

Regulating the Role of Religion in Society in an Era of Change and Secularist Self-doubt: Why European Courts Have Been Right to Adopt a Hands-Off Approach

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Abstract Why have the European Court of Human Rights and Court of Justice of the European Union adopted such a hands-off approach in relation to the steady stream of national measures that have intensified limits on religious expression in, and influence over, the public realm? This article argues that the intensifying of these limits can be seen, in part, as reflective of a justified loss of confidence in previously dominant, deterministic narratives that saw secularization of society as inevitable. In response, many states are attempting to harness the power of the law to push a secularization process that they previously regarded as inevitable. The article suggests that, while these laws are sometimes troubling, given the scale, pace and unprecedented nature of the religious change Europe is undergoing, how coexistence and freedom of and from religion can best be preserved cannot but be an open question. It concludes that in these circumstances, judges in pan-European courts have been correct to avoid attempting to identify ideal solutions and to impose them across the board.

Key words: secularism, freedom of religion, Europe, European law, Islam

1. *Introduction*

Writing about religion in today's Europe is a particularly difficult task. It is not just that religion is a sensitive matter in its own right but because to discuss religion and its role in contemporary Europe is not just to discuss religion but to dive into a host of other sensitive, hot-button topics at the same time. The role played by religion in Europe can't

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be isolated from discussions of issues like migration, multiculturalism, terrorism and racial discrimination all of which provoke angry debates in their own right.

What is more, in these debates, it is often not clear which side a good progressive should back. Historically in Europe, it has been the left that has been anti-clerical and the right more favourable to a more extensive role for religion in law, politics and society. But in recent times with the migration-driven emergence of minority religious communities that are, in many countries, on average, more devout and conservative than the majority population, both left and right have split. The left, which has long traditions of being both anti-clerical and pro-immigration, has been divided between those who are resistant to any attempt to lessen the limits on religion's public role that have emerged in many European societies and those who are sympathetic to multiculturalist arguments that these limits may need to be relaxed to accommodate migrant-origin communities. The right, on the other hand, has been split between those who welcome the increased questioning of the secular paradigm that new religious minorities bring and those who see accommodation of the religious demands of migrant-origin communities as a threat to national identity.

On top of this, all of these debates take place against the background of Europe's history of colonialism and of looking down on non-white and non-Christian cultures. This can make arguments that might otherwise seem straightforwardly progressive, for example, the argument that equality between men and women or toleration of homosexuality are fundamental values of society that must take precedence over conservative, usually religious, worldviews, seem like just another incidence of white Europeans talking down to those from other cultural backgrounds.

In this paper, I want to try to avoid too many potential sources of anger and to focus more on two inter-related 'whys'. The first 'why' is to ask why it is that restrictions on religious influence over law, politics and indeed society are in general becoming more intense at a time when, overall, Europe has never been more secular. The second is to consider why, given that these intensifying restrictions on religion raise clear issues of European fundamental rights law (the laws I will discuss restrict rights such as freedom of religion and belief, the right to equal treatment, the right to free expression and the right to privacy all of which are protected under EU law and the European Convention on Human Rights), European Courts have been, in general, unwilling to interfere with this trend.

In the second and third sections, I discuss how the role of religion in Europe and the law regulating this role, are changing. The fourth section shows how, by and large, European Courts have decided not to interfere with this process. The paper then discusses the reasons why pan-European Courts such as the Court of Justice of the European Union and the European Court of Human Rights have taken such a hands-off approach before concluding with some broader points about why I think such a hands-off approach is by and large the least worst option available.

This paper focuses on Western Europe (roughly the 15 states that were EU members before 2004 excluding Greece but including Norway and Switzerland) as the issues I will be discussing arise in those states in ways that they do not arise in most of central Europe.

2. *How Is Religion's Role Changing in Europe?*

In international terms Western Europe, overall, stands out for its non-religious nature. It has some of the lowest rates of religious belief and practice in the world and those rates are declining rapidly.¹ In political terms, religious influence is also notably low and falling. Although many countries, like England, retain symbolic links to a particular faith, no country (other than the Vatican) in Western Europe is a theocracy.² In all states, politics and religion and law and religion are regarded as separate realms and there is no equivalent to the significant political influence of the Christian right in the United States or Brazil or the political Islam movements in many Muslim-majority countries.

That said, sociologist Jose Casanova has noted that, even though Christian churches have largely accepted the separation of religion and politics, they have remained active and influential in relation to what he terms, 'life world issues' by which he means issues related to the beginning and end of life, sex and the family.³ This has meant that laws in relation to abortion, assisted suicide, divorce and gay marriage have retained a Christian imprint.

¹ See for example the data on religious affiliation in European Commission, Directorate-General for Justice and Consumers, *Discrimination in the EU in 2015: Report* (European Commission 2015) <<https://data.europa.eu/doi/10.2838/499763>> accessed 23 August 2022, 437; and the data on attitudes towards religion and society in 'Being Christian in Western Europe' (The Pew Center, 29 May 2018) <<https://www.pewresearch.org/religion/2018/05/29/being-christian-in-western-europe/>> accessed 14 June 2022.

² See JTS Madeley and Z Enyedi (eds), *Church and State in Contemporary Europe: The Chimera of Neutrality* (Frank Cass Publishing 2003).

³ J Casanova, *Public Religions in the Modern World* (University of Chicago Press 1994) 41, 57.

Yet, in Western Europe, even this last bastion of religious influence has fallen in recent years. Divorce and abortion are now universally available. Gay marriage is now the law in every Western European country other than Italy and Switzerland and some microstates, and assisted suicide is steadily advancing. Strangely, at the same time as religion and religious influence has been declining, public debate has been marked by anxious discussion about the need to limit religious influence on public life and to reinforce the secular nature of our societies and states. In recent years, Western European societies have been convulsed by debates over the limitation of the right to mock religion, the promotion of illiberal values in some religious schools, proposals to enshrine a belief in secularism, sex equality and tolerance of sexual freedom as part of citizenship tests as well as the acceptability of religious symbols and religious clothing in public contexts.

This odd mix of religious decline and increasingly anxious debate around religious influence arises out of the reality that religion in Europe is linked to a whole series of other developments, notably migration and because the pattern of overall decline, conceals important differences. Western Europe has the combination of a very low birth rate and high levels of migration leading to significant changes in religious makeup. While the proportion of Christians, and particularly practicing Christians, in Western Europe is declining,⁴ the proportion of some minority faiths, particularly Islam, is rising rapidly.⁵

The regulation of the role of religion in Western European societies has therefore moved on from being largely a matter of striking a balance between Christianity and secular humanist influences and has become a multi-actor relationship between a large but declining Christianity, rapidly growing irreligion, and also a rapidly growing Islam which is the religion of the large majority of immigrants to Western Europe. National systems used to operating a system that emerged largely from conflict and compromise between Christian and secularist influences now find that the system has a new significant actor. Because in most of Western Europe a large Islamic population is a recent phenomenon, European Muslims find themselves living with a settlement whose boundaries were formed from the ceasefire lines that emerged from a long conflict between Christian and secularist influences in Europe whose boundaries

⁴ See (n 1) above.

