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## DIRETTRICE

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*This focus is the final output of the research project of national interest Migration and Religion in International Law (MiReIL). Research-based Proposals for Inclusive, Resilient, and Multicultural Societies, funded by the Italian Ministry of University and Research and by the European Union – NextGenerationEU in the framework of the “Piano nazionale di ripresa e resilienza (PNRR)”*

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## MIGRATION AND RELIGIOUS FREEDOM IN EUROPE: SEARCHING FOR CONSTITUTIONAL SECULARISM

Elisa Olivito\*

SUMMARY: 1. Religions and Fundamental Rights: Reconsidering the Principle of Secularism in the European Framework of Migrations. – 2. Secularism and the Majority Criterion in a Context of Migration: Critical Remarks Starting from the Italian Case. – 3. Secularism for Everyone or against Others?

### 1. Religions and Fundamental Rights: Reconsidering the Principle of Secularism in the European Framework of Migrations

This essay aims to offer tailored reflections on the principle of secularism in relation to certain aspects of migration and religious liberty in the European context. It does not, therefore, propose a general review of national or European legal theories and case-law on secularism, nor a review of national and European legal doctrine and case-law on issues relating to migrants' religious freedom.

Rather, the paper seeks to offer some food for thought on constitutional secularism and the associated risk of legal short circuits and inconsistencies given the presence of migrants on national territories.

Indeed, the appeal made some years ago to reconsider the principle of secularism appears to remain current today.<sup>1</sup> This is shown by the questions that have arisen in many European States in recent decades, triggering a major debate in public opinion.

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#### Double-blind peer reviewed article.

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<sup>1</sup> In Italy, this appeal originated with G. DALLA TORRE (ed.), *Ripensare la laicità: il problema della laicità nell’esperienza giuridica contemporanea*, Torino, 1993. For a similar appeal in a larger European framework see, more recently, R. BHARGAVA, *Reimagining Secularism. Respect, Domination, and Principled Distance*, in N. BHUTA (ed.), *Freedom of Religion, Secularism, and Human Rights*, Oxford, 2019, p. 21 ff., and L. ZUCCA, *Rethinking Secularism in Europe*, *ivi*, p. 141 ff.

Consider, for example, the problems relating to religious holidays other than national ones (and therefore the day of weekly rest), ritual burial and slaughter, observance of religious dietary rules, conscientious objection, the use of places of worship, the display of the crucifix, and the wearing of the Islamic veil in public places or at the workplace.<sup>2</sup>

The legal questions raised by these matters are clearly symptomatic of a larger unrest in European societies. Moreover, they bear witness to major changes caused, among other things, by massive migration flows and by the resulting conflicts – including legal conflicts – over recognizing the growing religious pluralism.<sup>3</sup>

However, in theoretical and practical terms, there have been difficulties in dealing with the migrants' religious demands, also because these demands are founded upon claiming an identity that is both cultural and religious. These difficulties have appeared to arise primarily from the need to search for new categories, and these categories are often the result of a "legal transplant" from legal cultures and historical experiences distant from European ones.

In actuality, the opinion that in this area there are first and foremost theoretical difficulties depends not only on the notions used to frame those demands, but also on the context in which they are employed, and on their disruptive effects when they are grafted onto profoundly changed social and cultural settings.

Indeed, historically speaking, movements and migrations epitomize humankind's most timeless experiences, and have always been crucial factors in the development of heterogeneous – including religiously heterogeneous – societies. Consequently, the struggles for recognition connected to religious affiliation and cultural identity, beyond merely characterizing the postmodern condition, express needs typical of the human condition as elaborated in various ways over time.

However, in contemporary legal systems, the religious claims of migrants – and the degree to which a legal system can accommodate them – must be framed within a more rigorous reflection upon what keeps complex and pluralistic societies united, and upon the bonds underpinning social coexistence. Issues that relate to containing the

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<sup>2</sup> For an examination of the solutions adopted in this regard in European States, see L. ZANFRINI, *Migrants and Religion: Paths, Issues, and Lenses. A Multidisciplinary and Multi-Sited Study on the Role of Religious Belongings in Migratory and Integration Processes*, Brill, 2020; M. VENTURA (ed.), *The Legal Status of Old and New. Religious Minorities in the European Union*, Albolote, 2021. As regards the multiple paths through which religion and secularism find space in the European Union, despite the fact that it has no expressly recognised legislative competence in religious matters see S. CARRERA, J. PARKIN, *The Place of Religion in European Union Law and Policy. Competing Approaches and Actors inside the European Commission*, in [www.ceps.eu](http://www.ceps.eu), 30 September 2010; R. MCCREA, *Religion and the Public Order of the European Union*, Oxford, 2010.

