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ARTICLES

Secularism in Canada and Europe

Mohammad Fadel*

Secularism, it seems, is often in the eye of the beholder, and I wonder the extent to which it has lost its usefulness as an analytical category and instead serves solely as an exclusionary argument in today's political discourse. The most striking use of the term in contemporary popular discourse is its use to distinguish the "civilized", western world, which is taken, uniformly, to be "secular," from the "uncivilized" Islamic world which remains beholden to religion. This crude and exclusionary use of the term secular belies the bewildering diversity of configurations of religion and state, in both the Islamic and the non-Islamic worlds. This article, however, will focus on the complex range of practices that fall under the rubric of "secular" in two major parts of the western world, Canada and Europe. The article will begin with a brief discussion of the meaning of the term secular, and then will discuss the different understandings of secularism in the jurisprudence of the Supreme Court of Canada and the European Court of Human Rights.

1. THE CONTESTED MEANING OF SECULARISM

Secularism, like any philosophically rich concept, not only has many meanings, but it also has many layers of historical meaning. And while today we tend to contrast the secular with the religious, as though they are binary modes of living in the world, or binary choices about metaphysical truth, in the middle ages, they were viewed as existing side by side rather than as alternatives. Thus, the Catholic Church had "secular" orders and "religious" orders, each with different functions. "Traditional" secularism then views religion and state as operating in separate, but intertwined spheres, in which the normative values of religion are to play an important role in guiding secular affairs, even if it does not, directly, control secular affairs.

As a result of the Enlightenment, the Reformation and the religious wars, however, the meaning of the secular gradually took on a different turn, one which asserted the autonomy and self-sufficiency of secular life from religious instruction or church control. This led to the view, once more or less widely held, which associated secularism with rationality, and that as human beings progressed, scientific rationalism would come to displace, permanently, religious views from social, intellectual and cultural life and render it irrelevant to the formation of public life. On this view of secularism religion was destined to become just another superstition*

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which might retain its hold on a small number of people, but would lack any social valence.

In the field of post-Enlightenment political theory, once religious theories of the states, e.g., the divine right of kings, were overthrown in favour of the notion that political legitimacy derived from the consent of the governed, secularism also began to mean that religious views should be excluded from public deliberation, or to put it differently, that religious views were relevant only to private conscience, but they had no role to play in the formulation of public law. The concept of the privatization of religion and its consequent exclusion from public affairs is sometimes referred to as the Enlightenment bargain with religion: in exchange for religious toleration, the religious would agree not to interfere in how the state would be organized and administered. Another version of the privatization of religion would go further than this, and demands that no religious signs or symbols be permitted in public spaces, whether or not state practices are involved. This conception of secularism would limit religious expression to particular places, e.g., churches, synagogues, and mosques, but exclude religious expression in other areas of social life, such as the work place.

Finally, one might speak of a politically liberal version of secularism, which tries to effect a compromise between theories of secularism that would completely privatize religion and theories that would make religion simply one, among many sources of value that regulate social life. Political liberalism’s conception of secularism is essentially pluralist. This conception of secularism is based on the notion that the characteristic feature of life in a democratic society is pluralism, with citizens embracing numerous and incompatible ways of life, some of which are religious and some of which are not. From the pluralist perspective, secularism refers to the obligation of the state to remain neutral with respect to the truth of the various doctrines that its citizens hold, while at the same time obliging the state to protect the constitutional and statutory framework within which a pluralism of ideas can continue to thrive. Accordingly, the defining feature of this mode of secularism is the commitment to neutrality.

