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Unveiling the limits of tolerance: comparing the treatment of majority and minority religious symbols in the public sphere

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1 The constitutional treatment of religion: the challenge of strong religion and fundamentalisms

Globalization poses two daunting challenges to traditional approaches to reconciling constitutionalism and religion. First, large-scale migration makes constitutional democracies much more religiously diverse, leading to confrontations between newly arrived religions that are at significant odds with prevailing mores and well-entrenched religions established in the country of immigration. Moreover, intensification of religious fanaticism and fundamentalism – including that behind global terrorism – are presumed a direct reaction to dislocations and inequities associated with globalization[1].

Second, the concurrent process of globalization and privatization has led to a blurring of the line between the public sphere and the private sphere. Religion has become "deprivatized," in a trend started in the 1980s in countries as different as Iran, Poland, Brazil and the United States,[2] thus not only seeking a much increased role in the public sphere but also in the political arena. Consequently, reconciliation of constitutionalism and religion through adherence to secularism in the public place becomes increasingly difficult and contested.

The revival of religion in pluralist and multicultural settings steeped in identity politics seriously challenges the legitimacy of the dominant conception of constitutionalism anchored in the principle of secularism. Theoretically, there is a radical challenge to the essential tenets

[1] G. Borradori, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (Chicago University Press, 2003).

[2] J. Casanova, *Public Religions in the Modern World* (Chicago University Press, 1994).

that animate the project of the Enlightenment: a clear-cut distinction between faith and reason; commitment to entrusting the public sphere to the rule of reason; and promotion of equal liberty for all. Moreover, certain practices associated with the Enlightenment project may have often been inconsistent, but its theoretical foundations have been steadfast throughout. For example, a political actor can be motivated by his religious faith and yet his political actions would remain consistent with secularism so long as he sought to influence and persuade other political actors through arguments deriving from public reason.[3] Indeed, certain contemporary religions are compatible with such use of public reason, but others are not. Fundamentalist religions often seem incompatible with the rule of public reason, and in the context of the revival of religion, even certain non-fundamentalist religions may find it unduly constraining.

Concurrently, a radical postmodern philosophical attack has been launched against a key Enlightenment tenet, namely the cleavage between the realm of reason and that of faith.[4] The postmodern challenge builds on the "disenchantment of reason" associated with the perception that reason as the means to the implantation of a universally justified rational order gives way to purely instrumental reason – that is a use of reason for purposes of advancing the narrow interests of the powerful, fostering colonialism and neo-colonialism, exacerbating disparities in wealth, and so on.[5] The reduction of reason to instrumental reason turns the means of the Enlightenment against its ends, and particularly against the pursuit of liberty and equality for all.

As instrumental reason spreads, alienated social actors tend to retreat to individualist isolation in futile opposition to an increasingly oppressive and meaningless social reality.[6] This produces a fragmentation of competing postmodern visions fueled by subjectivism stemming from disenchanted individualist isolation.[7] In this postmodern setting, all

[3] See J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

[4] M. Rosenfeld, "A Pluralist Critique of the Constitutional Treatment of Religion" in András Sajó and Sholomo Avineri (eds.), *The Law of Religious Identity: Models for Post-Communism* (The Hague: Kluwer Law International, 1999) pp. 39–40.

[5] J. Habermas, "Conceptions of Modernity: A Look Back at Two Traditions" in J. Habermas, *The Postnational Constellation: Political Essays* (Cambridge: Polity Press, 2001), pp. 130, 138–40.

[6] *Ibid*., p. 140.

[7] See J. Habermas, "The Postnational Constellation and the Future of Democracy" in J. Habermas, *The Postnational Constellation: Political Essays* (Cambridge: Polity Press, 2001), pp. 58, 88.

competing discourses and conceptions of the good emerge as ultimately purely subjective and equivalent, thus negating any priority to secularism, modernism, reason or Enlightenment values.[8] Accordingly, the Enlightenment project is full of contradictions and irrationalism, and passion and subjectivism are frequently prone to overcome the rule of reason. As the line between reason and the irrational blurs and the private and public spheres collapse into one another, the foundations that lend support to the nexus between constitutionalism and secularism seem increasingly precarious.

These developments have huge theoretical and practical implications that are closely linked to one another. For those both religious and secular who wish to avert the implantation of religious hegemonies or of war among religions, it is imperative to rethink how a new viable nexus between constitutionalism and religious pluralism may be theoretically grounded and practically implemented. Under current constitutional practice, there are essentially five different models for managing the relationship between the state and religion. These are:

1. the militant secularist model bent on keeping religion completely out of the public sphere (e.g., French and Turkish *laïcité*);
2. the agnostic secularist model which seeks to maintain a neutral stance among religions but does not shy away from favoring religion over atheism and other non-religious perspectives (this is close to current American constitutional jurisprudence);
3. the confessional secular model, which incorporates elements of the polity's mainstream majority religion, primarily for identitarian purposes, and projects them as part of the polity's constitutional secularism rather than as inextricably linked to the country's main religion (e.g., Italy's or Bavaria's adoption of the crucifix as a secular symbol of national identity);
4. the official religion with institutionalized tolerance for minority religions model (e.g. the United Kingdom, Scandinavian countries, Greece);
5. and the *millet*-based model in which high priority is given to collective self-government by each religious community within the polity (e.g., Israel).

[8] For a discussion of the contrast between Derrida's and Habermas' understanding of the historical deployment of the Enlightenment project, see M. Rosenfeld, "Derrida's Ethical Turn and America: Looking Back from the Crossroads of Global Terrorism and the Enlightenment," *Cardozo Law Review* (2005), 815, 826–31, 836–7.

All of these models have serious shortcomings. The militant secularist model, purportedly neutral toward religion, often seems downright hostile to it and, particularly, to minority denominations. Think of the French law of March 17, 2004, which prohibits "the wearing of symbols or clothing by which students conspicuously manifest a religious appearance" in all state schools.[9] This law is neutrally worded and therefore theoretically applicable to all symbols, including Christian ones. Controversies, however, have arisen exclusively in relation to the right of pupils belonging to religious minorities to wear symbols such as the veil, the *kippah*, and the turban, which, unlike the small crucifixes usually worn by Christians, are by nature conspicuous. The agnostic secular model, though arguably open to all religions, puts those who do not embrace a religious conception of the good at a disadvantage. In the confessional secularism model the state privileges the "national religious inheritance" as a key element of civic cohesion, thus granting preferential treatment to the "historical national religion" and mere tolerance to all others. This is potentially doubly problematic: on the one hand, it excludes minority religions and non-religious ideologies from the mainstream in such a way as to cut off or diminish the role of the latter in the building of national identity; on the other hand, if adherents to the majority religion are divided among the culturally attached and the deeply religiously committed to it, the latter may object to attempts to "secularize" sacred symbols. The Italian and German controversies over the display of the crucifix in public schools are good examples of this phenomenon. The official national religion model is explicit about privileging the country's majority religion, but seems prone to insufficient tolerance of minority religions and of non-practicing members of the official religion. Thus, Greece, which operates under this model, is the only European Union country to ban proselytism in its constitution.[10] Finally, the *millet* system is unsatisfactory too in that it tends unduly to disadvantage non-conformists or dissidents within recognized religious communities, and to thwart secular initiatives such as the polity-wide pursuit of gender-based equality.

This chapter focuses on key current questions through a comparative analysis of the treatment of displays of religious symbols in public places. These questions include: whether, assuming commitment to pluralism, multiculturalism and religious and non-religious comprehensive

[9] Law No. 2004–228 of March 15, 2004, Journal Officiel de la République Française [JO][Official Gazette of France], March 17, 2004, p. 5190.

[10] See Art. 13, para. 2, Greek Constitution, 1975

views, there may be ways to improve on existing models or to replace them with better suited ones given the new religious and political realities; and whether tolerance can be redeployed to boost pluralism while avoiding irreconcilable conflicts between religious fundamentalism and secularism.

The place of religious symbols in public spaces provides a particularly good case study in as much as conflicts over such symbols constitute a direct challenge to the legitimacy of the dominant conception of constitutionalism as inextricably linked to secularism. In a pluralistic society, religious symbols play a key role in identity-related dynamics. Moreover, globalization, large-scale migration and the aftermath of September 11, 2001 have dramatically increased the quest for social cohesion and strong collective identities. Religious symbols figure prominently in this quest because they evoke absolute, and therefore reassuring, truths, although they can easily turn into catalyzers of aggression, to the extent that they generate blind fixations and unquestioned adherences.[11] Religious symbols at once unite and divide, thus setting barriers between self and other. Majorities and minorities seek shelter in religious symbols, as a reflex against the increasing difficulty they experience in finding a common core of shared civic values. Moreover, a comparative analysis of the reactions of courts and legislators confronted with such conflicts reveals a tendency to counter or minimize pluralism, rather than to seek a reasonable accommodation of the different religions within the polity.

