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Through the Looking Glass:
The "Right to Religious Freedom" on the Shores of the Mediterranean

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§ 1 Introduction

To speak of religious freedom in the Muslim-majority Middle East and North African countries might seem to be simply a formal exercise. From a European perspective, the idea that secularism, democracy, and religious freedom are an inseparable trio intimately and exclusively linked to the Christian experience is quite widespread. According to this view, not only is Christianity the only religious tradition able to separate God and Caesar thereby allowing democracy and religious freedom to flourish, but histories and contemporary surveys also would highlight how the relationship between Islam and this trio would be of one of inverse proportionality. «Islam», «and not Islamic fundamentalism», is perceived as the «underlying problem for the West»[1], the most dangerous Schmittian "enemy" of Western civilization. Nevertheless, these ideas, which have their counterparts in the Muslim world, are not persuasive. They understate the complexity of the situation and are self contradictory. They are based on the idea of the existence of "pure civilizations" and "pure concepts". Further, because of their essentialist and neo-orientalist character, these assumptions undermine the universality of the "religious freedom" they pretend to define, defend and propagate. Finally, more simply, many of these assumptions are strictly dependent on a political and economic agenda that uses "religious freedom" to export a comprehensive neo-liberal societal model. This is neither new nor surprising, but the awareness of the multiple interests involved in this campaign should help both to evaluate the political role of the "right to religious freedom" and to relativize a too paternalistic Christian-Western attitude toward majoritarian-Muslim countries.

This intervention does not intend to address the broad question of the genesis and meaning of the idea of "religious freedom" and its present

[1] Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster Paperbacks, 2003), 217.

international role[2]. Rather, moving beyond the narrative of a Christian Northern side and an Islamic Southern shore as incommensurable realities, I would like to propose the possibility of a common interconnected Mediterranean history of what has been called, since the nineteenth century, the "right to religious freedom". In particular, I will emphasize the role played, on both Mediterranean shores, by the passage from an earlier plural and undefined "religious freedom" differently understood by a range of societal actors, including religious individuals and communities, to a "*right* to religious freedom" shaped and monopolistically controlled by the nation states. In fact, only these modern states today, like Humpty Dumpty in *Through the Looking Glass*, can claim that the "right to religious freedom" «means just what (they) choose it to mean—neither more nor less»[3].

My conviction is that what is experienced today on both shores is, seventy years after the end of the Second World War and the decolonization, a trans-Mediterranean "constitutional citizenship question" rather than an "Islamic" or a "right to religious freedom" specific question. This contemporary "constitutional question" tests the real capacity of nation states to renegotiate their relationships with civil society and so to renegotiate the boundaries between institutional, public and private spaces.

§ 2 Religious freedom on the "Northern-Christian" shore

In Europe, nation-states and the "right to religious freedom" share the same date of birth. In fact, recognition of the "right to religious freedom" was the precondition for the triumph of nation-state legal systems over their predecessors, the Holy Roman Empire and the Roman Catholic Church[4]. This recognition has also accompanied the transfer to the nation-states of the force – and violence – previously directly unleashed by religion. This new "right to religious freedom" had an amphibious nature, being characterized by both personal and collective dimensions. With recognition of individual religious freedom nation-states established with their subjects a fundamental personal

[2] Cf. Elizabeth Shakman Hurd, *Beyond Religious Freedom: The New Global Politics of Religion* (Chicago: Chicago University Press, 2015)

[3] Lewis Carroll, *Through the Looking Glass* (Raleigh, NC: Hayes Barton Press, 1872), 72.

