Religious Identities and Fading Modernity:

The Case of "War for Souls"

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Executive Summary

The project aims to deal with the problem of religious identities as a basis of political relation in constitutional state. First chapter inquires into the case study of the phenomenon of "war for souls", taking place in Greece, Georgia and Russia against proselytizing religious denominations. The problem is analyzed in wider social, historical, cultural and political context. As a major finding of the first chapter, it is argued that due to specific contextual considerations essentially similar in the countries under review, religious identities are entrenched in politics. This in turn leads to the suppression of the rival religious denominations to avoid the perceived dangers of Pluralism.

Second Chapter analyzes selected jurisprudence of the European Court of Human Rights in order to trace normative solutions. In conclusion of the second chapter, it is argued that European Court Human Rights significantly defers to member states with dominant religious identities, which create internal contradiction with the court's pluralistic conception of Democracy and the neutrality of state in religious matters.

After finding the difficulties with European Human Rights Law analysis; third chapter discusses the issue in wider framework of philosophy and political and constitutional theory. As a result the principle of secularism is identified as a normative solution.

Concluding remarks summarize the advantages and shortcomings of the principle of secularism and contend that the findings of the present thesis may inform redefinition of its content to better address social reality.

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Introduction

Revival of religious conciseness around the world is now generally acknowledged.[1] The talks about clashes of civilizations, Islamic fundamentalism and its links to international terrorism became notorious and subject of heated discussion.[2] The stakes involved are high and political correctness often requires more neutral expressions. Strong religion is proper term to describe the religious aspirations often labeled fundamentalist before.[3]

Despite the use of terminology the (re) emergence of strong religions and revival of religious consciousness with new vigor are generally accepted social facts. Religious identities revitalize themselves in the world struck by the wave of constitutionalization of state power and human rights revolution.

It is asserted that modernity passed by and gave away its aspirations of the privatization of religion and secularization of society.[4] Even in the United States, regarded as the embodiment of enlightenment ideals, religious conciseness is getting ever growing significance and claims its place in public sphere.[5] Some authors go so far as to portray American public space as the battleground of competing orthodoxies.[6] Whether it is correct description or not for the US; it is apparent that claims coming from religions heat spectacular public controversies even of

[1] Jurgen Habermas, *Religion in Public Sphere*, European Journal of Philosophy 14:1, (2005), section 1.
[2] *Ibid*
[3] See, Andras Sajo, *Preliminaries to a Concept of Constitutional Secularism*, 6 Int'l J. Const. L. 605(2008), p.1, referring to the concept of strong religion as developed in Gabriel A. Almond, R. Scott Appleby & Emmanuel Sivan, *Strong Religion: The Rise of Fundamentalism Around the World* (2003)
[4] Habermas, *Supra* note 1
[5] In American Legal Scholarship most vigorous defender of the Claim is Michael Perry. See, for example, Michael J. Perry, *LIBERAL DEMOCRACY AND RELIGIOUS MORALITY*, 48 DePaul L. Rev. 1 (1998)
[6] Hunter Baker, *COMPETING ORTHODOXIES IN THE PUBLIC SQUARE: POSTMODERNISM'S EFFECT ON CHURCH-STATE SEPARATION*, 20 J.L. & Religion 97 (2004- 2005); *See* also, Ruti Teitel, *A CRITIQUE OF RELIGION AS POLITICS IN THE PUBLIC SPHERE*, 78 Cornell L. Rev. 747 (1993), arguing that United States Supreme Court by its Opinion in *Employment Division vs. Smith* (494 U.S. 872 (1990) accepted Religion as politics in US public sphere.

international scale. The publication of notorious cartoons of Prophet Mohammed by Danish newspaper *Jyllands Posten* is widely discussed example of this.[7]

Danish Cartoon controversy once again demonstrates that given the waves of constitutionalization and human rights revolution, religions often assert their claims in human rights terms. Protection of the religious sensitivity as a constituent of religious liberty is one example. The claim of religion so framed counters the competing human rights claim rested on freedom of expression. Clash of fundamental rights thus becomes one broad perspective[8] that can be taken to analyze the consequences of the religious revival in public sphere.

The history of oppression which stands behind the emergence of both freedom of expression and freedom of religion is the reason to be suspicious then it comes to restrictions and requires abandoning the frames of purely human rights analysis. Are the human rights claims made on religion's behalf for restrictions of the rights of others sincere? And what is the rationale behind such claims? These are common and legitimate questions. For the subsequent inquiry, the case of Blasphemy is generally readily available and picked example. Consequently, any discussion concerning the clash between freedom of speech and religion will not escape this ancient crime. United Kingdom is a classic jurisdiction to explore in this respect.

In England blasphemy constituted common law offence and formed part of criminal libel together with defamation, sedition and obscenity. The object of the crime was to preserve the respect towards god. According to Blackstone the *actus reus* of the crime was carried out 'by denying his being or providence; or by contumelious reproaches of our Savior Christ.'[9] But Blasphemy was not only about the offence of the God, it was indivisibly associated with

[7] *See*, Andras Sajo, *Countervailing Duties as Applied to Danish Cheese and Danish Cartoons*, in *Censorial Sensitivities: Free Speech and Religion in Fundamentalist World*, Andras Sajo (ed), (2007)
[8] *See*, Renata Uitz, Constitutional Democracy Trapped Between Freedom of Expression and Freedom of Religion: A Preface, in *Censorial Sensitivities: Free Speech and Religion in Fundamentalist World*, Andras Sajo (ed), (2007)
[9] *BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND*, 59 (1769).

sedition.[10] Anglican faith was the source of the King's legitimacy therefore the denial of its truth was denial of King's authority and amounted to sedition.

As a crucial characteristic of blasphemy; it was only protecting the majority faith of Anglican Church established in the Kingdom. Selectiveness of the criminal provision proscribing blasphemy excluded from its protection not only creeds distinct from Christianity but also different Christian denominations. The tenets of the latter were protected only as far as they were common to the dominant Church.[11] The ironic example of the application of this rule is Salman Rushdie case where the author of "Satanic Verses" offending Islam and its prophet was not prosecuted under British Blasphemy law as Islam did not fall under its protection.[12]

In the middle of XIX century the rationales of the social importance to protect the theological and doctrinal foundations of the established church from denial and sedition were modified. Such rationales were transformed in offensiveness rationale. The speech was not proscribable for the mere denial of truth but for attacking Christianity "in a 'tone and spirit . . . of offence, and insult, and ridicule," in contrast with "sober, temperate and decent" which was tolerated.[13] The applicable test for blasphemy became the compliance by the speaker to the "decencies of controversy".[14] What was decent offensive was determined by the standards of Anglican majority.

[10] Robert C. Post, *CULTURAL HETEROGENEITY AND LAW: PORNOGRAPHY, BLASPHEMY, AND THE FIRST AMENDMENT*, 76 Cal. L. Rev. 297 (1988) p. 4; citing: "Such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, State and Government, and therefore punishable. ... For to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and that Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law." - *Taylor's case* cited from *THE LAW COMMISSION, WORKING PAPER NO. 79: OFFENCES AGAINST RELIGION AND PUBLIC WORSHIP* 5-6 (1981)

[11] *Ibid*

[12] *R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1991] 1 QB 429, DC

[13] Post, *Supra* note 10, p.5 citing Lord Denman's charge in *Regina v. Hetherington* , 4 St. Tr. N.S. 563, 590-91 (1841).

[14] *Ibid*, citing Lord Coleridge, *Ramsay and Foote*, 15 Cox C.C. at 238

The example of Blasphemy shows what kind of claims could possibly be covered under human rights language. This is especially instructive when it comes to strong religions having wider social and political ambitions.

At the same time claims from special existential value of religion for human being still can be made.[15] In the freedom of speech vs. Freedom of Religion controversy, compelling considerations from human dignity and personality rights may restrict freedom of anti religious speech when it amounts to hate speech.[16]

Having said all these, I turn to the controversy which could be perfectly fit both the framework of clash of fundamental rights and rising religious consciousness. It is common to a number of Eastern European Countries with predominantly Orthodox Christian population. The situation on ground is described as "war for souls" between local, dominant Orthodox Churches and Foreign religious missionaries. The controversy is clearly a response to missionary and proselytizing activities of foreign religious denominations and involves a number of restrictions for proselytizing faiths. The restrictions are of wide range and vary from country to country; from hindrance at the stage of registration of the religious organization to Criminal prohibition of Proselytism.[17]

As a result, the scholarly discourse of the controversy of "war for souls" is centered on the issue of proselytism. Long works are devoted to the analysis of proselytism as a human rights law issue. As a result the internal tension within the concept of Proselytism in the form of competing rights claims is recognized. It is contested whether it involves the clash between free speech and religion or competing claims from freedom of religion of the proselytizer and the target of

[15] Matthias Mahlmann, *Free Speech and the Rights of Religion*, in *Censorial Sensitivities: Free Speech and Religion in Fundamentalist World*, Andras Sajo (ed), (2007) p. 60-61

[16] *Ibid*, p.62–69;On Hate Speech See generally, Michel Rosenfeld, *HATE SPEECH IN CONSTITUTIONAL JURISPRUDENCE: A COMPARATIVE ANALYSIS*, 24 Cardozo L. Rev. 1523 (2003)

[17] *See*, the discussion and references in Section 1.1 *Infra*.

proselytisaztion. Caught in these dichotomies the analysis from purely legal perspective enters into deadlock in search of the answer on the question whether restrictive legislation against proselytizing religions can be justified under the human rights claims of the target of proselytisation.[18] The well known "proper"- "improper" proselytisation distinction made by European Court of Human Rights (hereinafter ECtHR) is an example of this approach.[19] Such narrow framing often represses and/or marginalizes the discussion of the problems involved in the controversy of "war for souls" as the wider social issues having far reaching implications in democratic society.

The first Chapter attempts to explore the problem of "war for souls" as a wider social problem in Greece, Georgia and Russia and to uncover the hidden considerations that fuel "war for souls". Second and Third Chapters trace normative principles that may provide solution to the broad problems identified in the first chapter.

[18] *See*, generally Tad Stahnke, *The Right to Engage in Religious Persuasion*, in *Facilitating Freedom of Religion or Belief: A Deskbook*, T. Lindholm, W. Cole Durham, Jr., B.G. Tahzib – Lie, (Ed); E. A. Sewell, L. Larsen, (Associate Ed) (2004), p. 619; John Witte Jr, *A PRIMER ON THE RIGHTS AND WRONGS OF PROSELYTISM*, 31 Cumb. L. Rev. 619 (2001); Paul M. Taylor, *THE QUESTIONABLE GROUNDS OF OBJECTIONS TO PROSELYTISM AND CERTAIN OTHER FORMS OF RELIGIOUS EXPRESSION*, 2006 B.Y.U. L. Rev. 811 (2006); Steven T. Mcfarland, *MISSIONARIES AND INDIGENOUS EVANGELISTS: THE RIGHT TO BEAR WITNESS IN INTERNATIONAL LAW*, 31 Cumb. L. Rev. 599(2000-2001)

[19] *See*, *Kokkinakis v. Greece*, ECtHR, Judgment of 25 May1993. Taking into account the jurisdiction and mandate of ECtHR such approach may seem well justified in comparison with academic scholarship.

Chapter One

Creature of fear

And I tell you, you are Peter,
And on this rock I will build my church,
And the gates of hell shall not prevail against it.

Matthew 16:17-19

Fear breeds Repression

Concurring opinion of Mr. Justice Brandeis,
Whitney v. California
274 U.S. 357 (1927)

1.1. Proselytism and the Eruption of the "War for Souls"

The discourse on the exclusionary practices against religious communities in Eastern European Countries with predominantly Orthodox Christian populations is often focused on the Proselytism as a central problem. Proselytism – described as inherent constituent of the manifestation of religion[20] is not a homogenous phenomenon which in itself can be perceived as

[20] Renata Uitz , *Freedom of Religion,* (2007), p. 56

a problem.[21] The heterogeneity, in turn indicates multiple contexts of its existence. Therefore, it is the context that often matters and is capable of changing the shapes of particular phenomenon. John Witte Jr. one of the most authoritative and widely cited scholar in the field of religious liberty refers to the problems associated with proselytism as "one of the great ironies of the democratic revolution of the modern world"[22] thus placing them in a particular context. Witte elaborates that: "modern human rights revolution has helped to catalyze a great awakening of religion around the globe. In regions newly committed to democracy and human rights, ancient faiths once driven underground by autocratic oppressors have sprung forth with new vigor. On the other hand, - continues Witte- in parts of Russia, Eastern Europe, Africa, and Latin America, the human rights revolution has brought on something of a new war for souls between indigenous and foreign religious groups. It is a war to reclaim the traditional cultural and moral souls of these new societies and a war to retain adherence and adherents to the indigenous faiths. In part, this is a theological war, as rival religious communities have begun actively to demonize and defame each other and to gather themselves into ever more dogmatic and fundamentalist stands. In part, this is a legal war, as local religious groups have begun to conspire with their political leaders to adopt statutes and regulations restricting the constitutional rights of their foreign religious rivals."[23]

The "War for souls" is a phenomenon emerging as a reaction to proselytism in specific circumstances and has significant negative effects on such fundamental freedoms as Freedom of religion, thought, conscience and expression. It is a metaphor coined to describe the set of

[21] *See*, Stahnke, *Supra* note 18 p. 619, citing the concurring opinion of Justice Frankfurter, *Niemotko v. Maryland*, 340 U.S. 268,275 (1951)
[22] Witte, *Supra* note 18, p. 1
[23] *Ibid*,

problems connected to proselytism in 1990's Russia.[24] But it shall be argued that this metaphor can be employed as a generic expression applicable to other similar contexts. As already demonstrated elsewhere, the "war for souls" is multidimensional. In its theological dimension it generally presupposes the existence of "traditional" and often dominant religion "fighting" against non traditional and foreign religious denomination(s). In its legal dimension the "war for souls" involves state as a player, usually acting on behalf of dominant religion and employing its repressive powers to the detriment of the non dominant religious group(s).

In light of the foregoing analysis, it shall be contended that proselytism is not the problem *per se*; but it rather triggers various complex problems among which is the phenomenon of "war for souls".

The following sections deal with the eruption of "war for souls" as a response to proselytism. The cases of Greece, Russia and Georgia constitute the framework for comparative analysis. However the analysis is not limited to legal and constitutional comparison and simultaneously aims to capture the problem in broader context. The context refers to all relevant historical, theological, political, social, and cultural considerations. Such perspective opens the possibility to overcome the difficulties related to the framing of the problem of "war for souls" in purely legal terms. Treatment of "war for souls" as a wider social problem promises new insights for the better understanding of legal and constitutional challenges it entails, pursuance of such perspective may also illuminate our approaches towards the solution of these challenges.

[24] John Witte Jr., *Soul Wars: The problem and Promise of Proselytism in Russia*, 12 Emory Int'l l. Rev. 1 (1998), p.1

1. 2. The Features of "War for souls"

1.2.1. Theological and Sectarian Controversy

A solid theological foundation is among the determinative grounds of "war for souls". Orthodox Christianity is the "dominant" and traditional religion in the countries under consideration.[25] Orthodoxy itself is the spiritual union of the autocephalous and autonomous churches adhering strictly defined Christian dogma.[26] This dogma is ontologically different from other creeds including Christian ones[27], which from Orthodox perspective are perceived as a heresy and schism. Doctrinal differences define the perception of proselytism by Orthodox Churches[28]. Inspired by the doctrinal differences and related perception of proselytism as preaching of heresy, in all three countries, Orthodox authorities directly express hostile attitude towards proselytizing religious denominations and stress the necessity of resorting countermeasures against their activities.

The authors of the metaphor "war for souls" clearly get inspiration from the Patriarch of all Russia, his Holiness Aleksey II who at the Episcopal gathering publicly proclaimed the obligation "to battle for people's souls by all legal means available" against "continuing

[25] Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, prepared by Mr. Abdelfattah Amor, Special Rapporteur of the Commission on Human Rights, A/51/542/Add.1, 7 November 1996, p.25; CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONOF RELIGIOUS INTOLERANCE, Report by Mr. Abdelfattah Amor, Special Rapporteur on freedom of religion or belief, Addendum, VISIT TO GEORGIA, E/CN.4/2004/63/Add.1, 16 December 2003, pp. 6,8; Harold J. Berman, Freedom of Religion in Russia: An Amicus Brief for the Defendant, 12 Emory Int'l l. Rev. 1 (1998), p. 314.

[26] Charalambos K. Papastathis, INTERNATIONAL CHURCH-STATE SYMPOSIUM: ARTICLE: The Hellenic Republic and the Prevailing Religion, B.Y.U.L. Rev. 815 (1996), p.7

[27] Supra note 24, pp. 30-33

[28] Ibid, p. 33-37; but doctrinal differences do not themselves lead to the outbreak of theological war for souls. For example ecumenical orthodox patriarchate and patriarch himself has been pursuing tolerant policy towards the different creeds. See, Kyriakos N. Kyriazopoulos, PROSELYTIZATION IN GREECE: CRIMINAL OFFENSE VS.RELIGIOUS PERSUASION AND EQUALITY, 20 J.L. & Religion 149 (2004-2005), p. 7; the considerations transforming doctrinal differences into full scale "war for souls" will be examined later.

intensive activity by some Catholic circles and various protestant groups … and to the growing activity of sects, including those of a totalitarian nature."[29] The Council of Bishops in Moscow further clarified the position of Russian Orthodox Church. The resolution adopted by the Council expressed concern: "in connection with the continuing proselytizing activity of protestant *false* missionaries in Russia [and] the growth of organized *pseudo-Christian* and *pseudo-religious* sects of neo-pagan communities, occultists and devil-worshipers in the CIS and Baltic states"[30] (*Emphasis belongs to author*). The missionary activities by various denominations were perceived as a declaration of war. As Metropolitan Kirill observed, missionaries from abroad have commenced fighting against Orthodox Church.[31]

In Greece, orthodox authorities are less extreme in their evaluations but nevertheless claim that Protestant denominations are not "known religions".[32] The position is sharper in case of Jehovah's witnesses, who according to the orthodox hierarchs constitute "a sect which contests the divinity of Jesus Christ and the status of the Virgin and the Saints."[33]

As their Russian counterparts Greek Orthodox clerics also emphasize their duty to resort countermeasures and justify such countermeasures by "the right to react morally against those who are hostile to the moral integrity of the members of the Orthodox Church and take advantage of the poverty and low cultural level of some of those members."[34]

[29] *Address of the Patriarch to the Councils of the Moscow Parishes at the Episcopal Gathering, December 12 1996*, in *Tserkvno- Obschestvennyi Vestnik*, Dec. 26, 1996, p.7, cited in Witte, *Supra* note 24, p. 1

[30] Resolution of the Council of Bishops in Moscow, Feb. 18-23, 1997, 7(103) *Pravoslavnaya Moskva* , Mar.1997, p.11, cited *Ibid*, p.15

[31] Metropolitan Kirill, *Gospel and Culture* (unpublished speech delivered at Conference on World Missions and Evangelism, World Council of Churches, Salvador, Bahia, Brazil, Nov. 24- Dec.3, 1996, cited *Ibid*, p.13 .

[32] The definition of "known religion" and related difficulties are examined later.

[33] *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, prepared by Mr. Abdelfattah Amor, Special Rapporteur of the Commission on Human Rights, A/51/542/Add.1, 7 November 1996, p.26

[34] *Ibid*

The Georgian Apostolic Autocephalous Orthodox Church also negatively assesses the proselytizing activities by some religious denominations, especially by Jehovah's witnesses[35] perceived as a sect by Orthodox Church. Orthodox Clergy considers Protestant denominations as "non - traditional" and sometimes also categorizes them as "sects". Muslim, Jewish and Armenian religions are treated as traditional. They have been present in Georgia for centuries and practicing their belief without encountering significant intolerance. Orthodox authorities tolerate traditional religions. Extremist religious groups, namely that of Father Basil Mkalavishvili, notorious due to its violence against some "non traditional" religious denominations[36] adopted similar attitude towards "traditional" faiths. High orthodox hierarchs usually limit themselves with the expression of negative attitude towards non traditional religions, but lower ranking clergymen are often hostile during their speeches on parish meetings and some of them have allegedly inspired or participated in the violence. The same is true in case of some right wing politicians and teachers at schools.[37] As in the case of Greece[38] and Russia[39] media institutions including broadcasting media are also widely involved in a theological and ideological struggle against non traditional religious creeds on behalf of dominant orthodox religion.[40]

[35] MICHAEL OCHS, Persecution of Jehovah's Witnesses in Georgia Today, Religion, State & Society, Vol. 30, No. 3, (2002) p. 21

36 Activities of Father Basil Mkalavishvili's group are described later.

37 See, CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONOF RELIGIOUS INTOLERANCE, Report by Mr. Abdelfattah Amor, Special Rapporteur on freedom of religion or belief, Addendum, VISIT TO GEORGIA, E/CN.4/2004/63/Add.1, 16 December 2003; and Reports on International Religious Freedom released by Department of State of United States since 2001, available online at: http://www.state.gov/g/drl/rls/ , last visited on November 25, 2008.

