

ORARE / LABORARE

Alain Supiot[†]

Professor Finkin was eager to conclude our work together on the expression of religion in the workplace with an interdisciplinary discussion, using the synopses of contemporary positive law as a jumping-off point for broader historical and cultural considerations. Such a venture would be quite impossible were it not for the high quality of the surveys of national legislation included in this issue, and even with these, it remains a perilous undertaking. For while a comparative analysis of developments in constitutional and labor law shows clearly that the rules defined by national legal systems to harmonize the sphere of work with that of religion are being challenged across the board, it does not allow us to predict with any certainty where this contestation might lead.

“He who does not know where he comes from does not know where he is going,” says a Fula proverb, and since we cannot predict the future, we must turn to the past. We are ill-equipped to interpret the transformations we see today in national legal systems unless we give some historical depth to the issue of the relations between work and religion. If we remind ourselves that work was long attributed a religious quality (Section I), and that the meaning of religion switched into its opposite at the beginning of the modern era (Section II), then we may be able to understand, and ask the right questions of, contemporary transformations (Section III).

I. THE RELIGIOUS DIMENSION OF WORK

“*Laborare et orare*” (to work and to pray): this adage is often attributed to Saint Benedict, whose Rule required monks to divide their time equally between prayer and manual labor.¹ But essentially the same idea is also present in the short treatise on work —*De opere monachorum*— that Saint Augustine wrote in the fifth century. In it he denounced certain monks who did not stop at growing their hair out but cited Saint Matthew—

[†] Director, Nantes Institute of Advanced Studies, Nantes University, France; Permanent fellow of the Institute for Advanced Study of Nantes - Member of the Institut Universitaire de France. Translated from the French by Saskia Brown.

1. See Rule of Saint Benedict, Ch.48, §. 1: “Idleness is the enemy of the soul; and therefore the brethren ought to be employed in manual labor at certain times, at others, in devout reading.”

the birds of the field that “sow not, neither do they reap” (*Matt.* 6:26–28)—to justify evading manual labor and living off donations from the faithful. Augustine’s response to these latter-day hippies who spent their time singing the praises of Universal love, and begging, was the sharp pericope from the Second Epistle of Saint Paul to the Thessalonians: “Whosoever does not work does not eat” (2 *Thess* 3:10).² Monks, said Augustine, should not exempt themselves from man’s common lot, condemned as he is to earn his living by the sweat of his brow. A religious vocation should not serve as a pretext for laziness and living off other people’s labor. From the point of view of this Augustinian conception of work, which marked the entire history of Christianity, working was nothing other than obeying God’s will. It detains us here because it both foreshadows the advent of Western modernity and is the continuation of another way of thinking about the relations between work and religion, which is alien to us today, although it characterized the Ancient World and is still operative in the civilizations with which the West is now confronted in the context of “globalization.”

If we were to look for a motto for this other way of thinking, it would be “*Laborare orare est*” (to work is to pray). From earliest times, humankind equated work with prayer. Through his labors, man was integrated into an order that transcended him and linked him to his fellow men and to the gods. Work meant first and foremost working the land, plowing (in French, *le labour*, from which we have the Anglo-American term *labor* and the French *labeur*). As Jean-Pierre Vernant has shown for the Ancient Greek world, tilling the soil was not an attempt to transform nature—which would have been an impiety—but rather to be at one with it so that, in return, it would provide man with enough to feed his household or *oikos*. In working the land, man entered into a relation with the gods as much as with his fellow men, which gave this activity a particular prestige.³ Such a view is still current on the African continent that, in this respect as in others,⁴ is closest to the Ancient Greek world. The civilizations of Sub-Saharan Africa have not (yet) forgotten that we are always more powerfully connected to the land than is expressed by our Cartesian presumption of “making ourselves as masters and possessors of nature.”⁵ In these cultures,

2. A. Mandouze, ‘*Au travail, les moines*’. *Un mot d’ordre de Saint Augustin*, in CONVERGENCES. ÉTUDES OFFERTES À MARCEL DAVID 325 (1991).

