

## *Introduction*

The resurrection and rise of religion in recent years triggered an ambiguous response in Europe. On the one hand, some have sided with a hard-line secularist position—often associated with French *laïcité* (translated, problematically, as ‘secular’ or ‘secularity’)—which sharply separates public and private spheres and firmly relegates religion to the latter. On the other hand, some have felt the need to reassert the Christian roots of Europe as a non-negotiable starting point. Either way, we witness Europe’s struggle to grapple with its identity and in particular with its foundational values: rule of law, democracy, human rights, and, last but not least, secularism. Each one of them is asserted as an article of faith, rather than defended with cogent arguments. The European Court of Human Rights (ECtHR), for example, does not always articulate the reasons that lead it to a decision, in particular when it deals with secularism.<sup>1</sup> Moreover, European institutions and societies are increasingly at pains to accept that religious minorities would use those tools to advance their own agenda. Human rights are a good illustration: if freedom of religion holds true it applies to all religions and not only to the religion of the majority. This means for example that Muslims have the right to build their own religious buildings and to wear the clothes prescribed by their own religion. The claims may even go further: some parts of private life, because they are private, may eventually escape the rule of secular law to the benefit of the rule of religious law. Increasingly vocal claims of religious minorities have triggered the reaction of religious majorities who would want to preserve a central role in society; an example of this may be the litigation on the crucifix in the classroom in Catholic countries. This string of cases, which has inundated European courts, illustrates a potential collision course between law and religion in Europe.

The central question that I explore in this book is the following: is there a conflict between law and religion? The question is crude and in need of further elaboration but it conveys my central preoccupation well. At first, law and religion may be seen to be dealing with different domains. It may thus seem far-fetched to ask that question. After all, religion is firmly rooted in the transcendental perspective, while law is quintessentially immanent: God and

<sup>1</sup> See eg *Laursi v Italy*, 18 March 2011, Application no 30814/06.

Caesar have always had two separate kingdoms. Religion aims at the salvation of people in eternity, whereas law aims at peaceful coexistence here and now. Religion promotes one specific understanding of the good life, whereas law attempts to be neutral about it and promotes as many ways of life as possible. Yet both law and religion regulate behaviour of large constituencies in different yet overlapping areas of life.

There is no complete overlap between law and religion, nor is there clear-cut separation. Law and religion meet at different points, be it the regulation of family life, the edges of life, or educational matters to give a few important examples. So the question becomes: what if law and religion issue incompatible norms? Does law have to give in to religion or vice versa? Or is there a space within which religion can ask for exemption? Or is it law that has to justify its divergence from religion?

Past answers to these questions are instructive and show the extent to which the relationship between law and religion evolved throughout the years. In medieval Europe, the dualism between immanent and transcendent world-views was clearly resolved in favour of the latter. The justice that mattered most was divine justice in the afterlife. The ultimate adjudicator was God and it mattered little from his viewpoint that an individual was a good law-abiding citizen if he was not a good Christian. Greek philosophers who happened to be born before Christ had no access to paradise for example. Dante's limbo is populated with virtuous people who have been excluded from the possibility of salvation.

Religious wars between Christians brought into sharp relief the necessity of a secular law firmly detached from religious considerations. If Christians of different denominations wanted to live together in this world, they had to put aside for a while their doctrinal disagreements. Law thus acquired the independent status of pacifier between religions in the whole of Europe. Europe was broken down into homogeneous areas where one majority religion enjoyed the support of the law, while acknowledging its toleration vis-à-vis other religions. This brought us to the age of nations: the conflict became one between the nation state and the national church both vying for predominance over a discrete territory. In France the conflict was particularly bitter following the Revolution since the new elite attempted to strip the church of its wealth and benefits. It took more than a century to settle legally that conflict with the famous *Loi de 1905*, establishing a legal separation between church and state.<sup>2</sup> Contemporary debates have been dominated by the

<sup>2</sup> For a magisterial historical account of the church and state relation in Europe and in France in particular, see René Rémond, *Religion et société en Europe aux XIXe et XXe siècles. Essai sur la secularization* (Éditions du Seuil, 1998).

church and state framework, constantly redrawing the boundaries between the two.

