The crisis of the secular state—A reply to Professor Sajó

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The failure of the European Constitution ignited two apparently independent debates, on the future of European states and on the place of Christian values in the European public sphere. In recent years, the latter question has become more and more burning; so much so that the future of European secular states is considered to depend to a great extent on its ability to cope with the alleged threat of religion. Responding to an essay by András Sajó, Preliminaries to a Concept of Constitutional Secularism, which appeared in I•CON in October of 2008, this paper distinguishes two competing theories of the place of religion in Europe and suggests that the best understanding of secularism does not exclude religious minorities from the public sphere. European states should develop a common secular position that articulates and promotes conditions of coexistence and communication.

Introduction

The failure of the European constitution ignited two apparently independent debates: what is the future of the European states, on one hand; and what is the place of Christian values in the European public sphere, on the other. In recent years, the latter question has become more and more urgent; so much so, that the future of European secular states is considered to be very much dependent on their ability to cope with the alleged threat of religion.

Professor Sajó’s contribution to I•CON attempts to provide both an explanation for the weakness of secularism and a response to it by laying the groundwork for a stronger concept of constitutional secularism. Sajó begins his study

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of constitutional secularism by pointing out that strong religion is back in the public square. The threat posed by religion, he argues, is real, and secularism does not provide enough guidance to keep religion at bay. The reason for this weakness is to be found in the contingent and local nature of secularism, which developed within each secular state in a way that is too much open to compromises and concessions. As a response to this state of affairs, Sajó argues that secularism should rediscover its constitutionalist roots in order to become more assertive and aggressive vis-à-vis the claims of religion.

My aim in this reply is to show that Sajó’s diagnosis of the threat constituted by religion is only partly accurate. My suggestion is that religion is not a threat in itself but, rather, is simply a symptom of a greater malaise: the inability of secular states to cope with diversity. Moreover, Sajó’s prognosis, entailing a stronger notion of constitutional secularism, is wrong both in theory and practice. Wrong in theory, because it assumes that European societies could agree on a common notion that excludes religion; in practice, because it believes that the best way to deal with religion is to silence it. What unites Sajó’s diagnosis and prognosis is the belief that strong religion is a disease to be eradicated and that constitutional secularism can be the cure. I believe, instead, that the central problem to be analyzed, here, is the crisis of the secular state in its different European versions. All European states have experienced similar, though not identical, problems when regulating the place of religion in the public sphere. To cope with the crisis, the secular state should develop a twofold strategy. On the one hand, it should promote, as far as possible, active communication and mutual understanding among all the groups of a society. On the other, it should accept that in some specific cases we face conflicts between religion and the secular state that cannot be solved by appeal to broader common principles. In these limited cases, we have to agree to disagree, and the default position, therefore, will have to promote a thinner notion of coexistence among different groups and individuals on the basis of clear rules of the game. This will be illustrated toward the end of the paper with a discussion of the place of Shari’a law in European secular states.

In what follows, I will not use Sajó’s notion of strong religion. Instead, I will simply speak of religion, as I do not believe it is possible to draw a clear line between the two. An otherwise peaceable religion may very well claim an exception or a compromise that appears to some as a strong challenge to the secular constitution of the state. For example, some hard core secularists believe that wearing the veil in public poses a threat to secularist principles. See Leyla Şahin v. Turkey, 41 Eur. H.R. Rep. 8 (2005). It is important to distinguish between the claims made by religious people and the nature of religion itself.

Jürgen Habermas, Between Naturalism and Religion (Polity Press 2008).

John Gray, Two Faces of Liberalism (Polity Press 2000). I am aware that this double strategy may be regarded as not very neat, since it combines a more substantive idealist perspective that promotes communication with a thinner realist perspective that promotes coexistence. To put it in Gray’s terms, I suggest that the two faces of liberalism can be reconciled by assigning them different roles at different stages of deliberation and adjudication on the place of religion in the public
The paper is organized in the following way: in the first section, I will compare and contrast Sajó’s diagnosis of strong religion as a threat to secular constitutional states with my diagnosis of religion as a symptom of the crisis within secular constitutional states. In the second section, I will compare and contrast Sajó’s prognosis, consisting in ruling out religion in the public sphere, with my own position, consisting in promoting communication and mutual understanding, over the long run, and securing coexistence in cases of persistent disagreement and conflict.

1 Two diagnoses

1.1 Religion as a threat

Sajó is principally worried about religious movements that challenge secular arrangements directly. In particular, he fears that religion may undermine “the legal arrangements that claim to be neutral and generally applicable to all people living in the national community.” In a nutshell, the challenge is as follows: religion forces secular legal systems to agree on compromises and concessions that imperil the integrity and coherence of secular laws. An example would be the growing encroachment on freedom of expression for the sake of protecting religious sensibilities. As a sign of the half-hearted and meek response of secularism, Sajó adduces the continued existence of blasphemy laws that partly excuse the blurred boundary between free expression and the protection of religion. The saga of Danish cartoons teaches us. Sajó argues, that secularism is weak and open to compromises and concessions that European secular states should firmly and clearly refuse to make, and that they should so refuse on the basis that religion does not have a place in the public square and that we should protect what we really value. As a consequence, he welcomes the abolition of the blasphemy law on the part of the U.K. government on May 8, 2008, after a thirty-year campaign.7

Yet, there is something lost in translation in this picture. As far as the U.K. is concerned, the abolition of the blasphemy law must be read in conjunction with the Racial and Religious Hatred Act 2006, which deals with the balance...
between free speech and the right to be shielded from hatred. In section 29 J, after having defined what amounts to expression and behavior that stirs up religious hatred, the act states:

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system. The Racial and Religious Hatred Act 2006 defines away the conflict by setting what I call a presumption of priority. Free speech still sets the tone for the context in which we express ourselves. We presume that our words are free even when we want to criticize or ridicule another religion. The act, nonetheless, carves out an egregious exception, which concerns behavior and expression that intends to provoke religious hatred. How do we know what falls in the latter category? This is part of a longer story that has yet to unfold in the future years and concerns the relationship between various groups in a society. The best we can do is to avoid prefacing that relationship as a conflict.

