András Sajó

CONSTITUTIONALISM AND SECULARISM: THE NEED FOR PUBLIC REASON

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András Sajó
Professor, Central European University, Budapest.

In order to sustain modernity, or to sustain public order as ordered liberty, one needs a considerable level of secularization. Constitutionalism exists only where political powers do not ground their public affecting decisions on transcendental concerns. People are buried in cemeteries not because it facilitates resurrection but for public health reasons.

Secularism as an institutional arrangement provides protection to a *reason-based polity* against a social "(dis)order'' that is based on dictates of religious doctrine and heated *passions.* When constitutional law insists on secularism, it insists on the possibility of a reason-based political society. Secularism dictates (expresses the need) that legal choices be based on secular public reasons, i.e., reasons accessible to all, irrespective of their religious belief.[1] Religiously grounded reasons have to be "translated." For most translation theories the requirement of public reason is satisfied as long as the legislative reasons are presented and accepted on grounds reasonably

[1] "The public use of man's reason must always be free, and it alone can bring about enlightenment among men; the private use of reason may quite often be very narrowly restricted, however, without undue hindrance to the progress of enlightenment. But by the public use of one's own reason I mean that use anyone may make of it as a man of learning addressing the entire reading public. What I term the private use of reason is that which a person may make of it in a particular civil post or office with which he is entrusted." IMMANUEL KANT, *An Answer to the Question: "What is Enlightenment?"*, *in* POLITICAL WRITINGS 54, 55 (Hans Reiss ed., 1991).
The demand for public reason is intimately related to a more fundamental concern of Kant, namely personal autonomy. There is no personal autonomy without public reason. "Kant conceived autonomy as the capacity to bind one's own will by normative insights that result from the public use of reason. . . . As a result, a religious or metaphysical justification of human rights becomes superfluous. To this extent, the secularization of politics is simply the flip-side of the political autonomy of citizens." JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS 127 (Max Pensky ed., trans., 2001).

accessible to all (i.e., which do not presuppose some act of faith or belief in scripture, where the constitutional arrangement is not an act of faith).

For those who would reject the requirement of translation, it is personal "importance" that matters and all arguments are or might be equal, irrespective of their nature. This makes discourse meaningless. Without secular reason-giving, privileged knowledge like divine command that is accessible only to the believer will become acceptable and potentially mandatory. This undermines many things dear to constitutionalism, equality in particular. It undermines popular sovereignty as well in the sense that popular sovereignty presupposes that all members of the community have reasoning capacity that enables them to participate in political decision-making.

Such equal participation is what makes popular sovereignty legitimate. The sovereignty of a people exercising its faculty of reasoning is the essence of constitutionalism that assumes secularism. But the relation between constitutionalism and secularism remains uncertain. Partly for pragmatic and historical reasons, existing modern liberal constitutions are not particularly clear on the relationship between constitutionalism and secularism: In fact, a number of constitutions allow for a state church and allow churches to retain some privilege of public power without necessarily undermining the liberal and democratic nature of those states. This uncertain, unprincipled position causes inconveniences, as it does not provide sufficient protection against the aggressive claims of strong religion.[2] On the other hand it became increasingly discriminatory, especially in European countries with large migrant, predominantly Muslim communities. The religion-based practices of these communities are constantly criticized and restricted in the name of their incompatibility with secular values, while at the same time the allegedly secularist constitutional system allows preferential treatment to religions that have a historically recognized privileged place in the constitutional system.

The question remains open: Is secularism inherent in constitutionalism? In order to answer the question I look first to some proxies of secularism that are used to address the role of the state in a secularizing political community. This is followed by a discussion of the broader patrolling role of secularist concepts and how these core concepts can resist the challenge of strong religions and religions with a potential for reconquering the public sphere for their purposes. The last part of the paper discusses different non-secular foundations claimed in legislation that secularist jurisprudence has to refute in order to safeguard constitutionalism.

[2] "Strong religion" refers to religions moving toward fundamentalism and challenging the secular political order. *See* Gabriel A. Almond, R. Scott Appleby & Emmanuel Sivan, STRONG RELIGION: THE RISE OF FUNDAMENTALISM AROUND THE WORLD (2003). *See also* András Sajó, *Preliminaries to a Concept of Constitutional Secularism*, 6 INT'L J. CONST. L. 605, 605-29 (2008) (discussing constitutional secularism, which is not to be confused with atheism). Further, secularism is a normative concept for constitutionalism, which presupposes the social phenomenon of secularization, i.e., the withdrawal of religion from public and private life as an organizational principle.

I. CONSTITUTIONAL APPROACHES TO SECULARISM

At this point two intellectual strategies emerge. One strategy takes a hard look at a theory of strong secularism. The issue in this approach is this: Is it possible to develop such a theory, or is it futile or at least not necessary for constitutionalism? Alternatively, for a *jurisprudential* theory of constitutional secularism that can be used in deciding cases, one may simply postulate the possibility of such a theory and seek identifiable elements of secularism that will be able to resist the pressure coming from strong religions, especially when strong religions use constitutional arguments as Trojan horses to make constitutionally acceptable or even compulsory the good life promised and mandated by strong religion. In the absence of the refutation of the possibility of a theory of strong secularism, one can legitimately follow the second approach. This is the accepted strategy of the present paper, which has jurisprudential ambitions only.

Claude Lefort has argued forcefully that secularism in the sense of absence of religion in public life means simply that the sovereign's place becomes hollow.[3] But such emptiness means that there are no fixed rules and structures here, and democracy, or other forces, fill the void in a continuous process. In a way, from a constitutionalist perspective, there is little guidance left except a negative one: For good reasons, liberal constitutional law is at least suspicious in case one or another religion intends to fill the void that is needed for popular sovereignty. After all, it is the first duty of constitutionalism to react to all forms of totalitarian, i.e., all-embracing, life forms.

But perhaps this negative concept of secularism does not provide us the whole story. The resulting secularism is negative: The secular, constitutionalized space is left open for intervention according to the dictates of the state. This is challenged today in claims that argue that there is no space exempt from religious considerations. In fact, the thesis of "hollowness" is hotly contested on non-religious grounds too: The secular state is not hollow since it embodies the parallel choice of the liberty of conscience and equality, and also that of universality which renders possible to embrace all human beings without according privilege of any kind to a particularism. "Together with liberty, equality and the concern (care) for the universal . . . the autonomy of judgment and the wager of intelligence constitute the decisive values of secularism."[4]

The positive values of liberty that populate the hollow space created by its expurgation from religion do not necessarily follow from secularism, but they are enabled by secularism and support it. Close to this richer concept of secularism, the European Court of Human Rights quoted affirmatively the definition of the Turkish Constitutional Court in *Leyla Sahin*. Here again secularism is an opportunity that is particularly friendly towards certain fundamental values of constitutionalism:

> [S]ecularism is the civil organizer of political, social and cultural life, based on national sovereignty, democracy, freedom and science. Secularism is the principle which offers the individual

[3] CLAUDE LEFORT, *Permanence du Théologico-Politique?*, *in* ESSAIS SUR LE POLITIQUE: XIX[e]-XX[e] SIECLES 251-300 (1986).

[4] H. PENA-RUIZ, QU'EST-CE QUE LA *LAÏCITE*? 72 (2003); *see also* G. HAARSCHER, LA LAÏCITE (2004).

> the possibility to affirm his or her own personality through freedom of thought and which, by the distinction it makes between politics and religious beliefs, renders freedom of conscience and religion effective. In societies based on religion, which function with religious thought and religious rules, political organization is religious in character. In a secular regime, religion is shielded from a political role. It is not a tool of the authorities and remains in its respectable place, to be determined by the conscience of each and everyone. . . .[5]

At the center of secularism a clear rejection of everything religious in politics is always present. The constitutional order refuses certain divisive particularisms. Consider the concept of secularism in India.[6] This is based on the assumption that, if religion becomes the organizing factor in politics, public order will be at stake.

