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Between "geo-law" and "theo-law"
Considerations on religions as transnational centres of identity

Silvio Ferrari[1]

1. Introduction

In an acute and captivating essay[2] Natalino Irti writes that "law is now g*eo-law*. On one side we find the provinces of the Earth, the more or less vast homelands, keepers of differences, unmistakable for their languages, customs and traditions. Here rules the power of borders, which limit and circumscribe, include and exclude, separate the inside from the outside. Anyone who is inside acquires identity and is a member of the *civitas*; anyone outside is a foreigner. Borders determine places, and it is in places that our singularity is built and our sense of belonging is exercised (p. 9)." On the other side, as Irti writes, we find "the global dimension of techno-economics", characterised by "spatial phenomena that do not know any border or measure, that do not live in any of the Earth's provinces, and that constitute an abstract and artificial *non-place*" where "specific languages are reduced to the English jargon of techno-economics; the variety of currencies tends contract; people adopt the positions typical of the market (entrepreneurs, buyers, sellers) […]. Thus, together with the identity of places, we have lost the identity of people, who are considered mere *servants of the market*" (p. 10).
The most evident characteristic of this planetary law is that it is free of any territorial bond. In a previous essay of his[3] Irti had already put forward some interesting considerations about the relationship between law and space, contrasting Kelsen's conception with that of Schmitt. If in Schmitt's opinion territory is the foundation of law, for Kelsen the spatial dimension only defines its field of application as the foundation of law is not a territory but a *Grundnorm* (Basic Norm). Contemporary law is gradually breaking free of its primeval bond with a territory (i.e. with a people, a history, an identity): it is only by this process that law can aspire to deal effectively with globalization that by definition transcends any limit of space.
In Irti's analysis this deterritorialization of the foundation of law goes hand in hand with its reduction to a formal conception. A formal conception of law frees the norm from its slavery to content (i.e. to the original *nomos* of land) and enables it to be truly applied universally: from this perspective the validity of law "depends only upon the will, which has gone through the procedures and assumed established forms.[…]. Formal values, which are totally independent from the content, i.e. from the matters examined and dealt with in the procedures, guarantee *per se* the validity of the law." Against this formalistic reduction – in which the jurist becomes a technician "whose knowledge becomes know-how", forced to "convert his language, distilled from the wisdom of centuries, into a bureaucratic, economic or technical vocabulary"[4] - it is useless to appeal to principles and values that justify the fundamental rights of the human person: "either such principles and values *transcend* the will of men, thus becoming vulnerable to anti-metaphysical criticism and bound to disappear along with the other Gods; or they are born from the will of men as it has developed in the course of history, thus *being part of the conflict* with other values and principles, one side against the other" (p. 13).
There is little doubt that such a deterritorialized and formalistic law, more concerned with the rules of economy than with the reasons of politics, inclined to speak the language of interests and to

[1] Professor of Ecclesiastic Law and Canon Law, University of Milano.
[2] Nichilismo giuridico, Roma-Bari, Laterza, 2004.
[3] Norma e luoghi. Problemi di geo-diritto, Roma-Bari, Laterza, 2001.
[4] Guido Alpa, Sul nichilismo giuridico, in Materiali per una storia della cultura giuridica, n. 2, dicembre 2005, p. 524.

define itself through the technical terms of an "expert" system, has expanded enormously in recent decades, as Maria Rosaria Ferrarese[5] has thoroughly shown in an essay published shortly before Irti's. It is therefore understandable that this kind of law is seen as the law of our future.
But is this really so? Analysis of contemporary reality shows that there are other processes underway, other trends that are taking shape and that are gaining sufficient strength to be seen as possible alternatives to the dominant system. From my standpoint as a researcher of the relationship between law and religion it is easy to see a line of force running through contemporary society which - to stay with Irti's choice of words - I shall call theo-law, theological law, with a religious foundation. But to explain what I mean by this expression we need to take a step back and consider the twofold process of reduction that religions (and their laws) have undergone since the second half of the 19th century.

