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Affect and the theo-political economy of the right to freedom of 'thought, conscience and religion'

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Abstract

Building on the work of G. Agamben and others in this paper I suggest that from the point of view of bio-politics, all controversies, or even 'crises', stemming from the distinction between modern, secular or/and multicultural law and politics and traditional religion (and from disagreements over the 'correct' way to structure their relationship) are best seen as part of the paradigm of *oikonomia*, a legacy of Christian political theology; *affective* trust in this paradigm on the part of the Christian/post-Christian subject makes possible *an ethos that comprises dogmatism with flexibility*; this, rather than convictions about the value of universalist notions of either political or legal Right is the real key to appreciating a regime of qualified rights such as Art. 9 ECHR.

1. Introduction

The debate surrounding the accommodation of religious beliefs in secular democratic societies, such as, recently, refusals to issue marriage licenses to same-sex couples on religious conscience grounds, tends to overlook two aspects that are highlighted in this paper. First, pitting 'religious conscience' against duties under positive law is assumed to be a species of a universal 'conscience v law' problematic that the Greeks, say, depicted in plays such as *Antigone*. Yet this paper suggests caution in assuming the timeless universality of this problematic at least in any precise sense. The modern perspective on conscience is essentially that of a private *will*, as a representative faculty of the 'inner' or core self, which is pitted against the General Will that is expressed by the law in a representative democracy. As Hannah Arendt argued this perspective has its roots in Christian (especially Pauline) doctrine whereby conscience refers to experiences that humans have not only with themselves but also

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“inside themselves.”² In religious conscience claims, I submit, it is such ‘private’ *will* that is pitted against the General Will represented by the law. Arendt has made clear the difference of this perspective on conscience from the one suggested in classical discourses centring on the equivalent Greek word for the ‘inner voice’ – *συνείδησις*. Plato and Aristotle never explicitly mention it, while Socrates, as Hannah Arendt argued, spoke of it in terms of an inner “dialogue between me and myself”³ that is “not thematically concerned with the Self, but on the contrary, with the experiences and questions that this Self, [which understood as no more than] an appearance among appearances, feels are in need of examination.”⁴ The fact that Socrates did not refer to his conscience as valid reason to be excused from the law in his trial, is evidence that indeed the classical understanding of conscience was not one of representation of a self that privileges its own position. Moreover, the classical position was that conscience expresses the constant *interplay* of interiority and exteriority - not their perpetual ‘struggle’ as we find it in and since Paul.⁵ Turning from Athens to Jerusalem one can likewise acknowledge the lack of a developed and central concept of individual conscience in the Old Testament, as we see emerging later in Paul. Rather, the word ‘heart’, the nearest equivalent to ‘conscience’ in the ‘Old’ Testament Hebrew, denotes a relationship between God and a covenant community, rather than an autonomous self-awareness between a person and his or her world in the way it is the case for conscience in Christianity. For these reasons Christianity must be acknowledged as the original formative context of the (now globalised) use of the term ‘conscience’ to denote an idea of freedom that is tied to the notions of conflicting private and general “wills” as in the case of the freedom of ‘thought, conscience and religion’ per Art 9 ECHR.

On this basis, this paper emphasises the need for the debate to move beyond the desire to come up with a definitive hierarchy between moral/religious conscience and respect of the general law. To be sure, unlike the ancient Greeks, Christians and post-Christian moderns are not prepared to merely register, or also stage, for ‘cathartic’ reasons, the *tragic* clash between positive law and conscience in the sense of a will to obey a ‘higher’ law: rather, their glorious synthesis remains in the horizon. On the other

² Hannah Arendt, *Willing*, in *The Life of the Mind* (New York: Harcourt, Brace Jovanovich, 1978), p. 63.

³ Arendt, *Willing*, p. 64.

⁴ *Ibid.*

⁵ *Ibid.*

hand, however, there is in the history of Christianity a notable displacement of the Final Judgment -and of the violence of those who seek to precipitate it- in favour of an *economic/administrative rationality* of mutual accommodation of 'inner' conscience and common will. Today, sometime after the Reformation and secularisation, the prevalence of this rationality is clear in such late modern developments as the judicial test of proportionality, but also through flexible policies of religion-respecting secularism or pragmatic multi-culturalism in liberal polities. In this regard, this paper, following Giorgio Agamben, suggests that the most noteworthy, if usually downplayed, feature of the western legal system is its ancient dualism (originally between natural and positive law) *in its medieval acculturation*: namely as a *dualism structured around the metaphysical pivot* of a God-modelled *providential sovereign will*. Indeed, historically, Byzantine emperors, Catholic Popes, western European kings and, modernity's 'autonomous' individuals and 'self-determined' polities have, in effect, excelled less in championing the rule of either higher or positive law and more in perpetuating a (now globalised) *managerial mode of social existence* in which principles and rules are dealt with flexibly and exceptions can become the norm where it is expedient. Despite its conservatism this ultimately anomic- bio-political administrative paradigm of *oikonomia* -derived from 'anarchic' *divine providence*- has the advantage of staking social co-existence on an (originally Catholic) ethos that *comprises dogmatism with flexibility* and promotes prudence in economically, and always provisionally, synthesising law *and* critique, even law *and* revolution, passing one off for the other.

While Agamben criticises this ethos and even developed an 'emancipatory strategy' for subverting it my ambition here goes no further than providing a *realist* critique of contemporary laws and jurisprudence relating to 'religious-conscientious' claims from the perspective of said ethos in the western *and* westernised world. Overall, I first argue, controversies stemming from the distinction between modern, secular or/and multicultural law and politics and 'traditional religion' (and from disagreements over the 'correct' way to structure their relationship) must be seen as part of a self-perpetuated globalised western paradigm of *oikonomia*, namely of - ultimately anomic-bio-political administration of populations in a post-sovereign era in which neither transcendent nor immanent visions can prevail and the perennial 'tension' generated between them must, thus, be managed. We need to own up to the fact that in so far as

this paradigm is perpetuated neither a political or moral theory of justice nor a theory of 'pure law' will ever have a greater significance than the utility of their *economic* association which requires the exercise of discretion with a view to managing social conflicts. For all its faults, the great advantage of this bio-political mode of social co-existence that occidental Christianity made possible is its - first Catholic, then Protestant - ethos which comprises dogmatism with flexibility and economically and always provisionally synthesises such binaries as interiority/exteriority, transcendence/immanence, religion/the secular, law/critique, even law/revolution. In relation to the specific topic of this volume I argue, first, that we should declare openly that by invoking will and sovereignty -including in order to be allowed exceptions from universally applicable rules on the basis of the qualified right to thought, conscience and religion- *any individual or group is inserted into the oiko-nomik/managerial mode of social existence that has been long-term represented and originally invented by Christianity.* Thus, members of *any* 'religion' exercising a 'right' to freedom of 'thought, conscience and religion' are to be understood as availing themselves of conceptions of moral or juridical 'right', 'conscience' and of 'religion' that have always been key to the *Western-Christian* paradigm of governance in which the power of the 'will' of individual, of peoples and their sovereign state and its emanations is routinely exaggerated in comparison to the paradigm's truly unique gift to humanity: discreetly and increasingly putting management of differences above their resolution. Thus, to rely on Art. 9 is to invite the question of how best to achieve a good-enough-balance, say, between identitarian needs and ultimate loyalty to the state. Secondly, I argue, achieving such a balance is not to be taken for granted, as if it were a matter of definitive knowledge or will of legislators, judges, religious leaders, 'experts' and individuals. Nor can the discretion that comes with this task of management be fettered through appeals to majorities' 'constituent' power, such as, for example the 2009 Swiss referendum result banning the construction of new minarets. It is incumbent upon anyone availing the discourse of a legitimately qualified human right to 'thought, conscience and religion' to persuade, explicitly or not, of their position's *prudential* value in facilitating the *management* of various, traditional and hybrid, appeals to extra-legal duty. In this regard this paper reviews and echoes several critics of various recent legal and political decisions on religious freedom in Europe who diagnose several problems from the misunderstanding of all 'religions' as easily comparable to Christianity to outright

privileging of the latter. My endorsement, however, comes with important qualifications. Rather than submitting such decisions to some theory of justice or democracy I, first, argue that they constitute *bad management* of religious-conscience claims; secondly, I offer an explanation for this bad management that is less accusatory than those who speak of western chauvinism. To manage 'religions' one must first understand their hold on the human psyche and this requires us to leave behind the Enlightenment's bias against affect and the chimera that purely intellectual, or conceptual, sense-making, suffices for living together.

These arguments are made gradually in what follows. First the ground work is laid in section 2 where the thesis is presented that the most important feature of the western governmental paradigm is its administrative rather than legal or political logic. This is followed by exemplification in section 3, in the form of a critique of the universalism of concepts underlining freedom of 'thought, religion and conscience' in liberal, secular or multi-cultural, constitutional polities in relation to Art. 9 ECHR.⁶ A reading of related contemporary jurisprudence ultimately shows that while its first paragraph speaks of "everyone" its main beneficiaries cannot but be those who 'blindly' *trust* in what is presupposed in the second, qualifying, paragraph of the Article: the capacity of the sovereign and the courts to definitely declare what ought to count as 'religion' after taking into consideration a range of issues as presented to them not only and not predominantly by politicians and jurists, but by experts in various fields (e.g. security) and a media-tised 'public opinion.' To get more people to join in the chorus of acclamation of such decisions –especially among minorities living in Europe- I suggest, requires less emphasis on the rightness of laws and judgments and more on their practical, less 'glorious' merits. Conversely the critique of the manner in which religious differences are handled should go beyond the universalist point of view of either democratic pluralism or the rule of secular law; instead, it should be part of a critique of bio-politics enhanced by political theology and which takes seriously the possibility that

⁶"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

ideologies, fantasies, even shared values and consensuses can continue to have a hold on the subject even after what has been, and perhaps prematurely, hailed as their ‘deconstruction’.

2. Premises and arguments

2.1 Today, the dominant hypothesis about the origins of modern constitutionalism is no longer the one defended by C. H. McIlwain who, in his classic work *Constitutionalism: Ancient and Modern*, identified Plato’s *Laws* as the foundational work on constitutionalism.⁷ Instead, the prevailing hypothesis is provided by historians like Berman, Tierney and Oakley who argue that modern constitutionalism finds its roots in the so-called Papal Revolution of the 12th century, when the Pope decided the Church could give itself laws independently of the Emperor’s will and of imperial law.⁸ Moreover, the discovery of just how much late-medieval natural theologians have contributed to the emergence of the rule of law, modern democracy and even free market capitalism⁹ forces us to doubt the parthenogenesis of secular cosmopolitan and neo-cosmopolitan, liberal and neo-liberal world-views with their assumptions that universal models of democracy have gradually been perfected in the West. This change of perspective, requiring us to re-consider modern constitutionalism and human rights in light of their parochial western and specifically occidental Christian/Post-Christian history, coincides with a growing, diverse, literature on ‘political theology’¹⁰

⁷ Plato’s conception of the rule of law, according to McIlwain, was carried forward by Cicero, and in this neo-roman garb it arrived to modern republicanism, as would later be outlined by Pocock and Skinner and Pettit.