In practice, the above insulation of the religious from the politically relevant public sphere is far from total. The meaning attributed to secularism in constitutional law varies from country to country. We should take into consideration that we have at least two models of constitutional secularism. In the majority of constitutional democracies, the slow change within religion itself is what has created the conditions for constitutional secularism in exchange for a very strong protection of free exercise of religion. It is not surprising that instead of a comprehensive notion of secularism and corresponding comprehensive theories of secularism, in these countries historically inherited proxies, like separation of church and state, neutrality of the state, etc., are used to operationalize it.

Of course, in a few countries secularism (*laïcité*) seems not to need proxies. Secularism is an express principle and fundamental value in the French Constitution, reflecting many years of divisive social conflict.[7] Likewise, the Turkish and Indian commitments to secularism result from specific political conflicts. All these formal recognitions were part of an attempt to remove religion from public life and freeze a specific political arrangement.

Writing the emerging arrangement into law or constitution served to declare victory over the secular political ambitions of religions and churches. The express recognition and strong endorsement of secularism was the result of fierce conflicts between forces resisting neutralization of the public space and other social forces that used constitutional law to consolidate their victory. The textual affirmation of secularism was intended to radically remove religion from public life and freeze a specific political arrangement. France and Turkey are perhaps the most well-known examples of this approach (known as "constitutionalized secularism").

Doctrinally, the term might signal some direction, especially where there are forces interested in considering that signal. Still, the word and the notion provide very little guidance. It is quite telling

[5] Leyla Sahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R., ¶ 108 (2004).

[6] *See, e.g.*, Brenda Cossman & Ratna Kapur, *Securalism's Last Sigh?: The Hindu Right, the Courts, and India's Struggle for Democracy*, 38 HARV. INT'L L.J. 113 (1997).

[7] In some instances the term cannot be found in the text of the constitution but is an accepted part of the constitution due to judicial interpretation. In India it was the Supreme Court that elevated it into a fundamental and immutable constituent element of the constitutional system. In Mexico the term is not present in the Constitution of 1917, though the specific institutional arrangements of the constitution gave a very specific meaning to *laicidad* and it sanctioned a strongly anti-clerical policy.

that the secularism of the French Constitution is satisfied by proclaiming that France is a secular republic, without any additional explanation. This was a statement of facts that referred to specific arrangements existing in 1946; it implies a reference to a certain status quo to be sustained.[8] Notwithstanding rhetorical statements to the contrary, there is no clear principled program to rely upon in case of new developments.

In other systems the constitutional text emphasizes only the separation of church and state, for example in Estonia and Hungary, or more ambiguously, in the United States. Elsewhere the matter is left undecided. Secularism by silence prevails in South Africa, where it is argued that separation can be considered as implied. But such implied considerations are often disregarded when it comes to claims based on free exercise of religion; see the judicially imposed ban on the publication of the Mohammed cartoons in South Africa.[9] In Canada religion is conspicuously absent from public life and politics, but considerations of religion are permissible and even dictated by pluralism.

The text of the constitution is not decisive; strong separationist positions in jurisprudence may go hand in hand with intense presence of religion when it comes to the organizing of everyday life. Elsewhere the social process of secularization may create a situation where isolated constitutional and political decisions, consolidated into social conventions, create de facto constitutional secularism notwithstanding the text of the constitution. This is the case in Norway, where notwithstanding the constitutional recognition of a state church, secular arrangements prevail in law. In Britain, public law still contains elements that could go, in principle, against secularism.

On closer scrutiny, even constitutionalized secularism relies on *proxies*, beyond its fundamentally negative position that consists in the refusal of the religious in what it claims to be "political." Recall the references in *Leyla Sahin*; in addition to the refusal of religious politics, individual freedom and church autonomy based on the separation of church and state are the key components.

Proxies and the related specific practices that were established in the name of secularism (as long as they respected freedom of religion) point toward the normative demands of constitutionalism (as "rational sovereignty"). These demands, operating as principles, should discipline these proxies, which will provide jurisprudential applicability.

[8] In fact, there was considerable disagreement about *laïcité* among the draftsmen of the 1946 Constitution, but the constitutionalization of *laïcité* was supported by the French bishops too. MAURICE BARBIER, LA LAÏCITÉ 63 (1995).

[9] *Jamiat-Ul-Ulama of Transvaal v. Johncom Media Investment Ltd. & Ors.*, [2006] Case No. 1127/06 (S. Afr.).

SEPARATION

The first proxy regards the relation between the state and churches. In this sense secularism is some kind of separation of church and state, which serves popular sovereignty indirectly by excluding churches from the exercise of public power. But separation is not only intended to avoid the despotic concentration of power in the hands of an organization that already possesses, or used to possess spiritual power. It also serves to limit the same sovereign power and enables freedom of religion. Separation places the churches outside the realm of the secular power to a very great extent. This amounts to a constitutionally prescribed limit on sovereign popular power, and it reflects separation of powers concerns: A union of secular and ecclesiastical control would equal tyranny, irrespective of the fact which one of these entities has absolute power.

Secularism in the sense of separation means that non-secular bodies shall not exercise secular power, not even by the grace of the sovereign.[10] Vice versa, secular bodies shall not exercise ecclesiastical power (the principle of church autonomy or non-interference). This is not to say that secularism necessitates that the famous wall of separation never be crossed. Secularism does not rule out that there is place for religions in public life, and to some extent even in government activities. In the case of government welfare and cultural services where no government power or constraint is used, and where the goal of the service is purely secular (even if it overlaps with some religion-dictated duty), there can be place for denominational service provisions as long as the service provided is not conditioned on religious criteria that would amount to the ecclesiastical use of public (distributive) power, which would put the stamp of government authority on the religious exercise. The participation in the service provision shall be offered to the denomination on equal grounds with non-denominational organizations and the ecclesiastical organizations shall act here in their private capacity.[11]

I see no constitutional reason that the state should sponsor efforts that will generate people who will be reluctant to accept a shared citizenship. Allowing the growth of sectarianism is as wrong constitutionally as forced homogenization in state schools is in disregard of personal autonomy.

Current practices show that church involvement in electoral politics and the status of purely religion based political movements is also surrounded by uncertainty. The U.S. Supreme Court considers political divisiveness a ground for finding religious involvement in politics unconstitutional, but in the American context this borders limiting the free speech rights of the religious.[12]

[10] "[T]he grant of actual legislative power to churches is within the proscription of the Establishment Clause." Larkin v. Grendel's Den, Inc., 459 U.S. 116. at 127 (J. Rehnquist, dissenting). Such considerations do play a role in the rejection of legislation grounded on religious reasons, though taking into consideration in the legislative process (e.g., by inviting church representatives to a hearing) is legitimate and it is the exercise of the speech rights of the religious community and its members.

[11] Federal financial support to Catholic nuns who owned and operated hospitals was upheld even in the keenly separationist U.S. because the secular service was provided to all. Bradfield v. Roberts, 175 U.S. 291 (1899). The potential presence of religious symbols and other impacts on the patients were not an issue.

[12] For additional objections, see LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 127983 (2d ed. 1988).

The divisiveness argument is unobjectionable under conditions of extreme inter-faith tension, as in India, while this is less of an issue in Germany for example, with its tradition of secularized Christian parties.

As to the other side of the coin, namely state intervention into church matters, the placing of churches and hence, that of religious practices outside the state is far from total. The placement should not mean exemption from general considerations of public order. Further, the extent of the dislocation of churches is variable. If they are simply in the private sphere, constitutional law quickly finds them once it is understood to be applicable in private relations. In fact, to correct the consequences of the horizontal effect of constitutions (comparable to the state action doctrine in the United States) churches are increasingly granted exceptions; churches are "more private" than other private entities. Either they are privileged among other private entities (which is not always justified by needs of freedom of religion) or have special status. All this might be seen as departure from separation and a violation of it, at least in light of the United States practice, where in principle churches do not have special privileges in the private sphere and are treated in all regards as other not-for-profit organizations, irrespective of their spiritual mission. It is true, however, that the United States is less willing to constitutionalize private relations. But the autonomy of churches (in the sense of non-interference by the state into the handling of the sacred) remains a serious anomaly for the equality and universality of civil rights, even if it serves freedom of religion.