[4] Cf. Olivier Christin, *La paix de religion. L'autonomisation de la raison politique au XVI^e siècle* (Paris : Seuil, 1997) and William T. Cavanaugh, *The Myth of Religious Violence. Secular Ideology and the Roots of Modern Conflict* (Oxford-New York : Oxford University Press, 2009).

and direct bond of loyalty. At the same time, while they used the protection of personal religious freedom (interpreted as *forum internum*) to affirm their supremacy and make citizens faithfully linked with the state authority, nation-states used control over external manifestations of religions (*forum externum*) to shape their collective identities on homogeneous religious boundaries, represented by the new national churches, to ensure social cohesion and public order for the new national apparatus. The "right to religious freedom" was strictly connected with a common national citizenship and perceived as a direct consequence of the political exclusivist link that tied citizens to their nation-states. Recognition of religious affiliations became only secondary compared to the bond that connected citizens to the state. Over time, in fact, Europe separated civic apostasy from religious apostasy, providing citizens a common personal status imbued with the national religious traditions but under the exclusive scrutiny of secular state authorities. Without being an explicit constitutional principle and perfectly compatible with formal confessional statements, secularism was the implicit rule of modern nation-states, representing their (dream of) separation from civil society and absolute political primacy in the public and private spheres. From the Nineteenth Century on, the "absolutely free" individual side of the "right to religious freedom" provided the narrative masking a permanent Church-Christian-centered collective side that, despite formal separation, Kulturkampf and an explicitly anticlerical secularism, was never perfectly in line with the liberal assumptions of state neutrality.

After the Second World War and the Shoah, a new European constitutionalism introduced important changes. First of all, it softened the primacy of nation-states, introducing a new universalistic discourse about "human rights" into national frameworks. From "national citizenships" based on a thick and "natural" sharing of specific cultural and religious historical values, this constitutionalism has promoted a citizenship based on the sharing and learning of the common principles and rules of a constitutionally democratic political experienced life[5]. In fact, the national Constitutions, the signing of the European Convention for Human Rights, and the progressive establishment of the European Union, have opened the nation-states legal systems both to an "internal" recognition of cultural and religious diversities and to an "external" cooperation with other national

[5] I'm referring here to what I would call a "Habermasian global constitutional citizenship".

systems. In this framework of softer nation-state sovereignties, "pluralism" has substituted "social cohesion", "public order", "security" and "nationalism" perceived as authoritarian symbols. Entering the constitutional language and overshadowing "separation", pluralism has also become the authentic translation of a secularism recognized for the first time as a fundamental constitutional principle[6]. In this way post-war European constitutionalism managed to fully combine *liberal arguing*, a public discourse formally aspiring to liberal principles of secularity and rationality with *democratic bargaining*[7], a political life also shared by religious forces that don't necessarily totally sympathize with the same liberal and rational assumptions. Consequently, secularism was transformed from an ideological instrument excluding religion from the public sphere, as it was from the late Nineteenth Century, to the constitutional regulator of a plural society. The central role played by *democratic bargaining* has provided an opportunity for traditional European religions – and in particular for Catholics - to start conciliating with *liberal arguing*, with self-sufficient, secular, forms of political power and with "human rights". At the same time, individuals and not churches have become the real interpreters of new forms spirituality and the protagonists of the "right to religious freedom"[8]. However, disproving any overly simplistic idea of the end of history and of "uninterrupted progress", universality and pluralism "in action" are presenting nation-states (and national churches) with the fait accompli of their evaporated sovereignty. Both the "external" process of European unification and the end of "internal" social homogeneity have eroded national boundaries and state-centered primacies.

These deep changes have not been acknowledged by European nation-states; they were papered over during the "cold war". Yet repression of these deep changes has not been possible in the long run. The end of the cold war followed in 2004 by the largest enlargement in the history of the European

[6] Secularism (*laïcité*) entered the 1946 France IV Republic Constitution (art. 1) instead of the principle separation and the pluralistic interpretation of this new constitutional laïcité was clearly affirmed by Maurice Schumann: cf. Assemblée Nationale Constituante, *Annales de l'Assemblée Nationale Constituante élue le 2 juin 1946* (2e séance du 3 septembre 1946), pp. 3474-6.

[7] Cf. Alfred Stepan, "Religion, Democracy and the 'Twin Tolerations'," *Journal of Democracy* 11, no 4 (October 2000) : 37-57.

[8] Cf., e. g., Winnifred Fallers Sullivan, *A Ministry of Presence. Chaplaincy, Spiritual Care, and the Law* (Chicago and London: The University of Chicago Press, 2014).