⁵ See 'Europe's Growing Muslim Population' (Pew Research Center, 29 November 2017) <<https://www.pewresearch.org/religion/2017/11/29/europes-growing-muslim-population/>> accessed 14 June 2022.

were fixed without Muslims in mind and which may prove challenging and restrictive for them.

3. *How Is the Law Changing?*

The law regulating the role of religion in Western European societies shows, in recent times, a consistent pattern of the replacement of informal restrictions on religious practice and influence with more formal, legal restrictions. Interestingly, although it has been the most secular continent in the world for some time, the strict legal rules around the role of religion in Europe were notably unsecular. *De facto* secular societies coexisted with rules that were, on paper not very secular at all. A 2003 survey by John Madeley and Zsolt Enyedi showed that not a single European state, even France, had a relationship with religion that met the standards of institutional and symbolic separation then required by the US Supreme Court.⁶ Many European states retained state churches, others levied taxes on the faithful for the benefit of their religions, virtually all states subsidized religious schools and hospitals.⁷

What I take from this, is not that European states were actually heavily religious, but that the limitations on influence that undoubtedly existed took another form. While states on paper were endorsing and giving religion certain privileges, the actual impact of these privileges was qualified by social and cultural expectations that limited the actual influence of religion over law, politics and the state.

To take an example, England, Denmark, and Saudi Arabia, all have an official state religion. But obviously, what this means in real terms, for the relationship between religion and the state is very different in London and Copenhagen than it is in Riyadh. In England and Denmark there is an official religion but everyone is expected to know that in terms of substance, politics and law are largely separate from religion in a way that they are not in Saudi Arabia.

This 'let's pretend' or 'as long as you don't really mean it' approach that uses social and cultural norms to qualify the legal situation on paper extended beyond the symbolic relationship of the state to religion. For example, in relation to mockery of religion until recently at least ten Western European states had anti-blasphemy laws or equivalents on their

⁶ (n 2) above.

⁷ *Ibid.*

books.⁸ Yet, this coexisted with a vigorous culture of mocking religion and it was understood that, while the laws were not entirely a dead letter, it was expected that religion would put up with significant criticism and even mockery. In other areas, the law simply was not involved and social norms did all the relevant work. Most countries did not have rules around religious symbols at work but there was a social convention that people, by and large, were reticent about their faith in work contexts. It was also generally expected that migrants who became new citizens would be only too thrilled to embrace secular European ways so no one even thought about including a duty to do so in naturalization law. As Martin Conway's study of post-War democracy in Western Europe notes, the post-War period had seen the side-lining of the long tradition of Catholic opposition to liberal democracy,⁹ a process that was copper-fastened by the changes wrought by the Second Vatican Council. With the disappearance of the most prominent source of religious opposition to liberal democracy an assumption grew that the thinking of all religious traditions were ultimately likely to follow a similar course. Indeed, the term 'aggiornamento' which means 'bringing up to date' that was used by Pope John XXIII to describe the changes that he envisaged the Second Vatican Council would promote shows how these changes were viewed as synonymous with modernisation. If you believe that the embrace of liberal democracy by religion is inherently modern, then a certain complacency becomes inevitable. If you assume that all religious traditions that have shown opposition to liberal democracy are destined to follow the path taken by the Catholic Church and to drop such opposition, then partisans of liberal democracy will feel no strong need to defend it from religious opposition and to remove potentially illiberal religious privileges from the statute book. After all, if religious opposition to liberal democracy, and indeed, religious belief itself, were both in inevitable decline, what harm could these legal relics do? It is this complacent attitude that has now changed. European countries are less and less willing to leave the relationship between religion, state and law as a grey area and are increasingly using the law to impose black and white rules in this area.

⁸ 'Preliminary Report on the National Legislation in Europe concerning Blasphemy, Religious Insults and Inciting Religious Hatred' adopted by the Commission at its 70th Plenary Session (Venice, 16–17 march 2007) CDL-AD(2007)006-e <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2007\)006-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)006-e)> accessed 14 June 2022.

⁹ M Conway, *Western Europe's Democratic Age: 1945–1968* (Princeton University Press 2020) chapter 1.

As I noted elsewhere ‘the symbolic status granted to religion by the state or previously largely symbolic laws relating to matters such as blasphemy, have come to be seen in a new light as the cultural consensus that limited their impact breaks down. Therefore, just as the unused and symbolic powers of the British monarchy would be threatened by the growth in the United Kingdom of significant numbers of people who genuinely believed in monarchical government, the symbolic status of European religions has been called into question by the increase in the number of adherents to religious traditions whose relationship to politics and law has not been moulded by the same conflicts and compromises that have influenced the relationship between culturally entrenched forms of Christianity and the state in Europe.’¹⁰

This dynamic is visible in the way in which the nod and wink approach to blasphemy is failing to survive the post-Danish-cartoons, Salman Rushdie and *Charlie Hebdo* era. Since 2008 amongst western European states the United Kingdom,¹¹ Norway,¹² the Netherlands,¹³ Iceland,¹⁴ Denmark,¹⁵ Malta¹⁶ and Ireland¹⁷ have all abolished their anti-blasphemy laws. In addition, in 2013 EU foreign ministers unanimously agreed guidelines that call for the repeal of blasphemy laws within the context of EU foreign policy.¹⁸ A grey area in which blasphemy laws remained on the books but were largely unused, has been replaced with a much more black and white position.

The same is true in relation to the wearing of religious symbols in certain contexts. An expectation that people would be generally be fairly

¹⁰ R McCrea, *Religion and the Public Order of the European Union* (paperback edn, Oxford University Press 2013) 262.

¹¹ Criminal Justice and Immigration Act 2008.

¹² See ‘Norway Scraps Blasphemy Law after Hebdo Attacks’ *The Local* (7 May 2015) <<https://www.thelocal.no/20150507/norway-scraps-blasphemy-law-after-hebdo-attacks/>> accessed 14 June 2022.

¹³ E Janssen, ‘The Rise and Fall of the Offence of Blasphemy in the Netherlands’ in J Temperman and A Koltay (eds), *Blasphemy and Freedom of Expression* (Cambridge University Press 2017).

¹⁴ ‘Iceland Makes Blasphemy Legal’ (*BBC News*, 3 July 2015) <<https://www.bbc.co.uk/news/world-europe-33378778>> accessed 14 June 2022.

¹⁵ See ‘Denmark Scraps 334 Year-Old Blasphemy Law’ *The Guardian* (2 June 2017) <<https://www.theguardian.com/world/2017/jun/02/denmark-scraps-334-year-old-blasphemy-law>> accessed 14 June 2022.