38 Kyriazopoulos, Supra, note 28, p. 6

39 International Religious Freedom Report 2007, Released by the Bureau of Democracy, Human Rights, and Labor, available at: http://www.state.gov/g/drl/rls/irf/2007/90196.htm , last visited on November 25, 2008.

40 CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONOF RELIGIOUS INTOLERANCE, Report by Mr. Abdelfattah Amor, Special Rapporteur on freedom of religion or belief, Addendum, VISIT TO GEORGIA, E/CN.4/2004/63/Add.1, 16 December 2003, p.19

Generally, in all countries under consideration Orthodox Christianity is adhered by the majority of population. Orthodox clergy tolerate historically present "traditional" religions. Traditional - non traditional dichotomy becomes crucial, due to the negative assessment and openly hostile attitude towards non traditional religious denominations displayed by local Orthodox Churches. The hostility generally entails the claims by Orthodox Authorities to put an end the proselytizing activities of other religious denominations.

1.2.2. The Art of Silencing

The ways disfavored religious communities are silenced/excluded differs in the countries under review. This descriptive section intends to demonstrate the existence of restrictive practices and will not enter the detailed legal analysis of the relevant rules.

In Greece the constitution reserves the right to worship for prevailing[41] and known religions. Under known religion fall all religious denominations except Orthodox Church. The entry of these denominations to the religious market and their activities are supervised and controlled by a public authority - department of different cults and religions under the Ministry of National Education and Cults. Recognition as a known religion falls under the power of the latter entity. Although recognition does not transform religious institutions of known religions into administrative agencies, it nevertheless subjects them to the state supervision and control.

The criteria for the recognition of religion as known, originates from an academic interpretation and is determined by the case law and administrative practice. To be qualified as known religion applicant faith shall be transparent and shall not have any secret dogmas or rites.[42] This requirement according to the Greek authorities serves as a safeguard to public order morals and

[41] The prevailing religion is Greek Orthodox Church. The issues related to it are discussed later.
[42] Kyriazopoulos, *Supra*, note 28, p. 7-8

rule of law.[43] In initial case –law and administrative practice transparency and conformation to the public order and morals were regarded as closely connected cumulative criteria. But later developments in jurisprudence twisted the requirement to accommodate otherwise transparent religions not wholly in line with public order and morals.[44] The second criterion for the known religion is abstention from proselytism.

This requirement comes from the constitutional prohibition of proselytism.[45] The prohibition is interpreted as generally applicable to acts against all known religions.[46] Although opponents often contend that it applies only acts directed against prevailing religion.[47]

The Relevant penal provision of the Greek legislation[48] was adopted at the time of dictatorial rule of Metaxas and is preserved to date. Pursuant to the jurisprudence of Greek courts: "purely spiritual teaching does not amount to proselytism, even if it demonstrates the errors of other religions and entices possible disciples away from them, who abandon their original religions of their own free will; this is because spiritual teaching is in the nature of a rite of worship performed freely and without hindrance. Outside such spiritual teaching, which may be freely given, any determined, importunate attempt to entice disciples away from the dominant religion

[43] *Supra* note 14, p. 4
[44] Kyriazopoulos, *Supra*, note 28, p. 7-8
[45] Article 13(2) of the Greek Constitution
[46] *Supra* notes 26 and 33, p.5
[47] Kyriazopoulos, *Supra*, note 28, p.26
[48] "1. Anyone engaging in proselytism shall be liable to imprisonment and a fine of between 1,000 and 50,000 drachmas; he shall, moreover, be subject to police supervision for a period of between six months and one year to be fixed by the court when convicting the offender. 2. By 'proselytism' is meant, in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion (heterodox), with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety. 3. The commission of such an offence in a school or other educational establishment or a philanthropic institution shall constitute a particularly aggravating circumstance." § 4 of Greek Law No. 1363/38, as amended by Law No. 1672/39 , cited *Ibid*, p. 1

by means that are unlawful or morally reprehensible constitutes proselytism as prohibited by the Constitution." [49]

Generally, courts have been convicting for proselytism where the teaching of other religious belief involved offensive references to the prevailing religion and thus intruded upon the religious feelings of target, promise of material benefits were used as a form of inducement, or the targets of proselytising activities were "inexperienced" or of low intellect and proselytiser had taken advantage of this. The list of activities in the criminal law provision, according to the case law, represents the description of the means used in the perpetration of the act and is not *actus reus* of the crime. Any "direct or indirect attempt to impinge on religious beliefs by any of the means separately listed in the Law" constitutes crime of proselytism.[50]

To sum up, restrictions against proselytizing religious communities in Greece take two directions. Firstly, the recognition as known religion is denied in order to prevent the community to organize itself as legal entity[51]. Secondly criminal offence of proselytism is applied to those who nevertheless pursue missionary activities.[52]

[49]Judgment #2276/1953 of Greek Supreme Administrative Court cited in *CASE OF KOKKINAKIS Supra* 19, Para. 17,

[50] Kyriazopoulos, *Supra*, note 28, pp.22-24, having extensive review of the case law of Greek Courts on the crime of Proselytism.

[51] The recognition as a known religion is necessary to obtain the permit for having a place of worship and status of legal entity under public law. Without legal personality religious communities are unable to own places of worship or other property and take part in legal relations and appear before courts. Religious communities without known religion status are compelled to pursue their activities under the ordinary private law association. The Following excerpt from the 2008 US Department of State Country Reports on International Religious freedom is illustrative of the hardships religious communities encounter at registration stage. "Different groups that follow the ancient polytheistic Hellenic tradition applied in each of the last four years for house-of-prayer permits. In the past, the Ministry of Education and Religion had not responded despite advice from the Ombudsman for Human Rights. In 2006 the Ministry responded to one of these groups, stating that it "would delay its formal response due to the seriousness and the peculiarity of the matter." There was nothing further from the Ministry. The Jehovah's Witnesses had 11 pending house-of-prayer permit requests, some dating from 2005. They sent a protest letter to the Ombudsman in December 2006, who contacted the Ministry and recommended that it send an official response as mandated by law. The Ministry sent no response as of the end of the reporting period. Members of the Jehovah's Witnesses community reported that two Greek Orthodox bishops made requests to a local court that the Jehovah's Witnesses house-of-prayer permits be repealed. The matter is still pending in the court system. Reportedly,

In Russia restrictions for religious communities are codified in 1997 Law "on Freedom of Conscience and Religious Associations" (hereinafter 1997 law).[53] The 1997 Law replaced the Law of 1990 adopted in the context of "Perestroika". The 1990 Religious Law is regarded as the legal basis of the "golden age" of religious liberty. Since the early 90's, pressure by the Russian Orthodox Church and nationalistic groups affiliated to it, against the activities of foreign religious organizations had been tightening. In 1993 President Yeltsin has vetoed the amendments having similar restrictive content as the 1997 Law, on grounds of incompatibility with constitution and fundamental rights enshrined therein. But finally the efforts of Orthodox Church and its supporters achieved success and president Yeltsin signed the new Law in 1997 subsequently ending the "golden age" of religious liberty in Russia.[54]

The 1997 law reinforces general constitutional guarantee in the field of religious liberty and lists the legitimate grounds for its restriction, namely, protection of constitutional order, morals, health, legitimate rights and interests of others, interests of public security and national defense.[55] On the other hand, the law is quite complex, full of ambiguous and vague concepts and provisions restricting religious liberty.[56] The following paragraphs will examine the provisions

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Jehovah's Witnesses filed four additional applications for permits for Kingdom Halls in 2007. They had not received a reply and a construction permit remained pending due to bureaucratic delays at the end of the reporting period. Minority religious groups have requested that the Government abolish laws regulating house-of-prayer permits, which are required to open houses of worship. Local police have the authority to bring to court minority churches that operate or build places of worship without a permit. In practice, this happens rarely." *International Religious Freedom Report 2008*, Released by the Bureau of Democracy, Human Rights, and Labor, available at: http://www.state.gov/g/drl/rls/irf/2008/108449.htm , last visited on November 25, 2008

[52] Anti Proselytism Legislation forces missionaries to undertake training to steer clear of anti proselytizing laws. Because of this tactic and higher awareness of law enforcement officials in proselytism related legal issues, the number of arrest and conviction of missionaries significantly decreased in last years; though they still hinder missionary activities. See, *Ibid*

[53] "Federalni Zakon o Svobode Sovesti i o Religioznikh Obedineniakh" (Federal Law on the Freedom of Conscience and Religious Associations); English translation by Lawrence Uzzel is annexed to the Volume: *Soul Wars: The Problem of Proselytism in Russia*, 12 Emory Int'l L. Rev. 1 (1998)

[54] See, *Supra* note 24; W. Cole Durham Jr., Lauren B. Homer, *Russia's 1997 Law on Freedom of Conscience and Religious Organizations: An Analytical Appraisal.* 12 Emory Int'l L. Rev. 1 (1998), pp.106-116

[55] *Supra note* 53 Articles 2-3

[56] *Supra* note 54 p. 116

having restrictive character/effect on religious freedom in general and are capable to obstruct the proselytizing activities of religious denominations in particular.

The 1997 law prohibits the exercise of freedom of conscience and worship connected to the coercion over the personality of human being, intentional offense to the feelings of citizens associated with their relationship with religion, propaganda of religious superiority, destruction or impairment of property or threat of commission of such acts, are prohibited. Additionally, the 1997 law prohibits the holding of public events or dissemination of texts or images offending the religious feelings of citizens in the vicinity of buildings of religious establishments.[57] The provision is directly capable of hindering the proselytizing activities. The overbreadth and vagueness of the provision together with its obscurity and the risk of selective and discriminatory application has been the concern and ground for critic of its early commentators.[58]

In order to illustrate further indirect restrictions often of purely procedural nature the examination of the complex system of rules governing the status of religious entities and related issues is necessary. The 1997 law introduces the generic term "religious association" defined as "voluntary association of citizens of Russian Federation and other persons permanently legally residing on its territory united by the goal of joint confession and having features corresponding to that goal: a creed, the performance of worship services, religious rituals and ceremonies, teaching the religion and religious education of the followers."[59] Religious associations are further classified. This classification determines their legal status, rights and duties and entitlement to privileges. Pursuant to the 1997 Law Religious associations are divided into religious organizations and religious groups.

[57] *Supra*, note 53, Article 3(6)
[58] Durham and Homer, *Supra*, note 54, pp.142-145
[59] *Supra* note 53, Article 6

Religious group is the lowest and simplest form of religious association and is defined as "the voluntary union of citizens associated together with the aim of confession and dissemination of belief. "[60] Religious groups do not have legal personality and consequently are not subject to registration. They are afforded with the rights to conduct worship, religious rituals and ceremonies, teach the religion and religiously educate their followers. Absent legal personality religious groups are hindered to hold corporate property, hire personnel, obtain state benefits and all other rights and privileges afforded to the religious organizations.[61]

Religious organizations on the other hand are defined as association of citizens or other persons permanently and legally residing on the territory of Russian Federation. Religious organizations have legal personality and consequently are subject to registration. Religious organizations are further divided into local and centralized religious organizations. Local organization shall be composed of at least 10 citizens or legal permanent residents, habitually residing at the locality concerned and shall present the proof of their existence at the territory concerned for at least 15 years for the date of registration application. A Centralized religion organization shall according to its Charter be comprised of at least 3 local religious organizations.[62] Religious organizations are granted with a wide set rights and privileges, enabling them to accomplish their objectives.[63]

[60] *Ibid*, Article 7
[61] *Supra* note 56, p. 169
[62] *Ibid*, pp.170-182
[63] They are entitled to corporate ownership of the property and its unhindered disposition, including the exploitation for ritual, social, charitable, educational purposes, also for the production including the exclusive right to produce religious literature and articles for worship and other religious services; to set up of business undertakings including but not limited to the production of religious goods; to import religious educational material in printed audiovisual or any other form as well as articles for religious services. The property of religious organizations is usually exempted from taxes and the worship places are exempt from bankruptcy proceedings or any claim on behalf of creditors. Religious organizations are allowed to invite foreign nationals for professional activities. They are entitled to obtain benefits from state, municipal and other organizations in a form of buildings land or other movable or immovable property made available by the latter entities free of charge. Religious organizations are entitled to receive financial and other forms of benefits from the state for the restoration and maintenance of their property representing historical and cultural heritage. And finally they are allowed to conduct chaplaincy in places of detention and hospitals, cooperate with the state in the voluntary religious education in public schools and obtain

Grounds for the liquidation of religious organization and banning of religious organization/ group are also capable of hindering the religious liberty of a wide range of religious denominations. "The organs of prosecution service, executive agencies charged with the registration of religious organizations and local self government agencies are empowered to apply the court and demand the liquidation/banning of religious organization/group on enumerated grounds.[64]

Commentators[65] point to the overbreadth of these grounds and despite the seeming relevance to the legitimate objectives of limitations under international human rights law and cast doubt about their relevance to the proportionality thresholds, especially under ECHR.

The 1997 law responded to the fears concerning the proselytizing activities of foreign religious denominations. Firstly it prohibited religious activities of foreign religious organizations, and by imposing the citizenship or permanent legal residency requirement for establishing religious associations it effectively excluded the possibility of setting up such associations by the foreigners. Second set of measures targeted newly emerged religious denominations. By setting requirement of 15 years existence for the registration as a religious organization it effectively hindered many new religious denominations from institutionalizing their activities, giving them

state support in teaching general educational disciplines in religious educational establishments. Witte, *Supra* note 24, pp. 20-23

[64] Undermining of social security and public order; extremist activities; forcing family disintegration; infringement upon the personality rights and freedoms of the citizen; infliction of damage established in accordance with the law on the morality or health of citizens, including the use of narcotic or psychotropic substances, hypnosis, performance of depraved or other disorderly actions, in connection with their religious activities; encouraging suicide or the refusal of medical help to persons in situations dangerous to life and health, on religious grounds; prohibiting to obtain compulsory education, forcing members and followers of the religious association or other persons to alienate their property for the use of religious association; obstructing citizen to leave religious association by threatening to life, health and property, if there is a danger to of this threat actually being carried out, or by using force or other illegal actions, inciting citizens to refuse the fulfillment of their civic obligations established by law, or to perform other acts disturbing order. *Supra* note 53, Article 14

[65] *Supra* note 54, pp.215-221

more organized and widespread nature.[66] The 1997 Law subjected to mandatory registration all religious organizations anew, pursuant to its requirements. Many of the organizations non compliant with 15 years threshold were registered but failed the re registration procedure according to the 1997 Law. Constitutional court's decision later removed 15 years requirement for the organizations registered before the entry into force of the 1997 Law.[67] In addition to the softening of restriction, passage of time enabled more religious denominations to meet 15 years requirement. Nevertheless, the tool of denial of registration was still employed by administrative agencies. Although such obstacles sometimes were result of corruption and bureaucracy with no religious connotations, it significantly affected a number of religions.[68] Abuse of administrative discretion in a form of clear religiously motivated discrimination continues to create obstacles to date and has become the source of remarkable jurisprudence by ECtHR.[69] In contrast the Russian Orthodox Church as a Centralized religious organization continued to be almost sole recipient of the various benefits from state and enjoyed privileged and preferential treatment.[70]

In Georgia registration and legal personality issues of religious communities other than Georgian Orthodox Church is also problematic. Before concluding constitutional agreement in 2002, Georgian religious marketplace resembled *laissez faire*, totally unregulated by government, having historically present natural monopolist Georgian Orthodox Church

[66] Ibid, pp. 157-161; 221-225; T. Jeremy, Gunn, Caesar's Sword: The 1997 Law of the Russian Federation on the Freedom of Conscience and Religious Associations, 12 Emory Int'l L. Rev. 1 (1998), pp. 57-64

[67] Decision no. 16-P of 23 November 1999 in the case of Religious Society of Jehovah's Witnesses in Yaroslavl and Christian Glorification Church, cited in Case of Church of Scientology Moscow ECtHR, Infra note 69

[68] Reports on International Religious Freedom released by Department of State of United States since 2001, available online at: http://www.state.gov/g/drl/rls/ , last visited on November 25, 2008.

[69] Case of Kuznetsov and Others v. Russia, ECtHR, Judgment of 11 January 2007; Case of the Moscow Branch of the Salvation Army v. Russia, ECtHR, Judgment of 5 October 2006;
"In view of the Court's finding above that the reasons invoked by the Moscow Justice Department and endorsed by the Moscow courts to deny re-registration of the applicant branch had no legal basis, it can be inferred that, in denying registration to the Church of Scientology of Moscow, the Moscow authorities did not act in good faith and neglected their duty of neutrality and impartiality vis-à-vis the applicant's religious community." CASE OF CHURCH OF SCIENTOLOGY MOSCOW v. RUSSIA, ECtHR, Judgment of April 5 2007 Para.97

[70] See generally Witte, Supra note 24, and Durham and Homer, Supra note 56

But on the other hand the absence of the legal regulation of religious marketplace has not created a heaven for religious liberty. Lack of legal status and recognition has hindered the activities of religious entities especially those of the newly arrived, to pursue their activities Lack of legal personality entailed difficulties to own property, organize places of worship, and etc.[71]

As a result of the 2003 Rose Revolution and of the subsequent fundamental changes government begun to eradicate the inequality among the various religious denominations. Although the changes were not motivated by purely egalitarian motives, the situation of religious denominations other than Orthodox Church was significantly changed. Since 2005 they were granted permission to register and acquire status of non commercial legal entity under private law.[72] The registration procedures are simple but some denominations especially those traditionally present in Georgia, namely Armenian Church demand for the status of legal entity of public law and the privileges enjoyed by Orthodox Church, especially the restitution of property taken under Bolshevik rule. Many other religious denominations also challenge the suitability of the status of legal entity of private law and do not wish to register.[73]

Laissez Faire era was also distinguishable by the outbreak of religiously motivated violence by some extremist groups, notably defrocked Orthodox priest Father Basil Mkalavishvili.[74] Father Basil's was often publicly supported by some politicians including Members of Parliament[75] and

[71] Khatuna Tsintsadze, *LEGAL ASPECTS OF CHURCH-STATE RELATIONS IN POST-REVOLUTIONARY GEORGIA*, 2007 B.Y.U. L. Rev. 751 (2007) p. 3-4

[72] *See*, Ochs, *Supra* note 35, p. 5, discussing the Ruling of Georgian Supreme Court denying the Right to register as a Religious Organization under the Status of Legal Entity under Private Law.

[73] See, Tsintsadze, *Supra* note 70

[74] Father Basil Mkalavishvili and his group "were responsible for violent attacks against religious minorities from 1999 to 2003. Mkalavishvili led dozens of mob attacks against Jehovah's Witnesses, Pentacostalists, Baptists and other religious minorities in Georgia. The assailants broke up religious services, beat congregants, ransacked or looted homes and property, and destroyed religious literature. Police did not take adequate measures to stop the attacks and, at times, even participated in the attacks."
Georgia: Ex-Priest Jailed for Attacks Against Religious Minorities, Human Rights Watch, Feb. 1, 2005, available at http://hrw.org/english/docs/2005/01/31/georgi10098.htm last visited on November 25 2008

[75] "Representatives of the [Jehovah's] Witnesses maintain that that the local population initially reacted favorably to their preaching and attempts to share their faith, but at the end of 1998, they say, the atmosphere changed when

even some Orthodox clergy.[76] Although Basil and his followers were brought to justice by new government, the evidence of inactivity and tacit approval of the extremist activities, by the former government officials was sufficient for European Court of Human Rights to hold Georgia responsible for the violation of religious liberty of the victims of one of the notorious attacks perpetrated Father Basil.[77] State tolerated violence against different religious creeds aiming to suppress their proselytizing activities is the clear demonstration of the far reaching consequences of "war for souls" overstepping the boundaries of theological/ doctrinal debate and attaining legal or quasi legal character, directly or indirectly involving state's repressive power.

