

DARSHAN DATAR

European University Institute

RELIGIOUS AUTONOMY AS SECULARISM'S SILENT PARTNER

**S**cholarship has noted that the genealogical trajectory of a state has consistently had an impact on the evolution of state-church relationships. Philosophers have conceded that historically, as a sociological fact, religion was not purged from the public as much as it gradually lost its relevance to public life.

Charles Taylor prolifically referred to this phenomenon as being the result of a *Nova effect*.<sup>1</sup> Taylor's argument stands as a testament to previous scholarship on the matter. Karl Marx and Max Weber both saw religions appeal to the public sphere as being contingent on the limits of human rationality. Marx and Weber believed that as public reason moved into the sphere of logical and rational reasoning, religion would no longer have any force as a public mobilizer or organizer. What all their theories were hinting at was the inevitability of the demise of religion in public life.

Step forward into the 21st century. There is a new wave of theorists, both from the domain of law and sociology, who argue that the predictions of past philosophers are not in sync with how the world currently organizes itself. Seyla Benhabib points to the radical re-emergence of religion in the public sphere and argues eloquently about the death of secularization. What is critical to note here is that Benhabib did believe through her writing that secularization was once a factually observable phenomenon.<sup>2</sup>

However, what Benhabib later observes is that secularization has now lost its force in the face of the reemergence of a radical religious discourse within the public sphere.<sup>3</sup> The reemergence of religion is a fact that cultural anthropologists have also noted in quite some depth. Sabha Mahmood has demonstrated through her work how religious symbols in Iran have assumed the role of not only identity markers but also palpable sources of dissent against both neoliberal critiques of religion as well as radical religious impositions from the Muslim right.<sup>4</sup> All these strands of literature seem to have taken into account a re-emergence of religion within the dominant cultural space. But has legal literature taken note of any of these findings?

Constitutional theorists have also spoken of a reemergence of religion in the public sphere, and have observed that the resurgence of religion has had profound constitutional impacts. The dominant theories emerging from constitutional theorists are: first, that secularism must tighten its grasp on the public sphere to force secularization to become a social reality and a historical ideal. The

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<sup>1</sup> Charles Taylor, *A Secular Age* (Harvard University Press, 2008).

<sup>2</sup> Seyla Benhabib, "The Return of Political Theology: The Scarf Affair in Comparative Constitutional Perspective in France, Germany & Turkey", *Philosophy and Social Criticism*, 36 (2010).

<sup>3</sup> Ibid.

<sup>4</sup> Sabha Mahmood, "Politics of Piety: The Islamic Revival & the Feminist Subject" (Princeton university Press, 2005).

second argument is that secularism is currently in need of reform, and that the movement into a post-secular phase is more desirable to deal with the reemergence of religion. What both strands of theory agree on is the inviolability of secularism within a liberal constitutional order that both values and protects the freedom of religion.

However, there seems to be a consensus that secularism must reform itself in the face of the new religious threat in order to inclusively secularize a society. Through the course of this paper I will attempt to challenge this notion in the social sciences and in constitutional theory by demonstrating how constitutionalism continues to secularize societies due to its inherent urge to dominate religion. My argument will outline how constitutions occupy a unique position in public life, so as to demonstrate how they control the contours through which public discourse and belief operates. In order to do this, this paper will first outline what liberal constitutionalism is and the relationship it has with secularism. Further, it will ask and perhaps answer the second question of whether liberal constitutional courts ought to be constrained in their domination of religion in order to allow for religion to function more prominently within the public sphere.

### *Constitutionalism and Its Relationship with the Secular*

Secularism as a concept in a liberal constitution provides protection to a polity based on reason against the heated passion of religious doctrine and by doing this regulates the space religion occupies in the public sphere.<sup>5</sup> Traditional liberal constitutional theory argues that secularism is a shield to ensure that liberal values continue to function in the face of a religious critique. Separating governance from religion, which is at the core of secularism's structural task, is deemed to be vital to the liberal constitutional order by constitutional scholars.

