Robbers, 86–88.

constituted as a synthesis of the individual religious freedom and the separation of state and church.<sup>49</sup>

An indispensable element of the German model of church-state relations is the recognition of corporative religious freedom, which is accorded to religious organizations.<sup>50</sup> In the legal environment in which religious freedom is not constrained to the plane of individual rights, co-operation with the state becomes a necessity.

The subjects of cooperation are those tasks of public nature and common importance for the exercise of which certain religious affiliation or identity is either necessary or valuable. The principal example of such a task is religious instruction in schools, but many others are present in the German system: operation of theological faculties, provision of welfare, provision of religious content for the media, participation of churches and religious communities in media monitoring and development of program selection, service of chaplains in the military, conservation and preservation of temples and holy places in general, levying and collection of church tax, etc.<sup>51</sup> The countries that were liberated from communism when the Berlin wall fell and that joined the EU in 2004 have all adopted the model of church-state cooperation.<sup>52</sup> The wide-spread adoption of the cooperative model by the post-communist states confirms that the model is the most accommodative of a strong contribution of religion to the constitutional identity of a political community, having in mind the fact that the Christian churches played a prominent role in the fall of communism in Central and Eastern Europe.

In a judgment brought in 2003<sup>53</sup> the Constitutional Court noted that in principle an abstract danger to religious freedom of children resulting from the fact that a teacher wears a head scarf cannot justify infringement upon religious freedom of that teacher. However, the same judgment referred the matter to the legislature, allowing for the possibility that state may regulate the matter within a wide margin of appreciation.

<sup>49</sup> Stefan Koriath, Ino Augsburg, "National Report: Germany", *Religion and the Secular State: Interim Reports* (eds. J. Martinez Torrón, W. Cole Durham, Jr.), The International Center for Law and Religion Studies, Brigham Young University, Provo 2010, 323.

<sup>50</sup> "Organizations such as religious communities enjoy freedom of religion or belief in their own right. Organizations do not only represent the rights of their members, but also have their own proper rights." G. Robbers, 122.

<sup>51</sup> *The Relationship of Church and State – A Perspective on the European Union, Joint Statement on Issues relating to the European Integration Process*, Church Administration Office of the Evangelical Church in Germany, the Secretariat of the German Bishops' Conference, 1995, 11 21, 24, 25, [http://www.dbk.de/fileadmin/redaktion/veroeffentlichungen/gem\\_texte/GT\\_04\\_a.pdf](http://www.dbk.de/fileadmin/redaktion/veroeffentlichungen/gem_texte/GT_04_a.pdf), 13 October 2015.

<sup>52</sup> I. Leigh, 41, 60 61.

<sup>53</sup> 2003 BVerfGE 108, 282.

As result, many states (eight out of sixteen) enacted laws prohibiting teachers to demonstrate their religious beliefs, but, in some cases (six out of sixteen), under an irrefutable assumption that demonstrating Christian and other traditional Western beliefs did not contravene the law.<sup>54</sup> The Constitutional Court effectively overturned the 2003 judgment by an order of 2015<sup>55</sup>, declaring as unconstitutional a law forbidding display of religious symbols on grounds of abstract danger such display could create for religious freedom of the students or disruption in the school. Instead, concrete danger must exist in order that a limitation upon religious freedom of teachers is justified. Furthermore, the court found that students' negative religious freedom was not encroached if a teacher wore a head scarf. Finally, the Court also struck down the provision favoring display of symbols of Christian and traditional Western beliefs.<sup>56</sup>

#### 4.2. The European perspective of the Strasbourg court

The European Court of Human Rights in Strasbourg confronted frontally the renaissance of religion in the countries of the post-communist Europe by striving to limit the discourse on religious freedom to the realm of individual rights.<sup>57</sup> It accords to churches and religious communities the "victim" status in relation to violation of freedom of religion "only when it can show it is bringing a challenge in representative capacity on behalf of its members."<sup>58</sup> According to Leigh, the case-law of the ECtHR has been shifting in the past decades from neutrality understood as "equal respect", which allowed for different treatment of religions for justified reasons and in matters not involving fundamental rights, to the understanding of neutrality that requires equidistance to all religions and strict equality of religions. The same author allowed that the *Lautsi* judgment, presented in part 3.1 of this paper, may signify a change of direction of the subject shift, concluding that overall recent case-law of the ECtHR has been fairly incon-

<sup>54</sup> Christine Langenfeld, Sarah Mohnsen, "Germany: The teacher head scarf case", *International Journal of Constitutional Law* 3/2005, 89–91.

<sup>55</sup> 1 BvR 471/10 and 1 BvR 1181/109.