More generally, blasphemy is not merely a relic from the past. In Europe, it is true that free speech and secularism play a paramount role, and that there is a presumption in favor of liberty. However, courts do draw a line at a certain point: the European Court of Human Rights (ECtHR), for example, confronted the issue of blasphemy in its seminal case, Otto Preminger Institute v. Austria. The case concerned a film that portrayed the Christian holy family in highly derogatory terms. The ECtHR had to decide whether the administrative sanction preventing the screening of the movie was in breach of article 10 of the convention, or whether it was justified on the ground of protection of religious feelings. Strasbourg argued that the administrative sanction was justified because the film risked provoking a strong reaction within a prevalently Christian population.

Critics of this decision argue that there is no tension between free speech and the right not to be offended in one’s own religion because the latter is not a right, properly speaking. If there is a right not to be offended or harmed by other people’s words, this must apply to any feeling, not only religious ones. We can be offended as football supporters, political partisans, and so on. There is nothing special about religion that warrants an ad hoc protection. This may be true on political grounds. It is arguably hard to single out an independent political reason for religion’s special protection. After all, other forms of association could claim equal protection. In other words, it is difficult to show why,

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as a matter of principle, religion should receive different treatment. However, it is not so difficult on prudential grounds. Religion can inspire large crowds by stimulating their deepest feelings of attachment and identity. Religious people are particularly susceptible to offense and are very keen on responding to the perceived harm with any means, be they legal or illegal.

We learn, quickly, that part of the problem lies with the notion of secularism itself. Sajó bemoans the fact that we lack a strong normative theory of secularism to underpin our legal systems, and he attempts to fill this gap by offering his own brand of constitutional secularism. He begins this endeavor with an anatomy of secularism and secularization. Secularism is defined by Sajó as a social fact and as a feature of constitutionalism. We also learn that it stands for an ambiguous social reality, and that it is uncertain as a legal concept. Sajó then defines secularization as “a historical project still in the making.” In essence, for Sajó, it is about religion and its organizations “ceding some of their power over various aspects of life in favor of the state.”

To define secularization as a historical project is problematic. Yet, as Olivier Roy rightly points out, secularization is “a social phenomenon that requires no political implementation.” It takes place gradually as religion loses its position at the center of human lives. Understood this way, secularization is not about the power relation between state and church but about the gradual waning of religion in society. The advantage of this definition is that it explains the difference between secularization, as a process, and the notion of secularism, which is a political project with a set of normative claims as to the relationship between religion and the state. Secularism and secularization may go hand in hand, as was the case in Europe until the end of last century. The resurgence of religion, however, raises doubts as to the direction of the political project, on one hand, and of the social process, on the other.

One illustration of secularism in its strongest and most aggressive form is the French notion of laïcité. This is characterized by two separate elements: legal laïcité and ideological laïcité. The former consists of “a very strict separation of church and state, against the backdrop of a political conflict between the state and the Catholic Church that resulted in a law regulating very strictly the presence of religion in the public sphere (1905).” The latter “claims to provide a value system common to all citizens by expelling religion into the private sphere.” Sajó suggests that a preferable version of constitutional secularism would be an aggressive type (close to laïcité) capable of responding to religion and its presence in the public sphere. But in Europe laïcité is clearly an exception. No other state has an equally strong commitment to both the legal

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10 See Sajó, supra note 2, at 609.
12 Id. at xii.
13 Id.
and ideological elements. No other state has entrenched a secularist principle, constitutionally, except Turkey.\textsuperscript{14} In northern Europe, secularism is not present as a legal or constitutional doctrine (in fact, many states have an established church, as in the U.K. or Denmark). But these societies were gradually secularized, without open confrontation with religious institutions.

An additional problem for a comparative constitutional theory of secularism is that it can hardly account for experiences outside of the Western world. The notion of secularism is deeply intertwined with local practices and histories in the West, as Charles Taylor has powerfully demonstrated.\textsuperscript{15} As a consequence, it scarcely makes sense to speak of Indian secularism as something comparable to Western experience. In addition, to propound a truly general theory of constitutional secularism becomes an uphill struggle. Sajó, no doubt, is aware of the importance of local history and other contingencies in the formation of the Western understanding of secularism. In fact, he explains the weaknesses of secularism in terms of its many different facets, which makes it a “fuzzy constitutional concept.” But for Sajó this does not constitute an obstacle for the definition of a concept of constitutional secularism.

If secularism is weak and uncertain because of its local rootedness, secularization is only a half-hearted compromise, according to Sajó. In the majority of legal and political systems the project of secularization has never been coherently conceived and brought forward. The relationship between church and state has been dealt with, typically, through numerous compromises and concessions thought to be compatible with secularism itself. Unfortunately, Sajó argues, the project of secularization does not lead us anywhere, given that it fails to display the intellectual consistency required to achieve any project for freeing the public square from religion. The problem with this position, as already pointed out, is that secularization is not an intellectual project but an organic development of a society in response to the gradual waning of religion in the lives of people. Secularization does not set standards according to which the public square can be considered a neutral space. Rather, it mirrors a gradual development; thus, by definition, it will always be a less-than-fully-realized process. Moreover, local contingencies, to great extent, shape national policies concerning religion.

