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# FIDES ET LIBERTAS



## 2012

SECULARISM AND RELIGIOUS FREEDOM—  
CONFLICT OR PARTNERSHIP?

THE JOURNAL OF THE INTERNATIONAL  
RELIGIOUS LIBERTY ASSOCIATION



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SECULARISM AND RELIGIOUS FREEDOM—  
CONFLICT OR PARTNERSHIP?

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## DECLARATION OF PRINCIPLES

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We believe that religious liberty is a God-given right.

We believe that legislation and other governmental acts which unite church and state are contrary to the best interest of both institutions and are potentially prejudicial to human rights, and hold that religious liberty is best exercised where separation is maintained between church and state.

We believe that government is divinely ordained to support and protect citizens in their enjoyment of natural rights, and to rule in civil affairs; and that in so doing, government warrants respectful obedience and willing support.

We believe in the natural and inalienable right of freedom of conscience—to have or not have a religion; to adopt the religion or belief of one's choice; to change religious belief according to conscience; to manifest one's religion individually or in community with others in worship, observance, practice, promulgation, and teaching—subject only to respect for the equivalent rights of others.

We believe that religious liberty also includes the freedom to establish and operate appropriate charitable or educational institutions, to solicit or receive voluntary financial contributions, to observe days of rest and celebrate holidays in accordance with the precepts of one's religion, and to maintain communication with fellow believers at national and international levels.

We believe that religious liberty and the elimination of intolerance and discrimination based on religion or belief are essential to promote understanding, peace, and friendship among peoples. We believe that citizens should use lawful and honorable means to prevent the reduction of religious liberty.

We believe that the spirit of true religious liberty is epitomized in the Golden Rule: *Do unto others as you would have others do unto you.*

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## STATEMENT OF PURPOSES

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The purposes of the International Religious Liberty Association are universal and nonsectarian. They include:

- 1 Dissemination of the principles of religious liberty throughout the world;
- 2 Defense and safeguarding of the civil right for all people to worship, to adopt a religion or belief of their choice, to manifest their religious convictions in observance, promulgation, and teaching, subject only to the respect for the equivalent rights of others;
- 3 Support for religious organizations to operate freely in every country through the establishment of charitable or educational institutions;
- 4 Organization of local, national, and regional chapters, in addition to holding seminars, symposiums, conferences and congresses around the world.

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## MISSION STATEMENT

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The mission of the International Religious Liberty Association is to defend, protect and promote religious liberty for all people everywhere.

# HONOR *those who* *advance* RELIGIOUS FREEDOM

Every year, Washington gathers to attend the Religious Liberty Dinner. This year, join us as we celebrate and bring attention to a central human right – the freedom of religion or belief – both in the United States and around the world.

Thursday, April 18, 2013  
Washington, D.C.



Religious  
Liberty  
DINNER

*Championing Freedom  
of Conscience for All*





# FIDES ET LIBERTAS THE JOURNAL OF THE INTERNATIONAL RELIGIOUS LIBERTY ASSOCIATION

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**Price US\$10.**

This periodical is indexed in the ATLA Religion Database(r), a product of the American Theological Library Association, 300 S. Wacker Dr., Suite 2100, Chicago, IL 60606, USA. email: [atla@atla.com](mailto:atla@atla.com), <http://www.atla.com>.

ISSN 1940-6924

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## APPRECIATION FOR DR DENTON LOTZ— A GREAT VOICE FOR RELIGIOUS FREEDOM

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**I**t is with certain nostalgia that I write these few words of thanks for Dr Denton Lotz. Since 2002 Denton has been the IRLA President. It has been a great honor and pleasure to work with him for the past ten years. Denton is a vibrant defender and promoter of religious freedom. As Secretary General of the Baptist World Alliance for many years, he met religious leaders, heads of state, government officials, monarchs and princes. In all his interventions he had strong words of support for religious freedom.

Denton and the IRLA share the same heritage of religious freedom: The Anabaptist/Baptist heritage. It includes separation of church and state in a context which makes cooperation possible—not in a context of hostility. This is why most of the IRLA members see Denton as one of them.

Denton was also a great Christian leader. As Secretary of the Conference of Secretaries of the Christian World Communions (CS/CWC), I can give testimony. Denton represented very well the Baptist World Alliance family in that group. He was also the voice of religious freedom.

I will never forget the large and historical convocation when the President of Romania hosted many of the religious leaders of the world. I was invited to attend. Denton was among the top ten who were invited to speak to the crowd and to all the officials: Presidents, Patriarchs, Cardinals, Ministers of governments, and Ambassadors. No one else said a word in favor of religious freedom, but Denton did. In this great meeting, religious freedom was not ignored because Denton was there.

Every time Denton was invited to speak we knew that he would have a word for religious freedom, a word for those who are persecuted for their faith.

Dear Denton, it was an honor to have you as IRLA President. It was a pleasure to work with you. Thank you for being, year after year, a great Ambassador for religious freedom for all people everywhere.

Dr John Graz, Secretary General  
International Religious Liberty Association



## INTRODUCTION TO NEW IRLA PRESIDENT— AMBASSADOR ROBERT SEIPLE

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It is a privilege and a great pleasure for me to welcome our new IRLA President, Ambassador Robert Seiple. Ambassador Seiple has been our Keynote Speaker for the last three World Congresses on Religious Freedom, and he has had an important role in several other events—such as the Meeting of Experts. He has been a member and Vice President of the IRLA Board for several years.

I met Bob for the first time in 1998 at the White House when he was introduced by President Clinton and Secretary of State Madeleine Albright. He was the First US Ambassador-at-Large for International Religious Freedom. After the meeting I invited him to the Commemoration of the 50th Anniversary of the United Nations Human Rights Declaration. In fact, I invited him even before I knew what kind of event we would organize. He very kindly said, “Yes.” My Associate, Richard Lee Fenn, organized the event a few months later in December 1998. Bob and Margaret came to our headquarters office, and Bob gave a great speech. Bob always gives good speeches. Since that time we have had many opportunities to work together.

Bob was an excellent ambassador and a strong voice around the world for religious freedom. His service as ambassador began at a time when religious minorities and new religious movements were being attacked in Europe. Bob lifted up high the banner of freedom. I remember the conference in Vienna where he and his team made sure that the principle of religious freedom was kept in the context of human rights. Through his voice the United States faced tensions with some of its allies who were willing to minimize the value of freedom. Bob was not their ally. He was on the side of those who were discriminated against and marginalized.

For those who knew him at that time, Bob will always be the first United States Ambassador of International Religious Freedom. Welcome, Mister Ambassador! You smiled when in my first introduction of you, I said, “Your Excellency.” Welcome Bob! We are all proud and encouraged to have you as our new President.

Dr John Graz, Secretary General  
International Religious Liberty Association



## THE HONORABLE ROBERT A. SEIPLE BIOGRAPHY

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Ambassador, global leader, and educator, Bob Seiple has spent the last three decades fashioning humanitarian solutions that endure. His international travels have been as extensive as the experiences and contacts developed through years of global involvement. Vulnerable lives, lived out in difficult places, have provided the personal challenge for Seiple's work.

Prior to taking the position of President and CEO of the Council for America's First Freedom, Seiple founded the Institute for Global Engagement (IGE), a "think tank with legs," to develop sustainable environments for religious freedom worldwide, and to inspire and equip emerging leaders with faith-based methodologies of engagement. Seiple spent the previous two years in the State Department as the first ever U.S. Ambassador-at-Large for International Religious Freedom. This position, created by the International Religious Freedom Act of 1998, was charged with promoting religious freedom worldwide, promoting reconciliation in those areas where conflict had been implemented along religious lines, and making sure that this issue was woven into the fabric of the U.S. foreign policy.

Seiple spent the previous 11 years as President of World Vision, Inc., the largest privately funded relief and development agency in the world. In that capacity, he increased the annual income base of the organization from \$145 million to over \$350 million per year. Additionally, Seiple guided the organization towards an expanded involvement in advocacy in the worldwide struggle against poverty and hunger. When he left, World Vision was administering help to more than 70 million beneficiaries in over 100 countries of the world.

Seiple was born December 6, 1942 in the rural community of Harmony, New Jersey. He received an AB degree in American Literature from Brown University in 1965. From 1966-69, he served in the U.S. Marine Corps attaining the rank of Captain. He flew 300 combat missions in Vietnam and was awarded five Battle Stars, the Navy Commendation Award with Combat 'V,' 28 Air Medals and the Distinguished Flying Cross. This experience motivated him to become an outspoken advocate for the healing of Vietnam's relations with the United States.

Returning to his alma mater in 1971, Seiple held a number of administrative positions, including Director of Athletics and Vice President for Development. In his last position, during a 12-year tenure, he successfully directed the Campaign for Brown, the largest fund-raising campaign ever attempted at the University at that time. Seiple was President of Eastern College and Eastern Baptist Theological Seminary from 1983 to 1987.



In 1994, Seiple was named, “Churchman of the Year” by Religious Heritage America. In 1996, he received World Relief’s “Helping Hands” award. In 2004, he was awarded the “Good Samaritan Award” by Advocates International. He is the recipient of the National Award from First Freedom Center as well as the Religious Freedom Award from the International Religious Liberty Association, both received in 2005. That same year, Seiple also received the Brown University “Distinguished Alumni Award” given by the Ivy League Football Association. In April 2006 Seiple received The Abraham Kuyper Prize and Lecture at Princeton Theological Seminary. He also received the Distinguished Service Award from the International Center for Law and Religion at BYU in 2006. He is the recipient of eight honorary degrees as well as the Secretary of State’s Distinguished Public Service Award.

Seiple is new newly elected president of the International Religious Liberty Association and is Honorary Chair of First Step Forum, two groups active in religious freedom issues. In 2005, he joined the Board of Denver Seminary.

Seiple is married to the former Margaret Ann Goebel and they have three grown children and five grandchildren.





## INTRODUCTION TO *FIDES ET LIBERTAS*

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This edition of *Fides et Libertas* draws contributions from two major landmarks in the history of the IRLA—the Meeting of Experts held at the School of Law of the University of Sydney, Australia, in August 2011, and the Meeting of Experts held at the University of Toronto, Canada, in August 2012. These two events both had presentations related to the theme of Secularism and Religious Freedom, and they explored the nature of the relationship between secularism and religious freedom. Specifically, is the relationship that of antagonism or that of useful partnership? Or does it depend on the context or on how one defines *secularism* or *religious freedom*?

The words that cluster around the concept of *secular* are characterized by polysemy. They can evoke a wide range of ideas: A theory of society, a process of history (secularization), a state of mind and culture (secularity), a theory of truth (secularism), a philosophy of history, a doctrine of governance, a neutral attitude towards religious or non-religious worldviews, an epistemology of humanism, a model of pluralism, a rejection of ecclesiastical authority, and a creed of atheism.<sup>1</sup>

In part of the world, secularism has been used by anti-religious atheistic ideologies in order to drive out of the public sphere religious symbols or even government-funded, faith-based initiatives.

However, this trend does not tell the whole story of the relationship between secularism and religious freedom. French secularism, for example, known as *laïcité*, is unique. It is different from other models of secularism, even though it is at times compared to the Mexican or the Turkish models. *Laïcité* started out not only for the separation of church and state but, as the French law of 1905 explicitly stipulates, as a guarantee of freedom of conscience equally secured for people of all religions recognized by the Republic and for non-religious persons. Even within French society, various models of secularism have been experienced and adopted depending on historical contexts and socio-political issues. How civil peace is secured has been a major issue in France.

The British model bears the stamp of the Act of Supremacy of 1634. The American model accommodates the integration of religious language within the constitution. This is typical to how the United States was founded. Canada provides an interesting case, with variations within the same country because of the different approaches of the French and English to secularism.

Encounters between secularism and Islam have been the object of several recent studies, with the fundamental question being: Is Islam compatible with secularism? Though the issue is more complex and should not, therefore, be oversimplified, the

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<sup>1</sup> See S. Parvez Manzoor. “Desecralising Secularism,” in John L. Esposito and Azzam Tamimi, Eds. *Islam and Secularism in the Middle East* (London: Hurst & Company, 2000), p. 81.



following question is legitimate: Can a society based on the “subject,” where individuality and human rights are emphasized, be compatible with models of society that more prominently focus on community and duties over rights? This question has several ramifications, not only at a philosophical level, but also at social, political, economic, religious and ideological levels.<sup>2</sup>

Fundamentally, how is secularism related to freedom? The answer to this question is complex. Giving one definition of secularism risks overlooking nuances essential to an accurate assessment of a wide range of particulars.

In the French context, for example, *laïcité* is associated with liberation from the domination of ecclesiastical authorities and at the same time making room for the free exercise of one’s religion or lack thereof.<sup>3</sup>

Olivier Bobineau and Stéphane Lathion make a case that freedom of conscience and the free practice of one’s beliefs constitute the heart of French *laïcité*. They distinguish four aspects inherent to the French model of secularism known as *laïcité*.

*Laïcité* of opposition is essentially characterized by resistance and militancy against the influence of a religious denomination on civil society.

A *laïcité* of proposition is considered the heart of the French law aimed at securing freedom of conscience and a guarantee of freedom to practice one’s religion. This is contrary to the assumption according to which *laïcité* means the marginalization of religions out of the public sphere.

Another aspect of French secularism is called *laïcité* of differentiation. This aspect emphasizes the neutrality of the state in that no religion has privileged status or should be funded by the state. This provision guarantees that there will be no state religion, one that is elevated above the others.

The fourth aspect is called *laïcité* of composition, and it allows cooperation between the state and religious institutions. In fact, the French secular state does not exclude the funding of religious services offered by religions in schools, hospitals, prisons, and various social programs.

The articles in this publication provide a variety of perspectives that enrich the debate and help us grasp the promises and pitfalls of a relationship between secularism and religious freedom that will most certainly stay with us for years to come not only in the northern hemisphere but also in the emerging global south.

Ganoune Diop, Ph.D.  
Director United Nations Relations  
Deputy Secretary General  
International Religious Liberty Association

<sup>2</sup> See Tony Evans. *Human Rights in the Global Political Economy: Critical Processes* (London: Lynne Rienner Publishers, 2011), pp. 59-87.

<sup>3</sup> Emile Poulat gave a clear definition: “*Laïcité*, is the public freedom of conscience for all, men and women.” It is freedom to believe or not to believe, freedom of religion or lack thereof. The twofold objectives of *laïcité* are freedom of conscience and freedom as absence of domination of one religion over others.

# FIDES ET LIBERTAS



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PART ONE:  
SECULARISM AND RELIGIOUS FREEDOM  
—CONFLICT OR PARTNERSHIP?

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# RELIGIOUS FREEDOM IN A SECULAR STATE

HEINER BIELEFELDT<sup>1</sup>

Freedom of religion or belief has been enshrined in the Universal Declaration of Human Rights (UDHR), adopted by the United Nations on December 10, 1948, as well as in a number of legally binding international and regional human rights documents, in particular the 1966 International Covenant on Civil and Political Rights (ICCPR). Unlike policies of religious tolerance—as they were pursued in the past under the auspices e.g. of Christianity, Islam or the Enlightenment—the political implementation of freedom of religion or belief is not an *act of grace*, but an *act of respect*, finally based on the due “recognition of the inherent dignity ... of all members of the human family,” to quote from the preamble of the UDHR. This difference marks a genuine paradigm shift. Immanuel Kant therefore rejects the attitude of mere political tolerance as an expression of arrogance, since a policy of tolerance still presupposes the idea that the government wields a legitimate authority to decide on questions of religious truth, a presumption that Kant strictly denies.<sup>2</sup> Using religious language, Thomas Paine goes a step further by blaming purportedly tolerant rulers for blasphemously exercising an authority in religious affairs which should be reserved to God alone.<sup>3</sup> Modern Muslim theologians, like Mohammed Talbi, clearly share this approach.<sup>4</sup> From such a perspective, freedom of religion or belief clearly goes beyond traditional (or contemporary) forms of religious tolerance in that it requires of the state to strictly respect and protect free choice in religious or belief-related matters as an *inalienable right* to which every human being is entitled.

There is another aspect in which freedom of religion or belief goes beyond mere political tolerance. Since human rights belong to all human beings *in an*

<sup>1</sup> Dr. Heiner Bielefeldt is a German philosopher, historian and Catholic theologian. He is Professor of Human Rights and Human Rights Policy at the University of Erlangen. In 2010, he was appointed United Nations Special Rapporteur on Freedom of Religion or Belief.

<sup>2</sup> Cf. Immanuel Kant, *An Answer to the Question: What is Enlightenment?* in: *The Cambridge Edition of the Works of Immanuel Kant. Practical Philosophy* (Cambridge: Cambridge University Press, 1996), pp. 11–22, p. 21.

<sup>3</sup> Cf. Thomas Paine, *The Rights of Man* (London: J.M. Dent & Sons, 1906), p. 66: “...by the same act of assumed authority by which it tolerates man to pay his worship, it [i.e. tolerance, H.B.] presumptuously and blasphemously sets itself up to tolerate the Almighty to receive it.”

<sup>4</sup> Cf. Mohamed Talbi, *Religious Liberty: A Muslim Perspective*, in: *Conscience and Liberty*, 3rd year, No. 1 (Spring 1991), pp. 23–31, at p. 31. In Talbi’s understanding, “religious liberty is fundamentally and ultimately an act of respect for God’s Sovereignty and for the mystery of His plan for man, who has been given the terrible privilege of building on his own responsibility his destiny on earth and for the hereafter. Finally, to respect man’s freedom is to respect God’s plan.”



*equal manner*,<sup>5</sup> freedom of religion, as a human rights claim, is inherently linked to the principle of non-discrimination which runs through the entire architecture of human rights. This implies, among other requirements, that a state committed to implementing freedom of religion or belief must ensure that people of different religious or non-religious backgrounds enjoy *equal rights* and have *equal opportunities* to manifest their convictions in public life. However, if the state were to favour one religion over others or even use a particular religion as the basis of its own political legitimacy, then those adhering to that state religion would likely be privileged—at least symbolically—at the expense of other people and to the detriment of the principle of non-discrimination. It is for this reason that the state should not favour any particular religion or belief (or set of religions, say, monotheistic religions).

Political secularism is not a purpose in itself, but a means to an end, i.e., in that it can provide a conceptual framework for the systematic implementation of freedom of religion or belief. It thus has the status of *an indispensable second order principle*. This principle can be further spelled out as the principle of *respectful non-identification*. It means that for the sake of freedom of religion or belief—and thus in a spirit of respect for human rights—the state should not identify itself, neither theoretically nor practically, with any particular religion or belief.

The principle of respectful non-identification has a negative and a positive component which always should be seen in combination. The isolation of the (seemingly) negative component of non-identification easily leads to describing secularism simply as a loss of religious substance and, as some would claim, a general decline of moral values, too. This is a polemical view shared by many conservative critics such as, for instance, Carl Schmitt who castigates the secular state for being the result of the modern “age of neutralization”<sup>6</sup> in which he says religious and moral values have altogether ceased to play a role in political life. Against such a misrepresentation it is worth recalling that political secularism is based on a strong normative concern, i.e., the universal right to freedom of religion or belief. The secular principle of non-identification should therefore always be qualified as an *expression of respect* and hence as something positive.

Whereas some critics ignore or deny the positive normative substance underlying political secularism, others challenge the claim of non-identification by claiming that secularism itself is a sort of comprehensive belief system. Historically, we have indeed a number of examples of comprehensive secular worldviews designed to replace traditional religions, sometimes by using similar means, including secular missionary activities, community rituals and erecting places of meditation. For instance, the “Secular Society” founded in London in the mid-nineteenth century, or the “German

<sup>5</sup> Cf. article 1 of the Universal Declaration of Human Rights: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

<sup>6</sup> Cf. Carl Schmitt, *Der Begriff des Politischen*. Enlarged 2nd edition from 1932 (Berlin: Duncker & Humblot, 1963), p. 80.



Association for Ethical Culture” established a few decades later, devoted themselves to a secularist missionary work analogous in its purpose and structure to the missionary work of the Christian churches.<sup>7</sup> One of the most prominent examples of doctrinal secularism is Auguste Comte’s vision of a new scientific “Religion of Humanity” (1851). Comte calls for scientifically trained sociologists to serve as “priests of humanity” and form a quasi-clerical secular hierarchy in charge of spreading the post-Christian trinitarian creed of “love, order and progress.”<sup>8</sup> Ironically, Comte’s aim of bringing about a “sociocratic” unity of the state and the new secular creed mirrors the “theocratic” ideal of the French Catholic counter-revolution, an ideal to which Comte extends a high degree of admiration, even though, at the same time, he aspires to overcome Catholicism and traditional religions in general.<sup>9</sup> For all his progressive rhetoric, Comte’s post-religious ideology is basically anti-liberal. It is designed to replace allegedly “subversive” human rights with a codex of universally binding duties and to submit the individual to the worship of the collective whole of humanity.<sup>10</sup>

Relics of the nineteenth century type of doctrinal secularism continue to play a role in contemporary political debates on religious issues. It is all the more important not to equate this type of doctrinal secularism with the liberal concept of political secularism based on freedom of religion or belief. The difference between the two concepts of secularism is indeed fundamental; it is not merely a difference of degree but a difference of principle. Whereas some comprehensive secular doctrines, such as Comte’s scientific Religion of Humanity, aspire to marginalize traditional religions, the liberal-secular principle of respectful non-identification, by contrast, aims at facilitating equal freedom and participation for all people in a religiously pluralistic society.

One of the stereotypical misunderstandings of political secularism is that it is said to lead to a privatization of religion. To be sure, religion has its private, even its intimate dimensions—traditionally referred to under the title of *forum internum*. Needless to say that freedom of religion or belief has to protect those private dimensions. However, it is important to note that article 18 of the ICCPR and many other human rights documents, beside the private sphere, also cover public manifestations of religious life “in teaching, practice, worship and observance.”

Taking into account the extension of freedom of religion and belief beyond the private sphere is crucial for an appropriate understanding of the liberal concept of secularism. For many religious people faith permeates all dimensions of human life, including public life. That is why religions and other belief systems must have an

<sup>7</sup> On the following cf. Herman Lübbe, *Säkularisierung. Geschichte eines ideenpolitischen Begriffs* (Freiburg/ München: Alber, 1965), pp. 42ff.

<sup>8</sup> Cf. Auguste Comte, *Système de Politique Positive ou Traité de Sociologie, Instituant la Religion de l’Humanité* (new print of the 1851 edition, Osnabrück: Otto Zeller, 1967), vol. 1, pp. 321-399.

<sup>9</sup> Cf. Comte, *op.cit.*, vol. 3, p. 605.

<sup>10</sup> Cf. Comte, *op.cit.*, vol. 1, pp. 363ff.; vol. 3, p. 601.



opportunity to manifest themselves in the public space, too.<sup>11</sup> An understanding of secularism such that the public sphere should be purged of all visible manifestations of religious life would violate the right to freedom of religion or belief.

In political reality there may be overlaps and grey zones between both types of secularism. Whether particular secular political agendas are pursued as a purpose in itself or in the service of a fair implementation of freedom of religion or belief for everyone may not always be clear at first glance. In order to cope with existing ambivalent phenomena of secularism, however, it is all the more important to stick to conceptual precision in this regard. Otherwise we would intellectually undermine the very possibility of a State being committed to a non-discriminatory understanding of freedom of religion or belief as a universal human right.

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<sup>11</sup> Cf. Jose Casanova, *Public Religions in the Modern World* (Chicago: University of Chicago Press, 1994).



# SECULARISM, THE SECULAR, AND SECULARIZATION

T. JEREMY GUNN<sup>1</sup>

## INTRODUCTION

In 1958, Richard Loving, a white man, and Mildred Jeter, a black woman, traveled from their native Virginia to marry each other in Washington, D.C. Five weeks after the newlyweds returned home, Sheriff R. Garnett Brooks broke into their bedroom at 2:00 a.m. and charged the couple with violating the state law forbidding interracial marriage. In 1959, Judge Leon M. Bazile convicted both Lovings and sealed their fate with a religious justification for his decision:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.<sup>2</sup>

There is no reason to doubt that Judge Bazile believed that his Bible and his Christian religion prohibited race-mixing, and we can easily imagine that many of the legislators who enacted Virginia's Racial Integrity Law shared similar beliefs about God's opposition to interracial marriages. The Lovings challenged their conviction in state and federal courts for the next eight years. Finally, in 1967, the United States Supreme Court reversed their conviction on the grounds that Virginia's statute violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

Although we have no measure of the public response to the appropriately named *Loving* decision, it certainly would not be surprising if many people who lived in the 24 other states that, like Virginia, had miscegenation laws prohibiting interracial marriage, believed that the United States Supreme Court had replaced God's law with man's law and that the decision provided yet another example of the Warren

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<sup>2</sup>As quoted in *Loving v. Virginia* (1967) 388 U.S. 1.





Court's attempt to drive religion out of the public sphere.<sup>3</sup> In 2007, 40 years after the Supreme Court's decision, and after Richard had died in a car accident, Mildred Loving issued a statement saying:

I am still not a political person, but I am proud that Richard's and my name is on a court case that can help reinforce the love, the commitment, the fairness, and the family that so many people, black or white, young or old, gay or straight seek in life. I support the freedom to marry for all.

Mildred Loving's opinion supporting the right of gay people to marry is not shared by many people who have strong religious convictions. In 2012, for example, Monsignor Keith Newton, formerly an Anglican Bishop who converted to the Roman Catholic Church, declared in the Vatican that the "problem of the ordination of women and gay marriage are symptoms of the problem—the problem I think is liberalism in religion, secularism."<sup>4</sup> Secularism and liberalism, for Monsignor Newton, are enemies of religion and the push for gay marriage is a clear example of an assault on the sacred.

Interracial marriage is no long illegal anywhere in the United States. In 2010, three years after Mildred Loving issued her plea for "the freedom to marry for all," the Pew Research Center issued a report on American attitudes toward interracial marriage. In its survey, Pew found that more than 14% of all new marriages in the United States are between interracial couples and that more than one-third of the families in the United States now include people of different races. More than 60% of Americans have no objection to interracial marriages within their own families.<sup>5</sup> We can thus imagine that the children and grandchildren of those who believed that God's law prohibited interracial marriage in 1967 today would likely see no religious objection to whites and blacks marrying each other. If this were true, would the change be better understood as *secularism triumphing over religion*, or, as *the lessening of racist attitudes of religious believers*?

In public opinion surveys conducted during the first decade of the twenty-first century, the Pew Forum on Religion & Public Life noted a dramatic shift in public attitudes toward gay marriage in the United States. Although there was a 22-point spread in opinion about gay marriage in 2001 (57% opposed to 35% supporting), by 2011 support and opposition were statistically even (46% to 45%). Furthermore, the strongest opposition to gay marriage was in the older population while the stron-

<sup>3</sup>The era known as the "Warren Court" (1953-1969) was famous for several U.S. Supreme Court decisions that were understood by its critics as undermining religion in the public sphere, including decisions against state-sponsored prayer and Bible reading in public schools, the posting of the Ten Commandments in public schools, and restricting state financial aid to religious schools.

<sup>4</sup>"Former Anglicans Celebrate Mass in St. Peter's, Give Thanks to Pope," *Catholic News Service*, Feb. 29, 2012, <http://www.catholicnews.com/data/stories/cns/1200760.htm>.

<sup>5</sup>Curiously, the Pew Study, which did not even ask about possible *religious* objections to interracial marriage, did ask about objections to *interreligious* marriage, and found that Americans were much more accepting of mixed-race than mixed-religion marriages, and that the objection was strongest to marriages with atheists.



gest support was among the young, suggesting that for demographic reasons alone the future likelihood of broad acceptance of gay marriage. Other surveys have found that the children of Evangelical Christians, much to the dismay of their parents, are increasingly supportive of gay marriage. It can thus be imagined that within a few years after Monsignor Newton's statement, gay marriage will be widely accepted by religious communities in the United States and Europe. It is entirely possible that the grandchildren of those who now believe that gay marriage should be blamed on secularism and liberalism, as does Monsignor Newton, will find no religious objection whatever to gay marriage, just as the grandchildren of Judge Bazile may see no religious objection to interracial marriage. If this were to happen, we can well imagine that Monsignor Newton might well describe this as the triumph of secularism over religion in the public sphere. But would he be correct? Might future generations of religious believers explain that what really happened was not a decline of religion, but the reduction of human prejudices from true religion? And, supposing that religious people of the future believe that the real reason behind their grandparents' opposition to gay marriage was not sacred religion but human homophobia, who would be right—Monsignor Newton or those hypothetical religious believers of the future?

It is often asserted that the so-called "secularization theory" of the 1960s and 1970s—which argued that religious adherence was in decline—has been refuted by the "return to God" and the "re-enchantment of the world" that is observable around the world since the 1980s. The Muslim world has been cited as the most obvious counterexample to the secularization theory. There is, it is argued, a resurgence of interest in Islam that is now evident by the percentage of women wearing the veil (*hijab*), by the increase in religious language by political figures, and by the growing influence of Islamist and Salafist groups throughout the Muslim world. Supposing that these examples are factually correct, are they in fact evidence of growing religious devotion, or, might they merely be examples of the increasing use of religious language and religious symbols to express other concerns? Are we witnessing a return to authentic Islam (however that may be understood) or an increase in the use of religious symbols as markers of Muslim identity?

The ancient medina of Fez, Morocco, is widely believed by Muslims in North Africa and beyond to be a sacred city. Today's medina in Fez, however, probably has fewer mosques than it did 100 years ago.<sup>6</sup> Football matches are now broadcast on televisions throughout the medina to audiences that certainly appear to be more passionate about a match pitting Manchester United against Real Madrid than Friday sermons or the *Qur'an* recitations that also appear on televisions in the medina. Should this be understood as some evidence that the great-grandparents of

<sup>6</sup>Unofficial figures place the number of mosques in the Fez medina today at 170. During the reign of the twelfth century's Yaqub Al-Mansur, 785 mosques were located with the same geographical space. Ali ibn-abī-Zar, *Rawd Al-Kirtas: Histoire des Souverains du Maghreb et annals de la ville de Fès*, trans. Auguste Beaumier (Rabat: Editions La Porte, 1999), p. 48.



the Fez football fans were more religious than their descendants or that the public sphere in the medina was more religious in 1900 than it is today? Although we can observe from photographs and glean from written accounts that the earlier generation appeared to be more religious, we also should ask: In what religion did they believe? Was it a religion of deep personal piety, powerful experiences of prayer and a devotion to God that was based on intimate familiarity with the *Qur'an* and the hadith of the Muslim Prophet, or might the illiteracy of the majority of the former population have meant that they were less knowledgeable about the *Qur'an*? Was the comportment of the earlier generation based more on superstitions and social pressures? Perhaps the most devout and informed Fezis of today, if transported back in time, would find that their ancestors were people ignorant of the basic tenets of the “true Islam” and that they were influenced by superstitions claiming that speaking to a black cat would transform the feline into a frightening Jinn and that pouring hot water in the sewer would provoke angry Jinns to spring from the underworld and torment the perpetrator.<sup>7</sup> Would any of these examples, real or hypothetical, help explain whether Fez has become more religious or more secular? The earlier generation might think that the latter is more secular and less religious, while the latter generation might think that the earlier was more superstitious, gullible, and influenced by folk myths and social pressures rather than true Islam.

Looking toward the Christian world, we have the curious example of the seventeenth century's Princess Elizabeth Charlotte of the Palatine, the Duchesse d'Orléans (married to Louis XIV's brother) who refused to believe that “in all Paris, clerical or lay, there are more than a hundred people who have the true faith and even who believe in our Lord.”<sup>8</sup> Supposing that she was correct, would not this undercut any theory that presupposes a relatively more religious seventeenth century and a relatively more secular twenty-first? More recently, should Vatican II (1962-1965) be understood as the triumph of modern secularism over traditional Catholic orthodoxy, or as the reinfusion of traditional doctrine into a Church that had lost its way? Or as a restatement in modern language of the eternal and unchangeable religion? Is the Catholic Church in the twenty-first century on a path of moving away from the secularism of Vatican II toward a pre-Vatican II religious consciousness? Perhaps any conclusions we might reach about one era being more religious or more secular than another says more about our own presuppositions than any actual changes in religion or secularization in the Christian or Muslim worlds.

If we focus on how people over time have explained the causes of infant mortality we are probably safe in concluding that secular explanations of illness and death have become increasingly prevalent, even when they are not the only explanations offered. In most countries today, including those deemed most religious, infant

<sup>7</sup> For the continuation of such beliefs in modern Morocco, see Tahir Shah, *The Caliph's House* (New York: Bantam Dell, 2006).

<sup>8</sup> Quoted in Owen Chadwick, *The Secularization of the European Mind in the Nineteenth Century* (Cambridge: Cambridge University Press, 1977), p. 9.



mortality is increasingly likely to be analyzed through a secular lens that focuses on factors such as pre-natal medical care, genetic predisposition, sanitation, nutrition, and environmental pollution rather than in terms of the inscrutable ways of the Divine or of God calling his children home. Yet the parents of an infant who dies prematurely or the members of a religious community that loses one of its young may well continue to frame their understanding of the loss in terms much like their ancestors. The secular explanation is not necessarily incompatible with the religious belief that is linked to the past by a “chain of memory.”<sup>9</sup> On the one hand there are many powerful indicators of what certainly seem to be an increasing reliance on scientific explanations of events, but on the other hand there is also an unwillingness of a substantial part of the world’s population to let go of God entirely. The conclusion about whether the world is becoming more secular may hinge on which of the many possible factors one chooses to emphasize: the frequency of references to God by politicians? The percentage of women who are veiled? Having as first recourse for an illness a visit to a priest or to a medical doctor? Popular beliefs in Jinns and angels?

This chapter argues, in part, that the terms *secular*, *secularism*, *secularization*, *lay*, *laïque*, *laïcité*, the *separation of church and state*, and *religion* may be just as likely to distort our understanding of whether parts of the world are in fact undergoing secularization (whatever that is) as well as our understanding of disputes about the meaning of a secular state or a secular public sphere. The confusion is due, in part, to the fact that these terms are widely and inconsistently used to describe a vast range of phenomena that do not readily lend themselves to one-word labels. In addition, the terms are often used with strong moral judgments attached. Monsignor Newton and other opponents of what he considers to be secularism and liberalism understand that they are not neutrally describing a specific social phenomenon. Rather, they are self-consciously offering value-laden religious objections to what they see as morally harmful trends.

Those who first used the words *secularism* and *secularist* in mid-nineteenth century England to describe their ideological movement similarly did not intend their choice of words to be neutral. For them, the words bore positive connotations and they identified a worldview that favored the improvement of mankind and the reduction of suffering in the world. And yet when we in the twenty-first century read the pamphlets of self-professed Victorian-era secularists, we are likely to be struck less by their secularism and more by the fervent moral and quasi-religious tone that, by comparison, makes many famous television preachers of modern times appear to be both more secular and more political. It is possible that England’s famous eighteenth century preacher George Whitefield would be appalled by the comparative materialism, egoism, and secularism of his modern-day admirers, including the televangelists Jerry Falwell, Oral Roberts, and Robert Schuller.

<sup>9</sup> Danièle Hervieu-Léger, *Religion as a Chain of Memory*, trans. Simon Lee (New Brunswick: Rutgers University Press, 2000).



The disputed meanings of terms such as *secularism*, *secularization*, and *laïcité* have had particularly important consequences on our understanding about whether the world is becoming more secular, as suggested by the secularization theory and denied by its opponents, as well as whether the state should be secular and whether the separation of religion and the state promotes or undermines the freedom of religion.

## ETYMOLOGIES AND ORIGINS OF TERMS

### Etymological Roots of Secular and Lay

To begin our analysis, we will examine the origins of the words *secular* and *lay* (and their cognates), as well as the *separation of church and state*, prior to the conflicts that came to surround these terms during the nineteenth century and that have continued thereafter.

*Secular, seculariser, saecularizatio, and secularization.* The word *secular*, in both English and the Romance languages, derives from the Classical Latin *saeculum*, alternatively meaning an era or an age.<sup>10</sup> It was sometimes taken to mean the longest potential lifespan of a person, variously identified as 100 to 110 years. During the Roman Republic, theatrical games (*ludi saeculares* or *ludi scaenici*) were set to occur at 100-year intervals. The expression *saecula saeculorum*, which appears more than a dozen times in the fourth century *Vulgate Bible*, has been translated into English as meaning “world without end” or “forever and ever.” *Saeculum* is also the etymological root of the word for *century* in Romance languages: *siècle* (French), *siglo* (Castilian Spanish), *secolo* (Italian), *secol* (Romanian), *segle* (Catalan), and *século* (Galician). Thus the original Latin root of *secular* (and its cognates) refers to periods of time.

According to the *Oxford English Dictionary* (OED),<sup>11</sup> the earliest English use of the word *secular* appeared in 1290 and differentiated among those who had taken vows (holy orders) by whether they lived a monastic life separated from the world, or lived and worked in the world. Although both had taken vows (such as to live in poverty, chastity, and obedience), some were cloistered in monasteries (and called *regular* or *religious*) while those living in the world (*secular*) were not. Coincidentally, in the same year (1290), *secular* was also used to signify something “belonging to the world and its affairs as distinguished from the church and religion.” It meant “civil, lay temporal. Chiefly used as a negative term, with the meaning non-ecclesiastical, non-religious, or non-sacred.” In the 16<sup>th</sup> century *secular* was used to describe educational subjects that were non-religious in nature and that partook of reason.<sup>12</sup> Thus, from as early as the late thirteenth century, *secular* came to have two distinguishable meanings: first, separating those living under divine orders into two categories

<sup>10</sup> The eighteenth-century American motto “*novo ordo seclorum*” may be translated as “the new order of the ages.”

<sup>11</sup> *The Oxford English Dictionary*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 1991).

<sup>12</sup> Over time, *secular* came to be used to describe the civil law as opposed to ecclesiastical law. William H. Swatos and Kevin J. Christiano, “Secularization Theory: The Course of a Concept,” *Sociology of Religion* 60 (1999), p. 211.



(cloistered versus living in the world), and second, things belonging to the world that were not in the religious realm.

According to the *Centre National de Ressources Textuelles et Lexicales* (CNRTL),<sup>13</sup> *séculier* was also introduced into the French language in the thirteenth century, where it was used to mean he “who lives during the century (or in time), in the world” (“*qui vit dans le siècle, dans le monde*”), with the cited example being that of a secular canon. As with English, it was understood to mean “temporal” or “in the world.” According to *Le grand Robert de la langue française*, such meanings continued into the eighteenth century.<sup>14</sup> The principle meanings of *séculaire* in the nineteenth century *Litttré* dictionary were associated with the passage of time, particularly with references to the span of a century.<sup>15</sup>

Although deriving from the root word *secular*, the fifteenth and sixteenth centuries saw the use of the French words *séculariser* and *sécularisation* as bearing the specific meaning of the transfer of that which had been owned by the Church (particularly the Roman Catholic Church) to the State, private persons, or sometimes other religious communities (such as a Protestant Church).

During the sixteenth century, the English word *secularization* meant the “conversion of an ecclesiastical or religious institution or its property to secular possession and use; the conversion of an ecclesiastical state or sovereignty to a lay one” (*OED*). These terms were associated with the transfer of property ownership, as when agricultural lands or buildings of a monastery were seized by the state or sold to the aristocracy. According to Franco Ferrarotti, the Latin word *saecularizatio* first came into use during the negotiations that culminated in the Peace of Westphalia (1648). The word was offered by the French legate Longueville as a term to signify the expropriation of Roman Catholic Church properties for other uses, including granting them to Protestant churches.<sup>16</sup> The 1806 *Webster* defines *secularization* as “the act of converting from an ecclesiastical to a secular use.”<sup>17</sup> The 1873 *Litttré* gives this same meaning to *secularization*, identifying Voltaire as having employed it as such in 1743: “I do not believe that the Prussian king wanted France to become involved in the secularization of ecclesiastical lands for the benefit of Austria.”<sup>18</sup> It will be this meaning of “the transfer of ownership of property” that will play a significant role in France between the Revolution of 1789 and the 1905 Law on the Separation of Churches and the State. It was not until the late nineteenth century that *secularization* came to acquire the additional meaning of the rejection of a religious worldview

<sup>13</sup> <http://www.cnrtl.fr/>.

<sup>14</sup> *Le grand Robert de la langue française*, 2<sup>nd</sup> ed., (Paris: Le Robert, 1992). According to Albert Dauzat, Jean Dubois, and Henri Mitterand in their *Dictionnaire étymologique et historique du français* (Paris: Larousse, 1994), *sécularité* was introduced in 1170, *séculaire* in 1550 (from Latin *saecularis* (century), and *seculariser* in 1586.

<sup>15</sup> É. Littré, *Dictionnaire de la langue française* (Paris: Librairie Hachette et Cie., 1873).

<sup>16</sup> Ferrarotti, pp. 77-78. See also Shiner, p. 208.

<sup>17</sup> Noah Webster, *A Compendious Dictionary of the English Language* (1806 edition) (N.P.: Bounty Books, 1970).

<sup>18</sup> “Je ne crois pas qu’il [le roi de Prusse] voulût que la France se mêlât de cette sécularisation [de principautés ecclésiastiques en faveur de l’Autriche].”





in favor of one without religion, as will be described further below.

**Lay, Laic, and Laïque.** The English *lay* as well as the French *laïc* and *laïque* derive from the Greek *laikos* (of the people) as opposed to *klêrikos* (of the clergy). In Latin, *laicus* (*laical/laicum*) meant “unconsecrated.” The *OED* identifies *lay* as appearing as early as 1330 and as referring both to “people as contradistinguished from the clergy” or as meaning “not in orders; non clerical.” The first use of the term *lay* with the pejorative connotations of “unhallowed; unsanctified; unspiritual, secular, worldly” came in 1609. Where as *secular* may be understood as implying different living arrangements for those who were living under vows, *lay* came to differentiate ordained clergy (priests, bishops, hieromonk) who were authorized to perform sacramental services from all people who were not so ordained. *Laïque* in French followed the same meanings as *lay* in English, separating the ordained clergy from those who were not ordained. Increasingly, the more common reference was to people who had no religious duties or responsibilities as opposed to all church officials.

**The Separation of Church and State.** While the concept of separating church and state in Christian thought might be traced back to Jesus’s call to “render unto Caesar that which is Caesar’s and unto God that which is God’s,” the introduction of the metaphor “wall of separation” to divide religion from the secular world is generally credited to Roger Williams in 1644:

First the faithful labors of many Witnesses of Jesus Christ, extant to the world, abundantly proving, that the Church of the Jews under the Old Testament in the type, and *the Church of the Christians under the New Testament in the Antitype, were both separate from the world;* and that when they have opened a gap in the hedge or *wall of Separation between the Garden of the Church and the Wilderness of the world,* God hath ever broke down the wall itself, removed the Candlestick, and made his Garden a Wilderness, as at this day. And that therefore *if he will ever please to restore his Garden and Paradise again, it must of necessity be walled in* peculiarly unto Himself from the world, and that all that shall be saved out of the world are to be transplanted out of the Wilderness of the world, and added unto His Church or Garden.<sup>19</sup>

Professor David Little has forcefully argued that the seventeenth century’s Roger Williams offers a full-bodied, modern concept of the separation of religion and the state that is based on the premise of the two worlds of religion and the state:

The wilderness Williams fears is the condition of an established religion where both church and state are mutually degraded and corrupted by failing to observe the critical distinction between the inward and outward

<sup>19</sup> Roger Williams, “Mr. Cotton’s Letter Lately Printed, Examined and Answered,” (London, 1644), in Reuben Aldridge Guild, ed., *The Complete Writings of Roger Williams* (New York: Russell & Russell Inc., 1963) 1:108 (emphasis added).



forums. A state where there is no establishment—where conscience is free to exercise itself as it should—is, to be sure, a place in which ‘the gardens of Christ’s churches’ can exist as intended; but it is also a place in which the state can perform its duties as intended as well. It is such circumstances that exhibit the desirable degree of consonance and harmony between religious and the civil organizations, thereby fulfilling the proper vocations of each.<sup>20</sup>

Writing a century and a half after Roger Williams, American President Thomas Jefferson used the same metaphor, but with an alternate meaning suggesting not the fear that the garden of church will be harmed by the corruption of the world, but that separating the church and the state would benefit the integrity and health of both. In his famous 1802 “Letter to the Baptists of Danbury, Connecticut,” Jefferson quoted the First Amendment to the U.S. Constitution and added his own interpretation of its meaning. “I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between Church & State.”

#### NINETEENTH CENTURY POLEMICS: RELIGION VERSUS IRRELIGION

Prior to the mid-nineteenth century, the words *secular* and its cognates (including *secularization*) were reasonably straightforward terms used to describe the transfer of ownership of property from a religious entity to another owner. Similarly, the words *lay* and its cognates were used to identify religious men who had taken sacred vows and who lived “in the world” (such as Franciscan friars), as opposed to other religious men who had taken sacred vows, but who lived a monastic or cloistered existence (such as Dominican or Augustinian monks). The words *secular* and *lay* were generally not used to denote an unreligious frame of mind nor were they used to describe societal attitudes that departed from a religious worldview to one devoid of religion. Neither the famous encyclical *Mirari Vos* (Gregory XVI, 1832) nor the infamous *Syllabus of Errors* (Pius IX, 1864) condemned any of these terms. Although the *Syllabus* denounced pantheism, naturalism, rationalism (in both its absolutist and moderate varieties), indifferentism, latitudinarianism, socialism, communism, liberalism, and Protestantism, it said nothing about *secularism*—a word that was coined a little less than 20 years earlier.

