

FREEDOM OF RELIGION AND FREEDOM FROM
RELIGION: THE EUROPEAN MODEL

JHH Weiler

FREEDOM OF RELIGION AND FREEDOM FROM RELIGION: THE EUROPEAN MODEL

*JHH Weiler**

I

What place may religion have in our public space? In our definition of the State? In our educational systems? In defining our public identity? It is, in part, a question of and for democracy: Imagine a State with a majority of practicing Christians among its citizens. May they use the legislative and administrative institutions of the State to make theirs a Christian State? Would that not run up against our most cherished constitutional principles of freedom, notably freedom of religion and freedom from religion? The impact of the French and American revolutions on our political and constitutional cultures is so enduring and powerful that we tend to take the American ‘separationist’ and French ‘*laïque*’ (secular state) as normative, as setting the yardstick for any thinking on this issue. And thus, the most “natural” answer to the question: A Christian State? Nooooo!

There is, interestingly, a paucity, in the discussion of these issues, of normative comparative analysis. By normative comparative analysis I mean a comparative analysis of systems in liberal societies which offer an alternative to the Franco/American model. You would almost think that the latter is typical, whereas it is, even among Western democracies, the exception rather than the rule. The fact that it is exceptional does not mean that normatively it is not compelling or more compelling than the alternatives. But that must be an informed judgment call.

At this point in the literature, one usually finds a turn to discussion of other arrangements of Church and State to demonstrate alternatives to the Franco/American model—such as the German Cooperative model, the British or Danish or Maltese Establishment models, or the Greek or Polish Endorsement models, etc.

The literature in this area performs a disservice, as it conflates the relationship between Church and State with the issue of identity. Allow me to explain—by making three “moves.”

First Move: State and Nation. The very framing of the issue as Church–State is itself a creature of the French and American Revolutions, which loads the dice, for it conflates State with Nation. The reason it can do this so ‘nonchalantly’ is that both France and the United States conflate nationality with citizenship in an uncomplicated—but also, let me emphasize, in an, empirically-speaking, exceptional—way.

More commonly, the emergence of the modern State is tied to the emergence of the modern nation-state (or a new self-understanding of old states) and the concept of self-determination. The Self of the State is the nation. German unification, that conglomeration of the territory of what became modern Germany out of dozens of little principalities—the Bismarck enterprise—was also *co-terminus* in inventing, creating, and then consolidating the notion of a unified

* New York University School of Law.

German people. The Italian State—the *Risorgimento*—was not only a territorial fusion on the Italian peninsula, it also reflected the belief that there was something that transcended the previous separateness: the Italian nation. Older states came to understand themselves in similar fashion. And so it was after World War I (WWI), and again after World War II (WWII), with de-colonization, and as recently as the fall of the Soviet empire.

Second Move: Religion. There is much more to religion—notably in the Abrahamic religions—than religious sensibility properly speaking. They all have or have had a huge impact on our cultural asset, not least our political cultural asset—and consequently on our identitarian asset. Sometimes their cultural asset is directly manifested through literature, poetry, the plastic arts, and music. Sometimes it is indirect, shaping our sensibility to the human condition in profound ways. Given the historical prevalence of the Judeo-Christian tradition in the West, it is impossible to understand political culture—even secular political culture, even the cultural identity of the most *laïque* of persons—without this asset being in the background. The recent speech given by Nicolas Sarkozy about the Christian roots of France was not an evangelizing appeal or referent—it was a reference to the cultural dimension of Christianity which is indispensable to an understanding and, in his view, self-understanding of secular France. The famous WWII essay of Benedetto Croce has always been understood in a similar sense.

Third Move: Religion and Nation. In the emergence of the nation in the modern nation-state or the new national self understanding of older states, religion, in this thick cultural sense, could and did become an important and at times constitutive element in the self-understanding of persons as a collective people. In short, in the cultural make-up of the nation, religion may play a huge part even for those who have abandoned its deistic content.