3. J.-P. VERNANT, TRAVAIL ET NATURE DANS LA GRÈCE ANCIENNE (1955), reprinted in II MYTHE ET PENSÉE CHEZ LES GRECS 16–36 (Paris, Maspéro, 1965). English translation MYTH AND THOUGHT AMONG THE GREEKS (Jeff Fort & Janet Lloyd trans., 2d ed MIT Press, 2006).

4. On deliberative procedures, see M. DÉTIENNE COMPARER L’INCOMPARABLE (2000).

5. See O. JOURNET-DIALLO, LES CRÉANCES DE LA TERRE. CHRONIQUE DU PAYS JAMAAT 364 (2007); D. LIBERSKI-BAGNOUD, LES DIEUX DU TERRITOIRE. PENSER AUTREMENT LA GÉNÉALOGIE (2002).

work is part of the cyclical time of days and seasons rather than the linear time of accumulation, the time of “white man’s work” that “never ends.”⁶ And the deeply religious nature of working the land is what continues to give it a distinction beyond any business or craft activity.⁷

Indian civilization also preserves a fundamentally religious relation to work. The caste system may even have originated in a sort of ossification of a hierarchical system of corporations within which each person was identified by the type of work assigned to him or her. Although there is no consensus on this point, it is unanimously accepted that it is religion which links caste and type of work.⁸ When a person carries out the type of work corresponding to his caste he is in harmony with his *dharma* and so is working toward his salvation as well as upholding the cosmic order.⁹ As Louis Dumont has observed, this division of labor is not “a more or less incidental juxtaposition of religious and non-religious (‘economic’) tasks but is both the religious basis and the religious expression of their interdependence. More precisely, it is the deduction of their interdependence from religion.”¹⁰ Modern India has attempted, with some success, to dismantle the caste *system*, but it has not managed to do away with castes themselves. Since castes are today the object of positive discrimination, they generate new normative effects, with the result that one’s religious identity still has a strong influence on working life, determining the conditions of access to certain types of work.¹¹ Our Western minds will find it easier to appreciate these close links between work and religion if we recall the ambivalence of work in the Judeo-Christian tradition, as both expiatory (we have transgressed the divine will) and as an expression of the godlike nature of man (our vocation is to become “as masters and possessors of nature”).

This ambivalence can help us grasp in what way the Augustinian conception of work differs from that of Antiquity, and how it prefigures modernity. For Augustine, work was to be performed in addition to prayer, but was not identical to it. These two duties incumbent upon man were complementary but different, and today have become radically separate. The modern conception of the relations between work and religion, as it

6. G. ROSSANTANGA-RIGNAULT, LE TRAVAIL DU BLANC NE FINIT JAMAIS. L’AFRICAIN, LE TEMPS ET LE TRAVAIL MODERNE 94 (2006).

7. D. ZAHAN, RELIGION, SPIRITUALITÉ ET PENSÉE AFRICAINE 187 (1970).

8. LOUIS DUMONT, HOMO HIERARCHICUS: THE CASTE SYSTEM AND ITS IMPLICATIONS (Mark Sainsbury trans., 1980), see especially chapter IV on “The Division of Labor.”

9. R. LINGAT, LES SOURCES DU DROIT DANS LE SYSTÈME TRADITIONNEL DE L’INDE 45 (1967) (Translated with additions as J. DUNCAN M. DERRETT THE CLASSICAL LAW OF INDIA (1998)).

10. DUMONT, *supra* note 8, *passim*.

11. See CHRISTOPHE JAFFRELOT, INDIA’S SILENT REVOLUTION, THE RISE OF THE LOWER CASTES IN NORTH INDIA (2003).

emerges from the excellent national surveys presented at our conference, could go under the motto of “*Laborare aut orare*” (to work or to pray). In contemporary law, work and religion are two different registers of human activity, both of them legitimate and to be enshrined by law equally, but which should interfere as little as possible with each other. Whenever conflict occurs, the individual’s right to practice his or her religion freely must be reconciled with the need for common rules governing the world of work. In cases where a religious organization stipulates a certain work activity, most national legal systems have made provisions for opt-out clauses from common labor law on certain points. But these are, precisely, exemptions, which do more to underscore than to undermine the essential separation between the sphere of work and that of religion. This separation is all the more marked when work is an obligation incumbent upon all, whereas prayer is now an issue of personal freedom.