The idea of separation between church and state has the appeal of simplicity. It nonetheless shows in practice great weaknesses due to the numerous exceptions and provisos that accompany that position. Moreover, it is not a universal stand since many states in Europe opt for a system of establishment (Greece, Norway, United Kingdom (UK), etc). Today, it may be more accurate to depict the church–state relationship as one of collaboration on different fronts.<sup>3</sup> Not only that: the state has to accommodate and possibly collaborate with leaders of religious minorities who have the ability to reach communities that are alienated from ordinary political processes.

One of the theses of this book is that the church–state model is out-dated and does not provide guidance as to the relationship between law and religion. In each European state, there is more than one church and each one of them is competing for followers. The state no longer sees churches as enemies but as charitable entities that can assist with some social problems and sometimes with the delivery of education. I suggest in this book that we should look beyond the church–state paradigm and begin to think of the presence of religion in the public sphere differently. First, religion is not confined within national boundaries, so its presence should be studied, evaluated, and recorded not just at the national level, but also at the supranational and international level. Secondly, the state has a strong interest in the community-building function of religion. Thus, at the European level, I will suggest that political institutions should promote a marketplace of religions where religious institutions compete for faithful while delivering their societal goods.

Moving beyond the church–state debate, the book offers a new understanding of secularism at the European level. When we speak of secularism the risk is to opt for a specific and very contingent conception of secularism that would have to be extended to the whole European constitutional landscape. So, for example, many claim that French *laïcité* provides the clearest and strongest statement of secularism and as such it should be embraced at the supranational and, perhaps, at the international level. This would be a mistake for several reasons: firstly, French *laïcité* as it is commonly understood—ie as a doctrine that protects religion only in so far as it is in the private sphere—is highly problematic as it creates an asymmetry between religious and non-religious people to the detriment of the former. Secondly, French *laïcité* as expounded above is a misrepresentation of the original intent

<sup>3</sup> See on this point, Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (Oxford University Press, 2011).

of the *Loi de 1905*, which aimed to end the conflict between church and state by creating a legal separation between the two. Thirdly, the uncompromising character of French *laïcité* makes it a much easier target for those who want to criticize European secularism.<sup>4</sup> It has come to represent a rigid, divisive position which heartily pleases its followers and uncompromisingly repels its enemies. For these reasons, it is not helpful to extend one contingent historical experience to the whole of Europe.

A more promising starting point for constructing a viable conception of secularism for Europe is by paying attention to the changing socio-legal political landscape. If the Peace Treaty of Westphalia had established national kingdoms within which one religion was superior to any other, the secularization of power went hand in hand with the dismissal of the monopoly of one church. Instead of religious homogeneity, Europe is now characterized by religious (and social) heterogeneity. No one religion can claim supremacy over any other; if anything they may lend a helping hand to each other when facing the secular authority. Secularism can therefore be understood today as a way of maximizing religious diversity, while creating a unitary legal framework that would allow disagreement between religious and non-religious people to be settled peacefully.

I hasten to add that the new model of secularism is not a fully fledged philosophy, nor is it a new ideology or a world-view. It is instead a legal doctrine more properly called 'inclusive secularism'. It is easier to say first why inclusive secularism is not any of the things mentioned above. Secularism has many separate—and sometimes competing—layers. Secularism can be a whole system of thought, an epistemic stance, a world-view, an ideology, or a legal-constitutional approach. As a system of thought secularism is all-encompassing and aims at explaining the world as it is without reference to God. As an epistemic stance, secularism is meant to offer a disclaimer on what we can know and what is beyond our reach including religious knowledge. As a world-view, secularism provides a possible political viewpoint through which we are meant to look at human institutions. As an ideology, secularism is a corrupted form of a political world-view and aims to provide a dogmatic normative position as to what society should look like. Finally as a legal-constitutional doctrine, secularism attempts to provide a framework within which religious and non-religious people can live together. Inclusive secularism belongs to the last category.

<sup>4</sup> For a wonderful examination of the French debate, see C Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford University Press, 2009).

Inclusive secularism, as I understand it, is the art of devising institutions for plural societies so as to maximize religious diversity, while preserving a unitary legal-political framework. No doubt there are competing understandings of secularism (see chapter 2). The conventional view presents secularism as a solution to the church and state problem mentioned above. The secular state in Western democracies has to organize the relationship between itself and the church. Some states elect a regime of separation (US, France, etc), other states elect a regime of collaboration if not establishment (UK, Greece, etc). The choice between separation and establishment is largely contingent and depends on discrete constitutional histories: a dominant church may contribute to the obedience vis-à-vis established power. A dominant church generally represents a social majority for whom the religious institution is desirable; however, it does not mean that minorities will be well treated under one dominant religion.