Quite often churches are deemed to be equal partners of the state, even if they exist on the basis of a constitutional or governmental authorization, which technically means that they exist legally by state recognition. Here, their ontological pre-existence is elevated to normatively independent existence. In different Concordat regimes, at least allegedly, the source of the recognition of certain manifestations of religion, including those that would depart from general rules in order to follow sacral considerations, is found in international treaties or inter-organizational domestic agreements, i.e., in mutual consent and not in the exercise of sovereign power. It is hard to reconcile such equal partnership and the resulting privileged treatment with the concept of popular sovereignty. Such privileged treatment is even more dubious, because accepting churches as equal partners of the state very often means that the state accepts as its partner a body that is not created, and is not operating, according to the democratic principles that are required for all the partners of the state. The disregard of the demand of the democratic structures as a condition of recognition is reserved to sovereign entities: A constitutional state (in the non-democratic international law order) does not question the existence and equal standing of another state on grounds of lack of democracy in that state. But it should, as a matter of principle, insist on a minimal constitutional order in regard to its own subjects, at least when observance of human rights and democracy are required *to sustain its own democratic nature.*

NEUTRALITY

Irrespective of the level of separation, there will be specific practical relations between church and state. In handling these relations, the need for the application of the principle of neutrality emerges.[13] The neutral state simply refuses (or claims to make attempts to refuse) to take sides among competing concepts of the good life.

Like separation, neutrality is uncertain and full of historical happenstance and compromise. The Supreme Court of Canada aptly summarizes this:

> The duty of neutrality appeared at the end of a long evolutionary process that is part of the history of many countries that now share Western democratic traditions. Canada's history provides one example of this experience, which made it possible for the ties between church and state to be loosened, if not dissolved. . .
>
> Since [1867], the appearance and growing influence of new philosophical, political and legal theories on the organization and bases of civil society have gradually led to a dissociation of the functions of church and state; Canada's demographic evolution has also had an impact on this process, as have the urbanization and industrialization of the country. Although it has not excluded religions and churches from the realm of public debate, this evolution has led us to consider the practice of religion and the choices it implies to relate more to individuals' private lives or to voluntary associations . . . These societal changes have tended to create a clear distinction between churches and public authorities, placing the state under a duty of neutrality. . . . The concept of neutrality allows churches and their members to play an important role in the public space where societal debates take place, while the state acts as an essentially neutral intermediary in relations between the various denominations and between those denominations and civil society. . .
>
> In this context, it is no longer the state's place to give active support to any one particular religion, if only to avoid interfering in the religious practices of the religion's members. The state must respect a variety of faiths whose values are not always easily reconciled.[14]

Especially where there is no express reference to secularism in the constitution, and/or where secularism is understood in the national culture as anti-religious or atheist, neutrality is used as a substitute or a (sometimes poor) proxy of secularism. As Justice Brennan stated, "It may be true that individuals cannot be "neutral" on the question of religion. But the judgment of the Establishment

[13] See András Sajó, *The Concepts of Neutrality and the State*, *in* FROM LIBERAL VALUES TO DEMOCRATIC TRANSITION (Ronald Dworkin et al. eds., 2003); András Sajó, *Government Speech in a Neutral State*, *in* DEMOCRACY AND THE RULE OF LAW 369, 369-89 (Norman Dorsen & Prosser Gifford eds., 2001); András Sajó, *Neutral Institutions: Implications for Government Trustworthiness in East European Democracies, in* BUILDING A TRUSTWORTHY STATE IN POSTSOCIALIST TRANSITION 29-51 (Janos Kornai & Susan Rose-Ackerman eds., 2004).

[14] Congrégation des Témoins de Jéhovah de St-Jérome-Lafontaine c. Lafontaine (Village), 2004 CSC 48; [2004] 2 S.C.R. 650, ¶ 68 (Can.).

Clause is that neutrality by the organs of government on questions of religion is both possible and imperative."[15]

Neutrality is often used as meaning "state impartiality," which explains the concept's attractiveness. After all, impartiality satisfies minimalism in morality. Impartiality is satisfied if "the rule serves no particular interest, expresses no particular culture, regulates everyone's behavior in a universally advantageous or clearly correct way. The rule carries no personal or social signature."[16]

Neutrality has become an increasingly attractive virtue of the liberal state. The non-involvement of the state in certain matters that were dividing the society in a fundamental, identity-shaping way is seen to be the guarantee of social peace or truce. In a way, social peace by neutralization lies at the heart of Madison's dream of constitutionalism. He sought to find the panacea against the factionalism that is transferred through the branches of power in governmental neutrality.

In the secular constitutional context the attractiveness of "thin impartiality" depends on certain preconditions. At least the following conditions of the neutrality of public power are to be operative:

(a) the state determines the boundaries of the public sphere, while
(b) certain areas of religious activities, once they are outside the public sphere receive strong protection against state and other, nongovernmental interferences: all this for the sake of free religious practice.

There are a number of possible forms of neutrality in its "thinness," and some of them are less resistant to religious pressures than others. The sphere of application of neutrality depends on how the state is actually construed. How far-reaching the privatization of religion can be depends on the "'extent" of government involvement in social service provision. The more extended the welfare state is, the more difficult it is not to qualify the private as public. Hence the requirement of neutrality is correspondingly extended and at the same time more denominational activity will come under government control and be accommodated in the public sphere.

Welfare services provided by religious organizations shall be accessible to all citizens equally; otherwise the arrangement would contribute to the recreation of a sectarian division of society. This is a particularly important caveat in the authorization of denominational schools, hospitals, etc., in the name of enhancing pluralism. The pluralist claim is that by allowing and *sponsoring* denominational schools diversity is sustained. But the denomination providing a publicly funded school service should constantly prove that the diversity so sustained is not exclusivist; that the public school of a denomination is offering a curriculum that will be accommodative to students not pertaining to the religion.

[15] Marsh v. Chambers, 463 U.S. 783, 821 (1983) (Brennan, J., dissenting).

[16] MICHAEL WALZER, THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD 7 (1994).

In countries where it is believed that the concept of the welfare state is duty-bound to promote rights and even freedoms, a special concern of neutrality emerges. Where the social service (from education to health care) is provided by a denomination as public service, secularism requires a heightened scrutiny regarding the satisfaction of the neutrality requirements, i.e., that there is no sign of favoritism towards or discrimination against the denominationally provided service, not only vis-à-vis other religions but any other private provider. This concern is often missing, allowing religions to reconquest the public square. It is often the case that denominations get public funding for religious manifestations or operational costs of religious organizations in the guise of lump-sum support to sustain the denominational social service provision.

In fact neutrality in itself seems to offer limited protection to secularism and liberal democracy. As Toni Massaro stated in the context of American neutrality:

> The constitutional balance between religious autonomy and other liberal values simply cannot be effected by a demand that government act neutrally . . . . A neutrality mantle is ill-suited to the task of balancing the relevant interests because both sides can—and do—seize this mantle with equal force.[17]

CONVENTIONS

The above two proxies of secularism, separation and neutrality, remain uncertain practices and ideas, full of apparent inconsistencies, concessions and contingencies. In light of all the departures from a single concept of secularism, are we to conclude that secularism is not a viable general concept of liberal constitutionalism? After all, many of these departures are principled. Is secularism primarily a rhetorical and political concept, only a matter of mentality and political culture, even where, as in France, it is presented as having a specific and clear meaning?