Does this imply that work itself, salaried work, no longer has any religious connotation? Judging by the unambiguous pronouncement made by the President of the Chamber of Commerce of Lyon at the end of the nineteenth century, this would indeed seem to be the case: “Civilizing, in the modern sense of the word, means teaching people to work so that they can buy, trade and spend.”¹² Although this statement was made in the context of colonialism, it is wholly applicable to globalization (which is simply the continuation of colonialism by other means), and it suggests two different readings as regards religion. On the one hand, it epitomizes the secularization of work; work no longer integrates the worker into a natural order that transcends him (unlike work within the *oikos*), but into market exchange that is governed solely by the criterion of utility and no longer by divine Providence. On the other hand, the statement can be read as the triumph of a Religion of work. Work is the ultimate obligation imposed on all the peoples of the earth for all eternity. This obligation to work, which is asserted in the Preamble to the French Constitution, is a debt that cannot be acquitted, replacing the genealogical debt of traditional societies.¹³ If one is unable to settle this debt, one is “condemned to unemployment.” Mass layoffs are in many respects the modern equivalent of human sacrifice, carried out in the name of the laws of the economy, and that pitches workers and their families into the inferno of joblessness and poverty. But maybe this is no more than an analogy, and we should accept Max Weber’s diagnosis that *Beruf*, the duty to work, with its evident religious roots, was entirely secularized by the advent of capitalism. In

12. Cited by H. WESSELING, *LE PARTAGE DE L’AFRIQUE* 169 (1996, with a new edition by Folio-Gallimard 2002).

13. See J. Tonda, *Preface*, ROSSANTANGA-RIGNAULT, *supra* note 6.

order to explore this hypothesis further, we shall have to reconsider the term “religion,” which is as rich in meanings as the term “work.”

II. RELIGION AND RELIGION

In order to grasp the multiple senses of the term religion, I will not start from the tortuous history of the Latin term *religio*, whose etymology is disputed¹⁴ (but that definitely does not have the universality usually attached to it), but rather from the *lex mercatoria*, which people so readily put forward today as the basis for a global business law that would be free from any state control.¹⁵ This body of rules governing trade came into its own in the Mediaeval period at a time when Europe was not yet a jigsaw of States but a mesh of feudal networks and free towns. This was the context, which has some similarities with our own times, in which trading practices gave rise to a number of legal techniques that had a glorious future ahead of them, for example the bill of exchange or the first forms of trading company. It was possible for merchants to create legal bonds transcending the heterogeneity of territorial legal systems because they viewed each other as good Christians, bound to honor their word. They applied the rule of *Pacta sunt servanda*, not because of any particular code of law but because of their shared faith in a God who was guarantor of the pledged word.

This crucial role of faith has by no means disappeared from the world of business today. Returning from his trip to the United States at the beginning of the twentieth century, Max Weber reported the following suggestive statement by a businessman: “[A]nyone can believe what he chooses. But when I learn from a customer that he doesn’t attend church, then for me he’s not good for fifty cents. *Why pay me if he doesn’t believe in anything?*”¹⁶ It is belief—whatever its object—that is at the heart of the rational calculation implied by the contract. Tocqueville had already expressed doubts as to whether man “can tolerate at the same time complete religious independence and entire public freedom,” adding that “if faith be wanting in him, he must serve, and if he be free, he must believe.”¹⁷ This remark is entirely applicable to the freedom to contract, which is inconceivable without shared faith in a third figure that guarantees

14. Does it come from *ligare* (to bind) or from *legere* (to gather)? See II E. Benveniste, *Pouvoir, droit, religion*, LE VOCABULAIRE DES INSTITUTIONS INDO-EUROPÉENNES 267–73 (1969) (English translation INDO-EUROPEAN LANGUAGE AND SOCIETY (Elizabeth Palmer trans., summaries, table, and index by Jean Lallot, vol. 2, Coral Gables, Fla., University of Miami Press, 1973).