In the emergence of modern Ireland, through its struggle to become a state independent from Protestant Britain, Catholicism was among the most salient elements of national self-understanding. The preamble to the Irish Constitution till this day has a flowery reference to explicit Catholic imagery, with the Holy Trinity being defined as the source of truth, beauty, and justice. This, of course, is in an Ireland that recognized—in the same Constitution—the full and equal citizenship of Protestants, Jews, and, naturally, atheists. To have full-fledged Jewish citizens who could, say, vote for and be elected to the Irish Parliament, and serve in the highest offices of the State as full and equal citizens, was not considered to be in contradiction with a Constitutional self-understanding of the Holy Trinity as being the source of all truth, beauty, and justice—and was not regarded as contradictory or insulting by the many who did not share that vision.

Let me bring these ‘three moves’ to a sharp conclusion: Religion is not something that emerges when we discuss the relationship between State and Church. It can predate the State and be part of the identity of the very nation of which the State is an expression. Religion may belong to the fundamental notion of Self-Determination. Scrubbing out religion from the collective and public space may compromise that primordial “right” of self-determination.

II

Keeping this in mind, then, let us turn to the contemporary debate about the place of religion in European public space—a debate which has assumed sharper edges with the advent of large and vibrant religious Muslim societies in Europe today, in the face of both a Christianity which has been continuously losing ground in an ever-secular Europe, and a corresponding decline in the role of Christian culture in the self-understanding of the European nations and nation-states. There was, as you will recall, a huge discussion about the possible reference to “Christian Roots” as part of the Identikit of the European Union in the Preamble to its now-defunct “Constitution.” Now questions arise in national contexts—with the debate, for example, on the appropriateness of a crucifix in public schools, which has been litigated before the German Constitutional Court, is under legislative consideration in several countries, and was the subject of consideration by the Grand Chamber of the ECHR following the November 2009 *Lautsi* decision by the Second Chamber. It is hard to recall any ECHR litigation in recent times that has attracted as much public and media attention. Relate the discussion on the cross to that on the burqa and you have your finger on the constitutional pulse in and of Europe.

I want to offer a somewhat novel, and surely contestable, way of framing the issues as they manifest themselves today.

III

We habitually talk of the commitment to religious freedom, both positive and negative—freedom of religion and freedom from religion—which European states are constitutionally, and under the Convention system, obligated to guarantee their citizens and residents.

In fact, I would suggest, the European constitutional landscape posits two, rather than one, “Freedom of Religion.” In addition to the classical *individual* Freedom of and from Religion, in its very structure Europe represents a second *collective, identitarian*, Freedom, conceptually stemming from self-determination, namely the freedom of nation-states to include in their self-definition, in their self-understanding and in their national and statal symbology, a more or less robust entanglement of religion and religious symbols. (Right ‘off the bat’ let me say that there is no small measure of hypocrisy in the oft-heard insistence that Turkey must be *laïque*—Turkey yes but Denmark no?)

Consider France and the United Kingdom, good examples because both are founding members of the European Convention on Human Rights and, despite the usual imperfections, are both considered robust liberal democracies in good standing.

France, in its very Constitution, defines itself as *laïque*—usually understood as a political doctrine which does not allow the State any endorsement or support of religion—and would, say, consider the display of religious symbols by the State or the funding of religious schools, as, well, anathema. At an *individual* level, “*laïcité*” (secularism) does not necessarily mean individual atheism or agnosticism. I know many persons, and so do you, who are religious in a profound and

1. *Lautsi v. Italy*, 54 Eur. Ct. H.R. 3 (2011).

capacious way, but uphold *laïcité*. They do so because they believe, independently of their personal conviction, that it is wrong for the State to get entangled with religion. This precision is important since it helps highlight the fact that *laïcité* is a political doctrine that articulates the best way to regulate the relationship between the State and Religion. The origins of, and justification for, *laïcité* can be historical (e.g., the specificities of the *Ancien Régime* and the subsequent French Revolution), but also theoretical—rooted in both principled and pragmatic considerations of, say, how best the State may ensure peaceful coexistence among religious factions.

Laïcité is to be contrasted with an opposing doctrine, which is also very common in Europe but which has no broadly accepted name. “Theocracy,” even the most ardent supporters of French-style *laïcité* would agree, would not be an appropriate label to describe a state like the modern UK or Denmark. For convenience let us refer to ‘non-*laïque*’ states. Like France, and like everyone else, the non-*laïque* are both committed to, and obligated by, an imperative of assuring individual freedom of and from religion—but they see no wrong in a religious, or religiously rooted, self-understanding of nation and state, and in a public space more or less replete with state-endorsed religious symbology. In England, part of the UK, the Monarch is not only the Head of State, but also the titular head of the Anglican faith and its institutional manifestation in the Church of England, the “Established Church” of the Nation and State. Many state functions have a religious character: clergy sit (or sat) ex-officio as part of the legislature, the flag carries the cross (of St. George), and the national anthem is a prayer to God.