To my mind the uncertainties and variations only indicate that when it comes to the application of secularism as a liberty enhancing border-patrol, there are additional constitutional considerations that secularism has to accommodate. Beyond the concern with free exercise of religion, additional legitimate constitutional considerations referred to as "public order" and "conventions" are also integral constituent parts of constitutional secularism. After all, constitutional law is not exclusively made of values and principles; it has organizational and conventional components[18] too. Conventions are

[17] Toni M. Massaro, *Religious Freedom and "Accommodationist Neutrality": A Non-Neutral Critique*, 84 OR. L. REV. 935, 944 (2005).

[18] Conventionalism does not refer to conventions in the technical sense as it is understood in English constitutional law. The original meaning attributed to constitutional convention was that of rules restricting the Crown's discretionary power. *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (E.C.S. Wade, ed., 10th ed. 1959); *see also* Geoffrey Marshall, *The Constitution: Its Theory and Interpretation*, *in* THE BRITISH CONSTITUTION IN THE TWENTIETH CENTURY 29, 37 (Vernon Bogdanor, ed. 2003). For a more comprehensive understanding, see PIERRE AVRIL, LES CONVENTIONS DE LA CONSTITUTION: NORMES NON ÉCRITES DU DROIT POLITIQUE (1997). Conventions often reflect fundamental political compromises regarding living together, on the sidelines of the constitution.

particularly strong in matters of regulation of religion.[19] The understanding of secularism in constitutional practice is historically shaped and it is, therefore, contingent. Even a principled approach to constitutional rights will not rule out considerations of contingencies in constitutional practices. As a matter of fact, given the pragmatic nature of constitutions, national constitutional arrangements regarding secularism have to be, at least to some extent, contingent. As Kent Greenawalt has put it:

> [W]hen we examine our political practices, we see that our society has had some loose, moderately controversial conventions about the place of religion in political life. I think those conventions represent one appropriate approach within a liberal democracy. . .[20]

Constitutional law is full of conventions reflecting historically developed assumptions which are based on specific compromises. While a strong concept of state sovereignty stands for the idea that all public power emanates from the state, conventions attenuate the position, especially as far as the existence and recognition of churches are concerned. Sometimes, as in Germany, certain churches seem to have a pre-constitutional existence and are simply recognized by the constitution.[21] This results in "the differential treatment of religious groups that," according to Cole Durham,

> has not been held to violate [international law-based] antidiscrimination norms. In part this reflects political considerations, since there is typically insufficient will to take on entrenched relationships between the state and predominant religions that have evolved over centuries. It also reflects assumptions that there are reasonable and objective considerations, growing out of history, tradition, accrued obligations, identity forming and government limiting roles, social peacekeeping and the practicalities of dealing with major churches that justify differential treatment.[22]

There are considerations that inculcate into constitutionalism historical conventions of the kind mentioned above, but such conventions lack the force of constitutional principles. Notwithstanding elaborate theories like praktische Konkordanz, which intends to maximize by coordination conflicting fundamental rights,[23] preferential treatment of certain religions, or even of religions vis-à-vis other organizations with similar functions, remains constitutionally problematic as the handling of Jehovah's Witnesses in Germany indicates.[24] Conventions tend to crystallize inconsistencies and tensions with principles, and sometimes they point towards unrecognized principles.

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[19] Lawrence Tribe attributes this role to history. TRIBE, *supra* note 12, at 1224. The American Supreme Court at a certain point held that tax exemptions to church property did not violate the Establishment Clause, as such longstanding practice did not materialize in additional steps bringing closer establishment. *See* Walsh v. Tax Comm'n, 397 U.S. 664, 678 (1970).

[20] Kent Greenawalt, Religion and American Political Judgments, 36 WAKE FOREST L. REV. 401, 411-12 (2001).

[21] The relevant provisions of the Weimar constitution were taken over into the Grundgesetz.

[22] W. Cole Durham, Jr., *Facilitating Freedom of Religion or Belief Through Religious Association Law*, *in* FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK 329-30 (Tore Lindholm et al. eds., 2004).

[23] KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIKS DEUTSCHLAND 317 (1984).

[24] Article 137 (5) of the 1919 Weimar Constitution (still in force) incorporated a certain suspicion against the denominations that were not politically strong enough to be recognized as churches by the time of the making of the Constitution. The resulting wording was used for many decades in German courts to doubt the constitutional loyalty of certain denominations like that of Jehovah's witnesses. Notwithstanding the fact that they were active in Germany for more than one hundred years and numbered above 150,000, they were denied church status because of doubts of political loyalty until 2000. The German Constitutional Court found it unsustainable on a narrow factual basis. BVerfGE 102, 370 (2000) (refusal of the oath of loyalty and the religious teachings about the satanic nature of the state are improper indicators of civic loyalty to the state).

Historical happenstance remains irritating for constitutionalism. It is no surprise that these are gradually eliminated for reasons of constitutional aesthetics (which means consistency), even without political or social pressure and without generating excessive church resistance. Moreover, the conventionally permissible arrangement may not reflect contemporary public perception properly: what used to be and was accepted as religious, is understood as simply customary, hence there is no entanglement.[25] Conventions are often too slow to reflect sudden changes in the religious landscape and are subject to jurisprudential revision.

II. THE EMERGING CONCEPT OF SECULARISM AND ITS ANSWERS TO STRONG RELIGION

In view of the above, said constitutional secularism is full of concessions. Perhaps this makes secularism and even constitutionalism weaker in theory but they are not necessarily undermined. Nevertheless, some *suspicion* continues to linger. The needs and values, which were served by separation, might pay the price of the concessions. Suspicions have consequences in constitutional law. Suspicion suggests that the special preferential treatment of religion in the public sphere in the form of accommodation has to be justified every time, even if presumptions work in its favor if it is based on free exercise claims. The specific preferential church treatment and the exceptions granted in the name of free exercise have to be demonstrated as reasonable, and one that will not undermine constitutional requirements like equality, democracy, and autonomy.

Secularism looks hollow; it intends to patrol the boundaries of a space defined as public to keep it exempt of sacral, transcendental considerations. It is negative as it defines itself against certain strivings of religion. Some of the proxies used in constitutional law—like "separation" that sustains state sovereignty, and the neutrality of the state (meaning impartial non-involvement)—are "flexible" because they reflect conventions and also because they tend to accommodate other constitutional considerations, especially protection of free exercise of religion.

I have argued elsewhere that secularism is a normative consequence of popular sovereignty.[26] Constitutional democracies presuppose and are created to enforce popular sovereignty. Popular sovereignty means that all power in the state originates from people, therefore *it cannot originate*

[25] The argument is often abused to the detriment of other denominations, as in Sunday observance cases. *See, e.g.*, R. v. Big M Drug Mart, Ltd., [1985] 1 S.C.R. 295 (Can.); *State v. Lawrence* 1997 (4) SALR 1176 (CC) (S. Afr.); McGowan v. Maryland, 366 U.S. 420 (1961). Most constitutional courts for example accept majority religious practices as neutral constitutional practices, claiming that these reflect neutral considerations or national traditions deemed neutral. National religious holidays and Sunday observance are typically justified as satisfying the need of weekly rest and family togetherness, and the fact that the national holiday or the Sunday/Sabbath overlaps with a religious dictate is not addressed or is considered irrelevant.

[26] Sajo, *supra* note 2.

from the sacred. People's power is sovereign and cannot be a delegated power; it cannot exist by God's grace. In consequence no other entity but the people has original powers, including the powers to legislate. All entities, including churches, exist by wish of the sovereign, irrespective of the ontological precedence of certain entities in the state. For this reason secularism has to insist on the refusal of non-secular sources of power in the name of popular sovereignty. Further, it has to insist on a secular epistemology in legislation and in the sense of promoting it in society. Otherwise the needs of rational faculties and the protection of human rights will be in jeopardy.