<sup>3</sup> Although in a different sense than that maintained here, this is also emphasized by A. PIN, J. WITTE JR., *Meet the New Boss of Religious Freedom: The New Cases in the Court of Justice of the European Union*, in *Texas International Law Journal*, 2020, p. 235 ff.; J. WITTE JR., A. PIN, *Faith in Strasbourg and Luxembourg? The Fresh Rise of Religious Freedom Litigation in the Pan-European Courts*, in *Emory Law Journal*, Vol. 70, 2021, 587 ff., with reference to the case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) in the matter of religious freedom and State neutrality.

forces disruptive of social coexistence and to the influence that particularist bonds have in the development of the human being are reappearing today in a new guise.<sup>4</sup>

In this regard, migrants' religious demands force us to ponder the difference between mere tolerance and the promotion of pluralism, as well as the limits within which law can or must take account of religion as a factor conditioning of individual behaviour. In this sense, religious identity conflicts stimulate expansive reflections on the pendulum swing between a heightened relativism of law and values, and the law declining altogether to recognize the multiplicity of identities and affiliations.

The legal issues arising from the pluralistic features – including religious pluralism – of contemporary societies must come to terms with certain attainments of modernity, which in Europe have often translated, with due differences, into constitutional principles. Indeed, the challenges connected to the migrants' religious claims and the relevance that religious affiliation can have in legal terms appear to encourage rethinking the binary oppositions underpinning modernity.

Dualities of Enlightenment origin and mold – individual/community, public/private, and freedom/tradition – were in fact constructed as dichotomies with an *either/or* connotation.<sup>5</sup> This was because, in order for the individual to be fully realized on the one hand while achieving loyalty to the nation-state on the other, it was deemed necessary to free everyone from the particularistic constraints of narrow communities and to confine community bonds and precepts to the private sphere.

The migrants' claims built upon religious affiliation therefore touch on a key principle in modern Western legal systems: the principle of secularism.<sup>6</sup> This principle – correlated with but different from that of secularization – was asserted in order to safeguard those binary oppositions and govern the relationship between religions and the State.<sup>7</sup>

<sup>4</sup> See C. TAYLOR, *A Secular Age*, Cambridge, 2007, p. 437 ff., who interestingly highlights differences between Europe and the United States as host countries in relation to the place given to religion in society: "One crucial feature of U.S. society, which may help to explain the American (or European) exception, is that it has a long and positive experience of integration through religious identities, whereas in Europe these have been factors of division: either between dissenters and the national church, or between the church and lay forces. And this relatively positive experience sits alongside that other dimension of diversity, race, which has continued to be deeply problematical. Indeed, the notion of "whiteness" has evolved in American history. Some previously excluded groups, like swarthy South European Catholics, eventually enter the category precisely because their faith becomes included in the consensual civil religion. So it is not only, or even mainly, the plight of the immigrant as such (e.g., the necessity of networking, and the like) which is operative here; rather the crucial factor is a structural feature of the host society, the way it integrates through religious identity. But this historical experience itself begins to explain the difference with Europe" (*ivi*, p. 524).

<sup>5</sup> As to attraction of secularism into the Enlightenment and its consequent institutionalization see S. MANCINI, *Introduction: Constitutionalism and Religion in an Age of Consolidation and Turmoil*, in S. Mancini (ed.), *Constitutions and Religions*, Cheltenham, 2020, p. 2 ff.; M. ROSENFELD, *Constitution and Secularism: a Western Account*, *ivi*, p. 21 ff.

<sup>6</sup> "The secular State is properly presented as a specific and exclusive characterization of the more general figure of the XIX-century European liberal State": L. GUERZONI, *Stato laico e Stato liberale: un'ipotesi interpretativa*, in *Diritto ecclesiastico*, 1977, p. 533 (my translation).

<sup>7</sup> For a comparison between the United States and the European Union as relates to the incorporation of immigrant religions in the public sphere of US and EU civil societies, see J. CASANOVA, *Immigration*



In this regard, it bears mentioning that there are several elements thought of as characteristic of State secularism, each of which can be conceived and concretely expressed in very different ways. These are civil authority's autonomy and independence from religious authority, the State's non-denominationalism, the State's neutrality and impartiality in religious matters, and the temporal nature of the values that the State expresses and promotes.<sup>8</sup>

Nevertheless, the fact that secularism is a constitutional principle in many European legal systems, like Italy's, ought not to mislead us, because it is neither expressed nor conceived, or even implemented, in accordance with a universal, diachronically and synchronically valid model.<sup>9</sup> Notwithstanding the international constraints concerning the guarantee of religious freedom, this is in fact one of the fields in which European States are accorded a wide margin of appreciation in regulating relations with religious denominations.

This may be clearly gleaned from the case law of the European Court of Human Rights (ECtHR), according to which:

[w]here questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance [...]. It is not possible to discern throughout Europe a uniform conception of the significance of religion in society [...], and the meaning or impact of the public expression of a religious belief will differ according to time and context [...]. Rules in this sphere *will consequently vary from one country to another* according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order [...]. Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context.<sup>10</sup>

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*and Religious Pluralism: An EU/US comparison*, in T. BANCHOFF (ed.), *The New Religious Pluralism and Democracy*, Oxford, 2006, p. 59 ff.