Although Violence against religious communities is no longer reported, and legislation permits religious communities to register and obtain legal personality they still experience the problems related to tax exemption, and permission for erecting places of worship.[78]

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parliamentarian Guram Sharadze seized on the issue of religious purity and turned it into a rallying cry to protect Georgian Orthodoxy. His speeches led to heightened pressure on Witnesses and other minority religions; other Georgian parliamentarians began speaking out, and then local authorities started impeding the Witnesses' attempts to hold congresses." Ochs, *Supra* note 35, p.6 and 20-21

[76] Metropolitan of Georgian Orthodox Church Atanase (Chakhvashvili) declared in TV appearance that The Jehovah's Witnesses, Baptists, Anglicans and Pentecostals 'have to be shot dead … 'We do not want to conduct it peacefully … We have to express it by war. No peaceful methods will help. Mkalavishvili does it in a masculine and heroic way.' Metropolitan Atanase's position was denounced by the official statement of Georgian Orthodox Patriarchate. Metropolitan later apologized for the statements. In General Georgian Orthodox Church though having negative attitude publicly denounces any violence against the religious groups disfavored by it. *Ibid*, p. 21-22
See, also *CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONOF RELIGIOUS INTOLERANCE, Report by Mr. Abdelfattah Amor, Special Rapporteur on freedom of religion or belief*, Addendum, VISIT TO GEORGIA, E/CN.4/2004/63/Add.1, 16 December 2003 and Reports on International Religious Freedom released by Department of State of United States since 2001, available online at: http://www.state.gov/g/drl/rls/ , last visited on November 25, 2008.

[77] "The Court notes that the police refused to intervene promptly at the scene of the incident to protect the applicants concerned, and the children of certain of their number, from ill-treatment and that the applicants were subsequently faced with total indifference on the part of the relevant authorities who, for no valid reason, refused to apply the law in their case. In the Court's opinion, such an attitude on the part of authorities under a duty to investigate criminal offences was tantamount to undermining the effectiveness of any other remedies that may have existed."
"The Court considers that, through their inactivity, the relevant authorities failed in their duty to take the necessary measures to ensure that the group of Orthodox extremists led by Father Basil tolerated the existence of the applicants' religious community and enabled them to exercise freely their rights to freedom of religion."
Case of *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia*, ECtHR, Judgment of 3 May 2007 Para. 124 and 134

[78] Reports on International Religious Freedom released by Department of State of United States, http://www.state.gov/g/drl/rls/irf/2008/108447.htm

In conclusion the restrictive measures against proselytizing communities can be classified in three broad categories: 1. Legal/administrative impediments to register and obtain legal personality. This measure is common to all countries under consideration. 2. Prohibition of Proselytism under criminal law. This practice is peculiar to Greece; and 3. State tolerated and supported violence against proselytizing religious group. The practice was pursued in Georgia in the period of 1999 -2004, till the conviction of the main perpetrator of religious violence Father Basil Mkalavishvili.

1.3. The Origins of "War for Souls"

After the description of the ways in which doctrinal and sectarian controversy is reflected in law and the consequences it entails; several historical, social and cultural considerations deserve closer attention. Their careful scrutiny sheds light to the origins of reasons that make possible for the claim of Orthodox Churches to take countermeasures against their rivals to be transformed into actual legal restrictions.

1.3.1. Byzantine Conception of Church - State Relations

Before advancing to the discussion of current state of the Relations between Church and Political authorities it is worth to undertake the historical patterns of Church – State relations in Greece, Georgia and Russia. We will see that these patterns not only explain the current arrangements in these countries but also provide the key to the underlying reasons for the waging of "war for souls". The historic pattern of Church –State relations in the countries under consideration is shared and originates from Byzantine Empire. Byzantine Empire – historical predecessor of

contemporary Greece was the bastion of Orthodox Christianity where Orthodoxy as a religious doctrine was shaped. Consequently, it had overwhelming influence over other Orthodox Christian Churches of the East including Georgian and Russian Orthodox Churches.

Church and State in the history of Christendom is controversial issue and Byzantine part of the story is not the exception. Before turning to Byzantium, any inquiry into the Christian understanding of the Church –State relations starts from the biblical expression of Jesus: "Give to Caesar the things that are Caesar's and to the God the things that are God's. "[79] The pronouncement makes the distinction between temporal and divine kingdoms and identifies Christians as dual citizens of the two realms. The Bible makes clear that divine kingdom is superior and individual has to "obey god rather than man"[80] But Biblical distinction between the two kingdoms could never calm the inherent dialectics of this dichotomy; centuries of Christian History offers very dramatic illustrations of this.[81] In different epochs and places the balance between the two powers were constantly fluctuating and the tensions had never been reconciled in such a way that would lead to the coherent and uniform pattern in Christendom[82]

To begin with the Christian communities of the first centuries; though unified, they were not corporate bodies yet. Their political relationship to the powerful Roman Empire was limited to the role of persecuted faith. [83] This picture was radically changed by the conversion of Roman Emperor Constantine to Christianity. Constantine became Christian Emperor of Roman Empire and established Christianity as its principal ideological foundation. Under Constantine Christian

[79] Mark 12;13-17, Matthew 22;15-22, Luke 20;20-26
[80] Acts 5;29
[81] James E. Wood Jr., *Christianity and the State*, Journal of the American Academy of Religion, Vol. 35, No. 3, (1967) p. 259
[82] See, *Ibid*, distinguishing Eastern Orthodox, (Byzantine), Roman Catholic and Protestant conceptions.
[83] David Knowles, *Church and State in Christian History*, Journal of Contemporary History, Vol. 2, No. 4 (1967) p.4-5

faith had dominated society and culture of Roman Empire[84]. The domination lasted throughout the whole existence of its successor Byzantium which had never experienced secular tradition. Constantine's overall political program aimed at setting the foundation of Christian Empire. As a consequence political and ecclesiastical authorities intermingled and remained in such relationship throughout the Christian History of middle ages.[85]

Constantine's political theory clearly struck and uneven balance of power between the two realms of Church and Empire. Constantine took Christian conception of divine origin of all authority and proclaimed Emperor as a chosen representative of the God. The God given authority made Emperor the protector of Church. Constantine perfectly used non hierarchical and non corporate organization of Christian Church at that time and under the mandate of god appointed protector imposed total control over Church. He could summon Councils, publish their decisions and appoint the Patriarchs. This conception of the relations between political and ecclesiastical authority was conclusively established by Emperor Justinian. According to him while both Church and Emperor possessed divine powers, Emperor was the shepherd and ruler of Christian Society responsible for the preservation of the dignity of priesthood and sanctity of Christian doctrine. The obligation to protect the integrity of Christian Doctrine produced the power to declare particular doctrines as heresy.[86] The apparent domination of Imperial power over Church in Constantinian or Justinian fashion was later described by historians as

[84] Constantine expelled pagan religion from society and disentangled it from the Hellenized Roman Culture. Pagan Religion having merely ritual form did not dominate Roman Culture which rather was permeated by ancient philosophy under Hellenic influence. Such state of affairs was inevitable as ancient philosophy provided substantive conceptions of good absent in merely ceremonial pagan religions. In contrast Christianity not only envisaged its own conception of good but also proclaimed its all embracing character and absolute truth. Consequently pagan religion was vulnerable to Christianity backed by coherent substantive doctrine and Emperor's political support. Glanville Downey, *Julian and Justinian and the Unity of Faith and Culture*, Church History, Vol. 28, No. 4, (1959)

[85] The fusion of political and ecclesiastical powers prevailed in all Orthodox, Roman Catholic and early Protestant settings though under different and shifting balance of power between them. *See,* generally, Knowles, *Supra* note 83

[86] In effect by eliminating dissent Emperors were protecting the integrity of the source of their own power.

Caesaropapism.[87] The term became exposed to multiple attacks. Critics asserted that Imperial authority over doctrinal matters was never achieved fully and that the actual balance of power was shaped in constant struggles between Emperors and patriarchs.[88] Rejecting Ceaseropapism they contended that historically, throughout the tensions between two powers emerged, as ideally characterized in legal and ecclesiastical documents, the harmonic relationship – *Symphonia*; Translating into interdependence – "a blend of domination by the emperor over the church in certain areas, and perhaps an absence of imperial authority in other spheres."[89] More precisely, Symphonia meant the absolute power of the Emperor over temporal realm, his control over the organization and administration of the church and possession of significant spiritual powers, but at the same time his inability to exercise unlimited authority over dogmatic content of religion, regardless various attempts to this end throughout the history.[90]

Historically, the Byzantine tradition was not alien to Russia. The conversion of Kievian Russian Princes to Christianity happened under clear Byzantine influence. The first bishops in Russia were appointed by Byzantium. The Bishops were cohabitating without significant tension. Orthodox Church's influence significantly increased during and after Mongol rule. The Church

[87] Knowles, *Supra* note 83, p. 7

[88] The first major opposition to Emperor originated in Rome. Pope Gelasius I challenged the status of Emperor as the God appointed Guardian of Church and Shepherd of Christian Society. According to Gelaisus ecclesiastical power was greater than the political. Although the source of both was divine; Emperor was the son of Church and his god given authority was only unrestricted in temporal matters. Spiritually Emperor was guided by the Church. This Controversy led to the disintegration of Christian Church. Emergent Roman Catholicism reinvigorated the biblical vision of the supremacy of ecclesiastical power. Under Holy Roman Empire Catholic Church fully dominated political power. The two realms of political and ecclesiastical power were also fused but in Contrast to Byzantine version balance of power was in favor of Catholic Church headed by Pope. Famous pronouncement of this conception belongs to prominent Catholic Theologian Thomas Aquinas: "Church and State are as two swords which god has given to Christendom for protection; both of these however are given by him to Pope and the temporal sword by him handed to the rulers of state." Therefore, the tensions between fused spiritual and temporal authorities had different directions in Byzantine and Roman Catholic traditions. In the former Church was struggling to achieve gradual independence from Imperial power. In the latter, rulers were fighting to escape Catholic Church's domination. In Catholic World only after renaissance and reformation, then newly emerged European nation states managed to subordinate Churches to political authority in a setting named Erastianism very similar to Byzantine Caesaropapism. See, generally, *Ibid*, and Wood, *Supra* note 81

[89] Deno J. Geanakoplos, Church and State in the Byzantine Empire: A Reconsideration of the Problem of Caesaropapism, Church History, Vol. 34, No. 4. (1965), p. 385

[90] *Ibid*

played a unifying role supporting Russian people in their resistance to Mongol oppression. In aftermath of Mongol Rule, the growing influence of church was accompanied, by the expansion of Russian state. At that time the Byzantine Empire - the guardian of Orthodoxy had been already perished. Russian clerics took this opportunity to develop theories of Russian succession to the Byzantium in the capacity of sole guardian of Orthodoxy.

The self-identification as a Byzantium's successor was far from symbolic. The Russian state was being transformed into absolutist Empire. Not surprisingly, path to absolutism included approximation of the Church –State relations to the classic Byzantine model. This process was finalized by the reforms of Peter the Great who institutionally subordinated the Church to the state, leaving to it only unrestrained dogmatic authority. Till the fall of Russian Tsarist Empire the Orthodox Church was an integral part of autocratic political power and ideology. Orthodox Christianity sacralized and legitimized Emperor and was instrument in colonization process. Bolshevik revolution in 1917 brought militant disestablishment and harassment by atheist regime to the Russian Orthodox Church. Bolsheviks changed approach during WW II. Soviet Leader, the expelled student of the Tsarist Orthodox Christian Seminary Joseph Stalin re appreciated legitimizing and unifying powers of church. Stalin factually subordinated Orthodox Church to the Council of Religious Affairs of the Soviet of Ministers of the USSR. Russian Orthodox Church survived the remaining years of Soviet rule through collaboration and cohabitation with communist state.[91]

Orthodoxy in Georgia spread from neighboring Byzantium and for centuries was under its strong influence. Orthodox Christianity represented the western Christian values as opposed to the Zoroastrism and then Islam- the religions of conquering eastern powers. Georgian Church gained

[91] See, generally about the history of Russian Orthodox Church and Sate; Firuz Kazemzadeh, *Reflections on Church and State in Russian History*, 12 Emory Int'l L. Rev. 1; Gregory L. Bruess, *Religion identity and Empire: A Greek Archbishop in the Russia of Catherine the Great*, (1997)

autocephaly in V century, but remained under significant influence of Byzantine Orthodox Church till the fall of Byzantium. The Church played an important unifying function for Georgian nation that largely preconditioned the escape from Arab conquerors and creation of united Georgian Kingdom in X century. The relations between Church and state power during this period gradually developed from harmonic cohabitation with accompanied tensions, to the more Byzantine style state dominated setting. In XII century growing absolutism of David the Restorer necessitated the cleansing of the Church from opposing bishops and imposition of control over the organization and administration of the Georgian Orthodox Church. By appointing leading Bishop as his Grand Chancellor, David the Restorer fused institutional structures of church and state.

David the Restorer was successful even in slight modification of the dogmatic content of Georgian Orthodoxy. But after the death of David and subsequent fall of Georgian state in the following centuries, the Kings gradually lost power over Church. After the disintegration of Georgian State into several kingdom and principality, Georgian Orthodox Church shared the same fate as local Bishops followed the separatist tendencies of the rulers. The relationship returned to the mode of harmonic cohabitation between Kings and Principals and Orthodox Authorities.

The long twilight of Georgian kingdom ended with Russian annexation in XIX century. Russian Colonizers abolished autocephaly of Georgian Church and subordinated it to Russian Orthodox Church. Georgian Orthodox Church regained autocephaly in 1917. Brief period of Independence gained after the collapse of Tsarist Russia in 1917 ended with the occupation of Georgian Democratic Republic by Soviet Russia in 1921. Nevertheless Georgian Orthodox Church continued autocephalous existence during Soviet occupation. Therefore the description of the

state of Russian Orthodox Church under Tsarist autocracy in XIX century and under soviet rule is equally applicable to Georgian Orthodox Church.[92]

This short historic summary clarifies the basic characteristics of the Byzantine conception of Church – State relations and its strong influence in Georgian and Russian historical patterns of Church – State relations. In conclusion, for centuries neither Greece (its historic predecessor of Byzantium) nor Georgia and Russia had any meaningful distinction between spiritual and temporal authority. Byzantine conception as variant of Christian conception of Church and State rested on the dialectics of distinct and at the same time uniform nature of the Church and State. Consequently, the two authorities coexisted in unity though with shifting balance of power exercised over each other. Generally the state prevailed in this tension; at least Orthodox Churches in Byzantine tradition have never achieved domination over state in Roman Catholic way. Orthodox churches were state Churches and dominated in the society and culture of these countries.

1.3.2. Orthodox Christianity as indivisible part of national identity

Political Agenda of Emperors Constantine and Justinian reflected in Byzantine conception of Church and state were manifold. Most important political objective behind this conception was sacralization of Emperor and his power. Preservation of religious legitimacy mandatorily required religious homogeneity in a multinational and multicultural Byzantine Empire.[93]

[92] See Generally about the History of Georgian Church and State in W.E.D. Allen, *A History of the Georgian People*: *From the beginning down to the Russian Conquest in XIX Century*, (1971); Georgian Sources: "SaqarTvelos Istoriis Narkvevebi" (Inquiries into Georgian History) available online at webpage of Georgian Parliament's National Library, http://www.nplg.gov.ge/ , last visited on 25 November 2008. Teimuraz Fanjikidze, *Religious Processes in Georgia at the verge of XX and XXI Centuries* (2003)(in Georgian) and Nikolay Durnovo, *The Fate of Georgian Church*, Originally published in Russian in "Russki Stiag" (1907) Georgian translation is available online at http://www.nplg.gov.ge/dlibrary/collect/0001/000007/qartuli_eklesii_bedi.pdf , last visited November 25 2008

[93] *See*, generally, Wood, Knowles and Downey, *Supra* notes 81,83 and 84

Designation of Orthodox Christianity as a part of national identity in Byzantium perfectly achieved desired homogenizing effects.

Although Greek antique tradition and enlightenment liberal ideas largely determined the final stage of the struggle of Greek people against Ottoman rule followed by independence, the Byzantine heritage of orthodoxy as a pillar of national identity still played important role. Throughout the Ottoman domination, Orthodoxy served important unifying function for Greeks. Orthodox Christianity as opposed to Islam – the religion of oppressors in a way symbolized the whole national resistance against Ottoman Empire. As a result, neither centuries of Turkish rule nor the enlightenment liberal ideas were able to divorce Orthodox Christianity from the Greek national identity. The Hellenic Republic throughout its development adopted Orthodox nationalistic ideology placing orthodoxy in the center of Greek national identity. Greek Orthodox nationalism simply equates being Greek with being Orthodox Christian [94]

Similarly since the adoption of Christianity in X century Orthodoxy has become an essential part of Russian national identity. As Nicolas Gvosdev, scholar working on the issues of Russian church-state relations contends, Orthodox Christianity historically formed part of the "social contract" and defined the identity of the Russian people representing the core ethnos of Russian state. Gvosdev argues that the affirmation of individual religious liberty in Russian Constitution, constitutionally invalidated this kind of social contract based on the communal understanding of religious liberty, where to be Russian meant to be Orthodox Christian. Nevertheless he admits that such conception of Russian national identity still plays important role. Orthodoxy as a majority religion in the past millennium greatly affected Russian political spiritual and cultural spheres. The continued influence of Orthodox Christianity in social and political domain can not

[94] Kyriazopoulos, *Supra*, note 28, p. 6

be eliminated as practical matter. Furthermore this influence can not be regarded as a constitutional question.[95]

Recent studies clearly show that in a course of increasing centralization of political power Putin administration also took measures towards reinvention of Russian identity. One which is essentially monocultural and ethnocentric based on Orthodox Christian cultural tradition and Russian ethnicity.[96]

Historically, Orthodoxy played decisive role in the consolidation of Georgian nation under single state. Its leading function in the national resistance against foreign domination for many centuries strongly associated Orthodox Christianity to Georgian identity. Religious persecution of Georgians by the conquerors of different religion involving compulsion to convert into Conqueror's creed greatly contributed to Christianity's deeper embedding in Georgian identity and made Georgian synonymous to Orthodox Christian. The doctrinal affirmation of Georgian national identity is closely linked to the name of Ilia Chavchavadze - leader of national liberation movement against Tsarist Russia in the XIX century. His maxim: Georgian language, fatherland and orthodox Christian belief, defined the three pillars of Georgian national identity which is to date commonly and almost unanimously embraced by Georgian society.[97]

1.3.3. Byzantine Symphonia and Constitutional State

This section tries to demonstrate that the current constitutional/legal statuses of Orthodox Churches in the countries under consideration effectively keep the unity between State and

[95] Nicolas K. Gvosdev, RELIGIOUS FREEDOM: RUSSIAN CONSTITUTIONAL PRINCIPLES--HISTORICAL AND CONTEMPORARY, 2001 BYULR 511, pp.4-9

[96] Warhola, James W, Religion and Politics Under the Putin Administration: Accommodation and Confrontation within "Managed Pluralism",1/1/07 JCHURST 75 (2007)

[97] See, *Supra*, note 71

Orthodox Church. It does not intend to establish that currently all three countries strictly follow Byzantine conception of Symphonia. It is impossible as even in medieval epoch the conception was widely contested and its actual content was contingent upon the variable of actual political powers of the Church and Emperor at a given time. Symphonia is one version of Christian understanding of Church and State relations and according to this understanding consists of at least two contradictory principles providing for the distinct and unified nature of the church and state. Therefore, taking into account the principle of distinction, some sort of a separation of church and state is not entirely alien for Christian thought. Even in Symphonia Church enjoyed doctrinal independence from the Emperor. But it has to be borne in mind that separation from state in Christian conception is coupled with the contradictory principle of unity. How this dialectics is solved is dependent on the variety of circumstances including actual distribution of the political power among actors involved. Accordingly within Christian conception actual arrangements of Church – State relations vary from state dominated regime in Symphonia to Church Dominated regime in early Roman Catholicism or intermediate regimes based on the recognition of unique and overlapping competences of each other.

Therefore it is possible for the Orthodox Churches to accept the separation from the state as far as its institutional and doctrinal independence is concerned but this does not automatically entail the rejection of the principle of unity. The argument is that following to Byzantine conception as a historically prevailing pattern of Church State relations, Greece Georgia and Russia preserve basic principle of Christian conception– the distinct but uniform nature of Ecclesiastical and political authority, as the foundation of their Relations between Orthodox Church and the State.

As far as the dialectic of the distinct and uniform nature of church and state is not overcome there always remain considerable degree of unity between Church and State. Despite the varying

degree of unity and different constitutional and legal means of its achievement in three countries under consideration; the principles of Byzantine Conception of Church and state informing the existing church–state relations have common political agenda. Therefore, showing the influence of the Byzantine conception in current church-state arrangements is a prerequisite to further discussion of the hidden political objectives behind the existence of dominant Churches in the countries under review; leading to the conclusion that these political objectives result in suppression of the faiths other than dominant religion.