Nevertheless, during the course of the nineteenth century, terms such as *secularism*, *secularization*, and *laïcité*, along with the “separation of church and state,” came to acquire additional new—and often pejorative—connotations ranging from

<sup>20</sup> David Little, “Roger Williams and the Puritan Background of the Establishment Clause,” in T. Jeremy Gunn and John Witte, Jr., eds., *No Establishment of Religion: America’s Original Contribution to Religious Liberty* (New York: Oxford University Press, 2012), p. 112.





a “non-religious worldview” to a more strident “anti-religious worldview.” In some cases new connotations were consciously advocated by those who sought to attach a positive meaning onto an old root word, as was the case when Jacob Holyoake introduced the term *secularism* in 1851. In other cases pre-existing terms were given sharply polemical meanings, such as when the previously positive connotations of the word *liberal* (meaning “generous”) became used in a pejorative way when British Tories began to describe their opponents as *liberals* (suggesting “dissolute and undisciplined”). It is indeed revealing to see the chronological order in which the modern connotations of several terms were first introduced during the course of the nineteenth century.

**Liberalism**, according to *Chambers Dictionary of Etymology*, first appeared in English in 1819, one year after *libéralisme* made its first appearance in French.<sup>21</sup> The word derived from the Latin *liber* (“free”). The fourteenth-century root *liberal* bore the positive meaning of “befitting free men.” The 1806 *Webster* defined the word *liberal* with this same sense: “generous, bountiful, free, genteel.” According to the *Encyclopedia of Philosophy*, the word *liberal* “was first heard in a political sense in England in the early nineteenth century, when ‘liberals’ were thus named by their Tory opponents.”<sup>22</sup> One of the leading modern scholars of the Victorian period, the former Regius Professor of Modern History at Cambridge, Owen Chadwick, began his study on secularization in Europe in the nineteenth century with a chapter on liberalism.

Confused, vague, contradictory, the idea of liberalism dominated the nineteenth century, more a motto than a word, more a programme of what might be than a description of what was; a protean word, which some claimed to rest upon coherent philosophies and economic theory and others saw as the destruction of the stable structure of a reasonable society.<sup>23</sup>

The person who perhaps more than any other associated with the term *liberalism* in France during the first third of the nineteenth century was Félicité de Lamennais, a Catholic priest who sought to reform the church from within. There were, before Lamennais, self-described liberals who formed part of the opposition to the restored Bourbon regime (1815-1830).<sup>24</sup> The term nevertheless became prominently associated with Lamennais. His *Des progrès de la révolution et de la guerre contre l'église* (1829) repeatedly used the term favorably and it appeared with regularity in his correspondence of that year and thereafter. On August 19, 1829, for example, he wrote to Le Marquis de Coriolis saying that “henceforth, there is a fight to the

<sup>21</sup> *Chambers Dictionary of Etymology*, Robert K. Barnhart, ed. (Edinburgh: Chambers, 1988).

<sup>22</sup> *Encyclopedia of Philosophy*, vol. 4, Paul Edwards, ed. (New York: Macmillan Publishing Co., Inc., 1967), p. 458.

<sup>23</sup> Chadwick, *Secularization*, p. 21.

<sup>24</sup> See René Rémond, *The Right Wing in France: From 1815 to de Gaulle*, trans. James M. Laux (Philadelphia: University of Pennsylvania Press, 1969).



death between liberalism and the Bourbons.”<sup>25</sup> Lamennais was the principal force behind the publication of the newspaper *L'Avenir* (1830-1831) and he was one of its principal contributors as well.<sup>26</sup> In one of his many paeans to liberalism, Lamennais praised “a liberalism that is true, enlightened, generous, and which presses against all oppression and which strongly favors true liberty; a liberty that is equal for all and entirely for all.”<sup>27</sup> *L'Avenir* was known for promoting not only liberalism and urging an alliance between liberals and Catholics, but also reform of the Church, freedom of conscience, democracy, economic justice, the separation of church and state, freedom of education, and the freedom of the press.<sup>28</sup>

Although Lamennais hoped to win the support of Pope Gregory XVI to the cause of liberalism, he failed. The Pope ordered *L'Avenir* to cease publication in 1831, an order that Lamennais immediately obeyed, albeit with resentment. The Pope went one further step and issued the encyclical *Mirari Vos* in 1832 to condemn exactly the ideas that had been promoted in *L'Avenir*. Although mentioning neither the priest nor the newspaper by name, there was no question about who the target was. The encyclical condemned “liberalism and indifferentism” in the official English subtitle (*libéralisme* in the official French). The text of *Mirari Vos* did not include the word *liberalism* itself, but criticized instead what it apparently perceived to be three constituent components of liberalism: freedom of conscience, freedom of religion, and freedom of the press—each of which had been praised in the pages of the newspaper. In official Vatican circles, liberalism would henceforth be stripped of its positive connotations of free and generous and would thereafter be tainted by papal condemnation.

The most famous papal condemnation of liberalism appeared in the *Syllabus of Errors*, which was released as an addendum to the encyclical *Quanta Cura*, promulgated on December 8, 1864. The conjoined documents were prepared at a particularly difficult time for the papacy. King Victor Emmanuel II had succeeded in uniting most of Italy with the exception of the Papal States, which were then occupied by French troops ostensibly protecting the Pope. “The mortal enmity between the Church of Rome and Italian liberals was only a tense example of a clash which was found in Prussia, Austria, France, Spain and sometimes England.”<sup>29</sup> The Italian parliament had declared in 1861 that Rome should be the capital of the new Italian

<sup>25</sup> Lamennais, *Correspondence*, vol. II (Paris: Didier et Cie., 1863), p. 71.

<sup>26</sup> See Peter N. Stearns, *Priest and Revolutionary: Lamennais and the Dilemma of French Catholicism* (New York: Harper & Row, 1967), p. 72.

<sup>27</sup> *Oeuvres de F. de la Mennais, Journaux ou articles publiés dans le mémorial Catholique et l'Avenir* (Paris: P.D. Cailleur et Cie., 1836-1837), p. 267.

<sup>28</sup> See Stearns, *Priest and Revolutionary*, pp. 64-97; Guido Verucci, ed., *L'Avenir (1830-1831)*, (Roma: Edizioni Di Storia et Letteratura, 1967). It was in this same sense that the Centre National de Ressources Textuelles et Lexicales (CNRTL) noted Alphonse de Lamartine's definition of *libéralisme* in 1835 as meaning “Independence of spirit, particularly with regard to religious dogmas.” (“Indépendance d'esprit en particulier à l'égard des dogmes religieux.”) (Lamart., *Voy. Orient*, t. 1, 1835, p. 37). <http://www.cnrtl.fr/definition/liberalisme>.

<sup>29</sup> Chadwick, *Secularization*, p. 45.



state, a decision strongly denounced by Pope Pius IX and rendered effectively impossible by the French troops loyal to the Pope. But in September 1864, an agreement was reached between the French ruler, Napoleon III, and Victor Emmanuel, which provided that the new Italian capital would be in Florence and that the French troops would leave within two years. The compromise was bitterly denounced by Italian patriots, who continued to insist that Rome should immediately become the capital, as well as by the Pope, who feared that the withdrawal of French troops would ultimately lead to the final loss of his states.

*Quanta Cura* and the *Syllabus of Errors* promulgated by the beleaguered Pius IX contained a litany of “heresies and errors” of the modern world that were denounced under the rubric of liberalism. The Pope’s language was not temperate. The identified errors were “evil opinions” resulting from the “nefarious enterprises of wicked men, who, like raging waves of the sea foaming out their own confusion” offered “deceptive opinions and most pernicious writings” designed to seduce “deprave[d] persons, and especially inexperienced youth . . .” (*QC*, para.1). The errors were condemned for being “monstrous portents of opinion which prevail especially in the age” (*QC*, para.2). These liberal ideas were “totally false” and it would be necessary to “exterminate [these and] other evil opinions.” The idea of “liberty of conscience” was “insanity” and “naturalism” was “absurd” (*QC*, para.3). The *Syllabus*, which listed 80 distinct errors, concluded by identifying the “errors having reference to modern liberalism.” One such error was that the “Roman Pontiff ought to, reconcile himself, and come to terms with progress, liberalism and modern civilization” (*SE*, 80). Other condemned errors falling under liberalism included the possibility that Catholicism should not be the only religion of the state (*SE*, 77) and allowing non-Catholics the right to practice their own religion (*SE*, 78). The *Syllabus* also condemned the doctrine of separation of church and state, which will be discussed further below.

The liberalism that was denounced by the Holy See in the nineteenth century did, however, evolve. During the last quarter of the nineteenth century, Catholics started to see liberalism as their friend. “German Catholics appealed to it as early as the 1870s, French Catholics not until the 1890s. From the end of the 1880s, Pope Leo XIII started a policy of encouraging Catholics to take part in democratic elections. . . .”<sup>30</sup> Once the Italian (or French) state became the opponent of Catholicism rather than its supporter, Catholics themselves adopted the liberal position of freedom of conscience as their defense against what had now become a non-religious state. “Like the liberal, the Christian maintained the faith that legal right can be moral wrong and that a legislator cannot reject appeals to an ethical standard not derived from his laws.”<sup>31</sup> The liberty of conscience that was once a reviled heresy became the foundation of the modern Catholic doctrine of human rights as explained

<sup>30</sup> Ibid., p. 46.

<sup>31</sup> Ibid., p. 47.



in *Dignitatis Humanae* (Paul VI, 1965). What Professor Chadwick described above as the beginning of secularism in Europe, the liberal claim of the primacy of conscience, was fully embraced by the Second Vatican Council.

In all his activity a man is bound to follow his conscience in order that he may come to God, the end and purpose of life. It follows that he is not to be forced to act in manner contrary to his conscience. Nor, on the other hand, is he to be restrained from acting in accordance with his conscience, especially in matters religious.<sup>32</sup>

Just as we saw a transformation of religious attitudes toward allowing interracial marriage on the part of Americans, so we see a transformation of official Catholic doctrine on the sanctity of conscience. Is it more appropriate to understand this as secularization or as the purification of religion?

As described above, President Thomas Jefferson introduced the term “separation of church and state” in the nineteenth century as a shorthand characterization of the U.S. Constitution’s religion clauses. The term thereafter crossed the Atlantic and became a topic of discussion among Europeans. Lamennais, as previously mentioned, particularly praised the concept of the separation of church and state in *L’Avenir*.<sup>33</sup> In 1830 he published an article entitled “On the Separation of Church and State,” where he took a position not unlike that of Jefferson. “We believe that today religion must be totally separated from the state and the priest from politics.” He argued that people “demand the total separation of church and state” and that this principle significantly implicates “freedom of conscience.” Lamennais’s concern, like Jefferson’s, derived not from antagonism toward the church or the state, but from the fear that each might inappropriately interfere with the legitimate activities of the other. “The government should not interfere with religions or their teachings or discipline. The spiritual order should be outside of such involvements and be completely free from temporal control.”<sup>34</sup>

As with his attempt to promote liberalism within the church, Lamennais’s effort to aid religion by promoting the separation between church and state similarly was condemned. *Mirari Vos* denounced the separation of church and state because it would “break the mutual concord between temporal authority and the priesthood”—a relationship that “always was favorable and beneficial for the sacred and the civil order” and that had been deceitfully promoted by “the shameless lovers of liberty.”<sup>35</sup>

In the year between the publication of the Lamennais article on the separation of church and state in 1830 and the promulgation of *Mirari Vos* in 1832, Alexis de

<sup>32</sup> *Dignitatis Humanae*, para. 3.

<sup>33</sup> See especially Lamennais, “De la séparation de l’église et de l’état,” in Guido Verucci, ed., *L’Avenir* (Rome: Edizioni Di Storia et Letteratura, 1967), pp. 25–31.

<sup>34</sup> *Oeuvres de F. de la Mennais, Journaux ou articles*, pp. 151, 152, 155.

<sup>35</sup> *Mirari Vos*, para. 20.



Tocqueville decided to make his own inquiry into the issue during his fact-finding visit to the United States in 1831. In America, Tocqueville discovered a widespread American consensus in favor of the separation of church and state. Although the report on his findings did not appear in published form until 1835, Tocqueville found that Americans “thought that the main reason for the quiet sway of religion over their country was the complete separation of church and state. I have no hesitation in stating that throughout my stay in America I met nobody, lay or cleric, who did not agree about that.”<sup>36</sup> Other foreign visitors to the United States in the nineteenth century, both Catholics and non-Catholics, made observations similar to those of Tocqueville. The Hungarian patriot and statesman Louis Kossuth wrote in 1852 that some countries are endangered by the “direct or indirect amalgamation of Church and State. [However,] of this danger, at least, the future of [the United States] is free.”<sup>37</sup> Writing in 1862, Tocqueville’s fellow Frenchman, the Count Agenor de Gasparin, declared that the United States had “proclaimed and loyally carried out the glorious principle of religious liberty” while at the same time adopting “another principle, much more contested among [the French], but which I believe destined also to make the tour of the world: the principle of separation of Church and State.”<sup>38</sup> Another European count, the eccentric Pole Adam De Gurowski, concurred: “Religious liberty, the absolute separation of Church and State, has become realized in America far beyond the conception, and still more the execution, of a similar separation in any European Protestant country. This separation, and the political equality of all creeds, constitute one of the cardinal and salient traits of the American Community.”<sup>39</sup>

Some American Catholics who traveled to Europe told their co-religionists that one of their best guarantees of religious freedom in the United States was the separation of church and state. One of the leading Catholic publications in the United States heartily endorsed Thomas Jefferson’s 1802 interpretation of the U.S. Constitution. “The state [according to Jefferson’s theory], is a purely political organism, and is not in any way concerned with religion; and this soon came to be the prevailing sentiment in the Democratic party, whose acknowledged leader Jefferson was, which may explain why the great mass of the Catholics in this country have voted with this party.”<sup>40</sup> Catholics in America “owe the freedom which they now enjoy to the operation of the general laws [on religion].”<sup>41</sup> Far from feeling themselves to be the victims of a polemic, Catholics, like their fellow countrymen, embraced the concept. During the course of the nineteenth century in America, Jefferson’s phrase “separa-

<sup>36</sup> Alexis de Tocqueville, *Democracy in America*, J. P. Mayers and Max Lerner, eds., trans. George Lawrence (New York: Harper & Row, 1969), pp. 271–72.

<sup>37</sup> Louis Kossuth, *The Future of Nations, In What Consists Its Security: A Lecture Delivered in New York, June 21, 1852* (New York: Fowler and Wells, 1854), p. 32.

<sup>38</sup> Agenor de Gasparin, *The Uprising of a Great People: The United States in 1861* (London: S. Low, 1861), pp. 63–64.

<sup>39</sup> Adam G. De Gurowski, *America and Europe* (New York: D. Appleton, 1857), p. 323.

<sup>40</sup> “The Catholic Church in the United States: 1776–1876,” *Catholic World* (July 1876): pp. 440–41.

<sup>41</sup> *Ibid.*, p. 441.



tion of church and state” came to be broadly accepted as a shorthand description of American constitutional doctrine.<sup>42</sup> In 1878, the United States Supreme Court officially adopted Jefferson’s “wall of separation of church and state” as the guiding interpretation of the religion clauses of the First Amendment.<sup>43</sup>

Observations such as these, by Catholics and non-Catholics, were no more persuasive with the Vatican in the *Syllabus of Errors* than had been Lamennais earlier in the nineteenth century. The *Syllabus*’s error number 55: “The Church ought to be separated from the State, and the State from the Church.” The condemnation of this doctrine continued. In the encyclical *Libertas Praestantissimum* (Leo XIII, 1888), the “separation between Church and State” was designated as a “fatal theory” whose “absurdity” is “manifest.” (LP, paras. 18, 38, 39).

In 1905, the French—the one-time protectors of Pius IX in 1864 when he promulgated the *Syllabus of Errors*—adopted a new law pointedly entitled “On the Separation of Churches and the State” (*la loi de 9 décembre 1905 concernant la séparation des Églises et de l’État*). The term *séparation* occurs solely in the title of the law and, like the term *laïcité*, does not appear anywhere in the text itself. The statute provided for the transfer of church lands to the state. The new French law was immediately denounced in the encyclical *Vehementer Nos* (Pius X, 1906). The Holy Father “condemned” this law, which was based on a theory that was “eminently disastrous and reprehensible” and was “absolutely false.” (VN, paras. 3, 4)

Writing in 1910, the great historian of the French revolution, Albert Mathiez, wrote a lengthy article criticizing the anachronistic use of the concept of *séparation de l’église de l’état* that had crept into historians’ writings during the previous decade.<sup>44</sup> Historians writing in the first years of the twentieth century had made the mistake, according to Mathiez, of retroactively applying the modern concept of the separation of church and state to the beliefs and actions of eighteenth-century philosophers and revolutionaries. On some occasions, Mathiez argued, they simply mischaracterized the beliefs of those whom they were describing. On other occasions, they mistakenly criticized their subjects for failing to articulate clearly the doctrine

<sup>42</sup> For the use of “separation of church and state” in nineteenth-century America, see T. Jeremy Gunn, “The Separation of Church and State versus Religion in the Public Square: The Contested History of the Establishment Clause,” in *No Establishment of Religion*, Gunn and Witte, eds.

<sup>43</sup> *Reynolds v. United States* (1878) 98 U.S. 145. Seventy years later, the Supreme Court reaffirmed the separation metaphor as a guiding standard in constitutional interpretation in *Everson v. Board of Education* (1947) 330 U.S. 1. In the wake of *Everson*, some scholars began to attack the appropriateness of Jefferson’s metaphor in constitutional interpretation. Increasing public opposition to the concept of “separation of church and state” did not emerge until the 1980s, coinciding, not coincidentally, with the rise of the religious right and the Moral Majority (founded in 1979). Perhaps the ultimate, albeit misdirected, attack on the concept was in Philip Hamburger, *The Separation of Church and State* (Cambridge: Harvard University Press, 2002). Hamburger argued that the real originators of the modern concept of separation were jingoists, racists, nativists, free-thinkers, anti-Catholics, and the Ku Klux Klan. For a response to Hamburger see my “The Separation of Church and State versus Religion in the Public Square” cited at note 41 above. The U.S. Supreme Court has ceased using the term as an explanation of the meaning of the Constitution and political leaders have become increasingly vocal in their denunciation of the term.

<sup>44</sup> Albert Mathiez, “Les philosophes et la séparation de l’église et de l’état en France à la fin du XVIII<sup>e</sup> siècle,” *Revue Historique*, vol. 103 (1910): pp. 63-79.





of separation, despite the fact that they did not actually have such beliefs. While the 1905 law may have helped launch the term ‘separation’ into modern French consciousness, with the resulting historical errors that Mathiez identified, the important term *laïcité* appears nowhere in the 1905 law—a law that for many is the legal foundation of *laïcité* in France.<sup>45</sup>

According to the *OED*, *anticlerical* first appeared in the English language only in 1845, and at that time signified a person who was “opposed to clericalism.” By 1886, *anticlericalism* bore an even sharper tone as suggesting the worldview of freethinkers in opposition to the clergy. Surprisingly, *anticléréal* failed to appear in the *Litttré* of 1873 or 1877. *Le grand dictionnaire universel du XIXe siècle (Le grand Larousse)* introduces *anticléréalisme* as late as 1866 under the definition of a belief “opposed to the influence and to the intervention of the clergy in public life.”<sup>46</sup> René Rémond, apparently having missed the entry in *Le grand Larousse*, dates its first appearance to 1876 (in the *Journal officiel* of June 27). *Anticléréal* was, of course, never understood to be a neutral term. According to Chadwick, “Anti-clericalism in France was first, a feeling in republican bellies.”<sup>47</sup> Although the word did not come into common usage until the end of the nineteenth century, the concept of course had deep roots in European history.<sup>48</sup> The instigation of the growth of anticlericalism after mid-century can, to some extent, be traced to the increasingly reactionary pontificate of Pius IX. Although he had been widely praised as a reformer upon his elevation to the papacy, the revolutionary year of 1848 pushed him into a deep conservatism. In France, the increasingly reactionary Vatican reminded the French of the return of the Jesuits in 1814, when the clergy aligned itself with the restored Bourbon throne. In addition, the Risorgimento in Italy, which had seized virtually all of the lands of the Papal States by 1860, increasingly pushed Pius IX and his defenders toward the right. The establishment of the French Third Republic in 1870-1871 and its growing *anticléréalisme* created a potent mixture when, for many Republicans, the Church became toxic and the consequences were the laicization of public schools in the 1880s and, ultimately, the seizure of church properties by the Law on Separation of Churches and the State of 1905.

According to the *OED*, the word *secularism* was first published by George Jacob Holyoake in the *Reasoner* on December 10, 1851. To the contrary, the *North American Review* had already published an article in January 1846 that referred to “the alleged secularism of the last age” without defining the term, which suggests that its meaning was already reasonably understandable to the reading public. The word also had appeared in two earlier issues of the *Reasoner* in 1851.<sup>49</sup> Professor Chadwick

<sup>45</sup> See the discussion of *laïcité* below.

<sup>46</sup> Opposé à l'influence et à l'intervention du clergé dans la vie publique.”

<sup>47</sup> Chadwick, *Secularization*, p. 39.

<sup>48</sup> See Henri Plard, “Anticléréal, anticlericalism: Évolution de ces termes,” in *Aspects de l'anticléréalisme du moyen âge à nos jours*, ed. Jacques Marx (Brussels: Editions de l'université de Bruxelles, 1988), pp. 15-21.

<sup>49</sup> *The Reasoner and Theological Examiner*, vol. XI (June 25 and July 16, 1851): pp. 88, 118.



credits Holyoake with having “put into the English language that new word... *secularism*. In June 1851 a friend and backer, the lawyer W.H. Ashurst, advised [Holyoake] to call himself a secularist, with the special object of freeing himself from the imputations of atheism and infidelity.”<sup>50</sup>

The difference between 1846 and 1851 is, of course, of little significance. The important point is that *secularism* can be identified with reasonable precision as having come into English usage in the middle of the nineteenth century and it was understood as identifying a doctrine (or worldview) that relies upon this-worldly reasoning rather than on faith or on adherence to tradition.<sup>51</sup> Holyoake, unlike some later proponents of secularism, did not overtly attack religion nor make metaphysical assertions denying the existence of God or an afterlife, but asserted simply that his focus of concern was on what reason and science could reveal about the observable world. The *OED* describes the first meaning of *secularism* to be the “doctrine that morality should be based solely on regard to the well-being of mankind in the present life, to the exclusion of all considerations from belief in God or in a future state.”

One of the first full-bodied explanations and defenses of the newly coined *secularism* appeared in a public debate in 1853 between the activist George Holyoake and the Reverend John H. Rutherford of Newcastle-on-Tyne.<sup>52</sup> In that debate, Holyoake made a concerted effort not to attack, insult, or denigrate religion or faith, but to argue instead that public policies and political actions should be based on reason, science, and phenomena observable to everyone rather than on the individual’s personal feelings about scripture or faith in an afterlife. Holyoake did not deny the existence of God nor make any claims about what might exist after death. He argued only that public policies should be founded on what can be observed and understood by the rational mind rather than by means of the ineffable sentiment of faith.

The 1853 Holyoake-Rutherford debate was transcribed, and we have Holyoake’s original definition of secularism as it emerged (haltingly) from that debate:

It will perhaps be useful to state briefly what is intended by what we call Secularism; and you will see how out of this grows the importance which I attach to the proposition we have to debate. Secularism is a development of free thinking, including its positive as well as its negative side. Secularists consider free thinking as a double protest—a protest against speculative error, and in favour of specific moral truth. The term Secularism has not been chosen as a concealment or disguise, or as an apology for free

<sup>50</sup> Owen Chadwick, *The Secularization of the European Mind in the Nineteenth Century* (Cambridge: Cambridge University Press, 1977), p. 91. For Holyoake and secularism, see the discussion below. For a study of Holyoake’s activities and influence, see Edward Royale, *Victorian Infidels: The Origins of the British Secularist Movement, 1791–1866* (Manchester: U.P., 1974).

<sup>51</sup> It is probably fair to say that Holyoake is using *secularism* as what Charles Taylor would describe as an *external dyad*. Unlike an *internal dyad*, which would define secularism in relationship to something else (that is religion), Holyoake wants to treat it as a concept in and of itself that does not need to refer to something else.

<sup>52</sup> *Christianity versus Secularism. A Public Discussion in Newcastle-on-Tyne, between The Rev. J.H. Rutherford and Mr G.J. Holyoake* (London: Ward & Co., 1854).





inquiry but as expressing a certain positive, ethical element, which the terms infidel, atheist, skeptic, do not express.<sup>53</sup>

Holyoake's secularism, as he defines it, is earnest, serious, humanitarian, and moral. While the Reverend Rutherford responded with his own earnestness based on fidelity to the Christian scripture, in reality the two men differed less on how people should behave toward their fellow men and more on the underlying rationale for their differing worldviews. According to Chadwick, the "more carefully we examine secularist groups the more they look like a little religious denomination . . ."<sup>54</sup>

Holyoake's opponents nevertheless seized upon the words *secular* and *secularism* and used them as pejoratives in contrast to their firm religious values based on faith in God, the scriptures, and the Church. The subtitle of the Reverend Woodville Woodman's 1852 pamphlet attacking Holyoake says it all: *The Fallacy of Infidel Arguments Exposed and Refuted*. Almost immediately, *secularism*, like *atheism*, *agnosticism*, and *free-thinker* aroused the outrage of the pious classes. Later having tired of defending *secularism* as a neutral term, Holyoake's successor at the Secular Society, Charles Bradlaugh, embraced *secularism* as a polemical term to be used in bold opposition to religion and carried his fight to the masses.

Interestingly, the French took more time incorporating *sécularisme* into their language than it took the British to incorporate *laïcité*. *Sécularisme* failed to make an appearance in the *Litttré* of either 1873 or 1877, and *Le grand Robert* (1992) identifies its first appearance as not coming until 1889.

The word *agnostic* was coined in 1869 by the biologist T.H. Huxley. Already famous as the most public champion of Darwin's theory of evolution, Huxley introduced the term to describe his skeptical worldview that it was impossible to know whether God exists. He later wrote that "Agnosticism is not a creed but a method, the essence of which lies in the vigorous application of a single principle . . . Positively the principle may be expressed as in matters of intellect, do not pretend conclusions are certain that are not demonstrated or demonstrable."<sup>55</sup>

Although the words *socialism* and *communism* are not synonyms for *secularism*, they also made their first appearances in the mid-nineteenth century. *Socialism* first appeared in print in English in 1837, six years after first being used in France to describe the teachings of Saint-Simon, according to Chambers. The French *communisme* first appeared in print in 1840, followed three years later by the English *communism*.<sup>56</sup> Karl Marx's *Communist Manifesto* was published in 1848. Charles Darwin's *On the Origin of Species* was first published in 1859. Seven months after Darwin's book was published, the famous Oxford debate of 1860 on evolution pitted T.H. Huxley against Bishop Samuel Wilberforce. The theory of evolution would,

<sup>53</sup> Ibid., p. 3.

<sup>54</sup> Chadwick, *Secularization*, p. 92.

<sup>55</sup> *Atheism* is defined in the 1806 *Webster's* as "a disbelief of the being of a God."

<sup>56</sup> *Chambers Dictionary of Etymology*.



of course, have an enormous affect on how religion defined itself. Nevertheless, “Darwin and Darwinianism had no direct influence whatever in the secularization of the British working-man, and probably not much in that of any other worker of the nineteenth century.”<sup>57</sup> The words *Marxism* and *Darwinism* appeared shortly thereafter.<sup>58</sup> The encyclical *Quod Apostolici Muneris* (Leo XIII, 1878) explicitly condemned socialism, communism, and nihilism. The differences between Marxism and ardent Christianity should not be ignored—nor should their similarities. John Winthrop’s “City on a Hill” speech provides a compelling reference point:

We must be willing to abridge ourselves of our superfluities, for the supply of others’ necessities. We must uphold a familiar commerce together in all meekness, gentleness, patience and liberality. We must delight in each other; make others’ conditions our own; rejoice together, mourn together, labor and suffer together, always having before our eyes our commission and community in the work, as members of the same body.<sup>59</sup>

*Secularization* was first used as a term describing societal changes from a religious to a non-religious orientation in 1863. It nevertheless was a relatively modest innovation: “The giving of a secular or non-sacred character or direction to (art, studies, etc.); the placing (of morals) on a secular basis.” The earliest example that the *OED* cites with the full-bodied modern connotations of *secularization* appears in William Lecky’s 1865 publication *A History of the Rise and Influence of Rationalism in Europe*. Throughout the two-volume work, published in several editions between 1865 and 1910, Lecky used the words *rationality*, *science*, and *secularization* as synonyms that he juxtaposed to *religion*, *customs*, *superstition*, *persecution*, and *magic*. He described “the successive transformations” in European thought that furnish “striking examples of that process of gradual secularisation which, under the influence of the rationalistic spirit, is displayed in turn in each department of thought and action. Besides this, there are few more powerfully destructive agents than customs or institutions, no matter how little aggressive, which a Church claiming supreme authority endeavours to suppress and which have nevertheless secured their position in the world.”<sup>60</sup> The 1864 *Syllabus of Errors* and the 1865 *History of the Rise and Influence of Rationalism in Europe* each draw a battle line between truth and honesty on the one side, and falsity and error on the other. Only ten years had passed since the spirited debate between Holyoake and Rutherford that took place before a respectful and earnest audience. Holyoake’s *secularism* was not the enemy of religion; Lecky’s *secularization* was.

<sup>57</sup> Chadwick, *Secularization*, p. 106.

<sup>58</sup> “Marxism was the most powerful philosophy of secularization in the nineteenth century.” Chadwick, *Secularization*, p. 66.

<sup>59</sup> John Winthrop, *A Model of Christian Charity* (the “City on a Hill” sermon), 1630.

<sup>60</sup> W.E. H. Lecky, *History of the Rise and Influence of the Spirit of Rationalism in Europe*, 2<sup>nd</sup> ed. (London: Longmans, Green, and Co., 1865), vol. 2, p. 353.



According to the Centre National de Ressources Textuelles et Lexicales (CNRTL), the first published French use of *secularisation* as meaning the “process of progressive elimination of all religious elements” appeared in Ernest Renan’s *L’Avenir de la science*, published in 1890.<sup>61</sup> Renan had actually written the book as a young man during the revolutionary year of 1848, but it did not appear in print until more than 40 years later, after he had become the director of the *Académie Française*. Thus it seems that the first written (though not published) appearances of the words *anti-clerical* (1845), *secularism* (1846), and *secularization* (1848) all appeared within three years of each other. Interestingly, as will be described below, it was also Ernest Renan who first introduced in France the modern meaning of *laïcité* as a term to describe a doctrine about the proper relationship between religion and the state.

The word *laïcité* has obvious roots in the Greek and Latin terms identified above. It increasingly came to mean, according to *Le grand Robert*, “those who are not part of the clergy” (“qui ne fait pas partie du clergé”) or something that is “independent of all religious confessions” (“indépendant de toute confession religieuse”). One of the definitions offered by the 1873 *Littre* is “someone who is neither ecclesiastical nor religious” (“Qui n’est ni ecclésiastique ni religieux”). In 1882, Ernest Renan spoke of *laïque* as being “separate from religion.” The word *laïcité* itself first appeared in the *Littre* dictionary in its 1877 supplement, where it was defined as something having a “*caractère laïque*”—virtually the same definition as the modern *Littre* (1967): “Having a laic character. The subject of laic teaching” (“*Caractère laïque. Au sujet de l’enseignement laïque*”). The 1967 *Littre* identifies *laïcité* as having first appeared in print on November 11, 1871. Surprisingly, the *OED* identifies the English *laicize* as having been introduced into English in 1870, one year before its first appearance in French, with the meaning of “to commit (a school, etc.) to the direction of laymen; to make (an office) tenable by laymen.” The English word *laicity* was first employed in 1909, presumably being a direct loan word from the French *laïcité*. It is important to note that even though the specific word *laïcité* (and its English-language variations) first appear in the nineteenth century, they are introduced originally largely in the same sense as *laïque* and *secular* from earlier generations. They do not, at that point, refer to a doctrine or philosophy on the relationship between religion and the state.

It is somewhat difficult to identify exactly when *laïcité* acquired its current meaning of identifying a doctrine about the relationship between religion and the state. Modern French scholars, such as Jean Baubérot, commonly employ the term *laïcité* when describing the nineteenth-century French laws on public schools, including the famous March 28, 1882 Establishing Compulsory Primary Education and the October 30, 1886 Law on the Organization of Primary School Instruction. Notably, however, those laws themselves do not use the word *laïcité* and the 1882

<sup>61</sup> “Processus d’élimination progressive de tout élément religieux.” (Renan, *Avenir sc.*, p. 82).



law does not use any cognate of *laïque*.<sup>62</sup> The 1886 law did, however, use the word *laïque* as an adjective to identify female instructors (*institutrices*) at the public schools in order to underscore that they must not be *religieuses* (nuns). The 1886 law's procedures for converting formerly religious schools into state schools is described as *laïcisation*, thus using the term consistently with one of its meanings going back to (at least) the sixteenth and seventeenth centuries and the first uses of *laïcité* in the 1880s.

Although some writers may have emphasized that the *laïc* state should be neutral and tolerant towards all religions prior to the 1870s, others injected an anti-Catholic or anti-religious bias into the word. The word *anticlerical* is often associated with these negative connotations of *laïcité* that are not inherent to the word but are often implied in the subtext or in the context.

The earliest example that I have found where *laïcité* was used in its modern, broad sense of identifying several aspects of the relationship between church and state occurred in 1880. In an unfortunate injury to French pride, this first instance appeared not in Paris, but in Brussels. The final report of the proceedings of the 8<sup>th</sup> Rationalist Congress of the Belgian Federation of Rationalist Societies proclaimed:

This liberty of conscience, this independence of reason from all religious dogma, logically leads to the more or less radical suppression of all religious figures from directing any public affairs of things [*choses*] that are the responsibility of the state, of the province, or the town: humanity, in a word, seeks the *laïcité* of all public institutions, the complete *sécularisation* of all public services.<sup>63</sup>

Two years later, Ernest Renan, whose *Life of Jesus* used historical sources to undermine the scriptural version of Christian history, offered a somewhat less broad but nevertheless modern description of *laïcité* when he referred to the “continued progress of *laïcité*, that is to say a State that is neutral among religions and is tolerant of all religions [*cultes*] and that forces the Church to obey this principal point.”<sup>64</sup> Renan, while calling for the state to show neutrality among religions, nevertheless insisted that the Roman Catholic Church [*l'Église*] be *forced* to accept state neutrality. We can see in Renan's statement an early example of the rhetoric of generous neutrality combined with the warning that the state should be ready to coerce those who do not accept it. Renan is, in any case, no longer using the word to describe a transfer

<sup>62</sup> For an example of the use of the word *laïcité* to describe these laws that did not themselves use the term, see Jean Baubérot, “Laïcité,” in *Encyclopaedia Universalis* vol. 13 (Paris: Encyclopaedia Universalis, 1994), p. 416.

<sup>63</sup> Fédération des Sociétés Rationalistes de la Belgique, *Compte-Rendu du VIII<sup>e</sup> congrès rationaliste* (Bruxelles: Typographie de D. Brismée, 1880), p. 27.

<sup>64</sup> “Le premier, c'est le progress continu de la laïcité, c'est-à-dire de l'État neutre entre les religions, tolerant pour tous les cultes et forçant l'Église à lui obéir en ce point capital.” Renan offered these words in his position as the director of the *Académie Française* in his speech welcoming the scientist Louis Pasteur into membership in the august body in its meeting on April 27, 1882. *Discours de réception de M. Louis Pasteur; Réponse de M. Ernest Renan* (Paris: Calmann Lévy Éditeur, 1882), p. 51.



of property from a religious to a non-religious owner, but to identify an institutional relationship between religion and the state.

By the 1890s, *laïcité* was increasingly being used in a way that combined the rhetoric of neutrality with anticlerical sentiments and anticlerical language. In an article published in 1895 on education in the university, the authors understood *laïcité* to “imply the ideas of liberty and justice” implemented by “a *laïque* state that has freed social life from all dependency on mysticism and that has given birth to the sentiment of human dignity that is founded not on metaphysics, but on self-reliance.”<sup>65</sup> Here, as with Renan, the state is not being entirely neutral with regard to religions and religious beliefs, but is understood as playing a role that competes with religion by demystifying the world and by placing the dignity of human beings into the space previously occupied by religion.

The word *laïque* was first incorporated into French constitutional law in 1946. The preamble of that Constitution provided that public education in France is to be “free and *laïque*” while Article 1 provided that “France is a Republic that is indivisible, *laïque*, and social.” The 1958 Constitution establishing the Fifth Republic announced in its Article 1 that “France is an indivisible Republic, *laïque*, democratic, and social. It assures the equality before the law of all its citizens without regard to origin, race, or religion. It respects all beliefs.”

Contemporary proponents of the doctrine of *laïcité* continue to describe its qualities as being neutral, tolerant, and as separating religion and the state. It is in this sense that the doctrine has been widely accepted in France by both Catholics and non-Catholics as the consensus French model that shines as an example for the entire world (just as the doctrine of separation of church and state largely united American Catholics and Protestants in the nineteenth century). But another aspect of the doctrine is never far from the surface. *Laïcité* is also used as an ideological justification for the state to suppress religious activities and beliefs that challenge the tranquility of the general public. In this regard, *laïcité* provides a legitimizing rationale for the non-neutral and sometimes intolerant state to suppress, undermine, or circumscribe religious beliefs and religious activities that are disfavored by the general public. In this context, the power of the state is unsheathed (often with broad public support) to attack unpopular religious trends—whether it be Muslim schoolgirls wearing headscarves, new religious movements (pejoratively and broadly derided as dangerous *sectes*), or at times even the Catholic Church. While the term *laïcité* has come to be broadly accepted in France as a characterization of neutrality of the state, there remains not far beneath the surface the ongoing potential of its anti-religious dimension to arise.

Prior to the early nineteenth century, the words *lay* and *secular* (and their cognates), as well as the term *separation of church and state*, were generally employed

<sup>65</sup> H. Marion and Raymond Thamin, “L’Éducation dans l’université,” *Revue de Métaphysique et de Morale*, vol. 3 (November 1895): pp. 708-722, 720.



as neutral terms. Although the course of the development of the words and terms varied across the nineteenth century, *liberalism* and the *separation of church and state* emerged as salient terms by the time *Mirari Vos* was promulgated in 1832. The years between *Mirari Vos* and the 1864 *Syllabus of Errors* saw the first appearances of the words *socialism*, *communism*, *anticlericalism*, *secularism*, and Darwin's *evolution*—words tinged with ideological meanings that continue to evoke polemical responses. The first dozen years following the *Syllabus* witnessed the emergence of the word *agnosticism* by T.H. Huxley, Darwin's principal public advocate, as well as the new word *laïcité*. The debates about the best relationship between church and state were often exacerbated by the deep underlying tensions about the merits of religion itself. Modern polemical debates about secularism, secularization theory, and religion in the public sphere may themselves continue to suffer from the polemical residue of nineteenth century culture wars.

## ANALYSIS OF SECULARISM, SECULARIZATION THEORY, AND THE SEPARATION OF RELIGION AND THE STATE

The terms *secular*, *secularism*, *secularization*, and *separation of religion and state* all acquired pejorative meanings in the nineteenth century, and they continue to be value-laden with both positive and negative connotations today.<sup>66</sup> In contemporary Germany, for example, a secular state is generally understood as a positive attribute, while in the United States a candidate for political office who has a secular worldview would be treated with suspicion by a majority of the electorate. The term *laïcité* has legal meanings in France, where it is widely praised, and in Turkey, where it is becoming increasingly controversial. For many Europeans and Americans, the separation of religion and the state is understood as a positive development, although an increasing number of Americans are becoming hostile to the concept. For some scholars, secularization has the positive connotation of a world that is becoming more rational and less superstitious. For others, however, secularization signifies hostility to religion, God, and morality. Many people believe that religion in the public sphere is a necessary element of religious freedom, while others see it as an abuse of both religion and freedom. Taking the word *secularism* as one example, each of the following interpretations is perfectly legitimate with historical and philosophical justification:

1. Secularism implies hostility toward religion,

<sup>66</sup> It should be added that an entirely new word based on the root word has now appeared in the academic landscape: *postsecular*. According to the trenchant analysis of Professor James Beckford, the word seems to have appeared as early as 1966, though it did not become widely used until many years later when it might be said to have become trendy, a word that Beckford himself does not use. Beckford identifies six clusters of ways in which the word has been used and suggests that there has been such a proliferation of inconsistent uses that it cannot be described as having any particular or coherent meaning in and of itself. This chapter will not probe further into this particular use of the word. James A. Beckford, "Public Religions and the Postsecular: Critical Reflections," *Journal for the Scientific Study of Religion*, 51 (2012): pp. 1-19.





2. Secularism implies state neutrality and tolerance toward religion,
3. Secularism implies indifference toward religion,
4. Secularism implies anticlericalism,
5. Secularism implies a decline in religious explanations for the origin of the world,
6. Secularism implies the liberation of individuals from the dogmatism of religion, or
7. Secularism implies the privatization of religion and the removal of religion from the public sphere.

Depending on who is speaking, each of these seven different meanings of secularism could be understood positively or negatively. Thus, for some, a secular state (or public sphere) is necessarily bad because it is antagonistic to religion, while for others a secular state (or public sphere) has a positive connotation of state neutrality toward religion and the removal of the state from interfering in matters that should be left to religion itself. These competing and highly contested interpretations of secularism make it difficult both to formulate public policy as well as to make a rigorous assessment of whether the world is becoming more secular.

I propose to examine three distinct but interrelated problems surrounding secularism that might be clarified by a careful and systematic use of language. Of course it is impossible to resolve all of the difficulties surrounding these three problems because of the philosophical disagreements that underlie them. Nevertheless, I hope to reduce some of the confusion by reframing and recharacterizing the issues. The three distinct yet interrelated problems are:

1. Articulating and clarifying three distinct levels of analysis when the word *secular* is used as an adjective modifying the words (a) *state*, (b) *societal institutions*, and (c) *human beings* (both individually and collectively).
2. Questioning the coherence of part of the debate involving *secularization theory* as an explanation of possible societal changes from religion to irreligion.
3. Following from the first point above, offering a clearer meaning of the term *separation of religion and the state*.

Although it is obviously impossible to resolve the many legal, political, and philosophical difficulties surrounding the term *secularism* and related concepts simply by clarifying the usage of terms, it may be possible to eliminate some needless controversies and unproductive disputes.

### THREE LEVELS OF ANALYSIS: THE STATE; SOCIETAL INSTITUTIONS, AND HUMAN BEINGS

There are three levels of analysis to which the word *secular* (and its cognates)



might be applied: 1) the state, 2) societal institutions (as defined below), and 3) human beings (both individually and collectively). By clarifying the discussion at each of these three levels it may help avoid unproductive discussions about trivial issues and facilitate analysis about secularism where it might better be applied. After this introduction, I will offer some thoughts about how policy and law might be better formulated by constantly keeping in mind the exact level that is under analysis and avoiding the application of ideologically-weighted words at inapposite levels of analysis.

1. *The State.* The term *state* is used to include all of the institutions of government and public administration within a polity, whether in a unitary or federal system. Thus the *state* includes national and federal legislatures, the executive and the judiciary branches, and other institutions ranging from independent agencies to central banks. It also includes institutions of government at the regional level (provinces, regions, *Länder*, *départements*, federal states), and the local level (cities, towns, municipalities, *arrondissements*, counties, prefectures, communes, et cetera). For our purposes here, there are four types of state: a) secular and neutral, b) secular and interventionist, c) theocratic, and d) hybrid. (These may be understood as something of “ideal types,” and it is of course possible to imagine other types of state or states that blend the constituent elements in different ways.)

(a) A *secular and neutral state* will be understood to be one where the state does not assert any religious competence or authority to make decisions based on religious law nor the relative merits of different theologies and religious beliefs. A hallmark of the secular and neutral state is its separation of religion and the state. It provides broad autonomy to religious institutions to conduct their own affairs provided that they do not violate neutral laws of the state (such as laws against embezzlement, murder, child abuse, or enslavement).

(b) A *secular and interventionist state* will be understood to be one where the state does not assert any particular religious competence to make theological judgments, but one where the state nevertheless intervenes in religious matters and does not grant broad autonomy to religious institutions. The secular and interventionist state might, for example, control religious education and play a role in the appointment of clergy, even though it claims no theological authority. Communist states typically are secular and interventionist.

(c) A *theocratic state* asserts its competence to make theological judgments, to decide religious questions, and to implement religious decisions as it deems appropriate based upon its religious authority. The theocratic state may grant some measure of autonomy to religious institutions depending on the circumstances, but it retains the ultimate power to control religious matters. Not all decisions of a theocratic state are necessarily premised upon religious authority, and one may reasonably question whether some decisions are really based upon religion (as officially proclaimed) or might be a result of political expediency. In characterizing a theocratic state, the ana-





lytical question is not whether religion, in reality, forms the basis for state decisions, but whether the state asserts its competence to make religious decisions and whether the population of the state to some extent accepts the state's religious authority. Many Muslim-majority states are theocratic in this sense, although there is a wide range of practices among them.

