

Legal dimensions of secularism: challenges and problems

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Introduction

As it happens once and again in the legal sphere, we face here an initial problem, related with language and meanings. Secularism is a word which has been associated with other terms, like “secular”, “secularization”, “neutrality” and “laïcité”. And I think that it is fair to say that the meaning of these terms is not completely clear and that it depends on scholars’ preferences and on the language we use.

In Latin languages, the word “laïcité” (French), “laicidad” (Spanish), “laicità” (Italian) address the basic idea of some sort of separation (not necessarily isolation) between churches and state. In the political and legal imaginary, the word “laïcité” seems to recall the more strong and emphatic expression of strict separation. In Anglo-Saxon languages, it seems to be more appropriate to designed separation with the term “religious and ideological neutrality”. Neutrality could be understood in different ways and in several degrees.

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All those terms (“laïcité”, “neutrality” and “separation”) have suffered a “deflationary process” in the political and legal sphere, as a result of which it is difficult to understand legally what kind of separation are we dealing with and to what measure religious freedom is protected satisfactorily. For the purposes of this brief presentation, I shall try to sketch some ideas and clarifications. Also I shall address some basic problems related to the topic we are dealing with, namely secularism and its legal expression.

Meanings

“Secular” means “not connected with religious or spiritual matters”. In this sense it is probably right to say that many of us live in secular states, in countries in which the origin and justification of the political power is totally secular, states in which religion is present but, as Charles Taylor points out, religion «occupies a different place in social life, compatible with the sense that all social action takes place in profane time»². «Put in another way, in our "secular" societies, you can engage fully in politics without ever encountering God»³.

Along with the term secular, immediately it appears the term “secularization”. Strictly speaking, “secularization” means «to transfer from ecclesiastical to civil or lay use, possession, or control». As Professor Casanova has pointed out, «[s]ecularization as a concept refers to the actual historical process whereby this dualist system within "this world" and the sacramental structures of mediation between this world and the other world progressively break down until the entire medieval system of classification disappears, to be replaced by new systems of spatial structuration of the spheres. Max Weber's expressive image of the breaking of the monastery walls remains perhaps the best graphic expression of this radical spatial restructuring. The wall separating the religious and the secular realms within "this world" breaks down. The separation between "this world" and "the other world," for the time being at least, remains. But from now on, there will be only one single "this world," the secular one, within which

² Charles Taylor, *Modern social imaginaries* Duke University Press, Durham, 2004, p. 194.

³ Charles Taylor, *A secular age*, Harvard University Press, Cambridge, Mass., 2007, p. 2.

religion will have to find its own place»⁴. Secularization is process in which religion ceases to be the central factor of social cohesion, of collective world explanation, to become a choice among other choices.

Secularization, according to Olivier Roy, «is a social phenomenon that requires no political implementation»⁵. It would be proper to say that religion has been “tamed” or “domesticated” and rendered under the legal scheme of the civil rights as “freedom of religion of belief”. The understanding of religion as a matter of choice leads to the understanding of religion as a matter of freedom⁶. However, this perspective may lead also to privatization of religion (a private choice) and also to the detriment of the link between culture, religion and identity⁷.

With regard to secularization, it is important to note two caveats. The first is that the secularization theory has been construed according to European standards. Therefore it cannot simply be applied to other civilizations. The second caveat is that traditional theories on secularization, which equate modernity, scientific development, economic improvement, migration to urban centers, etc. with secularization, have been replaced with theories which equate modernity with pluralism⁸. In this sense, scholars stress the difference between Europe and the United States in how the process of secularization took place and in the role of religion in the public square⁹.

Secularism: ideology and legal framework of Church-State relations

At first glance, it would seem that secularization is related to secularism. However, the relationship is not so plain and simple. In common use, secularism means “indifference to or rejection or exclusion of religion and religious considerations”. In a more technical use, secularism is a polysemic word which embraces at least two different meanings.

⁴ José Casanova, *Public religions in the modern world*, University of Chicago Press, Chicago, 1994, p. 15.

⁵ Olivier Roy, *Secularism confronts Islam*, Columbia University Press, New York, 2007, p. 7.

⁶ Michael J. Sandel, *Liberalism and the limits of justice*, Cambridge University Press, 1998, pp. xvii-xiv.

⁷ Karl-Heinz Ladeur, “The Myth of the Neutral State and the Individualization of Religion: The Relationship Between State and Religion in the Face of Fundamentalism”, *Cardozo Law Review*, 30, 2009, p. p. 2460.