<sup>8</sup> For the Italian debate about State secularism see, among others, L. GUERZONI, *Note preliminari per uno studio della laicità dello Stato sotto il profilo giuridico*, in *Archivio giuridico*, 1967, p. 61 ff.; C. CARDIA, *Stato laico*, in *Enciclopedia del diritto*, vol. XLIII, Milano, 1990, p. 874 ff.; F. RIMOLI, *Laicità (dir. cost.)*, in *Enciclopedia giuridica Treccani*, vol. XVIII, Roma, 1995, p. 1 ff. More recently, for the European debate as to the different way of conceiving and implementing State secularism as "religious neutrality", see S. HENNETTE-VAUCHEZ, *Religious Neutrality, Laïcité and Colorblindness: A Comparative Analysis*, in *Cardozo Law Review*, Vol. 42, 2021, p. 539 ff.; M. HUNTER-HENIN, *Religious Neutrality at Europe's Highest Courts: Shifting Strategies*, in *Journal of Law and Religion*, Vol. 11, 2022, p. 23 ff.

<sup>9</sup> See R. BOTTONI, *The Constitutional Principle of Secularism in the Member States of the Council of Europe*, in J.H. BHUIYAN, A. BLACK (eds.), *Religious Freedom in Secular States: A 21st Century Perspective*, Brill, 2022, p. 147 ff.

<sup>10</sup> European Court of Human Rights, Grand Chamber, judgment of 10 January 2005, application No. 44774/98, *Leyla Şahin v. Turkey*, para. 109. As to the ECtHR case law, making reference to the principle of secularism, see T.J. GUNN, *The "Principle of Secularism" and the European Court of Human Rights: A Shell Game*, in J. TEMPERMAN, T.J. GUNN, M.D. EVANS (eds.), *The European Court of Human Rights and the Freedom of Religion or Belief: The 25 Years since Kokkinakis*, Brill, 2019, p. 465 ff. For a comparison between the ECtHR case law and the case law of the Italian Court of cassation, see G. RAIMONDI, *Crocifisso, laicità dello Stato, libertà religiosa. In margine alla sentenza delle Sezioni Unite della Corte di cassazione n. 24414 del 9 settembre 2021 alla luce della giurisprudenza della Corte di Strasburgo*, in *Lavoro Diritti Europa*, 2021, p. 2 ff.



In legal terms, then, the principle of secularism is translated into institutions and law statutes that differ considerably not only from one legal system to another, but also over time. This depends on the fact that secularism, “before being a legal reality, is essentially and above all a political principle”<sup>11</sup> and, therefore, a relative, historically determined value. Its legal implementation is variable, because the corresponding principle is affected by the historical, political, religious, and cultural changes emerging from society.

This is proved by the fact that, just as Italian scholars distinguish between a “negative” and a “positive” secularism,<sup>12</sup> French scholars emphasize the transition from a *laïcité de combat* to a *laïcité ouverte*.<sup>13</sup>

Although these distinctions risk simplifying abundantly nuanced concepts, as far as Italy is concerned the difference is easily grasped in certain long-standing Constitutional Court judgments that have ranked secularism as a “supreme principle of our constitutional system”. For the Italian constitutional judges, the State’s secularism, “as it emerges from Arts 2, 3, 7, 8, 19 and 20 of the Constitution, does *not* imply the *indifference of the State* to religions but rather a *guarantee of State protection* of the freedom of religion, in a regime of confessional and cultural pluralism”.<sup>14</sup>

However, the Constitutional Court has in some ways gone beyond the criticism-prone concept of “positive” secularism. Indeed, “positive” secularism has been conceived as the State’s attitude to secularism that places itself at the service of the concrete demands arising from the citizens’ civil and religious conscience. In decisions subsequent to Judgment No. 203/1989, the constitutional judges preferred to emphasize the following facets of the principle of secularism: (i) the “State’s *neutrality* in religious matters”;<sup>15</sup> (ii) the consequent obligation of the “equidistance and impartiality of legislation towards all religious denominations”;<sup>16</sup> and, lastly, (iii) the protection of freedom of religion in a system grounded on religious and cultural pluralism, favouring the maximum expansion of freedom for all.<sup>17</sup>

Meanwhile, in the French legal system, the expression “militant secularism” indicates a secularist, non-religious, or antireligious ideology, that denies religion any space in the public sphere and takes a hostile attitude towards it. To the contrary, “open secularism” takes the form of acknowledging the religious factor’s social

<sup>11</sup> L. GUERZONI, *Note preliminari*, cit., p. 114 (my translation).

<sup>12</sup> Arising from certain rulings by the Italian Constitutional Court, the distinction indicates, in the first case, the State’s indifference to religions, and, in the second case, the State’s guarantee for safeguarding freedom of religion. For a critique on this distinction and the consequent weakening of the principle of secularism, see P. BELLINI, *Riflessioni sull’idea di laicità*, in *La questione della tolleranza e le confessioni religiose*, Napoli, 1991, p. 38 ff.

<sup>13</sup> On these notions, see M. WIEVIORKA, *Laïcité et démocratie*, in *Pouvoirs*, 1995, p. 61 ff., and J. BAUDOUIN, P. PORTIER (eds.), *La laïcité, une valeur d’aujourd’hui? Contestations et renégociations du modèle français*, Rennes, 2015.

<sup>14</sup> Italian Constitutional Court, Judgment No. 203/1989.

<sup>15</sup> Italian Constitutional Court, Judgment No. 235/1997.

<sup>16</sup> Italian Constitutional Court, Judgment No. 329/1997, as well as Judgment No. 508/2000.