(d) A *hybrid state* is one that declares it has some competence to make theological judgments or to favor one religion over another, but that in reality exercises this authority rarely or in a very limited way. Like the interventionist state it may interfere in religious activities, or, like the neutral state it may abstain from doing so. An example of the hybrid state is the United Kingdom, where the reigning monarch is the Governor of the Church of England and where Parliament has the ultimate authority to decide Anglican doctrine.

2. *Societal Institutions in the Public Sphere.* The second level of analysis pertains to non-state (or predominantly non-state) institutions that operate in the public sphere. These include an extremely broad range of entities, including business corporations, markets, religious organizations, social clubs, hospitals, restaurants and cafes, places of entertainment, NGOs, political clubs, sporting events, non-state schools, etc. It should be underscored that the emphasis here is on institutions rather than the human beings who work in them, receive services from them, own them, or patronize them. To be clear, these institutions operating in the public sphere are non-governmental and may or may not be affiliated with religion. Catholic cathedrals and Buddhist temples are societal institutions that are religious while cafes or sports arenas are secular. Of course some institutions may be hybrid in that they are owned and operated by religious institutions even though they provide secular services, such as medical care.<sup>67</sup>

One of the confusions that arises with the use of the term *public sphere* is the ambiguous and inconsistent meanings of the words *public* and *private*. Public, in contexts other than how I am using it here, could be an adjective designating the state, such as in the cases of public schools, public administration, public libraries, public parks, or public servants. On the other hand, private institutions that are not owned or operated by the state may be very active in the so-called public sphere. For example, a privately owned movie theatre screens films for the general public and a preacher may deliver a sermon to the public without the word public having any reference to the state. Sony is a private corporation that is one of the world's largest manufacturers of electrical products for the public. It engages in public advertising and its presence is quite visible on the public airwaves. McDonald's and Coca-Cola are publicly owned and publicly traded on the New York Stock Exchange, even though they are private corporations.

Thus, the phrase "religion in the public sphere" can be deeply ambiguous and

<sup>67</sup> There are of course many such hybrid institutions with sharply differing characteristics. The point here is not to identify all possible institutional arrangements, but to initiate a basic framework for analysis.



confuse the underlying issues. It is quite a different thing to suggest “religion in the public sphere” means that religion should be sponsored or supported by the state (the first sense above) rather than meaning that religion is accessible and visible in public domain (the second sense). The terminology that I am proposing here refers to the second sense and thus “religion in the public sphere” is not state-sponsored or state-promoted.

3. *Human Beings (Individually and Collectively)*. The final level of analysis consists of the living human beings, individually and collectively, who think, speak, engage in religious and political activities, buy, sell, and argue with each other in the marketplace, and who associate with other human beings in the full range of human activities as families, friends, colleagues, congregations, and companions. An individual may be more religious than her sister or her parents. A family may, as a whole, be more materialistic or pious than its neighbors. Some individuals may pursue wealth, fame, or power, and others may pursue salvation. Some may obtain fame and wealth by preaching about salvation. It is likely that most human beings consist of some mixture of religious and secular sentiments and beliefs.

Owen Chadwick makes the insightful observation that the real origin of secularism in Europe was not rationality, modernism, or science, but the conscience of the individual. “Christian conscience was the force which began to make Europe ‘secular;’ that is, to allow many religions or no religion in a state, and repudiate any kind of pressure upon the man who rejected the accepted and inherited axioms of society. My conscience is my own. It is private.”<sup>68</sup> This original secularism is symbolized in Martin Luther’s declaration: “Here stand I, I can do no other . . .”

The adjective *secular* may of course be applied to each of the three different levels, although there is a substantially different meaning between secular states and secular societal institutions on the one hand, and secular human beings on the other. Whereas human beings may believe in God (or not) and pray (or not) and fast (or not), institutions do not have minds, bodies, or souls, and do not have the capability of engaging in any of these activities. States and societal institutions will neither go to paradise nor hell. Although we can understandably refer to a state as being secular or an institution as religious, what we really mean when we attach these adjectives to them is that human beings have either endowed these entities with the ability to sponsor religious activities or have not so endowed them. If we look back to the fifteenth and sixteenth century meanings of *séculariser* as described above, where property ownership was transferred from a religious institution to another institution, it is very much in accordance with this meaning of secular societal institution.

I suggest at this point that although political debates and academic discussions may argue about whether states should be theocratic or secular or whether societal institutions are increasingly secular, the principal (though not exclusive) subject of concern for most is whether human beings are or are not becoming more or less

<sup>68</sup> Chadwick, *Secularization*, p. 23.



religious. It is the potential secularization of human beings that animates the emotions and enlivens the debates. We can speculate at this point that religious believers who want the state to be more religious feel this way not because they want the state to be recognized as holy, but because they believe that a more religious state will reinforce and support the religion of human beings. When the arguments are clarified, I believe, the real concern is not the salvation of the state but the salvation of its citizens.

## SECULARIZATION THEORY AS A WAY OF UNDERSTANDING SOCIETAL CHANGE

During the 1960s, secularization theory was the reigning theory in the field of the sociology of religion.<sup>69</sup> Despite the inevitable disagreements among scholars, the proponents of the theory generally argued that with the increase of rationality, developments in science and medicine, and the continuation of aspects of modernity such as materialism, urbanization, industrialization, mass communications, globalism, and pluralism, religion would have less of a hold on the popular imagination and that society would become increasingly more secular. Although the leading advocates of the theory did not predict a steady decline in religion or its inevitable disappearance, they were impressed by signs that religion had already been losing its influence in the modern world, particularly in Europe. They offered evidence of this decline in such factors as the decreasing rates of church attendance, as well as public opinion surveys that revealed a decreasing belief in the existence of God and a weakening of trust in religious institutions. Among the names most famously associated with the secularization theory in the 1960s were Professors David Martin, Bryan Wilson, Thomas Luckmann, and Peter Berger. During the 1960s, acceptance of the secularization theory was so broad that it became part of the prevailing wisdom in the academic world.

Max Weber is generally credited with introducing the modern concept of secularization into academic usage. Weber's most famous articulation of the concept first appeared in his essay "Science as a Vocation," based upon a lecture that he delivered in 1918, as World War I was coming to an end. In it, Weber famously wrote that the "fate of our times is characterized by rationalization and intellectualization and, above all 'the disenchantment of the world.'"<sup>70</sup> This latter phrase, *die Entzauberung der Welt*, was borrowed from Friedrich Schiller.<sup>71</sup> Weber argued elsewhere that there is a "steady progress of the characteristic process of 'secularization,' to which in

<sup>69</sup> I fully agree with Professor Steve Bruce's suggestion that it would be more appropriate to call this the "secularization paradigm" rather than the "secularization theory." I will, however, use the more conventional term in this discussion.

<sup>70</sup> "Science as a Vocation," in *Max Weber: Essays in Sociology*, trans. and ed. by H. H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946), p. 155.

<sup>71</sup> For Schiller, see H. H. Gerth & C. Wright Mills, "Bureaucracy and Charisma: A Philosophy of History," in Glassman & Swatos, 1986, pp. 11–15; see especially p. 11.



modern times all phenomena that originated in religious conceptions succumb.”<sup>72</sup> Although Weber also argued that *charisma* has the power to re-enchant and to ignite imagination and belief and, although he nowhere predicted the inevitable disappearance of religion, he did believe that rational thought, exemplified in thinking, analyzing, bureaucratizing, intellectualizing, and by the scientific investigation of nature, undermines the influence of superstition and erodes belief in magic, mystery, and the supernatural. Based upon the thoughts described above, whether appropriate or not, Weber is credited by many with launching the secularization theory.

In the 1980s, the secularization theory came to be challenged by scholars who saw a resurgence of religion that was alternatively described as the “revenge of God” and, in response to Weber, the “re-enchantment of the world.” The events of the year 1979, whether symbolically or actually, may be seen as launching a sea of change in perspectives. In that year, a revolution overthrew the secular regime of the Shah of Iran and replaced it with a theocracy led by the Ayatollah Ruhollah Khomeini. Later that year, Muslim militants seized the Grand Mosque in Mecca during the Hajj, which led the Saudi government to launch a bloodbath at the holiest shrine in the Muslim world. In December of 1979, the Soviet Union invaded Afghanistan, which produced the rise of the *Mujahedeen*—holy warriors who later would be equipped in part by the Central Intelligence Agency as the United States and Muslim fundamentalists engaged in a common battle against the Evil Empire. In 1979, inside the United States, the Christian Coalition came into existence. This organization, which helped make Jerry Falwell and Pat Robertson household names and political forces, became the most famous of the groups associated with the new “religious right.” It brought together Protestant Fundamentalists, Evangelicals, conservative Catholics, and others to help “bring God back to America” and to help elect Ronald Reagan to the presidency.

The 1980s and the 1990s provided additional salient examples of an energized religious world. The longstanding troubles in Northern Ireland pitted the Roman Catholic IRA against the Reverend Ian Paisley’s many paramilitary groups. The Likud Party in Israel adopted religious language to challenge the secular Labor Party at the same time that the militant Islamist Hamas movement challenged the secular PLO in Palestine. The fighting between Israelis and Palestinians increasingly came to be characterized as one of Jews against Muslims. Although the civil war in Sri Lanka involved political and nationalist issues, and although the leaders of the Tamil Tigers proclaimed their atheism and socialism, the religious identity of Tamil Hindus fighting Sinhalese Buddhists figured prominently in the public’s understanding of the struggle. Even if the Yugoslav civil war of the 1990s might best be understood as having been a political struggle that politicians manipulated by their use of religious imagery, religion nevertheless came to be understood as the salient factor in the battle between Serbian Orthodox Christians against Bosnian Muslims. In Algeria in

<sup>72</sup> Weber, “The Protestant Sects and the Spirit of Capitalism,” in *Essays in Sociology*, p. 307.



1991, the Islamic Salvation Front won the first round of the country's parliamentary elections, only to be suppressed by the military's declaration of a state of emergency. The Hindu nationalist Bharatiya Janata Party (BJP) came into prominence and then into political power in India in the 1990s. Observations across the world of Muslims, whether in the Middle East or elsewhere, suggest that women are wearing the headscarf (*hijab*) in increasing numbers. Religion certainly appeared to be more visible than a generation earlier.

Elsewhere in the 1990s, a wave of Christian missionaries traveled to the formerly communist countries of Eastern Europe and the former Soviet Union. Although they had little success in winning converts to their beliefs, they did raise the profile of religion as a factor in society and contributed, indirectly, to the growing influence of the Russian Orthodox Church—which promoted itself as the bastion against these supposedly “totalitarian sects and cults.” The perceived rise of new religious movements in Europe, the southern hemisphere, and Asia similarly contributed to the perception that religion was on the rise. Pentecostalism was on a rapid path of growth both in Africa and South America. In the late 1990s, international freedom of religion was squarely placed on the international agenda by the enactment of the “International Religious Freedom Act of 1998” in the United States. Since that time, religious freedom has become a salient topic in international human rights, where the beliefs and activities of religious persons are weighed against the repressive actions of states. This international trend toward a newly charged religious world appeared to give the factual lie to an academic theory that presumed that the world was becoming more secular—and particularly to any theory that postulated a steady path of decline or the inevitable disappearance of religion.

Academic challenges to the secularization theory, based on this seeming rise in religious activity, appeared in the late 1980s and increased in the 1990s. University of Virginia sociologist Jeffrey K. Hadden was in the forefront with his pejoratively entitled article, “Toward Desacralizing Secularization Theory” (1987). Other prominent theorists quickly joined in with their attacks on the received wisdom, including Roger Finke, Laurence Iannaccone, Grace Davie, and others. Rodney Stark concluded the decade, if not the century, by throwing what he believed to be the last shovel of dirt on the theory's grave with his “Secularization, R.I.P.” (1999).<sup>73</sup> Perhaps the most salient event in the challenge on the conventional wisdom of the secularization theory was the conversion of Professor Peter Berger, who previously had been one of the most prominent scholars associated with secularization theory. He confessed his

<sup>73</sup> Professors Finke, Stark, and Iannaccone are famous for their “rational choice” and “supply-side” theories of a “religious economy” that form a substantial part of their joint argument against the secularization theory. For a variety of reasons, this author is not persuaded by these arguments completely apart from whatever strengths or weaknesses the secularization theory might possess. My argument with the rational choice model is, however, outside the scope of this chapter. Grace Davie is known for arguing that what might appear to be secularization is better explained by people redirecting their deep religious proclivities in new directions. Her catch-phrase formulation of this phenomenon is “believing [in spirituality] without belonging [to a religious organization].”



mistake and acknowledged that the world was indeed becoming more religious in his writings, including “Secularization in Retreat” (1997) and “The Desecularization of the World: A Global Overview” (1999). Some sociologists, in attacking secularization theory, wrote less as dispassionate observers and more as enthusiasts for the transformative power of a rediscovered faith.

By the beginning of the twenty-first century, and particularly after the events of September 11, it was common in international settings for speakers to begin their discussion of religion by criticizing those who had wrongly asserted the world was becoming more secular. Often underlying the criticism was something more than a factual or academic observation about the perceived growing importance of religion in the world. Added to this was the assumption that it was good that religion was playing a more prominent role. Luke Bretherton, for example, argued that “the recent resurgence of religion in public life, and in particular in urban life . . . represents the ‘salvation’ of politics.”<sup>74</sup>

Religiously motivated terrorism, the obvious counterexample to the assertion that religion is good, was alternatively: a) treated as an additional reason to take religion seriously, as former Secretary of State Madeleine Albright argued, or b) denounced because violence could not come from genuine religion (the position taken by then-President George W. Bush, who assumed that religion *qua* religion must be good). Many presumed that genuine religion was a positive force in the world and that it should be taken more seriously in academe, domestic politics, and international affairs.

The secularization theory, although dethroned from its position as the “received wisdom” in sociology, never completely disappeared. A new generation of scholars that included Steve Bruce and Mark Chaves refined and clarified the arguments that had been made by their predecessors. Prominent scholars continued to argue that the core of the secularization thesis was correct: the importance that religion once held to people continues to erode, despite all of the seeming counterexamples that newly energized religion reveals. Some scholars responded to the onslaught against the secularization theory by asserting that its critics had caricatured it by falsely asserting that it had rigidly predicted the inevitable decline and eventual disappearance of religion—a position that had in fact been taken by only the most extreme and unrepresentative of secularization theorists. The most illustrative example of this phenomenon was Rodney Stark’s repeatedly citing the straw man example of Anthony F. Wallace’s 1966 college anthropology textbook that asserted the inevitable extinction of religion.<sup>75</sup> Wallace’s textbook serves quite nicely as a rhetorical foil, but Stark’s argument would have been more impressive and less polemical had he been

<sup>74</sup> Luke Bretherton, “Religion and the Salvation of Urban Politics: Beyond Cooption, Competition and Commodification,” in *Exploring the Postsecular: The Religious, the Political and the Urban*, Arie Molendijk, Justin Beaumont, and Christoph Jedan, eds., pp. 207–22 (Leiden: Brill, 2010), p. 207.

<sup>75</sup> See Philip S. Gorski and Ates Altinordu, “After secularization?” *Annual Review of Sociology* 34 (2008): pp. 55–85, 56.



able to show that Wallace's opinion was widely shared rather than repeatedly cite the same textbook to make his point.

Berger's move to join the anti-secularists was no doubt a significant symbolic victory against the once-dominant theory, but it is not necessarily true that Berger's switch was to the right side of history. By the twenty-first century, the Iranian theological revolution that helped launch the reexamination appears to be stalled and kept in place not by popular demand but by the same repressive tools that were once employed by the Shah. The conflicts in Northern Ireland and the Balkans have largely abated. Muslim extremism, which is far from a spent force, increasingly appears to be an erratic force that wreaks destruction on Muslim victims. Moderate Islamist parties have come to power or are on the verge of power in several countries, but there is no one on the horizon whose influence compares to that of Khomeini. The religious right in the United States continues to have a role, but appears to be increasingly fragmented along a series of divisive social issues. The Republican Party's leading candidates for president against Barack Obama in 2012 did not include figures typically associated with the religious right, but Roman Catholics and a Mormon. Nevertheless, the answer to the question of whether the world is becoming more or less secular cannot be resolved by reference to a few anecdotal examples, however telling or salient they might appear. There is a need to look more seriously and deeply.

It is probably easier to establish somewhat objective criteria to determine whether a state is secular and neutral or whether a societal institution has been secularized than it would be to determine whether human beings are religious, secular, or even what those terms mean with regard to humans. The introduction to this chapter already raised the difficulty of determining what the markers of religiosity are in relationship to attitudes about inter-racial marriage, gay marriage, and belief in superstitions. If a married couple with four boys decides to stop compelling their children to attend church and the boys stop going, family church attendance drops by 66 percent. If church attendance were a measure of secularization of human beings, this would suggest a significant decline for the family. But is this a useful measure of secularization? By this hypothetical example, nothing really has changed in terms of the religious sentiments of human beings; it is only that parental coercion has stopped forcing the uninterested from doing something that they do not want to do.

Having identified and defined the three levels of analysis, we are now better equipped to be clearer about some of the different and competing meanings of *secular* and *secularization*. In brief, and as will be elaborated below, it should be helpful to understand and differentiate:

1. A secular state is one that does not assert any religious competence or authority to make its decisions. It may be a neutral secular state that grants religious autonomy to human beings (individually and collectively) as well as to societal insti-





tutions that are religious. A secular interventionist state is one that, although claiming no religious competence, interferes in religious activities and doctrines. Within this definition, it is imagined that most Americans and Western Europeans, for example, would likely support a neutral secular state that provides religious autonomy and does not purport to have religious competence. A debate that is now occurring broadly in the Muslim world is whether the state should be a neutral secular state or a theocratic state—although the words used inside these debates are not necessarily those that I have used here.

2. Societal institutions in the public sphere may or may not be religious and there may (or may not be) an increase in the actual number of religious (or non-religious) institutions in the public sphere. Similarly, there may be an increase (or decrease) in the relative percentage of religious (or non-religious) societal institutions in the public sphere. These do not, however, necessarily say anything about changes to the religious beliefs of individuals.

3. Human beings (individually and collectively) may or may not be increasingly religious or secular, whether in actual numbers or on a percentage basis. We can imagine, for example, that there are more “secular individuals” living on the earth now than ever did so previously, in part because there is a larger total number of human beings now living. The same can be said for religious individuals. It may be possible to say that there are more religious Muslims now living than at any time in history, if for no other reason than that there are now more living Muslims. This is a separate question from asking what percentage of Muslims is religious and what percentage is secular. So it might be that while the total number of living Muslims who are religious is higher than at any point in their history, at the same time the percentage of religious to secular Muslims is on the decline. There remains, of course, the complicated if not unanswerable question of deciding how it should be determined what constitutes a secular Muslim and what constitutes a religious Muslim. While these questions are difficult and may be incapable of being answered, it is important to distinguish them from whether societal institutions are decreasingly religious and whether appearances of religiosity in the public sphere necessarily tell us anything about whether individuals are more or less religious.

When scholars debate the merits of the secularization theory with regard to the public sphere, they may unintentionally be confusing distinct concepts such as: a) whether the number (or percentage) of individuals is increasingly secular, or b) whether societal institutions—particularly schools and hospitals—are increasingly being transformed from religious control to state control, or c) whether manifestations, appearances, symbols, and language of religion are increasingly apparent in public. By framing the issues as described above, the purpose is to be able to speak with more clarity about the arguments underlying secularization theory as well as the favored relationship between religion and the state. Ultimately it may be impos-





sible to have any objective measure to evaluate the secularization theory, but there is good reason to be clear about the issue before assuming it can be proved or falsified.

Professor Chadwick argues that secularization should not be understood to be “change of fashion or custom” or a “change in habits” regarding what is acceptable to society.<sup>76</sup> To illustrate the point, he offers the example of Prime Minister Balfour’s playing golf on Sunday in 1905, an action that elicited much unfavorable comment at the time. Despite Chadwick’s rejection of this example, we might question whether the event was as meaningless as he suggests. The issue for Lord Balfour was not the stylistic question of whether his golfing knickers matched his argyle socks or whether he should have completed his outfit with a Tam o’Shanter, but whether it was appropriate for the head of government of the British Empire, an empire that justified its military actions on its Christian mission, to publicly ignore the Anglican Church’s fourth commandment to keep the Sabbath day holy. While it may well be the case that a Sunday golf outing constituted nothing more than a change of fashion for the Prime Minister and the Regius Professor of Modern History at Cambridge, calling this a “change of fashion” may itself be a profound indicator of secularization.

In 1967, at the time when the secularization theory was rising to predominance, a perceptive article by Professor Larry Shiner challenged the empirical evidence upon which the theory was based.<sup>77</sup> Shiner questioned whether the word *secularization* was in fact a useful or productive term, as well as whether it was in fact possible to measure whether something like secularization was occurring. A half-century after he made his argument, most of his criticisms and observations still stand—in spite of the fact that the prevailing consensus may have shifted from one supporting the theory that postulated an increase in secularization to one that now maintains that it is religion that is on the rise. In words as true then as now, he observed that during “its long development the term ‘secularization’ has often served the partisans of controversy and has constantly taken on new meanings without completely losing old ones. As a result it is swollen with overtones and implications, especially those associated with indifference or hostility to whatever is considered ‘religions.’”<sup>78</sup>

Regardless of whether one finds greater support for the secularization theory or for the resurgence of religion analysis, the Shiner article offers a cautionary warning that continues to challenge any empirical claim that either religion or secularism is on the rise, whether in the United States, Europe, the Muslim world, or the world generally. In the spirit of Shiner, but with a different way of framing the question, I would like to pose two problems that confront any theory that asserts a rise (or decline) in religion. First, which specific factors should be seen as revealing a rise or decline? Second, how may these factors be measured?

<sup>76</sup> Chadwick, *Secularization*, pp. 14, 15.

<sup>77</sup> Larry Shiner, “The Concept of Secularization in Empirical Research,” *Journal for the Scientific Study of Religion* 6 (1967): pp. 207–220.

<sup>78</sup> *Ibid.*, p. 218.



In response to the observation that there has been a resurgence of religion as revealed by the growing number of women wearing headscarves and the increasingly prominent role of religion in politics, it might be fair to question the value of the particular factors that are cited to justify this observation. Has there been, for example, a notable rise in acts of religious kindness? Are the amounts of alms and *zakat* distributed to the poor increasing on a per capita basis? Would most devout religious believers prefer to spend their hard-earned money on a new iPhone or a religious organization? Are cathedrals packed to overflowing for mass on Sunday mornings in Segovia and Smolensk? Are football stadiums increasingly empty on Sunday afternoons in the United States, Europe, and South America in growing respect for the explicit Commandment to keep the Sabbath day holy? Is the Catholic Church opening or closing more seminaries for its clergy? Do religious sermons speak to a growing television audience in comparison to programs such as “Arabs Got Talent” and “Big Brother”? Do teenagers (and their parents) spend more time posting and reading messages on walls on Facebook or reading the Holy Scriptures? Are the majority of people behaving better than they did a generation ago in accordance with the venerable teachings of Jesus, Hillel, the Guru Nanak, the Buddha, and the Prophet Mohammad?

The evidence of the resurgence of religion in the contemporary world may be based more upon the frequency of apparent selected symbols of religion and on salient examples of religious politics than by a heartfelt increase in religious piety by the majority of people in the world. It may be that the secularization debate is oblivious to genuine religious devotion (however measured) and has much more to do with worldly manifestations of religiosity that have no relevance to the original teachings upon which the world’s great religions were founded. Perhaps we are observing not the resurgence of God in the world, but another form of worldliness that is now justified in the name of God.

While it is easier to identify the secularization of the state and societal institutions, these do not necessarily tell us anything about the real interest—whether human beings are becoming more or less secular. There are many factors that could be selected to serve as indicators of the increase (or decrease) of secularization of human beings,<sup>79</sup> including:

1. the wearing of religious garb (such as the *hijab* or the crucifix);
2. attendance at religious services (at the church, mosque, temple, or synagogue);
3. attendance at “secular” events (*e.g.*, sports, entertainment, political);

<sup>79</sup> As argued above, the focus of secularization in this chapter is on human beings rather than on the more abstract concepts of state or societal institutions. If one were to attempt to apply a secularization thesis to the state or societal institutions, then the task would be to measure such factors as the relative number of secular and religious institutions that operate in society or the relative frequency of religious versus state institutions that perform functions such as registering births, conducting marriages, conducting burials, or operating hospitals and prisons.



4. daily activities (*e.g.*, religious and non-religious reading; religious and non-religious viewing of mass media);
5. self-reporting of religious beliefs and values in public opinion surveys;
6. adherence to commands of religious authorities (*e.g.*, counseling against the use of contraceptives or against abortion);
7. contributions to religious organizations and religious causes (*e.g.*, tithing, *zakat*);
8. adherence to (original) religious doctrines regarding usury and interest;
9. the number of times a person prays per day (or per week);
10. the number of times per day (or week) that a person has a feeling of religious connectedness to God;
11. voting preference on the basis of the religious position of the candidate;
12. the observance of religious obligations (*e.g.*, abstaining from alcohol or other prohibited foods);
13. the number of clergy (or other religious officials) in training for the ministry; and
14. the tendency to explain medical events (*e.g.*, the death of a child) in religious terms.

As far as this author is aware, and for understandable reasons, no rigorous or systematic effort has been undertaken to measure secularization (or religiosity) in a comprehensive way that takes into account this broad range of possible factors.<sup>80</sup> Rather, one or two individual elements are selected for analysis as if they were sufficient to determine whether something as complex as secularization is increasing in human beings.

Many religious believers who denounce secularism, and who often believe that it is increasing, frequently attribute its apparent growth to the harmful influence of non-religious people (including atheists, agnostics, free-thinkers, and secular humanists), a secular state (which promotes secularism in public schools and suppresses religion in the public sphere), and to influential people in the mass media (Hollywood, the entertainment industry, and the liberal media). The relative influence of these sources on secularization is debatable. But focusing on ideological opponents probably misses the most influential sources that undermine religious adherence. Possibly first and foremost is materialism and consumerism. While religious figures often denounce the evil of materialism, they sometimes seem to save their harshest criti-

<sup>80</sup> The most impressive attempt to provide a broad analysis of a wide range of factors appears in Ronald Inglehart and Pippa Norris, *Sacred and Secular: Religion and Politics Worldwide* (Cambridge: Cambridge University Press, 2004). Unfortunately, Inglehart and Norris rely principally on self-reporting about attitudes, which are not entirely reliable indicators.



cism for their ideological opponents. As has been discussed above, other factors that presumably contribute to whatever secularism is taking place include sports, other forms of entertainment (including most powerfully television), technology, transportation, medicine, indifference, and laziness. If the electrical power is cut, the modern person is more likely to call the electrical provider than to pray to God. Diseases are increasingly associated with germs and viruses rather than the will of God. Perhaps the greatest new threats to religion are what Pascal would call distraction: the Internet, Twitter, the smart phone, and the availability of McDonald's and KFC.

## THE SEPARATION OF RELIGION AND THE STATE

The discussion above identified four “ideal type” states with regard to the relationship between religion and the state: 1) the secular-neutral, 2) the secular-interventionist, 3) the theocratic, and 4) the hybrid.<sup>81</sup> There are, of course, other possible arrangements, with these four categories having been introduced not because they provide a comprehensive description of the range of possibilities, but because they may help clarify understanding about some important issues.

It is not difficult to understand why authoritarian rulers intent on enhancing their powers would likely prefer to rule either in either a category 2 or 3 state. It is also easy to understand why a religious authority might prefer category 3, but also possibly 1 or maybe 4 (but not 2).

We can imagine that dominant religious groups might prefer the theocratic state or the hybrid state, as they would presumably find the state to be supportive of their religion. Of course they might also prefer to have a secular neutral state if they feared that state authorities might abuse their power. It is understandable why a public that had some suspicions of religion and confidence in the state would prefer category 2. We also can understand why religious minorities would likely prefer living in a category 1 state, with the possible exception of where state authorities shared the same religion as the minority and would support the minority (as perhaps in Syria, Iraq, and Lebanon). But if they did not have the ability to control state decisions, they too would presumably, on average, prefer category 1. What about religious groups that are suspicious of political figures potentially being used to interfere with their religious practices? It would seem that the most obvious choice for them also would be a category 1 state.

If we combine these answers, understanding that we are speaking only of very general categories and simple responses, some patterns emerge. Those who want the state to control religion are likely to be either authoritarian leaders or dominant religious groups. Minority groups (usually) and those suspicious of the motives and actions of people in political power are likely to favor category 1. All of these answers were made without regard to the role of secularization. We can ask under which of these four systems is the state best able and least able to promote seculariza-

<sup>81</sup> See discussion above.



tion of religion? The answer would seem to be that only category 1 is exempt; each of the other four categories has a greater power to promote secularization—though that does not mean that they necessarily would. Under this analysis, category 1 is most likely to be protective of religious independence and least likely to trust political authorities to make religious decisions.

Finally, we should ask the ultimately unanswerable question of how well do theocracies do when it comes to avoiding the confusing of religious decision-making and political expediency? Asked another way, do theocracies avoid becoming entangled with the very secular world of power politics? While our answers to such questions may reflect our own preconceptions, it certainly is arguable that the most salient example of a modern-day theocracy (excepting the Holy See) is Iran. It is difficult to imagine that a majority of the population in any country of the world would look to Iran as a successful example of the union of religion and the state.

This analysis seems to point in the direction of suggesting two things. First, that the state that is least likely to harm or to secularize religion is the category 1 state. Second, religion is also most likely to prosper unencumbered by political calculations under the category 1 state. Although this issue is far more complicated than space permits here to resolve, the examination of the issues through this particular lens may be of value. This does suggest, in a way, that Jefferson's wall of separation may indeed be good, as he imagined, for both religion and the state. This is not dissimilar from nineteenth century struggles. "Most of the men who tried to separate the Churches from the State [in Victorian England] wanted to make society more Christian even while they made the state more secular."<sup>82</sup>

## CONCLUSION

This chapter has argued essentially five points.

1. We should clarify our understanding of how we are using terms such as *secular* and *secularization*.
2. We should distinguish among three different levels of secularization (state, societal institutions, and human beings) and recognize that, while useful things can be analyzed under the first two, the real focus of interest is whether human beings are or are not becoming more secular.
3. It is difficult—and perhaps even impossible—to actually say anything definitive with regard to whether human beings are becoming more secular. As said in the beginning, does an increase in acceptance of interracial marriage and homosexual marriage mean that those who accept them are becoming more secular, or that our notions of what is *really* religious and what is secular are constantly evolving?
4. Even if we were able to ascertain the factors that identify what is secular and what is religious, it is perhaps impossible to measure them in any meaningful way.

<sup>82</sup> Chadwick, *Secularization*, p. 93.



5. Despite the impossibility of identifying the factors of secularism or speaking with certainty about its recent increase or decline, it is meaningful that science and medicine have increasing explanatory power, and even the most religious of societies rely on developments in those fields. Nevertheless, the capacity to reinterpret what is and is not religion also remains powerful and it would be naïve to imagine its disappearance any time soon.

The civilized debate about secularism described above between Holyoake and Rutherford in England in 1853 resembles a much more recent public discussion in Germany between Joseph Cardinal Ratzinger and Professor Jürgen Habermas. Their conversation, which took place in 2004, appeared in published form with the title *Dialects of Secularization* (*Dialektik der Säkularisierung*). The future Pope Benedict XVI, who at that time was the prefect of the Sacred Congregation for the Doctrine of the Faith (formerly known as the Roman Inquisition), condemned neither the secular nor secularism. The future pontiff, speaking to Professor Habermas, appealed to “the reason we share in common” and advocated a joint effort to “seek the basis for a consensus about the ethical principles of law in a secular, pluralistic society.”<sup>83</sup> Recognizing that “the secular culture is largely dominated by strict rationality,” Ratzinger nevertheless identified it as “an important contributory factor” not only to Western culture, but to the world as a whole.<sup>84</sup> Indeed, the Cardinal identified “the two main partners” in the intercultural debate as “the Christian faith and Western secular rationality . . .”<sup>85</sup> Rationalism, after wandering for 140 years in the *Syllabus of Errors*’ wilderness, was baptized by the future pope as if it were a prodigal son. Moreover, Ratzinger recognized secular rationality, along with the religious faith, as being one of the two pillars of Western civilization. It may be more helpful to understand religion and secularism as fluid concepts that are constantly interacting with each other rather than as clearly defined antagonists engaged in a battle—even when partisans of religion and secularism believe themselves to be at war. Indeed, the real enemy of religion may not be the principled and vigorous secularist, but the person who lacks genuine personal piety but uses religious language in the public sphere in order to obtain power and influence.

<sup>83</sup> Jürgen Habermas and Joseph Ratzinger, *The Dialectics of Secularization: On Reason and Religion*, trans. Brian McNeil (San Francisco: Ignatius Press, 2005), p. 69 (emphasis added).

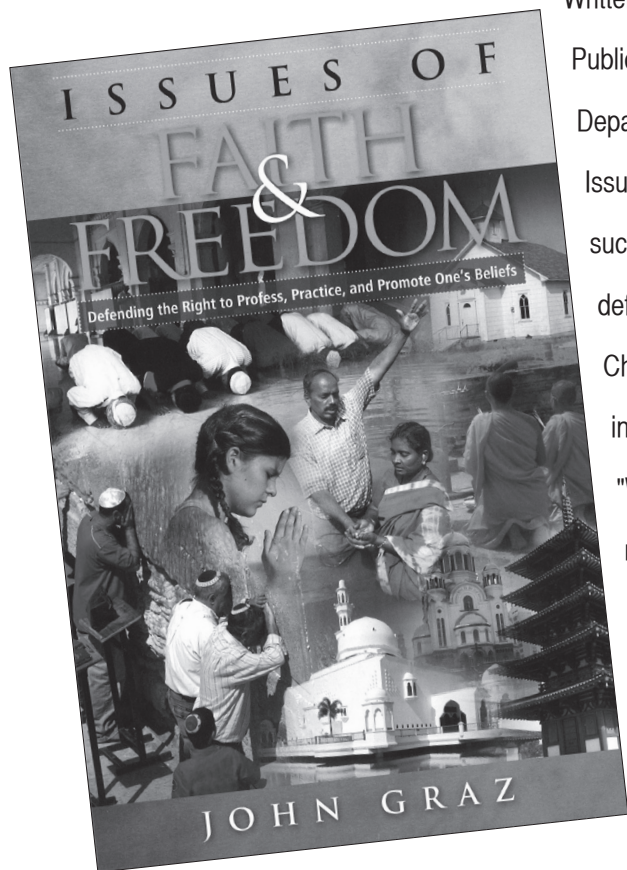
<sup>84</sup> *Ibid.*, pp. 74, 75 (emphasis added).

<sup>85</sup> *Ibid.*, p. 79.



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# SECULARISM AND RELIGIOUS FREEDOM IN THE LIGHT OF EUROPEAN EXPERIENCE<sup>1</sup>

D. J. B. TRIM<sup>2</sup>

It is natural to consider Europe in a discussion of the challenges of secularism. In the third millennium of the Christian era, what once was Christendom is now characterised by intensely secular societies—Western Europe, in particular, is probably the most secularised part of the world and is often characterised as “post Christian.” Nevertheless, religion remains particularly important in the European context because of its longstanding and enduring political significance. England, Scotland, Germany and the Scandinavian countries have Protestant state churches; the Orthodox church has privileged status in Serbia, Montenegro, Greece and Bulgaria; the Catholic Church has a special legal status in Spain, Italy, Poland and Croatia; and in France the historical and cultural importance of Roman Catholicism gives it a unique place in French society and politics, which to some extent belies the aggressive official commitment to *laïcité*. The experience of Christian minorities is, moreover, of considerable significance in the broader political and social history of the United Kingdom, the Netherlands, Belgium, Germany and the French Republic; all of these nations now also have sizeable non-Christian minorities.

Despite important national and regional differences in the European history of pluralism, right across Europe there is renewed debate: about the place of religion and the relationship of Church and State in what are now largely secular societies; about how (or whether) acceptance of diversity can be combined with universal civic values; about the tension between evolving national identity and sectarian identities—in sum, about whether pluralism is sustainable or perhaps even desirable, and

<sup>1</sup>This paper is based on two recent books that I co-edited with Richard Bonney, the distinguished historian of the state, of pluralism, and of Christian-Muslim relations: Trim and Bonney (eds.), *Persecution and Pluralism: Calvinists and Religious Minorities in Early-Modern Europe, 1550-1700* (Oxford, Bern, Berlin, Brussels, Frankfurt am Main, New York & Vienna: Peter Lang, 2006) and *The Development of Pluralism in Modern Britain and France* (Oxford, Bern, Berlin, Brussels, Frankfurt am Main, New York & Vienna: Peter Lang, 2007). They surveyed the history of religious pluralism in Western Europe from the sixteenth century to the present day and in them can be found fuller supporting references for the arguments that follow. This article synthesises some of the key arguments of the two books as regards secularism and religious freedom (and it draws to a significant extent from the two introductory chapters, which were largely authored by me).

<sup>2</sup>David J. B. Trim, Ph.D. (University of London, 2003) taught history and theology at Newbold College for over ten years, was the Walter C. Utt Chair in History at Pacific Union College for two years, and senior research fellow at the University of Reading. Since February 2011 he has been Director of Archives, Statistics, and Research, for the General Conference of Seventh-day Adventists, located in Silver Spring, Maryland, USA.





whether an overt public-sphere secularism, with religion absolutely confined (by statute as well as by convention) to the home is the best foundation for a free society. The latter, certainly, is a theoretical argument increasingly being made by celebrity journalists, such as Christopher Hitchens and Polly Toynbee, well-known artistic figures, such as the novelist Martin Amis, and prominent scientists, such as Peter Atkins and Richard Dawkins. These are British exemplars, but they have equivalents elsewhere, especially (but not only) in France.

Debate and discussion are not distanced from urgent political reality, for Western governments and societies are grappling with policy questions such as whether to fund minorities' education of their children if it might perpetuate sectarianism (which affects evangelical Christians who want to teach creationism, as well as Moslems); whether to protect ethnic and religious rights that appear to clash with gender rights (the issue of headscarves); and whether groups, seeking to restrict the free speech of others ought to have the protection of free speech laws, and whether free speech ought to have religious limits (the issue of the *Satanic Verses*, the Danish cartoons, and the assassinated Dutch film-maker Theo van Gogh's movies *Submission* and *05/06*).

This, then, is the context; but what, then, is there to learn from the European experience? From the last five hundred years of a history of religious diversity, many lessons could no doubt be learned. I will restrict myself to two main points—the first, which I sketch out very briefly, is drawn from present-day experience; the other, which I elaborate at greater length, from history.

It is important, firstly, to recognise the intrinsic interrelatedness of religion and ethnicity—I believe that it will be impossible to promote truly inclusive and respectful values if religion is simply ignored, side-lined or relegated to behind closed doors. In late twentieth-century Western Europe, debates about pluralism and about how open, free societies can exist and flourish generally focused on issues of race rather than religion. While the attacks of al-Qaeda and its partners and analogues on New York, Istanbul, Madrid and London have highlighted the discontent of Muslim immigrants in Western nations, the issue is a wider one, yet one regularly missed almost entirely by aggressive advocates of secularism as a solution to Europe's social ills.

However, the simple fact is that religion and ethnicity often go hand in hand. However, while great educational efforts to reduce racism were made in most late twentieth-century European nations, there was very little recognition, whether by governments, pressure groups or think-tanks, that the characteristic patterns of behaviour, which distinguish many minorities almost as distinctively as skin colour, are very frequently specifically *religious* in nature, rather than simply originating in the different culture where a given minority originated.

Clothing, culinary practices, work patterns, family life arrangements, housing preferences, and the manner of celebrating the passage of the seasons and central human experiences (birth, marriage, death)—all of these very effectively mark mem-



bers of a minority group as *other*. All can and frequently do derive from specifically religious requirements, and therefore cannot easily be abandoned. All can and do evoke discrimination. This is the case even when religious freedom has some legal protections, for studies by political scientists reveal that, where religious beliefs have consequences for daily secular life, there is less practical willingness to accept diversity. Toleration is readily extended to what are seen as overtly religious observances; however, a narrow and exclusivist conception of what constitutes *religion* means that, in practice, members of minorities often suffer prejudice and discrimination unless they conceal or forego the rites and customs that define them.<sup>3</sup> The reality of life in an *ethnically* diverse community is that *religious* diversity is present as well, and so, too, are public manifestations of that diversity.

This became particularly apparent to me, as a long-term resident of Reading, a British city with a higher than average population of ethnic minorities<sup>4</sup> spread across a wide number of ethnicities, each with a distinctive faith orientation: Pakistanis were Muslims; Indians were Hindus and Sikhs; Africans were generally members of small, independent Christian Churches, as were West Indians, though a significant minority of this minority were Rastafarians. The Hindu festival of *Divali*, the Islamic festival of *Eid al-Adha*, and the traditional English celebration of Guy Fawkes Day (originating in the triumph of Protestantism over Catholicism), are all celebrated within a week or so of each other—celebrated enthusiastically and *publicly*, in ways that are both similar (all seem to involve lavish use of fireworks), yet also quite different.

If there is a genuine desire to erode or eradicate ethnic intolerance, prejudice both between religions and against religion must also be combatted. Because radical secularism seeks to take matters of faith entirely out of the public sphere, it is likely to marginalise members of ethnic minorities, for whom religious practices are an essential part of their identity.<sup>5</sup> Secularism thus is in danger of being repressive of many minorities, not merely of religious ones.

It is important, moreover, and here I move to my second point, to stress that history indicates that the waning of religious zeal and the discrediting of theological dogma are not necessary preconditions for the emergence of toleration, pluralism and civil liberties. While reliance on human reason and abilities, rather than simple (or simplistic!) faith in an immanent deity, is widely regarded today as positive, and

<sup>3</sup> E.g. see G. T. Beckley and P. Burstein, "Religious Pluralism, Equal Opportunity and the State," *The Western Political Quarterly*, 44 (1991), pp. 185–208.

<sup>4</sup> See Office for National Statistics, "Resident Population Estimates by Ethnic Group (Percentages)," Reading, June 2009. <http://www.neighbourhood.statistics.gov.uk/dissemination/LeadTableView.do?jsessionid=zdq2TJnS10zSDkFsWlHqTGG5tSYnnfpzJK0LqsXph6vGGQBxFVDL222248611!1314188978290?a=7&b=276849&c=reading&d=13&e=13&g=407934&i=1001x1003x1004&o=322&m=0&r=1&s=1314188978290&enc=1&dsFamilyId=1812&nsjs=true&nsck=true&nssvg=false&nswid=1280>.

<sup>5</sup> Cf. Jaime Contreras's observation of Spanish Muslims: "Culture and tradition are part of their identity" in his paper "Trends in Secularism and the Arab World," presented at the 13<sup>th</sup> meeting of the International Religious Liberty Association's Panel of Experts, University of Sydney, August 22–24, 2011.



to a great extent underpinned the Enlightenment and thus, eventually, secular modernity, it is not a panacea against either intolerance or repression. Furthermore, the simple equation “religion = dogmatism = repression” is fallacious.

Intellectually sophisticated societies have been guilty of intolerance and so have societies (and polities) that have avowedly embraced scepticism. In Europe this has taken the form of accepting that freedom of belief in its purest form can be restricted solely to the private sphere, and that, in contrast, the state could legitimately and reasonably impose certain social values by force—even if these impinged on freedom of religion. This has been a recent trend among European intellectuals but it dates back to the seventeenth and eighteenth centuries.

The celebrated seventeenth-century English political theorist and freethinker, Thomas Hobbes (1588–1679), averred that the state could compel external religious conformance. Albeit called an atheist by contemporaries, he probably was not truly atheistic in the modern sense, but he was certainly a radical sceptic. And yet, drawing on the biblical example of Naaman (2 Kings chapter 5), Hobbes argued that “all believers, whether Christian, Jewish, Mahometan or otherwise,” could reasonably be required by the state to conform “to publicly authorised religion.” Yet he “did not consider this unbending obligation as a type of intolerance. Crucial to his understanding was the distinction between public and private religion.”<sup>6</sup> Because the believer was free to do what he liked in the privacy of his own home, Hobbes held that the state which imposed external conformity would still be tolerant. He was, as it were, literally and only an advocate of freedom of conscience—but not of practice.

