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## A Modest Proposal

### An Overgrown Constitutional Path to Cultural/Religious Pluralism in Italy

#### Abstract

This essay comprises two sections. The first one presents and explains the proposal to broaden the meaning and scope of “intese” (agreements) between the State and minority denominations. “Broadened intese” is the label employed here to define the attempt to align the “intese” with both the generally pluralistic aspirations of the Italian Constitution and the need for the hetero-integration of national legal systems stemming from globalization processes. The device of hetero-integration is, in turn, strictly related to freedom and, even more specifically, religious freedom. The proposal for “broadened intese” is motivated, moreover, by the need to develop an instrument for legal intercultural integration that is more powerful than private international law. This use of “intese” should function as a means to promote and implement a value-based pluralism rather than a merely inter-legal or inter-normative one, so as to further the legal inclusion of cultural and religious differences.

In the second section, the topic of religious and cultural difference is analyzed with regard to the request from the UAAR, an Italian atheist/agnostic association, to conclude their own “intesa.” In the framework of the survey on the intercultural use of “intese,” the examination of this request from the atheist organization and the subsequent refusal of the State serves to highlight the connections extant between legal secular culture and religious tradition in the Italian legal system as well as, comparatively, in other legal systems. The “atheist difference,” actually, proves to be a radical one. In this respect, it allows for a strengthening, by reflection, of the argument for broadening the scope of “intese” in order to guarantee both religious freedom and equality before law.

**Keywords:** Religious Freedom, Pluralism, Intese, Intercultural Law, Atheism.

#### 1. Freedom and Hetero-integration in State Legal Systems

*National legal systems* have become undersized for the *law* state communities need. There is no longer symmetry and coextensiveness between them. Contemporary legal and political scholars argue that such lack of correspondence is a consequence of globalization and the related de-territorialization of law. People, sovereignty, and land, are still a sort of rhetorical accoutrement of national institutions, but they have become merely a part of the state law façade. The close implication of such a discourse

is that each state legal system is in need of hetero-integration, that is, it should be complemented with legal (and not only legal) tools taken from outside the national borders<sup>1</sup>.

The aims of people, and thereby of the legal subjects belonging to each state, extend beyond the national territories, and dictate the pace of those who pursue them. Individuals and their interests are geographically on the move, and continually traverse national borders and the related legal systems. So, even when the achievement of some end is envisaged and protected by the state law, the path of implementation requires proceeding overseas. In order to maintain its effectiveness, namely to be *real* and not only *virtual*, the state legal system must hetero-integrate, drawing in the “normative, social, economic, cultural etc. *elsewhere*,” into itself.

This hetero-integration might appear to be something new, inherent to contemporary times, but this is not quite the case. The assumption that any state is self-sufficient dates back to the dawn of modernity<sup>2</sup>. One of its implications—which over time has become a sort of legal dogma—is that the universe of law is self-referential. This means that legal discourse should address and *talk about* rights and duties only, and only to the extent that they are stated in current laws and successfully delivered by institutional circuits. So it is that freedom, embedded within this theoretical-dogmatic bubble, has also been identified as a “right.” The label under which freedom has been categorized, consequentially, is precisely that of “Rights of/to Freedom.”<sup>3</sup> Legal positivist doctrine—even if reactionary and deluded—forged this device, and yet it resulted, paradoxically, in the most anti-positivist outcome one can imagine. Actually, the constitutions of the world have always *mentioned*, *mention*, and presumably will continue to mention the word “freedom.” They identify it as something different from the word “rights” and its semantic references. Only in a few cases—most likely as a result of the involvement of both professional and academic lawyers in the drafting of constitutional texts—can one find some strange hybrid, such as in expressions like, “*everyone has the right to freely exercise their...*” or other similar phrases.<sup>4</sup>

But if freedom—at least according to jurists—is *only* a right, then why do members of Constituent Assemblies all over the world insist on including it, and further, do this by using the noun “freedom” (by itself)? The answer to such a question would not be terribly difficult to deduce, *per se*. Unfortunately, it is often overshadowed by blankets of doctrinal theories, most of which are deeply influenced by the influence of normativist or institutionalist legal schools of thought and their characteristic ethical and social cynicism (not always as genuine as theatrically feigned by some scholars).

On the one side, it is true that freedom, were it not provided and protected by institutions, would be a mere chimera, the object of empty hopes. On the other side, though, it seems to be logically unacceptable to consider freedom as equivalent to any other connotation of subjectivity

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<sup>1</sup> Such a conclusion is reached also with regard to the exigencies of legal inclusion of Otherness stemming from the multicultural transformation of societies. See, for example, Santos (2002), Fitzpatrick (2014).

<sup>2</sup> See Scattola (2009: 1 ff.).

<sup>3</sup> See Ricca (2006).

<sup>4</sup> This is the case, precisely, of Art. 19 of the Italian Constitution, which states: *Everyone has the right to freely profess their religious belief in any form, individually or with others, to promote them, and to celebrate rites in public or in private, provided they are not offensive to public morality.*

defined as a right by the law. But following this approach to the “freedom issue” makes us similar to someone who cuts off his feet to get at his shoes. “Freedom”—if this word is to be worthy of being accorded any sense, at least in official use by law texts—is not the legitimate offspring, or even a mere derivation of legal systems. In no case could authorities aprioristically mold and form “freedom.” Political power and institutions should not adopt top-down judgments about freedom without first listening to *the voice of the people*. To full appreciate this—and to understand why politicians insist on putting the word “freedom” in constitutional texts—one might ask somebody whether he prefers to be (with regard to some activity or conduct) “entitled to a right,” or rather, *simply* “free.” One could ask an adolescent, for example, if he would prefer to *have the right* to come home in the evening when he wishes or instead to *be free* to come home when he chooses. Anyone with a bit of experience as a parent (a sort of *in sextodecimo*, or fun-size legislator) is well aware that the answer would doubtless fall on the latter alternative, namely “freedom.” But why is it so? Why does an adolescent seem to know something that jurists have forgotten or, perhaps, prefer not to remember? The answer, again, is simple even if far-reaching from an anthropological and cultural point of view.

Freedom is impossible to contain inside the boundaries of state legal systems; otherwise, it would cease to be. It has its own source in individuals, and is not dissociable from their psychocognitive activity. Of course, nobody could deny that a *freedom* bereft of recognition, devoid of any institutional protection, would run the risk of becoming nothing more than a meaningless word. This trope does not imply, however, that legal systems and institutions, even as they protect it, can disregard the duty to listen to its source, namely a human subject endowed with creativity, with the capacity to generate new horizons of sense, new ways of moving and overcoming social, material, natural hindrances, and so on. What this means is that *being free* cannot be separated from the concrete situations in which each human being feels her/himself to be free<sup>5</sup>. Still further, no one can

<sup>5</sup> The best explanation of this *fact* can be found, on my view, in Buzzati (2015: 224 ff.). Given its icastic force, I prefer to quote the little story in its entirety:

**“FREEDOM:** Some time ago, at the market, I bought a goldfish in a small glass fishbowl. There was little room for the creature, and real swimming was out of the question. To see it continually bumping up against the glass made me feel very sorry for it. No matter how many times he was disappointed, however, he was never persuaded—this was clear—of the futility of his attempts to escape.

Filled with pity, I decided to provide him with a less cramped home. In my garden I built a beautiful round tub three and half meters in diameter, half a meter deep. As soon as the tub was ready, I filled it with fresh water, and just as I was about to pour the little fish in, a thought came to mind: at the moment, the water in his bowl is warm, so if I suddenly dump him in cold water, mightn't he catch cold? To avoid the risk, I found a very simple solution. I dropped the fishbowl, little fish and all, into the tub. There were two benefits to this approach: first, the little critter could become acclimatized to the lower temperature of the tub; second, and more significant because unexpected, the happy surprise when, as he so often did, he came to the surface, and realized that the water continued even beyond, the prison was no longer a prison and all around, a great ocean unfolded before him, his to freely swim.

So it went. The bowl rested on the bottom of the tub, and for a while the fish continued to slam his nose up against the glass; but at a certain point, he happened to swim up to the mouth of the fishbowl. Finding more water, he timidly ventured out and, at last, finding no barriers of any kind, he began to swim madly back and forth across the tub, exalted by the sudden freedom.

This happiness lasted just two days. Three mornings later, when I went to see how he was, I froze, finding the fish holed up in the fishbowl I had forgotten inside the tank. He was very calm, calmly swaying in the middle of the water, nor

ever say for someone else when the other must feel free. A different matter, instead, is to conjugate freedom in the plural and to compose and balance its consequences pluralistically. This issue is bound, first of all, by a logical constraint. If intended in categorical and thus universal terms, the idea of freedom implies the respect of equality. Conversely, when freedom is not intended for all, and therefore people are not equally free, such a freedom, if understood as a concrete opportunity to act, quickly transforms into a mere expression of power, inherently blind and insensitive to Otherness.

A law that “hears” the people, that takes their voices and creativity into account, must necessarily be a hetero-integrating law. It is no coincidence that the idea of “*a freedom*” recognized and guaranteed by public institutions coincides, from a historical point of view, with the migration/displacement of faith and religion to a position outside the domain of modern state law. Secularization and freedom, and especially religious freedom, are two sides of the same coin. Together, they show how legal hetero-integration directly hinges on modern constitutionalism and the legal experience of modernity.

## 2. Beyond the two dogmas of completeness and exclusivity of state legal system

did he bash frantically against the side of he bowl, as before. “The whims of fish!”—I thought. “Even prisoners-for-life yearn to return, for a brief visit, to the jail where they spent so many years of the most bitter seclusion.”

But the fish’s visit was not a brief one. Come evening, the fish was inside the fishbowl, still. Thus, I was at the end of my rope, and said to him:

“My dear fish, excuse me, but you seem to have crossed a line! I spent quite a tidy sum so that you might be able to swim as you please, so sorry did I feel seeing you always secluded in that miserable bowl. And you? Now you’ve come back to that same bowl, and spend all your days inside it as if being free meant nothing to you. I swear you’ll drive me to my wits end!”

Then, (since it is a myth that fish cannot speak, whereas it is instead merely possible to notice some minor difficulties in pronouncing their “R’s”), only then, the small creature replied to me:

«Oh, Man, how dim-witted you are, if you’ll forgive my honesty! What a cockeyed idea of freedom you have! It is not the mere ‘use’ of freedom that matters, as such use is an insipid and utterly vulgar thing. What really matters is, on the contrary, the *possibility* of using it. This is its most exquisite quality. I love being in this bowl, which is so intimate, cozy, and favorable to solitary meditations. Nonetheless, I know that when I so desire, I can go out and take long trips across the tub (for which, by the way, I am extremely grateful to you).

«It was a prison, this bowl, and now it is no longer. That is the difference. But not only. When I stay here, in this cubbyhole, materially I am living the same life I lived when I felt prisoner and was unhappy. But it is precisely staying here that allows me to enjoy an achieved sense of well-being. In this way, I do not forget my previous suffering and can thus draw an ever-renewed solace from the comparison, and prevent a habitude to vastness from annihilating, little by little, my capacity for tasting its sweetness. I remain in my jail, but the door is open, so I can see, always, the boundless space I might swim across: this sight is enough to cheer my heart. If instead I sought to glory in what fate has given me, if I ran from side to side in the tub all the livelong day, never stopping, after a while I would inevitably have my fill. And then, the fulfillment would cease. And I would begin to covet wider and wider seas, more and more boundless vastness, something that does not now occur. In short, I would be unhappy again. You understand, thus, how no one knows how to enjoy divine freedom as I do. And now, if you really wish to make me happy, please leave me to the quiet of my nook.»

At that point, feeling I had made a fool of myself, I withdrew, babbling vague apologies.”

The hetero-integration of national legal systems brings with it the overcoming – or perhaps even a sort of rejection – of the positivist dogmas of the completeness and exclusivity of state law. Today, recognizing the incompleteness of state legal systems and their non-exclusivity is inevitable: even beyond the oft-cited consequences of globalization, we might look to the intertwined Italian and European experience.<sup>6</sup> This conclusion is supported by many institutional elements and data such as the European Union and its structures. But the mere fact that the EU exists—founded, though it was, on a misunderstood positivism that made jurists barely more than mere recorders of legal events—still does not explain why those two dogmas have become obsolete. In this regard, we should examine whether they were constitutive elements of Constitutionalism, and specifically if this was also true of the constitutional experience in the aftermath of World War II; or rather, if both these dogmas remained theoretical obsolescent relics even in the 1950s.

Turning to the EU and the anti-European claims ever-present on the political stage, for example, we should think back to the initial phases of “unification” and, specifically, to the legal reception of European Community regulations and their immediate effectiveness within the normative/nomogenetic dynamics of each member state. What appears as fact today—precisely, the European Union—is instead the outcome of a process and also of a contextual re-reading, adjustment, and re-making of several theoretical schemas, including the above two dogmas. Symmetrically, the difficulty in imagining and executing an exit from the EU (to wit: “Brexit”) should be viewed in light of the overall path of legitimation that originally allowed entry into Europe for every member state, and hence gave birth to Community Institutions. However muddled and blurry (thanks to the lack, at least in Italy, of constitutional law to legitimize it), entry into the European Community in the late 1950s ended up orbiting around a sharp exigency of hetero-integration.

In Italy, for example, the legal and political earthquake that followed the conclusion of the MEC Treaty (and the institutional innovations it provided) found a formal reception—or better, a systematic justification—only many years later by virtue of Article 11 of the Italian Constitution.<sup>7</sup> Although this was a ferociously criticized solution, the argumentative strategy underlying it was based on grounds difficult to question: peace and justice among nations cannot be pursued alone. And yet, they constitute, at the same time, a basic interest and a founding axis of each and every democratic/constitutional state. Precisely for this reason, every state needs to hetero-integrate itself to achieve at least one of its purposes—we could say also “its main end”—since peace and justice are essential preconditions for the existence of states. The ends/values of constitutional states demand, therefore, that national legal systems *learn* from “outside” systems. Such a dynamic of self-overcoming, which could be intended even as a dialectics, takes place also with respect to freedom and state relationships with religious institutions. In the face of the source of freedom (namely, the subject, the individual), the state legal system can’t help but hetero-integrate itself. It must do this, paradoxically, to accomplish its own ends. In other words, to become *complete and fully itself* (therefore also exclusive,

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<sup>6</sup> As for “Brexit,” I am not sure that it will improve the completeness of the English legal system. I think, instead, that the degree of hetero-integration (both formal and substantive) is likely destined to increase.

<sup>7</sup> See sentence n. 170/1984 of Italian Constitutional Court.

meaning, unique/true to its underlying foundational project) the legal system has to negate itself and become inclusive (of that which lies outside it). Along such a path, freedom reveals itself to be no longer a merely subjective prerogative, as if it were an emergence from a pondered antagonism between individuals and public institutions; rather, freedom becomes an out-and-out *source of law*.

### 3. The Constitutional *Continuum* from Religious Freedom to the “Intese.”<sup>8</sup>

From the perspective of legal hetero-integration, EU treaties and Italian *intese* with religious denominations (Article 8.3 of the Italian Constitution)<sup>9</sup> are not far apart; indeed, in some respects, we should view them as evidence of a step backwards. I say this because religious freedom and the hetero-integration of the state legal system constitute a sort of twin combination that connoted the political and legal experience of pre-Republican Italy. The utterly modern “Otherness” of religion with respect to the foundational axes of the state played, at the time, a double role. On one side, that *alienation* was an important historical achievement, an assertion of power and autonomy gained by secular law; on the other side, it comprised a kind of fragility, a sort of defect that negatively affected the (allegedly) complete and exclusive sovereignty of state.