While the aforementioned narrative continues to have an overwhelming amount of normative influence, its accuracy has constantly been critiqued.<sup>6</sup> Scholars have declared that secularism is being used as a convenient excuse to regulate religion in ways that hamper minority rights, and this has led scholars to call for the abolishing of secularism as a concept.<sup>7</sup> At the heart of this criticism is that secularism as a doctrine hampers the practice of religions that are non-western and non-Christian.<sup>8</sup> A second line of criticism is that secularism as a concept has at its core a form of religious intolerance that impacts the dignity of individuals who necessarily believe in the ordering of public life on religious grounds.<sup>9</sup>

Each one of the aforementioned criticisms alludes to the fact that there is not enough autonomy given to religions in the public sphere within secular legal orders. In order to adequately respond to this

<sup>5</sup> András Sajó, "Constitutionalism & Secularism: The Need for Public Reason", *Cardozo Law Review*, 30 no 6 (2010): 2401-14.

<sup>6</sup> Ratna Kapur & Brenda Cossman, "Secularism's Last Sigh?: The Hindu Right, the Courts, and India's Struggle for Democracy", *Harvard Journal of International Law* 38, no 1 (1997): 122. Talal Asad, *Formations of the Secular: Christianity, Islam & Modernity* (Stanford University Press, 2013).

<sup>7</sup> Susana Mancini, "The Tempting of Europe, The political Seduction of the Cross", in *Constitutional Secularism in an Age of religious Revival*, Eds. Michel Rosenfeld & Susana Mancini (Oxford University Press 2014).

<sup>8</sup> Ronan McCrea, *Religion & Public Order of the European Union* (Oxford University Press, 2010): 203-10.

<sup>9</sup> Michel Rosenfeld, "Recasting Secularism as One Conception of The Good Among Many in a Post-Secular Constitutional Polity", in *Constitutional Secularism in an Age of religious Revival*, Eds. Michel Rosenfeld & Susana Mancini (Oxford University Press 2014).

criticism and redeem secularism as a concept, the question we must consider is whether religion must be given an autonomous legal sphere in order for there to be truly inclusive secular legal order?

### *Secularism and The Relationship with the Religious*

Perhaps it would, at this stage, be prudent to demonstrate how courts understand secularism. Secularism as defined by the European Court of Human Rights seems to be the most comprehensive definition of the term as national courts avoid creating a meta definition of the concept. The Court of Human Rights observed that:

[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 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 every one.<sup>10</sup>

This form of secularism as understood by liberal courts emerged from social revolutions, which underpinned the notion of a Christian Dualism that constructed a secular and a religious sphere.<sup>11</sup> The revolutions set out the contours for a very traditional view of secularism, which largely gave rise to the proposition that religion was an evil that plagued governance and in turn threatened popular sovereignty through its function as a social organizer. The concept of secularism that emerged through these revolutions, specifically the French revolution, advocated for a radical separation of religion from politics. This separation signified a rupture between ecclesiastical sphere and political sphere. The goal that this radical form of secularism seeks to achieve is to prevent religion from dominating public life. It further ensures that the seat of sovereignty is not based on an ecclesiastical order but with a constitutionally approved sovereign. To put it flamboyantly: It was the victory of a constitution over theology.

This specific radical separation continues to be seen in certain liberal secular regimes. The first regime that comes to mind is the regime in France, which was consolidated by the law in 1905. The French system predicates itself on a radical dominance over religion. As mentioned by Michel Trooper, the 1905 law does not form much of a rupture or deviation from the previous regime under Napoleon.<sup>12</sup> The argument I derive from this is that all forms of secularism have within them an inherent urge for the domination of religion by the state apparatus.<sup>13</sup>

The reason I make this claim is that, according to scholars, secularism as a concept is necessarily created to protect individuals from the domination of religion.<sup>14</sup> Therefore, by separating religion and

<sup>10</sup> Leyla Sahin v. Turkey, App. No. 44774/98, Eur.Ct.H.R., ¶ 108 (2004).

<sup>11</sup> Silvio Ferrari, "Who is Afraid of Religious Freedom? The Right to Freedom of Religion & Belief & Its Critics", *Religion & Human Rights*, 11 (2016): 224.

<sup>12</sup> Michel Trooper, "Sovereignty & Laicite", *Cardozo Law Review*, 30 No. 6 (2010).