Furthermore, conflicts over religious symbols lead to blurring of the line between secularism and religion. Whether in conflicts over majority (e.g. the crucifix) or over minority (e.g. the Islamic veil) symbols, courts and legislators often secularize the meaning of religious symbols and interpret it consistent with the sensibilities, prejudices and identitarian claims of the majority. On the one hand, the religious significance of majority (Christian) symbols is watered down and presented in "cultural" terms as indicia of the historical and cultural dimensions of national identity only incidentally linked to a particular religion. On the other hand, minority, and, particularly Islamic, symbols are cast as expressions of cultural and political values and practices at odds with liberal and democratic ones. As a practical consequence of this trend, crucifixes may be displayed in public schools because secularized Christianity becomes a structural element

[11] L. L. Vallauri, "Simboli e Realizzazione" in E. Dieni, A. Ferrari and V. Pacillo (eds.), *Symbolon/Diabolon: Simboli, Religioni, diritti nell'Europa multiculturale* (Bologna: Il Mulino, 2005), p. 14.

of Western constitutional identity, while the wearing of Islamic symbols is banned or restricted because they are portrayed as portents of illiberal and undemocratic values.

2 Religious tolerance and cultural Christianity

From a constitutional standpoint, the modern state steeped in the normative order issuing from the Enlightenment should at once be neutral regarding religion, by neither favoring it nor disfavoring it within its public sphere, and be equally protective of its citizens' freedom *of* and *from* religion within the private sphere. Many constitutions reflect this dual constitutional prescription. Thus, the US Constitution's "Establishment Clause" prohibits the state from adopting, preferring or endorsing a religion whereas its "Free Exercise Clause" enjoins the state from interfering with the religious freedom of its citizens.[12] Article 1 of the French Constitution specifies the secular character of the Republic and the duty of the state to respect all beliefs.[13] Other constitutions only contain a free exercise clause, but implicitly embed the principle of separation in the founding principles of the system. This is the case in Italy where in the absence of any explicit constitutional provision, the Constitutional Court's jurisprudence[14] has instituted secularism (*laicità*) as a fundamental principle of the Italian legal system, prescribing state "equidistance and impartiality with respect to different faiths … in order to protect freedom of religion in a context of religious and cultural pluralism."[15] The United Kingdom, in contrast, has an official church, but also a high degree of accommodation for minority religions yielding a model of "inclusive multiculturalism." In Germany there is no strict separation between church and state and the constitution of the each *Land* regulates the role of religion in the public sphere according to its dominant religious tradition. All *Länder* constitutions, however, protect religious freedom and prohibit discrimination on the ground of religion.

[12] US Constitution Amend. I, 1791.

[13] Art. 1, French Constitution, 1958.

[14] Corte cost., April 11, 1989, n.203, available at www.giurcost.org/decisioni/1989/0203s-89.html (last accessed September 5, 2011).

[15] Corte cost., July 1, 2002, n.327; Corte cost., November 13, 2000, n.508; Corte cost., October 11, 1997, n.329; Corte cost., September 30, 1996, n.334; Corte cost., November 29, 1993, n.421; Corte cost., April 19, 1993, n.195; Corte cost., January 11, 1989, n.13; Corte cost., May 23, 1990, n.259; Corte cost., April 11, 1989, n.203. All of these cases are available at the Constitutional Court's website www.cortecostituzionale.it/actionGiurisprudenza.do (last accessed September 5, 2011).

In all the above cases the constitutional handling of the relationship between religion and the state draws on the Enlightenment but remains far short of its ideals. This is hardly surprising given the wide gap between Enlightenment ideals and how they have actually fared since they were launched in the eighteenth century. A telling example of this is provided by contemporary constitutional jurisprudence regarding the relationship between religion and the state. Secularization and the transition to liberalism resulted in a state model no longer endorsing a conception of the good related to a particular religion, but that put in question the powers of integration of a secularized society. The nation state with its emphasis on a distinct national identity anchored in a common history, language, tradition and culture displaced religious belief as the source of integration of the polity, but that did not preclude religion's persistent survival as an implicit mainstay engrained in the secular nation's tradition and culture. And because of Europe's overwhelmingly Christian heritage, repression of the latter quite naturally prompted its return as (Christian) culture and tradition.[16]

Conflicts over religious symbols provide a particularly salient example of how the entanglement between national identity and the polity's Christian heritage actually shapes the understanding of religious tolerance and informs the interpretation of religious rights. To illustrate this, we will first analyze the type of conflict that arises when a religious symbol deriving from the majority religion is used as a component of the "public language" of identity by state authorities. We will then turn to the kind of conflict that arises when the individual right to wear religious symbols and clothing is sought to be limited in the name of other rights and principles that bear equal constitutional value. In principle, this second type of conflict may arise equally in relation to the majority religion and to minority ones. Comparative analysis will demonstrate, however, that controversies have almost exclusively concerned minority symbols, chief among them the Islamic headscarf.

3 The putative neutrality of Christianity and the desecration of majority symbols

The display of Christian symbols in state schools has been challenged in many countries, including the United States, Switzerland, Germany and

[16] See D. Augenstein, *A European Culture of Religious Tolerance*, European University Institute Working Paper LAW 2008/04, p. 7.

Italy. The Italian and Bavarian judgments on the display of the crucifix are particularly clear examples of the blurring of the line between religion and secularism.

In 2005 Italian administrative courts ruled on the legitimacy of the display of the crucifix in state schools,[17] and concluded that "[t]he crucifix … may be legitimately displayed in the public schools because it does not clash with the principle of secularism, but, on the contrary, it actually affirms it."[18] Much to the disbelief of most constitutional law scholars stands the assertion that secularism has been achieved in Italy thanks to the founding Christian values. Accordingly, it would be paradoxical to exclude a Christian symbol from the public domain because of the principle of secularism, which is supposed to be actually rooted in Christianity.

According to these courts, the crucifix does not have a univocal religious significance, but several that are context dependent. In a church it has a religious significance, but in a school it also embodies social and cultural values widely shared even among non-believers. In the public schools the crucifix is a religious symbol for believers, but it also evokes the fundamental state values that constitute the basis of the Italian legal order for all citizens. The crucifix, therefore, has an important educative function regardless of the religion of the schoolchildren.

Earlier, in 1991, the Bavarian Supreme Court had similarly reasoned:

> [w]ith the representation of the cross as the icon of the suffering and Lordship of Jesus Christ … the plaintiffs who reject such a representation are confronted with a religious worldview in which the formative power of Christian beliefs is affirmed. However, they are not thereby brought into a constitutionally unacceptable religious–philosophical conflict. Representations of the cross confronted in this fashion … are … not the expression of a conviction of a belief bound to a specific confession. They are an essential object of the general Christian–occidental tradition and common property of the Christian–occidental cultural circle.[19]

[17] The crucifix is listed in the "furnishing of all classrooms" of public schools in two royal decrees that date back to the 1920s (Art. 19 of the royal decree n. 1297 of April 26, 1928 and Art. 118 of the royal decree n. 965 of April 30, 1924). The two royal decrees had been enacted by the fascist government before the 1948 Constitution came into force. These decrees are administrative law sources, and thus the Constitutional Court cannot review them, as it may only review primary sources originating in the legislature.

[18] TAR Veneto, Mar. 17, 2005, n.1110, para. 16.1.

[19] Bayerischer Verwaltungsgerichtshof [BayVGH] [Bavarian Higher Administrative Court] June 3, 1991, p. 122; Bayerische Verwaltungsblatter [BayVBI] pp. 751–4, (FRG), reprinted in *Neue Zeitschrift fuer Verwaltungsrechts [New Journal of Administrative Law*], Issue 11, 1991, p. 1099.

It follows that the placing of a crucifix in classrooms of state schools does not injure the basic rights (to negative freedom) of pupils and parents who, on religious or philosophical grounds, reject such representation.