15. See the seminal article by B. Goldman, *Frontières du droit et lex mercatoria*, ARCHIVES DE PHILOSOPHIE DU DROIT 177 (1964).

16. Max Weber, “Churches” and “Sects” in *North America: An Ecclesiastical Socio-Political Sketch*, 3 SOC. THEORY 7, 7 (Colin Loader trans., 1985) (emphasis added).

17. Tocqueville, *Of individualism in democratic countries*, II DEMOCRACY IN AMERICA ch. 2, cited in DUMONT, *supra* note 8, at 49.

agreements.¹⁸ Jurists and economists in large numbers today fail to see this vertical dimension of the contractual link and foster the illusion of a world flattened out by globalization.¹⁹ They tend to use the term “trust” or “confidence” to refer to this founding principle of economic life, forgetting that confidence, etymologically, is nothing other than shared faith. The importance of good faith (*bona fides*) in contract law should remind us of the non-subjective faith that is at the heart of the business world, a faith that every producer and consumer is assumed to share. In this sense of a faith upheld by all, Religion is not a matter of subjective belief but a dogmatic framework that both transcends market rationality and makes it possible; asking a Mediaeval merchant if he believes in the Pope would have had about as much sense then as asking an American businessman today if he believes in the Supreme Court.

As we have seen, modernity brought about a complete inversion of the everyday sense of religion. Up to the sixteenth century in the West, religion implied a public faith *par excellence*, and only with the Protestant reform and a long period fending off public interference and hostility, did the term come to designate a matter of privacy—a private faith or subjective belief. Harold Berman has charted the history of this major legal revolution which also gave rise to the modern State.²⁰ But this inversion of sense did not remove the need for a non-subjective faith, Religion with a big R, in its difference from subjective belief (an issue of personal freedom).

The Japanese jurists of the Meiji era were well aware of the need for such a distinction when they set out to endow their country with a Western-style constitution.²¹ On the one hand, this constitution was to enshrine religious freedom, that is, individual beliefs (religion with a small r). But on the other hand, it required a collective belief on which to reestablish imperial authority over all the Japanese people, regardless of their religion. *Shintô* was chosen for this because it was the only faith to provide a founding myth of Japanese society. The problem was then to reconcile the public consecration of *shintô* with the recognition of religious freedom. The solution arrived at—the work of Inoue Kowashi in particular—was to create a particular semantic field by which to designate the different religions that the Japanese could follow. Religion in this sense is called

18. See A. SUPNOT, *HOMO JURIDICUS: ON THE ANTHROPOLOGICAL FUNCTION OF THE LAW* 78 (Saskia Brown trans., 2007).

19. See T. FRIEDMAN, *THE WORLD IS FLAT* (2005). For an acute analysis of such “flattening,” see O. De Leonardis, *Nuovi conflitti a Flatlandia*, in G. GROSSI [A CURA DI] *CONFLITTI CONTEMPORANEI* 5 (2008).

20. II HAROLD J. BERMAN, *LAW AND REVOLUTION: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* (2006).

21. O. Nishitani, *Sécularité ou traduction de la Modernité au Japon*, in LYON, *CAHIERS DE LA VILLA GILLET* (1998).

shûkyô, a neologism coined from *shû* (household altar) and *kyô* (teaching, doctrine), which can be found as *buk-kyô* (the teachings of Buddha: Buddhism), *ju-kyô* (the teachings of Confucius: Confucianism), *kiristo-kyô* (the teachings of Christ: Christianity), and so forth, *kyô* here being the equivalent of our suffix *-ism*. *Shintô* does not belong to this semantic field, and “*shintoism*” is not a term in Japanese. *Shintô* was elevated to the status of an official social rite, that is, to Religion with a big R. It indicates the divine path to be followed by all Japanese and constitutes the structuring principle of social space.

