REVERSED SECULARIZATION AND THE LIMITS OF CONSTITUTIONAL SECULARISM: REEVALUATING MODELS OF SEPARATION IN FRANCE, ITALY AND TÜRKIYE

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Abstract

Emergent literature in constitutional law related to religious revival, focuses on conceptual conundrums and criticism of constitutional secularism. The dissertation offers a novel perspective on the source of weakness of the principle and a better understanding of the responses triggering criticism. Instead of focusing solely on theoretical considerations, the dissertation determines the normative potential and practical meaning of constitutional secularism, by focusing on three jurisdictions with constitutional commitment to the principle (France, Italy and Türkiye); on two historically contested areas, indicative of its limits (education and state funding of religion); through three levels of inquiry (conceptualization, legislative and adjudicative). To better understand the evolution of the principle it introduces the concept of *reversed secularization* - a process of political renegotiation rearranging the landscapes of state-religion relationship. To better classify avenues taken by courts in adjudicating cases impacting the interpretation of the principle, it introduces the dichotomy of the *thickening* and *thinning* of the principle of secularism. The dissertation answers the question: *What is the normative potential of the principle of secularism in the three jurisdictions and how does it operate under pressure from contextual and political determinations?;* by answering three sub-questions: *How was the principle of secularism constructed, and what contextual determinators were key in its normative conceptualization? How has the normative content of the principle of secularism been developed or challenged on the legislative level in the field of education and state funding of religion? Does judicial interpretation in cases related to constitutional secularism and education or state funding of religion lead to the "thickening" or "thinning" of the principle of secularism?*

The main argument is as follows: *Constitutional secularism, as a specific arrangement determining the level of separation in a specific jurisdiction, is contingent upon the level of the consolidation of power the state achieved in the nation-building project and the strength of the*

majority religion against which it emerged; as such it is normatively weak and upon changed conditions allows for political re-negotiation leading to a process of reversed secularization. The dissertation finds that the level of separation between religion and state in each jurisdiction was preconditioned by the respective level of constitutional consolidation of power of the state at the time of foundation of legal institutions, and the *organized* strength of the majority religion. The "founding moment" determines a path dependence, both institutionally and at the level of reasoning. However, while the original constitutional position sets the frame, it does not preclude adaptation to changing political and social conditions, in particular the influence of politicized religion. All this indicates the relative weakness of secularism as a concept or principle. On a legislative level, the renegotiation of what is permissible in education has shifted in accordance with dominant positions even if the core framework remained intact whilst, the limits of permissible funding have been prone to reinterpretation being a value-neutral domain in which justifications can be easily translated into neutral terms. At the level of adjudication, trends in both fields have indicated a *parallel thickening and thinning* of the principle of secularism.

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Table of contents

List of Abbreviations

AKP – Justice and Development Party (*Adalet ve Kalkınma Partisi)*

CJEU – Court of justice of the European Union

DC - Democrazia Cristiana

Diyanet – The Directorate of Religious Affairs (Türkiye)

ECHR – European Convection of Human Rights

ECtHR – European Court of Human Rights

FrCC – French Constitutional Council

GNA – Grand National Assembly (Türkiye)

ICCt – Italian Constitutional Court

WW1 – World War One

WW2 – World War Two

Introduction

In the past 30 years scholars working in the field of religion across disciplines have focused on explaining the phenomenon of religious revival. The theory of secularization once taken as an "orthodoxy"[1] became seriously contested, and with that secularism itself,[2] reigniting the study of secularism in inter/multi-disciplinary perspectives.[3] In this vast area of study, scholars in the field of constitutional law focused mostly on questions related to the future of constitutional secularism[4] and the boundaries of religious freedom.[5]

These vast debates gave birth to conceptual conundrums and criticism. The many "faces" of secularism provoked some scholars to attempt to capture and define its multiple dimensions,[6] while others questioned the nature and meaning of secularism, labeling it as anti-religion,[7]

[1] Steve Bruce, *Religion and Modernization: Sociologists and Historians Debate the Secularization Thesis* (Oxford: Clarendon Press, 1992).
[2] See José Casanova, *Public Religions in the Modern World* (Chicago: University of Chicago Press, 1994).; Silvio Ferrari and Sabrina Pastorelli, eds., *Religion in Public Spaces: A European Perspective* (London: Routledge, 2012).; Frank J. Lechner, "The Case against Secularization: A Rebuttal," *Social Forces* 69, no. 4 (1991): 1103–19.; Craig J. Calhoun, Mark Juergensmeyer, and Jonathan VanAntwerpen, eds., *Rethinking Secularism* (Oxford: Oxford University Press, 2011).
[3] Paul Zucherman and John R. Shook eds., *The Oxford Handbook of Secularism* (Oxford: Oxford University Press, 2017).
[4] In the realm of constitutional law, the most comprehensive body of work on the interplay between constitutional secularism and religious revival is Susanna Mancini and Michel Rosenfeld, eds., *Constitutional Secularism in an Age of Religious Revival* (Oxford: Oxford University Press, 2014).
[5] See Rex J. Ahdar and I. Leigh, eds., *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005).; T. Jeremy Gunn, "Religious Freedom and Laïcité: A Comparison of the United States and France," *Brigham Young University Law Review*, no. 2 (2004): 419–506.; Hanna Lerner, "Constitutional Permissiveness, Constitutional Restrictiveness, and Religious Freedom," in *Assessing Constitutional Performance* (Cambridge: Cambridge University Press, 2016), 171–202.
[6] For example, Scharffs distinguishes secularity from secularism. See Brett G. Scharffs, "Secularity or Secularism: Two Competing Visions for the Relationship between Religion and the State in the New Turkish Constitution," *BYU Law Research Paper No. 15-16*, (2011).; Casanova distinguishes between the secular, secularization and secularism. See José Casanova, "The Secular and Secularism," *Social Research* 76, no. 4 (2009): 1049–66..
[7] For an overview of this critique see Michel Rosenfeld, "Recasting Secularism as One Conception of the Good Among Many in a Post-Secular Constitutional Polity," in *Constitutional Secularism in an Age of Religious Revival*, eds. Susanna Mancini and Michel Rosenfeld (Oxford: Oxford University Press, 2014), 79.

preferring atheism,[8] used to repress minorities[9] or imposing westernization. These conceptual inconsistencies motivated scholars like Bader to locate the problem exactly in secularism's fuzziness as well as its contested nature, suggesting that we simply "drop [it] from our constitutional language completely" and replace it with liberal-democratic constitutionalism.[10]

In the field of constitutional law, critiques have been directed towards what secularism has or has not managed to do, arguing that secularism is used to "mask" and advance preferential treatment to majority religions[11] and/or that it has not been able to answer, manage, and deal with diversity.[12] Decisions in specific cases across Europe have served as bases for such criticism, such as those dealing with the permissibility of the crucifix in public classrooms[13] or the impermissibility of Muslim minarets placed among churches.[14] Finally, there are those like Sajó that find the problem in secularism's lack of normative salience as oppose to strong religion,[15] more specifically the fact that "the normative position of secularism was based on

[8] Models of constitutional secularism should be understood as inherently and functionally different to the institutional atheism as established in former communist and socialist regimes that were de-facto against religion and de-jure atheist. The jurisdictions covered by this dissertation and their models of religion-state relationships are different than these models as they operate withing national and supranational legal frameworks guaranteeing human rights. Furthermore, they also are different than models like the one established in Mexico in the years after 1917 and the one established in Uruguay that offer a version that is often described as not having genuine concern about religious freedom. See Carmen Asaín Pereira, "Religion and the Secular State: Uruguayan Report," in *Religion and the Secular State: National Reports*, ed. W. Cole Durham and Javier Martínez-Torrón (Provo: The International Center for Law and Religion Studies Brigham Young University, 2010), 767–89.; Adrian A. Bantjes, "Mexican Revolutionary Anticlericalism: Concepts and Typologies," *The Americas*, Personal Enemies of God: Anticlericals and Anticlericalism in Revolutionary Mexico, 1915-1940, 65, no. 4 (2009): 467–80.

[9] Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton: Princeton University Press, 2015).

[10] Veit Bader, "Constitutionalizing Secularism, Alternative Secularisms or Liberal-Democratic Constitutionalism? A Critical Reading of Some Turkish, ECtHR and Indian Supreme Court Cases on 'Secularism,'" *Utrecht Law Review* 6, no. 3 (2010): 8.

[11] Susanna Mancini, "The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence," *Cardozo Law Review* 30, no. 6 (2009): 2629–68..

[12] John T. S. Madeley and Zsolt Enyedi, eds., *Church and State in Contemporary Europe: The Chimera of Neutrality* (London: Frank Cass, 2003).; Lorenzo Zucca, "The Crisis of the Secular State - A Reply to Professor Sajó," *International Journal of Constitutional* 7, no. 3 (2009): 494–514.

[13] See Lautsi and Others v. Italy, No. 30814/06 (Grand Chamber, European Court of Human Rights March 18, 2011).

[14] See Ouardiri v. Switzerland, No. 65840/09 (European Court of Human Rights July 8, 2011). and Ligue des Musulmans de Suisse and Others v. Switzerland, No. 66274/09 (European Court of Human rights July 8, 2011).

[15] On strong religion see Gila Stopler, "The Challenge of Strong Religion in the Liberal State," *Boston University International Law Journal* 32, no. 2 (2014): 411–48.; Gabriel Abraham Almond, R. Scott Appleby, and Emmanuel Sivan, *Strong Religion : The Rise of Fundamentalisms around the World* (Chicago: University of Chicago Press, 2003).

the relativity of religion" and that even though "jurisprudential theory of secularism has to be able to withstand these challenges…most democracies are without a strong normative theory or practice of constitutional secularism."[16]

The dissertation offers a novel perspective on the source of weakness of the principle of secularism and a better understanding of the responses triggering criticism. Instead of focusing solely on theoretical considerations, the dissertation determines the normative potential and practical meaning of constitutional secularism, by focusing on three jurisdictions with constitutional commitment to the principle (France, Italy and Türkiye); on two historically contested areas, indicative of its limits (education and state funding of religion); through three levels of inquiry (conceptualization, legislative and adjudicative). To better understand the evolution of the principle it introduces the concept of *reversed secularization* - a process of political renegotiation rearranging the landscapes of state-religion relationship. To better classify avenues taken by courts in adjudicating cases impacting the interpretation of the principle, it introduces the dichotomy of the *thickening* and *thinning* of the principle of secularism. Thus, the contribution of the dissertation to the field is threefold.

First, it compares three jurisdictions that have attracted little to no attention as viable comparators. While numerous comparative works have focused on the Turkish and French models, [17] and while the Italian and Turkish models have attracted limited interest in

[16] András Sajó, "Preliminaries to a Concept of Constitutional Secularism," *International Journal of Constitutional Law* 6, no. 3 & 4 (2008): 607.

[17] More notably, in his 2009 book Kuru classified the French and Turkish models as representative of what he calls "assertive secularism." The main aim of the book however is to appeal to political scientists and answer the question of "how religion and politics interact, not whether they should." See Ahmet T. Kuru, *Secularism and State Policies Toward Religion: The United States, France, and Turkey*, Cambridge Studies in Social Theory, Religion, and Politics (Cambridge; New York: Cambridge University Press, 2009). In his 2017 book Akan compares France and Türkiye focusing the question of how French l*aïcité* traveled from France to Türkiye, and the challenges that both jurisdiction face regarding implementing a rigid form of secularism and dealing with the notion of diversity (that he claims is not a new issue). The author additionally explores how the principle of secularism traveled inside and outside Europe. See Murat Akan, *The Politics of Secularism: Religion, Diversity, and Institutional Change in France and Turkey*, Religion, Culture, and Public Life (New York: Columbia University Press, 2017). More specifically, Barras has recently published a working paper where she looks at the re-invention of secularism in France and Türkiye by different actors through the language of human rights. See Amélie Barras, "Using Rights to Re-Invent Secularism in France and Turkey," *EUI RSCAS 2008/20*, 2008.

comparative perspectives,[18] comparative works on the three jurisdictions together has not transpired, especially not in comparative constitutional law literature centering on religion-state relationships. The necessity for a comparative analysis of the three jurisdictions rests on three justifications: 1) the commitment to constitutional secularism, granted the highest level of protection; 2) the similarity in context from which secularism emerged – through the struggle for centralization and consolidation of state power against strong religions refusing to give up their political influence; 3) the influenced on the French example on the other two jurisdictions. These three models also have a particular comparative value when viewed as gradual shades in a pallet of the principle of constitutional secularism. If we consider the French model as a first and initial model, the models in Türkiye and Italy are on two opposite sides of the French. The Turkish on one side, as a model establishing stricter control over religion, the Italian on the other, as a model establishing a looser contractual relationship between the state and religious organizations. Or if put symbolic terms, in France the state is the sea and religious organizations one of many islands within it; in Türkiye, there is just the state-the sea, as religion is controlled as one part of the state; in Italy, the state is the sea, but the Catholic Church is a big island, even geographically, that overtakes a big part of the sea's territory (considering the bilateral principle even the metaphor of two islands can do).

Second, the dissertation will question the normative finality of constitutional secularism in the three jurisdictions, by introducing the concept of *reversed secularization*. Reversed secularization is a process of political renegotiation that rearranges the landscapes of state-religious institutions relationships in national jurisdictions towards greater entanglement. As such, it is a process that produces institutional and legislative change. I follow Urbinati in her

[18] Most notably, Ozzano and Maritato have recently written a comparative paper on the Vatican and the Diyanet in Italy and Türkiye respectively, their development from a historical and institutional lens and their influence on state policies on family related issues. See Luca Ozzano and Chiara Maritato, "Patterns of Political Secularism in Italy and Turkey: The Vatican and the Diyanet to the Test of Politics," *Politics and Religion* 12, no. 3 (2019): 457–77.

work titled similarly "Laïcité in Reverse" in understanding the public sphere within its law-oriented meaning, seeking to "locate all political deliberation in every case in relation to lawmaking,"[19] where she warns that religious groups through their representatives influence secular law by translating religious precepts into arguments of public reason, and thus making laws in agreement with their religious codes.[20] However, the process of *reversed secularization* does not only view the processes that occur on the legislative level, rather than on the constitutional, legislative and judicative level, as a process that encompasses different shapes and forms. Hence, it is a term that defines a gradual process occurring in multiple levels and institutions rather than in society itself and explains the changes that emerge under the framework of constitutional law and the paradigm of secularism. Accordingly, reversed secularization does not imply that we are experiencing an opposite process that would ultimately lead to the same conditions present before the process of secularization and institutional differentiation. It, therefore, differs from desecularization.[21] It also differs from the idea of a post-secular society in the Habermasian sense,[22] both since it does not suggest that we have entered a whole new era, and because it does not entertain problems of society as such if not directly correlated to, or translated into state acts and actions.

Finally, the dissertation introduces a novel approach that frames the outcomes of specific judicial decisions as contributing to the *thinning* and *thickening* of the principle of secularism in its liberal understanding. A *thinning* of the principle of secularism transpires when its significance is "watered down" in most instances in the spirit of catering to the majority religion. A *thickening* of the principle of secularism, caters equally to the majority religion and

[19] Nadia Urbinati, "Laïcité in Reverse: Mono-Religious Democracies' and the Issue of Religion in the Public Sphere," *Constellations* 17, no. 1 (2010): 6.
[20] Thus, in this work she revisits Habermas and Rawls' revisions of the role of public reason. *Urbinati, "*Laïcité in Reverse,*"* 16.
[21] See Peter L. Berger, *The Desecularization of the World : Resurgent Religion and World Politics* (Washington, D.C.: W.B. Eerdmans, 1999).
[22] See Jürgen Habermas, *An Awareness of What Is Missing: Faith and Reason in a Post-Secular Age* (Cambridge: Polity Press, 2010).

emerges when there is an overinflation of its existential meaning at the expense of liberty, which has allowed for the state power/interference to penetrate where it was not allowed to do so before.

Thus, the main question the dissertation will answer is: *What is the normative potential of the principle of secularism in the three jurisdictions and how does it operate under pressure from contextual and political determinations?* Through the method of induction, to answer the main question the dissertation I will first answer three sub-questions: 1) *How was the principle of secularism constructed, and what contextual determinators were key in its normative conceptualization?* 2) *How has the normative content of the principle of secularism been developed or challenged on the legislative level in the field of education and state funding of religion? 3) Does judicial interpretation in cases related to constitutional secularism and education or state funding of religion lead to the "thickening" or "thinning" of the principle of secularism?*

Consequently, the main argument of the dissertation is as follows: *Constitutional secularism, as a specific arrangement determining the level of separation in a specific jurisdiction, is contingent upon the level of consolidation of power the state achieved in the nation-building project and the strength of the majority religion against which it emerged; as such it is normatively weak and upon changed conditions allows for political re-negotiation leading to a process of reversed secularization.*

The logic of the argument operates under the assumption that as circumstances change, even if secularism is protected on a constitutional level, its interpretation is prone to shifts. These shifts occur on two levels: the legislative level and the level of adjudication. On the legislative level, legislative and policy acts, often influenced by institutional engagement of political and religious actors, determine or re-determine what is (im)permissible action by the secular state. An example of such acts can be those introducing religious symbols or religious

education in public schools or introducing forms of state funding to religious organizations in general. On the adjudicative level, the permissibility of said state action is often challenged directly or indirectly under the principle of constitutional secularism. In these cases, there is a danger that courts may adopt certain interpretative technics that lead to the *thinning* or *thickening* of the principle of secularism in its liberal understanding. I argue that these processes and their outcomes are evidence of an ongoing process of *reversed secularization*.

Reversed secularization as a process starts after institutional differentiation is complete, meaning upon the new nation-states' successfully take-over of functions once performed by religious organizations. In terms of establishing a timeline, the following logic is applied. The nation-state in the jurisdictions covered by this dissertation was built opposed to a strong religion[23] aiming to contain its influence in the process. As the state-formation was completed and the secular nation-state was born, the domination over the state apparatus was no longer in question. Thus, in time religious organizations finally accepted their place under law and the process of secularization, in an institutional sense, was considered completed. What has happened next and what we experience as an outcome today is the process of reversed secularization. When strong religions are institutionally contained - the state consolidated its power, and religions lost their strong nature - the threat of their prevalence is no longer imminent. In the absence of an imminent threat, a larger entanglement does not seem as problematic. Consequently, even though states are secular in a sense that they maintain the highest authority in normative ordering as well as maintain the secular source of their sovereign power, in areas more closely connected to public social functions, larger state-religion identification and entanglement is emerging. Thus, as *laïcité, laiklik, laicità* are constitutional

[23] For references and definitions of strong religions see Stopler, "The Challenge Of Strong Religion In The Liberal State."; Rosenfeld, "Recasting Secularism as One Conception of the Good Among Many in a Post-Secular Constitutional Polity."; and Jürgen Habermas, "Struggles for Recognition in the Democratic Constitutional State," in *Multiculturalism*, ed. Amy Gutmann (Princeton: Princeton University Press, 1994), 107–48.

concepts and reverse secularization is the re-interpretation of those concepts, the dissertation will investigate the renegotiated meaning of secularism through three levels of inquiry.

The research will be conducted through three level of inquiry: 1) at the level of conceptualization (by constitution-drafting in the case of Türkiye, by the laws of the Third Republic in France and by adjudication in Italy); 2) at the level of the legislative processes in the enactment of laws questioning the principle; 3) at the level high and constitutional courts. All levels of inquiry will be approached by applying the descriptive, analytical and comparative methods. Thus, a descriptive overview of legal frameworks will be conducted, however, secondary sources will be also used to analyze the causal relationships between sociological, historical and political factors and lawmaking. Critical evaluation of the findings will be conducted through the comparative legal research (CLR). In the first level, the application of CLR will be more limited, as the focus will primarily be to investigate the jurisdictions independently. However, in the second and third levels of enquiry, CLR will serve as the dominant approach as they will provide a systematic exposition of legal frameworks and case-law as well as their evolution from a comparative perspective. CLR will also be used to evaluate substructural forces that influence courts and decision-making. As this dissertation concerns jurisdictions within a civil law (continental) tradition, in using primary sources, it will primarily rely on an approach consistent with analyzing cases interpreting statutes; however, it will also look at standards of review and attempt to show innovative, interpretive methods.[24]

The first level as applied to every jurisdiction specifically will aim at answering the first sub-question of the dissertation mainly: *How was the principle of secularism constructed, and what contextual determinators were key in its normative conceptualization?* To do so, a contextual and historical analysis will be conducted focusing on the social and political factors that have influenced the conceptualization of the principle in the specific national context. The

[24] A. Hsieh, "Using cases in Legal Analysis", The Writing Center at George Town University, 2012, 24.

first level of inquiry is vital as the normative potential of constitutional secularism established in its funding documents dictates religion-state relationships and future legislative/judicial action. As Lerner argues, when conceptualizing religion-state relationships, constitution-drafters apply either strategies of constitutional permissiveness or a more restrictive approach by adopting "specific constitutional constraints [designed] to limit the range of possibilities available for future decision-makers."[25] She further argues that from a liberal secular perspective, permissive constitutional arrangements are normatively weaker as they allow for non-egalitarian policies.[26]

The second level and third levels of inquiry will focus on education and state funding of religious education. More specifically, in the field of education this dissertation will focus on the issues of state funding of private religious schools, religious education in public schools and the permissibility of religious symbols in public schools. In terms of state funding of religious organizations, both direct and indirect funding will be covered by this dissertation. The justification of the area focus is two-fold: 1) throughout time and contexts, competing interests and attempts to grab power or elevate influence between religious institutions and states have manifested most frequently and notably in the fields of education and funding;[27] 2) education and money are closely related to influence in a broader social context – education due to its role of shaping future citizens and their loyalties and funding since money in itself grants larger opportunity for achieving goals and interest and therefore both serve as a method of sustaining and elevating influence and power. Considering their significance, these two areas

[25] Lerner, "Constitutional Permissiveness, Constitutional Restrictiveness, and Religious Freedom." 172.
[26] Ibid, 197.
[27] This is not to say that matters concerning the family and related to (but not necessarily) gender and sexuality have not been prevalent. In fact, conflicts between competing conceptions and rights in these areas have been tested both in front of national and international courts. See for example Ewieda and Others v. The United Kingdom, No. 48420/10, 59842/10, 51671/10 and 36516/10 (European Court of Human Rights January 15, 2013).; Syndicat Northcrest v. Amselem, [2004] 2 SCR 551; *Lee (Respondent) v Ashers Baking Company Ltd and others (Appellants) (Northern Ireland)* [2018] UKSC 49; Masterpiece Cakeshop v. Colorado Civil Rights Commission, 584 U.S. ___ (2018)

have been historically contested and prone to practical challenges indicative of the limits of constitutional secularism.

The second level of inquiry as applied to the areas of education and state funding of religion respectively will aim to answer the second sub-question of the dissertation namely: *How has the normative content of the principle of secularism been developed or challenged on the legislative level in the field of education and state funding of religion?* The significance in the second level lies in the importance of political deliberation in lawmaking [28] and its outcomes. Even if the constitution is restrictive, meaning that it leaves less space for ordinary legislation to govern state-religion relationships, ordinary legislation alters the normative content of secularism through the process of deliberation. Although this dissertation will not entertain purely political narratives, it cannot disregard that certain processes of political renegotiation rearrange the landscapes of state-religious institutions relationships in national jurisdictions.

Finally, the third level of inquiry will aim at answering the third sub-question of the dissertation namely: *Does judicial interpretation in cases related to constitutional secularism and education or state funding of religion lead to the "thickening" or "thinning" of the principle of secularism?* The third level of inquiry is important as in socially polarizing, politically charged hard cases where the permissibility of legislation is questioned under the principle of constitutional secularism, courts often directly or indirectly (re)interpretate the principle by via different interpretative methods. As Grimm notes, interpretation in constitutional adjudication is a legal operation, not a political one.[29] It has "its basis in the text and can be derived from it in a reasonable argumentative manner," and must distinguish "between legal and non-legal arguments, be they political, economic, or religious."[30] However,

[28] Urbinati, "Laïcité in Reverse," 6.
[29] Dieter Grimm, "Constitutions, Constitutional Courts, and Constitutional Interpretation at the Interface of Law and Politics," in *Constitutionalism: Past, Present, and Future* (Oxford: Oxford University Press, 2016), 199-212.
[30] Ibid, 205.

legal operations become difficult in the so-called "hard cases" where positivism as a method prevalent in European courts has arguably failed,[31] and so has pure textualism. Thus, judges must "look beyond the text of constitutional provisions in order to resolve constitutional dilemmas"[32] and resort to purposivism, historical analyses, legislative history, or philosophical approaches; the choice of which may allow for a judge "to stay as close as possible to his favored outcome."[33] These cases raise questions of judicial activism, legitimacy and even imperialism,[34] as they "tend to tackle long-boiling constitutional conflict triggered by political disagreement."[35] Hence, even though as Rosenfeld notes, structural and institutional features of European constitutional Courts have averted deep divisions (as compared to the U.S) certain decisions over fundamental values (such as crucifix cases) have led to the crises of Courts' legitimacy.[36] Moreover, such cases may have a substantial influence on constitutional doctrine.[37]

These considerations, however, cannot be investigated in a vacuum, but rather in relation to the particularities of each Constitutional Court/Council as well as the contemporary trends in interpretative mechanisms that might have influenced the courts decisions. The French Constitutional Council[38] had a primary role of "balancer" between the powers of the executive

[31] Ronald Dworkin, "Hard Cases," *Harvard Law Review* 88, no. 6 (1975): 1057–109.
[32] András Sajó and Renáta Uitz, "Who Guards the Guardians? Constitutional Adjudication," in *The Constitution of Freedom* (Oxford: Oxford University Press, 2017), 342.; See further Abraham Klaasen, "Constitutional Interpretation in the So-Called 'Hard Cases': Revisiting S v Makwanyane," *De Jure Law Journal* 50, no. 1 (2017): 1–17.
[33] Alexander Volokh, "Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else," *New York University Law Review* 83, no. 3 (2008): 769. Even though Volokh has argued that an "individual judge's choice of interpretive method does not usually substantially affect the methods that other judges use."
[34] Grimm, "Constitutions, Constitutional Courts, and Constitutional Interpretation at the Interface of Law and Politics."
[35] Sajó and Uitz, "Who Guards the Guardians?," 342.
[36] Michel Rosenfeld, "Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts," *International Journal of Constitutional Law* 2, no. 4 (2004): 633–68.
[37] Ashutosh Bhagwat, "Hard Cases and the (D)Evolution of Constitutional Doctrine," *Connecticut Law Review 30*, no. 3 (1998): 961–1017.
[38] On discussions on the nature of the Council and its qualification not as a political institution but rather than a court see Louis Favoreu, "Le Droit Constitutionnel, Droit de La Constitution et Constitution Du Droit," *Revue Française de Droit Constitutionnel*, no. 1 (1990).); Dominique Rousseau, "The Conseil Constitutionnel Confronted with Comparative Law and the Theory of Constitutional Justice (or Louis Favoreu's Untenable Paradoxes)," *International Journal of Constitutional Law* 5, no. 1 (2007): 28–43.

and Parliament.[39] Before the 2000s, Council treaded political controversies carefully not to cast any doubt of possible judicial "*coup d'Etat;"*[40] *ultimately resulting in its slow transformation* from a mere "buffer" to a proper constitutional adjudicator.[41] Thus, the Council applies a "formalist and quite cryptic approach,"[42] showing self-restraint and creating a perception of merely applying the law to the facts.[43] On the other hand, the Italian and the Turkish Constitutional Courts are based on the Kelsenian model, prevalent in Europe[44] and from the moment of their establishment have asserted their authority. With its first decision, the ItCC, declared the binding nature of all constitutional norms[45] thereby establishing its prestige and authority.[46] The Court not only delivers different types of decisions (corrective, interpretative, additive), but also applies different interpretative methods, and unlike the French, has mostly interpreted the constitution as a living instrument. The TCC, whose activism has led to its contestation,[47] has always been considered not only as a guardian of the Constitution, but also a guardian of Kemalist principles and modernity. The Court often

[39] Due to the historic skepticism and fear of courts and under Édouard Lambert's enduring influence. See Édouard Lambert, *Le Gouvernement Des Juges et La Lutte Contre La Législation Sociale Aux États-Unis* (Paris: Marcel Giard and Cie, 1921).

[40] Arthur Dyevre, "The French Constitutional Council," in *Comparative Constitutional Reasoning*, eds. András Jakab, Arthur Dyevre, and Giulio Itzcovich (Cambridge: Cambridge University Press, 2017), 323–55.

[41] It was not until its 1971 decision, and even more so after the 2004 reforms, the Court has emerged into as a strong institution.

[42] Vicki C. Jackson and Jamal Greene, "Constitutional Interpretation in Comparative Perspective: Comparing Judges or Courts?," in *Research Handbook in Comparative Constitutional Law*, eds. Tom Ginsburg and Rosalind Dixon (Cheltenham, UK: Edward Elgar, 2011), 599. For an opposing view see Mitchel de S.-O.-l'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press, 2004).

[43] Michael Wells, "French and American Judicial Opinions," *Yale Journal of International Law* 19, no. 81 (1994): 92.

[44] Further on the features of the Court see Tania Groppi, "The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?," *Indian Journal of Constitutional Law* 4, no. 1 (2010): 100–17.

[45] See Decision. no. 1/1956 (Italian Constitutional Court 1956). On the first years of the Constitutional Court see John Clarke Adams and Paolo Barile, "The Italian Constitutional Court in Its First Two Years of Activity," *Buffalo Law Review* 7, no. 2 (1958): 250–65.

[46] See Groppi, "The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?"

[47] Aslı Bâli, "Courts and Constitutional Transition: Lessons from the Turkish Case," *International Journal of Constitutional Law* 11, no. 3 (2013): 666-701. However, the Court's power has been contained "contained" by the 2010 constitutional reform. See Osman Can, "The Turkish Constitutional Court as Defender of the Raison d'Etat?," in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, eds. Rainer Grote and Tilmann Röder (New York: Oxford University Press, 2012), 259-78.

delivers decisions that both adopt broad philosophical considerations as well as the extensive translation from ECtHR cases, without much creativity.[48]

The dissertation will be organized in six chapters. Chapter 1 will provide for a normative and theoretical framework on constitutional secularism as well as its interplay with questions related to education and state funding of religion. The aim will be to provide conceptual clarity by defining secularism as a liberal constitutional principle and to provide examples of its limitations. Chapters 2 through 4 will focus on each jurisdiction respectively and contextually frame the conceptualization of the principle of secularism from its establishment and beyond. The final goal would be to answer the first sub-question posed by the dissertation as applied to all three jurisdictions respectively, namely: *How was the principle of secularism constructed, and what contextual determinators were key in its normative conceptualization?* Chapter 5 will be devoted to education, more specifically on issues that emerge related to the funding of private religious schools as well as religious education and the presence of religious symbols in public schools. Chapter 6 will be devoted to indirect and direct funding of religion, its regulation and accessibility. Chapters 5 and 6 will provide insights into the two additional sub-questions posed by the dissertation, namely: *How has the normative content of the principle of secularism been developed or challenged in the field of education and state funding of religion? Does judicial interpretation in cases related to constitutional secularism and education or state funding of religious organizations lead to the "thickening" or "thinning" of the principle of secularism?*

[48] Bertil Emrah Oder, "Populism and the Turkish Constitutional Court: the Game Broker, the Populist and the Popular," *Verfassungsblog* (blog), accessed April 1, 2022, https://verfassungsblog.de/populism-and-the-turkish-constitutional-court-the-game-broker-the-populist-and-the-popular/.

Chapter 1. Preliminary Considerations: Constitutional Secularism and two Examples of its Limitations

This chapter aims to provide conceptual and normative clarity, first by defining the principle of secularism and thereafter by providing a normative framework on issues concerning religion, education and state funding. Thus, Section 1 will embark on a mission to find the essence of constitutional secularism. To do so, a brief historical and theoretical overview of the emergence and development of secularism will be provided, positioning secularism as a problem of sovereignty turned solution towards equal citizenship and religious liberty. The following overview is by no means extensive or exhaustive. Tracing the historical evolution of church and state relationships from their first divergence after the baptism of Constantine to today would be a worthy endeavor; however, it is one already taken by historians[49] and thus is above the scope of this dissertation and the expertise of its author. Instead, a thematic overview will be provided positioning the concept of secularism in history as well as in constitutional and legal doctrine, as linked to sovereignty and legitimacy.

Section 2 will elaborate on the theoretical and normative underpinnings in questions where secularism meets emerging issues in education and state funding of religion. These two areas have tested the normative framework under which constitutional secularism operates and best portray its changing content when under practical and contextual difficulties. Since the dissertation will focus on three Council of Europe member-states, in search of a normative framework I will rely primarily on the standards of the ECtHR.

[49] See David Knowles, "Church and State in Christian History," *Journal of Contemporary History* 2, no. 4 (1967): 3–15.

1. The Essence: Constitutional Secularism as Sovereignty and Equality

1.1. A Historical Quest for the Essence of Secularism

Etymologically, the term *secularism* in a manner we associate it with today, was first articulated in the 19th century.[50] Even though constructed differently in the English and French speaking world, it nevertheless equally referred to a differentiation between the sacred and the temporal. [51] Secularism emerged as a doctrine regulating sovereign power, through controversies and conflicts between religious institutions and the state throughout history. Thus, the central issue was one of authority and control. In this struggle additional concepts emerged directly from it or in parallel to it. Thus, as Knowles points out the relationship between church and state in Europe "is closely allied to, and indeed often confused with those other recurring dialogues between liberty and authority, between the individual and the group, a between law and conscience." [52] This sub-section will provide a brief overview of the historical and theoretical particularities surrounding the conceptualization of secularism and supporting principles, by positioning the concept as emergent from struggles over sovereign power turned solution towards equal citizenship and religious freedom.

[50] The term secularism had different meanings prior to the 19th century. In the medieval times, the world "*secularis*" "was used to distinguish those members of clergy who worked with people within society in contrast to their brethren who were exclusively devoted to spiritual pursuits within the confines of monastic life." Mancini and Rosenfeld, "Introduction," xvii. In the period of the Reformation the term secularization was used to categories the process of reclaiming Church property for the sake of converting them for non-religious use.

[51] In the English-speaking world, it was first used by George Jacob Holyoake (an editor of various periodicals considered radical at the time) to describe himself and others who shared his views as *secularists,* defining secularism as "a code of duty pertaining to this life, founded on considerations purely human". See Bob Forder, "George Jacob Holyoake," National Secular Society, accessed November 9, 2018, https://www.secularism.org.uk/george-jacob-holyoake.html. In France, the term *laïcité* emerged from debates surrounding the exclusion of religious dogma from public education as the last stage of progressive differentiation/secularization. See Sylvie Le Grand, "The Origin of the Concept of Lacité in Nineteen Century France," in *Religion and Secularity. Transformations and Transfers of Religious Discourses in Europe and Asia*, eds. Marion Eggert and Lucian Hölscher (Leiden: Koninklijke Brill NV, 2013), 59–76.

[52] Knowles, "Church and State in Christian History," 3.

1.1.2 Secularism as a Struggle for Sovereign Power

While, throughout history numerous doctrines defined and redefined the demarcation of power between the Church and the State in Europe, in the Muslim world such theories never emerged due to the lack of organized structure in Islam. Even though such doctrine never emerged, a relationship forged in power did exist between the ulama and secular leaders. All throughout history Sunni Muslim religious leaders have indeed challenged and even overthrown Muslim rulers, thus, it has been said that "anyone who [could] win over the ulama or in other ways achieve a standing as a valid religious spokesman [was] in a position to pose a serious organized challenge to government."[53] However, these confrontations are not comparable to those in Europe, as historically and even today, in predominantly Sunni Muslim states the state maintained its power over the ulama, including the "right to appoint and dismiss qadis, muftis, and teachers in Muslim seminaries, has exercised control over financial aspects of Muslim religious properties such as mosques, *madrasas* and the institution of *waqf*."[54] This tradition especially echoes in the context of the Ottoman Empire and thereafter in the establishment of the Turkish Republic through the Diyanet.

In the Western world, the roots of secularism are to be found in doctrines and frameworks regulating sovereign power. In Christian though, there is an understanding of duality of authority in things sacred and temporal, that has changed its shape via emerging doctrines on supremacy. The primary reference of this duality is found in the New Testament in the phrase "Render unto Caesar the things that are Caesar's, and unto God the things that are God's."[55] The reference epitomizes a dualism of authority that nevertheless derives from the same source - God, but with a different mission,[56] where Caesar ought to exercise its authority over "earthly

[53] L. Carl Brown, *Religion and State: The Muslim Approach to Politics* (New York: Columbia University Press, 2000), 33.
[54] Ibid, 35.
[55] Matthew 22:21
[56] See Joseph Lecler, *Toleration and the Reformation* (New York: Association Press, 1960).

processes" such as the criminal punishment and levying of taxes.[57] As a doctrine it was further developed by Augustine in the 5th Century in *City of God against the Pagans,* as a tale of two cities - one of God for the pious and the one of sinful man,[58] demarking the "divide between the spiritual realm and the arena of politics."[59] The two cities he claimed, coexist peacefully but, uncomfortably until the end of time.[60]

This view is reflected in the 5th century Gelasian doctrine of the two powers (*duo sunt*) dividing "the sacred sovereignty of the priesthood and the executive power of the prince."[61] However, in Roman Catholicism, the predominant view was one of supremacy of the Church over the state.[62] Thus, under the Gelasian doctrine the "priestly authority was greater, inasmuch as it guided even the emperor's soul as that of a son of the church, yet the priesthood obeyed the emperor in matters of public, secular interests."[63]

After the fall of the Western Roman Empire the Catholic Church became more and more involved in secular, civil governance on a local level.[64] In the Medieval period, the Church had accumulated significant strength in temporal matters, governing armies, aiming to establish theocracies.[65] At the same time, nobles and kings assumed numerous Christian duties, among which was the duty to nominate bishops and abbots in a customary ceremony called "investiture."[66] By the 9th century and especially after the establishment of Charlemagne's Empire, the Church strived towards a central place "not only over the souls of Christendom,

[57] See Ibid.
[58] Francois Venter, *Constitutionalism and Religion,* Elgar Monographs in Constitutional and Administrative Law Series (Cheltenham, UK: Edward Elgar Publishing, 2015), 20.
[59] Mancini and Rosenfeld, "Introduction," xvii.
[60] Venter, *Constitutionalism and Religion,* 20.
[61] James E. Wood, *Church and State in Historical Perspective. A Critical Assessment and Annotated Bibliography* (Westport, Connecticut; London: Praeger, 2005), 26.
[62] Ibid.
[63] Knowles, "Church and State in Christian History," 7.
[64] See F. Richard Wright, *Parallels of Power. An Introduction to Some Individualists of Church and State* (Bristol: John Wright and Sons LTD., 1966).
[65] See Ibid.
[66] Uta-Renate Blumenthal, "Investiture Controversy," in *Britannica*, accessed February 9, 2022, https://www.britannica.com/event/Investiture-Controversy.

but over their political life."[67] Thus, the Gelasian doctrine shifted into a doctrine entrusting the pope "with two swords, temporal and spiritual, that he bestowed the former upon the secular ruler, but only so that he might serve the ends of the pope to whom he owed his"[68] As a result, whilst in the Medieval period "the distinction was not between Church and State as two separate entities, but rather between the two different authorities and hierarchies which respectively administered different aspects of life[69] and "the relationship between spiritual and political authority was consistently intimate, it was also antagonistic, exhibiting, at various times, an intense struggle for religious authority and political power."[70]

The power of the Papacy did not go unchallenged and forged a tradition of continuing attempts by the state, in its the quest of sovereignty, to tame and control the Church. Factual controversies reflected a larger struggle for power between papacy and specific states, a few most worthy of mentioning. One of the greatest controversies,[71] is that of the investiture contest (from the second half of the 11th and first decades of the 12th century). The controversy stemmed from the Gregorian reform and especially the development of the notion *libertas ecclesiae*[72] and escalated in open conflict between Gregory VII and the emperor Henry IV (and later several other European monarchs) over the custom of investiture, that also involved proclaiming loyalty to the king. The conflict resulted in the excommunication of the Emperor by the Pope, the proclamation of the Anti-pope by the Emperor, and ultimately into a civil war.[73] It was an example of the Church struggle for complete autonomy and the states refusal to surrender its control and demand for loyalty, even if symbolic. A less notable, but equally

[67] Knowles, "Church and State in Christian History," 8.
[68] Ibid, 10.
[69] See Christopher Dawson, "Church and State in the Middle Ages," in *Medieval Essays (The Works of Christopher Dawson)* (Catholic University of America, 1954), 67–83.
[70] David Little, "Christianity and Religious Freedom in the Medieval Period (476 – 1453 CE)."
[71] Sandy B. Hicks, "The Investiture Controversy of the Middle Ages, 1075-1122: Agreement and Disagreement Among Historians," *Journal of Church and State* 15, no. 1 (1973): 6.
[72] See Kevin Madigan, "Chapter 8. Libertas Ecclesiae: The Age of Reform, ca. 1050–1125," in *Medieval Christianity: A New History, New Haven* (New Haven: Yale University Press, 2015), 119–47.
[73] See further Wright, *Parallels of Power*, 23-38.

illustrative example, are the limitations imposed by the *Magna Carta* on Church donations. The *Magna Carta* prohibited donations in land to be made to the Church without the King's approval.[74] The enactment of the Statute of Mortmain by Edward the First in 1279 effectively enforced these limitations, previously almost completely disregarded. Thus, this is another example of a sovereign attempting to control the functioning of the Church.