1975 Greek Constitution is the most explicit in the pronouncements reminiscent of the Byzantine Symphonia. Although it proclaims the absolute freedom of religious belief and conscience but at the same time limits freedom of worship to the "prevailing" and "known" religions only and prohibits proselytism. The Constitution defines neither the concept of prevailing and known religion nor proselytism, but declares Greek Orthodox Church as a prevailing religion of the Hellenic Republic.[98] The constitutional status of Orthodox Church as a dominant religion is consistently affirmed throughout the constitution. The preamble of the constitution opens with the phrase: "In the name of the Holy and Consubstantial and Indivisible Trinity". President of the Republic[99] and Members of Parliament are required to take the religious oath that is the oath before holy trinity.[100] It can be modified in case of person representing different religion, but the same text of the oath of the President is not subject to the modification, that effectively prevents a person of non orthodox religion to take the office of the President.[101]

[98] Article 3 f the Greek Constitution, Kyriakos N. Kyriazopoulos, The "prevailing religion" in Greece: Its meaning and implications, 9/30/01 J. Church & State 511 (2001), p.1
[99] Article 33(2) of the Greek Constitution
[100] Article 59(1) of the Greek Constitution
[101] *Supra* note 33, p. 5

The Constitution goes even further and constitutionalizes the Orthodox dogma of inviolability of the Holy Scriptures.[102] The Constitution provides for the spiritual unity of Greek Orthodox Church with Ecumenical Orthodox Patriarchate and other Orthodox churches and for the preservation of autocephalous regime and self –governance of the Greek Orthodox Church.[103]

In the absence of the constitutional definition of the concept of prevailing religion there are significant controversies, especially among the legal scholars around its precise meaning[104].

According to the actual practice the *de facto* meaning of the prevailing religion signifies the official religion of the state. The status of prevailing religion confers to Orthodox Church legal personality under public law with attendant privileged treatment; Apart from the constitution privileged status of Orthodox Church is affirmed by legislation in force, practice of state organs and jurisprudence of the courts.

The jurisdiction of autocephalous Orthodox Church of Greece does not extend to the whole territory of Hellenic Republic but covers its significant portion.[105] The constitution provides for the autocephaly and self –governance of the Greek Orthodox Church. Constitution refers to the Patriarchal Act and Tome as the authoritative sources of law. According to the latter acts, the Church shall be administered according to the cannon law. The Greek Council of State extended the authority of these acts only to the composition of the Holy Synod and subordinated administration of the Church to the state legislation.

Greek state enjoys broad powers in religious and ecclesiastical matters. The powers are especially far reaching in case of prevailing religion and results in the institutional subordination of the Orthodox Church to the state. The control is achieved by the means of special state

[102] Article 3(3) of the Greek Constitution
[103] Article 3of the Greek Constitution, Papastathis *Supra* note 26, p. 4
[104] *Supra* note 98, p.7
[105] Several ecclesiastical districts are still subordinated to the spiritual leadership of ecumenical patriarchate. *Ibid*

supervisory organs in the field of religion. Under Greek legislation Ministries of National Education and Cults and foreign affairs are entrusted with such supervisory powers.

The Ministry of National Education and Cults is empowered with general supervisory and administrative authorities in the domain of state policy concerning religious cults. Its agencies, namely the departments of Ecclesiastical Administration[106], of Ecclesiastical Education and Religious Instruction[107], and of Persons of a Different Cult and of a Different Religion[108] are entrusted with distinct tasks embracing all religious matters within the national territory of Hellenic Republic. Regarding abroad, Greek Ministry of Foreign Affairs has unique responsibilities in religious field.[109]

[106] It Consists of Ecclesiastical Administrative Affairs Division; and the Division of Holy Churches (parishes), Holy Monasteries, and Parish Priests. The former is responsible for recognition and status of the bishops of the Churches of Greece and Crete; supervision of the implementation of the constitution and legislation on the organization and administration of the Churches of Greece and Crete, of the metropolises of the Dodecanese, of the religious associations and foundations, as well as their supervision and the sanction of their acts; the founding, the abolishment and the merger of metropolises; the exercise of supervision of the management of the property of the Churches of Greece and Crete, as well as of the ecclesiastical legal entities of public right. The latter's task is implementation of legislation on monasteries and hermitages (excluding those of the peninsula of Mount Athos), churches, vicarages and their personnel; the expropriation of land for the purposes of erecting or enlarging churches. Kyriazopoulos, *Supra*, note 28, pp. 13-15

[107] Is composed of the office of Personnel responsible for the appointment and the official status of the personnel of the schools of ecclesiastical education, of the Apostolic Diaconia of the Church of Greece, and of the preachers and office of Administration dealing with the foundation and the supervision of the schools of ecclesiastical education; the suspension of the operation, the conversion of form, the transfer of seat, the integration and the abolishment of these schools; the programs of their operations; affairs of registration, of transfer and examination of their students; matters pertaining to the Apostolic Diaconia of the Church of Greece; the equivalence of the schools of ecclesiastical education to those of other public schools and to their diplomas; and affairs of religious instruction and of religious associations and foundations. *Ibid*

[108] It includes Office of Persons of a Different Cult responsible for proselytism, the procedures for entry into the country of foreign heterodox clergy and religious ministers, the procedures for the foundation and the operation of the places of worship of the non-Orthodox Christians, of divinity schools, seminaries, foundations and other legal entities, as well as their supervision and office of Persons of a Different Religion, performing similar tasks towards different religions and also deals with the appointment, the discharge, and matters of official status of the general chief rabbi, the chief rabbis and the Muslim muftis. *Ibid*

[109] Its department of ecclesiastical affairs "is responsible, according to the existing legislation and in cooperation with the other co-responsible agencies and religious authorities, for the supervision, study and recommendation for the solution of all matters and affairs pertaining to the Orthodox and other Christian and non-Christian churches outside Greece, to the Orthodox Divinity Schools and Ecclesiastical Centers outside Greece, to the Clergy living abroad and to the Administration of Mount Athos." *Ibid*

The Greek Orthodox Church is an administrative authority as it discharges public powers under Greek legislation. Status of administrative agency is the main rationale for far reaching state supervision and control. Orthodox Church exercises administrative authority either by joint action with state bodies or by the participation of governmental agents in the decision making process. Furthermore, legal acts of the Orthodox Church are subject to judicial review by administrative courts and the Council of State. The Jurisprudence of Administrative Courts defines the scope of judicial review of the acts of ecclesiastical bodies and excludes from judicial scrutiny only those having "spiritual and purely religious content".[110] According to this narrow exclusionary clause, the wide range of issues of purely religious and clerical nature normally exempted from public domain in secular states fall under the state regulation and control. As a part of state apparatus Orthodox Church is able to legally enforce its acts. State has the obligation to found and support ecclesiastical schools of Orthodox Religion. Religious Service in Army is solely provided by the Orthodox Chaplains. The complete control exercised by the state is further evidenced by state exploitation of Church property. The church gets only the remuneration for its Clergy in exchange of the devolution of its property to the state.[111]

Constitutional Status of the prevailing religion for the Orthodox Church, protection of the integrity of Orthodox Religious doctrine by the constitution and assimilation of the Church into administrative agency and its total institutional control by the state do not contradict to the constitutionally guaranteed Church autonomy Greek setting. Autonomy only refers to unrestrained dogmatic authority of the Orthodox Church. The institutional fusion with the state

[110] *Ibid*

[111] The property issue led to the dispute that reached to the ECtHR. In *CASE OF THE HOLY MONASTERIES v. GREECE*, ECtHR, Judgment of December 9 1994, Greek Government argued that Greek Orthodox Church was public authority integrated into the institutional structure of the state.

and doctrinal independence of the Greek Orthodox Church resonates to Christian dialectic conception of the uniformity and distinction between divine and temporal realms. The degree of unity and state control over the church is the highest in contrast to Georgian and Russian cases and therefore the closest to the classic Byzantine conception of Symphonia.

The 1995 Georgian Constitution takes more balanced approach. The Constitution provides for the absolute liberty of conscience, belief and confession. Their manifestation is subject to limitation on a sole ground of the rights of others.[112] At the same time the Georgian Constitution recognizes the special role of the Apostolic Autocephalous Orthodox Church of Georgia in the history of the country and affirms its independence from the state. The Constitution stipulates that relations between state and Orthodox Church shall be governed by the constitutional agreement which conforms to Georgia's international obligations, namely those in the field of religious liberty.[113] Constitutional agreement has the status of constitutional law and forms part of the constitution; therefore in the event of potential conflict with international treaty it takes the precedence. The reference to its conformity with international law can be partly attributed to this consideration.

Constitutional agreement emerged as the recognition of the influence of the Georgian Orthodox Church as an institution and societal actor.[114] After totalitarian oppression it quickly regained lost positions and was transformed into the powerful institution enjoying significantly more public confidence than governmental counterparts.[115] This made Orthodox Church an institution whose opinion became crucial for all political actors in the process of struggle for and especially

[112] Article 19 of the Georgian Constitution
[113] Article 9 of the Georgian Constitution
[114] See Ochs, *Supra* note 35, p. 7, describing the claims of Orthodox Church to privileged status and advocacy conducted to achieve it before the conclusion of Constitutional Agreement
[115] See, generally, Tsintsadze, *Supra* note 71

maintenance of political power. These considerations significantly encouraged the revival of the long history of cohabitation and collaboration of Orthodox Church and state in Georgia.

Constitutional agreement maintained the secular principle of the constitution providing for the independence of Orthodox Church from the state. Together with the recognition of its special historical function Georgian Orthodox Church acquired the status of legal entity under public law.[116] But compared to Greek Counterpart, Georgian Orthodox Church is not entrusted with any public function. Church enjoys institutional and dogmatic independence and at the same time in the capacity of public corporation enters legal relations necessary for its functioning. Orthodox Church as a public corporation deals with its corporate property sets up educational establishments and media institutions including journals, TV and Radio stations, charitable organizations such as orphanages and shelters and etc.[117]

Constitutional Agreement granted to the Orthodox Church the title to the property under Church's possession and exempted from taxes. In addition state recognized the material loss suffered by the Orthodox Church under communist rule and provided for the restitution Church property taken under Bolshevik rule.[118]

State recognizes the marriages concluded by Orthodox Church[119] and exempts the clergymen and students of religious educational establishments from military service.[120] Constitutional Agreement provided for the cooperation of Orthodox Church with state in the educational field.[121] Constitutional Agreement granted to the orthodox clergy the admission to the prisons

[116] Article 1 of the Constitutional Agreement
[117] See, generally Tsintsadze, *Supra* note 71
[118] Articles 6-8 and 11 of the Constitutional Agreement
[119] Article 3 of the Constitutional Agreement
[120] Article 4 of the Constitutional Agreement
[121] Article 5 of the Constitutional Agreement, Memorandum of Understanding between Georgian Orthodox Church and Ministry and Education and Science concluded under Article 5, provides for the elaboration of the detailed framework of the Orthodox Church's consultative functions in the sphere of Education.

and military establishments to provide chaplaincy.[122] State undertakes the obligation to declare Great Orthodox feasts and Sunday as public holidays.[123]The Secrecy of Confession is declared inviolable and Clergymen are obliged not to reveal its content.[124] Last, but not least, Patriarch of the Georgian Orthodox Church enjoys immunity his arrest or criminal responsibility is absolutely prohibited without exceptions.[125] Most of these privileges are solely enjoyed by the Orthodox Church.

Little is devoted to the Agreement between Georgian Orthodox Church and State in scholarly literature. The only available Commentary to the Agreement is reproduced on the official website of Georgian Orthodox Patriarchate. Commentary interprets Article 1 (1) in the following way: "The relation between Church and state is often compared to the dual nature of god: divine and human. State and Church shall be unified and distinct at the same time like the divine and human nature in Christ. The Preamble of the Constitutional Agreement enshrines this very Christian truth." "The Church represent divine kingdom and has primacy only there… The State is based on earthly rules and prevails in temporal realm."[126] Orthodox Church's vision portrays two powers with their unique and overlapping competences, where each power has absolute power in the field of its unique competence but cooperate to achieve common interests. Such understanding of Church State relations does not reject the separation of Church and State. The Separation is understood as one way rule ensuring institutional and doctrinal independence of the Orthodox Church form the state. But it does not overcome the dialectic which also embodies the

[122] Article 4 of the Constitutional Agreement; Legal Arrangements related to Chaplaincy in Prisons is regulated by the Agreement between Georgian Orthodox Church and Ministry of Justice, Separate Agreement regulates the cooperation of the two entities in the sphere of the resocialization of convicts.
[123] Article 1 (6) of the Constitutional Agreement
[124] Article 2 of the Constitutional Agreement
[125] Article 1(5) of the Constitutional Agreement
[126] Davit Chikvaidze, *"konstituciuri shetankmeba saqartvelos sakhelmtsifosa da saqartvelos samociqulo avtokefalur martlmadidebel eklesias shoris: komentarebi" "Constitutional Agreement between the Georgian State and Georgian Apostolic Autocephalous Orthodox Church : Commentaries"* available online at http://www.orthodoxy.ge/samartali/komentarebi/sarchevi.htm last visited on November 25 2008

principle of being unified with the state. Similarly to Russian Church's conception of Church State relations descried below the institutional and doctrinal separation do not exclude the Church from social and political arena. The presence in social and political arena presupposes the close cooperation with the state.

The 1993 Russian Constitution takes different path from Georgian and Greek Constitutions. It proclaims the secular state, and prohibits religious establishment.[127] The constitution further affirms equality and outlaws discrimination including on religious grounds.[128] Constitution guarantees to everyone freedom of conscience and freedom of religious worship, including the right to profess individually or jointly with others, any religion, or to profess no religion, to freely choose embrace and disseminate religious or other beliefs and to act in conformity of them.[129]

Preamble of 1997 Law "on Freedom of Conscience and Religious Associations" "recognizes the special contribution of orthodoxy to the history of Russia and to the foundation and development of Russia's spirituality and culture." It also refers to Islam, Buddhism, Judaism and other religions and creeds which along with Christianity "constitute an inseparable part of the historical heritage of Russia's peoples." Preamble provides for the promotion of mutual understanding, tolerance and respect in questions of freedom of conscience and belief.[130]

Despite the constitutional provisions affirming secularism the actual status of Orthodox Church is clearly privileged.

[127] Article 14 of the Russian Constitution
[128] Article 19 of the Russian Constitution
[129] Article 28 of the Russian Constitution
[130] *Supra* note 53

Russian Orthodox Church solely enjoys the privileges afforded to Religious Organizations under Russian legislation and gets extensive economic benefits[131]. Russian Orthodox Patriarchate gets additional benefits from the State for the restoration of cultural monuments.[132]

Under the Putin Administration Russian Orthodox Church deserved more preferential treatment. President Putin made particular emphasis on the reassertion of Russian spirituality and highly appreciated the role of Orthodox Church in this process. Patriarch has blessed him personally and President has awarded medals to him and other distinguished clergy. President Putin identified himself as the Orthodox believer and made Orthodox faith central to his rhetoric about moral renewal and spiritual regeneration of the country.[133]

Moscow Patriarchate's own conception of Church – State relations supports the separation of Church and State only on institutional level and envisages active role of the Orthodox Church in public including political sphere.[134] According to Metropolitan Kirill: "On the political plane this entails the necessity of dialogue and cooperation between the Church and powers that be, in the interest of people. "[135]

Therefore current Russian Church – State relations similarly to Greece and Georgia are framed within the Christian dialectic conception on the unity and distinction of divine and temporal realms. The actual relations preserve the unity between Russian Orthodox Church and the State together with the former's institutional and doctrinal independence.

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[131] Patriarchate among other businesses runs a Bank, factory, prestigious hotel at the Danilov Monastery and oil exporting company. Church officials have been involved in controversial cases of the importation of tobacco and wine under tax exempt status as a humanitarian aid. Only in tobacco transactions patriarchate was exempted from paying approximately 40 million USD in taxes. Zoe Knox, *The Symphonic Ideal: The Moscow Patriarchate's Post-Soviet Leadership*, Europe-Asia Studies, Vol. 55, No. 4, (2003), p. 587 -589

[132] The restoration of the Cathedral of Christ the Savior in Moscow alone cost 250-500 millions USD under different estimations. The substantial portion of the sum was from State funds. *Ibid* , p. 586- 587

[133] *Ibid*, p. 589 – 590

[134] Bishops' Council of Russian Orthodox Church, *"Bases of the Social Conception of the Russian Orthodox Church,* cited *ibid* , p.580-582

[135] Kirill of Smolensk and Kaliningrad, *"The Russian Orthodox Church and the Third Millennium"* Ecumenical Review, 52, 3, p.306 cited *ibid,*

1.4. The Source of Fear

The claims of Orthodox Churches to dominance in social and political sphere and suppression of its competitors has its explanations. Every church which upholds the absolute truth of its doctrine strives to achieve these objectives. Additionally we can refer to the personal ambitions of clergy to political influence and economic privileges. Thus the reasons of Orthodox Churches to follow the Christian doctrine of the distinction and unity of the Church and state appear to be more than sufficient. But what motivates the political authorities in Greece, Russia and Georgia to preserve the unity with Orthodox Church? Political Agenda behind Byzantine and generally Christian conception was mainly twofold and interwoven: to achieve social homogeneity and get political legitimacy. As described by Cole Durham Lack of political legitimacy is often followed by the use of legitimizing power of religion.[136] It is true that political legitimacy of Byzantine Emperors was of divine nature and this was officially proclaimed foundational principle of Empire. It is also true that in Constitutional States of Greece, Georgia and Russia such rule is constitutionally repressed by the rule of democratic legitimacy. But the official pronouncement is only one side of the coin. The divine legitimacy is valid as far as the majority adheres to the god who gives that legitimacy thus religious homogeneity is necessitated. In contrast to divine legitimacy democratic legitimacy does not necessarily needs social homogeneity but is easily achievable under its conditions.[137] Under social homogeneity the polity is stable as it avoids factional

[136] W. Cole Durham Jr. Perspectives on Religious Liberty: A Comparative Framework, in Religious Human rights in Global Perspectives, Legal Perspectives, J. Van der Vyver, John Witte Jr, ed. (1996), p. 13

[137] To the extreme, Carl Schmitt contended that Democracy required social homogeneity and without the latter real democracy was not possible. *See*, Carl Schmitt, The Crisis of Parliamentary Democracy, translated by Ellen Kennedy (1996), p.15

clashes. Liberal thought replaces homogeneity by pluralism as a stabilizing force of political system. It disconnects political power from religious source and counters pluralism to the homogeneity serving the coherence of divinely justified despotic power. Religious pluralism fostered by religious liberty serves to eliminate the religious homogeneity as a common form of social homogeneity.[138] But on the other hand Pluralism has not played such ideal stabilizing force as envisaged by enlightenment liberal thinkers. Inherent dangers of pluralism as described by the critics of liberalism result in the inner subversivness of liberal political system. This rather extreme evaluation is not fully devoid of value and in essence is acknowledged among liberals themselves.[139] As a result political powers even in democracy are often tempted to address these dangers by seeking social homogeneity. National identity is one among such homogenizing devices. But national identity based on religion is the extreme mean to achieve social homogeneity and secure political stability. Whether officially proclaimed or not such policy leads to the attribution of sacral elements to democratic legitimacy and consequently to the political power constituted under such legitimacy.

In Greece common acceptance of the existing system by Greek political forces[140] indicates that for them the utilization of Orthodox Church to foster homogeneity of their constituencies is effective tool to manage the dangers of pluralism within constitutional democracy. The criminal proscription of Proselytism clearly serves:" the ultimate goal of preserving the specious religious homogeneity of the governed citizens, which serves an obsolete form of state cohesion on the basis of creed."

[138] *Ibid,*
[139] For the discussion of the issue based on Liberal critics and the response of Liberal Political and legal scholars, David Dyzenahus, *Legality and Legitimacy*: *Carl Schmitt, Hans Kelsen and Herman Heller in Weimar*, (1997)
[140] Kyriazopoulos, *Supra* note 98, p.9

In Russia the development from democracy after immediate aftermath of Soviet collapse to Putin authoritarianism also witnessed the restoration of imperial identity defined by the orthodox faith. Recent studies show that President Putin's second term involving increased centralization of power and making of authoritarian state was characterized by the turn from previous policy of "managed pluralism." This was accompanied by significant improvement of the relations between Russian Orthodox Church and Putin administration, church's increased voice in political domain and Kremlin's grown skillfulness at using the Russian Orthodox Church- enjoying considerable popular trust as an institution, for political advantage, as well as demonstrating a "growing ability to manipulate all religions."[141] Even scholars contending for limited power and influence of Russian Orthodox Church on Russian politics admit the rise of Orthodox Christian rhetoric in Russian politics during President Putin's second term and role of Kremlin in this process.[142] All these together with the attempt to affirm the monocultural and monoethnic national identity clearly indicates the use of church and religion to achieve desired social homogeneity for the maintenance of centralized political power in a self proclaimed multinational and multicultural thus inherently pluralistic society.