One might call these three interpretations of secularism, respectively, “traditionalist secularism,” “Enlightenment secularism,” and “neutral secularism,” respectively. One finds all three trends compete for support in the Canadian political sphere. In Europe, however, it appears there are very few voices in support of “traditionalist secularism,” and instead political battle lines are effectively limited to debates between Enlightenment and neutral secularisms. While what I am calling Enlightenment secularism has sharp disagreements with what I am calling neutral secularism, insofar as the former considers religion to be, as a general matter, a socially destructive phenomenon whose influence should be checked, whenever possible, by state intervention, while the latter takes no explicit stance as such on the value of religion in the lives of citizens, both are united in insisting that religious reasons as such play no independent role in governance. Even here, however, Enlightenment secularism is more exacting than neutral secularism: while Enlightenment secularism demands a complete exclusion of religious motivations from public life, neutral secularism considers religiously motivated political conduct to be legitimate insofar as it is otherwise consistent with the public values of democracy. Traditionalists, however, deny that this is a distinction with a difference. In Canada, for example, religious conservatives continue to attack both Enlightenment and neutral secularisms, asserting essentially that they are one and the same. Arguing that all citizens possess some kind of metaphysical commitments that are ultimately not amenable to mutual justification, it is arbitrary—and hence disrespectful and unfair—to exclude one set of reasons as legitimate grounds for political judgment (religious)—while granting legitimacy to all kinds of non-religious reasons in the public sphere. Enlightenment secularism is also particularly strong in Quebec, although it appears much weaker in Ontario as well. As discussed most prominently, perhaps, in the Bouchard-Taylor Report, many citizens in Quebec interpret secularism, and the related notion of the secularity of the public sphere, to mean that there is no place for either religious observance or religious symbols in shared public spaces. For Quebeckers espousing this view, religion can only be observed in private spaces, and when in a public space, religious citizens are entitled only to their beliefs; any manifestations of religion in shared space then ought to be subject to public regulation.

The Bouchard-Taylor Commission rejected this conception of secularism, with its expansive conception of the public, and came down squarely in favor of neutral secularism, arguing that secularism entails four principles, two of which are goals, and two of which are institutions intended to secure those goals. The goals, according to Bouchard-Taylor are to recognize the moral equality of persons and secure the freedom of conscience and religion of persons. The institutional means used to secure these goals are the separation of church and state and the neutrality of the state with respect to religion and other deep convictions, even secular, convictions. Because one of the goals of secularism is to secure freedom of conscience and religion, the institutional means used to secure those goals—neutrality—should not be used as a justification to suppress manifestations of private conscience, whether secular or religious.

2. SECULARISM IN CANADIAN CASE LAW

If we turn from the contested terrain of political and moral theory to the post-Charter case law of the Supreme Court of Canada, we can see an unqualified endorsement of neutral secularism as the defining characteristic of the legal concept of secularism in Canada. In this sense, Canadian law regarding the relationship of religion to the public order underwent dramatic change as a result of the adoption of the Charter. Most notably, and as explained in the holding of Big M, legislation endorsing one religion—the Lord’s Day Act, for example—could not satisfy the new standard of government neutrality, even if the law’s effects were secular and did not interfere in the religious liberties of non-believers. It was enough to doom the statute that it communicated to the public that Christianity was the preferred religion of the state. Such statutes, prior to the Charter, had been routinely upheld under Canada’s then-existing Bill of Rights.

But this was also not the only difference in which the law regulating religion changed by virtue of the Charter. The Supreme Court of Canada, in reasoning that smacks of Enlightenment secularism, invalidated the results of a parliamentary election in Quebec in an 1877 decision, Brassard v. Langevin, in which it concluded that the Church’s endorsement of the Conservative candidate, and its repeated statements that voting for the liberal candidate would amount to a sin, amounted to undue influence under s. 95 of the Dominion Controverted Elections Act. If this decision amounted to an overly-aggressive policing of religious dis-
in the sense that they would be compatible with "the diversity of belief and non-belief, the diverse socio-cultural backgrounds of Canadians." Subsequent decisions of the Canadian Supreme Court have essentially reinforced the pluralist approach to religious freedom under the Charter: affirming a broad scope for religious freedom that may be limited when "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." Accordingly, in its 1995 decision, Children's Aid Society of Metropolitan Toronto v. The Supreme Court upheld the general matter that Jehovah's Witnesses' s. 2(a) religious freedom rights were violated when the Children's Aid Society intervened to secure a blood-transfusion for their infant child, but that this violation was justified under s. 1 because it was necessary to preserve the future rights of the infant child. In other circumstances, however, where the state could not justify the restriction on religious freedom arising out of a law, the Supreme Court upheld the claimant's s. 2(a) rights.