He was followed by the radical Enlightenment philosopher, and sceptic, Baruch Spinoza (1632–77). While an ethnic Jew, Spinoza was neither an observant Jew nor a Christian; his religious views, like those of Hobbes, are hard to characterise because of the very different worldview of the times, but in terms of belief he was, at most, a deist; he certainly was fundamentally sceptical in his approach to religion, an *epistemological sceptic* in Nicholas Miller’s nice phrase. Despite this, Spinoza accepted that rulers could impose a state religion—even though, in late seventeenth-century Europe, that would mean orthodox Christianity, whether Catholic or Protestant. Spinoza argued that the “inward worship of God and piety in itself are within the sphere of everyone’s private rights and cannot be alienated,” yet he, like Hobbes, drew a distinction between public and private religion. What he called [quote] the “outward observance of piety” was, he held, a legitimate area of state action, since the state could ensure, by unity in public religion, “public peace and well-being.”<sup>7</sup> So, though he himself was a sceptic, Spinoza was, in effect, an advocate of religious

<sup>6</sup> Justin Champion, “Private Is in Secret Free. Hobbes and Locke on the Limits of Toleration, Atheism and Heterodoxy,” research paper, available at [www.personal.rhul.ac.uk/uhra/026/tolerate.pdf](http://www.personal.rhul.ac.uk/uhra/026/tolerate.pdf). I owe this reference to Richard Bonney.

<sup>7</sup> Michael Rosenfeld, “Spinoza’s Dialectic and the Paradoxes of Tolerance: A Foundation for Pluralism?”, *Cardozo Law School, Public Law Research Paper* 79 (2003). Downloadable from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=466360](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=466360). I owe this reference, too, to Richard Bonney.



intolerance.

Jean-Jacques Rousseau (1712–78), the celebrated Swiss–French philosopher and advocate of popular sovereignty, also accepted the legitimacy of persecution, in certain circumstances. Rousseau was a deist and in some of his works argues for toleration and freedom of discussion in religious matters. However, he takes for granted that religion is needed to bind a society together and he coined the term *civile religion* (civil religion) for a form of religion that was primarily social in nature, rather than spiritual or theological. Civil religion, he thought, ought to avow belief in a deity; in a life to come; in the existence of virtue and vice, which the state (and the deity) should respectively reward and punish; and the “sanctity” (his word) of law and the social charter that should underpin a virtuous republic.<sup>8</sup> Such a religion he presents as being “fit for republicans and citizens.” Rousseau argues that it will be “a purely civil profession of faith,’ whose articles are to be arranged by the sovereign ‘not exactly as dogmas of religion, but as sentiments of sociability without which it is impossible to be a good citizen or a faithful subject.’” And, Rousseau argues, while “the sovereign . . . ‘cannot compel men to believe’ these sentiments, [he] ‘can banish from the state anyone who does not believe them.’ The unbeliever is banished not so much for impiety as for unsociability, having shown himself ‘incapable of sincerely loving the laws and justice.’”<sup>9</sup> Chillingly, however, Rousseau, the advocate of republicanism and tolerance, then asserts that “if anyone, after having publicly agreed to these dogmas, shall behave as if he did not believe them, he is to be punished by death, for he has committed the greatest of all crimes: he has lied in the face of the law.”<sup>10</sup>

Soon after Rousseau’s death France was transformed by the French Revolution, whose leaders drew heavily on the philosopher’s thinking. The changes effected by the Revolution have often been portrayed in terms of the transformation of a superstitious society into a rational one. However, the advent of educated scepticism in place of blind faith did not create a society any more respectful of individual religious freedom—and in light of Rousseau’s views, perhaps this is not surprising. Brian Strayer observes that even the celebrated 1787 Edict of Tolerance “did not grant the Huguenots religious liberty.”<sup>11</sup> The revolutionary apostles of reason were soon sacking many of Paris’s churches in an orgy of destruction as bad as any wrought by intolerant (and iconoclastic) Protestants during the Reformation. Faithful Catholics in the Vendée were slaughtered *en masse* in an episode that continues

<sup>8</sup> Terence Ball, *Reappraising Political Theory: Revisionist Studies in the History of Political Thought* (Oxford & New York: Oxford University Press, 1995), p. 111. For the influence of such ideas in the United States, see Robert Neely Bellah, “Civil Religion in America,” *Journal of the American Academy of Arts and Sciences*, 96 (Winter 1967), pp. 1–21.

<sup>9</sup> Ball, *Reappraising Political Theory*, 110, quotations from Rousseau’s *Contrat social*, i.e. *Social Contract* (1762), bk. IV, ch. 8.

<sup>10</sup> Rousseau, *Ibid.*, quoted in Ball, *Reappraising Political Theory*, p. 111.

<sup>11</sup> Brian E. Strayer, *Huguenots and Camisards as Aliens in France, 1589–1789: The Struggle for Religious Toleration* (Lewiston, N.Y.: Edwin Mellen Press, 2001), p. 487.



to be politically controversial and deeply divisive in present-day France. Huguenot pastors and Roman Catholic priests, monks and nuns were indifferently guillotined or imprisoned, with Catholic and Protestant sometimes sent to the same galley.<sup>12</sup> All were victims of a regime that persecuted its religious opponents as zealously as any historical church.

In contrast to the arguments of Enlightenment philosophers, and the actions of those influenced by them, official religious toleration had already emerged in the Dutch Republic and England: both Christian states. Toleration was conceded, as John Coffey has shown, because of theological arguments propounded by Christians. These Christian tolerationists were dogmatists: they were trying to get toleration accepted as part of Christian dogma, while radical sceptics such as Spinoza accepted the right of the state to compel, at least in public.<sup>13</sup> In addition to this significant role played by dogmatists in crating liberty, as Brendan Simms and I argue in a recent history of the roots of humanitarian intervention, the origins of the modern concept of humanitarianism and human rights lies in early-modern concern about, and opposition to, religious persecution.<sup>14</sup> So, rather than being antithetical to human rights, as some secularists allege, religious freedom is in fact innate to the modern doctrine of human rights.

Yet the reverse is not true. While revolutionary France was the first European state to adopt a declaration on human rights (more than 150 years ahead of its neighbours), in 2004, the French Republic banned the wearing of any religious symbols in a state-run school. Whether Muslim *hijab*, Christian cross, Jewish *kippa* or Sikh turban, *all* such symbols were proscribed: an astoundingly authoritarian and oppressive piece of legislation. To be sure, its objective was the preservation of *laïcité*, with its clear-cut distinction between *église* and *État*, and so ultimately it was intended to be genuinely in the interests of those revolutionary principles, *liberté* and *égalité*—but there is little sense of *fraternité*. In any case, the law looks not so much like a bold step for the preservation of individual freedom as like the persecution of Quakers in early-modern England for wearing hats in the presence of social superiors—an action that today seems quaint but that at the time was perceived as destructive of social order. And the fact that secular persecutors use the language of “social order” (or, in the United Kingdom, “social cohesion”), since they theoretically

<sup>12</sup> David A. Bell, *The First Total War: Napoleon's Europe and the Birth of Warfare as We Know It* (New York: Houghton Mifflin, 2007), 154–85; Strayer, *Huguenots and Camisards*, p. 501.

<sup>13</sup> John Coffey, “Scepticism, Dogmatism and Toleration in Seventeenth-Century England,” in Bonney and Trim, *Persecution and Pluralism*, pp. 149–176; see also his *Persecution and Toleration in Protestant England, 1558–1689* (Harlow: Longman, 2000). Similar processes obtained in North America: see Nicholas Miller, *The Religious Roots of the First Amendment: Dissenting Protestants and the Separation of Church and State* (Oxford & New York: Oxford University Press, 2012); and cf. Chris Beneke, *Beyond Toleration: The Religious Origins of American Pluralism* (Oxford & New York: Oxford University Press, 2006), chap. 4.

<sup>14</sup> D. J. B. Trim and Brendan Simms, “Towards a History of Humanitarian Intervention,” in idem (eds.), *Humanitarian Intervention: A History* (Cambridge & New York: Cambridge University Press, 2011), p. 21; Trim, “Humanitarian Intervention in Historical Perspective,” in *Ibid.*, pp. 382, 386–387, 391.



believe in religious toleration, ought not blind us to the reality of their intolerance. There is a long history, going back to the seventeenth century persecutors of the Quakers and including even well-known contemporary tolerationists like Roger Williams and John Locke, of using social or political arguments to justify denying full civic rights to a minority whose religious views simply cannot be stomachied.<sup>15</sup>

In the case of present-day France, the fact is, too, as many commentators recognized, that the ban on religious symbolism was disproportionately detrimental to people who are doubly marginalized, as members of both ethnic and religious minorities. We come back here to my first point about the extent to which, in the European context, minorities are minorities both religiously and ethnically. The French law also illustrates how secular libertarian and religious rights can come into conflict; the tension between individual or communal diversity and universal civic rights; and how present-day secular-humanists and political-libertarians can be just as intolerant of religious dissenters as established state Churches in centuries gone past.

So, just as scepticism and pluralism are not necessarily linked, neither are dogmatism and intolerance. In the early-modern Netherlands and England, the experience of Christian religious minorities moved Christians on all sides finally to persecute no more, and did so largely because of arguments rooted in the New Testament and in a Christian sense of charity. It is there that the roots of modern Western pluralism lie. In nineteenth- and twentieth-century Britain and France, the increasing preparedness of elites, albeit sometimes grudging, to come to terms with cultural, social, and doctrinal heterogeneity was not so much due to the triumph of enlightened ideals among the majority community but rather to the determination of minorities not to endure repression stoically, and instead to demand and secure rights.<sup>16</sup> Instead of being defenders of particularism, many members of religious minorities became proponents of ecumenism. However, while society in Britain, France, Germany, the Low Countries and Switzerland eventually proved able to accept a variety of Christian and even overtly secular ideologies, acceptance of adherents of faiths from *outside* the western traditions has been problematic. Those western traditions have been, of course, the Lutheran, Reformed, Anglican and Catholic forms of Christianity, but also, since the eighteenth century, secular humanism. Supporters of the latter have no better track record of tolerance or acceptance of religious minorities from outside the mainstream than members of the Churches.

Certainly the idea that pluralism is impossible where religious commitment is widespread is unsubstantiated by the evidence of history. It is the fruit of a humanist/secularist mindset, one not only sceptical about, but openly antagonistic towards religion, and one that is often expressed in polemical language, of a type used in the heyday of religious wars, rather than that characteristic of modern interchurch and

<sup>15</sup> E.g., see D. J. B. Trim, "Christian Persecution," part 5, "Reformation, Toleration and Persecution," *Liberty* 106:5 (Nov.–Dec. 2011), pp. 23–24.

<sup>16</sup> Chapters by Terrie Aamodt, Penny Mahon, James Deming and Aubrey Newman in Bonney and Trim, *Development of Pluralism in Modern Britain and France*.





interfaith dialogue.<sup>17</sup> Religious people in general and Christians in particular are still all too likely to dislike or detest people of other churches or faiths, but this is matched or exceeded by the loathing of religion of some of its most prominent opponents, such as Richard Dawkins; and the experience of religious diversity in early modern Europe, during the heated and often violent first century and a half after the Reformation, strongly suggests that in religious belief can lie, not only the cause of violence and intolerance, but also the cure.

If this is true, however, then I suggest that creeds and sects need a kind of internal pluralism. Dialogue needs to take place not only *between* different faiths and denominations but also *within* them. Religions are rarely monolithic; there are usually different traditions and points of view within them. When these fissures broaden into cracks, then often the movement itself will splinter, with the resultant new sects often openly hostile to each other. Thus, as we know, Latin Christianity split into Roman and Protestant and Protestant split into Lutheran, Calvinist and Anabaptist. English Christianity split into Anglican and Calvinist, and the Calvinists split further again. The same fragmenting process has been common of newer religious movements. Importantly, when adherents accept, or at least respect, each other, it is regularly a first step to accepting people of other confessions or religions, or of none. And this is a willingness that secularists or radical humanists often lack, precisely because they tend to conceptualise themselves solely in opposition to the religious *other*, rather than in dialogue with it, in sharp contrast to many people of faith.

To conclude: Europe is the most secularized area in the world today. Attendance at religious rites is uniformly low and European social values are generally pluralist and inclusive. However, the gains made by xenophobic right-wing parties since the late 1990s, the general heightening of anti-Islamic prejudice, and the intemperate claims of pundits such as Richard Dawkins and Christopher Hitchens that raising children in a religious faith is the equivalent of child abuse<sup>18</sup>—all suggest that tolerance and pluralism may not be as deep-seated as might once have been assumed.

As one historian of ideas notes, “pluralism is constantly under threat, even and perhaps especially in countries which think that they long ago solved the question of relations between state and church.”<sup>19</sup> It is essential not to overstate the threat of secularism to pluralist society and to religious freedom. In problematising claims that secularism is innately liberal and religion illiberal, as I have done in this paper, I run the risk of misrepresenting secularism. Many self-styled secular–humanists are passionately committed to defending minority rights—voices such as those of Dawkins are probably not representative, but rather simply over-reported.

<sup>17</sup> Cf. John Coffey, “The Myth of Secular Tolerance,” *Cambridge Papers*, 12:3 (Sept. 2003), p. 1 (also available to download at URL <[http://www.jubilee-centre.org/cambridge\\_papers/index.php](http://www.jubilee-centre.org/cambridge_papers/index.php)>).

<sup>18</sup> For an incisive critique see Peter Hitchens, *The Rage Against God* (London & New York: Continuum, 2010), pp. 148–155.

<sup>19</sup> Malcolm C. Smith, *Montaigne and Religious Freedom: The Dawn of Pluralism*, Études de philologie et d’histoire, 45 (Geneva: Librairie Droz, 1991), p. 182.



Nevertheless, trends have emerged, which, were they to continue and intensify, could threaten liberty. In the face both of re-emergent religious extremism and of aggressive, intolerant secularism, the relatively recent victory of acceptance and respect over intolerance and repression cannot be regarded as final and definitive; battles have been won, but not the war. Quite possibly it has to be won in every generation. That today some self-styled champions of liberty and liberalism are the proponents of repression is ironic, but no less disquieting for that. The way faith-based minorities are treated by religious, irreligious and a-religious majorities has been, and surely will remain, a key battleground in the struggle for genuine freedom of belief and unbelief.





# FREEDOM OF EXPRESSION AND RELIGION— FRENCH SITUATION 2011-2012

BLANDINE CHELINI-PONT<sup>1</sup>

The question of “freedom of expression and religion in France” can be viewed in two ways. On one side, the media has for several years carried on a passionate and recurrent public debate, in newspapers and television, on Islam as a general topic. Islam occupies most of the French public discussion when there is question of religion in the media,<sup>2</sup> and that discussion is often worried and pessimistic. On the other side, the judiciary one, there are many conflicts concerning the disrespect for religious convictions or religious peoples, but finally very few case laws. That situation reveals a mixed overview of the difficulties with respect to religious beliefs in France. These two aspects do not match exactly, but they give us—from my point of view—a kind of suspicious atmosphere, far from the peaceful and open attitude which could be held by a country such as France which is supposed to protect religious freedom.

I. The heart of public and media debate on religion is currently monopolized by the growth of Islam in France.

A. There is, on the first level, a representation of the French public opinion about Islam and the Muslim presence in France. This representation creates a social and political division and also a fracture of the electorate where right and left wings maneuver to gain political advantage.

The backdrop to the year 2012 will remain the shootings in May, by a 22-year-old Frenchman of Algerian descent, Mohamed Merah. He shot three French Jews in the head, including two young children, at the entrance of a Toulouse’s Jewish School; plus three military paratroopers of North African origin, one of them converted to Catholicism, in the city of Montauban. What was their crime according to the killer, who was eventually surrounded then killed by the police? The first victims, he said, belonged to the people who kill Palestinian children and the latter have been miscreant Muslims, who allegedly killed, in the name of France, faith-brothers in

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<sup>2</sup> There were 21,639 articles on media database website *Factiva*, between January 2000 and December 2010, concerning the topic “religion in France;” 14,226, or 70%, is consecrated to Islam in France. This data was collected for my research, “Le protestantisme aujourd’hui au miroir de la grande presse,” in *La Nouvelle France Protestante, Essor et recomposition au XXIème siècle*, Jean-Paul Willaime et Sébastien Fath (dir), Labor et Fides, 2011, p. 74.



Afghanistan.<sup>3</sup>

Coupled with the backdrop of economic and financial crisis that reinforces a general feeling of uncertainty, part of the French public opinion seems increasingly afraid of Islam and Muslims and sees them as a source of violence and problems of all kinds. Internet sites and blogs are full of remarks where people write that their country will eventually slip into a civil war, which is still very far from reality.<sup>4</sup> On the contrary, another part of public opinion denies that Muslims are a problem for French society, which is an open pluralistic society, a society where immigration has its place.<sup>5</sup>

Reflecting such impressions, political parties took public positions during the last presidential campaign: the right and the extreme right made speeches ranging from firmness to alarm. They claimed a shared will to control, and they want to further legal limitations to immigration. They want to track down illegal immigrants and to defend the secular and national identity of France.<sup>6</sup> Overall, the right denounced the influence of religious fundamentalism within the French Muslim population, fundamentalism that it refuses to explain by racism and by the difficulty of integrating Muslim immigrants and their children.<sup>7</sup> The right attributes the growing rise of fundamentalism to a broad geopolitical tectonics, for which Europe paid the price by way of its immigrant populations. Political and media subgroups have been formed in the French right who believe and spread the idea that too many freedoms, especially freedom of expression, are given to radical Muslims and that these freedoms help ghettoize Muslims in closed neighborhoods by systematically challenging human rights, including equality between men and women.<sup>8</sup>

Thus, after the killings of Toulouse, when Nicolas Sarkozy, still President, banned the arrival in France of several Egyptian and Saudi Salafi preachers, invited by the UOIF (Union des Organisations Islamiques de France) to its annual Spring meeting at Le Bourget, near Paris, the right-wing newspapers hardly criticized the government's negligence for the preceding years,<sup>9</sup> when the well-known Salafis were permitted to freely reach French territory and speak in front of thousands of people.

No more does the National Front party hold the role of acting as a foil and

<sup>3</sup> [http://www.lexpress.fr/actualite/societe/affaire-merah-ce-qu-a-dit-bernard-squarcini\\_1167608.html](http://www.lexpress.fr/actualite/societe/affaire-merah-ce-qu-a-dit-bernard-squarcini_1167608.html). On this tragic story, see Éric Pelletier et Jean-Marie Pontaut, *Affaire Merah : l'enquête*, Michel Lafon, 2012, p. 200, Franck Hériot et Jean-Manuel Escarnot, *Vous aimez la vie, j'aime la mort, enquête sur la dérive de Mohammed Merah*, Editions Jacob-Duvernet, 2012, p. 240.

<sup>4</sup> <http://www.forumfr.com/sujet360129-post680-risque-de-guerre-civile-entre-francais-et-arabes.html>.

<sup>5</sup> <http://www.leparisien.fr/societe/neuf-enfants-d-immigres-sur-dix-se-sentent-francais-10-10-2012-2220103.php>.

<sup>6</sup> <http://www.atlantico.fr/decryptage/islam-et-immigration-face-au-declin-demographique-europeen-derriere-fantasmes-verite-chiffres-michele-tribalat-514982.html>.

<sup>7</sup> 'L'image de l'Islam se dégrade fortement en France,' *Le Figaro*, October 25, 2012.

<sup>8</sup> Media now discuss the development of the *droitosphère* on the web: see for example the online newspaper *Atlantico*, December 31, 2012, at <http://www.atlantico.fr/decryptage/expansion-droitsphere-web-signe-t-elle-desserrement-contraainte-liberte-expression-imposee-certaine-gauche-depuis-40-ans-gilles-592971.html>.

<sup>9</sup> *Le Figaro*, "Sarkozy veut accélérer l'expulsion des extrémistes," 27/03/2012; "la France interdit la venue de prédicateurs salafistes," 30/03/2012; "Entre 5000 et 10000 salafistes en France," 31/03/2012; "Le camouflet des salafistes à l'Etat angélique," 20/09/2012.



repellent in its denunciation of the Muslim invasion that is caused by uncontrolled immigration. It is now being joined in this denunciation by some of the Gaullist electorate and the formation of a sub-group in the Gaullist majority party, called the People's Right, which is pushing for a stop to immigration. A significant group of secular activists, normally more left wing, are also supporting this portrait of Muslims that endangers the historical values of France. The debate in 2011 sparked by Muslim squatters praying on the sidewalks of certain cities in France (due to lack of space in the Mosques), including Paris, Lyon and Marseilles, and the debate in 2012 on active Salafism in France after street manifestations against the web movie *Innocence of Muslims*, are striking examples of the way the media feeds on the political statements of these groups that ignite heated debates.<sup>10</sup> At the same time, we are witnessing a rise in the popularity of right and left wing associations that define themselves as republican resistance organizations, led by *Le Bloc identitaire* (the identity block)<sup>11</sup> (right) born in Nice, and the *Riposte laïque*<sup>12</sup> (Secular Response) (left) born in Paris, whose websites are particularly popular. Other groups are also visited on the net, like *Bivouac* or *Résistance républicaine*.<sup>13</sup> These new groups organized a public republican *aperitif* (sausages & wine) on June 18, 2010 in Paris—the day General de Gaulle called for the resistance—and again on June 18, 2011. They also organized the same type of *aperitif* on September 4, 2010, commemorating the 140<sup>th</sup> birthday of the Third French Republic. These new Republican resistance groups have recently come up with a slogan: “Neither Shari’a nor Burqa in the Republic!” The media has extensively covered every single one of these events.

Facing these discourses, the French Left and extreme left seem—while insisting, when it was necessary, depending on the context and the electorate, on the need to preserve secularism and respect for sexual equality<sup>14</sup>—much more optimistic and benevolent about the Muslim presence. Moreover, according to an IPSOS poll, the Muslim citizens voted for the Socialist candidate Holland, more than 90%, because of this conspicuous benevolence.<sup>15</sup> Analysis of the French Left is much more consensual, in a traditional sense, and focused on the defense of pluralism and the melting pot, as a true proof of a large, generous and universal society.<sup>16</sup>

B. There consequently exists a strong difference of opinions in the media concerning the representation of the Muslim presence in France:

On one side, the right-wing media denounce the worldliness, the silence and

<sup>10</sup> *Libération*, “Qui sont les salafistes français?” September 22, 2012, “En France le blasphème n’existe plus,” September 18, 2012. Yves Thréard, “Les nouveaux ennemis de l’Occident,” *Le Figaro*, October 7, 2012. “Cet Islam sans gêne” dossier du numéro 2094, *Le Point*, November 1, 2012.

<sup>11</sup> [www.bloc-identitaire.com](http://www.bloc-identitaire.com).

<sup>12</sup> [www.ripostelaique.com](http://www.ripostelaique.com).

<sup>13</sup> [www.bivouac-id.com](http://www.bivouac-id.com); [www.resistance-republicaine.eu](http://www.resistance-republicaine.eu).

<sup>14</sup> On that link between laïcité et equality of women see <http://librepensee72.over-blog.com/article-oppression-des-femmes-egalite-des-sexes-et-laicite-75361098.html>.

<sup>15</sup> [http://www.lavie.fr/actualite/93-des-musulmans-ont-vote-pour-francois-hollande-07-05-2012-27212\\_3.php](http://www.lavie.fr/actualite/93-des-musulmans-ont-vote-pour-francois-hollande-07-05-2012-27212_3.php).

<sup>16</sup> Christophe Barbier, “L’immigration, une chance pour la France” *L’Express*, November 14, 2012.



even the denial of the press and the public authorities, confronting the dereliction that represents the social weight of an immigrant population, generally of Muslim background, in the economic crisis.<sup>17</sup> They denounce the corresponding increase of immigrant criminal behaviors and the new correlation between Islam and delinquency over the past fifteen years.<sup>18</sup> Then these same media denounced the silence of other media, national press and broadcast media, on the influence of accelerated radical Islam that claims a religiously justified sexual inequality and gives birth to a powerful counter-society, spreading anti-Christian, anti-Zionist and anti-Republican prejudices.<sup>19</sup> A case has just made a great stir in my area. In Marseilles, July 25, 2012, a woman was arrested by police for wearing the full veil, banned by law since 2010. Three hundred citations were made this year for that reason.<sup>20</sup> The woman refused to show her face or give her ID, saying she obeys God, not the laws of the Republic. The three policemen eventually were circled by about thirty people and, after some confusion, they were injured. Finally, four people were arrested by other policemen who had come to help, but they were immediately released. The prosecutor of Marseilles did not want more “tension” at the beginning of Ramadan.<sup>21</sup> The police union Alliance mobilized the media. They defended a recurrent discourse, common to the different police unions in France, that they are not supported by the Justice Department or by their own Ministry. The same week, a church was criminally burned in Villefranche-sur-Saône, where three mosques were inaugurated in recent years in the same neighborhood. This event was not reported by the press, but extensive comments immediately became available on militant websites.<sup>22</sup>

On the contrary, another part of the media shows the Muslims rather as victims of discrimination by the institutions, the police, and the professional circles. We therefore can find in the press in the same week as the story of the assaulted policemen in Marseilles and the burned church in Villefranche-sur-Saône, other events: three young leaders of a summer camp sponsored by the city of Gennevilliers, were dismissed for observance of Ramadan during their work time—despite their contract to monitor and care for children at the seaside. Overall, the media denounced the discrimination and the disrespect for Muslim religious practices, with a lot of

<sup>17</sup> Malika Sorel-Sutter, *Immigration-intégration, le langage de la vérité*, Mille et une nuit édition, 2011; Hugues Lagrange, *Le déni des cultures*, Seuil, 2011. Christophe Guilluy, *Fracture française : pour une nouvelle géographie sociale*, Politique, François Bourin Editeur, 2010.

<sup>18</sup> A. Tsoukala, “Le traitement médiatique de la criminalité étrangère en Europe, in *Déviance et Société*,” 2002, 26, pp. 61-86.

<sup>19</sup> Broadcast *Mots croisés*, “Islam où est le problème?” on [www.francetv.fr](http://www.francetv.fr).

<http://www.prechi-precha.fr/la-tele-americaine-choquee-par-le-silence-des-media-francais-sur-une-manifestation-contre-lislamisme-video/>.

<sup>20</sup> [http://www.nytimes.com/2012/09/02/world/europe/tolerance-eases-impact-of-french-ban-on-full-face-veils.html?pagewanted=all&\\_moc.semityn.www](http://www.nytimes.com/2012/09/02/world/europe/tolerance-eases-impact-of-french-ban-on-full-face-veils.html?pagewanted=all&_moc.semityn.www).

<sup>21</sup> <http://www.lefigaro.fr/flash-actu/2012/07/25/97001-20120725FILWWW00619-un-controle-de-femme-voilee-tourne-mal.php>.

<sup>22</sup> <http://www.prechi-precha.fr/?s=eglise+de+villefranche&cx=0&y=0>; <http://ripostelaique.com/la-france-est-a-nous-villefranche-sur-saone-chronique-dune-islamisation-bien-avancee.html>.



interviews and comments by Muslim leaders on radio and TV news broadcasts. The mayor of Gennevilliers backtracked.<sup>23</sup>

In another register, and also during the same week, the media was upset that two pig heads were hung outside the gates of the mosque in Montauban—the city of the May assassinations.<sup>24</sup> Two ministers, one of them the Minister of the Interior, hurried to apologize on behalf of France.<sup>25</sup> A new observatory, the National Observatory against Islamophobia, funded by the ICO (Islamic Conference Organisation), declared that the case was not unique and that there had been a 72 percent increase in anti-Muslim acts in the country this year. And the French media repeated this data with alarmist expressions.<sup>26</sup>

There is a very strong media focus on the Muslims, and the rise of the Front National (an extreme right-wing party) electorate is essentially due to the fear of Muslims and Islam; so France has produced laws which provide strong symbolic limits to the expression of the Muslim religion. But at the same time, the French are seeing tougher legislation against discrimination based on religious affiliation. They created an advisory high court, *la HALDE*, to deal with incidents of discrimination and also held a public debate on the representation of diversity in the media (which resulted in the Mandatory Act of 2008 on representing diversity in the media).<sup>27</sup> The principle is to preserve a sense of unity, to the detriment of the manifestation of differences which, if they exist, must remain private. The entire public space is seen as a sanctuary of neutrality. We are waiting to see if this country will succeed, without jeopardizing its tradition of no religion in the public sphere, in its gamble with religious mixing to improve the diversity of ethnic, religious, or gender diversity in the media in order to lower the level of negative representations of religious minorities.

II. In such a context, which I find particularly tense, it is important to note that a wide gap exists between the number of incidents concerning the link between religion and freedom of expression, and the very low number of court cases. That is statistically insignificant.

A. Most of the time, conflicts do not give rise to legal recourse. In recent years, various expressions could be seen as forms of violations of conscience and religion. Despite having raised debates and reactions, they did not give rise to legal action,

<sup>23</sup> [http://www.lemonde.fr/societe/article/2012/07/31/ramadan-la-mairie-de-gennevilliers-renonce-a-imposer-a-ses-employes-de-dejeuner\\_1740770\\_3224.html](http://www.lemonde.fr/societe/article/2012/07/31/ramadan-la-mairie-de-gennevilliers-renonce-a-imposer-a-ses-employes-de-dejeuner_1740770_3224.html).

<sup>24</sup> <http://www.melty.fr/france-deux-tetes-de-cochon-devant-la-mosquee-de-montauban-a122103.html>.

<sup>25</sup> [http://www.lemonde.fr/politique/article/2012/08/02/manuel-valls-indigne-par-la-profanation-d-une-mosquee-a-montauban\\_1741301\\_823448.html](http://www.lemonde.fr/politique/article/2012/08/02/manuel-valls-indigne-par-la-profanation-d-une-mosquee-a-montauban_1741301_823448.html).

<sup>26</sup> [http://www.lepoint.fr/societe/inquietante-progression-des-actes-islamophobes-en-france-18-11-2012-1530496\\_23.php](http://www.lepoint.fr/societe/inquietante-progression-des-actes-islamophobes-en-france-18-11-2012-1530496_23.php) ; <http://www.lefigaro.fr/flash-actu/2012/11/18/97001-20121118FILWWW00106-hausse-des-actes-islamophobes.php> ; <http://www.leparisien.fr/espace-premium/actu/les-actes-islamophobes-en-augmentation-19-11-2012-2333715.php>.

<sup>27</sup> *La représentation de la diversité dans les médias, Conseil National de l'audiovisuel, rapport rendu dans le cadre de la loi du 31 mars 2006 relative à l'égalité des chances, 2008*. Available at: [www.csa.fr/upload/dossier/Promotion\\_diversite\\_dans\\_medias.pdf](http://www.csa.fr/upload/dossier/Promotion_diversite_dans_medias.pdf).



because the chances of getting a favorable ruling appear reduced in the frame of the French Law. Thus, in the autumn of 2011, some Muslims and Christians may have felt hurt in their conscience by what others considered to be their freedom of expression or creation. Much more than the manifestation of any feeling—quite wrongly described as “Islamophobic” or “Christianophobic”—strategic provocation seems to be the cause of these events. This allows their authors to draw attention to a work or an idea which would otherwise probably pass quite unnoticed and which is then given wide and free publicity.

1. After the previous case, in February 2006, known as the “Mohammed cartoons,” the weekly satirical newspaper *Charlie Hebdo* continued its provocation in its issue number 1011, of November 2, 2011, subtitled *Sharia Hebdo*, including proposals of “Muhammad, editor in chief.” In the same issue, *Charlie Hebdo*, desiring to prove that its religious critics were not solely focused on Islam, included below the heading a subtitle, *The Catholic fundamentalists against the theater*, with inside the issue an article entitled *Cathos and Muslims fundamentalists together*. This double provocation was followed by a criminal fire which destroyed the office. No one thought the office was burned by angry Catholics. And the burning was of course denounced by everyone who cares to respect law and order as a condition and guarantee of the enjoyment of all rights and freedoms, including freedom of expression and respect for conscience.<sup>28</sup>

2. The conscience of Christians, or at least some of them, was indeed worried during Spring and Autumn 2011 by a succession of “affairs.” First the exhibition of different artworks, entitled *Piss Christ*, representing a crucifix immersed in urine, and, in autumn 2011, two screenplays (*On the concept of the face of the son of God*, *Golgotha Picnic*) and one advertising campaign. This advertising campaign was made by the Italian group Benetton, using picture montages of personalities who were kissing on the mouth, including the Pope and an Imam together! The Vatican denounced it as “*an unacceptable use of the image of the Holy Father, manipulated and exploited as part of an advertising campaign for commercial purposes*.” The offended reactions and expressions of indignation faced by these theater plays and advertising campaign had as a main effect increased the fame of what these Christians said they were shocked about. Uncertain or divided on the reactions and attitude to take, the religious authorities, in most cases, called for calm and tolerance. For better or worse, on May 25, 2012, 34 Catholic fundamentalists who boycotted the show *On the concept of God’s face*, were prosecuted for obstructing the freedom of expression! On the other side, humor, as a new weapon, was used by Catholics during this summer

<sup>28</sup> [http://www.lemonde.fr/actualite-medias/article/2011/11/02/condamnation-unanime-de-l-attentat-contre-les-locaux-de-charlie-hebdo\\_1597183\\_3236.html](http://www.lemonde.fr/actualite-medias/article/2011/11/02/condamnation-unanime-de-l-attentat-contre-les-locaux-de-charlie-hebdo_1597183_3236.html) . X. Ternisien, “Un incendie d’origine criminelle ravage les locaux de Charlie Hebdo,” *Le Monde*, November 2, 2011. Char. Cornevin, “Charlie Hebdo ravagé par une bombe incendiaire,” *Le Figaro*, November 3, 2011, S; Dreyfus, “Le siège de Charlie Hebdo ravagé par un incendie,” *La Croix*, November 3, 2011. J. Métreau, “Charlie incendié mais Charlie épaulé. Charlie ne lâche pas le crayon,” *20 Minutes*, November 3, 2011.





2012: A television series called *Inquisitio* and produced by public channel France 2 really caricatures the Catholic Church of the fourteenth century, during the time of Avignon's papacy. A group of young Catholic non-fundamentalist bloggers, try to ridicule the offending character of the series in diverting the video advertisement of the series by schoolboy humor on the internet, and its own advertisement has been very successful and seen by thousands people on You-tube.<sup>29</sup>

B. Additional paradox: statistically there are more Christian and Jewish cases than Muslim cases that come to the court, and the majority of attacks or insults presented to the judge are finally not penalized.

1. I find only one case described by the plaintiff as provocative, which was finally penalized by a Court in March 2010, the Court of Appeal of Rennes city, in a decision which convicted for “incitement to racial discrimination,” a user who stated on a website that “French Culture radio belongs almost entirely to the Jewish community” and denouncing what he called the “Jewish supremacy” on the public media in France. The judge decided that “in designating the Jewish community, the defendant presented a group of people only identified by its ethno-religious character” and that “in defining this community as ‘supremacist’ (...), the defendant refers to the Jewish community the vengeance of his readers (...), and arouses feelings of fear and hatred.” The Criminal Chamber of the French Cassation Court, in an ultimate judgment in June 2010, rejected the last appeal.<sup>30</sup> Conviction for violation of the respect for conscience has thus been validated. But it is very exceptional. Traditionally freedom of “anti-religious” expression is protected as a priority.<sup>31</sup>

2. Thus, following the publication in a satirical weekly that “Christians had to be given to lions for eating” and claiming that “it results from the Gospel according to St. Mark Book—a pornographic book—that Christ, a big pig, was a true pedophile,” the General Alliance against Racism and for the Respect for the French and Christian Identity (AGRIF), seeing elements of a “provocation to discrimination, hatred or violence against Christians because they belong to a religion,” had seized the judges, on the basis of Article 24, paragraph 8 of the Law on Press of July 29, 1881.

In its judgment of April 7, 2010, the Court of Appeals of Paris (Room 2-7) confirmed the first judgment, dismissing the claims of the association on the ground that “even voluntarily ironical, and perhaps outrageous and indecent, the sentences in question cannot be separated from their goal: make the reader laugh, the reader who can’t be mistaken about the meaning and scope of the article. These statements cannot be taken seriously. They are in a deliberately provocative editorial. This satirical weekly encourages in no way public discrimination, hatred or violence against a group of persons because of their belonging to any particular religion and if they may offend some sensibilities, these passages do not exceed the limits of freedom of

<sup>29</sup> <http://www.youtube.com/watch?v=ncc-b2cqLqw>.

<sup>30</sup> <http://www.juricaf.org/arret/FRANCE-COURDECASSATION-20100622-1082337>.

<sup>31</sup> Emmanuel Derieux “Respect des croyances et la liberté d’expression, droit français et européen, actualité jurisprudentielle juin 2010-novembre 2011,” *Annuaire Droit et Religions*, volume 6, 2012, PUAM, pp. 793-803.



expression.”<sup>32</sup>

The Criminal Chamber of the Court of Cassation, in a judgment on March 15, 2011, rejected the final appeal, considering that “the Court of Appeal of Paris has correctly assessed the meaning and scope of the issue, and rightly held that they do not constitute an offense or incitement to discrimination, hatred or violence against a group of persons because of their belonging to a religion.”<sup>33</sup>

3. I found only two recent jurisprudences on Muslim cases. But again, the result was not favorable to the associations which were complaining for the same reason, the public anti-Muslim posters of Front National political party.

a. Because of one of the electoral posters of the Front National “representing a woman in a burqa before a representation of France covered by the Algerian flag and pierced by minaret-like shaped missiles, with the slogan ‘No to Islamism,’” the judge of the TGI (Tribunal de Grande Instance) of Nanterre city was seized by the Movement against Racism and for Friendship among Peoples (MRAP), by the mean of a *référé-liberté* process (a urgent procedure in case of attempting on constitutional freedoms). According to the association, the poster spreads “inaccurate information likely to cause confusion in the public mind, between Algeria, a Muslim country, Algerians and Muslims in France, and Islamism and the wearing of burqa.” For the association, “the chosen image (was) likely to create confusion in the public mind, between violence among Muslims and war, in that it represents minarets piercing like missiles French territory, itself covered by the Algerian flag.”<sup>34</sup>

The Court of Appeal of Versailles (14<sup>th</sup> century), in its decision on April 27, 2011, declares that “the information and the announcement of the refusal of Islamism, that is only the perversion of Islam, along any fundamentalism, ultra-orthodoxism or religious universalism (...) are guaranteed by democratic debate and respect for the exercise of freedom of expression” and that “it belongs to the MRAP association to demonstrate how this question is a provocation or incitement against a group of people and therefore a call or an invitation to a hateful or discriminatory behavior, because of membership to a group, race, or religion.” The Court added that “freedom of expression does not suffer from exemption based on an obligation to comply with strict economic, political, historical or sociological truth” and that “the only restrictions of expression that may be made, must be justified by a need corresponding to the social imperative of protecting the reputation or rights of others, the prevention of disorder and the crime prevention.” For the Court, “the act of propagating the implicit assertion of this poster does not establish, with the evidence required, a provocation or incitement to hate or discriminate against Muslims (...) which clearly goes beyond the mere assertion of ideological question.” The Court also mentions that “the mere fact of the controversial character of the poster does

<sup>32</sup> Ibid., p. 795.

<sup>33</sup> Ibid., p. 797.

<sup>34</sup> Ibid., p. 796.





not allow the President of the Court to decide that it creates an illicit disorder.” Accordingly, the Court concludes that there is no need for a *référé-liberté* and diverts the association to the normal trial court. Then, the Court of Nanterre, in its judgment of April 5, 2011, discharged the plaintiff.<sup>35</sup>

b. In another similar action brought by the International League against the Racism and Antisemitism Association (LICRA), against another Front National election poster, bearing the same words “No to Islamism,” that “would provide an incitement to discrimination, hatred and violence against a group of persons because of their (...) religion,” the Court of Marseilles city, on March 12, 2010, find “the existence of a manifestly illicit trouble,” caused by the said political party, and condemned it to the withdrawal of this poster.<sup>36</sup> But, after this decision, the Court of Appeal of Aix-en-Provence (1<sup>st</sup> c. C), in a decision dated May 12, 2011, did not consider, as previously done by the criminal court, that there was evident responsibility of trouble from that party and its president who, among other things, did argue that “the poster is against Islamism and therefore refers to the political and religious claims of radical Islam.” The Court of Appeal supported the “right of a political movement (...) to express his fear and to denounce Islamist obscurantism and any sign of communitarianism” in the production and dissemination of this poster. The Court of Appeal reversed the Court of Marseilles injunction and “dismisses LICRA of all its demands.”<sup>37</sup>

## CONCLUSION

We can see with these few cases, that there is a strong foundation for the respect of religious beliefs in France, which is the law itself; As it is actually built, there are few opportunities to correct abuses of anti-religious expression through legal channels. The law is cumbersome and the law on press freedom, of July 1881, even changed a thousand times, is made to protect, by any angle, freedom of expression. There is no current possible recourse for offended believers in civil responsibility, for fault and with pecuniary repair, with which the difficulty of proving defamation or incitement to hatred, could be turned. Moreover, our law, in a secular Republic, excludes considering a concept such as blasphemy. That the criminal offenses of defamation, insult or incitement to discrimination for religious reasons are rarely used and sanctioned by French courts, we have just seen. Difficult to implement, because of the particular procedural law of July 29, 1881 and the principle of strict interpretation of the penal provisions, such repression is probably quite inadequate.

By the flexibility in the determination of fault and the injury assessment, the path to civil responsibility would certainly be more appropriate. Could violations of the beliefs and dignity of peoples be more frequently characterized as misconduct and, to ensure the balance of rights, be subject to due compensation? Many schol-

<sup>35</sup> Ibid., p. 797.

<sup>36</sup> Ibid., p. 798.

<sup>37</sup> Ibid., p. 799.



ars, including Professor Emmanuel Derieux, one of our most famous specialists on freedom of expression, agree with the flexibility of this way, a civil action, on the basis of Article 1382 of the Civil Code.<sup>38</sup> But, for engaging and achieving this result, yet should the Court of Cassation not continue to stand—not without recent challenges!—the principle, reached by judgments of July 12, 2000, that “the abuse of freedom of expression, defined and punishable under the law of 29 July 1881, cannot be repaired on the basis of Article 1382.” Without this openness, which solution is available to those who feel seriously offended in their religious beliefs and convictions? Will they not be tempted to use extra-legal means?

Finally, between a very tense media and political debate about the Muslim presence in France and a weak legal possibility to protect the believers against a vindictive expression, France, for the moment, does not seem to be an exemplary country where the media and the law regulate and facilitate social harmony and religious freedom. But the question is whether the penalization of religious discrimination would include forbidding any criticism of religion in the media? The OIC has jointly denounced the virulence of criticism directed at Islam during the dispute over defamation of religions in recent years.<sup>39</sup> This organization has also denounced the discrimination and even quasi-persecution suffered by Muslims in Western countries. The problem is quite clearly stated: freedom of expression in the West is a screen to develop negative stereotypes of Islam and Muslims. Moreover, these stereotypes, according to the OIC, lead to the trivialization of racist, xenophobic and discriminatory statements and attitudes, while openly anti-Muslim political parties gain votes and notoriety. So, is there less negative stereotyping when religious vilification is strictly forbidden? In a report on this issue<sup>40</sup> one interesting answer came from the United Nations Special Rapporteur on Freedom of Religion or Belief in 2006, Mrs Asma Jahangir, was that, unfortunately, in countries where criminalization of defamation (blasphemy) is very active, discrimination and persecution of religious minorities are the strongest. Completely reversing the perspective of the OIC, Mrs Jahangir also said that in many cases people are far more discriminated against, stereotyped and persecuted by authoritarian states than by the media. Hence, criminalizing religious vilification cannot be a solution in democratic countries, which should help the media to be aware of their power to influence the public mood and acceptance of a concrete religious diversity in public space.<sup>41</sup>

A lot of effort is required to accomplish this goal, especially at this moment in European history. Indeed, we can be quite concerned about the turn of events that

<sup>38</sup> Ibid., p. 803.

<sup>39</sup> [www.oic-oci.org/home.asp](http://www.oic-oci.org/home.asp). See also from Silvia Angeletti, “Defamation of religions in UN Documents: context and trends”, *Annuaire Droit et Religions*, volume 6, 2012-2013, pp. 633-642.

<sup>40</sup> Report on religious freedom (September 2006), Human Rights Council 2<sup>nd</sup> session, A/HRC/2/3, [www2.ohchr.org/english/bodies/hrcouncil/2session/documents.htm](http://www2.ohchr.org/english/bodies/hrcouncil/2session/documents.htm).

<sup>41</sup> Council of Europe, Parliamentary Assembly, Recommendation 1605 (April 15, 2008), [assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta08/fres1605.htm](http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta08/fres1605.htm).



is affecting the entire European continent. In some large sections of the European population, secularism is pointed to as the vilified path of multiculturalism and of de-Christianization orchestrated by elite liberals without conscience, and as the direct cause of the Islamization of the continent. In France the exact opposite gives equal results. Secularism is put forward as a protective shield against the fear of Islamization and the destruction of French culture. Secularism in France is now used as an argument for the same nationalist identity awakening which has taken hold in parts of Europe. Faced with the global economic crisis and increasing immigration, particularly in countries that have never faced this phenomenon, like Scandinavia, and faced with a sentiment of loss of status, a dangerous anger is rising from the bowels of the old world.<sup>42</sup>

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<sup>42</sup> This text was written before the tragedy in Norway on July 22, 2011 when Anders Behring Breivik murdered 77 people in Oslo and on the island of Utøya.