Union; permanent settlement of a large number of Muslims in the Continent and a deep economic crisis have caught European nation-states at a crossroads. The inability and the indecision of European nation-states in addressing the insecurity and identity anxieties caused by implementing structural universalism and pluralism have polarized societies between those who retreat to old warm national ties and those who gamble on the new multicultural policies. Ideology plays a big role in this context and so does religion: reference to national religious traditions both by the contestants and by the partisans of the new globalized order has become common. Also nation-states have started again using "religious narratives" for their needs. In fact, not only do religious traditions represent one of their most powerful resources, but the "right to religious freedom" represents one of the few in relation to which European nation-states have kept some autonomy vis-à-vis Brussels and the European Court of Human Rights. In particular, after September 11th; July 7th 2005, when British Muslims attacked the London underground and January 7th 2015 with the attack to the French magazine *Charlie Hebdo*, Islam has been seen to symbolize the limits of European tolerance, the limit of what multiculturalist policies could accept, the limit of the "European boundaries", of the "negotiated order" of the Old continent[9]. These discourses have reactivated the old colonial European orientalism now fueling worries about increasingly scarce welfare resources against immigrants and especially against Muslims, perceived as untitled and dangerous aliens. But these discourses also unmask or, at least, undermine the European universalistic pretension of a "constitutional citizenship" equally fair towards different religious or cultural backgrounds and really opened to their *democratic bargaining*. And in fact, since the second half of the Nineties, this "constitutional citizenship" has been countered by *Leitkultur*, or "cultural citizenship", based on a thick and "natural" sharing of specific national ties. Pluralism is being challenged by securitarian fears and the reappearance of "public order", a concept that had lost its centrality at the height of the post Second World War constitutionalism.

The need to preserve public order and to restore "social cohesion" reassigns a pivotal political role to a church-centered "right to religious freedom" in the strategy of nation-states. If in the thirty years between the

[9] Cf. Ralph Grillo, "British Multiculturalism: a Negotiated Order," in *Les minorités: un défi pour les États. Actes du colloque international (22 et 23 mai 2011)*, ed. Académie royale de Belgique (Bruxelles: Académie royale de Belgique, 2012), 173-203.

Sixties and the Eighties the "right to religious freedom" seemed to be mostly interpreted as an individual freedom of choice, since the Nineties it has been clearly mostly perceived in its political and institutional dimension. The need to protect "social cohesion" has served as the rationale for the French and Belgian legal bans of the burqa; in the same way secularism as public order had been the rational for the ban of the headscarf from French state schools. In both cases, individual autonomy and self-interpretation of personal "religious" behaviors have been subordinated to the political-theological interpretation of the European nation-states. In both cases, individual religious freedom has been subordinated to the nation-state's "right to religious freedom".

The headscarf and the burqa are the most well known and symbolic cases, but they are far from being an exception. The anxiety of nation-states about what they perceive to be a disintegration of societal links leads them to perceive as simple "security questions" what that are deep society changes and to strengthen the control – rather than the dialogue - in areas where other dangerous normative religious and cultural competitors from the civil society exercise their influence: family and education first of all. The Muslim presence catalyzes the worries of the European nation-states and unveils the defensive character of their "right to religious freedom". In fact, this "right" is being mobilized to force Muslims to organize as a hierarchical "moderate church", aimed first of all at reassuring state authorities. Europeans Muslim are forced to define their identity in the light of an essentialized and hetero-interpreted religious belonging and to postpone and subordinate their individual "religious freedom" in the *forum externum* to an institutional "right to religious freedom" theoretically able to protect the *forum internum* of "Islamic national churches"[10]. Nevertheless, strict cooperation between European and majoritarian-Muslim states in controlling and shaping these "Islamic national churches" makes the state centered and secularizing character of this "right to religious freedom" particularly evident.