¹⁶ ‘Repealing Blasphemy Law a Victory for Free Speech Says Humanist’ *The Times of Malta* (14 July 2016) <<https://timesofmalta.com/articles/view/repealing-blasphemy-law-a-victory-for-freedom-of-speech-says-humanist.618859>> accessed 14 June 2022.

¹⁷ Blasphemy (Abolition of Offences and Related Matters) Act 2019.

¹⁸ *Guidelines on the Promotion and Protection of Religion or Belief* (Luxembourg, 4 June 2013) Council of the European Union, Foreign Affairs Council Meeting.

reticent about their faith at work is being replaced by rules that mandate when people can and when they cannot wear religious symbols. In France, the obligation on civil servants to be religiously neutral has been interpreted and extended to cover all those working in government funded roles.¹⁹ Some German Länder have restricted the wearing of religious symbols for public servants (including in some cases teachers and in some cases such as Berlin, civil servants more generally) as part of moves to remove religious symbols from state offices in general.²⁰ Similar moves have been seen in Denmark where judges have been prohibited from wearing religious symbols in the courtroom²¹ and a ban on face-veiling has been introduced.²² In the private sector too, informal arrangements are being replaced by more black and white rules. In the leading EU case on religious symbols at work, *Achbita*, I think it is significant that, the employer had had an unwritten policy that prevented the wearing of political or religious symbols which had then been formalized into a written rule.²³

Similarly, the view that to be modern was to be secular had led to an expectation that migrants to Europe would inevitably embrace the idea of secular politics and sexual liberalism, even if they originated in much less secular and much more conservative societies. But this assumption has faded and is increasingly being replaced by measures that encourage the adoption of secular and sexually liberal approaches and in some cases, penalize those who reject such values. Between 2003 and 2007, 13 EU member states made the granting of long-term residence to

¹⁹ *Ebrahimiyan v France* ECHR [2015] 1041.

²⁰ See 'Discrimination in the Name of Neutrality: Headscarf Bans for Teachers and Civil Servants in Germany' *Human Rights Watch* (26 February 2009) <<https://www.hrw.org/report/2009/02/26/discrimination-name-neutrality/headscarf-bans-teachers-and-civil-servants-germany>> accessed 15 June 2022. See also, H Chang, 'Headscarf Debate in Germany: Taking It off or Putting It on?' (*European Academy of Religion and Society*, 1 January 2021) <https://europeanacademyofreligionandsociety.com/news/headscarf-debate-in-germany-taking-it-off-or-putting-it-on/#_ftn8> accessed 15 June 2022. It should be noted that, as Chang notes, the German Federal Constitutional Court has ruled that blanket bans on the wearing of headscarves by teachers to be unacceptable. A concrete threat to the peaceful running of a school or to the neutrality of the state must be shown.

²¹ US Department of State, '2021 Report on International Religious Freedom: Denmark' (2 June 2022) <<https://www.state.gov/reports/2021-report-on-international-religious-freedom/denmark/>> accessed 15 June 2022.

²² 'Danish Burqa Ban Comes into Effect amid Protests' *The Guardian* (1 August 2018) <<https://www.theguardian.com/world/2018/aug/01/danish-burqa-ban-comes-into-effect-amid-protests>> accessed 15 June 2022.

²³ *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions* NVECLI:EU:C:2017:203.

migrants subject to a compulsory integration test.²⁴ Many of these tests promote knowledge of, or even make the grant of residency or citizenship contingent on, being in agreement with secular and liberal principles. Tests in Germany,²⁵ the Netherlands²⁶, France²⁷ and the United Kingdom²⁸ all highlight issues of religious freedom, equality of men and women and tolerance of homosexuality.²⁹ In France, the Conseil d'Etat has upheld the refusal of citizenship to a Muslim woman on the grounds that her 'radical practice of her religion' which included the wearing of a niqab was incompatible with the basic values of French society including gender equality.³⁰ In 2010, the French justice minister refused to grant citizenship on the basis that the applicant forced his wife to be fully veiled and rejected the principles of secularism and equality of men and women.³¹

²⁴ See J Mourao Permoser, 'Civic Integration as Symbolic Politics: Insights from Austria' (2012) 14 *European Journal of Migration and Law* 174–98 at 174.

²⁵ In Germany migrants must pass both a German language test and a 'Life in Germany' test. The latter involves questions that require awareness of issues such as religious freedom, the equality of men and women and toleration of gays and lesbians. See: 'Integration Courses' and 'The Final Exam' Federal Office for Migration and Refugees: <<https://www.bamf.de/EN/Themen/Integration/ZugewanderteTeilnehmende/Integrationskurse/Abschlusspruefung/abschlusspruefung-node.html>> accessed 20 June 2022.

²⁶ The Netherlands requires integration courses for those intending to come to the Netherlands and for migrants living there; see: *Immigratie en Naturalisatiedienst*, 'The Civil Integration Exam' <<https://ind.nl/en/civic-integration-exam-abroad>> accessed 20 June 2022. The integration course covers matters such as freedom of religion, equality of men and women, same sex marriage and separation of religion and state (see the video accompanying the integration course at: <<https://www.naarnederland.nl/en/lesson-materials-english-edited-2>> accessed 20 June 2022).

²⁷ See in J-Y Blum Le Coat and M Eberhardt, 'Législations et politiques migratoires en France' in J-Y Blum Le Coat and M. Eberhardt (eds), *Les immigrés en France* (La Documentation française 2014) 37–56.

²⁸ See *Life in the United Kingdom: A Guide for New Residents* (3rd edn, The Home Office 2013).

²⁹ Issues of sexual freedom and particularly tolerance of homosexuality stand out as the most striking difference between the values of Muslims and non-Muslims. See R Inglehart and P Norris, 'The True Clash of Civilizations' *Foreign Affairs* [2003] March/April 62–70, whose authors characterize the differences between Muslims and non-Muslims are related to 'eros not demos' (that is acceptance sexual freedom, not democracy, is the greatest challenge for European Muslims) and AC Alexander and C Welzer, 'Islam and Patriarchy: How Robust Is Muslim Support for Patriarchal Values?' (2011) 21(2) *International Review of Sociology* 247–76. See also Sarfaz Mansoor's moving investigation of British Muslim identity in which he identifies homosexuality as a particular challenge S Mansoor, *They: What Muslims and Non-Muslims Get Wrong about Each Other* (Headline 2021).

³⁰ Conseil d'Etat, Séance du 26 mai 2008, Lecture du 27 juin 2008, n° 286798, *Faiza M.*

³¹ See 'France Denies Citizenship to Moroccan Man Who Forces Wife to Wear Full Veil' *The Guardian* (2 February 2010) <<https://www.theguardian.com/world/2010/feb/02/france-values-republic-veil-women>> accessed 20 June 2022.