A secularist jurisprudence has to be reminded of these concerns, particularly because neutrality of the state and its separation in the sense of non-involvement (into the affairs of churches and religions) are sometimes inclined to permissiveness in favor of religion; these principles allow some unconstitutional practices in the name of autonomy of the collective entities. At the same time, when the state enforces human rights and secular concerns it is accused of violating neutrality and imposing a specific secular world-view. This argument is used as a Trojan horse for strong religions. Without a clear commitment to secular principles the mistaken remorse of judges (for not allowing more diversity and more freedom in the manifestation of religion) will result in further permissiveness (not a bad thing per se) and erosion of the secular.

The practical damage that its proxies cause to secularism is partly related to the "thinness" of these proxies, particularly of neutrality. Freedom of religion and respect of multicultural pluralism press for departure from "neutrality as equal distance"; it is argued that distance should not be kept and religions as pluralistic forms of life should be allowed in public life. For many commentators such departure (for them an "improved" neutrality) is a welcome step needed for efficient free exercise protection. Highly respected decisions of the South African Constitutional Court and of the Canadian Supreme Court can be quoted here.[27] The German Federal Constitutional Court talks about "open neutrality of the state."[28]

> The idea behind this conception is that the religions are supposed to have a positive role not only in private, but in public life as well. The neutrality, and thus the secularity, of the state manifest itself not by banning the presence of religion in the public sphere but by giving them space without discriminating any of them.[29]

The once-hollow or at least individualistic and free public space of the secularist imagination is populated again by religions, which are deemed to play a "positive role" in public life. The state is now expected to be religion-friendly,[30] and it is advised to remain so, denying at the same time such friendly treatment to aggressive religions, or religious positions. But it is jurisprudentially det-

[27] *See, e.g.*, *Big M Drug Mart*, [1985] 1 S.C.R. 295; *Lawrence* 1997 (4) SALR 1176 (CC); *McGowan*, 366 U.S. 420.

[28] BVerfGE 108, 282, 298 (2003) (Kopftuch Ludin [Ludin's headscarf] case).

[29] Matthias Mahlmann, *Religion, Secularism, and the Origins of Foundational Values of Modern Constitutionalism*, presented at the VIIth World Congress of the International Association of Constitutional Law in Athens, at 11-15 (June 14, 2007), *available at* http://www.enel-syn.gr/papers/w12/Paper%20by%20Matthias%20Mahlmann.pdf.

[30] This went as far as French President Nicolas Sarkozy demanding positive secularism in a speech at Saint-Jean de Latran in Rome in December, 2007. *See* Henry Samuel, *Nicolas Sarkozy in Row Over Secularism*, TELEGRAPH.CO.UK, Feb. 14, 2008, *available at* http://www.telegraph.co.uk/news/worldnews/1578691/Nicolas-Sarkozy-in-row-oversecularism.html.

rimental, perhaps even impermissible, to enter into a case by case analysis of the role a specific religion plays in society. Moreover, such analysis would encourage the application of existing social bias, disregarding the detrimental potentials of "good" religions and blowing out of proportion the destructive impetus of the already suspicious, "odd" new and minority religions.

The theories of secularism which are based on the benevolence of religions reflect magnanimous and optimistic assumptions about the cooperative and "civilized" nature of religion. Where one can assume that religions are sensible and responsive, ready to dialogue and compromise in the spirit of tolerance or irrelevance,[31] the pluralistic concessions and strong accommodation are perhaps affordable and there are good practical reasons to legitimize such attitude. But religion (and this applies to all denominations) is not homogeneous and it is changing all the time. One cannot take peaceful coexistence for granted, and my concern here is with secularism facing strong religion, and religions which can go "strong." (They all can do so.) The weakness of secularism, and hence of liberal democracy originates in the forgetting about the nature of many religions, or part of their tenets. As Toni Massaro aptly summarizes it:

> [S]ome religious faiths reject secular reason and pluralism outright as proper cultural baselines; and fidelity to most religious faiths implies conduct, not just belief or expression. Official support of religion therefore can mean reinforcement of conduct that undermines foundational liberal principles of critical inquiry, religious and ideological pluralism, and secular reason.[32]

The inherent threats to constitutionalism coming from religion are easily forgotten in the atmosphere of "mutual understanding." The golden years of sweet romance and the democratic pressure of organized religions resulted in "accommodationist neutrality"[33] even in the United States.

Where religion is socially or politically *perceived* as aggressive the equation immediately changes: "[T]he state's duty [is] to protect its citizens against excessive demands of individual religious groups."[34]This desire comes naturally. Otherwise we run the risk of granting a public presence to practices and communities that stand for values hardly compatible with the constitution. Of course, people are free to choose their good life, even if this is contrary to the values of the constitution, which has to be neutral in this regard anyway. But here, by granting access to the public sphere, the constitutional order contributes to the affirmation and spreading of such values that are contrary to liberal constitutionalism. After all, is it appropriate to subsidize a school where the subordination of women is taken for granted and is taught as a divinely ordained matter?

Some prominent thinkers, most notably perhaps Professor Karl-Heinz Ladeur, rely on sociological observations, namely the role of religions in the national culture, and propose a rethinking of the

[31] The Augustinian approach of Catholicism to secular power is not troubling to the worldly power. Reinhold Niebuhr and many others prefer reason to revelation when it comes to moral truth. REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY: A STUDY OF ETHICS AND POLITICS 28 (2001). These are easy cases for accommodation of religion.

[32] Massaro, *supra* note 17, at 943.

[33] *Id.* at 936.

[34] Karl-Heinz Ladeur & Ino Augsberg, *The Myth of the Neutral State: The Relationship Between State and Religion in the Face of New Challenges*, 8 GERMAN L.J. 143, 148 (2007).

constitutional role of religions in constitutional law by granting recognition to religion as *culture*. "This excludes an undifferentiated equal treatment of all different religions. . . . The dominance of the prevalent religion or 'Weltanschauung' in a certain society is of crucial importance for the educational process."[35] This strategy is clearly directed against certain, culturally "suspect," unusually strong religions. In order to distinguish out religions that are labeled culturally different, the position clearly discriminates among religions in the name of culture protection and cultural difference.[36] The inherent problem of such suspicion is that it is not content-neutral. In this program the government has to look, at least to some extent, into the teachings of certain religious groups, which is, prima facie, against fundamental procedural guarantees of church autonomy.

Secularism is not fixed, and it has to be able to learn. Notwithstanding (or perhaps because of) neutrality, the practice of many states can be flexible in granting public functions to churches, though quite often to more established churches which are seen as "normal players" of social life. But genuine secularism, following the principle of "rational sovereignty," shall grant public presence to religions only on equal (neutral) footing with other social actors (including non-traditional religions).

Of course, one should not have illusions. Secularism, with all its neutrality, is capable of mistakes when it comes to the determination of state policies, harms, etc. Courts have limited capacity to counter such mistakes, except if the mistake is dictated by world-view bias, like antireligious sentiment that imposes burdens on religion and the religious who are singled out for that burden.

Notwithstanding its imperfections, the above "patrol" concept of secularism points to certain applications for mid-level constitutional theory, which can be of use in judicial decision-making. The patrol perspective avoids the disguised discrimination of the "cultural" approaches as well as the aggressive accommodationism based on pluralism and unlimited exercise of religion. In secularism there is no place for religious legislation; personal law, if it is religious, is unacceptable, at least in principle. Free exercise, even if coupled with autonomy, shall not undermine the principle that the sacred cannot become a source of legitimate state power. In this regard the non-confessional nature of the state contains a negative (exclusionary) commitment.

The secularist patrolling of the boundaries of the public sphere against religious intrusion offers guidance in judicial decision-making. First, it offers resistance to religion-based ordering of public life. In practical terms it requires a consistent application of neutrality. Further, in view of the neutrality principle, when it comes to advancing the good life the state cannot claim to know what the

[35] *Id.* at 151. In the Israeli legal debate, claims to observe religious commands are presented not as dictates of the Torah but as cultural demands constitutionally legitimized by the Jewish character of the State of Israel.