⁸ The idea, roughly speaking, is that by functionally distinguishing law from power, Canon law advances the first ideal of “rule of law”. Cf. H. J. Berman 1983 *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press); *Id.* 1993 *Faith and Order: The Reconciliation of Law and Religion* (Emory UP); *Id.* 1994 ‘Law and Logos’ *DePaul Law Review* Vol. 44 Issue 1 art. 4. *Id.* 2003 *Law and Revolution II: The Impact of the Protestant Reformation on the Western Legal Tradition* (Harvard University Press). B. Tierney 1982, 1092 *Religion, Law and the Growth of Constitutional Thought 1150–1650* (Cambridge University Press). Francis Oakley 2012 *The Mortgage of the Past: Reshaping the Ancient Political Inheritance (1050-1300)* (Yale University Press).

⁹ E.g. Giacomo Todeschini, *Il prezzo della salvezza. Lessici medievali del pensiero economico* (Rome: NIS, 1994).

¹⁰ The term was most in/famously popularized by Carl Schmitt but has been thankfully appropriated by a large and growing body of non-fascist literature; See: Carl Schmitt *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press, 2006); *Political Theology II. The Myth of the Closure of any Political Theology* (transl. M. Hoelzl and G. Ward) (Cambridge, UK: Polity Press, 2008); *Roman Catholicism and Political Form* (transl. G. L. Ulmen) (Westport, CT: Greenwood Press 1996); G. Agamben *Id.* 2011 *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government* (Stanford University Press); L.V Kaplan & C.L Cohen (eds.) *Theology and the Soul of the Liberal State* (N: Lexington

as well as 'post-secular' theory.¹¹ In the current climate this debate cannot be considered esoterically 'academic'. Cases like *S.A.S. v. France*, in which the ECtHR endorsed France's claim that banning the *burqa* is indeed necessary for "living together," force us to consider the possibility that, even today, the question of "*apprendre à vivre enfin*" posed by Derrida¹² may be answerable in different ways depending on the prevailing political theology. In my key example, Giorgio Agamben argues that in the western paradigm the imperatives of *oikonomia*, bio-politics, or population management, trumps both democracy and the rule of law but Christian and post-Christian/secular western legal and political imagination is ideologically blind to the actual impotence of law and politics (which are mystified as glorious by analogy to God).

Said Western (Greek-Roman-Christian) paradigm, I submit, comprises elements derived from Greek philosophical metaphysics (especially as filtered via Stoicism) and the Roman statist-judicial legacy especially after it merged with Christian *economic-*

Books, 2010); In particular for the militant-millennarian theology of capitalism see E. Mensch "St Augustine, Markets and the Liberal Polity" in pp. in *Theology and the Soul of the Liberal State* pp.121-160; H. de Vries & L.E Sullivan (eds.) *Political Theologies Theology and the Soul of the Liberal State – Public Religions in a Post-Secular World*. New York, Fordham University Press, 2006); J. Milbank *et al.* (eds) *Theology and the Political – The New Debate* (Durham & London: Duke University Press, 2005); P. Blond (ed.) *Post-Secular Philosophy – Between philosophy and Theology* (NY & London: Routledge. 1998); James R. Martel *Divine Violence – Walter Benjamin and the Eschatology of Sovereignty* (Routledge, 2012); Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, CA: Stanford University Press, 2003); Gil Anidjar, "Secularism," *Critical Inquiry* 33 (2006): 52–77. See also M. Diamantides 'Constitutional Theory and its Limits. Reflections on Comparative Political Theologies' *Law, Culture and the Humanities* 11 (1) 2015; 'On and Out of Revolution: Between Public Law and Religion' *Law, Culture and The Humanities* 10 (3) 2014; 'God's Political Power in Western and Eastern Christianity in Comparative Perspective', *Divus Thomas* November issue 2012.

¹¹ In one example of post-secular thinking, Michel Rosenfeld argues that the defence of constitutionalist values is better served once we admit that constitutionalism is not a culturally neutral discourse although it is the one that can ensure the best conditions for multicultural living in modernity. M. Rosenfeld, 2012 *Law, Justice, Democracy and the Clash of Cultures – A Pluralist Account* (Cambridge University Press). For another recent example, in relation to rights, Samuel Moyné asserts that the rise of human rights after World War II was prefigured and inspired by a defence of the dignity of the human person that first arose in Christian churches and religious thought in the years just prior to the outbreak of the war [*Christian Human Rights* (U. of Pennsylvania Press, 2015)]. In relation to politics, and in a much more sweeping argument, the central thesis of Simon Critchley's *The Faith of the Faithless: Experiments in Political Theology* (Verso 2014) is that modernity is driven by a religious drive not to see the religious dimension in politics ("secularism, which denies the truth of religion, is a religious myth" [111]). "Modernity" is nothing but "a series of metamorphoses of sacralization" (10). This means that any modern political form(ation) makes use of something sacral, of a belief in divine sovereignty – be it popular ("God the monarch becomes God the people" [55]) or anonymous (e.g., "the markets are not satisfied") – in its rituals (such as parliamentary elections), in the constitution (107), in the "magic" (85) of political representation (88)), etc. All this leads Critchley to claim that "in the realm of politics, law and religion there are *only* fictions." (91) "Is politics practicable without religion? ... I do not think so." (24).

¹² J. Derrida, J. Birnbaum *Apprendre a vivre enfin* (Paris : Editions Galilée 2005)

political theology (Trinitarianism), which, as Agamben argues,¹³ still over-determines our deficiently immanent thinking. In my view this composite paradigm involves: (i) thinking according to a series of binary distinctions inherited from classical philosophical metaphysics (e.g. body/mind, *zoe/bios*, private/public, emotion/reason, *dynamis/energeia*, *auctoritas/potestas*, autonomy/heteronomy, and, for our purposes, religion and the secular); *Ipsa facto*, as Agamben's series entitled *Homo Sacer* makes clear, we tend to disregard (or 'abandon') any 'form-of-life' that cannot be neatly placed on either side of these distinctions. (ii) Postulating a third element that *economizes* – i.e. encompasses without dissolving – such binary-relational encryptions of reality and stabilizes their 'tension.' The Stoics introduced for this purpose the ideas of *Logos* and *Pneuma* (Gr: Spirit), which were substituted in the medieval period by the Christian postulates of *God* and *Holy Spirit* to which, further, was added the new postulate of the *incarnated Son of God/Son of Man* and the idea that the world is organized as a huge *household* (Gr: *oikos*) originally 'owned' by God and later, with secularization, by 'humanity.' *Humanity*: understood as a family not in the genealogical sense – since for the Christians after Paul 'there is no Jew or Gentile' – but in a modified sense of the Greek *oikos* or *household*. Lacking a word for 'family' the Greeks spoke of *oikos* as encompassing family and property (incl. slaves and animals) of a master; Not only is the *oikos* different from the *polis* in that it is governed by only one master [or *archon*], as opposed to the *polis* which has several *archontes*,¹⁴ but also in that the omnipresent personality *in* the house is *not* the master (the *despotes*) who enjoys his threefold largely unlimited superiority as a father, husband and master (in the strict sense of the master/slave relationship) from afar, but his chief executive or 'vice-master': the *oikonomos*, or manager of the household, mostly chosen among the slaves with the explicit task of watching over the successful everyday coping with any business that come along, and usually more feared than the master himself, at least by the other slaves of the household. As G. Agamben shows, the notion in modern secular constitutional thinking that the sovereign 'reigns but does not govern' is a direct adaptation of the postulate that God/the Christian prince must be acclaimed as the glorious sovereign even if impotent/crucified. Thus, Agamben's genius is not merely that he has pointed out the particular geographic, cultural and religious *Western* origins

¹³ *The Kingdom and the Glory* op cit n. 5.

¹⁴ Ps.-Aristote, *Oikonomika*, Book I, first phrase, quoted in Agamben, *The Kingdom and the Glory*, n. 4.

of our deficiently secular, universalist legal and political imagination. More importantly, he has shown that since the Greek *polis-oikos* distinction has itself been imagined as part of a universal *oiko-nomia* neither democracy nor law actually play the decisive role attributed to them. In whose hands lies the task of administering the universal 'house' of humanity in our emerging post-sovereign world society of bi-politics? In the Western tradition the owner of the 'house' has been successively imagined as the male head of the family, the Roman God-Emperor, the Christian God and finally universal Man/the 'people;' Yet in all cases, Agamben shows, it is *not they* who actually govern even if they are said to 'reign.' Behind the façade of (legally or politically defined) sovereignty lies increasingly *anomic administration without government* in the hands, respectively, of a chosen slave in the Greek household (the *oikonomos*), of the bureaucracy of the Roman emperor, the *majordomo* of the anointed Christian King and, in modern times, of the increasingly differentiated professions (lawyers and politicians, economists and scientists etc.) and impersonal bureaucracies, interest groups, experts etc. who derive their legitimacy neither from democracy nor from law.¹⁵ If Agamben is right, diffuse biopolitical administration/management is *all there is* but God, first, and a series of pseudo-immanent *archons* in the wake of God's death (popular Will, categorical imperative, utility, class struggle) serve to hypostasize and agentify this managerial process with reference to One glorious sovereign; the numerous, daily, fragmented, mundane, day-to-day acts of administration of beings and things –even beings *as things*– are hence imagined to constitute a singular power and avail of a dignity greater than the sum total of their constituent fragments. In sum, ours are societies that are managed as a household, or *oikos*, according to administrative rationality, but which are misrepresented as a *polis* in which either legal or political rationalities ostensibly prevail, due to the prevalence of a still active *particular* political theology.

First impressions aside, this approach ought not surprise. Did not *oikonomia* exist in all but name in the modern legal realists' criticism of conceptual formalism (i.e. the claim that legal concepts and principles neither have a 'necessary' content nor are their relationships fixed within a coherent and integrated body of law)? And for what else but

¹⁵ For one contemporary example of the discussion of our advanced stage in replacing law and politics by management in all but name see for example: A. Somek 2010 'Administration Without Sovereignty' in Dobner and Loughlin eds. *The Twilight of Constitutionalism?* (Oxford: OUP) pp. 267-8.

a sense of *oikonomia* underpins the desire to strike a ‘balance’ between majoritarian democracy and counter-majoritarian courts, or utility and rights, which, per H.L.A Hart, forms the leitmotif of much contemporary analytical jurisprudence, say that of Rawls and Dworkin (Hart 1979)? In the field of modern public law theory is it not an accurate statement that “[T]he modern formation of all constitutionalist regimes is characterized –in various degrees according to country –by the fact that the government’s jurisdictional authority [to pursue *salus populi*] is recognized as absolute but its exercise is circumscribed in form”¹⁶ notably, in our times, through the application of the proportionality test and such principles of judicial self-limitation and the ‘margin of appreciation’? Building on Agamben’s insights in a recent book with A. Schütz¹⁷ we emphasised that, historically, the *simultaneous dedication* to the rule of law and the critique of ‘the law’ are the dual legacy of Christianity’s overcoming of Judaism which led it to embrace individualism; likewise, in politics, the postulation of sovereign will that is *equidistant* from such binaries as immanence and transcendence, natural and positive law, liberty and statism, revolution and law, rights and social justice etc., as the ‘necessary’ basis for organised society is, we claim, indisputably part of the legacy of western Christian, Trinitarian, *economic* political theology; this outlook specifically identifies *occidental Christianity* (Catholicism and Protestantism), including its latest, epigenetic, outcome: secularism. Moreover, we defend the, admittedly polemical, thesis that a sort of ‘foundational schizophrenia,’ regarding its universality or parochialism, has hitherto meant that all attempts of providing a Western-modern model for a convincingly non-imperial¹⁸ type of global civilisation so far have failed just as the many conceptual fruits of the modernity it has fostered, notably limited government and rights, have spread, or at least are known, everywhere. On the one hand the global spread of western values and institutions in the nineteenth and twentieth centuries has drastically limited the *diversity of ways to institute humankind* that historically obtained in and among different traditions¹⁹; on the other hand, however, the various crises of

¹⁶ Martin Loughlin 2003 *The Idea of Public Law* at X.