By the 13th century "popes, having replaced kings as the ultimate authority in the Western empire, came to possess the final say regarding the use of force"[75] resulting in the Christian Crusades and later the inquisition; thus, the fact that church became "a body with all the qualities and claims of a state, a unitary conception of power"[76] was dominant. In 1302 Pope Boniface VIII, under the writings of Bernard of Clairvaux as interpreted by Thomas Aquinas,[77] reevaluated the Gelasian doctrine and framed the *two swords doctrine.*[78] Not departing from the Gelasian doctrine, the two swords doctrine simply strengthened the position of the primacy of the Pope as the vicar of Christ, in whom Christ has vested his whole authority,[79] thus, proclaiming universal jurisdiction.[80] At the same time, ideas developed surrounding the notion of the secular state as "a natural and necessary development of human society."[81] Most notably, in *Defensor pacis*, Marsilius Of Padua claimed that the main cause for unrest was the strive of the Church to prevail over secular rulers,[82] and building on Aristotle he advocated for a polity based on consent;[83] William Ockham was also "one of the first medieval authors to advocate a

[74] "Statute of Mortmain Law and Legal Definition | USLegal, Inc.," accessed July 3, 2020, https://definitions.uslegal.com/s/statute-of-mortmain/.
[75] David Little, "Christianity and Religious Freedom in the Medieval Period (476 – 1453 CE)," Berkley Center for Religion, Peace and World Affairs, accessed August 27, 2022, https://berkleycenter.georgetown.edu/essays/christianity-and-religious-freedom-in-the-medieval-period-476-1453-ce.
[76] Knowles, "Church and State in Christian History," 10.
[77] See L. P. Fitzgerald, "St. Thomas Aquinas and the Two Powers," *Angelicum* 56, no. 4 (1979): 515–56.
[78] See Venter, *Constitutionalism and Religion*, 20.
[79] Brian Tierney, *Origins of Papal Infallibility, 1150-1350 : A Study on the Concepts of Infallibility, Sovereignty and Tradition in the Middle Ages* (Leiden: E. J Brill, 1972).
[80] Knowles, "Church and State in Christian History," 10.
[81] Ibid.
[82] Filimon Peonidis, "Marsilius of Padua as a Democratic Theorist," *Roda Da Fortuna* 5, no. 1 (2016): 106–24.
[83] Cary J. Nederman, *Community and Consent: The Secular Political Theory of Marsiglio of Padua's Defensor Pacis* (Lanham, MD: Rowman & Littlefield, 1995).

form of church/state separation,"[84] developing a political theory on the state of nature and the role of consent in delegating law-making power.[85]

In the 14th and 15th century, influenced by the emerging political though, the growth of national consciousness as well as administrative efficiency, monarchs reasserted themselves in regaining their power.[86] They were especially concerned that the Church had been acquiring a great deal of wealth and power at the expense of the state.[87] An example of such "reassertion" was King Philip the Fourth's (The Fair) of France act towards limiting the jurisdiction of ecclesiastical courts, reforming the privileges of the clergy and much like Edward in England, imposing control over the transfer of land to the Church.[88] This ultimately resulted in complete rupture between the King and Pope Boniface VIII, and gave the Kind the etiquette of "an implacable enemy of the Church and the forerunner of the anticlericals of his own day."[89]

In the 15th century both kings and the Papacy had a crisis of authority at the expanse of each other's grab on power.[90] The extreme papal claim was first challenged by the realism of the French monarchy and thereafter by doctrines and theories that proclaimed kings as vested with absolute authority.[91] Thus, kings of Spain, France, and England, unlike their predecessors, were "regarded as the sole authority, the representative of God, to whom subjects owed a quasi-religious obedience."[92]

[84] Paul Vincent Spade and Claude Panaccio, "William of Ockham," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Spring 2019 (Metaphysics Research Lab, Stanford University, 2019), https://plato.stanford.edu/archives/spr2019/entries/ockham/.
[85] See Stephen Chak Tornay, "William Ockham's Political Philosophy," *Church History* 4, no. 3 (1935): 216-17.
[86] Knowles, "Church and State in Christian History," 11.
[87] In particular, the concern was that the state suffered reduction of revenue from feudal estates due to land donations made to the Church. See "Medieval and Middle Ages History Timelines - Edward (I, King of England 1272-1307)," accessed November 12, 2018, https://www.timeref.com/people/edward_i_king_of_england_1272_1307.htm.
[88] See Joseph Reese Strayer, *The Reign of Philip the Fair* (Princeton: Princeton University Press, 1980).
[89] Strayer, *The Reign of Philip the Fair*, 237.
[90] Knowles, "Church and State in Christian History" 12.
[91] Ibid.
[92] Ibid.

The 16th saw the birth of the Protestant Reformation, that divided European Christianity and led to raging religious wars under *cuius region, eius religio* doctrine, aligning state and religion.[93] The 1648 Peace of Westphalia, that ended the Thirty-Year War that raged across Western Europe, confirmed the doctrine of *cuius region, eius religio* but, in limited capacity by confirming the principle of the *ius emigrandi* stating that "subjects of a ruler who did not share his religion had the right to emigrate peacefully."[94] Not only that Martin Luther influence the development of church-state doctrine,[95] the Protestant Reformation created additional confessional blocks- Lutheran and Calvinist. By generating competition for the Catholic Church once holding monopoly, the Reformation contributed towards the secularization of the West.[96]

Yet, the 16th and 17th century also saw the birth of Gallicanism as ultimate doctrine of state supremacy over the Church, as well as the break of England from the Catholic Church. Although as a term Gallicanism itself was first attested in 1810 Napoleon France, it finds its roots as early as the 8th and 9th century and developed in the realm of ideas in the late 16th century.[97] Gallicanism refers to a "large number of doctrines of canon or public law defining the liberties of the Gallican church."[98] In its core, Gallicanism encompassed political doctrines on the restriction of papal power, consisting of three basic ideas: "independence of the French king in the temporal order; superiority of an ecumenical council over the pope; and union of

[93] The concept finds its roots in the Peace of Augsburg in 1555.
[94] Venter, *Constitutionalism and Religion*, 21.
[95] Martin Luther developed the two-kingdom doctrine. The doctrine that did not diverge from the duality set forth in the previous doctrines developed by the Church; God governs both kingdoms however, he claims they must not be confused, as they have been throughout history, as it would be fatal for both. See Thorsten Prill, "Martin Luther, the two Kingdoms, and the Church," *Evangel: The British Evangelical Review* 23, no. 1 (2005): 17–21.
[96] See Davide Cantoni, Jeremiah Dittmar, and Noam Yuchtman, "Religious Competition and Reallocation: The Political Economy of Secularization in the Protestant Reformation," *The Quarterly Journal of Economics* 133, no. 4 (2018): 2037–96.
[97] "Gallicanism," in *Encyclopedia Britannica*, Ecclesiastical and Political Doctrines, accessed September 29, 2022, https://www.britannica.com/topic/Gallicanism.
[98] Jotham Parsons, *The Church in the Republic. Gallicanism & Political Ideology in Renaissance France* (Washington, D.C.: The Catholic University of America, 2004), 5.

clergy and king to limit the intervention of the pope within the kingdom."[99] The story of Gallicanism is a story of the "gradual subjugation of the French episcopate and clergy to the secular power,"[100] officialized with the Declaration of the Clergy of France of 1682 and the Acts of the Assembly of 1682 concerning the question of ecclesiastical power.[101] Even though the Acts did not survive past a decade, Gallicanism developed into a tradition reemergent in the 19th century as opposed Ultramontanism, whose influence on religion-state relationships is felt in contemporary France.

The most significant example of the imposition of state sovereignty over religious matters is the act of establishment of the Church of England under Henry the VIII. The quarrel between the Pope and the King regarding the annulment of the King's marriage, resulted into the gradual enactment of numerous of acts that separated the English Church from Roman hierarchy. In 1534 the Act of Supremacy finally recognized Henry VIII as the "Supreme Head of the Church of England;" England still had one Church but, under the rule of the sovereign.[102]

Thus, even though secularism as a contemporary concept is an intellectual product of the Enlightenment (c. 1690-1790) that emerged as a historical consequence of the European Wars of religion, it reflected a long history of power-struggles between the Church and the state. Thus, it emerged as a theory of legitimacy and sovereignty, answering questions on where power comes, and how power is exercised.

The roots of secularism as a concept in the Enlightenment must be understood in the context in which it emerged. Considering the devastating consequence of the religious war, enlightenment thinkers did not propagate the "end to religion, but rather aspired to reform churches and beliefs so that they ceased to be an obstacle to political stability, social harmony,

[99] "Gallicanism," in *Encyclopedia Britannica*.
[100] Alfred Barry, "Bossuet and the Gallican Declaration of 1682," *The Catholic Historical Review* 15, no. 2 (1929): 143.
[101] Ibid, 148.
[102] See W. Cole Durham and Brett G. Scharffs, *Law and Religion: National, International, and Comparative Perspectives* (New York: Aspen Publishers, 2010), 11-12.

economic growth and intellectual development."[103] In fact, after the 1970's the paradigm upon which Enlightenment studies examine the way thinkers approached religion shifted - from reason vs. religion to reason vs. the Church.

Enlightenment philosophers were opposing the Church and clerical influence and not religion itself. [104] They had their faith in the God but believed as dictated by deism that since God "had not intervened in worldly affairs since Creation … the Church's claim to mediation between divinity and humanity [was] fraudulent."[105] They opposed in the words of Kant, "ecclesiastical despotism" or in the words of D'Alembert the "abuse of spiritual authority."[106] In the most notable contribution in early Enlightenment, John Locke's *A Letter Concerning Toleration,*[107] Locke presented the idea of "secularization" of state powers claiming that matters of state and matters of the church must be separated; there should be no controversy as to who takes care of the "soul" and who resolves matters of the commonwealth. His doctrine on separation, vesting the state with the task to uphold the common good, would influence religion-state frameworks on both sides of the Atlantic.[108]

However, as Barnett claims we must not forget that philosophers were rather spectators/observers of "politico-religious struggles and transformations across late-seventeenth- and eighteenth-century Europe."[109] Hence, it is paramount that actual politico-religious conflicts, and conflicts within Catholicism itself, are given more attention. As he puts

[103] Juan Pablo Domínguez, "Introduction: Religious Toleration in the Age of Enlightenment," *History of European Ideas* 23, no. 4 (2017): 275.
[104] It must be noted that the Enlightenment itself was not a unified movement, although in most part "secular" and "anti-clerical" there were also religious and even Catholic trends within it. See Jonathan Sheehan, "Enlightenment, Religion, and the Enigma of Secularization. A Review Essay," *American Historical Review* 108, no. 4 (2003): 1061–80.; David Sorkin, *The Religious Enlightenment: Protestants, Jews, and Catholics from London To* (Princeton: Princeton University Press, 2011).
[105] S. J. Barnett, *The Enlightenment and Religion: The Myths of Modernity* (Manchester: Manchester University Press, 2003), 2.
[106] Domínguez, "Introduction: Religious Toleration in the Age of Enlightenment," 275.
[107] John Locke, *A Letter Concerning Toleration*, trans. William Popple (Huddersfield: J. Brook, 1796).
[108] John Jr. Witte, "Facts and Fictions About the History of Separation of Church and State," *Journal of Church and State* 48, no. 1 (2006): 25.
[109] Barnett, *The Enlightenment and Religion,* 14.

it, "religious conflict was most often politico-religious conflict, and it is to the politicization of religion that we should look for one of the main motors of secularization."[110] Consequently, the Enlightenment brought upon, as J. G. A. Pocock notes, "a series of programmes for reducing the power of either churches or congregations to disturb the peace of civil society by challenging its authority."[111] Nowhere does that come across clearer as it does in the French example, where circumstances and grievances inspired philosophical writings and philosophical writings inspired a revolution.

The French Revolution translated Enlightenment ideas into a political project whose final product was the creation of the nation-state. It represented a break with the past, an event that brought down the *Ancien Régime*[112] ending the entanglement of church and state and the monopoly of Catholicism in the public sphere. The aim of the revolutionaries was to achieve a complete break with the past[113] and put reason and conscience of Men as central. The Declaration of the Rights of Man and of the Citizen, "[freed] the state of the power of religion."[114]

The idea of divine rights and powers of the King was abolished, and the source of sovereignty was transferred to the French people. Religious values guarded by moral norms became secondary to norms adopted by legislation and guarded by the state apparatus. A new political and societal power structure was born, one that placed the state above the Church and affirmed the break of institutional ties between the Church and the state. Thus, the creation of the nation-state and the secularization of sovereign power meant primarily "that religious

[110] Ibid, 38.
[111] John Greville Agard Pocock, *Barbarism and Religion*, vol. 1 (Cambridge: Cambridge University Press, 2009), 7.
[112] See François Furet, *Revolutionary France, 1770-1880*, History of France (Oxford: Blackwell, 1992), 3.
[113] Ibid.
[114] Jean Baubérot, "Laïcité and Freedom of Conscience in Pluricultural France," in *Secularism on the Edge, Rethinking Church-State Relations in the United States, France and Israel*, eds. Jacques Berlinerblau, Sarah Fainberg, and Aurora Nou (New York: Palgrave Macmillan, 2014), 103.

contents and principles were expelled from state apparatuses, and in particular from civil and criminal legal codes."[115]

Thus, the roots of constitutional secularism can be traced back to a century old religious-political conflict concerning the demarcation of power. The secularization of state power emerged as a cornerstone of the Enlightenment's philosophy, as well as its political project,[116] and shifting the answer to the question: who decides the rules of the game - the rights and obligations. Thus, the principle of secularism in its essence answers questions regarding the source and nature of *power*. It answers the question of *where power comes from* - what the basis for power is; what grants legitimacy. The duality between the sacred and the secular remains but, the source of power shifted – state power in temporal matters on longer derives its legitimacy from the divine, but rather the people.[117]

1.12 Secularism as Equality: From Toleration to Equality and Freedom of Religion

Even though Thomas Aquinas already developed a rather limited theory of toleration, the Peace of Westphalia introduced toleration as modus for rulers by confirming the principle of the *ius emigrandi* and doctrine of *cuius region, eius religio,* in a limited sense. According to the limited interpretation of *cuius region, eius religio,* a king could change the state church, insofar as he does not interfere with private worship of other subjects, by guaranteeing freedom

[115] Urbinati, "Laïcité in Reverse," 8.
[116] J. Judd Owen, *Religion and the Demise of Liberal Rationalism: The Foundational Crisis of the Separation of Church and State* (Chicago: University of Chicago Press, 2001), 1.
[117] There are those that criticize the concept of secularism by emphasizing the paradox posed by its Christian foundations. They argue that the foundational values of the secular state- equality and human dignity are religious in their roots and therefore this represents an apparent "paradox of the secular state - instead of freeing itself from religious influence, the secular state is based on religious values." However, the dualism between the scared and the secular enrooted in Christian doctrine cannot be understood as embodied in constitutional secularism the modern constitutional sense. In Christian doctrine both sacred and secular authorities derive from God. See Lecler, *Toleration and the Reformation*.; As Mahlmann emphasizes it is certainly undeniable that this classical doctrines contributed to the development of the separation of religion and the state, however their conception was dependent on viewing the social order as dependent and determined by the will of God. In contrast, the developments of the ideas of legitimacy during the Enlightenment when the modern conception of secularism was formed placed humankind/men as source of justification of state power. See Matthias Mahlmann, "Religion, Secularism, and the Origins of Foundational Values of Modern Constitutionalism" (VIIth World Congress of the International Association of Constitutional Law, Athens, 2007).

of worship in private homes. [118] In 16th and 17th century toleration developed as a legal concept on a national level, as specific acts (some more some less successful)[119] such as the 1562 *Edict of Toleration* and the 1598 *Edict of Nantes* in France, the 1689 Toleration Act in England, and the *Edict of Tolerance* in the Habsburg Monarchy only in 1782, awarded certain protections. Therefore, the notion of religious tolerance on the European continent (at this point in a purely limited sense) was born as an inevitable consequence of the clashes and wars between the two streams in Christianity, and as a way of managing non-homogeneity. Thus, as Lecler argues freedom of conscience as individual freedom not exclusively awarded to Christians "advanced along with the recognition of religious pluralism."[120]

The idea of toleration was further developed in the Enlightenment. In A *Letter Concerning Toleration*, considered paramount in the history of ideas concerning toleration, Locke maintained that religious tolerance is "the chief characteristical mark of the true church" [121] and that religious pluralism should be a source of stability. [122] Enlightenment thinkers varied in demarking the limits and subjects of toleration: for Bayle, the limits were very broad both in tolerating freedom of conscience and conversation, for Spinoza it was paramount to protect freedom of thought and the press rather than belief,[123] whilst Voltaire advocated for universal tolerance.[124]

In this period Enlightenment thinkers developed theories of toleration as a means of finding a buffer between religions in a factual plural social reality, and for keeping the peace.

[118] Venter, *Constitutionalism and Religion*, 20.
[119] See Richard H. Dees, "Establishing Toleration," *Political Theory* 27, no. 5 (1999): 667–93.
[120] Urbinati, "Laïcité in Reverse," 7, referring to Joseph Lecler, "Liberté de Conscience: Origines et Sens Divers de l'expression," *Recherches de Science Religieuse* 54, no. 3 (1966): 370–406.
[121] John Locke, *A letter Concerning Toleration* (1689) in Ahdar and Leigh, *Religious Freedom in the Liberal State*, 15.
[122] See Locke, *A Letter Concerning Toleration*.
[123] See Jonathan I. Israel, "Locke, Bayle, and Spinoza: A Contest of Three Toleration Doctrines," in *Enlightenment Contested: Philosophy, Modernity, and the Emancipation of Man 1670-1752*, ed. Jonathan I. Israel (Oxford: Oxford University Press, 2006), 135–63.
[124] Caroline Warman, ed., "Voltaire, 'On Universal Tolerance', 1763," in *Tolerance*, 1st ed., vol. 3, The Beacon of the Enlightenment (Open Book Publishers, 2016), 93–95.

Thus, "toleration was necessarily better suited than religious unity for achieving peace and political stability." [125] As such toleration must be understood as modus of governance, of "directing" or even more so of curtailing state power in curing the evils of sects, heresies and "obstinate innovators."[126] Early liberal thinkers were thus, not only concerned with sustaining the peace, but also with "showing the illegitimacy of absolute rule."[127]

The idea of protection of rights, including freedom of religion, emerged parallelly to the rise of the nation state in 17th and 18th century, as well as to the development of frameworks of religion-state relationships, and forms of separation. Thus, toleration gradually evolved, or served as bases for the development of freedom of religion as a legal construct,[128] protected by the majority of documents proclaiming rights and liberties during the Enlightenment.[129]

Additionally, in both Europe and the United States separation of religion and state was also introduced as means toward equal citizenship and protection of religious liberty. In France, the birth of the nation-state strengthened these protections by altering the notion of citizenship through egalitarian lens. As the source of legitimacy shifted from God to the people, a new understanding of citizenship was constructed – one no longer religion-based, but rather territory-based. For example, in France before the Revolution only those who belonged to the religion of the one sovereign had the status of citizens with all the rights and obligations that came with it. After the Revolution all men (at the time only *men*) were considered equal, with equal rights and obligations despite their religious belonging. In terms of what substantive citizenship entails, now citizenship demanded loyalty to the state and not to one God or "its" institutional organization.

[125] See Domínguez, "Introduction: Religious Toleration in the Age of Enlightenment," 279.
[126] David Hume, *The History of England Vol. VI* (London: Liberty Fund, 1786), 165.
[127] Paul J. Weithman, "Introduction: Religion and the Liberalism of Reasoned Respect," in *Religion and Contemporary Liberalism*, ed. Paul J. Weithman (Notre Dame: University of Notre Dame Press, 1997), 4.
[128] On the development see further Lynn Hunt, "The Enlightenment and the Origin of Religious Toleration," *Reeks Burgerhartlezingen Werkgroep 18e Eeuw Tijdschrift* 4, no. 4 (2011): 4–36.
[129] See the 1689 English Bill of Rights, the 1789 French Declaration on the Rights of Man and the Citizen as well as the 1791 American Bill of Rights.

However, in Europe and France in particular, although the idea of toleration was also closely linked to curtailing and informing state action, the Revolution itself was fueled by anticlerical sentiments and class antagonism, as an "attack against the political power and privileges of the dominant institutionalized organized majority religion."[130] Therefore, its initial purpose was to dismantle the political and financial power of the Catholic Church and promote self-governance transferring legitimacy from God to the people. The new state, based on popular sovereignty (thus, based on consent), was to shield its citizens from the injustices of the previous regime and guarantee certain rights.

The way religious freedom and rights in general were constructed in the European context differs from the American reality and thus, in the European and the American traditions two separate doctrines on secularism and religious freedom/liberty were developed. In the United States, as colonies were mostly diverse and composed of citizens fleeing religious persecution, two separate approaches/justifications to state-religion separation emerged.[131] The first one was championed by the founder of Rhode Island Roger Williams, who advocated for separation as necessity in order to protect the "garden" of the church from the "wilderness" of the (secular) state order. Thus, the idea for the sake of religious liberty emerged.[132] The second was championed by Jefferson, who justified the need for separation for the sake of protecting state institutions from excessive religious influence. Thus, separation was perceived as a shield against the federal government's intrusion into religious affairs and *vice-versa*.

It is also important to emphasize that these circumstances and developments later have produced two different conceptions of rights and citizenship. In the American tradition, rights vis-à-vis the state are viewed as negative - requiring a space free from government action. The more limited and restricted state power is, the more protected and guaranteed citizens' liberties

[130] Mancini and Rosenfeld, "Introduction," xix.
[131] See Durham and Scharffs, *Law and Religion*.
[132] See Ibid, 9.

are. In the European context, on the other hand, under the influence of the French tradition, citizens have the right to live under the law; thus, "liberty is often viewed not as a freedom from State interference with the individual sphere, but rather as freedom through the state."[133]

In correlation to this view, and as a product of its overall historical development and context, on the continent a larger entanglement of the state and religion exists and is considered permissible. Of course, this varies considerably from state to state, but there is a prevalent view that some functions performed by religious organizations have a societal value and thus, deserve state support. Consequently, in many European jurisdictions the state is often a "servicer or producer of rights" to individuals and non-state organizations (for example, by the servicing of taxes for religious organizations or funding certain operations or organizations such as education).

1.2. Secularism in Theoretical Terms: Sovereignty and Equality

In its most simple definition, secularism is "encapsulated in two imperatives: separation of Faith from Reason and equal liberty for all."[134] These two imperatives emerge from *sovereignty* and *equality* and are closely linked to source, nature and "management" of power. *Sovereignty*, as a concept determines *where* power comes from and is linked to legitimacy. It encompasses the highest independent and autonomous authority of the state in temporal matters (decision-making and exercise of power) by linking public power to legitimacy (from God through is representatives on Earth to the people/nation) and legality[135] accomplished through "the art of separation,"[136] as noted before "[precluding] any source of law but the secular."[137]

[133] Michel Troper, "Constitutional Law," in *Introduction to French Law*, eds. George Berman and Etienne Picard (Alphen aan den Rijn: Kluwer Law International, 2008), 16.
[134] Mancini and Rosenfeld, "Introduction," xv.
[135] See Jean L. Cohen, "Sovereignty, the Corporate Religious, and Jurisdictional/Political Pluralism," in *Religion in Liberal Political Philosophy*, eds. Cécile Laborde and Aurélia Bardon (Oxford: Oxford University Press, 2017), 84.
[136] See Ronan McCrea, "The Consequences of Disaggregation and the Impossibility of a Third Way," in *Religion in Liberal Political Philosophy*, eds. Cécile Laborde and Aurélia Bardon (Oxford: Oxford University Press, 2017), 74.
[137] András Sajó, "Preliminaries to a Concept of Constitutional Secularism," *International Journal of Constitutional Law* 6, no. 3 & 4 (2008): 605.

Secularism in its conception is also about *curtailing power*. As a tool of curtailing power secularism is best presented by Laborde's minimalist, deflationary theory of secularism, as theory of justification of political power.[138] J*ustificatory secularism,* as she calls it, builds on the workings of liberal theorists Habermas and Rawls that suggest that in the liberal state the creation of general laws and actions must be equally accessible to all citizens and thus religious grounds for justification of public decisions are impermissible. According to her understanding, public commitment to separation and strict religious restraint is only applicable to the state and state officials and not to citizens. Secularism is not a comprehensive ethic to be endorsed or an ideology by itself promoting anti-religious sentiment; rather, secularism is a state of affairs, *a set of constraints* on state action and speech. As she puts it, "the state is secular so that citizens do not have to be."[139]

Finally, secularism imbodies *equality* as an implied concept informing*/requiring certain state action.* Thus, it encompasses equal citizenship (including both rights and obligations to live under the law/including limitation of rights in prescribed conditions), equal liberty (of conscience, belief and practice individually or collectively) and equal treatment regardless of religious (non)belonging.[140] Thus, in its essence and core (and reflective to its purpose throughout its historical development) secularism is a counter-majoritarian principle, aimed at hindering the tyranny of the (religious) majority.[141] In its interpretation, this function must always be decisive.

[138] See Cécile Laborde, "Justificatory Secularism," in *Religion in a Liberal State*, eds. Gavin D'Costa et al. (Cambridge: Cambridge University Press, 2013).
[139] Ibid, 165.
[140] What in political theory and in the work of Audi is described as the institutional dimension of separation rests on three principles two of which are in fact dimensions embodied in the concept of equality: the libertarian principle –permitting the exercise of religion within limits and equalitarian principle prohibiting preference to any religion. The third principle, that of neutrality – the obligation of the state not to favor or disfavor any religion is another aspect that I will unpack further on. See Robert Audi, "The State, the Church, and the Citizen," in *Religion and Contemporary Liberalism*, ed. Paul J. Weithman (Notre Dame: University of Notre Dame Press, 1997), 39.
[141] Madison in Federalist no. 10 has also explicitly linked religious passions to intolerance. See James Madison, "The Federalist Papers No. 10," The Avalon Project, accessed September 2, 2022, https://avalon.law.yale.edu/18th_century/fed10.asp.

A secular state must also be neutral, as neutrality as a construct is a consequence of the context in which secularism emerged, as a guard against the alternative which has brought political turmoil and violence. Due to the circumstances surrounding the birth of secularism, religion was considered a threat to political stability, and because religious pluralism in a polity was and is a fact, it is argued that the foundation of common moral values upon which government is to be formed ought to be secular.[142] However, the principle of state neutrality has been heavily criticized in contemporary debates from several aspects.[143] The main critique is that neutrality it a contested concept in its essence and meaning,[144] that it is an unattainable myth,[145] or simply that it has not delivered on its promises in practice.[146] In reference to adjudication, it has been stressed that the use of neutrality in the jurisprudence of particular courts has been inconsistent;[147] that it has served as an avoidance mechanism;[148] a "futile quest" impossible to adjudicate.[149]

One way out of the "neutrality trap" is to understand neutrality through its historical function *as a means to an end*[150] - as a guarantee of state sovereignty, legitimized by the will

[142] Paul J. Weithman, *Religion and Contemporary Liberalism*, 1.
[143] For an overview of countering positions see János Kis, "State Neutrality," *Discussion Papers, Center for Global Constitutionalism*, Discussion Papers, Center for Global Constitutionalism (WZB Berlin Social Science Center, 2012), https://ideas.repec.org/p/zbw/wzbrlc/spiv2012801.html.
[144] See Jeremy Waldron, *Liberal Rights Collected Papers (1981-1991)* (London: Cambridge University Press, 1993), 143.; Anna Su, "Transformative State Neutrality," *Supreme Court Law Review* 91 (2019): 151–86.
[145] Rafael Palomino, "Religion and Neutrality: Myth, Principle, and Meaning," *Brighan Young University Law Review* 2011, no. 3 (2011): 657–88.; Tim Nieguth, "Privilege or Recognition? The Myth of State Neutrality," *Critical Review of International Social and Political Philosophy* 2, no. 2 (June 1, 1999): 112–31.
[146] Madeley and Enyedi, *Church and State in Contemporary Europe*.
[147] This is a critic has been most addressed towards the ECtHR, see Julie Ringelheim, "State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach," *Oxford Journal of Law and Religion* 6, no. 1 (2017): 24–47.
[148] Karl-Heinz Ladeur and Ino Augsberg, "The Myth of the Neutral State: The Relationship between State and Religion in the Face of New Challenges," *German Law Journal* 8, no. 2 (2007): 143–52.
[149] See for example Arthur S. Miller and Ronald F. Howell, "The Myth of Neutrality in Constitutional Adjudication," *University of Chicago Law Review* 27, no. 4 (1960): 661.
[150] This idea has been introduced by Charles Taylor. He proposes that we view secularism and the requirement of neutrality as a means to an end, the end(s) being the three principal ideals of the French Revolution: liberty, equality, fraternity. "First, no one must be forced in the domain of religion, or basic belief. This is what is often defined as religious liberty, including of course, the freedom not to believe. This is what is also described as the "free exercise" of religion, in the terms of the U.S. First Amendment. Second, there must be equality between people of different faiths or basic beliefs; no religious outlook or (religious or areligious) Weltanschauung can enjoy a privileged status, let alone be adopted as the official view of the state. Third, all spiritual families must be

of the diverse people and of equal citizenship. That would mean that neutrality must entail the three prevalent theoretical conceptions of state neutrality: of justification, of effects and of treatment.

Justificatory secularism is closely linked to a certain theory of *neutrality of justification*. Neutrality of justification, primarily championed by Rawls[151] and Dworkin[152], is a conception of neutrality that rest on the premise that the state must refrain from justifying laws and state action based on particular conceptions of the good (such as ones arriving from religious doctrine). This conception derives from individual autonomy - "since the exercise of autonomy may lead to the acceptance of any of a variety of conceptions of the good, respect for each person's autonomy requires the state to be neutral between different views of the good life."[153]

This conception is *not* only based on the value and accessibility of reason. Non-imposition of religious norms on citizens by the state has also to do with the *nature of religious reasons,* more specifically their comprehensive scope (conception of the good), controversial content and alienating nature (divisiveness as a product of troubled history of conflict). In other words, "what is wrong with religious argument as official justification is not that it is not 'rational' or true…but, rather that, at least in a pluralistic western societies with a history of religious conflict, it is controversial and divisive in a particular way."[154] Like other liberal theorists before her, Laborde suggests that states' actions must be based on secular public justifications or be translated into secular terms; meaning that even when arriving from religious conceptions, if actions are translated into secular terms and therefore become

heard, included in the ongoing process of determining what the society is about (its political identity) and how it is going to realize these goals (the exact regime of rights and privileges). This (stretching the point a little) is what corresponds to "fraternity." Charles Taylor, "The Meaning of Secularism," *The Hedgehog Review* 12, no. 3 (2010): 23–34.

[151] John Rawls, *A Theory of Justice* (Cambridge, Massachusetts; London, England: Harvard University Press, 2005).; John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

[152] Ronald Dworkin, *A Matter of Principle* (Cambridge, Massachusetts; London, England: Harvard University Press, 1985).

[153] Andrew D. Mason, "Autonomy, Liberalism and State Neutrality," *The Philosophical Quarterly (1950-)* 40, no. 161 (1990): 433.

[154] Laborde, "Justificatory Secularism,"167.

accessible, they pass the test since they embody different conceptions of justice reflected from the comprehensive views of a particular society.[155] A specific "unwanted side effect" of such "translation", however, can be that in certain contexts where a strong majority religion is present, they might lead to "directly [recognizing] the cultural patrimony of the large majority of the population."[156]

Another conception of neutrality is the *neutrality of effects* introduced by Raz, building on Rawls and arguing that for a state to be neutral it has to also ensure that everyone has an equal ability to pursue their goals.[157] Wall and Klosko put it this way: "the state should not do anything that has the effect – whether intended or not – of promoting any particular conception of the good or of providing greater assistance to those who pursue it."[158] One reading of this conception of neutrality is that it adds another dimension of constraint on state action – "the state must not only refrain from justifying laws by appeal to (controversial) conceptions of the good, it must refrain from enacting neutrally justified laws which have the effect of promoting particular (controversial) conceptions of the good."[159]

The third framework of neutrality is that of *neutrality of treatment,* developed by Patten.[160] He argues that a state can be considered neutral among rival conceptions of the good when, relative to an appropriate baseline, its actions are equally accommodating of such conceptions.[161] He additionally argues that "equally accommodating policies are neutral, in the treatment sense, even if (a) they can be expected, due to contingent facts, to have different

[155] As opposed to Rawls for example, who claims that laws should be based on general acceptable common sense and conclusions from methods of science when it is not controversial. See Rawls, *Political Liberalism*.
[156] For such considerations based on the Italian experience see Urbinati, "Laïcité in Reverse: Mono-Religious Democracies' and the Issue of Religion in the Public Sphere," 18.
[157] See Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1986).
[158] Steven Wall and George Klosko, eds., "Introduction," in Perfectionism and Neutrality: Essays in Liberal Theory (Lanham: Rowman & Littlefield, 2003), 8.
[159] Ian Jennings, "Against State Neutrality: Raz, Rawls, and Philosophical Perfectionism" (Dr. Phil., Berlin, Humboldt-Universität-zu-Berlin, Philosophische Fakultät, 2009), 45.
[160] Alan Patten, Equal Recognition: The Moral Foundations of Minority Rights (Princeton: Princeton University Press, 2014).
[161] Ibid, 27.

effects on different conceptions of the good and even if (b) a state may have neutral reasons to provide some conceptions of the good with greater benefits."[162]

The ideal for the neutral state is somewhere between the three above mentioned conceptions of neutrality. Both equality and sovereignty require neutrality of justification - provide that state action is not based on a particular conception of the good, and /or is translated and reasoned in secular general terms. This transpires not only from the divisiveness of certain conceptions of the good, or the value of reason, but also from state sovereignty whose legitimacy is based on all people it governs belonging to all creeds (or none) and the respect of their individual autonomy. Even if this criterion is fulfilled, as state action must not only be on-face neutral but, it also must envision and produce consequences that treat different groups and individuals equally. If a law is justified by reasons that are translated into on-face neutral accessible terms but, clearly treat certain individuals unequally, it cannot pass merit. In theoretical terms, there must be *neutrality of effects,* which in in legal terms would mean that it cannot have disparate treatment/ indirect discriminate.

Since in the real world, an especially in Europe entanglement of states and religion is a fact of life and a legal reality, there must also be *neutrality of treatment*, meaning that both benefits and exemptions must be available equally to all religious organizations. Thus, even though states may grant public functions to churches "genuine secularism, following the principle of "rational sovereignty," shall grant public presence to religions only on equal (neutral) footing with other social actors (including non-traditional religions)."[163] A separate question concerning religious-based exemptions and accommodation (and one that can serve as a pre-condition) is whether there is a justification for treating religion differently. Without delving into these debates, I will just mention that special treatment of religious organizations

[162] For interpretation and critique Chiara Cordelli, "Neutrality of What?," *Critical Review of International Social and Political Philosophy* 20, no. 1 (2016): 37.
[163] Andras Sajó, "Constitutionalism and Secularism: The Need for Public Reason," *Cardozo Law Review* 30 (2009): 123.

in Europe is a fact but, different models of separation between state and religious institutions in Europe (that vary based on the history, context and the process of transferring sovereignty and its outcome) treat (or not) religious organizations and individuals differently.

However, partly in line with Cordelli's critique,[164] I claim that Patten's premise that state action is neutral even if under neutral reasons provides certain conceptions of the good with greater benefits, may give leeway to preferencing the majority. Thus, it either cannot be accepted or should be accepted with a certain limitation. The only acceptable justification for such an action ought to be one that is in line with secularism's counter-majoritarian function; meaning, since neutrality of treatment is linked to equality of opportunity, if such actions are enacted they must be aimed at equalizing the level playing field. Finally, if legislation is implemented by the state in a *manner* in which it produces different or opposite outcomes, it is in breach with the principle of equality and thus in opposition to the secular nature of the state.

Consequently, in its core a secular state is one whose legitimacy derives from its people, that exercises its power though laws and action based on non-religious justifications accessible to all citizens (translated in secular terms, but also producing equal outcomes) and guarantees equality of all its citizens regardless of their religious (non)belonging. A secular state as a liberal ideal must ensure that if certain exemptions or state-based benefits to religious organizations exist, they should be available to all religious organizations equally (deviation from this norm must have counter-majoritarian bases). This definition should be understood as a liberal normative ideal, since different constitutional arrangements in secular states govern relationship with and towards religion differently.

[164] Ibid.

2. Preliminaries on issues in Education and Funding and the Limits of Constitutional Secularism

Controversies in education and state funding of religion have historically invoked issues of sovereignty, autonomy and questions related to the normative framework under which constitutional secularism operates. Thus, they are indicative of the shifts in the interpretation of secularism under practical and contextual difficulties. However, even though the lines of what is permissible are adjusted and modified, in the area of education human rights standards have established a normative framework for the protection of individual liberties setting certain rules related to the content and organization of religious education. Regarding state funding of religion however, such standards have not been developed, as every jurisdiction has its own systems, established and limited by its national frameworks and in most part beyond the scope of international human rights considerations. In the following section, I will map-out the main issues in the two areas as related to constitutional secularism, the frameworks under which they operate indicating the limitation of the principle.