[36] Similar favoring of the majority religion in public life results from a balancing theory as understood by Professor Venter, with reference to South Africa: "Explicit favoring of a religion or religious institution amidst religious pluralism cannot be defended in a constitutional state. It is however equally indefensible for the state to ignore the historical and social ethos of its population and to act as though religious convictions are irrelevant or unimportant. This consideration naturally brings forward the likelihood of having to weigh majority against minority interests or historical against contemporary considerations, and then to find an equitable solution." Francois Venter, *Can A Constitutional State Really Be Secular?*, presented at the VIIth World Congress of the International Association of Constitutional Law in Athens, at 11-15 (June 14, 2007), *available at* http://www.enelsyn.gr/papers/w12/Paper%20by%20Francois%20Venter.pdf.

good is, even less to impose what it considers to be good life. The fundamental assumption is that it is up to social actors (endowed with the faculty of reasoned choice) to determine for themselves the good life.

Secondly, secularism provides the judge with a good dose of skeptical suspicion when she has to deal with religion- (free exercise-) based claims. Consider the above-mentioned example of public funding of denominational schools. To the extent that such arrangement is conventional, it has to prove that it does not undermine the development of rational faculties among the pupils. Accepting that children have a right to education there is no secularist reason, in principle, not to contribute the same amount per child to schools run denominationally, as long as the education satisfies secular standards and goals. Further, public funding will become highly problematic if the school is discriminatory. Of course, discrimination here is not limited to race or denominational origin; it includes religious bias about ideas.

Some strong religions are popular and politically endorsed. To renounce accommodation that is already granted to these "popular, civilized" strong religions to other strong religions on the basis of the allegedly troubling nature of these religions would be prima facie unacceptable, being in violation of church autonomy and equality of religions.

Such suspicion regarding certain religions on alleged doctrinal positions and specific religious practices is regularly present regarding insular, "unusual" religious minorities, e.g., "sects" in France, Scientology in a number of European countries, and, in a very different form, with regard to European Islam.[37] It results in discriminatory treatment of religious groups and it sends the message of exclusion to minorities. Suspicion of the unusual might dictate wrong policies too. Accommodation, if used by strong religions, raises practical concerns of public order. This indicates that accommodation that seemed to be harmless and politically convenient cannot be sustained. Otherwise, at least the same concessions are to be granted to strong religions, which would abuse their autonomy. Whatever concessions are granted to "respectable" religion to the detriment of secularism, similar concessions will be demanded by strong religions. It follows that one should always consider what happens if a specific accommodation will be elevated to general rule.

A strong, militant version of secularism dictates suspicion in the sense of precautionary thinking. The precautionary principle defends the "void" public space of the constitutional state. Secularist precaution is primarily concerned with the maintenance of public reason as a foundation of political and policy decisions. This cannot be abandoned for the sake of accommodation of less aggressive religious positions. Otherwise, secularism will be undermined by a fundamental paradox: when we provide protection to religious beliefs and practices we run the risk that we abandon the demand for public reason giving. The unconditional prevalence of freedom of religion is also unsustainable. After all, it is not true that all sincere religious or other beliefs deserve equal protection in their manifestation, whatever *manifestation* is dictated by the religion.

[37] For an American example of the attempts to hinder the Santeria religion, see Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

Constitutionalism does not provide impenetrable shelter to religions and religious practices. Worldviews are in competition and threatening each other; proselytism is threatening to other religions; secular life forms are threatening to religions and religious communities, and vice versa. There is no constitutional reason to change this competitiveness, as long as it remains fair. Secularism was born as a reaction to totalizing concepts of life including those that insist that only the divine plan offers good life. There is no reason to remain tolerant in face of totalizing life plans, and in such regard secularism and the secular constitutional state shall not be neutral. In view of imperatives of the individual right to freedom of religion a liberal concept of secularism stands for the admission of religions though on conditions determined by an impartial state.

A border-patrol concept of secularism remains open to constant self-doubt and soul-searching that might paralyze it. This has an inherent reason: secularism as a constitutional doctrine must respect freedom of religion. But again, with all the constitutional imperative to respect free exercise, this shall not bound secularism to accept unconditionally all free exercise claims, as if they were absolute on grounds of their particular respectability. On the contrary, the position of the border patrol has to reflect the fact that free exercise of religion is often overprotected,[38] a situation that often results from unprincipled, historical and political contingencies.

The free exercise of religion is often overprotected and in many instances rightly so. Overprotection means that freedom of religion is considered a trump because religious convictions are believed to be more intense, and for that reason more vulnerable, or more important for the self than other believes or dictates of the conscience. Nonreligious beliefs and dictates of the conscience are not necessarily having the same high level of protection as religious practices—see the difficulties of conscientious objectors if they claim exemption on grounds other than religious. This overprotection means that the state shall make reasonable efforts for accommodation. Accommodation can be defended also on personal autonomy grounds, i.e., within the liberal paradigm. For reasons of personal significance, this is what people living in a religious community find vital for their life plan.[39]

Further, for the same reasons of personal significance church autonomy (as an instrument of free exercise of religion) is to be protected, including exceptions (immunities) to general rules, e.g., in employment, or in matters of religious truth that might otherwise amount to harassment.[40] The exceptionalism of accommodation is limited only by equality and equal dignity concerns.

But what happens if such an overprotected entity enters the public sphere, especially with the intention to reconquer it and will claim that its positions be treated as at least one of the possible grounds for legislation? It will continue to insist on its privileged position: It will claim that the criticism of its position is an unconstitutional, humiliating, and harassing attack on the free manifesta-

[38] The overprotection of minority religious beliefs can be explained on other grounds, like vulnerability.

[39] Of course, a non-liberal justification of church autonomy would emphasize the social importance of the institution, while the religious argument, where applicable, would refer to the special or holy nature of the church. Churches, at least in matters of belief, are to be protected on grounds of state neutrality too.

[40] Even the Swedish Supreme Court had to concede that Biblical positions that otherwise amount to anti-gay hate speech shall be protected. *See* Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2005-11-29 p. 1 (Swed.).

tion of religion, because, for example, criticism is frightening or it is in violation of some divine command, etc. To paraphrase Richard Rorty,[41] in constitutional law, at least in this regard, *religion as immunity will be used as a conversation stopper.* The claim to accept non-secular reasons means that the reasons of an already overprotected position are allowed into public deliberation.

It is true that religion may serve fundamental identity needs of the individual; as such beliefs and related *emotions* are worthy of protection. But this is not a sufficient ground to allow the recolonization of the public sphere by sentiments of pride and indignation and concepts of self-development in an organized form. Further, there is a public order concern here: strong religions are often missionary and command to save the souls of *others* and the whole world by imposing their own values on the rest of the society, not allowing accommodation for other beliefs and life forms.

III. FACING CHALLENGES

Having in mind the patrolling duties of secularism in a constitutional system, a constitutional jurisprudence should respond to non-secular constitutional arguments in order to sustain the fundamental constitutional values behind secularism, namely popular sovereignty in a polity of (mentally) autonomous critical citizens. Advocates of certain strong religions challenge the secularist position, using constitutional arguments. When addressing these claims, border patrolling secularism shall take as point of departure the otherwise justified overprotection of free exercise. In fact, the jurisprudential suspicions of the secularist regarding these claims are based on the danger that the overprotected position invites inevitably for abuse. Obviously, such suspicion does not mean that people participating in public debates and even law should not recognize that some of the fundamental values of a secularist constitutional system originate in religion or religions. The suspicion concerns the abuse of this truism, namely that these shared humanitarian values serve as a blank check for everything that comes from religion.