¹⁷ M. Diamantides & A. Schütz *Political Theology: Demystifying Universality’s Immaculate Conception* (Edinburgh University Press, 2016)

¹⁸For an example in the area of constitutionalism see: J. Tully 2007 “The Imperialism of Modern Constitutional Democracy” in M. Loughlin and N. Walker (eds.), 2007, *The Paradox of Constitutionalism* (Oxford University Press).

¹⁹ One way of showing this is related to the spread of western law; as Samera Esmeir shows, referring to nineteenth century colonial Egypt, the widespread presence of the ‘positive law v. natural law’ western debate took up all available space for discussion in the very name of ‘modernity’; this, thereby, both

the early twentieth-first century are being met with increased anxiety about 'civilizational clashes,' the 'return of religion' etc. In our book we argue that since by now *there is no viable* 'traditional,' moral or practical, alternative to western Christian/post-Christian, secular/post-secular modernity, the words 'clash', 'conflict' and 'war' can now only refer to *endo-civilisational* conflict or *civil war*²⁰. Part of our argument is that while the occidental, and by now globally familiar, *triadic* model of 'humanity' -centring on the specific ideas of the *political animal* (the *Zoon Politikon*, to recall Aristotle), the *juridical human* (the *Homo Juridicus*, to quote A. Supiot's title²¹) and the *economic human* (the *Homo Economicus*, to cite critics of A. Smith, J.S Mill, etc.)- is, historically and anthropologically speaking, *only one among many* ways of instituting humanity, it is by now a *de facto inescapable* framework for integration into the emerging world society; indeed, under the aegis of supporters of new cosmopolitanism, even international law, is departing from its horizontal, consent-based, Westphalian character and is being "constitutionalised" with certain 'universal' values being claimed as ensuring the hierarchical prevalence of international law just like domestic constitutional law.

2.2 In these circumstances, any individuals or groups that purport to abide, and inculcate in their children, a different, pre-modern, 'traditional,' identity are answerable

presupposes the violent de-humanisation of subjects of alternative, non-occidental, institutional models, and forecloses the evolution (or even the taking into account) of these models; yet, the 'positive law v. natural law' model *is* playing the role of a resilient and uninterrupted consensus worldwide and, thus, *is* structuring the ensuing *Juridical Humanity*, to quote Esmeir's title: *Juridical Humanity: A Colonial History*, Stanford (Stanford UP: 2012).

²⁰ Cf. Giorgio Agamben *Stasis: Civil War as a Political Paradigm* (Edinburgh University Press: 2015). It is thus that we make sense of such murderous incidents as the attack on 14/7/16 in Nice, by a disaffected Muslim Tunisian-French perpetrator who apparently embraced Islamism in-between work, alcohol drinking and gay cruising. Consider also those who fly out of their native Europe to fight in Syria on the side of Islamists who recruited them (using social media and while relying on aid from god knows how many different agents) in order to establish a sovereign "Islamic State' (ironically while also using the old Islamic slogan 'there is no sovereignty but in God') where only one school of Islamic law would be interpreted by a *hierarchy* (a dejected notion in classical Islamic history) and imposed territorially (not by personal status as in classical Islamic history); In what sense are these disaffected second generation Europeans indicating a '*return*' of a medieval 'Islamic theocracy' to the throne from which modernity ejected it other than the one it had in western medieval and humanist history where the Christian Prince -unlike the Muslim caliphs- was anointed and where, among all previous non-European states the Semitic ones were the worst (followed by some distance by the Eastern Roman Empire - the so-called 'Byzantium')? Cf. M. Diamantides 'Shari'a, faith and critical legal theory' in: Diamantides, Marinos and Gearey, Adam (eds.) *Islam, Law and Identity*. Abingdon, UK: Routledge, (2011) pp. 49-67 and 'Towards a Western-Islamic Conceptions of Legalism', in Barshack, Goodrich, Schutz (eds) *Law, Text, Terror* (London: Glasshouse Press, 2006) pp.95-118.

²¹ Alain Supiot, *Homo juridicus : Essai sur les fonctions anthropologiques du droit*, Paris (Seuil : 2005).

to the question just how much one *can* achieve this without either ending up as sort of *exotic curiosity* (living inside yet cut-off from the state e.g. as the members of the anti-Zionist *Naturei Karta* in Israel) or else committing *performative contradiction*’ either – for instance - by claiming an exception from liberal universally applicable laws *on the basis of a right* to freedom of conscience and religion; *or*, say, of choosing, having been radicalised on social media, to take a plane from Europe to Syria to be a pawn for various forces while fighting for an ‘*Islamic*’ State that is led by a Caliph that bears much more similitude to a divine-right type pre-modern European sovereign than a pre-modern Arab Caliph. Thus, this paper first argues that, the *very invocation of sovereignty, alongside the exercise of individual choice by right, appears as an efficient means of conversion of all religions not to Christianity but to the mode of social existence of religion that has been long-term represented and originally invented by Christianity.* Non-choice, or, for the individual, the fact of simply being born into a religious framework and existing within a given religious integrity – in other words the existence of religion in the form of an extended form of kinship – had, for long, provided the general framework of the existence of religions. If, according to Serge Margel’s insight, the Christian religion can be described as a ‘comparative religion’,²² that which distinguishes Christianity from other cults against which it has profiled itself right from its beginnings and from which it keeps distinguishing itself, is the very fact of its self-profiling, or self-distinguishing, through an intrinsically *choice-based* mode of relating to the Christian ‘message’. On this basis we think that, starting from the 17th and in an accelerated manner through to the 21st century, there has been a process of “Christianisation” – or perhaps “meta-Christianisation” – of world society by successfully subjecting the subject’s relationship to any religion whatsoever to a conversion process toward religiosity that is offer- and choice-based (till then the distinctive feature of Christianity). In this sense Christianity has historically taken possession of the religious potential of Westernised humankind not only nor primarily through actual conversions, but through ever more individuals and groups “embracing” choice-based religiosities. In light of this the question of religious conscience claims loses any reference to actual inter-religious, ‘inter-cultural’ or ‘inter-civilizational’ differences. Consequently, whenever we are confronted with conscience-based religious exceptions claims based on the ‘truth’ of one’s religion it is pertinent to recall Foucault’s

²² S. Margel 2005 *Superstition: L’anthropologie du religieux en terre de chrétienté*, Paris: Galilée). 63 ff.

point that that man has become *a confessing beast* (Fr.: “*une bête d’aveu*”) within the Western-cum-Christian cultures (“*en occident*” are his own words).²³ This beast, the individual that is shaped as a truth-saying, truth-arguing, truth-exalting being, is not part of divine creation: it is the product of a number of centuries of involvement in Western, secularizing/secularized Christianity; *what* forms the actual content of the truth to be confessed take is secondary to the attachment to the image of truth-exalting being. Hence, that “[W]ords are deeds” – Wittgenstein’s famous observation must be read in conjunction with Foucault’s insight about the unprecedented *value* Western Christian history has tagged to the fact of “saying it”, of “speaking it out.” We may call this the surplus value of speaking out. Foucault was not the first or the only one to have had an inkling of the difference-construing adventure that Western Christian self-shaping has initiated by *dignifying* the human animal as an outspoken animal, capable of hitherto unseen performances within the dimension of performativity. In this sense, whenever one exercises a right to defend a truth before a modern public arena, *one must also be prepared to be content with just the very action of doing so* which amounts to discharging a moral duty regardless of the outcome. In this regard trust in the value of modern processes of legislation and adjudication as independent of their actual outcomes and consequences is tantamount to the social trust generated in medieval Christian times by participation in doxological and acclamatory rituals.²⁴

The other side to our thesis in *Demystifying Universality’s Immaculate Conception*, is that conceptual, or purely intellectual, meaning is *not* the most fundamental in the institution of human subjects as it has been widely accepted since the Enlightenment; as far as the institution of the human subject is concerned, *affective* meaning - *iconomic* and *experiential* – takes precedence; ‘ideology’ finds its force in the affective side of the subject’s identification with particular iconic images in which specific metaphysical postulates are encoded, and in its ritualistic behaviour through which these postulates are performatively validated as if true social facts; thus, for one example, the western Christian/post-Christian subject *trusts blindly* in the message

²³ M. Foucault 1977 “Nietzsche, Genealogy, History” in *Language, Counter Memory Practice*. Edited by Donald Bouchard (Ithaca: Cornell University Press).

²⁴In *Opus Dei: An Archaeology of Duty* (a follow-up to *The Kingdom and the Glory* Giorgio Agamben investigates the roots of the *moral concept of duty* in the theory and practice of Christian liturgy: “[T]he liturgical mystery is not limited to representing the passion of Christ, but in representing it, it *realises its effects* so that one can say that the presence of Christ in the liturgy coincides with its effectiveness. But this implies...a transformation of ontology, in which substantiality and effectiveness will seem to be identified.” G. Agamben, tr. A. Kotsko *Opus Dei: San Archeology of Duty* (Stanford UP, 2013), p. 40.

encoded in the Christian *Cross*: glory and humiliation, victory and defeat, sovereignty and impotence exist in a never-ending, unverifiable and unquestioned dialectic 'relation.' Arguably, the *love* of this message still helps even the atheist but not nihilistic post-Christian western subject to deal with the disappointments that follow from both the unintended consequences of its actions and decisions as well as the 'necessary', 'pragmatic', compromises to the principles of rule of law and democratic sovereignty, giving it an 'advantage' over those for whom the cross commands no love (or even commands hatred, as for example, the symbol of crusades); consequently, only *that* subject is gifted/burdened with what we called, an "oikonomical" intelligence; this intelligence gave rise, in the 4th century religious history in the Greek-speaking New Rome, to the theologico-institutional edifice of the *Trinity* and the image of the world-as-*oikos* (Gr.: household); this led to the subsuming of political and juridical thinking to administrative/managerial rationality; hence, the aforementioned western triadic *conception* of man as *political, juridical* and *economic* animal is *imagined* as a relation in which the former two are mediated by the latter. Along with this came the Christian version of the *oikonomos* in Jesus - one who gloriously takes his duty of saving the household at heart to the point of giving his life- with the effect that every time political or juridical principles are mutually compromised there is no sense of loss of dignity. Here, lies a real difference between the 'west and the rest'; while, as mentioned, the conceptual framework for *thinking* the human as a political, juridical and economic/administrative animal is almost perfectly globalised by now, the *ideological trust* invested in the latter's capacity to structure the tension generated between the former two, is not or is less so. When, for example, a Syrian Muslim refugee seeks refuge in Europe on account of his intellectual knowledge that the people of this continent swear by their absolute allegiance to *universal* human rights (for 'there is no Jew or gentile', nor Christian or Muslim), but is turned away (e.g. forcibly sent back to a third country like Turkey with which EU leaders reached a deal that defies the Geneva Convention), it is unlikely that s/he will not feel anger at the perceived European 'hypocrisy.'