Indeed, European secular states respond very differently to the alleged threat of religion. Some believe in top-down strategies, where secularism is imposed as a necessary medicine. So, for example, France was quick to enact a statute on the ban of Islamic scarves from public institutions. Others have a more laissez-faire approach. They believe that we should leave ample room for maneuver by individuals and communities. Bright-line rules in this area look


\textsuperscript{15} See Charles Taylor, A Secular Age 15 (Harvard Univ. Press 2007).
suspicious and limit freedom in a perilous way. Thus the U.K., Denmark, Holland, and the Scandinavian countries are reluctant to tighten the screws on expressions of religious fundamentalism. Sajó is disappointed with the latter responses more than with the former. He advocates a stronger, more aggressive, more self-confident form of secularism.  

Recent events seem to confirm his worries. In the U.K., the issue of the veil was brought out in public by then–foreign affairs minister Jack Straw (in 2006), while in Denmark the cartoons of Mohammed created much unrest in the population, and the state had to take this into account. In Holland, the murder of Theo Van Gogh made the Dutch people question their own liberal attitudes toward religion. Does this mean that the right response to religion is a more aggressive attitude on the part of the secular state? This is hardly the case. France has not responded to the threat posed by social instability in the suburbs. More generally, France is still struggling with its social problems. The country seems incapable of assimilating a large majority of its immigrants despite its aggressive integration policies. Laïcité was strong when its legal and ideological elements worked in unison. If the state and the society agree that religion is to be kept out of the public sphere, then laïcité works fairly smoothly and effectively. But that is not the case anymore, when legal laïcité imposed by the state is not immediately accepted by the whole of society. The fact of imposing on all a single precise view of the world only exacerbates the divide among the different elements of society.

European secular states are incapable of responding effectively to the increasing claims of religion. Sajó’s diagnosis consists in singling out strong religion as a discrete threat that needs to be tackled head-on. I want to suggest that there is something wrong with Sajó’s diagnosis. The actual problem is not religion but the secular state’s inability to cope with diversity. The secular state is unable to foster mutual understanding and create an appropriate framework of coexistence for the whole society under conditions of pluralism.

Religion’s revival is not a disease but simply a symptom of the crisis confronting the secular state. Religion understands that the next challenge is not at the level of the state but at another level. Supranational pressures increasingly reveal that the state is no longer the best form of organization for our societies. The struggle for the soul of Europe has moved from the level of the state to the European level. Hence the heated debate provoked by the reference to Christian values in the European constitution. As Olivier Roy rightly points out: “Religion today is participating, in the same way as the construction of Europe is, in the disassembly of the spaces that created the modern nation-state.”  

Perhaps the European patient suffers from a deeper disease than religion. It would not be enough to eradicate that putative cancer when the whole

16 See Sajó, supra note 2, at 615.
17 See Roy, supra note 11, at 12.
of the European body politic is ill. Thus, one is then compelled to ask, What is the nature of this crisis?

1.2 Religion as a symptom of the crisis of the secular state

The secular state is in a difficult position. It barely copes with diversity and the fact of pluralism. And yet there is no alternative. Economically, this state is dependent on immigration. Politically, it can hardly create barriers and walls of separation between the West and the rest of the world. Socially, the state is unable to keep together its own population, which is increasingly atomized. It does not come as a surprise that religion is not welcome; yet, it keeps knocking at the door with increasingly more difficult demands. And the impossibility of satisfying them only increases the gap between different segments of society, which is thus more and more polarized. This is, in a nutshell, what can be called the crisis of the secular state.

European secular states vary considerably when it comes to the management of diversity. France firmly believes in the assimilation of everyone under the umbrella of republican values. Unfortunately, believing is one thing; succeeding, another. Assimilationist strategies want to minimize cultural difference in order to maximize social unity at the state level. Article 1 of the French Constitution 1958 is crystal-clear: “France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organized on a decentralized basis.” The unity of the nation, its indivisibility, is the paramount principle of the Constitution. In order to guarantee unity, the republic proclaims itself blind with regard to religion. The second principle, tellingly, is that of laïcité (translated, problematically, as “secular” or “secularity”). As a consequence, the law is also blind when it comes to differences of origin, race, or religion. One may think that all of this is desirable, that we can only be truly free and equal if everyone is treated as a free and equal person by the neutral state. However, to turn a blind eye to the reality of difference is deeply problematic.

If the state, as an abstract entity, can pretend to be neutral, it does not go without saying that the people constituting the state and the society will behave in like manner. Discrimination in all spheres is widespread in France. One example, above all, is the failure of the dream of “les cités”—the building blocks erected in the suburbs of cities all around France. Initially conceived as a place where everyone would become French and thank the generous state for the opportunity provided, they slowly became ghettos, where the lowliest people in the society are gathered. The crisis of the assimilationist state begins here in the banlieues. Here, religion has its strongest pull. Thus fundamentalism grows in places where the secular state wanted to erase diversity and propagate republican

18 For an excellent study of France’s republican position, see CÉCILE LABORDE, CRITICAL REPUBLICANISM (Oxford Univ. Press 2008).
values. By involuntarily creating these new communities in the banlieues, the French state shreds its “Rousseauist myth of a republic where there is nothing between the state and the citizen-individual in his isolation.” 19

At the opposite end of the spectrum lie multicultural strategies. Diversity matters in this case. Cultural communities are allowed to form and flourish. The state does not impose a single model or a set of republican values. It protects a general freedom to live according to one’s own cultural and social norms so long as nobody abuses his or her freedom or interferes with someone else’s lifestyle. Recent events, however, have challenged this model, probably even more than they have the French model. Multicultural states such as the United Kingdom, Denmark, and the Netherlands have witnessed events that have made them ponder their own commitment to cultural diversity. After the terrorist attacks in London perpetrated by British Muslims, the reaction was clear and painful. The prime minister is reduced to insisting on British values, as if to kindle the French Rousseauist myth, hoping to instill them in all of society. 20

