Law and Religion in a Secular World: A European Perspective

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This article examines two interpretations of the process of secularisation that can be traced back through European legal and political thought, and a more recent trend that challenges both of them. It does this through the prism of the public sphere, because in today’s Europe one of the most debated issues is the place and role of religion in this sphere, understood as the space where decisions concerning questions of general interest are discussed. The article concludes, first, that the paradigm through which relations between the secular and the religious have been interpreted is shifting and, second, that this change is going to have an impact on the notion of religious freedom and, consequently, on the recognised position of religions in the public sphere.¹

Introduction

In 2007, the philosopher Charles Taylor published a book entitled *A Secular Age*. In its introduction he raised a question: ‘What does it mean to say that we live in a secular age?’ In trying to articulate an answer, Taylor identifies different ways of characterising secularity and one of them ‘concentrates on the common institutions and practices – most obviously, but not only, the State’. According to him,

while the political organization of all pre-modern societies was in some way connected to, based on, guaranteed by some faith in, or adherence to God … in our ‘secular’ societies you can engage fully in politics without ever encountering God.²

Is it so? Taylor himself admits that ‘it’s not so clear in what this secularity consists’, and his doubts about the exact meaning of expressions such as ‘secular world’ or ‘secular age’ have prompted me to devote much of this article to examining the two interpretations of the process of secularisation that can be traced back in European legal and political thought, as well as a more recent trend that

¹ This is the revised text of a lecture delivered at Emmanuel College, Cambridge, on 3 March 2012, at a conference to celebrate the 25th anniversary of the foundation of the Ecclesiastical Law Society.

challenges both of them. I have done this through the prism of the public sphere, because in today’s Europe one of the most debated issues is the place and role of religion in this sphere, understood as the space where decisions concerning questions of general interest are discussed and taken. I shall argue, first, that the paradigm through which the relations between the secular and the religious have been interpreted is shifting and, second, that this change will have an impact on the notion of religious freedom and, consequently, on the position recognised for religions in the public sphere.

RELIGION VERSUS SECULARISM

For a long time the question of the place and role of religion in the public sphere has been addressed through a binary model, contrasting the secular and the religious. Its main features can be synthesised in the following way. To be truly neutral and impartial towards different religious (and non-religious) life conceptions, the public sphere cannot but be secular. Decisions affecting politics, law and economics must be based on reason, not on the faith of one or other citizen. While the private choices of each person may be taken exclusively on the basis of religious motivations, public choices – and the whole decision-making process from which they arise – have to be based on rational principles, which can be shared by people professing different religions (or none).

From this perspective, the need to keep religion out of the public sphere is justified by the fact that every religion teaches a particular conception of life, potentially conflicting with the conceptions upheld by other religions. To prevent the danger of a clash and to ensure the equal treatment of all religions, it is essential to ground the public sphere on a principle that is universal and neutral, and therefore capable of being accepted by all people regardless of their religion: this principle is human reason. The universality of reason prevails over the particularity of religions and justifies their exclusion from the public sphere, which must be designed and constructed exclusively in secular terms. Much of the current debate on religious symbols in the public space is based on this assumption. The Christian cross or the Islamic scarf may attest a particular faith or belonging; therefore in some countries they cannot be worn by judges or civil servants (nor, in a couple of instances, by students and employees of private companies) because they manifest a value system that cannot claim to be either universal or neutral. Interestingly, this approach

3 On this topic, see S Ferrari and S Pastorelli (eds), Religion in Public Spaces: a European perspective, (Farnham, Surrey, forthcoming 2012).
4 For an overview of this debate, see the essays collected in N Hosen and R Mohr, Law and Religion in Public Life (London, 2011).
has been adopted in the appeal filed by the Italian government against the first European Court decision in the *Lautsi* case: the legitimacy of displaying the crucifix in school classrooms was primarily upheld on cultural grounds, affirming that it manifested the Italian identity and tradition. Implicitly (and probably against the intentions of its proponents), this argument supports the conception of a secular and neutral public sphere.