Both regimes of separation and establishment face the dilemma of how to treat minorities. Interestingly, where the dilemma is more evident it is not necessarily more serious. In England, the Church of England is the established church of the land. Anglicans are obviously fine with this, but what about Catholics or other Protestants? Law, and in particular the constitution, evoke for many the myth of neutrality. The constitution is a pact for all—it does not exclude anyone; to the contrary; it attempts to bring everyone into the legal fold. Law being equal for everyone, there is no risk of treating people unfairly, or so the story goes. Yet, secularism thus understood faces the dilemma of neutrality: how do secular states show equal respect to religious and non-religious people if the constitution seems to privilege a non-religious perspective?

My version of secularism does not attempt to solve the dilemma; instead it takes it seriously as a symptom of a widespread malaise: the inability of the secular state to cope with diversity. It is hard to believe that a secular state is neutral between religious and non-religious views. However, it is possible to suggest that the secular state should strive to be agnostic in matters of conscience. The secular state can thus be portrayed as being equally distant from religious and non-religious people; it does not assume any truth or any vision of conscience. Instead it painstakingly attempts to promote mutual understanding and nudge towards practical compromises between different constituencies. A secular state should not silence religious voices, it should allow for their participation in the public sphere, while setting out conditions for participation for all. Crucially the option to participate in democratic life should be wide open, but the final product of deliberation—secular law—can only employ a language that everyone can understand without the need

to appeal to transcendental-metaphysical considerations that are not shared by all.

Inclusive secularism should be understood in a very broad sense since it encompasses different layers at the domestic, supranational, and international level. I refer to those layers separately and as a whole; in the latter case I loosely talk of a European Constitutional Landscape constituted by European states, the European Union (EU), and the Council of Europe, all contributing to different extents to the elaboration of secularism at different levels. It may even be the case that at the international and supranational level, secularism acquires a different meaning from domestic secularism which is inescapably rooted in national constitutional histories.

In the last fifteen years or so, the ECtHR has taken a keen interest in the application of Article 9 European Convention on Human Rights (ECHR) that deals with freedom of religion. Several cases from European states led the Strasbourg Court to examine the practices of states with established churches (Greece), as well as strictly secular states (Turkey). Recently, a high-profile case from Italy led the Court to consider whether the presence of the crucifix was compatible with secularism. Regrettably, the Grand Chamber came to view secularism as an ideological conviction of some people, rather than the precondition for coexistence through law.<sup>5</sup>

The EU has had to grapple with its own position vis-à-vis religion. The high point of the debate was reached with the preamble to the European Constitution. The question was whether or not Christian values should be inserted in the preamble. Meanwhile the constitutional ambition collapsed, while the preamble refrained from referring to Christian values. However, the question of the constitutional identity of the EU remains open and this book also aims to discuss the implications of such a quest. Domestic states are obviously concerned with religion, both in relation to their majorities and minorities alike. Examples of friction between the secular state and religion could endlessly be multiplied: think of the headscarf debate in France; the crucifix in the classroom in Italy, Bavaria, and Spain; the place of sharia law in Britain; the Mohammed cartoons in Denmark; the racist murderer in Norway and so on. More importantly, there is no existing secular model that is able to create a peaceful space for religious people in Europe. Inclusive secularism as I present it in this book aims to carve out a place for religion, while maintaining the secular nature of the law.

<sup>5</sup> See *Lautsi v Italy*, 18 March 2011, Application no 30814/06.