2. Religions and nations

The historical period from the second half of the 19th century up to the end of World War I is currently called the age of nationalisms. The idea of nation encompasses the cultural and political identity of a people and the institution expressing this identity, the State, finds its legitimacy in relation to a nation: the State, as Pasquale Stanislao Mancini wrote, is the legal system of the nation.
There are obviously some exceptions to the rule just as there are some important differences: the problems cannot be expressed in the same terms in the case of old Nation States like France or Spain and in newer ones such as Italy and Germany. There is, however, a common element: the process of construction or consolidation of national identity involves the devaluation of all particular identities. Local cultures, languages and markets decline and their place is more or less rapidly taken by their national equivalents. The Nation State lays claim to the monopoly of patriotism and it is not willing to share it with other subjects: the religion of the Nation – as we can easily see during the First World War – is the only one capable of legitimately demanding the sacrifice from its believers: the citizens.
Religions and religious communities suffer the impact of this process as they represent, at least potentially, alternative centres of identity and of patriotism that must be brought back under the control of the national State. This operation can be carried out differently depending on the specific traits of each religion. Some religions are in fact easily absorbed within the national dimension. The clearest example of this is the case of Christian Orthodox Churches: they lack a supranational centre of government (the Patriarch of Constantinople's authority is little more than nominal) and actual power lies in autocephalous Churches which often share borders with the States in which they live; in various cases, moreover (see the case of the Balkans under Ottoman domination), the different Orthodox Churches have represented the centre of national unity that has allowed populations under foreign political and military occupation to preserve their own identity. These historical events and these theological and juridical characteristics allow the Church to identify itself with a nation and with the State that is its expression. The typically Orthodox notions of a symphony of Church and State and above all of canonical territory express these dynamics very well: the territory over which the State exercises its sovereignty actually corresponds to the territory over which the Church asserts its monopoly over all other religions. It is obvious that this community of interests does not exclude the possibility of – even major – clashes between Church and State. Nonetheless, it provides a context of converging interests that helps to settle and solve conflicts.
Religions that have a stronger supranational dimension – in particular Roman Catholicism – are confronted with a more difficult situation. In the 19th century the Church of Rome was still nostalgic for a political model based on the relationship between two supranational authorities, the Pope's

[5] Le istituzioni della globalizzazione. Diritto e diritti nella società transnazionale, Bologna, Mulino, 2000, from which I have taken some of the definitions of contemporary law used in the previous lines.

and the Emperor's: this model started to crumble at the end of the Middle Ages with the emergence of Nation States which claimed the right to control the Church's organization within their territory, including the right to appoint bishops. Right from the start the formation of national States (along with the possibility of establishing National Churches) was perceived by the Holy See as a threat to the Church's unity and to the Pope's sovereignty.
This historical background explains the suspicion with which some European States still viewed their Catholic citizens in the 19th century, calling into question their patriotism and their loyalty to the national cause: English Catholics were called "Papists" and French Catholics were known as "*Ultramontain*" as they were accused of looking beyond the Alps and recognizing a foreign subject (the Pope) as having supreme authority over them.
In the first decades of the 20th century this suspicion slowly faded. During the First World War the Church of Rome remained strictly neutral and avoided supporting any of the sides involved in the conflict. In the years immediately following the War it ceded part of its power to national Episcopates (strengthening the role of national Bishops' Conferences) and encouraged the establishment of Catholic political parties through which believers could take part in the political life of their national States. But the conflict between national identity and religious identity, which has luckily hardly ever degenerated into a war, did not end in a draw: it is the former that prevails and that dictates the conditions of the tacit agreement between Church and State. In many European countries the decline of State confessionalism means religion has stopped being considered the symbol of national identity that it had been, at least formally, up until the liberal revolutions of the 19th century: religions (plural) are now particular collective identities that are inscribed within a firmament dominated by the idea of Nation - which no longer needs religious support to affirm its supremacy over its citizens' lives. Even where State confessionalism survives, it has been progressively reduced to an empty formula (as in northern-European countries) or to an indicator of an important – albeit partial and not universally valid - component of national identity.