A liberal democracy cannot plausibly impose an *obligation* to display the crucifix in public schools, without weakening or neutralizing its religious significance. The Italian and Bavarian courts accordingly had to proceed to disarticulate the semantic significance of the crucifix.[20] Thus, the crucifix loses its specific (religious) value and becomes a general symbol of civilization and culture, available for free use by the state to meet the needs of the political community. Such an instrumental use of religion is not only inappropriate from a secular political and ethical point of view, but it also prompts government interference in church matters contrary to the principle of state neutrality or equidistance. This was actually stressed in the German Federal Constitutional Court's 1995 judgment prohibiting the display of the cross in Bavarian state schools on the ground that the pressure to learn "under the cross" is in conflict with the neutrality of the state in religious matters.[21] Moreover, according to the Court,[22] not considering the crucifix as a religious symbol connected with a specific religion violates the religious autonomy of Christians and actually produces a desecration of the crucifix itself. A similar argument is found in Justice Brennan's dissenting opinion in the US Supreme Court decision in *Lynch* v. *Donnelly*[23] where the Court's majority concluded that the city of Pawtucket, RI, had not violated the Establishment Clause by including a crèche in its annual Christmas display. However, in Brennan's view:

> The crèche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part. The import of the Court's decision is to encourage use of the crèche in a … setting where Christians feel constrained in acknowledging its symbolic meaning and non-Christians feel alienated by its presence. Surely, this is a misuse of a sacred symbol.[24]

[20] A. Morelli, "Simboli, religioni e valori negli ordinamenti democratici" in E. Dieni, *I simboli religiosi tra diritto e culture* (Milan: A. Giuffrè, 2006) [hereinafter *I simboli religiosi*), p. 85.

[21] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 16, 1995 (*Kruzifix-Urteil*), 93 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (FRG), available at www.kirchen.net/upload/1232_Kreuz.pdf (last accessed September 5, 2011).

[22] *Kruzifix-Urteil*, 93 BVerfGE 1.

[23] *Lynch* v. *Donnelly*, 465 U.S. 668 (1984).

[24] *Lynch* v. *Donnelly* [465 U.S. 668, 728].

Another recurrent element in the "crucifix cases" is the supposed universal character of Christianity *as opposed* to the parochial nature of other denominations. Although neither the Italian nor the Bavarian challenges to the display of the crucifix were brought by Muslims, the two judgments rely explicitly on a comparison between Christianity and Islam, concluding that whereas the former is rooted in the state's democratic values, the latter is incompatible with them. Thus Christianity, *unlike other religions*, is presumed inherently inclusive of the tolerance and freedom that are pillars of the secular state. According to the Italian court, there is "a perceptible affinity … between the essential core of Christianity" and that "of the Italian Constitution." The Court does admit that "during history, many incrustations were settled on the two cores, and especially on Christianity,"[25] but nonetheless, harmony between the two endures because "despite the Inquisition, anti-Semitism and the Crusades" it is "easy" (!) to recognize the most profound core of Christianity in the "principles of dignity, tolerance and religious freedom and therefore in the very foundation of a secular state."[26] Moreover, the display of the crucifix does not discriminate between Christians and non-Christians, because "exclusion of infidels is common to all religions except Christianity, which considers faith in the omniscient secondary to charity, that is to say respect for the others." It follows that "the rejection by a Christian of those who do not believe implies the radical denial of Christianity itself, a substantial abjuration, which is not the case in other religions."[27] Which "other religions" the judge refers to is no mystery as the judgment refers to "the problematic relationship between certain states and the *Islamic* religion."[28] The Court also refers explicitly to the two principal preoccupations that cause Westerners sleeplessness after 9/11: the clash of civilizations and the threat of Islamic fundamentalism. According to the Court, globalization and large-scale migration make it "indispensable to reaffirm, even symbolically, our identity (through the display of the crucifix), in order to avoid a clash of civilizations." Consistent with this, the Court emphasizes that the crucifix – which embodies the value of tolerance – must be displayed in public schools, in order to teach "*non European* pupils … to reject all forms of *fundamentalism*."[29]

In the Bavarian case the Court draws the contrast even more starkly. Its judgment explicitly differentiates between the approved display of the crucifix and "cases in which the teacher … through the wearing of

[25] TAR Veneto, Mar. 17, 2005, n.1110, para. 11.7.
[26] *Ibid*., para. 11.6. [27] *Ibid*., para. 13.3.
[28] *Ibid*., para. 10.1, emphasis added. [29] *Ibid*., emphasis added.

attention-drawing clothing (Baghwan) … which unambiguously indicates a specific religious or philosophical conviction, impermissibly impairs the basic right to negative religious freedom of pupil and parent."[30]

A similar belief in the universal nature of Christianity, but not of other religions, was recently expressed by US Supreme Court Justice Antonin Scalia, during the oral argument in the case of *Salazar* v. *Buono*,[31] a case dealing with the constitutionality of the display in a military cemetery of an eight-foot-high Christian cross, originally erected as a memorial to soldiers killed in war. Justice Scalia defined as an "outrageous conclusion" the observation made by the plaintiff's attorney, that "the only war dead that that cross honours are the Christian war dead." Stating that "the cross is the most common symbol of the resting place of the dead," Scalia asked "What would you have them erect? – A cross – some conglomerate of a cross, a Star of David, and you know a Moslem half moon and star?"[32]

The attorney's reaction ("I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew"[33]) apparently provoked a burst of laughter in the Courtroom,[34] but Scalia's comment remains troubling.

In many constitutional democracies, the notion of secularism as equidistance by the state in relation to the different faiths is increasingly under attack. It Italy, for example, not only the Vatican, but also leading political players suggest that a "new" understanding of secularism is needed, a "positive" or "healthy" one to counter the relativistic wave that Western democracies are supposedly currently experiencing. "Positive" secularism does not place all denominations on an equal footing: it calls for the state to recognize that the "national religious inheritance" is not just one among several denominations, but rather a key component of civic cohesion.[35] This seeks to justify preferential treatment for the "historical national religion" and mere tolerance for the rest.[36]

This "positive" understanding of secularism is by no means "new." Gustavo Zagrebelsky defines it as a "pale reincarnation of the past, a sort of 'semi-secularism' that represents what remains of the old dream of the 'Christian Republic', and is based on the opposite of the Westphalian principle: *cuius religio, eius et regio*."[37] The result is a "new form of alliance between religion and public power, where the ethical force of the first one upholds the political force of the latter and vice versa."[38]

[30] *Neue Juristiche Wochenschrift*, 38 (1995), p. 1101.
[31] *Ken L. Salazar et al.* v. *Frank Buono*, No. 08–472, October 7, 2009, oral argument.
[32] *Ibid*., p. 39. [33] *Ibid*. [34] *Ibid*.
[35] G. Zagrebelsky, *Stato e Chiesa. Cittadini e cattolici, Passato e Presente*, Issue 73, 2008, p. 16.
[36] *Ibid*., p. 17. [37] *Ibid*., p. 18. [38] *Ibid*., p. 19.

The crucifix cases mesh with this "new" understanding of secularism, which can be characterized as "post-secular"[39] or "confessional" secularism. Judges do not contest the viability of secularism, but they interpret it in a way that makes it compatible with granting privileges to Christianity, thus denying any clear-cut distinction between the realm of faith and that of reason, and refusing to confine the public sphere to the latter realm.

4 Unveiling the limits of tolerance: Islam as the irreconcilable "other"

There is a striking contrast between the treatment of Christian symbols and those belonging to religious minorities, particularly in the context of public schools. Surprisingly, in spite of significant variations in their country's management of the relationship between religion and the state, German, British and French cases all subject Islamic symbols to a process of semantic disarticulation resulting in interpretation according to majoritarian cultural parameters. The mechanism is analogous to the one applied by the Italian and Bavarian judges in the crucifix cases analyzed above. Unlike in the latter, however, the conclusion in cases involving Islamic symbols is that these (or certain variants of them) cannot be legitimately displayed because they are associated with beliefs and behavior that contradict the essential values that state schools must promote. Among such values, gender equality, characterized as a singularly Western value, plays a key role.

The same pattern emerges in the European Court of Human Rights' "veil jurisprudence." In adjudicating the legitimacy of bans on wearing the veil, the ECtHR, while formally relying on the doctrine of the margin of appreciation, consistently interprets the *hijab* as a religious symbol which cannot be reconciled with Western values. Thus, the Court not only grants wide deference to national authorities in determining the significance of the veil, but it also makes the value judgment, concluding that wearing the *hijab* can be legitimately prohibited because it objectively endangers democratic values.