[41] Richard Rorty, *Religion as Conversation-Stopper*, *in* PHILOSOPHY AND SOCIAL HOPE 171 (1999). For Rorty, religious arguments were conversation-stoppers in the sense of being private opinions brought up in a debate about a public matter: "[T]he ensuing silence masks the group's inclination to say, 'So what? We weren't discussing your private life; we were discussing public policy. Don't bother us with matters that are not our concern.'" *Id.* But religion, or religious arguments, are used as conversation-stoppers in a different sense when the religious position claims superiority and exclusive knowledge. In this scenario, the religious position accuses the secular one of lack of understanding, while the religious position understands the public reason but finds it irrelevant. Relying on its constitutionally protected status it will claim that the protection shall extend to the recognition of its positions in legislation.

THE CONSEQUENTIALIST OBJECTION

Constitutional policies that would replace liberal constitutionalism with democratic or non-democratic theocracy stand for a social organization that is based on the intense *emotional* identification of the believers. The political regime that is in denial of divine commands cannot be accepted for the community of the strongly religious because "People do not feel whole if they try to divorce their deepest sources of insight from their political stances."[42] Accepting non-secular grounds for legislation runs the risk of accommodating the above position.

RELIGIOUS PLURALISM

One of the Trojan horses that would bring religious ground into democratic justification is misconstrued pluralism. Strong religions insist on the accommodation of their practices. By this logic, religion-dictated public and private conduct should be accommodated in the name of equality of individuals and their religions without further secular scrutiny (i.e., without asking if the conduct satisfies the neutral criteria of generally applicable valid law). This seems to me a misconstruction of pluralism. After all,

> [p]luralism, tolerance and broadmindedness are hallmarks of a "democratic society." Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position.[43]

But it does not follow from the requirement of the proper treatment of people *from* minorities that their respect means recognition of religious minority (or majority) *practices* and viewpoints[44] that dictate practices that disregard tolerance or violate gender equality, or are simply harmful in the sense J. S. Mill understood harm to be the ground for restrictive governmental action, or which limit and deny social integration chances to members of the minority into communities of their choice.

A specific version of pluralism is localism, modeled partly on *Yoder*[45] : a tolerant society should allow a local community to live according to its religious tenets, especially if there are no spillover

[42] GREENAWALT, *SUPRA* NOTE 20, AT 406.

[43] Sahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R., ¶ 108 (2004).

[44] Viewpoints as such are of course protected as speech and belief.

[45] Wisconsin v. Yoder, 406 U.S. 205 (1972).

effects to the rest of the society. This position seems to satisfy the liberal expectation of tolerance and self-determination—except that the subject benefiting from the arrangement is not the individual. In fact, the individual within the group might be left unprotected.

Further, constitutionalism is once again a theory of the functioning state. If the tolerance of *Yoder* is applied broadly we run the risk of societal and national disintegration. It is for this reason that the extension of the *Yoder* approach was rejected in the U.S. in *Kiryas Joel*,[46] while it remains a matter of continued contestation in Israel. The Israeli Supreme Court seems to solve such conflicts in favor of national unity (out of fear of "balkanization") and with an eye on democracy that works at the national level, but not in some local communities.[47] A religiously motivated law that undermines democracy or that cannot be translated in a way that fits into democracy remains problematic.

HYPOCRITICAL PUBLIC REASONS (THE RELIGIOUS IS NOT LOST IN TRANSLATION)

For most translation theories the requirement of public reason is satisfied as long as the legislative reasons are presented and accepted on grounds reasonably accessible to all (i.e., which do not presuppose some act of faith, belief in scripture, where the constitutional arrangement is not an act of faith). These theoretical requirements were accepted in law quite some time ago. The *Lemon* test requires that for a statute to be constitutional, it "[f]irst . . . must have a secular purpose; second its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive entanglement of government with religion."[48]

But even public reasons will be inadequate for the constitutionality of legislation and other governmental decisions as they do not depend only on the grounds of justification, on the reasons supporting it. It matters what the specific act actually does, in the sense of its consequences,[49] which have to be evaluated in secular terms and not in terms of salvation.

To some extent secular jurisprudence cannot disregard the motives behind public reason, even where the arguments are translated (translatable). Certain reasons that seem to satisfy the public reason requirement might be problematic, being hypocritical. A position that claims that it ar-

[46] Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994).

[47] *See, e.g.*, HCJ 953/01 Solodkin v. Beit Shemesh Municipality [2004] IsrLR 232, 248. Per President Barak, allowing for national solutions in divisive matters for legislation only while requiring compromise at the local level is "required by the values of the State of Israel as a Jewish and democratic state. It is reflected in the need to balance, on a local level, the Jewish and national values, on the one hand, against the liberty of the individual in a democracy, on the other."

[48] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). For Canada, see Chamberlain v. Surrey School District No. 36 [2002] 4 S.C.R. 710 (Can.).

[49] *Cf.* GREENAWALT, *supra* note 20, at 407.

gues against abortion in the name of protecting the health of women while in reality is concerned about the sanctity of life is not honest, and abuse of the argument, and lack of honesty, shall not be judicially rewarded. Besides, such hypocrisy will be detrimental for the very religion that the lie was intended to serve. Unfortunately such hypocrisy (resulting partly from the acceptance of conventions) is not alien to constitutional adjudication. Some constitutional courts, for example, accept majority religious practices claiming that these are neutral constitutional practices that reflect neutral considerations of health, family life or national traditions deemed neutral. National religious holidays and Sunday observance are typically justified as satisfying the need of weekly rest and family togetherness; the fact that the national holiday or the Sunday/Sabbath overlaps with a religious dictate is simply not addressed. Further, the Canadian Supreme Court found secularism to be compatible with religion-based policy considerations, as long as this did not preclude pluralism:

> The School Act's . . . requirement of secularism in s. 76 does not preclude decisions motivated in whole or in part by religious considerations, provided they are otherwise within the Board's powers. But the Board must act in a way that promotes respect and tolerance for all the diverse groups that it represents and serves. . . . The words "secular" and "nonsectarian" in the Act imply that no single conception ofmorality can be allowed to deny or exclude opposed points of view. The section is aimed at fostering tolerance and diversityof views, not at shutting religion out of the arena. It does not limit in any way the freedom of parents and Board members toadhere to a religious doctrine that condemns homosexuality but it does prohibit the translation of such doctrine into policydecisions by the Board, to the extent that they reflect a denial of the validity of other points of view.[50]

Is this to indicate that the Board may allow in the school religious education that condemns regularly the sin of homosexuality allowing, however, students or other pastors to praise homosexuality if they wish (and dare to wish) so? The Canadian position may reflect a pragmatic conventionalist approach in the sense Greenawalt refers to conventions.[51] But is this an area for conventions? Without a principled approach conventional benevolent secularism might not resist strong religion, and it is for this reason that in countries where strong religion has social sex appeal, it is exactly this approach that is advocated. It is for this very reason that the French and the Turkish constitution took a principled, as opposed to a conventionalist, position.

[50] Chamberlain v. Surrey School District No. 36, [2002] 4 S.C.R. 710, 2002 SCC 86 (Can.) (quoting from the case note).

[51] "When we examine our political practices, we see that our society has some loose, somewhat controversial, conventions about the place of religion in political life. I think those conventions represent one appropriate approach within a liberal democracy, and one well suited for our society at this time. I regret that within the larger culture there is a kind of sharp division between serious religion, which affects many people and has a considerable influence on political life, and the broad culture, which has become largely nonreligious. I believe it would be healthy were there more dialogue in the broad culture about a religious or spiritual dimension of life. What I do not favor is a substantially increased injection of religious premises into discussions of particular political issues." Kent Greenawalt, *Religious Expression In The Public Square—The Building Blocks For An Intermediate Position*, 29 LOY. L.A. L. REV. 1411, 1420 (1996).

NO NEED FOR PUBLIC REASON?