<sup>13</sup> Ibid.

<sup>14</sup> Patrick Weil, "Headscarfs v. Burquas: Two French Bans With Different

politics the state apparatus is capable of better protecting the liberty of individuals who do not want to profess an institutionalized religion.<sup>15</sup> The same would theoretically be an argument which is also applicable for the protection of religious minorities. The separationist regime should theoretically allow for minority religions to be exempt from the dominance of a majority religion.<sup>16</sup>

The aforementioned notion of secularism is not indigenous to France, and it continues to manifest itself in numerous liberal constitutional states across the world. A first example is the state of Turkey prior to the Erdogan era.<sup>17</sup> Turkey, prior to the Erdogan regime had its version of secularism entrenched in the constitution to the point where it was deemed to be an immutable part of its constitutional identity. This was indicated by the Constitutional Court of Turkey which argued that secularism was unamendable.<sup>18</sup>

Such was the appeal of a separationist regime often dubbed as *Kemalism*.<sup>19</sup> *Kemalism* follows a very similar trajectory to the French notion of secularism. It is the dominance of religion by the state and this dominance is achieved through the eradication of religion from the political realm. *Kemalism* represents a radical separation that involves the governmental control of dress codes and the strict separation of religious orders from interfering in politics. In fact, *Refah Partisi*<sup>20</sup>, a case before the European Court of Human Rights demonstrates how Turkey is one of the few nations, which, in the past, has invoked militant democracy clauses to deny religious parties a claim within the political setup. This goes to show how much of a threat Turkey views religion as, and how the constitutional order through secularism and militant democracy clauses protect the Turkish constitution as the supreme seat of sovereignty.<sup>21</sup>

Theoretically this state dominance is seen as a necessary facet of the traditional separationist view. Rajeev Bhargava clarified that in the Indian context, secularism assumed the meaning of maintaining a principled distance from religion until there was empirical evidence that there was the dominance of a religious minority by another religion, or by a religious sub-faction within the same religion.<sup>22</sup> India's model of secularism as envisaged by the constitution also gives the government authority to interfere in ecclesiastical politics in the event that there was a form of caste-based discrimination within the Hindu tradition.<sup>23</sup> Therefore, once again the Indian system predicates itself not as separation granting autonomy to religious orders but as a functional secular dominance over religious orders.

However, what is critical to note is that the dominance over religion

Meanings in Constitutional Secularism", in *Constitutional Secularism in An Age of religious Revival*, Eds. Michel Rosenfeld & Susana Mancini (Oxford University Press 2014): 195-214.

<sup>15</sup> Ibid., 195- 215.

<sup>16</sup> Ibid.

<sup>17</sup> Emre Oktem & Mehmet C. Uzunm, "Religious Dress Codes: The Turkish Case" in *Religion in Public Spaces: A European Perspective*, Eds. Silvio Ferrari & Sabrina Pastorelli (Asgate 2012), 191.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid., 191.

<sup>20</sup> [2003] ECHR 87: ¶ 123.

<sup>21</sup> Emre Oktem & Mehmet C. Uzunm, "Religious Dress Codes: The Turkish Case" in *Religion in Public Spaces: A European Perspective*, Eds. Silvio Ferrari & Sabrina Pastorelli (Asgate 2012), 191.

<sup>22</sup> Rajeev Bhargav, "The Distinctiveness of Indian Secularism" in *The Future of Secularism* (Oxford University Press, 2009).

<sup>23</sup> Ibid.

alone would not satisfy the requirements of liberal constitutionalism; it is merely one facet of what liberal constitutionalism requires. Solely dominating religions by a state apparatus would be tantamount to an exclusive use of governmental authority over religious order, which has the effect of annulling religious rights on an individual and community level. In the absence of religious autonomy, liberal constitutions begin to treat religion in a very similar way to authoritarian constitutional order.