A Germany

Five German *Länder* have adopted laws that prohibit Islamic symbols but specifically permit Christian ones in public schools

[39] *Ibid.*

(Baden-Württemberg,[40] Saarland,[41] Hesse,[42] Bavaria[43] and North Rhine-Westphalia[44]). These laws constitute a direct reaction to a Constitutional Court judgment concerning the wearing of the veil by a teacher.[45] That teacher was refused a permanent civil servant post in a primary school in the conservative *Land* of Baden-Württemberg because she insisted on wearing the veil, which prompted the conclusion that she had a "lack of personal aptitude." The Constitutional Court ruled that German *Länder* had the right to ban teachers from wearing the veil as long as they passed specific laws on the matter, which prompted the *Länder* with the strongest Catholic traditions to adopt specific laws on the issue. The law enacted in Baden-Württemberg in 2004 prohibits teachers from "exercis[ing] political, religious, ideological or similar manifestations," particularly if they constitute "a demonstration against human dignity, non discrimination." However, the "exhibition of Christian and occidental educational and cultural values and traditions does not contradict" such prohibition. Human Rights Watch interviewed officials from the Baden-Württemberg Ministry of Education, Youth and Sport, who confirmed that Christian clothing and display were deliberately exempted by the legislature and that nuns' habits, the cross, and the *kippah* are permitted.[46] The law adopted in Saarland affirms that the "[s]chool has to teach and educate pupils on the basis of Christian educational and cultural values." The Hessian law bans all civil servants including public school teachers, from wearing religious clothing and symbols that may jeopardize the "neutrality of the administration and state" or endanger the "political and religious peace" in the state. To determine what is banned under this law, the "humanist- and Christian-influenced Western tradition of the Land of Hesse has to be taken into due account."

[40] Gesetz zur Änderung des Schulgesetzes, April 1, 2004, and Gesetz zur Änderung des Kindergartengesetzes, February 14, 2006.

[41] Gesetz Nr. 1555 zur Änderung des Gesetzes zur Ordnung des Schulwesens im Saarland (Schulordnungsgesetz), June 23, 2004. In the explanation to the draft law, it is stated that the regulation is not limited to headscarves; however, the wearing of Christian and Jewish symbols remains possible.

[42] Gesetz zur Sicherung der staatlichen Neutralität, October 18, 2004.

[43] Gesetz zur Änderung des Bayerischen Gesetzes über das Erziehungs- und Unterrichtswesen, November 23, 2004.

[44] Erstes Gesetz zur Änderung des Schulgesetzes für das Land Nordrhein-Westfalen, June 13, 2006.

[45] Ludin, Bundesverfassungericht, September 24, 2003, 2BvR, 1436/02.

[46] Human Rights Watch, "Discrimination in the Name of Neutrality. Headscarf Bans for Teachers and Civil Servants in Germany," p. 26, available at www.hrw.org/reports/2009/02/26/discrimination-name-neutrality-0 (last accessed August 11, 2011).

In Bavaria nuns' habits are allowed[47] because, as a ministry official stated, a nun's habit is not a political symbol, while a headscarf can also be a political symbol conflicting with the equality of women.[48]

The governing parties introducing the draft laws in the North Rhine-Westphalia parliament emphasized the importance of the "Christian Western and European tradition," arguing that it is "not a breach of the neutrality requirement if a teacher commits to this tradition."[49] It follows that "the nun's habit and Jewish *kippah* remain permissible."[50]

B The United Kingdom

The United Kingdom has not adopted any general regulation concerning the wearing of religious symbols and clothing by teachers and pupils. Schools have different rules and the Islamic headscarf is commonly worn in British state schools. One particularly thorny case, however, directly questioned the basis of religious tolerance and revealed a number of ambiguities regarding the British inclusive multicultural model. The case decided by the House of Lords in 2005 concerned the uniform policy of a maintained secondary community school. With about 79% of its pupils being Muslim, the school offered three uniform options. The dress code was decided after consultation with parents, students, staff and the imams of the three local mosques. All agreed that one of the options, the *shalwar kameez*, satisfied Islamic requirements of modest dress for Muslim girls. However, Shabina Begum, a Bengali pupil who had worn the *shalwar kameez* without complaint for two years, claimed the right to wear a long coat-like garment (*jilbab*), which alone met her religious requirements of concealing the contours of the female body, as was required for maturing girls, more than the *shalwar kameez* was able to do. Her claim was rejected and she never returned to school. The House of Lords upheld the school's uniform policy.[51]

"The substance of its majority position – It has been argued – may be summarized as follows: the head teacher is clearly a good and sensible head teacher, the dress code was drawn up in a reasonable way after wide consultation, schools are entitled to have dress codes, and therefore we

[47] Human Rights Watch, "Discrimination in the Name of Neutrality," p. 26.
[48] *Ibid.* [49] *Ibid.* p. 28. [50] *Ibid.*
[51] *Regina (Shabina Begum)* v. *Governors of Denbigh High Sch.* [2006] UKHL 15, [2007] 1 AC 100 (H.L.) (appeal taken from Eng.).

feel no inclination to interfere." Added by Baroness Hale is the proposition (paraphrased here) "and she is a child, whose religious views may be taken less seriously than those of an adult, and for whom schools should provide a place of protection from undue religious pressure from family and community."[52]

Many children are likely to encounter similar pressure within a number of religious communities, including fundamentalist Christians and orthodox Jews. Moreover, pressuring children to comply with religious duties is regarded as normal in mainstream religion. No judge has ever ruled that it is illegitimate for a Catholic family to impose on its children attendance at Sunday Mass, even if they would prefer to spend the day differently. When it comes to Islam, however, judges and legislators seem to feel a greater necessity to protect children's rights. There is a final disturbing element in the *Begum* case, which is expressed in the concern that allowing the *jilbab* would create two categories of Muslims within the school, which might lead to conflict, threatening the harmony and good functioning of the school as a whole. Their Lordship are certainly aware that in the many-sided Islamic world, there exist more than two categories of Muslims and that the idea that a head teacher, three local imams and a group of parents from Luton are entitled to vouch for the preferences and the needs of *all* Muslims is rather absurd. However, the Court seems to embrace this reductive version of Islam, where there is no room for diversity or for minorities within minorities: in short a watered-down version of Islam that seems less foreboding.

C France

In July 2003, after the French courts had struggled for over a decade over the right of Muslim schoolgirls to wear the veil, President Chirac set up an investigative committee, with the task to reflect on the application of the principle of secularism. The commission, chaired by Bernard Stasi, the French state's ombudsman, interviewed representatives from different groups: political and religious leaders, school principals, social and civil

[52] G. Davies, "(Not Yet) Taking Rights Seriously: The House of Lords in *Begum* v. *Headteacher and Governors of Denbigh High School*," Human Rights & Human Welfare, Working Paper No. 37, 2006, available at www.ssrn.com/abstract=945319 (last accessed August 11, 2011).

rights groups. In December 2003 it issued a report,[53] which eventually led to the introduction of the law of 2004 which prohibits the display of religious symbols in state schools. Moreover, in order to clear the field of all ambiguities concerning what symbols the law was meant to target, after the law's enactment the Minister of Education issued a decree according to which "[t]he prohibited signs and dress are those by which the wearer is immediately recognizable in terms of his or her religion, such as the *Islamic veil*, whatever its name, the *kippah* or a crucifix of *manifestly exaggerated dimensions*."[54]

It had been estimated that less than one percent of the Muslim students in France had actually worn the veil. In particular, a total of 1,256 *foulards* were reported in France's public schools at the start of the 2003–04 school year. Only twenty of these cases were judged "difficult" by school officials.[55]

Five years after the enactment of the "veil law," after suffering a heavy electoral defeat in the regional elections, French President Sarkozy launched a campaign against the *burqa/niqab* type of veil. In September 2010 the French parliament adopted a new law making it illegal to wear full-face veils in public.[56] The statistics of the Interior Ministry indicate that the number of women who wear the *burqa* in France is no more than 1,900.[57]

In preparation of the enactment of the "burqa law," the French National Assembly drafted a report,[58] which is in many ways analogous to that released by the Stasi Commission. In the view of the latter, the ban of religious symbols was necessary to maintain public order, as "wearing an ostensibly religious symbol … suffices to disrupt the tranquillity of the life of the school."[59] The relationship between the presence of the symbols

[53] Commission de reflexion sur l'application du principe de laïcité dans la republique, "Rapport au president de la republique," available at www.lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf (last accessed August 11, 2011).