These worries have extended to the education system where the schools have increasingly been placed under obligations to actively promote secular and liberal norms. In France, schools have historically been seen as having a role in promoting republican values of liberty, equality and fraternity and this has been reinforced with the 2004 ban on ostentatious religious symbols which has been justified by the political scientist Patrick Weil (who sat on the commission responsible for the recommendation to proceed with the law) on the basis of the need to disrupt the transmission of potentially oppressive identities to Muslim girls.³² In Denmark, even more radical measures have been taken. In areas that have high unemployment, high crime, low educational attainment and high numbers of migrants, children must attend publicly funded nurseries for 25 hours a week and must take classes in Danish values.³³ Even in the United Kingdom, which has long seen itself as more pragmatic and less ideological than France, things have been moving in a French direction. Following on the controversy in relation to what was being taught in some Muslim-majority schools in Birmingham, the government required all schools to teach what they called 'Fundamental British Values' which include democracy, individual liberty, tolerance of those of different beliefs and mutual respect.³⁴

4. *Response of European Courts*

Many of these laws raise serious issues in terms of European law. Restrictions on the wearing of religious symbols restrict rights to freedom of religion, freedom of expression and privacy rights guaranteed by the European Convention on Human Rights and EU law. Integration tests can be seen as discriminatory and also restrictive of religious freedom. Laws allowing schools to promote particular values potentially breach the right of parents to have their beliefs respected by the education system. Blasphemy laws restrict freedom of expression.

³² See P Weil, 'Laïcité is a most liberal legal frame: Reflections on the work of the Stasi Commission' in K Alidadi and M-C Foblets (eds), *Public Commissions on Cultural and Religious Diversity* (Routledge 2018).

³³ See Office of the UN High Commissioner for Human Rights, 'UN Human Rights Experts Urge Denmark to Halt Sale of "Ghetto" Buildings' (23 October 2020) <<https://www.ohchr.org/en/press-releases/2020/10/un-human-rights-experts-urge-denmark-halt-contentious-sale-ghetto-buildings?LangID=E&NewsID=26414>> accessed 20 June 2022.

³⁴ See The Department of Education, 'Guidance on Promoting British Values in School Published' (27 November 2014) <<https://www.gov.uk/government/news/guidance-on-promoting-british-values-in-schools-published>> accessed 22 June 2022.

EU law historically has been very strong in its commitment to non-discrimination. Cases such as *Defrenne*³⁵ in which the principle of equal pay for equal work were given a broad interpretation were key to the development of the EU legal order while the Court of Justice has repeatedly stated that non-discrimination is a fundamental principle of the Union's legal system.³⁶ Many of these laws are potentially discriminatory, both because they penalize religions, such as Sikhism and Islam that place emphasis on embodied practices such as wearing veils or turbans rather than the belief emphasised by Christianity but also because, their impact is so often disproportionately on women (this is particularly the case in relation to laws that restrict the wearing of the headscarf in certain contexts which have a disparate impact on Muslim women on grounds of sex as well as on grounds of religion).

What is more, it is undeniable that some (though not all) of those supporting these restrictive laws do not do so out of the most honourable of motives. The *Rassemblement national* in France has become a champion of secularism and the equality of men and women, not because of sincere commitment but because its leaders have discovered that these issues can be a stick with which to beat migrant-origin communities. This can put a particularly ugly complexion on laws, such as those discussed above, which also tend to have a disproportionate impact on ethnic minorities.

However, despite these concerns, both the Court of Justice of the European Union and Strasbourg's European Court of Human Rights have, in general, refused to intervene by finding that these laws violate European legal norms. A few examples will suffice. The latter Court has turned down all of the challenges to France's restrictions on religious symbols in the public service and in school, repeatedly stating that secularism is compatible with the values of the European Convention on Human Rights on the grounds inter alia that it is one way of promoting religious coexistence.³⁷ Indeed, in *SAS v France*, the Court was willing

³⁵ Case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* ECLI:EU:C:1976:56.

³⁶ See for example, recognition of the principle of non-discrimination as a self-executing general principle of EU law in Case C-144/04 *Werner Mangold v Rüdiger Helm* ECLI:EU:C:2005:709.

³⁷ See *Ebrahimian v France* [2015] ECHR 1041, *Dogru v France* (2009) 49 EHRR 8; *Ranjit Singh v France* App no 27561/08 (ECtHR, 30 June 2009); and *Aktas v France* App no 43563/08 (ECtHR, 30 June 2009).

to take this notion of coexistence beyond the state sector and upheld the prohibition on public face veiling on the basis that it was a legitimate means to try to 'live together'.³⁸

The Strasbourg court has also been very hands off in relation to religious symbols in schools, ruling in *Dahlab v Switzerland*³⁹ that the Swiss authorities were entitled to require teachers not to wear religious symbols while also holding in *Lautsi v Italy*⁴⁰ that Italy could retain crucifixes in schools provided that the overall effect was not oppressive. Even in relation to blasphemy, where, as noted above, there is rising political consensus, the Court has been notably unwilling to second guess national choices and has refused to overturn blasphemy laws in Austria⁴¹ and Turkey.⁴² The Court of Justice of the European Union has also been hands-off in its cases ruling in *Parliament v Council*⁴³ that integration conditions for migrants were not, per se, a violation of fundamental rights and holding in *Achbita*⁴⁴ that private employers could require their employees not to wear religious symbols at work provided that the ban was consistently enforced and did not target any one faith.

It will already be clear that a common theme in these cases is consistent deference towards the state. When it comes to regulating religion's role in society, both European Courts have almost never intervened. European judges have been content for states to restrict religious symbols at work or not to, to have religious symbols in the classroom or to ban them, to ban blasphemous speech or not to. All they have generally done is, on occasion (most notably in the rulings of the Court of Justice in *Achbita* and *Bouagnaoui*) to require that such laws are applied in a consistent and proportionate way.⁴⁵ The main possible exception to this hand-off approach has been the restrictive approach taken towards exemptions permitting religious employers to discriminate against employees to protect their ethos. In this area, which mainly effects

³⁸ *SAS v France* [2014] ECHR 695.

³⁹ *Dahlab v Switzerland* [2001] ECHR 15.

⁴⁰ *Lautsi v Italy* [2011] ECHR 2412.

⁴¹ *E.S. v Austria* App. No. 38450/12 (ECtHR, 25 October 2018).

⁴² *I.A. v Turkey* Case No. 42571/98 (ECtHR, 13 September 2005).

⁴³ Case C-540/03 *Parliament v Council* [2006] ECR I-5769.

⁴⁴ n 23 above.