2.1. Issues of Sovereignty, Secularism and Education

Before secularization processes took place and the state took over functions performed by religious institutions, education was one of the main responsibilities of churches. Today, education is one of the most important functions of the modern state.[165] Education forges the relationship between the state and its citizens thus, it is a requirement for the "performance of

[165] Different authors prescribe different main functions to public education. For example, for Rousseau, the main function of education is the development of moral character, See Terrence Cook, "Rousseau: Education and Politics," *The Journal of Politics* 37, no. 1 (1975): 108–28.; for Webber, historically education and its management correspond with the current "political structures and practices of a society, as well as the character of its economic system", see Eugenie Samier, "Weber on Education and Its Administration: Prospects for Leadership in a Rationalized World," *Educational Management Administration and Leadership* 30, no. 1 (2002): 27–45.; Marxist writer Antonio Gramsci (as Marx never delivered any comprehensive works on education per se) claimed that the ruling class has hegemony over knowledge – what he called 'cultural hegemony' as a way to control the subject class, see Martin Brown, "Is There a Marxist Perspective on Education?," Culture Matters, May 21, 2018, https://www.culturematters.org.uk/index.php/culture/education/item/2819-is-there-a-marxist-perspective-on-education.; from Bagley "public education is a community's institutionalized effort towards self-preservation and progress" where common ideas and ideals are entrenched. See William C. Bagley, "The Function of the Public School," *Religious Education* 13, no. 1 (2006): 43–45.

…most basic public responsibilities… [and represents a] the very foundation of good citizenship."[166] Due to the function and role of the school as a place where the future citizenry is molded, the battle for dominance over education has been crucial in the establishment of the nation-state. Thus, the state needed to establish loyalty through public education, while religious institutions had interest in maintaining their presence in public schools or in perpetuating their influence through private educational establishments. Consequently, the two most significant issues that ought to be addressed are the issue of religious education in public schools and state funding of private religious schools.

The presence of *religious instruction and /or teaching about religion*, in public schools was an extremely contested issue during the emergence of the nation-states, as forging loyalty and patriotism was paramount. Today however, religious education in some form or other, is present in public schools in all three jurisdictions (as in most European states), even if they have a constitutional commitment to secularism.[167] Nevertheless, the form and content of religious education in public schools is subject to certain normative requirements in line with national and international human rights standards.

While a confessional approach to religious education is unacceptable,[168] *inclusive* religious education (even if mandatory)[169] in line with international human rights standards[170] is considered valuable for its contribution towards a society where people "live together,

[166] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
[167] *See* Ian Leigh, "Objective, Critical and Pluralistic? Religious Education and Human Rights in the European Public Sphere," in *Law, State and Religion in the New Europe: Debates and Dilemmas*, eds. Lorenzo Zucca and Camil Ungureanu (Cambridge: Cambridge University Press, 2012).
[168] See Leigh, "Objective, Critical and Pluralistic?"
[169] The curriculum mustn't be predominantly based on one religion but, incorporate information objectively, critically and in a pluralistic manner, and if classes are of confessional nature, then opting-out options must be available. See Folgerø and Others v. Norway, No. 15472/02 (European Court of Human Rights June 29, 2007);
[170] See "Toledo Guiding Principles on Teaching about Religion and Beliefs in Public Schools" (Warsaw: ODIHR, 2007).; Folgerø and Others v. Norway. ; Mansur YalÇin and Others v. Turkey (European Court of Human Rights September 11, 2014).

despite holding different religious and secular beliefs."[171] Different jurisdictions have adopted different approaches to the issue. For example, in France there is no religious education/instruction in public schools but, teaching about religious facts is present through the curricula of numerous subjects. In Türkiye, even though a more radical model is established, religious education in public schools is compulsory. In Italy, religious education is facultative in state schools.

In countries that have incorporated compulsory religious instruction in public schools, two dimensions emerge contested both under human rights considerations and related to constitutional secularism. The first dimension encompasses issues related to the content of religious education, more specifically the nature of the curriculum and relevant opt-out procedures. There are mainly three normative standards that emerge from this dimension. The first derives from considerations on the limitations on the (ab)use of state power that emerges from *prohibition of indoctrination* especially relevant regarding mandatory education. Thus, according to the ECtHR "[t]he State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions." [172] Consequently, "the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner."[173] This means that the state is prohibited from imposing indoctrination through the overall school framework as well as directly through the curriculum.[174] On the other hand, if the mandatory religious instruction is organized and delivered in a way that satisfies the standard of "objective, critical and pluralistic", parents

[171] See Robert Jackson, "Human Rights in Relation to Education About Religions and World Views: The Contribution of the Council of Europe to Classroom Religious Education," *Journal of Religious Education* 66, no. 1 (2018): 85.
[172] Kjeldsen, Busk Madsen and Pedersen v. Denmark, No. 5095/71; 5920/72; 5926/72 (European Court of Human Rights December 7, 1976), para. 53.
[173] Kjeldsen, Busk Madsen and Pedersen v. Denmark, No. 5095/71; 5920/72; 5926/72 (European Court of Human Rights December 7, 1976), para. 53.
[174] See Jeroen Temperman, "Parental Rights in Relation to Denominational Schooling under the European Convention on Human Rights," *Religion & Human Rights* 12, no. 2–3 (October 7, 2017): 142–52.

cannot oppose to it, as "otherwise all institutionalized teaching would run the risk of proving impracticable."[175] What is accepted as in line with this standard is often ambiguous[176] and is decided on a case-to-case bases.

However, if the content and form of the mandatory religious instruction does not satisfy these criteria, opt-out procedures must be in place for students who wish to abstain.[177] In early ECtHR jurisprudence, just a simple exemption was enough to satisfy the Court.[178] However, in recent years the ECtHR has imposed stricter requirements regarding opt-out clauses, closely related to the negative right not to disclose one's religious affiliation and due to possible stigmatization that can arise from the act of opting out. Thus, providing no alternative for students who opt-out and simply excluding any grade for religious/ethics classes in school certificate may amount to stigmatization and is therefore impermissible.[179]

The second dimension concerns questions on organization of religious instruction in public schools, and is therefore related to issues of decision-making power, shared or exclusively held by the state and/or religious organizations. More specifically, this dimension concerns questions on who has the power to determine curriculum design and who teaches religious instruction classes. Depending on the religion-state relationships developed and determined in a specific country, the answers to these questions vary. Issues related to discrimination in employment based on ministerial exception often arise when religious institutions decide on who ought to teach these courses or if they taught by clergy members.[180]

The second most important issue that raises conflicts is the issue of the *operation and state funding of religious private schools.* Private schools enjoy protection under the rationale

[175] Folgerø and Others v. Norway, para. 84.
[176] Leigh, "Objective, Critical and Pluralistic? Religious Education and Human Rights in the European Public Sphere."
[177] See Saniewski v. Poland, No. 40319/98 (European Court of Human Rights May 22, 1997) and Bulski v. Poland, No. 46254/99; 31888/02 (European Court of Human Rights November 30, 2004).
[178] For an analysis see Burkhard J. Berkmann, "Religious Education before the ECtHR: The Opt-out Clause Does Not Suffice Anymore," *British Journal of Religious Education* 44, no. 4 (2022): 432–43.
[179] See Grzelak v. Poland, No. 7710/02 (European Court of Human Rights November 22, 2010).
[180] Fernández Martínez v. Spain, No. 56030/07 (European Court of Human Rights June 12, 2014).

of protecting parental choice[181] and the beliefs of the child.[182] The obligation of the state to respect parent's rights regarding their religious and philosophical convictions, also extends to private teaching.[183] The rationale in affording private school protections[184] is that they help safeguard pluralism in education by providing "an alternative outside the realm of the public sphere (the state and its public powers)."[185] Even though there is no obligation of the state to provide funding for denominational schools,[186] in most of Europe, some forms direct and/or indirect public funding of private schools under the justification of parental choice is present.[187] Direct funding exists in the form of the payment of teachers' salaries or operational costs, whereas indirect funding includes scholarships or vouchers available directly to students and families. Given that in most of Europe private schools are predominantly religious, debates surrounding the permissibility of state funding, explicitly or implicitly derives arguments on the interpretation of secularism as a principle – its non-funding component (originating from separation), and the capacity of private schools to safeguard equality. The legal epilogues of these conflicts are tackled on a national level and therefore vary significantly from state to state.

[181] The right includes to "to direct the upbringing and education of children under their control," and "in conformity with their religious and philosophical convictions," See Pierce v. Society of Sisters, 268 U.S. 510 (1925), Protocol 2 of the ECHR. This has been the traditional view, in past times articulated as the choice of the father or the Pope as the only relevant source of authority in education and later as a neoliberal economic rationale also articulated in the interest of the child. For the latter See Milton Friedman, "The Role of the Government in Education," in *Economics and the Public Interest*, ed. Robert A. Solo (New Brunswick: Rutgers University Press, 1955).

[182] Article 14 of the Convention on the Rights of the Child. Additionally, the development of the child's own cultural identity and values particularly in the field of education is protected by Article 29 of the Convention on the Rights of the Child.

[183] Folgerø and Others v. Norway, para. 84 and Hasan and Eylem Zengin v. Turkey, No. 1448/04 (European Court of Human Rights October 9, 2008, para. 48.

[184] See Ingrid Jordebo Foundation of Christian Schools and Ingrid Jordebo v. Sweden, No. 11533/85 (European Court of Human Rights March 6, 1987).

[185] Temperman, "Parental Rights in Relation to Denominational Schooling under the European Convention on Human Rights," 145.

[186] See Case "Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium" v. Belgium, No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (European Court of Human Rights July 23, 1968); X v. United Kingdom, No. 7782/77 (European Court of Human Rights May 2, 1978).

[187] Even though there is no such *obligation* under European, regional human rights regimes. See Guide on Article 2 of Protocol No. 1 – Right to education, Registry of the European Court of Human Rights, August 21, 2021.

Finally, constitutional secularism has been central in debates regarding the *presence of religious symbols in public schools* mainly for three reasons. First, because of the central importance of education for state and the particularity of the school as a place where future citizens are built, free from indoctrination. As Laborde argues, civic symbols and public values are introduced in public schools to forge a sense of democratic and egalitarian citizenship and "to endorse a robust public identity capable of transcending more particular religious, cultural and class loyalties."[188]

Second, the obligation of non-identification of the state with any religion has an emphasized element of non-coercion, especially considering the mandatory nature of education and the nature of children as impressionable.[189] This dimension is relevant mostly vis-à-vis religious symbols in public schools and as worn by public teachers and is commonly justified based on the nature and effects of symbols themselves and/or the nature of the liberal state as benevolent towards conceptions of the good life, thus prohibited from identifying with any religion.

Finally, when prohibitions are imposed on students, this poses questions on the nature of secularism understood as a constitutional principle aimed to curtail state power: what the state can ask from its citizens under public order considerations. Justifications for the (im)permissibility of religious symbols in public schools can be linked to a conception of citizenship within its substantive dimension[190] (see universalism vs. communitarianism in France, Chapter 2), to the potential existential threat of religion to the political system – to the

[188] Cécile Laborde, "Secular Philosophy and Muslim Headscarves in Schools," *The Journal of Political Philosophy* 13, no. 3 (2005): 309.

[189] This perspective and its aspects is best described by Justice Brennan in *Edwards v. Aguillard* "the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family" because 1) "the [s]tudents in such institutions are impressionable and their attendance is involuntary"; 2) "[t]he state exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Edwards v. Aguillard*, 482 U.S. 578 (1987)

[190] See Dorjana Bojanovska Popovska and Francesca Raimondo, "Formal and Substantive Aspects of Citizenship and Its Connection to Religion. Definition, Practices and Comparative Perspectives," *Quaderni Di Diritto e Politica Ecclesiastica, Rivista Trimestrale* 29, no. 2 (2021): 509–28.

republic and democracy (see Türkiye, Chapter 4, and to a more limited extant France) and to the significance of those symbols "as expressions of cultural and political values and practices which are at odds with liberal and democratic ones."[191]

This brief overview shows that although a normative human rights framework imposing minimum standards as related to religious education in public schools is in place, in the two other areas – funding and religious symbols- states have been given flexibility in regulating these issues without many standards to abide to. The fact that national frameworks vary considerably from state-to-state shows that variety of solutions are considered acceptable in different countries with a constitutional commitment to secularism.

2.2. Issues on Secularism and State Funding of Religion

The two main questions that arise when considering the possibility and permissibility of state funding of religion are the following: Should the state fund religion (indirectly/directly, for general/specific purposes)? If yes, what is the effect of such funding and when is such funding acceptable?

Arguments against the funding of religion can be based on considerations arriving from both a perspective of individual liberty and organizational autonomy. An argument against is that public funding of religious groups coerces taxpayers to (financially) support a specific view that they might not otherwise support.[192] An argument against the funding or religious organizations specifically, can arise from the perspective of autonomy, namely that if the functioning of religious institutions is dependent on state funds, their independence will be impaired.[193] In constitutional controversies, the permissiveness of state funding can be/is under review based on considerations of equality or vis-a-vis non-funding principles (if

[191]Mancini, "The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence 2631.
[192] See James Madison, "Memorial and Remonstrance against Religious Assessments, [ca. 20 June] 1785," in *The Papers of James Madison. Vol. 8: 10 March 1784–28 March 1786*, eds. Robert A. Rutland et al. (Chicago: Chicago University Press, 1973).
[193] See Brett G. Scharffs, "The Autonomy of Church and State," *BYU Law Review* 2004, no. 4 (2004): 1217–1348.

envisioned).[194] However, in Europe financial relationships between the state and religion are prevalent across jurisdictions. As Scharffs frames it, this is because in Europe, a model of autonomy based upon *interdependence* prevails (as opposed to *independence* in the USA) where state funding to religious organizations is not impermissible.[195]

State funding can come in the form indirect funding through (the existence of special tax exemptions or deductions) and in the form of instruments of direct public funding of religious institutions. Tax exemptions to religious institutions have existed since Roman times and Constantine's conversion to Christianity,[196] and continued as a tradition in medieval times (see English Statute of Charitable Uses of 1601) until today. There are several justifications for both indirect and direct funding of religious organizations. The main to justification for tax exemptions is the nature of religious organizations – they are non-profit entities; thus, they are tax exempt. Furthermore, tax exemptions available to religious organizations have another function: they reinforce separation between the state and religious organizations.

Direct funding of religious institutions in Europe is seen as an extension of individual rights on an organized level. This understanding derives from the European particularity where majority of constitutions position rights as exercised through the state whilst envisioning the state as a "servicer or producer of rights" to individuals and non-state organizations. The justification for the public funding of religion is mainly due to the need for compensation of property appropriation (see for example, Germany, Belgium and the old Italian system) or the understanding that certain functions performed by religious institutions are valuable for society as a whole and, therefore, ought to be supported by the state (in a limited sense this also applies to the French system). Additionally, in the formation of specific nation-states as the Church

[194] Please note that the ECtHR has found that paying taxes to support state churches does not violate the ECHR. See Darby v. Sweden, No. 11581/85 (European Court of Human Rights October 23, 1990).
[195] Scharffs, "The Autonomy of Church and State," 1332.
[196] "Pro and Con: Churches and Taxes," Britannica, August 8, 2019, https://www.britannica.com/story/pro-and-con-churches-and-taxes.

lost its taxing power, they needed alternative means of founding. In Italy this led to the *Fondo per il culto* to help the beneficium (*benefice*) system and in France to the contraversy regarding the Civil Constitution Clergy and the framework of the Napoleon Concordat.

The Turkish example differs from such approaches because it establishes complete financial dependence and thus, control of the majority religion. In the Ottoman Empire, as in the European Kingdoms, the expenses of religious services were fully paid by revenue of the waqfs[197], not from the state budget.[198] As Muslims were considered as a special millet - highest in the social hierarchy, "the protection and the fulfillment of needs of other religious groups in return for recognizing state authority and paying taxes was regarded as part of the Muslims' religious law."[199] After the establishment of the Republic the state took-over all the aspects of management and funding of the majority religion through the Diyanet. The justification of such approach rests on the premise that lack of control over the majority religion will jeopardies democracy itself.

Different models of state funding produce different effects in the so-called religious marketplace. A specific area within the study of economy of religion focuses on the supply-side model or the economy of religion, and investigates how government regulation impacts the behavior of "religious producers" (religious institutions).[200] Focusing on the United States, Finke and Iannaccone have argued that any government regulation, including constitutional amendment, legislation or simply a minor regulation, impacts the scope of rights of religious

[197] Waqfs are defined as: "As a juridical act and term… meant to devote one's own property as a perpetual trust to some charitable purpose under specific conditions by taking it out of one's possession eternally". See Kayhan Orbay, "Imperial Waqfs within the Ottoman Waqf System," *Endowment Studies* 1, no. 2 (2017): 136.
[198] Şenol Korkut, "The Diyanet of Turkey and Its Historical Evolution," *Turkish Studies International Periodical for the Languages, Literature and History of Turkish or Turkic* 11, no. 17 (2016): 447–66.
[199] H. Sule Albayrak, "Religious Pluralism and Religion-State Relations in Turkey," *Religions* 10, no. 1 (2019): 3.; The administration of non-Muslim communities was in the hands of the *kocabasi* (local religious leaders), that had civil and religious authority in the fields of education, jurisprudence and religion and were responsible for collecting taxes.
[200] On the other hand, economy of religion scholarship focusing on demand-side analysis of the secularization model is focused on answering questions related to how economic development reduces individual participation in formal religious services. See Roger Finke and Laurence R. Iannaccone, "Supply-Side Explanations for Religious Change," *The Annals of the American Academy of Political and Social Science* 527 (1993): 27–39.

institutions.[201] They provide examples demonstrating that "freer access to the religious marketplace expanded and invigorated the supply of religion.. [that] religious innovations…occur in response to religious deregulation"[202] and that disestablishment affects the number of members/followers of the majority and other religions.[203] Thus, some constitutional models of church-state relationships produce fiercer competition in the religious marketplace and more engagement of religious organizations in the public sphere.

For our debate however, as funding is very much a reality, key considerations arise regarding neutrality of such models and their inclusiveness. A critical assessment of this matter ought to include aspects regarding registration of religious institutions as a precondition of gaining state benefits as well as actual pathways towards state funding. More specifically, and in relation to the considerations in sub-section 1.2, the main concern is if state funding is equally available to religions on equal (neutral) footing, or if it affords grater support for traditionally accepted religion(s). For the analysis to be complete, one must recognize that there might be multiple avenues for gaining state funding. A proper example of this is the funding of churches built before 1905 in France - contextual circumstances placed them under the ownership of the state and therefore the state pays for their upkeep.

3. Conclusion

The overview of the evolution of secularism reveals four features that link back to its nature and essence. First, that secularism does find its roots in Christian thought, but evolves past it in the period of Enlightenment. Thus, it is a product of historical struggle, of the wars of religion and religious-political conflict concerning the demarcation of power that is a cornerstone of the Enlightenment's philosophy, as well as its political project.[204] Second, that

[201] Ibid.
[202] Ibid, 39.
[203] Ibid, 39.
[204] J. Judd Owen, *Religion and the Demise of Liberal Rationalism: The Foundational Crisis of the Separation of Church and State* (Chicago: University of Chicago Press, 2001), 1.

theoretically and in reality, it is mainly positioned against religious organization(s) and not religion itself. Third, that in its infancy secularism as aligned with toleration and later neutrality is envisioned as a solution to religious pluralism (and conflicts arriving from it) that as such was (and still is) a trait of society. Finally, that the secularization of state power is accompanied with the changing notion of citizenship, its bases, what it entails and who (from church to state) decides the rules of the game – the rights and obligations.

Thus, the principle of secularism in its essence answers questions regarding the source and nature of *power*. It answers the question of *where power comes from* - what the basis for power is; what grants legitimacy. The duality between the sacred and the secular remains but, the source of power shifted – state power in temporal matters on longer derives its legitimacy from the divine, but rather the people. It also answers the question of *how power is exercised*. This dimension has *a negative* and *a positive* aspect. First, it curtails power, meaning that it limits state action in the form of tolerance and non-interference. Second it informs the nature and content of the exercise of power – by "[precluding] any source of law but the secular"[205] and by bounding power by certain general values, ideals and concepts one of which most importantly is equality.

Consequently, as a normative ideal, a secular state is one whose legitimacy derives from its people, that exercises its power though laws and action based on non-religious justifications accessible to all citizens (translated in secular terms, but also producing equal outcomes) and guarantees equality of all its citizens regardless of their religious (non)belonging. A secular state as a liberal ideal must ensure that if certain exemptions or state-based benefits to religious organizations exist, they should be available to all religious organizations equally (deviation from this norm must have counter-majoritarian bases). The latter consideration is even more important in Europe, where due to historical and contextual considerations, a larger

[205] Sajó, "Preliminaries to a Concept of Constitutional Secularism," 605.

entanglement of the state and religion exists and is considered permissible. This furthermore emphasizes the necessity to focus more on equality and the aspects of *how power is exercised* (nature and effect) as opposed to solely the curtailment of state power.

Where education and funding are concerned, the interpretation of the principle of secularism as well as the religion-state relationships established in a particular state dictate the permissibility, form and organization of all the aspects that arise from it. Certain normative framework does operate as related to the limits of state power as imposed by principles founded in liberalism as well as in human rights frameworks. However, the fact that national frameworks vary considerably from state-to-state shows that variety of solutions are considered acceptable in different countries with a constitutional commitment to secularism. The prospect of such frameworks to continuously change, as it will be presented in Chapter 5 and 6, will further indicate the flexibility in the interpretation of the principle of secularism itself.

Chapter 2. The Conceptualization to *Laïcité*

Laïcité marked an end of a historical process towards freeing public power from religious influence[206]. It is at the heart of republicanism,[207] an act of "emancipation from religious supervision of schools, public institutions, and then of the state."[208] Even though considered an integral part of "*Frenchness*,"[209] the inability to define *laïcité* has been prevalent throughout disciplines, as it has been referred to as a contested value[210], an idea turned program[211], a code of ethics, even an ideology,[212] and a doctrine.[213] For a constitutional law scholar, however, *laïcité* represents a distinctive model of secularism[214] governing the institutional separation and relationship between religious institutions and the French state. It rests on republican principles and values, as bases for its particularity – such as a specific understanding of rights,[215] sovereignty, and citizenship.[216] Its particularity is also a reflection of the specific and

[206] See David Saville Muzzey, "State, Church, and School in France: IV. Moral Education as an Ideal of the French Republic," *The School Review* 19, no. 6 (1911): 263.
[207] See Claude Nicolet, *L'idée Républicaine En France: Essai d'histoire Critique (1789-1924)* (Paris: Gallimard, 1982).
[208] Henri Peña-Ruiz, "Laïcité and the Idea of the Republic: The Principles of Universal Emancipation," in *Secularism on the Edge, Rethinking Church-State Relations in the United States, France and Israel*, eds. Jacques Berlinerblau, Sarah Fainberg, and Aurora Nou (New York: Palgrave Macmillan, 2014), 99.
[209] See Mireille Rosello, "Laïcité, Grammar, Fable: Secular Teaching of Secularism," *Postcolonial Studies* 10, no. 2 (2007): 153–69.
[210] See Véronique Altglas, "Laïcité Is What Laïcité Does: Rethinking the French Cult Controversy," *Current Sociology* 58, no. 3 (May 1, 2010): 489–510.
[211] See Poulat Émile, "Laïcité: De Quoi Parlons-Nous? Confusions et Obscurités," *Transversalités* 4, no. 108 (2008).
[212] "Laïcité is also an ethical code based on freedom of conscience seeking the development of the human person both as an individual and as a citizen." See Patrick Claffey, "Laïcité: Value or Ideology?," *An Irish Quarterly Review* 105, no. 418 (2016): 169–82.
[213] See Roger Trigg, *Religion in Public Life: Must Faith Be Privatized?*, *Religion in Public Life* (Oxford: Oxford University Press, 2008), 116.
[214] Sarah Fainberg and Jean Baubérot, "French Laïcité: What Does It Stand for? A Conversation between Jean Baubérot and Sarah Fainberg," in *Secularism on the Edge, Rethinking Church-State Relations in the United States, France and Israel*, eds. Jacques Berlinerblau, Sarah Fainberg, and Aurora Nou (New York: Palgrave Macmillan, 2014), 85–94.
[215] See Michel Troper, "French Secularism, or Laïcité," *Cardozo Law Review* 21, no. 4 (1999): 1267–84.; Michel Troper, "Sovereignty and Laïcité," in *Constitutional Secularism in an Age of Religious Revival* (Oxford: Oxford University Press, 2014), 146-59.
[216] See Eoin Daly, "Ambiguous Reach of Constitutional Secularism in Republican France: Revisiting the Idea of Laïcité and Political Liberalism as Alternatives," *Oxford Journal of Legal Studies* 32, no. 3 (2012): 583–608.

complex[217] context from which it has emerged and developed - from the Revolution, through the turbulences in the war between the Two Frances, to its conception in the Third Republic.

The aim of this Chapter is to contextually frame *laïcité* and its normative potential, and thus answer the first sub-question of the dissertations as related to France mainly: *How the principle of secularism was constructed, and what contextual determinators were key in its normative conceptualization?* To do so, the structure of the chapter is designed as follows. To understand the context which brought upon the need for institutional differentiation and a "laic" state of affairs, Section 1 will provide a short overview of the context and background leading to the coining of *laïcité* in the Third Republic - both through the lens of theoretical and conceptual constructions, such as the values of republicanism and the ideas of the enlightenment; as well as "models" of religion-state relationships that preceded it. Section 2 will analyze the construction of *laïcité* in the laws of the Third Republic, mainly the education laws, the 1901 Law on Associations and the 1905 Law on the Separation of the Churches and State – as postulates of *laïcité* in France prevailing today. It will thereafter look at adjustments, exemptions and concessions enacted between 1905 and the Fourth Republic that constitute and integral part of how *laïcité* is interpreted. Finally, Section 3 will look at the constitutionalization of *laïcité* in the Fourth and Fifth Republics and the normative framework under which it operates.

1. The Road to the Third Republic in Context

Laïcité was introduced and codified almost a century after the Revolution, both semantically as neologism and as a concept of institutional "design". Some authors view the process towards the establishment of *laïcité* in the Third Republic as gradual, others as traveling

[217] See Sophie Boyron, "French Constitutional History: A Difficult Coming of Age," in The Constitution of France: A Contextual Analysis (Oxford: Bloomsbury, 2013), 1–28.

back and forth,[218] while some have traced both commonalities as well as differences of the models established through time.[219] It is perhaps true, as Gunn argues, that *laïcité* developed principally during the five years following the Revolution and the Third Republic.[220]

As a system of government and model of sovereignty, the First Republic was established on 25th of September 1792, and through the course of centuries it developed not only as a model of governance, but also a form of society and a comprehensive worldview.[221] As a model, it fought an "uphill battle" with anti-republican forces: from the Jacobin and Bonapartist dictatorship, monarchical restorations, Catholic reaction, to the Vichy regime – as "each of France's first four Republics… found itself menaced and ultimately overthrown by anti-republican forces."[222] But the battle of the Two Frances – one republican and the other Catholic/monarchists refusing to accept the Revolution[223] – was not only about the form of governance, more so it was about values; whether republican values or moral values based on the majority religion were to be the binding glue of the nation. In this section, I will provide a brief overview of the republican principles and concepts relevant for *laïcité*, as well as the models of religion-state governance in place before the laws of the Third Republic.

1.1 Republicanism and French Particularism

Inspired by the ideas developed in the Enlightenment, the Revolution marked the end of the *Ancien Régime*. As Tocqueville observed, the main aim of the Revolution was to abolish the institutions of the feudal system and replace them with "a social and political organization

[218] For an overview of different positions see Kuru, *Secularism and State Policies Toward Religion,* 136.
[219] Hunter-Henin ultimately argues that, "whilst the French Revolution does not explain the emergence of laïcité fully, it accounts for its militant tones," more precisely, it's ideal of transcendence and its hostility towards the Catholic Church. Myriam Hunter-Henin, *Why Religious Freedom Matters for Democracy. Comparative Reflections from Britain and France for a Democratic 'Vivre Ensemble'* (Oxford: Hart Publishing, 2020).
[220] Gunn, "Religious Freedom and Laïcité: A Comparison of the United States and France."
[221] Edward Berenson, Vincent Duclert, and Arthur Goldhammer, "Introduction: Transatlantic Histories of France," in The French Republic: History, Values, Debates, eds. Christophe Prochasson, Edward Berenson, and Vincent Duclert (Ithaca: Cornell University Press, 2011), 1–8.
[222] Ibid, 6.
[223] Further on a contextual and historical analysis on the War between the Two Frances see Douglas Johnson, "The Two Frances: The Historical Debate," *West European Politics* 1, no. 3 (1978): 3–10.

marked by more uniformity and more simplicity and resting on the basis of the equality of all ranks."[224] In other words, the Revolution brought upon a new political system legitimized by popular sovereignty with a distinct egalitarian character as envisioned by the Declaration of the Rights of Man and of the Citizen, thus eliminating the leftovers from the feudal Estate system and nobility privileges.[225] Hence, its anti-religion (or anti-Catholic Church) polices were pro-egalitarian as the main drive of the Revolution was not primarily liberty, but equality.[226] As a political ideology, republicanism developed as an expression of its underlining values - *liberté*[227], *égalité*[228], *fraternité* – as guiding lights of the Revolution; but also principles whose construction is inherently linked to *laïcité* as a model *sui generis* coined as a term a century later.

Laïcité, encompasses the secularization of the *source of legitimization* of power - from the divine right of the king to the popular consent of citizens as a totality, while positioning reason and conscience of Men (as opposed to irrationality and superstition)[229] as central for the justification for state action.[230] It derives from the idea that social order depends on human, instead of transcendent construction (and contract)[231] or legitimation. In the same vein, it strips the Catholic Church off its power in temporal affairs through state take-over of the

[224] Alexis Tocqueville, *The Old Regime and the Revolution* (New York: Harper and Brothers, 1856), 35.
[225] For an overview of conditions that led to the Revolution as well as the role of the Catholic Church see Thomas Bokenkotter, "The French Revolution (1789 - 1914)," in *Church and Revolution, Catholics and the Struggle for Democracy and Social Justice* (New York: Image Book, 1998).
[226] See further Jeremy Jennings, "Equality," in *The French Republic: History, Values, Debates*, eds. Edward Berenson, Vincent Duclert, and Christophe Prochasson (Ithaca: Cornell University Press, 2011), 103–11.
[227] For an overview of the definition and types of liberty in French republican thought and more specifically the views of Benjamin Constant in 1819 see Benjamin Constant, "The Liberty of the Ancients Compared With That of the Moderns," in *Political Writings*, ed. and trans. Biancamaria Fontana (Cambridge: Cambridge University Press, 1988).
[228] See Conseil d'Etat France, "Sur Le Principe d'égalité," January 1, 1998.
[229] Such action was based on the ideas that emerged from French Enlightenment suspicious of religious sects in general and Christian sects specifically, seeing them as a threat to the welfare of society, and the state itself. For further overview of the views of eighteen century Enlightenment thinkers in France as well as policies of (in)toleration and persecution in 18th century France see David D. Bien, "Religious Persecution in the French Enlightenment," *Church History* 30, no. 3 (1961): 325–33.
[230] See Baubérot, "Laïcité and Freedom of Conscience in Pluricultural France," 103; François Furet, *Revolutionary France, 1770-1880*, History of France (Oxford: Blackwell, 1992), 3.
[231] Trigg, *Religion in Public Life*, 121-22.

administration of activities previously administered by the Church as well as through allowing for actions previously prohibited due to the precepts of a religious doctrine (such as divorce).

The enactment of the Declaration also marked a transformation of the centrality of duty towards the monarch, God and the Church into the centrality of inalienable rights.[232] However, as Grimm notes, since the Declaration was adopted as a basis for a new legal order, "fundamental rights functioned as tasks and guidelines for the legislature in the complicated and long-lasting process of law reform" [233] hence, rights were envisioned not only as negative, but also as positive - having an additional programmatic function.

Additionally, in the French tradition rights and prescribed limitations of rights were particularly conceptualized. Rights are envisioned as public freedoms and thus, "civil rights [are not conceived] as natural rights that each individual can assert against the state, but as the natural right to enjoy freedoms defined and delimited exclusively by law."[234] Rights also rest on "formalist, individualist equality, based on a non-institutional identity to unitary civil status"[235], one that seeks to abstract its citizens from their other identities. Such a conception is linked to the particular universalist conception of citizenship according to which "there is no duality of state and citizen; the citizen does not have an identity independent of the state."[236] The nation is constructed as a totality, as *indivisible*. As Daly notes, this universalistic conception of citizenship is influenced by the idea of Rousseau's construction of *volonté générale*, as "the whole body of the nation [making] no distinction between any of the members who compose it."[237] Ultimately, what unites citizens are their shared values. This *universalist* approach differs from its particularistic counterpart that conceives citizenship in *particularistic*

[232] Such transformation was intellectually influenced by Rousseau and his writings on rights and duties. See Jeremy L. Caradonna, "The Death of Duty: The Transformation of Political Identity from the Old Regime to the French Revolution," *Historical Reflections / Réflexions Historiques* 32, no. 2 (2006): 273–307.
[233] See Dieter Grimm, "Types of Constitutions," in *The Oxford Handbook of Comparative Constitutional Law*, eds. Michel Rosenfeld and Andras Sajó (Oxford: Oxford University Press, 2012), 113.
[234] Troper, "French Secularism, or Laïcité," 1268.
[235] Daly, "Ambiguous Reach of Constitutional Secularism in Republican France," 584.
[236] Troper, "French Secularism, or Laïcité," 1268.
[237] Daly, "Ambiguous Reach of Constitutional Secularism in Republican France," 588.

terms - tied to a unique set of circumstances distinctive for a particular group, singular identity.[238]

As to the limitation of rights, under the Declaration, manifestation of opinions and religious views can be limited if determined by law and in the interest of public order (Article 10). Here it is important to note that in the French context it might be said that "the whole of the law has its chief object the organization and maintenance of public order."[239] Traditionally understood, the defense of public order is a "function of government, permitting restrictions on individual liberty to be imposed so as to 'maintain public security, tranquility, and health.'"[240]

Finally, and related to the previous two, a particular conception of state sovereignty was constructed, one that according to Troper has not one, but three dimensions, all defined through time vis-à-vis state attitudes towards religion. Thus, sovereignty is understood as a state feature - independent from any other religious external and internal power, whose highest authority does not derive from a religious authority and one in possession of the totality of the powers "even though it does not exercise them all."[241] Such a specific conception of sovereignty was constructed through religious-political conflicts in France across centuries,[242] following the legacy of the Gallican tradition and the Erastian doctrine.[243] Under this conception, the sovereignty of the state translates into power to propagate essential values and "to make pronouncements regarding religious questions."[244] This kind of conception of sovereignty

[238] See Michel Rosenfeld, *The Identity of the Constitutional Subject Selfhood, Citizenship, Culture, and Community* (Abingdon: Routledge, 2010), 32.
[239] Maître J. B. Bernier, "Droit Public and Ordre Public," Transactions of the Grotius Society 15 (1929): 84.
[240] John Bell, *French Constitutional Law* (Oxford: Clarendon Press, 1992), 83.
[241] See Troper, "Sovereignty and Laïcité," 150.
[242] Even though traces of the power struggle between state authorities (the monarchy) and the Catholic Church, as well as the establishment of some kind of "secular policies" predate the revolutionary period. See for example the historical overview in Chapter 1, more specifically the power-struggle between King Philip the Forth (The Fair) and Pope Boniface.
[243] A doctrine that maintains that church ought to be subordinated and governed by the state. See John Neville Figgis, The Divine Right of Kin (Cambridge: Cambridge University Press, 1914).
[244] Troper, "French Secularism, or Laicite," 1272.

allowed for and was in line with the established model of control and management of religion prevalent before the 1905 Law.

1.2 The Road Towards the 1905 Law: A Contextual Roadmap of Models Governing Religion from the Revolution to the Third Republic

In the infancy of the Republic, the aim of the state was to completely contain the power of the Catholic Church. This led to the enactment of anticlerical policies whose target (as is the case with anticlericalism) was to contain the "privileged status of clerical 'caste' that [was] perceived as hypocritical, immoral, and avaricious, especially when viewed from the perspective of the egalitarian concept of popular sovereignty."[245] Socially, negative and positive de-Christianization policies[246] were enacted to de-Christianize an already secularizing society.[247] These policies were especially severe in the years of the *Terreur*.[248] Institutionally, the Civil Constitution of the Clergy was introduced, constituting a national Church financially dependent on and loyal to the state, and independent from the Vatican and the Pope.[249] The Civil Constitution as a state act established control over the organization, funding, and

[245] Rene Remond, *L'anticléricalisme en France de 1815 à nos jours* (Paris: Fayard, 1976), 10-12, 21-30, 33 in Adrian A. Bantjes, "Mexican Revolutionary Anticlericalism: Concepts and Typologies," *The Americas*, Personal Enemies of God: Anticlericals and Anticlericalism in Revolutionary Mexico, 1915-1940, 65, no. 4 (2009): 468.
[246] Negative de-Christianization polices include the prohibition of manifestation of religious symbols as well as the policies established by the Constitution of the Clergy. Positive, consisted of introducing alternatives for Catholicism such as cults of honoring great man and martyrs of the Revolution, worship of Reason and the Supreme Being etc. See Thomas Kselman, "State and Religion," in *Revolutionary France: 1788-1880*, ed. Malcolm Crook (Oxford: Oxford University Press, 2002), 70.
[247] Furet, *Revolutionary France, 1770-1880*.
[248] See Edmond de Pressensé, Religion and the Reign of Terror: Or The Church During the French Revolution (New York: Carlton & Lanahan, 1869).
[249] See James Harvey Robinson, "The Civil Constitution of the Clergy," in *Readings in European History*, vol. 2 (Boston: Ginn & Company, 1906), 423-427.

functioning of the Church.[250] Its enactment and especially the loyalty oath requirement[251] fragmented the clergy itself and escalated into a civil war conflict.[252]

After the Thermidorian Reaction and overthrow of the Jacobin government, a new constitution was enacted. In the context of the counterrevolutionary insurrections in the West of France,[253] the Republican members of the Convention feared that a Catholic resurgence would benefit the royalists.[254] Thus, the Constitution of 1795 imposed separation and not control: it prohibited the enactment of laws that recognize religious vows or obligations contrary to the natural rights of man, and the mandatory contributions or state subsidies to any religion; it likewise guaranteed the right of performing religious worship of one's choice, so long as it complies with the law.[255] By its nature, the 1795 Constitution is considered the historical predecessor of the Third Republic.[256] However, notwithstanding such constitutional guarantees, persecution continued[257] as laws that allowed it were still in force.[258] Thus, the period between 1791 and 1803 is "considered as a sort of gallic version of the Church of England, subjugated, as it was, by the Republic."[259]

[250] Under this arrangement, the clergy's salaries were paid by the state, the diocese was limited within the lines of the state administrative units while all bishops and cures were to be elected by active citizens, the Pope would ordain bishops only after the government had appointed them. With no property the Church was under financial control of the State as state funding was its only source of income. See Lewis Rayapen and Gordon Anderson, "Napoleon and the Church," *International Social Science Review* 66, no. 3 (1991): 117–27.
[251] Clergy members were required to take an oath of loyalty to the state, a requirement they fiercely opposed even though the practice was not that different than the practice in the previous regime where they had to swear an oath of loyalty to the King. See Jennifer Llewellyn and Steve Thompson, "The Civil Constitution of the Clergy," Alpha History, September 2, 2022, accessed on January 20, 2022, https://alphahistory.com/frenchrevolution/civil-constitution-of-the-clergy/.
[252] See Troper, "Sovereignty and Laïcité," 152.
[253] For further in-depth analysis on church-state relations between the Terror and the enactment of the 1795 Constitution see Sophia H. MacLehose, "Separation of Church and State in France in 1795," *The Scottish Historical Review* 4, no. 15 (1907): 298–308.
[254] See Ruth Graham, "The Challenge of Secularization to the Sacraments Under the First French Republic," *The Catholic Historical Review* 68, no. 1 (1982): 13–27.
[255] Constitution of the Year III (1795).
[256] See David Saville Muzzey, "State, Church, and School in France I. The Foundations of the Public School in France," *The School Review* 19, no. 3 (March 1911): 178.
[257] Add to that the imprisoning the Pope Pius VI after victory over the Papal states in 1798 and upon his refusal to renounce his temporal power.
[258] See MacLehose, "Separation of Church and State in France in 1795."
[259] For this and opposing views see Steven Englund, "Church and State in France Since the Revolution," *Journal of Church and State* 34, no. 2 (1992): 332.

