Introduction

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The present book is based on a workshop that brought together legal and political theorists to discuss tensions and dilemmas raised by religion with respect to secular law and political authority. The interdisciplinary workshop was organized in Florence, at the European University Institute in 2008. Florence is an ideal *locus symbolicus* for such an intellectual enterprise. At the height of its cultural and political power, Florence was torn by the political–religious conflict between the Guelfs and the Ghibellines, a conflict whose early stages were immortalized by Dante's *Divine Comedy*. The Ghibellines strongly believed that the Emperor should represent the ultimate political authority, while the Guelfs wanted a central political role for the Catholic Church, and viewed the Pope as having both spiritual and temporal authority. This political–theological conflict, which forced Dante into exile away from his beloved Florence, was acrimonious and violent. Nonetheless, the conflict also nourished a range of novel political ideas concerning the relation between state and church. Machiavelli, together with other outstanding fellow Florentines, stands for one beginning of modernity and modern political thought in Europe. He proposed novel views on the nature of authority before Europe's wars of religion and the influential work of Hobbes, Locke (see Chapter 1) and Bayle (see Chapter 2).[1]

The relation between religion and secular state as a central question for modernity has, however, been at points obscured and masked by other problems. During the Cold War, the question was, by and large, eclipsed by the gigantomachia between capitalism and communism, and its perception was shaped by the conviction that modernization would cause the ineluctable decline of religion.[2] This teleological image of modernization

[1] M. Viroli, *Machiavelli's God* (Princeton University Press, 2010).

[2] For a *locus classicus* of this belief in contemporary sociology, see P. L. Berger, *The Sacred Canopy*: *Elements of a Sociological Theory of Religion* (Garden City, NY: Doubleday, 1967).

as secularization has recently been discarded by influential sociologists. Scholars such as P. Berger or J. Casanova have replaced the theory of secularization with that of desecularization or deprivatization of religion.[3] From this perspective, the fact that religion has returned to the public sphere brings into question the notion of the incompatibility between modernity and religion, and leads to the image of "multiple modernities."[4] Nonetheless, the now-popular idea of the "return of religion" is in part an academic myth. Religion is not like a volcano that, dormant for some time, is erupting over again. During the Cold War, religiosity did not shrink in a decisive way. Moreover, its hostility to religion notwithstanding, communism represented, with its myths, rituals and messianic "structure," a continuation of religious experience, and a substitute for and a distortion of it. It is not surprising that the communist experience was analyzed, by J. Benda and E. Voegelin to M. Eliade and R. Aron, as a "secular religion."

In the vacuum left by the collapse of communism in 1989, the issue of religion in the public sphere has reassumed a central place in current debates, and compelled scholars into rethinking their empirical and theoretical tools. As Pippa Norris and Ronald Ingelhart argue, religiosity is globally on the rise.[5] There appears to be, however, a notable exception: the European continent. In Europe, churchgoing has been in decline and the number of non-believers or those who are indifferent is on the rise.[6] The empirical hypothesis of secularization remains open, yet not even the recent history of Europe has, in fact, confirmed the teleological saga of the linear decline of religion. Europe has become increasingly secularized, in the sense that "society has gradually emancipated itself from religion without necessarily denying it."[7] In many European countries the power of institutional religion has declined, while the interest in individualized

[3] Berger has turned upside down his earlier theory of secularization in Berger (ed.), *The Desecularization of the World* (Washington, DC: Ethics and Public Policy Center, 1999). See also P. Berger, G. Davie and E. Fokas, *Religious America, Secular Europe?: A Theme and Variations* (Aldershot: Ashgate, 2008) and J. Casanova, *Public Religions in the Modern World* (University of Chicago Press, 1994).

[4] See P. J. Katzenstein, "Multiple Modernities as limits to secular Europeanization?" in P. J. Katzenstein and T. A. Byrnes (eds.), *Religion in an Expanding Europe* (Cambridge University Press, 2006), pp. 1–42.

[5] P. Norris and R. Ingelhart, *Sacred and Secular: Religion and Politics Worldwide* (Cambridge University Press, 2004).

[6] G. Davie, *Europe: The Exceptional Case. Parameters of Faith in the Modern World* (London: Darton, Longman and Todd Ltd, 2002).