<sup>17</sup> Italian Constitutional Court, Judgment No. 63/2016 and Judgment No. 67/2017.

importance, and the consequent recognition of its relevance in a regime of equality, without prejudice to the State's neutrality.<sup>18</sup>

But the distinction between different understandings of secularism suffers from a certain degree of approximation, because it is just an attempt to emphasize the changeable nature of the corresponding legal principle. In this sense, it must be acknowledged that secularism today has to grapple with new thrusts towards the "deprivatization" of religion<sup>19</sup> – thrusts that contradict the negligible and isolated role accorded to it by the process of secularization.<sup>20</sup>

Since there is no full correspondence between secularism and secularization, the latter can be (and has in fact been) understood variously: (i) as the differentiation and emancipation of secular spheres (law, economy, science) from ecclesiastical institutions and religious norms; (ii) as the progressive decline of religious beliefs and practices; (iii) as the relegation of religion to the private sphere. But while the first meaning is a necessary consequence of secularization, the other two are a historical manifestation of it.

From this perspective, the religious demands of migrants raise just as many challenges to the principle of secularism, because they force legal scholars, politicians, and public institutions to reconsider the boundaries between religion and secularism, or between religion and culture – and consequently to rethink the guarantees of religious freedom.<sup>21</sup>

In fact, in continental Europe, and in more accentuated fashion since the 1980s, the phenomena of deprivatization of religion have taken on a new dimension, also as a consequence of the social and cultural changes caused by migration flows. Religions invade the public sphere no longer – and not only – to claim their own functions and recognised prerogatives in the face of an autonomous *saeculum*, but to contribute towards redefining the boundary between the public and private spheres. They therefore demand a public role in order not only to defend private spaces for their

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<sup>18</sup> French Constitutional Council, 2012-297 QPC, 21 February 2013: "[...] that the principle of secularism is one of the rights and freedoms guaranteed by the Constitution; that it follows that the State must be neutral; that it also follows that the Republic does not recognise any religion; that the principle of secularism requires in particular that all beliefs be respected, the equality of all citizens before the law without distinction based on religion also be respected, and that the Republic guarantee the free exercise of religion; that it implies that it shall not subsidise any religion" (official translation into English of the French Constitutional Council).

<sup>19</sup> On the deprivatization of religion, see J. CASANOVA, *Rethinking Secularization: A Global Comparative Perspective*, in P. BEYER, L.G. BEAMAN (eds.), *Religion, Globalization, and Culture*, Leiden, 2007, p. 101 ff., and even before, ID., *Public Religions in the Modern World*, Chicago, 1994. According to José Casanova the term "secularization" is understood at times as the decline of religious beliefs and practices in modern societies, at times as the privatization of religion, and at times as emancipation from religion, institutions, and norms.

<sup>20</sup> Cfr. R. REMOND, *Religion et société en Europe. Essai sur la sécularisation des sociétés européennes aux XIXe et XXe siècles (1789 - 1998)*, Paris, 1998.

<sup>21</sup> See M. WARBURG, *Globalization, Migration and the Two Types of Religious Boundary: A European Perspective*, in P. BEYER, L.G. BEAMAN (eds.), cit., p. 79 ff.

religious practices and beliefs, but to contest the boundaries between legality and morality, between individual and society, and between family, civil society, and the State.

Moreover, although the proactive engagement of religious denominations in the public sphere is conditioned upon acknowledgement of fundamental constitutional principles, respect for individual freedoms, and the preservation of differentiated orders between religious and public authorities,<sup>22</sup> major questions arise from the legal standpoint as well.<sup>23</sup> In the first place, these questions relate to how social changes, produced also by migration, affect the interpretation of constitutional principles and the guarantee of fundamental rights.

In this regard, the following question arises in particular.

What actually happens when an active role in the public space is claimed by religious denominations that have experienced no secularization processes analogous with those taking place in the European legal systems, and that waves of migration have brought into European societies?

In countries where secularization has taken hold as the progressive decline of religious beliefs and practices or as a relegation of religion to the private sphere, some religious demands end up profoundly questioning certain assumptions of modern constitutionalism.<sup>24</sup> Indeed, the fact that migrants invoke strict observance of religious precepts and claim their religious affiliation in the public sphere appears to contradict, first and foremost, certain secularized arrangements, as they are covered by the constitutional principle of secularism in many European legal systems.

However, these questions are so closely entwined with those of multiculturalism that it would be reductive to view them as regarding solely the religious sphere. A great many multicultural conflicts in fact arise in the field of religious freedom, thus turning secularism into a battleground for the cultural claims of certain minority groups. From this standpoint, multiculturalism has prompted a significant change of direction for religion-related demands, given that religious diversity is increasingly experienced, claimed, and (also) practised as a cultural diversity.

The presence of migrants belonging to cultures different from the majority has turned the public space into the locus where cultural identity is asserted, and has caused religious differences to be experienced as an important part of that identity. Religious claims have thus taken on a strong cultural connotation, and legal questions have been raised on the level of cultural identity in addition to that of religious belief.