In view of the above, *this paper secondly argues that, as with all qualified human rights, the right to 'freedom of thought, conscience and religion,' or any other right that may be invoked as part of a claim to exception from universally applicable laws,*

*presupposes trust in its oiko-nomic deployment, no matter how close this comes to anomie, and that said trust is more readily had by those post-Christian subjects who are accustomed to glorifying/acclaiming as 'absolute' principles of legal or political Right despite their impotence before the exigencies imposed by the ad hoc logic of administering populations in a manner analogous to the way pre-modern Christian subjects offered doxologies to God/acclamations to the sovereign. That Christianity is distinguished for its contribution to the development of a paradigm in which the political animal and the *homo juridicus* are enveloped by the *homo economicus* is due to the fact that, as analysed by Agamben, economic, Trinitarian, Christian theology was from the outset not "a "story about God or about divinity"; rather, it is immediately *economy and providence*, in other words, an *activity of self-revelation and government, of self-revelation in the service of government*, and that means, in turn, of the *care for the world* as an *oikos*. The Christian deity articulates itself in a Trinity; it does so, however, not in a way that might be understood as a form of "theogony" or "mythology"; rather, what it offers is an *oikonomia*, and this not in the weak and negative – although in a sense perfectly "economic" – sense of dispensation or government by so-called "one-off", or exceptional cases, but also in the strong and economic sense of a "household" articulation and administration device, a way of making sense of what it is for a community to live under the divine command of a Trinitarian God, which includes a conception of life, a sustainability-oriented conception of life, and thereby the government of creatures. Divine freedom and providence support creaturely freedom precisely in founding and governing 'an immanent praxis of government.'"²⁵ In light of this Agamben proposes that in order to gain access, let alone to understand the structures and functioning of power, we must set aside the "pseudo-philosophical analyses of popular sovereignty, the rule of law, or the communicative procedures that regulate the formation of public opinion and political will..." turning instead to the analysis of an unbroken Roman-Christian tradition of doxology, to the hymns and acclamations that "seemed to have disappeared in modernity" but that, in reality, reaches its climax in what Debord calls the contemporary *society of the spectacle*²⁶ wherein, per Agamben, "power in its 'glorious' aspect becomes indiscernible from *oikonomia* and government" (*ibid.*). "To have completely integrated Glory with*

²⁵ Agamben, *The Kingdom and the Glory*, *op.cit.*, n. 5, p. 47, added emphasis.

²⁶ *The Kingdom and the Glory*, *op. cit.*

oikonomia in the *acclamative* form of consensus is...the specific task carried out by contemporary democracies and their *government by consent*, whose original paradigm is not written in Thucydides' Greek but in the dry Latin of medieval and baroque treaties on the divine government of the world" (*ibid*). In short, the claim in the centre of Agamben's message is that modern democracy – government by consent – pertains to a *tradition* in which we endlessly and thoughtlessly or performatively *glorify* the economic administration of the world. Administration by governments which promise optimal conditions for the advantageous reproduction of chances of some new type of activity – we might call it the exercise of life, instrumentalises persons and things and is deeply indifferent to our own *uselessness* and 'inoperativity' as living things. However, this administration, these governments, tend to abandon us, as typically as unavoidably, to political irrelevance and a growing share of us, to unemployment and irrelevance as well. This acclamative bio-political tradition – where God, or sovereign Will, are glorified regardless of their truth or falsity – was never really in jeopardy by such key modern constitutionalist ideas as legislative sovereignty, natural right and the separation of powers, all of which rather reify the tradition by presupposing a 'unitary yet divided' political subject along the lines of the Trinitarian God. First: God, or Pope-Emperor; then, under the sign of secular nature, Leviathan, or the people (people-nation). Nor is, arguably, this tradition notably inflected in a further step, and by a more recent set of 'post-modern' ideas, those foregrounded by 'reflexive constitutionalism'.²⁷ As we know, this set of ideas are based upon a further notion of people/the people understood as 'pure communication'. Here belongs the consensual position of a Jürgen

²⁷ The debate on 'reflexive constitutionalism' centres, in abstract terms, on the need for permanent constitutional contestation and revisability of constitutional norms through a permanent process of deliberation; it covers various theories of constitutional design understood in terms of *purely* bottom-up, deliberative democracy *procedural* terms and avoiding setting substantive norms; it stresses law's role in providing the procedural framework to allow for self-regulation by other sub-systems (politics, economy etc.). As Stijn Smismans, notes in the context of an analysis of attempts to found a European Constitution, however, "[T]hinking normatively about ensuring bottom-up reflexive processes without reflecting on the substantive values of the constitutional design in which such processes have to operate is unlikely to deliver democratic governance"; this is, at best, an attempt to think constitutional design "*as if* such design could be neutral in substantive terms"; moreover, "[Law] has traditionally had a role in translating societal norms into substantive legal norms. As in no other subsystem, this process has been linked to democratic procedures. In reducing law to a procedural role, the definition of substantive norms will be left to subsystems that do not guarantee democratic processes" 'European Constitutionalism and the Democratic Design of European Governance: Rethinking Directly Deliberative Polyarchy and Reflexive Constitutionalism', K. Tuori & S. Sankari *The Many Constitutions of Europe* (Routledge, 2010), chapter 8, pp. 169-195, p. 192. I wish to retain, from Smismans's critique that, so far, reflexive constitutionalism has *not reflected enough* on the role western law has historically played in both *promising and guaranteeing* a substantive meaning to democracy; Smisman's love of and trust in this promise is too entrenched in western consciousness to ignore.

Habermas, of which Gunther Teubner and others try to develop a reformed-informed updated version.²⁸

What follows is a more detailed defence of these two arguments especially in relation to Art. 9 ECHR.²⁹ A reading of related contemporary jurisprudence ultimately shows that while its first paragraph speaks of “everyone” its main beneficiaries cannot but be those who *blindly trust* in what is presupposed in the second, qualifying, paragraph of the Article: the capacity of the sovereign and the courts to declare what ought to count as ‘religion’ after taking into consideration a range of issues as presented to them not only and not predominantly by politicians and jurists, but by experts in various fields (e.g. security) and a media-tised ‘public opinion.’ To get more people to join in the chorus of acclamation of such decisions –especially among minorities living in Europe- I suggest, requires less emphasis on the rightness of laws and judgments and more on their practical, less ‘glorious’ merits. Conversely the critique of the manner in which religious differences are handled should go beyond the universalist point of view of either democratic pluralism or the rule of secular law; instead, it should be part of a critique of bio-politics enhanced by political theology and which takes seriously the possibility that ideologies, fantasies, even shared values and consensuses can continue to have a hold on the subject even after what has been, and perhaps prematurely, hailed as their ‘deconstruction’.

3. Art 9 ECHR

3.1 The first paragraph of Art 9 ECHR draws together, in one *triadic* right, the freedoms of “*thought, conscience and religion*”. Thus, human rights lawyers are accustomed to using these three terms in one breath as aspects of a compassing right held by autonomous man, which is at once guaranteed by and limiting the sovereign state. The same structure – a triadic relation structured by and against the sovereign – is also typical of legal theorists confronting the question whether members of religious

²⁸ E.g. Gunther Teubner *Constitutional Fragments*, OUP 2013.

²⁹“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

minorities may have a right to be exempted from otherwise universally applicable laws; indeed the literature reveals mostly arguments from either ‘fairness’, ‘conscience’ or from ‘equality of opportunity’, alongside the (implied or explicit) assumption that the State holds the rightful power to determine what may count as a religion in the first place.³⁰ A first implication of this structure of Art 9. is both obvious and not generally paid enough attention to; thinking (“thought”), feeling a sense of extra-legal moral responsibility (conscience), and not-questioning some un-falsifiable, ‘transcendental’, or ‘sacred,’ source of value (“religion”), are all *imagined* as being in an obscure ‘relation’ that is at once *inescapable* and *non-fusible* and which the sovereign legislator, the law-interpreting courts and legal theory, can render less obscure by hierarchizing it. Now, it has been the modern experience –motivating this very volume- that parliaments, courts and legal theory have been hierarchizing this triadic relation without the desired bonus of rendering it much clearer. The USA Supreme Court’s approach to religious exemptions from the ninety-sixties to-date, for example, shows a trajectory from an accommodation-ist phase, where exemptions from laws that were thought to burden people’s consciences were liberally granted [provided the Court was satisfied there was no compelling state interest that the law promoted; cf. *Sherbert v. Verner* (1963), *Wisconsin v. Yoder* (1972)], to the adoption of a much weaker non-discrimination test [cf. *Employment Division v. Smith* (1990)]. In Europe, too, as I will presently mention in more detail, there is no disputing the growing lack of clarity –and, consequently of trust - that prevails in the general ambit of Art. 9. For radical critics of the very idea of sovereignty the fact that the state fails to definitively provide principled clarity is not surprising; for Wendy Brown, for instance, “[S]overeignty produces both internal hierarchy (sovereignty is always sovereignty over something) and external anarchy (by definition, there can be nothing governing a sovereign entity, so if there is more than one sovereign entity in the universe, there is necessarily an anarchy among them);³¹ to this insight I wish to add that sovereignty is not merely a notion that ‘somehow’ allows us to think of political unit as simultaneously necessarily hierarchical and anarchic; it has a long history which stretches only in part to the ancient Greek democratic *polis* which had a tendency to disunion, faction, *stasis*; there, the binary relation between internal hierarchy/external anarchy lacked, as it were, the solid anchor that our concept

³⁰ Cf. K. Greenwalt, (2006) *Religion and the Constitution* Princeton: Princeton University Press, 2 vols., vol. 1, pp.124-56; T. Asad, *Formations of the Secular*, *op cit.* n. 5.

³¹ *Walled States - Waning Sovereignty*, New York (Zone Books: 2010), p. 53.

of sovereignty offers; as Giorgio Agamben has argued, this concept of sovereignty is unthinkable otherwise than within a *Western* (Greek-Roman-Christian) paradigm that *presupposes* unity *as* and *entrusts* it to a flexible *economic-anarchic* ‘relationship’ of indifference between hierarchy and anarchy which finds its original model in the Trinitarian God on whom the modern idea of an omnipotent yet limited government is modelled (cf. the ‘constitutional paradox’³² of sovereignty as constituent and, at once, constituted power). Hence, as is the case with many other matters, questions of religious exemptions are sent to the sovereign to be resolved under general normative standards only to arouse the suspicion of a sectarian (or secularist) bias by being treated, instead, by means of endless exceptions, re-qualifications etc. as part of a non-ideal, contextual, policy-informed, ‘economic,’ strategy that is less about legal or political reasoning and much more about administrative or managerial reasoning. The more the sovereign attempts or promises principled solutions, the bigger the ensuing need to manage the disappointment from the gap between the aspiration to govern and the reality of managing. At the same time the fact that in Art. 9 ‘thought’ is mentioned first in the sequence whilst religion is last, is not without significance: it shows the modern attribution of primacy to *secularized logos*; Even ‘religion’, as the second paragraph of art. 9 shows, is primarily understood by lawyers in line with the modern, protestant German idealist -cum-secular paradigm: as having a ‘core’ of private/communal *beliefs* in specific conceptual meaning and a ‘periphery’ of *manifestations* of said beliefs in the form of symbols, icons, rituals etc. *Conceptual* sense-making is thus proclaimed, in and out of the scope of religion, as fundamental whilst imagery, ritual, love and art - the stuff of which affective meaning consists both in traditional religion (when they are sanctified in relation to the Holy) and civil religion (in which case they are sanctified by the absence of the Holy) are relegated to secondary status). ‘Conscience’ in turn, sits squeezed between thinking and believing, public and private meaning, discharging the same function of the pivot that allows two players to play seesaw.