# RELIGION AND NON-DISCRIMINATION IN THE WORKPLACE: THE EUROPEAN DIRECTIVE 2000/78

JAIME ROSSELL<sup>1</sup>

## I. INTRODUCTION

From a religious point of view, historically Europe has been a religiously homogeneous land in which Christians and Jews have long co-existed. However, this situation changed in the 1950s with the arrival of increasing numbers of migrants in several countries. Today, Europe is facing a more varied religious landscape than ever before with the result that European states need to respond to new multi-cultural and multi-confessional demands. Migrants, refugees, people belonging to new religious movements, and asylum-seekers from different cultural and religious backgrounds have added to the previously existing religious diversity, leading to an urgent need to accommodate diverse religious requirements and to tackle the problem of religious discrimination.

According to *Eurobarometer*,<sup>2</sup> 42% of Europeans feel that discrimination on grounds of religion or belief is widespread.<sup>3</sup> We do not have reliable statistics about the presence of different religious groups in Europe, but 73% of the European Union (EU) population consider themselves believers or belong to a religious denomination. However, statistical data in the Member States of the EU differ markedly in relation to the basis of the inquiry and social background. Of those identifying themselves as religious adherents, an estimated 55.14% identify as Roman Catholics, 13.4% Protestants, 6.7% Anglicans, 3.1% Orthodox Christians, 2.9% Muslims, 0.3% Jews, and 18.25% as belonging to other denominations and persons not belonging to a denomination.<sup>4</sup> Figures on religious observance also vary between the different EU countries. In Greece and Slovenia, a very large majority of the population considers itself religious (between 95% and 98%), while in France and the Netherlands the percentage of non-believers is between 40 % and 45%.

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<sup>2</sup> *Special Eurobarometer 296 Discrimination in the European Union: Perceptions, Experiences and Attitudes*, Fieldwork February-March 2008, Directorate General Employment, Social Affairs and Equal Opportunities.

<sup>3</sup> Discrimination based on religion/belief is seen as most widespread in Denmark (62%), followed by France (57%) and the UK (56%). These are all countries where immigration issues feature prominently in public debate. At the other end of the scale, just 10% of Latvians and 11% of Lithuanians and Czechs think this type of discrimination is common in their country.

<sup>4</sup> Robbers (ed) *State and Church in the European Union*, 2<sup>nd</sup> edition (Nomos, Baden-Baden, 2005).



The presence of such religious diversity in Europe has led to increasing contact between religious groups and believers and the rest of society, which has sometimes revealed deep-seated prejudice and stereotyping.<sup>5</sup> The accommodation of religious diversity, and in particular the individual's right to manifest and practice his or her religion, represents a further challenge, especially when such practices differ from common European ones. So, for example, problems arise in relation to the wearing of religious symbols and clothing in the public sphere, religious education in schools, respect for religious holidays or food practices, and discrimination in relation to job access and social services.

In that sense the EU has been active for some time in the fight against discrimination. The issues of diversity, equality of treatment, and discrimination are high on the political agendas of the European institutions, and the ways in which the EU has dealt with religion and religious affairs in law and policy have been subject to dynamic processes particularly during the last 15 years.<sup>6</sup> Issues related to religion and belief have become increasingly topical in Europe's workplaces, illustrating the idea that religion cannot be confined to the private lives of individuals.

Religious matters are, however, by and large, within the competence of the individual Member States. The EU treaties confer no competence to enact legislation covering the religious domain and the Member States retain sovereignty over the status<sup>7</sup> of churches and religious associations or communities.<sup>8</sup> This means that there is no EU policy on religion. Nevertheless, since the entry into force of the Amsterdam Treaty in May 1999 and the Treaty of Lisbon in December 2009, the relations between religion and European law have been transformed: a set of harmonized

<sup>5</sup>To give some examples: a) Popular discourse and political events, frequently reflected in the media, negatively link Islam and terrorism; b) People belonging to religious minorities, especially migrants, have higher rates of unemployment or unfair treatment in public or social services; c) There is an increase in hate speech; and d) The issue of registration of religious communities is of particular concern. While a number of churches and religious communities have a long-standing presence in Europe and have gained a particular status and privileges, many others do not receive the same treatment.

<sup>6</sup>Carrera and Parkin, *The Place of Religion in European Union Law and Policy: Competing Approaches and Actors inside the European Commission* (RELIGARE Working Document 1, 2010), published at <http://www.ceps.eu/ceps/download/3750>.

<sup>7</sup>Declaration 11 of the Amsterdam Treaty established that "the European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States." This statement has been reaffirmed by its re-enactment as Article 17 of the TFEU.

<sup>8</sup>"In the European Union it is possible to differentiate between three basic types of civil ecclesiastical law systems [in which the State organized the relations with the Churches or religious denominations]. The first basic type is characterized by the existence of a State Church or predominant religion. In this system there are close links between State power and the existence of the Church. The systems of England, Denmark and Greece, Malta and Finland belong to this basic category. On the other hand there are systems founded on the idea of a strict separation of State and Church; for instance, in France with the exception of the three eastern *départements*, and also in the Netherlands. There is to a great extent a legal separation in Ireland also. The third type features the basic separation of State and Church while simultaneously recognizing a multitude of common tasks, in the fulfillment of which State and Church activity are linked: Belgium, Poland, Spain and Italy, Hungary, Austria, the Baltic States and Portugal belong to this group. In some of these States, agreements between state and religious communities play an important role to regulate *res mixtae* as education, taxes, financial support, marriage and family law, religious assistance and so on." Robbers, *State and Church in the European Union*, op cit, no. 3, p. 578.



European laws and common policies have emerged relating to religion and religious affairs. In fact, as early as 1975, the ECJ had held in *Prais v. Council*<sup>9</sup> that religious discrimination was prohibited in Community law as contrary to the fundamental rights of the individual.<sup>10</sup> The insertion of Article 13 into the Treaty Establishing the European Community by the Amsterdam Treaty (today, Article 19 of the TFEU) provided the necessary legal basis to take legislative action to combat discrimination based on the ground of religion or belief. As already discussed in Chapter 1, religion is one of the grounds on which discrimination is prohibited by the Framework Directive. Thus, it can be said today that, though the Member States retain their competence in the area of religion, that competence is limited by EU law, particularly by the principles of non-discrimination and proportionality.

## II. THE EMPLOYMENT EQUALITY DIRECTIVE 2000/78/EC

The Directive, adopted in 2000, provides the first example of a European Directive dealing with religion. The protection it confers applies to religious communities and to all employees, both in the public and private sector, in relation to conditions of employment and access to employment, promotion and training.

Religion, however, was excluded from the Race Directive also adopted in 2000 and this exclusion has been strongly criticized.<sup>11</sup> It means that the ban on religious discrimination, unlike that in relation to race, is confined to the sphere of employment. The present author believes that this is a mistake since often the distinction between racial and religious discrimination is not clear and cases frequently present aspects of both racial and religious discrimination. Given these complexities, it is arguable that religious discrimination would be better addressed together with racial discrimination, through the same legal instruments. Moreover, as the European Parliament has noted, all forms of discrimination should be addressed and dealt with equally, as differing legislative treatment for certain types of discrimination has the effect of creating a kind of “hierarchy of suffering.”<sup>12</sup> Also, the UN Human Rights Committee has expressed concern over such “hierarchization of discrimination grounds” and it has requested consideration of amendments to anti-discrimination legislation with a view to “leveling up and ensuring equal substantive and procedural protection against discrimination with regard to all prohibited grounds of discrimination.”<sup>13</sup> In the view of the present author, EU law should ensure effective protection from discrimination for all persons in all areas of life. This requires

<sup>9</sup> Case 130/75 [1976] ECR 1589.

<sup>10</sup> Both religious freedom and non-discrimination on the ground of religion are also today reaffirmed and strengthened by the Charter of Fundamental Rights (Articles 10 and 21).

<sup>11</sup> Chopin and Niessen (eds), *The Starting Line and the Incorporation of the Racial Equality Directive into the National Laws of the EU Member States and Accession States* (Commission for Racial Equality/Migration Policy Group, Brussels/London, 2001), p. 25.

<sup>12</sup> European Parliament Resolution on non-discrimination and equal opportunities for all—a framework strategy (2005/2191 (INI)), adopted 14 June 2006, (EP doc. A6-0189/2006).

<sup>13</sup> Concluding observations of the Human Rights Committee on Austria, October 2007 (CCPR/C/AUT/CO/4).



the same level of protection with no hierarchy of rights between different grounds, including gender, race or ethnic origin, religion or belief, age, disability or sexual orientation.

### A. The definition of “religion or belief”

The Employment Directive does not define any of its discrimination grounds nor does it refer to the laws of the Member States for the definition of these concepts. The concepts of religion and belief are notoriously difficult to define. Generally speaking, religion is understood as “the belief in and worship of a superhuman controlling power, especially a personal God or gods”<sup>14</sup> or as a professed system of faith, including beliefs, observance and worship. The term *belief* is taken to mean any system of philosophical beliefs or convictions that guides one’s life.

The internal legislation of the Member States generally does not provide for a definition of religion,<sup>15</sup> although in several of them there are definitions contained in interpretative sources<sup>16</sup> or in jurisprudence,<sup>17</sup> so the interpretation of the concepts included in the Directive will very much depend on national tribunals. Moreover, in the words of Lopatowska, “the current religious pluriformity not only has complicated the legal delimitation of what counts as religion and religious freedom but it also complicated the question of its limits.”<sup>18</sup>

This is a crucial problem for legislation prohibiting religious discrimination and one of the reasons why most international covenants, when addressing religious freedom and religious discrimination, use the expression “religion or belief,” without providing a definition of religion, in order to encompass a wide variety of systems of beliefs, including non-belief. Again quoting Lopatowska, “the distinction between religion and belief does not seem to be of the major importance in the Directive. However, it is not contested that the term *belief* is of a broader nature than religion; for example, religion is included in the understanding of belief. The jurisprudence of the European Court of Human Rights suggests that beliefs, to be protected, must be

<sup>14</sup> *The Oxford English Dictionary*, 3<sup>rd</sup> edition, (Oxford University Press, Oxford, 2010).

<sup>15</sup> Bell, Chopin and Palmer, *Developing Anti-Discrimination Law in Europe* (Office for Official Publications of the European Communities, Luxembourg, 2007); Vickers, *Religion and Belief: Discrimination in Employment—The EU Law* (Office for Official Publications of the European Communities, Luxembourg, 2007), pp. 25-30.

<sup>16</sup> For example, in Austria such definition is contained in the explanatory notes to the Federal Law on the Status of Religious Confessional Communities.

<sup>17</sup> In Germany a definition is contained in the interpretation of the guarantee of freedom of religion by the Federal Germany Constitutional Court, where religion is any specific certainty as regards the whole of the world and the origin and purpose of mankind which gives sense to human life and the world, and which transcends the world (BVerwGE 90, 112 (115)); also Dutch jurisprudence distinguishes between religion and belief, on the basis that for religion a “high authority” (God) is central. Thus the Equal Treatment Commission has found Rastafarianism to be a religion (ETC Opinion 2005-162). Other states provide a negative definition, detailing only what does not count as a religion. In Spain, article 3.2 of the Organic Law on Religious Freedom provides that “activities, intentions and entities relating to or engaging in the study of and experimentation on psychic or parapsychological phenomena or the dissemination of humanistic or spiritual values or other similar non-religious aims do not qualify for the protection provided in this Act.”

<sup>18</sup> J Lopatowska, *Discrimination Based on Religion or Belief in the EU Legal Framework*, [2009], *Derecho y Religion*, p. 74.





distinguishable from mere opinion, and attain a certain level of cogency, seriousness, cohesion and importance.<sup>19</sup>

The definition of religion and belief is sometimes made even more problematic because it is linked to ethnicity, either because a religious group is considered to have an ethnic character or because members of a religion belong predominantly to a particular ethnic group. In fact, the ground of religion or belief has a strong potential to overlap with racial or ethnic origin and several times in employment discrimination cases, it is not necessarily clear on which basis an employee was discriminated against and the employee faces some options on how to frame a claim.

## B. Discrimination

The Race and Employment Directives identify four forms of prohibited conduct: direct and indirect discrimination, harassment, and instructions to discriminate. The definitions contained in the Employment Equality Directive are a result of a longstanding jurisprudence of the Court, predominantly that dealing with the cases involving discrimination based on sex. The great majority of Member States have introduced legislation which expressly forbids each of these four types of unlawful action. Moreover, in most cases, the definitions provided in national legislation are very similar to the definitions found in the Directives but many states have chosen essentially to reproduce the text of the Directives on these core concepts.<sup>20</sup>

### 1. Direct discrimination<sup>21</sup>

Direct discrimination occurs when one person is treated less favorably than others because he/she follows, is perceived to follow or does not follow any particular religion or belief, or is associated with a person of a particular religion or belief:

- a. An employer decides to dismiss an employee simply because he/she declared that he/she belongs to a particular religion.
- b. The refusal of an employer to hire or to promote someone because of his/her religion or belief.

This discriminatory treatment must be explicit and intentional and most of the claims attended to by national courts refer to termination contracts or refusals to examine job applications because of lack of membership in a specific church or association.

### c. Exceptions

The Directive contains two exceptions which are particularly relevant in the con-

<sup>19</sup> Ibid., p. 75.

<sup>20</sup> See Bell, Chopin and Palmer, *Developing Anti-Discrimination Law in Europe*, op cit, no. 13, pp. 16-21.

<sup>21</sup> Art. 2(2)(a) "direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1."





text of discrimination on the ground of religion or belief. The first is in Article 4(1)<sup>22</sup> which provides that a difference of treatment which is based on religion or belief shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. A difference in treatment based on religion or belief would therefore not be deemed discriminatory when those employed are involved in the teaching of religion or in religious observance.<sup>23</sup>

The majority of Member States—Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia, Spain, Sweden and the UK—have chosen to include such an exception within their national legislation and this applies to many or all discrimination grounds.

The second, and more contentious, exception is to be found in Article 4(2): “Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organizations the ethos of which is based on religion or belief, a difference of treatment based on a person’s religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organization’s ethos. This difference of treatment shall be implemented taking account of Member States’ constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

“Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organizations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organization’s ethos.”

It is to be noted that, as with the definition of religion, there is no definition in the Directive of what ethos is. However, at least Article 4(2) does not establish a general exemption. The difference in treatment will be permitted where, by reason of the nature of these activities or the context in which they are carried out, a person’s

<sup>22</sup> “Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.”

<sup>23</sup> See Vickers, *Religion and Belief Discrimination in Employment—the EU Law*, op cit, no. 13, p. 56.



religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organization's ethos. This requirement does not have to be determining, though it must be legitimate and justified, as well as genuine and occupational. The Directive aims to balance different principles: the preservation of national peculiarities in the legislation on churches and religion, the protection of churches' rights and autonomy, and the prohibition of discrimination. For instance, if a religious community is intolerant against homosexuality, a requirement to be loyal to the religious principles of the organization can be indirectly discriminatory against homosexual employees. In the same sense, a Catholic school could refuse to hire a non-Catholic religious education teacher in order to guarantee religious teaching. However, the same school is probably not permitted to refuse a Muslim who applies for work as a cleaner in the school because the nature or the context of this activity is not relevant for the protection of the ethos of the school. The exemptions based on Article 4(2) are permitted only if the requirements are proportionate to the religious aims of the organization and if there is no discrimination based on other grounds.

The Directive allows organizations to make requirements relating to employees' religion or belief in different circumstances; some states such as Austria, Denmark, Germany, Greece, Ireland, Italy and Slovakia have provided exceptions that go beyond the strict terms of the Directive or which remain ambiguous. In some cases, exceptions are particularly wide, creating a broad area where the prohibition of discrimination is not applied. Controversies have arisen about the extent of these exceptions: while on the one hand they could be said to breach the principle of equality, on the other they aim to protect other fundamental rights, i.e. religious freedom and the freedom of churches to organize themselves and to act consistently with their faith and principles. France, Estonia and Sweden, for instance, do not grant any exemptions for religious organizations. In some other countries, such as Belgium and Portugal, similar exemptions are not expressly prescribed, but it is common legal practice to recognize the right of churches to autonomy and internal organization, including when this implies a deviation from common anti-discrimination rules.<sup>24</sup> As Carrera and Parkin observe that "the ambiguity surrounding the loyalty requirement leaves the door open for the possibility of legislative discrepancies from member state to member state and represents a source of potential litigation, particularly where it concerns situations where national legislation allows organizations with a religious ethos to discriminate.... The Directive leaves much discretion to the courts to decide on the facts of the case and therefore this assessment would need to be carried out largely on a case-by-case basis. However, the courts interpreting this provision will need to keep in mind the fundamental human rights implications of

<sup>24</sup> See M Bell, I Chopin and F Palmer, *Developing Anti-Discrimination Law in Europe*, op cit, no. 13, p. 43; Vickers, *Religion and Belief Discrimination in Employment—the EU Law*, op cit, no. 13, pp. 57-60.



this exception.”<sup>25</sup>

### C. Indirect Discrimination<sup>26</sup>

The structure of indirect discrimination is more complex. A dress code in working environments is a neutral rule—applied to everyone but can indirectly discriminate against some religious groups. For example: the employees of a company have a dress code, i.e. to wear a particular cap with the color of the company. This could disadvantage Sikh employees who wear turbans for religious reasons, or Muslim women who wear headscarves.

According to this concept, job requirements should be appropriate for the job in question and should prevent the imposition of unnecessary requirements that have a disproportionate impact on a person of a particular religion or belief. In contrast to direct discrimination, indirect discrimination will not be unlawful if it can be justified.

The Directive does not explicitly include a right for employees to request reasonable accommodations from their employers on the basis of religion or belief. The concept was introduced in the Directive but was limited to the ground of disability.<sup>27</sup>

But “if we interpreted ‘dynamically’ the prohibition of indirect discrimination already includes a right to reasonable accommodation of deeply-held beliefs and religious practices. In that sense, the freedom of religion can also require positive steps to realize the effective exercise of the fundamental right.”<sup>28</sup> In that sense, the lack of certain accommodations to adjust to certain religions of employees could be perceived as indirect discrimination based on religion or belief. A denial of reasonable accommodation is considered a form of discrimination.

As we can see at the RELIGARE Policy Brief, “only a limited number of member states have included (some) rights to reasonable accommodations for religious beliefs or practices or similar measures:

“1. Art. 13.2 of the 2004 Bulgarian Protection Against Discrimination Act provides that employers have a duty to ensure working conditions in terms of working hours and days of rest in accordance with an employee’s faith as long as this “would not result in excessive difficulty for the organization and implementation of the production process, and where there are

<sup>25</sup> Carrera and Parkin, op cit, no. 5, p. 11.

<sup>26</sup> “Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or (ii) as regards persons with a particular disability, the employer or any person or organization to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.”

<sup>27</sup> Article 2(2)(b)(ii) “as regards persons with a particular disability, the employer or any person or organization to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.”

<sup>28</sup> See RELIGARE Policy Brief [May 2012], published at <http://www.religareproject.eu>.



possible ways to compensate for any potential unfavorable consequences of this on the overall production outcome.”

“2. Under the Flemish Decree of May 8, 2002 on proportionate representation (which has a limited material scope of application) the notion of ‘reasonable accommodations’ is not restricted to persons with disabilities and could therefore also apply to persons of a particular religion or belief or an ethnic origin. There is no case law on this topic though.

“3. In Spain, the Cooperation Agreements between the state and the Evangelical, Jewish and Islamic communities recognize the rights of employees adhering to these religions to celebrate their religious holidays but require that an agreement is reached with the employer.”<sup>29</sup> <sup>30</sup>

And “with respect to the European setting, we need to look at how the prohibition of [in]direct discrimination is interpreted and applied in religious discrimination cases. In the Netherlands and Germany, something closely akin to a duty of reasonable accommodation arguably already exists under the current legal framework:

“1. Several Dutch employment cases consider and evaluate the efforts of employers to look for alternative solutions to keep the employee on the job.”

“2. A German Federal Labor Court decision held that the dismissal of a Muslim employee from a supermarket because of his refusal to work with alcoholic drinks would be invalid if there was other employment available for the employee (e.g. a transfer to the fresh food department).”<sup>31</sup>

In France and Denmark, a failure to meet the duty can constitute unlawful discrimination; it is not specified whether this is classified as either direct or indirect discrimination. In Sweden, failure to provide reasonable accommodation is linked to the concept of direct discrimination. In contrast, failure to provide reasonable accommodation is treated as indirect discrimination in Austria and Slovakia. “It is clear that these contrasting approaches affect the availability of adequate employment opportunities for religious minorities across member states. An individual’s religious beliefs or practices such as dress can reduce the range of employment opportunities

<sup>29</sup> As an example, Article 12 of the Islamic Communities Agreement establishes that “1. Members of the Islamic Communities belonging to the Islamic Commission of Spain who wish may request the termination of their work on Friday of each week, day of solemn prayer and compulsory collective of Muslims, from the thirteen thirty to thirty hours sixteen and the conclusion of the work day one hour before sunset, during the fasting month (Ramadan). In both cases, you will need the prior agreement between the parties. The hours of work shall be left without compensation recovered. 2. The festivities and commemorations stated below, that according to Islamic law have the religious character, may, provided that there is agreement between the parties, to the generally established by the Workers’ Statute, Article 37.2, with the same character of paid and non-recoverable, at the request of the faithful of the Islamic Communities belonging to the Islamic Commission of Spain....”

<sup>30</sup> RELIGARE Policy Brief op cit.

<sup>31</sup> Ibid.



they are able to accept in certain countries but not in others.”<sup>32</sup> The adoption of an explicit duty would thus have significance, but in general there is very little case law in this area, so it is difficult to anticipate how the key concepts will be applied in practice.

#### D. Implementation of the Employment Directive

Since the adoption of the Employment Directive in 2000, many EU Member States have delayed the process of implementation.<sup>33</sup> In some cases, the discussion on appropriate ways of transposing the Directives has not been concluded, and jurisprudence from both the ECJ and the Member States’ courts is only just starting to develop. The activism of the Court of Justice in giving a broad interpretation of the Treaty provisions and the deriving Directives was remarkable but the number of decisions about this Directive is marginal and the Court has never decided on grounds of religion and belief.

The numerous national provisions and the national judicial interpretation are crucial to clarify important boundaries. In that sense, more than 250 noteworthy cases were reported to the Network of Legal Experts in the Non-discrimination Field between 2004 and 2010 (64 about religion). The majority of reported cases regarding religion come from Belgium, France, the Netherlands and the UK. A few relevant actions have also been found in Denmark, Germany, Italy, Slovenia and Sweden.<sup>34</sup>

Judicial cases have predominantly involved employees of minority religions such as Muslims and Sikhs, but there are also cases involving Adventists and other devout Christian employees:<sup>35</sup>

<sup>32</sup> Ibid.

<sup>33</sup> “20 of the 25 Member States have generally, if not fully in some instances, transposed the two Directives into their national law: Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Slovakia, Spain, Sweden and the United Kingdom. The Czech Republic, Estonia, Latvia, Lithuania and Poland have partially transposed the Directives but significant legislation is still missing, primarily in relation to the scope of the Racial Equality Directive beyond employment (Article 3(1) (e)-(h)). A handful of Member States still had until the end of 2006 to transpose the disability and age provisions, where they notified the European Commission that they would take advantage of the optional additional three years for transposing these provisions (Article 18 Directive 2000/78) of those, only Sweden has not met this extended deadline as far as age is concerned.” Bell, Chopin and Palmer, *Developing Anti-Discrimination Law in Europe*, op cit, no. 13, p. 12.

<sup>34</sup> See Thien Uyen Do, 2011: *A case odyssey into 10 years of anti-discrimination law*, [July 2011] European Anti-discrimination Law Review, pp. 11-20.

<sup>35</sup> See RELIGARE Policy Brief, op cit.



1. With regard to religious symbols and dress-codes.<sup>36</sup> Characteristically, employees were dismissed for wearing a headscarf in the work place.<sup>37</sup>
2. With regard to request for time off to observe religious duties or holy days.<sup>38</sup>
3. With regard to exemptions of certain job duties that contradict religious or philosophical beliefs.<sup>39</sup>

Jurisprudence will play a great role in defining and interpreting the language of

<sup>36</sup> A female Muslim receptionist was dismissed for seeking to wear a headscarf during work hours (Belgium: Antwerp Labour Court of Appeal, 23 December 2011); A female Muslim doctoral researcher's financial stipend was retracted because she—as a civil servant—wore a headscarf when conducting research at the University (France: Administrative Court of Toulouse, 17 April 2009); A Christian airline check-in assistant was dismissed after she sought to wear a necklace with a large crucifix at work (the UK: *Eweida v. British Airways* [2010] EWCA Civ 80); A Sikh hotel employee was dismissed for wearing a turban and growing a beard (the Netherlands: Kantonrechter Amsterdam 24 January 1986); A female Muslim nurse was fired by a hospital because she sought to cover her elbows (and particular hygiene standards justified a sleeveless uniform) (the Netherlands: Civil Court's-Hertogenbosch 13 July 2009); Female Muslim teachers have been dismissed for wearing a headscarf in the classroom (ECtHR: *Dahlab v. Switzerland*; Belgium, France, Germany); Female Muslim store clerks have been denied jobs or dismissed by grocery stores because of their headscarves (Denmark, Belgium, France).

<sup>37</sup> This rise in case law has accompanied fierce public debates, in particular regarding the possible general ban on the wearing of the burka/niqab in public areas, which has been under discussion in many European countries such as Belgium, Denmark, Italy and the Netherlands. France adopted a law prohibiting the concealment of an individual's face in public spaces in October 2010.

<sup>38</sup> A Seventh-day Adventist employee was dismissed for absenting himself on the Saturday Sabbath (EComHR 3 December 1996, *Konttinen v. Finland*). In that case the Court declares the application inadmissible because "Article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognized by the Convention and its Protocols. It safeguards persons, who are placed in analogous situations, against discriminatory differences of treatment.... The Commission considers that the present complaint fails to be examined in conjunction with the above-cited Article 9. It is true that the Finnish legislation on working hours provides that the weekly day of rest is usually Sunday. However, this legislation does not contain provisions which would guarantee to members of a certain religious community any absolute right to have a particular day regarded as their holy day. Assuming that the applicant could be considered to be in a situation comparable to that of members of other religious communities, the Commission therefore finds that he has not been treated differently in comparison with such members. Consequently, this complaint does not disclose any appearance of a violation of Article 14 of the Convention taken in conjunction with Article 9; A Muslim public teacher was denied a limited amount of time off to be able to participate in collective Friday prayers (EComHR 12 March 1981, *X. v. United Kingdom*). In that case the Court declares the application inadmissible because "it does not appear from the applicant's submissions that, as regards the fulfillment of his contractual teaching obligations in 1974/75, he was either individually or as a member of his religious community treated less favorably by the education authorities than individuals or groups of individuals placed in comparable situations. The applicant refers in his submissions to the position of Jewish *children*, but he has not shown that other *teachers* belonging to religious minorities, e. g. Jewish teachers, received a more favorable treatment than he himself."

<sup>39</sup> A Muslim (higher education) teacher refused to shake hands with female students/colleagues (the Netherlands: District Court of Rotterdam, 6 August 2008). In that case discrimination was justified for reasons pertaining to the usual rules of etiquette and greeting in the Netherlands; A Muslim grocery store clerk asked not to have to handle or be in touch with alcohol (Germany: Federal Labour Court, 24 February 2011); A Christian marriage registrar asked not to have to officiate over same sex partnerships as this ran counter to her religious beliefs (The UK: *Ladele v London Borough of Islington* [2009] EWCA Civ 1357). The Court considered the case in light of Article 9 of the *European Convention on Human Rights*, which protects the right to freedom of thought, conscience and religion and the right to manifest that religion. However, these rights are subject to such limitations as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others. As a result, Article 9 does not afford the right "to manifest one's religion at any time and place of one's choosing." *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100. The Court further held that the requirement was necessary to ensure that Islington complied with laws prohibiting discrimination against persons based on their sexual orientation.



the Directive and the notions contained in the texts. We need litigation in order to develop case law, which will complement the rules provided by the Directive. However, today the litigation in these areas has been extremely limited. Moreover, the number of cases in some countries remains very low so we need some measures:

As Thien Uyen Do says, “on the one hand, on-going awareness-raising activities and information campaigns regarding remedies and support to victims must strongly be encouraged at both, the national and local level. On the other hand, suppressing procedural difficulties that affect access to justice.”<sup>40</sup>

It is the role of NGO’s and the civil society to assist potential claimers to introduce cases to national courts. Yet it has also become clear that without a European impetus, many Member States would not have protection against these discriminations.

### III. THE PROPOSED EQUALITY DIRECTIVE OF 2008

The majority of Member States of the EU have an equality clause in their constitutions which applies generally or entails a general prohibition of discrimination. In addition, they of course possess specific anti-discrimination legislation adopted in order to transpose the Equality Directives.<sup>41</sup> Some states have also passed legislation prohibiting religious discrimination beyond the scope of the Employment Directive.

However, the EU Commission believes that further progress in this field is necessary. It has therefore proposed a consolidated anti-discrimination law which, like the Anglo-Saxon systems, would protect six different areas (gender, race or ethnicity, religion and belief, disability, age and sexual orientation) and would apply to employment, social protection (including social security and healthcare), access to goods and services available to the public (including housing), and education. As part of the strategy following the celebration in 2007 of the European Year of Equal Opportunities, on July 2, 2008 the Commission adopted a proposal for a directive implementing the principle of equal treatment, irrespective of religion or belief, disability, age or sexual orientation.<sup>42</sup> There were five main reasons for taking this further step:<sup>43</sup>

- Non-discrimination on grounds of religion is today considered to be a fundamental right;
- There is a perceived need to ensure a uniform level of protection against

<sup>40</sup> Thien Uyen Do, op cit, p. 20.

<sup>41</sup> See Chopin, Cormack and Niessen (eds), *The Implementation of European Anti-Discrimination Legislation: Work in Progress* (Migration Policy Group, Brussels, 2004).

<sup>42</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426.

<sup>43</sup> See Bell, *Extending EU Anti-Discrimination Law: Report of an ENAR Ad Hoc Expert Group on Anti-Discrimination Law* (ENAR, Brussels, 2009). <http://cms.horus.be/files/99935/MediaArchive/pdf/Extending%20EU%20Anti-Discrimination%20Law%20final.pdf>.





discrimination;<sup>44</sup>

- It was felt necessary to provide a means of combating multiple discrimination;
- It was also sought to provide a system of coherent and consistent protection across the EU; and
- There was evidence of rising levels of religious discrimination and intolerance in the EU.

The proposal provides a more horizontal framework of protection and it addresses the gaps in the material scope of the Framework Directive, while simultaneously respecting the principles of subsidiarity and proportionality.

Although the instrument remains a draft, it is nevertheless appropriate to make reference to it because it reinforces the EU strategy against discrimination and introduces new concepts such as multiple discrimination and discrimination based on assumption. It covers not only the employment dimension, but all the other areas of life which now fall within the scope of the Race Directive, in particular, social protection, social advantages, education, access and supply of public goods and services. The new directive would also call on the Member States to establish a body or bodies for the promotion of equal treatment on the basis of religion and belief; as Carrera and Parkin comment, “the proposed Directive would have the potential of introducing greater coherence in this respect, implying a more rigorous monitoring of religion-related discrimination, and establishing a professionalized service supporting claimants in religious discrimination cases.”<sup>45</sup>

#### **A. Multiple Discrimination, Discrimination Based on Assumption and Discrimination by Association**

The prohibition on discrimination had until recently usually been addressed by identifying a single cause of discrimination (race, gender, religion and so on), but without assuming that there could be several factors combined. Currently this approach has begun to change. In the international community the concept of multiple discrimination, which has an Anglo-Saxon origin, began to be recognized in the 1990s.<sup>46</sup> The European Commission, through the Directorate General for Employment, Social Affairs and Equal Opportunities and the Danish Institute for Human Rights, issued a report in 2007 on multiple discrimination<sup>47</sup> which, in an attempt to

<sup>44</sup> The current divergence in the material scope of the various EU anti-discrimination Directives sends out a signal that some forms of discrimination are viewed as less important than others, sometimes referred to as an “equality hierarchy.” The forthcoming Directive is the ideal opportunity to redress the present inconsistencies in the level of protection.

<sup>45</sup> Carrera and Parkin, *op cit*, no. 5, p.12.

<sup>46</sup> Note that Recital 14 of the Preamble to the Race Directive states that “women are often the victims of multiple discrimination.”

<sup>47</sup> See *Tackling Multiple Discrimination. Practices, Policies and Laws* (Office for Official Publications of the European Communities, Luxembourg, 2007).





define the concept,<sup>48</sup> made a distinction between multiple discrimination,<sup>49</sup> compound discrimination<sup>50</sup> and intersectional discrimination.<sup>51</sup> It also made recommendations to the Member States for its eradication.

In theory, all EU Member States which have transposed the EU anti-discrimination and equal treatment legislation could address multiple discrimination, at least in the field of employment. However, as EU legislation does not currently include an explicit provision on the matter, most Member States do not do so and only Austria, Germany, Romania and Spain specifically address it their legislation. Although the Explanatory Memorandum to the proposed directive refers to the need to address the issue of multiple discrimination, the fact is that the text makes no reference to it. As Bell comments, “the structure of anti-discrimination legislation often creates barriers to dealing with multiple discrimination in a comprehensive fashion. As mentioned earlier, EU legislation has created separate rules for race and religious discrimination... so it is necessary [to have] a Directive with the same material scope as the Racial Equality Directive, but covering the grounds of religion or belief, disability, age and sexual orientation as an essential starting point for addressing multiple discrimination. In that sense it is essential that the Directive explicitly confront the issue of multiple discrimination and require Member States to address this in their national legal frameworks.”<sup>52</sup>

And when we talk about religion alongside the overlap between religion and ethnicity, it is also evident that religion is closely connected to nationality. Many Muslim, Hindu, Buddhist and other religious minority communities in Europe are composed of nationals of third-world countries or their descendants. Therefore, discrimination on grounds of nationality may be difficult to disentangle from discrimination based on religion or ethnicity.<sup>53</sup>

<sup>48</sup> The Report used the definitions of Makkonen and Moon. Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore* (Institute for Human Rights, Åbo Akademi University, 2002). <http://web.abo.fi/instut/imr/norfa/timo.pdf>. Moon, *Multiple Discrimination—Problems Compounded or Solutions Found?* [2006] Justice Journal 86 <http://www.justice.org.uk/images/pdfs/multipliediscrimination.pdf>.

<sup>49</sup> “Multiple Discrimination describes a situation where discrimination takes place on the basis of several grounds operating separately. For instance, an ethnic minority woman may experience discrimination on the basis of her gender in one situation and because of her ethnic origin in another.” *Tackling Multiple Discrimination. Practices, Policies and Laws*, op cit, no. 30, p. 16.

<sup>50</sup> “Compound Discrimination, in contrast to Multiple Discrimination, describes a situation where a person suffers discrimination on the basis of two or more grounds at the same time and where one ground adds to discrimination on another ground—in other words one ground gets compounded by one or more other discrimination grounds.” *Ibid.*, p. 16.

<sup>51</sup> “Intersectional Discrimination refers to a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable.” *Ibid.*, p. 17. See also Moon, *Multiple Discrimination—Problems Compounded or Solutions Found?* op cit, no. 31.

<sup>52</sup> See Bell, op cit, no. 28, p. 9.

<sup>53</sup> *Ibid.*, p. 10.



However, the amendments tabled by the European Parliament<sup>54</sup> have taken up this form of discrimination explicitly. This is reflected in Recitals 9,<sup>55</sup> 12,<sup>56</sup> and 13,<sup>57</sup> and in particular Article 1 of the draft directive:

1. This Directive lays down a framework for combating discrimination, including multiple discrimination, on the grounds of religion or belief, disability, age, or sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment other than in the field of employment and occupation.

2. Multiple discrimination occurs when discrimination is based on:

- a. Any combination of the grounds of religion or belief, disability, age, or sexual orientation, or
- b. Any one or more of the grounds set out in paragraph 1, and also on the ground of any one or more of:
  - i. Sex (in so far as the matter complained of is within the material scope of Directive 2004/113/EC as well as of this Directive),
  - ii. Racial or ethnic origin (in so far as the matter complained of is within the material scope of Directive 2000/43/EC as well as of this Directive), or
  - iii. Nationality (in so far as the matter complained of is within the scope of Article 12 of the EC Treaty).

3. In this Directive, multiple discrimination and multiple grounds shall be construed accordingly. Despite the Parliament's amendments, it nevertheless seems that incorporating the concept of multiple discrimination is not a priority for the EU Council because the discussions that its Presidency held on February 11, 2010<sup>58</sup> on the proposed directive only refer to this concept in the same terms as appear in

<sup>54</sup> See the European Parliament legislative resolution of April 2, 2009 on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008)0426 – C6-0291/2008 – 2008/0140(CNS)).

<sup>55</sup> "Therefore, legislation should prohibit direct and indirect discrimination, multiple discrimination and discrimination by association based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation or gender in a range of areas outside the labor market, including social protection, education and access to and supply of goods and services, such as housing, transport, associations and health..."

<sup>56</sup> "Discrimination is understood to include direct and indirect discrimination, multiple discrimination, harassment, instructions to discriminate and denial of reasonable accommodation."

<sup>57</sup> "This Directive also takes into account multiple discrimination. As discrimination can occur on two or more of the grounds listed in Articles 12 and 13 of the EC Treaty, in implementing the principle of equal treatment, the Community should, in accordance with Articles 3(2) and 13 of the EC Treaty, aim to eliminate inequalities relating to sex, race or ethnic origin, disability, sexual orientation, religion or belief, or age or a combination of these, and to promote equality, whatever combination of characteristics relating to the above-mentioned factors a person may have. Effective legal procedures should be available to deal with situations of multiple discrimination. In particular national legal procedures should ensure that a complainant can raise all aspects of a multiple-discrimination claim in a single procedure."

<sup>58</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation 6092/10 ANNEX (DG G 2B).



Recital 14 of the Preamble to the Race Directive.

On the other hand, even though it does not appear in the original version of the proposed directive, the amendments proposed by Parliament and the document prepared by the Presidency of the EU Council refer to the concept of discrimination by assumption. The amendment by the Parliament calls for the introduction of an Article 2(4) stating that “discrimination based on assumptions about a person’s religion or belief, disability, age or sexual orientation or because of association with persons of a particular religion or belief, disability, age or sexual orientation, shall be deemed to be discrimination within the meaning of paragraph 1.”

The EU Council also proposes to include within the concept of discrimination, discrimination against or harassment of persons associated with persons of a particular religion or belief.<sup>59</sup> This is a new concept and offers considerably enhanced protection against discrimination. With its incorporation, the European Union reaffirms its struggle against all possible cases of discrimination that may exist, trying to establish a regulatory framework that offers the maximum protection to the individual, not only against the state but also against individuals.

## B. Exceptions to the Principle of Non-Discrimination

Another noteworthy aspect of the draft directive is its explicit mention of the religious factor as an exception to the prohibition of discrimination. This is a result of the application of the subsidiarity principle. It reflects the existing Articles 4(1) and (2) of the Employment Directive and demonstrates the extreme sensitivity of this issue in EU law.

Aware that the Union is composed of countries which view the place of religion differently, the Explanatory Memorandum accompanying the draft directive reinforces what is said in the text of the directive and states, “The diversity of European societies is one of Europe’s strengths, and is to be respected in line with the principle of subsidiarity. Issues such as the organization and content of education, recognition of marital or family status, adoption, reproductive rights and other similar questions are best decided at [the] national level. The Directive does not therefore require any Member State to amend its present laws and practices in relation to these issues. Nor does it affect national rules governing the activities of churches and other religious organizations or their relationship with the State. So, for example, it will remain for Member States alone to take decisions on questions such as whether to allow selective admission to schools, or prohibit or allow the wearing or display of religious symbols in schools, whether to recognize same-sex marriages, and the nature of any relationship between organized religion and the State.”<sup>60</sup>

<sup>59</sup> Article 2(1) “... For the purposes of this Directive, discrimination includes: ...f) direct discrimination or harassment due to a person’s association with persons of a certain religion or belief, persons with disabilities, persons of a given age, or of persons of a certain sexual orientation.” Ibid.

<sup>60</sup> Explanatory Memorandum accompanying the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. Op cit, no. 41.



In this draft directive, educational institutions with a religious base will allow exceptions to the prohibition of non-discrimination, consequently resulting in non-admission to school for belonging or not belonging to a particular faith, having or not a specific conviction or religious belief.

It is important to stress that this Directive will not require states to change the way in which their systems of education are organized so it is not possible for the Directive to be prescriptive in advance as to how individual situations will be resolved. The draft directive, although it broadens the scope of application of the principle of non-discrimination beyond the workplace and into the field of education, will nevertheless permit educational institutions with a religious base to continue to make decisions based on the ground of religion; for example, resulting in non-admission to school for belonging or not belonging to a particular faith.<sup>61</sup> For example, it may not be proportionate for a Catholic school to exclude a non-Catholic child if this leaves children from minority religions with no suitable alternative school (i.e. where all schools in the local district are Catholic in ethos). In contrast, if the school system is predominantly secular, and a Catholic school wishes to give preference to Catholic children in order to ensure that its Catholic ethos is maintained, then this may be proportionate where there is a wide choice of other schools in the locality. For this reason, the genuine service requirement emphasizes the *context* in which the service is provided as a factor for courts and tribunals to consider.

### C. National Equality Bodies

The report *Tackling Multiple Discrimination, Practices, Policies and Laws*<sup>62</sup> notes that several of the respondents highlighted that in order to address multiple discrimination effectively it is necessary to have national equality bodies which cover all protected grounds in all fields.<sup>63</sup>

The establishment of national bodies to ensure, protect and promote equality of treatment has been one of the most notable achievements of the EU legislation. Most of the Member States have implemented this aspect of the 2000 Directives by designating some existing institution or by setting up a new institution to carry out the competences assigned by the legislation. Such bodies give greater protection to individuals and groups than the courts alone can give, in particular by helping victims of discrimination to pursue their complaints. However, there are no specific guidelines for Member States on how these bodies should operate and there are today a wide variety of practices concerning equality bodies to be found in the

<sup>61</sup> Article 3 of the proposed directive provides: "3. This Directive is without prejudice to the responsibilities of Member States for the content of teaching, activities and the organization of their educational systems, including the provision of special needs education. Member States may provide for differences in treatment in access to educational institutions based on religion or belief. 4. This Directive is without prejudice to national legislation ensuring the secular nature of the State, State institutions or bodies, or education, or concerning the status and activities of churches and other organizations based on religion or belief..."

<sup>62</sup> Op cit, no. 30.

<sup>63</sup> Ibid., pp. 20-25.



EU Member States. The organization and role of these bodies vary from country to country.<sup>64</sup>

The equality bodies function as independent organizations and are required to provide independent assistance to the victims of discrimination. This function can involve various activities, such as providing information about the existence of anti-discrimination legislation and about the possibility of taking legal action to secure redress for discrimination; it may extend to the provision of legal representation. The equality bodies also refer people who experience discrimination to other organizations which can assist them and they may help the parties to reach an amicable settlement (mediation).

The equality bodies are also required to conduct independent surveys concerning discrimination and publish independent reports, making recommendations on issues relating to discrimination. They therefore not only monitor the implementation of the principle of non-discrimination but may also become, in a sense, the guarantors of the right not to be discriminated against, if necessary seeking amendment of the relevant national law.

However, what is still needed is a requirement for a single equality body, in other words, a national equality body which deals with all the protected grounds. This is vital if multiple discrimination is to be addressed effectively. It is not appropriate for a complainant with multiple identity characteristics to be forced to choose which ground of discrimination has been violated and then to seek redress through the appropriate equality body. Article 12 of the proposed directive reflects this philosophy:

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons irrespective of their religion or belief, disability, age, or sexual orientation. These bodies may form part of agencies charged at national level with the defense of human rights or the safeguard of individuals' rights, including rights under other Community acts including Directives 2000/43/EC and 2004/113/EC.

2. Member States shall ensure that the competences of these bodies include—without prejudice to the right of victims and of associations, organizations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination—conducting independent surveys concerning discrimination, publishing independent reports, and making recommendations on any issue relating to such discrimination.

Although the proposed directive merely aims to establish minimum competences for these bodies, the amendments proposed by the European Parliament add that

<sup>64</sup> Most of these bodies are part of Equinet, the European Network of Equality Bodies, which develops cooperation and facilitates the exchange of information and good practice between the national organizations. See <http://www.equineteurope.org>.



they must be capable of operating independently, that they must be provided with an adequate financial income and that they must have competences in all the areas covered by the Framework Directive. In addition, the parliamentary amendments inserted a number of new competences, in particular: (a) facilitating administrative or legal proceedings for discrimination where the victim is resident in a Member State other than that of the respondent, by contacting the equivalent organization/s in the Member State of the respondent; (b) ensuring access by the complainant to legal aid in accordance with Council Directive 2003/8;<sup>65</sup> (c) monitoring and conducting independent surveys concerning discrimination, including on the application of anti-discrimination law; and (d) cooperating and exchanging information with the Fundamental Rights Agency and with other similar EU bodies.

However, the draft directive is still only that: a proposal. Despite efforts by some countries to try to make it succeed, it has so far not proved possible to reach agreement on it. One reason lies in the formula to be used to regulate the prohibition of religious discrimination in the field of education. Finding a common denominator that will satisfy everyone and does not undermine national laws or the provisions of the Charter of Fundamental Rights is not easy.