This notion of the relationship between the secular and the religious has deep and prestigious roots in European political and legal thought. After the First World War, Max Weber proposed reconsidering the entire history of Western law in the light of a process of progressive rationalisation that undid the tangle of ethical, religious and legal precepts that was characteristic of pre-modern law. The magical and irrational law of primitive peoples, founded on oath and ordeal, is replaced first by the partially rational law of the great monotheistic religions (Christianity in particular) and later by the completely rational law of modern society born of the Enlightenment. After the Second World War, Hans Kelsen followed a similar line of thought, reflecting on the foundation of democracy: ‘The situation would, in fact, seem hopeless for democracy if we assumed that cognition of absolute truth, insight into absolute values, were possible’. This claim is likely to produce an ‘autocratic attitude’, while only by accepting the relativism of values and the possibility of their constant change is it possible to nurture a ‘democratic attitude’. For this reason, Kelsen is resolutely against ‘the claim of theology that it furnishes a foundation for democracy which it attempts to verify by showing that there is an essential connection between democracy and Christian religion’. More recently Jürgen Habermas applied these ideas to the definition of the public sphere. Proposals based on a religious belief can enter this sphere only if they are justified by rational arguments, namely arguments which are formulated in a language that can be understood even by people who do not share that religious conviction. Behind these jurists and philosophers it is not hard to see the long shadow of the sanguinary wars of religion in sixteenth- and seventeenth-century Europe and the echo of ‘etsi Deus

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non daretur’ (‘as if God did not exist’) devised by Grotius to put an end to them: if various religious communities are not able to live peacefully in the same public sphere, the only option left is to organise that sphere in secular terms and to admit into it only those people who accept the language of rationality.

These comments demonstrate that this concept of the relation between the secular and the religious goes back at least to the beginning of the modern age. However, it never dominated European cultural debate so completely as in the 30 years preceding the fall of the Berlin Wall. Seen from a distance, that was a form of golden age for western Europe: the shocks of the war and the loss of the French and British colonial empires had been metabolised and, with a few exceptions, these three decades were characterised by economic growth, political stability and a dream that seemed to have come true: European unification. At the beginning of the 1980s, Hans Blumenberg’s book, significantly entitled *The Legitimacy of the Modern Age*,11 manifested this optimistic attitude: modernity is triumphant and it has no need ‘to look for legitimacy outside of itself, either to transcendent God or the theologies that preceded it’.12 In opposition to Löwith, he writes that modern philosophy performs the role of theology and secularisation displaces religion, which is bound to decline and even disappear – according to the predictions of most sociologists of the time – in modern society. Such a cultural climate easily leads one to take these Western categories of secular and religious as cross-cultural categories, which are the expression of that ability to develop universal concepts that Weber considered a unique feature of European thought.13 From this perspective, secularisation is understood as an attribute of modernity: throughout the world, modernity presupposes both the distinction between secular and religious spheres and the placement of public choices in the first (the idea that there might be alternative modernities was to be formulated by Eisenstadt several years later,14 when the decline of the Old Continent and the development of the countries that had been its colonies irreparably damaged the credibility of Eurocentric theories).

This way of conceiving the relations between the secular and the religious, with all its corollaries on the definition and structuring of the public sphere, was of course the subject of considerable criticism even when it was at its zenith. Many argued that a secular public sphere inevitably gives priority to non-religious conceptions of life and world;15 that the neutrality of the public sphere

is a chimera because it is impossible to isolate it from its cultural background; and that there is no pure and universal reason on which the decisions affecting the whole community can be based, because these choices – apparently dictated by reason alone – are always rooted in a particular history. But none of these criticisms questioned the interpretative paradigm founded on the secular–religious dichotomy; they just opposed the arguments in favour of the necessity to give a secular character to the public sphere, showing their inconsistency.