Napoleon shared anti-clerical attitudes and supported the Revolution,[260] but started to see religion as a tool for political expediency and establishing social order when restoring stability was vital.[261] He considered the support of the Church as paramount for his governance. Hence, he saw the Pope as a "central figure that would assist in bringing the Catholics of France under the authority of the Republic" and the Concordat as a document that would order "priests to obey the government."[262] The 1801 Concordat and the Organic Provisions – as a unilateral state act - governed the relationship between the Church and the state for more than a century. It was aimed at resolving the relationship between the state and the Church after more than a decade of turmoil.

The established regime was by no means a return of the pre-revolutionary state:[263] "the civil state was secularized, and freedom of religion guaranteed."[264] However, even though the Concordat regime was built on a compromise, it retained state power over religion. On one hand, it allowed for public free exercise of the Catholic, Apostolic and Roman religion and recognized it as the faith of the majority of French citizens.[265] The Concordat also obliged the state to take measures allowing for French citizens to contribute to Churches and foundations.[266] Additionally, the state sale of church property was stopped and properties were placed at the Church's disposal.[267] Hence, the Church could freely manage property and receive

[260] Robert O'Brien, *The Stasi Report: The Report of the Committee of Reflection on the Application of the Principle of Secularity in the Republic* (Buffalo, New York: William S. Hein & Co., Inc, 2005), ix.
[261] It was the fall of Terror changed his opinion regarding the significance of religion - he now believed that strong religious sentiments mobilized masses more than any ideology. See Rayapen and Anderson, "Napoleon and the Church."
[262] Ibid, 121.
[263] As Grimm notes, Napoleon continued secularization and liberalization of state power in the legal realm, most importantly by enacting the Civil Code thus, creating a "liberal private law regime [that] coexisted with an authoritarian public law regime." Dieter Grimm, "Types of Constitutions," in *The Oxford Handbook of Comparative Constitutional Law*, eds. Michel Rosenfeld and Andras Sajó (Oxford: Oxford University Press, 2012), 119.
[264] Troper, "French Secularism, or Laicite," 1275.
[265] See the Preamble and Article 1 of the 1801 Concordat.
[266] See Article 15 of the 1801 Concordat.
[267] See Article 12 of the 1801 Concordat.

non-state funds. On the other hand, the state partly remained in control of the Church both by paying salaries of the clergy and having a say in their appointment.[268]

After resolving the state's relationship with the Catholic Church, Napoleon continued his efforts to similarly regulate other religions - within the limitation set by the specificity of the sects, and their non-existent hierarchical structure. On the same day when the Organic Articles governing the Catholic Church were published, Organic Articles for the Protestant sects (Lutheran and Reformed) were also enacted. The organization of Judaism came 6 years later. With the enactment of the Organic Regulation of the Mosaic Religion,[269] Judaism also became one of the official religions in France.[270]

2. Coning of *Laïcité* in the Third Republic

In the words of Peña-Ruiz "the secular recasting of the state" was initiated in France with the establishment of free mandatory, and *laïque* public education and with the enactment of the 1905 Law on the Separation of the Churches and State.[271] This recasting, he claims, is based on "the essence of the very word republic: the Res Publica addresses everybody, believers, atheists, and agnostics alike, and cannot therefore favor anybody."[272] Below, I will evaluate these laws and the construction of *laïcité* through their enactment.

[268] Part One of the Organic Provisions established the circumscription of the archbishoprics, bishoprics and parishes, the buildings intended for worship and finally to the salaries for the ministers. Part Four, Section Three of the Organic Provisions governed in detail all aspects from the organization of the Church and its governance and relations to the state.
[269] The Jewish community was separated into districts with a center in Paris. Rabbis and local officials had the task of incorporating Napoleon's policies. See Jon Bloomberg, *The Jewish World in the Modern Age* (Jersey City: KTAV Publishing House, Inc., 2004), 45.
[270] Much like the Catholic clergy, Protestant pastors and Jewish rabbis received a salary from the State. Napoleon would have preferred to reorganize the two religions in the same manner that he did Catholicism, with the aim to integrate, as well as control them. However, due to the lack of hierarchical structure of the religious orders of both Protestants and Jews, they were organized into institutions called consistories.
[271] Henri Peña-Ruiz, "Laïcité and the Idea of the Republic: The Principles of Universal Emancipation," in *Secularism on the Edge, Rethinking Church-State Relations in the United States, France and Israel*, eds. Jacques Berlinerblau, Sarah Fainberg, and Aurora Nou (New York: Palgrave Macmillan, 2014), 99.
[272] Ibid.

2.1 The Education Laws of the Third Republic

2.1.1 Background: The Road Towards Free and Secular Public Education

Between the Revolution and the Third Republic, the French state never managed to take-over the role as main educator, mostly due to practical problems and due to the enactment of inconsistent policies regarding the role of the Catholic Church and religious orders in and out of public schools.

Free and secular public instruction was a goal ever since the First Republic,[273] most notably through the Condorcet's report and plan[274] and during the *Terreur*.[275] In the first years of the Republic, state take-over of education was considered a priority - necessary to free education from the chuckles of ecclesiastical doctrine,[276] and to create a patriotic, enlightened citizenry loyal to the new Republic.[277] The new system was to embrace the idea of public education open to all striving to develop their talent,[278] considered as a public freedom and not an individual privilege[279] – right of the citizen rather than a human right.[280] However, the ambitious project of creating free, laic public education failed due to the lack of physical space/buildings and funds,[281] as well as laic teachers.[282]

[273] The Constitution of the First Republic guaranteed free public instruction to all citizens free education. The idea behind such wording being to achieve universal, *secular,* and obligatory public primary instruction. See the French Constitution of 1791.
[274] On Condorcet and his plan see Charles Duce, "Condorcet on Education," *British Journal of Educational Studies* 19, no. 3 (1971): 272–82.; Olivier Marty and Ray J. Amirault, *Nicolas de Condorcet. The Revolution of French Higher Education* (Cham: Springer, 2020).
[275] Muzzey, "State, Church, and School in France I," 189.
[276] Before the Revolution, education was left largely in the hands of the Catholic Church; the state limited its authority to general supervision. See Andre Legrand and Charles Glenn, "France," *International Journal for Education Law and Policy* 7, no. 1 (2011): 95–118. And R. D. Anderson, *European Universities from the Enlightenment to 1914* (Oxford: Oxford University Press, 2004), 40.
[277] L. Pearce Williams, "Science, Education and Napoleon I," *Isis* 47, no. 4 (1956): 370.
[278] See Muzzey, "State, Church, and School in France I," 178.
[279] See Legrand and Glenn, "France."
[280] Talleyrand's Report on Public Instruction from September 1791 proposed a plan how to systematically fulfill the idea of free and compulsory education for all men, meaning only man and boys since he found the role of women as wives and mothers would not benefit or even may be distracted by education, See "Editorial," *Signs* 10, no. 3 (1985): 415–17.
[281] Ibid.
[282] Almost all teachers were either part of the clergy or associated with the old regime and therefore considered unacceptable. It was not under the Directory that *"ecoles centrales"* replaced "colleges and the Paris Normal school finally opened. See Muzzey, "State, Church, and School in France I."

Napoleon centralized and monopolized public education by creating the *lycees*[283] and the Napoleon University as a central authority responsible of administering public schools and supervising private schools. [284] However, his main interest was creating future state administrators through secondary schools, hence, primary schools continued to be run by Departments and congregations.[285] The problem of the deficiency of laic teachers, necessary for the expansion of primary public schools, was addressed much later[286] with the 1833 Guizot Law that (re)organized the system of normal public schools.[287]

Despite practical difficulties inconsistent policies towards religious orders and free schools, as well as the role of the Catholic Church in public schools also prevented the state to achieve its role as main educator. In the early Republic, religious orders were banned from teaching[288] and the role of the Church in what were to be the new French public schools was diminished. The *narrative and rationale* against incorporating religious doctrine in public instruction in Condorcet's plan for public instruction was the principle of equality of each citizen in the eyes of the state - the state cannot adopt/prefer one worldview and with that temper with the liberty of opinion of citizens.[289]

Napoleon's policies departed from this approach as he reinstated the right of authorized religious orders to teach.[290] This together with his uninterest in primary education allowed for religious orders to "virtually [keep] the monopoly of primary instruction in France up to the

[283] His goal was "to give everyone the knowledge necessary for him to fulfill the functions in society to which he is called, thus, loyalty and obedience were paramount. See Ibid, 371.
[284] See Ann Margaret Doyle, "Catholic Church and State Relations in French Education in the Nineteenth Century: The Struggle Between Laïcité and Religion," *International Studies in Catholic Education* 9, no. 1 (2017): 108–22.
[285] J. David Markham, "The Revolution, Napoleon, and Education," The Napoleon Series, accessed December 11, 2018, https://www.napoleon-series.org/research/society/c_education.html.
[286] The figures alone prove this fact, as "in 1820 there were 22,000 primary schools with 800,000 pupils in France while by the 1850's there were 63,000 schools with 3,785,000 pupils. See David Saville Muzzey, "State, Church, and School in France II. The Campaign for Lay Education," *The School Review* 19, no. 4 (1911): 252.
[287] The law "requiring each of the eighty-seven departments of France to support a normal school for primary teachers, "either by itself or in connection with one or more neighboring department. See Ibid, 251.
[288] See Doyle, "Catholic Church and State Relations in French Education in the Nineteenth Century."
[289] See Muzzey, "State, Church, and School in France I."
[290] See Doyle, "Catholic Church and State Relations in French Education in the Nineteenth Century."

ministry of M. Guizot in 1833."[291] By 1808 the Napoleon University was heavily controlled by the Church and a decree determined that "the basis of instruction in the Imperial University shall be the principles of the Catholic religion," giving bishops the right to inspect the teaching in the *lycees*.[292] Religious instruction was again part of the public schools curriculum.[293]

Thereafter, royal regimes encouraged the Catholic influence in education through the Church's supervisory function and influence over the curricula in public schools.[294] The Guizot Law established the framework for public primary education whilst still keeping religious education in the curricula.[295] The 1860 Falloux Law[296] was aimed to "promote instruction as the vital means of reinforcing religious faith and of thus contributing to the preservation of moral, social and political order and finally eliminating the threat of Revolution."[297] Further regulations sent by the *Ministère de l'Instruction publique* to the departments stated that the "principal duty of the schoolteacher was 'to educate a man to be at the same time Christian and citizen.'"[298] In line with this mission, normal schools as established by the Guizot Law were placed under the control of the clergy.[299]

In addition to maintaining a strong position in public schools, the Church also provided an alternative to public schools by operating the so-called free schools.[300] The protection of the freedom of education derived from the understanding that it is the right of the father to make

[291] See Muzzey, "State, Church, and School in France I," 185.
[292] Ibid, 193.
[293] Ibid, 152.
[294] Sarah A. Curtis, "Supply and Demand: Religious Schooling in Nineteenth-Century France," *History of Education Quarterly* 39, no. 1 (1999): 51–72.
[295] Ibid.
[296] Driven by the fear of communism, the French bourgeoisie considered best to align with the Catholic Church to fight growing anticlericalism. See Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* (New York: Die Revolution, 1852).
[297] Roger Price, *The Church and the State in France, 1789–1870* (Aberystwyth: Palgrave Macmillan, 2017), 206.
[298] Ibid.
[299] The law put all normal schools as organized by the Guizot law under the supervision of the Church. It replaced normal schools by training schools designated by the Academic Council - a body controlled by the clergy, giving the power to the conseil general of each department to shut normal schools upon its own discretion. David Saville Muzzey, "State, Church, and School in France II. The Campaign for Lay Education," The School Review 19, no. 4 (1911): 254.
[300] Curtis, "Supply and Demand."

decisions regarding the child's education.[301] In the early Republic and the *Terreur*, the right of the father was considered aligned with the right of the state[302] yet, both freedom of teaching and the establishment of private schools enjoyed protection.[303] After the *Terreur*, the right to form private establishments for education and instruction was protected on a constitutional level via the 1795 Constitution. [304] This led to growth in the numbers of free schools.

During the First Empire, in line with Napoleon's mission to centralize education and establish monopoly, free schools were prohibited to teach any course taught by the *lycees*. The curricula of free schools was closely inspected by state authorities to check if they abide with said prohibition.[305] The long campaign for the freedom of teaching (*liberte de l'enseignement*) began as a response to these actions, led mostly by Catholics who wanted to set up rival institutions[306] and lasted until WW1 "when the Radicals abandoned their attempt to re-establish that monopoly."[307] The campaign was especially successful during the July Monarchy and resulted in the inclusion of guarantees of "public instruction and the liberty of instruction"[308] in the Constitutional Charter of 1830. The Guizot Law reaffirmed the freedom to establish private elementary schools,[309] as protecting freedom of teaching was one of its author's main goals.[310] Falloux Law removed all the restrictions posed on the opening and functioning of

[301] See Legrand and Glenn, "France."
[302] See Muzzey, "State, Church, and School in France I."
[303] A decree passed in 1973 declared the freedom of teaching and with that enabled juring priests to teach by permitting any citizen to open schools. The only condition was that they present a certificate of patriotism and morality to the local authorities Jonathan E. Helmreich, "The Establishment of Primary Schools in France under the Directory," *French Historical Studies* 2, no. 2 (1961): 192.
[304] See Article 300 of the French Constitution of 1795.
[305] See Muzzey, "State, Church, and School in France I."
[306] Anderson, *European Universities from the Enlightenment to 1914*.
[307] John H. Weiss, "The History of Education in Nineteenth-Century France: A Survey of Recent Writings" 3, no. 2 (1970 1969): 154, referring to Felix Ponteil's Histoire de l'Enseignement: 1789-1965 (Paris: Sirey, 1966).
[308] "1830: French Charter of 1830 - Online Library of Liberty," accessed December 24, 2018, https://oll.libertyfund.org/pages/1830-french-charter-of-1830.
[309] Legrand and Glenn, "France."
[310] See "The Ministry of Public Instruction," Association François Guizot, accessed February 9, 2022, https://www.guizot.com/en/politics/the-ministry-of-public-instruction/.

private schools imposed by Napoleon.[311] Thus, before the Third Republic, congregational schools[312] administered and staffed by religious personnel multiplied throughout France.[313]

In the wake of the Third Republic, the Catholic Church and religious orders had primacy in education.[314] The inability to overcome the practical challenges and failing to build public education infrastructure, combined with the favorable policies towards the Catholic Church of both Napoleon and the monarchist after him, allowed for the Church to both have considerable influence over public education, as well as to maintain considerable primacy in private education, especially in primary education.

2.1.2 Overview of the Education Laws of the Third Republic

The term *laïcité*, first used in November 1871, was coined through the debates between the two Frances in the battle for free, obligatory and secular *primary* education, and the exclusion of religious dogma in public education.[315] These debates emerged in a particular time and circumstances – amid the battle of the two Frances when republican voices once dimed and exiled returned to claim their power. During the Second Empire, tensions and resentment[316] between the two Frances "reached their peak," as "Republicans and Catholics both vehemently professed their incompatibility with one another."[317] Catholic Ultramontanism and Integralism

[311] They were only inspected by the state in terms of their compliance with "morality, hygiene and sanitation" requirements and their curriculum was only to comply with the constitution, morality and the laws. See Evelyn Martha Acomb, *The French Laic Laws, 1879-1889 : The First Anti-Clerical Campaign of the Third French Republic*, Studies in History, Economics and Public Law: 486 (New York: Octagon Books, 1967), 17.
[312] These schools, popularly accepted as "Catholic" in both content and structure – "they could be classified as either public or private, depending on whether any public funds communal, departmental, or national were allocated for their use, but all were administered and staffed by religious personnel primarily responsible to a teaching order. See Curtis, "Supply and Demand."
[313] Ibid.
[314] Acomb, *The French Laic Laws, 1879-1889*, 17.
[315] The word entered the dictionary of pedagogy and primary instruction as a neologism in 1887 the word. Le Grand points out that in the course of the 19th century due to the 1848 revolution and the debates regarding the educational reform, the term laïcité experienced a semantic mutation. Accordingly, from being used to describe a person that is religious but doesn't belong to the clergy, the term laïcité started to be used to describe a person that is not a member of a positive instituted religion.
[316] For further analysis see Ralph Gibson, Why Republicans and Catholics Couldn't Stand Each other in the Nineteenth Century, in Frank Tallett and Nicholas Atkin, eds., *Religion, Society and Politics in France Since 1789* (The Hambledon Press, 1991).
[317] Hunter-Henin, *Why Religious Freedom Matters for Democracy*, 29.

developed through the papal encyclicals from the second half of the nineteenth century (Syllabus of Errors[318] being most significant),[319] as an illiberal doctrine that "denounced secularism, disestablishment of the Church, and free exercise of religion, among other heresies of modernity,"[320] and the ban on teaching religious dogma in schools.[321] Even though Ultramontanism and Integralism took root and developed earlier in the century, they lingered for decades to come. Among some Republicans, who intellectually relied on evolutionary and sociological positivism while politically fearing a return of the monarchy,[322] *laïcité de combat* emerged aiming to "[reactivate] its most irreligious ferments."[323] Additionally, upon the establishment of the Third Republic political exiles returned to France, most of them republicans believing in the ideals formed in the Revolution. They were, no matter how fragmented, the force behind the laicization of education and the building of the *école républicaine.*

According to Buisson, who is considered the godfather of the term, *laïcité* is a necessary neologism portraying the secularization of education as the last stage of progressive differentiation through establishing the neutrality of the state through its curricula, its teaching staff as well as equality of rights despite of creed and civil status of marriage.[324] Thus, the take-over of primary instruction is inherently linked to *sovereignty:* it encompasses institutional differentiation - a "result of a historical process in which the public institutions freed

[318] Pope Pius IX, Syllabus of the Principal Errors of our times, 1864.
[319] See Gabriel Sanchez, "Catholic Integralism and the Social Kingship of Christ," The Josias, January 23, 2015, https://thejosias.net/2015/01/23/catholic-integralism-and-the-social-kingship-of-christ/.
[320] Micah Schwartzman and Jocelyn Wilson, "The Unreasonableness of Catholic Integralism," *San Diego Law Review* 56 (2019): 1043-44.
[321] The public reaction to the publication of the Syllabus "was immediate and violent." Even though published in the Second Empire, the French government reacted by forbidding bishops in France to publish the encyclical to the faithful" Daniel Callam, "The Syllabus of Errors: Canadian Reaction in the Secular and in the Protestant Press," *CCHA, Study Sessions* 46 (1979): 6.
[322] Hunter-Henin, *Why Religious Freedom Matters for Democracy.*
[323] A. Bantjes, "Mexican Revolutionary Anticlericalism: Concepts and Typologies," 465.
[324] Jean Baubérot, "Laicity," in *The French Republic: History, Values, Debates*, eds. Edward Berenson, Vincent Duclert, and Christophe Prochasson (Ithaca: Cornell University Press, 2011), 130.

themselves from the power of religion."[325] It is also a practice of sovereignty as power: it answers the question *who* has the power to shape future citizens and who determines the values according to which they are shaped. Thus, *laïcité* as linked to institutional differentiation crystalized in notions of neutrality of the state (in curricula) and laicity of the teaching staff, but also to equality of rights despite of creed and civil status.[326] The goal was to create a united rather than divided national consciousness "based upon the principles of the Enlightenment and the Revolution"[327] and by "fostering national unity and patriotism."[328] This corresponds to the understanding of *laïcité* as neutrality, as championed by the Opportunists,[329] whose interpretation was adopted with the education laws. The state must "propagate" neutral values, not based on religious doctrine,[330] both because of the divisiveness of religious doctrine and because of the obligation to respect freedom of conscience. Thus, the need for neutrality is based on the universalist notion of citizenship as well as the protection of liberty of conscience, and it prescribes constraint on state power in the form of non-interreference. This prescribed a stabilizing function to *laïcité*, "which denies religions public recognition and thus affirms a republican ideal of citizenship by checking the political force of infra-state identities."[331]

The centrality of power, the supremacy[332] of the state in "[shaping] the new generation in its own image"[333] was crucial. The consolidation of such power was accomplished through containing the power of religious congregations over education and building a public school

[325] Baubérot, "Laïcité and Freedom of Conscience in Pluricultural France," 103.
[326] Baubérot, "Laicity," 130.
[327] T. Salton, "Unholy Union: History, Politics and the Relationship Between Church and State in Modern France," 143.
[328] Acomb, *The French Laic Laws, 1879-1889*, 170.
[329] Kuru, *Secularism and State Policies Toward Religion.*
[330] Baubérot, "Laicity," 130.
[331] Eoin Daly, "Public Funding of Religions in French Law: The Role of the Council of State in the Politics of Constitutional Secularism," *Oxford Journal of Law and Religion* 3, no. 1 (2014): 126.
[332] See Evelyn Martha Acomb, "The Laic Laws - State Supremacy," in *A Free Church in a Free State? The Catholic Church, Italy, Germany, France, 1864-1914*, ed. Ernst C. Helmreich (Boston: D.C. Heath and Company, 1964), 100–103.
[333] M. Buisson, The Teacher and the Republic," Grande Revue of November, I909 in education in David Saville Muzzey, "State, Church, and School in France: IV. Moral Education as an Ideal of the French Republic," *The School Review* 19, no. 6 (1911): 263.

system. In 1880 the first attempt to restrict the establishment of educational institutions ran by unauthorized religious orders (primarily targeting the Jesuits)[334] failed in the Senate.[335] On 29th of March 1880, the same year, the President signed two Decrees: one specifically banning the Jesuit order and another demanding "that all other non-authorized orders apply, within the same period, for authorization from the government."[336] Refusing to do so many congregations were suppressed.[337]

Parallelly, the republican public primary school was built through the Ferry[338] and the Goblet Laws. First, the Law of February 27, 1880, changed the composition of the Higher Council of Education that during the Restoration and the Second Empire transformed from an advisory body into a supreme authority in educational matters.[339] Until 1879, the Council consisted of state representatives, clergy and social interest representatives, while later it consisted only of the minister of education and representatives of public and private schools of all levels. Thus, the clergy was no longer involved in the crafting and operating of public education. Consequently, the 1881 and 1882 Laws (so called Ferry Laws)[340] established free, laic and compulsory *primary* public education for children of both sexes from the age of six to thirteen. The laws also abrogated the provisions of the Falloux law that gave clergy the right to carry on "inspection, surveillance, and direction of the public and private primary schools."[341] The 1886 Goblet Law established government control over the curriculums, the selection of

[334] See Milorad N. Vuckovic, "The Suppression of Religious Houses in France 1880, and the Attitude of Representative British Press," *CCHA Report* 28 (1961): 9–23.
[335] The famous article 7 of the 1880 Law on Higher Education proposed by Ferry, prohibited the establishment of frees schools by unauthorized religious orders, or any member of the order to participate in any way in instruction and in education was defeated in the Senate by a slim margin. See Akan, *The Politics of Secularism*. The text of the Article was as follows: "No person belonging to an unauthorized religious community is allowed to govern a public or private educational establishment of whatsoever order or to give instruction therein."
[336] Vuckovic, "The Suppression of Religious Houses in France 1880, 14.
[337] The decrees were not consistently enforced; however, 261 houses and institutions were closed and that between 5,000 and 10,000 monks were evicted. See Gunn, "Religious Freedom and Laïcité: A Comparison of the United States and France."
[338] Caring the name of Jules Ferry, the Minister of Public Instruction.
[339] See Office of Education United States, "Report of the Commissioner of Education: Volume 1" (U.S Government Printing Office, January 1907).
[340] The Law of June 16, 1881, and the Law of March 28, 1882.
[341] Muzzey, "State, Church, and School in France II," 257.

textbooks and finally laicized the teaching staff [342] by prohibiting teachers to be clergy members and conditioning them to have a specific teaching diploma.[343] It also madated that at least one primary school be established in each commune, while a 1889 law made the state responsible for paying public-school teachers' salaries. [344]

The place of religious education in republican public schools was also evaluated in the process of the enactment of the Ferry Laws. In the Bert Report, examining the proposal of 1882 Law, the parliamentary commission "found the principles of "liberty of conscience" and "the law of the majorities" in conflict."[345] It was stated that education must not be taken over by the religion of the majority since "in the domain of conscience… the law of majority stops."[346] Thus, it encompasses the notion of non-interreference as a counter-majoritarian function of *laïcité*. Article 1 from the 1882 Law[347] prohibited religious instruction in public primary schools and, instead, teaching of independent morality and civics was made compulsory for the purpose of upholding and strengthening national unity.[348] In a letter, Ferry would write: "[the] first objective was to separate the school from the church, to guarantee freedom of conscience for all students, and to distinguish between two domains for too long confused, that of beliefs which are personal, and that of knowledge (connaissances) that is common and essential to

[342] Even though Law of August 9, 1879, revived and expended the Guizot law as it was in force before Falloux Law, providing the organization of normal schools in each department for both for man and women, financed by the departments with state aid. See Acomb, *The French Laic Laws, 1879-1889*, 163.
[343] "Law on the Organisation of Primary Education, the so-Called 'Goblet Law' | PERFAR," accessed December 26, 2018, https://www.perfar.eu/policies/law-organisation-primary-education-so-called-goblet-law.
[344] These laws were followed by a change in budgetary policies. For example, before 1883 the amount of the budget for cults and the budget for education were very close, with the budget of cults amounting to higher numbers. By 1883, the year after the 1882 law was enacted, the budget for education amounted more than double then that of the cults. See, Akan, *The Politics of Secularism*, 31.
[345] Akan, *The Politics of Secularism*, 32.
[346] Ibid.
[347] Law of March 28, 1882.
[348] In Parliamentary discussions regarding the issue of compulsory teaching of "independent morality" devoted Catholic monarchists deemed impossible to teach morality without religious foundation. Conservative Catholics claimed that the state cannot take upon itself the function to teach "since it embraced so many different doctrines within its own union." Liberal Catholics on the other hand, agreed that the state has the right to teach. Even though that right is not inherent rather than legal, it must either way be respected. See Acomb, *The French Laic Laws, 1879-1889*, 28-9.

everyone."[349] Thus, as Lizotte points out the "letter establishes a republican basis for common-sense morality that any good citizen should have intuitive access to, emphasizing a that the school is competent in the realm of uncontestable "knowledge" separate from the "beliefs" conveyed by the family and the church. As such it declares the public school as having universal moral authority over all citizens".[350]

Finally, the adopted version of the law envisioned an accommodative approach towards the parents who demanded religious instruction for their children, by providing one additional vacation day of the week other than Sunday to allow parents to provide religious instruction to their children outside of the public school. As it was debated in the early years after the Revolution, the rationale behind the law was protecting the *principle of equality* and the freedom of conscience of the non-observant parent and instructor. As such, the adopted solution championed by the moderate left Opportunists (as opposed to the solutions proposed in the Parliamentary discussions[351]) was liberal - secularizing the curricula but accommodating the right of the father.[352]

2.2 The 1901 Law on Associations and the 1905 Law on the Separation of the Churches and State

In the 1880's the issue of institutional separation between the state and religious organizations was headlining republican political campaigns for years. However, as

[349] Ferry, J. (1883, November 27). La lettre de Jules Ferry aux Instituteurs in Christopher Lizotte, "Laïcité as Assimilation, Laïcité as Negotiation: Political Geographies of Secularism in the French Public School," *Political Geography* 77 (2020): 3.
[350] Lizotte, "Laïcité as Assimilation, Laïcité as Negotiation: Political Geographies of Secularism in the French Public School," 3.
[351] On one side were the monarchists - Union des Droites, loyal to the old regime and the Catholic Church insisting on mandatory religious (Catholic) education in public schools, as they considered religious education as the only way to teach morality and the importance of God and. On the other side were the Republicans, separated into two fronts. Both insisted that mandatory teaching of religious education (meaning Catholic) to all students is against equality, as Catholic religious education will impose its views on children not belonging to the Catholic faith. They differed in the proposed approaches as to facultative religious education. One stream was the more radical left represented by Paul Bert (who drafted the parliamentary report on the laws) understood laïcité as a rapture with the past, as a positive ideology opposed to clericalism. This stream wanted to eliminate religious instruction from public schools without accommodation. See Le Grand, "The Origin of the Concept."
[352] See Le Grand, "The Origin of the Concept."

McManners puts it: until then "separation was [more] a subject of hope and not action."[353] Even when bills were proposed in Parliament, they were rejected because the context/conditions were still not ripe.

However, by the beginning of the 20th century, certain conditions had changed that made separation a necessity as well as a political end. First, the secularization of education was already complete, and further legislation was enacted to secularize other functions performed by the Church such as the administration of marriages, burials and healthcare.[354] This served as a preparatory program for separation. [355] Second, the Dreyfus affair led to monarchist/conservative forces and the Church to lose public support;[356] while in its aftermath, monarchist plots and national agitation started to threaten national sovereignty, while religious orders the supremacy of the civil governance.[357] Finally, upon this background, during the Waldeck-Rousseau[358] (1899-1902) and Combes (1902-1905) governments, two developments transpired, influencing the urgency of the enactment of the 1905 Law.

First, on 1st of July 1901 the Law on Associations was enacted, in its original form establishing strict control over religious congregations. Articles 13 through 18 imposed an obligation to all religious congregations that failed to request an authorization under a decree of 1804[359] to apply for authorization within 3 months. Such an authorization was to be granted

[353] John McManners, *Church and State in France, 1870-1914* (New York: Harper & Row, 1973), 140.
[354] Saunders, "France on the Knife-Edge of Religion: Commemorating the Centenary of the Law of 9 December 1905 on the Separation of Church and State."
[355] Adrien Dansette, "From Laic Laws to Separation," in *A Free Church in a Free State?: The Catholic Church, Italy, Germany, France, 1864-1914*, ed. Ernst C. Helmreich (Boston: D.C. Heath and Company, 1964).
[356] For an overview of the Dreyfus affair and the surrounding context including the Ralliement and their impact on the 1905 Law, see Norman Ravitch, *The Catholic Church and the French Nation 1589-1989* (London: Routledge, 1990), 92-112. For a view that underrates the significance of the Dreyfus affair to French politics, see Maurice that claims that the affair itself did not bring anything "fundamentally new to French politics, but merely revealed with startling clarity the division that still existed between 'les deux France." See Maurice Larkin, *Religion, Politics and Preferment in France* (Cambridge: Cambridge University Press, 1995). Specifically, on the Ralliement and the role of Pope Leo XII see Kevin Passmore, "The Ralliement (1890–1898)," in *The Right in France from the Third Republic to Vichy* (Oxford: Oxford University Press, 2012), 73–100.
[357] See Dansette, "From Laic Laws to Separation," 93.
[358] Further on Prime Minister Waldeck-Rousseau's personal stances as well as the Republican defense on suppression of religious orders see Ibid.
[359] "Law of Associations," Oxford Reference, accessed February 18, 2022.

"by a parliamentary statute specifically approving the congregation."[360] Failing to obtain one, a congregation would be deemed illegal and, thus, their property would be subject to confiscation. The Law also affected congregational schools, as it prohibited members of unauthorized congregations to teach.

During the Combes government, the Law on Associations was implemented with utmost force. The Prime Minister obtained a ruling from the Council of State altering its previous position, stating that only a decision from one chamber of Parliament, instead of both chambers, is enough to deny authorization of a congregation.[361] In the following years, parliamentary refusals led to the closures of hundreds of congregations.[362] In 1904, a law was passed restricting all religious communities from providing education leading to the closure of ten thousand Catholic schools and the expulsion of thirty thousand members of the Catholic orders.[363]

Second, the Concordat became a "tool" for punishing clergy members that protested governmental policies and were involved in advocating against republican candidates during electoral cycles.[364] In 1883 the Council of State issued a decision that granted the state a right to "suppress and suspend salary of clergy of every rank" justified under the states' right to watch over public services, in accordance with the Concordat "which recognized the head of the state as having the rights and prerogatives formerly held by kings of France with the Papacy."[365] Almost a decade later, the decision would serve as a convenient precedent, leading to the suspension of salaries of clergy members acting against republican interests. For example, the Waldeck- Rousseau government suspended the salaries of 150 members of the

[360] Gunn, "Religious Freedom and Laïcité: A Comparison of the United States and France," 439.
[361] Dansette, "From Laic Laws to Separation," 94.
[362] Gunn, "Religious Freedom and Laïcité: A Comparison of the United States and France," 439.
[363] The implementation of this law had an enormous effect on both Catholic teachers and students and schools in general. Between 1876 and 1877 there were 19.890 religious public and private schools. The number drastically decreased to only 1.851 between 1906 and 1907. Kuru, *Secularism and State Policies Toward Religion*, 148-149.
[364] Ibid.
[365] Acomb, *The French Laic Laws, 1879-1889*, 229.

clergy,[366] while the Combes government suspended the salaries of 86 lower ranking clergy members just in the first three months of its mandate, and a total of 632 by the end of its term.

In this context, Parliamentarians began to discuss more seriously the drafting of a law that would end the Concordat regime. In June of 1903 the Parliamentary *Commission de séparation* was created consisting of 33 members, led by the independent socialist Aristide Briand as a *rapporteur*.[367] The Commission presented the Briand Report on 4th of March 1905, advocating for complete separation of Churches and the state, while emphasizing the shortcomings of current the Concordat regime, mainly that it allowed for abuses both by the state as well as the Church.[368] The monarchists, opposed the law completely,[369] with Catholics fearing that separation would lead to further persecution.[370] Republicans were fragmented, proposing different solutions for governance of religion. The first stream proposed an anti-religion regime that would produce "political de-Christianization."[371] The second stream, led by Combes, proposed a less radical, but still anticlerical, solution: a one-sided Concordat - "Concordat without the Pope" - that would place the state above and in control of the Church.[372] The third stream, whose solution was ultimately adopted, advocated for complete separation of Churches and the state.[373]

[366] Akan, *The Politics of Secularism*, 56.
[367] For further insight into the debates within the Commission itself see Othon Guerlac, "The Separation of Church and State in France," *Political Science Quarterly* 23, no. 2 (1908): 259–96.
[368] The state did not respect the regime and aimed to enslave the church, while "the obligations of the State towards the clergy [were] enormous [while] the clergy remained free of any obligation." Additionally, the report suggested that the clergy was undermining the spirit of the Concordat "by working toward ruining and replacing civil authority." See citations of the report in Akan, *The Politics of Secularism*, 73.
[369] The Progressive Republicans and the Liberal Action MPs voted almost entirely against the law, with the Liberal Action leader Albert de Mun claiming that he "does not believe at all in the neutral State in matters of religion." See Ibid, 63.
[370] Saunders, "France on the Knife-Edge of Religion."
[371] Kuru, *Secularism and State Policies Toward Religion*, 149.
[372] See Baubérot, "Laicity."
[373] In sum, the report identified two main problems of the regime established with the Concordat and subsequently with the organic articles. Mainly that on one hand, the state power did not respect the regime and aimed to enslave the church, and on the other that "the obligations of the State towards the clergy [were] enormous [while] the clergy remained free of any obligation." Additionally, the report suggested that the clergy was undermining the spirit of the Concordat "by working toward ruining and replacing civil authority." See citations of the report in Akan, *The Politics of Secularism*, 73.

The 1905 Law on the Separation of the Churches and State[374] adopted on 1st of July 1905, represented a juridical middle way,[375] a political compromise offering an optimal solution,[376] in the aftermath of a difficult political-religious conflict.[377] The Law constituted a break from the preceding anti-congregational, anti-religious policies,[378] abandoning the Gallican tradition and discontinuing the dependency between the state and religion.[379] The camp that proposed the winning model adopted by the 1905 law "posed the issue in pragmatic rather than theoretical terms."[380] Thus, unlike the other proposals, the Law encompasses "merely an institutional framework for equal liberty of conscience."[381] The Law did not crystalize institutional neutrality as a comprehensive doctrine, imposing "a conception of the good life as autonomous, rational and secular."[382] Instead, its objective was to regulate state-church relationships and aimed to "privatize religions institutionally rather than socially" basing the limitations on exercise and manifestation only on public interest considerations, presenting a more liberal approach than previously established.[383] In the words of Poulat, the established regime contributed towards peacefully coexistence and was aimed "to settle [disputes] by limiting social violence" thus, "it does not control the course of society, marked, as sociologists say, by secularization."[384]

The 1905 Law was built around three principles: freedom of conscience, separation of State and Churches and the equal respect of all faiths and beliefs.[385] Article 1 obliged the Republic to ensure freedom of conscience and guarantee freedom of worship that can be limited

[374] Law of December 9, 1905 on the Separation of the Churches and the State.
[375] See Saunders, "France on the Knife-Edge of Religion."
[376] Baubérot, "Laïcité and Freedom of Conscience in Pluricultural France," 104.
[377] Lorenzo Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape* (Oxford: Oxford University Press, 2012).
[378] See Patrick Weil, "Why the French Laïcité Is Liberal," *Cardozo Law Review* 30, no. 6 (2008): 2699–2714.
[379] Ibid.
[380] Baubérot, "Laïcité and Freedom of Conscience in Pluricultural France," 133.
[381] Daly, "Ambiguous Reach of Constitutional Secularism in Republican France," 596.
[382] Ibid, 588.
[383] Daly, "Public Funding of Religions in French Law," 104.
[384] Émile, "Laïcité: De Quoi Parlons-Nous?," 12. (translated by author).
[385] See Weil, "Why the French Laïcité Is Liberal," 2704.

only by law and in the interest of public order. In the words of Baubérot, the state is actively neutral, and like a referee on a soccer field, it does not interfere unless the rules of the game are violated.[386] This specific conception of public order has allowed for a broad interpretation of the permissibility of limitation of freedom of worship (see especially the Cult controversy in Chapter 6).

The Law adopts a *neutral solution* as it treats all faiths equally in its collective dimension, thus, departing from the Concordat regime; and protects citizens equally despite religious (non)belonging. In its collective dimension, the neutral solution, excluding privilege, equalized the rules for registration, financing and the ownership of property by any religious group. While under the 1901 Law on Association, religious organizations were to be organized as private associations, under the 1905 law they could also form special religious associations/*associations cultuelles* (see further Chapter 6).