In India, this dual register of religion, as both public and private, was clearly perceived by Gandhi. His own translation from Gujarati into English of an (unpublished) work on technology rendered the Indian expression “to be faithful to the Dharma” by “to act as a good Christian,”²² thus displaying his understanding of Religion as a dogmatic corpus vital to every human society rather than as any religion in its particularity. Religion with a big R also figures explicitly in the founding texts of Western modernity, for example the Declaration of Independence of the United States or the Declaration of the Rights of Man and of the Citizen (1789). Later constitutions abandon this reference, reserving the term “religion” for subjective belief alone. They consequently lack a name for the new dogmas that structure public space (personal freedom or the formal equality of all human beings, for example), but these do not cease to exist, and arguably have all the more force for being perceived as “self-evident truths” rather than as one set of beliefs among others.

Although a constitution may not refer explicitly to Religion, the normative system cannot dispense with the three functions the latter fulfills: marking the founding reference of the legal system through particular rituals and emblems; grounding filiation; and legitimating political practice.²³ Many countries in the world still distribute these three functions between the State and the religious authorities, with the latter retaining jurisdiction particularly over issues of personal status. Only in the most secular countries does the State have a monopoly within its territorial borders (including within workplaces) over all three. The Universal Declaration of Human Rights (1948) represented the first attempt to establish a Religion of Humanity that would transcend territorial borders.

22. The phrase “true Christian” is Gandhi’s translation of the Gujarati expression *dharmishtha*, which literally means “one anchored or grounded in Dharma.” MAHATMA GANDHI, *HIND SWARAJ* (1909), see especially chapter five, *The Condition of England*. On this work, see Suresh Sharma, *Hind Swaraj as a Statement of Tradition in the Modern World*, in *REPRESENTING HINDUISM: THE CONSTRUCTION OF RELIGIOUS TRADITIONS AND NATIONAL IDENTITY* 283–93 (Vasudha Dalmia & Heinrich von Stietencron, eds., 1995).

23. See P. LEGENDRE, *LE DÉSIR POLITIQUE DE DIEU. ÉTUDE SUR LES MONTAGES DE L’ÉTAT ET DU DROIT* 394 (2005).

Whether in their national or international guise, these civil Religions (prefigured in many respects by Confucianism), play the same role as did the Religions of the Book in Christian or Islamic lands in the Mediaeval period, with one important distinction: they do not claim to be the fruit of Divine Revelation but of human will, employing techniques of interpretation that are different from the hermeneutics of sacred texts.

III. THE EXPRESSION OF RELIGION IN THE WORKPLACE

This review of the concepts of work and religion helps us understand the many different aspects of the expression of religion in the workplace. If we are talking about the expression of civil Religion, for example the Republican Religion of France, then the form this takes is the *obligation imposed on all employers and employees*, in all workplaces, to respect the basic human rights of the workplace, as enshrined in the constitution or the international agreements in force in the country concerned. If we are talking about a particular religion in the sense of the subjective belief of employers or employees, then its expression will depend on *the degree of freedom granted to the individual* to observe the rules laid down by his or her faith. Contemporary law shows us that these two dimensions of the religious—the public and the private—are everywhere in conflict today. But a comparative analysis also shows the particular ways in which each country has faced up to this conflict and reconciles public faith and private belief.

What emerges from the national surveys collected here is that, in most of the countries considered, the juxtaposition of public and private belief did not present any particular problem until relatively recently. This is because a Westphalian system still existed, in which the maxim "*Cuius regio, eius religio*"—respect for the Religion of the country, even in the sense of a purely civil Religion—still unquestionably prevailed over private religious affiliations. The tolerance shown toward the latter could vary according to period and country, but the general rule was that the dogmas adopted by the sovereign authority were applied uniformly over its territory. The separation of Church and State reinforced this kind of organization, with the founding beliefs of the State as enshrined in the Constitution replacing the Religion of the Ruler to form the common normative framework to which all were subject regardless of their subjective beliefs. Great Britain provides a particularly good example of this organization, since the sovereign is both head of the Anglican Church and also guarantor

of the religious freedom of her subjects.²⁴ But this model applies also to secular States like France, in which the dogmas of the “Republican Religion” (particularly the constitutional principles of personal freedom and equality before the law) take precedence over particular religions. Whatever the country in question, the hallmark of Religion with a big R is precisely that it has the power to legally define religions with a small r.²⁵ As regards labor law, this type of organization has, however, been globally destabilized by two forces.