THE DECONSTRUCTION OF RELIGION AND SECULARISM

In the last twenty years, this binary model of conceptualising the relationship between secular and religious has been increasingly challenged. The final target of this challenge was the claim that Western secularism – like democracy, human rights or constitutionalism – is a principle that has a universal significance and scope. This goal was reached by questioning the neutrality of the secular public sphere, but the starting point for the attack was much more specific. A number of scholars – many of them familiar with non-Western cultures and societies – called attention to the fact that Western secularism is not equally hostile to all religions: it actually penalises non-Christian religions in particular. This assumption has been synthesised in the expression ‘double standard secularism’: the conditions of access to the secular public sphere, apparently the same for all religions, are actually more demanding for non-Christian religions, whose doctrinal and organisational characteristics are less compatible with the secular profile that distinguishes the public sphere. This claim was made with particular force by Talal Asad in relation to Muslim communities that had immigrated to Europe: the separation between religion and politics required to participate in the debate that takes place in the public sphere can be compatible with the distinction between spiritual and temporal, which is a fundamental principle of Christianity, but ‘presupposes a very different conception of ethics from the one embedded in the classical shari’a’. The same
requirement, in other words, is much more burdensome for some religions than for others, reproducing precisely those inequalities that the secular configuration of the public sphere wanted to remove. While Asad and other supporters of this interpretation are careful to avoid any identification of secularism with the West,20 they stress that neither secularism nor religion21 are universal categories: they need to be contextualised, as they are the product of different and particular histories and cultures. Once applied to Europe, this conclusion means that European secularism is the outcome of European history, in which Christianity has played a central role. In this way, Asad’s analysis comes close to the second line of interpretation of the relationship between secular and religious that had developed in European thought.

In the preceding section of this article, we encountered a thesis that can be called the thesis of the ‘secularisation retreat’. Its core is that the process of secularisation implies ‘the retreat of religion as the dominant sphere of society’.22 However, secularisation has also been understood in a different way, not as retreat but as transfer. From this point of view, the process of secularisation consists of the transfer of religious contents into secular forms on both the ideological and institutional planes.23 This thesis has equally illustrious roots in European political and legal thought. It draws on the argument, already expressed by Karl Löwith after the Second World War, that secularisation is the bridge between Christianity and Greek thought on the one hand and modernity on the other, even though the latter is unwilling to acknowledge this debt;24 and it is supported by Carl Schmitt’s observation that ‘all significant concepts of the modern theory of the state are secularised theological concepts’25 and, at least indirectly, by Böckenförde’s famous dictum that ‘the liberal secular state lives on premises that it cannot itself guarantee’.26

It is no coincidence that all three are German scholars, two of whom were writing shortly after the catastrophic German defeats in the First and Second World Wars. We are miles away from the feeling of triumphant modernity that, a few years later, was to inspire Blumenberg and the early work of

23 Ibid, p 23.
24 K Löwith, Meaning in History (Chicago, 1949).
26 E Böckenförde, Staat, Gesellschaft, Freiheit (Frankfurt, 1976), p 60. Böckenförde continues that, on the one hand, such a state ‘can subsist only if the freedom it consents to its citizens is regulated from within, inside the moral substance of individuals and of a homogeneous society. On the other hand, it is not able to guarantee these forces of inner regulation by itself without renouncing its liberalism’.
Habermas. On the contrary, the driving force behind Löwith, Schmitt and Böckenförde is the need to explain the crisis of modernity, identified with the renunciation of its ethical and religious roots. However, there is a substantial difference between this line of thought and the use that Asad and others make of it: while the statements just quoted were intended to show the debt of modern secularism to Christianity, now they are used to show the inability of European secularism – which, under the cloak of modernity, remains intrinsically and inevitably Christian – to be fair to non-Christian religions. This point has been made with great clarity by Bhargava: Western secularism presupposes a Christian civilisation that is easily forgotten because, over time, it has silently slid into the background. Christianity allows this self-limitation, and much of the world innocently mistakes this rather cunning self-denial for its disappearance. But if this is so, this ‘inherently dogmatic’ secularism cannot coexist innocently with other religions... it can live comfortably with liberal, Protestantized, individualized, and privatized religions but has no resources to cope with religions that mandate greater public or political presence or have a strong communal orientation. This group-insensitivity of secularism makes it virtually impossible for it to accommodate community-specific rights and therefore to protect the rights of religious minorities.