The fact of pluralism is beyond dispute. Yet, it is a double-edged sword; it has advantages but also drawbacks. Western societies have become less parochial and have opened up to an ever-greater range of cultures and experiences. Within this framework, each individual is capable of choosing the life that best suits his values. But communication among the various groups and individuals is not always easy to achieve. The starting premises are, more often than not, different and the risk of talking at cross-purposes is high. Can we really agree on what dignity entails if one person believes it is an eminently religious notion and another believes that it is at the foundation of secular morality? For the former, God is the ultimate source of good. For the latter, God is absent from the picture, and all that matters is the self-determination of the individual. The greatest risk is polarization with a breakdown in communications. 21

It is important to stress, however, that polarization is not a consequence of the rise of religion. Of course, religion contributes to it; in fact, it thrives in this environment as it exploits division and disagreement. But religion is not the cause of polarization. The real cause is to be found in the inability of the secular state to cope with the fact of pluralism, or, to put it differently, with diversity. The unity and cohesion of our Western societies is not threatened by external agents; it is threatened, principally, from within. It is not a clash of civilizations, it is a clash within. 22

19 See Roy, supra note 11, at 97.
21 Even a liberalism of coexistence à la Gray accepts that there are ruptures in communication; however, he believes that the general legal, political framework will suffice. I believe that that can only work as a default position when communication breaks down, and disagreement is pervasive and persistent.
A clash within is characterized by an oscillation between passivity and aggression. Sajó defends the swing of the pendulum toward a more aggressive assertion of our values vis-à-vis religion. He believes that secularism, as we presently understand it, is fraught with uncertainty and shabby compromises; he seeks, instead, a more aggressive and self-confident constitutional secularism that will be up to the job of coping with (strong) religion, which is undermining the unity and cohesion of our polities. Sajó’s position is explicable in the present context, as we move from an essentially tolerant state to an exclusive one. In part, he acknowledges the weaknesses of the secular state but then wants to remedy these by appealing to a common notion of constitutional secularism the task of which would be primarily to police the area of reasonable positions and exclude those that do not meet these standards of reasonableness. However, the problem is that the less-than-reasonable positions thrive because the secular state has failed to integrate them in the first place. So our failure to include people becomes a ground for excluding them.

Part of the problem is that from the outset we never acknowledged the fragmentation of our values. We still believe that we live in fairly harmonious societies, in principle at least, and we point to our constitutions when we need support for this claim. Lacking a cohesive society, we agree that our fall-back position, what unite us after all, is our constitutional order. After all, we can still display constitutional patriotism. Sajó stretches this image to bear on the question of the place of religion in the public sphere. He believes that behind our local and historical differences in religious matters, we do share a common constitutional commitment to secularism. 23

Conflicts of values, and of worldviews, have shaped all our societies since their inception. We oscillate between the proliferation of conflicts and their adjudication. When they become unmanageable, we resort to an external adjudicator that interrupts the conflict by the use of force. Sajó calls it a conversation stopper, after Richard Rorty. 24 If we need to resort to that, however, we have already accepted the decadence of our society and of our secular state. A good sign of a healthy polity is to be able to cope with disagreement without falling into pieces. Sajó proposes to exclude religion, the agent provocateur, so that we can put our pieces back together. By suggesting that, he misses the target. The European patient needs a different medicine.

What can secular law achieve under these circumstances? It all depends. If we were to follow Sajó’s diagnosis, then secular law can do very little. It may raise its voice and impose bright-line rules on how to use religious arguments in public. However, it does not seem able to cope with pluralism and diversity in the matter of values. We will see, in the next section, that the prognosis

23 More on this in the second section of this article.
24 See Sajó, supra note 2, at 629. Sajó does not acknowledge, however, that Rorty changed his own position on the matter. See Richard Rorty, Religion in the Public Square—A Reconsideration, 31 J. RELIG. ETHICS 141 (2003).
offered by Sajó is all about eradicating the threat of religion. But this will not
solve the larger problem plaguing the secular state: its inability to accept
responsibility for the failure to manage diversity. If one accepts this diagnosis,
religion may be regarded more as a symptom than as an illness. It is a symptom
that we have to tackle and to which we must respond. However, the strategy
cannot be local and aimed solely at the eradication of that symptom. The stakes
are much higher: they are about reasserting the conditions for cohabitation,
on one hand, and communication, on the other.

2 Two prognoses

The response to religion will be based, inevitably, on an evaluation of the threat
that it represents. Sajó’s diagnosis insists that religion is the major problem,
one we have to tackle head on. His prognosis involves a surgical operation to
remove religion from our public spaces. The intervention would take place at
two levels, involving a more self-assertive notion of secular reason as the sole
expression of legitimate authority and a reaffirmation of popular sovereignty
as the sole source of legitimate authority. This double medicine, Sajó argues, is
mandated by constitutional secularism.

An alternative prognosis follows from an acknowledgement of the crisis of
the secular state in Europe. Religion cannot be regarded as the sole culprit for
social tensions and unrest. The problem is much deeper and more complicated,
and it needs to be addressed with a holistic and innovative attitude that should
be fully capable of embracing the facts of pluralism and diversity. This progno-
sis can only work on a long-term basis. It is not an intrusive operation going to
the core of our society to eradicate evil; it is a cognitive process that requires
everyone’s participation. One problem remains, and it concerns a strategy
adopted to the present cases. Conflicts between the secular state and religion
are real and cannot simply be dismissed. At times, it will be possible to reach a
sound compromise. On other occasions, we will have to agree to disagree and
resort to a default position that aims at coexistence on the basis of clear rules of
the game. In what follows, I will sketch and compare these two strategies.