<sup>56</sup> On the 2015 judgment of the German Constitutional Court see more Matthias Mahlmann, "Religious Symbolism and the Resilience of Liberal Constitutionalism: On the Federal German Constitutional Court's Second Head Scarf Decision", *German Law Journal* 14/2015, 887–900.

<sup>57</sup> Matthias Koenig, "The Governance of Religious Diversity at the European Court of Human Rights, *International Approaches to Governing Ethnic Diversity* (eds. J. Boulden, W. Kymlicka), Oxford University Press, Oxford 2015, 72.

<sup>58</sup> Jim Murdoch, *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights*, Council of Europe, Strasbourg 2012, 24, [http://www.coe.int/t/dgi/hr\\_natimplement/Source/documentation/hb09\\_rightfreedom\\_en.pdf](http://www.coe.int/t/dgi/hr_natimplement/Source/documentation/hb09_rightfreedom_en.pdf), 13 October 2015.

sistent on the subject of state neutrality.<sup>59</sup> A similar practical effect of affirming church-state cooperation had the judgment in *Wasmuth*, whereby the Court assessed that mandatory disclosure to the employer of affiliation to one of churches for which church tax was levied by the state was legitimate and proportionate to its aim, notwithstanding the applicant's right not to disclose his religious belief or lack thereof.<sup>60</sup>

#### 4.3. State neutrality in the context of the Establishment Clause of the U.S. Constitution seen through the lens of recent case-law

It is widely accepted that the prohibition of state establishment of religion in the U.S. Constitution is interpreted in an unusually broad manner, demanding strict separation of state and church, in contrast to the same prohibition in the German Basic Law, which merely prohibits "institutional interconnections between church and state" and "identification of the state with a specific religion".<sup>61</sup> The peculiarity of the constitutional set-up in the U.S. is the tension between the Establishment and the Free Exercise clauses. The Supreme Court of the U.S. has had to address this tension over the decades, and the resulting body of law is usually perceived as non-homogenous or even inconsistent.<sup>62</sup>

Due to the principal historic influence of the Christian church, education has been the primary arena in which state neutrality is probed. In that field, the judgment in the case *Zelman v. Simmons-Harris* of 2002 stands out by its practical consequences rather by its dictum: it upheld an Ohio state pilot program of providing low-income families with financial aid in the form of vouchers that could be spent both in public and in private schools participating in the program. In the 1999–2000 school year, 96% of students participating in the program were enrolled in a religiously affiliated school. The majority was of the opinion that the program was "neutral with respect to religion."<sup>63</sup>

An often-cited recent example of the alleged inconsistency of the Supreme Court in interpretation of the Establishment Clause are two judgments rendered in 2005: *Van Orden v. Perry*<sup>64</sup> and *McCreary County v. ACLU*<sup>65</sup>, both involving public display of the Ten Commandments. In

<sup>59</sup> Leigh claims that the new approach "fails to respect historic and cultural differences among European states", as well as that the model of strict secularity itself is not neutral in relation to individual beliefs. I. Leigh, 39–40.

<sup>60</sup> *Wasmuth v. Germany*, no. 12884/03, § 55, § 61, 17 February 2011

<sup>61</sup> E. J. Eberle, 26.

<sup>62</sup> E. J. Eberle, 31–32,

<sup>63</sup> *Zelman v. Simmons Harris* (00–1751) 536 U.S. 639 (2002).

<sup>64</sup> *Van Orden v. Perry* 545 U.S. 677 (2005).

<sup>65</sup> *McCreary County v. American Civil Liberties Union of Ky.* 545 U.S. 844 (2005).

the former case, the alleged violation of the Establishment Clause consisted in the placement of a Ten Commandments monument on the Texas State Capitol grounds. In the opinion for the majority, rejecting the violation of the Establishment Clause, Chief Justice Rehnquist emphasized the recognition of the role of God in the American history, citing a historical political document and certain decisions of the Supreme Court, and pointing to the wide-spread existence of similar public acknowledgments of the historic significance of the Ten Commandments, existing even in the Supreme Court itself and the Library of Congress. The opinion included a concession that the monument had “a dual significance, partaking both religion and government,” whereas the only criterion provided for deciding such ambiguous situations was the finding that the subject monument had a passive nature. The majority expressly excused itself from applying the so-called *Lemon test*<sup>66</sup> for deciding Establishment Clause challenges, claiming that the test had not been consistently applied thus far, as well as that the test was inapplicable to “the sort of passive monument that Texas has erected on its Capitol grounds.”<sup>67</sup>

In *McCreary*, the Supreme Court affirmed the Sixth Circuit Court of Appeals upholding of a preliminary injunction against posting of the Ten Commandments plates in courthouses by two counties in Kentucky. The majority opinion focused on applying the *Lemon test* to the case at hand, and based its decision on the finding that the first prong of the test – the requirement that government action must have a secular purpose – was not satisfied. Overall, the opinion emphasized the requirement of state neutrality and affirmed the *Lemon test* as a valid rule for assessing limits of neutrality.