Following the Declaration of Independence all Georgian Presidents affirmed the political significance of the Church. The government of the first Georgian President Zviad Gamsakhurdia was pursuing policies inspired by ethnic nationalism.[143] For Gamsakhurdia Georgian Orthodox Church was "embodiment of Georgian nationhood".[144] As a result he openly promoted Christianization policies. Gamsakhurdia's successor Eduard Shevardnadze was personally

[141] *Supra*, note 96, p. 3
[142] *See,* generally, Papkova Irina, *Russian Orthodox Church and Political Party Platforms*, 1/1/07 JCHURST 117(2007)
[143] Rafik Osman – Ogly Kurbanov and Erjan Rafik - Ogly Kurbanov, *Religion and Politics in Caucasus*, in *The Politics of Religion in Russia and the New States of Eurasia*, Michael Bourdeaux (Ed) (1995), p. 236 -237
[144] *Ibid*

blessed and baptized by Georgian Patriarch. Orthodox Church endorsed Shevardnadze who came into power after civil war overthrowing Gamsakhurdia's government. Shevardnadze actively employed Church to legitimize his policies. For example his pro Russian foreign policy was often justified by reference to common religion with Russia.[145] The Constitutional Agreement with Georgian Orthodox Church was concluded under Shevardnadze government which constitutionalized actual relations of his government with Georgian Orthodox Church.

Current government has not significantly changed this pattern. President Saakashvili's rhetoric regarding the new Georgian State based on revived Georgian identity often refers to Orthodox Church and its Patriarch. According to President Saakashvili's recent speech: "What our Patriarch said about Georgia's integrity, invincibility and victory, precisely depicts the ideology, spirituality and mood of Georgia today"[146].

1.5. Conclusion

Therefore national identity built on Orthodox religion is the foundation of the polities in given countries. Religious freedom namely freedom of preaching and dissemination of religion by the means of proselytizing activities is capable to enhance religious pluralism which will destroy religious homogeneity and consequently religiously built national identity. Religious identity is the technique to avoid the challenges of pluralism. At the same time possible consequences of successful proselytism show that pluralism can not be ignored. Indeed it is adequately appreciated and is perceived as a lethal threat to the social and political cohesion. The fear is logical also logically leading to repression. "War for souls" is a preventive attack against the perceived dangers of pluralism – the creature of fear.

[145] *Ibid*, p. 239

[146] The President of Georgia Mikheil Saakashvili attended a festal church service, 03 August 2008, Press Release of the Presidential Press Service available online at http://www.president.gov.ge/?l=E&m=0&sm=1&st=90&id=2681 , last visited on November 25 2008

Chapter Two

Playing around the circle?

2.1. Introduction

The basic conclusion of the first chapter argues that Orthodox Christian religion is the essential building block of the national identities in the countries concerned. National identity having strong religious component serves as a basis of constitutional polity. From this perspective Proselytism of different faith is capable of destroying the religious homogeneity of the polity. This as a chain reaction will result in dismantling religiously built national identity that in a long run can shatter the basis of the polity itself. Such apocalyptic visions and subsequent fears reinforced by the considerations of politics, power games, and economic interests of the actors involved, generate the response labeled under the metaphor of soul wars. More generally "war for souls" is the response to the perceived dangers of pluralism.

This conclusion could well be the end of the present inquiry. The restrictive practices are perfectly justified in light of the local social, political, historical, and cultural considerations and are either normatively entrenched in constitutional and legal system or consistently embedded in practice. But on the other hand there are International Human Rights norms often invoked by affected individuals, groups, organizations and academics to challenge validity of the practices of "war for souls."

Greece, Georgia and Russia are members of the Council of Europe and state parties to the European Convention of Human Rights. The instrument has enforcement mechanism – European

Court of Human Rights. The extensive jurisprudence of the Court enables researcher to identify the normative content of the convention as interpreted by the court. These considerations inform the choice of European regime of Human Rights protection as an analytical framework of this chapter.

The first chapter demonstrated that "war for souls" is connected to the foundational questions of the polity. Therefore taking into account the findings of the first chapter the basic task of the inquiry into the jurisprudence of ECtHR will be a search for the conception of democracy that envisages the consistent normative response of democratic polity to the pluralism. More specifically, if such conception of democracy exists under ECHR the way it is reconciled with religiously built national identity and preservation of the ties with singled out dominant Church. The inquiry will try to identify normative answers to these questions in the jurisprudence of the court. Therefore less attention will be paid to the legal technicalities related to framing particular human rights issue. At the same time these constraints can not be disregarded. Therefore the Chapter will start with the Freedom of Religion jurisprudence under Article 9 of ECHR relevant cases concerning proselytism and collective dimension of religious rights will be analyzed. This will be followed by the cases concerning Blasphemy and anti religious speech under Article 10 of the Convention. The selected jurisprudence can not provide the exhaustive picture but generally describes the approach of ECtHR to the issues of Religious identities and Church State ties.

2.2. Tacit Acceptance of the Importance of Religious Identity and its Political Agenda

Kokkinakis v. Greece[147] is landmark decision and starting point of the analysis of ECtHR's Freedom of religion jurisprudence.[148] Being the first case involving religious freedom ever examined by the court[149], the judgment contains the restatement of the ground principles enshrined in Article 9 of ECHR. The present piece will not escape their quotation:

> "As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.
>
> While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions. [It] includes in principle the right to try to convince one's neighbour, for example through "teaching", failing which, moreover, "freedom to change [one's] religion or belief", enshrined in Article 9 (art. 9), would be likely to remain a dead letter.
>
> Unlike the second paragraphs of Articles 8, 10 and 11 which cover all the rights mentioned in the first paragraphs of those Articles that of Article 9 refers only to "freedom to manifest one's religion or belief". In so doing, it recognises that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."[150]

Strategically applicant challenged the application of the criminal provisions proscribing proselytism, but put main emphasis on the substantive incompatibility of this provision to Article

[147] *Supra* note, 19
[148] In *Kokkinakis* the applicant was convicted for proselytism under the Greek Anti Proselytism Legislation. He Challenged both his conviction and substantive compatibility of the Anti Proselytism Legislation with Article 9 of the ECHR (Freedom of Conscience and Religion)
[149] Cases under Article 9 have not reached the court and were decided by Commission. *See*, generally, Javier Martínez-Torrón, *LIMITATIONS ON RELIGIOUS FREEDOM IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS*, 19 Emory Int'l L. Rev. 587 (2005)
[150] *Supra* note 19, Para. 31 and 33

9 of ECHR.[151] The central legal question of the case whether criminal prohibition of proselytism as such was contrary to the Freedom of Religion as guaranteed under ECHR was answered in negative. The court accepted that the protection of beliefs to prevent social unrest fitted the legitimate aims of protection of the public order and the rights of others and corresponded to the pressing social need.[152] The proportionality analysis was dominated by the adoption of the Greek government's distinction between "Proper" and "Improper" proselytism.[153] The court also referred the World Council of Churches in this regard therefore paid attention to religious views in general.[154] What failed the proportionality analysis was the application of the facially valid law. Greek courts did not substantiate the involvement of the applicant in improper proselytism and thus infringed applicant's freedom of Religion.[155]

The vagueness of the definition of criminally proscribable proselytism raised the question of the role of state in matters of conscience followed by open reference of judge Pettiti to authoritarian states and their use of vague provisions to control the minds of people[156]. In unison Judge Martens in a fashion of enlightenment philosopher appealed to the strict neutrality of the state in matters of religion, the unacceptability of the role of the state as a judge of the legitimacy of beliefs and conscience.[157] But the fundamental holding of the case as summarized by judge Martens himself, affirmed the role of the state as a guardian of personal beliefs though not in the same militant paternalistic fashion as judge Valticos[158] intended. The stricter scrutiny of the court applied to the enforcement by the state of such function, the margin of appreciation was narrower

[151] *Ibid*, Para. 38
[152] *Ibid*, Para.44
[153] *Ibid*, Para. 48
[154] *Ibid*
[155] *Ibid*, Para 49
[156] *Ibid*, Partly Concurring Opinion of Judge Petitti
[157] *Ibid*, Partly Dissenting Opinion of Judge Martens Para.15
[158] *Ibid*, Dissenting Opinion of Judge Valticos

here within the facts of particular case but was much broader at the basic level involving the crucial questions of church state relations, namely the dominant position of Orthodox Church.

The challenge of judge Martens that state assessment of religious conduct as improper and its subsequent criminal proscription creates the danger of discrimination when there is one dominant religion[159] was unanswered by the majority holding. Martens referred to the drafting history of ECHR in order to illustrate that despite the special status of particular religion under national law the obligations of state party under the convention remained the same.[160]

Both Martens and Pettiti rested their challenges on the enlightenment principle placing matters of belief and conscience in private realm.[161] State lacks "intrinsic justification" to judge religion; therefore it shall remain strictly neutral and preserve equality among different religions to ensure the tolerance.[162]

Martens attacks criminal proscription of proselytism as a breach of the neutrality of the state which fosters the dominant position of particular church and therefore is discriminatory. Martens' reasoning implies that special status of the Church when it transcends merely symbolic significance and results in the violation of religious equality and state neutrality is unacceptable.

The analysis of majority evaded all these considerations. It acknowledged specific historical and political origins of criminal proscription of proselytism but held that the preservation of the criminal offence by several democratic governments was sufficient proof that it served the legitimate aim of the protection of the beliefs of others from activities undermining the dignity and personality.[163] The court disregarded the claim of Judges Martens and Pettiti that the protection of dignity and personality even in religious context could well be achieved by the

[159] *Supra* note 157
[160] *Ibid*
[161] *Supra* note 156
[162] *Supra* note 157, Para.16
[163] *Supra,* note 19, Para. 34

means of general civil and criminal law provisions. The democratic nature of Greek polity was sufficient assurance for the court that original political objective behind the criminal offence of proselytism would not be pursued. The conclusion of the court was not affected even by the awareness that the special status of Orthodox Church in Greece is far from merely symbolic[164]. This is a demonstration of the Court's awareness of the strength of religious identity in Greece. The fact that the court attaches to such arguments considerable weight albeit not explicitly is further exemplified in *Manoussakis* case[165].

In *Manoussakis* case the court tacitly acknowledged not only the special status of Greek Orthodox Church but the legislation aimed at to secure the dominant position of Orthodox Church and religious homogeneity of the polity. Case involved the restraint forming part of the" war for souls" namely the requirement of the authorization of the state to erect the places of worship. Applicants were Jehovah's witnesses prosecuted for the unauthorized exploitation of the place of worship. Applicants were unable to get the authorization. The law granted wide discretion to the administrative authorities making it possible for the authorities to postpone the decision by indefinite period and not to provide any reason for the denial of authorization. The criteria for granting the permit involved the permission of local Orthodox Bishop. Applicants alleged that the law and administrative practice was calculated to obstruct the religious exercise by denominations other than Orthodox Church.[166]

Fundamental question in *Manoussakis* was the compatibility of the prior authorization requirement to the freedom of religious practice. It is notable that both applicant and government

[164] The paragraph in a statement of facts of the case clearly states that: "The Christian Eastern Orthodox Church, which during nearly four centuries of foreign occupation symbolised the maintenance of Greek culture and the Greek language, took an active part in the Greek people's struggle for emancipation, *to such an extent that Hellenism is to some extent identified with the Orthodox faith."* (Emphasis belongs to author). *Ibid,* Para.14

[165] Case of *Manoussakis and Others v. Greece*, ECtHR, Judgment of August 29 1996

[166] *Ibid,* Part I, Particular Circumstances of the Case and Para. 37

framed the question in this way. Applicant mainly challenged the substantive validity of the prior authorization requirement and policy of obstruction of the practice of religious denominations other than dominant religion, underlying the law and implemented in practice.[167]

The government defended prior authorization requirement *inter alia* on public order grounds.

> "According to the Government, the penalty imposed on the applicants served to protect public order and the rights and freedoms of others. In the first place, although the notion of public order had features that were common to the democratic societies in Europe, its substance varied on account of national characteristics. In Greece virtually the entire population was of the Christian Orthodox faith, which was closely associated with important moments in the history of the Greek nation. The Orthodox Church had kept alive the national conscience and Greek patriotism during the periods of foreign occupation. Secondly, various sects sought to manifest their ideas and doctrines using all sorts of "unlawful and dishonest" means. The intervention of the State to regulate this area with a view to protecting those whose rights and freedoms were affected by the activities of socially dangerous sects was indispensable to maintain public order on Greek territory."[168]

By holding that the authorization requirement pursued legitimate aim to safeguard the public order ECtHR adopted the Greek government's contention that the Orthodox Religious Identity of Greek Citizens defines the specific features of Greek Public order. The government could not be more sincere in defining the rationale for the authorization law. According to the Greek Government:

> "There were essential public-order grounds to justify making the setting up of a place of worship subject to approval by the State. The setting up of a church or a place of worship in Greece was, so the *Government affirmed, often used as a means of proselytism, in particular by Jehovah's Witnesses who engaged in intensive proselytism, thereby infringing the law that the Court had itself found to be in conformity with the Convention*."[169] (Emphasis Belongs to the Author)

The Greek government additionally referred to the "historical considerations" that "presupposed" the necessity of prior authorization requirement.[170] By holding that the Greek law in question pursued legitimate aim of protection of public order, without excellently disagreeing government's contentions and providing its own reasoning the court accepted the Orthodox

[167] *Ibid*, and Para.41
[168] *Ibid*, Para. 39
[169] *Ibid*, Para. 42
[170] *Ibid*

religious identity of the majority of Greek citizens makes it essential for Greek public order to proscribe proselytism by rival religious denominations.

The court held that there were genuine public order grounds for the existence of the law even though it later acknowledged that contested law "allows far –reaching interference by political, administrative and ecclesiastical authorities with the exercise of religious freedom"[171] and that "state has tended to use the possibilities afforded by the above mentioned provisions to impose rigid or indeed prohibitive conditions on practice of religious beliefs by certain non-Orthodox movements, in particular Jehovah's witnesses."[172] Nevertheless the court only held the conviction on ground of non compliance with prior authorization requirement was the violation of applicants' freedom of religion. The court regarded as unnecessary to rule on the substantive incompatibility of the law setting authorization requirement and criminally proscribing its non compliance. Although it underlined that the substantive invalidity of the law was applicant's primary claim. As a result the particular violation of the applicants' right to freedom of religion was remedied. Nevertheless, discriminatory law and practice in Greece are still in effect and continue to hinder the proselytizing faiths.[173]

In *Manoussakis* it was Judge Martens again who in his concurring opinion claimed that as in the field of freedom of expression, prior restraints shall be treated suspiciously in freedom of religion cases. He admitted that there were essential public order considerations for prior authorization rule in general but such considerations should be delicately treated as "public order arguments may easily disguise intolerance", especially in the presence of official state religion. For Martens the law envisaged broad discretion of authorities to assess the religious beliefs and

[171] *Ibid*, Para. Para.45
[172] *Ibid*, Para. 48
[173] *See*, *Supra* note, 51

involved in this process the representatives of dominant religion which rendered it incompatible with religious freedom.[174]

2.3. The Paradox of Neutral Arbiter

The rationale of the argument of previous section does not imply that there can not be essential public order grounds for the existence of prior authorization of state for religious communities, or restriction of the manifestation of religion is generally impermissible. The argument is about the court's reluctance to deeply inquire into the genuineness of the reasons forwarded by the government and to rule whether religious identity of the majority can modulate the scope of the rights and liberties under ECHR. How far can the state go in relation to religious communities? Is it only dominant Churches where the court tacitly evades apparent concerns of state neutrality and equality of religious denominations? Or is there any limit to the Court's deference even in case of dominant religion. Starting point of this inquiry is the cases concerning religious autonomy. In these cases the court made quite strong pronouncements for the neutrality of state in religious affairs. It is also remarkable that most of the cases did not involve the dominant churches.

Serif case[175] concerned two leaders of the Muslim community competing for the position of Mufti. Muslim community has special legal status under the Treaty of Lausanne between Greece and Turkey. The Muftis are confirmed by the State authorities and their activities are supervised and controlled by the state as far as Muftis discharge several administrative functions, namely

[174] *Supra* note 165, *Concurring Opinion of Judge Martens*, Para. 2, 6 and 7; Regarding the involvement of ecclesiastical authority in the registration/authorization procedure the court later held that: "Where the exercise of the right to freedom of religion or of one of its aspects is subject under domestic law to a system of prior authorization, involvement in the procedure for granting authorization of a recognized ecclesiastical authority cannot be reconciled with the requirements of paragraph 2 of Article 9. " *CASE OF METROPOLITAN CHURCH OF BESSARABIA AND OTHERS v. MOLDOVA*, ECtHR, Judgment of 13 December 2001, Para. 117

[175] *CASE OF SERIF v. GREECE* , ECtHR, Judgment of 14 December 1999

the effecting of marriage which is recognized by the state as legal and adjudication of family and inheritance matters among the members of the community. Applicant was not confirmed by the state as Mufti and was prosecuted for the usurpation of the powers of the minister of the known religion.[176]

The court did not rule *in abstracto* on the performance of public (administrative) powers by religious authorities. It stated that, giving such powers to the religious communities was not required by Article 9. At the same time it was neither prohibited by the convention and arguably in such circumstances the state had the reason to interfere. State interference in the affairs of religious communities is also allowed to control the tension for the protection of public order. The court conceded that in pluralistic societies, the tensions were inevitable consequence but the state role "in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other."[177] The supervision and control of the religious communities is permitted only to these ends.

> "State measures favoring a particular leader or specific organs of a divided religious community or seeking to compel the community or part of it to place itself, against its will, under a single leadership, would also constitute an infringement of the freedom of religion.[178]

These principles were affirmed and further developed in *Hasan and Chaush* case[179]. The complex facts of the case involved two competing factions of the Muslim community in Bulgaria. The executive branch of the state had been continuously interfering within the affairs of the community by favoring different factions at different times. The tool of interference was

[176] *Ibid*, The Facts of the Case
[177] *Ibid*, Para. 53
[178] Metropolitan Church of Bessarabia Case, *Supra* note 174
[179] *CASE OF HASAN AND CHAUSH v. BULGARIA*, ECtHR, Judgment of 26 October 2000

the Religious Act requiring the registration of the religious communities, unified under a single leadership.[180] The court held that:

> "Failure by the authorities to remain *neutral* in the exercise of their powers in this domain must lead to the conclusion that the State interfered with the believers' freedom to manifest their religion within the meaning of Article 9 of the Convention."[181] (Emphasis belongs to the Author)

It further repeated that "in democratic societies the State does not need to take measures to ensure that religious communities are brought under a unified leadership". And the acts of the state "were more than acts of routine registration or of correcting past irregularities. Their effect was to favor one faction of the Muslim community, granting it the status of the single official leadership, to the complete exclusion of the hitherto recognized leadership."[182]

The factual circumstances of the cases showed the presence of the significant political considerations. The split in the Muslim community had begun right after the removal of communist regime in the country. Certain Members of Muslim community intended to replace the leaders who collaborated with the previous authorities. During the conflict the government was actively involved in the negotiations with competing groups. Changes of state's sympathies towards the different groups suspiciously coincided with the political changes in the government.[183] This consideration was underlined by the applicants, but court did not have the opportunity to deal with such arguments. It found a violation on the basis of non compliance with "prescribed by the law" requirement. The court found the law incompatible with Article 9 on almost the same grounds[184] it rejected in case of the Greek law of necessity in *Manoussakis*.

[180] *Ibid*, The Facts of the Case
[181] *Ibid*, Para. 78
[182] *Ibid*, Para. 79
[183] *Supra* note 180
[184] The Religious Law in *Hasan and Chaush:* "Was arbitrary and was based on legal provisions which allowed an unfettered discretion to the executive and did not meet the required standards of clarity and foreseeability." *Supra* note 179, Para.86

What was sustainable when the interests of majority's religious identity were at stake was incompatible with the convention when no such consideration was involved.

Later in the *Supreme Holy Council of the Muslim Communities* case[185] brought by the rival faction of the one headed by Mr. Hasan, it did not rule on the "prescribed by law" challenge of the same law on the reason that it was not argued by the applicants. Subsequently, the court went on to test the same interference as complained in *Hasan and Chaush* against the "necessary in a democratic society requirement". ECtHR reiterated the ground principles of the previous decisions holding that:

> "The autonomous existence of religious communities is indispensable for pluralism in a democratic society. While it may be necessary for the State to take action to reconcile the interests of the various religions and religious groups that coexist in a democratic society, the State has a duty to remain neutral and impartial in exercising its regulatory power and in its relations with the various religions, denominations and beliefs. What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the principal characteristics of which is the possibility it offers of resolving a country's problems through dialogue, even when they are irksome."[186]

Under this line of Jurisprudence of the court the requirement of strict neutrality extends to wide range of regulatory powers including mediation between the competing groups. Overstepping the obligation of strict neutrality and efforts to unify the religious communities under single leadership is not possible even within the wide margin of appreciation enjoyed by the states "in the particularly delicate area of their relations with religious communities"[187].