⁸ Peter L. Berger, “Secularization Falsified”, *First Things*, February 2008, p. 23

⁹ Peter L. Berger, Grace Davie, Effie Kokas, *Religious America, secular Europe?: a theme and variations*, Ashgate, cop., Aldershot, Hants, England ; Burlington, VT, 2008.

According to Lorenzo Zucca, the first meaning of secularism deals with a «political project with a set of normative claims as to the relationship between religion and the state. Secularism and secularization may go hand in hand as it was the case in Europe until the end of last century»¹⁰. According to this first meaning, secularism is not a specific legal regime, but a modern competing worldview, partly originated in the Enlightenment, which involves a particular philosophical vision of the human being and of society and embraces all kind of considerations dealing with the social and political weight of religion, the differentiation of the public and the private sphere of action, the role of government in regulating social affairs, the content of the law, the aims of state-sponsored education, the proper behavior of politicians, judges and state agents, etc. For the purposes of this paper let's say briefly that secularism as a worldview «claims to provide a value system common to all citizens by expelling religion into the private sphere»¹¹. To put it simply, the term secularism «describes and ideology that is, and has been since its inception, anti-religious»¹².

As far as I know, there is no democratic State in the world which perfectly reflects the first meaning of secularism, namely secularism as a worldview¹³. Besides, it seems to me that secularism as a worldview is neither possible nor plausible to put into full practice. It is not possible, since international, regional and national experiences —specially in these days— shows a progressive de-privatization of religion¹⁴. And it is nor plausible, since in some cases secularism may lead to the infringement of freedom of religion¹⁵.

There is a second meaning of secularism, which deals with political and legal practices in many countries. In democratic countries governed by the rule of Law, it is common —at the Constitutional level or at the highest

¹⁰ Lorenzo Zucca, *The Crisis of the Secular State: A Reply to Professor Sajo* (February 14, 2009). ICON, 2009, p. 4, ref. 28/01/2011, available at SSRN: <http://ssrn.com/abstract=1343099>.

¹¹ Olivier Roy, *Secularism confronts Islam*, Columbia University Press, New York, 2007, p. xii.

¹² Iain T. Benson, "Considering Secularism", *Recognizing religion in a secular society: essays in pluralism, religion, and public policy* (Douglas Farrow ed.), McGill-Queen's Press - MQUP, 2004, p. 85.

¹³ There is a certain dose of myth surrounding secularism incarnated in France, as it is shown in T. Jeremy Gunn, "French secularism as Utopia and Myth", *Houton Law Review*, vol. 42 (2005), pp. 81-102.

¹⁴ José Casanova, *Public religions in the modern world*, University of Chicago Press, Chicago, 1994, p. 211.

¹⁵ Galo Bilbao Alberdi *et al.*, *La laicidad en los nuevos contextos sociales: estudio interdisciplinar*, Santander : Sal Terrae, 2007, p. 304.

laws level— to recognize freedom of religion or belief and to declare some sort of separation between State and institutionalized beliefs, religion, ideologies, etc. This practical secularism may be designated in many different ways such as the old “fighting secularism” like in France¹⁶, “positive secularism” like in Italy¹⁷ and Spain¹⁸, or “opened secularism” like in Québec¹⁹. It may be also proper to say that, according to this second meaning of secularism, there are some proxies or different forms to translate secularism into the law²⁰. In this sense, “separation of church and state” means «that non-secular bodies shall not exercise secular power, not even by the grace of the sovereign. Vice versa, secular bodies shall not exercise ecclesiastical power (the principle of church autonomy or non-interference)»²¹. And “neutrality” designates impartiality of the state, a state attitude that avoids taking sides among competing beliefs of worldviews.

There are many varieties, many practical solutions, different legal arrangements which reflect secularization as separation between State and Religions... None of them is the optimal model²². In building up secularism, States have to strike a balance between freedom and equality. This balance is not always well reached. In many European countries frequently the balance between freedom and equality brings about collaterally certain advantages and special regulations for major historical religions, while minority religions haven’t access to certain legal benefits in different issues, like public funding, tax exemptions, religious spiritual counseling in hospitals and prisons, etc. While some of these legal

¹⁶ Fernando Rey, “La laicidad ‘a la francesa’: ¿modelo o excepción?”, *Persona y Derecho*, vol. 53 (2005), pp. 385-736.

¹⁷ Giuseppe Casuscelli, “La «supremazia» del principio di laicità nei percorsi giurisprudenziali: il giudice ordinario”, *Stato, Chiese e pluralismo confessionale* (Rivista telematica), March 2009, accessed 28/01/2011, available in http://www.statoechiese.it/images/stories/2009.3/casuscelli_3supremaziam.pdf

¹⁸ Isidoro Martín, “El modelo actual de relación entre el Estado y el factor religiosos en España”, *Jornadas Jurídicas sobre Libertad Religiosa en España* (Juan Ferreiro Galguera ed.), Ministerio de Justicia, Madrid, 2008, p. 61.