For example, the overlapping between migration, cultural identity and religious affiliation has come clearly into view with the claimed right to wear certain religious symbols, or due to the repercussions that the mandatory presence of some of these

<sup>22</sup> But as to the return of religion as a serious challenge to constitutionalism's supreme or higher law standing see R. HIRSCHL, A. SHACHAR, *Competing Orders? The Challenge of Religion to Modern Constitutionalism*, in *University of Chicago Law Review*, 2018, p. 425 ff.

<sup>23</sup> On how "strong religion" may entail varying attitudes toward the legal order, see A. SAJÓ, *Preliminaries to a Concept of Constitutional Secularism*, in *International Journal of Constitutional Law*, 2008, p. 606 ff.

<sup>24</sup> As argued, for example, by A. SAJÓ, *Preliminaries to a Concept*, cit.

symbols in public spaces has on the principle of secularism.<sup>25</sup> In this specific area, moreover, even among legal scholars and lawyers there is a widespread automatic assumption that questions relating to certain minority religious symbols always and exclusively originate with migrants' claims.

Consider, for example, the opinion of Advocate General of the Court of Justice of the European Union, Juliane Kokott, in the *Achbita* case:

[t]here is no need to highlight here the social sensitivity inherent in this issue, particularly in the current political and social context in which *Europe is confronted with an arguably unprecedented influx of third-country migrants and the question of how best to integrate persons from a migrant background is the subject of intense debate in all quarters*. Ultimately, the legal issues surrounding the Islamic headscarf *are symbolic of the more fundamental question of how much difference and diversity an open and pluralistic European society must tolerate within its borders and, conversely, how much assimilation it is permitted to require from certain minorities*.<sup>26</sup>

Added to this is the difficulty of extending the guarantees of “positive” or “open” secularism to religious precepts to which work schedules, recognised holidays, and life rhythms do not conform, because these are adjusted to the precepts of other faiths.<sup>27</sup>

The multiplicity and diversity of *Weltanschauungen* that guide people's lives therefore force the secular State to choose between an attitude of rigid and blind neutrality<sup>28</sup> – which leaves the fulfilment of religious demands to power relationships – and the recognition of religious accommodations. This means positing an alternative between a “culture-blind” secularism and a “culture-conscious” one: an indifferent secularism, or one sensitive to the cultural pluralism of which religion is an essential component.

Having discarded the “either/or” solution, the direction most suited to the current historical, social, and cultural context is identified through a thoughtful “updating” of the principle of secularism, with full awareness of certain elements: religions increasingly longing to take centre stage on the public scene; collective and individual identities forged also by religious affiliation; situations of interreligious coexistence

<sup>25</sup> Cfr. L. BEAMAN *The Transition of Religion to Culture in Law and Public Discourse*, New York, 2020.

<sup>26</sup> Case C-157/15, *Achbita v. G4S Secure Solutions NV*, 31 May 2016, paras. 2-3, (my italics). As has been rightly highlighted, “[t]he mere fact that she felt it relevant or useful to contextualize a discrimination in the workplace case against the “migration crisis” speaks for itself. There is little doubt that what this reveals is that Muslim minorities in Europe, even when they are integrated and work, are apprehended as coming from migrant backgrounds and in need of (more) integration. And there is little doubt that, had the case not involved a veiled Muslim worker, Advocate General Kokott would not have chosen such elements of contextualization in her opinion”: S. HENNETTE-VAUCHEZ, *Religious Neutrality*, cit., p. 588. On the *Achbita* Judgment see also E. OLIVITO, *La Corte di giustizia non si “svela”: discriminazioni indirette e neutralità religiosa nei luoghi di lavoro. Il cliente (non) ha sempre ragione!*, in *www.diritticomparati.it*, 7 April 2017.

<sup>27</sup> Cfr. N. COLAIANNI, *Tutela della personalità e diritti della coscienza*, Bari, 2000, p. 158.

<sup>28</sup> As to the ambiguous concept of religious neutrality, with particular attention to its seesawing usages by CJEU, see lately E. HOWARD, *Religious Discrimination at the CJEU and the Social Inclusion Approach*, in *European Labour Law Journal*, Vol. 15, 2024, p. 711 ff.; R. XENIDIS, *From Religious Neutrality to Religious Discrimination in the Public and the Private Sector: Commune d’Ans and S.C.R.L.*, in *Common Market Law Review*, 2025, vol. 62, p. 513 ff.

caused by migrations, and that are such as to generate new conflicts; the appropriation of religion for political purposes; and the constitutional relevance of religious freedom in its negative meaning as well (the freedom not to believe).<sup>29</sup>

## 2. Secularism and the Majority Criterion in a Context of Migration: Critical Remarks Starting from the Italian Case

There is no dispute that European legal systems lack an unequivocal and shared notion of secularism, and that, even when States acknowledge it as a constitutional principle, it takes on different meanings over time. However, the fact that there is no unequivocal conception of secularism (and that this principle is implemented with a certain degree of elasticity) does not mean that secularism can be defined and shaped depending on the religion or citizenship of those raising religious demands.

In this sense, the debates over the principle of secularism revolve at times around certain ambiguities and contradictions that end up actually repudiating this principle. This is particularly the case with those who believe that certain religious accommodations do not run counter to the principle of secularism, since they are based upon the majority's belonging to a given religion.