3. Religions, ideologies and human rights

The end of World War I opened up new horizons. Nations, the political and cultural subjects that had prevailed in the second half of the 19th century, had to face a new antagonist: great ideological and political mass movements like Communism or Fascism. These had a supranational programme and message and they were capable of arousing a kind of solidarity and patriotism that crossed State borders. Nation States, which had won their own battle against sub-national centres of collective identity, now had to tackle a new and even more dangerous supranational subject challenging the national identity of their citizens.
The response to this new challenge cannot be sought only at the national level: the confrontation had to be dealt with on a higher plane. A solution took shape after World War II and this was the translation into law of the discourse of universal human rights. The universal declarations and conventions on human rights were not only a reaction to the horrors of Nazism and Fascism, they were also an answer to Communism which was the only universal ideology to survive the Second World War. These declarations provided an equally global perspective and they aspired to become the subject of a new patriotism aimed at defending the "free world": the latter – characterized by political freedom, press freedom, religious freedom and so on – was constructed as a supranational alternative to the Communist world where these freedoms were largely absent.
Religions are deeply involved in this change of perspective. They cannot compete with fundamental human rights on the grounds of universality: even the great supranational religions – Islam, Christianity and Buddhism – are not as universal as human rights claim to be. In a field defined by rights that are applied everywhere and to everyone, religions have to settle for a particular and more circumscribed position. This clearly emerges in the legal formulation of human rights: when article 2 of the 1948 Universal Declaration states that the rights contained in the Declaration regard everybody with no distinction of race, colour, sex, language, religion and so on, it maintains that universal rights have to be respected independently from the particular characteristics - among which religion - of the individual. It is sufficient to consider the right to

religious freedom to realize that not only States but also religions have to take this new legal universality into account. International conventions protect individuals against violations of religious freedom perpetrated by both States and religious communities: if a religious group prevents its believers from changing religion, that group becomes problematic from the point of view of respect of human rights.
Religious and national identities, which were on opposing sides some decades earlier, now have to deal with fundamental human rights which limit both the sovereignty of nations and - albeit to a lesser extent – the autonomy of religions. The field the latter operate in is no longer defined only by the constitutional law of the States in which they are situated but also by international law which - through human rights - tends to assert the primacy of individual conscience over the rights of religious communities.

4. Religions and globalization

The story does not end here. The fall of Communism in 1989 removed the last obstacle to globalization: the new world that has taken shape in the last twenty years is ruled by this global dimension which concerns the economy, technology, the media, the labour market and so on. Its main feature is deterritorialization - the absence of borders and countries. Also law has to be conceived in these terms because if it is to be globally applicable it cannot bear the hallmark of any particular country or legal tradition. As Irti has pointed out, Kelsen and his *Pure Theory of Law* have become the symbol of law's liberation from territory. The triumph of the universal and global dimension over the particular and local one now appears complete: neither Nation States nor religions seem to have the strength to resist this process.

But then something strange and unforeseen happened. The more globalization becomes dominant, the more there emerges the need for a local dimension, rooted somewhere specific and with its own traditions, its own language and its own religion; the more the territory loses its meaning, the more people feel nostalgic for a border that makes a distinction between those inside and those outside, because identity cannot be shaped without an “other” different from me that helps me understand who I am. Also jurists are affected by this change: there is a revival of interest in the works of Carl Schmitt and in particular his *Nomos of the Earth,* based on the reaffirmation of the bond between law and territory.
Once more, religions are profoundly influenced by this change of direction, dictated by the need for roots, traditions and a sense of belonging: religions are able to provide all of these rather efficiently, and they are even better at doing so than Nation States which often appear too small and undifferentiated to be credible antagonists of globalization.
The immediate result of this scenario has been a new version of the old alliance between nationalism and religion: what happened in the Balkans in the 1990s makes it clear that Communism had put the problems on hold but it had not solved them. A bloody process put the map of this part of Europe back to what it had been immediately after World War I, at the end of the Age of Nationalism. Not understanding in time that, once the Communist lid had been blown off, nationalities and religions would claim back their old rights was a naïve mistake: a shrewder interpretation of the history of this part of Europe would have shown that the danger of identifying religion with nation and culture was still very much alive and could become a tragic reality at any moment, which is in fact what happened.
At the same time a different and newer phenomenon was taking shape. In the age of globalization, identity has become progressively less linked with a territory and more connected with a sense of belonging. The argument is not only – and not even predominantly – between the spatial (or global) law of the market and the territorial (or local) law of identity: identity is now free from being tied to a territory and it looks more like a sense of belonging capable of crossing borders.
It is precisely the great religions and their laws that provide this possibility. On one hand they refer to someone or something capable of producing sense, of providing an interpretation of reality able to give value to human actions; on the other hand their rules – which prescribe pilgrimages, holidays, periods of fasting for the whole community – construct and articulate a sense of