Three corollaries can be derived from Asad’s observations. First, the binary model of reading the relationship between the religious and the secular is deceptive because it assumes both terms as trans-historical and trans-cultural categories. On the contrary, both religion and secularism should be seen as culture-specific constructs. As a consequence, the secular public sphere (at least in its European version) is not grounded on a principle that has a universal value. It is founded on reason: it is the fruit of a particular religion, history and culture, and therefore it is not exportable beyond the boundaries of the West. Second, once European secularism is placed in its context, its Christian roots become evident and prevent the claim of the neutrality of the secular public sphere from being taken seriously: this sphere is an exclusionary space where

27 Outside Europe, these ideas are echoed in Brian Tierney’s studies on the origins of natural rights in the canon lawyers’ school of the twelfth century (see B Tierney, The Idea of Natural Rights: studies on natural rights, natural law and church law 1150–1625 (Atlanta, 1997)) and also in Harold Berman’s claim that ‘Western legal science is a secular theology, which often makes no sense because its theological presuppositions are no longer accepted’ (H Berman, Law and Revolution: the formation of the Western legal tradition (Cambridge, 1983), p 165).


29 For an application of these principles to religious freedom and the case law of the European Court, see P Danchin, ‘Islam in the secular nomos of the European Court of Human Rights’, (2011) 32 Michigan Journal of International Law, 70–71.
some selected religions feel at home while others are left out in the cold.\textsuperscript{30} Third, a secular public sphere is not the best instrument to govern the pluralisation and publicisation of religion that characterise contemporary Europe: if the liberal model of toleration ‘results from an internal Christian dynamic of secularization, which reproduces theological principles in secular guise’, this model risks being unintelligible to communities originating from other cultures that ‘are unrelated to the attitudes generated by the Judeo-Christian anthropology’. Therefore if ‘we desire to find new solutions to the growing pluralism of our multicultural societies, it is advisable to stop looking at the world through Christian glasses’ and study ‘how cultures other than the West have tackled and solved the problem of pluralism’.\textsuperscript{31}

These criticisms of European secularism need to be contextualised too. They have developed at a time of religious pluralisation and publicisation. On the one hand, immigration (and, in a virtual way, globalisation) have brought into Europe an increasing number of people who follow religions that are not traditional in the Old Continent (in particular, Islam); on the other hand an increasing number of citizens claim the right to follow publicly the tenets of their religion in matters of dress codes, gender relations, family law and so forth, and this is outside the private domain to which religion had been confined. These two processes are taking place in a context dominated by the fear that Europe has entered a phase of demographic, economic, political and military decline. The feeling that the future does not live here any more has instilled many doubts in European minds about being able to manage the pluralisation and publicisation of religion with the tools available in the store of human rights. This lack of confidence results in a constant oscillation between the impulse to confine religion more strictly to the private sphere, excluding it from the process of building national identity, and the desire to strengthen national identity through the revitalisation (and therefore the re-publicisation) of the majority religion(s) only. Both developments seem to reinforce Asad’s conclusion that Europe is torn between rigid secularism and selective (that is, Christian-biased) support of religions, without a

\textsuperscript{30} See, with specific reference to the European Court jurisprudence on Article 9 of the European Convention, Danchin, ‘Islam in the secular nomos’, p 46. See also Bhargava, ‘Should Europe learn from Indian secularism?’ The fact that secularisation, despite its roots in Christian teachings, also negatively affects the status of the Christian religion and Churches in the public space is not overlooked. However, this result is downgraded to a side-effect of a process, secularisation, that has its core in the transformation of Christian ideas in the general (although implicit) attitudinal framework of society.