The first is the worldwide triumph of the dogma of the Market, which affects the perception of both work and religion. With respect to work, the “managerial turn” of the last thirty years has transformed the worker into a quantifiable resource called “human capital,” subject to the same management techniques as natural or financial resources. In all work, however, there is an opaque and subjective part, since each person gets to grips with words and things in a different way in order to make products, services, or new thoughts out of them, and the process is never entirely transparent or demonstrable. This subjective dimension is what remains of the religious in secularized societies. It is what links each individual’s interiority to the collective effort and gives meaning to working life, while continuing to make work an aspect of personal identity. It is this portion of opacity in work that participatory management or the “New Public Management” aims to do away with, making the activity of production entirely predictable and transparent. Each worker is alone in his attempt to achieve targets—quantified wherever possible—that he is supposed to have freely subscribed to. His responsibility does not stop at the end of the working day and he can no longer depend on the solidarity of his fellow workers to help him out. The pathogenic effects of this sort of working set-up are well documented in the medical field.²⁶ It also leads to disillusion with work, which takes over one’s existence while failing to give it meaning. Religions are also affected by this extension of the market paradigm to all aspects of human life, since they are viewed by the “Law and Economics” doctrine simply as products in competition on a “market of ideas.” What this market covers, as defined by its inventor Ronald H. Coase, is much the same as what is covered by the First Amendment, namely religious opinions and beliefs, but it differs from the market in goods and services in that no regulatory intervention is permitted.²⁷ The

24. See Mark Freedland & Lucy Vickers, *Religious Expression at the Workplace in the United Kingdom*, 30 COMP. LAB. L. & POL’Y J. 597 (2009).

25. For the case of America, see Nicolas Robert, *Le statut juridique des religions aux Etats-Unis et en France* (2006) (unpublished Ph.D. thesis, Université de Paris-I, on file with university).

26. See particularly CHRISTOPHE DEJOURS, *L’ÉVALUATION DU TRAVAIL À L’ÉPREUVE DU RÉÉL - CRITIQUE DES FONDEMENTS DE L’ÉVALUATION* 82 (2003).

27. R.H. Coase, *The market for goods and the market for ideas*, 64 AM. ECON. REV. 384 (1974).

belief in the existence of a Total Market encompassing all aspects of human life is particularly common in the United States,²⁸ where the Supreme Court has adopted the notion of a “market of ideas” and prohibited any regulatory practices liable to alter its “natural mechanisms.”²⁹ But its influence is more far-reaching, and cannot but undermine the subordination of particular religions to territorial normative frameworks. For example, a secular framework such as that of France or Turkey is no longer viewed as a body of rules that is binding on all, but as a system of belief like any other, which that consent to be treated on an equal footing, and in competition, with particular faiths.³⁰ The only Religion with a big R that will survive this onslaught is that of the Market itself and universal competition.

The second destabilizing force affecting the balances struck at national level is the rise of personal status, which claims precedence over the application of the law equally to all those who live and work on the same territory. The *personality of laws* first reappeared in Western legal systems with colonization, when the colonizers kept colonized populations under a different, indigenous, status. It then spread to Europe when certain States began to base personal status on racial characteristics. Today personal status takes a different form. It is no longer imposed, but actually demanded, in the name of personal freedom. The notion of personal law, which was reinvented in the nineteenth century in the context of colonialism and slavery, has found a new lease of life due to the vast numbers of people in Western countries imported to work there for next to nothing or who have been driven from their homes through the destruction of their traditional environments.³¹ Western countries that are faced with this situation have opted for one of two strategies: assimilation or multiculturalism. Assimilation means upholding the territoriality of laws, such that all citizens of the same country are subject to the same personal status. Multiculturalism, on the other hand, reintroduces the personality of laws so that new citizens may keep their original status. This kind of multiculturalism, however, in contrast to older mechanisms for coexistence between communities (such as indigenous status under colonialism or the