Two very recent judgments of the Supreme Court articulate a distinctively American doctrine of corporate religious freedom. The 2012 judgment in *Hosanna-Tabor v. EEOC et al.*<sup>68</sup> was rendered after a Lutheran church (Hosanna-Tabor) had been sued by the Equal Employment Opportunity Commission, an agency of the U.S. Federal Government vested with investigative powers, for allegedly dismissing its employee because the employee had threatened it with a lawsuit based on the Americans with Disabilities Act (ADA). On writ of certiorari to the Court of Appeals for the Sixth Circuit, the judgment of the latter in favor of the EEOC was reversed, whereby the subject dismissal was upheld on grounds of the so-called ministerial exemption. The dismissed person had been a

<sup>66</sup> The test is passed only if the following three prongs are cumulatively satisfied: secular purpose of government (legislative) action, absence of primary effect of advancing or inhibiting religion, lack of excessive entanglement between government and religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>67</sup> *Van Orden v. Perry* 545 U.S. 677 (2005).

<sup>68</sup> *Hosanna Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012).

“called” teacher in an elementary school operated by the church, equaled in status to a minister. In an unanimous opinion, the Supreme Court asserted that the joint operation of the Establishment and Free Exercise clauses barred lawsuits brought by ministers against their churches, as well as that the relief sought by the former employee would violate the Establishment Clause.<sup>69</sup> The Supreme Court’s reasoning clearly showed that at least part of the rights warranted by the Free Exercise clause were accorded to the church as such. In 2015 the Supreme Court issued a judgment in two joined cases, in which the U.S. Department of Health and Human Services (HHS) was confronted with two families and their three closely held corporations. The judgment has become popularly referred to after the largest of the three corporations – *Hobby Lobby, Inc.*<sup>70</sup> The three corporations and their owners had relied on the provisions of the Religious Freedom Restoration Act of 1993 (RFRA),<sup>71</sup> invoking their Christian beliefs, when they refused to provide to employees health insurance coverage for four contraceptive methods which may be used after inception, despite the fact that HHS mandated such coverage. The Supreme Court noted that HHS failed to satisfy the “least restrictive means requirement”, since it already had in place an exemption from the subject requirement for religious non-profit organizations. In order to confront the core issue of the case – whether a for-profit corporation could exercise religion, the Court invoked the same exemption that HHS had in place for non-profits and thus removed the corporate form as basis for denying protection to exercise religion by for-profits. The for-profit objective thus remained the only possible basis for the subject denial. According to the Court, that element could not serve as a discriminating criterion among corporations, since reducing a for-profit corporation to the profit-making goal would contravene both modern corporate law jurisprudence and actual operation of positive corporate law in the U.S. In this respect, of crucial importance seems to be the reasoning behind the majority’s refusal to accept the argument that for-profit corporations may not exercise religion: “protecting the free-exercise rights of corporations ... protects

<sup>69</sup> “The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.” *Hosanna Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012).

<sup>70</sup> *Burwell v. Hobby Lobby Stores, Inc.* (2015).

<sup>71</sup> The RFRA prohibits the “Government [from] substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability” unless the Government “demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U. S. C. §§2000bb 1(a), (b)

the religious liberty of the humans who own and control those companies... Corporations, ‘separate and apart from’ the human beings who own, run and are employed by them, cannot do anything at all.”<sup>72</sup>

In order to assess the scope of the rule established by the *Hobby Lobby* ruling, one would need to understand whether the Supreme Court intended to accord protection under RFRA to all corporations, or only to closely held ones. The wording of the holding would suggest the latter (“The contraceptive mandate, as applied to closely held corporations...”). It seems, however, that the Court abstained from putting forth a clear-cut rule, since in the opinion it merely expressed doubt that a large corporation with dispersed ownership could in fact articulate and hold sincere religious beliefs.<sup>73</sup> It remains thus a question of fact whether in any given case a corporation may be deemed to possess religious beliefs, depending on the structure of its ownership and control.

## 5. CONCLUSION

Church-state relations and scope of protected freedom of religion vary greatly between national legal systems, making the common denominator of secularity in the modern-day democratic world difficult to determine. The task becomes even harder in the diachronic perspective: over the past two centuries, the process of *secularization* permeated the democratic world. The standards of secularity are strictest in the United States and in France. Religious provenance of basic human rights and fundamental freedoms has remained alive in the U.S., whereas in France these are perceived as phenomena of human rationality. Abstention of the state from cultural and social life leaves room for religion in the U.S. Europe-wide preponderance of states that have executed concordats represents firm evidence that strict secularism has not prevailed in Europe.