But the disturbing encounter with a stable Islamic presence not only relativizes "state neutrality" and "religious autonomy". The nation states' fear of losing their primacy affects European secularism as a whole, moving it away from contemporary constitutional inclusiveness towards its ideological

[10] I'm grateful to Winnifred Sullivan for this idea that also emphasizes the process of secularization to which non-church religions are subjected within the framework of the European "right to religious freedom".

modern Eurocentric narrative. From the embodiment of a pluralistic state, this general principle has become an exclusivist historically grounded public order.

In spite of a pretended European superiority, the assertion that «pluralism depends» on freedom of thought, conscience and religion[11] sounds today rather ambiguous. Due to the pervasive and defensive role of state law, in fact, the relationship between pluralism and the "right to religious freedom" seems of inverse proportionality[12]. The more that pluralism has increased, passing from "law on the book" to "law in action", the more the "right to religious freedom" has revealed the resistance of the nation states to really grant wider autonomy to differentiated civil societies. The result risks being the opposite of what was suggested in its decision in Serif v. Greece in which the ECHR, considering «tensions» to be «one of the unavoidable consequences of pluralism», asked public authorities «not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other»[13].

In conclusion we may wonder if fear of losing their monopoly leads European nation states to unveil their continuing "religious character". European nation states can only recognize a "secondary pluralism", based on their own "theological" assumptions. European States have still not really updated their Humpty Dumpty role.

§ 3 Religious freedom on the "Southern-Muslim" shore

With the exception of Morocco, the present nation-states of the "Southern-Muslim" Mediterranean shore correspond to the former lands of the Ottoman Empire. The conquest of Constantinople in 1453 had had a strong symbolic impact on the Ottoman narrative and the universality of its power was experienced as absorbing the legacy of the Eastern Roman Empire. Thanks to weak political ties with the furthest imperial provinces, which enjoyed strong autonomy, the Ottomans didn't face the same nationalist pressures experienced by the Northern Empire. They could keep their universal aura while their (often autonomous) provinces didn't formally contest the Ottoman unifying role, perceived as a resource against foreign, common

[11] *Kokkinakis v. Greece*, § 31.

[12] Consequently, in a relationship not dissimilar from what usually bestowed to majoritarian-Muslim nation states: cf. the Introduction.

[13] *Serif v. Greece*, no. 38178/97, § 53, ECHR 14 December 1999.

enemies[14]. The enduring universalism of the Ottoman Empire prevented both the development of "individual citizenship" as a personal bond between local political entities and their subjects as well as the development of a "right to religious freedom" inhering in a nation state and charged with supporting the loyalty of those single subjects to their rulers. In fact, the ambiguous legitimacy of the local self-governments didn't need to emphasize the link between themselves and their subjects as in the Hobbesian European Leviathans and the "religious freedom" described in the sharaitic corpus and concretely implemented in different local contexts was adequate for the unity of an articulated transnational political community. Consequently, if on the Northern shore the nation-state's "right to religious freedom" developed an amphibious nature, on the Southern shore the sharaitic "religious freedom" merged Roman and Islamic traditions in a one-dimensional collective freedom centered on an ascribed religious pluralism. If on the Northern shore public recognition of the individual *forum internum* was essential for the legitimacy of the nation-states, on the Southern shore the same *forum internum* kept an exclusive "internal" moral and transcendent relevance. In fact, the religious choices of individuals were effectively considered free in their internal dimension and the eschatological salvation of each single faithful depended on their effective sincerity. Nevertheless, these "internal" individual religious choices couldn't claim, *per se*, any specific protection in the public sphere. On the Northern side the development of nation-states citizenships and the formal distinction between *forum internum* and *forum externum* in the "right to religious freedom" legitimized a public dialectic between individual and collective dimensions of religious belongings, and a possible distinction between public and private - but always "external" - spheres, that was managed with much more difficulty by the Ottoman version of "religious freedom". Finally, the lack of a political entity similar to the European nation-states let the monopoly of force – and of the violence - formally undivided and shared between religious and political actors. Thus, sharaitic "religious freedom" ensured the universality and the unity of the Empire but, at the same time, the universality and the unity of the Empire strongly influenced the self-understanding of this "freedom". Consequently, "religious" apostasy remained "civil" apostasy, an act that positioned the

[14] With the exception of the Wahabite Saudi Arabia.

apostate outside his family and societal ties. Individual religious affiliations remained politically primary, without a possible autonomous consistence.