28. See J.C. Yoo, *La liberté de religion et la liberté d'expression*, in LE FAÇONNAGE JURIDIQUE DU MARCHÉ DES RELIGIONS AUX ÉTATS-UNIS 44 (L. Mayali ed., 2002).

29. U.S. Supreme Court, *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Healy v. James*, 408 U.S. 169, 180 (1972).

30. See A. Gokalp, *France-Turquie, des deux côtés du miroir de la laïcité* (on file with author). As William W. Van Alstyne notes in his contribution, this equality is likely to be merely formal given that agnostic citizens cannot appeal to a religious law in order to claim special treatment. William W. Van Alstyne, *Religion in the Workplace: A Report on the Layers of Relevant Law in the United States*, 30 COMP. LAB. L. & POL'Y J. 627 (2009).

31. For the ways in which immigration affects the discussion of religion in the workplace, see the contribution of Achim Seifert, *Religious Expression in the Workplace: The Case of the Federal Republic of Germany*, 30 COMP. LAB. L. & POL'Y J. 529 (2009).

Ottoman *millet* system³²), claims to act in the name of human rights and the freedom of the individual to choose his or her personal status. This shift to an individualized and contractual basis from a collective and statutory one explains the inconsistencies of Western multiculturalism, which on the one hand condemns the wearing of the *burka* in Afghanistan and on the other hand sees it as the expression of religious freedom on the streets of London or Lyon.³³ Former Lord Chief Justice Nicholas Addison Phillips, the supreme judicial authority in England and Wales, recently based his arguments in support of allowing Islamic and Rabbinical courts to have jurisdiction in his country on the freedom of parties to submit their agreements to laws other than English law (“law shopping”).³⁴

Demands shift here from having to being, from the realm of the socio-economic to that of identity, with not only groups but also individuals wanting to become their own law-givers. On the collective level, the “right to difference” has been championed by various minorities—ethnic, sexual, and religious—who invoke their position as victims in order to obtain a special status and hence limit the scope of the law that applies to all the inhabitants of the same territory.³⁵ On the individual level, the right to privacy is claimed in order to challenge the principle of the inalienability of civil status and to enable each person to determine his or her own identity.³⁶ As always in the history of law, the reemergence of older legal structures does not imply a return to the past but is part of the construction of new categories. The personality of laws, in its individualist form of “a law for me” and “myself as law,” is the legal expression of the narcissism characterizing this latest stage of Western civilization.³⁷ In many respects, Islamism presents an inverted image of this state, as suggested by what is called *fatwamania* in Sunni countries and the fact that any imam whatsoever can claim to lay down the law.³⁸

The issues surrounding the expression of religion in the workplace have changed with this new situation. The emphasis on forbidding

32. On this way of exercising imperial power, see R. Mantran, *L'Empire ottoman*, in CENTRE D'ANALYSE COMPARATIVE DES SYSTÈMES POLITIQUES, LE CONCEPT D'EMPIRE 231 (1980).

33. See *Le port de la burqa crée de nouveau la polémique*, LE FIGARO, Apr. 10, 2004.

34. See THE GUARDIAN, July 4, 2008.

35. For the United States, see MICHAEL PIRE, BEYOND INDIVIDUALISM (1995); for Canada (and applying the same notion of “minority” to Inuits, homosexuals, and women), see A. LAJOIE, QUAND LES MINORITÉS FONT LA LOI (2002).