2.1 Constitutional secularism as a direct response to religion

Sajó’s notion of constitutional secularism could also be called strong secular-
ism. Its central concern is to exclude religion from the political realm. To
achieve this objective, it is prepared to use strong remedies and to draw bright
lines, where religion asks for compromise or concessions. Before studying what
constitutional secularism requires, we need to know what constitutional secu-
larism means.

After complaining about the weaknesses and ambiguities of secularism
resulting from its uncertainty, Sajó takes us by surprise when he suggests that
it is possible to identify a common core to the concept. This is all the more sur-
prising, as Sajó repeatedly acknowledges that secularism “has no clear standing
This means two things: on the one hand, secularism does not figure as a constitutional norm but for one very limited exception. On the other, it does not correspond to any other values of constitutional status. Despite all this, Sajó still firmly claims that “certain fundamental demands of constitutionalism propose and demand secularism.” Now, this may well be true from a purely normative viewpoint. But it does not tell us anything about the way in which different constitutional practices converge toward that common core.

The theoretical path proposed for reaching a definition of the concept of constitutional secularism is as follows: the starting point is represented by the many different local conceptions of secularism, which do not seem to share that much. The end point is the concept of constitutional secularism as “there seems to be enough commonality among these [conceptions] to allow us to construe the shared principles that form secularism.” It is very hard to understand how Sajó comes to this conclusion since, in the first part of the article, he has stressed the importance of local contingencies and histories. It is unclear, therefore, whether the concept of constitutional secularism is a top-down, purely normative concept, which comes from Sajó’s own peculiar understanding of constitutionalism and its fundamental requirements; or whether it is a bottom-up, experience-based concept, which derives from the distillation of discrete local constitutional attempts to regulate the relationship between law and religion. It would be possible to speculate endlessly on this ambiguous starting position. It is better, however, to move on and ask what animates Sajó’s position and what its central question is.

The central issue for Sajó is political. This seems to be a more promising context in which to analyze the problem. A more precise question could be the following: What is the place of religion in the public sphere? Of course, there is little agreement on how to define the public sphere. Nonetheless, many people in Europe would agree, at least, on this initial question because of our histories and practices. The question, as pointed out, is political. It is not theological or philosophical, that is, it is not about testing the theological or philosophical assumptions behind one position or another. It is about us, deciding what kind of polity we want and, with it, what kind of law and what kind of institutions. Sajó is right to point out that this is the central question. He is wrong, however, when he claims that the answer should be biased in favor of secular positions, as this is already the case. In Europe, we know already that a statute or a judicial decision cannot be prefaced or justified on any religious ground. But

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25 Sajó, supra note 2, at 621 (emphasis in original).

26 Id.

27 See id.

28 Habermas, however, makes a monumental effort to paint a subtle picture of it. See Jürgen Habermas, The Structural Transformation of the Public Sphere (M.I.T. Press 1991).
crucially, the fact that the official public sphere is religion-free does not and cannot imply that religion should stay out of any public space. It is because Europe is already biased in favor of secularism that we have to be particularly careful when we strike the balance between secular law and religion.

Constitutional secularism, however, strikes the balance in the harshest way: religion should stay out of the public sphere and, in particular, out of politics. Sajó suggests that we should reassert political authority as religion-free. Without secularism there is no constitutionalism, Sajó tells us. This position presents three problems. First, it seems to universalize a local understanding. Constitutional secularism, with its strong legal and ideological components, reminds us of the French version of *laïcité*. However, as I argued previously, French *laïcité* is a very peculiar exception in Europe, and there are no reasons why other European states would be better off with it. Second, it does not provide a solution for the tension between constitutional abstract principles and local, contingent understandings of secularism. Sajó merely asserts that there are enough commonalities to construe a concept of constitutional secularism. Yet there is neither evidence nor argument to this effect. If anything, Sajó convincingly persuades us that local contingencies and histories are extremely important to the understanding of secularism. Thirdly, it presents a chicken-and-egg problem: Does constitutionalism mandate secularism or vice versa? Sajó suggests, at one point, that constitutionalism mandates secularism, only to assert, later on, that secularism is a precondition for the existence of a constitutional order. Is there, then, a concept of constitutional secularism? The answer so far seems to be negative. But let us assume that constitutional secularism represents a common European position. What would that require the secular state to do?

Two main requirements characterize Sajó’s constitutional secularism. First, it mandates secular reasoning to the total exclusion of religious arguments as the only form of expression; second, it asserts popular sovereignty to the total exclusion of any other source of power, in particular divine. Let us examine these in turn.

Secular reason, Sajó tells us, springs from the Enlightenment. It requires that a polity be based on reasons open to all. Since religious reasons are not accessible to nonreligious people, this would constitute a burden for them and communication would be impossible. As a result, Sajó tells us, we should exclude categorically religious reason from the public sphere. Moreover, secular reason rules out religion from legislation and other official pronouncements. Secular reason is also central to the comprehension of human rights as these refer to a “homocentric world and to ways of thought freed from transcendentalist premises…”

29 See Sajó, supra note 2, at 620 (“secularism as a dictate of constitutionalism”).

30 See id. at 626 (“Secularism mandates a constitutional arrangement where autonomous critical reasons are to be respected as foundational for communal coexistence and self-regulation”).