In the end, however, religions and their institutional structures were pushed out of the state domain, while nevertheless remaining within the secular orbit, insofar as they continued to be integral to the lives of legal subjects. So, through various theoretical tricks and stunts, the state legal system, presumed *complete and exclusive*, was compelled to refer (through a series of *renvoi*) to the religious dimension: that is, it needed to hetero-integrate itself. However, and importantly, these efforts were carried out by the state to avoid compromising its asserted “absolute effectiveness.” Besides, if the secular state had denied religious freedom, then it would have self-defined as an atheist state. In this way, however, it would have given up its position of neutral agnosticism and liberalism, so taking a stand (although a negative one) on “faith issues.” Just to be clear, this path would not have been impossible to follow—and, actually, it was trodden by some states, even if it resulted in disastrous final outcomes. In any case, it would have been—as many political leaders readily understood—extraordinarily difficult to pursue in practice, if only because it would have reopened the conflict regarding the “truthfulness” of the ethical values underpinning an atheist illiberal state, as such committed to the “public control of people’s conscience.”

Within the particular historical and political context at the end of World War II, constituents were compelled to manage their relationships with religious communities according to the lexicon of

<sup>8</sup> The “intese” are provided by Article 8.3 of the Italian Constitution. They are specific agreements between the State and the representatives of various religious denominations, designed to regulate both civil/secular and confessional domains. They must be the object of specific reception by state statutory law.

<sup>9</sup> Art. 8 (Constitution of the Italian Republic):

“All religious denominations are equally free before the law.

Denominations other than Catholicism have the right to self-organization according to their own statutes, provided these do not conflict with Italian law.

Their relations with the State are regulated by law, based on agreements [intese] with their respective representatives.”

freedom, from the Catholic Church and Judaism to a range of other faiths. But freedom, precisely, brought with it the requirement for hetero-integration. In addition to the “Concordat”—the traditional instrument designed to mediate between the Catholic and secular domains—other protocols found their place in the Italian Constitution, namely the so-called *intese*, agreements accorded with “religious denominations different from Catholicism.” They were strange political-legal tools, surely innovative, but in many respects misunderstood (even today)<sup>10</sup>. However—as stated above—the category of “legal freedom” even here was not correctly designated. This is because freedom is a *conceptual item* that is different from “rights,” and should be considered, rather, as a constitutional consequence of hetero-integration processes, which are in turn a co-productive element of national legal subjectivity. On the other hand, as for its religious aspects, even at that time legal subjectivity appeared disaggregated, broken down, and spread across different legal circuits. One of these circuits, the ecclesiastical one, was explicitly recognized by the Constitution as an *independent and sovereign order*: that is, as a context of experience and sense (hence the choice to use the word *order* rather than *legal system* in Art. 7 of the Italian Constitution) to be thought of as distinct and autonomous from the secular one. The independence and non-territorial sovereignty of the Catholic Church’s order was, however, a political consequence of the religious freedom generally recognized for all subjects of law—not coincidentally, subjects of law equal before the law regardless of religion, according to Article 3 of the Italian Constitution.

The outcome of such a convergence between freedom and equality was and remains, and not by chance, Art. 8.1 (Italian Constitution), whose text defines all the denominations as being *equally free before the law*. The correspondence between the source of freedom and the persistence of an order of sense that diverged from the secular state’s cultural code engendered two gradually acknowledged opinions: respectively, that the denominational legal systems were primary; and, consequentially, that *intese* were not to be included within the list of legal sources stemming from state sovereignty. From an empirical and sociological point of view, these two ideas were not entirely defensible. Nonetheless both were outcomes of the constitutional dialectics between freedom and state sovereignty as already traced in Article 1 of the Italian Constitution.<sup>11</sup>

Religious freedom and the exigency to hetero-integrate the national legal system in order to accomplish its pragmatic and social projections, were both encapsulated, *per oppositionem*, in the principle of people’s sovereignty, therefore in a bottom-up device of state legitimation, as such directly rooted in the autonomy of each individual—to be intended in the strongest sense as sovereignty of oneself. This autonomy, in turn, is legitimized by virtue of the constitutional recognition of fundamental freedoms and rights, as constitutive elements of a “Republicanism” meta-principle. However, freedom and religion, despite their constitutional recognition, inhabit beyond the curtain wall of nation-state sovereignty, no matter what may be intended with regard to the sovereignty of the people.

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<sup>10</sup> See, recently, Consorti (2014).

<sup>11</sup> Art. 1 (Constitution of the Italian Republic):

“Italy is a democratic Republic founded on labour. Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution.”

#### 4. The *intese* and the extensive hetero-integration of state legal systems

That which is deemed to be an expression of freedom cannot be a derivation, or an emanation of state authority. This neat observation is the underlying reason for the reluctance to consider denominational legal systems as normative sets derived from state law and, consequentially, the *intese* as internal legal sources of the state.<sup>12</sup> Even the alternative proposal that qualified *intese* as “public law agreements”<sup>13</sup> was not intended to be in tune with, and nor elaborated in view of, the necessity to protect freedom as something else *than the State*. The “agreement” idea, as well as the very word, were a little too reminiscent of contractual practices, and so became entangled—at least within the theoretical imaginary—in the dialectics between will and normativity in the contract theory that was so fashionable at that time (and not only).<sup>14</sup> In other words, contracts seemed too anchored to their “typical modes” despite the recognition of contractual freedom stated by Art 1322 of the Italian Civil Code. So they appeared overly subject to the control and driving power of the state, and therefore unable to host the *capital* of pluralism, and the *extra-statehood* and *not-belonging* inherent to the experience of religious faith. All this was due, at least partly, to a flaw in Italian civil law doctrine and a related lack of connection between the contractual experience and the constitutional values/ends that were meant to be its foundation.<sup>15</sup> Only afterwards, and much later, was this hiatus bridged; the semantic potentialities of constitutional principles eventually began to interplay with the inter-subjective relationships among private individuals.<sup>16</sup> In this way, the Constitution slowly evolved away from its exclusive role providing a mere external limit to legislative power (one it embraced for many years after its enactment) and began to function as a horizon of ends, providing instead a teleological agenda for legislative power.

On the other hand, the omnipotence of the legislator and the alleged absolute co-extensiveness of the law with legislative acts were both constitutive elements of the liberal political imagery of Northern-European cultures. Looking back at the dawn of modernity, such ideological assumptions strongly invoke the Protestant ethic and the related identification between moral theology and civil ethics inherent to quotidian life. This ideal co-implication makes those assumptions very difficult to overcome without the *invention* of alternative cultural and legal paradigms. But, unfortunately, it was difficult for such alternative patterns to develop within the context of pluralist constitutionalism that was widespread in the aftermath of World War II; there was also a persistent lack of theoretical proposals oriented in this direction.

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<sup>12</sup> See Finocchiaro (2015).

<sup>13</sup> See Spinelli (1989); Lariccia (1986).

<sup>14</sup> In this regard, see most recently Colaianni (2016) and *ibidem* for other bibliographical references to the same author’s works on the same topic.

<sup>15</sup> Yet from a historical point of view, this kind of teleological connection with the overarching values of the legal discourse was a connotative aspect of the Medieval doctrine of contracts: see Gordley (1991).

<sup>16</sup> In this sense, a pioneering position was held by Heller.



The restored awareness of the close implications between the dynamics of subjectivity and the multiple layers of legislation—*inter alia* so typical of both the Roman and medieval legal traditions, specifically in the contractual area<sup>17</sup>—took a long time. Nowadays, things look rather different, along with—and, once again, it is no coincidence—the fading of the two dogmas of completeness and exclusivity of national legal systems. In this new situation, the classification of the *intese* as *constitutional agreements* that can be used in the service of the hetero-integration of the legal system, with important benefits for the reception of claims for freedom—could be argued for again, and with some hope of success. For this purpose, perhaps, *negotiating with and by means of expressions of freedom* should be understood as an exercise of hetero-integration, and therefore no longer as an emanation from the authority of a state that overwhelms an ever-bounded legal subjectivity. If this change took place, then the support for the dichotomy *inside/outside* with respect to national legal systems could vanish, along with the contradictions ensuing the inclusion of the *intese* in only one of these two opposite political/legal spaces.

Even more interesting in this re-conceptualization is the possibility to *see* the *intese* as instruments for *listening to* the claims raised by social and legal subjects. If so conceived, they would function as a sort of *institutional translator* of that which is Other-than-state and yet recognizable as being worthy of protection (at least potentially) by the national legal system and its constitutional instruments. Besides, freedom can dwell in and unfold across many aspects of quotidian life, but at the same time, it produces pragmatic projections that draw an ever-changing horizon of sense. What made people feel free yesterday, later transforms, often, into a current rule or custom. Put diversely, the threshold that defines our sense of freedom and emancipation moves continually, as it responds to new, changing features of individual life and social coexistence. The most evident closeness between such a normogenetic connotation of freedom and the legal structures of national law takes shape with respect to the areas of legal experience in which the autonomy of subjects unfolds: that is to say, all the institutes allowing a degree of choice to the individual, even if these accord with the entitlements and powers that are nevertheless somehow always pre-defined by the legal system and formulated through the category of positive law (or, in the broad sense, conditional rights). If such *scripts* of autonomy conceded to legal subjects by the legal system were to be invested with the semantic projections of freedom, then they could prove to be extraordinarily receptive and transform themselves into real forces for the production of new law, even relying upon pre-existing legal provisions.

## 5. Broadened “Intese”

Promoting the interplay of freedom with the semantic and pragmatic unfolding of subjective legal autonomy could help to solve many of the problems that currently encumber the responses of national democracies to the multicultural and multi-religious changes they are increasingly experiencing. More and more often we are witnessing an increasing *confessionalization* of problems

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<sup>17</sup> See Calasso (1957); Cortese (1962-1964).

engendered by cultural pluralism, namely a conversion of cultural conflicts into religiously-labeled struggles. This trend could be described as a sort of *political pathology* of our planetary present. Conflicts between different cultural options transfigure more and more often into forms of antagonism between religious heritages and national cultures or, alternatively, between claims of faith and secular institutions. Such a phenomenon is not only a result of the adoption of rhetorical strategies or surreptitious discursive devices exclusively finalized to support political struggles. I think that it contains, at least partly, something of genuine substance.

Religion and culture, if considered from a historical and anthropological point of view, are closely intertwined. Religions' traces can be found in many cultural habits, encapsulated in people's conduct and in the schemes they use to understand the world. The secularized and even the atheist contexts still encompass, as a result of cognitive resilience, paradigms of sense rooted in religious experience and traditions.

Tradition and religion seem, actually, almost inseparable. Likewise, the plots traced by the various processes of secularization and modernization could not be uncovered, analyzed and decoded without the anthropological-cognitive dimension that religious knowledge bestows on civilizations and cultures of the world. Doubtless, such an assessment also applies to Western culture. Hence, just as we can speak of Confucian, Hindu, and other kinds of atheists, so too must we refer to Christian atheists. The paradox in the juxtaposition of such terms, combined in the pairing "Christian-Atheist," is only apparent; it dissolves as soon as we consider the anthropological-cultural connotations of religions and in addition to those that are strictly denominational.

But let's return to Italy. When facing Western culture, particularly the Italian culture, foreigners could feel it necessary to re-interpret their own habits, codes of conduct, style of life and behavioral paradigms according to a religious perspective. This effort is prompted by the need to cope with the social universe of the host country, and position themselves within it. Even if these people consider themselves to be secular, they often undertake such retrospective cultural/religious journeys. There are many reasons why this occurs.

The encounter with Otherness *produces* history (and historicity). It triggers retrospective gazes, which in turn urge people to single out their own difference. On the other hand, the secular legal language of Western countries contains within it cultural features that are deeply rooted in specific cultural traditions. So, what appears to be merely "rational"—and thereby also universal—to Western eyes, could seem instead densely connoted, or worse, *highly contaminated* by Christian ethics in the eyes of non-Western people. It is important not to underestimate the pervasive presence/resilience of traditions and cognitive schemes derived from religious habits. This pervasiveness can sink below the secularized surface of social features and permeate the most intimate folds of quotidian life, precisely the same that take their rhythm and rule from legal provisions. It is just for this reason that in the West, as well as in post-colonial countries, cultural difference so frequently assumes the same features as religious identity. In so doing, it claims nothing but its own *space* within the *public space*, that is, along the same paths that all subjects of law tread every day. Across such efforts to reinterpret one's own identity, foreigners as well as minorities attempt to reposition themselves and their cultural differences within their social context.

Now, it is precisely with regard to such processes of transformative-socialization that the *intese* could be used as a bridge to translate and negotiate cultural differences. They could serve as devices to find ways to convey the (non-traumatic but concrete) inclusion of foreign cultural habits within the semantic potentialities of national cultures and legal traditions. But, in order to attain such functionality, the *intese* would need to be much broader than those the Italian government has concluded with denominational representatives thus far. Such “broadened *intese*” would need to cover a much wider range of topics and issues than those which current agreements with denominations address. Quite the opposite, the current *intese* are limited to defectively traced copies of the Catholic Concordats and the related *res mixtae*.

If we consider religion in its anthropological-cultural signification, and not only with regard to its denominational-sacramental features, it is precisely the above defectiveness that needs to be subverted. To be explicit, I mean that the number of *res mixtae* (namely, the matters open to bilateral negotiation) and possible lines of conflict between the State and the Catholic Church is, in the case of Italy, inevitably smaller than the number of frictions which might germinate around the relationships between Italian culture (including its legal system) and Islamic, Hindu, or Confucian, etc., religions. It is so merely because Catholic moral theology and, more generally, Christian theology are much closer to the ethical grammar formalized in the institutes and categories of Italian law than other traditional religious ethics. When they must abide national law, Catholic and Atheist-Catholic subjects will experience fewer conflicts of loyalty with their religious and/or cultural belonging than, for example, Muslim subjects. This is not the result of a quantitative assessment, but rather an inevitable implication of qualitative cultural features. This means only that the spectrum of themes, cases, or life situations liable to engender potential conflicts will presumably be more ample for Muslims or Confucians than Catholics. However, I want to be very clear on this point, so I will explore some practical cases.

It is safe to say that contractual matters and the related legal standards to judge subjects’ conduct (“good faith,” equity, the “prudent man” principle, etc.) have not encountered any notable conflicts of loyalty (cultural and/or religious) among Italian Catholics from Italy unification to present. This absence of contrast has, however, a historical/cultural explanation. Contractual standards constituted the basic ground on which the reciprocal influence between Christian moral theology and Western legal experience evolved, at least until the modern era. Today, the long shadow of such cultural conflation determines a sort of anthropological and political blindness, or at least unawareness, susceptible to false secularist assumptions. Even in 1984, no one could have *safely* come forward with the proposal that the Concordats were in fact addressing *contractual* topics or issues. Had someone made this claim, he would have been entangled in a quagmire of disputes about the dangers of confessionalizing the secular state. To be clear: this would have amplified the massive heap of controversies that actually accompanied the Villa Madama Concordat of 1984 provision authorizing a bilateral protection of cultural assets.

Today, with regard to the denominations and cultures that are cognitively and axiologically distant from Christian habits and ethical patterns, such problems have taken on a different hue. Paradoxically, a betrayal of the secularization of state law can be seen in the absence of any intercultural negotiation with features of the national law and its institutes that preserve Christian

ethical cultural/traditional roots: the same institutes that, on the contrary, national authorities and dominant public opinion pass off as absolutely rational and thereby universal.