In somewhat of a mirror image of what I wrote above, I know, and so do you, many persons in England who are very convinced atheists and yet see no harm in the ‘non-*laïque*’ state. They are also able to invoke considerations of principle and pragmatism: Has the UK been more riddled with religious strife than, say, France? It would seem that at least until recently, Catholics, Jews, and Muslims were at peace with, say, a photo of the Monarch on the wall of a classroom. More significantly, the English (or British) population at large has been at peace with a Catholic, Jewish, Muslim, or Church of England classroom funded from the general tax receipts of a population which is mostly secular, just as their French counterparts would be uncomfortable with the above.

It is not my purpose to claim normative parity for these two positions—a proposition which makes many people become very hot under the collar. But I will make two related claims. First, both the French and the UK (English) models are considered constitutionally legitimate in Europe. The UK (or Denmark, Malta, Greece, and many others with different recipes from the ‘non-*laïque*’ cookbook) is not, simply by being what it is, in violation of the Convention or in violation of the common constitutional traditions of Europe. Second, and more controversially, I assert that the claim that *laïcité* embodies a principle of neutrality requires a very narrow (and self-serving) definition of what we mean by neutrality. Sure, a *laïque* state, à la France, is neutral as between different *religious* factions in the French public space. But it is not neutral in a broader political sense. What may hang on a French classroom wall will depend on the political colour of French democracy at any given time: A bust of Voltaire? *S’il Vous Plait*. Marx? *Pourquoi Pas?* The noble Battle Cry of the French Revolution—*Liberté, Égalité, Fraternité*—is, in fact, to be found in countless schools across the country. The only things that may

not be displayed, independently of the contemporary color of voter preference, are a cross, a mezuzah, or a crescent. Kids may come to school with any manner of emblems such as the famous peace triangle, but not with you-know-what.

There is no contestation in Europe about the principles of freedom of and from religion (though there are many debates about their application). But there is a deep contestation about the most suitable way to regulate the symbolic and iconographic entanglement of Church and State. The *laïque* position is surely not “neutral” about that contestation: It is as much a polar position as is the ‘non-*laïque*’ position. It does not simply choose a side. It is a side. It is theoretically autistic or disingenuous to claim neutrality for a term which defines one pole in a bipolar dispute.

This argument brings about yet a third very important underlying distinction which is rarely articulated, but which was very visible in *Lautsi*, since, in my view, it undergirded the impassioned plea by the lawyers of the redoubtable Ms. Lautsi. It also, in my most humble and respectful opinion, undergirded the decision of the Chamber that was subsequently appealed to the Grand Chamber. There are those who truly believe that *laïcité* is a primordial condition—sine-qua-non for a good liberal democracy and that, at least implicitly, the non-*laïque* position is sub-optimal at best and aberrational at worst. Consequently, it is morally imperative for good democrats and liberal pluralists to attempt to clip the wings of religious manifestations of the non-*laïque* state as far as possible—a principled and consistent position.

IV

There are others (myself included) who hold the view that, even more in today’s world than before, the European version of the non-*laïque* state is hugely important in the lesson of tolerance it forces on such states and its citizens towards those who do not share the “official” religions, and in the example it gives the rest of the world of a principled mediation between a collective self-understanding rooted in a religious sensibility, or religious history, or religiously-inspired values, and the imperative exigencies of liberal democracy. There is something inspiring and optimistic in the fact that, even though the Queen is the titular Head of the Church of England, the many Catholics, Muslims and Jews, not to mention the majority of atheists and agnostics, can genuinely consider her as “their Queen” too, and are equal citizens of England and the UK. I think there is intrinsic value of incalculable worth in the European pluralism which validates both France and the UK as acceptable models in which the individual right to and from religion may take place.