The universality of the Empire and the primary role of religious ties didn't, however, prevent the development of a secularity not dissimilar than what in the North. A dialectic between religious and political authorities was evident from the very beginning and increased with the time. The ideal Islamic system of differentiation between political and religious authorities based on the *siyasa shar'iyya* soon revealed, in its Ottoman incarnation, to have a mere nominalist meaning. Following *siyasa shar'iyya* religious law (*sharī'a*), was to be interpreted according to a religious methodology by people specifically trained in it who would have the monopoly of legislation. Political authorities would have not the power to make laws but only administrative rules, which would need to conform to the demands of *sharī'a*. Yet the sultan's *qawānīn* didn't follow these strict requirements. With Süleyman I, modernity in the form of a primacy of political authority took the form of a strong Sunnite confessionalisation of the Empire, parallel with the contemporary secular confessionalisation of the Augsburg Empire and, at the Eastern borders, with the same process in the Shiite Safavid Empire. During the Nineteenth century, at the time of *tanzimât* and the first codifications, the independent nature of the sultan's "laws" became even more obvious.

As on the Northern shore at the beginning of modern age, when secularity and the confessional character of the nation-states coexisted, also on the Southern shore the primacy of political rulers over religious scholars didn't need to explicitly renegotiate the role of *sharī'a*: this would have meant to imperil the unity and the universality of the Empire. The sultan could remain caliph and the ideal *sharī'a* legal system remain an ideal[15]. This pretense proved structural and prevented the development of a widespread anticlerical narrative in Ottoman modernity. In fact, even three centuries later, we still don't find the same anticlerical narrative as on the Northern shore but, rather, a tragic attempt to establish an "individual", common, citizenship without a real – and necessarily radical - challenge to the religious roots of the legitimacy of the Empire. In fact, the 1876 Ottoman Constitution while it recognized «individual liberty» and the «equality before the law (…)

[15]Cf. Aharon Layish, "The Transformation of the Sharī'a from Jurists 'Law to Statutory Law in the Contemporary Muslim World," *Die Welt des Islams*, 44, 1 (2004): 85-113, with many references to the works of Wael B. Hallaq.

without prejudice to religion»[16], didn't provide any "individual" "right to religious freedom". The Constitution, rather, tried to substitute a clear affirmation of the primacy of the state over religions with a reference to an increasingly ambiguous and weak Ottoman identity. The result was that this Constitution spoke about «subjects», and not yet citizens and the «Empire», not yet state[17].

A desperate effort to combine Ottoman and Turkish identities with a common citizenship was attempted by the 1908 Constitution. It is well known how this compromise didn't work and how the fall of the Ottoman Empire led to the establishment of Kemalist Turkey; it also led to the complete Western European colonization of the Southern shore. Both these consequences have had a crucial and persistent effect on the understanding of citizenship and pluralism within the new political entities.

Turkey radicalized the secularism already pragmatically experienced by Ottoman Empire inflating it with a strong ideological narrative able to eventually establish individual links between the new Turkish state and its citizens. The Empire became a nation state, and subjects became citizens. The "religious freedom" of the Ottoman Empire was transformed into a "right to religious freedom", directly linking individual citizens and the new nation-state. Religious apostasy ceased to be a civil apostasy and the secondary and subordinated character of religious affiliations was clearly affirmed. As on the Northern side, secularism emphasized the individual dimension of the "right to religious freedom" or, better, of a "right to freedom *from* religion", as a symbol of its full modernity[18], on one hand, and, on the other, it used the collective dimension of this "right" as an instrument of the nation-state power. The government strictly controlled the religious field shaping through it a new Turkish social identity. As on the Northern side the rhetoric that surrounded secularism masked the inevitability of its religious and ethnically grounded character and, in particular, its Turkish and strictly Sunnite flavor. Consequently, internal pluralism was severely compromised by the

[16] Cf. arts. 9-10 and 17.