This concealment and silencing of the underlying but nevertheless pervasive conflicts haunting the quotidian life of millions of people from *different cultures* leads to, *inter alia*, striking and dramatic misunderstandings. Often, these people do not possess the cognitive tools necessary to decode what national law does not say and yet presumes, and therefore requires, even if without any explicit provision or request.<sup>18</sup> So, to provide a few examples, the semantic structure and dynamics of “good faith” and “fairness” of contract terms are cited by the Italian Civil Code and its statements with no further explanation. To complete their meaning, these legal provisions rely upon *cultural encyclopedias*, a *common knowing-how-to-do*. The implicit, or *mute* parts of legal rules may, however, vary greatly between cultures. This is also because the moral theologies and related orthopraxes that have been exerted by religious traditions continue to have a deep influence on law’s categories, and should not be overlooked. So, an individual from another culture could fall prey to tragic interpretive mistakes, notwithstanding his most genuine intentions to obey the law of the country in which she lives. On another side, the legal officers and practitioners of the state, first and foremost the judges, precisely because of their ignorance of Others’ culture and implicit legal knowledge, could grossly misinterpret Others’ conduct and its actual meaning. If judges or lawyers interpret the words and actions of Others presuming that they approach situations the exact same way that an average Italian does, then they could formulate legal qualifications that are completely off-target: consequently, the application of laws could turn out to be entirely inappropriate to rule the case at issue. Conversely, if the *intese* were used as a ground for legitimating legal interpretations, one that is open to the inclusion of Otherness and informed about it, then the entire national legal system and its intercultural potentialities could be significantly improved. Indeed, broadening the scope of the *intese*, at least according to the above perspective, could provide a higher degree of freedom and hetero-integration, in resonance with the principles already inscribed in the very grammar of the Italian democratic Constitution.

## 6. Advantages and Potentialities of the “intese estese”

Many countries intertwine the need for hetero-integration of their legal systems with strategies to govern their inner cultural pluralism. This also occurs when states address the activities of religious communities and their inner laws. The strategies aimed at protecting cultural and religious plurality mainly tend towards inter-normative and inter-systemic solutions. These legal devices are targeted at subjects and interests that are somehow already *legalized*: that is to say, subjects and their interests are considered almost exclusively through the conceptual spectrum provided by their legal system of belonging and/or origin. Their difference, more roughly, is relevant only if it is *a difference* already forged, declined, and configured in normative-legal terms. The result of this tendency is the forced juridification or *normative reduction* of any difference. It appears almost as a price to be paid, an

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<sup>18</sup> On these components of legal provisions, that I call “the mute or implicit parts of law,” see Ricca (2013: 94 ff.).

ideological pre-requisite, necessary in order for people to be entitled to the recognition and protection of their religious and cultural features. This strange *game of legalization* goes as far as to interpret cultures as if they coincided perfectly with normative/legal systems. So Others, or anyone who makes claims based on cultural or religious difference, must first demonstrate that their demands for recognition are ascribable to pre-existing normative/legal patterns. Every *common* citizen, however, is endowed with the right to instantiate the protection of her/his own difference and freedom by virtue of new readings and interpretations of constitutional principles, based on their creativity and psychosocial conditions. In this pursuit, common citizens do not bear the burden of demonstrating a correspondence between their requests and a pre-existing normative pattern. Their claims may be fueled by their power to interpret state law through the hermeneutical spectrum provided by their native cognitive and axiological schemes. Why should this possibility, this fundamental feature of democratic legal subjectivity, be denied to people belonging to other cultures or religions? This different treatment, in my view, is nothing but an unjustified and unjustifiable disparity.

However, once the difference is reduced to prescribed right/norm/legal system patterns, the way is already paved towards the adoption of the ordinary devices of *renvoi* to other legal systems, accorded with the private international law provisions of every national state. This practice makes the work of lawyers easy, since they are usually trained in and accustomed to handling legal rules rather than socio-cultural phenomena and the human ability to produce new meanings. Conversely, such an approach on the part of lawyers and legal practitioners makes *different* people's lives much more difficult, and consistently disempowers the inclusive capacities of state legal systems.

In some respects, the commitment to inter-legality—as illustrated above—tends to stiffen the exigencies of protection claimed by individuals and communities, locking them into fixed, if not frozen, schemes. This is because such schemes are almost exclusively based on normative and traditional patterns and rules of conduct, which in turn trigger processes of hyper-identitarian symbolization. So, people are led to *defuse* their ability to re-interpret their own cultural differences. Instead, they are urged to express the most radical aspects of their own cultural habits. Not infrequently, their requests of inclusion appear, therefore, as a morphological *irritant* with respect to the axiological-normative categories of the state. As a reaction, people and their concrete interests are eventually flattened in their cultural signification and made to coincide with the rules of local legal systems. To make matters even worse, the correspondence between such rules and people's claims is taken by state authorities as a measure to assess the seriousness and truthfulness of any demand for recognition of cultural/religious difference (and thereby the legal relevance of such difference in and of itself). The final outcome of this approach often results in a polarized cultural antagonism played out as a conflict between rules from different legal systems. Paradoxically, cultural differences end up being considered recognizable and relevant before the law only when it is possible to *detect* specific morphological incompatibilities of Others' behaviors that have been singled out in their mere material appearance; in other words, they have to emerge as blatant and almost glaring facts.

In so doing, however, rather than overcoming and relativizing cultural boundaries, inter-legal pluralism ends up raising new barriers and reinforcing existing ones. Along this path, new and old stereotypes take on even greater political significance; some clichés become revered truths, and cultures gradually undergo a process of folklorization that reduces them to mere repertoires of

customs invariably connoted by a distinctive and exorbitant exoticism. This is the plague—dangerously contagious in all sorts of ways—of multiculturalism<sup>19</sup>. The counterpart of such an exaltation of religious/cultural Otherness and its blatant *alienness* is the implicit assertion of *normality* that shrouds the existential and legal categories of quotidian life experienced by natives or dominant groups in an aura of universality. Of course, this ultimately means that the *cultural* and the *religious* are phenomena outside the *domain of reason*, almost as if they were mere affectations of civilization. On the contrary, whatever is (deemed) *common* (contracts, real estate, crime, inheritance law, business and entrepreneurial activities, etc.) is to be assumed to be immune from cultural and/or religious *contaminations*, and thereby inherently universal. So, on one side, people and their differences are reduced and made equivalent to rules and norms, which are taken to be more relevant than their real voices and demands; on the other side, these same people are annihilated, when it comes to their differences, by the steamroller of common legal categories allegedly clear of *cultural affections*, *religious beliefs or superstitions*, folkloric connotations, and any other kind of *irrationality*.

Regrettably, this overall approach, still so typical of even the most enlightened variant of *modernity*, overlooks the not insignificant detail that people are not norms; that cultural habits are far more semantically flexible than legal rules; that what is to be valued and enhanced is not so much culture in and of itself, namely assumed as a “thing” or an “object” from the past, but rather the *evergreen* ability of every human being to produce culture.

The “broadened *intese*” could provide a radical alternative to the treatment of cultural and religious difference based on inter-legality and international private law. They could serve as a discursive space available to negotiate cultural meanings and to unfold projections of freedom through the legal tools of state systems. Through the support provided by the “broadened *intese*,” cultural differences could spread throughout the national social environment, informing its various dynamics as well as the legal *scores* that orchestrate its making.

In this regard, an openness to the unfolding of freedom inherent in contract practice could constitute—as I mentioned above—a first step in undertaking an extension of the *intese*. So, for example, the government could consider the opportunity to include as part of an *intesa* with Taoist or Confucian representatives some general referral to their ways of delineating “good faith” in contractual negotiations. Still, such an agreement must avoid stiffening institutional schemes to interpret people’s behaviors. Rather, the *intese* should provide exclusively normative tools to give judges and legal practitioners some hermeneutical guidance in order to correctly interpret Otherness “in action.” A nomothetic template imagined for this purpose might read something like:

For the legal qualification of conduct by subjects of a different faith and/or culture [Hindu, Confucian, etc.], the Italian authorities will take into account, at the request of the relevant stakeholders, possible variances of meaning due to cultural or religious difference.

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<sup>19</sup> On the “multiculturalism vs. interculturalism” debate, see, most recently, Meer, Moodod, and Zapata-Barrero (2016). Let me stress, however, that the templates of interculturalism discussed in the essays included in this book coincide, more or less, with the sort of camouflaged assimilationism embodied by the Québécois interculturalism. This idea of interculturalism is, actually, totally at odds with mine: see Ricca (2008, 2013, 2014).

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In agreement with the denominational representatives, the parties will establish a list/framework, endowed with an exclusively declaratory value, pointing out the areas in which cultural or religious difference might be salient.

This legal device “at the request of stakeholders” and its inclusion in the normative text serve to connote an openness, that is, to indicate how the broadened *intese* might be used as potential resources available to legal subjects rather than mandatory top-down schemes of action. It would be a sort of “freedom clause” designed to allow each individual of a different faith or culture (relative to the dominant Italian one) an unconstrained choice in whether to make a claim for the legal recognition of his/her own difference. Such an openness of the normative provision would help, furthermore, to relativize the thorny issue of the identifying which social subjects are to be entitled to a broadened *intesa*. Regardless of who they are, they would not make binding decisions on all the people of a given faith or culture. Conversely, according to the above normative template, institutional agencies and judges should only be required to justify the lack or the denial of the recognition to the claims that individuals raise when they demand protection because of their religious or culture differences. In any case, agencies or judges should never impose cultural patterns over individuals if the latter do not demand a specific recognition of their difference. All this, more generally, could also prove useful to avert the ever lurking danger of cultural reifications/cosifications, the aprioristic ascription of customs, the ossification of people’s ability to exercise their cultural competence, and the packaging of culture into pre-determined stereotypes and/or normative scripts.

Such a provision of intercultural interpretive patterns could legitimate the efforts of both translation and transaction made by lawyers and other officers called upon to apply the law when cultural and religious differences are at issue. The “broadened *intese*” could open the way, therefore, to an interculturally informed use of national legal categories so as to defuse cognitive prejudices and avoid mistakes in the legal qualification of people’s conduct. In such a way, furthermore, these kinds of *intese* would become a means to promote an inclusive and inherently cosmopolitan declination of state law. This nomothetic approach’s ability to facilitate spontaneous intercultural transactions would result not only in an intensified protection of differences, but also a means to enhance a form of social governance that is aligned with democratic/constitutional requirements. In other words, the more people are willing to abide the law, the more this obedience becomes the easiest way to meet the needs of each of the subjectivities involved, whether native or foreign, and regardless of culture/religion. Besides, when legal practitioners are called upon to categorize and qualify social facts and actions, taking cultural and religious differences into account is not necessarily nor exclusively a matter of legal rules. Were the hermeneutical attitude (hopefully) conveyed by the “broadened *intese*” actually disseminated, then *difference* would know in advance that it could find a legal system ready to *listen and respond* to its exigencies. This opportunity, in turn, would allow *different people* to creatively re-interpret and remold themselves in view of the potentialities arising from an intercultural/transactional protection to be provided by a pluralistically responsive state law.

For such a creative attitude to take place, however, political institutions and legal practitioners should no longer consider cultural habits as norms or rules but rather as *means* available to individuals and their varied subjectivities. If the world of law practiced pluralism through this approach, it would become clear that within an authentic *democratic theater*, people would not belong

to cultures or religions but rather culture and religions would be available to individuals as means for unfolding their lives in a climate of reciprocal fertilization and coexistence. The “broadened *intese*” should also embrace aspects of legal experience involving individual autonomy. In this case, they could enable freedom (as such distinct from the mere autonomy intended as a strict consequence of the withdrawal of institutions’ legitimate power) to partake in processes of production and renewal of legal signification and subjectivity. An initial inventory of areas/institutes potentially involved in these kind of provisions could include:

1. Contract law
2. Inheritance law
3. Business activities, associations, foundations, etc.
4. Conceptualizations and modulations of penal responsibility according to an intercultural interpretation of cognitive and behavioral habits
5. Basic categories of legal subjectivity. Consider the concepts of bodily integrity, right to one’s own image, name, legal capacity, etc. See, for example, the first ten articles of the Italian Civil Code: the generality, if not universality, inherent at least to the linguistic formulation of these concepts and the related statements makes it almost impossible to tighten their signification into specific ethnic, cultural, and religious schemes based on a nationalist/ethnocentric interpretation.
6. Family relationships
7. Public spaces, town planning and zoning, legal aspects of architectural models
8. Intercultural and interreligious health care

The intercultural developmental potential of Italian law could be put to extensive use by the “broadened *intese*.” For this potential to become effective, however, the realization of the *intese* should be accompanied by a serious commitment to promote the intercultural training of legal practitioners.<sup>20</sup> Of course, this training should be underpinned by a previous legitimation provided by legislative statements that have already transposed the contents of previous agreements between the state and the various religious/cultural representatives into the national legal system. This overall governmental strategy would constitute a real innovation, a powerful—and for many reasons urgently needed—turn, allowing for a much improved management of the plurality of social life in contemporary national societies, and specifically in the Italian context. It is undoubtedly a challenging and mammoth project. It should involve, united in a common effort, first of all the citizens, and along with them jurists of varied backgrounds (civil law, penal law, religious law(s), comparative law, constitutional law, international law, legal history) supported, in turn, by anthropologists, cultural psychologists, sociologists, semioticians, human geographers, etc.). In short, this should be a challenge of the present that then draws the future: a future that may be capable of transforming the conflicts and problems of today into cultural resources available to all the human beings of tomorrow.

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<sup>20</sup> In this regard, see Ricca (2015).



## 7. Two concluding remarks

The implementation—even if only partial—of the “broadened *intese* project” would support the incremental development of a plural legal subjectivity through processes of inclusion directly engendered into and by state legal systems. The “broadened *intese*” could state that “legal practitioners, legal officers, and the courts shall endeavor to take into account the different cultural declinations of behavioral habits comprising the *building blocks*, or the *pragmatic matter*, of the institutes that are to be considered through the *intese*.” Such a provision would be equivalent to providing a direct channel for the hetero-integration of state law. This legal “duct” could immediately convey the demands for recognition from the exogenous (or better, *exo-state*) territories of freedom to the *forge* of legal-positive technicalities concerning legal subjectivity and its process of emersion and renewing. The *intese* could serve, in this case, as spaces open to constitutional negotiation between freedom and institutions. In this way, they could be instruments empowered to promote the sequential reproduction of reciprocal understanding, that is, the freedom to understand Otherness within a procedural frame supplied by state law. The more such sequential propagation were to take place, the more the “broadened *intese*” could function, in their nomothetic fashion, as operational normative devices addressing and supporting the various practitioners committed to dealing with quotidian legal experiences. So, for example, we could imagine that through the use of these “broadened *intese*,” lawyers and other legal practitioners would be enabled to translate/transact religious/cultural difference in serving client needs for contracts, wills, statutes for associations, foundations, corporations, and more. If this were to actually occur, many problems of multicultural democracies would presumably find very different solutions from the inadequate recipes suggested so far by supporters of inter-legal and inter-systemic pluralism. Furthermore, the *perception of being free to reciprocally understand Otherness* and having one’s own *different* voice heard *by and through* the law, could *make space* for *timely* forms of inclusive legal integration. In other words, people could appeal to a kind of legal assistance able to benefit from an inter-religious and intercultural use of law even before they unilaterally adopt behaviors that are culturally connoted and relevant to the law. So, they could avoid acting in non-discursive and un-transactional ways, which would otherwise run the risk of creating conflict. Difference, in other words, could develop from being a hindrance, or a bulwark to be defended, into a resource, a bridge leading to the drawing of new thresholds of social integration and inclusive legal subjectivity.