[7] O. Roy, *Secularism Confronts Islam* (New York: Columbia University Press, 2007), p. 15.

religious and spiritual searches has increased. Immigration and globalization have also contributed to the growth of a more diverse religious environment. For example, Islamic and Pentecostal beliefs have become more commonplace in several nations. As Charles Taylor points out, the secularization of Europe is accompanied "by a new placement of the sacred or spiritual in relation to individual and social life. This new placement is now the occasion for re-compositions of spiritual life in new forms, and for new ways of existing both in and out of relation to God."[8]

At the political–legal level, religious claims have become ever more visible in the public sphere. Initially private and social matters have been gradually turned into European contentious issues benefiting from the generous coverage of the mass media. This is not only because religious organizations and movements have found new "windows of opportunity" of lobbying for their interests and values in Brussels or Strasbourg. In effect, a variety of sub-state, state, international and supranational actors have, in spite of their often divergent interests, contributed to defining religious issues in terms of political and legal rights. The resulting process of politicization and juridification of religion has generated an ambivalent "culture of litigation." This "culture" can undermine the art of political compromise and reasonable legal accommodation of pluralism. Consider how the veil, initially a non-issue in the primary school Châtelaine in the canton of Geneva (Switzerland), was turned into a hard-fought political problem in the Swiss public space, and what's more, into the first "veil case" at the European Court of Human Rights (ECtHR).[9] After her conversion to Islam, a Swiss citizen and teacher (Ms. Dahlab) started to wear the veil at the end of the scholastic year 1990–91. It was understood that Dahlab was fulfilling her professional responsibilities without ever attempting to persuade her students towards her religious convictions. Nor did her wearing of the veil provoke complaints from colleagues or parents. However, in 1995, the local teaching inspector brought the fact that Ms. Dahlab was wearing the veil to the attention of the General Department of the Primary School Teaching of the canton of Geneva. This apparently insignificant event snowballed into a bitter public debate and a legal case that culminated in the case being brought to the ECtHR. In the end, the decision of the Court in the case *Dahlab* v. *Switzerland* (2001) supported the stance of the Swiss authorities: in line with the State Council of Geneva, the ECtHR argued, inter alia, that Mrs. Dahlab's

[8] C. Taylor, *A Secular Age* (Cambridge, MA: Harvard University Press, 2007), p. 437.
[9] Eur. Ct. H. R., *Dahlab* v. *Switzerland*, 15 February 2001.

wearing of the veil amounted to nothing less than a threat to "public order and public safety."[10]

In the Dahlab affair, the "security state" and its imagination created the conflict and prescribed a disciplinary antidote for it. Nonetheless, this is not to suggest that conflicts involving religion are merely fabricated by imagination. The fact remains that the inherited compromises and agreements about the place of religion in the secular state have been challenged in virtually all corners of the European continent. In particular, Europe is being confronted with the crisis of its two opposite models of integration: assimilationist (France, Turkey) and multicultural (UK, Holland).[11] On the one hand, France's laic model aims at creating a single overarching community where everyone assimilates into the republican and national values. The state plays a central role in creating the public sphere as a *locus* of militancy for public virtues and republican values. The state, public sphere and citizenship are largely "co-substantial": the public sphere is not primarily an independent and external check on a state contemplated with the distrustful eyes of the liberal citizen. To the contrary, the public sphere is part of the statehood, that is, it constitutes a space where the state and its republican citizens pursue their "mission" of safeguarding the public virtues and goods. The laic state does not grant recognition to ethnic and cultural–religious minorities: in order to become a *citoyen*, individuals are required to strip themselves of their attachments to any ethnic or cultural–religious group. By keeping their cultural–religious differences in the private sphere, individuals are regarded as being able to reach reconciliation in virtue of the consensus over the republican values. However, the French republican model attempts to define away conflicts by imposing a non-negotiable primacy of republican–national values over any other values. Therefore, it is a paternalistic model in so far as it imposes top-down solutions without room for genuine dissent and reasonable exceptions. Furthermore, the laic model works, in practice, more like a partial disestablishment regime in which the Catholic Church has been privileged by the state.[12]

[10] *Ibid*.

[11] C. Joppke, "The retreat of multiculturalism in the liberal state: theory and policy," *British Journal of Sociology* 55(2) (2004), 237–57.

[12] See C. Laborde, "Virginity and Burqa: Unreasonable Accommodations? Considerations on the Stasi and Bouchard-Taylor Reports" (2008), available at www.laviedesidees.fr/Virginity-and-Burqa-Unreasonable.html?lang=fr (last accessed September 5, 2011) and C. Laborde, *Français, encore un effort pour être républicains!* (Paris: Seuil, 2010); J. Baubérot, *Laïcité 1905–2005: entre passion et raison* (Paris: Seuil, 2004).