Democratic society in the court's vision is pluralistic, not homogenous. State neutrality is thus vital requirement for the 'proper functioning of democracy' based on pluralism. But the affirmation of pluralistic democracy and state neutrality together with tacit acceptance of the importance of the majority's religious identity and resultant statuses of dominant churches in a

[185] CASE OF SUPREME HOLY COUNCIL OF THE MUSLIM COMMUNITY v. BULGARIA, ECtHR, Judgment of 16 December 2004
[186] *Ibid*, Para.93
[187] *Ibid*, Para. 96

number of member states ends up in an apparent paradox. Is this contradiction reconcilable? How far the state can go in the interest of majority's religious identity?

In case of *97 members of Gldani Congregation of Jehovah's witnesses and 4 others v. Georgia*[188] the court clearly demarcated that limit by holding that the role of the state as a neutral and impartial organizer of the practice of all religious beliefs "is conducive to public order, religious harmony and tolerance in a democratic society and can hardly be conceived as being likely to diminish the role of a faith or a Church with which the population of a specific country has historically and culturally been associated."[189] Taking into account the facts of this case, one may have quite provocative question whether the violence amounting to torture is the limit there majority's identity and political agenda behind can not be taken into account. Whatever is the answer on this question or whether it is relevant at all or not does not change the fact that majority's religious identities have substantial say in determining the scope of convention rights. In the line of cases below this is no longer tacit or implicit but rather openly counted for.

2.4. The Rationalization of Sensitivities?

In *Kokkinakis* the court recognized the power of the state to protect individual belief from improper influence and offence. The court did not accept applicant's contention that this holding amounted to the protection of the beliefs of the adherers of majority religion only. This was so in the presence of the sheer fact that no prosecutions occurred for the commission of proselytism in favour of dominant religion.[190] Shortly after the adjudication of *Kokkinakis* case the court explicitly extended the protection to the sensitivities associated to beliefs. *Otto Preminger*

[188] *Supra* note 77
[189] *Ibid*, Para. 132
[190] *Supra* note 19, Para. 29

Institut case[191] involved the seizure and forfeiture of the film presenting Jesus Christ as mentally retarded and describing the sexual relationship between devil and Holy Virgin.[192] It is notable that the case is decided under Article 10 of ECHR providing for Freedom of Expression and not under Freedom of Religion clause. Elaborating the contours of state power as a guardian of religious sensitivities the court made reference to its judgment in *Kokkinakis*:

> "In the Kokkinakis judgment the Court held, in the context of Article 9 (art. 9), that a State may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with the respect for the freedom of thought, conscience and religion of others. *The respect for the religious feelings of believers as guaranteed in Article 9* can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society. The Convention is to be read as a whole and therefore the interpretation and application of Article 10 in the present case must be in harmony with the logic of the Convention."[193] (Emphasis belongs to the Author)

These principles apply regardless of the recognition by the court that:

> "Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith."[194]

But in a course of balancing there appears another controversial "however":

> "The manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them."[195]

[191] CASE OF OTTO-PREMINGER-INSTITUT v. AUSTRIA, ECtHR, Judgment of 20 September 1994
[192] *Ibid*, The Facts of the Case
[193] *Ibid*, Para.47
[194] *Ibid*,
[195] *Ibid*, Para.49

Although freedom of expression as enshrined in Article 10 of the ECHR protects not only favorably received ideas but also ones that "offend shock or disturb"[196] when religious sensitivities are at stake, national authorities in the sake of preserving tolerance in a democratic society enjoy "certain" margin of appreciation. The supervision of the exercise of margin of appreciation by the court is allegedly strict. But the extent of margin is determined by the "significance of the role of religion in society", the uniform conception of which throughout is not ascertainable throughout Europe. This does not imply that there is no conception of the significance of the religion in the Austrian province of Tyrol where the complained acts had taken place.

> "The Court cannot disregard the fact that the Roman Catholic religion is the religion of the *overwhelming majority of Tyroleans.* In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people *should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner."*[197] (Emphasis belongs to the Author)

The court rejected the contention that the expression was not public. More importantly the court held that neither artistic value of the film nor its contribution to public debate could outweigh the offence caused and that Austrian Courts ordering the seizure of the film have paid due regard the artistic freedom guaranteed under freedom of expression.[198]

In contrast, three dissenting judges in joint opinion argued about the contribution artistic works are capable to make to the public debate affording to them the protection under Article 10. They additionally argued in vain about the danger of granting to the government the power to test the actual contribution made to the public debate by particular expression and the fundamental incompatibility to the tenets of pluralistic democracy of the prior restraint powers afforded to the majorities. The minority opinion also contested the existence of the right to the protection of

[196] *Ibid*, citing famous holding of the court in the case of *Handyside v. the United Kingdom,* ECtHR , Judgment of 7 December 1976, Para.49
[197] *Ibid*, Para.56
[198] *Ibid*

religious sensitivities under Article 9 of the ECHR; but conceded that the protection of religious sensitivities may be necessary, albeit in a very restricted manner subject to stricter supervision of the court.[199]

In *Wingrove*[200] the court was confronted with a video describing the erotic fantasies of a Christian saint. The distribution of the video was restrained under British Blasphemy law.[201] The applicant unsuccessfully challenged the substantive validity of this law. The court expressly stated its reluctance to strike down national legislation *in abstracto,* even though it admitted that the one sided protection afforded by the law to only Anglican Christian belief was an "anomaly in a multidenominational society."[202]

The reason behind this approach was the lack of "sufficient common ground" in the Council of Europe against the necessity of Blasphemy laws in a democratic society.[203] In any event the allegedly discriminatory character of the law could not affect the legitimate aim it protected, namely the rights of others, more specifically the religious sensitivities of others. Here the court abandoned the *Otto Preminger* approach of balancing between freedom of expression and religion, but stated that legitimate aim of protecting the rights of others included the protection of religious feelings provided for in Article 9 of the convention. In this respect, members of the panel expressly referred to the academic criticism of the previous solution.[204] But on the other hand it did not affect the general course; the margin of appreciation remained wide.

> "As in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular

[199] *Ibid*, JOINT DISSENTING OPINION OF JUDGES PALM, PEKKANEN AND MAKARCZYK
[200] Case of *Wingrove v. the United Kingdom*, ECtHR, Judgment of 22 October 1996
[201] *Ibid*, Circumstances of the Case
[202] *Ibid*, Para.50
[203] *Ibid*, Para.57
[204] *Ibid*, Concurring Opinion of Judge Pettiti

> religious persuasion will vary significantly from time to time and from place to place, especially in an era characterized by an ever growing array of faiths and denominations." [205]

The court nevertheless engaged in a kind of proportionality analysis but held that high degree of offensiveness required by British Blasphemy legislation represented sufficient safeguards against arbitrary application by the authorities.[206]

Such deference to national law was criticized by the concurring Judge Petitti who underlined the direct link between the content of the offence of Blasphemy and justifications of the interference provided by the court. Judge Petitti also rejected Blasphemy law as pursuing the legitimate aim of protecting the others, referring to the discriminatory character of the law protecting the sensitivities of Anglican Christian's only. He claimed the same protection for the secular symbols and philosophical views.[207] In pursuance of this line dissenting Judge De Mayer openly questioned the necessity of the Blasphemy laws in a democratic society and held for the unacceptability of any prior restraint.[208] Dissenting Judge Lohmus was also hostile towards prior restraint sustained by the majority together with dubious nature of the state assessment of the actual offense towards the religious feelings of the population and resultant propriety of the determined "Pressing social need". His final concern was blurred and uncertain principles determining the wide margin of appreciation.[209]

These principles were applied consistently in *I.A.*[210] case where the publisher was prosecuted under Turkish Blasphemy laws. The divided court sustained the conviction holding that the profanation of prophet Mohamed was offensive to the Turkish society. The dissenting judges

[205] *Ibid*, Para.58
[206] *Ibid*, Para. 60 and 65
[207] *Supra* note 204
[208] *Ibid*, Dissenting Opinion of Judge De Mayer
[209] *Ibid*, Dissenting Opinion of Judge Lohmus
[210] *CASE OF İ.A. v. TURKEY*, ECtHR, Judgment of 13 September 2005

once again quoted the famous passage from *Handyside* case[211] and warned against the chilling effect of such measures. They were thrilled by the prosecution "in the name of God" creating unpleasant associations with theocratic society. On the other hand they admitted that majority holding was consistent with the court's case law and openly called for the reconsideration of the principles of *Wingrove* and *Otto Preminger*.[212]

In a subsequent line of cases the court protected speech offensive to religion and religious sensitivities which at the same time contributed to the public debate. *Paturel* case[213] concerned the book against French anti sect association. According to the author the latter association implemented Catholic Church's ideology of hatred and religious discrimination. The court found a violation of freedom of expression for the conviction of applicant and publisher for the defamation. The court afforded the protection to the author for contributing to the heated debate regarding the so called sects.[214] The same rationale was employed in *Giniewski* case[215] where the critics of Papal Encyclical while having offensive content "contributed to discussion of the various possible reasons behind the extermination of the Jews in Europe, a question of indisputable public interest in a democratic society. "[216] Evaluating the facts of the case the court further observed that "article in question shows that it does not contain attacks on religious beliefs as such" and was not "gratuitously offensive". Therefore the search for historical truth as far as it did not deny the "well established historical facts" was protected speech. Finally, the

[211] *Supra* note 196
[212] *Supra* note 210, JOINT DISSENTING OPINION OF JUDGES COSTA, CABRAL BARRETO AND JUNGWIERT
[213] *Paturel v. France*, ECtHR, Judgment of 22 December 2005, available only in French, discussed in Javier Martínez-Torrón, *Freedom of Expression vs. Freedom of Religion in the ECHR*, in *Censorial Sensitivities: Free Speech and Religion in Fundamentalist World*, Andras Sajo (ed), (2007), p.245
[214] *Ibid*
[215] *CASE OF GINIEWSKI v. FRANCE*, ECtHR, Judgment of 31 January 2006
[216] *Ibid*, Para. 51

court paid attention to the severity of the penalty and its chilling effects.[217] The latter consideration played significant role in *Aydin Tatlav* case[218] where the court similarly held, that the book was not "gratuitously offensive" or insulting towards believers or sacred symbols of Islam.[219]

In Blasphemy jurisprudence the court admitted that the reason of deference to national authorities is the absence of uniform standards regarding the public significance of religion. As a result it has to accept the laws bizarre to the spirit of pluralistic society it proclaims. The rationale of "offensiveness" and the real significance of sensitivities are clear but the court is still reluctant to disregard them and thus denounce the strongly prevalent religious identities.

Nevertheless as a recent development appeared the judgment of the court in the *Vajinai* case[220]. The holding of the case can lead to interesting change in this direction. The case concerns the political speech, namely the display of Red Star by Hungarian Communist politician. He was prosecuted under criminal provision proscribing the public display of Nazist and Communist symbols.[221] One of the justifications of the Hungarian government was the protection of the feelings of the victims of totalitarian regimes. The court replied that it is:

> "Of course aware that the systematic terror applied to consolidate Communist rule in several countries, including Hungary, remains a serious scar in the mind and heart of Europe. It accepts that the display of a symbol which was ubiquitous during the reign of those regimes may create uneasiness amongst past victims and their relatives, who may rightly find such displays disrespectful. *It nevertheless considers that such sentiments, however understandable, cannot alone set the limits of freedom of expression.* Given the well-known assurances which the Republic of Hungary provided legally, morally and materially to the victims of Communism, *such emotions cannot be regarded as rational fears.* In the Court's view, a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgement. To hold otherwise would

[217] *Ibid*, Para. 52 and 55
[218] Case of *Aydin Tatlav v. Turkey* , ECtHR, Judgment of 2 May 2006, available only in French discussed in Torron, *Supra* note 213, p.250
[219] *Ibid*
[220] *CASE OF VAJNAI v. HUNGARY*, ECtHR, Judgment of 8 July 2008
[221] *Ibid*, The Facts of the Case

> mean that freedom of speech and opinion is subjected to the heckler's veto."[222] (Emphasis Belongs to the Author)

The reasoning of the court also rested on the consideration that under the stable Democracy following to the transition, there was no clear and present danger that totalitarian communist ideas would subvert Hungarian state.[223]

The case does not concern the religious sensitivities of majority and in this case there may be counter arguments on the specificity of religious feelings. But at least one judge on the bench deciding *Vajnai* as a constitutional scholar believes that religious sensitivities does not deserve legal protection and that constitutional democracy can not rest on religious identity. In any case it is still unclear what effect if any *Vajnai* judgment will have on ECtHR's treatment of religious identities.

2.5. Some Reasons behind the Difficulties

In conclusion, the foregoing analysis shows and it is commonly accepted in scholarly contributions[224] that states have relatively high discretion in the field of religion. It is contended that the recognition of diversity in respect of the strength of religious identities and the existence of dominant churches across Europe formed part of the original agreement of ECHR and the Convention was not meant to alter it.[225] Arguably this was the reason of court's reluctance to either expressly touch or rule on these issues.

[222] *Ibid*, Para. 57
[223] *Ibid*, Para. 49
[224] *See* generally, Lech Garlicki, *Collective Aspects of the Religious Freedoms: Recent Developments in the Case Law of the European Court of Human Rights* and Torron , in a volume cited *Supra* note 213, p. 218 and 234
[225] *See*, Generally, Carolyn Evans and Christopher A. Thomas, *Church-State Relations in the European Court of Human Rights,* 2006 B.Y.U.L. Rev. 699 (2006) and Torrón, *Supra* note 149

The Court declaring that Convention presupposes pluralistic democracy with strict neutrality of the state in the matters of Religion is caught in apparent contradiction where it encounters strong religious identities of majorities. The court's exercise resembles playing around the circle from the local considerations to the uniform standards and vice versa.

This conclusion is not about to criticize the court, rather to underline difficulties it faces. Related to this issue is the contested mandate of the court to enforce single political philosophy of democracy. In this regard Judge Garlicki reminds us that there are questions "addressed more to scholars than judges"[226] as a perfect justification of academic inquiry into the normative responses of democracy to religious identities.

[226] Garlicki, Supra note 224, p.232

Chapter Three

Fading Modernity and the Ghost of a Disarmed Enemy

3.1. Introduction

The analysis of the first chapter clearly demonstrated that the problem of soul wars although having primary negative consequences for the rights and liberties of affected religious communities entails broader implications and touches the fundamental questions for the respective societies and their political communities. More precisely, religious identities are employed to respond to the "dangers of pluralism" that the latter poses social and political stability.

The preservation of this status quo requires majority religion's dominance in public discourse. Here the discourse of national identity with strong religious components is especially problematic. Public manifestation of non traditional religious faiths contests not only the truth of majority religion but also indirectly the truth of national identity as majority religion is regarded an indivisible and uncontested part of that identity. As a result discourse of national identity becomes "post truth" discourse having no place for rival claims. The truth of national identity becomes infallible and warrants the silencing of its challengers.

Consequently, in the context of soul wars a wide variety of measures are taken against disfavored religious communities and their members aimed at the prevention/suppression of their participation in public discourse. The measures either take the form of prior restraint at the stage of registration or silencing the members of the disliked community through criminal sanctions or state tolerated violence.

What is at stake here is the self understanding of democracy itself which determines its relation to truth, content of individual rights it incorporates and ultimately the way it achieves social cooperation in the society divided by the competing religious or other substantive doctrines each of them asserting its own truth. Whether religious identity as a basis of political relation is an answer to all these questions is highly suspicious.

The subsequent step of the search for normative principles is the examination of the problem from a theoretical angle to trace workable answers to the question of democracy's response to actual or perceived dangers of pluralism.

The task to reconstruct basic features of democratic political theory's response to these questions leads to the very historical foundations of current constitutional democracies, to the challenges the latter regime aimed to overcome and traces their development up to today. In this regard as democracy's attitude towards truth is crucial to the present inquiry, democratic political theory will unavoidably be examined within the wider philosophical framework, in light of the study of human condition facing the world[227] which informs the political theory's solutions.

The following sections deal with three main philosophical currents on the relationship of human spirit to the world. The discussion will outline different understandings by these philosophical thoughts of such crucial concepts as truth, faith, knowledge and different epistemological positions associated to them. Subsequently, in the course of the examination of democratic

[227] Ernest Gellner, *Postmodernism, Reason and Religion*, (1992) p. 1

political theory the implications of these different philosophical and epistemological understandings have in political theory if any, will be inquired. In order to get the clearer picture, the inquiry into philosophy and political theory will be put in historic contexts and generally will follow dynamics of their development.

Only after passing through these steps, the essence of normative principles defining democracy's response to actual or perceived dangers of pluralism could be sensibly grasped. Finally, the problem of "war for souls" will be discussed in light of these normative principles.

3.2. Philosophical Positions on the Relation of Human Being to the World

3.2.1. Religious Fundamentalism

Religious fundamentalism is characterized by affirmation of absolute truth of its doctrine. The doctrine is final, is not subject to compromise or revision and shall be followed in its totality.[228] The absolute truth of the doctrine is enshrined in revelation and can be accessed through faith. Dominance of revelation and faith downgrades the importance of knowledge and reason. Reason may assist faith in grasping the transcendent truth but its exercise is subject to the guidance of faith. Reason is only available to the people having sufficient familiarity with philosophy and theology.[229] Therefore only priests are able to access truth and guide others to it. This position denies the existence of any self evident and universally accessible truth. So defined, fundamentalist religions not only dominate within the culture of society but also penetrate every segment of societal and individual life. The revealed truth is overarching, comprehensive and all embracing; it provides right answers to all questions and has definite ideas of good life.

[228] Gellner, *Supra* note 227, p. 2-3

[229] Steven D. Smith, *Recovering (from) Enlightenment*, 41 San Diego L. Rev.1263 (2004) p. 5, discussing Thomas Aquinas in this respect, Thomas Aquinas, *Summa Theologica*, I.II., Q. 94, A. 1, cited *Ibid*

Compliance of individual conduct to the demands of truth is secured by the means of transcendent sanctions.[230]

Byzantine Christianity in middle ages described in first chapter is an example of fundamentalist religion. Similarly, medieval Western Christianity shared the basic characteristics of its Eastern counterpart. Namely, centralized and infallible authority, absolute claim to posses the means for salvation, availability of such means only through ecclesiastical authority and expansionism determined to save the souls of anyone and everywhere.[231]

3.2.2. Enlightenment Rationalism and Modernity

Enlightenment – the thought which ended theological dominance over philosophy and repudiated religious fundamentalism[232] has rich intellectual tradition and has not been free from internal contradictions and contesting interpretations.[233] But nevertheless it is still possible to reconstruct basic ideas underlying the Enlightenment philosophy. Enlightenment and its progeny ended the medieval ages and determined to eradicate the traditional societies grown with religious fundamentalism.[234] The enlightenment project commenced the new age of modernity celebrated by the primacy of reason.[235]

Rationalism - the child of enlightenment repudiates revelation and its absolute truth. Enlightenment rationalism denies any substantive truth and in this way "eliminates sacred from

[230] John Rawls, *Political Liberalism*, (1993) xiii and xvi – xvii
[231] *Ibid*,
[232] Gellner, *Supra* note 227, p. 80
[233] Smith, Supra note 229, p. 2 , citing Roy Porter that historical enlightenment was "necessarily rather amorphous and diverse" - Roy Porter, *The Enlightenment*, (2001) p. 9 . I this section I refer Enlightenment to describe philosophical position of rationalism associated to it. Political thought of enlightenment and its relation to rationalist premises will be discussed below. See the distinction about classical enlightenment philosophy and political thought associated to enlightenment in Smith *Ibid*
[234] Gellner, *Supra* note 232
[235] Smith, *Supra* note 229, p. 3-4

the world". "It desacralizes, disestablishes, and disenchants everything substantive."[236] But classical enlightenment did not abandon the commitment to the truth.[237] It does not deny the uniqueness of the truth but at the same time strips it from religious transcendence.[238] Instead of revelation truth can be discovered in "orderly system of nature".[239] Nature holds some self evident truths accessible for everyone[240] and the gateways to truth are no longer monopolized by priests. The decline of transcendent substantive truth puts everything in the world on unprivileged footing equally exposed to the objective scrutiny of reason. The cognitive methodology of enlightenment rationalism largely developed throughout overwhelmingly successful scientific revolution placed all facts and observers on equal level.[241] This method scrutinizes and studies all facts separately and in connection with each other. The knowledge is uniform but rational observer could only access it in piece meal fashion not as a package deal. In contrast Religion, tradition and culture whether religiously dominated or not are available only as package deals. They reduce knowledge to their own cognitive aspect.[242]

Enlightenment rationalism responds this claim by affirming that knowledge exists outside culture and is transcultural. Consequently reason is also disintegrated from culture. Enlightenment absolutizes rationalist methodology of knowledge in this transcultural and transmundane form.[243] It does claim that it is true cognitive method but it does not assert that it holds unique truth[244]. Existence of any privileged source of truth is thus refuted. Truth is unique but never definitive.