31 See id. at 625.
There are several problems with Sajó’s understanding of secular public reason. First of all, he fails to draw an important distinction between secular reason and public reason, which is clearly drawn, at least by John Rawls, in “the idea of public reason revisited.” Secular reason is based on comprehensive nonreligious views. Secular reason and secular values are much broader than public reason. Public reason is based on political conceptions that meet Rawls’s carefully crafted conditions: “their principles apply to basic political institutions; they can be presented independently from comprehensive doctrines of any kind; they can be worked out from fundamental ideas seen as implicit in the public political culture of a constitutional regime….” Even if Rawls’s distinction is not accepted by everyone, Sajó does not seem to disagree: “Secularism—and not only because of its intimate relation with the Enlightenment—mandates a constitutional arrangement where autonomous critical reasons are to be respected as foundational for communal coexistence and self-regulation.” He genuinely believes that secular public reason is our common comprehensive doctrine at the foundation of Western political systems.

The trouble is that secular reason, as a comprehensive doctrine, is not shared by everyone in our societies, as there are other competing comprehensive doctrines, mainly religious ones. How does one find a compromise between religious and nonreligious comprehensive views without appealing to secular reason? That is the question that preoccupies Rawls, though it does not seem to preoccupy Sajó in the least. This explains why Sajó does not hesitate to call religious arguments a burden on secular people. But the problem is that our societies impose secular burdens on religious people without paying the slightest attention to religious arguments. Hence, Sajó’s suggestion to exclude religious arguments totally has an authoritarian ring.

If it is true that official legislation and case law should not display religious arguments, this clearly does not apply to all the arguments in the public sphere. Habermas successfully distinguishes between different layers of the public sphere. The most general distinction is that between an official and a nonofficial public sphere. In the latter, the presence of religious arguments should be accepted. In due time, religious arguments should be translated or supported by nonreligious reasons so that other people may also benefit from them. These two provisos have been advanced by Habermas and Rawls, respectively. They both acknowledge, however, that this does create an asymmetry between religious and nonreligious people. Habermas, therefore, adds that nonreligious

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33 See id. at 143.

34 See Sajó, supra note 2, at 626.

people should be required to confront arguments originating from religious views with a more open mind and a greater willingness to learn from them.

Ultimately, Sajó’s suggestion that secular public reason is the only ground for human rights is deeply controversial. In Western democracies, there is no agreement on the issue of the foundation of human rights. Many scholars, however, recognize that human rights do have much in common with our Christian roots, even if they depart from them.\textsuperscript{36} For all these reasons, Sajó’s notion of secular public reason is highly problematic.

Let us now examine the second requirement of constitutional secularism: popular sovereignty as a source of power to the exclusion of religion. Sajó argues that “popular sovereignty means that all power in the state originates from people, therefore it cannot originate from the sacred.”\textsuperscript{37} The connection between secularism and popular sovereignty is not a common feature of European states and certainly not universal. In the U.K., for example the idea that sovereignty is deeply linked to secularism is simply not true: the queen is also the head of the Church of England.\textsuperscript{38}

More importantly, the argument from popular sovereignty hardly resists criticism. What if the people themselves were to seek a greater role for religion in the public sphere? Of course, they would not be able to alienate their own sovereignty, but they certainly would be able to appoint more religion-friendly officials. The story of Turkey, where secularism in a strong form has been constitutionalized since the times of Ataturk, is paradigmatic in this context. The conflict between religion and the secular state is at its peak when it involves political parties. The role of religion in politics is often ambiguous. Christian parties are a traditional feature of European political systems. But what would be the legal status of Islamic parties? Are they all to be banned because they promote Shari’a law and Islamic values? Or should we distinguish between moderate and authoritarian parties? It would seem logical to allow for the representation of Muslim Europeans through political parties provided they respect the basic conditions of our political orders: democracy, fundamental rights, and rule of law. Against this background, it is somehow perplexing to observe a string of cases coming from Turkey and dealing with the dissolution of Islamic parties. The leading case is \textit{Refah Partisi}.\textsuperscript{39} However, the currently ruling party was also under scrutiny of the Constitutional Court.

\begin{itemize}
\item \textsuperscript{36} See, e.g., Michael J. Perry, \textit{Toward a Theory of Human Rights: Religion, Law, Courts} (Cambridge Univ. Press 2006).
\item \textsuperscript{37} Sajó, \textit{supra} note 2, at 627 (emphasis in original).
\item \textsuperscript{38} To explain the connection between popular sovereignty and secularism, Sajó resorts to the example of postrevolutionary France. See Sajó, \textit{supra} note 2, at 627. Needless to say, this example is based on a local history that hardly represents states other than France itself. This confirms, if need be, that Sajó’s constitutional secularism is a disguised generalization of the French experience.
\item \textsuperscript{39} \textit{Refah Partisi (The Welfare Party) and Others v. Turkey} (application nos. 41340/98, 41342/98, 41343/98, and 41344/98).
\end{itemize}
In conclusion, Sajó’s prognosis is problematic for several reasons. The concept of constitutional secularism has shaky theoretical foundations and cannot represent a truly common European position. Moreover, its requirements, namely secular reason and popular sovereignty, yield very controversial positions that do not take seriously religious people. In the following, I will suggest that a better prognosis follows from an altogether different diagnosis. Religion is not the prime problem of the secular state. The secular state itself is in search of a better foundation. Religion is there to remind the state that it constantly needs to articulate its normative premises. From this viewpoint, religion may even help the state in its endeavor of becoming stronger vis-à-vis growing numbers of conflicts between various constitutive parts of the society.

2.2 The secular state and diversity
To suggest that religion is the problem, and its exclusion from the public sphere the solution is misleading, indeed wishful thinking. Misleading, because it misses the real problem, that is, the crisis of the secular state. Wishful thinking, because it promises to resolve a major social problem of communication between groups simply by imposing a conversation stopper. The secular state is unable to cope with the fact of pluralism. Rawls’s agonizing question captures well the mood: “How is it possible—or is it—for those of faith, as well as the nonreligious (secular), to endorse a constitutional regime even when their comprehensive doctrines may not prosper under it, and indeed may decline?”