Egypt under the leadership of Mubarak is a prime example of an authoritarian constitutional order.<sup>24</sup> In Egypt it was both common and constitutionally required for the government to appoint religious heads and control the religious order. Furthermore, the Supreme Constitutional Court of Egypt was responsible for the implementation of religious decision making, therefore assuming the role of the interpreter of both the constitutional order and the ecclesiastical order. The exclusive dominance of religion by a constitutional authority with the absence of religious autonomy being conferred to an ecclesiastical order mimics the structure of an authoritarian regime that often has constitutional structures, which perpetuate the dominance of religion in a public sphere without any systemic checks on authority.<sup>25</sup>

Liberal secular states cannot function in this way for two reasons. Firstly, because there is a constitutional urge to check governmental and judicial authority in order to preserve the liberal order from tyranny. Secondly, as noted by Brian Leiter, there is a need for a liberal state to be tolerant towards religion as it is tolerance that underpins the liberal identity. *Ergo* there must be an equitable protection of all religions, both nontheistic as well as those with established orders.<sup>26</sup>

With the justification for religious autonomy rooted both in constitutionalism as well as in moral liberal philosophy, it is perhaps justifiable to conclude that secularism in a liberal constitution has two facets: the first is its domination over religion in a political setting to ensure that society is free from a coercive influence that religion can exert, and the second is the non-interference in religion in a private setting.

#### *Demystifying Religious Autonomy And Introducing How Courts Violate the Concept*

At this point we must understand what religious autonomy is to fully grasp why it is essential to secularism. Religious autonomy as noted by Perry Dane moves beyond and transcends the notion of religious freedom, as it is a right given to a religious order, which effectively takes the form of a group right.<sup>27</sup> The group right however acts as a medium to consolidate religious identity on an individual level as it protects the faith that an individual identifies with. Perry Dane summarized the concept in his comparative study on religious autonomy.<sup>28</sup> Dane observed that:

[R]eligious autonomy is a species of religious liberty. But it is a

<sup>24</sup> Ran Hirschl, *Constitutional Theocracy* (Harvard University Press, 2010), 51-52.

<sup>25</sup> Ibid., 107

<sup>26</sup> Brian Leiter, *Why Tolerate Religion?* (Princeton University Press, 2013), 67.

<sup>27</sup> Perry Dane, "The Varieties of Religious Autonomy in Church Autonomy: A Comparative Survey" in *Church Autonomy: A Comparative Survey*, Ed. Gehard Robbers (Peter Lang, 2001).

<sup>28</sup> Ibid.

species with its own attributes. For one thing, it generally involves a well-defined institutional or communal interest, and not merely an individual one. Moreover, at least the paradigmatic claims to religious autonomy do not depend for their force on the specific norms of a particular religious community. Rather, they invoke limitations on government intrusion in any religious community.<sup>29</sup>

Dane further observed that the problem of religious autonomy arises from secular law trying to make sense of an ecclesiastical order and structurally protects the ecclesiastical order from a complete domination by the secular order.<sup>30</sup> It is therefore not surprising that cases of religious autonomy seem to consistently arise out of the law exerting normative superiority over a religious order. What the secular order aims to do is to restructure a religious order's internal functioning in line with the universal values derived from secular values.<sup>31</sup> It would thus be prudent to conclude that religious autonomy amounts to a structural limitation on secularism for two reasons: first because it is an implied limitation on the doctrine itself, and second because it amounts to a rights based check on secular governance.<sup>32</sup>

An example of a country that adequately protects religious autonomy is the United States. The reason for which the system is so favorable towards the concept is the unique phraseology of the constitution of the United States. The United States comprises two specific clauses to protect religion's role in society. The first is the establishment clause and the second is the free exercise clause. The establishment clause allows for the free establishment of an ecclesiastical order, while the free exercise clause allows the free practice of any religious belief by an individual. For the purpose of protecting ecclesiastical autonomy, the clauses work in tandem. Religious autonomy, much like separation of powers becomes a structural check on constitutional authority in order to preserve the right to religion.<sup>33</sup>

There is a distinction between violating the religious autonomy of a religious order and the violation of the individual's right to profess a religion. The right to profess religion is founded in the negative notion of individual liberty, which is applicable to an individual.<sup>34</sup> However, the right to religious autonomy is a group right that solidifies a religious orders right to manage its own affairs and to define its own practices.<sup>35</sup>

The central issue that underpins most religious autonomy-based lawsuits is the issue of legal intervention verses legal limitation.<sup>36</sup> Limiting religious liberty can be understood as secular law using secular public reason to curb religious expression or practice on the grounds that it conflicts with secular law. Interference with religious autonomy, on the other hand, is an investigation of the doctrinal aspects of a religion in order to yield a judicially ascertainable claim which may be validated as being ecclesiastically legitimate or not in and through the language of secular law's interpretation of the realm

<sup>29</sup> Ibid., 197.