⁴⁵ See R McCrea 'Faith at Work: The CJEU's Headscarf Rulings' (*EU Law Analysis Blog*, 17 March 2017) <<http://eulawanalysis.blogspot.com/2017/03/faith-at-work-cjeus-headscarf-rulings.html?m=1>> accessed 20 June 2022.

culturally entrenched Christian faiths that have a large and long-established role in the provision of healthcare and educational services, the Court of Justice (in *Egenberger* and *IR v JQ*) has interpreted EU anti-discrimination law in ways that restrict the ability of states to provide wide exemptions to religious employers.⁴⁶ This could be seen as an incidence of the mirroring of the increased restrictions on religious influence seen at Member State level. More importantly for my purposes, these two rulings restricting the scope of exemptions from anti-discrimination law granted to religious employers in Germany, is relatively permissive in that it does permit such exemptions to be granted, they just require that any exemptions be proportionate in their impact on other rights. This judicial reluctance to intervene in relation to the regulation of religion's role in society is not simply a matter of the Strasbourg and Luxembourg courts not taking religious freedom seriously. Indeed, when states attempt to interfere with core religious functions by preventing churches from operating by imposing onerous or discriminatory registration rules, the Strasbourg Court has been notably willing to intervene. In other words, the Strasbourg Court takes religious freedom seriously and does not defer to states in the face of attempts to curtail core religious practices such as the freedom to establish a religious group and the right of believers to associate with each other and worship freely.⁴⁷ But when it comes to the broader issue of religion's role in society as reflected in questions such as blasphemy laws, exemptions from discrimination rules and laws that seek to promote acceptance of secularism and sexual freedom in the context of immigration law and the education system, a much more deferential approach on the part of both the Strasbourg and Luxembourg courts emerges.

This timidity in relation to state attempts to regulate the role of religion in society, has been heavily criticized by many scholars. The courts have been accused of being cowardly and being complicit in discrimination

⁴⁶ See Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* ECLI:EU:C:2018:257 and Case C-68/17 *IR v JQ* ECLI:EU:C:2018:696. See also 'Salvation outside the Church?: The CJEU Rules on Religious Discrimination in Employment' (*UK Human Rights Blog*, 20 April 2018) <<https://ukhumanrightsblog.com/2018/04/20/salvation-outside-the-church-cjeu-rules-on-religious-discrimination-in-employment-dr-ronan-mccrea/>> accessed 22 June 2022. This approach was largely followed in Joined Cases C-804/18 and C-341/19 *Ix v Wabe e.V. and MH Muller Handels v MJ* ECLI:EU:C:2021:594 though a requirement of a 'genuine need' to restrict religious expression (implicit in the *Achbita* ruling) was made explicit.

⁴⁷ See for example *Church of Scientology of St Petersburg and Others v Russia* [2014] ECHR 1019 and *Genov v Bulgaria* [2017] ECHR 275.

or of stigmatizing minorities themselves.⁴⁸ From my point of view, the courts have certainly been cautious, even timid on occasion. There has been an awful lot of ink spilled about how far courts should go, what counts as too activist or not active enough. What is more interesting to me is to look at why? Why is it both that Western European states are turning to the law to regulate religion's role in society, usually in a more restrictive way, and why is it that European courts have been so cautious and deferential in reacting to these changes.

5. *Why the Turn to Law?*

What these laws represent above all is a loss of confidence. It would never have occurred to secularists of the 1960s or 1970s to pass a law to encourage the secularization of migrants to Europe and their descendants. Like broader European society of the time, secularists in that era were full of post-colonial arrogance that presumed that because secularism had been achieved in Europe, it was the way of the future that 'less developed' societies would follow in due course. They were drawing on over a hundred years of academic certainty from 19th-century foundational figures like Max Weber⁴⁹ and Emile Durkheim⁵⁰ onwards right up to the 1990s, that the decline of religion and secularization of society was an inevitable by-product of modernization. Scholars were certain that as societies modernized, religion was certain to decline. That confidence has gone. The last few decades have seen the emergence of modern, wealthy societies in the Gulf that did not become secular. What is more, across the Muslim world, religion has become an ever more powerful element of politics as the 1980s and 1990s wore on. By 1999, sociologist David Berger, a proponent of inevitable secularization theory, conceded that, outside of Europe, the world was 'as furiously religious as ever'.⁵¹

⁴⁸ See for example E Spaventa, 'What Is the Point of Minimum Harmonization of Fundamental Rights?: Some further Reflections on the *Achbita* Case' (*EU Law Analysis Blog*, 21 March 2017) <<http://eulawanalysis.blogspot.com/2017/03/what-is-point-of-minimum-harmonization.html>> accessed 20 June 2022. See also E Brems, 'Islamophobia and the ECtHR: A Test Case for Positive Subsidiarity for the Protection of Europe's Long-Term Migrants?' in B Çali, L Bianku and I Motoc (eds), *Migration and the European Convention on Human Rights* (Oxford University Press 2021).

⁴⁹ M Weber, *The Protestant Ethic and the Spirit of Capitalism* (Scribner's 1930).

⁵⁰ É Durkheim, *The Elementary Forms of the Religious Life* (Oxford University Press 2001).

⁵¹ P Berger and G Weigel (eds), *The Desecularization of the Modern World: Resurgent Religion and Modern Politics* (Erdemans Publishing Company and Public Policy Center 1999).

At the same time, historians, political theorists and legal theorists have shown us that secularism is neither a default nor neutral. Mark Lilla and others have shown how the idea of politics as an arena distinct from religion grew as a response to the specific problems caused by religious conflict in Europe in the 16th and 17th centuries.⁵² Charles Taylor and others showed that secularism as Taylor put it grew 'like weeds' in the cracks of Christian theology and how it has undeniably Christian origins and how it impacts more heavily on non-Christian forms of faith.⁵³

As the liberal Muslim writer Shadi Hamid has noted, there is simply no reason to assume that predominant patterns within Islam will follow the predominant pattern of European Christianity and accept separation of religion and state. After all, as he points out, the two faiths have very separate histories and Islam has its own rich intellectual traditions. Why, Hamid argues, should we be surprised that the two faiths have different approaches to the relationship of law, politics and religion?⁵⁴ Once we discard unevidenced and arrogant-colonialist assumptions that the particular ways of Europe are the innovative ways that all will follow, a certain secularist loss of confidence is inevitable. When large-scale migration to Europe from more devout and mainly Muslim areas of the world in the postwar period, arrogant-colonialist assumptions were all the rage in Europe. As the French scholar Olivier Roy put it, no one was concerned when a grandmother from the Rif Mountains wore a hijab after migrating to France. But when her French raised and educated granddaughter did the same they found it profoundly disturbing as it challenged deep-seated ideas they had about what was modern and who the future belonged to.⁵⁵ A symbol of a fading religious past seems fine, a symbol of an increasingly religious future seems frightening.

Viewed in this light, it appears that European states no longer have sufficient confidence to leave the law around religion a grey area and to rely on social norms or supposedly inevitable historical forces to deliver limits on religious influence. Instead they are pressing the law into action to reinforce those limits. Having assumed that history had a direction and that that direction made societies progressively more secular, Western European societies have lost that secularist self-confidence. The current majority which is favourable to restrictions on religious

⁵² M Lilla, *The Stillborn God: Religion, Politics and the Modern West* (Knopf 2007).