Secular and religious views can scarcely coexist without clashing with one another. Sajó suggests that the game should be won by the secular side. However, it is difficult to see how this squares with his claim that constitutional secularism is more than freedom from religion. It is also necessary for the maximization of freedom of religion. Even if this appears at first as an attempt to present constitutional secularism as an all-encompassing doctrine, it is clear that so many different goals are not jointly achievable. Here lies the weakness of constitutional secularism and of any other comprehensive view that attempts to reconcile many different and competing interests. The most egregious ones are protected by fundamental rights. Their conflicts illustrate the problem.

Freedom of religion clashes with freedom from religion, the Islamic scarf being a possible illustration. Freedom of expression clashes with the right not to be offended in one’s own religious feelings: think of the Danish cartoons. Freedom of association for political parties based on religious views clashes with secular constitutional requirements; this is what happened in several Turkish cases involving the Refah Partisi and then the Justice and Development party (AKP). And so on. Some of these conflicts can be defined away or avoided.

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40 See Rorty, supra note 24.

41 See Rawls, supra note 32, at 151.
Many strategies are available and do produce local results. But is a common strategy possible?

Many still believe in the possibility of reaching an area of consensus, where we free ourselves from our ideological assumptions and exchange arguments on a level playing field. Rawls’s attempt to carve out a space for reasonable political views fills that bill precisely. Yet it is unclear whether he succeeds. And more importantly, the stakes of this game are unclear. Political liberalism aims at a political level playing field. But religion in Europe may be interested in something more than the political game. It does not really want to conquer political institutions because it understands the crisis of the national state and contributes to it by pushing the boundaries and by playing with the state’s many contradictions and potential conflicts. However, religion is very much interested in the social game. It wants to conquer the people. It thrives in local communities and aspires to create global ones. An example is the idea of the *Umma* as a global community of believers. Another example is the pope’s suggestion that Christian values should be at the core of the European civil society.42

Religion may even leave to the state the political arena of institutional exchange and official communication. In this domain, reasonableness applies all the way through and excludes, in principle, comprehensive views that cannot be shared by all. Religion, however, does not give up its pursuit of truth and the relevance of its comprehensive doctrine for humanity. So it claims a place, and already plays a role, in the unofficial public sphere. It promulgates its message on a global level, not at the state level. The real problem is, simply, that the secular state, at the national level, is struggling with the fact of pluralism and does not appear able to provide viable answers. Inevitably it resorts to the next level, the European level. At the judicial level, the ECtHR has already been solicited in growing ways by the claims of religious minorities. The response has not always been satisfactory. The court started well with the *Kokkinakis* case, where the ban on religious proselytism in Greece was limited on the ground of respect for religious freedom: one religion cannot hold and control a monopoly on the sacred. But lately, strict secular arrangements prohibiting the political association of moderate religious people in Turkey were upheld, at least in the *Refah Partisi* case.

The goal of constitutional doctrines should be modified. They all aim at consensus and struggle to impose a model that would create the conditions for reaching it either procedurally or substantively. The more we insist on building consensus and convergence, the more we end up with shabby compromises, at best, and with alienated minorities, at worst. Our societies have too many overlapping and competing interests to defend. We have to accept that

42 *See* Joseph Ratzinger, *Without Roots: The West, Relativism, Christianity, and Islam* (Basic Books 2006). Ironically, the pope stressed time and again that there is no tension between religion and the secular state.
diversity and dissent are the underlying themes of our societies. The goal should not be to promote consensus at all costs. The goal should be dual and complex. Consensus should be sought as far as possible, on one hand. But, on the other, diversity should also be promoted and dissent allowed as much as possible. In other words, Europe should accept the possibility of conflict as a way of life, as its central tenet, and as its engine for change.

It will not be easy to agree on fundamental values. Comprehensive views will not give up their exclusive claims to truth. It is also very hard to agree on a few selected values applying to the political realm from the viewpoint of reasonableness. However, it may be possible to agree on the rules of the game. The game is diversity and dissent, and the rules must be such that diversity and dissent do not produce violence and social strife. We already have those rules in the form of bills of rights and the case law they produced. These rules are broad enough, and yet specific enough, to include everyone without requesting agreement on background values.

Sometimes it will be possible to reconcile competing claims. At other times, we will have to acknowledge that certain conflicts of rights not only stand for disagreement on basic values but also for the existence of a deadlock—a situation in which we cannot reach a solution without compromising something of value. In these cases, we face a dilemma. How should the rules of the game deal with dilemmas? There is no fixed answer to that. Some legal systems will opt for legislative solutions; others for judicial ones. Yet others for a mix of the two, or for something completely different, say, direct democracy through referendum.

The way in which dilemmas are adjudicated, however, is only a contingent issue. What is more important is to acknowledge and accept the existence of dilemmas in the areas of conflict between religion and the secular state. To do so, we will have to know more about religious claims and their background culture. In other words, we will initiate a process of mutual understanding. This would be a cognitive process that both could improve us while maintaining an underlying diversity. Only after that process, will one be in a better position to single out or define more precisely the normative conflict between religion and the secular state. Nor will it always be possible to explain away the conflict. In these cases, one will have to agree to disagree and appeal to the rules of the legal political system to settle the conflict. An example will illustrate this process: What should be the place of Shari’a law in Europe? The Shari’a is on everyone’s lips but nobody knows anything about the subject. An increased knowledge of Shari’a would not dispel any possible conflict, but, at least, it would diminish considerably the irrational fears that it triggers.