This, then, is how I would frame the issues against which the spate of cases and debates currently present in the European public space must take place. All too often, these debates are reduced to the oft-difficult line-drawing exercises between freedom of and from religion and their counterbalancing by other societal mores.

A word, then, about Europe. The European Union constitutional framework is meant to reflect the common constitutional traditions of the Member States. How would one achieve that when one has a France and a Britain? A Malta and a Sweden? The solution I propose is the so-called Polish solution, the elegant way in

which the contemporary Polish constitution catered for a society in which equal respect is owed to the religious and the non-religious. Both are recognized. Europe could recognize both.

V

What is the conceptual and normative theoretical case for the transcendent European constitutionalism which accepts this myriad of arrangements ranging from the French, through the Dutch to the English?

I would list the following considerations, which must be taken step by step.

First, national identity is considered of moral value in and of itself, and if religion—as faith and/or culture—is bound up with the make-up of that collective identity, it partakes of that moral value. It partakes of that moral value for several reasons: First, because collective self-determination is an expression of individual liberty and self-determination. Why should we Irish, separate and different from the British in many ways, of which our predominant faith is one important element, not be able to be our own people, in our own State, etc.? (The political and legal limits to the right of independence of national minorities within a State must be the subject of another paper). Is it not odd, the argument would go, that under freedom of religion I may be entitled to give expression to my faith at the individual level, but, even if theoretically every single one of my fellow citizens feels exactly like me, we may not give any expression of such in the public square, in the symbology of our State—which flows from the definition of the State as *laïque* as in France? The denial of that position is indeed deeply rooted in the heritage of the French Revolution, which defined religion as a private matter, even though the Abrahamic religions do not understand themselves as confined to the private sphere. Clearly, however, the British, or Danish, or Irish, or Greek, or Maltese, or Polish, etc., did not follow in the French footsteps, despite partaking in the same heritage.

It is for this reason that I do not like the vocabulary of “Margin of Appreciation” used by the Grand Chamber in resolving the *Lautsi* case in favor of Italy. (I like the result, but not that aspect of the reasoning). “Margin of Appreciation” is premised on the notion that the Individual and his or her rights are at the center, and that competing values are peripheral, on the margin. I do not accept that. I think that the good life is one in which the rights of the individual are balanced by duties and responsibilities towards others. I also would claim that the community, society, and human relations are indispensable components of the very human condition, so that the right of collective self-determination—how a society understands itself collectively—is hugely important and has to be carefully balanced. From this perspective, one could say, ironically and polemically, that it is the European Court which is operating within the Margin of Appreciation. The vocabulary is so entrenched that it would be futile to call for its abandonment, but its philosophical and jurisprudential limitations should be acknowledged.

Does this mean that the nation must be “pure”? Must Britain reject or exclude or repress, as it once did, Catholics or Jews or Muslims or seculars who hate all forms of religion? Why would the European Convention on Human Rights, one foundation of which is clearly the heritage of the French Revolution with its Declaration of the Rights of Man, accept the British model as an authentic

expression of its transcendent liberal values?

The answer to all of these questions is: of course not. Europe is crisscrossed with states that contain various minorities, including religious minorities, linguistic minorities and, indeed, national minorities. We now can identify the third grand principle which is part of the transcendent European constitutionalism. Formalized already at the end of WWI, Europe accepted the legitimacy of a conceptual distinction between nationality and citizenship. All citizens are equal in law, but this need not obliterate national distinctions—as even a cursory look at states such as the UK, Spain, Italy, and Belgium, to mention but a few, attest. Various regimes to accommodate this distinction are in place as these same states again attest: Devolution in the UK, autonomy in Spain, bi-communalism in Belgium, differentiated regionalism in Italy with a special status for the German-speaking Alto Adige, etc.

What is the normative conceptual underpinning of this third principle? Why is it accepted, especially if the dominant culture is religiously defined, as in, say, England? The answer, I would argue, is that allowing a religiously inspired identitarian asset to the state but insisting on strict non-discrimination on grounds of religion provides one of the most fertile grounds for cultivating one of the most cherished liberal virtues—that of tolerance. It is demonstrated in the fact that England is formally Anglican in its symbology but practices full religious freedom—thus allowing Catholics and Jews not only to worship freely, but also to be prime minister or legislator or chief justice, to be fully integrated citizens. This teaches tolerance and is in some respects inspiring. It is one reason why Britain has been so attractive to immigrants, why in modern Britain its Catholic citizens can be as patriotic as its Protestant citizens. It is a state of all its citizens and at the same time it has a powerful identitarian asset and identity which has its roots, and some very live manifestations, in religion. On this paradigm, it is France that seems less pluralist and tolerant in insisting on a single unique French nationality/citizenship repressing different national identitarian communities.