Even though the text of the Law itself does not explicitly mention separation, Article 2encompasses two aspects of separation.[387] The first aspect is non-recognition as non-establishment constructed in neutral terms to apply to all religions equally, thus departing from the previous Concordat regime. The second is non-financing with exceptions established in paragraph 2.[388] The non-recognition clause incorporates the republican ideal of formal neutrality as "a government stance that simply ignores the religious character of beliefs and practices for all government purposes."[389] The government's practice and decision-making must be reason-based and devoid of "dictates of religious doctrine and heated passions."[390] Religion and its manifestation are also privatized and contained from the public sphere. In the

[386] Jean Baubérot, "French Secularism: Republican, Indivisible, Democratic, and Social," *Cités* 52, no. 4 (2012): 13.
[387] In full: "the Republic does not recognize, finance, or subsidize any religious group,"
[388] Articles 31 and 32 protect individual religious exercise and worship and prohibit interference with religious worship. However, it is important to note that Article 1 foresees and justifies interference with the exercise of religious freedom when in line with public order considerations.
[389] Frederick Mark Gedicks, "Religious Exemptions, Formal Neutrality, and Laïcité," *Indiana Journal of Global Legal Studies* 13, no. 2 (2006): 474.
[390] Sajó, "Constitutionalism and Secularism: The Need for Public Reason," 109.

spirit of the preceding laws of the Third Republic, the requirement of strict formal neutrality is necessary both as justification of state action and as a symbol; for the sake of protecting the freedom of conscience of citizens[391] and for the sake of stability. Its interpretation is closely linked to the republican conceptions of universal citizenship, as *laïcité* "is based on the sameness model of equality in the public sphere, and relegates linguistic, cultural, ethnic and religious difference to the private arena."[392] As Laborde puts it: it "embodies an ideal of egalitarian justice as state neutrality."[393]

2.3. Adjustments, Concessions, Exceptions, and Limitations from the 1905 Law to the Fourth Republic

In the two decades after the enactment of the 1905 Law, *adjustments* and *concessions* were passed to accommodate the Catholic Church, and the Catholic Church only, representing, in a limited sense, a departure from formal neutrality as envisioned by the Law. For Baubérot, these violations of the principle of equality do not nullify the principle itself, for under the regime there is separation and a lack of Catholic political identity of the state.[394] For Troper these exceptions are representative of the ambiguates of French secularism, ambiguities that have led to "a series of rules and behaviors that can be understood either as violating, or as expressing, the spirit of French secularism."[395] As Rosenfeld argues, these accommodations can be seen as proof that "laïcité was molded so as to render the public space as compatible as possible with the culture associated with Catholicism, if not with the religion itself."[396] This "phenomenon is succinctly captured in the French popular term Catho-laique, which connotes

[391] Stéphanie Hennette Vauchez, "Is French Laïcité Still Liberal? The Republican Project under Pressure (2004–15)," *Human Rights Law Review* 17, no. 2 (2017): 286–287.
[392] Ratna Kapur, "Secularism's Others: The Legal Regulation of Religion and Hierarchy of Citizenship," in *Constitutions and Religion*, ed. Susanna Mancini (Cheltenham, UK: Edward Elgar, 2020), 51.
[393] Laborde, "Secular Philosophy and Muslim Headscarves in Schools," 308.
[394] Baubérot, "Laicity," 134.
[395] Troper, "French Secularism, or Laicite," 1280.
[396] See Michel Rosenfeld, "Constitution and Secularism: A Western Account," in *Constitutions and Religion*, ed. Susanna Mancini (Cheltenham, UK: Edward Elgar, 2020), 31.

both a Catholicism adapted to *laïcité* and a *laïcité* fitted for harmonious coexistence with Catholicism."[397]

Furthermore, certain *exceptions* allow for state interference in religious matters. Even though they might be considered as a departure from *laïcité* as defined by the 1905 Law, they have nevertheless been deemed in line with the French conception of sovereignty and thus, compatible with *laïcité*.[398] However, such exceptions (further addressed in Chapter 5 and 6) can be seen as indications that the Gallican tradition was never completely abandoned, even though the 1905 Law embodies separation in its liberal conception.[399] Finally, there is the issue of the geographical limitation of the application of the 1905 Law, that mainly poses questions regarding the indivisibility of the French state.[400]

2.3.1 Adjustments

Catholics of all social and political persuasions felt it necessary to denounce the 1905 Law. Discouraging any cooperation with the "Godless Republic," the Catholic Church did not recognize the Law, and Rome issued orders to the French clergy not to comply with it.[401] This forceful opposition to the Law was prevalent until after WW1. Hence, the Catholic Church refused to form a private law religious association specified by the law and faced the possibility of losing its property.

The 1905 law placed all places of worship built before the law of Germinal, Year X of the Revolutionary Calendar as well as those built by public entities constructed between the date of this law and the law of 1905, in state ownership.[402] However, Article 4 provided a period of one-year during which religious institutions could establish legal associations under

[397] Ibid.
[398] See Troper, "Sovereignty and Laïcité," 148.
[399] See Ibid.
[400] Gunn, "Religious Freedom and Laïcité: A Comparison of the United States and France."
[401] See Ravitch, *The Catholic Church and the French Nation 1589-1989*, 108-112.
[402] The costs for chaplaincy services in schools, colleges, hospitals, asylums and prisons are covered by the state as to ensure the freedom of conscience of individuals guaranteed by Article 1 of the law. Articles 31 and 32 protect the freedom of conscience and worship even further. See Article 5 of the Law of December 9, 1905.

Article 19; after which all their property could be transferred back to their new private religious associations. The law also allowed for state-owned buildings to be used by the new established religious associations.[403] All faith organizations complied with the law and therefore, had their property transferred back, all expect for the Catholic Church. Consequently, as the state began to create inventories of ecclesiastical belongings, resistance and even unrest started to arise.[404]

The moderate Republicans, leading the governments following Combes, refused to react by enacting any policies that might be seem as persecutory.[405] Instead in 1907, they enacted a new law[406] to accommodate the Catholic Church's refusal to abide by the law by allowing places of worship to keep their religious purpose,[407] and for the authorities to lend such properties free of charge to religious ministers of worship to use, without a legal title.[408] This was even more important since an additional law was passed in 1908,[409] transferring the ownership and management of the edifices not claimed by the new formed religious associations to the local government – the *communes*.

As the Catholic Church refused to establish a private association, the ownership of churches was transferred to the *communes,* whereas ownership of cathedrals to the state. All places of worship built after 1905 belong to the religious organizations registered as private religious associations and are governed primarily under the relevant legislation on housing and

[403] Article 13 states that " buildings used for purposes of public worship with their furniture and equipment will be put free of charge at the disposal of public religious establishments," i.e., associations of worship." See Guerlac, "The Separation of Church and State in France," 259–96.
[404] "The Law of 1905," *Musée Protestant* (blog), accessed February 20, 2022, https://museeprotestant.org/en/notice/the-law-of-1905/.
[405] See Ravitch, *The Catholic Church and the French Nation 1589-1989*, 108-112.
[406] Law of January 2, 1907.
[407] Therefore, this nationalization differed widely from the one done after the revolution where religious property was sized for the purpose of its conversion to secular purposes.
[408] Article 5 from Law of January 2, 1907. Such privilege can be taken away under circumstances such as: "the termination of the entrusted religious association; the cessation of religious services for more than 6 consecutive months, except for cases of force majeure; the improper conservation of the buildings or the disrespect of their original destination; non-compliance to the regulations pertaining to historical monuments) and it requires the approval of the Conseil d'E´tat." See Theodosios Tsivolas, *Law and Religious Cultural Heritage in Europe* (New York: Springer, 2014).
[409] Law of April 13, 1908.

urban development.[410] All those built before 1905, and not transferred back, are part of the public domain, thus, the state is responsible for their upkeep, through directly funding their repair and conservation; as a departure from the non-financing clause in the 1905 Law.

2.3.2 Concessions

When Rome accepted the 1905 law in 1923, an accord between the Catholic Church and the state was signed. The accord allowed for the Church to establish a "diocesan association." Thus, thus is a unique type of association available *only* to the Catholic Church, establishing "in every diocese an official religious organization under the bishop's authority."[411]

2.3.3 Exceptions

In 1911, the Central Bureau of Worship (*Bureau Central des Cultes*) was established within the Ministry of the Interior. Its authority includes controlling "the observance of the principles contained in the secular law of 1905 and administrative religious police (law and order for processions, etc.),"[412] as well as issuing guidelines to Prefectures "regarding which entities should be recognized officially as "religious associations."[413] It also functions as a "bridge between state and church," [414] by establishing representative associations as the French Council of the Muslim Faith (*Conseil français du culte musulman* - CFCM).[415] This approach further emphasizes the particularity of the French model, as state intervention in the form of

[410] See France in Tsivolas, *Law and Religious Cultural Heritage in Europe*.
[411] Baubérot, "Laicity," 134.
[412] Blandine Chelini-Pont and Nassima Ferchiche, "Religion and the Secular State: French Report," in *Religion and the Secular State: National Reports*, eds. W. Cole Durham and Javier Martínez-Torrón (Provo: The International Center for Law and Religion Studies Brigham Young University, 2010), 311.
[413] T. Jeremy Gunn, "Religion and Law in France: Secularism, Separation, and State Intervention," *Duke Law Review* 57 (2009): 961.
[414] Kerry O'Halloran, "France: Laïcité," in *State Neutrality. The Sacred, The Secular and Equality Law* (Cambridge: Cambridge University Press, 2021), 314.
[415] Further developments in the past 20 years have institutional strengthen a neo-Gallican approach – the establishment of the 2002 "regular institutional dialog," between the government and the Catholic Church and the creation of the "Departmental Commissions on Religious Freedom," since 2011. See Baubérot, "French Secularism: Republican, Indivisible, Democratic, and Social."

establishing representative associations as well as closely monitoring the activities of religious organizations is considered compatible with separation.

2.3.4 Limitations

The application of the 1905 Law and *laïcité* have a geographical limitation. In Alsace-Moselle the 1801 Concordat still applies, a peculiar predicament result of the region's German annexation at the time of the enactment of the 1905 Law. Furthermore, deferent regimes govern the religion-state relationships in some overseas departments: in French Guyana, the 1828 Royal Ordinance regulates Catholicism according to which the department pays the salaries of the Catholic clergy; while in Mayotte, "the local customary law of the Muslim majority continues to apply."[416]

3.Constitutionalization: The Fourth and Fifth Republic

3.1 The need for Constitutional Elevation

It was not until the Fourth Republic that the principle of *laïcité* was elevated to a constitutional principle. Article 1 of both the 1946 and 1958 Constitutions define the republic as indivisible, democratic, social and *laic.* The question is however whether incorporating the laic character of the state was a logical consequence of the developments in the Third Republic laws or was it a necessary guarantee. The answer can be found in French constitutional history and theory, as well as in the context surrounding the drafting on the constitutions.

Throughout French constitutional history and until WW2, constitutions were primarily understood as regulators of public power. Whereas constitutions were seen as tools constituting the branches of government and their powers, laws were considered the highest source of law as direct reflection of popular sovereignty.[417] This tradition had a very important consequence,

[416] Kapur, "Secularism's Others: The Legal Regulation," 50.

[417] In fact, rom the Revolution to the Fifth Republic, French constitutional history is one of cautionary constitution-drafting, experimenting with different political and institutional arrangements aiming to remedy past shortcomings. See Sophie Boyron, *The Constitution of France: A Contextual Analysis* (Oxford: Bloomsbury, 2013).

it gave the legislative power "a quasi-monopoly on the production of law."[418] However, after WW2 the functions and nature of constitutions through the world changed as commitment to abstract values and guarantees of human rights began to take equal part, elevating the role of courts (especially those tasked to interpret the constitution).[419] Although it would take 30 additional years for the FrCC to emerge as a relevant interpretative authority (somewhat unsurprisingly considering the French tradition vis-à-vis judicial review),[420] the Preamble of the 1946 Constitution explicitly guaranteed numerous rights. The Preamble of the 1958 Constitution incorporated the 1946 Preamble in its text as well as the Declaration, thus, affording the same protections to said rights. Hence, the incorporation of the values and principles of the Republic (in Article 1 and 2 of both Constitutions) can be viewed as a product of a trend. Furthermore, the Constitutive Assembly drafting 1946 Constitution was composed of members from the largest communist party PCF (*Parti communiste français*), the socialist SFIO (*Section française de l'Internationale ouvrière*) and the Christian- democrats MVR (*Mouvement Républicain Populaire*). The leftist block composed the larger portion of the Assembly. Both parties were strongly committed to *laïcité*.[421]

Perhaps most importantly, the drafting of the 1946 Constitution was in the aftermath of WW2 and the fall of the Vichy regime - an autocratic regime,[422] legitimized by the *Assemblee*

[418] See Troper, "Sovereignty and Laïcité," 154.
[419] See Duncan Kennedy, "Three Globalizations of Law and Legal Thought," in *The New Law and Economic Development: A Critical Appraisal*, eds. David M. Trubek and Alvaro Santos (Cambridge: Cambridge University Press, 2006), 19–73.
[420] Since the Revolution, influenced by Montesquieu, a particular doctrine of separation of powers was developed aimed 'to protect the executive against judicial interference," especially as judges were considered a center of conservative power. Thus, the function of the judge traditionally was considered to be a mechanical applicator of law to facts. See Jenny S. Martinez, "Horizontal Structuring," in *The Oxford Handbook of Comparative Constitutional Law*, eds. Michel Rosenfeld and Andras Sajó (USA: Oxford University Press, 2012), 552.
[421] In the Fourth Republic the SFIO played a crucial role in the opening of bettering the national laic school system. See George A. Codding and William Safran, *Ideology And Politics: The Socialist Party Of France* (New York: Avalon Publishing, 1979).
[422] He was granted full powers by the Parliament in the town of Vichy in 1940. See Nicholas Atkin, "The Challenge to Laïcité: Church, State and Schools in Vichy France, 1940-1944," *He Historical Journal* 35, no. 1 (1992): 151–69.

des Cardinaux et Archeveques (ACA)[423] and collaborator to Nazi Germany. Pétain saw himself as "a savior who would deliver France from the past sixty years of republican *laïcité*."[424] He was seen as an ally to the Catholic Church that blamed *laïcité* for the demise of France, condemning "republican policies on divorce [that]… had destroyed the stability and fecundity of the French family… the atheism of republican politicians themselves… [and] the secular laws of education of the 1880s and early 1900s."[425]

During his rule, Pétain proceeded in scrapping republican values and principles, both legally, by suspending liberal freedoms and re-writing the secular laws, and ideologically.[426] Since the Education Laws were the "crown jewel" of the Third Republic, they became Pétain's primary target. By the initiative of the Church and certain government members, left-wing teachers were dismissed, and the teachers' union abolished; a law was enacted overturning the teaching ban on religious orders; *devoirs envers Dieu* (duty to God) was reintroduced into the ethics syllabus of state school; "communes [had] the right to subsidize confessional schools"; and a law was passed that made "catechism an optional subject on the state school timetable."[427]

After WW2 France strived to distance itself from its "collaborative" Vichy past. Additionally, the regime was a cautionary tale of how quickly tides can change and the Church might yet again become a strong political power. Inserting the character of the Republic as laic in the constitution most likely had the aim to both distance itself from the past and to ensure that another Vichy regime does not emerge in the future.

There is also a possible connection between the constitutionalizing of *laïcité* and the introduction of female suffrage, considering that French women were very involved in the

[423] However, in this regard it's also important to note that the Catholic block was far from monolithic in its support for the regime. See Ibid.
[424] Atkin, "The Challenge to Laïcité," 154.
[425] Ibid, 153.
[426] By replacing the republican Liberté, Egalité, Fraternité (Freedom, Equality, Brotherhood) with a new motto Travail, Famille, Patrie (Work, Family, Fatherland) – clearly emphasizing and luring to nationalistic and conservative sentiments.
[427] Atkin, "The Challenge to Laïcité," 159.

activities of the Catholic Church and thought to be highly religious.[428] Especially in the 19th century, women were involved in every aspect of the Church activities in significantly larger numbers than men, leading to a considerable rise in women-led congregations.[429] This so-called "feminization of religion" found its roots in the time of the Revolution. Excluded from social and political activities, in religion women found a space to engage.[430] While the Church celebrated the role women played in sustaining religion, Republicans, such as Jules Ferry himself, emphasized the temperamental and intellectual inferiority of women.[431] Such traits were attributed to women's religiosity - a product of women's weak-mindedness and being prone to manipulation.[432] The Republic's wives and daughters were governed by the enemy[433] thus, the Churches' influence over women was the main justification against the adaptation of female suffrage until 1944[434] - introduced rather late and by Executive Ordinance rather than by law. The fear that women's vote "threatened to weaken the pillars of a Republic spearheading the fight for a secular society"[435] might be one of the motivations why the laic character of the republic was introduced in the constitution 2 years later.

3.2. *Laïcité* in the Fifth Republic

Even though the 1958 Constitution define the republic as indivisible, democratic, social and *laic,* the proclamation of the republic as laic "is simply a statement of facts" that does not

[428] See Noëlle Lenoir, "The Representation of Women in Politics: From Quotas to Parity in Elections," *The International and Comparative Law Quarterly* 50, no. 2 (2001): 217–47.
[429] See Frank Tallett, "Dechristianizing France: The Year II and the Revolutionary Experience," in *Religion, Society and Politics in France Since 1789*, eds. Frank Tallett and Nicholas Atkin (The Hambledon Press, 1991), 1–28.
[430] Ibid.
[431] Ibid.
[432] Zeldin claims that in the period of the Third Republic, despite the fact that the Church aspired towards a patriarchal family, in a society in which "male reigned supreme' women found in the Church a place where they were treated as equals. See Theodore Zeldin, "Religion and Anticlericalism," in *France 1848–1945*, vol. Two: Intellect, Taste and Anxiety (Oxford: Oxford University Press, 1977), 992-3.
[433] See James F. McMillan, "Religion and Gender in Modern France: Some Reflections," in *Religion, Society and Politics in France Since 1789*, eds. Frank Tallett and Nicholas Atkin (The Hambledon Press, 1991), 55–66.
[434] Hazel Mills, "Negotiating the Divide: Women, Philanthropy and the 'Public Sphere' in Nineteenth Century France," in *Religion, Society and Politics in France Since 1789*, eds. Frank Tallett and Nicholas Atkin (The Hambledon Press, 1991), 29–54.
[435] See Lenoir, "The Representation of Women in Politics," 218.

establish "a clear principled program to rely upon in case of new developments."[436] Thus, it is important to assess the kind of effects this qualification has in the legal universe. A review of the constitutional text as well as the jurisprudence of the FrCC, (post its 1971[437] decision and the constitutional reforms in 1974 and 2008)[438] and the Council of State, provide some answers.

3.2.1 Laïcité as a Constitutional Principle

3.2.1.1 An Unamendable Provision?

There is no clear consensus across academia, and more importantly no Council interpretation that can answer the question of whether *laïcité* as a principle is unamendable under the current constitutional arraignment. As Roznai has pointed out, even though Article 89 prohibits the amendment of the republican form of government and does not explicitly refer to secularism, "many view the principles of secularism as protected by Article 89 based upon the importance of *laïcité* to the French conception of republicanism."[439] Those who argue that *laïcité* is an unamendable point out that since *laïcité* figures in the Article 1 that describes what republicanism means in France and according to Article 89 the republicanism is unamendable so, is *laïcité*.[440] Those arguing against its unamendable status emphasize that it is the republican form of government that is unamendable and not republicanism and thus, *laïcité* is not an unamendable principle.[441]

[436] Sajó, "Constitutionalism and Secularism: The Need for Public Reason," 113.
[437] See Decision no. 71-44 DC (French Constitutional Council July 16, 1971).
[438] As traditionally courts were confined to only apply but not interpret the law, as Troper argues, "the quasi-monopoly of Parliament on the production of law helps explain the apparent lack of consistency of a notion like laïcité" since "laïcité does not dictate the substance of laws on religion, but the laws on religion inform on the substance of laïcité. Troper, "Sovereignty and Laïcité." Lack of judicial review meant no coherent interpretation to Article 1 or the Preambles of the 1958 and 1946 Constitutions. Even though the 1958 Constitution established a Constitutional Council, however, its competences before it's role until the 1971 decision and the judicial reforms of 1974 and 2008 were very narrow. Thus, until 1974 constitutional reform, (established via Constitutional Law No. 74-904 of October 29, 1974 amending Article 61 of the Constitution) the Council could review only acts referred by the President of the Republic, the Prime Minister and the two Presidents of the two Houses within 15 days after the vote. Until the 1971 decision (above), the Council only reviewed only the conformity of the referred laws against the numbered Articles of the Constitution.
[439] Yaniv Roznai, "Negotiating the Eternal: The Paradox of Secularism in Constitutions," *Michigan State Law Review* 2 (2017): 261.
[440] Ibid, 262.
[441] Ibid.

3.2.1.2 Constitutional Identity?

Even though many scholars maintain that *laïcité* is one of the main principles of French constitutional identity,[442] courts have not provided a definitive answer. A FrCC decision in 2006,[443] assessing whether an EU directive is in conformity with the Constitution, emphasized that the directive must not be contrary to the principles that shape the constitutional identity in France.[444] The Council of State followed by adopting the same view.[445] However, none referred to *laïcité* specifically. Both European courts, CJEU[446] and the ECtHR,[447] while addressing religious discrimination and limitation of religious manifestation in France, have accepted that limitations can be based on abstract values considered part of national identity. However, the decisions did not consider *laïcité* explicitly, rather than *fraternité* as a traditional fundamental principle of the French state.[448]

3.2.1.3 Fundamental Principles

In 1997, the FrCC delivered a decision[449] that recognized both the 1905 and 1901 Laws as founding documents of the modern French state. The principles that they establish, more

[442] Laurence Burgorgue-Larsen, Pierre-Vincent Astresses, and Véronique Bruck, "The Constitution of France in the Context of EU and Transnational Law: An Ongoing Adjustment and Dialogue to Be Improved," in *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (The Hague: T.M.C. Asser Press, 2019), 1181–1223.; Troper, "Sovereignty and Laïcité," 157.
[443] Decision no. 2006-540 DC (French Constitutional Council July 26, 2006). further confirmed by Decision no. 2017-749 DC (French Constitutional Council July 31, 2017). On constitutional identity in France vis-à-vis multilevel constitutionalism see François-Xavier Millet, "Constitutional Identity in France Vices and – Above All – Virtues," in *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. Christian Calliess and Gerhard van der Schyff (Cambridge: Cambridge University Press, 2019), 134–52.
[444] The Court replayed on Article 1-5 from the Treaty of Lisbon. Please note that there is no clear definition of constitutional identity. See Michel Rosenfeld, "Constitutional Identity," in *The Oxford Handbook of Comparative Constitutional Law*, eds. Michel Rosenfeld and Andras Sajó (Oxford: Oxford University Press, 2012), 756–76. As such can be dangerous if used to justify non-compliance with international obligations. See Julian Scholtes, "Abusing Constitutional Identity," *German Law Journal* 22, no. 4 (2021): 534–56.; Federico Fabbrini and András Sajó, "The Dangers of Constitutional Identity," *European Law Journal* 25, no. 4 (2019): 457–73.
[445] Société Arcelor Atlantique et Lorraine and ors v France, No. 287110 (French Council of State February 8, 2007).
[446] See Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV, No. Case C-157/15 (Court of Justice of the European Union March 14, 2017).and Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA, No. C-188/15 (Court of Justice of the European Union March 14, 2017).
[447] S.A.S v. France, No. 43835/11 (European Court of Human Rights July 1, 2014).
[448] Fabbrini and Sajó, "The Dangers of Constitutional Identity."
[449] See Decision no. 77-87 DC (French Constitutional Council November 23, 1997).

specifically freedom of association and freedom of conscience,[450] are considered fundamental principles recognized by the Laws of the Third Republic; thus, they are part of the Block of Constitutionality and enjoy constitutional protection.[451] The Council of State has also established that *laïcite* is one of the fundamental principles recognized by the laws of the Republic.[452]

3.2.2. Laïcité as a normative framework

3.2.2.1 A Republic: Popular Sovereignty

One aspect of the essence of *laïcité* is guaranteed with the outmost protection: the republican form of government. Thus, secularization of sovereignty as vested in the nation as a source of state power is afforded the highest level of protection – as unamendable under Article 89.

3.2.2.2 Neutrality

The requirement of strict formal neutrality of the state has several dimensions. The first dimension is the requirement of neutral justifications of state action, based on public reason and devoid of religious doctrine. The second dimension is the requirement of neutrality as non-identification, encompassing both non-recognition and protection of freedom of conscience of citizens, that also requires the containment of religious symbols from the public sphere. Finally, the third dimension envisions neutrality as equal protection, in its individual and collective/institutional dimension. It its individual dimension neutrality is protected by Article 1 of the Constitution,[453] understood within the universalist conception of citizenship that finds

[450] "Definition: Fundamental Principles Recognized by the Laws of the Republic," accessed February 21, 2022, https://www.toupie.org/Dictionnaire/Pfrlr.htm.
[451] There are three criteria when the Council assess whether a principle is a fundamental principle recognized by the laws of the republic: it must be crystalized in a law; enacted in a republic; and to be a principle that is constitutionally fundamental. See John Bell, *French Constitutional Law* (Oxford: Clarendon Press, 1992), 68-69.
[452] Syndicat national des enseignements du Second Degre CE, No. 219379, 221699, 221700 (French Council of State April 6, 2001).
[453] Article 1 of the French Constitution of 1958 guarantees "the equality of all citizens before the law, without distinction of origin, race or religion" and the respect of all religions, therefore guaranteeing equality and prohibiting discrimination based on religion.

its roots in the constitutional provision guaranteeing the *indivisibility* of the Republic and constructing the people/citizens as having "common civic status defined independently of identities of origin and belief." [454] The requirement of strict neutrality is furthermore emphasized by the impossibility of exemptions from general laws based on religious considerations – with the FrCC confirming that the principle of secularism "prohibits anyone from relying on his religious beliefs to overstep the rules governing relations between public authorities and individuals."[455] In its collective/institutional dimension, neutrality as equal protection is manifested by prescribing equal rights to religious associations by the 1905 Law.

3.2.2.3 Freedom of and from Religion

Freedom of conscience is recognized as one of the fundamental principles entrenched by the Laws of the (Third Republic) and is protected by Article 10 of the Declaration, both part of the Block of Constitutionality.[456] Under Article 10, the expression of religious opinions can be limited if they pose a threat to public order (same as the 1905 Law). In accordance with the French understanding, such an arrangement poses positive obligations on the state: to protect public order and to make the exercise of rights possible. The latter is manifested by the exceptions in Article 2 of the 1905 Law, the accommodative policies of the 1881 education laws, and further by the 1959 Debré law (see Chapter 5). The former is dependent on the interpretation of public order.

As mentioned, public order was traditionally understood as a "function of government, permitting restrictions on individual liberty to be imposed so as to 'maintain public security,

[454] See Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Massachusetts: Harvard University Press, 2001).; In Daly, "Ambiguous Reach of Constitutional Secularism in Republican France," 585.

[455] Decision no. 2004-505 DC (French Constitutional Council November 19, 2004). The decision reviewed the Treaty Establishing a Constitution of Europe and the Articles concerning freedom of religion.

[456] "Summary Sheet: Review of the Constitutionality of Laws - Role and Powers of the National Assembly - National Assembly," accessed February 21, 2022, https://www2.assemblee-nationale.fr/decouvrir-l-assemblee/role-et-pouvoirs-de-l-assemblee-nationale/les-fonctions-de-l-assemblee-nationale/les-fonctions-legislatives/le-controle-de-la-constitutionnalite-des-lois.

tranquility, and health.'"[457] In its contemporary interpretation however, conduct can be limited on public order considerations if it "runs directly counter to rules that are essential to the Republican social covenant, on which [French] society is founded."[458] Although this can be understood in light of *laïcité*'s stabilizing function,[459] it moves away from the liberal separationism envisioned by the 1905 Law and "tiptoes" into the Gallican tradition of the state as a propagator of social values.

Freedom *from* religion is also protected by the requirement of strict neutrality binding the state, and as individual liberty. Thus, religious proselytism, defined not only as an attempt to convince someone to join a religion but, also as the wearing religious symbols or garb in public service is prohibited in the name of neutrality.[460]

3.2.2.4 Non-financing as Separation

From the outset, the non-financing clause has been interpreted with some flexibility: in the service of freedom of religion through funding chaplains in hospitals, schools and prisons and in the service of accommodation in terms of property ownership and upkeep and as well as use of buildings of the catholic Church (see above). Article 19 of the 1905 Law (as amended) governing the upkeep of religious buildings, even though might be considered as contrary to the non-financing clause, it has not been challenged in front of courts, and thus exists as permissible in the legal universe.[461] The Council of State has interpreted the clause even more broadly, in a "liberal and pragmatic way"[462] that has allowed for the accommodation of the needs of minority religions (see Chapter 6).

[457] John Bell, *French Constitutional Law* (Oxford: Clarendon Press, 1992), 83.
[458]The "explanatory memorandum" to the bill banning the full-face veil as cited in S.A.S. v. France, Application No. 43835/11 (2014), para. 25 in O'Halloran, "France: Laïcité," 310.
[459] Daly, "Public Funding of Religions in French Law," 126.
[460] Decision no. 170207 170208 (French Council of State November 27, 1996). The decision was reaffirmed with decision Decision no. 2009-591 DC (French Constitutional Council October 22, 2009).
[461] Gunn, "Religion and Law in France: Secularism, Separation, and State Intervention," 597.
[462] Daly, "Public Funding of Religions in French Law," 124.

In terms of the funding of religious private schools, (more broadly analyzed in Chapter 5), in the 1920s, a strict non-financing interpretation was accepted, which viewed financial separation as a source of the resilience of *laïcité*, and therefore republicanism itself. However, post-WW2 the non-financing clause in the 1905 Law has been interpreted broadly as to allow state funding to private schools (even if religious).[463]

3.2.2.5 Application: Geographical Limitations.

In several decisions, the Council of State has upheld the limitation of the application of the 1905 Law, both in reference to Alsace- Moselle[464] region as well as overseas territories.[465] In the same vein, the FrCC also affirmed the constitutionality of such an arrangement by stating that: "the Constitution did not however call into question any specific legislative or regulatory provisions on the organization of certain religions, including in particular the remuneration of religions ministers, which were applicable in the various parts of the territory of the Republic at the time the Constitution entered into force."[466]

4. Conclusion

The aim of this Chapter was to contextually frame *laïcité* and its normative potential, and thus answer the first sub-question of the dissertations as related to France mainly: *How the principle of secularism was constructed, and what contextual determinators were key in its normative conceptualization?*

This Chapter finds that as a theoretical concept, *laïcité* was constructed under specific conceptions that have influence the French legal universe to this day. As a theoretical concept, *laïcité* echoes French republicanism and thus, is constructed under specific conceptions of sovereignty, rights and citizenship. Influenced by the Gallican tradition and the Erastian

[463] Decision no. 77-78 DC (French Constitutional Council November 23, 1977).
[464] Decision no. 219379 (French Council of State April 6, 2001).
[465] Decision no. 265560 (French Council of State March 16, 2005).
[466] Decision no. 2012-297 QPC (French Constitutional Council February 21, 2013).

doctrine, sovereignty of the state translates into power to propagate essential values and "to make pronouncements regarding religious questions."[467] Human rights, are envisioned not only as negative rights, but also as positive rights, limited under public order concerns, specifically understood. Influenced by the idea of Rousseau's construction of *volonté Générale* and the indivisibility of the state, citizenship is understood within a universalistic conception, binding citizens through abstract, shared values.

However, as a principle governing religion-state relationships, even though conceptualized in the Third Republic, the Chapter finds that *laïcité* is victim of its path-dependency. Furthermore, historically from the Revolution to the 1905 Law all regimes governing religion-state relationships have been influenced by the strength of the church and the level of consolidation of power of the state at the specific time. Thus, immediately after the Revolution and in an effort to consolidate its power, the state introduced a project of installing complete control over the majority religion via the Civil Constitution of the Clergy. The effort failed due to violent resistance from within the Church and the popular resistance against the *Terreur*. The Napoleon Concordat system was established because Napoleon saw an ally in the Church, an ally that will help him consolidated his power. The Concordat system however, echoed a tradition of control as the state kept the power over the Church in almost all aspects except for the interpretation of religious doctrine. Hence, until 1905 models of state-religion relationships were mostly based on a continued understanding of sovereignty that positions the state in some form of control over religion and not separated from it.[468] This allowed for the state to diminish the Church's political and social influence in the early years of the Republic, or at least to acquire the tools to do so in the future.

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[467] Troper, "French Secularism, or Laicite," 1272.

[468] As Hunter-Henin, relaying on a typology by Grimm argues, the period from the Revolution (as a constitutive moment) to the 1905 Law could be identified as militant secularism – anti-religious but devoted to political equality. See Hunter-Henin, *Why Religious Freedom Matters for Democracy*. Relaying on Dieter Grimm, "Conflicts Between General Laws and Religious Norms," in *Constitutional Secularism in an Age of Religious Revival*, eds. Susanna Mancini and Michel Rosenfeld (Oxford: Oxford University Press, 2014), 3–13.

This tradition was discontinued by the 1905 Law on the Separation of the Churches and State mainly because at the time the republican state had consolidated its power - institutionally by overtaking functions previously performed by the Church, most importantly of which education; and socially, since the Dreyfus affair led to monarchist/conservative forces and the Church to lose public support. Additionally, the abuses of the Concordat regime by the Waldeck-Rousseau (1899-1902) and Combes (1902-1905) governments, both help the consolidation of power and influenced the urgency of the enactment of the 1905 Law.

The 1905 Law represented a juridical middle way and a political compromise offering an optimal solution in the aftermath of a difficult political-religious conflict. Built around three principles - freedom of conscience, separation of State and Churches and the equal respect of all faiths and beliefs - the Law adopts a *neutral solution* as it treats all faiths equally in its collective dimension and protects citizens equally despite religious (non)belonging. Thus, the Law constituted a break from preceding anti-congregational, anti-religious policies, abandoning the Gallican tradition and discontinuing the dependency between the state and religion. However, the *adjustments* and *concessions* passed to accommodate the Catholic Church in the two decades after the enactment of the 1905 Law, the permissibility of certain *exceptions* that allow for state interference in religious matters as well as the geographical limitation the application of the Law shows the normative weakness of the arrangement from its outset.

Nevertheless, the current normative framework under which *laïcité* operates and around which it has been built, has managed to maintain the minimum and most significant aspects for a secular state namely, the secularization of state power, state neutrality and equal protection despite religious (non) belonging. It has been less successful however, in maintaining an obligation of non-financing. Thus, due to contextual considerations as well as practical difficulties, since its enactment the non-financing clause has been interpreted with some

flexibility. In recent decades however, the interpretation of what is permissible under this normative framework has been challenged especially in the field of education and state funding of religion. In the chapters devoted to education in financing, the aim will be to elaborate on these shifts in interpretation, the reasons for their emergence, their effects on the legislative level as well as to see how judicial interpretation in cases related to constitutional secularism lead to the "thickening" or "thinning" of the principle of secularism.

Chapter 3. *Laicità* as a Concept *sui generis*

For some, it is unconceivable that Italy, the geographical cradle of the Catholic Church, is a secular state. Yet, according to the postulates in its 1948 republican constitution as well as the interpretation of the ICCt, Italy is just that. *Laicitá* - the Italian equivalent to "secularism" – not explicitly referenced in the Constitution, emerged from the jurisprudence of the ICCt as a derivative of specific provisions. Italian *laicitá* is a product of its own history and context, more especially the nature of the Italian nation-state as opposed to a state-nation (as in France and Türkiye)[469] and the proximity and political influence of the Catholic Church in an otherwise weak state. Consequently, it allows for a greater state-religion cooperation, opened to religious organizations other than Catholic Church only after 1984. Additionally, even though it emerges from and operates in a liberal constitutional setting that prides itself in its advancement of liberty and equality, the interpretation of *laicitá* is influenced by a long-established tradition awarding preferential status of the Catholic Church.[470] As such, the effects it produces are under criticism, questioning its salience and the judicial system's capacity to take the constitution and its own jurisprudence seriously.[471]

This chapter will contextually frame the road to *laicitá* from the events leading to the Italian unification to the 1948 Constitution and beyond. The aim of this Chapter is to contextually frame *laicitá* and its normative potential, and thus answer the first sub-question of the dissertations as related to Italy mainly: *How the principle of secularism was constructed, and what contextual determinators were key in its normative conceptualization?* To do so, the structure of the chapter is designed as follows. To understand the context from which the need

[469] Alessandro Ferrari, "Why Are We Talking About Civil Religion Now: Comments on Civil Religion in Italy: A Mission Impossible," *George Washington International Law Review* 41, no. 4 (2010): 839–60.
[470] Alessandro Ferrari and Silvio Ferrari, "Religion and the Secular State: The Italian Case," *Servicio de Publicaciones de La Facultad de Derecho, Universidad Complutense*, 2015, 445–65.
[471] Pietro Faraguna, "Regulating Religion in Italy: Constitution Does (Not) Matter," *Journal of Law, Religion and State* 7, no. 1 (2019): 31–56.; Susanna Mancini, "Taking Secularism (Not Too) Seriously: The Italian 'Crucifix Case'," *Religion and Human Right* 1, no. 2 (2006): 179–95.

for institutional differentiation emerged, as well as the church-state relationships that shaped the Italian experience, Section 1 will provide a short overview of church-state relationships and the particularities of the Italian context from the unification to the 1929 Concordat. Section 2 will analyze the drafting of the 1948 Constitution and the concessions made to the Catholic Church, resulting in the somewhat contradicting nature of certain provisions in the constitution.[472] Finally, Section 3 will look at the construction and interpretation *laicitá* by the ICCt and lower courts.

1. The Italian State and the Catholic Church as Rivals Turned Friends: The road to the 1948 Constitution

The process of differentiation of religion and politics in Italy was influenced by the particularities of the context out of which the Italian state was born. Like in France and Türkiye, the project of the secularization of state institutions was a project of nation-building, however, it also had a distinctive component: it was *a project for territorial merger and liberation* through the process of consolidation and centralization of power. It was a project of a territorial merger, since before the unification in 1861[473] the territory of today's Italy was divided into states. It was a project of merger through liberation, since after the Congress in Vienna in 1815, many Italian territories were under Austrian or papal rule.[474] Additionally, as the national movement emerged more assertively at the beginning of the 19th century, most of its early protagonists had a distinct view of the future Italian state as Christian, and only aimed to slightly limit the temporal power of the Church.[475] By 1848, not only did such neo-Guelph ideal lost its appeal (at the expenses of a future towards a modern nation-state rather than

[472] Andrea Pin, "Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and State," *Emory International Law Review* 25, no. 1 (2011): 95–149.
[473] Or 1870 with the fall of Lazio and Rome under the Italian State, considered as the final stage of the unification.
[474] The Pontifical state was a theocracy under the governance of the sovereign, the Pope King.
[475] Nicolò Tommaseo one of the first writers calling on Italian unification favored the "marriage of Christianity and liberty." Gioberti the spiritual father of the neo-Guelph movement on the rise at the time envisioned a united confederation presided by the Pope. See Arturo Carlo Jemolo, *Church and State in Italy 1850-1950* (Oxford: Basil Blackwell, 1960), 3-5.

modernized Papal States), but also a strong stream of anti-clericalism emerged; primarily as a direct response to the Pope's reluctance to join the unification effort. Thus, in Italy contrary to France, no strong conception of republicanism and citizenship in line with abstract values (and emphasized egalitarianism) emerged. Instead, the quest towards unification was a search for a common ground that could serve as a pre-text of a territorial liberation. In addition, the Church's response to anti-clerical policies striping it from its territories and restricting its temporal power, however, was not retreat but assertion - creating parallel institutions to rival those of the state.