The multicultural model attempts to keep conflicts at bay and bring about reconciliation by supporting the development of "public spaces" of cultural–religious difference within which everyone can practice her own values. This model has the merit of emphasizing the salience of the recognition of the plurality of communities in the age of "galloping pluralism" (Charles Taylor).[13] But this model has, especially in its radical version, turned out to be over-optimistic as to the possibility of avoiding segregation, integrating the newcomers with their differences, and reconciliation.

The current conflicts have shaken the trust in the immediate feasibility of solutions based on reconciliation through multicultural recognition and assimilation in the public sphere.[14] Following D. Grimm, the conflicts involving religion can be broadly divided into freedom-centered and equality-centered: a believer or a religious group may claim a liberty that is not granted by the general laws, or they may claim equality rights that are not prescribed by the general laws. In the first case, the demand is either to extend or to restrict the generally guaranteed freedom in accordance with a religious commandment, duty or tradition. Think of conflicts over the ritual killing of animals, polygamy, consumption of drugs in a ritual, interruption of work for purposes of prayer, wearing a turban while driving, blood transfusions, and so on.[15] In the second case, the issue is either the equal treatment of various religious groups or the application of the equality principle within a religious group. Consider the debates and conflicts over whether all religious communities enjoy the same rights or whether indigenous religious beliefs may be privileged, namely the construction of mosques in non-Islamic countries, the call of the muezzin (just as the Christian churches ring their bells), public display of religious symbols, state subsidies for religious activities, the recognition of the religious holidays of the newcomers, and the equal treatment of various religious heritages in education.[16]

There are no transparent solutions at hand for solving such conflicts, which are often marked by dilemmatic situations, that is different if not

[13] Taylor, *A Secular* Age, p. 401. See also B. Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Basingstoke: Macmillan, 2000).

[14] See also M. Rosenfeld, "Equality and the Dialectic between Identity and Difference," in O. A. Payrow Shabani (ed.), *Multiculturalism and Law – A Critical Debate* (Cardiff: University of Wales Press, 2007), pp. 157–81.

[15] For more details, see Dieter Grimm's categorization of conflicts involving religion and law, in Grimm, "Conflicts between general laws and religious norms," *Cardozo Law Review* 30 (2008–2009), 2369–82.

[16] *Ibid*.

divergent imperatives. Such dilemmatic situations question and undercut the goodwill confidence in the mainstream philosophies of reconciliation through public reason (Habermas' dialogical postsecularism; Rawls' political liberalism) – philosophies that regard aporias as a marginal exception and dissensus as subordinate to disagreement.[17] Rights and values, pluralism and identity, justice and efficacy, autonomy and tradition, integration and toleration cannot always be balanced without the loss and sacrifice of something valuable. Consider again the headscarf. When the headscarf is converted into a contentious legal issue, a court needs to balance between gender equality and freedom of religion, non-domination and pluralism. Nonetheless, the headscarf has a plural meaning: it can signify subordination, but it can also be a means of expressing one's freedom of religion.[18] This entails that legal decisions which often follow an either/or logic cannot be taken without risk, sacrifice and loss, as they can either leave certain women unprotected or, to the contrary, curtail the free exercise of religion on the part of autonomous women.

The lack of consensus over such conflicts raises a vital concern: how it is possible to design anew stable and fairer agreements within the space of a *complex center* wherein there is no "single ideal solution" (Habermas) between the extremes of assimilationism and radical multiculturalism? In contrast to the public reason approaches (Habermas, Rawls), this concern involves a rethinking of the heritage of the Enlightenment in a more pluralistic and situational way (see Chapter 7) and taking history more seriously (see Chapter 1 and Chapter 4). It also gives a central salience to persistent disagreements (see Chapter 3) and also takes into account the importance of emotions and imagination (see Chapter 1 and Chapter 5).

This search for a theoretical renewal encounters specific layer difficulties when we move beyond the nation state and focus on the European institutions. Europe is marked by the debate and confrontation between different models of democracy, law and religion – from the model of a Christian Europe (Weiler)[19] to that of a postsecular (Habermas)[20] or laic one (see Chapter 13). This is unsurprising given the practical and

[17] J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993); J. Habermas, "Reconciliation through the public use of reason: remarks on John Rawls' Political Liberalism," *Journal of Philosophy* 92 (1995), 109–31.

[18] See, for instance, G. Jonker and V. Amiraux (eds.), *Politics of Visibility: Young Muslims in European Public Spaces*, (London: Transaction Publishers, 2006).

[19] See J. Weiler, *Un'Europa Cristiana. Un saggio esplorativo* (Milan: Rizzoli, 2003); Weiler, "State and Nation; Church, Mosque and Synagogue—the trailer," *I-CON* 8 (2010), 157–66.