Similar remarks may be made about judges and administrative agents, who could deal, in turn, not only with difference taken in itself, as a phenomenal and behavioral datum, but also with the cumulative outcomes of integration processes managed in advance by legal practitioners who are committed to timely intercultural assistance.<sup>21</sup> The “broadened *intese*,” if envisaged and employed in this way, would have an open structure, ready to renew itself in response to the socio-institutional implications of included translational/transactional patterns. Their statements would not operate,

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<sup>21</sup> See Ricca (2014).

therefore, as foundational meta-norms and hierarchically superordinate rules, but rather as poetic legal tools nestled and active inside the *making* of law. Their actual signification, consequentially, would be defined—as in every *beginning*—only in the light of their consequences.

The second topic I would like to address here regards a possible—indeed, almost certain—objection against the proposal to extend the contents and uses of the *intese*. Simply stated, “The ‘*intese*’ were designed to support the exigencies of denominations. What, then, do they have to do with culture? What do they have to do with religion, intended in anthropological terms? If they have been used thus far only to regulate religious buildings, marriages, ministers, sacred rites, and religious education, why shouldn’t we continue to assign them this specific role, however peripheral it may be?”

The answer to these questions emerges directly from the present. Contemporaneity challenges democracies through the *religiosization* (please forgive this cacophonous and yet efficacious neologism) of cultural diversities. To respond to the question raised above, it could be useful to ask another: *why do socio-cultural conflicts take the form of, or commute into religiously motivated disputes?* I have tried to provide some elucidations to this contemporary dilemma earlier in this essay (but also elsewhere<sup>22</sup>). So, I will dwell less on the causes of this phenomenon than on possible antidotes to its outbreak. The “broadened *intese*” and their ability to address the proliferating anthropological projections of *religious semantic patterns* could constitute, in my view, at least one such antidote.

There is no question that the *intese* were originally conceived of in a specific cultural climate as a tool to manage the conflictive overlapping between the secular order and the various religious orders of predominantly Jewish-Christian denominations. Nonetheless, they could serve, today, as a new approach that would be symmetrically opposite to the *religiosization* of cultural divergence: namely, a shift from religion—or better, religions—to cultures, and thereby to the elaboration of an intercultural and legal ground to support a genuine, symmetrically pluralistic coexistence. It would be a *move* as such necessary, in many respects, to trigger a deep re-thinking of secularization and laicism. Besides, this necessity is a consequence of the cosmopolitan connotation that the *substance* of social relationships has increasingly assumed within national states. At the same time, such a use of *intese* would constitute a revival, in an expanded form, of the *formula* for the governing of religious differences that Grotius devised at the dawn of legal modernity. His theoretical and political approach ultimately consisted in inviting people and governments to cast a legal *gaze* on all that was *cultural* (namely: *rational or natural*, as it was called at the time) in religions and moral theology; after which, he proposed to mine and transform it into building blocks intended to give shape to a common ethical-legal ground for the pacific coexistence of religious difference. In line with these long-term historical-theoretical coordinates, the proposal for “broadened *intese*” is to be regarded as explicitly *modern* and aimed at supporting the ideal exigencies of *a modernity that has probably been betrayed, and certainly not yet completed*. In many respects, the Enlightenment and the Declaration of the Rights of Man and of the Citizen, intended as pro-active and history-producing categories, have drawn an ethical parabola that is doubtless colored by sinister implications. Their humanitarian inspirations became bogged down in the grim marshes of authoritarian, imperialist, exploitative and ethnocentric misuse. I would ask, however, whether it’s possible to imagine a criticism of human

<sup>22</sup> See Ricca (2013: 1 ff.; 2013a: 194 ff.).

rights—and thereby of historical modernity and its consequences—without them, that is, as if there were no such idea as that of a human right, as if it did not exist. In short: can we criticize the Enlightenment without the Enlightenment? Would we be able to censure Human Rights (offspring of the Rights of Man and of the Citizen) and their uses without Human Rights?

I will leave it to the reader to answer these, as well as the questions that follow. As for the Enlightenment and Human Rights, could there be a version of rights that function as an expression and, at the same time, an outcome of the exercise of freedom in the absence of freedom? And could there be authentic freedom without the possibility of a reciprocal understanding among citizens? Now we come to the ultimate reason for the title of this essay, “broadened *intese*.” It points to the necessity of broadening our social agreements in a pluralistic fashion as a means of underpinning and conveying *freedom*, to understand Otherness, and so, to feed freedom.

## II

## Leggendo il giornale

I dialoghi tra gli atei/e i credenti/  
 si sono svolti, dicono,/senza incidenti./  
 Solo un po' stanchi i glutei/  
 per le lunghe sedute/e conversioni reciproche,/  
 imprevedute,/restando eguali, com'era prevedibile/  
 le percentuali.  
 (Eugenio Montale)<sup>23</sup>

### The false paradox of an Atheist “Intesa”: Religious Freedom, Incomplete Secularizations and Pluralistic Nomothetic

Sometimes, reality is in tune with imagination. In Italy, an atheist organization asked the Government to enter into negotiations to stipulate an *intesa*, according to Article 8.3 of the Italian Constitution<sup>24</sup>. Of course, the answer from the Government was “no.” The Italian Government rejected the request to start negotiations because of the “non-religious connotation” of the association UAAR<sup>25</sup> asking for the *intesa*. Ensuing the rejection of this request there has been a series of judicial rulings<sup>26</sup> on the matter, which were concluded with sentence n. 52/2016 of the Italian Constitutional Court. This decision, eventually, ruled in favor of the Italian Government. It has been declared that the opening of negotiations is to be considered a political act. So, the issue seems to be definitively over. Against political acts—according to the Constitutional Court’s decision— there is no possibility of appeal, except perhaps an eventual application to the European Court of Human Rights, most likely based on Article 17 (points 2 and 3) of the Treaty on the Functioning of the European Union (TFEU). The Treaty, in fact, states that the Union, “equally respects the status under national law of philosophical and non-confessional organizations.”<sup>27</sup> In any case, the State’s obligation to start

<sup>23</sup> English translation (mine):

“**Reading the Newspaper.** Dialogues between atheists and believers/were carried out—it is said—without blows./ Only some buttocks were a bit sore/from the long periods spent sitting/and the reciprocal conversions,/unforeseen,/but taking place, as was predictable, at the same rates.”

<sup>24</sup> The first formal request dates back to 1996.

<sup>25</sup> Union of Atheists and Rationalist Agnostics.

<sup>26</sup> The series of judicial decisions on this matter prior to the Constitutional Court’s sentence is: TAR Lazio, sent. 31 December 2008, n. 12539; Consiglio di Stato, Sez. IV, 18 November 2011, n. 6083; Corte di Cassazione, Sez. Un., sent. 28 June 2013, n. 16305; TAR Lazio, Sez. I, 3 July 2014, n. 7068.

<sup>27</sup> Art. 17 TFEU:

1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
2. The Union equally respects the status under national law of philosophical and non-confessional organizations.
3. Recognizing their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organizations.

negotiations for the *intese* will be very difficult to prove based only on Art. 17. The ongoing judicial developments on this issue lie, however, in the future, along with all of their consequences.

Several scholars responded to the above sentence of the Italian Constitutional Court and, more generally, the overall judicial approach, not to mention the political case taken in and of itself. Many of them focused on the definition of “political act” adopted by the Italian Government, the possibility to challenge it before the Courts, the discriminatory significance of the State’s refusal to begin negotiations on the *intese*, the interpretation of Atheism as a “laicist religion,” the actual need to use the *intese* as a means to protect and implement religious freedom on behalf of all social subjects, including atheist associations, and finally on the Government’s power to deny certain applicants *intese*, be they denominations or other kinds of associations.

The core of the Court’s argument is based on the following idea: the conclusion of an *intesa* has nothing to do with the effective constitutional protection of religious freedom. Consequently, the fact that no *intesa* is concluded or that the Government rejects the request to start negotiations with a specific denomination or association does not prejudice their religious freedom. It would be better, however, to refer directly to the words of the constitutional judge:

The meaning of the constitutional provision is the extension to non-Catholic denominations of the “bilateral method.” This provision covers areas specifically related to the peculiar exigencies of confessional associations (sentence n. 346/2002 of the Italian Constitutional Court). The *intese* are, therefore, designed to recognize the particular exigencies of each denomination (sentence n. 235/1997 of the Italian Constitutional Court): the *intese* can either provide for specific advantages on behalf of denominations or, conversely, impose particular constraints (sentence n. 59/1958 of the Italian Constitutional Court); furthermore, they can accord legal relevance within the state legal system to specific denominational laws. This definition of the *intesa*, that is, its function of recognizing the specific exigencies of each religious group, is to be considered indisputable, regardless of whether the praxis shows a tendency to homogenize the contents of new *intese* with those already stipulated: the contents, in any case, still depend on the wishes of parties.

What the Italian Constitution sought to avoid is the unilateral introduction of a special and derogatory relationship between the State and individual denominations. This was based on the assumption that this unilaterality could be a source of discrimination for the following fundamental reason: the particular relationships between the State and each denomination must be governed by a statutory law made “on the basis of bilateral agreements (*intese*).”

It is important to emphasize, following the jurisprudence of this Court, that in the Italian constitutional system the *intese* are not a condition imposed by the powers-that-be so as to allow the denominations to enjoy the freedom to organize, act, or even benefit from the application of laws, specifically addressed to them, within various legal areas. Apart from the stipulation of the *intese*, the equal freedom of organization and action is assured to all denominations by the first two paragraphs of Art. 8 of the Italian Constitution (sentence n. 43/1988 of the Italian Constitutional Court) as well as by Art. 19 of the Italian Constitution, which guarantees the exercise of religious freedom even in its associate form. This Court has, indeed, consistently held that the legislator cannot discriminate against confessional organizations based on whether they have or have not formalized their relationships with the State through *intese* or other agreements (sentence n. 346/ 2002 and sentence n. 195/1993 of the Italian Constitutional Court).

As positive law currently stands, some assumptions adopted by both the decision of the Court of Cassation—from which the present judicial conflict stems [translator’s note: that is, the conflict of competence between different state powers]—and the intervening party, are to be considered incorrect. In fact, it is impossible to claim that the lack of an *intesa*, in and of itself, can jeopardize the guarantee of equality for denominations different from the Catholic Church, protected by Article 8 of the Italian Constitution.

In our legal system, there is no over-arching regulation on religious matters from which denominations can draw legal support, provided they have previously concluded an agreement with the state. On the other hand, the Italian Constitution does not in any way dictate the necessity of such a general and pervasive regulation, since its text already assures the utmost protection of religious freedom. Certainly whenever legal rules relevant to religious freedom are to be applied, the Italian Constitution precludes the legislator from discriminating against religious associations on the basis of whether they have or have not concluded an *intesa*.<sup>28</sup>

<sup>28</sup> Translation mine. The original text of the Italian Constitutional Court’s decision cited above is as follows:

“Il significato della disposizione costituzionale consiste nell’estensione, alle confessioni non cattoliche, del “metodo della bilateralità”, in vista dell’elaborazione della disciplina di ambiti collegati ai caratteri peculiari delle singole confessioni religiose (sentenza n. 346 del 2002). Le intese sono perciò volte a riconoscere le esigenze specifiche di ciascuna delle confessioni religiose (sentenza n. 235 del 1997), ovvero a concedere loro particolari vantaggi o eventualmente a imporre loro particolari limitazioni (sentenza n. 59 del 1958), ovvero ancora a dare rilevanza, nell’ordinamento, a specifici atti propri della confessione religiosa. Tale significato dell’intesa, cioè il suo essere finalizzata al riconoscimento di esigenze peculiari del gruppo religioso, deve restare fermo, a prescindere dal fatto che la prassi mostri una tendenza alla uniformità dei contenuti delle intese effettivamente stipulate, contenuti che continuano tuttavia a dipendere, in ultima analisi, dalla volontà delle parti.

Ciò che la Costituzione ha inteso evitare è l’introduzione unilaterale di una speciale e derogatoria regolazione dei rapporti tra lo Stato e la singola confessione religiosa, sul presupposto che la stessa unilateralità possa essere fonte di discriminazione: per questa fondamentale ragione, gli specifici rapporti tra lo Stato e ciascuna singola confessione devono essere retti da una legge «sulla base di intese».

È essenziale sottolineare, nel solco della giurisprudenza di questa Corte, che, nel sistema costituzionale, le intese non sono una condizione imposta dai pubblici poteri allo scopo di consentire alle confessioni religiose di usufruire della libertà di organizzazione e di azione, o di giovare dell’applicazione delle norme, loro destinate, nei diversi settori dell’ordinamento. A prescindere dalla stipulazione di intese, l’eguale libertà di organizzazione e di azione è garantita a tutte le confessioni dai primi due commi dell’art. 8 Cost. (sentenza n. 43 del 1988) e dall’art. 19 Cost., che tutela l’esercizio della libertà religiosa anche in forma associata. La giurisprudenza di questa Corte è anzi costante nell’affermare che il legislatore non può operare discriminazioni tra confessioni religiose in base alla sola circostanza che esse abbiano o non abbiano regolato i loro rapporti con lo Stato tramite accordi o intese (sentenze n. 346 del 2002 e n. 195 del 1993).

Allo stato attuale del diritto positivo, non risultano perciò corretti alcuni assunti dai quali muovono sia la sentenza delle sezioni unite della Corte di cassazione che ha dato origine al presente conflitto, sia il soggetto interveniente. Non può affermarsi, infatti, che la mancata stipulazione di un’intesa sia, di per sé, incompatibile con la garanzia di eguaglianza tra le confessioni religiose diverse da quella cattolica, tutelata dall’art. 8, primo comma, Cost.

Nel nostro ordinamento non esiste una legislazione generale e complessiva sul fenomeno religioso, alla cui applicazione possano aspirare solo le confessioni che stipulano un accordo con lo Stato. Peraltro, la necessità di una tale pervasiva disciplina legislativa non è affatto imposta dalla Costituzione, che tutela al massimo grado la libertà religiosa. E sicuramente la Costituzione impedisce che il legislatore, in vista dell’applicabilità di una determinata normativa attinente alla libertà di culto, discrimini tra associazioni religiose, a seconda che abbiano o meno stipulato un’intesa”.

So, the “*intese*” would be not useful to protect/implement religious freedom nor eliminating the hindrances against its exercise that social conditions or the overall settlement of current legislation can cause—even because of their cultural bent. Thus, what are the *intese* for? Why did the Italian Constituent Assembly provide them? In the same vein, one even wonders what Concordats are for, and if the mention of the Lateran Pacts in Article 7.2 of the Italian Constitution was entirely appropriate. The Constitutional Court statements contain an implication that sounds as straightforward as it is worrying. That is, that the *intese*—and, at this point, even the Concordats—may only serve to provide privileges, special treatment, and legal accommodations related to the particular exigencies of individual denominations or, even, to impose detailed constraints<sup>29</sup>. None of this could be achieved through unilateral legislation without simultaneously violating the secular nature of the State.

The regulation of a specific area or the activities of a subject also implies—and presupposes—their pre-qualification, meaning, their categorization and conceptualization. Unfortunately, however, the secular state’s secularity relies upon its incompetence, a sort of cognitive blindness, with regard to religious faith. So, how could a secular state possibly regulate the activities of denominations and their members without drawing on the collaboration and consent of denominational stakeholders? If the State proceeded alone, unilaterally and authoritatively, then it would undermine and deny the “otherness” of the denominations with respect to the secular dimension. In this case, the state would overstep that border beyond which the *domains of freedom* unfold. But this takes us back precisely to our starting point and—what is worse—to a sort of self-confutation of the core idea that the Constitutional Court assumed as an axis for its judgment: namely, that religious freedom and *intese* run on two parallel paths.