[236] Gellner, *Supra* note 227, p. 80-81
[237] Smith, *Supra* note 229, p. 2
[238] Gellner, *Supra* note 232
[239] Gellner, *Supra* note 227, p. 82, citing Baron, d' Holbach, *The System of Nature or Laws of the Moral and Physical World*, (1970)
[240] Smith, *Supra* note 229, p. 3, referring to the Belief of American Founding Fathers in the existence of self - evident truths.
[241] Gellner, *Supra* note 227, p. 80
[242] *Ibid*, p.63, 73 and 83
[243] Gellner, *Supra* note 227, p.75 -78
[244] *Ibid*, p. 82 and 84

Therefore equal validity of all truth propositions is precluded. This implies that different religions, traditions and cultures can not assert equal validity.[245]

Enlightenment rationalism initially accepted both the existence of internally functional and relatively valid systems including cultures and absolutized method of cognition within one orderly system of nature.[246] As a response to this tension Enlightenment's greatest thinker Immanuel Kant made basic distinctions between orderly system of nature which is subject to its general, causal laws on the one hand and knowledge and morality on the other.[247] Kant questioned the existence of universal and objective reason.[248] According to him such unique and objective reason could not be found in the causal system of nature. Everything within nature is subject to causal and general natural laws and is therefore relative. As an implication cultures and individuals are also the part of this relative body of nature. But individual compared to others has the access to knowledge and morality.[249]

By refuting the existence of objective and universal reason within the nature Kant denied the existence of objective scientific knowledge accessible by transcendental reason external to the individual. Kantian practical reason is the creature of human being's inner morality.[250] The orderly system of nature is constituted by the reason born in individual morality. Individual morality puts constraints on the empiricism of practical reason[251] and in inner self of individual absolutizes rationalist method of cognition. The latter becomes moral imperative and internal constraint to the individual liberty.[252] Individual inference of being a rational agent is possible after making the basic distinction between external and internal morality and exercise of free will

[245] *Ibid*,
[246] *Ibid*, p.82
[247] *Ibid*, p. 83
[248] *Ibid*
[249] *Ibid*,
[250] Helen M. Stacy, *Postmodernism and Law, Jurisprudence in Fragmented World*, (2001); p. 25
[251] *Ibid*, p.26
[252] *Ibid*, Gellner, *Supra* note 227, p.83

in accordance with internal moral imperative. The moral imperative is the obligation of being rational.[253] As a consequence Kant's liberal philosophy totally disentangles knowledge and reason from any transcendent, traditional or cultural bonds. Reason is born inside individual, in his/her internal morality and not within particular religion or culture.

In conclusion, what enlightenment rationalism makes absolute is its theory of knowledge-epistemology dominated by the reason.[254] Enlightenment rationalism believes in the equality of all individual minds to grasp the true but only on condition of employing true epistemic means, namely the reason. Enlightenment rationalism is thus optimistic, as it believes in the existence of the unique truth and individual capacity to access this truth. But as a crucial qualification, it is important to bear in mind that rationalism's truth is unique but not comprehensive. Knowledge is not the identical substitute of revelation. Revelation is totally eradicated and secular salvation theology shall not replace it.[255] The latter is denied not as much because for its non existence but mainly for its collapses in its political realization. Enlightenment rationalism's attitude towards comprehensive truth does not totally repudiate the latter rather ejects it from the political realm and constraints its political realization.[256]

3.2.3. Relativism, Postmodernism and Critical Social Theory

Rejection of any valid secular salvation theology by enlightenment rationalism is mainly the consequence of historical experiences related to political breakdowns of such doctrines. Jacobin educational dictatorship, fascism, and Marxism are the notorious examples.

But Marxism is still prominent in this list deserving more scholarly interest and not only because it was best framed within the dictates of rationalist scholarship. Marxism is interesting as it

[253] *Ibid*,
[254] Gellner, *Supra* note 227, p.82
[255] *Ibid*, p. 87-88
[256] *Ibid*, 91-92

challenged enlightenment rationalism from at least two directions. Firstly, it affirmed that it held the truth of rational social order on earth. This truth was comprehensive and demanded political realization. Secondly, Marx challenged transcendence of unique truth still present in enlightenment project.[257]

Marxism was the first powerful sociological intrusion into the project of enlightenment rationalism. Together with notorious political consequences Marxism had a tremendous intellectual influence not limited to the creation of its own salvation doctrine. Marxism influenced its students Horkheimer and Adorno to develop critical social theory which in turn is crucial for the understanding of the philosophical tradition of postmodernism.[258]

Based on the Marxian premises of the dialectics of class struggle and exploitation Horkheimer's and Adorno's critical social theory alleged that in modern industrialized and complex societies, knowledge and scientific rationality became the instruments of oppression. Enlightenment's absolutized rational methodology of cognition and resultant scientific and technological progress led to domination of nature by the individual. The individual capture of nature resulted into the chain reaction of social domination and oppression of powerful groups over other groups. Knowledge in enlightenment rationalist understanding was employed to silence the critical thinking in individual and to subject him/her to the technocracy and bureaucracy of the modern industrialized and complex society. Individual identity was captured by the homogenizing effects of rationalist knowledge. The individual emancipation from this dialectical oppression was only possible by overcoming the rationalist knowledge.[259]

[257] *See*, Gellner, *Supra* note 227, p. 86-87
[258] *See*, Stacy, *Supra* note 250, p. 28-37
[259] *See*, *Ibid*, for the Summary of Horkheimer and Adorno

Simultaneously in philosophy there was growing awareness of the multifaceted oppressions of modern industrial technocratic society, the trend represented by Wittgenstein, Battaille and Husserl.[260]

In this direction, Martin Heidegger reinterpreted the basic ideas of Kantian philosophy and asserted the existence beyond relativism. He challenged the transcendence of truth still present in Kant. Premised on the Kant's ideal of practical reason as the product of internal morality Heidegger totally denied external metaphysical truth and replaced it by social consensus achieved by communication. Heidegger filled the gap between Kantian concepts of truth and judgment. Kantian judgment was purely subjective capacity socially and historically contingent guided by communicative rationality. Heidegger blurred the distinction between the objective truth and subjective judgment. The truth was defined by communicative rationality and therefore language had the pivotal function. In consequence Heidegger denied the existence of external and transcendent truth and replaced it by immanent morality of the existential person.[261]

Postmodern philosophical tradition made the step deep further. It not only criticized the objectivity of knowledge but some of its representatives following to relativism also rejected it.[262] It is notable that both Marxists[263] and early Frankfurt school of critical social theory criticized the rationalist methodology of knowledge but did not deny the existence of unique objective truth. [264]

In contrast, following to Heidegger Jacques Derrida[265] denied the possibility of objective knowledge and truth. Derrida expanded Heidegger's focus on language and totally refuted the

[260] *Ibid*, p.28
[261] *See*, *Ibid*, *Heidegger's turn to language*, p.25 -28
[262] *See*, Gellner *Supra* note, 227, p. 71
[263] *See*, *Supra* note 257
[264] *See*, Supra note 258
[265] *See*, *Derrida's Critique of Language*, Stacy, Supra note 250, p. 83-100

enlightenment rationalism's treatment of language. Rationalist understanding of language – the structuralism was placed under Derrida's poststructuralist attack.[266] His Grammatology reduces everything within the world to the texts; Texts which are not only graphical expositions but also living phenomena surrounded by the fog of indeterminacy.[267] Derrida rejects that the text has the core of settled meaning and is capable of expressing ideas without alteration; therefore structuralism's preference of the speech over writing is incorrect.[268] For him the meaning of the text is not connected exclusively to the author. Author's intent is one of the competing meanings among the various interpretations ascribed to the communication by the readers and listeners. Everything in the world is meaning and meaning is never definite. The truths are formed as a result of deconstruction of the communication – the search for the covered meanings beyond. Deconstruction is the endless search for the meaning not for the unique truth; the latter in its objective form, disassociated from subjectivity of the reader or listener is impossible.[269]

Another French postmodern philosopher Michel Foucault[270] directly attacked knowledge and portrayed it as an instrument of oppression.[271] He follows early Frankfurt school in this respect. But compared to Frankfurters Foucault believes in the emancipation of individual identity from the oppressive knowledge. For him power, knowledge, oppression and resistance create the causal continuum. Power structures dominate the discourses by the means of objective knowledge, and in this form filter and suppress the differences.[272] The dominating regimes of truth are not necessarily rational but often driven by irrational motives and contingencies.[273] The homogenizing practices of power via the domination of discourse by the means of knowledge

[266] *Ibid*, p.84
[267] *Ibid*
[268] *Ibid*, p.85
[269] *Ibid*, p.84
[270] *See*, *Knowledge and Power; Michel Foucault*, Stacy, *Supra* note 250, p. 61-82
[271] *Ibid*, p. 61
[272] *Ibid*, p. 62-63
[273] *Ibid*, p. 61

leads to the resistance from suppressed different identities. This premise of Foucault's philosophy becomes the basic driving force of the various social movements struggling for emancipation against the established power structures of modern societies. Feminist movement is a well known example.[274]

The forms of Postmodernism embracing relativism overcome the enlightenment rationalist knowledge and epistemology.[275] Objective knowledge is no longer possible; it is either determined by contingencies of different power structures or by the deconstruction exploring competing and never definite meanings. According to postmodern relativist thought all things in the world are equally indeterminate. The meanings are equally valid as truth propositions. Furthermore the meanings are cognitively equal. Therefore different cultures and religions have distinct but cognitively equal thought systems. Each such thought system is absolute for itself and its own means of cognition. Each culture, religion or substantive doctrine views itself and counterparts within its own terms. Postmodern relativist scholar has to deconstruct the meaning beyond this view. While dealing with this different equally authentic knowledge systems postmodern relativist scholar does not employ any different/superior knowledge system. As rationalist critics contend, here postmodernists are caught in deadlock of self referential systems of knowledge. Rationalists argue that postmodernist failure to ever arrive to the definite meaning after hermeneutic exercise leads to nihilism; nihilism not only in moral but also in cognitive sense, which is simply false for rationalists.[276]

[274] *Ibid*,
[275] See, The critique of Relativism and Postmodernism practicing it in Gellner *Supra* note 227, p. 72- 75
[276] *Ibid*, p. 71.

3.2.4. Habermas and Post metaphysical Thought

Despite the vigorous defense of enlightenment rationalism by its strict adherers, the critics from social theory and postmodernism can not be ignored. The challenge refers to the central premise of enlightenment rationalism – absolutized method of cognition. The most prominent attempt to revitalize modernity belongs to celebrated social theorist Jurgen Habermas. Habermas's modernity is characterized by post metaphysical thought.[277] Post metaphysical thought like its enlightenment counterpart remains agnostic to the substantive truth but at the same time does not reduces the knowledge to the scientific rationality.[278] Habermas's post metaphysical thought does not deny the distinction between faith and knowledge but at the same time rejects the disintegration of religious doctrines from the "genealogy of reason".[279] Habermas denies naturalistic conception of reason which represses everything not fitting within its "controlled observations, nomological propositions and casual explanations".[280] This self objectifying conception of reason and knowledge represses not only religious but also moral, legal and evaluative judgments.[281] Habermas proposes multidimensional concept of reason which reconstructs itself according to its genealogy. According to Habermas genealogy of reason is not limited to western metaphysical thought and enlightenment tradition.[282] He refers to the example of "Hellenization of Christianity" in which Christianity and ancient philosophy informed and redefined each other.[283] Habermas calls for the "liberation of cognitive substance from its

[277] Habermas *Supra* note 1, p. 16
[278] *Ibid*
[279] *Ibid*
[280] *Ibid*
[281] *Ibid*
[282] *Ibid*,
[283] *Ibid*, p.17

dogmatic encapsulation in melting pot of rational discourse."[284] The knowledge can be achieved not only by dogmatic, instrumental rationality but also by cognitive substances of different cultures and religions. Habermas believes that the religions still have "a semantic potential that unleashes the inspiring energy for *all of* society." [285]

Habermas's modernity learns from the religion but at the same time is agnostic to the truth claims made by them. Post metaphysical thought does not pass the judgment on the rationality of religion. In mutual learning processes involving mandatory translations post metaphysical thought gets the cognitive content which is rationally comprehensible. The "opaque core" is simply "encircled" and is kept apart from cognitive accession.[286]

3.3. Political Implications of the Philosophical Positions and their impact on Religion

3.3.1. Medieval State – Revelation as the Source of Legitimacy

In Medieval Christendom the substantive truth of Christian revelation dominated politics. Prevailing political theology of the era affirmed divine source of sovereign power (King, Emperor and etc.) making such divine legitimacy unobjectionable ground of obedience.[287] The preservation of divine legitimacy required religious homogeneity of the polity but Pluralism in the form of dissent to officially affirmed tenets of Christianity as a historical fact and unavoidable condition had been present virtually from the origins of Christian States. As a

[284] *Ibid*
[285] *Ibid*
[286] *Ibid*
[287] Jean Hampton, *Political Philosophy*, (1998), p. 6- 10

response ecclesiastical and political authorities had been pursuing what seemed as the only possible measure to uphold religious homogeneity to save the foundation of medieval polities. Use of state coercive power was this only tool. The entanglement of political and ecclesiastical authority is an additional explanation for the existence of such institution as inquisition possessing the coercive powers to eliminate dissent and preserve religious homogeneity. Nevertheless, strengthening of dissent within Christianity led to the dramatic clashes and resulted in religious wars. Failure to suppress the revolt concluded religious wars of XVI – XVII century by reformation and disintegration of uniform western catholic religion. Not surprisingly, emergent new beliefs shared Salvationist and expansionist character of the mother faith.[288]

As a result divine legitimacy of the medieval state became under multifarious attack. Firstly, Religious pluralism made it impracticable; the followers of religions different from the officially upheld one could not obey the power getting the authority from the god they did not believe in. Secondly, enlightenment rationalist philosophy and scientific progress desacralized the world and denied substantive truth of revelation. Consequently, the refuted revelation could no longer produce the legitimacy of political power.[289]

3.3.2. Towards the Exclusion of Substantive Truth from Socio – Political Realm

Once religious legitimacy is disestablished and foundations of medieval states shaken there emerges fundamental question whether legitimate authority is still possible. Political philosophy liberated from religious domination answered this question in affirmative and replaced the divine

[288] See, generally on the Medieval State, Rawls, *Supra* note 230, xii – xvii
[289] Habermas, *Supra* note 1, p.4-5

sovereignty by the popular counterpart. Thomas Hobbes was the political philosopher who introduced the idea of social contract as a foundation of sovereignty. Hobbes' fiction of human community without authority – state of nature was so horrible that individuals submitted to the fear of death in anarchy. Motivated by the aim of securing very physical survival, they overcame their pride and ceded all their rights to the almighty Leviathan – the unrestrained sovereign power. Hobbesian absolutism was similar to the absolutism of medieval monarch but at the same time essentially different. Hobbes' Leviathan was not divinely legitimized but was getting its authority by the consent of the governed. Hobbes adhered to the rationalist epistemology, denied the substantive truth of revelation and upheld objective, non transcendental knowledge. As the comprehensive truth of revelation was refuted no religion should realize itself politically. The competing truth claims by different religious revelations not subject to any validity test, were the cause of the nightmare of state of nature. Therefore all religions should submit to the sovereign and escape state of nature.[290]

In enlightenment progeny political philosophy has not been unanimous about prohibition of the political realization of rationalist truth. The very initial attempt to politically realize enlightenment idea in French revolution degenerated into Jacobin educational dictatorship[291] politically implementing substantive enlightenment ideals.

Marxist/Bolshevik regimes are another example of the implementation of secular salvation theology. There was nothing transcendent in Marxian dialectic of class struggle as foundational principle of human society but it asserted absolute truth and demanded the political realization of its doctrine.[292]

[290] On Hobbes, generally, *Supra* note 287, p. 39-49
[291] *See*, Schmitt, Supra note 137, p. 30-31
[292] Gellner, *Supra* note, 257

The practical failure does not fully repudiate the existence of secular salvation theology but at least downgrades it from the normative character to mere possibility and strips its uniqueness. Enlightenment rationalism is first of all the method of cognition which may absolutely deny certain forms of social cooperation and political power but can not provide their unique and comprehensive replacement.[293]

3.3.3. Liberal Answer: Politics without Substantive Truth

If Truth can not define the terms and institutions of social cooperation then what is the outcome? The project of modern constitutional democratic state started under apparent social fact of the existence of clashing religious doctrines.[294] The social reality is even more complex and includes not only religious but also moral and philosophical doctrines claiming to be substantive.[295] The fundamental question of political philosophy whether social cooperation in the society divided by irreconcilable comprehensive doctrines is at all possible poses itself with utmost vigor.[296] Not surprisingly the answer is affirmative.

We have seen that the way the fact of pluralism is addressed is largely determined by the society's attitude towards substantive truths. We have also witnessed that affirmation of substantive truth either in medieval state or rationalist dictatorships pursued exclusionary policies and had homogenizing effects, addressing the fact of pluralism by destroying it. These forms of political organization are invalid not only by the reason that their basic premise - the ability of substantive truth to define society is philosophically suspicious but also by the social fact that they can not guarantee stable social cooperation.

[293] *Ibid*, p. 88
[294] Rawls, *Supra* note 230, p. xvii
[295] *Ibid*
[296] *Ibid*

Thus constitutional democracy which claims to be stable form of social cooperation rests on the exclusion of the whole truth from socio – political realm.[297] It claims to achieve stable social cooperation under the fact of pluralism. It assumes the unacceptability of exclusionary practices and policies. Here constitutional democracy and its liberal premises of the relation to substantive truth come under attack. Postmodern critics argue for the inner contradiction between the liberal denial of substantive truth in politics and its non exclusivist and pluralistic ambitions.[298]

Despite these challenges, the following sections will try to demonstrate that constitutional democracy is able to provide sufficient normative framework to address the fact of pluralism taking into account the social reality adequately.

3.3.4. Some Preliminary Challenges for the Constitutional Democracy's Answer to the Fact of Pluralism

Before discussing contemporary contributions to the political philosophy and theory the theoretical foundations of constitutional democracies shall be briefly revisited. It is generally acknowledged that modern democratic thought has been profoundly influenced by two theoretical traditions.[299] One is broadly liberal theory of John Locke and the other is the Republican theory associated to the name of Jean Jacques Rousseau. The detailed features of each tradition and their development are out of my focus here. What is important is that modern constitutional democracies generally incorporate the elements from both traditions.

[297] *See*, Rawls, *Supra* note 230, p. xvii denying that political liberalism is comprehensive doctrine. *See also*, John Rawls, *THE IDEA OF PUBLIC REASON REVISITED*, 64 U. Chi. L. Rev. 765 (1997), arguing that: "The zeal to embody the whole truth in politics is incompatible with an idea of public reason that belongs with democratic citizenship."

[298] See, generally, Stanley Fish, MISSION IMPOSSIBLE: SETTLING THE JUST BOUNDS BETWEEN CHURCH AND STATE, 97 Colum. L. Rev. 2255, (1997) also Larry Alexander, LIBERALISM, RELIGION, AND THE UNITY OF EPISTEMOLOGY, 30 San Diego L. Rev. 763 (1993)

[299] Habermas, *Supra* note 1, p.19

Subsequently, in this section I will sketch out those basic liberal and republican principles which go to the heart of modern political theory of constitutional democracy and set up its normative response to the fact of pluralism within the stable system of social cooperation. Such restatement is necessary to proceed to the highly abstract contemporary theories employing their own terminology.

The classical liberal relation to the substantive truth within the system of social cooperation and its consequences for religions is outlined in Locke's famous "Letter Concerning Toleration."[300] According to Locke, as civil magistrate does not posses means to judge the truthfulness of any competing substantive truth claims, there is no place for these claims in politics.[301] The salvation is the private matter of the person and political power shall not interfere. Non interference of the political authority is demanded not only by the reason that it is unable to judge the truthfulness of any faith but rather the fact that even if it passes such judgment and imposes it forcibly this can not change inner personal conviction which is the sign of true faith.[302] These arguments support fundamental liberal distinction between the public and private backed by the principles of liberty of conscience and equality. The matters related to conscience, faith and salvation are private and interference of political authority is strictly forbidden. At the same time as political community is equally skeptical towards all religions; no adherent of any singled out religion can be treated differently for the sole reason of having his/her particular faith. Locke is not hostile to religion; it is rather protective of it from state violence. Similarly, politics and authority shall equally be guarded from sectarian wars and theocracies.[303] But Locke's toleration has its limits; no religion

[300] Cited in *Fish*, *Supra* note 298
[301] Fish, *Supra* note 298, p.5
[302] *Ibid*,
[303]These ideas of Locke realized on US soil by founding fathers were labeled under the metaphor of wall of separation between religious institutions and state, between public and private. This traditional institutional doctrine of separation is associated to three basic principles; the first libertarian principle envisages free exercise of religious freedom without undue interference from state which is only warranted when other fundamental rights demand; the

subversive to the foundations of the society and condemned by the judgment of whole mankind can be tolerated.[304] Here, we arrive to first basic principle of Liberal political philosophy making social cooperation under the fact of pluralism possible. The common ground shared by all mankind and thus by different religions themselves, defines the boundary of toleration within the system of social cooperation.