The fact that the majority of a State's population professes a religious faith provides no legitimacy to measures that, merely by incorporating that fact, actually distort the principle of secularism in its irrevocable core. If anything, in a migratory setting characterized by religious minorities, the principle of secularism should not be interpreted in such a way as to hinder the effective exercise of religious freedom in conditions of equality and without prejudice to living together. Indeed, this freedom would be strongly reduced not only if public authorities were to place themselves at the service of a religion or culture,<sup>30</sup> but also if they were to work towards a secularism indifferent to conditions of minority, marginalization, or social exclusion.

The need to articulate secularism without ignoring the actual conditions for professing minority faiths thus discredits the revival of the "majority argument."

<sup>29</sup> On some of these issues, see M. HILL, M.-J. VALERO-ESTARELLAS (eds.), *Human Dignity, Religion and the Law. Pluralism and Reasonable Accommodation of Religious Practices*, New York, 2025.

<sup>30</sup> The Italian Constitutional Court appeared to interpret secularism in this way when it articulated this principle as "the secular attitude of the State-community, which does not answer to ideological and abstract postulates of the extraneousness, hostility or confession of the State-person or its governing groups with regard to religion or a particular belief system but is *at the service of the concrete demands arising from the civil and religious conscience of the citizens*" (Judgment No. 203 del 1989, official translation into English of the Italian Constitutional Court). For a critique of this understanding of the principle of secularism as "positive secularism," see L. GUERZONI, *Problemi della laicità nell'esperienza giuridica positiva: il diritto ecclesiastico*, in G. DALLA TORRE (ed.), *Ripensare la laicità: il problema della laicità nell'esperienza giuridica contemporanea*, Torino, 1993, p. 123 ff., and S. LARICCIA, *Laicità dello Stato e democrazia pluralista in Italia*, in M. TEDESCHI (ed.), *Il principio di laicità nello Stato democratico*, Soveria Mannelli, 1996, p. 154 ff.

In fact, many years ago, the Italian Constitutional Court openly invoked the majority criterion in judging the constitutionality of certain provisions of the Italian Criminal Code on the protection of religious sentiment. While the social context was at that time quite different from the present one, the constitutional judges had maintained that the greater breadth and intensity of the criminal protection that the Italian legal system afforded to the Catholic religion corresponded to “the greater extent and intensity of the social reactions aroused by offences against it, as a religion professed by the majority of Italians”.<sup>31</sup>

Later, the Constitutional Court abandoned the majority argument with reference to the criminal protection of collective religious sentiment, refraining from using this criterion as a differentiating factor between measures responding to the guarantees of religious freedom and measures that instead constitute inadmissible support for a religion.<sup>32</sup> In fact, for the Court, the state’s attitude towards all religious denominations can only be one of equidistance and impartiality – a reflex of the supreme principle of secularism, within which different faiths, cultures, and traditions must coexist with equal freedom. It follows that the quantitative element of a more or less widespread affiliation with a religious denomination, and a greater or lesser breadth of social reactions to the rights violation of these religious denominations, cannot be of any relevance.<sup>33</sup>

However, the majority argument reappeared through the back door in Italy, making a veiled appearance in certain decisions relating both to the mandatory instruction of only the Catholic religion in public schools and to the wearing of religious symbols. The argument has to a certain degree operated to provide cover for some questionable attempts to adjust the principle of secularism – attempts that, in a context of religious pluralism, have turned the part (the religion of the majority of the population) into the whole (secular values shared by all). But if one considers that religious pluralism has seen significant growth also because of migration, these attempts actually appear to have brought about more a weakening than a reasonable adjustment of the constitutional principle of secularism.

As concerns instruction in the Catholic religion in public schools and at the State’s expense, it need only be considered that the Constitutional Court has found that “the Republic can, *precisely due to the secular form of the State*, have instruction in the Catholic religion provided on the basis of two criteria: a) the educational value of religious culture, which is no longer a matter of one religion but of the religious pluralism of civil society; and b) *the acquisition of the principles of Catholicism within the ‘historical heritage of the Italian people’*”.<sup>34</sup>

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<sup>31</sup> Constitutional Court, Judgment No. 39/1965, as well as, in analogous terms, Judgment No. 125/1957 and Judgment No. 14/1973.

<sup>32</sup> In this regard, see Constitutional Court, Judgment No. 925/1988, Judgment No. 440/1995, Judgment no. 329/1997, Judgment No. 508/2000.

<sup>33</sup> As expressed by the Constitutional Court in Judgment No. 508/2000.

<sup>34</sup> Constitutional Court, Judgment No. 203/1989 (my italics).



Nevertheless, the fact that the principles of a single religion are acquired within the historical heritage of an entire people, and are consequently secularized, is possible because the majority of the population professes and identifies with those principles.