The *intese* and their constitutional positioning *cannot avoid* benefiting religious freedom and its concrete implementation. In any case, the privileging of confessional associations—assuming it is compatible with secular law and non-discrimination principles—could also lead to a state’s encroachment on religious domains: a result that could, in turn, be caused by cognitive errors/misunderstandings, stereotypes, and prejudices regarding the universes of sense molded by each faith. In the end, if the State does not attempt to listen to Others, in this case the voices of people of faith, the attempts to support them could also infringe upon their freedom and thereby betray the secular connotation of law.

The impossibility of divesting *intese* of their relevance for religious freedom re-introduces an old problem, even if it is often dissimulated or camouflaged. The conclusion of an *intesa*, precisely because it is based on the theoretical template of contract law and the related principle of contractual freedom, must be a voluntary arrangement.<sup>30</sup> On the other hand, it would be difficult to imagine that Parliament or Government could be coerced should their conduct or attitude be found lacking. In any case, the mandatory conclusion of an *intesa* would imply an obligation to do something, and as such it cannot be surrogated or accomplished by force because of the sovereignty of Parliament.

<sup>29</sup> On this alleged “function” of *intese* see Randazzo (2008: 367 ff.; 427 ff.).

<sup>30</sup> I dealt with this argument in a book published several years ago: Ricca, 1996. More recently, see on this topic Colaianni (2016).

Contract freedom, of course, does not only apply to the State, but also to confessional representatives. No denominations or confessional representatives can be forced to conclude *intese*. Therefore, envisaging any form of “necessary bilateralism,” as the Italian Court of Cassation seems to do,<sup>31</sup> should be considered quite outside the Constitutional framework.

Asserting that a bilateral act, and therefore an agreement, is necessary and must be concluded by a compulsory legal requirement, would be equivalent to saying—using Abelard’s expression<sup>32</sup>—that the government or the denomination must fulfill such an obligation *on their own*. However, I think that it would be better to avoid these kinds of oxymoronic phrasings, particularly because in their shadow lies the chasm where an authoritative paternalism so often comfortably hides.<sup>33</sup>

<sup>31</sup> The judges of the Court of Cassation set out the following argument. Thus far, the *intese* have been structured more or less in the same way and contain almost identical text for all the denominations. Although this does not really resonate with a genuine pluralistic treatment of different denominations as intended by the Constitution, this sort of “equal privilege” is to be extended to all denominations demanding the conclusion of an *intesa*. To be curt, even if the negotiated legislation gives rise to a wrong-headed equality, it nevertheless erases any discretionary power of government that might politicize decisions around *intese*. It is like saying that an incorrect implementation of the Constitution, insofar as it is already widespread, provides a general right to all to enjoy/suffer the consequences. The untenability of such an argument, I think, does not call for any specific comment.

<sup>32</sup> “She obeyed on her own” is the expression that Abelard employed in his *Historia calamitatum mearum* to recount Eloisa’s conduct. After he was made the victim of a violent castration, Abelard declined Eloisa’s proposal to marry. She passionately insisted. In the end, however—as Abelard tells us, perhaps lapsing into an overly self-confident masculine paternalism—she obeyed “on her own.”

<sup>33</sup> The same could be said with respect to the possibility of the State withdrawing from an *intesa* or abrogating the related law in its entirety—that is, without any unilateral modification. Many scholars exclude the possibility of abrogating or withdrawing from an *intesa* (in the latter case the exclusion would also apply to denominations). To underpin this opinion, scholars argue on one side that the laws authorizing *intese* are atypical or “strengthened” legal sources according to Art. 8.3 of the Italian Constitution.; on the other side, they emphasize the necessity of respecting constitutional principles, in this case religious freedom, *magis ut valeant* (to the greatest possible extent). Withdrawing or abrogating an *intesa* would be, instead, a step backwards for the protection of religious freedom: hence it would be contrary to the Constitution and its implementation. On this topic, however, see Ricca (1993, 1996, 2013).

The withdrawal from or the integral abrogation of an *intesa* must be assessed for legitimacy by taking into account the logic inherent in the *intese* as acts of negotiation; further still, what also matters are the contents of each individual *intesa* and their relevance to the freedom of self-determination of both the State and the denominations. Moreover, the argument concerning values and their protection *magis ut valeant* makes very little sense. The assessment of what is “magis” (that is, “more”, “plus” or “best possible”) is problematic when we try to apply it to freedom. The respect for an *intesa* cannot be imposed on a denomination simply because at one time it *freely* accepted its contents and these allegedly protect its freedom: such an argument conjures up the oxymoronic idea of a sort of *mandatory freedom*. But it is not this at all. The experience related to *intese* as well as to contemporary Concordats has shown that the libertarian significance, and more generally the constitutional relevance, of bilateral regulations is linked to the current specific social circumstances and depends on the overall framework of the legal systems involved. The occurrence of general regulations that are more liberal than those provided by the *intese* has relativized in many cases the libertarian significance of previously negotiated provisions. Furthermore, the new regulations produced a conversion of the constitutional valence of *intese*, to the extent that some of their provisions became at risk for unconstitutionality because of their discriminatory effects with respect to religious freedom. This occurs when the statements included in general unilateral regulations play the role of an interposed pattern of constitutionality between each *intesa* and the Constitution. So, when they prove to be more liberal, they make it so that the previous bilateral regulations, perhaps normatively aligned with prior common legal standards, *become and are perceived as* discriminatory. It is the case, for example, for state authorization of real estate



That said, there remains one other matter. If the *intesa* is a means for religious freedom, then how is it possible that that protection of such a fundamental right is made dependent on the free self-determination of the State or the individual denomination to conclude an agreement? Human and/or fundamental rights are individual and inalienable: the State cannot infringe upon them, and their holders have no power to give up any such rights. In short, freedom of negotiation and religious freedom are non-fungible and cannot even be imagined as reciprocally alternative.

As so often when human thought must face certain dilemmas, it tries to escape the grip of contradiction by clinging to degrees. At that point, thus, the *genius* of graduated distinctions makes a sudden appearance, coming to the rescue of the interpreters of an at least ambiguous constitutional statement. Its most wonderful incarnation is the so-called “hard core” or “basic and minimum content” of human and/or fundamental rights<sup>34</sup>. This sortilege corresponds to a well-known doctrine often used as a rhetorical device to address two main issues:

a) The theoretical drama stemming from the differences ascertained among the various legal systems as regards the interpretation and implementation of human rights;

b) The definition of the limits of legislative power, in different historical periods (even with regard to constitutional revisions), when it lays down the implementing rules of constitutional freedoms.<sup>35</sup>

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acquisitions by ecclesiastical institutions if compared with the abrogation of Art. 17 of the Italian Civil Code; moreover, the case concerning the judicial reception into the state legal system of ecclesiastical declarations of canon marriage nullity, the so-called “*delibazione*,” which is still in force, notwithstanding the direct reception of foreign judicial decisions stated by Articles 64 et seq. of law 218/1995 reforming Italian Private and Procedural Law.

No doubt, there is a dilemma to be faced (see also the text): if the *intesa* is to be considered to be an implementation of religious freedom and the latter is indispensable because it is a fundamental right, then how is it possible that it can be subject to withdrawal or abrogation? At the heart of such dilemma there is a historical-cultural issue that I will discuss below. Nonetheless, it depends also on the function of the *intesa* as negotiated regulation. As a bilateral political act, it improves the autonomy of denominations, their Otherness with respect to the order of the State and thereby helps avoid unilateral interference by the government. Somehow, Concordats and *intese* seem to be in tune with the distinction of the two orders, namely the secular and the spiritual, rather than with religious freedom intended as a practical opportunity available to all individuals and confessional groups. Averting the negative implications of the State’s unilateral interferences, which in some respects evokes jurisdictionalist attitudes, is a goal that coordinates quite well with the adoption of agreements resembling international treaties—notwithstanding all the dystonic effects tied to this similarity. The relationship between the State’s unilaterality and religious freedom is, however, a different matter. In this case, negotiation and hetero-integration of state legal systems have to come to terms with the inner logic of pluralism and the cognitive lack inherent in a top-down exercising of the legislative function. This kind of negotiation should be considered as an ordinary procedural means to make laws. It does not match, however, the logic of the contract and contractual autonomy; this is because both are rooted in the assumption that the subjects of contractual relationship are utterly self-sufficient in standing up for themselves. This is the traditional liberal view of contractual subjectivity. But if such a vision has already proven untenable with respect to the socioeconomic conditions of all the social actors, it is completely in contrast with the protection of legal freedom. This conclusion can sound acceptable, of course, only if one does not want to cling to a strictly negative, old-style-liberal and conservative idea of constitutional freedom: unfortunately for the supporters of these arguments, such an attitude would have very little to do with the Italian Constitution and its pluralistic aspirations.

<sup>34</sup> See Hildebrandt (2010).

<sup>35</sup> See Barile (1951), Crisafulli (1952), Ruggeri (2008).

The essential meaning of this doctrine could be elaborated as follows: *human rights are in any case subject to interpretation and their results depend on culture, political context, historical and geographical conditions, etc. The universality of those rights is, however, not undermined by the variation of their different implementations. It could still be considered safe to engage them as long as all recognize (...and establish) that there is a “hard core,” a minimal threshold beyond which differences in protection cannot be permitted.*

It is quite clear that the doctrine of “hard core” of human rights is rather coarse, at least if considered from a cultural point of view; actually, in anthropological terms, it could be defined as a false solution.<sup>36</sup> By using this doctrine, problems seem to be merely displaced rather than truly solved. The challenge for universality comes to hinge on the determination of what is defined to be the hard core of human rights and consequently the legitimate minimum threshold of variation in their interpretation/implementation. But—as the history of legal experience has already shown—if such determination has proven itself to be a thorny issue with regard to social rights, it seems destined to remain definitively tangled when confronting the innumerable and unpredictable declinations of freedom.

A universal determination of what is essential and what is not with regard to freedom is almost impossible. As already pointed out above, no one can say for someone else exactly what constitutes (her/his) freedom. And it is so simply because the meaning of freedom coincides with “feeling free.” *A priori* or authoritative determination of what makes people feel free and which specific behaviors give them the perception of a real emancipation would be an absolute contradiction, and thus an untenable claim.

Still, the idea that authorities can determine what freedom is through a top-down decision-making process is rather widespread, if only for practical reasons since someone, sooner or later, will decide in any case what freedom is to be. This argument indisputably contains a seed of truth. But exchanging this seed for the whole plant would mean transforming a practical limit into a normative assumption. The consequence of completely overlooking the subjective sources for what it means to be free could be, however, a confounded annihilation of freedom. In any case, this idea has already been applied to the practice of *intese*. In order to bypass the tension extant between the freedom of contracts and the freedom of religion, it has been argued that the hard core of religious freedom cannot be the subject of bilateral negotiation.<sup>37</sup> The *intese*, in other words, could consist of exclusively what exceeds or lies beyond the minimal content of religious freedom: in a sense, what can be considered to be unnecessary (at least, from a constitutional point of view).<sup>38</sup> But this very definition

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<sup>36</sup> See Santos (2002: 46).

<sup>37</sup> It is something else, of course, to argue that an *intesa* cannot include statements in contrast with religious freedom or other constitutional principles. About the inconsistency related to a use of *intese* to address the “basic and minimum content” of religious/confessional freedom, see, recently, some suggestions, although only implicit, in Licastro (2016: 30 ff.).

<sup>38</sup> This, in short, is the tenet of the Constitutional Court: the circumstance that what is a *surplus* may even be good or *better* than what is normal, and this primarily because it is more suited to match the exigencies of each denomination, and cannot automatically transform into something to be considered constitutionally *necessary* and thereby indispensable to avoid a breach or an impairment of religious freedom. More generally, however, it needs to be said that a distinction between what is *more* and what is *better* would run the risk of getting bogged down in endless captious disputes. Something

of the *intese's* legitimate subject as a *surplus* would allow the government to maintain its freedom to refuse the conclusion of an *intesa* with this or that denomination whenever it wished to do so.

The sentences of the Italian Constitutional Court analyzed thus far seem to use—even if laconically and unsatisfactorily—precisely the above argument of “essential content” or a “hard core” of religious freedom. The constitutional judge goes so far as to make the absurd suggestion that the *intese* have nothing to do with religious freedom but are, rather, a mere instrument for a policy of privileges. And privileges—as is well known—are something that power concedes only to those who are in its good graces.

This way of addressing the relationship between religious freedom and the *intese*—or better, more generally, the relationship between freedom and negotiated legislation—presents, however, many problems. First of all, it seems to evoke a conservative idea of freedom in its identification of a minimal essential content. The answer to the question “what is the minimal content of religious freedom, of association, of speech, etc.?” requires making an effort of conceptual ascertainment, which is nothing less than a historical-cultural assessment. To this purpose, those who adopt and believe in this approach will most likely end up assuming a specific degree of freedom (and the related practical behaviors) as the just parameters of essentiality. These kinds of degrees and parameters will inevitably be drawn from past historical experience and existing socio-political conditions, or even rely upon an ideal weighted average among the most common claims for freedom that can be found in the cultural imaginaries of people. What is “new,” “more,” “exotic,” or simply “different,” when compared with the dominant national experience and the already existing social conditions, will be considered, then, as something that exceeds the “essential content” of freedom. This conservative bent, a sort of inherent misoneism, is due to the historical structuring of concepts; but even worse, such a conceptualization is all the more heightened when these concepts and categories are qualified or passed off as analytical, universal, aprioristically determined, etc.<sup>39</sup>

However, freedom is ever bound to the past, in a kind of polarized relationship. The meaning of the word “freedom” (also when intended as “legal freedom”) has to do with the possibility of opening up new horizons, new potentialities that exceed mere effectiveness, which is instead intrinsic to the individual and the social challenges already achieved. It is true that human beings tend to value freedom once they have lost it. Actually, it is only in the midst of a predicament that people realize that what only yesterday seemed to be *normal* (and thus also the object of *normative* provisions) has suddenly turned into something only eventual, probable, and in danger of vanishing. Such dialectic conversion, the metamorphosis of normality into freedom, does not confute but rather provides evidence of the *exceeding signification* inherent in *being free*. Freedom dwells on the frontier—a psycho-cognitive aspect as such already abundantly obvious to Hobbes. Only an approach to normality that

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is deemed *better* but not a *surplus* depending on how everybody looks at it, and only until he who enjoys the *better* does not begin to claim for it as something to be considered as a *more* to which he is entitled. This is precisely the case of atheists and their demand to obtain the *better* that the state recognizes and supplies to the benefit of denominations because that *better* would be constitutionally *better suited* to them and their specific exigencies.

<sup>39</sup> As for the historical and synthetic connotation of *a priori* and/or analytical judgments and categories, I have elaborated on my observations elsewhere, and so would prefer to avoid dwelling on them here: see Ricca (2008, 2013). See, however, Quine (1951, 1960) and Rossi-Landi (1980) and their respectively philosophical and semiotic approach to this issue.

sees it as a frontier of possibility—which is, then, the Kantian recipe of *Sollen*—and thereby as a reality that can be subverted, makes of daily experience a school where we learn how to be free and how to appreciate freedom. Put diversely, individuals must realize that a specific condition, a possibility currently at hand, could vanish: only then will freedom begin, in their eyes, to connote and color it.