belonging in everyday life that warms the heart and motivates people to act far more than the cold rules of the market underlying spatial law. But above all these theo-laws are set in a dimension capable of going beyond their own territorial origin without repudiating it. This is the element that has emerged most prominently over the last few years. Unlike States (and their legal systems), the great religions (and their legal systems) are able to cross borders without losing their power of attraction which derives from an identity and a sense of belonging that are situated historically and geographically. Jerusalem, Rome, Mecca and many other holy places and cities remain the points of reference of great religions but they do not limit their power of expansion.
European Islam is a good example of this sense of belonging. In the name of a theo-law, Islam represents an alternative as much to the laws of European States as to the spatial laws of the market: the *Ummah* – the Muslim community – goes beyond the borders of States and ethnic groups, basing itself on an identity founded on common belief and common religious practice. This is not an isolated case: similar dynamics are present in the Jewish community scattered around the world, or in the Evangelical movements of "Born Again" Christians that bring together the American *manager* living in New York and the Mexican *campesino* in Chiapas. In all of these cases the place of identity and of belonging cannot be determined geographically: it crosses territorial borders without disappearing into the spatial dimension of the global market. Irti's analysis does not apply very well to great religions. He maintains that, just as "places, dense with identity and history, are dissolved in the artificial space of commercial exchange, so individuals are reduced to "humanity". Humanity is needed to compensate and comfort the anonymous actors of the global market" (p. 11). The Muslim immigrant living in the Parisian *banlieue* does not look for comfort in humanity but in Islam and the same thing happens, with all due adaptations, for the poor people living in South-American *favelas*. It is not universal human rights these people are interested in, but something more concrete and immediate: the sense of brotherhood and the solidarity brought about by belief in the same God.
If we had to summarize these observations in a slogan (with all the risks of simplification and distortion this operation involves), we could say that religions are the new transnational nations. On one hand, they are firmly rooted in a shared tradition and common history, they provide a narrative their followers may identify with, they indicate a direction for each person's life and they generate solidarity among the members of the community, they fuel the belief in a common destiny and they are able to warm the hearts of their believers far more than the cold universality of human rights which risk being the true losers in this match: these are all features that traditionally defined nations. But religions are not paralysed within a territory, they can cross borders and above all they are capable of moving and of emigrating: it is hard for nations to do such things.

Religions and their theo-laws, so loaded with identity and sense of belonging, seem therefore to be the answer (or at least one of the most important answers) to the anonymous and depersonalizing spatial law produced by globalization. But this answer is not without problems, as it disrupts the design that emerges implicitly from Irti's analysis: that of a person who has lost his or her particular identity in the global-spatial dimension and who finds it again in the now innocuous and irrelevant local-territorial dimension made up of dialects and local street markets. The new identity-supplying role of religions, along with their capacity of moving and settling in new territories, generates a number of conflicts: between religions, which find it difficult to develop a convincing theory of the "other" and an effective ecumenical dialogue; with Nation States, worried about their own security, and with the macro-areas characterized by a common history and culture (one thinks of the tensions following the presence of Muslims in Europe and Protestants in Latin America); finally, with the dynamics underlying the process of globalization, founded on an efficiency-based rationalism that religions seldom share.

5. Religions, conflicts and secularity of the State

The three conflicts described above present different characteristics that would need a more refined analysis than the one we can provide in these pages. To understand their nature, however, it is useful to point out briefly the main feature of each one of them.

In the case of conflicts among religions, the most important element nowadays is the role they play in the formation of collective identities. In many parts of the world it was common for people of a different belief but of the same culture to live together. For example, this is the case of Christians and Muslims in Egypt, Syria and other countries of the Middle East: different in belief, they are part of the same Arab cultural world. This situation had not provoked any particularly serious problems until the "identitarian" components of religion got the upper hand, stressing the importance of belonging to the community, of the symbols that express this and of the borders delimiting it. This makes it difficult to reconcile the difference between belief and of cultural identity, because religion is perceived and experienced as something that necessarily produces cultural diversity. Religious diversity generates cultural extraneousness and makes it harder for different communities to live in the same territory. It gives rise to tensions that lead to phenomena such as ghettoization and marginalization or which directly result in open conflict.

Different is the case of the conflict between religions and national States. The intensification of the "identitarian" nature of religions would not bother States so much if it were not accompanied by a supranational element and by an increased capacity to cross borders, through immigration or through the media. It is not surprising that in recent years the issue of national security has so significantly entered the sphere of interest of scholars studying religions (and their laws). Up until a few years ago national security fell exclusively within the scope of political and military analysts: today those causing most concern are terrorists that act in the name of God and preachers inciting people to wage a Holy War.