The second foundational tradition of modern democratic thought – Republicanism is even more vulnerable to the challenges that it has anti pluralistic effects. Furthermore, though Republicanism shares with liberalism the idea of social contract it is often described as anti liberal.[305] The problem is associated with the central Republican premise – obedience to general will as an exercise of democratic self-government. In this conception of self government liberal public/private distinction acquires new vigor. General will demands the obedience of private individual who at the same time is the public citizen and in this capacity the co author of the general will.[306] Under Republicanism general will is not equated to the sum of individual interests, including those of religious citizens.[307] Thus the exclusion of substantive truth from politics is preserved. General will is the will of sovereign people not of the sovereign god. Religion is out public domain and this is necessary precondition of general will formation which is the consensus worked out of clashing individual claims. The consensus criterion incorporates liberal idea of deliberation in Republican tradition. By adopting liberal belief in deliberation

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second is equalitarian principle which prevents state of making preference towards any particular religious denomination. Such preference may restrict the choice of believer and compel to adopt the state preferred religious view. Additionally there is high chance that the laws will reflect religious outlook of the preferred church and the imposition of this outlook to those of different faith would deny their religious liberty and third is the neutrality principle meaning that state shall be neutral and does not make preference not only towards different religions but towards the religious as such. Robert Audi, *Separation of Church and Sate and Obligations of Citizenship, Philosophy and Public Affairs*, Vol. 18, No. 3 (1989) p. 259-265

[304] Cited in Fish , *Supra* note 298, p.7
[305] Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539 (1988) p.2
[306] Michel Rosenfeld, *Just Interpretations*, (2003) p. 219 -221
[307] *Ibid*

Republicanism tries to counter the charges of being homogenizing and to become more inclusive.[308] Otherwise the general will would be the will of homogenous people and the obedience to it the best homogenizing strategy. Indeed Republican principles have enormous potential to this effect.[309] Republicanism splits the identity of individual between private self and public citizen and requires from public citizen to disregard those interests of his/her own and of fellow citizens not complying with the general will. This is the moral obligation envisaged in civic virtue of public citizen. Civic virtue which is informed by general will makes up the ethics of democratic citizenship.[310]

3.3.5. The Idea of Public Reason

If the whole truth can not define society then what defines the political relationship in liberal democracy? According to John Rawls the idea of public reason is central to the idea of the democratic society itself.[311] The idea of public reason properly describes political relationship in democracy. Political relationship is based on the principle of reciprocity.[312] Reciprocity defines the political relation of free and equal citizens and therefore rejects the political relation based on the fundamental distinction between friend and enemy, between member and outsider of particular religious community and like.[313] Principle of reciprocity has its own understanding of political legitimacy. Political legitimacy requires that collective exercise of coercive power by free and equal citizens be sufficiently justified by the reasons that all other citizens in their

[308] See, Generally Sunsterin, *Supra* note 305
[309] *See*, Schmitt, Supra note 137, p. 13-15, arguing that Rousseau's Republicanism requires social homogeneity and leads to it.
[310] Rosenfeld, *Supra* note 306
[311] Rawls, *Supra* note 297, p.1
[312] *Ibid*,
[313] *Ibid*,

capacity as free and equal are supposed to reasonably accept.[314] Therefore the requirement of public reason is applicable to the discourse of government officials both in executive and legislative branch; to the discourse of judges especially to the discourse of Supreme Court judges and to the discourse of candidates to public office and campaign managers in their public communications.[315]

Principle of reciprocity defines the conception of democratic citizenship. "The ideal of democratic citizenship imposes moral not a legal duty – the duty of civility to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason."[316]

Rawls limits the application of the requirement of public reason to the domain of political. He thus tries to delimit the scope of personal and material application of the requirement of public reason. These limits correspond to his understanding of political public sphere. Restraints of public reason therefore does not apply to the background culture of civil society where various associations, religious organizations and media institutions are exempted from any duty to engage in a discussion pursuant to public reason.[317]

Rawls does not believe that public reason is restrictive and exclusionary. Acceptance of the constitutional regime implies necessary adjustment to the comprehensive doctrine itself if necessary. Therefore at the level of public justification this apparent paradox is already resolved.[318] Acceptance of constitutional regime means that comprehensive doctrine sets aside all claims to realize its vision of good life politically. The acceptance of constitutional regime means that religion gives up a hope "of changing the constitution so as to establish … [its]

[314] *Ibid*, p.2
[315] *Ibid*
[316] Rawls, *Supra* note 230, p. 217
[317] Rawls, *Supra* note 297, p. 2
[318] Rawls, *Supra* note 230, p. 218

hegemony, or of qualifying … obligations so as to ensure its influence and success."[319] Religion have sufficient reasons to accept constitutional regime is that except such regime "there is no other way fairly to ensure the liberty of its adherents consistent with the equal liberties of other reasonable free and equal citizens." [320]

Later as a response to criticism Rawls admitted that religious and other comprehensive doctrines may be introduced into public political discussion if they are supported by sufficient public reasons.[321] According to Rawls this proviso should be met in good faith.[322] If adequate public reasons are forwarded any appeal to comprehensive doctrine does not change the public nature of justification provided. In this respect it is worth to underline that Rawls always admitted that political conception of justice may well be supported by the equivalent values in comprehensive doctrines. Rawls referred to Abolitionist and Civil Rights movements in USA, whose claims though widely rested on comprehensive, including religious values nevertheless had sufficient public reasons for justification.[323]

The content of the public reason is determined by broadly liberal political conceptions of justice[324] constructed by the means of practical reason.[325] The form of reasoning used in justification is restricted to the "general beliefs and forms of reasoning found in common sense and the methods and conclusions of science when they are not controversial."[326]

Therefore, practical rationality filters any comprehensive value in the process of construction of political conceptions of justice. At the same time liberal values of freedom and equality

[319] Rawls, Supra note 297, p .8
[320] *Ibid*
[321] *Ibid*
[322] *Ibid*
[323] *Ibid*, p.9
[324] Rawls, *Supra* note 230, p. 223, Political conceptions of justice define the basic institutional structure of the society, basic rights and liberties and matters of basic justice. - Rawls, *Supra* note 230, p. 11-12
[325] *Ibid*, p. 90
[326] *Ibid*, p. 224

determine the outcome of the political constructivism in Rawlsian terms.[327] Therefore at the end there mandatorily emerges constitutional regime in the form of deliberative democracy affirming certain fundamental rights and liberties. Rawls contends that public reason is not dominated by one political conception of justice[328] but at the same time it is clear that any value which can not be justified in light of liberty and equality is blocked to be constructed as a political conception of justice. Rationality guided by liberal values of freedom and equality prevents any political conception which does not provide for the reciprocal political relationship. Public reason ensures that religious truth is effectively kept out of political domain. It prevents religious establishment and institutional links with any religious organizations, and reflection of religious values in legislation; legitimate law is reasonable law[329].

Liberal political philosophers who in comparison with Rawls assert moral superiority of liberal democracy[330] have even stricter conceptions of public reason. Robert Audi develops the ethics of democratic citizenship which requires the adhesion to secular rationale and secular motivation principles. Audi intends to block even publicly justified propositions if they are religiously motivated.[331] Rawls distinguishes secular reason from public reason; as public reason also filters secular comprehensive views.[332] But Audi's secular motivation principle is more intrusive as the restraint goes deeper to the cognitive level.

[327] "The criterion of reciprocity requires that when those terms are proposed as the most reasonable terms of fair cooperation, those proposing them must also think it at least reasonable for others to accept them, as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position." – Rawls, *Supra* note 297, p. 2; therefore reasonable for Rawls is what may be acceptable by fellow citizen as free and equal. *See also*, Rawls' distinction between reasonable and rational. Rawls, *Supra* note 230, p. 48

[328] Supra note 297, p. 4

[329] Rawls, *Supra* note 297, p. 3

[330] *See*, generally, Robert Audi, *Moral Foundations of Liberal Democracy, Secular Reasons, and Liberal Neutrality towards the Good.* 19 Notre Dame J.L. Ethics and Pub. Pol'y 197 (2005)

[331] Audi, *Supra* note 303, p. 277 – 286

[332] Rawls, *Supra* note 295, p.5

3.3.7. Habermas's Conception of Public Reason

Rawls position became subject of consistent attacks.[333] Robert Audi's secular reason was exposed even more intense criticism.[334]

The objection goes to the very heart of the self understanding of modernity and contends that faith can not be dissociated from knowledge. That epistemological split is artificial and religious citizens can not undertake the cognitive burden to translate their religiously motivated positions into the terms of practical rationality. Other critics argue for the contributions religious arguments are capable of making in public deliberation often resting their conclusions on empirical evidences. [335]

As a first step Habermas undertakes the defense of the normative foundations of the constitutional state. He acknowledges that self understanding of the modern constitutional state developed in a contractualsit tradition followed to the loss of divine legitimation.[336] Common human reason as a basis of justification of political power warranted institutional separation of church and state.[337] Equal religious liberty and state neutrality in religious matters on the other hand was the only proper answer to religious pluralism. Habermas believes that institutional separation is essential for the preservation of religious liberty and is normatively justified.[338] Habermas also affirms that democratic legitimacy requires that the coercive power of the state be

[333] See, Habermas, *Supra* note 1, p. 6
[334] *See*, *See*, among Audi's early critics, objecting his principle of secular motivation, Paul J. Weithman, *The Separation of Church and State: Some Questions for Professor Audi*, Philosophy and Public Affairs, Vol. 20, No. 1 (1991); *See also*, Habermas, *Supra* note 1, p.8 criticizing Audi's secular motivation principle.

[335] Habermas, *Ibid*
[336] *Ibid*, p. 4
[337] *Ibid*
[338] *Ibid*

it in the form of law, judicial decision, or decree bee justified by publicly available reasons equally accessible for all citizens, religious or secular.[339]

But Habermas challenges the applicability of public reason requirement to ordinary citizen when the latter is engaged in public policy advocacy or votes in the elections of public officers.[340]

Habermas' position reflects his philosophical position of post metaphysical thought discussed above. As naturalist and scientifically restricted rationality is no longer defensible and the place of religion in the genealogy of reason is acknowledged constitutional state can not place unequal epistemic burdens to it religious citizens. For Habermas the burden is also unequal in mental and psychological terms.[341] Nevertheless this does not deny the institutional separation and neutrality of the exercise of political authority. Beyond informal public spheres, in courts, parliaments and executive offices only public and equally accessible reasons count. The translation proviso of Rawls is still applicable but translation shall not happen only in the minds of religious citizens but in open deliberations where secular citizens also participate and cooperate with religious citizens in achieving translation. This involves self reflective attitude from a participant perspective of the democratic deliberation.[342]

Religious citizens shall develop necessary self reflective epistemic attitudes to reconsider their religious faith in light of secular experience. The wave of modernization of religious consciousness is the sign of actual trend towards this direction.[343] At the same time secular citizens shall accept the possible semantic and cognitive potential of religion and try to overcome the limitations of secularist thought by developing attitudes to grasp possible truth content from a

[339] *Ibid*, p.5
[340] *Ibid*, p. 8
[341] *Ibid*, p.9
[342] *Ibid*, p. p.10-12
[343] *Ibid*, p. 13-14

religious contribution made in open public deliberation.[344] Secular citizens shall view religions not as archaic remnants of pre modernism but acknowledge their possible existential significance.[345]

Behind this is the overcome of the practical rationality by post metaphysical thought and its replacement by communicative rationality. Communicative rationality supports Habermas' proceduralist theory of democracy.[346] Proceduralist understanding of democracy focus not only on the decision oriented processes regulated by democratic procedures but also informal public sphere comprising of media, associations and other institutions where in a robust discussion opinion formation takes place. Deliberative politics which is Habermas' prceduralist understanding of democracy "proceeds along two tracks that are at the different levels of opinion and will formation."[347] Informal public sphere in comparison with liberal understanding does not bracket out controversial ethical issues. The opinions around the divisive issues are formed in robust and unregulated discussion and only after this filter can enter the political public sphere of will formation.[348]

Admission of religious arguments in informal public sphere thus requires the complementary learning processes where both secular and religious citizens undertake self reflective attitude therefore cognitive burdens are symmetrically distributed. At the same time, Habermas warns that democracy is "epistemically discerning form of government" and is truth sensitive. Post truth democracy is now longer a democracy.[349]

[344] *Ibid*, p. 15
[345] *Ibid*
[346] Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996) p. 1-6
[347] *Ibid*, p.314
[348] *Ibid*, p. 309
[349] Habermas, *Supra* note, 1, p. 18

Finally, he makes the distinction between normative justification of constitutional democracy and epistemological dimension of the modernity. Habermas believes both liberal and republican foundations of constitutional state can be successfully defended normatively, but normative principles of democratic political theory are unable to resolve the epistemological uncertainty of modernity regarding the relation between faith and knowledge. Only the self reflective deliberation in public sphere in proceduralist democracy is capable of ever embarking to its possible solution.[350]

3.4. The Principle of Secularism

As a conclusion of all what was said above; the study of human condition tells us that there may exist substantive and overarching truth but warns us against its realization in society. Political Philosophy makes this as a normative principle. Philosophically repudiated revelation gives way to the rational justification of political power. The sovereignty emanates from the people not from the god. The reciprocal political relationship between free and equal citizens and between the citizens and political authority produces the democratic legitimacy. Democratic legitimacy requires that the addresses of the law identify themselves as the authors of this law and deliberation that generates rational outcomes. These fundamental principles also provide sufficient normative justification for the ethics of democratic citizenship that requires from citizens to reasonably justify their proposals concerning the coercive use of state power in the form of legitimate law, in a way that all other fellow citizens may reasonably accept. Political

[350] *Ibid*, p. 19-20

theory provides strong normative justification for Secularism which at the same time has normative status in Constitutionalism.[351]

It is a fact that modernity's project of secularization of politics is still pending. Secularization of society is also in an uncertain state, in light of the recent revival of strong religions.[352] Generally, the very philosophical and epistemological foundations of modernity is widely contested and shattered. Does this imply that principle of secularism also lost its normative justification? The answer of theory of Constitutionalism is no. The principles demanding the desacralization of state power and keeping substantive truth of religion out of politics are independently justified on normative level. It is true that repudiation of revelation by enlightenment philosophy greatly affected the development of constitutional state based on secular principles, but it was not the predominant reason that provided normative justification for the secular constitutional state. The epistemological and philosophical critique of reason can not alone affect the normative status it has in the self understanding of constitutional state.[353]

As an additional argument concerning the non decisiveness of epistemological challenge to the public reason; Whatever form of reason is employed be it scientifically limited or broader, in constitutional setting its exercise is guided by the fundamental and overriding values of freedom and equality. The requirement, that coercive power of the state shall be justified by the reasons accessible for all as free and equal works on the level of justification. It may have the preference towards practical reason but the assumption that religious arguments are inaccessible for all does

[351] Sajo, *Supra* note 3, p. 12
[352] *Ibid*, p. 4 and 12
[353] The ultimate step that can be taken by normative political or constitutional theory is to adopt Habermas's position implying that it does not pass any judgment on epistemological controversy in light of its normative principles. This may require the changes in epistemic dimension of democratic deliberation. But it does not affect fundamental secular principles that the existence of state coercive power and its exercise by the means of legitimate law shall be justified in such a manner that all constituents of the state and the addresses of the law shall reasonably accept as free and equal citizens.

not necessarily mean that they are cognitively incomprehensible; rather they are reasonably unacceptable in light of fundamental values of freedom and equality. In this respect, Rawls cites an example that Servetus may perfectly understood why Calvin wanted to burn him at the stake but the reasons of Calvin would not be acceptable for him as free and equal citizen.[354]

The epistemological conditions are important but not decisive in the normative justification of secular constitutional state. The correct understanding of the translation requirement of Rawls sheds to this more light. The translation proviso does not require from religious citizens to formulate their arguments in strict terms of practical or scientifically limited rationality. What counts as reasonable is that they are justified in light of political conceptions of justice which are broadly liberal and reflect liberal values of freedom and equality.

The abolitionist movement example is the best illustration of this. Abolitionists contented that slavery was contrary to God given freedom and equality but as far as they were perfectly justified under fundamental liberal values no necessary "translation" in the direct sense was necessary.[355]

On the same assumptions Habermas goes even further and admits that religious arguments may count if in complementary learning processes of democratic deliberation they will be reconciled with fundamental liberal values of freedom and equality. According to Habermas self reflection in this process is mutual and cognitive burdens are symmetrically distributed. However, it may be true regarding cognitive burdens, self reflection itself is not a symmetrical process. Learning from religion takes place as far as it does not compromise liberty and equality and its political realization in the form deliberative democracy. On the other hand religious self reflection is under the pressure of the "modernization of religious consciousness". At a minimum level this

[354] Rawls, *Supra* note 297, p. 3
[355] Rawls, *Supra* note 230, p. 249 -251

means that religion accepts constitutional state and abandons all hopes for its political realization and it has pragmatic reasons for it, as this is the only way to ensure its own liberty and secure its existence.

Constitutional State though part of the modernity does not depend in its normative justification wholly on epistemic position of modernity. Whether modernity as a philosophical tradition based on certain epistemic principles is still sustainable is different question which in itself is contested. On the other hand it is clear that modernity does not have the same vigor and is surrounded by the fog of uncertainties as a result of robust critique. Nevertheless philosophical or epistemological uncertainty in itself is not sufficient to denounce the normative principles of constitutional state only because they rest also on modernity's premises.

Constitutional State and its secular self understanding are normatively defensible not only because one generally favors modernity[356] but also because their normative core has not been successfully rejected. The alternative is clear, disregard of secularism and allowing religious arguments to justify political power or the law promises the religious tyranny or anarchy of warring sectarian factions.[357]

Constitutionalism - the theory of constitutional state presupposes free individual having moral powers of the sense of justice and reason.[358] Therefore, religious identity can not define political relation in constitutional state.[359] Constitutional principle of secularism which meant to disentangle religion and politics bans religious identities in political arena. Political relation defined as the one between adherers of certain religion and between them and political power is

[356] Sajo, *Supra* note 3, p. 14
[357] *Ibid*, p.10- 11; Habermas, *Supra* note 1, p.11-12
[358] Sajo, *Supra* note 3, p. 14
[359] *Ibid*, p. 11

fundamentally incompatible with the political relation of free and equal citizens towards each other and to political power exercised by them collectively.

Modernity is fading under multifarious attacks and its old enemy strong religious consciousness, supposed to be disarmed under the pressure of secularization and privatization of the religion, is still alive. It is not only alive but has never disappeared in certain areas of world. Religious consciousness is vigorously revived in Religious identities which in the presence of corporate structures of religions create collectivist identities thus creating double threat to constitutional state based on the identity of free and equal individual.[360] Religious identities not only attack their old enemy in wider societal level but also try to penetrate the most powerful child of modernity – secular constitutional state and change from within by redefining its fundamental principles.

This may be legitimate but no longer in accordance with constitutionalism.[361] Self understanding of the constitutional state is clearly secular and it can not be modified without completely abandoning it.

[360] *Ibid*, p.16
[361] *Ibid*, p.17

Concluding Remarks

Normative principle of Secularism attacks the very heart of the problem of "war for souls". It requires the removal of religious identity as a basis of political relation. Secularism disestablishes all dominant Churches the privileged status of which are far from symbolic. Foundational principle of Secularism - the requirement of public reason and reasonable law, also attacks discriminatory legislation as their terms can not be accepted by all citizens as free and equal members of the political community.

The consequences of the "war for souls" clearly indicate where the disregard of the secular foundations of constitutional state can lead. However the analysis of the first and second chapters clearly demonstrates how vulnerable the normative principles may become as they encounter the social reality. We have seen that politically dominant religious identity and the church representing it can endure even strictest constitutional provision of separation of church and state. We have also seen that justifications which often perfectly fit the idea of public reason cover reasonably repugnant purposes and even such far reaching principle as Robert Audi's secular motivation can not effectively prevent this.

The tension between social reality and normative validity is a huge problem and it could not be reconciled here in this particular narrow case and limited project. But the findings above can still contribute to the ongoing discourse, offering a variety of perspectives. Taking into account that secularism though normatively well justified is factually vulnerable and requires redefinition of its actual content by better addressing social reality,[362] the findings of this project may possibly provide some guidance.

[362] Sajo, *Supra* note 3 , p. 12

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