\textsuperscript{31} J de Roover and S Balagangadhara, ‘John Locke, Christian liberty and the predicament of liberal toleration’, (2009) 36 Political Theory 524 and 545. See also Bhargava, ‘Should Europe learn from Indian secularism?’, who argues that ‘available mainstream conceptions of western secularism are likely to meet neither the challenge of the vibrant public presence of religion nor [that] of increasing religious diversity’. 
convincing strategy to deal with the new religious communities that are spreading in the Old Continent.

NEUTRAL OR EXCLUSIONARY PUBLIC SPACE? THE STRASBOURG CASE LAW

Is Talal Asad right? Has the old paradigm of ‘secular versus religious’ become untenable? Does it need to be replaced by a new one, based on the antithesis ‘secular and Christian’ on the one hand versus ‘non-Christian’ on the other? Is the public sphere, far from being neutral, in fact an ‘exclusionary space’, which ‘good’ religions are authorised to enter and outside which ‘bad’ religions are forced to remain? These questions have important implications. The political translation of the first paradigm was an alliance of all religions against radical secularism; the political translation of the second is the alliance of moderate secularism and Christianity against non-Christian religions. If Asad is right, Christian religions will be allowed to maintain their privileged position in the public sphere, while pressure will be put on non-Christian religious groups (primarily Muslim ones) to give up their claims to community rights and to accept the principles of individual religious freedom and equal treatment that characterise the secular state. Christian churches will be permitted to have their crucifixes in the classroom, while Muslim communities will be prevented from building their minarets, as was decided in Switzerland three years ago.

In answer to the questions raised by Asad’s analysis, reliance may be placed on a quantitative examination of Strasbourg case law on Article 9 of the European Convention of Human Rights, the provision which protects freedom of religion. It goes without saying that the results of any quantitative analysis have to be approached with considerable caution. However, if the judgments declaring the violation of Article 9 are connected to the religious demography of the defendant countries, we obtain the following results:

These data show that the declarations of actions by the state in violation of Article 9 have mainly been handed down to countries with an orthodox majority (23 sentences) and, to a much lesser extent, to mixed (4 sentences), catholic (2 sentences) and muslim (1 sentence) countries, and never to a protestant country. In percentage terms, the figure for the orthodox countries is totally out of proportion: 79% of the judgments involving an orthodox country end with a declaration of violation. The percentages concerning the other countries where one religion is dominant are much lower: 5% for muslim and 9% for catholic countries.

So countries with an orthodox majority are found in violation of Article 9 of the European Convention much more frequently than countries where the majority of the population professes another religion.36 How can we explain this anomaly? Why are countries such as Greece, Russia and Bulgaria so often ‘condemned’ for violating Article 9 of the European Convention, while countries such as Sweden, Denmark or Norway are never ‘convicted’? Obviously there is no single explanation.37 It is simply possible, for example, that the domestic judicial systems of these latter countries are more efficient than the former in protecting the individual and collective rights of religious

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**European Court of Human Rights**

Decisions declaring a violation of Article 9 distributed according to the religious demography of the respondent states (as a percentage of all decisions concerning religious issues for the countries)35

<table>
<thead>
<tr>
<th>Kind of country</th>
<th>Number of countries</th>
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<tbody>
<tr>
<td>Catholic countries (19 countries)</td>
<td></td>
<td>2 decisions (9%)</td>
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<tr>
<td>Muslim countries (4 countries)</td>
<td></td>
<td>1 decision (5%)</td>
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<tr>
<td>Orthodox countries (11 countries)</td>
<td></td>
<td>23 decisions (79%)</td>
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<tr>
<td>Protestant countries (5 countries)</td>
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<td>No decisions</td>
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<tr>
<td>Mixed countries (7 countries)</td>
<td></td>
<td>4 decisions (19%)</td>
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35 In this table, a country is defined as catholic, protestant, orthodox, etc when at least 50% of its population declare that they profess that religion; a ‘mixed’ country is a country where no religion reaches this threshold. Even though it is purely a numerical datum, incapable of revealing the effective vitality of a religion, the fact that over half of a population follows the same religion normally indicates that some cultural categories which may be traced to the religion of the majority have had (and can have) a significant importance in establishing the legal tradition of the country. The data on the religious belonging of the population have been taken from ARDA (Association of Religion Data Archives, <http://www.thearda.com>, accessed 30 August 2011). The analysis of the European Court case law covers the years 1959–2009.