[54] Circulaire Nr. 2004–084 of May 18, 2004, Journal Officiel de la Republique Française [JO] [Official Gazette of France], May 22, 2004, emphasis added.

[55] Elaine R. Thomas, "Keeping Identity at a Distance: Explaining France's New Legal Restrictions on the Islamic Headscarf," *Ethnic & Racial Studies* 29 (2006), 237, 239.

[56] Law n. 2010–1192 of October 11, 2010 (Journal Officiel, October 12, 2010). The Conseil Constitutionnel upheld the constitutionality of this law, stipulating only that the ban should not apply to public places of worship; judgement n. 613 DC of October 7, 2010.

[57] Assemblée nationale, "Rapport d'information n. 2262, au nom de la mission d'information sur la pratique du port du voile intégral sur le territoire national," January 26, 2010, p. 28. [hereinafter Rapport 2262], available at: www.assemblee-nationale.fr/13/rap-info/i2262.asp (last accessed September 5, 2011).

[58] Rapport 2262.

[59] Commission de reflexion sur l'application du principe de laïcité dans la republique, "Rapport au president de la republique," p. 41.

and the disruption of school studies, however, is far from clear. The Stasi Commission referred to a number of practices (all associated with Islam), such as "course and examination interruptions to pray or fast," the refusal by schoolgirls to engage in sporting activities and the objections by pupils to "entire sections of courses in history or earth science,"[60] which certainly have a disruptive potential, but are neither caused nor aggravated by the use of the veil. The Commission also viewed Islamic headscarves as a threat to public order because they are associated with communitarianism.[61] The report mentions the difficult socio-economic situations of the *banlieue* inhabited by "many nationalities" (unemployment, poor school attendance etc.) and the risk that "communitarian groups with politics based on religion exploit this actual social unrest in order to mobilize activists."[62]

A similar pattern used by the drafters of the new proposed resolution on the *burqa* heavily relies on unproven assumptions and on the dialectic of the clash of civilizations. According to it, "The evidence we have gathered during our hearings show also the difficulties and the deep unease felt by people who every day are in contact with the public … Barbarity is growing. Violence and threats are frequent … This is not acceptable, and each time such an attack takes place, it is our living together based on the Spirit of Enlightenment that is violated."[63] The language of this passage – and in particular the juxtaposition of "barbarity" and the "Enlightenment" – is a clear assertion of the incommensurability of "Occident" and "Orient." Moreover, the only nexus between these "barbarities" and the full veil is the assumption that the latter is worn by subjugated women, whose husbands recur to violence in order to maintain control over them – an assumption contradicted by all available data.[64] The proposed resolution, however, heavily relies on the said assumption: "We know that this degrading garment goes hand in hand with the submission of women to their spouses, to the men in their family, with the denial of their citizenship."[65] Again, the nexus between poverty, segregation, communitarianism and the use of the veil is not clear. All the two reports suggest is that the use of the veil is imposed on women who live in the *banlieue* by communitarian groups without producing any hard data as support. Hence, just like in

[60] *Ibid*. [61] *Ibid*., pp. 45–6. [62] *Ibid*.

[63] Rapport 2262, p. 14.

[64] See the research done by anthropologist John Bowen, a world authority in comparative social studies of Islam at: *Student Life*, www.studlife.com/news/2009/09/25/france-asks-anthropologist-to-testify-on-burqa-debate/ (last accessed August 11, 2011).

[65] *Ibid*.

the German, British and the European Court of Human Rights cases, the argument that Muslim women are often not autonomous agents within their culture, and that they must therefore be protected by state authorities in order to advance gender equality, remains a totally unproven, and a heavily paternalistic, assumption.

D The European Court of Human Rights

The ECtHR has also dealt with the "Islamic veil issue." In all cases, it has held the ban on the veil to be consistent with the Convention. The main argument throughout has been that states are best placed for determining when interference with religious freedom becomes necessary in a democratic society, thus justifying the grant of a wide margin of appreciation.

In the past, the ECtHR had often legitimized the interference by states with certain rights, and in particular free speech, in order to protect the cultural/religious sensitiveness of the (Christian) majority. In several cases, the Court upheld measures against dissemination of ideas in order to protect morals as defined by the majority culture.[66] Thus, for example, in *Otto-Preminger Institut* v. *Austria*[67] the Court stated that those who exercise freedom of expression relating to religious beliefs and opinions may have an obligation "to avoid as far as possible expressions that are gratuitously offensive to others, and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs."[68]

The ECtHR further specified:

> [The Austrian courts found the film objected to] to be an abusive attack on the Roman Catholic religion according to the conception of the Tyrolean public … The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority on Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in the region … [and did not] overstep[] their margin of appreciation.[69]

In all the cases involved, the application of the doctrine of the margin of appreciation resulted in the protection of the collective religious and cultural freedom of the majority. Just as in the "Bavarian Crucifix Order," the

[66] Eur. Ct. H. R., *Müller and Others* v. *Switzerland*, April 28, 1988, *Serie* A 212; Eur. Ct. H. R., *Wingrove* v. *United Kingdom*, November 25, 1996.
[67] Eur. Ct. H. R., *Otto-Preminger-Institut* v. *Austria*, September 20, 1994, *Serie* A 295.
[68] *Ibid*., para. 49.
[69] *Ibid*., para. 36. But see *ibid*., p. 60 (Palm, Pekkanen, and Makarczyk, JJ, dissenting).

ECtHR balancing approach resulted in an extra guarantee of protection to cultural homogeneity and in a denial of rights to individuals belonging to ideological minorities.

The Court also relied on the doctrine of the margin of appreciation in *Dahlab* v. *Switzerland*,[70] but in that case did not end up on the side of religion as it decided that prohibiting women from wearing a headscarf in the capacity of teacher at state schools did not amount to interference with their right to freedom of religion. According to the Court, "in displaying a powerful religious attribute on the school premises … the appellant may have interfered with the religious beliefs of her pupils."[71] In addition, the Court emphasized:

> It must also be acknowledged that it is difficult to reconcile the wearing of a headscarf with the principle of gender equality, which is a fundamental value of our society enshrined in a specific provision of the Federal Constitution and must be taken into account by schools.[72]

Moreover, the Court feared that the appellant's attitude could provoke reactions and conflicts:

> [A]llowing headscarves to be worn would result in the acceptance of garments that are powerful symbols of other faiths, such as soutanes or kippas.[73]

With this, the Court sanctioned a clear double standard, as it did not question the fact that "the principle of proportionality has led the cantonal government to allow teachers to wear discreet religious symbols at school, such as small pieces of jewellery."[74] In short, it is now compatible with the Convention for teachers to wear "discreet" crucifixes, but not "conspicuous" veils.

In two cases decided on December 4, 2008 – *Dogru* v. *France*[75] and *Kervanci* v. *France*[76] – the ECtHR decided that the expulsion of two veiled pupils from state schools did not violate the Convention. The Court noted that in France the principle of secularism is fundamental and that states must be granted a wide margin of appreciation regarding the relationship

[70] Eur. Ct. H. R. (2nd section), *Dahlab .v Switzerland*, February 15, 2001.
[71] *Ibid*. (quoting the Federal Court of Switzerland).
[72] *Ibid*. (quoting the Federal Court of Switzerland) (internal citations omitted).
[73] *Ibid*. (quoting the Federal Court of Switzerland).
[74] *Ibid*. (quoting the Federal Court of Switzerland).
[75] Eur. Ct. H. R., *Dogru* v. *France*, December 4, 2008.
[76] Eur. Ct. H. R., *Kervanci* v. *France*, App. No. 31645/04 (Eur. Ct. H. R. 2008) (no English translation available).

between the state and religious denominations. The Court went on to stress that in France, as in Turkey or Switzerland, secularism is a constitutional principle, and a founding principle of the Republic, to which the entire population adheres and the *protection* of which appears to be of prime importance, in particular in schools. Accordingly, "an attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention." Said differently, the Court legitimated France's adoption of preventive measures in order to protect a fundamental constitutional value (secularism) from mere *attitudes* that fail to respect it. It is worth noting that the *attitude* in question in *Dogru* is the refusal of an 11-year-old to remove her headscarf during sports class.