As to religious symbols, the Italian Council of State also gave implicit emphasis to the majority argument when, in deciding on the mandatory display of the crucifix in schoolrooms, appealed to the supposed universality and nondenominational nature of the symbol of the Catholic faith: “the crucifix [...], aside from its meaning for believers, is the symbol of Christian culture and civilization, in its historic root, as a universal value, regardless of the specific religion”.<sup>35</sup>

The universal meaning accorded to a religious symbol like the crucifix is, in truth, a misrepresentation, because attributing this meaning becomes possible insofar as the symbol is associated with the religion professed by the majority. In this way, in fact, “courts and legislators tend to secularize the meaning of religious symbols and interpret them according to the sensitivities, prejudices, and claims of the majority”.<sup>36</sup>

At any rate, there is an element that explicit or implicit references to quantitative data share, and this may be meaningfully defined as “the removed material” from secularism.<sup>37</sup> The removed and latent component of secularism is in fact constituted by the assumed *Other* (who in point of fact is often a migrant belonging to a different religious faith), because the religious claims of the *Other* break the two-voice dialogue between public authorities and the majority religion, and bring to the surface the specious nature of a certain way of conceiving secularism.<sup>38</sup>

Moreover, in the impact with otherness, the linkage between secularism and the majority argument shows different faces.

Rejecting the religious demands of minority faiths is sometimes argued in the name of a secularism “in the majority’s image,” on the basis of schemes and criteria that are neutral only in appearance: they are in fact shaped upon the majority religion. Conversely, the majority argument comes into play when the laws in force, albeit responding to the *idem sentire* of the majority, are not deemed to be in conflict with the principle of secularism because they are envisaged as an expression of a shared identity.

For example, the identity-based metamorphosis of the majority argument can be seen in the reasoning adopted by Italian administrative judges in support of displaying the crucifix in public classrooms. The regional administrative court (TAR) of Veneto<sup>39</sup>

<sup>35</sup> Council of State, opinion No. 63/1988.

<sup>36</sup> S. MANCINI, *The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence*, in *Cardozo Law Review*, 2009, p. 2631 ff.

<sup>37</sup> I. DOMINJANNI, *Corpo e laicità: il caso della legge sul velo*, in G. PRETEROSSO (ed.), *Le ragioni dei laici*, Roma/Bari, 2005, p. 167 ff.

<sup>38</sup> “Secularized religion and secularism are used in order to exclude the other and protect the culturally homogeneous character of European societies that is perceived – and even explicitly described – as threatened by pluralism and globalization”: S. MANCINI, *The Power of Symbols*, cit., p. 2631. See also S. MANCINI, *Gender and Religious Symbols in the European Public Sphere: Unveiling the Paradoxes of Italian Toleration*, in E. OLIVITO (ed.), *Gender and Migration in Italy. A Multilayered Perspective*, Farnham/Burlington, 2016, p. 177 ff.

<sup>39</sup> TAR Veneto, Judgment No. 1110/2005.



and the Council of State<sup>40</sup> first attributed the significance of the religious symbol to “universal values,” and then made the universal message underlying this symbol coincide with the constitutional principle of secularism.

What is drawn from reading the two decisions is that the hermeneutical operation of converting the “particular” into the “universally valid” was possible insofar as that symbol was tacitly attributed to the faith professed by the majority of the population. That is to say, conferring universal secular value to the crucifix would not have been possible without the corresponding religious sentiment of familiarity towards the symbol itself.

Otherwise, it is hard to see how the Italian judges could have arrived at the assertion that the crucifix is a symbol with a historic and cultural value, “endowed with an *identity-linked value* referring to *our people*”<sup>41</sup> and an expression of values that – like tolerance, freedom of conscience, and solidarity – “have in and of themselves permeated the traditions, way of life, and culture of the *Italian people*”.<sup>42</sup>

At any rate, this is a line of argument that, *mutatis mutandis*, can also be found in some ECtHR judgments.

In fact, not unlike the Italian judges, the ECtHR pointed out:

it is true that by prescribing the presence of crucifixes in State-school classrooms – a sign which, whether or not it is accorded in addition a secular symbolic value, undoubtedly refers to Christianity – the regulations confer on *the country’s majority religion* preponderant visibility in the school environment. *That is not in itself sufficient*, however, to denote a process of indoctrination on the respondent State’s part and establish a breach of the requirements of Article 2 of Protocol No. 1. The Court refers on this point, *mutatis mutandis*, to the [...] *Folgerø* and *Zengin* judgments. In the *Folgerø* case, in which it was called upon to examine the content of “Christianity, religion and philosophy” (KRL) lessons, it found that the fact that the syllabus gave a larger share to knowledge of the Christian religion than to that of other religions and philosophies could not in itself be viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination. It explained that *in view of the place occupied by Christianity in the history and tradition of the respondent State* – Norway – this question had to be regarded as falling within the margin of appreciation left to it in planning and setting the curriculum [...]. It reached a similar conclusion in the context of “religious culture and ethics” classes in Turkish schools, where the syllabus gave greater prominence to knowledge of Islam on the ground that, notwithstanding the State’s secular nature, Islam was *the majority religion* practised in

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<sup>40</sup> Council of State, Judgment No. 556/2006.

<sup>41</sup> TAR Veneto, Judgment No. 1110/2005 (my translation and my italics).