Different again are the types of conflict that can arise between the laws of religions and the law produced by the agents of globalization which are able to act on their own (for instance, a large multinational corporation) or through the influence they exert on the activities of States. Indeed the law of globalization is inspired by rational and economic criteria that not always are shared by theo-laws, i.e. those laws that regulate the life of a person according to his or her belief and religious affiliation. Such laws, for example, can discourage women's access to work, prescribe fasts during daylight hours (thus reducing workers' productivity) or make workers abstain from any activity on a particular day of the week, which is hardly compatible with the full exploitation of factory production capacity.

At the centre of all these conflicts is a process of redefinition of the boundaries within which religions, national States and supranational or transnational bodies exert their power. The fact that religions are better able to cross borders than in the past does not mean that such borders have disappeared. Borders are essential for the construction of identity, both personal and collective, which means they cannot disappear, they can only be replaced. For each border that vanishes another one comes into being: if the line that separates the citizen from the foreigner appears less marked today, the one that divides the believer and the infidel becomes more and more definite. But what is more important is the danger that the two lines become blurred and overlap, taking Europe back to a sort of new wars of religion, in which the conflict is no longer between States but between communities existing within them, between contrasting religious and ethical orientations which are transversal to European society.

It is hard to believe that these new typologies of conflict are going to be short-lived phenomena, bound to disappear in the course of a few years: it is more likely that they will stay with us for a long time and so we have to find a way to govern them. It is pointless to seek this *governance* in the reaffirmation of the priority of the small national States as they do not have the necessary size to deal with the problem. The answer must be formulated at a higher level which, in our case, is the European one. But this level cannot be identified in terms of territory, as if the European Union were simply a larger State: it must be imagined in terms of culture, as something capable of organizing space around some guiding principles. In the case of Europe one of these leading concepts is the idea is the secular State.

The secular State is the only idea that has the power to bring together two fundamental components of Europe's cultural tradition: the Christian concept of “render unto Caesar the things which are Caesar’s, and unto God the things that are God’s” and the secular idea of “etsi Deus non daretur” (“as if there were no God”). The approach to the notion of secular State indicated by these two formulas is different but not incompatible: “etsi Deus non daretur” asserts the primacy of reason over belief in the field of public decisions; “render unto God” points out that there is a part that is of God's competence even in this field (and not only in that of private choices)[6].

No State – secular or not – has the magic wand to solve the conflicts outlined in the previous paragraph. But the secular State can define the grounds on which they have to take place and indicate some rules – in particular respect of the principles of reasonableness and democracy[7]- – which have to be accepted by all parties.

In this perspective, secularism should not be configured as a program but as a method, it is not the secularism that philosophers and political scientists talk about, it is first of all the secularism of jurists. This secularism does not aim to shape civil society according to its values, it has the more modest objective of regulating relationships between civil society and the State. This pragmatic conception of the secular State, as an instrument for regulating social pluralism, guarantees the mediation of law that prevents a single system of values (even that of the majority) from taking possession of public institutions.

I am not defending a chimerical neutrality of the State[8], as if in democracy it were possible for the State to avoid taking sides and choose according to the opinion of the majority of its citizens. But it is one thing to take sides knowing that every choice embodies the values by which it is inspired only in an imperfect and temporary way, it is another to put forward one's choice as the expression of the only possible truth. Without excluding the existence of an ultimate truth, the secular State declares it has no jurisdiction in this field. The State leaves the task of defining and proposing “ultimate” values to a number of subjects (among which religious communities) which act in a plural society and respect the principles of democracy. State legislation may be influenced by these values (in proportion to their reception into society), but not “confiscated” (in the sense that State institutions should not identify themselves with any of those systems of values).

A secular State that renounces the claim to dictate ultimate values and accepts its role – a modest but fundamental one – of allowing people to search for them and affirm them is the best way to contribute to creating room for dialogue and prevent the conflict from becoming more radical.

[6] Elsewhere I have tried to indicate the ways to put together these two different points of view, underlining that the secularity that we need today cannot be founded only on one of these: cf. Silvio Ferrari, Laicità dello Stato e pluralismo delle religioni, in Sociologia del diritto, n. 2, 2006, pp. 531; Id., Sul Trattato costituzionale europeo. Radici cristiane della laicità, in Il Regno-attualità, 15 settembre 2003, pp. 528-530.

[7] Cf. Silvio Ferrari, Laicità dello Stato cit., pp. 9-11.

[8] The impossibility of such neutrality is highlighted in John T.S. Madeley – Zsolt Enyedi (ed.), Church and State in Contemporary Europe. The Chimera of Neutrality, London, Frank Cass, , 2003.