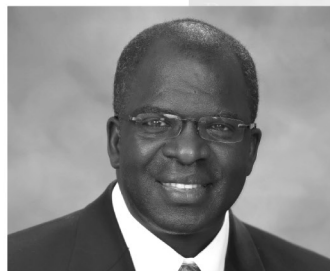
Legal tools are the cornerstones of the fight against discrimination, but they are not the only instruments for achieving this goal. In order to combat discrimination effectively, legislation needs to be supported by concrete action to bridge the gap between the legal text and the reality facing religious groups and individuals. The Directorate General for Employment, Social Affairs and Equal Opportunities is also responsible for “soft law” elements developed alongside this framework which aim to maximize the impact of EU anti-discrimination law and it has implemented a variety of programs and activities to execute its anti-discrimination policy and to promote equal opportunities. Examples include the European Employment Strategy and the European “Years,” including the 1998 European Year Against Racism, the 2007 European Year of Equal Opportunities for All, and the 2008 European Year on Intercultural Dialogue. The Community Action Program to Combat Discrimination also dispersed over 100 million euro during the years 2001-2006.

These EU initiatives highlight the importance of involving civil society and the social partners because they can both play an important role in raising awareness among the population about the need to combat discriminatory attitudes and acts of discrimination based on ethnic origin, race or religion. Considering the changing religious landscape of Europe as described in the introduction to this paper, this is particularly important; religious diversity and multi-culturalism are often perceived to be sources of conflict and there are misunderstandings, prejudice and ignorance towards and about religious minorities. Education can play an important role here.

<sup>65</sup> Council Directive 2003/8 of January 27 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. OJ L26/41 31.1.2003.



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# FROM SECONDARY SCHOOL TO THE SUPREME COURT OF CANADA AND BACK: DANCING THE TANGO OF “ETHICS AND RELIGIOUS CULTURE”

SHAUNA VAN PRAAGH<sup>1</sup>

## 1. INTRODUCTION

In the fall of 2012, secondary school students in Quebec, Canada, headed back to their classrooms and to an academic program that included a course in “Ethics and Religious Culture.” Part of the province-wide mandatory curriculum since 2008, the course is designed to enrich understanding of a variety of religious traditions and to provoke discussion of ethical issues from diverse perspectives. No matter their own faith or cultural heritage, all Quebec teenagers are expected to participate.

This particular year, the course began with the added confidence that comes from Supreme Court of Canada confirmation. In February 2012, the Court rejected a claim based on the religious freedom of Catholic parents for exemption of their children from the course, thus underscoring the mandatory and comprehensive character of “Ethics and Religious Culture” (ERC) in Quebec schools.<sup>2</sup> On the other hand, private religious schools began the academic year cautiously optimistic regarding the scope for offering faith-specific versions of the required ERC course.

As 2012 drew to a close, that optimism waned. A judgment of the Court of Appeal of Quebec closed the door on the possibility of meeting the government ERC requirement with an equivalent course taught from a particular faith-based perspective.<sup>3</sup> The Supreme Court of Canada may well be asked to hear an appeal on behalf of the Catholic high school from which the request originated. The teaching and learning of Ethics and Religious Culture seems firmly embedded in the education of Quebec adolescents, but sometimes passionate discussion continues over variations on the theme.

This paper focuses on the trajectory between secondary school and the Supreme Court of Canada, with an emphasis on the intertwining of faith-based identity and institutional autonomy, on one hand, and governance grounded in openness to a di-

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<sup>2</sup> *SL v Commission scolaire des Chênes*, 2012 SCC 7, [2012] S.C.J. No. 7 [*des Chênes*].

<sup>3</sup> *Québec (Procureur général) c Loyola High School*, 2012 QCCA 2139 [*Loyola 2012*], overturning *Loyola High School c Courchesne*, 2010 QCCS 2631, [2010] RJQ 1417 [*Loyola 2010*].





verse range of religious beliefs and practices, on the other. Entanglement of religion and state has traditionally been viewed with considerable (and important) scepticism, whether formally or informally conveyed by legal rules and principles. Alongside that concern exists crucial respect for the religious liberty of the individual: freedom of belief, conscience, practice, and community affiliation. The precise contours of individual rights and institutional autonomy vary depending on state context, and both deserve and receive much attention.

The following discussion dwells on the lessons provided by the Ethics and Religious Culture course and related claims. It takes the form of reflections on the dynamic contours of religion-state interaction in Canada and more generally. While the course and the judgments about it might provoke fear of a problematic *tangle* of faith and secular state, it may be possible instead to turn Ethics and Religious Culture into a *tango* lesson for these two partners.

## 2. (DIS)ENTANGLEMENT

### a. Tangle to Tango

When Loyola High School, a Jesuit Catholic institution in Quebec, requested recognition of its own version of Ethics and Religious Culture for its high school students, it moved to the centre of contemporary human rights litigation in Canada focused on the relationship of a secular, diverse state to the religious communities that exist and flourish within it. More specifically, it cast light on conflict over approaches to education, and the appropriate degree of autonomy held by faith-based schools. While in many ways specific to a particular governance scheme in one specific jurisdiction, the context in which the Loyola High School case arose provides a fruitful forum for exploring in a more general sense the complexities of religion-state interaction.<sup>4</sup>

Whether cast as co-existence, confrontation or conflict, interaction between religious and state institutions—particularly against a human rights-respecting backdrop—avoids simple definition or structure. Two images—that of a *tangle* and that of a *tango*—offer the framework for the discussion of the Loyola case and its counterpart examples, and the lessons they offer for thinking about religion, education and state governance.

When we imagine a tangle of something, we might think of weeds, hair, jewel-

<sup>4</sup>For more on religion, culture, and the state in Canada, see generally: Shauna Van Praagh, “The Education of Religious Children: Families, Communities and Constitutions” (1999) 47:3 Buff L Rev 1343; Howard Adelman and Pierre Anctil, eds, *Religion, Culture, and the State: Reflections on the Bouchard-Taylor Report* (Toronto: U of Toronto Press, 2011); Benjamin Berger, “Law’s Religion: Rendering Culture” (2007) 45 Osgoode Hall LJ 277; Richard Moon, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008); Natasha Bakht, “Religious Arbitration in Canada: Protecting Women by Protecting Them from Religion” (2007) 19:1 CJWL 119; Jean-François Gaudreault-DesBiens, *Le droit, la religion et le raisonnable: le fait religieux entre monisme étatique et pluralisme juridique* (Montréal: Éditions Thémis, 2009); José Woehrling, “La place de la religion dans les écoles publiques du Québec” (2007) 41:3 RJT 651; Pascale Fournier, “Halacha, the ‘Jewish State’ and the Canadian Agunah: Comparative Law at the Intersection of Religious and Secular Orders” (2012) 65 J Legal Pluralism 165.



lery chains, wool, or messy relationships. To be tangled up means that it is impossible to separate the strands, to follow the lines, to identify which piece belongs to what. Entanglement is a state of being that necessarily submerges precise demarcation.

Excessive entanglement with religion is a classic concern of any liberal democratic and diverse state. The state might be concerned with ensuring that no official support is given to any particular religion or set of religious institutions, or that if there is such support that it is carefully and clearly circumscribed. Avoiding problematic entanglement might also mean requiring judges and legislators to avoid asking questions about, or making any judgment on, the content of religious beliefs and values. Religious freedom is to be protected; as part of that guarantee, turning to the state for definitions or evaluations of religious norms is understood to constitute unjustifiable entanglement.

When, instead, we imagine a tango performed by two partners, there is no fixed state in which the participants find themselves. Instead, the tango consists of ongoing motion from beginning to end. This is a dance in which the steps must be learned but remain subject to constant modification, a dance in which each dancer in the couple must be continually receptive to the moves of the other. Always complicated and sometimes risky, the dance can be beautiful, impossible to replicate, and dramatically intense.<sup>5</sup>

Instead of the risk of shapeless permeability in the partnering of religion and state that the imagined picture of a tangle conveys, the model of the tango invites us to appreciate a creatively unstable yet identifiably structured interaction on the dance floor. When we look closely at arguments and conclusions framed in the language of Charters and Constitutions, we find that some of the entanglement of religion and the modern state—as institutions and as sites of identity—is inevitable and may not necessarily be problematic. Indeed, the often complex intertwining of religious and state narratives, norms, and preoccupations can reveal a dynamic duo where each partner is continually on the move while still holding on tight to the other.

The following discussion fills out these initial contrasting images of *tangle* and *tango* for religion-state co-existence in the arena of education, grounded in examples and decisions that show how and why religious communities and states sign up for tango lessons, practice rusty dance skills, or refine already sophisticated steps. As will become apparent, the methodological framework for this paper develops a fluid, descriptive, and reflexive model for grappling with religion and state. Rather than trying to capture any particular fixed dynamic or relationship between the two, the discussion integrates comparative approaches and practices with the objective of pro-

<sup>5</sup>For an account of both the artistic and normative dimensions of the Argentine tango, together with an analysis of the Code of the Buenos Aires “milonga” where the tango is danced, see Frédéric Mégret, “‘Así se baila...’: Codes de la *milonga portena* et ‘droit du quotidien’” (2008), online: <http://ssrn.com/abstract=1138280> or <http://dx.doi.org/10.2139/ssrn.1138280>.



voking fresh questions and creative responses, regardless of country or constitutional context.

## b. Education at the Intersection of Religion and State

The special sensitivity of secular courts to inappropriate interference with matters of faith has been succinctly captured by the Supreme Court of Canada in the following way:

[T]he State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, “obligation,” precept, “commandment,” custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.<sup>6</sup>

But, even with these basic guidelines to keep religion, whether majority or minority, somehow separate from the power or interference of the state, there are many examples of complicated intertwining. In Canada, in particular, the Constitution makes reference to God<sup>7</sup> and to the Catholic and Protestant Churches in the context of education.<sup>8</sup> Religious leaders can stand in for the state to officiate at a state-recognized marriage. In Montreal all can see the prominent cross on Mount Royal with its complex messages embodied in the sign of Christianity.<sup>9</sup>

In the everyday lives of individuals of faith, and in the shaping and nourishing of religious identity and practice, state law is importantly relegated to the background. And yet the fact that claims related to religious freedom can be articulated in the context of human rights codes or the *Canadian Charter of Rights and Freedoms* means that we look to courts as a significant site for understanding the relationship of religion to state. The kinds of situations in which the scope of religious liberty attracts litigation and potential Supreme Court attention include *inter alia* marriage and divorce, medical decision-making and procedures, regulations governing identity documents, and exemptions from bylaws or contractual obligations.<sup>10</sup> Issues related to children are especially sensitive, given the stake held by both liberal state and religious communities in shaping the next generation.<sup>11</sup>

<sup>6</sup> *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 50, [2004] 2 SCR 551, Iacobucci J [*Amselem*].

<sup>7</sup> *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. The Preamble reads: “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.”

<sup>8</sup> *The Constitution Act, 1867* (UK), 30 & 31 Victorian, c 3, s 93.

<sup>9</sup> Sherry Simon, *Translating Montreal: Episodes in the Life of a Divided City* (Montreal and Kingston: McGill-Queen’s UP, 2006) at 201–202.

<sup>10</sup> See *Brucker v Marcovitz*, 2007 SCC 54, [2007] 3 SCR 607; *AC v Manitoba* (Director of Child and Family Services), 2009 SCC 30, [2009] 2 SCR 181; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567; *Amselem*, *supra* note 5.

<sup>11</sup> See Shauna Van Praagh, “Faith, Belonging, and the Protection of ‘Our’ Children” (1999) 17 Windsor Y B Access Just 154.



We pay attention when law expends its energies disentangling religion and state and, alternatively, when it appears to guide the two into ever and ever more knotty tangles. Against a backdrop of social diversity—whether referred to as multiculturalism or interculturalism, mosaic or melting pot—the Supreme Court can be characterized as a leading partner in a dance performed by individuals and institutions constantly constituting themselves through intersecting identities.<sup>12</sup>

Education in particular provides a significant context for shaping the relationship between religion and state, often informed by Court judgments. From the perspective of the state, education is crucial for citizenship and for passing on values reflected in and sustained by state institutions. From the perspective of religious communities, education is crucial for affiliation and commitment and for the passing on of values reflected in and sustained by religious teachings and structures. The obvious similarity in objectives means that co-existence is not always peaceful. The interaction between state and religious communities—with respect to the shape of educational programs, the selection of teachers, the admission of students, or the content of coursework—is sometimes respectful, sometimes constructive, sometimes conflicting, and always complex.

### c. Three Examples

Three examples of interaction in the sphere of education illustrate a spectrum of classic concerns over, and safeguards against, excessive entanglement between religion and state. The examples come from the United States, the United Kingdom and Canada, and all take the form of Supreme Court judgments decided between 2009 and 2012. The first illustrates religious institutional authority over the hiring and firing of teachers; the second questions such authority over the selection criteria for the admission of students; and the third introduces conflict over the nature of a course related to religion but endorsed by the state. In other words, they show how liberal state and religious community can come into conflict over who teaches, who learns, and what's taught and learned.

Rather than examining in detail the constitutional, legislative and administrative sources that provide the framework for the issues at stake in each of the three cases, the brief descriptions offered here emphasize the approaches taken to the tricky task of disentanglement and the shape of interaction between state and religion revealed by each judgment. Thus, the United States Supreme Court decision in *Hosanna Tabor* appears to pull the strands apart with insistence, determined to avoid the risk of a messy tangle. The United Kingdom Supreme Court in *JFS* rewinds the strands into a newly configured entanglement, with religious institutions and rules expected to incorporate state-derived sensibilities. And the Supreme Court of Canada in *Commission Scolaire des Chênes* envisages ongoing tangling, untangling, and re-tangling between religious parents, children, and programs of public education. Presenting

<sup>12</sup> See Shauna Van Praagh, "Identity's Importance: Reflections of—and on—Diversity" (2001) 80 Can Bar Rev 605.



these approaches in a comparative way sets the stage for returning to the *Loyola High School* case to consider the lessons offered by Quebec's Ethics and Religious Culture program.

### 1) *Hosanna-Tabor, USSC13*

The judgment of the United States Supreme Court in the *Hosanna-Tabor Evangelical Lutheran Church* case represents the juridical conclusion to the story of Cheryl Perich, a kindergarten and fourth grade teacher at Hosanna-Tabor Evangelical Lutheran School. Ms. Perich taught math, language, social studies, science, gym, art, music, and also a religion class in which she led students in prayer. Although initially a lay teacher, she later received an invitation to become a "called" or "commissioned" teacher, which meant she had been called to her vocation as a teacher by God through her congregation.

In 2004, Ms. Perich was diagnosed with narcolepsy, a condition that meant she suffered from sudden and deep sleeps at various times through her day. She took a disability leave but then insisted on returning to the classroom. The school administration decided she wasn't ready to return and offered her a peaceful release from her position, something she refused, accompanied by a threat to take legal action. The congregation sent her a letter of termination. When she tried to bring a claim against them saying she had been discriminated against on the basis of disability, the Church simply answered as follows: she was a minister and had been fired for a religious reason, that is, for violating the belief and practice within the Church that conflicts should be resolved internally.

The Supreme Court of the United States agreed with the Church: with respect to the employment decision regarding ministers, there is no room for state interference. The Church shapes its own faith through its appointments and, at the same time, its dismissals. In a judgment that starts with reference to 1215 and the Magna Carta—in which King John agreed that the English church shall be free and its rights undiminished, its liberties unimpaired—the Court reviewed the history of religious freedom in the United States, starting with the arrival in the colonies of members of religious communities seeking liberty from the control of the Church of England. Hand in hand with their individual freedom to believe and practice according to their particular faiths, Americans were guaranteed autonomy of religious institutions from government preference and support.

That is, when a religious institution understands a person to be a minister of its faith—and there is a panoply of ways in which those institutions are structured according to doctrine—then the relationship between the institution and that individual is shaped free from state guidance or interference. The concern for entanglement is palpable. Indeed, the Court is very careful to say that state law and its judges cannot probe the validity of the religion-based reason for dismissal offered by the

<sup>13</sup> *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*, 132 S Ct 694 (2012).



Church or the characterization of Ms. Perich's work as that of a minister of the faith.

This is striking deference to the internal definitions, workings, organization, and decisions of a religious community. We might conclude that the clean break between the Church and Cheryl Perich, one of its called teachers, is made possible by the clean line drawn between the Church and state.

## 2) *E v JFS, UKSC14*

In *E v JFS*, a Jewish family sought admission for a child to a leading Jewish school ("JFS" - Jewish Free School) in London. The child, known as E, was refused on the basis that his mother's conversion to Judaism had not been overseen by an Orthodox rabbi, and thus that he was not a Jew according to the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth. The family claimed that the school's policy constituted impermissible discrimination as defined by the *Race Relations Act* to include treating one person less favourably than another on "racial grounds," which are in turn defined to include "ethnic origins."<sup>15</sup> The Court was asked to decide whether a definition of identity or membership that depends on matrilineal descent necessarily differentiates on the basis of ethnic origins, meaning that it could not be used to determine eligibility for admission to a religious school. Different approaches to religious identity and the interaction between religious institutions and state directives related to human rights can be traced in the judgment. The first insists that if an identity test relies on ancestry, then it's about race/ethnicity even if it's labelled religious; as a result, it must be replaced by a different *religious* test. In adopting this approach, the majority of the Supreme Court found that compliance with the *Race Relations Act* required modification of the school's admission criteria.

The matrilineal test in Judaism, the principle that bestows Jewish identity on any child of a Jewish mother, emphasizes race, ancestry, and ethnicity. Denying someone admission to a Jewish school on the basis of his lack of Jewish identity—as defined and interpreted within the religion and embodied in a matrilineal descent rule—thereby constitutes ethnic discrimination. A modified version, adopted by concurring judges and thus leading to the same conclusion, suggests that even if the test is religious, its application in the governance of public education must be subject to an assessment of effectiveness within that context.

The dissenting approach acknowledges the test as religious in essence, applicable to a school governed by a religious community and its institutions, and irreplaceable by a state-imposed understanding of religious identity. From an Orthodox perspective, the dissenting judges pointed out, the only relevant question is whether the child's mother is Jewish—either through her own mother or through Orthodox

<sup>14</sup> *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and others (United Synagogue)* [2009] UKSC 15 [JFS].

<sup>15</sup> *Race Relations Act 1976* (U.K.), s. 1.



conversion. That is a question about religion to be decided by religious law. *JFS* provides general education within an Orthodox Jewish religious framework and thus aims to serve a student population of children recognized as Jews by the Orthodox Chief Rabbi. In affirming the power of the school to prefer those children who are members of the Jewish religion under Jewish law, the dissenting judges acknowledge ongoing debate within the Jewish community regarding identity and affiliation, but warn the Court away from intervening in that discussion.

The *JFS* judgment underscores the co-existence of religious communities and a diverse liberal state, but the model of that co-existence differs from that set out in the *Hosanna-Tabor* case by the US Supreme Court. Given the context in which *JFS* arose, the UK Supreme Court's judgment acknowledges, and illustrates a diversity of views on, the ways in which the very foundations of religion and state can touch each other. The ideal picture might be one of arms-length partners, but *JFS* grapples with the fancy footwork that sometimes becomes necessary.

Presented together as a comparative snapshot of the interactions of religion and state, the two judgments set the scene for the recent Supreme Court of Canada decision concerning mandatory religion-related education in all Quebec secondary schools. Although that decision responds to a challenge to the Ethics and Religious Culture course on the basis of individual parental religious freedom, it has implications for the related *Loyola High School* litigation regarding religious institutional authority over the teaching of ERC. As in the US and UK cases, entanglement is at issue: entanglement of religious families with state schools in the case already decided by the Supreme Court of Canada, and entanglement of religious schools with a state-directed course in the case that may well be on its way.

### 3) *S.L. v Commission Scolaire des Chênes, SCC16*

In *des Chênes*, the Supreme Court of Canada considered the request of parents known as S.L. and D.J. to exempt their children from the Ethics and Religious Culture (ERC) course offered as a mandatory part of the curriculum in Quebec schools as of 2008. The parents claimed that the obligatory nature of the ERC program violated their freedom of religion and conscience guaranteed by the Canadian *Charter of Rights and Freedoms* and the Quebec *Charter of Human Rights and Freedoms*. More specifically, the parents argued that their right to pass on their Catholic beliefs and faith to their children was compromised by a course in which those children would be exposed to a range of religious traditions and ways of understanding and expressing spirituality. What the parents characterized as the inherent relativism of the ERC course would interfere, they insisted, with the way in which their children were growing up within Catholicism.

The Court's answer was very clear. No infringement of parental freedom of religion was entailed in the exposure of children to the ERC course ensconced in the

<sup>16</sup> *Des Chênes*, *supra* note 1.





education program of Quebec schools. No exemption of individual students could be granted on that basis. In other words, the Supreme Court refused to excuse children of one faith from learning about others, specifically in the way contemplated and applied in ERC.

The majority decision of the Supreme Court of Canada briefly reviewed the history of education in Quebec, highlighting the abolishment of denominational public school boards by the late 1990s and the adoption at the time of a new approach to religious education of children, leading to the introduction of ERC roughly ten years later. As underscored in the judgment, the mandatory ERC course aims to provide students with an understanding of ethical questions and of a range of influential religious traditions, without accompanying students on a “spiritual quest” or promoting a “new common religious doctrine.”<sup>17</sup> Regardless of the sincere faith of the Catholic parents who requested an exemption for their children, it was not possible for the Court to conclude that exposure to a comprehensive presentation of religious traditions constituted a violation of religious freedom. In particular, the Court deemed that the parents’ objective of passing on their faith to their children had not been interfered with.

The concurring judgment emphasized—more explicitly than its majority counterpart—the need to respect religious upbringing of children as part of meaningful religious freedom on the part of parents. With respect to the ERC course, a course for which, at the time the claim was filed, teaching methods, content, and spirit were sketchy at best, there was simply no way to assess the alleged interference with religious upbringing by these parents within their Catholic faith. In another case where there was a clearer picture of the substantive content and the pedagogical approach associated with ERC in a particular classroom, it might well be possible to establish such interference and accordingly justify an individual exemption.

The Supreme Court of the *des Chênes* case faced a different sort of entanglement than the Courts of *Hosanna-Tabor* or *JFS*. Both the American and British cases dealt with the relationship between institutional norms of the state, on one hand, and religion on the other; the troubles of the individual plaintiffs provided an opportunity for the state and the religious institution to work on their dance steps. In *des Chênes*, it is the personal beliefs and claims of the plaintiffs that are at issue and the church and school that together provide the backdrop.

In the wake of *des Chênes*, we might imagine the Chief Justice of Canada tangoing with the Catholic parents through the corridors of Quebec’s public secondary schools; in the wake of the *JFS* case, the Chief Justice and the Chief Rabbi might tango along the streets of London; in the wake of *Hosanna-Tabor*, it might be the Chief Justice and the leaders of the Evangelical Lutheran Church. All three Supreme Courts enter the dynamics of teaching and school administration through their

<sup>17</sup> Ibid. at para 34, citing Quebec, Ministère de l’Éducation, du Loisir et du Sport, *Ethics and Religious Culture* (Québec: The Ministère, 2007) online: <http://collections.banq.qc.ca>.



judgments as to the degree and nature of permissible closeness between state governance and religious faith and practice.

Beyond shedding light on the form and substance of Supreme Court participation in those complex dynamics, the judgments may help in imagining the dance that necessarily continues beyond their direct reach. Lessons can be gleaned from each as to the particular characteristics of the rapport between religion (as institution and source of identity) and state (through its institutions and sites for defining identity). Below, the Supreme Court of Canada judgment receives closer scrutiny in order to fill out the lessons from Quebec's Ethics and Religious Culture course for appreciating the close and complicated tango of religion and state.

### 3. TANGO LESSONS: ETHICS AND RELIGIOUS CULTURE

#### a. *des Chênes*: Religious families in a diverse society

The introductory paragraph of the majority judgment in the *des Chênes* case situates the issues at stake against a backdrop of contemporary Canada: "The societal changes that Canada has undergone since the middle of the last century have brought with them a new social philosophy that favours the recognition of minority rights."<sup>18</sup> Throughout the judgment, there is acute awareness and repeated acknowledgement of the social diversity of Quebec and Canada. The Ethics and Religious Culture component of the curriculum in Quebec schools appears both to stem from, and sustain, that reality.

As a complement to this general portrait, the opening paragraph of the concurring judgment makes reference to contextual and continuing interaction: "The implementation of this program re-emphasizes the continuing problem of establishing an appropriate relationship between the religious neutrality of a modern democratic state and the deeply held religious beliefs of members of Quebec society who are often in a minority situation."<sup>19</sup> Here, the ongoing dialogue between the state and particular communities (via their members) shapes the answer given to the claim of these religious parents that they are unable to accept public policy in the form of the ERC course.

The *des Chênes* case clearly adds an explicit social diversity element to the religious freedom picture introduced by the US and UK cases. The plaintiff parents' rejection of the ERC course and its secular perspective came across—whether deliberately or not—as a rejection of the respect for diversity that the course is meant to promote. Indeed, the stories told by religious parents and school officials are integrated into the complex co-existence symbolized by the multiplicity of approaches found in the ERC course itself. The reality and impact of social diversity are embodied by the denial of individual exemption on one hand and by the demand for continued dialogue on the other.

<sup>18</sup> *Des Chênes*, *supra* note 1, para 1.

<sup>19</sup> *Des Chênes*, *supra* note 1, para 44.



The majority judgment offers obvious support, via adherence to multiculturalism, for a government project that aims to teach a diverse group of children about a diverse group of religious traditions. The ERC course offers a roof under which individuals and identities come together and together appear to realize the promise of multicultural theory. But the very recognition of the multiplicity of ethical and religious perspectives and practices, embodied in the education program, is the problem identified by the parents who insist on securing their children's way on a particular path. For them, the risk is in too much recognition, in losing one's direction by being pulled in too many other directions, in substituting individual identity formation with comprehensive exposure to a collective tangle. Put in these words, the concern precisely mirrors the very critique sometimes aimed at multiculturalism itself.

In the concurring judgment, by contrast, we are invited to focus on the ongoing conversation, the incessant back-and-forth, between religious individuals and families and communities on one hand, and the state—in the form of a mandatory education program—on the other. If interculturalism signals a principle preoccupation with shaping the interaction between two parties or partners, it is reflected in the acknowledgement by this minority decision that questions will continue to be asked of the ERC program as well as of religious parents. The approaches and commitments of both schools and religious families throughout Quebec and Canada will continue to evolve, always influencing each other at the same time that they work to sustain their particular identities and vocations.

The Supreme Court of Canada in *des Chênes* tries simultaneously to express a commitment to a course substantively dedicated to reflecting and teaching a diversity of religious, ethical, and cultural perspectives, on one hand, and a commitment to a flexible, dialogical project responsive to the potential competition among religious, ethical, and cultural perspectives, on the other. But the extent to which room for religious sensibility of students and their families can be sustained within the framework of an ERC course that treats all religious and ethical standpoints as equally deserving of respect isn't clear. The scope for institutional disagreement between state and religion over precisely this set of issues is at the heart of the coinciding *Loyola High School* litigation.

#### b. *Loyola High School*<sup>20</sup>—Religious Schools in a Diverse Society

In *Loyola High School*, decided by the Quebec Court of Appeal in December, 2012, and potentially on its way to the Supreme Court of Canada, a private Catholic school in Montreal put in a request to the Minister of Education, Recreation and Sports, asking for permission to teach a modified but “equivalent” ERC program. The relevant legislative scheme gave power to the Minister to allow courses deemed to be equivalent to substitute for mandatory parts of the province-set curriculum. Loyola argued that “the incompatibility of the ERC program established by the Min-

<sup>20</sup> *Loyola 2012*, *supra* note 2.



ister stems from the fact that it inculcates a relativistic philosophy, commonly known as ‘normative pluralism.’ The basic principles of that philosophy trivialize and, for all practical purposes, negate religious experience and belief.”<sup>21</sup>

Loyola asked to continue teaching what they considered their equivalent but denominational program in which the “ethical ideal is not simply to ‘tolerate’ others but indeed to ‘love’ others, as our Christian faith teaches us.”<sup>22</sup> Loyola also argued that to deny their request to teach ERC in a denominational manner would be to violate their religious freedom, as protected under section 3 of the *Quebec Charter of Human Rights and Freedoms*.<sup>23</sup> In exercising the discretionary power to consider and decide the equivalence of Loyola’s version of the ERC course, a representative of the Minister found that Loyola’s confessional approach to the pedagogy and substance of ERC rendered the proposed course non-equivalent and therefore an unacceptable substitution.

At the first level of litigation, the Superior Court of Quebec found that the Minister’s jurisdiction and discretion under the relevant legislative framework<sup>24</sup> did not extend to a substantive comparison of Loyola’s confessional approach to the cultural and faith-neutral approach envisaged by the Quebec government. Although the Loyola program did have denominational elements, the Court found that the objectives (recognition of others and pursuit of the common good) and the learned competencies (ethics, religious culture, and dialogue) of ERC and its Loyola variation *were* equivalent within the ordinary (dictionary) meaning of the term. In essence, the Court insisted that the government can’t start up the music for everyone and then refuse to recognize the different ways in which the dancers offer their interpretations.

On appeal, that decision was reversed. As an issue of judicial review, the Court of Appeals found no justification for questioning what was a reasonable decision regarding equivalence of Loyola’s ERC program.<sup>25</sup> Further, the Court decided that, even though the fact that Loyola had to offer the government-created non-Catholic version of ERC could be characterized as an infringement of religious liberty, the violation was negligible in character.<sup>26</sup> The school was indeed asked to change its steps and to follow the moves set by the state. And it has been told that conforming with the requirements of the Minister of Education in the context of ERC does not threaten religious belief and practice in any significant way. In returning to the goals of the government in the final paragraphs of its judgment, the Court of Appeal subscribed to the majority decision of the Supreme Court of Canada in *des Chênes*.

<sup>21</sup> *Loyola 2010*, *supra* note 2, para 32.

<sup>22</sup> *Ibid.*, para 38.

<sup>23</sup> *Charter of human rights and freedoms*, RSQ, c C-12.

<sup>24</sup> *Regulation respecting the application of the Act respecting private education*, RRQ, c E-9.1, r 1, s 22; *An Act respecting Private education*, RSQ, c E-9.1, s 7.

<sup>25</sup> *Loyola 2012*, *supra* note 2, para 127.

<sup>26</sup> *Loyola 2012*, *supra* note 2, para 173.



The search for religious neutrality in the public sphere is an important challenge, according to the Supreme Court and confirmed in *Loyola High School* by the Quebec Court of Appeal.

The disagreement between the trial decision and the judgment of the appellate court in the *Loyola* litigation illustrates the difficulty in disentangling the strands of meaning of Ethics and Religious Culture. In claiming that their Jesuit approach to ERC was compatible with, if distinct from, the state's objectives, Loyola tried to open the door to a state-acknowledged variation on the central theme of the course and program. That request, heard by Quebec as a plea for autonomous control by a religious school over the design and teaching of ERC, was received as a rejection of the course and its message. In response, Quebec asserted its own objectives and the corresponding need for a uniform ERC course, unmodified by the particular school and its identity. In confirming that assertion, the Court of Appeals sent a clear message to Loyola, as a religious institution, ensemble of families, and student body. Whether intended or not, that message may well be heard by religious schools across the province as a rejection of their approach to faith, diversity, and community.

In this exchange of claims and responses, religion tries to keep the state at a distance; the state does the same in return. Each claims its own space, free from intrusion—and each may feel that the closeness of the other is anything but negligible. It may seem ironic that a project of the Quebec government dedicated to openness to a diverse spectrum of approaches to ethics and religion turns out to be closed to variation. But, as the two institutional parties eye each other warily across the dance floor, not willing to try out a tango, they seem unwilling to imagine, let alone execute, improvised intimacy in their ongoing partnership.

### c. Tango Melodies, Tango Steps

Attention to, recognition of, and respect for cultures, ethics, and faith—as promised by ERC—shape religious learning in a way that may be foreign to, and even in competition with, religion itself. This explains the almost passionate challenges to ERC by religious parents in *des Chênes* and by religious schools in *Loyola High School*. As we have seen, religious individuals and institutions may balk at the comprehensive and open exposure to Ethics and Religious Culture that grounds the secondary school program of religious education in today's Quebec. But the course itself suggests that religion and the liberal diverse state are doomed to co-existence. That co-existence might take the form of constant avoidance of excessive entanglement. Alternatively, we might take the ERC course as a lesson in how to imagine a different and perhaps more hopeful mode of living together.

The image, sketched earlier, of Supreme Court justices and religious claimants partnered in a tango, was clearly mythical. That fantasy-like quality is rooted not only in the fact that none of the imagined partners have taken dance lessons, but in the limited scope of their capacities for choreography. Appellate courts—as illus-



trated by the Supreme Courts of the United States, United Kingdom, and Canada in the cases brought forward in this paper—are very good at articulating boundaries and disentangling messy conflict. They can explain why and how the state should stay out of the employment relationship between Cheryl Perich and the Hosanna-Tabor Church; why the state in the name of human rights might have a role, albeit limited, in shaping religious affiliation for the purposes of admission to the Jewish Free School in London; and how religious upbringing within a Catholic family in Quebec is necessarily distinct from the way in which Catholic children learn about religion at public school.

The same courts aren't as talented when it comes to describing the ongoing dance between religion and state, beyond the process of litigation and the pages of resulting judgments. For that, we return in more detail to the tango, and to the endless variations and permutations in both the steps and the melody.

Tango is a dance characterized by a striking beat, intricate steps, and special shoes. Hands are held at a certain height, muscles are tensed, no smiles or small talk are permitted. There is intense concentration on placing and shifting and challenging one's feet into increasingly impossible angles and balance. Tango is also music: nuanced passion in both notes and rhythm, and piano and mandolin in counterpoint, picking up on each other's melody and story line. The notes surge forward, followed by quiet and fairly orderly passages in which the listener waits for the waves to crest and crash again.

The crucial elements of tango appear to be the following: there must be an unshakable respect on the part of each partner for the other; the participants must understand the seriousness of the form and music and rhythm of the dance. They come together and move apart; one might lead but the other still improvises; and in today's tango, the leader might switch from one dance to the next. The dance cannot be fixed or suspended at a certain moment. Instead, it is necessarily fluid, and its meaning and movement depend on perspective and experience.

As compared to a picture of hopeless entanglement as the inevitable consequence of closeness, the tango provides a more promising, albeit more difficult, image for the interactions of religion and state.<sup>27</sup> More inspirational than a messy tangle of different coloured strands, it suggests that true separation of those strands—such that they can be laid out in neat parallel, and thus never-touching, lines—is neither possible nor desirable. Moments of entanglement may be part of the tango, but they never suffocate the form by causing a missed step or beat.

What conditions or contexts allow for religion and state to learn and practice

<sup>27</sup> Mégret, *supra* note 4 at 7 argues that the quasi-codified rules of the *milonga* tango exist in order to regulate the unsettling intimacy and closeness between dancers and thus protect participants from each other's and society's mis-understandings: "Il emporte donc d'encadrer cette intimité afin qu'elle ne prête pas inutilement à de la gêne et ainsi de protéger les partenaires, et notamment historiquement, la femme, voire même les hommes contre eux-mêmes. Une grande partie des codes vise ainsi à désamorcer la tension créée par l'abolition de l'espace entre partenaires afin créer un environnement fondé sur le respect de l'autre [...]".



their tango steps? At a macro or global level, the answer might include democracy, freedom of religious belief and practice, and openness to the evolution of both religious and state norms and practices, sometimes as a result of interaction with the other. But paying attention to some of the intricacies of the dance can best be done at the micro or community-specific level. For example, by looking at educational programs in a particular society, and at the legal, administrative, and social framework that informs them, we can identify and follow the steps of a complex and constantly shifting dance between religion and state. That tango differs in other contexts and across time and space. By focusing on its dynamic in one place and at one moment, we get a glimpse of how and why we might pay attention to variations on the theme.

The combination of *des Chênes* and *Loyola High School* offers one version of the religion-state tango. The cases represent an invitation to consider who the people are, where they are coming from, and how education, religion, and identity continue to evolve in Quebec in the 21<sup>st</sup> century. In this vein, it is not surprising that the parents and school in the two cases are Catholic, representative of the majority faith community in a province that used to provide institutional support to the religious upbringing of Catholic children. The conversation about religious diversity is explicitly transformed into a reflection on the identity of today's Quebec. The focus becomes the texture of the *us*, the conditions and contexts in which *we* can flourish and move forward together. What does it mean to fashion state institutions around *us* as a collective community? What does respect for religious identity entail, if it has been dropped as a defining feature of this society?

These are questions that might be posed, albeit modified, in the context of any claim grounded in religious identity. As the claim is addressed, considered, and answered, what do we learn about the contours of religion-state interaction in any particular jurisdiction or community? As we follow that interaction, in the form of an ongoing and complicated dance, can we trace constructive change, the underlining of society-specific commitments, and the dynamic movement of individuals, communities, and states?

The two Quebec cases together challenge the idea that the closeness of tango implies impermissible and unpleasant entanglement. The refusal to exempt the children of devout Catholic parents from ERC doesn't mean that the same children won't grow up as devout Catholics themselves. The immersion in a course that increases knowledge of many religious traditions, without favouring any one in particular, can be meaningful for children whose religious identity is firmly ensconced. The *des Chênes* judgment reminds us that the precise contours of the policy and the Ethics and Religious Culture course it has generated will change and evolve. The voices of teachers, administrators, parents, and children—including individual members of religious communities—contribute to the ongoing shaping of the substance and significance of the institutions, including ERC, that form the fabric of our collective





experience.

Similarly, *Loyola High School* reminds us that focusing on what actually happens in classrooms and corridors when young people learn and talk about Ethics and Religious Culture may well provide more guidance than any anticipated Supreme Court judgment. The case allows the state to deny official recognition to faith-based alternatives to ERC. But within the parameters set by Quebec's Minister of Education, there will continue to be variations on the ERC course, informed by the institutional setting, the individual teachers, and the students, including those who identify as religious. Interactions between strong faith and meaningful engagement with ERC will continue and transform. And those interactions need not take the form of necessarily painful (and litigation-inducing) tangles of faith-based and pluralist perspectives on education.

It is not clear that the official stance, either of Quebec on one hand or of the religious communities within the province on the other, will lend itself to an explicit tango spectacle. But the tango may go on without that formal recognition and, indeed, may be all the more creative and subtle. As today's ERC students grow up, take seriously the lessons learned in ERC itself, and become aware of the possibilities of integrating many voices and vocations, they will begin to take on governing roles and responsibilities themselves. They will shift from quiet participants in the tango of religion and state into more confident choreographers of the dance.

#### 4. CONCLUSIONS—AN ENDLESS DANCE

It is no coincidence that the three major Supreme Court cases relevant to this paper have all been handed down since the introduction of the Ethics and Religious Culture course to the secondary school curriculum in Quebec, and that the course is at the core of an anticipated future appeal. At the same time that high courts are grappling with the implications of social diversity in liberal democracies, with the character and boundaries of religious institutional authority and with the protection of individual human rights, young people are doing the very same thing.

Perhaps it is by following these children and youth of all faiths and cultures that we envisage and explore a religion-state tango without excessive entanglement. Neither Quebec (or, more generally, the state) nor religious communities control a contemporary teenager's knowledge of ERC. That knowledge is not confined to the classroom, or indeed to the congregation. But conversations in classrooms do prepare adolescents for co-existence and conversations that carry on beyond their walls. Indeed, the reflections here may pave the way to empirical analysis of the impact of ERC on the perspectives, knowledge, beliefs, and practices of its students.

Cast as a way to imagine and participate in a continual and collective project, this essay does not provide an analytical model or set of recommendations for arguments in litigation. It accepts that engagement with religious freedom includes ongoing attempts to untangle state and religious institutions. At the same time, it



underlines the potential for respectful coordination and closeness. If entanglement is a state of being, which law and religion often fight to avoid, tango is a dance that might give meaningful shape to the interactions that law and religion are doomed to repeat. None of this is easy, in theory or in practice. Stories, whether within schools or in the highest courts of appeal in liberal democracies, provide us with the illustrations and models we need for acknowledging the particular mix of interdependence and fierce autonomy that we find in the relationship between religion and state.

Caring deeply about religious freedom can mean advocating for greater respect for community space; at the same time it can mean accepting that religion and state are necessarily interwoven according to the history and context of any particular place. Religious and state institutions form always-changing partnerships. Instead of spending so much time focusing on the ways in which entanglement can be not only problematic but suffocating, we might learn from the Ethics and Religious Culture course itself to pay close attention to the details of a tango of religion and state and to its ever-expanding repertoire of moves. The dance requires commitment, concentration, and constant practice: all worth it as the tango takes off and turns into something unique, remarkable, uplifting, and even inspirational.



# SECULARISM TRENDS AND THE ARAB WORLD

JAIME CONTRERAS<sup>1</sup>

For today's Westerners, Islam is becoming a closer neighbour, and that results in a situation that would have been highly unlikely in any other period of history. The space occupied by Islam in our world is so big that it affects our own lives. Islamic cultural and sociological manifestations convey daily life patterns that have more than fourteen centuries of history. That history has produced a society intermingled with and influenced by many of the values of Western cultural systems.

Today's Islamic societies are influenced by the values adopted from Western cultural systems and by their own traditions. The first express active and dominant roles while the Islamic traditions have difficulty in reinforcing their own identity in the scenario designed by the First World.

It seems obvious and indisputable that global modernity is the only scenario, and all the cultural systems of the world are obliged to live in it in accordance with their adaptation capacity. No one has the possibility of living and growing outside this grandiose setting. The key elements that give shape to this scenario are clearly defined:

1. Legal, social and cultural dominance of human rights according to the Universal Declaration of 1948.
2. Political sovereignty of the people, freely expressed and organized under the rule of law.
3. Secularized culture whose values are mainly defined in the public space, dissociating society from doctrinal elements of a religious nature.

Modernity adds to these key features a strong scientific and technological acceleration and the new universe created by a global market that distributes goods and services. To some extent, all the existing socio-cultural systems share the features of that market. Nobody is alien to that complex scenario although each country takes part in the system in proportion to its adaptation process, thus the parameters are extremely variable and complex.

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This is the setting where the complex political space of Islam displays its main unequal manifestations and, consequently, the role of its members and structures is also unequal, complex and fragmentary. The dysfunctions that this situation provokes are key to understanding the many tensions lived in the space known as Islam.

This complexity provokes confrontations between the people and the system structures in the friction zones. These confrontations may seem to be structural, but they are becoming exclusive and, above all, intercultural. Nevertheless, it is true that this *interculturality* is usually asymmetrical and unbalanced, so the role that the different systems play varies in intensity and extension.

Historically, Islam and the West have always been in conflict although the manifestations of that conflict differed depending on the situation. Different versions of the conflict have been constructed with the images chosen by the propagandistic power of each side. Those images show reductionist visions, as simplistic as they are persistent, that have great pedagogic effectiveness resulting from a high degree of manipulation.

It is paradoxical that these persistent distortions have not been constructed from distant cultures, but from the nearest border, sometimes closed but often open and flexible. It cannot be said that there have been no agreements and mutual exchanges between Islam and the West. There has been a mixed history of collaborations and rejections and even extreme acts of violence.

Since the 8<sup>th</sup> and 9<sup>th</sup> centuries, the perception each culture has had of the other has been characterized by stereotypes. From a then active and culturally brilliant Islam with desires of expansion, to the current moment in which many Arab cities explode with shouts that demand reforms and political freedom, the reality is that Islam is perceived as a threat to the Western world.

However, the technological revolution that places all of us in the same global setting multiplies contacts and encourages knowledge between systems. Even though that often means that signs of conflict grow too, the main feature of our time is that the border is thinner and the media make it possible to share knowledge in real time. For the first time in its history, Islam is not isolated.

In consequence, it is not wise to doubt the possible modernization of the Islamic culture or to claim that such modernization is an adventure alien to the substantial features of its culture. Regarding this point, we, the Westerners, have inherited a very rigid and intolerant view of Islam. We often confuse voices with echoes and consider, as essential, things that only had importance in the past.

This is the reason behind the uncompromising judgments that distort our own conceptual categories and end up assigning behaviours to certain cultures that we would never assign to ours. Surprisingly, many of our intellectuals defend primary dichotomies that deny the early elements of every historical process. Indeed, it is not unusual to hear some of them say that Islamic culture cannot evolve because of the nature of its ethnic, racial or cultural heritage.



Regarding this subject, it is impossible not to be surprised when hearing Jean Braudillard say that Islam “is the quarter of centred absolute, the ultimate face of antimodernism.” This categorical and unwarranted sentence does not prevent the French sociologist from claiming that the culture of human rights is ethnically and essentially opposed to the portrait constructed by Islam: “The portrayal of Islam as opposed to human rights depends on this type of essentialist, ethnocentric view of the Muslim world as alien to modernity.”<sup>2</sup>

Alien to modernity? Nobody can be alien to modernity today, because modernity is like a wave that guides us, alien to our will. Of course, it is true that the Organization of the Islamic Conference (OIC) and many Arab states have issued statements that obviously differ from the Universal Declaration that the UN issued in 1948. But it is also undeniable that all the Arab countries have made reforms showing a great concern and an intellectual interest about this subject. This openness is changing Islamic thinking and helping to make deep exegesis in their doctrinal texts, showing that it is possible to find a way to combine *sharia* and international comparative law.