Freedom can only coincide with the “possibility to be,” which, in turn, is a twin, inseparable feature of the “possibility of not being.” For all these reasons, the distinction between a minimal essential core and an *exceeding surplus* in the conception of freedom and the construction of its legal protection is untenable. This argument, on the other hand, is all the more applicable to religious freedom since it is cognitively placed outside the *realm* of values/ends that give foundation and legitimation to the secular state. When compared with the specific dimension of the secular state, religious freedom shows itself as inherently ab-normal, exceeding, exorbitant. Besides, the pretension of being able to define what is normal and what is not discredits itself when the subject-matter of such a distinction coincides with belief in resurrection, for example, or rather metempsychosis; and this, above all, when the political powers or judges must face individuals who construe the overall sense of their quotidian existence on these beliefs. Something similar can also, and I think should be said with a more general scope for cultural differences. “Hard cores,” minimal essential contents, etc., cannot be assumed as mere *data* if the various cognitive paradigms shaped by different cultures are at stake. Straddling such views, the cliff of ethnocentrism and the discriminatory use of human rights gets inevitably closer, and the falling off it becomes almost inevitable.<sup>40</sup>

“Hard cores” and focal features, if they were to be sought, could be configured as *results* of processes of intercultural translation and transaction. Universality, when observed through the spectrum of the comparison among cultural differences, is neither an essence nor a pre-existing ontological datum waiting to be grasped. It lies instead on the horizon, and it is coextensive with the vision of it: that is to say that universality is a processive means to reach, and at the same time, to go beyond itself by creating ever renewed horizons of universalization. Universality, therefore, does not coincide with concepts, nor can it be reified or cosified in its extensions/targets, meaning, mere behaviors, categorical or semantic schemas, etc. It is rather a potentiality of the human mind. Searching for it is only a matter of responsibility, an attempt, maybe even a dream that can become a reality only if human beings show a willingness to believe in it.<sup>41</sup>

The observations made so far regarding legal freedom help call into question a specific passage articulated by constitutional judges. I propose focusing on this text in the light of the overall structure of the above decision and specifically with regard to the qualification of the *intesa* as an instrument designed merely to allow a policy of privileges rather than to implement religious freedom. The Italian Constitutional Court states—it is worth repeating, as it is crucial—the following:

The Italian Constitution was designed to avoid the unilateral regulation by secular institutions of the relationships between the State and each denomination. This was based

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<sup>40</sup> I addressed the difference between a discriminatory use of human rights and an intercultural use of them in Ricca (2008, 2016): see there for further bibliographical references on this topic.

<sup>41</sup> For some reflections on the oneiric, but no less practical connotation of human rights, see Ricca (2015a).

on the assumption that unilaterality, taken in and of itself, could be a source of discrimination, and this for the following fundamental reason: the particular relationships between the State and each denomination are to be ruled by a statutory law made “on the basis of bilateral agreements (*intese*).”

This paragraph of the decision seems to implicitly state that the negative consequences of unilateral regulation—that is to say, the infringement of religious freedom and thereby the betrayal of the secularity of the state—would occur only if the State titled its laws, for example, “*Relationship with the Jewish denomination, the Waldesian denomination*,” and so on. The possible infringements of religious freedom, deriving from the State’s unilateral regulation of the confessional domain, and a related lack of hetero-integration of the national legal system, would instead evaporate if the unilateral laws did not include a referral to specific religious denominations. It would be so precisely because religious freedom and the *intese*, according to the Court’s arguments, would have nothing to do one with one another. The absurdity and the cultural blindness of such an implication is not worthy of particular analysis.<sup>42</sup> Conversely, both these positions serve to underscore once more the close connection extant between religious freedom and the constitutional use of *intese*. It is precisely in order to overcome the danger of authoritative, implicitly discriminatory deafness to the *voices of difference*, that the Italian Constitution provided the *intese*. They are (or better, should be) instruments of pluralism, channels to give voice to difference, a voice often silenced when the general and abstract laws are discussed and laid down. On the other hand, only members of a minority can truly perceive the constraints deriving from the assumption of dominant group cultural habits as general legal devices. In the eyes of those who belong to the dominant groups that forge a legal equality in their own image, law’s provisions appear *normal*, sometimes obvious and even *natural*. These universalizing *normalizations* conflating “*identity with themselves*” construed by dominant groups through the use of law propagate a stifling even if silent oppression of Otherness. But, worse still, the mystifying power of such legal devices asserts itself almost thoughtlessly, so much so that it seems to be a sign of undisputed and indisputable sovereignty. The dominance of the most powerful groups makes it so that “being” and “ought” end up conflating. So, those who are and feel themselves to be different, have to undergo the infliction of a code of equality that is entirely alien to them and to their interests. In other words, they are equal *before and under the law* but not *inside the law*. This condition leads Others, those who are different, to place the threshold of their freedom where the members of dominant groups are not even able to conceive it could be placed.

<sup>42</sup> Somehow the Italian Constitutional Court confuted this view in its subsequent sentence n. 63/2016. Constitutional judges ordered the annulment of law n. 2/2015 of the Lombardy region regarding religious buildings and providing specific restrictions for the denominations *without intesa*, specifically Islam. The Constitutional Court argued that religious freedom cannot be limited due to the lack of an *intesa* with an individual denomination. This argument, unfortunately, is insufficient to disentangle the Court from the absurdity of the statements analyzed in this text. Law n. 2/2015 of the Lombardy region actually refers specifically to denominational and religious activities in its title. So, we will have to wait for a judgment on a general law of the state in order to assess whether a qualified unilaterality (namely, a law without any explicit referral to denominations or religious freedom) will be considered unconstitutional or in contrast with religious freedom.

Freedom includes its making and its possibility. Being free has practical signification and practical consequences. However, the assumption that it coincides with and can be reduced to a mere repertoire of material behaviors would be more than a blundering error. In the same vein, it would be wrong to argue that freedom is substantiated only by legal rules that give people the right to behave so as to achieve their interests. As I have already observed, freedom is to be considered, for all intents and purposes, a source of law—at least in democratic-constitutional legal systems. Consequently, the tendency of freedom’s contents to transmute into objects of legal regulation, where they obtain general social recognition, is an almost inevitable, if not also desirable, phenomenon<sup>43</sup>. The already achieved thresholds of recognition will work, in turn, as a starting point to imagine new horizons of possibility, new potential social frontiers to be reached, new modes of individual action: in short, new targets of freedom. The grammar of legal equality shaped by liberal and positivist thought and the related general and abstract structure of laws make it, however, rather difficult for minorities to access and partake in processes of institutional recognition. So, the inclusion of new patterns of subjectivity within legal semantic patterns tends to turn into nothing more than a distant hope. The exigency to give rise to specific pluralistic channels, capable of giving voice and protection to minorities’ differences, stems precisely from this deficiency of liberal institutions and its historical legacy. If considered from this *nomoplastic* perspective, the legal provisions of *intese* could work as instruments of pluralism and as a means to supply “opportunities to do something” corresponding to the religious minorities’ claims for freedom. As time goes on, the contents of such agreements, just like the claims for freedom, could transform into or conflate with codes of social normality that are as such amenable to being formalized by general legal provisions. Furthermore, this is a phenomenon that has already taken place *inter alia* with Concordat regulations: for example, tax relief related to worship activities found an inclusive correspondence in the general regulation of non-profit associations.

The argument that the *intesa* can be a tool to support religious freedom, however, raises once again the issue of the non-mandatory character of their conclusion. But this question assumes a different aspect depending on whether it is considered from the perspective of the State or that of the religious subject demanding the stipulation of an *intesa*.

To proceed in an orderly fashion, I could start my argument by focusing on the second alternative above. We could suppose that no denomination is obliged to conclude an *intesa*. The exercise of this right to refuse a bilateral negotiation tends to jam, however, as soon as one attempts to coordinate it with religious freedom and its indispensability. Such a dilemma becomes clear as follows: if the *intesa* is a tool to implement religious freedom, and this freedom is indispensable, then how can denominations be allowed to aprioristically refuse to conclude an *intesa* since this tool is specifically designed to guarantee their freedom? The tension underlying the relationship between the freedom to negotiate and the freedom of religion comes again to the fore. Perhaps, to face this latent contradiction we could call into play the inescapable necessity to balance constraints and possibilities rather than resort to argumentative devices as difficult to manage as the “hard core of human and/or fundamental rights.”

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<sup>43</sup> See, Fuccillo (2005; 2014: 7 ff.).

Freedom—as said above—comprises the *possibility to do something*. This power of doing, however, is not absolute. Though it is inherently bounded by the necessity to decline its concept in a plural way, it can also bump up against empirical constraints. For example, if I choose to speak, then I cannot simultaneously keep silent. Every practical attempt to be free undergoes these kinds of pragmatic hindrances. They make it impossible to simultaneously put in place all the potential expressions of freedom or even those related to a specific freedom—in the particular case at stake, religious freedom. So, the refusal to conclude an *intesa* could be considered a legitimate exercise of religious freedom which is simply incompatible, due to practical or existential constraints, with the conclusion of an *intesa*, despite the benefits to freedom that said *intesa* could provide.

If we see things from the perspective of the State, the issue assumes, instead, different features. The assumption that the *intese* are (at least potentially) vehicles of freedom implies that their contents may be considered as an object of legal protection by the State. Now, the *intesa* in and of itself, as an agreement, cannot be taken to be “legally necessary” since such a qualification would undermine the meaning of the term “agreement” or *intesa*. In the same vein, this can be said about the contents of the *intese*. But if these contents relate to religious freedom and its exercise, then the State must protect them, whether or not it is possible to conclude an *intesa*. Again, however, the issue ends up being entangled in the challenge of unilaterality. Can the State underpin matters of freedom that are potentially regulated by an *intesa* independent of any negotiated agreement with those who hold that freedom, that is to say, the individual denominations? What is at issue here is a cognitive question rather than a political one; or better, the above question can be primarily seen as a cultural matter and only secondarily as an object of political choices. It concerns the nub of all relationships with “territories of difference” and involves, in general terms, co-ordination between legislative democratic authority and pluralism. The regulation of the “territories of difference” requires consistency between the constitutional ends and the legislative means concretely adopted by state institutions. But, is this consistency possible without previously decoding those “territories” to understand the actual meaning of what is at stake? And can we imagine that it is possible for the State to accomplish such a task without any dialogue and negotiation with the regulation’s target subjects?<sup>44</sup>

The overall discussion of *intese* proves to be, in the end, a sort of special laboratory for testing political-normative devices with general scope or, more precisely, the means best suited to support a “democratic nomothetic.” After all, pre-legislative negotiation with social subjects—obviously, all social subjects, including minorities—should be intrinsic to any democratic-pluralistic legislation. Therefore, we should ask ourselves whether the practice of *intese* can be considered to be a *nomogenetic* device that democratic states should use with a general scope, perhaps under the broader genus of negotiated legislation—of course, only in relation to the areas and cases requiring regulation that assures the legal recognition of differences. If we adopt this broader perspective to deal with the matter of the relationships between states and confessional associations, the whole discourse can likely assume a very different cast. The government may even decide to refuse the conclusion of a bilateral agreement with a particular denomination. At the same time, however, when it is facing new claims for religious freedom, the government must comply with its obligation to protect human

<sup>44</sup> On this topic, see the interesting remarks by Supiot (2008: 192 ff.).

and/or fundamental rights, through regulation if necessary. The State's action will have to include, also in this case, some sort of dialogue or pre-legislative regulation. This "exchange of views" should take place mainly to ensure both parties genuinely understand each other. Conversely, the negative connotation of unilaterality would no longer coincide with an exorbitant exercise of political power by the State but rather with the State's lack of information with respect to the social landscapes inhabited by a plural cultural Otherness. Knowledge and awareness of difference, substance and patterns of meaning of what differs, are fundamental prerequisites to understanding how to exercise legislative power in line with the constitutional imperative to respect and implement freedom and equality. Without an appropriate knowledge of Otherness, legislative discretion would end up being blindly applied and therefore in danger of producing injustice and infringing upon constitutionally guaranteed rights. The "item" of cognitive Otherness is, in any case, inherent in the very grammar of legal modernity: the secular state is constitutively ignorant about religious faith. Furthermore, as will be seen below, this analysis regarding the libertarian and democratic-pluralist signification of negotiated legislation will be useful for analyzing the apparent ambiguities and the false paradox that can be seen in the atheist-agnostic association's request for an *intesa*.

On this topic, I have to say immediately that I do not subscribe to the notion that atheist associations can be qualified as denominations. Such a hermeneutical attempt seems to be too much implausible: it sounds like a sort of interpretive triple somersault.<sup>45</sup> I can understand, however, the reasons underlying these kinds of forced readings of both social phenomena and legal statements. But let me take one thing at a time.

Article 8.2 of the Italian Constitution concerns denominations "different from the Catholic one." Article 8.3 opens, in turn, with the following expression: "their relationships with the State...", where "their" means "denominations different from the Catholic one." According to the Italian Constitution, the *intese* are not to be applied to any subjects other than denominations.

Now, anti-religiosity is surely the opposite of religion, therefore they are both, symmetrically, at the extreme ends of the same categorical axis. However, though atheism and religion are in opposition to one another, they are not reciprocally incommensurable. In a world deeply connoted by religions and their cultural-anthropological projections, atheism looks forward to a potential frontier, which can ultimately be considered as an expression of religious freedom. Its aim is to release the categories of human thought and social life from any perspective of faith. The declinations of this aspiration can have many different features, but all of them have to cope with a common historical

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<sup>45</sup> In a like vein, I consider rather inconsistent also the decisions delivered by the ECHR on these matters. Even Article 17 of the T.F.E.U. in paragraphs 2 and 3 maintains a distinction between confessional associations and philosophical and non-denominational organizations. Given this distinction, therefore, it is very difficult not to include atheist groups in the second category. Besides, the intent to provide an equal and non-discriminatory protection to all these social subjects does not at all imply equivalence between religious faiths and rational beliefs. For the purpose of legal protection, it is possible to draw a sort of common connotative ground underlying these two different expressions of human thought. It is quite legitimate to set out an inter-categorical dimension based on a common teleological or functional connotation. On the contrary, the attempt to argue a sort of coincidence of opposites between religion and atheism serves only to confuse the issue. On this argument, I agree with Colaianni (2016) and his reluctance to share the opinion expressed by some scholars, among which also Dworkin, about the quasi-religious features of atheism.



and socio-cultural datum. To put it roughly, the release from religion is an aim that refers to religious freedom: freedom of religion must also be considered as freedom *from* religion.<sup>46</sup> Besides, freedom from individual religions is, in turn, a prerequisite for any autonomous choice about one's own faith including, the possibility of converting to non-religious faiths, namely *pistemic secular attitudes*. On the other hand, belief, taken in its absolute meaning, is a common connotation of human behavior and is not exclusively coextensive with religious faith. Indeed, people can be devoted to their faith in science and knowledge. The same "anthropic principle," namely the belief in our ability to understand the universe, is a form of faith and, *inter alia*, full of practical consequences just like religious faiths—in both cases sometimes good, sometimes disastrous.

Article 8.3 cited above does not seem to take into account the atheists' specific exigencies to enjoy their freedom *from* religion. The semantic frame of this article seems to consider the *realm of faith* to include only that which is Other-than-State: a position perhaps in tune with an institutional-antagonistic reading of secularization, but in many respects still obstinately tethered to the past. The game of being free with respect to religion must also be played, however, beyond the field of the political-institutional confrontation, because it also takes shape within the unfolding of inter-individual relationships and quotidian life. And here, precisely, that game comes to include different cultural patterns and has to deal with the resilience of religion in the common conduct of people, as well as in patterns of law, despite the allegedly secular nature of the State. Article 8.3 seems to be concerned only with the freedom of denominations rather than religious freedom taken in general terms. In a sense, if we overlapped Article 8.3 with Article 19 of the Italian Constitution (which protects religious freedom in general terms, both in its individual and associated exercise, etc.—and therefore includes the aspiration to freedom *from* religion), the former would appear almost as an exception to the latter, as if it allotted a sort of privilege, and an asymmetrical treatment: in short, a kind of derogation to religious freedom that could be considered very close to an inner break within the overall constitutional system. Article 8.3 denies atheists the right to negotiate their social and legal conditions; and this as if atheism and its protection were already implicitly protected by the *common* legal culture or cultural aura of the Italian state.