[20] J. Habermas, *Between Naturalism and Religion* (Cambridge: Polity, 2008).

normative questions and dilemmas that mark the current European predicament: how to square the development of a consistent European approach to religion beyond the nation state, with the recognition of the often conflictive diversity of the continent's models? Where is the appropriate border between judicial interventionism and judicial restraint, excessive interference and moderation, the *esprit géometrique* and the *esprit de finesse*?

The present book brings together contributions that deal with this cluster of questions and dilemmas in three parts. Part I includes political–theoretical reflections which stand for different schools of thought, i.e. republicanism (see Chapter 1), liberalism (see Chapter 3), Critical Theory (see Chapter 2 and Chapter 5), post-colonial thought and multiculturalism (see Chapter 4). Part II analyzes concrete legal conflicts from different theoretical perspectives. It starts from a typology of conflicts (see Chapter 6), and centers on representative issues such as religious symbols (see Chapter 7), free speech and religious offense (see Chapter 10), education (see Chapter 8), equality and discrimination (see Chapter 9) or social cohesion (see Chapter 11). Part III focuses on the merits and ambivalences of the emergent European legal and political discourses on religion (see Chapter 12 and Chapter 13).

The present book adopts a pluralistic and interdisciplinary perspective, including contributions from different schools of thought (e.g. analytical, historical) and fields of research (e.g. political theory, legal analysis). In *Political Liberalism* (1993), Rawls points out that, when consensus is fractured and conflict emerges, we need to climb up the ladder of abstraction so as to gain more clarity in the principles that orientate us in grappling with concrete dilemmas. Rawls writes: "(i)n political philosophy the work of abstraction is set in motion by deep political conflicts … We turn to political philosophy when our shared political understandings, as Walzer might say, break down, and equally when we are torn within ourselves."[21] In Rawls' post-Hegelian understanding, philosophizing is meant to reinstate the consensus by a process of reconciliation with the "reason" embedded in our political tradition.[22] However, going up the ladder of

[21] Rawls, *Political Liberalism*, p. 49.

[22] Rawls draws on M. Hardimon's interpretation of Hegel's view as a philosophy of reconciliation. See esp. Rawls' *Lectures on the History of Political Philosophy*, ed. S. Freeman (Cambridge, MA: Harvard University Press, 2002). For a critique of the reduction of Hegel's view as a "philosophy of reconciliation," see Ch. Menke, *Tragödie im Sittlichen: Gerechtigkeit und Freiheit nach Hegel* (Frankfurt am Main: Suhrkamp), 1996.

abstraction in search of reconciliation is *one* limited way of conceiving legal–political theorizing. Probing afresh into the history of our current predicament and revitalizing "lost" traditions, bringing to light persistent dilemmas hidden behind the smokescreen of a reconciling reason, imagining innovative legal–political arrangements, deepening a sense of protest against some of well-entrenched traditions of our situation, correspond to alternative styles of reflection pursued in this book. Even if the representatives of these styles and their followers have often treated each other in a dismissive way, to conceive the relation between their approaches as one of incommunicability or mutual exclusion is artificial. Consider the seemingly opposed approaches of J. Rawls and Q. Skinner. In *Political Liberalism*, Rawls pursues his analytical approach under the form of "political constructivism." Political constructivism neither is able nor does it wish to bracket the question of history, as it is aimed to make explicit and to systematize what is implicit and unsystematic in a historical tradition. It is significant that Rawls opposes his "political constructivism" as based on a specific historical tradition, to Kant's ahistorical "moral constructivism." In turn, Skinner's historicist approach cannot avoid making general theoretical assumptions. In fact, Skinner's "revolution" in studying political ideas as "performances" in specific historical contexts was inspired by philosophers such as Wittgenstein, Austin or Davidson.[23] What's more, as Skinner makes the case that the concept of freedom initially formed in the context of the Roman republican period answers better the contemporary predicament than the liberal or socialist ones, he cannot avoid a degree of trans-contextual generalization and theoretical constructivism. The point is not that there is or should be a harmony between these different approaches. To the contrary, it is most likely that a relation of tension will remain between them, and so it should be. However, my suggestion is that these authors emphasize one of the different dimensions – history or structure, context or theoretical generalization and construction, factual research or imagination and so on – that constitute the *inner* and *open dialectic* of any legal–political and historical research. It is therefore more useful to see these methods and styles of investigation from a pluralist perspective, namely in a relation of mutual check and learning, rather than in one of incommunicability and reciprocal exclusion.