Ordinary courts are facing a growing number of cases in which the rules of two different legal systems clash. Strictly speaking, these are clear examples of

43 Lorenzo Zucca, Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA (Oxford Univ. Press 2007).
legal conflicts; they involve two valid rules that prescribe incompatible behaviors; and we have to choose between the two, thereby putting one rule to the side. For example, the rules in conflict may concern family law and have religious roots: Can we recognize polygamy? What is the legal status of talaq divorce?\footnote{This section draws on the very interesting dossier by Pascale Fournier, \textit{The Applicability of Sharia Law in Western Countries}, available at http://www.ccmw.com/documents/Pascalepaper.doc.}

In principle, European legal systems strictly prohibit polygamy. So if a second marriage takes place in Europe, it is customarily annulled. But what if the marriage has already taken place in another country, where polygamy is allowed? In this case the conflict of rules is the following:

Rule 1 says polygamy is strictly prohibited.

Rule 2 says it is not the case that polygamy is prohibited.

When courts deal with problems of private international law, rule 2 is a potential candidate for incorporation into the legal system of the litigation for the purpose of adjudicating the present case. The judge will have to apply the rules of conflict to establish which rule applies. In France, for example, the judge recognized that a polygamous relationship could yield some legal consequences such as the payment of children’s benefits.\footnote{See Cour de Cassation, Première chambre civile [Cass. 1e ch. civ.] [highest court of ordinary jurisdiction, first civil law chamber] June 3, 1998. Benali c/ Makhlouf, Rev. crit. DIP 1998, 652, note Ancel.}

\textit{Talaq} divorce is another feature of Shari’a.\footnote{See Kurt Siehr, \textit{Divorce of Muslim Marriages in Secular Courts}, in \textit{Vers de Nouveaux Équilibres entre Ordres Juridiques—Mélanges en L’Honneur D’Hélène Gaudemet-Tallon} [Toward New Balances Among Legal Orders—Essays in Honor of Hélène Gaudemet-Tallon] (Dalloz 2008).} When the husband says the word \textit{talaq} three times, the marriage is deemed dissolved. As a matter of principle, \textit{talaq} divorce is considered against the law in most European countries. However, some courts recognize its validity if \textit{talaq} divorce takes place abroad and both parties can be present to confirm this fact before a judge. Once again the conflict between two rules is quite explicit in theory. In practice, there is some accommodation, which becomes more and more necessary as our societies welcome a growing number of immigrants.

To a certain extent, it is possible to hold that Shari’a already has been taken into account in European legal systems. This is clearly the case when two parties opt for arbitration instead of an ordinary procedure. Private parties can perfectly well agree on settling their case before a Jewish tribunal, for example.\footnote{The Jewish court is called Beth Din, and it operates as a parallel system of adjudication.} In the case of arbitration, there is no conflict between rules: the parties simply agree to abide by a different set of rules. If the arbitrator does not produce a decision that satisfies both parties, then ordinary courts can step in.
and decide the case on the basis of national law. The national courts might very well take into account religious law if it does not conflict with the law of the land.

The entire debate triggered by the archbishop of Canterbury, therefore, starts from a misunderstanding. Critics thought that the archbishop was advocating an express integration of Shari’a law into English law. The archbishop was merely suggesting that Shari’a already plays a role in English law, and it may even play a greater role in the future. He suggested that Islamic councils could perform a function similar to that of the Jewish courts, and on the same basis. This was confirmed, very recently, in a speech by Lord Phillips, the most senior judge in England and Wales, who held: “There is no reason why sharia principles, or any other religious code, should not be the basis for mediation or other forms of alternative dispute resolution.”

The question of the place of the Shari’a in English law illustrates my twofold strategy. On the one hand, I am advocating that it is necessary to embark on a long-term project to enhance communication and mutual understanding among different groups and individuals in a society. Concretely, this means that it will be necessary to engage in a learning process with regard to Shari’a law in order to be in a position to evaluate what is acceptable and what is not. On the other, I am also arguing for clear rules of the game to settle the conflicts that cannot be solved by appeal to general principles of communication. These rules work as a default position in the case of prolonged and persistent disagreement over some specific question. It is clear, for example, that Shari’a principles could not be appealed to in order to justify legislation or judicial decisions.

Conclusion

Religion’s place in the European public square is a relatively new issue that deserves more attention. Sajó’s heartfelt position attempts to deal with many problems from a comparative constitutionalist perspective. This is, indeed, a good point of departure as the problem is common to most of the European states and cannot be reduced to a national issue. Sajó’s diagnosis, however, can be only partially shared. The responsibility for the open conflict between religion and the secular state cannot be attributed to one side only, namely (strong) religion. Sajó is, in fact, aware of this and complains in equal measure about the growing claims of religion and the weakness of secular states. His prognosis, however, betrays a more one-sided perspective. The secular state should reassert itself with greater confidence and respond more aggressively to the threat posed by some forms of religion.

I disagree. I believe that strong religious claims are not an isolated cancer that can be removed from societies by adopting a more aggressive counterposition. The crisis of the secular state is deeper and more daunting than that. It requires a holistic response that blends a more substantive strategy, based on increased communication and mutual understanding, with a thinner strategy that works as a default position and aims merely at coexistence in order to respond to actual cases of conflict between religion and the secular state. Increased mutual understanding can only take place in the long term; in the meanwhile, it is possible to resort to clear rules of the game in order to cope with discrete problems.

My approach is preferable to Sajó’s on two levels: the theoretical and the practical. Sajó exposed secularism’s practical problems, only to claim that these could be solved by developing a stronger, more self-confident, and aggressive theory of constitutional secularism flowing from the mandates of constitutionalism itself. I claim, instead, that those practical problems—actual conflicts between religion and the secular state—should be taken more seriously in order to modify the attitude with which the secular states respond to diversity and the fact of pluralism. Only then we can offer a better theory regarding the place of religion in the public square. My position blends an idealist theory that promotes mutual understanding and a realist theory that promotes coexistence under conditions of prolonged and persistent disagreement.