In contrast to the trend established in Western European cases, the margin of appreciation has been applied by the Court in the Turkish veil case, *Şahin* v. *Turkey*,[77] in order to legitimize the interference with the religious freedom of the majority. The Court considered the Turkish notion of secularism – which is shaped as a militant democracy clause and meant to protect the Kemalist regime *from Islam* – to be consistent with the values underpinning the Convention.[78] Thus, the Court accepted that, in protecting the principle of secularism, the state may impose certain limitations on individual rights. The Court observed that "the principle of secularism … is the paramount consideration underlying the ban on the wearing of religious symbols in universities,"[79] and accordingly:

> when examining the question of the Islamic scarf in the Turkish context, there must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it … Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need … especially since … this religious symbol has taken on political significance in Turkey in recent years.[80]

The Court went on to stress that "democracy does not simply mean that the views of the 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. Pluralism and democracy must be based on dialogue."[81] And this led the Court to the conclusion that Turkey, in imposing the scarf ban, did not overstep its margin of appreciation.[82]

[77] Eur. Ct. H. R., (Grand Chamber), *Leyla Şahin* v. *Turkey*, November 10, 2005.
[78] *Ibid*., para. 114. [79] *Ibid*., para. 116. [80] *Ibid*., para. 115. [81] *Ibid*., para. 108.
[82] *Ibid*., para. 122. But see *ibid*., p. 99 (Tulkens, J., dissenting).

It is curious that the Court used the margin of appreciation doctrine to protect *minorities* when the majority religion happens to be Islam. If we read this together with the legitimization of Turkey's militant anti-Islamic notion of secularism and with the statement in *Dahlab* that the veil cannot be reconciled with certain fundamental principles, the Court seems to imply a certain degree of incompatibility between Islam and liberal democracy (something that is explicitly stated in the case of *Refah Partisi*).[83] In contrast, all the cases, such as *Otto-Preminger*, in which the Court protected the sensibilities of mainstream Christianity, suggest that the latter is fully compatible with democracy and with the values that underlie the Convention. In sum, Christianity and Christian values can be defended even at the expense of trampling on fundamental individual freedoms, because the ECtHR does not perceive them as conflicting with the core values of the Convention system. Islam, on the other hand, even when it is the religion of the vast majority, can be restrictively regulated on the ground that it threatens the democratic basis of the state.

This trend was confirmed by the decision in *Lautsi* v. *Italy*,[84] which settled the Italian crucifix controversy discussed above. Using the margin of appreciation, the Court concluded that the mandatory display of crucifixes in Italian state school does not violate religious freedom and the parents' right to educate children according to their beliefs. This decision is particularly incoherent on several grounds; chief among them is that it stands the margin of appreciation doctrine on its head. The margin of appreciation presumes deference to a country's authoritative determination that a particular practice is consistent with the Convention. However, as the ECtHR acknowledges, Italian courts are divided over the legitimacy of the display of the crucifix. Hence, the Court took sides in a domestic dispute among courts, embracing the Catholic position. Second, the Court purports to distinguish the crucifix from the headscarf, on account that the first is an "essentially passive symbol" and the latter a "powerful" one. Indeed, Christ did suffer passively on the cross, but to imply that representing his suffering is much less likely to have an

[83] Eur. Ct. H. R. (Grand Chamber), *Refah Partisi (The Welfare Party) and others* v. *Turkey*, February 13, 2003.

[84] Eur. Ct. H. R. (GC) Application no. 30814/06, March 18, 2011. The Chamber had previously held Italy in violation of the Convention: Eur. Ct. H. R. (2nd section), *Lautsi* v. *Italy*, November 3, 2009. On this decision see S. Mancini, "The Crucifix Rage: Supranational Constitutionalism Bumps against the Counter-Majoritarian Difficulty," *European Constitutional Law Review* 6 (2010), 6–27.

impact on children than the wearing of a mere piece of cloth on a teacher's head defies all logic.

5 The lesson of religious symbols: the religious as secular and the secular as religious

Given the "disenchantment of reason" and the consequent retreat from modernism, postmodern subjectivism and the revival of religion, including the spread of religious fundamentalism,[85] loom as two sides of the same coin as they seek to fill the void left by the retreat of reason. Religion, accordingly, becomes "de-relativized" at the same time that it becomes "deprivatized," and as a corollary, secularism falls off its modernist pedestal and becomes akin to one more religion. Or more precisely, religion (gauged from within) finds more room to project its truth as absolute, while secularism viewed from the outside can be more readily cast as yet one more (false) religion. This, moreover, transforms the conflict between faith and reason into one among competing faiths. For example, in the 1980s Protestant fundamentalist parents brought cases before the US federal courts, in which they sought condemnation of the curriculum of the public schools attended by their children as unconstitutionally imposing the "religion" of "secular humanism" in violation of the Establishment Clause.[86] The courts rejected these claims, but in so doing did little to debunk the logic of the complaining parents.

Since fundamentalists regard their religion as the absolute truth that accounts for everything to the last detail, any utterance at odds with their religious truth strikes them as issuing from another (false) religion. A mere statement in a literary text read during English class to the effect that "nature is powerful and beautiful in its mysterious ways," which would strike an average contemporary reader as innocuous and devoid of significant religious connotation, would hence be doubly offensive to fundamentalist parents like those who brought suit. First, the statement in question is contrary to these parents' religion, which asserts that nature

[85] A distinction must be drawn between religious fundamentalism as a religious matter and as a politico-constitutional matter. From a purely religious standpoint, a "fundamentalist" is someone who takes holy texts literally; from a politico-constitutional standpoint, in contrast, a "religious fundamentalist" is one who considers his or her religion as the exclusive and absolute truth and who insists that the state be ruled pursuant to the dictates of the true religion.

[86] See *Smith* v. *Bd. of Sch. Comm'rs*, 827 F.2d 684 (11th Cir. 1987); *Grove* v. *Mead Sch. Dist.* No. 354, 753 F.2d 1528 (9th Cir. 1985).

can in no way be considered as being independent from the will of God. And second, in requiring these parents' children to read such statements, the school is spreading a false religion that denies the existence of God or at least his omnipresence and omnipotence.

This conflict between the visions of fundamentalist Protestants and US federal judges in the 1980s may seem arcane and no more than an isolated instance, pitting a handful of religious fanatics against the secular establishment committed to reason, constitutionalism and religious freedom for all. Upon closer scrutiny, and particularly as set against the case on religious symbols discussed above, however, the conflict in question looms as emblematic of the current predicament.

The comparative analysis of religious symbols-related conflicts has revealed that these are often characterized in terms of a sharp antagonism between Islam and the Christian "West." As emphasized above, majority symbols are legitimized as representing cultural values that are universally shared by the citizenry, in spite of the presence of minorities, and particularly Muslims who are cast as "the other."

In relation to minority symbols, when the contest is over the Islamic headscarf, judges and legislators restrict or ban its display either as incompatible with certain core principles of a democratic system (frequently gender equality) or with democracy *tout court*. The relevant cases openly rely on this dichotomy between Islam and Christianity to prescribe restrictive regulation of manifestations of Islamic religion and culture in the public sphere.

The French case seems different at first, but ultimately falls within the same pattern. In France it is not secularized Christianity, but militant secularism that is used to incorporate the forcibly shared, dominant values. Indeed, French secularism assumes the characteristics of a majority religion. The French State does not confine itself to ensuring the peaceful co-existence of all religions and non-religious perspectives, but becomes a party in the conflicts among them. The State identifies itself with one (the secular, majoritarian) conception and forcibly extends it to all groups and individuals. The secular republic requires a secular attitude from its citizens.[87]

The ideological use of secularism suggests the existence of a community of destiny, unified not by a common ethnic origin, but rather by the will of the French *philosophes*, which finds its natural expression in a secular

[87] J. W. Scott, "Veiled Politics," *The Chronicle Review*, November 23, 2007, at B10, available at www.chronicle.com/ (last accessed August 11, 2011).

state culture. Secularism, however, goes hand in hand with a Christian outlook, being the product of the historical process of separation between European states and Christian churches. Even in its French militant version, therefore, it ends up preferring the (secularized) Christian majority. In sum, both "militant secularism" and "secularized religion" are used by public authorities in order to protect cultural and religious homogeneity. While in the other cases secularism is watered down, in France the admission of Christian symbols in spite of secularism has the effect of diluting religion while preserving homogeneity. Both the compulsion to learn "under the cross" and that to learn bareheaded testify to the existence of a homogeneous collective identity and of outsiders who either accept to share, even symbolically, the values of the majority, or face exclusion from the public sphere.