¹⁹ Consultation Commission on Accommodation Practices Related to Cultural Differences (CCAPRCD), “Building the Future: A Time for Reconciliation”, 2008, p. 20, accessed 28/01/2011, available <http://www.accommodements.qc.ca/documentation/rapports/rapport-final-integral-en.pdf>

²⁰ Andrés Sajó, “Constitutionalism and Secularism: The Need for Public Reason”, *Cardozo Law Review*, 30, 2009, p. 2402.

²¹ Andrés Sajó, “Constitutionalism and Secularism: The Need for Public Reason”, *Cardozo Law Review*, 30, 2009, p. 2406.

²² Kevin Boyle (ed.), *Freedom of Religion and Belief : World Report*, London, UK: Routledge (1997), pp. 9-10.

regulations does not amount necessarily a legal discriminations against religious minorities, others practices may cause legal discrimination against believers of minority religions. In this sense, it seems to me that the role of the judiciary is vital in extending those benefits to minorities and in enjoining discrimination. It would be expected also that the increasing religious pluralism will lead to a more careful attention paid to new religions in European countries.

The rationale of secularism in politics and in the laws of the states has two sources. The first source is positive, namely the protection of freedom of religion itself. According to this first rationale, the best way to protect and promote freedom of religion requires from the state a strong degree of detachment from religion and some degree of differentiation of the roles, nature and goals of religions and of states. The role of the State is neither to bring salvation nor to hinder it. And the role of religion is neither to manage secular affairs nor to hamper social development and improvement, though it is also true that religions may help to social development and improvement²³.

Along with this positive justification, there is another negative one. This negative justification or rationale deals with the historical experience of the role of religions in national and international affairs, according to which the combination of religion with politics and with the State, renders strife and division between social groups, states, nations and ethnic groups. To avoid strife and division, separation between state and religion is not only desirable but essential. Recent affairs on religious extremism and fear to the so-called “strong religions” stress the support of this negative justification of secularism.

Challenges

Nowadays, secularism in state laws and politics confronts important challenges difficult to solve. In almost all cases, these challenges deal with the full observance of freedom of religion and with the full respect of the role and functions of religious groups.

²³ W. Cole Durham, “Legal Status of Religious Organizations: A Comparative Overview”, *The Review of Faith & International Affairs*, vol. 8 (2010), p. 9.

One of these challenges deals with education. The State claims a leading role concerning education as a tool for fostering democracy and shaping the profile of responsible and proactive citizens. This role has been growing in recent years because both International organizations and States are aware that education is vital to overcome some critical aspects of post-modernity and globalization. At the same time, religions claim to have an important role in education too, both as an agent promoting education at the service of parents and society, according to their own perspective and worldview, and as an important subject of the educational syllabus. These claims may clash between them and cast many questions: Does the State have the only leading role in education? Is it proper to the State to have the monopoly of educational issues? Can religion be part of the educational syllabus at the different levels? And, how can religion be part of the syllabus?

Another important challenge for secularism is the scope and limits of freedom of expression when confronted with religious ideas, religious groups and religious sensibilities. There are different legal responses to that complex issue, among them: blasphemy laws, anti-defamation laws, criminal laws to protect religious sentiments, hate speech laws, etc. There is a growing awareness of the difficulty in reaching a satisfactory solution in national laws, especially in those cases in which the conflict becomes international or global. Different affairs concerning cartoons, sacred books burning, transgressive art, etc. lead to the provisional conclusion that State laws are hardly the last word in resolving these sensitive issues.

In recent years, we have faced something which seems to be an unending problem, namely religious clothing or religious attire. In some cases, States require from its citizens a religiously neutral identity in certain public spaces and in certain official facilities. In doing so, the secular state intends to preserve its neutral and secular culture to afford freedom to all and to avoid an unduly religious influence. However, this requirement from the State compels citizens to shed their own religious and cultural identity. Indiscriminate ban of certain religious attire, though justified, does not

seem to be the best solution, according to international organizations²⁴. Undoubtedly this is another important challenge for the secular state.

Displaying of religious symbols in public places or in those elements which define the identity of a given country (like the flag, the anthem the coat of arms, etc.) is another relevant issue. How to reconcile those historical elements and symbols with the secular state? In other words, which is the permissible limitation to the negative aspect of freedom of religion of citizens? Is the solution to this issue beyond competing interests and rights, to reach an area of tolerance towards certain symbols?