<sup>42</sup> Council of State, Judgment No. 556/2006 (my translation and my italics). The “majority argument” in relation to the display of the crucifix in public schools has been lastly dismissed by the Italian Court of Cassation, United Sections, Judgment No. 24414/2021: “The State crucifix in public schools also conflicts with another corollary of secularism: the impartiality and equidistance that must be maintained by public institutions towards all religions, regardless of numerical considerations, since discrimination based on the greater or lesser number of members of one or another of them is no longer permitted. And it conflicts with religious pluralism as an aspect of a broader pluralism of values: public space cannot be occupied by a single religious faith, even if it is the majority” (my translation). The “majority argument” has been implicitly dismissed also in Council of State, Second Section, Judgement No. 2567/2024, concerning the display of the crucifix in public offices.

Turkey. Furthermore, a crucifix on a wall is *an essentially passive symbol and this point is of importance in the Court's view, particularly having regard to the principle of neutrality*.<sup>43</sup>

Invoking the identitarian meaning of elements belonging to the Christian tradition entails an implicit allusion to the majoritarian religious affiliation. What belongs to religious tradition is thus made a symbol of everyone's identity.

However, adjusting the content of secularism on the basis of an expressed or implicit concern of majority's religious affiliation is undermined by the failure to take into consideration the assumed *Other*. The principle of secularism thus ends up in excluding or legitimating a different treatment depending on whether the recipient of the measure belongs to a minority or the majority.

When secularism is shaped to the demands of the majority, otherness is removed at the moment when denial of accommodations (or, vice versa, the granting of the accommodations that this principle requires) is tailored to the majority's religious claims. The *Other* is therefore placed in the sight of a double-faced secularism: religious claims are upheld or rejected depending on their goal of respectively maintaining or changing the *status quo* of the relationships between the state and certain religions.

When a misleading secularism of this kind is assumed, its inclusive value and pluralistic meaning are disavowed, while on the contrary the principle of secularism, far from being mere indifference towards religious demands nor to an ideology, stands as the safeguard of an articulated and challenging religious pluralism.

### 3. Secularism for Everyone or against Others?

Although, in present-day debates on migration and secularism, the issue at stake is above all the governance of societies increasingly differentiated in ethical, cultural, and religious terms, what is most surprising is that the meaning of secularism is reconfigured not to accommodate the transformations of contemporary society, but so as not to cast doubt on the asymmetries in the starting points.

Conceived in these terms, quite little remains of secularism. When it is remoulded to preserve religious accommodations for the sake of the majority alone, it goes from being a "secularism *for* everyone" to becoming a "secularism *against* others." In the latter connotation, secularism sanctions an "absence": not the "being absent" that provides "space for a sense of possibilities",<sup>44</sup> but an absence determined by targeted exclusions and by partisan remodulations of the supreme principle of secularism.

Having understood, then, the principle of secularism as the framework within which to guarantee religious freedom to every person (also in its negative aspect of the

<sup>43</sup> European Court of Human Rights, Grand Chamber, Judgment of 18 March 2011, Application No. 30814/06, *Lautsi and others v. Italy*, paras. 71-72.

<sup>44</sup> F. REMOTTI, *Il pregio di ciò che manca e la laicità degli altri*, in G. PRETEROSSO (ed.), cit., p. 53.

freedom not to believe), the sharp alternative that seems to loom before us is not entirely convincing. In fact, we find ourselves choosing between a secularism that is made functional to the promotion of a substantial democracy and one conceived as the framework for a mere antidiscrimination law.

In the first case, the guarantee of religious pluralism is conditioned upon religious demands conforming to a militant model of democracy.<sup>45</sup> In the second case, the guarantee of the religious freedom of migrants, as they belong to minorities, is translated either into the same religious accommodations as those who belong to the majority religion, or into the generalized impossibility for public powers to provide services concerning the religious sphere.

However, it is submitted here that, if the linkage between secularism and substantial democracy can have exclusionary repercussions with the politicization of religious affiliation, the path of antidiscrimination law leads to the overall and assimilationist curtailing of secularism (in the former case) or to the general restriction of religious freedom (in the latter case).

Therefore, while it is still important to recognize secularism as a linchpin in European constitutional systems, it must be re-examined in terms of a constitutional secularism:<sup>46</sup> a secularism focusing no longer only on the relationship between religions and the State, but on ways to guarantee religious diversity that do not result in denominationalism.<sup>47</sup>

**ABSTRACT:** The Author argues that, in the European context of migration and religious pluralism, the constitutional principle of secularism concerns not only the relationship between religious denominations and the State, but also the pluralistic guarantees of non-denominational religious diversity. It therefore needs to be interpreted and applied in a way that does not translate into satisfying the religious claims of the majority alone.

**KEYWORDS:** constitutional secularism – migration – religious freedom – majority – minorities – pluralism.

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<sup>45</sup> See K. CAVANAUGH, E. HUGHES, *Rethinking What is Necessary in a Democratic Society: Militant Democracy and the Turkish State Source*, in *Human Rights Quarterly*, 2016, p. 623 ff.

<sup>46</sup> However, for a strong meaning of constitutional secularism not entirely coinciding with the one supported here, see A. SAJÓ, *Preliminaries to a Concept*, cit., p. 606 ff.

<sup>47</sup> In a similar although not entirely corresponding sense, see the distinction between State secularism and European secularism in L. ZUCCA, *A Secular Europe: Law and Religion in the European Constitutional Landscape*, Oxford, 2012, p. 195 ff.