3.2 Overall, I submit, in so far as the modern autonomous individual and collective sovereign subjects *are* imagined as consisting of a ‘foundational’ *triadic relation* between “thought, conscience and religion” in *that* order, Art 9 ECHR might as well have

³² Cf M. Loughlin and N. Walker (eds.), 2007, *The Paradox of Constitutionalism* (Oxford University Press).

been Art. Number One of the ECHR. There is, I further suggest, a ‘double trouble’ with this *arche*. The first trouble is that, arguably, the very assumption of the primacy of conceptual over affective meaning contributes to the alleged bias of western judges and law-makers against non-western religions. For example, in the USA the suggestion that religion equals belief gives rise to legitimate complaints that the state burdens religious individuals and groups with the duty to ‘explain’ their religious practices in theological terms.³³ Meanwhile, in Europe the suspicion grows that, despite claims to neutrality, state courts are prone to privileging the Christian images and rituals, by *arbitrarily* downplaying them as a bit of innocuous national ‘culture’ in contrast with minority religions’ symbols and rituals considered to be carrying religious messages. The obvious example is the ECtHR finding that the crosses hanging in Italian schools are “passive” symbols while, on other occasions, it has found that the Muslim veil is an active symbol of the ‘essentially’ undemocratic ‘religion of Islam.’³⁴ The message seems to be that while the cross symbolises the Christian/post-Christian prince’s love of *all* humanity, the veil or circumcision, to take another classic example, are marks of tribal distinction. Arguably, however, making children *look up* to the image of *the impotent yet triumphant* god on the cross at the place of their secular education is an efficient way to make them love and blindly trust in the Cross’ embedded message of political theology in a secular context: god/the sovereign are to be glorified even if evidently weak and falling. Moreover, in so far as distinctions such as that drawn between the cross and the veil can be shown to be less than impartial and principled, this begs the question of the efficacy of both the ‘veil of ignorance’ when reasoning legally and of democracy since it raises the suspicion that the universality of western conceptions of political equality may be skin-deep. In fact many a critic has suggested that European courts *arbitrarily* discriminate against minority religions and cultures in order to shore up a European identity ‘threatened’ by immigration in ways that validate the least palatable aspects of Carl Schmitt’s critique of liberal democracy. Take, for example, *S.A.S. v. France*; while the Court did not accept the French government’s position that the blanket ban of wearing a veil that covers the face completely was valid due to gender equality or

³³ W. Fallers Sullivan *The Impossibility of Religious Freedom* (Princeton UP, 2007).

³⁴ S. Mancini 2014 ‘The Tempting of Europe, the Political Seduction of the Cross: A Schmittian Reading of Christianity and Islam in European Constitutionalism’ in S. Mancini and M. Rosenfeld eds. *Constitutional Secularism in an Age of Religious Revival* (Oxford: OUP, 2014) pp. 111-135, at **XX**. Cf A. Vakulenko, ‘“Islamic Headscarves” and the European Convention on Human Rights: An Intersectional Perspective’ (2007) 16(2) *Social and Legal Studies* pp. 183-99.

human dignity concerns, it did accept France's claim that it was necessary for "living together" in France, underlining that states enjoy a wide margin of appreciation in cases like this but, presumably, also on the basis that France's claim is made in terms of purely secular 'public reason' and is thus intelligible to all, unlike the private beliefs manifested by veiling. In this connection, I join critics who suggest that there are structural reasons for such apparent failures to open up to other *non-Christian/post-Christian* cultures. As S. Motha writes neither private beliefs nor public reasons exist on the basis of intelligibility alone in so far as they equally *presuppose* a common *affect*;³⁵ The idea is that the autonomous individual/collective sovereign subject of modern law/politics is shaped, motivated, and sustained by its affective attachments to heteronomous contingencies of religion, as well as class, race, and culture. In a similar fashion I argue that while the jurisprudence and laws regarding the triadic article Art 9 may be intelligible to all, they can be mistrusted or trusted depending on whether one shares in the '*affect*' of occidental Christian /*post-Christian* communities that equally imagine an 'inescapable' relation of tension between god and Caesar, transcendence and immanence, the sacred and the profane etc. which requires continuous management, not resolution, in line with Trinitarian *economic* political theology as analysed by G. Agamben.³⁶

A rift over the role of unconscious affect in ensuring or undermining blind, ideological, social trust *as a precondition* for the emergence of public reason – and consequently, on whether a particular affect underlying Art 9 jurisprudence and related legislation bridges rather than distinguishes modern and traditional western views on the relation of law or politics and religion- is by now clearly demarcated. On one end, those who deny the primacy of affect over reason, are liable to the accusation of either cognitive dissonance or cyclical foundationalism; Dieter Grimm, for example, argues that secular democratic states must abstain from preferential treatment of any one

³⁵ S. Motha, 'Veiled Women and the Affect of Religion on Democracy' (2007) 34 *J of Law and Society* 139-62, at 154.

³⁶ *The Kingdom and the Glory*, *supra* n. 5 Trinitarianism can be described as one of the most successful examples of what the social anthropologist R. Rappaport calls 'ultimate sacred postulates' shared only by members of particular communities as the basis of their inter-subjective trust: particular religious and secularized metaphysical postulates (e.g. Genesis, the 'chosen people,' Christ, universal salvation through martyrdom and resurrection etc.). As linguistic beings our communication is beset by two fundamental problems: the 'lie' and the 'alternative' –the two sources of evil for M. Buber- and these are ameliorated by adopting "absolute sacred postulates" – such as *Divine Oikonomia*- that are un-falsifiable (for they do not correlate to any material *significata*) and unquestionable and, further, validated performatively as true social facts (with or without subjective belief in their truth); See R. Rappaport *Ritual and Religion in the Making of Humanity* (Cambridge UP 1999).

religion *but also* recognizes their privilege to protect and promote specific “values, traditions and customs that, although, originally rooted in a country’s predominant religion, have lost their religious connotations” and are no longer viewed as specific expressions of religion but rather have become a “part of a country’s general culture that includes believers and non-believers.”³⁷ Or else: secularised Christian traditions and values can be legitimately privileged because despite having “...Christian roots... [they] developed a formative effect for society *without retaining* a specific religious connotation”.³⁸ That argument of course requires us to take for granted the very thing we objected to from the outset: the parthenogenesis of modern universality. On the other end of the divide Saba Mahmood denies the primacy of intellectual meaning; she detects an impoverished modern understanding of icons, images and signs as inert objects of interpretation, rather than as actively constitutive of social reality and just as important as language in mediating social relations;³⁹ obviously, to this concern, must be added the aforementioned suspicion that western courts do not apply this view systematically across religious icons). “Icon” refers not simply to an image but to a *cluster of meanings* which “suggest a *persona*, an authoritative presence, or even a shared imagination. In this sense the power of an icon lies in its capacity to allow an individual (or a community) to find oneself in this world...a form of relationality that

³⁷ Dieter Grimm ‘Conflicts Between General Laws and Religious Norms’ in *M. Rosenfeld and S. Mancini (eds) Constitutional Secularism in an Age of Religious Revival* (Oxford: OUP, 2014)pp. 3-14, at 7 and 11.

³⁸ *Ibid.* p. 11; Grimm’s essay begins with the observation that “a process of re-politicisation of religion is taking place that goes along with a corresponding process of de-secularisation of society;” His primary concern is to defend European Christian-cum-secular states’ prerogative to: (i) the monopoly of legitimate force in enforcing laws that are “deemed to be consented to by all citizens in so far as they are good for all citizens in a this-worldly sense: security and welfare” (p. 5); (ii) ensure that religious beliefs are privatized and religious freedom is protected by law as an individual right to pertain or not in particular religious communities provided they are “regarded as compatible with the secular state [namely] as long as they do not claim absolute validity for society as a whole and stay within the framework of public order” (*ibid.*); (ii) determine whether a certain belief is religious in nature, and whether a group is truly a religious community” (p. 7); These prerogatives are threatened in European states which are at the receiving end of immigration by “members of non-Christian beliefs” (p. 4) which, unlike Christian denominations “have not undergone the process of historicisation and contextualisation of God’s revelation that permits Christian churches to adopt a more distant attitude vis-à-vis sacred texts and the commandments from them” nor “distinguish between the errors and the erring person, such that it is difficult for them to bridge the incompatibility of religious dogmas by a spirit of tolerance vis-à-vis believers of a different faith” (p. 4); In particular, many immigrants tend to come from “Islamic societies [that] remain unaffected by Western modernisation” and are “accustomed” to states where there is no clear distinction between religion, politics and law. In representing Islamic societies in this way Grimm effectively agrees with modern Islamists that ‘Islam’ provides a comprehensive legal and political code for the exercise of sovereign power. For a different, historically informed, view see ‘Shari’a, faith and critical legal theory’ and ‘Towards a Western-Islamic Conceptions of Legalism’, *op. cit.* n. 14.

³⁹ S. Mahmood ‘Religious Reason and Secular Affect: an Incommensurable Divide?’ *Critical Inquiry* 2009 Vol. 35, No. 4, pp. 836-842, at 840.

binds the subject to an object of the imaginary.⁴⁰ Thus, in explaining the controversy surrounding cartoons depicting the Prophet Mohamed, Mahmood shows how the fact that the debate was framed only in terms of an opposition of the *concepts* of blasphemy and freedom of speech suggests a failure to understand the anger felt by many Muslims by attending to the “affective and embodied practices through which a subject comes to relate to a particular sign –a relation founded not only on representation but also... attachment and cohabitation.”⁴¹ Mahmood brilliantly traces this failure to Protestant textualism, and further back to Byzantine *iconomachy*, presupposing a “semiotic ideology in which signifiers are *arbitrarily* linked to concepts, their [conceptual] meaning open to peoples’ reading in accord with a particular code shared between them.” This ideology works to naturalise “a certain concept of a religious subject ensconced in a world of encoded meanings.”⁴² Siding with Mahmood, rather than Grimm, I claim that the *conceptual* disavowal of traditional authorities in modernity does not constitute a complete disinheritance of a tradition which still binds the secular to images as that of Christ on the Cross; by declaring that *this* symbol is no longer ‘religious’ -as opposed, say, to the *hijab*- the ECtHR judges made an arbitrary and circumstantial division so as to keep *some* forms of life in their allocated *minoritarian* place inside a Europe that wishes to identify its way of life as the prototype household of ‘humanity’ rather than being seen as yet another form of life inside the global society that its culture indeed made possible in the first place. Where one stands in connection to the primacy of conceptual or affective sense clearly impacts on where one stands on the wider debate that informs the question of regulating the manifestation of religion and, thus, determines one’s allowed standing in the ‘household’. Contrast, for example, *Kokkinakis v Greece*,⁴³ (where the state’s blanket constitutional prohibition of proselytism was judged by the ECtHR as a disproportionate interference with religious freedom) with *Dahlab v Sitzerland*⁴⁴ or *SAS v France*⁴⁵ where the Court found in favour of, respectively, a particular and general prohibition of merely wearing a particular type of head dress. it could be argued, on the basis of a comparison, that in *Kokkinakis* the Court ostensibly protects a universal freedom while in effect it protects a *familiar*

⁴⁰ *Ibid.* at 74.