The present global diversity of church-state relations is a dynamic vector sum of numerous historical backgrounds, philosophical approaches and social and political values. Secularism purports to bring homogeneity to that complexity, but such ambition needs to be assessed in light of the underlying question: is secularity an end in itself or an instrument for achieving other ends of a democratic society? The concept of *post-secular* society, proposed by Habermas, seems to hold the latter claim as true. The recent philosophical challenge to secularism by Pope Benedict XVI, in addition to attributing responsibility for the perceived modern-day moral, spiritual and identity crisis of Europe to secularism, entailed questions which in effect produced barriers for an endorsement of strict secu-

<sup>72</sup> *Burwell v. Hobby Lobby Stores, Inc.* (2015).

<sup>73</sup> *Ibid.*

larism. Major crises of the European Union revolve around lack of solidarity. It remains to be seen whether the European Union will be able to evolve and strengthen further, without adjusting its constitutional basis to its common religious identity.

The rapport between secularism and Islam is controversial – on one hand, secularization of Europe may seem important to Muslims because it dethrones Christianity from its traditionally dominant role in culture and society at large, on the other hand, secularization is opposed to the understanding of the nexus between religion, government and law which is dominant in Islam. These considerations are furthermore complicated by the fact that a relatively small number of countries with dominantly Islamic tradition and religious affiliation may be assessed, by Western standards, as representative democracies, or as respecting fundamental freedoms.

The idiosyncrasy of the German model of church-state relations consists in the concept of positive state neutrality, in conjunction with church-state cooperation. German law accords corporative religious freedom to churches and religious communities as such, but is still in pursuit of the adequate balance between recognition of religious identity and state neutrality. The tension between the Establishment and the Free Exercise clause of the U.S. Constitution provide ample room for the U.S. Supreme Court to mold the rules on state neutrality as it deems needed. Two judgments of 2005 serve as proof that public display of religious symbols by public authorities may be allowed under certain conditions. The U.S. approach to corporative religious freedom accords to religious organizations only those aspects of the freedom of religion which are necessary to them in order to function and to represent their believers, but it recognizes the religious freedom of all legal entities, including for-profit companies.

Secularity in developed democracies fluctuates between three actualized paradigmatic models – those of the U.S., France and Germany – which consist of different sets of solutions to two dichotomies – recognition or ignorance of the public role of churches and religious communities, and strict separation or cooperation of religious organizations and the state. The legal systems of the U.S. and Germany both recognize the role of religious organizations in public life, but only the German model endorses cooperation between religious organizations and the state. Recognition of corporative religious freedoms seems to go hand in hand with the recognition of the public role of religious organizations.

Secularism developed together with modern-day Western democracies. Democracy assumes common identity and political responsibility of the citizens, their motivation to participate in political life, to solidarize, etc. Western democracy has grown on the foundations of Christianity.

Somewhat paradoxically, secularism and secularity not only have roots in Christian political doctrine, but have developed in political communities held together by Christian values and identity. The question whether the fast-growing Muslim population shall accept one or more of Western understandings of secularity, or modify them, is an accessory one. A reliable and widely-applicable model of coordination of religious tenets of Islam with the principles of governance of Western democracies still needs to be designed.

The variables affecting the outcome of the encounter between Western democracy and Islam do not depend solely on Islam. Developed democracies of the West are re-assessing the role of secularity in their respective societies, particularly in Europe where strict secularism has gained more ground. For the past decades and even centuries, Christianity has been providing the ethos of modern-day Western democratic societies. In some of them, primarily in Europe, it has been deprived of the legal recognition of its public role, so its reach started to wane. The resulting crisis of democracy and society in Europe is evident. It seems as though the West, and Europe in particular, needs to scale down the standards of secularity, allowing religion to solidify common identity, values and motivational preconditions of its political communities, if it wishes to preserve and further the democratic standards attained so far.

Concrete realizations of secularity are all conceptually dependent on the ideological doctrine of secularism, which seeks to achieve goals incompatible with the role of religion in a democratic society. For that reason secularity as a policy goal and a constitutional principle is prone to generating confusion. Religious neutrality of the state neither relies on an uncomprising ideology, nor it assumes deprivation of religion of its role in public life. Religious neutrality seems thus better suited than a reinterpreted secularity to serving the political, legal, and constitutional reassessment of the significance of Christianity for democracy in the West and in Europe in particular, as well as to ensuring a transparent and forth-right dialogue on the place of Islam and Muslims in Europe.