6 The ideal conditions

As our analysis of religious symbols-related conflicts has demonstrated, none of the types of constitutional treatment of religion actually in force in contemporary democratic polities fully conforms to the dictates of the Enlightenment. Given the number and variety of experiences involved, it seems most unlikely that any entirely successful alternative is looming over the horizon. It seems useful, accordingly, to inquire into the ideal conditions that would be best suited to allow for the optimal relationship between secularism and religion, consistent with full realization of the objects set by the Enlightenment project. These ideal conditions could provide a workable counterfactual[88] yielding a baseline against which to assess existing arrangements and furnishing adequate criteria for determining whether existing models of constitutional regulation might be perfectible, or whether the Enlightenment project is ultimately doomed to failure (at least as it pertains to the handling of religion).

Establishing the ideal conditions in question would depend above all on achieving the following essentials: first, setting a clear and workable divide between faith and reason; second, elaborating a conception of secularism that is truly *areligious* in that it neither favors nor disadvantages any religion or the non-religious; third, instituting a public

[88] A counterfactual is a constructed model that is contrary to fact but bears sufficient connections to relevant factual orderings to furnish workable criteria of perfectibility or appropriate standards for purposes of critique. See M. Rosenfeld, *Just Interpretations: Law Between Ethics and Politics* (Berkeley: University of California Press,1998), p. 124.

sphere clearly and firmly delimited from the private sphere and entirely amenable to the rule of areligious secularism; and fourth, populating the private sphere with religions and non-religious ideologies susceptible of being veritably treated equally – that is of benefiting from *substantive* as opposed to merely formal equal treatment[89] – and amenable to confining their expression and activities within the precincts of the private sphere.

The first of the four essentials clearly seems the easiest to achieve in theory and to set in motion as a fruitful counterfactual. This can be done by drawing the line between what is amenable to the methods of scientific inquiry or of empirical verification, on the one hand, and that which is not, such as religious beliefs or metaphysical convictions, on the other. At a counterfactual level at least, this line can be consistently and systematically maintained, but not so under actual historical circumstances. Moreover, strict adherence to this divide would not only exclude religion from the public sphere, but also morals and even arguably certain political claims. Take, for instance, Kant's famous moral claim that we ought to treat all fellow humans as ends and not as means. This claim is certainly not susceptible to empirical or scientific validation or falsification.

One may object that Kantian morality (and Kant himself) appeal to public reason, that is to "reasons accessible to all, irrespective of their religious belief,"[90] and Kantian morality is therefore clearly within the realm of reason as conceived by the foremost philosopher of the Enlightenment. This is an undeniable historical fact, but one can still defend the narrower conception of reason carved out to be consistent with our counterfactual as being better suited for purposes of constructing ideal conditions. As a matter of fact, one can plausibly accuse Kantian morality of being ultimately an expression merely of the "religion" of "secular humanism." Not only are the claims made by Kantian morality beyond any factual verification, but also, unlike the propositions of logic, they need not be accepted as valid by anyone who makes proper use of her rational capabilities. By drawing the line narrowly, the counterfactual would exclude some claims that would be acceptable under a Kantian or Rawlsian conception of public reason, but would also protect against endless discussion and blurring

[89] For example, in a polity comprised of Christians, Jews and Muslims, a legal prohibition of male circumcision would treat all three religions equally from a formal, but not from a substantive, standpoint. This is because whereas Judaism and Islam prescribe male circumcision, Christianity does not.

[90] See A. Sajó, "Constitutionalism and Secularism: The Need for Public Reason," *Cardozo Law Review* 30 (2009), 2401.

and against the constant danger of unleashing interminable slippery slopes.[91]

The second among four essentials, namely a version of secularism that is areligious and that neither favors nor disfavors any religion or the nonreligious looms as impossible to achieve. This is because one cannot rely on the epistemological distinction between what falls within the purview of science and what does not to craft a secularism that could qualify as areligious. Indeed, acting in conformity with science may readily qualify as anti-religious from the standpoint of at least some religions. For example, state-mandated vaccination of the entire population to prevent a deadly epidemic would be justified pursuant to universally accepted standards of contemporary medical science and yet at the same time counter a particular religion's prescription of any medical intervention as being against the will of God. The latter religion need not question the effectiveness of the vaccine, as that may be irrelevant in terms of the belief in the divine proscription to which it feels compelled to adhere.

In view of the preceding observations, no plausible conception of secularism emerges as *inherently* areligious, even as a purely counterfactual matter. This does not mean that the second essential must be dropped, but it does require that it be coordinated in a relational manner with the third and fourth essentials. Indeed, for secularism to be able to count as being areligious, it need not avoid conflict with all religions, but only with those with a presence within the relevant polity.

The characteristics of the third essential, a public sphere clearly distinguishable from the private sphere and amenable to exclusive rule under the precepts of areligious secularism, readily emerge in light of the previous discussion. From a counterfactual perspective, the divide between the public and the private sphere should track the counterfactual divide between reason and faith that informs the first essential. The public sphere should be exclusively confined to the realm of reason; the private sphere, on the other hand, would be equally amenable to the realm of faith and to that of reason. However, since even under the best of circumstances there would seem to be relatively little chance that adherents to all

[91] This counterfactual achievement does not imply, of course, anything similar at the factual level. There is a crucial difference between the realm of science and that of morals. What *counts* as science – as opposed to its relevance, utility or desirability – can be systematically determined in accordance with a set of established standards open to all. Because of this, to determine whether an assertion does belong to the realm of science (or empirical observation or logic) does not involve any act of faith in the sense that any assertion to validity in morals does.

different ideologies within a given polity would agree to characterize its public sphere as areligious, the ideal public sphere should be as reduced in scope as possible.

The fourth essential is that religions and non-religious ideologies being relegated to the private sphere be susceptible of substantive equal treatment within the confines of that sphere. For this to be possible, even counterfactually, it is necessary that no religion involved claim an entitlement in accordance with its own religious norms to priority or exclusivity with respect to other religions or non-religious ideologies within the polity, or to a stake in that polity's public sphere. Fundamentalist religions would obviously squarely negate any possibility of coming close to achieving the counterfactual requirements in question, as would any religion that requires intervention into the public sphere.

Before shifting from the counterfactual to the actual historical record concerning the relationship between secularism and religion, two further points warrant brief mention. The first of these is that certain political ideologies are better suited than others for purposes of approximating the counterfactual; the second, as already alluded to above, that some religions and some types of religion are more suited than others with the same purposes in mind.

The three principal political ideologies that are consistent with contemporary constitutional democracy and the ideals of the Enlightenment are liberalism, republicanism and communitarianism.[92] Some of these – and even some versions of the same one[93] – carve out a larger and more intrusive role in the public sphere than others. Moreover, some allow for greater autonomy of religious communities than others.

Concerning the second point mentioned above, it is obvious that some religions seem more inherently compatible with areligious secularism than others. Thus, a merely contemplative religion is obviously compatible with areligious secularism whereas an aggressively proselytizing one is definitely not. Moreover, beyond these extremes, certain combinations of religions within a polity may be more amenable to approximation to areligious secularism than others. Furthermore, of the three major Western religions, as indicated by the jurisprudence on religious symbols, Christianity seems much better suited to secularism than Islam or Judaism. This is due, in important part, to Christianity's commitment to

[92] For a comparison of these three ideologies from a pluralist perspective, see Rosenfeld, *Just Interpretations*, pp. 217–24.

[93] For example, libertarian liberalism calls for a more limited public sphere than its egalitarian counterpart.

the separation between the realm of God and that of Cesar as opposed to Islam's and Judaism's all-encompassing approaches requiring that religious rule extend over both the public and the political sphere. Because of this key difference, the counterfactual construct pointing to ideal conditions would be better off embracing Christianity rather than its two major Western counterparts in order to yield the best possible approximation of areligious secularism. But that would create a paradox. If the pursuit of areligious secularism leads to a preference for Christianity, would that not undermine the whole project by lifting Christianity above Islam and Judaism?

Based on the preceding analysis, the counterfactual elaborated above does not provide a pristine model that many would be eager to emulate. On the one hand, this counterfactual contains features that are undesirable or impossible to approximate. It provides a sharp and sustainable divide between reason and faith, but the idea that Kantian morals should be barred from the public sphere for the same reason as fundamentalist religion seems highly unattractive. On the other hand, even at the counterfactual level, the model in question is remarkably tenuous as it provides a conception of areligious secularism that cannot stand on its own. Finally, even if the counterfactual does not automatically favor Christianity – and there is a good argument that it does not, but that it is rather only open to certain liberal versions of many religions, such as liberal Protestantism, Reform Judaism, and so on – it would require suppression of a large number of religious ideologies with large followings in most contemporary constitutional democracies.