But is it really so? Or rather is it only an erroneous and obsolete cultural assumption? And has the time come for this assumption to be disproved through a renewed awareness of the relationships between legal experience and religious culture?

The above questions, in turn, lead us to wonder about the reasons, both explicit and silent, underlying the atheists' call for an *intesa*. The real motivations of this request have received very little

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<sup>46</sup> Just for this reason I do not share the distinction about a neutral atheism and a militant atheism with respect to the legal scope of Article 19 of the Italian Constitution. According to such an interpretation, the *mere not believing* must be included in religious freedom; conversely, the *pro-active not believing*, namely a concrete commitment to disseminate the doctrine of inexistence of any deity, would be outside the protection of Article 19. My position is rooted in an outlook on religious freedom that also encompasses the possibility to disenfranchise from the influence of religious culture pervasively influencing a specific social context; and this even when that religious culture cannot be qualified as strictly confessional. See, however, for further remarks, Ricca (2006, 2013). On Atheism, cfr., however, *Quaderni di diritto e politica ecclesiastica*, n. 1/2011, including the essays by Cappuccio & Gamper, Cardia, Coglievina, Cimbalo, Fattori, Filoramo, Floris, Greco, Onida & Fiorita, Parisi, Petrucci, Ringelheim.

attention from scholars, at least in their analysis of the judicial decision examined here. The website of UAAR (Union of Atheists and Rationalist Agnostics) provides some insights about the rationale behind the request. In this regard, I think, however, that it would be useful to listen directly to the Atheists' voice:

"We learn of the Constitutional Court's decision with great bitterness." This is the comment given by the UAAR responsible for legal actions, Adele Orioli. "It is bewildering to know that according to the Constitutional Court **the impossibility for non-religious citizens to have representation at the same regulatory level as religious denominations** is not considered discriminatory; and, moreover, that the power to decide who can or cannot stipulate a bilateral *intesa* falls exclusively within the space of governmental freedom. All in all, **we seem to have moved from the "accepted religions" established by Fascism to the "preferred religions,"** freely chosen by the government." "And yet," Orioli continues, "the State must guarantee equal treatment for all citizens and the social organizations that represent them. Instead, even though non-religious citizens constitute the fastest growing 'religious' group in the country, they continue to have fewer rights than everyone else."

The rationale that, since 1996, has motivated the UAAR's request for an *intesa* is driven by the fact that in Italy the overall legal framework for the freedom of religion and conscience is a composite of legal sources that form a pyramid; in the top-most position is the Catholic Church, which due to the Concordat, enjoys a regime of privilege.

This legal model, namely that exemplified by the Concordat, inspires also the conventional regime stated by Article 8 of the Constitution, related to the regulation of the relationships between the State and non-Catholic denominations (a regime so far enjoyed by 11 confessional associations).

The specific benefits arising from the conclusion of an *intesa* are substantial (provided that each denomination, when subscribing to the agreement, can waive one or more of them). These privileges comprise, from a financial point of view: the assignment of eight-per-thousand euros of revenue from personal income tax (IRPEF)—a device from which the UAAR has demanded abrogation for many years—and the tax-deductibility of donations up to € 1.032,91; from a socio-political point of view: access to the public broadcasting system and to having reserved frequencies; religious education in public schools, as well as a number of concessions regarding spiritual assistance in prisons and healthcare centers, and [the right to denominational] matrimonial law.

As a preferential regime, the system of *intese* gives religious denominations (with *intese*) decided advantages so as to put them in **a more powerful position than atheists**: furthermore, since all religious propaganda is inevitably anti-atheistic, just as atheist propaganda is anti-religious, the *intese* assure the related denominations considerable means of imposing an anti-atheistic social influence.

**Such a system threatens the very freedom of religion and thought** because the freedom to form one's own ideas and conscience regarding religion is inhibited by an imbalance of power between organized religions and atheists, produced precisely by the closed *intesa* system.

It is for these reasons that in recent years the UAAR has battled. And, as announced by the secretary of UAAR, Raffaele Carcano, "we will continue to fight, despite today's disappointment, and if necessary, we'll go all the way to Strasbourg."<sup>47</sup>

<sup>47</sup> Translation mine. The original Italian version of Adele Orioli's comment is as follows:

The arguments put forward by the UAAR are rather inconsistent. The most controversial—at least, in my view—regards the qualification of the association of atheists-agnostics as a “religious group.” It serves as an introduction to the subsequent atheist claims against discrimination and, specifically, regarding the demand for the same benefits provided to denominations through the *intese*. These critical remarks do not seem to be properly aligned with genuine exigencies of freedom. More than anything, they are the (rather usual) financial requests mostly prompted by an anti-Catholic antagonism. Nonetheless, the statement concludes with a deeply significant assessment that deserves—I think—our careful attention. Atheists see and argue against the transmutation of the *intesa* from an instrument designed to improve religious freedom into a device for real power. They seem to say: freedom is power, and the recognition of freedom gives rise to powerful social positions. It is perhaps a rather ominous conclusion, even if appreciably true. In the shadows of freedom and its protection, it is not uncommon to bump into the exercise of power, economic accumulation, and forms of social influence fostered by greed. Freedom often becomes an enemy of the freedom of Others. This occurs because it engenders social situations connoted by asymmetry and the

«Apprendiamo con molta amarezza della decisione della Corte costituzionale. Crea sconcerto sapere che per la Consulta **l'impossibilità per i cittadini non credenti di avere enti rappresentativi allo stesso livello normativo delle confessioni religiose** non crea alcuna discriminazione e che la facoltà di stabilire con chi stipulare un'intesa bilaterale rientri nello spazio di completa libertà governativa. Insomma **dai culti ammessi di fascista memoria, ora sembra che siamo passati ai culti “simpatici”**, a libera scelta governativa». «Eppure – prosegue Orioli – lo Stato dovrebbe garantire pari trattamento a tutti i cittadini e le formazioni sociali che li rappresentano. E invece, benché i non credenti siano il gruppo “religioso” più in crescita del Paese, continuano ad avere meno diritti di tutti».

Le motivazioni che, fin dal 1996, hanno indotto l'Uaar ad avanzare la richiesta nascono dalla constatazione che nel nostro Paese il quadro legislativo di riferimento in materia di libertà religiosa e di coscienza è un insieme composito di fonti che configura un sistema piramidale con al vertice, in posizione dominante, la Chiesa cattolica che, in forza del Concordato, gode di un regime privilegiato.

Un modello, quello concordatario, cui si ispira anche il regime pattizio che l'art. 8 della Costituzione ha stabilito regolare i rapporti tra Stato e confessioni religiose diverse da quella cattolica (cui hanno finora avuto accesso 11 denominazioni religiose).

I vantaggi che derivano dalla stipula di un'intesa sono consistenti (posto che ogni confessione al momento della stipula può stabilire di rinunciare a uno o più di essi). A livello patrimoniale: l'attribuzione dell'8 per mille del gettito IRPEF – meccanismo di cui l'Uaar da anni chiede l'abolizione – e la possibilità di dedurre ai fini fiscali liberalità fino € 1.032,91. Sul piano non patrimoniale: l'accesso al servizio radiotelevisivo pubblico e la riserva di frequenze; l'insegnamento dottrinale su richiesta nelle scuole pubbliche. Nonché una serie di agevolazioni per quanto riguarda l'assistenza spirituale nelle carceri e nei luoghi di cura, il diritto matrimoniale.

In quanto regime privilegiato, il sistema di *intese* attribuisce dunque alle confessioni religiose stipulanti vantaggi concreti che le pongono in **posizione di forza rispetto agli atei**: poiché ogni propaganda religiosa è inevitabilmente antiateistica, come la propaganda ateistica è antireligiosa, con le *intese* sono state attribuite alle confessioni stipulanti mezzi sostanziosi di condizionamento antiateistico.

**Un sistema che minaccia le stesse libertà di religione e di pensiero**, perché la libera formazione della coscienza in materia religiosa è inibita da uno squilibrio di forze tra chiese ed atei indotto da un sistema di *intese* chiuso.

Per questo l'Uaar in questi anni ha dato battaglia. E, annuncia il segretario dell'Uaar, Raffaele Carcano, «continueremo a farlo, nonostante la delusione odierna, e se necessario fino a Strasburgo».

annihilation of the rationale of Others. It is a huge problem that goes far beyond the recognition of religious freedom and affects *legal freedom* in all its aspects and declinations.

The UAAR stresses an indirect effect of *intese* and Concordats, the features of which are eminently socio-cultural. The legal provision of “protected areas” and “dedicated lanes” to protect the actions of confessional associations and the dissemination of their doctrines inevitably implies an indirect enhancing of the social influence of religious ideas. These can assume, in turn, cultural connotations (that is, no longer marked by their religious origins) which can lead to political choices assumed by secular institutions, such as Parliament, the Government, etc. The landscapes of daily life and quotidian habits can become, in this way, a sort of sounding board for ideas and practices stemming from religion, so as to spread and camouflage those ideas in the form of *normal*—in the sense of *secular*—political-normative choices. Living as atheists in a world culturally influenced by religious thought, all the more so when such influence is indirect and silent, can be extremely dispiriting, and above all, a source of discrimination.

Even if only implicitly, the UAAR shines a spotlight on the most vulnerable features of the modern state’s secularization: that is, its cultural incompleteness due to its principal focus on political-institutional rather than anthropological aspects. Certainly, it is impossible to overlook the objective difficulties of *re-inventing* a secular grammar capable of erasing the religious components encapsulated within the cultural traditions of various people. The *possible world* that atheists envisage would not be an automatic effect of the hypothetical silencing of all confessional voices. If taken in its most comprehensive scope, the atheist agenda is probably not viable, and is doomed to remain as unrealized as is secularization<sup>48</sup>. This is due not so much to a political weakness of atheist forces, but rather to the inevitable lack of cultural omnipotence of any single ideological project. Religion inhabits the history of mentalities. Making human thought free from its historical prints and its traditional anthropological devices would presuppose the possibility of getting to the ground zero of cultural competence and reinventing from that position the whole human universe. Nonetheless, a denial of the *cultural-religious difference* of atheists with respect to the categories of social and legal subjectivity still dripping with religious tradition would constitute, in any case, a form of camouflaged discrimination, a sort of surreptitious ignorance. From “good faith” to equity, the relationships between genders to inheritance law, the bioethical-legal concept of body to that of guilt and the rights of consciousness, and much else besides, all these matters could be subject to and maybe transformed by a radical atheist rethinking on the meaning of existence. Atheism is doubtless a kind of anthropological difference that needs to be supported by hetero-integration. Its diversity or better *non-normality* does not consist only in its opposition to religion as a key to understanding the world, but also in its attempt to elaborate cognitive and ethical paradigms that are different from those left as footprints in the culture of humanity by the various declinations of theological thought. The *Alter* of (that is, Other than) atheism is, in a sense, the same history of people, their historical culture. It is very difficult to imagine what the cognitive, ethical and political categories might be if humanity had been, throughout the ages, utterly atheist, without any idea of deity. Of course, however impractical, such a hypothesis should be gauged on and in tune with the different cultural traditions and their

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<sup>48</sup> On Atheism, see Martin (2007); Bullivant, Ruse (2013), and the classical essay by Del Noce (2010).

religious horizons. We must recognize, nevertheless, that such a task would be much more arduous to accomplish today, because of the contemporary overlapping and merging of the various traditions in the arena of democratic multicultural and multireligious societies.

The demand raised by the UAAR and deemed totally baseless by the Italian government constitutes, therefore, a false paradox. Somehow, it aligns with the rationale underlying the proposal for the “*intese estese*”—and this is without any doubt a paradoxical analogy. What drives the necessity to re-negotiate the legal secular grammar according to a multi-religious and intercultural perspective and, symmetrically, the response to the demand for an *intesa* raised by atheists, is to be found, in both cases, in the incompleteness of secularization. Even if the conclusion of an *intesa* remains outside the scope of the above Art. 8.3, at the same time we have to recognize that the demand for it surges from and helps shed light on the latent infra-constitutional inconsistency extant between Art. 8.3 and Art. 19: and this, at least, when both these statements are contextualized within a genuinely and deeply plural social fabric. In conclusion, the right to enter and obtain a negotiated regulation is coextensive with a protection of legal freedom that, as such, should be realized in a pluralistic fashion.

The recognition of specific protection for the *atheist difference* would inevitably be asymptotical in its cultural normative outcomes if compared with the *reigning legal normality/generality*. Nonetheless, there is nothing to exclude that one day it might flow into new legal provisions applicable to all and, as such, simultaneously capable of including the vision and exigencies of atheists as well. As noted above, the path from freedom to normality, from a differentiated plural protection to a general regulation, is politically viable and should remain ever open. That is why from a constitutional perspective, a negotiated regulation, even though not labeled as “*intesa* with a denomination,” should be an opportunity made available to atheists. But this should also apply equally to other deep cultural differences, above all when they engender views of the world which are genuinely alternative to the dominant culture in the Italian context or any other democratic country. They would not be “exceptionalistic” differentiations, as such comprising ontological derogations to public subjectivity. On the contrary, they could be progressive steps towards the gradual elaboration of more inclusive devices to shape the public legal subjectivity resulting from intercultural translations, transactions and transformations.

As I bring the second part of this essay to a close, I would like to propose an example related to Italian social experience. On June 18, 2016, some newspaper and television reports relayed a disconcerting and worrying event:

In Trapani, women cannot get an abortion in the public hospital. The only remaining doctor in the Obstetric Department of Sant’Antonio Abate Hospital who was not a conscientious objector has retired. To obtain abortion services, the women living in Trapani will have to go to Castelvetrano, approximately 80 km away, where there is, however, only one gynecologist who is not a conscientious objector. In the event that he is not at work, women who seek an abortion would have to go to Palermo [more than 100 km from Trapani].

In Italy, this is not an infrequent situation.<sup>49</sup> In this essay, I prefer not to dwell on abortion in and of itself, the right to which is nonetheless provided by Law n. 194/1978. Italian women have a legally recognized right to terminate pregnancy according to their free and autonomous choice. Public hospitals must guarantee the effectiveness of this right. Nonetheless, in many healthcare settings, the conscience objection to abortion saturates Obstetric Departments. It makes no difference whether all of these objectors are genuinely inspired by religion or not. It remains the case that in Italy it is sufficient that doctors qualify as conscientious objectors for them to be relieved from the duty to comply with women's abortion requests (on the other hand, Law 194 provides a specific regulation regarding assistance before and after an abortion, laid down precisely in article 9.3, even if it does not contain any explicit ban on objection in the case of therapeutic abortion). So, in the event that all the doctors of an Obstetrical Department are conscientious objectors, it will be impossible for women to obtain an abortion in that hospital. And if in a small town or district there are one or more hospitals where all the doctors are objectors, then women who reside there will be compelled to make an *abortive migration* or, alternatively, turn to private facilities (provided that the financial resources of these health care structures are sufficient to support the cost of these procedures). Many might say that this is an aberrant situation and should be regulated by the law independent of any bilateral negotiation. Perhaps. Nonetheless, the discrimination resulting from the unlimited exercise of conscience objection would have for an atheist woman a doubly negative significance. Actually, she would be denied not only abortion services but also the ability to exercise her freedom to respond to her pregnancy following ethical standards which differ from those adopted by gynecologists when they, in turn, exercise *their* religious freedom by expressing their conscientious objection to abortion. In that case, the atheist woman would bitterly realize that (religious) freedom is power. Her conclusion would be, most likely, that the unlimited freedom of conscience objection, as provided by law, is the result of a political and legal secular culture strongly influenced by Catholic ethics. Who could dispute, indeed, that the atheist woman is correct? That she is the victim of a complete annihilation of her religious freedom? And, what is worse, that this annihilation is legitimated in the name of an unlimited protection of the religious freedom of others?