[17] For the art. 8 «all the *subjects* of the *Empire* (were) without distinction called *Ottomans* no matter what religion they (professed)» (emphasis added).

[18] Also the 1876 Ottoman Constitution had already presented the link between «individual liberty» and "economic modernity" but neither this Constitution nor its 1908 version didn't adventure so far to involve in the modernization of the Empire a radical revision of the relationships between individuals, religion and political authority.

authoritarian attitude of the new nation-state[19] and cooperation with legal systems in the other former Ottomans lands has been displaced by the emphasis on Turkish *versus* Arab identity. For Kemalist Turkey the future - and "modern civilization" - came from the Northern West.

In the other lands of the defeated Empire Europeans exported only one face of their secularism. They exported the idea of a centralized nation-state but not those of progress, democracy and political debate. This was because Islam was perceived as a backward civilization unable to understand the European splendors and because if the the need not to weaken colonial control. European colonialism left two crucial legacies to the Southern shore: the definitive and explicit overcoming of the *siyasa shar'iyya* legal system, substituting positivist European-style codes and constitutional texts and, as appears especially clear from the 1923 Egyptian Constitution, a formal recognition of individual freedoms – even in religious matters - in a non-democratic framework. Differently than in the Turkish experience, the colonized Arab countries experienced a silent secularism, which could not openly clarify its relationships with the religious heritage. Despite the declarations of the League of Nations, European states, in fact, not only exploited the tensions connected to the uncertainty of the old personal religious status system to reproduce the capitulation system, but they also perceived the complex Ottoman religious heritage both as the symbol of the permanent inferiority of their Southern possessions and as a conservative force against liberal anti-colonial movements. Consequently, Arab nation states didn't follow the anticlerical rhetoric of Turkish secularism. Arab state secularism rather produced nation-states founded on a national and ethnic Arab character where explicit religious references could still be used to legitimate the state's political power.

§ 4 **Religious freedom in the "Southern-Muslim" shore: toward a (alternative) contemporaneity ?**

Theoretically, after 1945, with the birth of new Arab independent nation-states, the softer narrative of their secularism could have allowed in these countries a mix of *liberal arguing* and *democratic bargaining* similar to what was experienced on the Northern shore. Nevertheless, religious political parties were not allowed to participate in political debate nor did Islam experience

[19] For the art. 70 of the 1924 Constitution «freedom of conscience, of thought, of speech » were «natural rights of *Turks*» (emphasis added).

the pragmatic challenge of a free public life, and non-Muslims could not really test a democratic constitutional citizenship although this latter was now primarily based on their individual link with these secular nation-states.

In fact, Arab countries, but also Turkey, lost the post second world "constitutional momentum". Independence became the occasion to implement a modern model of nation-state that European nation-states were trying to escape. While Northern nation-states were opening to an interconnected internal pluralism and external cooperation with the creation of the European Union, in the Muslim-majoritarian Arab nation-states external cooperation and internal pluralism have followed distinct paths. Arab unity has proved a myth and the significant participation of Muslim lawyers at the international debate about human rights did not result in a review of the internal pluralism of their countries. This latter, in fact, was still often reduced to the religious denominational pluralism of the Ottoman Empire. Also the recognition of individual freedom, including the "right to religious freedom", that emerged from some more secular post-independence Constitutions, didn't result in a real constitutional supremacy over ordinary laws or an effective "democratization" of references to public order or morality. As the following developments have shown, secularism, religious references and in particular, from the Seventies, sharī'a, will always be used to grant to governmental élites (armies; parties in power and monarchies) a rigid separation between state and civil society and the full control of the religious field. The Northern cold war and the need of "Muslim oil" legitimized these *authoritarian secularisms*[20]. Individual connections between citizens and nation-states were primary not because they were founded on constitutional rights granted from the nation-states but because of a strong nationalism that pretended an absolute and blind loyalty to secular and securitarian powers.