7 Beyond the present predicament: can and should the Enlightenment project be salvaged?

The preceding discussion suggests that it would be unproductive to seek ever greater approximation of the above elaborated ideal counterfactual. Does that mean that the Enlightenment project must be completely abandoned when it comes to the constitutional treatment of religion? And even assuming that it need not, should it be abandoned?

The Enlightenment project has not become futile, but it ought to be transformed and reoriented. The divide between reason and faith need not be abandoned, but it must be conceived as much more fluid and uncertain, and it must be redeployed to address current threats to core Enlightenment values as opposed to those of the past. In the eighteenth century it was organized religion that was the Enlightenment's fiercest

adversary; today, it is fundamentalist and strong religions, with more moderate and more liberal religions often barely, if at all, at odds with scientific reason. One possibility, therefore, is to switch to a situational and relational approach.

The distinction between the public and the private sphere may no longer be useful for present purposes, but it might be fruitfully replaced by reliance on the contrast between *intra*-communal and *inter*-communal relationships. Broadly speaking, all those who share the same religious ideology[94] can be said to belong to a single religious community. Consistent with this, moreover, dealings within a single religious community are "intra-communal," whereas those involving two or more religious communities, or a religious and a secular community, or those that purport to transcend the bounds of all relevant religious communities, are "inter-communal."

The attractiveness of framing relationships in terms of the distinction between the intra-communal and the inter-communal is enhanced given that the citizen of a typical contemporary constitutional democracy is bound to become immersed in a number of different communities at once and to have to negotiate conflicts and tensions that arise as a result. A German-speaking Swiss Catholic feminist woman, for example, belongs to the Swiss nation, to one of its four main linguistic groups, to one of its two dominant religions, and to one socio-political group with particular aims and views regarding women's equality and gender-based relationships. Depending on the circumstances, the woman in question may focus more on her national identity than her linguistic group identity, or vice versa. On some occasions, her Catholicism may be in tension or conflict with her feminism. Because of that, she may decide to live with a certain amount of dissonance and inconsistency unless her various commitments become so incompatible that she must withdraw from some of the communities to which she belongs.

What is crucial for our purposes is that this single individual must constantly shift from intra-communal to inter-communal perspectives in the management of her multiple allegiances. Moreover, the kinds of operations that take place at the individual level can also be carried out at the collective level by various groups within the polity and the polity itself as the group of the whole. Except in cases of clear incompatibility, the dynamic between intra-communal and inter-communal dealings should

[94] We emphasize "religious ideology" rather than "religion" in order to allow for the characterization of different sects or denominations to be treated as different communities.

afford numerous possibilities for peaceful coexistence within a constitutional order among proponents of numerous and diverse religious and secular ideologies.

The dynamic between intra-communal and inter-communal dealings can also be helpful in reconfiguring secularism in light of the futility of pursuing a neutral areligious ideal and of the seemingly inevitable links between secularism and religion revealed in the course of retracing the history of the various actual incarnations of the concept. Functionally, secularism should promote peaceful and productive inter-communal relationships within the polity combined with guaranteeing maximum room for intra-communal autonomy consistent with preserving the integrity of the space needed for inter-communal exchanges. Substantively, on the other hand, secularism would draw on two distinct sources of identity. In part, secularism would draw on that which makes possible and facilitates inter-communal coordination and cooperation among religious ideologies, and among the latter and non-religious ones. What would be encompassed within this rubric would vary from one setting to the next, depending on the religions, history and cultures involved. In any case, incorporation of elements drawn from religion or religious culture would be entirely permissible. The criterion of validity for such elements derived from religion would not depend on how close or removed they may be from religion itself, but on whether they advance or hinder the smooth functioning of the requisite channels of inter-communal exchange.

In part also, secularism would draw on another source of identity, rooted in the traditional Enlightenment conception of the term. In contrast to the first source of identity, which could be characterized as secularism's inter-communal identity, this second source could be regarded as secularism's intra-communal identity, or in other words, as secularism's conception of itself as a separate and distinct ideology. Indeed, in all contemporary constitutional democracies, there are certain citizens who are secular rather than religious, who put science ahead of faith, and who believe that the pursuit of liberal liberty and equality for all should trump any divine prescription to the contrary. These "intra-communal" secularists have as much a right to have a place at the inter-communal table as do the proponents of the various religious ideologies.

Secularism's inter-communal identity is contextually dependent on the actual ideologies involved, whereas its intra-communal identity is self-contained, as one can easily imagine a well-functioning, self-enclosed, homogeneous, secular society cut off from all religion. In actuality, however, the gap between these two identities is likely to prove far less stark for

three principal reasons. First, intra-communal secularism must figure in the elaboration of its inter-communal counterpart to the extent that the secularist ideology is present in the relevant polity. Second, given the tendency to develop plural identities and multi-group memberships, elements of the secularist ideology are bound to slip into intra-communal precincts of competing ideologies. Thus, some liberal religions are quite compatible with commitment to liberal liberty and equality for all. Moreover, some adherents of non-liberal religions may nonetheless embrace certain secular values and cope with the tensions involved through compartmentalization. And, third, by the same token, proponents of intra-communal secularism need not shut the door to religion, and may in fact embrace religion without contradiction so long as they adhere to the primacy of the secular outlook.

From the standpoint of traditional Enlightenment values, secularism occupied a privileged place and the acceptance of religion was conditioned on compatibility with deployment of the secular project. In the context of the present reconfiguration of secularism, however, no such clear answers readily emerge. Secularism and the constitutional order it fosters are inherently tolerant of diversity, but why prefer secularism's tolerance over other kinds of tolerance or even over intolerant ideologies once one concedes that secularism as such is but one intra-communal ideology among many?

This last query forces one to focus on the larger question of whether the Enlightenment project is worth preserving at this point in time, or whether it would be preferable to abandon it in favor of a more suitable alternative. And, given the recent inroads of postmodernism and derelativized religion as well as the continuing progression of the disenchantment of reason, no readily available or obvious all-encompassing answer could be offered with confidence.

One can advance, however, two more modest answers. The first one is somewhat circular, but may nonetheless carry significant weight among proponents of constitutional democracy. Constitutionalism requires secularism (in some form) and they both go hand in hand with certain core Enlightenment values. Constitutionalism may thrive with a reconfigured on redeployed Enlightenment project, but it cannot survive the complete abandonment of the latter. Therefore, if for no other reason, the Enlightenment project ought to be preserved for the sake of constitutionalism.

The second answer is that contemporary polities are typically multiethnic, multicultural and religiously diverse, and that secularism, at least

in its inter-communal dimension, provides the best means to preserve the peace and to maintain the good functioning of such pluralistic societies. This second answer may be buttressed by either a lesser evil prudential argument or a more positive normative argument deriving from a pluralistic conception of the good. The former argument is predicated on the conviction that unless a stand-off among competing ideologies is maintained, a serious threat to the public order would ensue. The latter more positive argument relies, for its part, on the premise that pluralism is good and worthy of pursuit because it multiplies and enhances every person's opportunities for self-realization and self-fulfillment.

The preceding discussion leaves one with a vexing lingering question. The version of the Enlightenment project needed for the legitimation and operation of contemporary reconfigured secularism is dramatically more modest, less assertive, and less encompassing than that which emerged in the Age of the Enlightenment. Is that due to the ravages of postmodernism and derelativized religion? Or, is it rather due to the fact that much of the Enlightenment project has met with success and has become quietly internalized and subconsciously stored in the public psyche of contemporary constitutional democracies?

Both the preceding theoretical discussion and the prior analysis of the constitutional jurisprudence regarding religious symbols point to one distinct conclusion. The reconceived principle of secularism and the Enlightenment values it relies upon loom as indispensable to peaceful coexistence within our increasingly multi-ethnic, multicultural and multi-religious polities. This reconceived secularism is above all pluralist, and although it may not be able to set itself fully apart from religion – and even from some religions more than others – or from seeping into the inner walls of discrete religious communities, it is the best hope for harmonizing (as best as possible) intra-communal and inter-communal dealings. Pluralist secularism's principal creed is that no intra-communal truth is entitled to command inter-communal acceptance. This, in turn, commands a broad and generous conception of tolerance and of acceptance of the other. In terms of religious symbols, this translates into refraining from official imposition of majority ones and greater acceptance of minority ones as long as they are not proven to pose a threat to the survival of pluralist secularism itself – a very high threshold indeed.