These power relations, swinging the pendulum towards one side or the other, manifested through church-state policies that differed drastically between the early liberal period, fascist period and post-WW2 period. According to Lavagna, Raveraira and Grimaldi, church state relationships in Italy can be divided into four periods: 1) between the 1948 *Statuto Albertino* and the unification of 1861; 2) after the unification until the 1929 Concordat; 3) between the Concordat and the 1948 Constitution; and 4) after the 1948 Constitution.[476] What is more, the period after 1948 can be divided into two periods: before and after the development of the ICCt's jurisprudence in the 1980s that consequently led to the 1984 Concordat. As Donovan notes, one of the most prominent themes in literature focusing on church-state relationships in Italy surrounds "the role played by the Catholic Church in the failure of successive political regimes to consolidate themselves."[477] Thus, I will examine the period leading to the 1948 Constitution centering on power relations between the Catholic Church and the state. I will focus on three periods: 1) the period when the state attempted to tame the Church, resulting in revelry (liberal period); 2) the period when the state tamed the Church, resulting in concessions (fascist period) and 3) the period when the state and the church

[476] Faraguna, "Regulating Religion in Italy: Constitution Does (Not) Matter," 32.
[477] Mark Donovan, "The Italian State: No Longer Catholic, No Longer Christian," *West European Politics* 26, no. 1 (2003): 95.

continued their cooperation within the framework of a republican, liberal constitution (post-1948). The latter will be covered in Section 2 as it establishes the current legal framework, that shall be analyzed separately in detail.

1.1 The Legacy of the Unification of Italy and its Particularities

Unlike in France and Türkiye, the main struggle for establishing a nation-state in Italy was not a struggle aimed to free the country from the shackles of monarchs legitimized by religion, but a struggle for territorial liberation and unification. As a result, the particularity of the Italian context can be observed from several points of departure namely: 1) the establishment of a constitutional monarchy; 2) the development of a context-specific anti-clericalism; 3) the construction of citizenship and the nation-state and not state-nation character of Italy[478] and 4) the lack of establishment of a distinctive theory of rights.

Liberalism in Italy did not produce a republican form of government, as the political system remained a constitutional monarchy. Despite the fact that the project of democratic citizenship under the influence of the French Revolution and its thinkers had a profound impact on political movements of the unification emancipation, the reality of the *Terreur* produced a wave of anti-democratic sentiments dismissing Rousseau's doctrine of popular sovereignty among both republicans and conservatives.[479] Thus, the "endorsement of representative government by Italian scholars in some Italian states [including Piedmont-Sardinia,] occurred within this ideological framework, which was profoundly anti-democratic."[480] Furthermore, the French reality, especially during the reign of Napoleon the Second, made prominent Italian moderates look towards England rather than France as an example.[481] Thus, as Viroli shows,

[478] Ferrari, "Why Are We Talking About Civil Religion Now," 843.
[479] David Ragazzoni and Nadia Urbinati, "Theories of Representative Government and Parliamentarism in Italy from the 1840s to the 1920s," in *Parliament and Parliamentarism: A Comparative History of a European Concept*, eds. Pasi Ihalainen, Cornelia Ilie, and Kari Palonen (New York, Oxford: Berghahn Books, 2016), 244-245.
[480] Ibid, 255.
[481] See Maurizio Isabella, "Aristocratic Liberalism and Risorgimento: Cesare Balbo and Piedmontese Political Thought after 1848, History of European Ideas," *History of European Ideas* 39, no. 6 (2013): 835–57.

historically, "rather than expelling God and Christian religion from acceptable political discourse… [Italian republican theorists and governments] put them at the center of public spaces," thus, claiming that the unification was anti-clerical and yet religious.[482]

Even though the short-lived Roman Republic was the first example of republican governance, the legal infrastructure of Piedmont-Sardinia served as an example for post-unification Italy. In the decade before the unification Piedmont-Sardinia emerged as the leading modernizing progressive force among Italian states. Thus, Piedmont's constitutionalism and parliamentary life were considered instruments for both unification and liberation,[483] and its King, Victor Emanuele as a unifying figure supporting the liberals. Upon unification in 1861, the 1848 *Statuto Albertino* was extended to the totality of Italian territory and served as the country's constitution, [484] enacted not through a constituent assembly, but through publication/promulgation aimed at legitimizing the historical process of unification.[485] Thus, the *Statuto* was not a product of revolution, nor that of gradual transformation;[486] it was simply a point of departure into the weak "constitutionalization" of the unification as a long-term process.[487] It also emerged as a "half-way" meeting point between proponents of "aristocratic liberalism" aimed at building on the English example,[488] and a stream proposing monarchic-

[482] See Maurizio Viroli, *As If God Existed: Religion and Liberty in the History of Italy* (Princeton: Princeton University Press, 2012), preface.
[483] Frank J. Coppa, "'Realpolitik' and Conviction in the Conflict Between Piedmont and the Papacy During the 'Risorgimento,'" *The Catholic Historical Review* 54, no. 4 (1969): 592.
[484] According to Brunelli and Racioppi, in Italy the word 'constitution' was a synonym for Statute. See Francesco Racioppi and Ignazio Brunelli, *Commento Allo Statuto Del Regno, Con Prefazione Di Luigi Luzzatti*, vol. 1 (Torino: Tipografico Editrice Torinese, 1909), 45–52.; in Giuseppe Mecca, "In Keeping with the Spirit of the Albertine Statute-Constitutionalisation of the National Unification," in *Reconsidering Constitutional Formation II Decisive Constitutional Normativity*, ed. Ulrike Müßig (Cham: Springer, 2018), 313.
[485] Ibid.
[486] Ragazzoni and Urbinati, "Theories of Representative Government and Parliamentarism in Italy,) 244-245.
[487] Mecca, "In Keeping With the Spirit,) 313-314.
[488] Isabella, "Aristocratic Liberalism and Risorgimento."

parliamentary features.[489] Thus, according to Cassese, the unification of Italy from a "national-popular" movement shifted towards a "monarchical-governmental" movement.[490]

By design, the constitution was liberal and established a constitutional monarchy where the King remained the head of the executive, vested with broad powers, including legislative. His legitimacy remained hereditary according to the Salic law.[491] Popular sovereignty was the only source of power of one of the legislative chambers – the Chamber of Deputies. The fear that democracy would open the door for divisive factions and radical elements to enter the political arena prevailed after the unification. The *de-facto* purge on parliamentary functions and debates led by Cavour himself operationalized this understanding under his "equivocal parliamentarism."[492] The *Satuto* remained in force until the end of the fascist period, subjected to substantial revisions mostly through interpretation, due to its flexibility.[493]

The emergence of Italian anti-clericalism was also context-based: it depended on specific political considerations as well as geographic determination. In 1848, the Pope crushed the dreams of those who believed that he would not only approve but lead the unification by explicitly opposing it and refusing to enter the war with Austria as well as to be considered the head of the new Republic. Thus, he dimmed the alure of the neo-Guelph movement and liberal Catholicism.[494] The same "symptom" that "killed" liberal Catholicism ignited anti-clericalism, as the Church became an obstacle to national unity. Such "papal intransigence" forced liberals

[489] The first were led by Cesare Balbo, the second by Cavour. See Ragazzoni and Urbinati, "Theories of Representative Government and Parliamentarism in Italy.)
[490] Cassese S (2014) Governare gli italiani. Storia dello Stato. il Mulino, Bologna in Mecca, "In Keeping With the Spirit,) 313.
[491] Statuto Albertino, Article 2.
[492] Ragazzoni and Urbinati, "Theories of Representative Government and Parliamentarism in Italy,) 252-253.; D. Mack Smith, "Cavour and Parliament," *Cambridge Historical Journal* 13, no. 1 (1957): 37–57.; Anna Maria Rao, "Republicanism in Italy from the Eighteenth Century to the Early Risorgimento," *Journal of Modern Italian Studies* 12, no. 2 (2012): 149–67.
[493] Regarding the flexibility of the Statute see Teodosio Marchi, "Lo Statuto Albertino Ed Il Suo Sviluppo Storico," *Rivista Di Diritto Pubblico e Della Pubblica Amministrazione in Italia* 18 (1926): 187–209.
[494] See John Baptist Scalabrini, "Conflict Between Church and State," in *For the Love of Immigrants: Migration Writings and Letters of Bishop John Baptist Scalabrini (1839-1905)* (New York: Center for Migration Studies, 2000), 39–45.; Coppa, "'Realpolitik' and Conviction in the Conflict Between Piedmont and the Papacy During the 'Risorgimento.'"

to adopt a more anticlerical stance than first intended.[495] Thus, the anti-clerical movement, although fragmented, had a common struggle - to reduce the influence and curtail the power of the Catholic Church[496] seen as an embodiment of absolutism.[497] Even though the radicals under Mazzini[498] and the moderates under Cavour,[499] leading the struggle towards unification, had different views on the means towards its achievements, they shared the same view on the necessity to "contain" the Church.

Additionally, the Italian unification meant annexing the Papal territory to the Italian state and confiscating church property – as Papal states rested predominantly on, what was to become the new Italian state. Thus, in addition to the opposition of the rise of "godless" nation states epitomized by the numerous Syllabus's published by the Pope in the 19th century,[500] the Church fiercely opposed the unification of Italy also because it meant loss of territory and the Popes' temporal power. The additional interest made the containing of the Church both harder and more necessary.

Italian citizenship was constructed based on a common loyalty towards the state rather than classic patriotism. This is because even though the unification struggle was primarily a national movement, it operated within an emergent, but weak national identity - as *(city) state identity* was stronger. The construction of citizenship as included in the 1865 Civil Code reflected this understanding and constructed citizenship as against foreign domination. Thus,

[495] See Adrian Lyttelton, "An Old Church and a New State: Italian Anticlericalism 1876-1915," *European Studies Review* 13, no. 2 (1983): 225.
[496] S. William Halperin, "Italian Anticlericalism, 1871-1914," *The Journal of Modern History* 19, no. 1 (1947): 18–34.
[497] Coppa, "'Realpolitik' and Conviction in the Conflict Between Piedmont and the Papacy During the 'Risorgimento.'"
[498] The more radical stream, led by Giuseppe Mazzini the father of "Young Italy," aimed at unification through revolutionary means. Mazzini's slogan "God and the People" translated from his republicanism and anti-clericalism; as he believed that "both monarchy and the church were institutions that came between God and the People, restricting their liberty." See Christopher Seton-Watson, *Italy from Liberalism to Fascism, 1870-1925* (London: Methuen and Company, 1967), 4.
[499] The moderates were led by Cavour, who was "devoted to the ideal of liberty." They believed in operating through means of diplomacy and reform, They were more pragmatic and aimed at unification not through revolution but, through efficiency, accomplished by strong bureaucracy, army and police that would keep popular sentiments in check. Jemolo, *Church and State in Italy 1850-1950,* 16.
[500] Pope Pius IX, Syllabus of the Principal Errors of our times, 1864.

as the loyalty towards Italy was the main trait that defined the essence of Italians, the possibility of dual citizenship was excluded.[501]

Additionally, Catholicism remained a common denominator, [502] a strong binding element of a nation with otherwise weak elements of identity, [503] whose regional loyalty remained key in the decades following the unification.[504] According to Ferrari, the unifying role of Catholicism "explains the nation-state and not state-nation character of Italy" [505] as "social cohesion [was] a product of a certain natural, cultural-religious homogeneity, rather than a "patriotism" founded on a common bond of citizenship based on public institutions."[506] The Church's influence over the hearts and minds of the fragmented Italian nation at the same time made secularization reforms and nation-building even more important and a particularly difficult task; one that some consider futile as national unity was not completely established until 1922.[507]

Finally, while the Statuto guaranteed a vast pallet of rights and duties to citizens: equality before the law, individual liberty, freedom of expression and assembly as well as protection of private property,[508] a distinctive theory of rights, as in France, never emerged as central.

[501] Luca Bussotti, "A History of Italian Citizenship Laws During the Era of the Monarchy (1861-1946)," *Advances in Historical Studies* 5, no. 4 (2016): 143–67.
[502] Even though Italians belonged to many streams of Catholicism and experienced religion differently, most of them were officially baptized by the Catholic Church. This was mainly a consequence of the counter-reformation in the 16th and 17th century, "especially the operations of the Index and the Inquisition." See John F. Pollard, *Catholicism in Modern Italy : Religion, Society and Politics since 1861*, Christianity and Society in the Modern World (Abingdon: Routledge, 2008), 12-14.
[503] David I. Kertzer, "The Role of Ritual in State Formation," in *Religious Regimes and State Formation: Perspectives from European Ethnology*, ed. Eric R. Wolf (Albany: SUNY Press, 1991), 95.
[504] Lucy Riall, "Progress and Compromise in Liberal Italy," eds. Maria Serena Piretti et al., *The Historical Journal* 38, no. 1 (1995): 205–13.
[505] Ferrari, "Why Are We Talking About Civil Religion Now," 843.
[506] Ibid.
[507] Riall, "Progress and Compromise in Liberal Italy."
[508] See Statuto Albertino Articles 24-32.

1.2 The Liberal State and the Catholic Church: Failed Taming Turned Fierce Rivalry

As a result of the fragile position of the new Italian state and the position of the Catholic Church as its fierce rival, in liberal period two trends emerged: the state attempted to contain the Church's social influence, something already underway in Piedmont under the leadership of Prime Ministers D'Azeglio and Cavour,[509] while the Church refused to acknowledge the state and embarked on a mission to establish parallel institutions, rival to those of the state.

1.2.1 Consolidation of Power Through Differentiation: Taming the Church

Secularization reforms were enacted under Cavours' maxim "A Free Church in a Free State."[510] His vision was one of harmony between the two, side by side, both independent in their own realm.[511] He hoped that the Pope would ultimately give up his temporal powers and, thus, be allowed to order his own affairs, but until then control through secularization was needed.[512] Secularization reforms were enacted in mainly in three different areas: 1) actions towards taking over and/or supervision over functions of the Church, including its role in education; 2) containing its financial might; and 3) constructing a framework for church-state relationship.

Laws *aimed at taking over or supervising functions performed by religions institutions* primarily impacted charitable foundations, the institution of marriage, and education. The state

[509] In Piedmont numerous liberal ecclesiastical reforms were introduced at that point considered anticlerical, but moderate compared to other more radical propositions). See Coppa, "'Realpolitik' and Conviction in the Conflict Between Piedmont and the Papacy During the 'Risorgimento,'" 94-595. The so-called Siccardi Laws "abolished the Church's power of censorship, established freedom of worship of Jews and Protestants, reduced the number of feast days, and abolished the right of sanctuary on church property, the jurisdiction of church courts and the Church's monopoly of education." Pollard, *Catholicism in Modern Italy*, 22. Catholic religious education in public schools was also restricted, while "significant advances in the field of public education" emerged. See Ferrari and Ferrari, "Religion and the Secular State: The Italian Case," 434. Finally, in 1855 a law was passed that withdrew the statutory recognition of religious organizations neglecting their activities related to their purpose, leading to the suppression and seizors of property of many orders. Hidden behind the on-face neutral purpose, to suppress useless organizations, was the underlining goal - to suppress religious orders hostile to the new emerging order. Jemolo, *Church and State in Italy 1850-1950,* 12.

[510] Please note that there is historically ambiguity as to who coined and first introduced the maxim - whether it was Montalembert in 1860 or Cavour a year later at a speech. See Marvin R. O'Connell, "Montalembert at Mechlin: A Reprise of 1830," *Journal of Church and State* 26, no. 3 (1984): 515–36.

[511] Jemolo, *Church and State in Italy 1850-1950*, 17.

[512] Seton-Watson, *Italy from Liberalism to Fascism, 1870-1925*, 9.

established supervision over charitable institutions by establishing congregations of charities in each commune, and with that "effectively [removed] the clergy from the major role that they had played in the distribution of charities for centuries."[513] The institute of marriage, previously recognized as in the domain of the Church was taken over by the state with the introduction of compulsory civil marriage, while the upkeep of civil status registers were also transferred from parishes to the municipalities.[514]

The state's most important endeavor was assuming its role as main educator. The necessity to shape citizens loyal to the state, sharing common values and destiny was epitomized in D'Azeglio's famous words: 'we have made Italy, now we have to make Italians.' [515] Public education had a specific nation-building role: masses were to be incorporated in the nation through education using tools such as images, symbols and the language of the educated middle classes. Hence, early "national debates surrounding the theory and practice of educating the nation was loaded with politics of *incivilimento*" [516] – translated as "civilizing process." This civilizing mission was a priority in the first decade of unified Italy - education was the panacea, a cause the state was devoted to.[517]

However, much like in Türkiye and France, transforming the idea of mass public education into reality was difficult, as the state had to build its own (almost non-existent) infrastructure and diminish the role of the Church. After the unification, the 1849 Piedmontese Casati law was extended to the territory of Italy and served as a basis for building such an infrastructure.[518] Predominantly based on the French example of centralized education, the law awarded the task of governing education for children between the ages of 6 and 12 to the

[513] Pollard, *Catholicism in Modern Italy*. 40.
[514] Faraguna, "Regulating Religion in Italy: Constitution Does (Not) Matter."
[515] Marcella Pellegrino Sutcliffe, "Introduction: Liberal Italy and the Challenge of Transnational Education (1861–1922)," in *History of Education* 44, no. 5 (September 3, 2015): 619.
[516] Ibid.
[517] Raymond Grew, "Culture and Society, 1796-1896," in *Italy in the Nineteenth Century: 1796-1900,* ed. John A. Davis (Oxford: Oxford University Press, 2000), 224.
[518]Marcella Pellegrino Sutcliffe, "Introduction: Liberal Italy and the Challenge of Transnational Education (1861–1922)," in *History of Education* 44, no. 5 (September 3, 2015): 619.

municipalities, while secondary schools (*ginnasio* – 5 years and *liceo*- 3 years) to the central government.[519] Normal schools were also established to support the growing demand of teachers in the new public schools,[520] a strategic goal in the early years of unified Italy, one ultimately fulfilled.[521] The law proved rather successful in promoting education to the middle classes,[522] especially after 1870s when enrolment numbers started to grow considerably.[523] Once infrastructure was more or less in place, the 1876 Coppino Law finally established compulsory elementary education for children between the ages of 6 and 9 on the whole territory of Italy.[524] The Orlando Law extended compulsory education for children between the ages of 6 and 12 in larger towns.[525]

The Cassati Law also reduced the influence and interference of ecclesiastical authorities in public schools,[526] as Catholic religious education became elective in secondary schools, while remaining compulsory in primary schools.[527] By not mentioning religious instruction, The Coppino Law *de-facto* and *de-jure* abolished compulsory religious instruction from public schools and instituted a course entitled "The Elemental Duties of Man and the Citizen"[528]

[519] Anthony A. Scarangello, *Progress and Trends in Italian Education* (Washington, D.C.: US Department of Health and Wellness, Office of Education, 1964), 4.
[520] However, normal school attendees did not learn Latin and therefore were not allowed to continue their education at the universities.
[521] In 1866, 27% of teachers in public schools belonged to the clergy. By 1875 their number went down to 16%. See Anthony Scarangello, "Church and State in Italian Education," *Comparative Education Review* 5, no. 3 (February 1962): 201.
[522] Note for example that in time while illiteracy started to decline significantly in the north by the dawn of the 19th century, the same could not be said about the south. See Howard Rosario Marraro, *The New Education in Italy* (New York: S. F. Vanni, 1936), 10.
[523] Donatella Palomba, "Education and State Formation in Italy," in *International Handbook of Comparative Education*, eds. Robert Cowen and Andreas M. Kazamias (Dordrecht: Springer, 2009), 195–216.
[524] However, the lack of finances or rather the prioritization of other fields (military and navy expenditures) was the main reason for this hardship. As a result, elementary schools although overcrowded were almost neglected until the end of the 19th century; and considering that in the south primary schools were almost the only educational option available, a huge gap in the development of these schools emerged between the north and the south. The Corradini survey from 1907 uncovered many problems in public schools, both from organizational and substantive nature. There were not enough schools especially in the south and schools in general were very poorly funded. See Marraro, *The New Education in Italy*, 10.
[525] Scarangello, *Progress and Trends in Italian Education*, 5.
[526] Edward R. Tannenbaum and Emiliana P. Noether, *Modern Italy: A Topical History Since 1861* (New York: New York University Press, 1974), 233.
[527] Scarangello, *Progress and Trends in Italian Education*.
[528] Ibid, 5.

within the primary school syllabus as a substitute.[529] From 1888 and trough the last decades of the 19th century, an emphasis was placed on the formation of the citizen and strengthening "national pedagogy," which meant legitimizing the new state and political system.[530] The same year a law made religious instruction (purely Catholic and confessional)[531] optional upon parental request[532] and proved to be highly popular among students and their parents.[533]

In parallel, a large network of Catholic private schools still lingered as a strong competitor to the state. Private educational institutions (almost all of them religious) "were permitted to continue with their work as long as they complied with state requirements as laid down in the law."[534] According to the Cassati Law, private schools were to be freely established by qualified persons. The supervision of these schools was under the cap of the Minister of Education within the limits of morals, hygiene, abiding the State laws, and public order.[535] Private schools could also be recognized on an equal footing with public schools, if the Minister decided that they "[gave] sufficient guarantee of equally good instruction; the final examinations, however, [could] be passed only in the public schools."[536]

[529] This course introduced "instruction in the elements of the duties of the individual as man and as citizen in conformity with the resolute will of the majority in the Chamber of Deputies, and the intellectual class, who by now considered the teaching of any specific creed a survival of ancient times. See Educational Yearbook of the International Institute of Teachers College, (Columbia University, New York, 1932), 302. in Scarangello, "Church and State in Italian Education," 202.

[530] Donatella Palomba, "Education and State Formation in Italy," in *International Handbook of Comparative Education*, eds. Robert Cowen and Andreas M. Kazamias (Dordrecht: Springer, 2009), 195–216.

[531] In lower grades it included "prayers and elements of Christian doctrine; brief and clear statements and stories of immediate significance, taken from books and specifically from the Gospel." In higher grades it included "lessons in morals and Catholic dogma, on the basis of the ten commandments and the parables of the Gospel; principles of religious life and worship; Sacraments and ritual in accordance with Catholic belief and practice." See International Handbook of Comparative Education

[532] See Scarangello, "Church and State in Italian Education."

[533] According to a survey conducted 9 years after the law was enacted in 1897, out of 49,800 schools included in the survey religion was taught in 33,000. On a municipal level, out of 8,258 municipalities included in the survey, 5,975 provided religious instruction upon parental request. A total of 1,500,000 out of the 2,300,000 pupils in the schools included attended religious instruction. Surprisingly enough, out of 31,000 the teachers teaching those courses only 2,600 were priests. See Marraro, *The New Education in Italy*. As referenced in Sacarangello.

[534] Scarangello, *Progress and Trends in Italian Education*, 4.

[535] Those schools operating in contradiction to the established rules could be closed by order of the Minister. See Lorenzo Minio Paluello, *Education In Fascist Italy* (London: Oxford University Press, 1946).

[536] Ibid, 11.

In order *to contain the power of the Church*, the 1855 Piedmont Law suppressing religious orders was extended to apply to the whole territory of Italy in 1866 (and Rome in 1873).[537] This law only applied to organizations that did not have religious purposes, thus parishes and local churches were not affected, nor were orders involved in public instruction.[538] In 1866 approximately 1.800 religious orders were suppressed, and their property confiscated, while by 1867 the number rose to approximately 25.000.[539] Similarly to the first wave of confiscation in France after the Revolution, the confiscated properties were repurposed for public use.

However, to make sure that religious services were available across the country, which was a matter of political interest, the state created the *Fondo per il culto* to help the beneficium (*benefice*) system,[540] operating until 1984.[541] A benefice consisted of property – serving also as a source of revenue[542] - governed by the office of a specific cleric.[543] Differentiating between poorer and richer benefices, the system already had its problems, which only increased after the confiscation of property. Therefore, the fund was supposed to pay allowances called *supplemento di congrua* to the poorest of the clergy,[544] and securing minimum salary for priests

[537] Manuel Borutta, "Anti-Catholicism and the Culture War in Risorgimento Italy," in *The Risorgimento Revisited* (Palgrave Macmillan, 2012), 196.
[538] Coppa, "'Realpolitik' and Conviction in the Conflict Between Piedmont and the Papacy During the 'Risorgimento.'"
[539] See Gian Paolo Barbetta, *The Nonprofit Sector in Italy* (Manchester: Manchester University Press, 1997), 22.
[540] In a broader definition benefice "is often understood to denote either certain property destined for the support of ministers of religion, or a spiritual office or function, such as the care of souls, but in the strict sense it signifies a right, i.e., the right given permanently by the Church to a cleric to receive ecclesiastical revenues on account of the performance of some spiritual service." See "Catholic Encyclopedia: Benefice," accessed February 25, 2020, http://www.newadvent.org/cathen/02473c.htm.
[541] Such arrangement did not go uncriticized. For example, Marco Manghetti, considered the most faithful interpreter of Cavour's Free Church in a Free State, claimed that such compensation was against neutrality and the principles of non-interference. See Lyttelton, "An Old Church and a New State," 226.
[542] Williston Walker, *History of the Christian Church* (New York: Simon and Schuster Inc., 1985).
[543] David Durisotto, "Financing of Churches in Italy," *Law & Justice - The Christian Law Review* 165 (2010): 160.
[544] The funds were allocated from income from 5 per cent treasury bonds set aside by the government. Barbetta, *The Nonprofit Sector in Italy*, 23.

of poorer beneficia.[545] Thus, by helping to maintain poorer benefices, the state made them de-facto mostly dependent on state funds.

Finally, upon the fall of Rome in 1870 - marking the completion of the unification and the end of the secular power of the Pope – a law was enacted aiming to *regulate the relationships between the Church and the new state*. The 1871 Law of Guarantees, a compromise between the Left and the Right, attempted to resolve the Roman Question and its two aspects (religious and political). Being a one-sided legislative act, the law marked a departure from the previous Concordial regimes governing the relationships between city-states and the Church, seen as a temporary but necessary solution.[546]

The Law of Guarantees governed the rights and obligations of the Holy See and regulated church-state relations. The Pope was stripped of all his rights of a sovereign (while guarantying him the free enjoyment of the Vatican) whilst providing him with all the honors of a sovereign - attacks and offences against him were penalized similarly to the King, he was provided with diplomatic immunities, and the right to maintain armed forces. It also pardoned all clergy members from offences against the state. Additionally, the Law provided the Pope with an annual allowance as further compensating for the loss of papal territory.

Aiming to introduce church-state separation, the law also effectively abolished all the previous systems of control imposed on the Church by the state such as: the state promulgation of ecclesiastical laws, the loyalty oath, and the state authorization for holding Church Council meetings. However, it maintained its right to appoint ecclesiastical benefices and to control the

[545] Priests who did not have their beneficia confiscated (hence, still managed property) and had an income below the established minimum were to be supplemented by the fund. See Ibid.

[546] This is not to say that they anticipated reconciliation through Concordat. Their opinions were informed by authors who opposed Concordats as a solution and believed in the supremacy of the state and its legitimacy to control all affairs such as marriage and education. Both D'Azeglio and Cavour shared the convictions of Vincenzo Gioberti, a leading political writer of the 19th century, and opposed concordats as a solution of governing church-state affairs. On the contrary, Gioberti believed in the supremacy of the state and its legitimacy to control all affairs such as marriage and education therefore, he applauded the first Italian laws dealing with ecclesiastical affairs. Jemolo, *Church and State in Italy 1850-1950,* 11.

disposition of property of recognized ecclesiastical organizations.[547] Furthermore, Article 13 guaranteed the autonomy of Catholic seminaries. The state could intervene only if their teaching were against the law of the land. The problem for the state was that these seminaries continued to enroll not only clerical but lay students, and in large numbers, and as such were a fierce competition to state schools. Consequently, the interpretation of Article 13 shifted and, thus, applied only to seminaries which specifically trained for priesthood - all others were to abide by the ordinary rules as all other private schools and were not immune to the supervision of the state. [548] In reality all private schools, most of which were religious, were autonomous and the state had limited or no influence over their operations.[549]

The Pope nevertheless refused to acknowledge the Italian state and thus, rejected the Law Guarantees in its entirety. By rejecting the power of the state to grant him prerogatives,[550] the Pope and his successors also effectively rejected the annual endowment, and, thus, continued to rely on the "Peter's Pence"[551] as a main source of income. Instead, the Church "isolated" itself from participation in the newly formed state and started building rival institutions in almost all spheres of society. Thus, even though a separationist system was *de-jure* established, the state was unable to effectively limit the influence of the Catholic Church whose acts had immediate and practical implications on Italian social and political life.

1.2.2 In Parallel – A Strong Church in a Weak State?

The Church's main policies were one of retreat and social re-assertion. The *non expedit* doctrine was the main policy of retreat, deriving from the Church's non-recognition of the new

[547] "Catholic Encyclopedia: Law of Guarantees," accessed February 25, 2020, http://www.newadvent.org/cathen/07048a.htm.
[548] In December of 1872 the Ministry of Public Instruction issued a circular that adopted this interpretation.
[549] See George Talbot, *Censorship in Fascist Italy, 1922-43: Policies, Procedures and Protagonists* (London: Palgrave Macmillan, 2007).
[550] "Catholic Encyclopedia: Law of Guarantees."
[551] "Peter's Pence is the name given to the financial support offered by the faithful to the Holy Father as a sign of their sharing in the concern of the Successor of Peter for the many different needs of the Universal Church and for the relief of those most in need." See "Peter's Pence," accessed February 25, 2020, https://www.vatican.va/roman_curia/secretariat_state/obolo_spietro/documents/index_en.htm.

state. *Non expedit* forbade Catholics to engage in the political system of the state, including elections.[552] The main policy of re-assertion was the development of catholic lay organizations aimed at sustaining the Church's key role in education, banking, protection of migrants, charity as well as in the cultural life of citizens. In line with the Catholic corporatist theory[553], the aim was to create parallel institutions,[554] allowing the Church to maintain its the social influence and penetrate deep into Italian society as an alternative to the state. The most influential organization, Opera Dei Congressi,[555] spread Catholic culture and ideas and was the most responsible organization for the success of the *non expedit* policy.[556]

Unlike in France, the popular support for the liberal government was weak and therefore, so was the state. An event such as the Dreyfus affair, which mobilized masses and legitimized anti-clerical or separationist methods in France, never transpired in Italy. Anti-clericalism remained just an effort to legitimize the new laic state, but in reality it was a "source of serious turmoil and division, not political strength."[557] The state needed to outperform the church in the field of education and other social services - something that despite its efforts, it did not yet manage to do. As Pollar suggests, this demonstrates "the inherent weakness of the Liberal State and its ruling class…their failure in the four decades since unification to establish hegemony over Italian society"[558] and identity. It seemed that, in the words of Giolliti "Church and state [were] two parallel lines which should never meet."[559]

[552] See Gene Burns, "The Politics of Ideology: The Papal Struggle with Liberalism," *American Journal of Sociology* 95, no. 5 (1990): 1123–52.
[553] Its leading proponent was Prof. Giuseppe Toniolo. For an overview of his contribution to the economic doctrine of the Catholic Church see Piero Barucci, "Ripensare Oggi Giuseppe Toniolo (Rethinking Giuseppe Toniolo)," *Il Pensiero Economico Italiano* 22, no. 2 (2014): 43–48.
[554] By 1897 over 600 such working-class societies were formed and functioned. Prof. Tonolo believed that expanding such movement could give birth to a new Catholic state "rising from the ashes of liberalism." See Seton-Watson, *Italy from Liberalism to Fascism, 1870-1925*, 228-9.
[555] Opera Dei Congressi functioned between 1874 and 1904 when it was dissolved by Pope Pius X.
[556] It also played the key role in establishing unions, youth organizations, cooperatives, rural credit institutions in rural areas. See Seton-Watson, *Italy from Liberalism to Fascism, 1870-1925*, 228.
[557] Tannenbaum and Noether, *Modern Italy: A Topical History Since 1861*, 263.
[558] Pollard, *Catholicism in Modern Italy*, 42.
[559] Christopher Duggan, *A Concise History of Italy* (Cambridge: Cambridge University Press, 2013), 190.

Before the WW1, although Italian society became more secularized, "the gap between Catholics and the rest of Italian society, and between the Italian State and the institutional church [was significantly narrowed]."[560] Both the state and the Church abandoned some of their old fears and found common ground in their mutual respect for order.[561] By the 1890s, anti-clerical bills, even if introduced, never reached parliamentary debate and existing laws were not strictly enforced.[562] In 1893 Premier Crispi, fearing the socialist threat, called for a truce with God. This was followed by the growing realization among liberals and Catholics that if were to defeat socialists, *non expedit* must be loosened. In the early twentieth century *non expedit* was already suspended and a mass Catholic Party emerged after WW1. In 1919 the first Christian Democratic *Partito Popolare Italiano* (PPI) was established,[563] and Catholics finally entered the political process. Thus, before the WW1, it seemed that the once parallel lines finally were to meet again, and with the rise of fascism, they were not only to meet, but to become intertwined.

1.3 The rise of Fascism and the Beginning of Concordial Relations: Taming the Church, Concessions for a Strong State

Post-WW1 Italy experienced the rise of fascism, a movement that in its beginnings was leftist, anti-capitalist and anti-clerical.[564] By 1927, Fascists consolidated their power by collaborating with all forces of order.[565] Realizing that the Church was too strong of an adversary, one that could not simply be disregard,[566] Mussolini needed to abandon his anti-

[560] Pollard, *Catholicism in Modern Italy*, 69.
[561] Tannenbaum and Noether, *Modern Italy: A Topical History Since 1861*, 265.
[562] Seton-Watson, *Italy from Liberalism to Fascism, 1870-1925*, 226.
[563] *Non expedit* was repealed in 1919 by Pope Benedict XV. The PPI dissolved in 1926) is considered the ancestor of the Christian Democracy originally founded in 1943. See further in Carlo Panara, "In the Name of God: State and Religion in Contemporary Italy," *Religion & Human Rights* 6, no. 1 (2011): 75.
[564] The party's official program in 1919 envisioned the confiscation of church property and abolition of state subsidies for the episcopal incomes. See Daniel Anthony Binchy, *Church and State in Fascist Italy* (London: Oxford University Press, 1941), 132.
[565] See Ibid.
[566] Jemolo, *Church and State in Italy 1850-1950*, 186.

clerical inclination at least by lip-service - a position he held for most of his life.[567] At the same time, after decades of clashing with the state, the Church came to appreciate Mussolini's positive attitude towards the papacy.[568]

Ideologically, even though fascist ideology as such was not particularly strong,[569] it aligned with the Church in its opposition to communism and socialism, but also to enlightenment, liberalism[570] and democracy that were considered foreign ideas to the Italian Catholic tradition.[571] Practically, the collaboration with the Church can also be viewed from a perspective of a pattern behavior – as one rooted in opportunism, willing to cooperate with forces beyond its liking to achieve its goals.[572]

Fascist policies towards the Catholic Church differed considerably from those in the liberal period. First, Fascists achieved reconciliation between the state and the church through the Lateran Pacts, regulating their relationship through a Concordat (something that liberals refused to do). Thus, they succeeded in getting the Church to finally recognize the state and its authority (something that the liberals did not manage to do). Indeed, considerable concessions were made to the Church, which in return tamed it. However, such concessions were enacted in service to maintain the central and authoritarian state structure reinforced by a strong police state.[573] This was especially evident in the area of education and symbolically through the "return" of the clergy oath of loyalty to the state.[574] Second, other religions were also organized

[567] In this regard it's important to note that Fascist never ceased to look upon the Church with suspicion, even when "in coalition" with her. See Ibid.
[568] He raised the salary of priests, returned religious education in public secondary schools, together with the cross as a symbol of Catholicism in the classroom previously banned by the liberal regime.
[569] See Edward R. Tannenbaum, "The Goals of Italian Fascism," *The American Historical Review* 74, no. 4 (1969): 1183–1204.; "Ur-Fascism | Umberto Eco | The New York Review of Books," accessed May 31, 2022, https://www.nybooks.com/articles/1995/06/22/ur-fascism/. See Tannenbaum, "The Goals of Italian Fascism."; "Ur-Fascism | Umberto Eco | The New York Review of Books."
[570] The fascist movement considered the liberal regime their ultimate enemy. See Tannenbaum, "The Goals of Italian Fascism."
[571] See Marco Ventura, *Religion and Law in Italy* (Alphen aan den Rijn: Wolters Kluwer, 2013), 51-53.
[572] Tannenbaum, "The Goals of Italian Fascism."
[573] See Julius Stone, "Theories of Law and Justice of Fascist Italy," *The Modern Law Review* 1, no. 3 (1937): 177–202.
[574] Article 20 of the 1929 Concordat prescribed that "Bishops before taking possession of their dioceses shall take an oath of fidelity to the head of the State."

by law and within a framework of substantial control. Finally, both the Concordat and the Law regulating religious organizations introduced the concept of *public order*[575] as a limitation of the actions of religious institutions, having profound consequences in the years leading to WW2.

1.3.1 Concessions and the Lateran Pacts

The Lateran Pacts, consisting of the Treaty of Conciliation, the Financial Settlement and the Concordat, were enacted in 1929. The Treaty marked the closure of the Roman Question, reaffirming the status of Italy as a Catholic state and the independence and sovereignty of the Vatican. The Financial Settlement compensated the Holy See for the loss of territory, while the Concordat regulated the relationship between the Church and the state. The Concordat guaranteed substantial freedoms to the Church, within a framework of state supervision: it shielded the Pope the same way it did the King,[576] it fully exempted the Church from tax contributions,[577] it guaranteed the Church the right to exercise its spiritual power freely, to manifest worship publicly, and to be free to choose and manage its clergy (within slight limitations).[578] Additionally, the civil effects of the Sacrament of matrimony regulated by Canon Law were restored, and were understood as "the foundation of the family, that dignity which is conformable with the Catholic traditions of its people."[579] The Pacts, as such, allowed for the Church to establish (within limitation) its own autonomy – while still maintaining a vision of its role as an *ordinamento originario*,[580] in line with Pius XI politics of centralizing

[575] According to Ventura, a better translation in English would be "law and order". See Marco Ventura, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Italy," *Emory International Law Review* 19, no. 2 (2005): fn. 6.
[576] Article 8 of the 1929 Lateran Conciliation Treaty.
[577] Article 17 of the 1929 Lateran Conciliation Treaty.
[578] The state could oppose a nomination of those invested with parochial benefices who had to be Italian citizens and speak Italian. See Article 1, 2, 19 and 22 of the 1929 Concordat.
[579] Article 34 of the 1929 Concordat.
[580] See Agostino Giovagnoli, *La Cultura Democristiana Tra Chiesa Cattolica e Identità Italiana. 1918-1948* (Bari: Editori Laterza, 1991), 42.

religion[581] seeking to increase its social influence. As Bucci notes, by the recognition of Catholicism as the State religion, the recognition of the sacramental quality of matrimony, and of the place of religious instruction in public schools, the Italian State gained confessional character.[582]

Perhaps the greatest concessions and revisions on the role of the church were those in the field of education. The primary aim of education in Fascist Italy (as well as the establishment of youth organizations) was to produce citizens that serve the state and embody a new kind of nationalism. Thus, the role of Catholic religious instruction in public schools - compulsory and dogmatic – even if under the complete control of the Church according to the Concordat, served a purpose of the fascist state.