It is not a secret that, today, the big debate about human rights and Islam is not being properly discussed in Western society because the West is mainly sceptical about it. However, it is a key debate in most Arab universities and it is a complex one, given that it even questions basic principles of the Islamic cultural system. The few Western intellectuals that have seen the possibilities and meaning of that debate understand that it poses infinite possibilities of interaction between our world and Islam.

Thus it is a serious mistake to regard Islam as an entity structurally opposed to human rights. This thought not only makes difficult the political criticism necessary to denounce the diverse violations of human rights, but it also favours a “distorted meta narrative,”<sup>3</sup> in Amr Hamzay’s words.

The different reformist trends that we find inside the Islamic cultural system are closer to dealing with real problems and show more intellectual lucidity, because there are many of them and they are generating a deeply innovative movement that could be compared to the big adventure that Europe experienced throughout the Enlightenment.

Indeed, the key debate is similar: the dominant space of the sacred *versus* the dominated space of secularity. It is a fact that the *sharia* is a legal and moral reference, although not the only one, for the institutional structure of most Arab countries. Its permanence is unquestionable and that provokes several distortions with modernity. Which distortions? The answer is in the words of Leila Babes, the well-known Algerian sociologist and professor at the University of Lille: “Can we today accept the

<sup>2</sup>J. Braudillard, quoted in A. Chase and Amr Hamzay, *Human Rights in the Arab World*, University of Pennsylvania Press, 2008, p. 25.

<sup>3</sup>Ibid., p. 22.



death penalty for apostates, the amputation of hands, and the discriminatory status of women, and pretend that we respect freedom, pluralism, and human rights?”<sup>4</sup>

Babés’ indignation is obvious. The coexistence of Islamic cultural traditions that interpret the law in a rigid way with the legal and moral principles of the West is not possible, she says, unless we overcome those prejudices. These huge differences and contradictions between the two sides are the reason for the real problems that distance them, often in a dramatic and violent way.

Leila Babés goes on to say that the problem of the *sharia* keeps being an obstacle and the culture that defends it—Salafism—is widespread. However, their domination is not total and there are many Muslims who try to find a way of understanding between Salafism and modernity. That search and those divisions are breaking the cultural and religious views inside the Islamic world. Thus, any analysis from this side of the border needs to acknowledge those divisions. The events that took place in North Africa and the Middle East during the Revolutionary Spring are an evident sign of this fact. It is necessary to adopt an attitude that changes the many interpretations that the West has made of its Islamic neighbours.

Nevertheless, there are no simple answers to badly posed, reiterative questions: What is Islam? Why is it so reluctant to change? Can it change? Islam, an entity with more than fourteen centuries of history, cannot be explained in a simplistic way. Its own origins, between Judaism and Christianity, emerge from a vernacular of religious primitivism and show a mystified doctrinal and anthropological structure that resists any reductionism. It may be easier to explain what Islam is not than to define it.”<sup>5</sup> It is more practical to identify what is not. Islam is plural, of course. It has its schools and cultural practices and, like the other monotheist religions, has suffered the hurricanes of history—its splits, closings, loans and receptions—throughout its geographical diversity. Time and space have made it plural and multiform.

It is true that, unlike the West, its historical trajectory has not been symmetrical, at least regarding some specific parameters. It is impossible not to remember the early emergence of a critical spirit, along with extreme internal violence, in the 2<sup>nd</sup> century of the Hegira. Then, a humanistic spirit emerged that crossed the barrier of year 1000 to end up beheaded at the end of the 12<sup>th</sup> century, when its two main intellectuals, Averroes and Maimonides, were excluded from their original Islamic matrix.

Paradoxically, these two dissonant voices were used by the Christian West that began to wake up to discover its own classical origins. Mourab Wahba, the well-known Egyptian philosopher, has written that the real inheritor of atheist Averroes was not the Arab space but the Christian Latin world where the works of the great philosopher were read by subsequent generations, “If you read Luther and Galileo

<sup>4</sup> L. Babés, *Loy dé’Allah, Lois des Hommes*, Albert Michel, Paris.

<sup>5</sup> Quote in O. Auouad, Lahrech, *De un humanismo a otro: puentes y fronteras*, Convegno Internazionale. *Umanesimo Latino e Islam*. Universidad de Alcalá y Fondazione Casamarca. Treviso, 2002, p. 168.



you will grasp Averroes's spirit. Luther's motto: *sola scriptura* and free inquiry of the Bible. This motto means that Luther like Averroes refers only to the holy book with intention of using his reason to interpret the text without any other aid."<sup>6</sup> The reflection of Professor Moura Wahba is a good one, because today Averroes and other Arab thinkers may be used as a bridge to overcome the obstacles of the necessary dialogue.

In any case, the historical trajectories of the East and the West have been divergent. The Islamic world, eastern border of the West, has been gradually relegated to marginal spaces. At the end of the 12<sup>th</sup> century Islam suffered the so-called *cloture ideologique* (ideological closure),<sup>7</sup> the terrible defeat of the *ijtihad*, the critical reflection quoted by Mohamed Arkoun. Consequently, the most revolutionary cultural impulses would always be born, from that moment on, in the West.

Reason was buried and it could not recover its autonomy in the face of the doctrinal and religious truth that was imposed by kings and sultans assisted by a cohort of alfaquies. It became marginal, the secular periphery of a sacred and totalitarian Islam, as fanatic as obscurantist, that forgot its memory and became fragmented in principalities, emirates, kingdoms and sultanates. Every lord of these mainly isolated groups claimed legitimacy by way of supposed dynastic links with the Islamic Prophet himself, links that were made up by the imams that worked for him.

For many centuries, Umma—as a community of believers—and Dar-el-Islam—as a geographical space—were only rhetoric and nostalgic concepts. Consequently, the historical pilgrimage of Islam has been full of different criteria and programs, a feature that it shares with other religions. Like many of them, Islam has suffered totalitarian regimes and developed a rigid religious bureaucracy that, for many generations, remained insensitive in front of all the social and political revolutions that took place in the West.

And, finally, it is now that the West needs again a technological and cultural revolution that does not admit an empty space, when Islam, trapped in the same setting, demands being more than a silent presence. Thus, questions are arising, sleeping consciences are waking up and intelligence is beginning to imagine the future.

Of course, there are intellectuals in the Arab world who understand this revolution (*awlaama*) as a mere imperialist manifestation (westernization). Nevertheless, it is important to highlight that there are many more that adopt open stances. For example, it is worthwhile remembering Egyptian Professor Zouad Zakariya, well-known for his passionate defence of the influence of Western technology in Islamic countries.

Consequently, today's Islamic culture can walk any path: reform, revolution and, also, the feared involution. Once more, history is an instrument for social change,

<sup>6</sup> M. Wahba, *Averroes as a bridge*, Convegno Internazionale. *Umanesimo Latino e Islam*. Universidad de Alcalá y Fondazione Casamarca, p. 135.

<sup>7</sup> M. Arkoun, *L'humanisme arabe au VIIe-Xe siècle*, J. Vrin, Paris, 1982, p. 43.





but, in our global setting, history needs to be compared. In Arab and Muslim universities, the history of Islam is analyzed by comparing it with the history of the West and many questions are asked: Which was the inflection point between us? Why did it happen? And how? And when?

It is well-known and polemic, the provocative sentence that the Egyptian writer Fahmi Huedi claimed, some years ago, in a meeting of Arab intellectuals: “I wish Muslims had a Pope!” The sentence was daring and provocative and posed an interesting question: What would have happened if Muslims would have had an institution similar to the Pope in Rome?

The question received multiple answers; half of them were so unfocused that they highlighted the need of each side to learn the history of the other one. Maybe we should pay attention to the answer given by the Egyptian-Lebanese writer Amin Maalouf in diverse European and Oriental forums. Maalouf is one of the few intellectuals who is able to walk the paths that cross the border between the East and the West.<sup>8</sup>

Maalouf acknowledges that Islam is not a Church, neither in its doctrinal principles nor in its internal organization. The community of believers, Umma, is a sociological and cultural concept alien to the ecclesiastic conscience expressed in the theological notion of the mystic body of Christ. Also, the idea of a maximum religious authority, considered Vicar of Christ and Supreme Minister, is not present in Islam, not even in the Shiite branch. Any Muslim would find the institutionalized existence of a formal ecclesiastic structure repulsive. There are no preeminent members and even the definitions of orthodoxy are less than precise, so it could be concluded that, as Fuad Zakariya says, “the Islam is what Muslims make of it,”<sup>9</sup> a categorical sentence regarding the doctrinal flexibility of Islam.

Amin Maalouf thinks the same but immediately adds that such malleability has barely been used to prevent “the bad relations between money and religion,” a constant throughout the history of the papacy. However, Maalouf claims, unlike Islam, the papacy built its authority as a counterweight for the “omnipotence of kings and emperors” and the consequence of such fights between the throne and the altar was the emergence of civil society in Europe, the antecedent of what we now call secularism. An expansive field of freedom grew in the space that this concept created, a good habitat for all the revolutions that followed.

The Pope was as reticent to make changes as he was firm to maintain them once they were accepted by the Church impelled by the revolutionary context. It is true that the Church of Rome is conservative and slows down the rhythm of change but also that experience shows that the Church never goes back to the past: to the Inquisition, the burning stakes or the lists of forbidden books.

<sup>8</sup> A. Maalouf, *Si el Islam tuviese un Papa...*, Diario El Mundo, June 10, 2010, p. 54.

<sup>9</sup> Fuad Zakariya, Professor of Political Philosophy at Kuwait University, quoted in A. Chase and Amr Hamzay, *Human Rights in the Arab World*, University of Pennsylvania Press, 2008, p. 27.



It is also true that Islam, unlike the Church of Rome, never had a bureaucratic organization such as the Inquisition to suppress doctrinal mistakes or religious freedom, not even to adopt early tolerant stances, but in Mohammed's religion there was never a clear distinction between the throne and the altar. Sheiks and ulamas were always under the power of kings (with few exceptions, like the current Islamist Republic of Iran), so the arbitrariness of secular power could never be restrained. "Nothing durable can be built in the kingdom of arbitrariness," says Maalouf, regretting that civil society did not succeed in Islam and that individual freedom was almost ever absent. Secularism did not have any chance.

But history is not decisive and, as Paul Valéry said, "it is the science of things which are not repeated," thus nothing that happened in the past is a duty for the present. The advice is simple: Let's understand the lesson of experience in a proper way.

Islam may not have experienced the constant fights between temporal authority and spiritual power, but that does not imply a negation. After the ideological closing of the 12<sup>th</sup> century quoted by M. Arkoun, Islam was dominated by a traditional authoritarianism that did not need anything apart from its own static exhibition, thus demanding only a mechanical and non-critical obedience from its members that led to the triumph of the spirit of *taqlid* (submission). However, all the power of these structures did not impede thinkers from adopting the opposite spirit: the *ijtihad* (freedom of thought), and to demand politics of reform that would find a way to something similar to the secularization of the West. All in all, such claims never achieved their goals and successive failures fuelled a collective feeling of pessimism and incapability that extended to the most lucid sectors of this culture.

Maybe one of the most meaningful moments in this story of failures took place when Napoleon, at the end of the 18<sup>th</sup> century, went to Egypt. For the Europeans, for the defeated French Emperor, and for the triumphant Nelson, the encounter with Islam was disappointing. French and English understood that the modernity that they wished to represent was alien to Islamic culture and, besides, Islamic religion seemed to be simple and not original, barely a "mediocre synthesis of Judaism and Christianity."<sup>10</sup> Such vision made a deep impact and remained unchanged for many generations in the West and is still visible today.

For all the Islamic space, particularly for the Sultanate of the Ottoman Empire, the presence of the European army had transcendental consequences. In Turkey, a crisis began and also the political need for starting a long series of reforms (*tanzimat*) that concluded with the empowerment of the "Turkish youngsters," the fall of the Caliphate (1924), and the installation of a secular regime that even denied the tradition of the *sharia*. The traumatic effect of the European presence extended to the whole Arab world, not fully represented by the Ottoman Empire. It was obvious that the technological and scientific advances of Europe were critical of the Islamic

<sup>10</sup> F. López Barrios, *La conspiración de los ulemas*, Madrid, 2008, p. 114.



culture.

As expected, many questions arose and programs for renovation and change were created. It was necessary to discover the causes of the European development and also the pattern of its cultural elements. There were not many initiatives, but the ones that appeared were highly qualified. We only have to remember the movement known as *nahda* in Lebanon; the Study Commission of Rifaat Tantawi in Egypt; the names of persons as important as the Iranian Al-Afgani or the Egyptian Muhammad Abduh, etc. These reformist initiatives of the 19<sup>th</sup> century wanted to awake the critical spirit that they considered inherent to the Islamic culture.

In summary, these and some other initiatives were the only cultural phenomenon in the history of Islam that bear some resemblance to the process known as Enlightenment in Western thought. The Islamic reformists of the 19<sup>th</sup> century said that there was nothing in their culture or their religion that was opposed to the development of science and technique unless the ethical and moral consequences of that development were against the old traditions. Islam, Muhammad Abduh wrote, implies beliefs and wisdom that give identity to the whole Islamic community, and thus these should be scrupulously respected, because “making things that way we will not need much time to take the Arab nation from its backward mentality and customs to a superior state of mind.”<sup>11</sup>

Like some of our European thinkers, Abduh understood that the technological and scientific changes that had originated in Europe could find a way into the religious and moral order of his religion. All in all, this was the stance of the reformists of the 19<sup>th</sup> century: technology yes, but without questioning the principles of the Quran. Could that be possible? Since then, this question has been repeatedly asked by all the thinkers of the Islamic tradition and there have been many different answers. Some of them demanded a religious *aggiornamento* (bringing up to date), while others denied that possibility; it is the case of Al-Afgani, for example, who defended a pan-Islamic religious movement that did not despise scientific and technological development. Al-Afgani is still today one of the basic thinkers for the current fundamentalist thought.

Possibly the most spectacular influence that the European culture had on Arab reformism was the adoption of the political idea of nation in the power patterns of the Islamic world. After the fall of the Ottoman Empire, the subsequent disappearance of the Caliphate of Istanbul in 1924 and the military presence in the zone of the victorious powers of the big war of 1914-1918, many political Arab entities became political communities defined by criteria inspired by the European concept of the nation-state.

Since that moment, most of these Arab nations tried to enter modernity through the formation of a strong state made of social entities, more or less autonomous, that were later organized as political parties, a structure also imported from

<sup>11</sup> Ibid., p. 182.



the West. These previous entities were organizations that did not respond to a plural idea of society but were stable structures typical in Islamic society: clans or tribes. The most representative may be the Baaz party (Al Ba'ṯ, rebirth) whose trajectory extends to the present time, both in Syria and Iraq.

Later, in the context of the Cold War, these Arab nation-states adopted a modern political option that was ideologically closer to socialist trends than to Western political models; those states governed with the support of a strong military force. Regarding religion, these regimes understood that the social influence of religious authorities was pernicious for their modernizing projects and thus chose to reduce the public presence of imams and ulamas.

The creator of this model was Atatürk who, among other innovations, rejected the *sharia* as the legal framework for Turkish society. Nevertheless, the best-known example of these models may be the one encouraged by Gamal Nasser in Egypt, which was immediately followed by Ben Bella in Algeria, El Assad in Syria, Burguina in Tunisia and even Gadafi in Libya.

They all have in common the replacement of the pan-Islamic ideal with a trend called pan-Arabism, a political option that was much more secular and more modern. Certainly the pan-Arabic option pretended the political unity of the Arab countries, a difficult and complex challenge that, nonetheless, found a shared goal: not accepting the presence of the state of Israel. It became the *leitmotiv* of all the geopolitical vicissitudes of the area.

However, the secularizing Pan-Arabism, that also pretended to be socialist, placed the *ulamas* in the shadows of social and political marginality. It did not solve the problem of Israel and it could not really deal with the social problems of its populations. Affected by a demographic revolution whose effects continue, the economic growth indexes have not improved the standards of living of the Arab people. Overwhelmed by almost hungry crowds, the secular pan-Arabism has not been able to counteract the wave of pessimism and disenchantment that has invaded all its territories. Besides, far from being solved as the leaders promised, the question of Israel seems to head towards a much more pragmatic reality: the recognition of a state whose reality is becoming undeniable. Since the 1980s, these harsh facts have been the reason for the failure of pan-Arabism and have allowed the discourses of ulamas, of Iranian ayatollahs, of Wahhabism and of the Muslim Brotherhood of Egypt to find the voice that they had lost, a renewed voice multiplied through the means of communication, gaining a publicity that it never had before.

All these groups launched the same message at the same time: modernization, and its social and cultural manifestations, was an imposition of the pre-existing, tyrannical, atheistic West. The solution for the continuous frustrations of the Islamic people cannot be found but in Islam itself. Consequently, the solutions for the problems, not only of the Islamic space, but of the whole world, have to be found in the holy book. The Quran and the doctrine of the Sunnah are then the guides for the



resolution of international problems, so Islam can be seen as the more convenient religion and culture for the future of all humankind.

Thus, all the fundamental human rights—freedom, tolerance, equality, etc.—are Koranic rules wanted and dictated by God. They cannot be mistaken and, in consequence, they must be defended, especially from the ones who, like the sick Western society, despise them. Jihad is then necessary because it is a defensive weapon.

Despite their obvious simplicity, the success of such slogans has been evident. Appealing to the emotions of the masses, many sectors of Muslim society have found in this discourse a redeeming hope. The success of these doctrines, defended by fundamentalist groups, is also due to the intersocial solidarity that these groups have spread among the population and that has helped to reconstruct the social texture, damaged by the successive crisis. Although it is weak, such socioeconomic reconstruction has made possible the recovery of political communities regulated by the Koranic rules and legally defined by the *sharia*.

Under the power of religious authorities, the Muslim crowds receive utopian programs highly charged with messianic content that spread quickly throughout the global space thanks to communication technology. Armed with such ideas and motivated by their saving faith in a future triumphant Islam, whole sectors of this society have turned their backs on secular governments and have recovered the pride in their own religious culture.

Consequently, the old critical spirit of the early times—the *ijtihad*—shows clear signs of decline in social and cultural life of Islamic countries; and the traditional debates, the confrontations of different opinions and ideas that were frequent in many sectors of intellectual life—like universities or cultural centres—have given way to dogmatic situations. Let's analyze an example that comes from Morocco, a country with a clear reformist tradition, and that allows us to weigh the intensity of this phenomenon. When in 1982 the Education Minister, Asedien al Araqui, decided to suppress the teaching of philosophy from all the public universities of the country, the decision caused perplexity in the Moroccan intellectual sectors. In the Morocco of King Hassan, an Islamic country that was close to the EU due to its multiple relations and that sympathized with Western geopolitics, the study of science and philosophy was replaced with the Department of Islamic Studies by a royal decree. Such departments were directed by experts that came from the best-known centres of study of Wahhabism of the Islamic world.<sup>12</sup>

This odd example is not anecdotic, but it shows the intention in recent decades of giving intellectual support to religious movements by giving them institutional power in the education system. This is due to the fact that the role of an “intelligentsia with a mainly scientific training” has been very important in the fundamentalist revolution that has been widespread thanks to the impulse of the revolution of the

<sup>12</sup> Ibid., p. 190.



ayatollahs.<sup>13</sup> Not only ulamas or imams, but also engineers, economists, doctors, etc. were the major figures of the Islamic rearmament of the 1980s. These groups assumed a leading role impelled by the efficient and agile use of technology that they had learned in Western universities. Such technologies and a dynamic use of communication techniques made it possible for these groups to spread a religious message suitable for the Muslim masses that were massively arriving in big cities from rural areas. Thousands of illiterate youngsters suffering from a strong social uprooting had been the victims of the economic and social changes of their own communities, more and more dependent of the demands of the global markets.

Communication technologies, economic development, social neglect and religious hope as a “principle of the subject” in Touraine’s words, that provoke the inevitable protest of the individual against an unbearable social situation often personalized in the West, seen as the Great Satan, are the fundamentals of all the radical programs. Anyway, Islamic fundamentalist trends are created in a world in constant change. For the Muslim youth the changes that they are living are the so-called modernity, a modernity with obvious Western influences that makes them react in contradictory ways, sometimes accepting it and other times rejecting it. The population of these countries feels the need for changes that improve their life conditions and that make them reach the consumption levels of the West and of the high classes of their own societies.

These sectors, led by young, trained elite who know how to manage social networks, are asking for structural changes in their societies. Changes that are specific: democratic reforms, respect for human rights, political participation with public freedom, development of civil society, and capacity to resist social and political corruption. These hopes, despite being divergent in their formulations and origins, may be jointly expressed in a non-excluding way and they have undoubtedly improved the political conscience of many sectors that do not see religious faith as a fundamental element.

Such conscience is the ground for the revolts of the so-called Arab Spring. It is a vision that translates Western moral and political principles to Islamic society, at least regarding political representation. Hala Mustafá, director of Democracy Review, has said, reflecting on the multiple causes of the Tahrir Square events, that the frustrated expectations of a “... young generation exposed to the external influence and the development of technologies”<sup>14</sup> underlie the nature of the movement.

For these generations, the external influence represents the need to have, among other things, non-autocratic political regimes that are exempt from totalitarian ambiguities. They want elected regimes where the people’s will is freely exercised and where the power of families, clans or tribes—incorporated into oligarchies in these countries—can be controlled.

<sup>13</sup> G. Kepel, *Las políticas de Dios*, Madrid 1995, p. 18.

<sup>14</sup> H. Mustafá, director of Democracy Review, Egypt, *Diario El Mundo*, June 15, 2011, p. 56.



External influence also means the need for social politics in which propaganda and governmental sufficiency do not justify its political legitimacy by demagogically claiming an economic growth, based in statistical figures, that forgets developing protectionist politics for large population sectors. This situation is shared by all the countries involved in the revolts. The professional and dynamic youth are then seized by disenchantment and social scepticism. Thus, the path towards a needed modernity is a difficult one, full of obstacles, and desperation dwells in the heart of these societies.

But is the weight of a rigid and bureaucratized cultural tradition what really makes change difficult? The goal of the reforms of the Arab Spring was the establishment of democratic regimes in which human rights and individual freedom were fully guaranteed, but sometimes this is incompatible with the legal and constitutional order imposed by the *sharia*. Then doubts and reservations appear.

Regarding this aspect in Egypt, Mohamed El Baradei, one of the leaders of the events of Cairo, recently said that the goal of the political process that began in Tahrir Square was the establishment of a participatory democracy and a civil rule of law guaranteed by a civil constitution democratically approved. This rule of law would guarantee religious freedom, thus Salafist jihadism would be respected and the Muslim Brotherhood could fully exercise its religious beliefs and cultural programs. Nevertheless, El Baradei added with reservations that such guarantees would only be possible “if they, the Muslim Brotherhood, were ready to work in the framework of a constitution that respects universal values.”<sup>15</sup>

Some doubts arise and it seems necessary to adopt certain precautions. Many of the revolt leaders ask themselves: Is Salafist jihadism prepared to accept the civil constitution suggested by El Baradei? Besides, this is a question constantly asked from the West, that has reservations regarding the compatibility of the *sharia*—in the form it is usually regarded by most ulamas—and the Human Rights Declaration of 1948.

Of course, history determines a major part of the perceptions that we have of the world, but those perceptions do not decide our actions or our future. Islam history has its determining features but they do not have to decide its future; although it is true that the Human Rights declarations that have taken place in the Islamic space have religious origin and most of them find their justification in the Quran and the Sunnah. They are not rights inherent to man as an individual subject to the natural law—law that neither affirms nor denies any link with the law of God. No, in Islam “...there is not a single human right that is not protected by a Koranic verse or a saying of the Prophet.”<sup>16</sup> They are, thus, laws of God dictated for the good government of human society. From the Western point of view such fundamentals

<sup>15</sup> M. El Baradei, *Diario El Mundo*, June 18, 2011, p. 22.

<sup>16</sup> R. Martínez de Codes, *La ley islámica y otros derechos*, R. Loyola Díaz, T. Calvillo y A. Chehbouni (eds.), *Diálogo entre civilizaciones*, México 2010, p. 118.





are structurally religious and, of course, diametrically opposed to the secularization of the West.

However, although the historical trajectory of Islam has repeatedly denied this fact, there are many people who claim, with solid arguments, that there are no structural incompatibilities between the *sharia* and human rights. This perception is being spread among many sectors of the Arab community. Indeed, in the cultural backgrounds of many of the democratic aspirations of the young people that headed the revolts in Egypt and Tunisia there were no insurmountable incompatibilities between the Islamic law and the universal notion of human rights. These young people do not doubt their Islamic identity because, for them, their culture and traditions are part of their identity and being Muslim and defending human rights are perfectly compatible.

But, regarding this aspect, many of them think that it is necessary to make deep reforms. The dynamic of the events that are happening in the turbulent Islamic world shows that many Muslim spirits are experiencing a certain “aggiornamento,” spirits that are very sincere in their faith and that reject the cultural positions of a “non-Islamic modernism” defended by some intellectuals of Islamic origin who live in Western countries. For them—maybe the most representative name of this trend is Mohamed Arkoun—the modernization of the Muslim world, following the steps of the West, needs to reduce religious beliefs and doctrines to the space of the cultural traditions. Arkoun and his followers think that Islamic faith has to describe a trajectory that places it in the private life or in the internal space of the community, while its cultural aspects (holidays, fasting, etc.) would serve as a mechanism to maintain the identity cohesion of the community. This is a vision that, with more visibility in Europe, wants to make Islamic culture a part of the public space. Arkoun’s stance has been much debated and even supported by some sectors of the political and economic oligarchy of some Arab countries.

Stances like this, accused of being servile to the world of modernity, spark off reticence among the professional and intellectual sectors of the Arab countries, because they honestly think that it is possible to access modernity from the Islamic stances, without having to submit to Western patterns. Among them, it is worth highlighting Professor Mohamed Talbi because of his intellectual soundness and prestige in the Arab world. This admired Tunisian professor declares himself deeply Muslim in his faith, his convictions and religious practices. He does not hesitate to criticize the “non-Islamic modernism” and its followers, whom he accuses of extreme frivolousness.<sup>17</sup>

Expressing his contempt for these intellectuals, Talbi orders them to stop calling themselves Muslims because they actually practice a practical atheism or a justifying agnosticism. Talbi categorically writes that nothing can be expected from these

<sup>17</sup> M. Talbi, *Humanisme du Coran. Humaniser la charia. Lecture vectorielle du Coran et de la tradition*, in *Umanesimo Latino e Islam*, quote in p. 107.



thinkers that makes possible a real modernization of Islam.

To achieve such a goal, a precise, complex and difficult path has to be designed: a rigorous reading of the *sharia* must be made, given that the current manifestations of this law have no chance of being applied in its wholeness in most Arab countries. Indeed, Talbi says, in the political and cultural realities of most Islamic countries, the *sharia* poisons the life of Muslim communities and paralyzes progress, because all the possibilities offered by the law remain unexplored. Of course, ulamas and fakirs, settled into their privileges and accommodated in their alliances with political power, are the ones who have kidnapped all the possibilities of development of the *sharia*. Thus, it is urgent to rethink the Islamic law “in the sense of its humane aspect, its modern potential and the legitimacy of its reformulation. This endeavor is far from moving away from the will of God or from betraying its spirit. It actually fosters respect in accordance with the spirit of the Qur’an and the guidance it provides.”<sup>18</sup>

Professor Talbi shows an unlimited confidence in the possibilities of the Koranic Law to make its way into the world. What is more, without that openness the *sharia* does not deserve its name because the Quran is an open book that claims to be a guide. It is a way. As such, the holy book cannot find any obstacle and its doctrine cannot be stopped. Such vectorial reading of the Islamic law makes the whole assumption of its principles possible, in accordance with the Quran: “The Universal Declaration of human rights, particularly article 18 on freedom of conscience, including freedom to change one’s religion or freedom not to have one.” Talbi expresses himself categorically, overcoming the reticence of jurists and even going beyond the most advanced ideas about human rights ever expressed in the Arab world. Talbi is not a jurist or an ulama and has never had a political position, but his authorized voice is listened to with respect in many influential circles of the Arab world and, although his opinions may be peculiar, some of his disciples dare to adopt even more modern stances.

Of course, Talbi and his school never use the terms *secularization* or *laicization* in their reflections. The modernization of the *sharia* can be completed with the postulates of the Universal Declaration, but neither secularization nor laicization is a concept that fits in Islam, at least in their Western conception. For intellectuals like Talbi, the notion of *laicism* as it is understood, for example, in France cannot exist in the Islamic culture. Talbi, a Muslim who knows well the French culture, considers that in France the notion of *laicism* means absence of God, as Prevert (1900-1977) said: “Our Father who is in heaven, stay there!” In the secular West, God inhabits spaces so far away that he cannot be heard or he lives in such close and private places that he cannot go out of their narrow borders. Such stances are the result of the particular Western history, of an almost permanent conflict between temporal power and the Church. As I said before, this historical process is alien to Islam, which, unlike Christianity, is obviously not a Church. When the Muslim Prophet died, he left

<sup>18</sup> Ibid., p. 117.



no successor but the guide of the holy book and the tradition of the Sunnah: both are the fundamental grounds of the Umma, the community of believers. That is what Islam is: a community of believers with the spiritual guidance of the Quran—a guide or path, says Talbi, where Allah is always present and expressing his will. Consequently, the absence of God is unthinkable in this belief and, thus, secularization and *laicism* are also unthinkable.

Keeping this in mind, Talbi's School pursues a modernity which the Islamic law does not prohibit but shows a path whose design does not have to be absolute or totalitarian. It has to be a path that reinforces the autonomy of other social or political activities. It is very interesting to see how similar thoughts find social acceptance in wide sectors of the Muslim population, sectors who want deep changes and reforms which are able to finally modernize their societies. These changes, of course, must not copy or depend on Western models.

The West sparks hostility in that world and it is understandable for many objective reasons. History, from ancient to most recent times, gives us hundreds of them. The most erudite sectors of the Arab world know them very well and thus keep on saying that the necessary reforms have to be autonomous and, of course, much different from what they call "The American Project for the Grand Middle East." Many think that the simple presence of such a project implies accepting the contents of an imposed "special democracy."

Such special democracy, defined by the think tank so close to Washington, is highly harmful for their societies and, besides, it provokes multiple irregularities in its application. As Professor Noman Abdel Gany from the Enaba University of Algeria has pointed out, under the notion of "special democracy" it has been allowed "to keep Arab people living under exceptional laws and in the emergency state, governed by the unconstitutional regimes and represented by the invalid parliaments."<sup>19</sup> In fact, the responsibility of the USA or the EU in giving economic, political and military support to regimes characterized by totalitarianism is well-known, a support that these countries consider justified by the need of avoiding the inevitable advance of Islamic fundamentalism.

Those who, as Professor Abdel Gany, think that this is a wrong strategy, consider that the politics of reform have to be in accordance with the social realities of the countries involved. "The countries assert that they will make the reform that is needed by the people and in accordance with each nation's interest, not in compliance with the American orders or the Fund's conditions." It is obvious that the West arouses suspicion among Islamic societies and there are many reasons for such lack of trust. We only have to remember the enduring problem of Palestinian occupation, a wound always open in the Arab memory, the problem of Iraq, the events that took place in Yemen, the frequent tensions in Lebanon, etc. These events cause perplexity and disenchantment everywhere and make Arabs ask themselves about the perma-

<sup>19</sup> N. Abdel Gany, *Human Rights in the Arab World*, Arabic Network for Human Rights, 2004.



ment hostility of the West. This situation gets more poisoned when, after any summit of the Arab League, Arab governments themselves justify the stance of the Western countries and adopt a sickly-sweet discourse about the rights granted to their own populations. Many Arab intellectuals, even the ones that sympathize with the West, consider that pure political cynicism.

It cannot be denied that President Obama's discourse in Cairo in June 2005 provoked a wave of expectancy and hope in all the Middle East.<sup>20</sup> His bet for the defence of human rights as an essential part of the American national security strategy and his support for the changes demanded by civil society were soon questioned when it was clear that these objectives were hardly met. Bahey El Din Hassan, director of the Cairo Institute for Human Rights Studies, has pointed out that the famous discourse was "... a message of engagement with the Arab Governments and the disengagement with the Arab people."<sup>21</sup>

We should not question the political sincerity of Obama's administration that has been a real support for individuals and communities of civil society. It is also true that this support contrasts with the guidelines of official politics; but, in any case, the support of those civil entities which are trying to create cultural networks to defend human rights (especially those of minorities or women) must be acknowledged. And this is not about finding contradictions in the new strategic politics of the USA and the EU in the Islamic space, but about understanding that the construction of a new sovereignty should not imply any action that damages the original cultural structures. And this is what the communities that demanded changes in the Arab Spring are pursuing.

Thus, for example, many Egyptian leaders claim that, although there is only one universal declaration of human rights, this should not discredit the other declarations that, regarding the same subject or asking for changes and reforms, have been made in the Arab world. We all know that the Arab space is complex and to judge such variety by only one standard is a totalitarian reflection, as ignorant as it is intransigent, and reluctant to understand the deep movements of that society.

And while nobody can deny that one of the most powerful forces of the current Arab society is an unstoppable demographic revolution in which young people play the leading role, it also seems true that the democratic goal of giving voice to those communities makes it understandable that they want to keep talking about God in their own terms.<sup>22</sup>

<sup>20</sup> President Obama: "We see that countries that respect human rights and that are governed by the will of the people are more stable, more successful and more secure and that makes them better partners for us in our entire international endeavour." Quoted by T. C. Wittes, *Human Rights in the Arab World*, Carnegie Endowment for International Peace, Washington DC, June 30, 2010, p. 6.

<sup>21</sup> B. El Din Hassan, quoted by T. C. Wittes, *Human Rights in the Arab World*, p. 11.

<sup>22</sup> T. S. Shah, "La democracia está dando voz a todos los pueblos del mundo y estos quieren hablar de dios," Por qué Dios está ganando, *Foreign Policy*, August-September 2006, p. 19.



# PROMOTING RELIGIOUS FREEDOM IN SECULARITY: A LEGAL PERSPECTIVE<sup>1</sup>

DANIEL D. NTANDA NSEREKO<sup>2</sup>

## I. INTRODUCTION

It is an honour to have been invited to address this Conference on “Secularism and Religious Freedom—Conflict or Partnership.” In this paper I shall focus on “Promoting Religious Freedom in Secularity: A Legal Perspective.”

Religion is an intensely personal experience. It has to do with the heart and the inner feelings of the human person. To those who take it seriously, it expresses one of the deepest longings of the human spirit. As the history of the human race so poignantly reveals, many people have readily preferred death to a life that requires them to recant or to compromise their religion. Thousands upon thousands of people have suffered and continue to suffer persecution because of their religion. Thousands upon thousands of people have left their home countries as wanderers and refugees in search of the freedom to practice their religion.<sup>3</sup>

Today I am going to talk about how we can promote religious freedom through law in a world becoming increasingly secular. While I will focus on freedom of religion in Africa, I will also incorporate examples from other continents. First, let us begin by getting a better grasp on what freedom of religion entails.

## II. WHAT IS FREEDOM OF RELIGION?

Freedom of religion is often associated with freedom of conscience or belief. According to the Constitution of Uganda, every person in Uganda “shall have the right” to “freedom of thought, conscience and belief which shall include academic freedom in institutions of learning.”<sup>4</sup>

Freedom of conscience is one of the most fundamental of all freedoms. Accord-

<sup>1</sup> This is paper was presented at a conference on “Secularism and Religious Freedom—Conflict or Partnership?” organized by the International Religious Liberty Association, Punta Cana, Dominican Republic, April 24-26, 2012.

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<sup>3</sup> D. D. Nsereko, “Religious Liberty and the Law in Botswana,” 34 *Journal of Church and State* (1992), p. 845, [hereinafter: “Nsereko, Botswana article”].

<sup>4</sup> Constitution of the Republic of Uganda, article 29(1)(b).



ing to *Collier's Encyclopaedia*, the conscience is the mental faculty or function that distinguishes between right and wrong. It is the force that tells an individual what to do and bids him to do it. According to Christian tradition, conscience is the “the voice of God in the soul directing one to do right.” “Freedom of conscience” then is the right of every individual to follow the dictates of his or her conscience without any inhibition or compulsion. This includes the choice of what being or deity to believe in as well as the right not to believe in one. No wonder then that some constitutions treat freedom of religion as an extension or an aspect of freedom of conscience.<sup>5</sup> The European Convention on Human Rights follows the same path. Thus article 9 of the Convention provides that:

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.

In interpreting this provision, the European Court of Human Rights has said that:

Freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.<sup>6</sup>

Many, if not most, constitutions of democratic societies provide for secular governments. Therefore, it is important to understand what a secular government is and how religion fits into it. We must at the same time distinguish a secular society from a non-secular one as well as a secular government.

### III. SECULARITY

#### A. Secular Society

A secular society is a society in which there is no higher standard than the rules of the society itself; it is a society with no sense of transcendence, no sense of a

<sup>5</sup> Constitution of the Republic of Botswana, section 11(1) provides that the freedom of conscience “includes freedom of thought and of religion, freedom to change his religion or belief and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.”

<sup>6</sup> I. Rorive, “Religious symbols in the Public Space: In Search of a European Answer,” 30 *Cardozo Law Review* (2008-2009), pp. 2672-73, (quoting *Kokkinakis v. Greece*, App. No. 14307/88, 17 Eur. H.R. Rep. 397), [hereinafter: “Rorive”].



higher authority, no sense of God or of a moral standard greater than anything human. The official policy of the state in a secular society is anti-religion. The state and all its organs and institutions are hostile to religion. Religion and religious practices are viewed as anti-social, retrogressive or reactionary. Society does not tolerate them. On the contrary, it combats them with the ultimate aim of completely eradicating them from society. This was the case in communist or Leninist-Marxist states, where religion was considered to be the opium of the people and atheism was the official ideology of the state.

### B. Non-secular Society

A non-secular society, on the other hand, acknowledges the existence of an order that is transcendent over and higher than, temporal orders or authorities. That higher order is God. Society owes its existence and sustenance to God. In return, society also owes its allegiance to God. Declarations, national constitutions and other national emblems bear out this assertion. For instance, the preamble to the Constitution of Liberia begins by asserting thus: "Acknowledging our devout gratitude to God for our existence as a Free, Sovereign and Independent State and relying on His Divine Guidance for our survival as a Nation." Uganda's coat of arms also pledges: "For God and my country," and in the national anthem, the citizens commit the country to God when they sing: "Oh Uganda! May God uphold thee, we lay our future in thy hand." Similarly, the United States currency bears the words: "In God we trust."

The problem arises, however, when it comes to identifying the God that we idolize in these national documents and emblems. For instance, in Uganda, we are traditionally a polytheistic society. Even in these days of monotheism, there would still be difficulties of how to relate to or to worship this one God. This is so because religion or conscience is an intensely personal affair or phenomenon. As we say in the Luganda language, "*Lubaale maliba: buli afuluma alyambala bubwe*," which means God or a deity is like an apparel: every individual wears it in his or her own way. You may prefer it long or short, in this or that style, in this or that colour, and made from this or that fabric; it is all a matter of personal, free choice. We also say: "*Emmeeme katale: kye eyagala kye egula*," which means that conscience is like going to the market: you have a choice of what to buy. Different people may and frequently willy-nilly choose different things. They have the right to choose and the state through its government must protect that right. It is a fundamental and inalienable right.

### C. Secular Government

Consequently, societies which value the individual's right to freedom of conscience opt for a form of government that is neutral in matters of religion. Such a government is not to be run along religious dogma, let alone the dogma of any one





religious denomination. Though neutral in matters of religion the government is not hostile to it. On the contrary, it assumes a positive, friendly, tolerant and supportive stance toward religion generally. Its neutrality is thus benign. In this kind of polity the government also assumes the responsibility to enact and enforce laws that ensure that citizens realize their freedom of conscience and religion along with their other fundamental rights. This is what we understand by the term “secular government.” I must nevertheless emphasize that under a secular polity, it is the state as a corporate entity and its government and institutions that are secular as described above, and *not* the individual citizens. In elaborating on this concept, Dr. Radhakrishnan, former President of India, a state whose constitution proclaims that India is a “Sovereign Socialist Secular Democratic Republic,” said as follows:

When India is said to be a Secular State, it does not mean that we reject the reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that secularism itself becomes a positive religion or that the State assumes divine prerogatives. ... We hold that not one religion should be given preferred status. ... This view of religious impartiality, or comprehension and forbearance, has a prophetic role to play within the National and International life.<sup>7</sup>

From Dr. Radhakrishnan’s statement, we can deduce that separation of church and state is one of the defining characteristics of a secular state or government. In countries where there is separation of church and state, the two institutions exist for different though complementary purposes. They operate in separate domains: the state in the secular domain and the church in the spiritual domain. They are organized and administered separately. The state is administered according to its constitution and laws; the church is administered according to its constitution, laws, teaching, and traditions. Neither institution involves itself in the governance or administration of the other. The Constitution of Senegal neatly captures this aspect of church-state relations when it provides that:

The religious institutions and communities have the right to develop themselves without hindrance. They are free of the oversight [*dégagés de la tutelle*] of the State. They regulate and administer their affairs in an autonomous manner.<sup>8</sup>

Thus, neither the church nor the state meddles in the internal affairs of the other.

<sup>7</sup> P.M. Bakshi, *The Constitution of India* (Universal Law Publishing Co., 9<sup>th</sup> ed. 2009, Delhi), p. 3, (citing *Recovery of Faith*, p. 184).

<sup>8</sup> Constitution of the Republic of Senegal, article 19. *See also* article 14 of the Constitution of the Republic of Guinea, which provides that “The free exercise of religious sects shall be guaranteed. Religious institutions and communities freely create and administer themselves. They shall not be subject to the tutelage of the State.” Similarly, article 23 of the Constitution of the Republic of Benin provides that “The institutions and the religious or philosophical communities shall have the right to develop without hindrance. They shall not be subject to the guardianship of the State. They shall regulate and administer their affairs in an autonomous manner.”



Organs of the state, in particular, do not intervene in the internal disputes within a denomination. Those disputes must be resolved by the denomination itself in accord with its constitution, laws, teachings and traditions. The only time when state organs would be justified to intervene is where the disputes threaten the order, peace and safety of the state. The denomination, too, does not involve itself in partisan politics, or try to impose its dogma on the state.

Virtually all French-speaking and Portuguese-speaking African states proclaim in their constitutions that they are secular states. At the same time, they guarantee free exercise of religion. Few constitutions of English-speaking African countries have similar provisions. Namibia declares itself to be “a sovereign, secular, democratic and unitary State.” Additionally, Liberia, most likely because of its past association with the United States, has a more expansive provision. It reads, in part, thus:

No religious denomination or sect shall have any exclusive privilege or preference over any other, but all shall be treated alike; and no religious tests shall be required for any civil or military office or for the exercise of any civil right. Consistent with the principle of separation of religion and state, the Republic shall establish no state religion.<sup>9</sup>

Ideally, separation of church and state enables religion to develop and thrive without the corrupting influence of the state. It ensures equality of treatment. It enables the church to play its prophetic role, that Dr. Radhakrishnan alluded to, of witnessing to the state, particularly on the momentous matters of peace, justice, freedom and human rights, without inhibition. It also enables religious leaders to concentrate on spiritual matters for the good of their followers. Similarly, representatives of the state can concentrate on temporal matters for the good of all the members of the community irrespective of their religious affiliation. In an era of pluralism, separation of church and state appears to be the best model for protecting freedom of religion.

In the remainder of this talk, we will look at how successful or unsuccessful different states have been in applying the principle of separation of church and state to promote religious freedom. In so doing, we will define the roles each level of government plays in promoting religious freedom. We begin with the role of the constitution, then address the legislature and the judiciary.

#### IV. ROLE OF THE CONSTITUTION

What is the role of the constitution in protecting human rights? It does not grant human rights to the individual. It merely recognizes them and provides a mechanism for their enforcement. One might ask, why not use an ordinary Act of Parliament? What is so significant about the constitution?

The constitution is the supreme law of the land. It is superior to all other laws.

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<sup>9</sup>Constitution of the Republic Liberia (1986), article 14.



Indeed, all other laws owe their existence to it. Any law that is inconsistent with it is null and void to the extent of the inconsistency. It proclaims those fundamental principles which the people cherish and consider pivotal to the country's political system. Every principle enshrined in it is of an enduring and abiding value. Therefore, it is important to *entrench* the freedom of religion in the constitution.

What is entrenchment? Entrenchment means to establish firmly; to safeguard; or to accord special protection in such a way that what is protected cannot be easily removed or altered. An entrenched provision therefore is a constitutional provision that cannot be repealed or amended except under more stringent conditions than those that are used to repeal or amend ordinary provisions. Entrenchment then may be likened to putting multiple locks and other security devices on a door in order to secure it against easy ingress into a room by intruders.

The constitutions of Namibia and Ghana provide good examples. In Namibia, given that country's past experience of oppression under apartheid, the constitution outrightly forbids any amendment to Chapter 3 of the constitution, which deals with fundamental rights and freedoms.<sup>10</sup> In Ghana, the constitution singles out certain provisions as "entrenched provisions," including those relating to fundamental human rights and freedoms.