Our contemporary political theory has forgotten the lessons of Aristotle, Aquinas, and Maimonides who all insisted on a clear distinction between values (societal values) and personal virtues necessary to vindicate those values. You will not defend the Patria, or freedom, if your citizens are all cowards. If a constitutive liberal value is tolerance, it is not clear to me which of the two models, the French or the British, has a more salutary effect on the corresponding individual virtues. It is arguably a sharper lesson in tolerance to say: Though we are officially and formally Anglican, we will accept Catholics with absolutely no discrimination, than to say we are neutral and we will accept Protestant with no discrimination.

Moreover, that tolerance and inclusiveness becomes part of our self-understanding and self-identity. To be English both affirms a unique identity a feature of which is the willingness to accept others on equal terms in the positive assets of citizenship. As this translates into practice, it will, of course, have other cultural impacts on what it means to be English. English cuisine is not only roast beef and Yorkshire pudding but also Madras curry. As different “others” are integrated the self itself will change, organically. And for the “other,” the interesting part of being English is the fact that one is accepted as a full citizen, that one can partake in the cultural asset and British traditions—despite one’s otherness.

Interestingly, it has elicited huge loyalty.

Third, there is an important external dimension. There is value not only in the British/Danish/Maltese, etc. model as such, but also in the overall European model which accepts as legitimate a France and a Holland and a Britain. Liberal democracies are interested in the spread of democracy beyond the old West—and there have been huge strides in recent years. But large swaths of the world are populated by religious peoples and societies for whom the Franco-American model is extremely unappealing. It seems to suggest that democracy means consigning religion to the private sphere as in France and America. That democracy means separationism. The Europe model accepts separationism. But it also accepts other models which are more tolerant and friendly to religious society, provided that the binding of the religiously-inspired identity in the identitarian asset of the state does not compromise either freedom of religion or freedom from religion.

VI

There is one final little puzzle I want to address: It is surprising that transcendent European constitutionalism accepts the British, Danish, etc. model, especially in this extreme form where there is an established State religion, given the rootedness of the Human Rights apparatus in the French Revolution, the Declaration of the Rights of Man, and the move to privatize religion. There is, of course, a political explanation: Britain, for example, was a founding Member of the Council of Europe and among the principal drafters of the European Convention on Human Rights. But the fact that South Africa was a Charter Member of the UN did not make apartheid *kosher*.

I think the reason for the European pluralism on this issue has deeper roots.

First, we may note that there is an in-built tension: The principle of Human Rights (which privatized religion) pushes towards the French Model. The principle of Self Determination pushes towards the British model. The European solution is a plausible attempt at pragmatic compromise. In some respects it splits the difference in an interesting way: It vindicates the notion of fundamental liberties by insisting at the level of the individual on strict freedom of and from religion, and on non-discrimination in the non-identitarian aspects, but recognizes self-determination by allowing a Britain and Denmark and Malta, and Greece and Germany and Poland.

Make no mistake—there will be difficult boundaries to navigate. A law which ensured Anglican ascendancy in elections? That would not survive. But the Monarch has to be Anglican? That is still extant law: It is part of being the Monarch, though if Prince Charles, like Tony Blair, converted to Catholicism and petitioned the European Court, we would have some legal fun.

Second, the traditions of Human Rights and the dignity of man do not only derive from the Enlightenment, Neo-Kantianism, and the French Revolution. Europe's political culture, as brilliantly illustrated by the French Historian Remy Brague, has always drawn on two sources—Athens and Jerusalem—and their evolving incarnations. Even a modern Saint, St. Jurgen (Habermas), has come to acknowledge the Christian foundation of our modern tradition of Human Rights. The constitutional pluralism of Europe is but a manifestation of that rich, at times

fractious, but ultimately fecund tension and synthesis of those two traditions.