36 The high number of European Court decisions stating the violation of Article 9 by orthodox countries has been noted by M Koenig, ‘Human rights, judicial politics and the secularisation of nation-states: contentions over religion at the European Court of Human Rights’, paper given at the Trudeau Center for Peace and Conflict Studies, University of Toronto, 16 March 2011, para 1.

37 For the indication of two different approaches (realist and institutionalist) to the analysis of the European Court case law, see ibid, para 1.
freedom of their citizens, including the members of minority communities, so that those citizens do not need to appeal to the European Court.

However, there might be other, more complex explanations. One of these focuses on political reasons. Almost all the orthodox countries with a high number of violations of Article 9 are post-communist countries that made the transition from a totalitarian regime to a (more or less) democratic one after 1989. It is understandable that these recent democracies may face problems in the field of respect of human rights, and this could explain the high number of European Court decisions declaring a violation of the right to religious freedom. But this argument is proved wrong by an examination of Articles 10 (protecting freedom of expression) and 11 (protecting freedom of association) of the European Convention. These provisions grant two civil and political liberties that are no less important than religious freedom and therefore, if the explanation based on the totalitarian past of these countries were correct, the percentage of violations affirmed on the basis of Articles 10 and 11 should be as high as that of the violations pronounced in connection with Article 9. On the contrary, the declarations of violation of Article 10 concerning the post-communist countries are lower than those affecting the Western countries and the declarations of violations of Article 11, although higher, are a long way from the percentages reached in reference to Article 9. Taken alone, this finding is not sufficient to rule out definitively a ‘political’ explanation for the particularly high number of violations that affect orthodox countries. It is possible that, owing to social or cultural reasons, these countries have been quicker to adjust their domestic legislation on freedom of expression and association to European standards and slower in reforming their legal provisions concerning freedom of religion. But this explanation does not fit well in the case of Greece: why does this country, which has never been a member of the communist bloc, present the same high number of violations of Article 9 as the other orthodox countries?

A different explanation for the unusually high number of adverse findings arising from violation of Article 9 by these countries could lie instead in religious considerations. It is possible that their religious tradition and system of relations between the state and religion have had a specific relevance in relation to judicial determinations in cases concerning Article 9. Therefore we cannot

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38 See J Richardson and A Garay, ‘The European Court of Human Rights and former communist states’, in D Jerolimov, S Žrinič and I Borowik (eds), Religion and Patterns of Social Transformation (Zagreb, 2004), pp 223–234. According to these authors, the high number of violations ascribed to the former communist countries could signal a ‘double standard of justice’ applied by the European Court in judging Article 9 cases that involve these countries on the one hand and western European countries on the other. See also J Richardson and J Shoemaker, ‘The European Court of Human Rights, minority religions, and the social construction of religious freedom’, in E Barker (ed), The Centrality of Religion in Social Life (Farnham, Surrey, 2008), pp 103–116.