We may see another interesting issue in labour law and in non-discrimination policies applied to religious entities and organizations. I think that in this area it is especially important to take into account that the enterprise carried out by religious groups frequently requires a high degree of identification of workers with the spirit and mind which inspired the job. And this is something that state law may not perceive in its full extent. This delicate area calls upon the serious evaluation of the content and scope of religious autonomy.

In the aforementioned areas, and in many others, religious conscientious objection before State regulations is at stake, especially in sensible areas related the ethical dimension of behavior. It is a field which required from the State a great amount of fairness in balancing the respect of religious conscience and the protection of the state's interests which contested legal norms protect and support.

But the most important challenge for secularist States is the scope of secularism itself. In a recent conversation with my friend and colleague Javier Martínez-Torrón, we realized the increasing social presence and activity of non-theistic, atheistic and humanist organizations which very often request and obtain from the State legal personality and status akin to that of religious communities. These organizations claim from the State an implicit but visible endorsement of their ideas —many of them coincide apparently with those of the State. This may well be the case of the claim

²⁴ Parliamentary Assembly, Council of Europe, *Resolution 1743 (2010)1 Islam, Islamism and Islamophobia in Europe*, 23 June 2010.

for religious neutrality. Is religious neutrality *really* neutral? Probably, if we understand neutrality as a concept embracing also all kind of worldviews, it is so. But, at the same time, States cannot be neutral by definition (it is impossible). Neutrality is a *operational* State principle or attitude which applies only to certain areas of human activity. In a way, this reminds me the recent oral submission by Professor Weiler on behalf of Third party intervening States in the *Lautsi* case²⁵ before the Grand Chamber of the European Court of Human Rights²⁶. In that occasion, Professor Weiler pointed out: «if the social pallet of society were only composed of blue yellow and red groups, then black – the absence of color – would be a neutral colour. But once one of the social forces in society has appropriated black as its colour, than that choice is no longer neutral. Secularism does not favour a wall deprived of all State symbols. It is religious symbols which are anathema». The great risk and challenge for a secularist State is then avoiding any kind of *confessional neutrality*, giving back to any sort of religion and welcoming the ideology of secularism under the guise of neutrality.

Tackling with challenges: general approaches

How can the secular state tackle all these challenges? Probably there are many responses to this question, but I would like to bring to your consideration a recent exchange on secularism and on the secular state between two European professors of constitutional law, András Sajó and Lorenzo Zucca, in the International Journal of Constitutional Law. The exchange reflects two different approaches and answers to the challenges described before.

Professor Sajó contended that the struggle for constitutionalism and for the equal enjoyment of fundamental rights require a strong secular state before

²⁵ *Lautsi v Italy*, Application No.30814/06, 3 November 2009, (2010) 50 E.H.R.R. 42.

²⁶ Joseph H. H. Weiler, *Oral Submission by Professor J. H. H. Weiler On Behalf Of Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, The Russian Federation And San Marino – Third Party Intervening States In The Lautsi Case Before The Grand Chamber Of The European Court Of Human Rights*, ref. 28/10/11, available in <http://www.ilsussidiario.net/News/Politics-Society/2010/7/1/Exclusive-Joseph-Weiler-How-I-defended-the-Crucifix-Before-the-European-Court-of-Human-Rights/96909/>. Audio and video available in ECHR Webcast of Hearings, http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?&p_url=20100630-1/en/.

(against) the threat of strong religions who pretend to reconquer a directive role in the public square and to achieve religious goals at the expense of the frailty of the secular state. In this sense, it seems that the state must protect freedoms (including freedom of religion) *against* religions. According to Sajó, only the strong secular state and the public reason language in the public square could guarantee full and equal freedom. This is the liberal perspective of the secular State.

By contrast, Professor Zucca thinks that the challenges before the secular state do not come from strong religions. Religions are not the problem, but perhaps only the symptom. The very problem is the inability of the secular state to tackle diversity and pluralism. To solve this problem, Zucca proposes a twofold strategy «[o]n the one hand, [the secular state] should promote, as far as possible, active communication and mutual understanding among all the groups of a society. On the other, it should accept that in some specific cases we face conflicts between religion and the secular state that cannot be solved by appeal to broader common principles. In these limited cases, we have to agree to disagree, and the default position, therefore, will have to promote a thinner notion of coexistence among different groups and individuals on the basis of clear rules of the game»²⁷.

Both the analysis of problems and of the options to solve the challenges of the secular state are opened questions. Probably our discussions these days may offer fresh arguments and tools in order to adequately address these important challenges.

²⁷ Lorenzo Zucca, "The crisis of the secular state--A reply to Professor Sajó", *International Journal of Constitutional Law*, 7, 2009, p. 495.