⁵³ C Taylor, *A Secular Age* (Harvard University Press 2007).

⁵⁴ S Hamid, *Islamic Exceptionalism: How the Struggle over Islam Is Reshaping the World* (Saint Martin's Press 2016).

⁵⁵ O Roy, *Secularism Confronts Islam* (Columbia University Press 2007).

influence on law, politics and society is acting much more like a majority that feels the historical and demographic tide is running against it and that the growth of more devout communities will in the future outweigh the current decline in Christianity. No longer as confident as it once was that it will be the majority in the future, the secular majority is now trying to use its current dominance to buttress its position by using the law to actively promote secular norms. In effect this amounts to an attempt to use the law to do the job of delivering secularism and freedom from religion that those who favour these principles were previously confident that 'history' would deliver for them.

This approach has many drawbacks. Law is a blunt tool. Freedom of religion and belief is a key fundamental right and liberals are rightly worried by the restrictions on individual autonomy involved in laws such as the French legislation banning face veiling in public. Laws subjecting the beliefs and opinions of migrants to scrutiny appear to go against the key distinction between regulating actions and beliefs and to run counter to the liberal desire attributed to Queen Elizabeth I not to 'open windows into men's souls'. Discrimination lawyers are rightly worried at the impact on racial and religious minorities of laws restricting religious symbols at work. In addition, the cynical use of principles such as gay rights, feminism or secularism by Marine Le Pen and others to exclude can make otherwise worthy principles seem suspect. The courts have a valuable role to play in protecting fundamental rights and vulnerable minorities and European courts have been one of the main organs through which discriminatory or illiberal laws have been successfully challenged in the past.⁵⁶ Why then, do I think that, by and large the two main European courts have been right to take the hands-off approach in relation to challenges to the proliferation laws that are increasingly restrictive of religion's role in law and society?

6. *Doubt*

The answer to that question is 'doubt'. When European courts intervene either to provide binding interpretations of EU legislation and the

⁵⁶ From many possible examples see the ruling of the Court of Justice on sex discrimination *Defrenne* (n 31), or the ruling of the European Court of Human Rights on discrimination against Roma children in *D.H. and Others v Czech Republic* App no 57325/00 (ECtHR, 13 November 2007) or the rulings of both courts on recognition of same sex relationships (Case C-673/16 *Coman and Others v General Inspectorate for Immigration and Ministry of the Interior* ECLI:EU:C:2018:385 and *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010)).

requirements of the EU legal order or to find a that a particular law violates the European Convention on Human Rights, they set out an approach that will bind a large number of states. Such a course of action requires a high degree of confidence on the part of the court that, in the case of religion's role in society, states who toughen up restrictions on religious influence or religious expression are acting illegitimately or excessively.

Yet how can the courts in Europe have such certainty? Yes, some of the laws may be backed by some people for the wrong reasons, but that is a perennial problem in law (if a law restricting ritual slaughter is passed with most deputies motivated by a desire to avoid animal suffering but some motivated by discriminatory motives, how can we distinguish the role played by the good and bad reasons?).

There are good reasons to wish to maintain the limits on religious influence over law and politics that have grown up in Europe over the decades. As a person who grew up in a state (Ireland) where religion held significant political power and which criminalized male homosexuality until 1993, I know this too well. Given the teachings of most mainstream religions, religious influence over law and politics is likely to be particularly bad for women and bad for gays and lesbians, among others.

When politics is conducted on religious lines swing voters can disappear. With eternal life at stake the stakes of political conflict can become frighteningly high. As Lilla says in his discussion of Hobbes' approach to religion 'the reason human beings in war commit acts no animal would commit is, paradoxically, because they believe in God. Animals fight to eat or reproduce; men fight to get into heaven'.⁵⁷ Now, this is not strictly true as humans can behave sadistically for a range of reasons. In addition, religion is not the only means through which intractable political disputes can arise and even conflicts that are seen as religious will also have other elements to them. But that does not mean that Hobbes, Lilla and others were wrong to view religiously infused politics as particularly apt to produce intractable and ferocious political conflict. As Fukuyama notes, Europe's wars of religion in the 16th and 17th centuries 'were driven by a range of economic and social factors...but they derived their ferocity from the fact that the warring parties represented different Christian sects that wanted to impose their particular interpretation of religious dogma on their populations'.⁵⁸ To

⁵⁷ M Lilla (n 52) 84.

⁵⁸ F Fukuyama, *Liberalism and Its Discontents* (Profile Books 2022) 6.

take some examples from the contemporary world, political conflicts in Israel, Iraq and Syria all draw on many different sources but their intractable nature is certainly reinforced by the religious character of much of the political division.

In his excellent history of Post-War Western Europe,⁵⁹ Tony Judt sought to explain why, during the 1970s and 1980s, the baby boom generation turned against social democratic politics in favour of the tax cutting ideology of Ronald Regan and Margaret Thatcher. For him what had happened was that the welfare state had so successfully eliminated the pervasive uncertainty that had blighted the lives of previous generations that those who had grown up knowing nothing but the security welfare systems provided took that security for granted. Without experience of uncertainty they could no longer imagine why it had been so necessary to establish a welfare state in the first place and resented the high taxes and regulatory burdens it imposed. Similarly, most of Western Europe has not had direct experience of religiously based political competition or religious domination of political life. Accordingly, many Europeans have difficulty fully valuing the benefits that the limits that have developed over religious influence over law and politics have brought.

Though it is largely taken for granted, it is remarkable and extremely historically rare that, currently, across Europe people, by and large, have freedom to believe or not believe and to live in according to religious tenets or to sin away as they please. The kind of restrictions on religion that have proved controversial in recent times such as limits on the wearing of symbols of religion or belief at work,⁶⁰ requirements to abide by non-discrimination rules in relation to sexual orientation⁶¹ or a protection of the right to mock religious beliefs⁶² compare very favourably with the kinds of punishment of heretics and persecution of religious minorities and those whose life-plans and identities clashed with predominant religious norms that have been the norm in European history. Indeed, they also compare very favourably with the current approach adopted in many other areas of the world, most notably many Muslim-majority societies where legal restrictions on apostasy, atheism and

⁵⁹ T Judt, *Postwar* (Penguin 2005).

⁶⁰ See *Eweida and Others v United Kingdom* ECHR [2013] 37; see also *Ebrahimian v France* (n 37).

⁶¹ *Ibid* *Eweida*.

⁶² The controversies around insulting cartoons in the *Jyllands Posten* in Denmark and *Charlie Hebdo* in France are notable instances.

sexual conduct that violates religious norms are the norm. This should underline to us just how rare and precious the degree of freedom of and from religion that is currently enjoyed in Europe actually is, even if discrimination on grounds of religion and restrictions that impinge on religious practices and identities have not been entirely removed.