A more direct, increasingly popular attempt to bypass secularism, exemplified in Michael Perry's scholarship, intends to change the very concept of liberal constitutionalism.[52] In Perry's view such constitutionalism simply does not require that public, and in particular constitutional, decisions be based on public reason, as long as fundamental rights in the constitution are respected.[53] In practical terms such respect would offer limited relief to those who would not like creationism as a mandatory subject or an alternative subject of the curriculum.

Perry and many others claim that a court that stands for secularism, neutrality or non-establishment shall not strike down legislation that outlaws conduct "on the basis of a religiously grounded belief that the conduct is immoral." But I think moral grounds have a spillover effect; law is speech that reinforces beliefs and discourages others with discriminatory effects. The disregard of these effects amounts to judicial myopia, or hypocrisy. Such judicial attitude is highly problematic, as it allows more than a semblance of the endorsement of a specific religious practice. At least for the minorities it will remain a violation of neutrality.

Perry's argument is partly prudential. When it comes to the judicial review of legislation the judiciary never knows what is actually based on religious beliefs and what is not. But what about the weak form of the translatability argument, that is that legislation has to have a plausible *independent secular ground*? For Perry, the acceptance of this requirement would require or allow judges to substitute their moral judgments for the moral judgments of legislators where there are moral controversies in society.[54] But this is not a principled objection. Liberal constitutionalism stands for certain values, and therefore not all moral impositions of the majority on the minority are acceptable. Here judges have a special role. Constitutional decisions, including judicial decisions, are about sustaining public order (in the most neutral sense possible). Further, the constitutional judge has a moral obligation to protect the minority in specific circumstances against religiously inspired generalized rules. In fact, legislating morality in the absence of actual harm, in the name of an imagined decent (in our case "heavenly") society is very problematic for liberal constitutionalism, at least as long as liberal constitutionalism stands for individual autonomy. With all the constitutionally mandated respect towards free exercise of religion, a court of a constitutionalist state must be particularly concerned when a religious ground is detectable behind (or runs parallel to) a secular ground, given that the particularism of religions is often directed against other religions and atheists. Such particularism puts in danger the equal citizenship of believers and non-believers. Such fears are particularly well founded in the case of strong religions, which (contrary to inward-looking

[52] *See, e.g.*, Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Is Not Illegitimate in a Liberal Democracy*, 36 WAKE FOREST L. REV. 217 (2001).

[53] Recall that at least in the liberal tradition of Kant, fundamental rights are not respected per se but as means of personal autonomy, where personal autonomy is the autonomous use of reason in the public. *See* HABERMAS, *supra* note 1, at 102.

[54] A religion-dictated choice may be unconstitutional on other grounds, for example disfavoring racial intermarriage, but not on non-establishment grounds.

strong religions such as that of the Amish) intend to bring salvation to outsiders. This means that, as a minimum, the religion would prescribe general rules of conduct applicable to all people in a way that the prescribed conduct of people will not cause *embarrassment to the religious.* But, unpleasant as it may be, modernity means, among others, living in embarrassment.

Not all religions are equal in terms of their political ambitions, but some strong religions do have undeniable political ambitions. Statman and Sapir claim that

> "even if religion carries the seeds of intolerance, and even of violence, it could not justify a blanket denial of the rights of the religious to participate in public discourse, in their capacity as religious people. Conceivably, less-extreme protective methods are available in order to prevent the frightening results mentioned above. . ."[55]

But participation in public discourse is not the same as deciding a public policy on religious grounds, and promoting that particularistic agenda through law. There are many instances where policy proposals reflecting religious positions are accessible, tolerable and even acceptable to non-sectarian members of society, but she who insists on religious command, runs the risk of remaining irrelevant.

Perry argues that for most Americans it makes no sense to deprivilege moral judgments that cannot stand independently of religious faith. For him, the opposite attitudes are clearly sectarian.

Perry claims that the requirement of independent secular grounds is "discrimination against many religious believers."[56] It would be second-order citizenship for the religious where her beliefs do not stand as such compared to citizens whose most fundamental moral beliefs are secular, and therefore are directly relevant in public decision-making. (Needless to say, advocates of strong religion—in its pluralist version too—excel in claiming victim status, in the best tradition of the contemporary culture of narcissism.)

Perry's position is mistaken. The fact that the secular reasons, and only the secular reasons are accepted in constitutional law for public action, is not a sign of preference to "secular *beliefs*" and even less for secularist citizens. Nothing precludes the religious to share such beliefs, and in fact, believers do share such beliefs, or accept very often for use in the politically organized society. In fact, Perry misconstrues the fundamental belief and values of the secularist. By the way, secular beliefs, too, are often disregarded, and the atheist will be wrong to claim that he is discriminated against by a public choice because of his world views. His argument is disregarded, perhaps because it is wrong, or because it concerns a matter of public disagreement, or simply because the majority is mistaken. Mistakes are regrettable but legitimate in a secular democracy, as long as they are based on a mistaken assumption that is accessible intellectually to all.

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[55] Danny Statman & Gidon Sapir, *Is the Liberal State Entitled to Act in Reliance on Religious Considerations?* 23 (unpublished manuscript, on file with the author).

[56] Perry, *supra* note 52.

Where the legislation stands for inoculation (in violation of certain religious beliefs), this is not favoritism serving the belief of the atheist who would worship inoculation or public health, or the health of her children. Inoculation (its beneficial consequences) is acceptable on grounds accessible to all reasonable people, religious or not, irrespective of divine commands. Notwithstanding the inherent difficulties of neutrality, it is the neutrality of public reasons (i.e., the legal requirement of non-religious reasons accessible to all) that helps to avoid turning people into second rate citizens.

NORMATIVE AUTHORITY

The issue is not that religious arguments are incomprehensible to the non-believer. The secular citizen understands the concept of God, but it is without *normative authority* for her. But then why should the religious person accept the normative authority of unicorns or human rights, or science? These things she can understand just like any other reasonable person; it is just that these things will be (might be) without normative authority for her. Certainly, there is nothing talismanic in secular arguments as satisfying public reason giving except that the other, non-secular approaches are more detrimental. What matters is the answer to the question: what has normative authority in *law*? In that regard constitutionalism and Western constitutions have made a choice. Other constitutions in other societies may make a different choice but they cannot be called constitutionalist. More importantly, the choice of the secular constitutional arrangement is intellectually and practically available to all, including the religious, but this is not true the other way around. People had the possibility to participate in these choices: these are their sovereign political choices. But as far as theocracy is concerned, here the commands are taken for granted, do not result from common choices and in principle they are imposed on the believer, who has limited power to opt out.

In pragmatic terms the actual Western choice of constitutionalism is a negotiated one. It may well be that we will reach a point where religions and churches will become much more powerful in these negotiations, and there will be a moment where the religious position will prevail in constitutional law. At that moment it will be the choice made by religion, and not people's choice, that will matter, even if that choice was endorsed by a majority consisting of fundamentalist believers. In the unlikely case where all people voluntarily choose religion you can't say that the policies will be, for this reason, sovereign choices of the people consisting of sovereign, autonomous individuals. The choices will be that of (to a great extent pre-existing, taken for granted, non-negotiated)[57] religion.

In secularist constitutionalism religion is absent from public life, and from political-legal decisions in particular. At the same time religious people, religious motives, religious arguments are welcome

[57] Of course religions too are negotiated, though not in a democratic process, but this is a sociological consideration and not a normative one.

in the public debate, as all people, all honest motives, and all arguments. A soup kitchen might be run because of religious convictions and it will remain an act of salvation of the soul. But as far as law is concerned it remains soup distribution that should follow neutral sanitation and welfare service rules.

Let me come back to Lefort's powerful paradigm of secularism. The banishment or withdrawal of religion from the public square has left a hollow space behind. There are no fixed rules and structures here, and democracy, or other forces fill the void in a continuous process. It matters for constitutionalism what the rules of filling the void are; and constitutional jurisprudence should stand for the idea that secular laws should set the rules of engagement.