The leading case in this regard is Multani, decided in 2006. In that case, the court concluded that the prohibition against weapons in public schools, when applied to an orthodox Sikh, violated his s. 2(a) rights in a manner that could not be demonstrably justified as necessary to a free and democratic society under s. 1 of the Charter.

Using the Oakes test, the Court has consistently attempted to maximize the scope for pluralism in Canadian society while ensuring that the basic demands of a free and democratic society are not violated. One can certainly take umbrage with the outcomes of particular cases — in Amselem, for example, one might justify criticizing the Court for failing to respect sufficiently the contractual rights of the other condominium owners, a result that might have unexpected negative consequences for religious citizens of Canada, or in Hutterian Brethren of Wilson County, for failing to take seriously the impact that imposing a photo requirement would have on the way of life of an isolated religious commune relative to the effect that an exemption would have on the reliability of the drivers license as a reliable identification document. Nevertheless, it would be hard to argue that among liberal democracies, Canada's religious freedom jurisprudence is by far the most welcoming of minority religious practices, even more so than the U.S.

This is evidenced by two facts. The first is that no Canadian case involving a s. 2(a) claim, with the exception of the recently decided Commission scolaire des Chenes, has failed to agree with the claimant that his or her s. 2 rights had indeed been violated. The breadth of s. 2(a) in Canadian jurisprudence compares favorably with the contrasting rule under the First Amendment of the U.S. constitution as construed by the U.S. Supreme Court in its Employment Division v. Smith decision in 1990. That case held that a law of general applicability, even if it substantially burdened a person's ability to exercise his religion, did not violate that person's rights to the free exercise of religion in the absence of proof that the law was motivated by animus against the particular religion. In Canada, by contrast, in almost all cases where the religious-rights' claimant lost her claim, the Court only upheld the law in circumstances where it was satisfied the government had met its burden of demonstrating that the restriction on the claimant's s. 2 rights was justified under s. 1 analysis. Even the decision in Commission scolaire, however, should not be taken to represent a greater willingness on the part of the Supreme Court to narrow the scope of s. 2(a): as the concurring opinion of Justice LeBel made clear, just as the record was devoid of sufficient facts to prove a violation of s. 2(a), it was also
devoid of sufficient evidence to assure that the program’s implementation in the future “would not . . . possibly infringe the rights granted to the [parents]” to raise their children in the Catholic faith.

The second unique feature of Canadian jurisprudence with respect to religious freedom claims is the manner by which the Court applies the Oakes test to the government’s professed justifications of the abridgment of the right to religious freedom. Unlike the case law of the European Court of Human Rights shares with Canaca the willingness to recognize a broad right to religious freedom, under the doctrine of “the margin of appreciation,” it is also extremely deferential to the national governments’ arguments regarding the circumstances in which it is legitimate to restrict a claimant’s religious freedom. Canadian courts, however, under the “minimal impairment” prong of the Oakes test are much more skeptical of governmental justifications, and the result is a jurisprudence much more willing to accommodate the claims of religious minorities. The best example that real proof is needed before s. 1’s standard is Multani, where the court found that the government could provide no evidence that kirpans were in fact used as weapons in the classroom setting, despite the fact that Sikhs had been present in Canada for several generations; and the government could not explain why, if it was necessary to prohibit any object that could be used as a weapon, it did not have enhanced safety precautions with respect to items that were otherwise readily available in schools such as scissors and baseball bats. This unwillingness to accept the government’s reasons marks a stark contrast with the deference the ECtHR gives to the government’s justification of its laws in Europe as will be seen in my discussion of European cases shortly.