Limits on religious influence over law and politics, such as those that apply in most of Western Europe, do have downsides but also serve valuable goals. They can be a way to avoid the undesirable effects of religiously driven political conflict and can be a vital principle for those such as women or gays and lesbians who, given the predominant teachings of the main religions in contemporary Europe, may suffer under a more religiously influenced system. It is therefore legitimate for states to wish to uphold the limits on religious influence over law and politics that have been achieved in Europe. The best question is not therefore if laws that seek to promote such limits are legitimate. The better question is whether these laws are they unfairly targeted, excessive or ineffective.

They may well be. There is a significant danger that the legitimate goal of restricting religion in some instances will be abused by those with discriminatory agendas and used in a selective way to oppress certain groups (particularly, in the context of today's Europe in which religion is mixed up with issues of migration, race and post-colonialism, Europe's Muslims). This is something in relation to which European courts should intervene. Indeed, the Court of Justice has, in other contexts, a long history of requiring that national rules that limit a right protected by EU law are applied consistently and fairly across the board. For example in *Conegate*,⁶³ the Court of Justice ruled that the United Kingdom could only prohibit the importation of inflatable pornographic dolls if it could show that it also prohibited the domestic sale and production of the same product. The same desire to avoid selective targeting (albeit in the morally more important arena of targeting of adherents of particular faiths) is seen in one of the limited number of instances where a European Court has intervened in relation to restrictions on religion: in the *Achbita* and *Bougnaoui*⁶⁴ cases on religious symbols at work, the Court of Justice emphasized that restrictions on religious symbols at work could be justified only if they are part of a policy covers all signs of religion or belief that is 'genuinely pursued in a consistent and systematic manner'.⁶⁵

⁶³ Case 121/85 *Conegate Ltd v HM Customs and Excise* ECLI:EU:C:1986:114.

⁶⁴ Case C-188/15 *Asma Bougnaoui and ADDH v Micropole SA* ECLI:EU:C:2017:204.

⁶⁵ *Achbita* (n 23) para 40.

It is also possible that even if fairly applied, we may find that such laws may be going further than is necessary and that they may produce a counterproductive sense of victimization and exclusion that outweighs any good they might do. But given that we are in the first few decades of dealing with this new kind of religious diversity in Europe and given that no European country feels that it has hit on perfect solutions, no one can yet be sure that this is the case. Once we drop the arrogant, colonialist and unevidenced assertion that history has some kind of inevitable arc that bends towards secularism, liberalism and that consequently freedom of and from religion are bound to flourish no matter what approach we take, we realize that we just cannot yet know what is the best way to proceed.

Europe has undergone three enormous changes in the last 70 years any of which on their own would be sufficient to produce endless unpredictable consequences. After more than a millennium in which Christianity exercised overwhelming social and cultural influence, levels of belief and practice have suddenly collapsed. For centuries, most Europeans went about their day to day lives believing they were being observed and judged by the Christian God. Most no longer do. The scale of changes that that will bring about can only be imagined.

Secondly, after centuries in which non-Christian religious communities were a very small minority, Western Europe has, since 1960, developed a large and rapidly growing Muslim minority and significant minorities of other faiths. Many critics of the timidity of the European courts speak as if there is a large store of precedents of such changes going off smoothly and that consequently any worries that negative consequences may ensue are the product of prejudice or delusions. But that is not the case, we do not have precedents for the kind of religious change Europe is currently going through. Indeed, there are many examples from other areas of the world of societies that have salient religious divides, such as Lebanon, Cyprus, Iraq and Nigeria, which find that they have to spend a lot of time and effort seeking to manage religious divisions and often have to abandon democracy for con-sociational democracy (as in Northern Ireland) where majority rule is replaced by community vetoes.

Finally, Europe has undergone a revolution in terms of gender and sexuality where roles, institutions and norms that governed people's life course for centuries have suddenly been overturned. This also has

had the effect of making a duty to respect ‘basic values’ seen in some integration tests or policies such as the promotion of ‘Fundamental British Values’ in schools, a much more demanding standard for arrivals from devout conservative places than it would have been before. A migrant from Algeria or Pakistan arriving to Paris or London in 1950 would have found things more relaxed than at home but encountered a familiar basic set up. Sex before marriage was taboo, homosexuality regarded with near universal disgust and both law and society promoted the subordination of wives to husbands. In 2022, a migrant making the same journey will leave a still-conservative atmosphere and arrive in a place where not having sex until you are married is regarded as weird, where equality between spouses is the law and where homophobia not homosexuality is regarded as a (secular) sin. A values gap has become a values chasm. The demand that migrants accept the basic values of their new home is one I support but we should recognize that it has become much more demanding than before and that it is liberals who have moved the goalposts by including historically unprecedented sexual freedom and gender equality as part of society’s basic values.

Any one of these three changes would produce enormously uncertain and unpredictable effects. Taken together, it means that all of the chips are currently in the air and confident predictions should be seen as inherently suspect. A post-Christian,⁶⁶ partly Muslim⁶⁷ and sexually free Europe is a Europe that is very recent and very different from what went before. No one with any historical perspective can think that we can already be confident about how things in such a Europe will turn out. There is often an unhelpful tendency to view history in what might be called a ‘the end’ way. By this I mean the kind of approach that believes that some recent social changes represent an end point rather than a particular stage in a story that may develop in a number of ways. One example of “‘the end’ thinking’ is the approach to the very recent revolution in attitudes towards sexuality in Western Europe which believes that the story of this revolution can be summarized (admittedly simplistically) as follows: ‘Gays and lesbians were oppressed for

⁶⁶ The decline in both nominal Christianity and levels of Christian belief in Western Europe is steep and shows no sign of stopping, see n 1 above.

⁶⁷ By 2050 a large number of European states will have significant Muslim populations, see n 5 above.

centuries in Western Europe. Then there was decriminalization in some then all countries. This was followed by anti-discrimination laws and, finally, same-sex marriage. The End'. A similar view is often prevalent in relation to the emancipation of women under which the story runs 'Women were oppressed for centuries, then we had female suffrage, then reforms to laws on marriage sex and work. The End'.

Such an approach is absurdly deterministic. There is no way of knowing whether the twenty five years of tolerance of homosexuality after centuries of oppression marks the end of such oppression or merely a blip, or whether fifty years of sex equality has brought a definitive end to wholesale and longstanding oppression of women in Europe. What seems permanent often passes away. The history of Europe is littered with countries that existed for centuries and whose names no one remembers anymore. Burgundy was a state for almost 1400 years but is now barely remembered. If you think that feminism once achieved cannot be undone, talk to some Iranian women. History does not have an end. It is ongoing and unpredictable as those who thought that the decision of the US Supreme Court in *Roe v Wade* brought an end to the question of the legality of abortion in the United States have recently found out.