But the "constitutional momentum", the passage from modernity to contemporaneity has also arrived on the Southern shore, where a bottom up pressure has provoked a deep political fracture openly posing the "pluralism question". In fact, the Arab spring has re-opened the question of external cooperation and internal pluralism. On one side, current Southern constitutionalism reveals a process of endogenous constitutionalization of

[20] Cf. Pierre-Jean Luizard, *Laïcités autoritaires en terres d'Islam* (Paris : Fayard, 2008) and, for a specific national case, Carsten Wieland, *Syria: ballots or Bullets? Democracy, Islamism and Secularism in the Levant* (Seattle: Cune Press, 2006).

(international) "human rights" that should not simply be dismissed as a mere assimilation of a Northern thinking. On the other, the "public" debate about the religious legitimacy of the states has obliged them first of all to take into account the inescapable intra-Muslim diversities, always perceived as a scandal and with a sense of irremediable guilt; the differentiation between political and religious authority, always experienced with embarrassment from the Omayyad's time, and the need to overcome personal status in the name of more complex identities and a common "constitutional citizenship", able to overcome historical sectarianisms. Arab springs, in other words, have reopened the question of the legitimacy of majoritarian-Muslim nation-states unsolved since Ottoman times.

In this regard, the Egyptian and the Tunisian cases are very instructive. Both situations have highlighted the impossibility for constitutional sharī'a to keep a unifying role and the pressure towards a more accentuated differentiation between institutional and religious fields. The Egyptian case illustrates both the secular use of sharī'a by the state and the failure of the attempt of the Muslim Brotherhood to implement a more confessional interpretation of this reference; Tunisia illustrates the inability of sharī'a to unify the political arena and the consequent consensual choice to leave this religious source outside of the institutional field.

The failure of the short Muslim Brothers *democratic bargaining* has prevented them from promoting their version of the relationships between state institutions and civil society in a majoritarian Muslim constitutional democracy and Egypt from solving the ancient dilemma of the ground of political citizenship, freezing a very tense situation where sharī'a and the "right to religious freedom" remain "secular weapons" used to control political and religious fields. Tunisia, the birthplace of Arab constitutions, seems, on the contrary, an example of a successful compromise between opposite instances. Here the *liberal arguing* and the *democratic bargaining* seems, so far, to be working[21].

[21] Tunisian situation also differs from Turkish and Moroccan, the other two MENA countries where Islamic political parties are experiencing what Stepan calls *democratic bargaining*. In fact, on one side, the Moroccan *democratic bargaining* is seriously conditioned by the King; in Turkey the AKP seems today following the same path of the old Kemalist Party, recurring to a principle of secularism with an Islamic flavor to strictly control the religious and the political fields and, potentially, the civil society as a whole. In this sense the present Turkish situation paradoxically reminds the post-Morsi Egypt.

Tunisia, in fact, illustrates the importance of the *democratic bargaining* experienced by the "Islamic party" Ennahda that made sharī'a a mere "negative" element of the constitutional compromise, revealing the impossibility of finding a common normative reading of this source and the need to substitute them with legalistic forms of religious legitimacy, more historical and inclusive. But the exclusion of sharī'a from the Constitution also reveals the anachronism, also in a majoritarian Muslim society, of an ethical state and the necessity of a real constitutional citizenship founded on the guarantee of fundamental rights by the nation-state.

Regarding the "right to religious freedom", article 6 of the 2014 Tunisian Constitution introduces two important novelties: the explicit recognition not only of the freedom of belief but also of the «freedom of belief and conscience» and the recognition of «practices», without naming limits. In this way, both the public relevance of *forum internum* to articulate a real pluralism, and recognition of a wide *forum externum* represent novelties not only for the Southern side but also in relation to the usual constitutional drafting on the Northern side. Moreover, recalling the aborted 1920 Syrian Constitution, article 2 of the present Tunisian Constitution declares «Tunisia (…) a civil state (…) based on citizenship, the will of the people, and the supremacy of law». The reference to the «civil state», *dawla madaniyya*, has overcome disputes about the religious or the secular legitimacy of the state, becoming the rule of interpretation of the art. 1 which consecrates the role of Islam as cultural and historical – and not legal and normative – root of the nation[22]. The reference to the «civil» character strictly anchors state sovereignty to the popular will (like the secularity principle) without impeding the opening of civil society to religion (more clearly than some present European interpretations of the secularity principle). By so doing, reference to the «civil» character of the state appears to prevent the "extreme interpretations" always possible for religious and secular forms of state qualifications.