The pluralist perspective that informs the present enterprise is all the more salient given the need for more interaction and collaborative

[23] See especially the essays in Q. Skinner's *Visions of Politics: Regarding Method*, vol. I. (Cambridge University Press, 2002).

projects between legal and political theorists working on religion – above all in Europe. The relative absence of such enterprises is due, in general, to the protocols of overspecialization, homologation and promotion in the current university system.[24] The relative lack of interdisciplinary projects applies much more to Europe's academic space than to the American one, as the European "cultural wars" and the resulting jurisprudential religion are more recent phenomena.[25] At the same time, in Europe an asymmetry between legal and political theorists is notable: there are probably more legal theorists who are well versed in the normative issues of political justice than there are political theorists who are experts in legal issues. Somehow understandably, there are not so many political theorists who choose to acquaint themselves with the intricate technicalities and meanders of the jurisprudential traditions.

In a letter written in 1929, the US Supreme Court Justice Oliver Wendell Holmes famously states: "I have said to my brethren many times that I hate justice, which means that I know if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms."[26] Nonetheless, while justice and law, political and legal theory are relatively autonomous, building a "wall of separation" between them is unsustainable, not least because the border between law and politics has become ever more complex. In Europe particularly, there are at least two interrelated reasons for this complexity. The first is the European passage from government to multi-layered governance. Religious organizations and movements have been contributing to this shift by "going" European, and thus by rendering more complicated the traditionally binary relation between state and church. Likewise, various European institutions (the European Parliament, the European Commission, the Council of Europe, etc.), have become increasingly involved with religion. This trend, which includes the recent institutionalizing of the dialogue with religious organizations by the Lisbon Treaty (article 17-C), will probably gain more importance in the future. Second, in the past decades there has been a global trend of judicialization of politics at

[24] See T. D. Campbell, "Legal studies" in R. Goodin and P. Pettit (eds.), *A Companion to Contemporary Political Philosophy* (Basic Blackwell, 1995), pp. 183–211; K. E. Whittington, R. D. Kelemen and G. A. Cadeira (eds.), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008).

[25] The first case decided under Article 9, European Convention on Human Rights (ECHR) – which protects freedom of religion – was *Kokkinakis* v. *Greece*, in 1993 (Eur. Ct. H. R., *Kokkinakis* v. *Greece*, 25 May 1993).

[26] Letter to John C. H. Wu, 1 July 1929, in *Justice Holmes to Dr. Wu: An Intimate Correspondence 1921–32* (New York: Central Books, 1947).

the international and supranational level that has affected Europe as well. "Judicialization" is a particular dimension of the broader process of juridification: it refers to the increasing reliance on courts and judicial means for addressing public policy questions and political controversies.[27] This raises the normative question of democratic legitimation, given the transfer of power from representative institutions to courts and judiciaries whose members are not always elected in transparent ways. With respect to religion, the process of judicialization enforces, especially after 9/11, the political or "militant dimension" of the Convention system.[28] This can be seen from the ECtHR's concern with fundamentalist and other "threats" to public order posed by certain religious symbols, forms of speech or behaviour. Naturally, grasping such questions regarding the dynamic interaction and unstable borderline between politics and law requires the collaborative effort between political and legal theory and case study.

Part I, dedicated mostly to contributions focused on political ideas, begins with Maurizio Viroli's reflections on the history of the idea of a republican or civil religion. Viroli's contribution is part of his broader agenda of unearthing forgotten treasures of European thought, his most recent interest being in placing the notion of republican religion at the heart of a republican revival. Methodologically, Viroli develops the historical and linguistic turn of the Cambridge School, and examines political ideas not only on the basis of major political texts but also of cultural artefacts such as Ambrogio Lorenzetti's representative painting in the Sala dei Nove of Siena's Palazzo Pubblico. In recent years Viroli has interpreted Machiavelli as a key figure for the Western history of the relationship between politics and religion, an aspect that has escaped the recent historiography on republicanism. In contrast to Q. Skinner and J. G. A. Pocock, Viroli develops S. Wolin's observation that American Christianity can be considered "a Machiavellian civil religion."[29] For Viroli, the Founding Fathers and

[27] Tom Ginsburg, "The Global Spread of Constitutional Review" in K. E. Whittington, R. D. Kelemen and G. A. Cadeira (eds.), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008), pp. 81–99. See also B. Iancu (ed.), *The Law/Politics Distinction in Contemporary Public Law Adjudication* (Utrecht: Eleven International Publishing, 2009).

[28] For the idea of militant democracy and ECtHR's approach to religion, see P. Macklem, "Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe," Working Paper Series, University of Toronto, 2010.

[29] Viroli, *Machiavelli's God*, p. 25. S. Wolin, *Tocqueville between Two Worlds: The Making of a Political and Theoretical Life* (Princeton University Press, 2001), pp. 297–8.