If we accept that secularism and freedom from religion are desirable but are not destiny and not guaranteed to win out by some inevitable historical process, the question becomes what our societies should do to uphold them. In my view, the changes the Europe has undergone in relation to religion are so large and so recent that the judges of European courts cannot possibly be confident enough to say that they know what options are best-placed to reconcile the effective protection of these values with other goals and to impose those options across the entire continent in the case of the Strasbourg Court or across the whole of European Union in the case of the Court of Justice of the European Union.

After all, many in France argue that if they had been just a little less secular and more multicultural they would be better off⁶⁸ but many in

⁶⁸ See M Schain, 'The Success and Failure of Integration Policy in France and Britain: Convergence of Policy and Divergence of Results' in M Prugl and M Thiel (eds), *Diversity in the European Union* (Springer 2009) and D Sanchez, 'France's Cultural Assimilation Model Has Failed' (*Medium*, 5 April 2019) <https://medium.com/@danielsanchez_/https-medium-com-danielsanchez-frances-cultural-assimilation-model-food-for-thought-af6109f631f1> accessed 22 June 2022.

the Netherlands⁶⁹ and the United Kingdom⁷⁰ argue that they would have been much better off if they had been less multicultural and more secularist in their approach. In relation to the question of whether the best way to manage our increasing religious diversity is to adopt a French-style approach under which we all hold off expressing our religious identity in some shared contexts or follow a British-style, 'let it all hang out' approach, the jury is still out. We are still in the early stages of this process and do not have enough information for anyone to be certain that their approach is guaranteed to succeed. Europe is still experimenting with what works best. Indeed, some countries have been switching back and forth between different approaches, as in relation to the British approach to the promotion of values in schools which, as noted above, has become notably more 'French' in recent years. In these circumstances, it would be the height of intellectual arrogance for either European court to decide, at this stage, that it had hit on the winning formula, particularly as many of the legal texts being interpreted by the Strasbourg and Luxembourg Courts can be amended only by unanimous agreement of all relevant states.

That does not mean that the restrictive laws I have discussed are the best way of doing things. They should, often, be criticized. But the critics should have the humility not to act as if they themselves have the ideal solution, especially when this solution is not articulated. Too often academia consists of pure critique with no solutions. Worse, that pure critique is often based on unarticulated certainties that we all know what works best.

Those who reject laws that seek to reinforce the restrictions on religious influence over politics, laws restricting religious expression in certain shared contexts, and laws which require migrants to sign up to liberal or secular principles as a condition of migration or naturalization should be clear the basis on which they are doing so. If it is because they do not think secularism or freedom from religion are worth defending,

⁶⁹ For an account of changing Dutch approaches see I Buruma, *Murder in Amsterdam: The Death of Theo Van Gogh and the Limits of Tolerance* (Penguin 2006).

⁷⁰ For a balanced take see K Malik, 'The Failure of Multiculturalism: Community versus Society in Europe' *Foreign Affairs* (March/April 2015) <<https://www.foreignaffairs.com/articles/western-europe/2015-02-18/failure-multiculturalism>> accessed 22 June 2022. See also, 'Multiculturalism Has Failed, Believe Substantial Minority of Britons' *The Guardian* (14 April 2018). <<https://www.theguardian.com/world/2018/apr/14/multiculturalism-failed-substantial-minority-britons-integration-rivers-blood-enoch-powell>> accessed 22 June 2022; and 'State Multiculturalism Has Failed Says David Cameron' *BBC News* (5 February 2011) <<https://www.bbc.co.uk/news/uk-politics-12371994>> accessed 22 June 2022.

that is fine, but they should say so explicitly. If it is because they think that any such laws are unnecessary, that is also fine, but they should then explain why they think such laws are unnecessary and why their view should not be seen as one that relies on an unevidenced belief that religion always becomes liberal or fades through some inevitable historical process.

Perhaps some critics of the timidity of European Courts think that principles such as secularism and freedom from religion are worth defending but that these laws are not the best way to achieve this goal. This may well be true, but to make such a critique effective is it necessary for critics to make clear what alternatives they have in mind that they think will succeed in protecting secularism and freedom from religion in a better way.

Solutions from academics are important because such solutions are so difficult to come up with. It is not the case that societies are naturally fair, free and just and that privilege or disadvantage are like stains on a naturally perfect cloth, that can be scraped or washed off. Often, as when one particular religion has played a disproportionately large, sometimes foundational role in national culture, an absolutely neutral approach to religion⁷¹ is unrealistic and some privilege and unfairness will be woven into the cloth from the beginning. As Taylor rightly said, sustainable political communities are not made up of 'a scratch team of history with nothing more in common than the passenger list of some international flight'.⁷² It can be very hard to work out just how to remove woven-in unfairness without tearing the fabric altogether. That is the kind of difficult, non-applause gathering work that it is important for academics to do.

I for one have serious reservations about European states' turn to law in their attempts to cope with the changing landscape of religion in Europe. You do not want to fall into the trap identified by G K Chesterton when he noted how many people opposed religion because it was oppressive but then were willing to put up with endless oppressive measures to get at religion. These laws may compromise liberal values too much. They may not even work and could easily backfire. I certainly think that those who propose them need to think carefully about

⁷¹ An absolutely neutral approach would rule out, for example, symbols, such as the Swedish flag, that bear an imprint of Sweden's Christian past or the use of the shamrock as a symbol of Ireland or the having Christmas as a public holiday.

⁷² C Taylor, 'Liberal Approaches and the Public Sphere' Discussion Paper 15 (The Centre for the Study of Global Governance, London School of Economics 1995) 19.

how they appear in the light of Europe's awful colonial past. But I also recognize that we are all feeling our way in the dark. The EU is already struggling in Poland and Hungary with its failed bet on the 1990s 'end of history' view that liberal democracy, once achieved, could never be reversed. A further bet on theories of historical inevitability would be unwise.

As Trispiotis has noted, the Strasbourg Court has recognized that safeguarding 'peaceful coexistence' is a legitimate goal that may justify proportionate restrictions of fundamental rights.⁷³ Europe has undergone changes of such a magnitude in relation to religion and its place in society that no one can be certain how things will turn out, or be certain of what is the best way to ensure that religious coexistence is sufficiently safeguarded and that the freedom of and from religion that has been achieved in Europe remain intact. In these circumstances European Courts have been right to be modest about their ability to identify ideal solutions.

⁷³ I Trispiotis, 'Two Interpretations of "Living Together" in European Human Rights Law' (2016) 75(3) Cambridge Law Journal 580, 590–6. On the issue of accommodating measures designed to protect secularism, *per se*, within the text of Article 9 of the European Convention on Human Rights, see R McCrea, 'Secularism before the Strasbourg Court: Abstract Constitutional Principles as a Basis for Limiting Rights' (2016) 79(4) Modern Law Review 691.