⁴¹ *Ibid.* at 70.

⁴² *Ibid.*

⁴³ [1993] ECHR 20

⁴⁴ [2001] ECHR 899

⁴⁵ [2014] ECHR 695.

Christian apostolic *ritual* of announcing the ‘Good News’ (in this case by Jehova Witnesses); after all, the Pentecostal miracle (which allowed the ‘Good News’ to be conceptually equally intelligible to all, Jews and gentiles) is commemorated as a public holiday even in secular France! Could it be that, irrespectively of dis/belief in God, the mere fact of celebrating this holiday can be said to validate as an unquestionable social fact the Christian-cum-secular postulate that communication on the basis of conceptual *logos* alone –the business of the *confessing animal* to use Foucault’s term- suffices for the purposes of ‘living together’? If so, is not the different treatment of *Kokkinakis* from *Dahlab* a sign of religious affect and blind trust in a postulate that not everyone on the planet is predisposed to love? While the ECtHR would not likely decide *Kokkinakis* in the same manner had the applicant been speaking incomprehensibly (say, ‘in tongues’), its preference for confessional *logocentrism* is as blindly enthusiastic as that shown by those earlier European colonizers who addressed native Americans *in Latin*, reading to them a Papal letter that announced the good news of their ‘inclusion’ in the civilised world *qua* common household of ‘humanity’?⁴⁶ Similarly, consider those western-educated colonial subjects who replace local with western law in order to gain membership in the civilised “juridical humanity” at the cost of retrospectively de-humanising their pre-colonial lives?⁴⁷

3.3. The second trouble with contemporary Art. 9 is that, by placing, as is the standard, the qualifying paragraph in a sequentially *secondary* position, it mystifies the situation of *oikonomia* by suggesting that the right is primarily about absolute freedom of private faith –its ‘core’- whereas the State and its bureaucracy may only limit its – ‘non-core’- public manifestation. There is no doubt that this distinction is itself a secularised legacy of the Christian tradition and that the Christian prince was the first model of a sovereign who determines the meaning of religion, as well as of ‘public safety, order, health or morals, and is to be *prima facie entrusted* to prescribe such limitations to the freedom to manifest one’s religion or beliefs as are ‘necessary’ for the protection of the rights and freedoms of others. Among those who do not blindly abide the metaphysical thesis that the glory of an absolute is not diminished by its economic

⁴⁶ This, per Agamben, is one of the key features of the Christian theo-political imagination; See *The Kingdom and the Glory*, n.5 and above section 1.

⁴⁷ See S. Esmeir *Juridical Humanity-A Colonial History* (Stanford University Press, 2013).

application, however, Art. 9 jurisprudence and associated national legislation may actually *reinforce the suspicion* that the modern constitutional state, secular or multicultural, did not just replace but *assumed* the characteristics of the Catholic Church. Hence the importance of political theology; how the ever expanding literature on political theology impacts on the debates on the ability of the sovereign state to function separately from religion (secularism) or/and in a way that allows all religions to flourish (multiculturalism) requires only a basic introduction here. As is well known, thanks primarily to E. Kantorowicz, the very concept of the corporate sovereign is unthinkable without taking account the rise of natural theology, at the expense of the apophatic, in the Catholic middle ages and, specifically, those scholastics who made possible the idea of impersonal sovereignty by blending Roman (inheritance) law with Christian metaphysical postulates; For a less known example, P. Legendre shows how the Catholic Church inverted the Roman idea of the emperor as *dominus mundi* (owner of the world) into the elusive and impersonally notion of *dominium mundi* which served to justify the West's civilising mission.⁴⁸ Certain post-secular philosophers also understand modern law, politics and society as still structured through what can be termed onto-theology, seeing in modern sovereignty a secularized-theological concept of power. Concerning such secular theology Schmitt famously speculated that all significant concepts of the state are secularized theological concepts and that “[T]he metaphysical image that a definite epoch forges of the world has the same structure as a form of its political organization.”⁴⁹ More recent scholarship discusses yet other aspects of the epigenetic relationship between medieval natural theology and the modern secular political and legal imagination; C. Thornhill shows how the modern state inherited from the Catholic Church the notion of continuous, *abstract* ‘political power’, always-already legitimate, that can be stored in ecclesiastical/state institutions.⁵⁰ It is, arguably, just such abstract ‘power’ that gets enlisted by the institutional sovereign who, as C. Schmitt infamously argued, must be understood primarily not as having an absolute power to legislate, as Bodin declared, but, rather, but rather a prerogative - not delegated- power to proclaim enemies and to introduce exceptions so as to bridge the

⁴⁸ P. Legendre *Dominium Mundi : L'Empire du Management* (Paris : Mille et une nuits, 2007).

⁴⁹ *Political Theology: Four Chapters on the Concept of Sovereignty*, *supra* n. 5, at 36 and 46 respectively.

⁵⁰ C. Thornhill *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (Cambridge University Press: 2011).

inevitable gaps between norms and facts at times of crisis. Further, we can conceive of the liberal lawyers' attempts⁵¹ to counter Schmitt's emphasis on unity and constituent power⁵² as well as the attempts by leftists to enlist his ideas in order to promote an agonistic democratic politics that advance pluralist rather than fascist agendas,⁵³ taken together, as performatively *iterating* and *certifying*, first, a distinction between constituent/constituted power inherited from the Catholic Middle ages (in so far as it derived from to the distinction between God's *potentia absoluta* and *potentia limitata*),⁵⁴ and, secondly, the need to economically manage the tension between them, ostensibly in line with ideas of legal or political right but, in effect, as arbitrarily as the circumstances require, in line with the secularised Cristian postulate of *oikonomia*. *Oikonomia*, which in classical Greece had meant the a-political administration of a household, had by then become the mysterious divine praxis undertaken for the salvation of humankind.⁵⁵ Since, further, the theological idea of exception-as-*oikonomia* coalesced with, respectively, the Greek and Roman legal concepts of *epieikeia* and *aequitas*, fairness and justice came to mean the *anomic dispensation (dispensa)* that relieves one from too rigid an application of the canons in imitation of divine compassion for humanity.⁵⁶ In fact this marked the Byzantine political and legal system power as dispensation from the law gradually replaced legislation as the main expression of sovereignty and Byzantine rulers found it equally expedient to appear as merciful Christians by annulling onerous contracts binding the meek *and* pardoning their corrupt officials. Now, without a doubt, the constitutional states the luckier among us live in, do not avail of the eastern Christian apophatic theology that essentially *endorses anomie* as mystery (in ways that both sustain and bring down power). Our constitutional states follow a path marked by yet more innovations introduced by Catholicism's late mediaeval natural theology whereby, in sum, *oikonomia/exception is*

⁵¹ These are well summarized in D. Dyzenhaus *The Constitution of Law- Legality in a Time of Emergency* (Cambridge: CUP, 2006), p. 35-53.

⁵² Carl Schmitt *The Concept of the Political* (Chicago: University of Chicago Press, 1996).

⁵³ E.g. C. Mouffe *Agonistics: Thinking the World Politically* (Verso 2013); 'Deliberative Democracy or Agonistic Pluralism?' *Social Research* Vol. 66, No. 3, (Fall 1999), pp. 745-758.

⁵⁴ See *Constitutional Theory and its Limits*, *supra* n. 5.

⁵⁵ The 9th c Eastern Patriarch Photius, for example, wrote: '*Oikonomia* means precisely the extraordinary and incomprehensible incarnation of the *Logos* ...it means the occasional restriction or the suspension of the ... rigor of the laws and the introduction of extenuating circumstances, which "economizes" ...the command of law in view of the weakness of those who must receive it.' (Cited in *The Kingdom and the Glory*, *supra* n. 5, p. 49).

⁵⁶ *The Kingdom and the Glory*: p. 49.

not a mysterious silence of the law as in the East,⁵⁷ but a justifiable suspension of the law – as in the Catholic idea of ‘just war’ or permissible usury- introducing the known problematic that concerns us to date whenever we debate the (im)possibility of ‘constitutional dictatorship’ which liberals struggle to affirm and C. Schmitt famously denied. In modern liberal democracies justifications of use of public power are essential and exceptions are ultimately traced to the need to preserve the circumstances in which the popular Will can be expressed (for some see this means basically free elections while others, Habermasians for instance, present a wider list of conditions necessary for the endless communicative processes of consensus-making that is, according to them, wider than elections.

Moreover, the very suggestion that a legal or political sovereign is the third element ‘required’ to structure the tension obtaining between the ‘religious’ and the ‘profane’ –conceived in a binary manner- has a history that belies its universalism. Arguably, the modern distinction between the secular state and ‘religion’ mirrors rather than dissolves the Catholic tradition that, in turn, had transformed the ancient Christian idea of ‘Two Swords’ or ‘Two powers’ (sacred and temporal) into a ‘political principle’. In any case scholars such as Saba Mahmood convincingly argue that the ‘religious’ and the ‘secular’ are not opposed ideologies but, rather, concepts that are “interdependent and necessarily linked in their mutual transformation and historical emergence” which gained a “particular salience with the emergence of the modern state and attendant politics.⁵⁸ Talal Asad contrasts the distinctly modern opposition between the sacred and the profane, according to the modes of classification particular to developments in anthropology and sociology in the nineteenth century which found its most famous exposition in Durkheim's *Elementary Forms of Religious Life*, with the opposition between divine/satanic transcendent powers and spiritual/temporal worldly institutions in medieval theology.⁵⁹ The re-classification occurred, claims Asad, in the aftermath of Europe's encounter with the non-European; It was through the designation of non-European practices as fetish and taboo, allocated exclusively to ‘Nature Folk’ or backward peoples,’ and the self-identification of enlightened Europe with ‘profanation,’ namely the exclusive capacity to reorder society through ‘forcible

⁵⁷ See: ‘God’s Political Power in Western and Eastern Christianity’ *supra* n. 5.

⁵⁸ ‘Religious Reason and Secular Affect’ *supra* n. 9, at 836.

⁵⁹ *Formations of the Secular* *supra* n. 5.

emancipation from error and despotism', that an essential separation was wrought between 'the sacred,' now universally associated with mythic religion that Europe had left behind, and the profane, now associated with the history of European Reformation and Secularisation that others –e.g. Islam- 'must' emulate. Asad, further, focuses on the fact that, in structuring the 'right' relation between the state and religion the secular sovereign as well as secular courts must first assume the paradoxical position of a secular body having to determine what counts as religious before deciding to what extent manifestations of religion can be legitimately limited in the name, once again, of preserving the 'separation' of Church and State in order to show how contemporary secular liberal democracy retains structures and forms embedded in Christian dogma.