I wish to conclude my discussion of Canadian cases, however, by noting that the term secularism as such appears rarely in Canadian case law. The most important case discussing the legal meaning of “secular” and the related concept of “secularism” is Chambertain v. Surrey School District (2002). In that case, the Supreme Court was called on to interpret s. 76 of British Columbia’s School Act which provides that “[a]ll schools and Provincial schools must be conducted on strictly secular and non-sectarian principles,” while at the same time commanding that “[t]he highest morality must be inculcated, but no religious dogma or creed is to be taught in a school or Provincial school.” In the facts of the case, the Surrey School Board passed a resolution refusing to authorize three text books for kindergarten classroom instruction that depicted same-sex parented families. The validity of the resolution at issue turned on whether it was consistent with the s. 76 of the School Act.

The trial court concluded that the resolution was ultra vires because the school board, to the extent that it relied on religious reasons to exclude books depicting same-sex parented families, had run afoul of the statute’s requirement that school affairs “be conducted on strictly secular and non-sectarian principles.” A majority of the Supreme Court upheld the trial court’s decision, but on alternative grounds.

Most significantly for our purposes, the Court rejected the trial court’s conclusion that the statute’s reference to “secular and non-sectarian principles” meant that the school board was precluded from using religious concerns to formulate school policy. Far from excluding religious considerations, the School Board was indeed “required to bring the views of the views of the parents and communities they represent to the deliberation process. . . . Religion is an integral aspect of people’s lives and cannot be left at the boardroom door.” The School Board’s error consisted in its failure to consider the views of all families in the community. Thus, the court stated that what secularism rules out . . . is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community. A requirement of secularism implies that, although the Board is indeed free to address the religious concerns of parents, it must be sure to do so in a manner that gives equal recognition and respect to other members of the community. Religious views that deny equal recognition and respect to the members of a minority group cannot be used to exclude the concerns of the minority group. . . . Parents need not abandon their own commitments or their view that the practices of others are undesirable. But where the school curriculum requires that a broad array of family models be taught in the classroom, a secular school system cannot exclude certain lawful family models on the ground that one group of parents finds them morally questionable.

The error of the Board, therefore, lay in the fact that “[t]hey acted on the concern of certain parents about the morality of same-sex relationships, without considering the interest of same-sex parented families and the children who belong to them in receiving equal recognition and respect in the school system.”

3. EUROPEAN SECULARISM

Continental Europe, in particular France, sometimes has the reputation of a militant secularism that is diametrically opposed to the relatively easy-going, tolerant multiculturalism of Anglo-American societies. Indeed, as the Bouchard-Taylor Commission reported, many Quebecers had based their understanding of secularism and the public-private distinction based on what they believed, erroneously, was French religious policy, not realizing that the French state also engages in substantial direct support of religious expression in ways not generally adopted in Canada or the United States. What may be true, however, is that from a sociological perspective, religion is a less a salient social force than it is in North America, particularly among the white European majority, and as a result, issues of religious freedom have become conflated with issues related to minority rights and integration. This unfortunate dynamic, particularly with respect to Muslims in Europe, might give the erroneous impression that European law has adopted Enlightenment secularism in contrast to Canada’s neutral secularism. In fact, a careful reading of the case law of the European Court of Human Rights’ decisions on questions of religious express shows that as a formal matter, its conception of secularism is also one that ostensibly requires the state to take a neutral posture toward different ways of life and religious and philosophical convictions; however, the chief difference is that the ECHR, by virtue of its status as a supra-national tribunal, applies what it calls a “wide margin of appreciation” to questions of religion-state relations in contrast to the more critical standard of review that Canadian courts apply to these questions using the Oakes test. Because of the deferential standard of review the ECHR applies to state justifications on restrictions of religious expression, the European practice of secularism, turns out to be much less tolerant of minority practices than Canadian law.