<sup>30</sup> Ibid.

<sup>31</sup> Cole Durham & Bret Schraffts, *Law & Religion: National, International & Comparative Perspectives* (Wolters Kluwer, 2010).

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Marc Galanter, "Hinduism, Secularism & The Indian Judiciary", *Philosophy East & West*, 21 No. 4 (1971): 467, 469-70.

of religion.<sup>37</sup>

This principle was first fleshed out by the U.S Supreme Court in the decision of *Watson v. Jones*.<sup>38</sup> *Watson v. Jones* enshrined the principle that a secular Court could not review a decision by an ecclesiastical community or Court with the exception of fraud and malice.<sup>39</sup> However, in the case of *Serbian Eastern Orthodox Diocese v. Milivojevich*<sup>40</sup>, the Supreme Court stated that it was essential that in cases of civil suits where an interpretation of the internal doctrine of a religion was required, the Court could not engage in an interpretation or even a judgment of the case.<sup>41</sup>

The case further went on to reject the Wilson exception. Furthermore, in the case of *Jones v. Wolf*<sup>42</sup>, the legal precedent was laid down which would later be accepted by the Supreme Court, where it was held that there was a need for the court to interpret in a secular manner.<sup>43</sup> The case reemphasized that the Courts could not engage in a reinterpretation of the religion. The aforementioned trend was aptly summarized by the Court in the case of *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, where the Court noted that [To] accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."<sup>44</sup>

What is plainly apparent from the aforementioned decisions is that there is a link between secularism and religious autonomy in a liberal constitutional regime. While, in constitutions such as Egypt this fidelity might not exist. It seems as though religious autonomy is an integral facet of secularism. Too often today secularism is used as a reason to justify the encroachment on the autonomy of a religious group to define the contours of their own private morality and fidelity towards the divine. As I have demonstrated in this section, there seems to be an inseparability of the concept of secularism which at its very core, in whatever mold it exists has within it an inherent urge to provide religious orders with the autonomy to collectively define their own practice.

### Conclusion

The strand of legal thought which has advocated for the reversion to militant secularism to engage with the threat of the reemergence of religion in the public sphere has perhaps misunderstood what is at stake in this issue. They have neglected to fully theorize the relationship between secularism in a liberal constitutionalist setting and its relationship with the liberal order as well as the world of ecclesiastical politics.

By assuming that secularism is a tool of governance that enables the state to exert dominance over religion without any formal checks and

<sup>37</sup> Ibid., 476-80.

<sup>38</sup> *Watson v. Jones*, 8- U.S. (13 Wall) 679 (1872).

<sup>39</sup> Ibid.

<sup>40</sup> 426 U.S. 696 (1976).

<sup>41</sup> Ibid.

<sup>42</sup> 443 U.S. 595 (1979).

<sup>43</sup> Ibid.

<sup>44</sup> *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. (2012).

balances other than rights-based measures, we do not appreciate that secularism itself is a structural check on governmental authority. It is not merely a structural check against the excessive influence of religion in government but also a check on the excessive influence of government over the working of an ecclesiastical order.

By thinking about secularism as a structural check, on the capacity of government to make decisions—much in the same way as separation of powers between the executive, the legislative and the judiciary—we may better appreciate how pivotal religious autonomy is as a necessary component of secularism in liberal democratic regimes. By understanding secularism as a structural check we understand that religious autonomy is its silent unwritten partner, and this prevents the contortion of secularism in liberal states to justify the violation of religious freedoms in the name of neutrality.

It is my claim that all constitutions have a certain dominance over religion, however, constitutions which follow liberal constitutional models underpinned by checks and balances must respect religious autonomy because it is part of the very structure of liberal secularism.

*Darshan Datar is a researcher at the European University Institute in Florence, Italy, who writes on issues related to constitutionalism and religion.*