These criticisms of the secular state extend to multicultural polities. Thus, the modern principle of state-guaranteed multiculturalism -as practiced e.g. in the less than secular UK- can be genealogically linked, via Hobbes, Locke etc., to the Christian prince's toleration of religious and other differences and, further back, to the medieval principle of 'unity in diversity' a product of the Catholic Church subsequently incorporated into the ideology of the Holy Roman Empire in their parallel efforts to proclaim their appellate jurisdiction over the fragmented European feudal space. The adaptation of the principles of the 'two powers' and of 'unity in diversity' respectively into the principles of state/church separation and toleration is explicable in the context of Bodin's reformulation of sovereignty as legislative (rather than appellate) and the rise of social contract theories among bourgeois Europeans in need to bring to a close their Catholic-Protestant wars so as to proceed with the business of commercial peace. These *adaptations* were first made possible thanks to the efforts of natural theologians who confiscated God's absolute yet self-limited power on behalf of man.⁶⁰ Moreover, B. Bhandar⁶¹ eloquently argues that notwithstanding their differences as political ideologies (French-style) secularism *and* multiculturalism are "deployed as techniques to govern difference"⁶² which share a ... "common philosophical lineage" and a relationship to the collective and individual subject of Enlightenment and post-Enlightenment thought, namely a 'unitary if plural' sovereign political subjectivity.

⁶⁰ See 'The Limits of Constitutional Theory' *supra* n. 5.

⁶¹ B. Bhandar "The Ties That Bind: Multiculturalism and Secularism Reconsidered" (2009) *J of Law and Society* Vol. 34 n. 3, pp 301-325.

⁶² *Ibid.* p. 301.

“[W]hile secularism ostensibly decouples culture from religion to produce a common political culture, and multiculturalism purports to accommodate a diverse range of cultural and religious practices, both fail to accommodate difference that stretches the bounds of citizen-subject defined according to Anglo-European norms of culture, which implicitly includes Christianity.”⁶³ Bhandar’s insightful equivocation of secular and multicultural “techniques to govern difference” in the light of their common presupposition of a ‘unitary if plural’ sovereign political subjectivity can be related to the claim that our legal and political imagination may be overdetermined by Christian postulates which simultaneously prep us for submitting to pastoralism, bio-politics, anomic administration *and for not knowing* it as we are passionately glorifying any would-be god-like sovereign to replace the monarch we dispatched in the modern era.

4. Conclusion

4.1. I argued that controversies stemming from the distinction between modern, secular or/and multicultural law and politics and ‘traditional religion’ (and from disagreements over the ‘correct’ way to structure their relationship) must be seen as part of a self-perpetuated globalised western paradigm of *oikonomia*, namely of - ultimately anomic-bio-political administration of populations in a post-sovereign era in which neither transcendent nor immanent visions can prevail and the tension generated must be managed. In view of this, we need *less* grandiose attempts to resolve such issues –by way of referenda like the Swiss minarets kind, or by way of laws such as the French legislative ban on the *burqa*- and less attempts to glorify these decisions as being in conformity with natural or positive law; we need, instead, to own up to the fact that – for all its *many* faults- the great advantage of the mode of social co-existence that occidental Christianity made possible is its - first Catholic, then Protestant - ethos to comprise dogmatism with flexibility and to economically and always provisionally synthesise law *and* critique, even law and revolution, passing one off for the other. Returning to the specific topic of this volume I argued, first, that it is high time to declare openly that simply by invoking a conscientious will that is ready to confront state sovereignty –including in order to be allowed exceptions from universally applicable rules on the basis of the qualified right to thought, conscience and religion-

⁶³ *Ibid.*

any individual or group *is inserted into the oiko-nomik/managerial mode of social existence that has been long-term represented and originally invented by Christianity.* Today, no one but perhaps an uncontacted tribe in some jungle, can claim not to be working *in* and, effectively, *for* the perpetuation of the globalised western paradigm whereby a sovereign is acclaimed as able to hierarchize between such binaries as democracy and rule of law, positive and natural law, immanence and transcendence, while the actual business of managing these differences falls to more mundane, disparate and often anonymous forces; with that in mind an article such as Art 9 ECHR should be read and taught with less fanfare about the supposed power of law or politics to settle matters and more emphasis on law and politics as merely parts of a wider bio-political nexus which becomes apparent when we scrutinize the jurisprudence that interprets this Article's qualifying *second* paragraph. Applicants should be left in no doubt that by relying on this article they are inadvertently validating neither only democracy nor only the rule of law but the Christian bio-political notion of government by *oikonomia*, an integral, if usually under-highlighted, part of modern political theory and jurisprudence.

On the other hand, there is, sadly, no disputing the fact that today's Europe, in particular, shows signs of un-economic inflexibility. This is the Europe of ethno-religious revival in Hungary, of Switzerland banning minarets by referendum, of France banning burqas by law and even of super-liberal Sweden firing a well-integrated Muslim civil servant for refusing, on conscientious-religious grounds, to shake a woman's hand while instead placing his right hand on his heart as a sign of respect.⁶⁴ Some instances of xenophobia would be ridiculous if they were not terrifying— for example, French mayors banning '*burqinis*' on beaches that, not too long ago, had witnessed the obverse policing of swimwear; this is all the more terrifying because this particular clothing item, invented only a few years ago by an entrepreneurial Lebanese-Australian woman fashion designer, is a perfect example of a "glocal-isation" a term first used in the Harvard Business Review in the late eighties, popularised a decade later by sociologist Roland Robertson and generally taken to mean the *simultaneity or the co-presence* of both universalizing and particularizing tendencies. The *burqini*, thus, exemplifies perfectly how the non-western subject can be peacefully inserted into the

⁶⁴<https://www.rt.com/viral/352863-sweden-muslim-handshake-lawsuit/> accessed August 2016.

oiko-nomik/managerial mode of social existence pioneered by Christianity and, consequently, into the global space of westernised/westernising world society that became accessible with de-colonisation; this is a space the key ideological feature of which is the simultaneous presence of binarily organised differences –e.g. religion and the secular- under the ideological aegis of sovereignty; its main actual feature is the constant management of differences by a wide range of loosely interconnected actors – from *burqini* designers to security experts- and where commodification, for all its faults, requires cultural flexibility and ‘commercial’ peace. In so far as contemporary incidents of western xenophobia and chauvinism suggest a desire to insulate the West’s ‘particular ways of life’ from the necessary adaptations that come with the globalisation that these very same particularities initially made possible, this amounts to a desire to revert back to the *particular place* called ‘West’ ‘from which to oversee the management of the global space of *westernised/westernising* world society. The violence of such chauvinism can and is met with even more violent forms on the part of those *westernised/westernising non-Christian others* it angers. All this is *bad oikonomia*, which, in view of the westernization of the whole world, leads not to a genuine ‘clash of civilizations’ but to an endo-civilizational ‘civil war’.

Another side to my argument was that such bad management of religious claims may in part be due to the Enlightenment bias against affect and the chimera that purely intellectual, or conceptual, sense-making, suffices for living together. Indeed, this prejudice is common between those happy with the way the ECtHR has recently employed the margins of appreciation and the proportionality test in cases concerning Art. 9, such as Grimm, those who, on the contrary, disapprove of these decisions as having misapplied these tests in certain cases, and even those radical thinkers who focus on ‘faith’ as an instrument of transformation.⁶⁵ Because they accept the dominant Enlightenment paradigm whereby conceptual, universalisable meaning is the most fundamental, they all endorse the view that Christianity is no longer a *real* religion: it is a kind of “belonging without believing;”⁶⁶ this is compatible with the earlier modern axioms of ‘civic religion’ in which the postulate of God is replaceable with the consciously held counter-factual of sovereignty. That may be true but, as J. Lacan

⁶⁵ See below para. 3.2.

⁶⁶ Jose Casanova “Religion, European Secular Identities and European Integration,” in Timothy Byrnes and Peter Katzenstein (eds.) *Religion in an Expanding Europe* (Cambridge: Cambridge University Press, 2006), p. 65 quoting Davie Grace *Religion in Britain Since 1945: Believing Without Belonging* (1994)].

argued, an idol “gives pleasure to other gods” that are arguably more essential than a factual idea –or, indeed, a ‘counterfactual idea,’ or even a fiction that one knows to be a fiction if so our love of, blind trust in, and performative validation of communal idols and formulaic imaginations in which key postulates are encrypted is a *precondition* for language both as private belief and reasoned discourse. From this alternative point of view, it is understandable that scholars of post-colonial subjectivities are suspicious of all claims that Christianity is ‘no longer a religion’ (e.g. in response to Badiou and Žižek’s turn to Paul’s emancipatory universal message A. Abeysakara speaks of euro-centrism *in the guise* of “Christianity Light”⁶⁷). If I am right that the continuity, as opposed to ‘rupture’, between theological and secular imagination passes through the subject’s *affective* identification with metaphysical postulates –such as *oikonomia*– that are embedded in stuff like those crosses displayed in Italian schools which the Court in *Lautsi* declared to be religiously de-activated or “passive symbols,” then, alongside the conceptual universality of such key modern philosophies as Kantianism, Hegelianism, utilitarianism etc. we must consider the possibility that subjectivities instituted in Christian/post-Christian settings are *more affectively predisposed*, compared to others, to have –and expect of others!– *blind trust* in the western paradigm which casts *oikonomia* in the fictitious glorious light of sovereignty, political or legal, that supposedly shapes the world by reasoned decision, for instance, by hierarchizing the relation of public order to freedom of manifesting one’s ‘private religious beliefs’; On the one hand this affective predisposition is a privilege: in the current climate it allows the Christian/post-Christian subject to experience the current crises of sovereignty and legitimacy⁶⁸ with a subjective *sense of certainty* that others lack. On the other

⁶⁷ A. Abeysakara *The Politics of Post Secular Religion: Mourning Secular Futures* (NY: Columbia U.P., 2008) at p. 82; but see the whole paragraph ‘Humanism’s “New Beginning”’ pp. 68-83.

⁶⁸ In constitutionalist terms: “We live today in an age simultaneously marked by the widespread adoption of the idea of constitutionalism, of ambiguity over its meaning, and about its continuing authority far from being an expression of limited government; constitutionalism is now to be viewed as an extremely powerful mode of legitimating extensive government. Where this form of constitutionalism positions itself on the ideology-utopia axis...has rarely been more indeterminate...notwithstanding the liberal gains...the significance of the idea of the constitutional imagination’ has never exhibited a great degree of uncertainty” Martin Loughlin ‘The Constitutional Imagination’ (2015) 78(1) *Modern Law Review*, pp. 1-25, p.25. Alternatively: “[C]ontinued belief in political democracy as the realization of human freedom depends upon literally averting our glance from powers immune to democratization, powers that also give the lie to the autonomy and primacy of the political upon which so much of the history and present of democratic theory has depended...”[...] (Wendy Brown, ‘We are all democrats now...’ in Amy Alen Ed. *Democracy in what State?* (New York, Columbia U.P., 2011), p. 54; “While weakening nation-state sovereigns yoke their fate and legitimacy to God, Capital...becomes God-like: almighty, limitless, and uncontrollable. In what should be the final and complete triumph of secularism, there is only theology” W.

hand, of course, this ‘privilege’ is tantamount to *blindness*; a key feature of the modern crisis of legitimacy/authority, is that it at once increases the suspicion that all types of sovereignty, secular or neo-religious, are impotent before the planet-wide growth of pastoralism and purely administrative rationality (as M. Foucault taught us less authority means more normalising power...) *and* increases the desire *for* a sovereign authority. In so far as the controversies surrounding the ‘proper’ relation of traditional and civic religions and, in particular, the proper exercise of the right to “thought, conscience and religion” also reflect and feed the general crisis of authority, it is interesting to consider how the debates on religious conscience claims contribute to the perpetuation of a “loop”⁶⁹ between the suspicion of the extant law/politics and the desire for either new, ‘improved’, legislation or/and legal interpretation, or a new ‘revolutionary’ shift by means of constituent power be it as part of class struggle or the so-called ‘clash of civilisations.’ Meanwhile, from Israel to the UK and from the USA to Iraq the *actual* regulation of social life is left in the hands a disparate body of loosely connected administrators and experts in various fields, lawyers, secular and ethno-religious politicians, lobbyists, economists, communication experts, security advisers, whose decisive interactions and clashes amount neither to a singular decision nor can be authorized by reference to either law, politics, economy *or* even traditional religion (how, for instance can ‘religious Zionism’ be seen as anything other than as a modern, very untraditional, form of Judaism?⁷⁰).