§ 5 Conclusions

We might ask ourselves if this "constitutional momentum" has arrived too late for the Southern shore. The "Arab spring's bottom up pressure for a real constitutional citizenship, has occurred when it is experiencing serious

[22] «Tunisia is a free, independent and sovereign state. Islam is its religion, Arabic its language and the Republic its system. This article cannot be amended».

difficulty in Europe. Moreover, the call for pluralism and for nation-states to open to political forces representative of civil society coincides with the rising of a trans-Mediterranean "Islamic question". For the first time simultaneously in the North and in the South, the challenges of pluralism and the securitarian fears of nation-states are concentrating on the securitarian worries on Islam, producing partial and fragmented answers aimed at organizing and controlling Muslim movements and associations. In this context the "right to religious freedom" seems more part of the problem than a possible solution. In fact, the trans-Mediterranean simultaneity of the debate, symbolized by the paradigmatic role assumed by the "Islamic question", highlights once again the special political nature of the "right to religious freedom" that still appears, on both Mediterranean shores, as the essential guardian of the nation states' public orders. On the Northern shore the "right to religious freedom" paradoxically makes the integration of Muslims in the European political space more difficult. The "church character" of this right, in fact, reveals both the role of traditional churches in the European nation-states building and the boundaries that separate aliens and "foreign citizens" from natives. Paradoxically, single "Muslims" are not admitted, as such, to establish individual links with European nation-states. Full citizenship of Muslims, in fact, depends on their acceptance of a (moderate, state) "Islamic church". On the Southern shore, where religious references are still explicitly used to found the link between individuals and nation-states, the coincidence between "right to religious freedom" and the citizenship issue in its whole is even more evident. In particular, the question of personal status challenges the «Abrahamic religions»[23] for which the recognition of their sharī'a laws represent both the symbol of insurmountable borders between "minority" and "majority" ascribed "churches" but also, especially for Christians churches, compensatory instruments for shaping clerical hierarchies able to exercise institutional powers on their faithful and civil society[24].

In the light of these observations, Western campaigns against "religious persecution" on the "Islamic shore" ignore the complexity of the issue that

[23] Cf. the art. 64 of the Egyptian Constitution.

[24] This situation is not radically different from what experienced by European Muslims forced to exchange their "religious freedom" in the *forum externum* with an institutional "right to religious freedom" theoretically able to protect the *forum internum* of "Islamic national churches".

involves all citizens of the majoritarian-Muslim states, regardless of their religious affiliations. This forgetfulness is also the reason why very rarely do these same campaigns address the question of the European citizenship of "European Muslims", rejecting any comparison between their situation and what of non-Muslims in the Southern shore. Conversely, the same forgetfulness is typical of the campaigns of majoritarian-Muslim states against "Western islamophobia".

What is experienced on both shores is not principally a trans-Mediterranean "Islamic question", or a specific "religious question" but rather, more widely, a trans-Mediterranean "constitutional citizenship question", which tests the real capacity of nation states to accept and manage religious and cultural pluralism and, consequently, to renegotiate their relationships with civil society and so to renegotiate the boundaries between institutional, public and private spaces.

In this framework, the degree of "de-churchization" and disestablishment of "Mediterranean rights to religious freedom" will measure the capacity of Mediterranean contemporary nation states to fulfill their role of final guarantors of common fundamental rights of their citizens. At the same time, the degree of "de-churchization" of civil society by religious groups, moving away from utopian *Medina Ummah* and *European Christianitas* will measure the degree of the participation of religions to a Mediterranean *democratic bargaining*.