The recently decided case of Laatris v. Italy shows how complex the question of secularism really is on the continent. This case challenged the legitimacy of I-
aly's laws requiring public school classrooms to display a crucifix on the grounds that it violated the religious freedom rights of non-Catholic children and the rights of their parents to direct their education in accordance with the parents' beliefs. The court ultimately upheld the legitimacy of the Italian practice, overturning an earlier chamber decision which found that the practice violated the ECHR. The Grand Chamber, in its opinion, pointed out that only a small number of European states, for example, explicitly forbid the display of religious symbols in public schools. 

The ECHR, public of Macedonia, France and Georgia. Likewise, only a small number of European states required the display of the crucifix in classrooms, e.g., Austria, Poland and some regions of Germany and Switzerland. Likewise, more than half the population of European states live in states that are not self-declared secular states. After concluding, there is no European consensus on the matter of the display of religious symbols in public schools, the Grand Chamber pointed out that, although Article 9 of the ECHR imposed on Italy a "duty of neutrality and impartiality," European law "does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind." It does, however, demand that "the State, in exercising its functions with regard to education and teaching, to take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner, enabling students to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism."

The Grand Chamber, therefore, accepts the notion of neutral secularism, one that obliges the state to be neutral with respect to its teaching of moral, philosophical and religious doctrines. This means that in teaching about religion, "the State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents." Applying this standard to the crucifix, the Grand Chamber said "there is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed." Moreover, any negative effects the display of the crucifix might have on children in terms of implying that the state prefers Catholicism over other forms of religious expression was reduced or mollified by the fact that other religious festivities, including Ramadan, were celebrated and Muslim girls were allowed to wear the Islamic headscarf in Italian public schools.

Just as important as the absence of evidence of "indoctrination," the Grand Chamber reiterated that decisions such as Italy's to continue to display crucifixes as part of its national traditions is one that "falls . . . within the margin of appreciation of the respondent State," as does the efforts of contracting parties to "reconcile the exercise of the functions they assume in relation to education and teaching with respect for the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

The ECHR's reliance on the "margin of appreciation," while understandable, however, carries with it substantial risks that political forces within particular European countries will be able to undermine the substantive values of the Article 9 guarantee of religious freedom give the ECHR's demonstrated reluctance to challenge state practice in this admittedly sensitive area of governance. And, in fact, one might use its decisions in various cases involving Muslim claims proof of the lengths to which the ECHR is prepared to go in deferring to state authorities when it comes to organizing religious life in the various European states which are parties to the ECHR. Even as the ECHR claims that it applies a neutral version of secularism, in cases involving Muslim human rights claimants, such as Dahlab, Sahin, and Refah, the Grand Chamber casually credited the claims of the state parties in all three cases: the first two cases — the first from Switzerland and the second from Turkey — involved state-imposed restrictions on wearing the Islamic headscarf, while the third case involved the dissolution of an "Islamist" political party in Turkey that had successfully gained a plurality in the Turkish parliament and headed the ruling coalition. In Dahlab the issue was whether a public school teacher who had converted to Islam and begun wearing the Islamic headscarf could be forced, consistent with her Article 9 rights under the ECHR, to remove it upon pain of dismissal from her job. In that case, the ECHR accepted Switzerland's characterization of the hijab as a "powerful external symbol" that risked indoctrinating young public school students, which was ostensibly a concern because the applicant was an elementary school teacher. The ECHR also described the hijab as difficult to reconcile either with gender equality or the concept of equal respect required in a democracy. In Sahin a Turkish female medical student was expelled from medical school because of her insistence on wearing the Islamic headscarf. She eventually completed her medical education in Austria, which permitted her to attend while wearing her hijab. In Sahin the ECHR credit the Republic of Turkey's claim that restrictions on the hijab were necessary to protect the freedom of others, either non-Muslims, or Muslims who did not wear hijab because it inevitably had a proselytizing effect and the need to protect the values of gender equality. In the case of Refah the ECHR credited Turkey's claims that a commitment to the Sharia was incompatible with a commitment to democracy because, among other things, the Sharia included discriminatory norms and was "invariable" and "inflexible," and thus incapable of adapting itself to democratic norms.