4.2 One may balk at my suggestion that Christian fantasies may be still playing such an important ideological role, I am aware that the position I advance breaks with a consensus that spans the divide between defenders and critics of modern democracies. For the former, going against Arendt’s dismissal of elections as the best possible form of democracy, the revolution has succeeded – the republic *is* secular. Among critics of

Brown, *Walled States - Waning Sovereignty* (Zone Books, 2010) p. 66. In philosophical terms: “Today, there is no legitimate power left anywhere on earth [...] The integral juridification and economization of the relations between humans and the confusion between what we can believe, hope, love, and that which we are required to do and not to do, to say and not to say, [convicts] all the powerful of the world themselves of illegitimacy» [Translated from G. Agamben, ‘L’Eglise et le Royaume’, in *Saint-Paul: Juif et apôtre des nations*, éd. André Vingt-Trois. Paris: Paroles et Silence, 2009), pp. 27-36 (35).

⁶⁹ “Widespread suspicion undermines trust in the courts and the law, even while it further entrenches the law by spurring in ever more legislation. Every new set of reforms opens doors for more suspicion, and in return, more legislation” Hussein Al Agrama 2012, *Questioning Secularism – Islam, Sovereignty and the Rule of Law in Modern Egypt* (University of Chicago Press) p. 141.

⁷⁰ See L. Batnitzky *How Judaism Became a Religion: An Introduction to Modern Jewish Thought* (Princeton UP 2013).

liberal regimes some endorse Arendt's critique of the failure of secularization but, echoing the view that Christianity is 'a way out of religion', suggest that, paradoxically, "[T]he persistence of [Christian] political theology could be a prelude to its end."⁷¹ This is a strong position held, diversely but equally, by an increasing number of diverse western philosophers such as M. Gauchet⁷², J. L. Nancy⁷³-, S. Critchley,⁷⁴ A. Badiou⁷⁵ and S. Zizek. From this point of view the contemporary phenomenon of individuals and groups in modern secular constitutional democracies turning to the law to claim exceptions from civic duties on grounds of religious conscience, in principle, represents a possible a setback. The liberal position is that if religious views are not yet absent from public communicative Reason - as an (earlier) Habermas once advocated- their public manifestation must be delimited through the collaborative labour of the national

⁷¹ S. Moyne 'Hannah Arendt on the Secular' *New German Critique* 2008 Volume 35, Number 3 105: 71-96 p. 96.

⁷² Marcel Gauchet Trans. Oscar Burge *The Disenchantment of the World: A Political History of Religion* (Princeton University Press, 1999). Per Gauchet all the great religions of the "Axial Age" (the term is the German philosopher Karl Jasper's), brought with them a three-fold "dynamics of transcendence." In sum: the sacred, previously dispersed and coextensive with something like "nature," concentrated in one omnipotent creator God who still sustains the world yet is increasingly withdrawn from it; subsequently God's transcendence led man to abandon magical explanations for the phenomena that surrounded him; thirdly, because the new God was to be the God of all men, the idea of human universality under one God and his human vicar both legitimated and spread with political empires. These dynamics of transcendence result in a fascinating paradox: the more powerful God becomes the "more man is free" in the sense that man begins to reason for himself, to question the divine law, to embrace his freedom.

⁷³ J. L. Nancy 2003 'Deconstruction of Monotheism,' 6(1) *Postcolonial Studies: Culture, Politics, Economy* 37-46. Philosopher J.L. Nancy writes of the "auto-deconstructive" tendencies of monotheisms to marginalize their myths in favour of narratives that relate directly to the needs and interests of man, including in relation to law and politics.

⁷⁴ Simon Critchley's central thesis in *The Faith of the Faithless: Experiments on Political Theology* (Verso, 2012) is that modernity has so far been driven by a religious drive not to see the religious dimension in politics ("secularism, which denies the truth of religion, is a religious myth" (111)). "Modernity" is nothing but "a series of metamorphoses of sacralization" (10). This means that any modern political form(ation) makes use of something sacral, of a belief in divine sovereignty - be it popular ("God the monarch becomes God the people" (55)) or anonymous (e.g., "the markets are not satisfied") - in its rituals (such as parliamentary elections), in the constitution (107), in the "magic" (85) of political representation (88)), etc. All this leads Critchley to claim that "in the realm of politics, law and religion there are *only* fictions." (91: "Is politics practicable without religion? ... I do not think so" (24). He proceeds to argue for the emancipatory potential of *faith* in "a fiction that we know to be a fiction, yet one in which we still believe." (10, added emphasis). Against this background, Critchley argues that we need a new conception of the stuff that makes political communities stick together, a new conception of the fictitious "religious dimension, which is found in the life of every people" (68). This is why the main "concern of [his] book is with the nature of faith" (161). Its nature is fictitious but linked to a "rigorous activity of a subject" (18). These two - theory of political fictions (faith) and subjective ethical activism - are the elements of an "ethical neo-anarchism" (114).

⁷⁵Radical neo-Hegelians, reject much of Arendt's critique -the social question for them is *the* political question - but, mindful of the Lacanian idea that man has a 'passion not to know' acknowledge the political usefulness of fiction for example, in radicalising Christian liberation theologies. Hence the turn towards Paulian theology, minus its liturgical 'packaging' and institutional history, e.g. In A. Badiou, *Saint Paul: The Foundation of Universalism* (Stanford University Press, 2003) or his *Philosophy for militants* (Verso Books 2012).

sovereign and the Courts. Radical critics like Critchley or Badiou, on the other hand, insist that we need to continuously reform our religious *faith* so that its energies can be channelled towards re-politicization. The common devil, with these different positions, lies, first, in the fact that, despite their universalism, their understanding of 'religion' as conceptual faith uncritically reflects the specific historical transformations of European Christendom, above all other religious groups, culminating with Protestantism and the view of religion by German Idealism. Secondly, the problem lies in the fact that their open-ended, *eschatological*, character coincides, and performatively *certifies*, the particular and *much criticised*, as arbitrary and biased, handling of Christianity and other religions by the ECHR as discussed earlier. It is preferable to acknowledge this *anomie* as integral to the economic political theology that still characterises the western approach to law and politics and, on this basis, assess each law passed and each judicial decision in the field of religious difference with an eye to whether it helps the integration of all people in the increasingly bi-political mode of social existence that Christianity pioneered or, instead, it impedes it in the name of reverting to the model of absolute legal or political sovereignty.

My approach does not foreclose the *in toto* conceptual critique of bio-politics; but it does point out the possibility that ideologies and fantasies can continue to have a hold on the subject even after their deconstruction. Humans develop social relations on the basis of trust based on sense they must invent and which, for the most part of human history, included diverse, unverifiable, unquestionable "postulates," which correspond to no material *significata* but can be validated as true social facts in a performative sense.⁷⁶ Thus, even though by today many people do not believe in the conceptual truth of such postulates as, for instance, Christian Trinitarianism, writers on matters of law and political theology as diverse as Harold Berman⁷⁷ and Giorgio Agamben have fruitfully examined the ideological and affective basis on which this fundamental postulate of European Christian –and, in Agamben's case, of its attendant theological notion of *oikonomia*– still functions to the effect that the western and westernised subject can, by validating in deed these postulates, re-produce a certain sense of 'living together' that allow it to trust those who also do. If in a 'religious' sense this means

⁷⁶ *Ritual and Religion in the Making of Humanity supra* n. 30.

⁷⁷ E.g. in 'Law and Logos' *DePaul Law Review* 1994 Vol. 44 Issue 1 art. 4.

believing in such postulates or at least behaving piously before ancient images or in liturgies where these postulates are embedded, in a secular sense this can also mean believing in the power of sovereignty or at least acting in ways that iterate its political theology by acting piously before a constitutional Text, or the ECHR, or alternatively *Das Kapital* and participating in such constitutional rituals as elections or demos with a raised fist. This persistence of political theology can explain, for instance, the frustration of Hannah Arendt - renowned for arguing, in *The Human Condition*, that “the victory of the Christian faith in the ancient world . . . could not but be disastrous for the *esteem and the dignity* of politics”⁷⁸- with the constitutional settlement that followed the American Revolution.⁷⁹ In their attempts to give new *esteem and dignity* to popular political sovereignty after the death of God and the toppling of monarchy by divine right, however, legalists, natural lawyers, Marxists and Arendt equally took for granted the narrative of modernity’s historical ‘rupture’ with traditional faith (though it inherited the innocuous ‘paraphernalia’ of this faith mediaeval acculturation); this narrative of parthenogenesis of a modernity that bravely dared to look back to antiquity for inspiration however, is much too close to the fiction that an incarnated God remains glorious even as his tortured body hangs dead on a cross. It is, arguably, on the basis of love for this secularised fiction of undying dignity that both supporters and critics of representative government routinely dismiss the insights of political theology. Thus, while critical legal history and ‘societal constitutionalism’⁸⁰ point to a disenchanting mode of historical analysis, stripping law of its metaphysical dignity, unity, and coherence by exposing it as the outcome of mundane and profane processes and interests, critical legal studies continues to exemplify the continuing inability of modern constitutional imagination to seduce the subject without making allusions to precisely such metaphysically postulated unity, coherence and even ‘Glory’ of law or politics. In fact, even in situations where national sovereignty is clearly hollow (e.g. in crisis-stricken Greece, Brexit Britain) people are seduced by legal and ‘purely’ political visions

⁷⁸ Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), 314. Cf. Hannah Arendt, *On Revolution* (Harmondsworth: Penguin, 1973), esp. 159-160l italics are added for emphasis.

⁷⁹ Her depiction of the pre-constitutional American colonists’ ‘covenants’ as having a purely worldly founding and merely incidentally and retroactively religious (by means of the unfortunate triumph of the metaphysics of legalism and natural rights which collapsed politics into nature) was described by one of her sympathetic contemporary commentators as bearing “little relation to historical fact.” ‘Hannah Arendt on the Secular’, *supra* n. 66, at 90.

⁸⁰ E.g. *Constitutional Fragments* op. cit. n. 22.

of restoring it. As a result, any discussion of the 're-enchantment of law'⁸¹ should extend beyond those who make religious claims from exceptions from universally applicable rules to include those who, in making and interpreting such rules and dealing with these claims, over-emphasise *with words* political or legal rationality and underplay the administrative/managerial rationality informing their *deeds*.

⁸¹ Y. Blank 'The Re-enchantment of Law' 96 *Cornell L. Rev* 2011.