The benefit of entrenching religious freedom in the constitution is that it acquires an elevated status, higher than an ordinary Act of Parliament, and it becomes enforceable through the courts. Enforceability of rights takes them away from the realm of mere slogans, often found in party manifestoes and in communist-type constitutions. As is often said, rights without enforcement are like shadows without substance.

## V. ROLE OF THE LEGISLATURE

After ensuring that freedom of religion is enshrined and entrenched in the Constitution, the legislature steps in to transform general principles into specific statutes.

## VI. ROLE OF THE JUDICIARY

The judiciary also plays a vital role in promoting religious freedom. While the constitution and laws may declare that all people have the freedom of religion and that the government should incorporate the principle of separation of church and state, these words are meaningless until the courts interpret them.

### A. Defining Freedom of Religion and the Secular State

Human rights generally, and the freedom of religion particularly, are often formulated in broad and sometimes indefinite terms. For example the Constitution of Namibia merely states that "All persons shall have the ... freedom to practise any religion and to manifest such practice."<sup>11</sup> It does not say what manifesting or

<sup>10</sup> Constitution of the Republic of Namibia, article 131.

<sup>11</sup> Constitution of the Republic of Namibia, article 21(1)(c).



practising a religion entails. Similarly, the Constitution of Uganda merely provides that “Uganda shall not adopt a State religion.” It does not enumerate what practices amount to “adoption of a State religion.” In fairness, though, constitutions cannot exhaustively spell out all the ramifications and nuances of the freedom of religion or of the principle of separation. It is the function of the courts to put flesh to the bare bones of the constitution and to breathe life and meaning to its provisions according to the lights of the day. For example, the courts of various countries interpret the term *secular* differently, according to their historical experiences. Thus the courts in Italy do not see any incompatibility of having crucifixes in public school classrooms with the principle of secularism.<sup>12</sup> Those of Germany and Switzerland, on the other hand, consider them to be incompatible.<sup>13</sup>

## B. Limitation on Freedom of Religion

Judges also play a vital role in defining the limitations of religious freedom. It is the role of the courts to oversee that laws restricting the right to manifest one’s religion are legitimate. Many states have put restrictions on a person’s right to manifest their religion on the basis that the infringement of that right was “necessary for a democratic society.” Nevertheless, what is acceptable in a democratic society is not always easy to define. For example, in 1977 President Idi Amin of Uganda proscribed all religious denominations in the country with the exception of Moslems, Catholics, Anglicans and Greek Orthodox. The basis for this horrendous action was that there were too many religions in the country and this was conducive to national unity.<sup>14</sup> Admittedly, Amin’s Uganda was not a democratic society. But would other democratic societies accept the reasons that Amin gave to deny his people their freedom of religion as valid? On this point one finds as instructive Malawi’s constitutional provisions on the subject. According to the Constitution of Malawi, the laws restricting a guaranteed right must be “recognized by international human rights standards and necessary in an open and democratic society.”<sup>15</sup>

While Malawi’s provisions are salutary in that they give the courts a broader scope for interpreting “democratic society,” they are not entirely without problems. For instance, what is acceptable in “an open and democratic society”? The European controversy over Islamic veil cases provides a good example.

The European Court of Human Rights (ECtHR) has upheld all bans on Islamic veils in public education in cases brought before it. Six concerned students and six related to teachers. While it stated that a “State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of

<sup>12</sup> Ibid., p. 2633, (quoting TAR, Mar. 17, 2005, n.1110, para. 16.1).

<sup>13</sup> Ibid., p. 2640.

<sup>14</sup> See D. D. Nsereko, “Religion, the Law and the State in Africa,” 28 *Journal of Church and State* (1986), pp. 268-287

<sup>15</sup> Constitution of the Republic of Malawi, article 44(2).



religious beliefs or the ways in which those beliefs are expressed;<sup>16</sup> the court has also held that “States are best placed for judging when the interference on religious freedom is necessary in a democratic society and therefore must be granted a wide margin of appreciation.”<sup>17</sup> Accordingly, the role of the ECtHR has been subsidiary, simply deferring to the state’s judgment.

### C. Preventing Discrimination (Principle of Accommodation)

In discharging their responsibility, courts must be particularly sensitive to protecting the rights of members of minority groups; for by belonging to minority groups, these people are already disadvantaged. They are often forced to forego or compromise conscientiously held religious scruples in order to claim benefits that are enjoyed by members of majority groups. Yet, as Thurgood Marshall of the U.S. Supreme Court has emphasized, “a society that truly values religious pluralism cannot compel adherents of minority religions to make the crude choice of surrendering their religion or their job [or benefits enjoyed by other citizens].”<sup>18</sup>

Applying the principle of accommodation<sup>19</sup> would go a long way in allowing members of minority groups to practice their religious beliefs and in preventing discrimination against them. That principle requires employers, government and other institutional administrators to make special arrangements to enable employees, students or other persons affected who belong to minority religious groups to continue to enjoy benefits that others enjoy without having to forego their religious tenets. The duty is discharged when the employers or institutional administrators and others in authority make reasonable attempts to make such arrangements.<sup>20</sup> However, if they can show to the satisfaction of the court that the arrangements will be too costly or will unduly hamper the proper functioning of their business or institution, they are excused from making such arrangements.

The Supreme Court of Uganda attempted to apply this principle, albeit half-

<sup>16</sup> Rorive, *supra* n. 4, p. 2684, (quoting *Sahin*, 44 Eur. H.R. Rep. 5, para. 107).

<sup>17</sup> Mancini, *supra* n. 21, pp. 2656-57.

<sup>18</sup> *Transworld Airlines, Inc. v. Hardison* 63 (1976), dissent.

<sup>19</sup> See, for example, *Sherbert v. Verner*, 374 U.S. 398 (1963). But see *Transworld Airlines, Inc. v. Hardison*, *supra* n. 42.

<sup>20</sup> The following are examples of such arrangements by American universities to accommodate students who are unable to participate in school activities because of religious tenets. In its 1997-98 Bulletin, Columbia University Law School, New York, under a section titled “University and Law School Regulations” and the subheading “Religious Holidays,” states that: “It is the policy of the University to respect its members’ religious beliefs. In compliance with the New York state law, each student who is absent from school because of his or her religious beliefs will be given an equivalent opportunity to register for classes or make up any examination, study, or work requirements that he or she has missed because of such absence on particular day or days. No student will be penalized for absence due to religious beliefs and alternative means will be sought for satisfying the academic requirements involved.”

Similarly, in a memorandum dated August 1, 1997, the Associate Provost for Faculty Affairs at the University of Maryland stated that: “The policy of our university and of the University Systems of Maryland states that students should not be penalized in any way for participation in religious services. We now enrol students of many religions, and I ask that you be sensitive to their requests for excused absences and make-up exams for reasons of religious absence. Students should be informed that they are responsible to give the instructor notice of intended religious observance by the end of the scheduled assignment period.”



heartedly, in a case against Makerere University.<sup>21</sup> In that case, students who were members of the Seventh-day Adventist Church challenged the university's requirement that students attend lectures and sit for exams on any day of the week, irrespective of the students' religious beliefs. The students asked school administrators to reschedule the exams or allow the students to take it Saturday evening after Sabbath was over, but the school refused. It stated that "it was a secular University which could not cater for particular religious groups, given its limited physical facilities and huge financial costs involved."<sup>22</sup>

The Supreme Court of Uganda upheld the university's policy in part because they found the university had offered the students "reasonable accommodation" by allowing them to retake exams and courses missed when they were next offered. The Court agreed with the university's contention that the further accommodations requested by the students would create an "undue hardship" on the university. It would appear, however, as the students' pointed out, that the Court simply took the word of university administrators regarding the costs of accommodation without requiring proof. By not requiring proof of undue hardship, courts can thus give institutions an easy way out of their duty to accommodate, making the principle ineffective.

The principle of accommodation could also be applied to the issue of dress, either as a uniform for school children or the police or as dress code for lawyers. For example, in the Zimbabwe case of *Re Chikweche*,<sup>23</sup> a Rastafarian lawyer was initially denied the right to practise his profession because he wore dreadlocks, a symbolic expression of the Rastafarian religious belief.<sup>24</sup> He was considered not to be "a fit and proper person" allowed to appear in the courts because he was "unkempt and not properly dressed," as is required of all members of the legal profession. Thanks to the liberal and open attitude of the Zimbabwean Supreme Court, the lawyer was admitted to practise with his dreadlocks. According to Gubbay CJ,

Refusal by the [trial] judge to entertain the application placed the applicant in a dilemma. Its effect was to force him to choose between adhering to the precepts of his religion and thereby foregoing the right to practise his profession and appear before the courts of this country, or sacrifice an important edict of his religion in order to achieve that end.<sup>25</sup>

Similarly, and in contrast to the veil cases in Europe, the Constitutional Court of South Africa struck down a school's ban on wearing jewellery because it had the

<sup>21</sup> *Dimanche, Mokera, and Nansereko v. Makerere University*, Supreme Court of Uganda, Constitutional Appeal No. 2 of 2004 [hereinafter: "Makerere University case"].

<sup>22</sup> *Ibid.*, p. 3.

<sup>23</sup> Law Reports of the Commonwealth (1995), p. 93.

<sup>24</sup> The Rastafarians justify the wearing of dreadlocks on the Book of Numbers 6:5, which provides that "All the time of his separation no razor shall pass over his head, until the day be fulfilled of his consecration to the Lord. He shall be holy, and shall let the hair of head grow."

<sup>25</sup> Law Reports of the Commonwealth (1995), p. 100.



potential for indirect discrimination. A schoolgirl was not allowed to wear her nose stud, which was part of her South Indian Tamil Hindu culture and religion. The court held that the rule allowed certain groups of learners to express their religious and cultural identity freely, while denying others that right. Therefore, it amounted to discrimination.<sup>26</sup>

The Constitutional Court of South Africa also has promoted freedom of religion in issues of marriage by allowing Muslim widows in polygamous marriages to benefit from intestacy laws, which had discriminated against them on grounds of religion, marital status and gender.<sup>27</sup>

## VIII. CONCLUDING REMARKS

It is highly advantageous to entrench in the Constitution provisions that guarantee human rights in general and the freedom of worship in particular. This is because of its elevated status. Additionally, in today's pluralistic world, it is vital that such provisions provide for separation of church and state. Religion is safer when it is free from the corrupting influence of the state, which accompanies entanglement with it. Nevertheless, it is submitted that constitutional provisions in and of themselves are not enough to protect freedom of religion.

Therefore, in addition to formal constitutional provisions, there must exist in any given country a constitutional culture to serve as the bulwark for those provisions. A constitutional culture is one where the rulers voluntarily accept restraints on their powers; where the majority recognize and respect the rights and interests of the minority; where there is tolerance for opposing views; and where human rights and the rule of law form part of the people's daily experience. In the absence of such a culture, constitutional provisions, as we have demonstrated, are not worth the paper they are written on. On the other hand, where a constitutional culture exists, paper provisions are of secondary importance, since their essence is inscribed on the hearts of the people and embedded in their culture.

Additionally, since courts play such a vital role in watching over and enforcing human rights, their independence and impartiality is of monumental importance. Oftentimes when public opinion is cowed or numbed, when all voices of dissent are silenced and when all avenues of recourse are closed, courts remain the last bastions in the defence of liberty. Therefore, judicial independence must be guaranteed and jealously guarded. Additionally, the men and women who staff the courts must be supported by the public. They must also be educated and sensitized on existing international norms and standards on the freedom of religion.

Lastly, it must be emphasized that freedom of religion is but one of the many fundamental rights of the individual. Each one of those rights constitutes a link in

<sup>26</sup> Constitutional Court of South Africa, MEC for Education: *KwaZulu-Natal and Others v. Pillay*, Case CCT 51/06, October 5, 2007.

<sup>27</sup> *Fatima Gabie Hassam v. John Hermanus Jacobs NO and others (with the Muslim Youth Movement of South Africa and the Women's Legal Centre Trust as amici curiae)*, CCT 83/08, July 15, 2009.



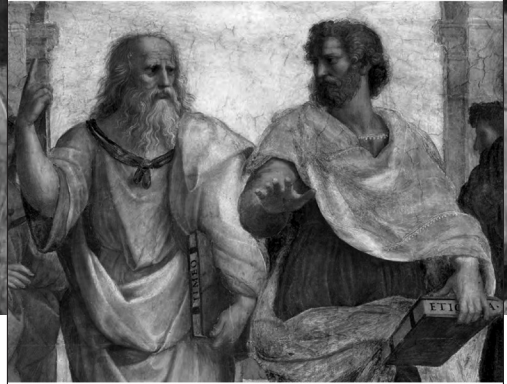


a chain of inextricably entwined rights. If any one of them breaks the whole chain will come asunder. Therefore freedom-loving people everywhere must be sensitive and be vigilant to ensure that all human rights are respected and observed by all governments everywhere and at all times. The same dictators who violate the right to life, the right of assembly and association, the right to freedom of expression and the right to participate in one's government through a free and fair election will not hesitate, when it is convenient, to trample underfoot the freedom of religion. As Abraham Lincoln so well put it, "Perpetual vigilance is the price of liberty."



Jaime Contreras Contreras  
Rosa María Martínez de Codes  
(eds.)

## Trends of Secularism in a Pluralistic World



Iberoamericana / Vervuert

**The tension and interaction between notions such as secularity, secularism, secularization, neutrality of the state, “wall of separation,” and other such similar concepts on the one hand, and, on the other, religion, religious communities, religious autonomy, religious expression, and the like, constitute the general subject of this book.** The editors and contributors have made an effort to illuminate from different perspectives the fascinating problems and conflicts that the increasingly dramatic role of religion in modern international life engenders. Such issues are global as well as particular, worldwide as well as domestic. The modern state, a secular organization on the whole regardless of the form of relationship with religion that it adopts, must produce answers acceptable to the majority of its population that do not hurt the rights of minorities not sharing the predominant faith. This book explores some of the major situations demanding the attention of all sectors of the pluralistic world that is currently evolving.

Natan Lerner, *Interdisciplinary Center Herzliya, Israel*

**Available at Amazon.com; Silvermineinternational.com;  
or by calling 203-451-2396.**



# WHY PROTECT RELIGION?<sup>1</sup>

BARRY W BUSSEY<sup>2</sup>

## I. INTRODUCTION

First, let me welcome you to Toronto. In many ways the City of Toronto is a miniature version of New York City in that you can walk the streets for five minutes and you will hear five different languages. Diversity and tolerance is a description that Torontonians and Canadians in general take pride in—or we like to think so. However, with diversity there are flashpoints of disagreement—one of those is religious expression.

While Canada is becoming more diverse in terms of its religious make up, it remains a country in which the majority are Christian. Statistics Canada reports:

- By 2031, the number of people having a non-Christian religion in Canada will almost double from 8% of the population in 2006 to 14% in 2031.
- The proportion with a Christian religion will decline from 75% to about 65%.
- The share with no religion will rise from about 17% to 21%.
- Within the population having a non-Christian religion, about one-half will be Muslim by 2031, up from 35% in 2006.<sup>3</sup>

Given that 75% of the population is currently Christian, it is not surprising to find that there are common understandings of what religious expression is acceptable to the majority and what is not. Many Christian rituals and holidays are not only acceptable, but they are built right into the schedule of civil society. Christian holidays such as Christmas and Easter, for example, remain days when both civil and government offices close.

However, with increasing numbers of immigrant religious practices making their way into the Canadian mosaic there are challenges. The majority mainline Christian population is often unfamiliar with the new immigrant groups and their religious practices. The law is forced to deal with these unaccustomed religious practices and seek to find a balance of the competing interests. For example, the Supreme Court

<sup>1</sup> While this paper has been revised for publication, much of the flavor of the spoken version is retained.

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<sup>3</sup> <http://www.statcan.gc.ca/daily-quotidien/100309/dq100309a-eng.htm>.



dealt with a Sikh student demanding the right to express his faith by wearing a *Kirpan*, a ceremonial dagger knife, to school.<sup>4</sup> The court ruled in his favour, though with a number of stringent conditions including that the knife must be sewn on the inside of his clothing. The Court struggled with the Hutterites insistence that they be exempt from the photograph requirement for the Alberta driver's license. The Hutterites refused the photo because they saw it as a violation of the 2<sup>nd</sup> Commandment—not to make any graven images.<sup>5</sup> The Court deferred to the Alberta government and refused the religious exemption on the ground that the Hutterites still could follow their faith without the privilege of driving—they could hire a taxi.

To help alleviate the fear of the foreigner it would be helpful if politicians would join the forces of integration rather than taking advantage of religious prejudice to advance their political careers. Unfortunately that is wishful thinking.

Currently there is an election campaign in the Province of Quebec. The Parti Québécois has as its campaign slogan, “À nous de choisir,” (For us to choose). The increased emphasis is on the *nous*, meaning the Quebecois. Last week the PQ leader Pauline Marois announced that if she is elected Premier she will implement a Charter of Secularism. Her new Charter will prohibit government employees from wearing “conspicuous religious signs.” Exactly what those signs will be is not stated; however, we can expect that the Muslim headscarf, or *hijab*, the Jewish skullcap, or *yarmulke*, and the Sikh ceremonial dagger, or *kirpan*, may be among the prohibited signs.

While removing the religious signs of the new immigrants Marois specifically says that she will not get rid of the Christian symbols—such as the crucifix—because they are part of Quebec's cultural heritage. “We do not have to apologize for being who we are,” she stated. “I believe that Quebecers have a much deeper attachment to the religious symbols that allowed the Quebec people to survive on American soil.”<sup>6</sup> The religious symbols she has in mind, of course, are those symbols of the Roman Catholic Church.

Given the increased rate of immigrants coming to this country and bringing with them new religious expressions, there is bound to be increased litigation as these newcomers find their niche in Canada. Such increased scrutiny in the law's relationship with religion has intrigued me for some time. The question as I see it is not “Why protect religious expression?” but rather, “Why does religion merit special protection of the law in the first place?” It is a fundamental question.

## II. WHY DOES RELIGION MERIT SPECIAL PROTECTION OF THE LAW?

Over the last several years I have been studying the law's protection of religion.

<sup>4</sup> *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256.

<sup>5</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567.

<sup>6</sup> <http://fullcomment.nationalpost.com/2012/08/14/graeme-hamilton-pauline-marois-two-tier-secular-vision-for-quebec/>.



The more I study the question, “Why does religion merit special protection of the law?” the more questions I seem to be finding. At this stage it has virtually consumed my academic endeavour.

The *Canadian Charter of Rights and Freedoms*<sup>7</sup> protects freedom of religion. “[O]nly beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held” are protected under the *Charter*’s freedom of religion.<sup>8</sup> Why? What is it about that category of beliefs and practises falling under the rubric *religion* that justified differential treatment from the non-religious beliefs and practises? Why, for example, should the law require workplace accommodation of holy day observance,<sup>9</sup> where a day off for religious practise is protected but a day off to attend a political rally would not be; also consider religious garb in school,<sup>10</sup> where wearing a ceremonial dagger or knife in accordance with religious belief is protected but wearing a knife for other reasons would not be tolerated. Is it defensible for a modern liberal democratic society, such as Canada, to continue treating freedom of religion as being unique? Or, can religion’s protection be adequately addressed by more general protections of other rights such as equality or speech? Is religion’s protection an anachronism—a quirk of history that is no longer applicable in our multi-cultural society? These are among the questions that I have been asking in my proposed PhD dissertation as I investigate the rationale for extending specific rights-based protection to religion.<sup>11</sup>

The fact that the law protects freedom of religion suggests that the law (indeed society at large) had, at one point, some theory or account of why religion was given such significance. For why else would the law specifically include religion as a protected category if it did not understand its importance? Modern society must now make sense of this legacy to ensure that there is an adequate explanation for the current context. It will require significant resources from legal and political theory to develop answers and a clear rationale for any reasonable citizen to see the justification for religious protection.

It is curious that in *jealously*<sup>12</sup> guarding the freedom of religion the Supreme Court of Canada (SCC) has not yet seen fit to articulate an explanation as to the continued relevance of such protection. Such reticence may suggest that the SCC itself does not understand why the law would continue to grant religion a special status in a liberal democracy. The court’s reticence may also explain why its interpretation of religious freedom protection has been narrowing of late.<sup>13</sup>

<sup>7</sup> *Canadian Charter of Rights and Freedoms*, Part I of The Constitution Act, 1982, enacted as Schedule B to the Canada Act 1982, (U.K.) 1982, c. 11, which came into force on April 17, 1982.

<sup>8</sup> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, para. 39.

<sup>9</sup> *Ontario Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536.

<sup>10</sup> *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256.

<sup>11</sup> I am hoping to be able to commence the PhD dissertation in the fall of 2013.

<sup>12</sup> *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, paragraph 53.

<sup>13</sup> Mike Madden, “Second Among Equals? Understanding the Short Shrift that Freedom of Religion is Receiving in Canadian Jurisprudence,” (2010) 7: 1 J.L. & Equality, pp. 57-88.



Without appreciating the reason why religion is to be jealously guarded, the SCC risks the failure of continuing a robust protection of religious freedom when other claims seek to take predominance. It is argued that such a process has already begun. Increasingly religious freedom loses in the balancing of rights exercise that has become commonplace. The dissertation is meant to join the conversation in the search for understanding what, if anything, it is about religious belief and practise that requires special treatment in Canadian rights protection instruments, constitutional as well as statutory.

The literature that addresses the Canadian protection of religion is relatively sparse. While there is some, it has not been a robust or a sustained discussion.<sup>14</sup> By far the lion's share of debate has centred on the United States context.<sup>15</sup> The U.S. debate, not surprisingly, has concentrated on the interaction between the two clauses in the First Amendment of the U.S. Constitution.<sup>16</sup> The principles discussed in the U.S. commentary have some bearing on the Canadian context; however, the fact

<sup>14</sup> Benjamin L. Berger, "The Cultural Limits of Legal Tolerance," (2008) 21 Can. J. L. & Jurisprudence 245; Benjamin Berger, "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State," (2002) Can. J. L. & Soc. 39; Benjamin L. Berger, "Law's Religion: Rendering Culture," in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008), 264; Paul Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond," (1996) 54 U. T. Fac. L. Rev. 1-64; Mike Madden, "Second Among Equals? Understanding the Short Shrift that Freedom of Religion is Receiving in Canadian Jurisprudence," (2010) 7:1 J. L. & Equality 57-88; Jonathan Chaplin, "Beyond Liberal Restraint: Defending Religiously-Based Arguments in Law and Public Policy," (2000) 33 U.B.C. L. Rev. 617-646; Lorenzo Zucca, "The Place of Religion in Constitutional Goods," (2009) 22 Can. J. L. & Juris. 205-219; Bryan Thomas, "Secular Law and Inscrutable Faith: Religious Freedom, Freedom of Conscience, and the Law's Epistemology," [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1275351](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1275351).

<sup>15</sup> Avihay Dorfman, "Freedom of Religion," (2008) 21 Can. J. L. & Juris, pp. 279-319; Timothy Macklem, "Faith as a Secular Value," (2000) 45 R.D. McGill, pp. 1-63; Anthony Ellis, "What Is Special About Religion?" *Law and Philosophy* (2006) 25:219-241; Christopher L. Eisgruber and Lawrence G. Sager, "The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct," (1994) 61 U. Chi. L. Rev. 1245; Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge: Harvard University Press, 2007); Paul Horwitz, *The Agnostic Age: Law, Religion, and the Constitution* (New York: Oxford University Press, 2011); Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008); Douglas Laycock, "Liberty as Liberty," (1996) 7 J. Contem. Legal Issues, 313; Mark Tushnet, "The Redundant Free Exercise Clause?" (2001-2002) 33 Loy. U. Chi. L.J. 71; Tore Lindholm, W. Cole Durham, "Do We Need the Right to Freedom of Religion or Belief," Paper presented at the Norwegian Centre for Human Rights, Oslo, Norway, May 25, 2011; Brian Leiter, "Why Tolerate Religion," (2008-2009) 25 Const. Comment. 1; Brian Leiter, "Foundations of Religious Liberty: Toleration or Respect?" (2010) 47 San Diego L. Rev. 935; Dieter Grimm, "Conflicts between General Laws and Religious Norms," (2009) 30:6 Card. L. Rev., 2369; Micah Schwartzman, "What if Religion Isn't Special," <http://ssrn.com/abstract=1992090>; Andrew Koppelman, "Is It Fair to Give Religion Special Treatment?" (2006) U. Ill. L. Rev. 571; Andrew Koppelman, "How Shall I Praise Thee? Brian Leiter on Respect for Religion," (2010) 47 San Diego L. Rev. 961; Steven G. Gey, "Why Is Religion Special? Reconsidering The Accommodation of Religion Under the Religion Clauses of the First Amendment," (1990-1991) 52 U. Pitt. L. Rev. 75; E. Gregory Wallace, "Justifying Religious Freedom: The Western Tradition," (2009-2010) 114 Penn St. L. Rev. 485; Steven D. Smith, "Discourse in the Dusk: The Twilight of Religious Freedom?" <http://ssrn.com/abstract=1431556>; Steven D. Smith, "Unprincipled Religious Freedom," (1996) 7 J. Contem. Legal Issues 497; Steven D. Smith, "Is a Coherent Theory of Religious Freedom Possible?" (1998) 15 Const. Comment. 73; Kent Greenawalt, "Moral and Religious Convictions as Categories for Special Treatment: The Exemption Strategy," 48 Wm & Mary L. Rev. 1605.

<sup>16</sup> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. am. 1.



remains that it is a U.S. focused enterprise with its own peculiarities. My research seeks to fill a gap in the literature by presenting a Canadian-centred discussion about why religion is protected in the law.

There is general agreement in the literature that individuals should not suffer discrimination or otherwise be disadvantaged because of their religious beliefs; however scholarship is divided about whether religious freedom should receive special recognition in law. For example, Christopher Eisgruber and Lawrence Sager's "Equal Liberty" recognizes that religious practises, needs, and interests of minority religious groups are to be accommodated by government in the same way as are mainstream interests.<sup>17</sup> There is no need, in their view, for religious freedom to have special treatment in the constitution because at the heart of every religious freedom struggle is the issue of fairness.<sup>18</sup>

On the other hand, scholars such as Douglas Laycock argue that if religious freedom protection was taken out of the constitution, it would render "all constitutional rights vulnerable to repudiation if they go out of favor."<sup>19</sup> Andrew Koppelman argues that religious freedom is one among many distinctive goods that should remain protected by the law. "Fairness," notes Koppelman, "cannot be guaranteed but space can be created for its possibility." Religious freedom exemption is one means toward that end. "Because no single legal rule can protect all deeply valuable concerns, more specific rules are necessary. Accommodation of religion is one of these."<sup>20</sup>

### III. CONCLUSION

By drawing from the rich debate south of the border it is hoped that important insights will be gained to assist in understanding more fully why Canadian rights-based legal protections may have singled out religion as important and whether such reasons justify its continued importance in light of modern sensibilities.

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<sup>17</sup> Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge: Harvard University Press, 2007), p. 13.

<sup>18</sup> Eisgruber and Sager, *Religious Freedom and the Constitution*, p. 15.

<sup>19</sup> Douglas Laycock, "Liberty as Liberty," (1996) 7 J. Contem. Legal Issues, 313, p. 314.

<sup>20</sup> Andrew Koppelman, "Is It Fair to Give Religion Special Treatment?" (2006) U. Ill. L. Rev. 571, p. 603.



# FIDES ET LIBERTAS



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PART TWO:  
REPORT FROM 7<sup>TH</sup> IRLA  
WORLD CONGRESS

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# THE 7<sup>TH</sup> IRLA WORLD CONGRESS

DR JOHN GRAZ, IRLA SECRETARY GENERAL

Every five years the International Religious Liberty Association holds its world congress. Do we really need such an event?

The answer to this question was given in the first minutes of the opening session of the 7<sup>th</sup> IRLA World Congress. A short video showed an example of the violation of religious freedom around the world. Millions of people are victims of religious intolerance. Places of worship are burned, and innocent people are killed or spend years in prison. Laws like the laws on apostasy and on blasphemy are used to oppress religious minorities and dissidents more than to protect religions.

Religious freedom is a fundamental freedom and a gift from God. Silence and inaction are not appropriate responses to persecution. Every meeting which promotes religious freedom is an answer to these violations of human rights. A world congress is one among other significant answers. It may be only a drop in the ocean, but it is our drop, our contribution. This is why the IRLA has held World Congresses on Religious Liberty since 1977.

## 1. A SHORT HISTORY

The first three World Congresses were held in Europe: Amsterdam in 1977, Rome in 1984, and London in 1989. During this period the world was divided in two parts: The Western world and the Eastern world. The line between the two worlds was in Europe. Holding a congress in Europe made it possible to invite delegations and officials from the communist bloc. Having the two entities debate on the theme of religious freedom was a real opportunity to build bridges. It was also a way to express the neutrality of the IRLA on the political level. Religious Liberty is a principle and most of the communist countries had supported the Universal Declaration of Human Rights in 1948. The reports we received at that time from the Eastern bloc let us hope for some improvements on religious freedom.

Building bridges is still one of the objectives of our association. This is why we held our 12<sup>th</sup> IRLA Meeting of Experts in Amman, Jordan in 2010; and then a year later we sponsored a conference at the University of Amman on the theme of "Teaching Respect for Religions." This is why we always make sure to have experts or scholars from different religions at all our congresses, symposiums and festivals. We believe the principle of religious liberty is a universal principle not a Western one. It



has roots in most of the traditions of the world. History shows that in every religion, in every culture, believers and non-believers have suffered persecution when religious freedom was not respected. Every human being should have the freedom to decide about his or her religion. Religion is a matter of choice. Though I am a believer myself, I also defend the freedom to have no religion at all. It has to do with our human dignity.

I had the privilege to coordinate the organization of four of the seven World Congresses. One of the first decisions I made after becoming Secretary General was to hold this event every five years. Regularity is an important factor in long-term success.

The second decision was to move from Europe to another continent. The world had changed. New democratic countries were borne; officials from the former communist countries could travel to places other than Europe. Dr Bert Beach, my predecessor, had already planned to hold the 4<sup>th</sup> congress in Latin America. The manager of the congress, Don Robinson, and I decided to hold the event in the beautiful city of Rio of Janeiro. Since Brazil is one of the best countries for religious freedom, we knew that we could count on the support of the authorities and churches. It was a good congress with more than 350 participants. We had top level experts and officials, including the United Nations Special Rapporteur for Freedom of Religion or Belief, Professor Abdelfattah Amor.

Five years later in 2002, we went to Manila in the Philippines. We were invited by the Head of State, President Gloria Arroyo. It was an excellent congress with the presence of the First US Ambassador at Large for International Religious Freedom, Robert Seiple. The main leaders of the state came to deliver short speeches.

In 2007, we went to Cape Town, Republic of South Africa. With more than 600 participants, it was the largest IRLA World Congress ever organized. Having been in Europe, in South America, in Asia, and in Africa, we next looked towards Central America and the Caribbean. I worked closely with Roberto Herrera, the IRLA Secretary General for the Inter-America Region. He did a great work in organizing several events including the first IRLA Inter-American Congress which was followed by a Festival of Religious Freedom in Santo Domingo, which 13,000 people attended. We thought first about Mexico City, but for several reasons we decided to look at some other places. Santo Domingo came first, but after visiting the Dominican Republic with our new Congress Manager, Daisy Orion, we chose the beautiful resort of Punta Cana.

The support of the Inter-America Region—its President, Dr Israel Leito, and the leaders of the Dominican Republic Association, Pastor Cesario Acevedo and Attorney Miguel Nuñez Duran—was so strong that the 7<sup>th</sup> IRLA World Congress became the largest ever organized. There were 900 participants attending, and they represented 70 nationalities. The resort of Barceló, in Bavaro near Punta Cana, offered a fabulous environment and all the facilities we needed to hold a great event.



Again we invited many of the best experts in the field of religious freedom. Some of them have been with us since the IRLA Congress in Rio de Janeiro, like Professors Alberto de la Hera, Rosa Maria Martinez de Codes, and our IRLA President who received the Life Commitment Award, Dr Denton Lotz. Dr Bert Beach, who has attended all the congresses since Amsterdam, was also there. Ambassador Robert Seiple was there for his third World Congress, as was Professor Cole Durham, who brought with him several university professors from Latin America and Europe.

A congress on religious freedom needs to have experts, NGO activists, government officials, and religious leaders. The President of the Seventh-day Adventist Church, Dr Ted Wilson; the General Secretary of the Baptist Alliance, Dr Neville Callam; and the new Secretary General of the Global Christian Forum, Dr Larry Miller, were part of the program. From Washington DC came Attorney Knox Thames, the Director of Policy and Research for the US Commission on International Religious Freedom; Attorney Richard Foltin, Director of National and Legislative Affairs for the American Jewish Committee; Attorney Tiffany Barrans, the International Legal Director for the American Center for Law and Justice.

Many of the Ministers or Secretaries of State for Religious Affairs from Central America and the Caribbean, including from Cuba, were present.

The program included nine plenary sessions (plus the closing meeting), six breakout sessions with 12 groups, and five special topic meetings. I added the special topics in the evening for the ultra-motivated participants—those who were willing to sacrifice the beautiful beaches, swimming pools, and great restaurants to attend another meeting. I expected just a few small groups, but I was surprised to see the rooms full from 7:30 to 8:30 pm. The rooms were also full during the plenary and the breakout sessions. This showed the great interest of all participants.

## 2. AN ATTRACTIVE THEME

The Theme: Secularism & Religious Freedom—Conflict or Partnership? was very attractive. The initial theme did not have the word “Partnership.” Dr Ganoune Diop convinced us to add it. It was a good move. It reflected the content of most of the lectures. Secularism, when it becomes extreme or ideological, is dangerous for religious freedom. The secular values it wants to impose are often opposed to religious values.

But in its moderate form, in its non-anti-religious form, secularism offers a protection for human rights and religious freedom. Secularism has opened a space of freedom for all believers and non-believers. If believers are absent from the public square they will be marginalized. They have the possibility to be present, to promote their values, and to contribute to a healthy balanced society.

## 3. THE ALTERNATIVE OF SECULARISM

If the alternative of secularism is a religious country, this is not good news. We



have seen what happens for religious minorities in religious countries. During centuries when one religion dominated the Western world, it was a disaster for religious freedom. Does this mean that secularism is good? Not necessarily. Secularism can become intolerant and oppressive for believers; but before it reaches this point, believers have to play their role and defend human rights. As long as human rights and religious freedom are respected and serve as criteria of justice, a secular society can offer to believers many possibilities for partnership.

#### 4. LOOKING TOWARDS 2017

During the closing session of the world congress, several religious freedom activists received awards. Then, as a good surprise, the Secretary of State, Cesar Pinta Toribio arrived from the capital city Santo Domingo, a four-hour trip by car, to spend one hour with us. It was his way to show the interest of the government in our 7<sup>th</sup> IRLA World Congress.

On Saturday two buses left Punta Cana to attend the Festival of Religious Freedom in Santo Domingo. It was a great celebration with music, songs, short speeches and the presence of members of the government and of the parliament. IRLA Secretary General for the Dominican Republic, Cesario Acevedo, asked Dr Ted Wilson and me to unveil a bronze plaque in memory of the 7<sup>th</sup> World Congress.

The 7<sup>th</sup> IRLA World Congress was a successful event. I would need several pages to thank those who helped us. I have already mentioned several names, but I need to add my associates Dr Ganoune Diop and Attorney Dwayne Leslie; our office manager, Carol Rasmussen; our specialist Gail Banner; our Vice President, Dr Delbert Baker; our treasurer and manager Daisy Orion and her assistant Cheryl Show; our Communication Director, Bettina Krause; all the members of the Board of Directors and our President, Dr Denton Lotz.

I am aware that such a large number of participants could not have been reached without the strong support of the Inter-America Region. Its President, Dr Israel Leito, made several incentive decisions. His team and Secretary General, Roberto Herrera, did an outstanding work to promote the event. I also want to mention the North America Religious Liberty Association (NARLA), led by Alvin Kibble, Ken Denslow, Melissa Reid, and Lincoln Steed, Editor of *Liberty* magazine, who brought the largest US delegation in the history of the world congress.

I shared with Denton Lotz, the Life Commitment Award for Religious Freedom. It was a surprise for both of us. Denton has been on the international scene for many years and is one of the strongest voices for religious freedom.

A special thanks goes to the Dominican Republic Association Secretary General, Pastor Cesario Acevedo; the President of the Association, Attorney Miguel Nunez Duran, and their team.

Now we look forward with confidence to August 2017, to the 8<sup>th</sup> IRLA World Congress. The venue will be Miami, Florida, USA.

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# RESOLUTIONS OF THE SEVENTH WORLD CONGRESS OF THE INTERNATIONAL RELIGIOUS LIBERTY ASSOCIATION ON SECULARISM & RELIGIOUS FREEDOM— CONFLICT OR PARTNERSHIP?

Punta Cana, Dominican Republic, April 24-26, 2012

The International Religious Liberty Association (IRLA) in its Seventh World Congress held in Punta Cana, Dominican Republic, expresses thanks and appreciation for the hospitality shown by its people in welcoming us to their country and commends the recent inclusion of the freedom of religion protections in their constitution. As the president of the Dominican Republic expressed most aptly in his message to the Congress, “this country is a ‘land of freedom’ where people of very different faiths—or no faith at all—can live and worship according to the dictates of their conscience.”

This has truly been an historic event. It has been the first World Congress to be held in the Inter-America region and the largest IRLA Congress to date, with almost 900 attendees and guests. It has been the most internationally diverse, with men and women representing more than 65 countries.

The Congress received remarks from government officials from the Republic of Colombia, Curacao, the Bahamas, Mexico and Cuba as well as from former Ambassador Robert Seiple, the first US Ambassador-at-Large for International Religious Freedom, and Knox Thames, director of Policy and Research for the United States Commission on International Religious Freedom.

Leaders from many different faith groups addressed the Congress, including Dr Neville Callam, General Secretary of the Baptist World Alliance; Dr Larry Miller, Secretary of the Global Christian Forum; and Dr Ted N C Wilson, president of the Seventh-day Adventist Church.

Our attendees spanned the spectrum of belief and non-belief—Jews, Muslims, Roman Catholics, Seventh-day Adventists, Orthodox, Mennonites, Baptists, Mormons, Scientologists, and many others.

This Congress has brought together experts and delegates to discuss the relationship of secularism and religious freedom and to share experiences concerning the ways that secular institutions and secularization in society can benefit and also threaten the right to freedom of religion or belief of both individuals and religious communities.

Participants in the Congress, consistent with the stated principles of the IRLA, recognize freedom of religion or belief as a fundamental human right rooted in the





dignity of all human beings. The protection of this right is vital for a just society and undergirds all human rights.

Based on the experience of many countries represented at the Congress it was noted that *secularism* can describe an array of social phenomena, some of which are consistent with and supportive of religious freedom, while others threaten, erode, and potentially undermine it. Over the course of history, the emergence of secular states and secular institutions has often played a vital role in assuring protection of freedom of religion or belief for all. Indeed some ideas identified as secular were the products of religious thinkers and religious thought. However, certain forms of secularism can result in the imposition of inappropriate limitations of this fundamental right.

With these considerations in mind, participants recognized that secularism can be understood in many ways. Congress speakers referred to a variety of conceptions of secularism. One version is *militant secularism*, which is explicitly hostile to religion and seeks to eliminate all signs of religion, at least from public space, and, in some versions, from private space as well. Another position includes *moderate* conceptions, which call for benign neutrality and flexible accommodation of religion. Still other conceptions of secularism envision affirmative cooperation between the secular state and religion. At the same time, secularism can be a critical defense against religious totalitarianism, providing religious freedom to all belief communities.

The view that emerged during the Congress was that what is problematic for religious freedom is secularism as a totalizing ideology: a worldview that only recognizes secular values, thereby excluding religious values. In contrast, regimes characterized by secularity which seek to establish a neutral framework that welcomes and seeks to accommodate religious differences are most conducive to fostering religious freedom.

This Congress adds to the existing body of resolutions and recommendations from previous Congresses.

## CONSEQUENTLY, THIS SEVENTH IRLA WORLD CONGRESS RESOLVES TO:

1. Call the nations of the world to actively promote the principles of freedom of religion or belief, as elaborated in Article 18 of the Universal Declaration of Human Rights and the body of international human rights instruments.
2. Urge governments to establish laws and create the framework for societal activity and freedoms that produce a positive environment for religious freedom according to international standards.
3. Encourage those overseeing constitutional and legislative reform processes to provide protection of religious freedom which does not benefit a particu-



lar faith to the detriment to others and those who practice no religion.

4. Request the IRLA to continue to identify concrete ways for individuals and its local chapters to productively engage in religious freedom advocacy, ensuring that such advocacy is sensitive to both context and situation.
5. Encourage individuals, including youth, to take the initiative to become advocates for religious freedom, locally and internationally.
6. Maintain religious freedom as a unique and foundational human right and resist the pressure to accept reductionist arguments which maintain that other rights such as freedom of speech, association, and equality, make religious freedom unnecessary.
7. Reaffirm the statement from the sixth congress that “religious freedom is best advanced when religion and state remain separate in their own respective spheres, that states be neutral to any specific religion, and not hostile to religion generally, recognizing the positive contributions religion can and does make in society.”
8. Reaffirm the statement from the sixth congress “that the less obvious forms of discrimination and intolerance that are manifested in some countries under the justification of secularism be identified. Such issues as the banning of religious symbols in the public sphere, the denial of the right to observe specific days of worship, and refusal of conscientious objector status, raise questions about commitment to freedom of religion or belief.”
9. Recognize that IRLA National and Regional Committees are important instruments for involving the IRLA membership in carrying out the Mission of IRLA worldwide and advancing the cause of religious freedom, and that the formation of more IRLA country and regional affiliate organizations and the recruitment of members who are willing to promote the principles of religious freedom is strongly urged as a means to protect, promote, and defend the principles and practice of religious freedom for all people everywhere.
10. Recommend to the IRLA Meeting of Experts that they consider the question of the appropriate role of religious belief in the forming and shaping of public policy and the right of religious people to share their views in public forums.

Brad Kemp, Secretary  
Congress Resolution Committee

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## FIDES ET LIBERTAS SUBMITTING MANUSCRIPTS

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*Fides et Libertas* encourages the submission of manuscripts by any person, regardless of nationality or faith perspective, who wishes to make a scholarly contribution to the study of international religious freedom. *Fides et Libertas*, as the scholarly publication of the International Religious Liberty Association, seeks to obtain a deeper appreciation for the principles of religious freedom that IRLA has enunciated, including the following: religious liberty is a God-given right; separation of church and state; government's role of protecting citizens; inalienable right of freedom of conscience; freedom of religious community; elimination of religious discrimination; and the Golden Rule. *Fides et Libertas* is open to a wide perspective in upholding those principles including:

- Historical studies
- Articles that deal with theoretical questions of theology and freedom
- Essays on the meaning of such concepts as human rights and justice
- Works focused on politics and religion; law and religion

Articles should be accessible to the well-educated professional as well as to the lay person who seeks to know more. They are to be a means of continuing a scholarly conversation of the subject at hand. Therefore it is incumbent on the author to bring a new insight or knowledge to the conversation.

### ARTICLE SUBMISSION

Submitted articles are evaluated by academic and professional reviewers with expertise in the subject matter of the article. *Fides et Libertas* will seek to ensure that both the identity of the author and the identity of the reviewer remain confidential during this process. *Fides et Libertas* accepts simultaneous submissions but requires the author to notify the editorial staff immediately if he/she accepts another offer.

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After an initial review of the article by the editors of the *Fides et Libertas* to ensure that articles minimally meet its mission, standards and priorities, each article is referred to an outside peer reviewer. Final decisions on accepting or rejecting articles, or sending them back with encouragement to re-submit, are made by the editors. Upon acceptance, articles then undergo a thorough technical and substantive review, although authors retain full authority on editorial suggestions on the text. If technical deficiencies, such as significant errors in citations or plagiarism, are discovered that cannot be corrected with the help of staff, the Executive Editor reserves the right to withdraw the manuscript from the publication process. Generally, *Fides et Libertas* publishes material which has not previously appeared and it does not simultaneously publish articles accepted by other journals.

Articles in electronic format or disk, or author's requests for information should be addressed to:

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*Fides et Libertas* book reviews are meant to carry on the conversation with the authors under review. A simple description of the book fails to reach the goal envisioned by *Fides et Libertas*. We are looking for essays that take positions and provide clear reasons for such—being in the range of 2,500-5,500 words. Smaller review essays will be considered provided they actively engage with the topic and the author.

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Book Review manuscripts should be double-spaced, with the following information at the top whenever it is available:

1. Name of book
2. Book's author or editors
3. Publisher with date
4. Number of pages and price

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Review Essays may have a title (which is not necessary) which should be placed immediately above the identifying information.

Reviewer's Name for Book Reviews should appear at the end of the review, together with a footnote giving the reviewer's title(s), if any, and institutional affiliation(s) together with the institution's location.

For Further Information about the *Fides et Libertas* Book Review Policies and Procedures, or to submit your name as a reviewer, or an idea for a book to be reviewed, please contact:

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[www.IRLA.org](http://www.IRLA.org)  
ISSN 1940-6924