39 See Ferrari, ‘The Strasbourg Court’.
discard a priori the possibility that these countries have been more problematic than others from the standpoint of compliance with Article 9 of the European Convention not because they are post-communist but because they are orthodox countries. This conclusion is confirmed by other data: first, no post-communist country with a catholic majority – including countries with a strong catholic tradition such as Poland – is affected by the Court’s declarations of violation; second, among the Western countries, the record for the highest number of violations is held by an orthodox country – Greece; finally, in the ranking of violations, the first three places are occupied by orthodox states (Greece, Russia and Bulgaria). These facts seem to indicate that the high number of ‘convictions’ of these countries is due to specific characteristics of the way in which the orthodox religion has been practised in the southern and eastern part of Europe over the 20 years following the fall of the Berlin wall: in particular, the strong opposition of orthodox Churches to proselytism (connected to the notion of canonical territory) and the strong ties that were re-established between states and majority Churches (based on the traditional orthodox notion of symphonia between these two institutions). In relation to Article 9, therefore, the watershed would not divide countries that were part of the Soviet or the Western bloc: if we accept this second explanation, the dividing line runs between orthodox and non-orthodox countries.

One might object to this conclusion that Islam is much more problematic than orthodox Christianity in relation to Article 9 of the European Convention: if we espouse a ‘religious’ interpretation of the European Court case law, we should also explain why the violations of Article 9 by Muslim countries are so few. The answer to this objection is that all the decisions concerning Muslim countries relate to just one of them – Turkey – and Turkey (together with France) is the most avowedly secular country among the members of the Council of Europe. These decisions cannot therefore be taken as illustrative of Muslim countries as a whole but are to be explained with reference solely to Turkey, a country characterised by a constitutional commitment to secularism that is not shared by other Muslim countries that are members of the Council of Europe. It is interesting to note the high number of violations of Article 10 (182 decisions) and Article 11 (39 decisions) of the European Convention committed by Turkey. These data have been explained by Greer by the fact that ‘Turkey continues to have a constitutional commitment to a uniquely strong secular, unitary state, not wholly consistent with the

40 This also confirms that the ‘orthodox anomaly’ does not have a political justification: if the number of convictions that affected orthodox countries had a political foundation, this difference between catholic and orthodox post-communist countries could not be explained.
41 See Ferrari, ‘The Strasbourg Court’.
European notion of political pluralism and the rights of minorities. But Greer fails to add that, while freedom of expression and freedom of association are the grounds on which the Strasbourg Court has chosen to urge Turkey to have respect for fundamental rights, freedom of religion did not attract the same attention by the Court. A secular state, even in the radical form that sometimes characterises Turkey, is deemed by the Court to be less problematic in relation to Article 9 of the European Convention than states which adopt in their laws the traditional principles of orthodox religion.

This last observation opens the way for the third explanation, so closely connected to the previous one as to appear to be the flip side of the same coin. It is possible that the European Court has developed its own notion of religion which fits better with some religions than with others. This possibility did not escape the attention of some lawyers: Carolyn Evans has written that the European Court tends to protect more firmly ‘the cerebral, the internal and the theological … dimensions of religion and belief’, while paying less attention to ‘the active, the symbolic and the moral dimensions’; and Julie Ringelheim has noted that ‘underlying the Court’s case law is the idea that religion is primarily an inward feeling; a “matter of individual conscience”’.44

While the first explanation for the high number of European Court decisions ‘condemning’ orthodox countries for violation of Article 9 has already been the object of a number of studies, the second and the third ones have so far been neglected, and the implications merit identification and exploration, to which we now turn.

RELIGION AND RELIGIOUS LIBERTY: TWO DIFFERENT APPROACHES

Is it possible to draw some general conclusions from this analysis? Perhaps it is, but only in a tentative and provisional way. If the data emerging from the analysis of the European Court case law are correct, the dividing line mentioned before does not run primarily between different religions but between two different ways of conceiving and experiencing religion, one more focused on the *forum internum* and the other on the *forum externum*. This is not to deny that certain decisions of the European Court of Human Rights show a bias

against Islam, as some observers have indicated: but this bias has to be seen as a component of a larger trend that opposes a way of envisioning and practising religion that is not exclusive to Islam but is transversal to many historical religions, including Christianity.