The place of religion in public schools already started to change in the 6 years leading to the Pacts, via the so-called Gentile Reform (carrying the name of the Minister of Public Instruction, Giovanni Gentile) which transformed the Italian public education system. As a child of an authoritarian regime, the reform expanded the power of the state over all spheres and levels of public and private education. It also "reformed" the goals of the public educational system in line with the ideals of the regime and Gentile himself. Gentile believed that each child is a religious being,[583] and understood the need for religious instruction for the purpose of establishing discipline as well as culture.[584] His aim to make religious instruction the

[581]To achieve these goals the Pope worked primarily with the Catholic Action rather than the Catholic parties Ibid, 155.
[582] P. Vincent Bucci, *Chiesa e Stato* (The Hague: Martinus Nijhoff, 1969), 5.
[583] According to his "actual idealism" based on Hegel, education was to be understood as personality formation and not just the transfer of knowledge. As Marraro writes, in his comprehensive book glorifying the reform, "the idealist declares that the school cannot maintain an attitude of indifference in the matter of religion." Citing, Codignola who worked with Gentile on the reform, the Catholic religion is "a complete institution of life, a vital organism, and a most profound system of truth;" therefore, religious education recognizes the strong bond of each child to its Catholic religion in his sense of duty, home and tradition. See Marraro, *The New Education in Italy*, 18.
[584] As Ascoli will have us believe "religion, according to the Hegelian Gentile, [was] an ethics for simple souls that the cultured grown-up man gratefully and respectfully rejects. Max Ascoli, "Education in Fascist Italy," *Social Research* 4, no. 3 (1937): 342.

foundation of public education in order to achieve "moral restoration of the Italian spirit"[585] was in fact a pragmatic strategy of using religion for reasons of the state.

In 1923, a royal decree introduced religious instruction [*ora di religione*] i.e., "the teaching of the Christian doctrine in accordance with the Catholic faith [as] the basis and aim of elementary education in all its grades."[586] Students could still be exempted by request from their parents. In 1924, a royal decree (in force even today)[587], among other things, made the presence of the crucifix mandatory on the walls of all primary schools. Four years later, again by the force of royal decree, crucifixes were listed as standard equipment in primary school.[588]

The 1929 Concordat made religious instruction based on Christian doctrine obligatory for all pupils in public elementary and secondary schools,[589] and placed all aspect of religious instruction under the control of the Church; as teachers were selected by the clergy and textbooks approved by the Ecclesiastical Authority. [590] This large concession of an all-controlling regime[591] allowed for the Church to secure its central place in the development of Italian youth.[592]

The Concordat furthermore cemented the position of free schools as completely free and independent. Thus, Catholic private schools of all levels and similar educational and

[585] Talbot, *Censorship in Fascist Italy,* 68.
[586] Article 3 of Royal Decree No. 2185 as cited in Scarangello, "Church and State in Italian Education," 203.
[587] Article 118 of Royal Decree no.965 of April 30, 1924 stated: "Each school must have the national flag and each classroom must have a crucifix and a portrait of the King."
[588] See Article 119 of Royal Decree no.1297 of April 26, 1928.
[589] With the only difference being that for secondary (*scuola media*) schools when such instruction was carried on by Ecclesiastical or religious associations, they were subject to the examination by the State and had to comply with conditions for candidates of the Government schools. See Article 35 of the 1929 Concordat.
[590] Article 36 of the 1929 Concordat specified that "such teaching shall be given by means of masters and professors, priests and religious approved by the Ecclesiastical Authority, and subsidiaries by means of lay masters and professors, who for this end shall be furnished with a certificate of fitness to be issued by the ordinary of the diocese."
[591] This approach differed widely from Gentile's ideas or the role of religious instruction in public schools. He referred to the educational system established by his reform as secular emphasizing that "the teachers of religion are nominally appointed by the secular authorities and the syllabus of religion is historical and cultural in character rather than dogmatic. See Scarangello, "Church and State in Italian Education," 205.
[592] See Angelo Gaudio, *Scuola, Chiesa e Fascismo* (Brescia: Edditrice La Scuola, 1995), 156.

cultural institutions[593] "depend solely on the Holy See without any interference on the part of the scholastic authority of the Kingdom."[594] Years before, "Catholic [private] schools were provided parity with the public ones,"[595] and in effect were granted equality of status in terms of qualifications while having their own examination boards.[596]

1.3.2 Governing Minority Religious Organizations

In the year of the Pacts, Law Nr. 1159 of 1929 (*la legge sui culti ammessi*), was enacted regulating all other organizations with a purely religious aim. According to Sccopola, the law was enacted as an effort to institute a sort of balance to the regime established by the Concordat vis-à-vis the Catholic Church.[597] The law itself was "relatively liberal in tone" guaranteeing freedom of conscience and free exercise of religion within the limits of public order and morality.[598] Ministers of permitted religions (which in effect meant "tolerated") were to be approved by the Government and opening places of worship was also subject to authorization – a striking difference with the Catholic Church whose superior position was confirmed in the parliamentary reports preceding the enactment of the law.[599] Subsequent amendments to the law enacted in 1930, tightened the grip of the state control over religious institutions by subjecting them to further "bureaucratic hops."[600]

[593] Including Universities, the greater and lesser Seminaries, diocesan, inter-diocesan or regional, the academies, the colleges and other Catholic Institutes for Ecclesiastical formation and culture. See Article 39 of the 1929 Concordat.
[594] Article 39 of the 1929 Concordat.
[595] Frank J. Coppa, "From Liberalism to Fascism: The Church-State Conflict Over Italy's Schools," *The History Teacher* 28, no. 2 (1995): 142.
[596] Jemolo, *Church and State in Italy 1850-1950,* 268.
[597] Pietro Scoppola, "Il Fascismo e Le Minoranze Evangeliche," in *Il Fascismo e Le Autonomie Locali, a Cura Di Sandro Fontana* (Bologna: Il Mulino, 1973), 331–94.
[598] Law no. 1159 of June 24, 1929.
[599] Jemolo, *Church and State in Italy 1850-1950,* 267.
[600] Huw Martin Thomas, "The Lateran Pacts and the Debates in the Italian Constituent Assembly, with Reference to Religious Freedom, and the Consequences for Religious Minorities (1946-1948)" (Swansea University, 2005), 41.

1.3.3 Introducing Public Order as a Prescribed Limitation to Religious Freedom

Both the Concordat and Law Nr. 1159 made a reference to public order as a limitation to the exercise of religious freedom. Even though the 1889 Law on Public Security already established that worship ceremonies outside of places of worship must be approved by the public security authorities,[601] a concept of public order as such was not constructed. The Concordat and the Law Nr. 1159 referred to public order in a different capacity. In the Concordat, a reference to public order was made in the text of the bishop loyalty oath. Bishops had to swear that neither them, nor their clergy would participate in activities that might threaten public order or the well-being and interest of the Italian state. Thus, the reference to public order is symbolic rather than being a clear establishment of limitation and is secondary to loyalty of the state. Article 1 of Law Nr. 1159, on the other hand, prescribed that other religions are "admitted into the kingdom, as long as they do not profess principles and do not follow rites contrary to public order or morality."[602] Thus, their toleration and preservation depended on their conduct in line with public order considerations. In the fascist period, the implementation of the law and its interpretation was left to local and regional authorities under wide discretion,[603] which in the next 10 years led to the religious persecution of minority religions.[604]

[601] Article 7 of Law no. 6144 of June 30, 1889.
[602] Article 1 of Law no. 1159 of June 24, 1929.
[603] Giorgio Rochat, "Polizia Fascista e Chiese Evangeliche," in *I Valdesi e l'Europa*, ed. Enea Balmas (Torre Pellice: Collana Della Società Di Studi Valdesi, 1982), 416.
[604] See Gasper Mithans, "The Italian Fascist Regime, the Catholic Church and Protestant Religious Minorities in 'Terre Redente' (1918–40)," *Approaching Religion* 9, no. 1–2 (2019): 57–76.; Kevin Madigan, *The Popes Against the Protestants: The Vatican and Evangelical Christianity in Fascist Italy* (New Haven and London: Yale University Press, 2021).; Michele Sarfatti, *The Jews in Mussolini's Italy From Equality to Persecution*, trans. John Tedeschi and Anne C. Tedeschi (Madison: University of Wisconsin Press, 2006).

2.The framework of the 1948 Italian Constitution: Constitution Drafting and Effects

After WW2 and the Italian liberation in 1945, the Italian people had the task to decide if they would like to remain under monarchical rule or transform their kingdom into a republic. In the referendum held in June of 1946 the republican idea prevailed with over two million votes.[605] The same year a republican constitution was to be drafted. The constitution drafting process was a momentous occasion of a short-lived unity across the ideological spectrum[606] against fascism and in the pursuit of the reborn "religion of liberty."[607] As such it is a "'[constitution] born from the Resistance' forged to reject totalitarian experiences."[608]

In the next section I will provide an overview of the framework of the 1948 Constitution specifically in relation to religion-state relationships and freedom of religion. In doing so, I will also provide an overview of the considerations that influenced its final form as well as the effects of the established framework.

2.1 Religion - State Relationships: The Drafting, form and Effects of Article 7

In the Constituent Assembly, the Communist Party (which, together with the Socialists, formed the block on the left) and the newly formed *Democrazia Cristiana* (DC) party, a successor of the dissolved *Partito Popolare Italiano* (PPI), were most represented.[609] As such, the constituent assembly was not a predominantly Catholic one.[610] However, the

[605] Marco Ventura, "The Rise and Contradictions of Italy as a Secular State," in *Religion, Rights and Secular Society*, eds. Peter Cumper and Tom Lewis (Cheltenham: Edward Elgar, 2012), 128.
[606] Ferrari, "Why Are We Talking About Civil Religion Now."
[607] Viroli, *As If God Existed: Religion and Liberty in the History of Italy*, 277-78.
[608] Giuseppe Martinico et al., "The Constitution of Italy: Axiological Continuity Between the Domestic and International Levels of Governance?," in *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law: National Reports* (The Hague: T.M.C. Asser Press, 2019), 493.
[609] Ventura, *Religion and Law in Italy*, 64-64.
[610] Other smaller parties the *laici* were also represented in smaller numbers and not in line with either the left or the right Ventura, *Religion and Law in Italy*, 64-64. For further discussion on political parties in the constitution drafting process see Roberto Ruffilli, *Cultura Politica e Partiti Nell'età Della Costituente* (Bologna: Il Mulino, 1979).

influence of the DC, aligned with the Catholic Action[611] and, thus, with the interest of the Catholic Church,[612] as well as the left's fears of divisiveness and perceived anti-clericalism[613] led to the enactment of a liberal constitution inherently contradicted in itself, containing relics of a confessional state.

The Subcommittee on political and civil rights was responsible for resolving the question of religion-state relationship.[614] Even though DC representatives did not constitute a working majority in the Subcommittee they had considerable influence. As Bucci notes, most of them were skillful lawyers compared to which "the caliber of the other parties' representatives was minuscule."[615] They had had two objectives: entrenching a provision in the Constitution "asserting in no uncertain terms the sovereignty of the Church and her independent arrangement from her very origin (ordinamento originario)" and including the Lateran Pacts on the level of constitutional norms.[616]

Concerning the former goal and its achievement, under the influence of DC representatives in the Subcommittee, the issue of church-state relations was framed as an issue of "a juridically independent order" – framing both the State and therefore the Church independent from each other.[617] The final wording of Article 7 paragraph 1: "*The State and the*

[611] Considering the context of the times, the Cold War and the imminent communist threat, the party enjoyed both moral and financial support not only by the Vatican but the United States. Catholic priests had firm ties with the DC and took strong stance on political issues themselves. The Church retained its influence by applying pressure in policy making processes and influencing the outcome of elections by mobilizing support and votes for the DC through the Catholic Action. The Catholic Action and other similar organizations (CISL, ACLI) were directly consulted in the appointment of ministers and candidates in parliament. See Raphael Zariski, *Italy : The Politics of Uneven Development* (Hinsdale: Dryden Press, 1972), 221.

[612] Some go as far as to claim that the outcome of the constitution-making process proved the Party's subordinate position. See Patrick McCarthy, "The Postwar Settlement: Catholic Hegemony?," in *The Crisis of the Italian State : From the Origins of the Cold War to the Fall of Berlusconi* (New York: St. Martin's Press, 1995), 25.; This influence and dependence on the Catholic Church made the Catholic Action Party a weak organization, but a strong political actor since the Church was a very efficient generator of voter support (apart from clientelism and patronage that were also source of votes). That's why the Party enjoyed a majority in Parliament for almost 40 years after the establishment of the new Italian Republic. Gianfranco Pasquino, "Italian Christian Democracy: A Party for All Seasons?," *West European Politics* 2, no. 3 (1979): 89.

[613] Pin, "Public Schools, the Italian Crucifix, and the European Court of Human Rights."

[614] The full name Prima Sottocommissione della Commissione per la Costituzione. See Bucci, *Chiesa e Stato*, 7.

[615] Ibid, 8.

[616] Bucci, *Chiesa e Stato*, 8.

[617] Ibid.

Catholic Church are independent and sovereign, each within its own sphere" encompasses this construction. The wording originates from the Catholic social doctrine as prescribed in Leo XIII's *Immortale Dei* Encyclic (1885), by which the constitutional framers were inspired,[618] corresponding with the "canon law elaboration of the concept of the Catholic Church as a sovereign entity."[619] Thus, the inclusion of the word "sovereign" "was obviously designed to avoid any possible degree of subordination of the Church to the State."[620] As Zucca notes, this arrangement, framing the relationship between the Vatican and the Italian state, establishes "mutual independence of two normative systems: Italian laws and Vatican laws" as the Vatican aims to influence secular law on a global level.[621]

The goal of securing the constitutional protection of the Lateran Pacts was the highest priority of the Catholic Church, fearing that otherwise a future Constitutional Court might find them in conflict with the principle of equality and therefore strike down the law enforcing them as unconstitutional.[622] Influencing the debate from outside, the Vatican considered the inclusion of the pacts as a matter of maintaining religious peace as well as their possible exclusion as an act of violation of the conscience of the Italian people.[623] A generic reference to God[624] in the Constitution was looked upon as a menace that might jeopardize the ultimate goal - securing the constitutional protection of the Lateran Pacts.[625] On the inside - in the Constituent Assembly - the inclusion of the Pacts in the constitutional text was debated seriously, with the Communists opposing the mention of the Lateran Pacts considering it a

[618] See Pin, "Public Schools, the Italian Crucifix, and the European Court of Human Rights," 114-5.
[619] Ventura, *Religion and Law in Italy*, 57.
[620] Bucci, *Chiesa e Stato*, 8.
[621] Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape*, 57.
[622] Pin, "Public Schools, the Italian Crucifix, and the European Court of Human Rights." For a collection of works devoted to the role of the Catholic Church in the Constitution drafting process see Giovanni Sale, *Il Vaticano e La Costituzione* (Milano: Jaca Book, 2008).
[623] Bucci, *Chiesa e Stato*, 21-22.
[624] The inclusion of both the Universal Declaration of Human rights as well as a reference to God in the Preamble, was proposed by the DC as a guarantee against totalitarianism, as a commitment for positioning the individual and his natural rights as transcending the state. The proposal was rejected as divisive. See Viroli, *As If God Existed: Religion and Liberty in the History of Italy*, 278.
[625] See Sale, *Il Vaticano e La Costituzione*.

leftover from the pre-republican regime.[626] However, fearing that they might alienate rural voters if they seemed anticlerical, the Communists ultimately voted for the inclusion of the Pacts in the constitution.[627] Finally, the proposal by the DC representatives was adopted stating that: "*Their [church and state] relations are regulated by the Lateran pacts. Amendments to such Pacts which are accepted by both parties shall not require the procedure of constitutional amendments."*[628]

Under the original arrangement, dubious in itself, the Italian state was neither secular nor confessional.[629] Even though the text of the Constitution does not explicitly mention Catholicism as the majority religion, Article 1 of the Pacts reaffirming Article 1 of the *Statuto Albertino* positions Catholicism as a state religion.[630] As such the inclusion of the Pacts is considered "the mother of all constitutional antimonies"[631] tarnishing the egalitarian character of the constitution by reaffirming the privileged position of the Church. Even though it establishes independence (not separation *per se*) and proclaims state sovereignty, the separation that the constitution *envisions* is not strict. Under the influence of the DC, the constitutional text mirrors a strong link and collaboration between the state and the Catholic Church.[632] Other denominations do not share such a status.

2.2 Constitutionalizing Freedom and Equality: Evaluation of the Framework Emerging under the Article 2, 3, 8, 19 and 20

2.2.1 Article 3 and Article 20: Equality

Equal citizenship is protected by Article 3 proclaiming all citizens equal before the law with equal social dignity without distinction on several grounds including religion.[633] Thus,

[626] Pin, "Public Schools, the Italian Crucifix, and the European Court of Human Rights."
[627] See Leo Pfeffer, *Church, State, and Freedom* (Boston: Beacon Press, 1967), 38.
[628] Article 7 paragraph 2 of the 1948 Italian Constitution, initially Article 5 in the Constitutional Draft.
[629] See Ventura, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Italy."
[630] Article 1 of the 1929 Lateran Pacts.
[631] Michele Aims, Chiesa Padrona: Un Falso Ciurdico dal Patti Lateranesi a oggi. 56 (2009) in Ferrari, "Why Are We Talking About Civil Religion Now," 848.
[632] See Pin, "Public Schools, the Italian Crucifix, and the European Court of Human Rights."
[633] Article 3 of the 1948 Italian Constitution.

equality is listed as a fundamental principle. Article 3 also assigns a positive obligation on the state to remove the obstacle of social and economic nature, which might constrain freedom and equality of citizens. On an organizational level, Article 20 protects religious organizations from special legislative restrictions of fiscal burdens regarding their registration, legal capacity or activity.[634] Hence, this article equally protects the registration and functioning of all religious organizations without discrimination, within the different regimes of registration and establishment as prescribed by law (on legal personality and establishment see further Chapter 6).

2.2.2 Article 8: Equal Liberty

Article 8 formally protects *equal liberty* (*not* equal treatment) by guarantying equality before the law to all religious denominations, as well as the right to self-organize within the limitations vested in general laws (*ordinamento giuridico italiano*). Thus, unlike in the previous regimes where the Catholic Church was the state religion whilst other religions were tolerated, under the new constitution all religions are equally recognized. Paragraph 3 further prescribes that "their relations with the State are regulated by law, based on agreements with their respective representatives." As such, the paragraph constitutes the "bilaterality principle" upon which the Italian system rests, according to which the state regulates each religious organization based on its specific needs.

However, as Ventura notes, when the constitution is read through the lens of a realist, two factual considerations challenge this *pro-freedom* approach – "the strong differentiation in the legal status of religious groups legitimated by Article 8 of the Constitution, which speaks of equal freedom instead of equal treatment or recognition" [635] as well as the status of the Catholic Church recognized and regulated through an international treaty protected by the

[634] Article 20 of the 1948 Italian Constitution.
[635] Ventura, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Italy." 914.

Italian Constitution. In fact, the bilateral principle and the legal framework in Italy established a particular four-tier system:[636] the Catholic Church enjoying a constitutionally protected special status, whereas other denominations *may* enter into the agreements with the state upon the states' discretion,[637] and some governed by law (see further in detail in Chapter 5 and 6).

Additionally, as until 1984 Catholicism was still *de-jure* a state religion, the ICCt in its early jurisprudence interpreted the principle of equality vested in Article 8 as compatible with the special preferred status of the Catholic Church.[638] This led to the *de-facto* moratorium of paragraph 3 of Article 8, since under this arrangement no other religious denomination could enter a contractual relationship with the state. At the time, the DC "opposed initiatives to change the Constitution as to withdraw privileges of the Catholic Church and afford greater rights for religious minorities." [639] This differentiation between the associative and denominational status of religious organizations would have a "fundamental impact on the life of faith communities in Italy"[640] (see further in detail in Chapter 5 and 6).

2.2.3 Article 2, Article 19 and Article 21: Freedom of Conscience, Thought and Religion

Article 8 ought to be considered in conjunction with other provisions guaranteeing freedom of religion and equality. Article 2 recognizes and guarantees inviolable rights of the person both individually and as part of a social group.[641] Such a wording acknowledges, on an equal footing, the organizational freedom of all social groups "where human personality is expressed" with limitations consistent with national interest or the enforcement of the law of the land.[642] The further regulation of religious communities and the guarantee of organizational religious freedom are enshrined in Article 8 as presented above.

[636] See Ferrari and Ferrari, "Religion and the Secular State: The Italian Case," footnote 34.
[637] See Ventura, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Italy," 2005.
[638] Pfeffer, *Church, State, and Freedom*, 38.
[639] Ventura, "The Rise and Contradictions of Italy as a Secular State," 131.
[640] Ventura, *Religion and Law in Italy*, 72.
[641] Article 2 of the 1948 Italian Constitution.
[642] Ventura, *Religion and Law in Italy*, 80.

Article 19 guarantees *anyone* the right to "freely profess their religious belief in any form, individually or with others, and to promote them and celebrate rites in public or in private, provided they are not offensive to public morality."[643] Therefore, Article 19 in conjunction with Article 21 protecting the free expression of thought, protects religious beliefs and their manifestation of citizens and non-citizens alike. The prescribed limitation is public morality and other positive laws arriving from the general principle of subjection to the law. As such, the provision annuls the previous conception of *"ordine pubblico"* (public order/law and order) as incompatible with the current constitutional order.[644]

2.2.4 Equal Liberty and Separation but not Laicità?

The constitutional framework guarantees the republican form of government/popular sovereignty and equal citizenship as fundamental principles. Despite awarding a privileged status of the Catholic Church, it also envisions a distinction between political and religious orders.[645] However, the framers did not regard the two realms as completely separate with some explicitly rejecting the definition of the state as laic as it "sounded hostile to religion due to its French pedigree."[646] The consequence of these decisions and the roots of such conceptions have influenced the development of a particular strain of *secularism à l'italienne - laicità sui generis.*

[643] Public morality is interpreted by courts as common social understanding of sexual morality. See Ventura, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Italy," 2005.
[644] Ibid.
[645] As such some consider Article 7 as a base for the later development of laicità. in Pin, "Public Schools, the Italian Crucifix, and the European Court of Human Rights," 114.
[646] Ibid, 116. To reach such conclusion Pin generally relays on Stefano Ceccanti, "La Laicità Francese Non È più Quella del Passato," *Forum di Quaderni Costituzionali* (Dec. 2011). More specifically on exact statements from some of the drafters Pin refers to the Constitutional Assembly Act, No. 418 (Nov. 21, 1946) (statement of Framer Mr. Cevolotto) (affirming the Constitutional draft).

2. The Development of *Laicità* in Italian Jurisprudence: Mapping its Normative Potential

The principle of *laicità*, absent from the constitutional text, emerged as a construct from the jurisprudence of the ICCt. This section will provide an overview of developments that led to the enactment of the 1984 Concordat and the ICCt's construction of *laicità* as well as an overview of the normative framework surrounding *laicità* as a constitutional principle.

3.1 Background: The Social, Scholarly and Jurisprudential Winds of Change

Four developments led to the enactment of the 1984 Concordat as well as the ICCt's construction of *laicità* as a supreme constitutional principle. First, in the 1960s and 1970s, despite the political dominance of the DC and the Vatican, the Italian society seemed to be secularizing. Apart from declining church attendance,[647] after the Second Vatican Council, the numbers of memberships in catholic organizations such as the Catholic Action, also started to drastically decline.[648] The social and political discourse began to revolve around the question of the political role of Catholicism (especially considering the dominant role of the DC), "with secularists promoting religious freedom and freedom from religion for everyone, as well as the confining of religion within the private sphere."[649] Finally, in the 1970s, the secularization of Italian society was evident, as to the Pope's surprise[650] the Italian people voted in favor of the laws of divorce and abortion via referendum. Hence, the "creation of a more socially and legally secular country" was significantly influenced by bottom-up movements and developments. [651]

[647] Pasquino, "Italian Christian Democracy," 93.
[648] Ibid, 92.
[649] Andrea Pin and Luca Pietro Vanoni, "Protecting Religious Freedom from Fear: Italian Lessons on Islam, the Public Sphere, and the Limits of Judicial Review," *Talk About: Law and Religion* (blog), March 16, 2020, https://talkabout.iclrs.org/2020/03/16/protecting-religious-freedom-from-fear-italian-lessons-on-islam-the-public-sphere-and-the-limits-of-judicial-review/.
[650] Patrick McCarthy, "The Church in Post War Italy," in *Italy Since 1945* (Oxford; New York: Oxford University Press, 2000), 144.
[651] See Ventura, "The Rise and Contradictions of Italy as a Secular State," 132.

Second, as Ventura shows, in the 1960s and 1970s theoretical doctrines started to develop around the concept *laicità*, among members of academia.[652] Jemolo referred to *laicità* as dictating equality of all regardless of religious affiliation;[653] Lariccia gave *laicità* a central place in the governance of church state relationships,[654] Morra attempted to define the term *laicismo;*[655] while Caputo suggested that church-state differentiation ought to be reassessed according to new concepts.[656] In the 1970s the concept also started to develop among a new generation of judges, which while studying the particular church-state relationship had argued that *laicità* was a natural outcome of the constitutional text.[657]

Third, on numerous occasions the ICCt had addressed the effects of legislation enacted in the pre-constitution period and had reviewed their compatibility with the new constitutional order.[658] However, under the majoritarian argument – notably that Catholicism is the faith shared by almost the totality of Italian citizens – the Court justified its special protection.[659] In the 1970s two departures in the Court's jurisprudence served as heralds of doctrinal change. First, in 1973 the Court delivered a decision in which whilst upholding the criminalization of blasphemy, it urged the legislator to revise the legislation and extend the same protection to non-Catholic denominations.[660] It is not until 1988 (post the new Concordat) that the Constitutional Court would reject the majoritarian argument as a justification for unequal treatment/discrimination.[661] Second, in 1971 the Court introduced the doctrine of supreme

[652] See Ventura, "The Rise and Contradictions of Italy as a Secular State," 132.
[653] See Arturo Carlo Jemolo, "Le Problème de La Laïcité En Italie," in *La Laïcité*, ed. A. Audibert (Paris: Presses Universitaires de France, 1960), 455–80.; Arturo Carlo Jemolo, *Coscienza Laica* (Brescia: Morcelliana, 2008).
[654] Overview in Ventura, "The Rise and Contradictions of Italy as a Secular State," 132.
[655] Nello Morra, "Laicismo," *Novissimo Digesto Italiano* 9 (1963): 437–43.
[656] Giuseppe Caputo, *Il Problema Della Qualificazione Giuridica Dello Stato in Materia Religiosa* (Milano: A. Giuffrè, 1967).
[657] Ventura, *Religion and Law in Italy*, 68-9.
[658] For an analysis on the Constitutional Court jurisprudence in the period between 1950 and 1970 see Groppi, "The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?"
[659] See most notably in cases regarding blasphemy Judgment no. 125 (Italian Constitutional Court 1957), Judgment no. 79 (Italian Constitutional Court 1958), Judgment no. 39 (Italian Constitutional Court 1965).
[660] Judgment no. 14 (Italian Constitutional Court 1973).; The Court will finally expand the interpretation of the provision in 1995 See Judgment no. 440 (Italian Constitutional Court 1995).
[661] Judgment no. 925 (Italian Constitutional Court 1988).

constitutional principles (*principi supremi dell'ordinamento constituzionale*) as hierarchically higher than the norms of the Concordat.[662] Accordingly, it became possible for the Court to strike down norms of the Concordat if they were in violation of these principles – which it soon did in several decisions regarding matrimony.[663] The subject jurisprudence *de-facto* opened the door to the possibility of one-sided changes to the Concordat – its form and effects. It became clear that the dubious constitutional constellation (mainly the confessional principle that the Constitution seemed to endorse) producing "milder forms of discrimination"[664] to other religious communities became unacceptable.

Finally, the inevitability of change and the necessity for adaptation started to become abundantly clear to the Catholic Church, that responded with attempts to adopt its own doctrine fit for the times. Generally, such process already started with the Second Vatican Council,[665] and more specifically in the context of Italy, with the attempts of Catholics to find a way to reconcile Catholicism with the laic Italian state.[666] Formally, this led to the signing of the new Concordat in 1984, annulling the confessional principle and establishing cooperation between the Church and the State, as a key principle in line with the doctrine affirmed in the Second Vatican Council.[667]

According to the 1984 Concordat, the Catholic religion was no longer the sole religion of the Italian state, which by itself had substantial influence on the status of minority religions.

[662] Judgment no. 30 (Italian Constitutional Court 1971).
[663] Judgment no. 32 (Italian Constitutional Court 1971). concerning equality in matrimonial nullity in cases of incapacity and Judgment no. 18 (Italian Constitutional Court 1982). Were the Court annulled a provision in the Concordat the automatic civil effect of ecclesiastical rulings on marriage nullity.
[664] Pin, "Public Schools, the Italian Crucifix, and the European Court of Human Rights," 118.
[665] The totality of the document as adopted in the Second Vatican Council available at: https://www.vatican.va/archive/hist_councils/ii_vatican_council/index.htm. For the effect and importance of the Second Vatican Council and: democracy see Andersen, Thomas Barnebeck, and Peter Sandholt Jensen. 2019. "Preaching Democracy: The Second Vatican Council and the Third Wave." Journal of Comparative Economics 47 (3): 525–40; theory of human rights see Michał Chaberek. "The Teaching of the Church on Religious Freedom: A Break or Continuity of Tradition?" Collectanea Theologica 90, no. 5 (March 1, 2021); church and state John Courtney Myrray S.J., "The Issue of Church and State at Vatican Council II," Georgetown University Library, accessed June 18, 2022, https://library.georgetown.edu/woodstock/murray/1966h.
[666] See Giuseppe Lazzati, *Laicità Impegno Cristiano Nelle Realita Temporali* (Rome: AVE, 1985).
[667] See Ventura, *Religion and Law in Italy*, 49.

Most notably, paragraph 3 of Article 8 of the Constitution could finally take effect and the principle of cooperation could be extended to other religious communities. Soon the Italian government reached six different agreements (*intesa*) with other denominations based on Article 8 of the constitution. Today this number doubled. As the *intesa* are similar in nature, this opened the door for other religious institutions to receive state funding as well as to organize religious education in public schools – by request and at their own expense (see Chapters 5 and 6 for more detail).

3.2 Laicità as a Constitutional Principle and a Normative Framework

3.2.1 Laicità as a Supreme Constitutional Principle

Unlike in France, secularism or *laicità* is not specifically referenced in the constitutional text rather it is a product of constitutional interpretation. In its landmark 1989 decision,[668] upon the task to decide whether the teaching of the Catholic religion in public school is compatible with the constitution, the ICCt for the first time explicitly recognized the Italian state as secular by constructing the principle of *laicità.* The Court found *laicità* to be embedded in the foundational text[669] deducing its meaning respectively from Articles 2,3,7,8, 19 and 20 (see the articles above), and giving it a status of supreme constitutional principles (*principi supremi dell'ordinamento constituzionale*). Thus, As Mancini notes, *laicità* as a principle has multiple constitutional referents: "freedom of religion and secularism—are therefore two separate fundamental constitutional provisions, and all sources of law, to be legitimate, have to be consistent with both."[670]

According to the jurisprudence of the ICCt, unnameability of the republican form of government vested in Article 139 applies to the supreme principles included in the very first articles of the Italian Constitution;[671] the logic being that "any change concerning these

[668] Judgment no. 203 (Italian Constitutional Court 1989).
[669] Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape*, 152.
[670] Mancini, "Taking Secularism (Not Too) Seriously: The Italian 'Crucifix Case'," 181.
[671] Judgment no. 1146 (Italian Constitutional Court 1988).

principles would result in a revolution in the technical sense of the word." [672] These "fundamental principles and inalienable rights" are the 'center of gravity' of the Constitution, [673] thus the Court could review (the now amended) the Lateran Pacts, constitutional provisions, amendments and laws[674] as well as international/supranational laws and regulations against their compliance with said supreme principles.[675] These principles include: popular sovereignty, *laicità*, unity,[676] equality and inviolable rights (limited to the right's essential nucleus).[677] Thus, in the Italian constitutional framework, *laicità* enjoys the highest form of protection. However, in this decision and subsequent case-law *laicità* has been particularly constructed. Some consider it as positive [678] or healthy secularism,[679] while others point out its non- egalitarian nature and its capacity to serve as a legitimation tool for majoritarian domination, where other religions are only tolerated. [680]

[672] Martinico et al., "The Constitution of Italy," 496.
[673] Judgment no. 1146 at 11.
[674] Judgment no. 29 (Italian Constitutional Court 1988).
[675] Judgment no. 183 (Italian Constitutional Court 1973). and Judgment no. 170 (Italian Constitutional Court 1984). Further and specifically on the so-called Taricco saga between 2015 and 2018 see Giovanni Piccirilli, "The 'Taricco Saga': The Italian Constitutional Court Continues Its European Journey: Italian Constitutional Court, Order of 23 November 2016 No. 24/2017; Judgment of 10 April 2018 No. 115/2018 ECJ 8 September 2015, Case C-105/14, Ivo Taricco and Others; 5 December 2017, Case C-42/17, M.A.S. and M.B.," *European Constitutional Law Review* 14, no. 4 (2018): 814–33. On fundamental rights and international law see Alessandro Chechi, "Judgment No. 238 – 2014 (It. Const. Ct.)," *International Legal Materials* 54, no. 3 (2015): 471–506.
[676] Judgment no. 118 (Italian Constitutional Court 2015).
[677] See further on supreme principles in Daria de Pretis, "Constitutional Principles as Higher Norms? Is It Possible to Determine a Hierarchy within the Constitution? Unamendable (Eternal) Provisions in Constitutions and Judicial Review of Constitutional Amendments" (European Constitutional Courts XVIIth Congress, Batumi, Georgia, 2017).
[678] Giorgio Feliciani, "La Laicità Dello Stato Negli Insegnamenti Di Benedetto XVI," *Stato, Chiese e Pluralismo Confessionale* Aprile (2011): 6.
[679] See Giuseppe Dalla Torre, "Sana Laicità o Laicità Positiva?," *Stato, Chiese e Pluralismo Confessionale* Novembre (2011): 8.
[680]As Mancini claims, the protagonists of "positive" and "healthy" "[do] not place all denominations on an equal footing" rather than seek that "the state must recognize that the "national religious inheritance" is not just one among other denominations, but rather an element of civic cohesion. What follows is that the "historical national religion" should enjoy a preferential treatment, while other denominations should simply be tolerated." See Mancini, "The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence," referring to Gustavo Zagrebelsky, "Stato e Chiesa. Cittadini e Cattolici," *PASSATO E PRESENTE* 73 (2008): 16.

3.2.2 Laicità as a Normative Framework

3.2.2.1 Sovereignty

One aspect of the essence of secularism guaranteed as a supreme principle is the republican form of government and, thus, the secularization of sovereignty as vested in the nation as a source of state power.[681] The republican form of government enjoys utmost constitutional protection, as it cannot not be a matter for constitutional amendment.[682]

3.2.2.2 Positive and negative state obligations.

According to the ICCt, *laicità* does not require state "indifference" to religion, but positions the state as a "[guarantor] for religious freedom in a regime of confessional and cultural pluralism."[683] As Ferrari and Ferrari note, it is "a positive and active *laicità*" that "supposes the existence of a plurality of value systems" awarding equal protection and requiring state neutrality regarding religious and non-religious view alike.[684] As such, it "does not refer to state-church relations only, but it is a synthesis of the values and duties of the contemporary plural and democratic state in which religion plays a full role, like each other component of a civil society."[685]

The ICCt also clearly distinguishes the meaning of *laicità* from non-involvement or hostility towards religion and emphasizes that it "does not require ideological and abstract theorizations of state or state leaders."[686] Some interpret this approach as a clear attempt by the Court to distance the meaning of *laicità* from the French conception of *laïcité;* as Mancini notes: "*secularism à l'italienne* does not imply neutrality, but a positive, or active attitude

[681] Article 1 of the 1948 Italian Constitution.
[682] Article 139 of the 1948 Italian Constitution.
[683] Ferrari and Ferrari, "Religion and the Secular State: The Italian Case," 433.
[684] Ibid.
[685] Ibid.
[686] Judgment no. 925.

towards all religions and religious communities. Thus, there is no established state church, but neither is there a total separation between religion and the state."[687]

According to the ICCt's case law, the state has positive obligations to safeguard religious freedom,[688] and to protect the conscience of everyone, irrespective of credo or conviction or lack thereof.[689] This also applies provisions sanctioning blasphemy, now interpreted to include protection from offenses to believers of other faiths.[690] The state also has negative obligations *to respect* confessional autonomy, free from state interference in the internal life of religious denominations (even in regard to employment)[691] to be equidistant and impartial towards all religious confessions, excluding the possibility of the existence of a state Church. Most importantly, at least for the purpose of this dissertation, in the decision-making oath case the Court stated, "that religion and the moral obligations deriving from it cannot be imposed as a means to the end of the state."[692] The Court emphasized that the principle of secularism or the non-confessionalism of the State imposes a distinction between civil and religious matters[693] - thus the political use of religion and the religious use of politics as illegitimate.

3.2.2.3 Dubious equality and neutrality.

In the real world, the consequence of the interpretation of such a positive secularism has allowed for a dubious application of neutrality and equality. The predominant role that culture and tradition play not only in the Italian political discourse, but also in judicial interpretation has allowed for an interpretation of religious freedom "based on the idea of a privileged treatment of religious convictions over non-religious ones (*favor religionis*) and

[687] Mancini, "Taking Secularism (Not Too) Seriously: The Italian 'Crucifix Case'," 181-82.
[688] Judgment no. 203.
[689] Judgment no. 117 (Italian Constitutional Court 1979), reaffirmed in Judgment no. 334 (Italian Constitutional Court 1996).
[690] Judgment no. 440.
[691] Judgment no. 259 (Italian Constitutional Court 1990).
[692] Judgment no. 334.
[693] Judgment no. 334 (Italian Constitutional Court 1996), para 4.

based on a clear superiority of the Catholic Church;[694] "significantly limiting the pluralism connected with *laicità* as a juridical principle."[695] Such an interpretation seems in sync with the Vatican's strategy to reclaim its position "in the name of Christian identity and roots of Italy,"[696] for the purpose of enacting legislative measures that would be informed by the Church's views as well as funding the Church's activates.[697] Clear examples of these are the teaching of Catholic religious doctrine in public schools, state funding to religious organizations, the multi-tier scheme of recognition (and relationship with the state) and the presence of the crucifix - all considered in line with *laicità* (see Chapters 5 and 6).

By referring to the "value of religious culture" and stating that "Catholic values form part of the historical heritage of the Italian people,"[698] the Court maintained that the teaching of religious doctrine under the control of the Church is "not only consistent with but even represents an application of the principle of *laicità*."[699] Regarding equality on a collective level, the ICCt has maintained that principle of equal freedom applies to all denominations "regardless of the denominational stages and options with respect to internal organization."[700] Thus, equal liberty to all denominations regardless of whether or not they are governed by *intesa,* by law or informally is formally recognized. However, equal liberty does not mean equal treatment, considering the privileges that this differentiation produces (see Chapters 5 and 6).