36. For this shift toward a self-determined personal status in the name of the right to privacy, see II H. MUIR WATT, DROIT INTERNATIONAL PRIVÉ no. 642, at 43; D. GUTMAN, LE SENTIMENT D'IDENTITÉ. ÉTUDE DE DROIT DES PERSONNES ET DE LA FAMILLE 340 (2000); J.-L. Ranchon, *Indisponibilité, ordre public et autonomie de la volonté dans le droit des personnes et de la famille*, in A. WUFFELS, LE CODE CIVIL ENTRE IUS COMMUNE ET DROIT PRIVÉ EUROPÉEN 26 (2005).

37. CHRISTOPHER LASCH, CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS (1979).

38. See Habib Y., *Halal, haram, sport panarabe*, LE TEMPS (ALGIERS), Sept. 19, 2008.

discriminatory practices against employees on grounds of their religious beliefs has shifted into what is perhaps its opposite, namely using these beliefs as the basis for “positive discrimination,” that is, for claiming individual rights that employers are called upon to respect. Although this shift from the register of freedoms to that of individual rights is not specific to issues of religious identity,³⁹ religion is a particularly fertile terrain for such legal claims, since each religion demands recognition of different norms from those applied by the State or by employers. Given this trend, all legal systems are faced with a question of life or death that can best be phrased in the words of the Supreme Court of the United States when it treated the subject of polygamy among Mormons more than a century ago: Can one allow each citizen to become a law unto himself without destroying the very idea of a State governed by the rule of law?⁴⁰ A system in which the obligation to obey laws would depend on their agreement with each individual’s religious beliefs would lead precisely to such an outcome.⁴¹ Modern States, as bearers of Religion with a big R, cannot renounce the hierarchical superiority of their laws over the laws of religion with a small r without disavowing themselves. In the words, once again, of the Supreme Court: “that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.”⁴²

Every country—or at least all of those discussed at this conference—is affected by the dogma of the Total Market and by the growing number of

39. It is also apparent in issues of morality. Homosexuality, for example, was at first rightly recognized as a personal freedom, but is today claimed as an element of identity that should give rise to particular rights. A further limit was crossed when a young woman called Jennifer Hoes won her case in Holland to marry herself at Haarlem Town Hall. *Holländerin heiratet sich selbst*, DER SPIEGEL, Feb. 19, 2003.

40. “So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.” *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878).

41. The government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, “cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.” *Lyng v. Northwest Indian Cemetery*, 485 U.S. 439, 451 (1988). To make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is “compelling”—permitting him, by virtue of his beliefs, “to become a law unto himself.” *Reynolds v. United States*, 98 U.S. 145, 167 (1878)—contradicts both constitutional tradition and common sense” *Employment Div. v. Smith*, 494 U.S. 872, 885 (1990).

42. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990). It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

claims concerning personal status. Every country is torn between fundamentalism and deconstruction. Fundamentalism means ossifying the normative framework and refusing to let it evolve in ways that accommodate the profound changes affecting contemporary societies. Deconstruction, at the other extreme, means dismantling this normative framework and giving free rein to the jostling of individuals who have set themselves up as their own law-givers. France, for example, is torn between a fundamentalist secularism and the lure of multiculturalism.⁴³ Only by drawing on its own legal tradition may a country hope to avoid these two pitfalls and withstand the tide of religion- and identity-based claims. As the etymology of the term reminds us, “tradition” (*trans-dare*: what is given from one side to another) is not an attachment to the past but what of the past is still alive in us and enables us to invent the future.⁴⁴ The national surveys brought together in this issue show the variety of mechanisms that have made it possible to reconcile religious freedom with the need for a generally applicable law in each country. These national legal traditions are the most solid support judges can find to respond to the challenges of our present times.

43. See Francois Gaudu, *Labor Law and Religion*, 30 COMP. LAB. L. & POL’Y J. 507 (2009).

44. On tradition as a living past, see Suresh Sharma, *Hind Swaraj as a Statement of Tradition in the Modern World*, in REPRESENTING HINDUISM: THE CONSTRUCTION OF RELIGIOUS TRADITIONS AND NATIONAL IDENTITY 283, 286 (Vasudha Dalmia & Heinrich Von Stietencron eds., 1995).