As long as Law n. 194 remains in force, the lack of any provision requiring the presence of non-objector gynecologists within the public hospital will be a serious violation of women's rights, if not even a dissimulated sabotage. However, whether legally sanctioned or not, the current situation in some parts of Italy is essentially equivalent to that of a country where the right to abortion is not recognized. Just for a moment, let me imagine that in Italy abortion was actually illegal: can it be considered constitutionally legitimate to deny an atheist woman the right to claim a negotiated regulation designed to protect her *different* religious freedom? What if such a legal provision ensured, *inter alia*, that each Obstetrical Department *also* included non-objector gynecologists or, alternatively, non-anti-abortion atheist gynecologists? I think that many anti-abortion activists would answer positively as to the possibility and legitimacy of an eventual denial. Their argument would likely go as

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<sup>49</sup> On the conscience objection to abortion, also with regard to the effects of cultural overlapping between processes of secularization and religious traditions in various countries, see Vazquez (2016) and *ibidem* for further bibliographical references about the Italian social experience.

follows: just as it is unacceptable to stipulate a negotiated regulation allowing someone to kill in the name of her/his faith, so too must the ban on abortion be exempt from exceptions. The qualification of abortion as a murder is, however, a *canonical* case of cultural absolutism. Imagining that a prohibition to abortion were in force, perhaps written into law in the wake of anti-abortion pressure from so-called *pro-life advocates*, the chance to achieve a negotiated regulation would represent for the atheists the only way to avert the *ultimate abortion of secular pluralism*. This also because unlike the prohibition, the provision of the right to abortion allows only for a possibility without, however, imposing any general obligation. The cultural instruments for providing tools that enable women to make informed choices about pregnancy, in full compliance with all the various viewpoints regarding the life of the fetus, would also be ensured in the case of a legal recognition of this right—as currently provided in all countries that recognize the possibility of abortion. Nor can we fail to mention that what should remain really open, or better, duly implemented by the State, should be efforts aimed at the removal of the social determinants that so often compel women to abort, including psychosocial or environmental constraints (financial, familial, work-related, etc.).

Regardless, I believe that a negotiated regulation should be adopted now: and this notwithstanding Law 194, which, though technically in force, is at risk of ineffectiveness and should not, in any case, prevent the creation of a legal remedy designed to provide a fair balancing between women's freedom and objector gynecologists' *almost absolute* right to exercise conscience objection. A viable solution could consist, maybe, in a special support for atheist women seeking abortion which would allow them to receive medical assistance from private gynecologists in public hospitals and at state expense (borne by the National Health Service). Such a provision would be similar to that adopted for Jewish circumcision by the *intesa* with the *Unione delle Comunità Ebraiche* (Union of Jewish Communities) and reproduced by Law n. 101/1989. In 1998, as is well known, the Italian National Bioethics Committee declared the legitimacy of circumcisions in public hospitals performed by competent subjects belonging to Jewish Communities. The *intesa*, however, did not explicitly state that such a procedure was to be at State expense. This lack of provision induced the National Bioethics Committee to exclude the possibility of funding Jewish circumcision through the National Health Service. It does not prevent, however, that in the future the *intesa* can be changed, especially since many Jewish families (as well as those of other faiths who practice circumcision) have serious difficulties bearing the costs of this kind of surgical operation—with the attendant risk of “backstreet” circumcisions. The question arises as to what sort of features the overall situation could take if the doctors of the National Health Service began to exercise their right to conscientious objection with regard to male circumcision. In this case, wouldn't Jewish subjects be entitled to have their own competent physicians authorized to provide circumcision in public healthcare facilities? Wouldn't this be, at least, an appropriate measure to ensure prompt medical assistance and the safeguarding of children's health in the event of operational complications?

In the case of abortion, given that it is a right recognized to all women by Italian law, atheists would find in the same general law the right to obtain, at State expense, the assistance of private non-anti-abortion physicians if and when all the public gynecologists of an Obstetrical Department had exercised the right to conscientious objection. In fact, something similar has already occurred in practice. Over the years, a new medical figure has arisen in Italy, namely, the so-called *gettonisti*. They

are private physicians called upon to provide abortion services in public hospitals in the event that all staff gynecologists have declared themselves to be objectors. Their intervention is currently configured as a burden on State resources. State financial support would be all the more legitimate, then, if provided within a negotiated regulation with atheists. And this if only because at stake would be nothing less than a *threatened right* in the effective exercise of religious freedom by *Others*.

The above-mentioned case sharply exemplifies the possibility that freedom transmutes into power, and hence into a possible source of discrimination. At the same time, it shows the necessity to consider religion not only as a set of spiritual, sacramental and variously ineffable practices. Religious faith unfolds its projections throughout many aspects of life—indeed, the practice of abortion is anything but a religious rite. The inner tendency of religion is to transform into rules of common conduct for people and, therefore, into moral and legal theology that is perhaps too often dissimulated in *apparently secular* ethical and legal patterns. This tendency conveys and allows, therefore, the dissemination of religious influence and imperatives within civil and secular contexts and institutions. I wonder whether scholars who believe that the relationships between law and religion—and their associated research areas—only concern ritual and/or sacramental experiences, would not do well to change their focus. A consideration that becomes all the more salient and inescapable with respect to multi-ethnic, multi-religious and multicultural societies, where the cultural resilience of religion within the main categories of national legal systems is increasingly evident as a source of serious and growing conflicts.

People cannot avoid facing *Others*, their religion, their cultural habits, which bring within them the cultural marks of faith sedimented by history and tradition. Difficulties arising in managing these kinds of encounters unveil the incompleteness, the cultural relativity of the process of legal secularization carried out in the past by various countries and their laws. Conversely, the reification of the “religious” and its cultural projection, along with its rigid reduction to rites and dogmas, end only with a symbolic fetishizing of faiths’ imperatives and the ensuing inevitable political exploitation of them. Despite this worrying and widespread involution, the fight for symbols is always, in its true substance, a struggle for the redefinition of the overall social grammar previously settled in various contexts by dominant groups. It would be better (and very useful) for all of us if experts in *law and religion* kept this implication firmly in their minds. To say this is not contingent invention, rather it is long-term history that shows us the deep psycho-social meaning of all sorts of battles for symbols and the vital necessity to disambiguate this meaning. An example may help to better convey the sense and scope of these issues:

In the late fifteenth century, as Christians were extending their rule over the remaining pockets of Moorish dominion in the Iberian peninsula, a North African legal scholar named Al-Wansharishi issued a legal finding (*fatwa*) to address the situation of an influential Muslim advocate in Marbella. The man in Marbella wished to obey the edict directing good Muslims to abandon Christian jurisdictions in Spain, but he felt compelled to stay and continue to work as an advocate for Moors whose property and livelihood were being threatened under Christian rule. His appearances before Christian judges to represent Muslims seemed a worthy cause, one that he apparently thought would warrant an exception to the edict. The *mufti* disagreed. He ruled that it was the man’s duty to flee Spain. Contact with Christians – particularly the close dealings with Christian judges that the advocate’s role would require –



was a form of contamination. The Moors staying behind were, in any case, hardly entitled to such care since they were already breaking with Muslim authority by staying in a Christian jurisdiction, the mufti explained. They should be left to their won devices. Al Wansharishi made it clear that it was Christian authority, not Christian themselves, that made contamination inevitable. Christians with subject status posed no particular threat. But to live under Christian rule was “not allowable, not for so much as one hour a day, because all the dirt and filth involved, and the religious and secular corruption which continues all the time”. The central rituals of Muslim religious life would be threatened – the collection of alms, the celebration of Ramadan, the daily prayers. Just as troubling to al-Wansharishi was the inevitable disappearance of distinctive forms of expression of Muslims: “their way of life, their language, their dress, their ... habits.”

We do not know whether the Marbella advocate obeyed the fatwa. We know that some influential Moors chose to stay and fill the role of advocates for the conquered Moors. We also know that their actions, as agents seeking to reinforce one legal authority by representing cases before another, were remarkably common in territories of imperial or colonial conquest. We know, too, that al-Wansharishi’s interpretation of the stakes of this decision was repeated throughout Muslim Spain and in other settings of conquest and colonization. Colonizing authority understood just as readily that the structure of legal authority and the creation of cultural hierarchies were inextricably intertwined. Jurisdictional lines dividing legal authorities were the focus of struggle precisely because they signified other boundaries marking religious and cultural difference. As al-Wansharishi observed, the structural relation of one legal authority to another had the power to change both the location of boundaries and the very definition of difference.

Turning this statement around, we see that contests over cultural and religious boundaries and their representations in law become struggles over the nature and structure of political authority. Ways of defining and ordering difference are not just the cultural materials from which political institutions construct legitimacy and shape hegemony. They are institutional elements on their own, simultaneously focusing cultural practice and constituting cultural representations of authority. Fine distinctions among groups attain an importance that appears exaggerated to observers outside a particular time and place but reflects participant’s certain knowledge that they are struggling not just over symbolic markers but over the very structure of rule.<sup>50</sup>

In light of the above extract, we can say that symbols simultaneously show and conceal; they are *called into play to speak to us* precisely because the voice of those who ask for an open and discursive recognition of their subjectivity is ignored. Treating “the religious” in a *cosifying and reductively confessionalist* way only ends up fomenting insoluble conflicts. This is because the official argument of such conflicts, the declared bone of contention, has only indirectly to do with the real reasons of the confrontation. This is the case, in some respects truly emblematic, of the Islamic veil or the so-called *burkini*, which evokes the disputes—not so oddly—about the sex of angels, belonging to a past well-

<sup>50</sup> This long quote is from Benton (2002: 1-2). I think it could be very useful to provide a historical and long-term perspective to the analysis of the challenges that plural, multi-religious and multicultural contemporary societies have to face. Unfortunately, past experiences do not seem to have been etched into human beings’ collective memory. Perhaps, it is really true that history judges humankind but teaches us nothing. From past wrongs we seem only to be able to learn ... how to make the same mistakes again and again.

known to western Christians. The full Islamic veil is banned—according to the ECHR, lawfully—in some countries such as France because it conceals the face. What remains to be understood, however, is how such concealment is nothing but a declaration, a claim for differentiation, which implies so much more than the veil itself. In other words, while it conceals, the veil shows something else. And yet, Westerners pretend not to see what the veil tries to put before their eyes. As for such issues, the misunderstandings and missteps the ECHR has incurred in recent years constitute an example of *deliberate blindness*. Furthermore, I think that it is not a provocation, but only a simple summing up outcomes, to say that the best decision of the ECHR on this kind of matter is undoubtedly that which has not yet been written. Besides, as the saying goes, the tree is recognized by its fruit. Although I have no intention of justifying any terrorist action, which remains in any case something wicked and abominable, the decision *S.A.S. v. France*, Application n. 43835/11, given on July 1, 2014 by the ECHR, above all because of the reasoning behind the judgment, represents an act of cultural blindness.

The refusal to see and know, by tacitly assuming essentially one's own superiority over Others' culture, has a steep price, as the myth of Polyphemus teaches us. On that pathway anybody can end up losing the possibility to see the *sun*. This constitutes a major deprivation, even if it is indispensable to recovering the sight of one's own mind. In the same way, we have to recognize that religion is much more than its confessional connotations and reifications. Religion and denomination, as well as religion and religious institutions, are not coextensive. The "religious" is not just about the "confessional" or the "sacramental" dimensions. As long as institutions and scholars refuse to take this distinction into account, this lack of coextensiveness, they will not be able to understand why the democratic recipe is in grave danger of involution on a planetary scale. Without the skillfulness to *see* how much religion nestles in the patterns of legal subjectivity and in the multilateral and multicultural claims stemming from them, none of us will be able to elaborate a democratic normative lexicon capable of underpinning a peaceful coexistence with people from different cultures and faiths.

Now, going back to the matter of the regulation of the condition of *atheists*, I wonder whether a normative negotiation carried out with their representatives might not lead, in the future, to a general regulation that is *nomothetically* more inclusive. A negotiated normative could transform, tomorrow, into an ordinary law capable of including, equitably and symmetrically, the rights and exigencies of all social actors: Catholics and atheists, women, and conscientious objector doctors alike.

The false paradox of an *intesa* with atheists demonstrates the necessity of rethinking the relationships between freedom, pluralism and legislation. The claims raised by atheists embody and make visible the challenge and, simultaneously, the urgent exigency to conceive of a pluralist nomothetic adequate to our contemporary legal experience.<sup>51</sup> It provides an important clue as regards the necessity for a radical renewing of the conceptual schemes of legal regulations—including either *civil law* or *common law*—so as to ensure more space for normative negotiation and fair recognition of differences.

In general terms, the space for negotiation could be imagined either as a procedural passage

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<sup>51</sup> On pluralistic nomothetic and its intercultural and inter-religious possible declinations see Ricca (1996, 1999, 2013).

prior to the parliamentary or judicial elaborations of norms, or as a subsequent check—but, in any case, to be accomplished before laws or judicial decisions are implemented. With respect to this second hypothesis, I imagine a kind of regulation that features directive devices rather than imperative statements; moreover, these should be designed to achieve general ends, so as to remain open to procedural negotiation about the legal means to be adopted in view of the different situations at stake and the various subjectivities involved. It is—as I noted above—a mammoth task, which requires a reassessment of the whole generality of modern legislation, as such based on the ideal of normative equality. To achieve such results, we might do well to include within secular legal thought a deep assessment of the role of equity within canon law, as well as the flexibility inherent in the laws of other religions, from Hinduism to Islam. On the other hand, we have to consider that the imbrication of statutory laws and judicial decisions at the constitutional level engenders a dialectic tension between values/ends and legal rules, equality and difference, purposes and means, individual justice and general rules, authority and autonomy of political/legal subjects, and so on. The construction of an inclusive legal subjectivity can be the only historical outcome—never perfect or definitive—of the unfolding of these dialectic relations and movements. The “score” containing the sequences of these transformations shall be written on the same pentagram as the corresponding cultural metamorphoses. A genuine pluralistic nomothetic cannot be the result of blind acts of dominance impelled by a mystifying and silencing refusal to recognize Otherness. This attitude belongs to the past, and that past should not be repeated. And yet, I cannot pretend that such an exhortation is much more than the prophecy of a disappointment.

I can't think of a better way to conclude than to arrange a paraphrase, almost a conceptual anagram, of Montale's poem quoted earlier:

#### **Aggiornando la lettura**

*Sono stati riconosciuti/solo come frangenti/i focosi dialoghi/tra atei e credenti./  
 Gli uni e gli altri/eran gemelli/nell'orchestrare i loro duelli.  
 Uno solo il loro tarlo/e all'unisono s'affannavano/per dissimularlo,/*  
*la fine.<sup>52</sup>*

<sup>52</sup> English translation:

**Renewing the reading:** They turned out to be/only fleeting/the fiery dialogues/of atheists and believers./They and the others/were dual/in orchestrating their duels./Only one was their common thorn/and united they labored/to conceal it,/the end.

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