## The Structure of the Book

The book follows a tripartite division: Inferno, Purgatory, and Paradise, as in the famous work of Dante Alighieri, *The Divine Comedy*. However, *A Secular Europe* is neither divine, nor is it a comedy. If anything, it attempts to explain a deep-seated tension between religion and the secular state. Dante's Europe aimed to be unitary under the practical authority of the emperor and the theoretical authority of the church. There was no doubt that Europe was Christian, the only issue was whether or not the pope should also exercise temporal power—that is, power over the mundane business of politics and day-to-day life. Dante believed that the pope should not mingle with such issues and leave to Caesar the task of ruling over the terrestrial world. The task of the pope, after all, was much more important: he had to prepare people for the world of the afterlife. In that world, moral and legal standards would not be arbitrary and contingent. The world of the afterlife would be breathtakingly ordered and ranked. Everyone would have his place in the architecture of that world and there would be no room for deviation within it. The world of the afterlife is the real Christian world where Christian moral principles are laid out and implemented as clearly and coherently as possible. The world of the things as they are pales by comparison: this world is fragmented, disorderly, and at times meaningless—especially when void of Christian meaning.

The journey through Hell, Purgatory, and Paradise is a journey towards transcendental knowledge for Dante. In *A Secular Europe*, the journey is towards immanent knowledge instead. This does not preclude the possibility of religion. If Dante postulates a deep unity in the afterlife on the basis of a strict interpretation of Christian theology and Aristotelian teleology, *A Secular Europe* attempts to present secular law as the tool with which we can aim at unity in this world. Christian morality was the glue which bound people together in medieval society. Secular law is what binds people together in today's Europe, or so I suggest. It provides a framework within which religious and non-religious people can live together.

The journey in *A Secular Europe* begins with religious wars of the seventeenth century, when the schism within the Christian world caused people from all over Europe to clash with and slaughter each other. The political unity of Europe was shattered and destroyed over three decades of brutal conflicts. That is as close as it gets to Inferno in this world. Peace in Europe could only be reached at the price of engineering states with homogenous religious majorities in order to avert clashes between religious groups. Dissent and diversity were stifled and suppressed in exchange for order and authority. Within this landscape, toleration was the main instrument that would enable

the survival of religious minorities. To be tolerated was not a privilege, but a mere pact of non-aggression (chapter 1).

It took Europe three centuries to shake the order established by Westphalia in the most violent way. Brutal wars in the nineteenth century were followed by global conflicts in the twentieth century. European nations fought bitterly amongst themselves until they understood that something had to be done in order to prevent murderous conflicts. The post-war period paved the way for a new political scenario in which certain national interests were pooled together. It is only since 9/11 that Europe has started rethinking itself as a Christian bloc as opposed to other blocs of civilization. The rise of religions has provoked a reassertion of secularism in aggressive and exclusive terms (chapter 2). Thus, the road seems to be leading towards a clash between secular law and religion (chapter 3).

The headless search for European identity is discussed in the section entitled Purgatory, where Europe purges its sins of nationalistic hubris and attempts to get to grips with itself. To grapple with its Christian identity, however, is more a sign of uncertainty and inability to articulate a new vision for the future rather than a genuine foundational exercise (chapter 4). After all, Inferno was the result of a Christian Europe torn between various religious families and sects. Something important was lost in that struggle. Europe moved from a unitary empire, through a bipolar Christian world and has now arrived at a stage of deep social and religious pluralism. Diversity is the central factor of today's Europe, which cannot be reined in by a reaffirmation of monolithic religious roots. Religion may still have a place in Europe but no religion should have a monopoly over other religions or over the morality of a state (chapter 5). European institutions are still in Purgatory searching for their real soul. Meanwhile their questioning is further prompted by the presence of Muslim minorities whose place in Europe is still unclear. Their religious and cultural background seems to be at odds with European conceptions of life in common and coexistence. In particular it seems hard to reconcile being Muslim with being European where the former stands for belonging in a community of belief whereas the latter stands for belonging in a political community which rejects belief. The tension materializes with the question of the place of sharia law in European legal and political systems (chapter 6).

Paradise is the last step of the journey where European fragmented reality meets with what I take to be the pillars of a shared European future. Diversity is the central idea that informs this part. European secularism should not be about the relationship between one state and one religion. Instead European secularism is about the relationship between plural religions among themselves and between various political entities ranging from the national to the

supranational and international. The relationship between religious and non-religious people should be informed by the quest for mutual knowledge as organized by the secular state in appropriate *fora*, such as the school classroom which is the very first place where cultural differences can emerge and merge (chapter 7). More generally, the ethics guiding the relationship between people should be receptive and attentive to the protection of diversity (chapter 8). Finally, the instrument through which diversity can be maximized, while tensions between different people can be minimized, is secular law (chapter 9).

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