A number of scholars of religion have insisted on the necessity of differentiating between two facets of religion. Religion can be primarily understood as an act of choice based on individual conscience and concerning a belief that is recognised as true or as a belonging (prior to any individual choice) that is supported by the sharing of not so much a doctrine but practices, symbols and rituals. A whole book, significantly entitled Collectivistic Religions, has recently been devoted to this distinction. The author, Slava Jakelic, notes that ‘we live in an age when the language about religion is the language of choice’. Such a language finds it hard to make sense of ‘the millions of people around the globe who were “born into” some religious group rather than religiously “born again”’ and to understand these collectivistic religions that are ‘public in character and defin[e] people’s group identity’. According to Jakelic,

the ‘choice’ of religion is also established as a legal principle: it serves to define what religion is and to assure the protection of what many consider to be two of the most sacred freedoms – the freedom of conscience and the freedom of religion.

This point had already been made, over 20 years ago, by Michael Sandel:

protecting religion as a lifestyle, as one among the values that an independent self may have, may miss the role that religion plays in the lives of those for whom the observance of religious duties is a constitutive end, essential to their good and indispensable to their identity.

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47 S Jakelic, Collectivistic religions: religions, choice, and identity in late modernity (Farnham, Surrey, 2010), pp 1–3 and 194, emphasis in original.

More recently, this position has been reiterated with specific reference to the European Court by Peter Danchin:

on the one hand, there is conscience which is freely chosen, private and disestablished, and on the other there is religion which is unchosen, adopted by custom or tradition, public and sensitive. The tacit or background conception of religion as conscience is what defines the basic shape and contours of Article 9 jurisprudence.49

The language adopted by these scholars is not uniform, and sometimes they miss the point that the distinction between chosen and ascribed religions runs within each religious tradition (although it is possible that, in specific situations, a religious community places the accent more on one aspect than on the other).50 But the two directions are sufficiently clear. Sometimes the courts (for example, the United Kingdom Supreme Court in the JFS case51) focus on a conception of religion and religious freedom that hinges on individual free choice, understood as the ultimate value to be protected. As this is their point of departure, they have trouble in seeing why freedom of religion requires special protection over and above that offered by the legal provisions that safeguard freedom of conscience, opinion and expression,52 and why the internal autonomy of religious communities should be defended more strongly than that of a normal association. Sometimes, on the contrary, the courts favour an identity-based concept of religion, in which the traditional religion of the country is seen as an essential element of social cohesion. In this case, the emphasis is not placed on the individual and his or her freedom of choice but on the ‘civil’ and cultural role played by religion: all the judgments of the Italian courts on the issue of the crucifix in schools have emphasised the cultural value of this symbol and on this basis have affirmed its legitimate display in a public institution. Taking the latter stance as the starting point it may become difficult to ensure equal treatment for religious minorities that are perceived more as an element of social division than as one of social cohesion.53

These different ways of looking at religion and religious freedom also have an impact on the position of religion in the public sphere. If the accent is on

50 In my opinion, this is the case in the orthodox Churches in the European post-communist countries. See Ferrari, ‘The Strasbourg Court’.
53 Danchin, ‘Islam in the secular nomos’, p 69, traces these approaches ‘to two rival liberal traditions: one deriving from a civil philosophy which views the right to religious liberty in jurisdictional terms and the public sphere in terms of social peace; the other from a metaphysical philosophy which views the right to religious liberty in terms of freedom of conscience and the public sphere in terms of a comprehensive moral theory of justice’.
individual conscience and freedom of choice, the public sphere will be open to those religions which are ready to recognise individual freedom in their internal organisation and which therefore do not insist too much on membership by birth (as opposed to membership by choice), which do not sanction the apostate too heavily, and which do not resort to extreme forms of proselytising. If, instead, the emphasis is on the identitarian and cultural value of religion, traditional religions will be appointed as gatekeepers of the public sphere and access to it will be granted only to those minority religions that have a doctrine and an organisation which is not too far from that of the dominant religion in a country. For different reasons, neither scenario seems able to provide adequate answers to the growing religious plurality of Europe.