While the court in Lautsi pointed out the absence of any evidence that a state-sponsored crucifix was effective in indoctrinating students into Catholicism, the ECHR seemed willing to believe that the mere presence of a hijab was sufficient to terrify or intimidate non-hijab wearing students into either becoming Muslim or deprive them of the neutral environments necessary to promote education. It also was willing to credit the state's characterization of the hijab and the relationship of the Sharia to democracy without any engagement with the applicants' own understandings of the practices or commitments at issue. The ECHR recently reiterated its willingness to adopt state's characterizations of religions practices in its 2009 decision, Ougen vs. France. This case again involved a Muslim female who wanted to wear a hijab in public school, including, during physical education class. While the ECHR recognized that prohibiting her from wearing the hijab did violate her Article 9 right to religious freedom, the restriction was justified either on the grounds of protecting the rights of others or the requirements of health and safety. Under either theory, however, the court did not explain how wearing the hijab represented a health and safety threat, or how wearing the hijab constituted "an ostentatious act that constitute a source of pressure and exclusion" to other non-hijab wearing students.
It seems clear that the ECHR limits itself to policing the formal reasons given by national authorities in their treatment of religious practices. Accordingly, it is unlikely that the ECHR would interfere in anything but the gravest interferences in religious freedom, e.g., overt persecution. Its repeated decisions regarding Muslim applicants, for example, make clear that if states wish to adopt overtly assimilationist policies designed to reduce, if not eliminate entirely, the visibility of Islam and Muslims, the ECHR will not present much of a barrier. Review of these decisions leaves one with the distinct impression that something like Enlightenment secularism is in fact motivating the decisions of national court systems, if not something worse, at least with respect to their Muslim populations, and that the ECHR’s doctrine of the margin of appreciation simply provides a fig leaf of legitimacy to state practices that are anything but neutral.

4. CONCLUSION

Both Canada and the ECHR share a legal commitment to secularism understood as neutrality of state institutions within a framework of constitutional governance. Nevertheless, there is a great difference in the way this commitment to secularism is practiced, largely as a result of the different degrees of skepticism with which the Supreme Court of Canada and the ECHR, respectively, deploy in analyzing governmental justifications for abridgments of religious freedom rights. In Canada, the SCC applies the Oakes test which requires the government to demonstrate that its proposed measure is not only related to a permissible goal, but that it has chosen the means to achieve its goal that is minimally impairing of the rights of citizens, and is otherwise proportional. The ECHR, on the other hand, largely because it is a supra-national court, has granted State Parties a wide margin of appreciation in the manner they structure religion-state relations within their territories. As a result, political majorities within European states are better able to impose restrictions on the practices of religious minorities than is the case in Canada. Part of the difference may also be the result of the simple fact that the populations of Europe are less religiously observant and less religiously diverse than in North America generally and Canada particularly. As a result, the political reality of secularism may be much closer to Enlightenment secularism than the neutral secularism that both European and Canadian courts claim undergirds the constitutional systems of both European and Canadian democracy. From the perspective of legal realism, then, it is not too surprising that rights of religious expression, or the requirement of strict state neutrality on questions of religion, are routinely ignored where large majorities are united on certain theo-political assumptions.

Jeffrey Stout, an American philosopher of religion, has described secularization not as the decline of the salience of religion in social life, but the rise of a plurality of religious viewpoints such that it no longer becomes possible to assume that one shares religious premises — whether theistic, agnostic, or atheist — with others. Canada’s public sphere is clearly secularized using this conception of secularization, even if religion continues to be very important for many Canadians. Ironically, it appears that Europe is less secularized using this conception precisely because solid majorities seem to be united in a single approach to religion and its manifestation.