Furthermore, in a case testing the preferential treatment of the Catholic Church in the tax code (regarding exemptions),[701] the ICCt maintained that the state is bound by impartiality

[694] Ferrari, "Why Are We Talking About Civil Religion Now," 853.
[695] Ferrari and Ferrari, "Religion and the Secular State: The Italian Case." 431.
[696] See Ventura, "The Rise and Contradictions of Italy as a Secular State," 138.
[697] See Ibid.
[698] Judgment no. 925. in Pin, "Public Schools, the Italian Crucifix, and the European Court of Human Rights," 121.
[699] Judgment no. 13 (Italian Constitutional Court 1991). in Pin, "Public Schools, the Italian Crucifix, and the European Court of Human Rights," 123.
[700] Judgment no. 195 (Italian Constitutional Court 1993).
[701] Judgment no. 235 (Italian Constitutional Court 1997).

and nondiscrimination towards all religious organizations and must be *neutral* towards religious matters; while at the same time it legitimized the differential treatment according to the nature of the institutions and the different relationship that the state has established with different faiths.[702] Thus, even though in 2000 the Court summarized *laicità* and reaffirmed the obligation of the state to "be equidistant and impartial" and not differentiate between religious organizations based on membership, de-facto preferential treatment is permissible. [703]

3.2.2.4 Application by lower Courts

It is also important to note that the implementation of the principle of *laicità* has been inconsistent in the jurisprudence of lower courts, most evident in the crucifix in public schools' controversy (see Chapter 5).

4. Conclusion

The aim of this Chapter was to contextually frame *laicitá* and its normative potential, and thus answer the first sub-question of the dissertations as related to Italy mainly: *How the principle of secularism was constructed, and what contextual determinators were key in its normative conceptualization?*

This Chapter finds that as a theoretical concept, *laicitá* reflects the particularity of the Italian context namely, weak republicanism, a context-specific anti-clericalism, a nation-state instead of a state-nation character and the lack of establishment of a distinctive theory of rights. First, after the unification liberalism in Italy did not produce a republican form of government, as the realities in France made Italian moderates look towards Britain rather than France as an example. Second, Italian anti-clericalism emerged as a direct response of the "papal intransigence" against the Unification, mainly fearing the loss of territory and the Popes' temporal power, making the Church both harder and more necessary to contain. Third, Italian

[702] Ibid.
[703]Ventura, "The Rise and Contradictions of Italy as a Secular State," 139.

citizenship was constructed based on a common loyalty towards the state rather than classic patriotism. The unifying role of Catholicism for a nation with otherwise weak elements of identity, explains the nation-state and not state-nation character of Italy. Finally, a distinctive theory of rights, like that in France, never emerged.

As a principle governing religion-state relationships, even though *laicitá* did not emerged until the 1980's, it has been influenced by path dependency that produced the Concordat system as the only viable solution. As in France, historically from the Unification to enactment of the 1984 Concordat, all regimes governing religion-state relationships have been influenced by the level of consolidation of power of the state at the specific time. Unlike in France however, the level of the strength of the Catholic Church did not fluctuate due to its social influence and geographical proximity. Thus, the "success" of the state depended on its relationship with the Church.

The unsuccessful attempt to govern church-state relationships via a "one-sided" law portrayed by the enactment of the Law of Guarantees in 1871, was a result both of the strength of the Church and the weakness of early liberal state. The strength of the Church in Italian society allowed for the Church to maintain its position in not acknowledging the Italian state consequently, rejecting the Law and asserting itself as a parallel, rival institution. In contrast, in the first 50 years after the Unification the state was not particularly strong thus, it could not successfully apply pressure on the Church to comply with the Law. An event such as the Dreyfus affair, which mobilized masses and legitimized anti-clerical or separationist methods in France, never transpired in Italy; additionally, the state did not manage outperform the church in the field of education and other social services. When the Fascist government gained power, much like Napoleon in France, it understood that if it was to consolidate its power it needed the Church as an ally. Instead of enacting a one-sided law, the Fascists achieved reconciliation between the state and the Church via the Lateran Pacts. Even though they

afforded considerable concessions to the Church, especially in the field of education, the concessions were nevertheless enacted in service of maintaining a central and authoritarian state structure.

The framework of the 1948 Constitution was liberal with strong protections of equality and individual liberties, it nevertheless kept the confessional principle of the state by awarding constitutional protection to the Lateran Pacts. The DC representatives, whose interests converged with the Catholic Church, were the main protagonist in making this happen. Thus, even though the state had consolidated its power, the strength of the Catholic Church in the political realm contributed to the endurance of the Concordat regime. Under the original arrangement, the Italian state was neither secular nor confessional, tarnishing the egalitarian character of the constitution by reaffirming the privileged position of the Catholic Church. Even though the Constitution established state-church independence (not separation *per se*) and proclaims state sovereignty, the separation that the constitution *envisions* is not strict, instead the mirrors a strong link between and collaboration between the state and the Catholic Church.

The development of *laicitá* by the ICCt and the enactment of the 1984 Concordat that ultimately revised the framework governing religion-state relationships, was influenced mostly by 3 considerations: 1) a secularizing society; 2) the change in legal and constitutional doctrine; and 3) the change in the doctrine of the Catholic Church after the Second Vatican Council. These trends led to development of *laicitá* at the level of constitutional adjudication.

Not embedded in the text of the constitution, the ICCt deduced *laicitá* from specific constitutional provisions and deemed it a supreme constitutional principle enjoying the highest form of protection. However, the decision of the constitutional framers not to regard the state and the church as two completely separate realms, has influenced the development of a particular strain of *secularism à l'italienne* - *laicità* sui generis. Thus, even though the Italian

state is secular in a sense that state power is secularized, the republican form of government is protected and equal protection despite religious (non) belonging is guaranteed, the development of *laicitá* as positive secularism has allowed for a dubious application of neutrality and equality.

The predominant role that culture and tradition play not only in the Italian political discourse, but also in judicial interpretation has allowed for an interpretation of religious freedom as preferring religious convictions over non-religious convictions and for awarding a superior status to the Catholic Church. Thus, even though equal liberty to all denominations is formally recognized it does not mean equal treatment. In the chapters devoted to education in funding, the aim will be to see how this constellation develops and is challenged on the legislative level as well as to see how judicial interpretation in cases related to constitutional secularism lead to the "thickening" or "thinning" of the principle.

Chapter 4. Turkish *Laiklik* – A Vision for State and Society

Laiklik, or constitutional secularism *alla turca*, is a rare example in the Muslim world.[704] Its legal implications have granted *laiklik* the prefix assertive,[705] the model of religion-state relationship it establishes one of control[706] and the constitution proclaiming it one of the most militantly secularist.[707] The way *laiklik* is conceptualized has urged authors to recognize the duplicity in its implications in the legal and social universe,[708] emphasizing its role in policies of social- engineering [709] and identifying it as a tool, often (ab)used, for achieving modernization and progress.[710] Perhaps, it is the nature of Islam, and the particularity of the Turkish context that necessitated such a conception, or at least that is what its "founding" fathers believed.

Since the foundation of the Republic, *laiklik* was considered as both a protector against religious normative ordering as well as against social backwardness. Hence, in its core, like in France, but even more accentuated in Türkiye, *laiklik* has been constructed as a guardian of democracy and the republic, without which none would be possible. Understood as such, it has long enjoyed the highest possible constitutional protection, post-1961 guarded by the TCC through mechanisms of militant democracy[711] and by limitation of constitutional amendment

[704] Ergun Özbudun, "Secularism in Islamic Countries: Turkey as a Model," in *Constitutionalism in Islamic Countries*, eds. Rainer Grote and Tilman J. Roder (New York: Oxford University Press, 2012), 135–46.
[705] Kuru, *Secularism and State Policies Toward Religion.*
[706] Durham and Scharffs, *Law and Religion*.
[707] Ran Hirschl, *Constitutional Theocracy* (Cambridge, Massachusetts; London, England: Harvard University Press, 2010), 7.
[708] Scharffs, "Secularity or Secularism."
[709] Ahmet Erdi Öztürk, "Transformation of the Turkish Diyanet Both at Home and Abroad: Three Stages," *European Journal of Turkish Studies. Social Sciences on Contemporary Turkey*, no. 27 (2018).
[710] Bernard Lewis, *The Emergence of Modern Turkey* (Oxford: Oxford University Press, 1961).
[711] On the concept on militant democracy see Karl Loewenstein, "Militant Democracy and Fundamental Rights, II," *The American Political Science Review* 31, no. 4 (1937): 638–58.; Andras Sajó, ed., *Militant Democracy* (Utrecht: Eleven International Publishing, 2004).; Svetlana Tyulkina, *Militant Democracy. Undemocratic Political Parties and Beyond* (London: Taylor and Frances, 2015).; Specifically on militant democracy and religious freedom in Europe see Patrick Macklem, "Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe," *Constellations* 19, no. 4 (2012): 575–90.

power. It has also allowed for a particular institutional architecture, establishing the Diyanet as a government body in complete control of all aspects of the majority religion.

This Chapter will contextually frame the conceptualization of *laiklik* from the establishment period, through the 1961 and 1982 Constitutions and beyond. The aim of this Chapter was to contextually frame *laiklik* and its normative potential, and thus answer the first sub-question of the dissertations as related to Türkiye namely: *How the principle of secularism was constructed, and what contextual determinators were key in its normative conceptualization?* To do so, the structure of the Chapter is designed as follows: Section 1 will provide a contextual overview of the particularities of *laiklik* and its construction in the establishment period. Section 2 will analyze the context in which the 1961 Constitution was drafted and the institutional and normative structures it established. Finally, Section 3 will analyze the context in which the 1982 Constitution was drafted and the institutional and normative structures it established.

1. The Particularity of Turkish *Laiklik* as Constructed in the Establishment Period

The legal system in the Ottoman Empire – the predecessor of the Turkish Republic - was based on Sharia law, within the limits posed by the millet system, as well as binding customary law. A state-sponsored version of Islam was defined by the ulema and imposed top-down, providing a clear political identity,[712] while religious diversity was tolerated resulting in relatively persecution-free environment.[713] The legitimacy of the Sultan derived from a divine source, and especially before the 19th century, the term Ottoman was understood not in a

[712] Karen Barkley, "Rethinking Ottoman Management of Diversity. What Can We Learn for Modern Turkey?," in *Democracy, Islam, and Secularism in Turkey*, eds. Alfred Stepan and Ahmet T. Kuru (New York: Columbia University Press, 2012), 12–31.
[713] See Lewis, *The Emergence of Modern Turkey*.

national, but rather a dynastical sense - Turks were loyal primarily to Islam and the Ottoman house and state.[714]

The republican establishment period was a clear break with the Ottoman legacy, even though certain concepts central to the new republic emerged already in the last decades of the Empire. Two conceptions are most prominent: modernization and westernization as processes rooted before liberation and the role of constitutionalism itself not only as an instrument of curtailing state power, but also as an instrument for fulfilling specific visions of society.

The Turkish struggle for liberation and independence was led by Turkish National Movements, composed of factions of the Committee of Union and Progress (from hereinafter CUP) and guided by Mustafa Kemal, aimed at birthing an enlightened, modern and westernized nation into the boarders of the new nation-state. The building of the Turkish nation state, and, thus, the particularity of Turkish *laiklik*, can be observed from the perspective of ideas codified into law in mainly three areas: 1) the secularization and consolidation of state power, 2) secularization/building of the nation and society, and 3) governance of minorities. Hereinafter, I will observe the particularity of the Turkish context through the lens of these three areas and the concepts surrounding their achievement, additionally providing insight into patterns that endured from the pre-republican period. Finally, I will address the constitutionalization of *laiklik* in 1937.

1.1. Secularization and Consolidation of State Power: From an Empire to a Republic

In Türkiye as in other new nation-states, the "establishment of legal uniformity within territorial boundaries" was one of the main aims of the state.[715] Not only that the source of legitimacy was to be transformed from that of God to that of the nation, but legal uniformity was also meant to preserve national unity through state-centered homogeneity that left no room

[714] Ibid.
[715] Aylin Özman, "Law, Ideology and Modernization in Turkey: Kemalist Legal Reforms in Perspective," *Social & Legal Studies* 19, no. 1 (2010): 72.

for competing normative orderings.[716] Secularization of state power in the establishment period was mainly realized through actions aimed at achieving two complementary goals: the foundation of a republic, and diminishing and ultimately controlling the majority religion.

1.1.1 Secularization of the Sovereign and the Legal System

The foundation of the Republic was achieved through legislative means, enacted through the GNA, whose role and function mirrored a particular conception of popular sovereignty. Three acts paved the "legislative road" towards the republic. By the Organic Law of April 23, I920, the GNA appointed itself as "the *sole* representative of the nation, exercising sovereign powers of legislation and administration," while, repudiating the government of the Sultan. Consequently, both the revolutionary 1921 Basic Establishment Act and the 1924 Turkish Constitution, although democratic in spirit, established an "assembly" rather than a "parliamentary" system of governance.[717] Thus, both legislative and executive powers were vested in the GNA and no checks and balances were put in place to de-concentrate power.

This institutional framework mirrored "a "majoritarian" or "Rousseauist" conception of democracy, rather than a liberal or pluralistic democracy based on an intricate system of checks and balances."[718] This hyper-majoritarianism fit the establishment ideology – all powers were vested in the new nation, built along majoritarian lines and encompassing a grand role. This conception is inherently linked to a particular understanding of national unity as indivisibility of the nation. Even though this institutional framework was abandoned with the 1961 constitution and thereafter, the effects of its conception remained.

[716] See Ihsan Yılmaz, "Non-Recognition of Post-Modern Turkish Socio-Legal Reality and the Predicament of Women," *British Journal of Middle Eastern Studies* 30, no. 1 (2003): 26.
[717] Ergun Özbudun and Ömer Faruk Gençkaya, "Chapter 1: The History of Constitution-Making in Turkey," in *Democratization and the Politics of Constitution-Making in Turkey* (Budapest: Central European University Press, 2009).
[718] Ibid, 12.

The Lausanne Treaty signed on 23rd of July 1923 between representatives of the new Turkish Republic as a successor of the Ottoman Empire and the Allies,[719] recognized its sovereignty and right to self-determination and demarked the boundaries of the new Turkish Republic[720] (with a few exceptions).[721] On 29th of October 1923, the Grand National Assembly constituted the Turkish Republic and elected Mustafa Kemal as its first president.

After asserting control, it was time for the newly formed state to abolish the institutions representative of the previous regime. On the 1st of November 1922, the Sultanate was abolished while the Caliph became elected and the Caliphate[722] supervised by the GNA.[723] A year later, on 29th of October 1923, the GNA declared Türkiye a republic and Mustafa Kemal was elected as its first president. The Caliphate was finally abolished on the 3rd of March 1924. By the same act the Ministry of Religious Law and Endowments was abolished, established by the GNA in 1920 to replace the Shayk al-Islam.[724] Even though short-lived, the Ministry was vested with vast authority in religious and political affairs, thus its establishment is a testament to the cautious way secularization was performed in the early years.[725]

The secularization of the legal system was followed by the closure of Sharia Courts and the enactment of the "Amended Law on Court Organization and the Legal System" serving as

[719] Britain, France, Italy, Japan, Greece, Romania, and the Kingdom of Serbs, Croats, and Slovenes (Yugoslavia).
[720] "Treaty of Lausanne, Allies-Turkey [1923]," Encyclopedia Britannica, accessed November 23, 2018, https://www.britannica.com/event/Treaty-of-Lausanne-1923.
[721] Yildiz Atasoy, *Turkey, Islamists and Democracy: Transition and Globalisation in a Muslim State* (New York: LB. Tauris & Co Ltd, 2005), 37.
[722] It was the first time that the two were separated and considered as distinctive authorities. On the debates on the separation between the Sultanate and the Caliphate in the establishment period see Macit Akman, "The Closure of the Sharia Courts," in *Social, Educational, Political, Economic and Other Developments Occurred in Turkey Between the Years of 1923-1938* (ISRES Publishing, 2018).
[723] See Edward Maed Earle, "The New Constitution of Turkey," *Political Science Quarterly* 40, no. 1 (1925): 73–100.
[724] The office of the Shaikh al-Islim, known as simply the Shaikh al-Islam held the highest rank the religious bureaucracy of the Empire as the Grand Mufti of the empire, chief jurisconsult for the central government, often serving as a political advisor to the Sultan and governing an elaborate hierarchy of religious officials including judges, jurisconsults, and religious teachers. The Sheikh-al-Islam was placed on equal footing with the Grand vizier and was vested with enormous power; in fact, a fatwa could even remove the sultan from the throne. See Richard W. Bulliet, "The Shaikh Al-Islām and the Evolution of Islamic Society," *Studia Islamica*, no. 35 (1972): 53–67.
[725] The Minister of Islamic Law and Foundations was one of the highest ranked government officials as it served as a deputy of the President or Prime Minister. See Ufuk Ulutas, "Religion and Secularism in Turkey: The Dilemma of the Directorate of Religious Affairs," *Middle Eastern Studies* 46, no. iii (2010): 389–99.

the foundation of the legal system.[726] The legal architecture was also transformed as Sharia law was further replaced by Civil, Criminal and Administrative Codes based on the Swiss and Italian models. Further legislation was enacted to conclude the transformation - universal suffrage to both man and women was introduced in 1926, education was secularized and mix classes were introduced were boys and girls participated together, and the Muslim lunar calendar was replaced by the Gregorian solar calendar.[727] All these legal reforms were accompanied by very strict enforcement by public prosecutors and gendarmes; while propaganda campaigns were also put in place to discredit local representatives of the Ottoman imperial system.[728]

1.1.2 Diminishing the role of Religion and Establishment of Control

The particularity of the Turkish context is echoed in the fact that the diminishing of the role of Islam in the public sphere ultimately took the form of complete state control, reflected in the establishment of the Diyanet and the provisions of militant democracy conceived as early as 1926. The necessity of both has been justified under considerations related to the nature of Islam and actual regime threats and rebellions in the early years.

Even though the Ministry of Religious Law and Endowments was abolished in the interest of detaching religion from governance,[729] the establishment of the Diyanet, founded to replace the Ministry, detached religion from governance, but not governance from religion. Established in 1924,[730] the Diyanet represented both continuity and a departure from the Shaikh al-Islim. As the Shaikh al-Islim was responsible for administrating faith and worship affairs

[726] See Akman, "The Closure of the Sharia Courts," 53.
[727] See Ibid.
[728] Atasoy, *Turkey, Islamists and Democracy: Transition and Globalisation in a Muslim State*, 38.
[729] As one of the drafters of the reforms, mufti Hoca Halil Hulki, claimed: "There is a great danger in religion's and the army's interest in the state affairs. This reality was accepted by all modern countries and governments as a governing principle." Ufuk Ulutas, "Religion and Secularism in Turkey: The Dilemma of the Directorate of Religious Affairs," *Middle Eastern Studies* 46, no. 3 (2010): 392.
[730] See Law 429 of March 3, 1924.

related to Islam in the Empire,[731] the Diyanet and General Directorate for Foundations were responsible for the "management of prayer houses and dealing with the belief and practices of Islam"[732] in the republic. However, unlike the Shaikh al-Islim, the Diyanet was and is under the absolute control of the state, both in terms of financing and appointment. Thus, its establishment also marked a departure from the policies governing the Shaikh al-Islim, reflecting a statist conception aimed at subordinating and controlling religion top-down.

The main justification for the necessity of the establishment of the Diyanet and organizing religious services as a public/civil duty[733] was neither ideology nor tradition – even though both played a role. Instead, both the particularity of Islam and its political role were emphasized, constructed with Christianity. In terms of its particularity, both the lack of centrality and organized clergy served as a justification for state organization.[734] In terms of its political role, both its role as a legitimizer of the previous regime and its inherent undemocratic potential served as a justification for state control. The undemocratic potential of Islam was considered derivative from its nature, as an all-encompassing religion aimed at conquering and informing temporal power. Thus, the imminent threat that Islam posed to the republic and democracy necessitated control over the majority religion instead of separation – prevalent in secular western states where Catholicism predominates. Additionally, in order to distance religion "from the political situation in which it has been put for centuries,"[735] it was necessary to further "reform" or "rationalize" it through purification.

Consequently, within its function the Diyanet only controls and supports Sunni interpretations of Islam. Other religions were only tolerated but not supported by the state, and

[731] "Establishment and a Brief History," Diyanet, accessed July 19, 2021, https://www.diyanet.gov.tr/en-US/Institutional/Detail//1/establishment-and-a-brief-history.
[732] Öztürk, "Transformation of the Turkish Diyanet Both at Home and Abroad," 1.
[733] See Ulutas, "Religion and Secularism in Turkey."
[734] Öztürk, "Transformation of the Turkish Diyanet Both at Home and Abroad."
[735] Taha Parla and Andrew Davison, *Corporatist Ideology in Kemalist Turkey: Progress or Order?* (Syracure, New York: Syracuse Universty Press, 2004), 108.

streams within Islam were not recognized. Parla and Andrew see this as a reflection of the preferential status of the majority especially given that the vast majority of the Turkish population identify as Sunni Muslims.[736] Alternatively, Ulutas[737] referring to Gellner, sees it as reflection of the aim of the elites who established the Diyanet, to promote only Sunni-Islam as "high culture" as opposed to folk Islam (i.e. Alevism and Sufism).[738] Finally, Öztürk sees this function of the Diyanet as an aim of itself, noting that it was envisioned as a "vital institution in the social engineering processes of the ruling elite by creating an 'accepted' Islam which was envisaged as a religion that is ultimately passive in the public space."[739]

Öztürk's position may most accurately reflect the function of the Diyanet especially in the establishment period, when its main task was to implement government reforms[740] and to protect it from regime threats. By implementing government reforms, the Diyanet "acted as the guardian of the existing regime, bringing Islamic legitimacy to it."[741] Through bearing the responsibility of paying salaries of imams, the state "prevented alternative claims on the sphere of religion with the potential to countermobilize a movement at the regime level and at the same time maintain the majority religion as the cement of society."[742] Thus, in the first two decades of the Republic, the "CHP saw state-salaried imams as a guarantee against regime threats."[743]

Thus, the Diyanet was one of numerus tools aimed at the consolidation of power against opposition forces. In the aftermath of the Sufi-led Sheikh Said Rebellion of 1925 raised as a reaction of the abolishment the Caliphate,[744] Sufi orders were banned and considered the

[736] See Ibid.
[737] Ulutas, "Religion and Secularism in Turkey."
[738] Ernest Gellner, *Nation and Nationalism* (Oxford: Blackwell, 1983), 76-8.
[739] Öztürk, "Transformation of the Turkish Diyanet Both at Home and Abroad," 4.
[740] See, Ulutas, "Religion and Secularism in Turkey."
[741] Öztürk, "Transformation of the Turkish Diyanet Both at Home and Abroad," 4.
[742] Akan, *The Politics of Secularism*, 215.
[743] Ibid, 225.
[744] Malik Abdukadirov, "The Place of Religion in Turkish Society: An Analysis Through the Lens of the Center-Periphery Thesis," *Journal of International Social Research* 10, no. 54 (2017): 519.

enemy.[745] However, the rebellion also served as a justification to suppress any opposition that might have existed within the ruling class itself.[746] Under the Law for the Maintenance of Order, in force from the 3rd of March 1925 and the work of the special Independence Tribunals, the regime eliminated all opposition and gained absolute power, establishing a one-party system.

To tackle dissent, but to also ensure the swift success of government reforms, on the 13th of March 1926 the GNA enacted Law 765 - the Turkish Penal code, introducing Article 163. The Article for the first time enacted protection from the use of religion in the public and political sphere by prohibiting "the establishment of political organizations that appeal to religious convictions or feelings" as well as the "exploitation of religion, religious life, and matters sanctified by religion for the mobilization of the people."[747] Interestingly, even though the Penal Code was almost entirely copied from the 1889 Italian Penal Code,[748] similar provisions do not appear in the Italian version. In a different form, however, such provisions can be found in the 1810 French Penal Code, which served as a foundation of criminal law in the Tanzimat. Articles 201-208 from the 1810 French Penal Code envision penalties for the disturbances of public order, but specifically occasioned by Ministers of Religious Worship, in the exercise of their Ministries, and not political organizations. These provisions particularly included acts of incitement of disobedience and revolt against state authority.[749] Although its content was changed as early as 1946, the conception introduced by Article 163 would be further developed and gain constitutional protection with the 1961 and 1982 constitutions, establishing strong guarantees through provisions of militant democracy.

[745] Reşat Kasaba, *The Cambridge History of Turkey* (Cambridge: Cambridge University Press, 2008), 164.
[746] Ibid.
[747] Quoted in Günter Seufert, "The Changing Nature of the Turkish State Authority for Religious Affairs (ARA) and Turkish Islam in Europe," *Working Paper, Center of Applied Turkish Studies*, (2020), 13.
[748] M. Yasin Aslan, "Transformation of Turkish Criminal Law from the Ottoman-Islamic Law to the Civil Law Tradition," *Ankara Bar Review* 2 (2009): 92–98.
[749] "France: Penal Code of 1810," Napoleon Series, accessed August 15, 2022, https://www.napoleon-series.org/research/government/france/penalcode/c_penalcode3a.html.

1.2. Secularization of the Nation and Society: From *umma* to Nation

The empty space left by Islam as an ideological postulate, considered unsuitable for an effective modern state, created a vacuum that ought to be filled.[750] On one hand, this vacuum was filled with a specific version of nationalism, as the basis for what was to become a civil religion based on myths of history and language – or Turkishness as the new religion.[751] On the other hand, Islam, together with language and race (even if not explicitly), was the main identification element of the *nation* and the *Turkish citizen* built through homogenizing reforms also based on exclusion and (dis)identification.[752] Policies of hominization had an additional context-specific component – transformation of the social, political, ideological, religious and economic system[753] through westernization[754] and modernization,[755] traditionally understood as necessary for progress. Thus, as Yavuz notes, there was an irreconcilable paradox of the policies in the establishment period: "on one hand, the state used Islam to unify diverse ethno-linguistic groups; on the other, it defined its progressive civilizing ideology in opposition to Islam."[756]

[750] M. Sükrü Hanioğlu, *Atatürk: An Intellectual Biography* (Princeton: Princeton University Press, 2013), 160.
[751] Ibid, 161.
[752] See Ugur Ümit Üngör, *The Making of Modern Turkey: Nation and State in Eastern Anatolia, 1913-1950* (Oxford: Oxford University Press, 2011).
[753] Mehmet Cengiz Uzun, "Protection of Laicism in Turkey and the Turkish Constitutional Court: The Example of the Prohibition on the Use of the Islamic Veil in Higher Education," *Penn State International Law Review* 28, no. 3 (2009): 392.
[754] Even though the processes of modernization and westernization root as early as the 15th century they more aggressively emerged in the second half of the 18th and peaked in the second half of the 19th century. The term "westernization" is a "process of adopting ideas and behavior that are typical of Europe rather than preserving the traditional and local ideas, meanings, customs, and behavioral patterns." See Gamze Akbas et al., "Westernization in Ottoman Culture and Built Environment," *International Journal of Humanities, Arts and Social Sciences* 6, no. 3 (2020): 112.
[755] As ideological underpinnings one might consider: 1) western acculturalization (material and non-material out of which we must specifically emphasize the traveling Enlightenment ideas); 2) the trend of development of national consciousness in the world and in territories in its proximity; and 3) the development of Turcological research focused on the Turkish civilization. See further Lewis, *The Emergence of Modern Turkey*.
[756] M. Hakan Yavuz, "Cleansing Islam from the Public Sphere," *Journal of International Affairs* 54, no. 1 (2000): 22.

1.2.1 Turkishness as Citizenship

The understanding of popular sovereignty as hyper-majoritarianism led to the emergence of a particular concept of citizenship. Constructed in the one-party period under the banner of "one language, one culture and one idea," citizenship (being a Turkish citizen) was distinguished from nationality (Turkishness), where citizenship rights were awarded to the latter.[757] *Turkishness*, represented a highly abstract unitary ideal[758] formed through shared values and traits.[759] To uphold the conception of one homogeneous nation, any denial of such a unity was perceived as a vital threat to the state.[760] According to Yavuz, the reforms of (dis)identification could also be observed though a racial lens: zones of prosperity were "concentrated around the "white Turks," or governing political elite, who were at the center of state power, while the zones of conflict were centered around the poor and marginalized sectors of the population—"the black Turks."[761] This interpretation of citizenship, in conjunction with the structural control over religion, led to two things: promotion only of a certain interpretation of Islam in accordance with a particular Sunni tradition; and marginalization of minority religions and groups.

1.2.2 The Purification of Language

One of the main markers of Turkishness was language thus, reforms were enacted towards its "purification." Inward, language as a marker of nationhood was a basis for Turkish nationalism.[762] Considering its role, in the words of Atatürk, language had to be "liberated…

[757] Katalin Siska, "Mustafa Kemal Atatürk's Effect on the New Concept of the Turkish Identity and Citizenship in Particular the Constitutional Regulation of the Young Turkish Republic," *Forum: Acta Juridica Et Politica* 6, no. 1 (2016): 139–49.
[758] See Daly, "Ambiguous Reach of Constitutional Secularism in Republican France."
[759] For other examples see the Preamble of the French Constitution, 1958 and Preamble of the Constitution of the Federative Republic of Brazil, 1824 as amended in 1988.
[760] See Martin van Burinessen, "Kurdish Society, Ethnicity, Nationalism and Refugee Problems," in *The Kurds: A Contemporary Overview*, eds. Philip Kragenbrook and Stefan Speri (London: Routledge, 1992), 65.
[761] Yavuz, "Cleansing Islam from the Public Sphere," 22.
[762] Eun Kyung Jeong, "A Study of the Formation of Early Turkish Nationalism," *Acta Via Serica* 3, no. 1 (2018): 57–83.

from the yoke of foreign tongues."[763] Towards that aim, language was purified by excluding words borrowed or originating from Persian and Arabic and substituting them with new words based on an existing Turkish word.[764] As part of the linguistic reform, the Arbo-Persian Ottoman script was replaced by the Latin alphabet (the Modern Turkish Alphabet), mandated by law in 1928. Outward, efforts were made to prove the Turic origins of the languages of major civilization. The Turkish Historical Society and the Turkish Language Institution were therefore established for the purpose of conducting research in the field of history and language.[765] Especially after 1933, Atatürk himself "devoted much of his time to the rewriting of Turkish history and the 'purification' of the Turkish language."[766]

1.2.3. State-sponsored Version of Islam and Good Citizenship

Another marker of Turkishness was religion. However, the Turkish citizen was Muslim, but abiding to a controlled version of Islam determined by the state apparatus and interpretated in accordance with modernity. During the late 1920s and 1930s, the newly appointed clergy in the Diyanet re-wrote all religious textbooks aimed at promoting the traits of the new good citizen, presented not only as a state, but also as a sacred duty.[767] These traits included, among other things, to "respect the laws of the republic, submit to the progressive guidance of state officials, do his utmost to learn modern techniques."[768] Thus, the Diyanet not only controlled religious interpretations, but also produced new interpretations intended to shape society and serve as foundations of good citizenship.

A notable example of where the construction of these two markers intertwine is the initiative for a state-sponsored translation of the Koran from Arabic to Turkish (the *Hak Dîni*),

[763] Hanioğlu, *Atatürk: An Intellectual Biography*, 175.
[764] Ibid, 174.
[765] Akman, "The Closure of the Sharia Courts."
[766] Andrew Mango, "Atatürk," in *The Cambridge History of Turkey, Volume 4 Turkey in the Modern World*, ed. Reşat Kasaba (Cambridge: Cambridge University Press, 2008), 168.
[767] See Atasoy, *Turkey, Islamists and Democracy: Transition and Globalisation in a Muslim State*, 39-40.
[768] Ibid.

commissioned by the Diyanet in 1925. According to some, the translation campaign was initiated by Atatürk[769] and was used to reform and nationalize Islam. However, as Wilson argues "state involvement in Qur'an translation occurred only after private publishers printed translations in 1924 that ignited considerable controversy, leading the parliament to sponsor the composition of a reliable and eloquent Turkish translation."[770] Even through translations "certainly contributed to a nationally oriented Islamic outlook," [771] unlike other policies, they enjoyed considerable support among the faithful and the clergy.

1.2.4 Building a Loyal Nation and the role of Education

As in other nation-states, in Türkiye loyalty to the nation was key[772] and education played a crucial role in building the new loyal citizen. Even though educational reforms were already initiated in the Tanzimat, in the Ottoman tradition references to Islamic morality were always employed through education for the purpose of building loyalty towards the state. Thus, there was a tradition of rigidity in the educational system that also served to not only transfer knowledge, but also to control students' behavior, discipline and morality.[773]

In the Second Constitutional Period, the CUP's main aim was to achieve national and social progress, and westernization via education.[774] To that end, in 1913 the "Provisional Law of Primary Instruction" was enacted, transforming the infrastructure of public schools. Additionally, in 1916 under the advisement of Ziya Gökalp a decision was adopted

[769] See Niyazi Berkes and Feroz Ahmad, *The Development of Secularism in Turkey* (London: Hurst & Company, 1998).
[770] M. Brett Wilson, "The First Translations of the Qur'an in Modern Turkey (1924-38)," *International Journal of Middle East Studies* 41, no. 3 (2009): 419.
[771] M. Brett Wilson, "Translations of the Qur'an: Islamicate Languages," in *The Oxford Handbook of Qur'anic Studies*, ed. Mustafa Shah and Muhammad Abdel Haleem (Oxford: Oxford University Press, 2020), 561.
[772] See Baskin Oran, "Kemalism, Islamism and Globalization: A Study on the Focus of Supreme Loyalty in Globalizing Turkey," *Southeast European and Black Sea Studies* 1, no. 3 (2001): 20–50.
[773] See Ibid.
[774] Abdullah Cevdet one of the funders of the CUP, known for his almost extreme westernizing views considered westernization "an inevitable obligation …both in individual and political arena" believing that "there is no civilization on earth except for Europe." In his publications he suggested that dervish lodges ought to be abolished and their revenues to be transferred to the budget for education, furthermore that all *madrasah* should be closed and new literary and technical schools to be founded. Ziya Gökalp also advocated for all the *madrasa* to be placed under the Ministry of Education. See Atasoy, *Turkey, Islamists and Democracy: Transition and Globalisation in a Muslim State*, 34-37.

strengthening government control over education. The decision placed the so-called Quran schools (*madrasah*), previously supervised by the Ministry of Pious Foundations, under the jurisdiction of the Ministry of Public Education.[775]

In the establishment period, the ruling elite aimed at formulating a new society by "political-engineering …through state-controlled moral education."[776] The solution for altering the already existing "corrupt environment" in order to create a perfect society was to change the way new generations were taught to think. The approach for achieving this goal was establishing education top-down while destroying old institutions and practices,[777] a trend that in a limited sense started in the Second Constitutional Period. Directed by such intentions, the new elites started to enact laws that would alter the infrastructure in the republic along the lines of positivism, which became a "guiding principle of the Turkish educational system."[778]

Thus, between July and August 1923 the first educational conferences were held to decide on a program and legislative infrastructure of educational institutions.[779] The founders of the program "intended to adopt western civilization as a whole including western secular culture, to improve the nation to the contemporary western level, and avoid the superstition, mystical feelings, scholastic ideas, and out of date principles of life, [and] adopting positivism."[780]

A unified educational system was established through two laws: one that abolished the Ministry of Pious Foundations (Law No 429/1924) and another that placed all educational institutions including all religious schools under the Ministry of Education (the Unification of

[775] Tuncay Saygin, "'Secularism' From the Last Years of the Ottoman Empire to Early Turkish Republic," *Journal for the Study of Religions and Ideologies* 7, no. 20 (2008): 23.
[776] M. Hakan Yavuz, "Understanding Turkish Secularism in the 21th Century: A Contextual Roadmap," *Southeast European and Black Sea Studies* 19, no. 1 (2019): 61.
[777] Ibid.
[778] Ibid, 64.
[779] Sataahaddin Zaîm, "The Development of Educational System in Turkey (The Impact of Westernization on the Education)," *İstanbul Üniversitesi İktisat Fakültesi Mecmuası* 45 (2011): 490–518.
[780] Ibid, 501.

Education Act, Law No 430/1924) (*Tevhid-i Tedrisat Kanunu*).[781] The Unification of Education Act vested the Ministry of Education with complete control, financial and otherwise, over the highly centralized education in the new formed state. To this day, the Ministry has absolute authority over the design of the curriculum, textbook content and the assignment as well as the development of teachers and staff.

The Constitution of 1924 made primary education mandatory whilst, by 1927 schools at all levels were made free.[782] These legislative acts abolished the duality of education (religious/secular) that existed from the beginning of the Tanzimat reforms. Traditional educational institutions, especially prominent in the primary school sector, were secularized and put solely under state control.

In the Second Educational Conference the aims of the national education and curricula were established focusing on the development of elementary schools, eradicating illiteracy (and learning the new Latin alphabet) and the increasing of the quality of education. Substantively the goals were to educate the Turkish to be nationalist, populist, revolutionist, and secularist as well as to raise the Turkish nation to the level of contemporary civilization.[783] However, like in France and Italy, the building of the public school system proved a difficult task. Thus, substantial effort was put forward to create infrastructure for secular public schooling with an emphasis on the training of primary public-school teachers.[784] In between 1924 and 1930 efforts were directed at not only on raising the number of teachers, but also in raising their quality of their training and aligning their knowledge with the values of the Republic. After 1926 and especially after 1930, special programs were developed for primary school teachers

[781] Bozkurt Güvenç, "History of Turkish Education," *Education and Science: Special Issue* 22, no. 108 (1998): 50.
[782] Güvenç, "History of Turkish Education," 52.
[783] See Zaîm, "The Development of Educational System in Turkey," 502.
[784] See Fatih Bozbayindir, "The Policies on Training Teachers in Atatürk Period (1923-1938)," in *Social, Educational, Political, Economic and Other Developments Occurred in Turkey Between the Years of 1923-1938* (ISRES Publishing, 2018).

that were to take upon the task to teach at villages and rural areas.[785] Hence in 1924 and "the Course of Citizenship and Sociology was included in the curriculum of all the primary teacher education schools."[786] According to Bozbayindir, the training policies succeeded in reshaping primary school teachers into idealistic Republicans however, due to limited funds, raising the number of teachers remained a challenge.[787]

With the aim of centralization, under the Unification of Education Act all religious schools (a total number of 479 *medrese*) were closed.[788] In their place, the law authorized the Ministry to open special Imam Hatip schools and a Faculty of Theology at the Istanbul University for educating enlightened scholars of Islam loyal to the republic.[789] Hence, 29 four-year Imam Hatip secondary schools were opened in 1924.[790] By 1930 all these schools closed due to lack of interest/enrolment. To fill the void of the closed Quran schools, a few state-licensed *"Kuran Kurslari*" courses were established at the primary school level. In 1933, the Faculty of Theology at Istanbul University was also closed under the same justification.[791]

After a few years of reduced compulsory religious education in primary and secondary schools, in 1928 compulsory religious education in secondary schools, and in 1931 in primary schools, was completely eliminated.[792] Thus, education polices were imposed top down, aiming at enlightening the nation and transforming it along western secular lines. It was also about control over citizen production and forging citizens loyal to the nation and not the *umma.*

[785] Fatih Bozbayindir, "The Policies on Training Teachers in Atatürk Period (1923-1938)
[786] Ibid, 101.
[787] Ibid, 109.
[788] Akan, *The Politics of Secularism*, 307.
[789] Bozkurt Güvenç, "History of Turkish Education," *Education and Science: Special Issue* 22, no. 108 (1998): 50.
[790] Ibid.
[791] Akan, *The Politics of Secularism*, 307.
[792] Ibid.

1.2.5 Modernization, Westernization and the "Programmatic" role of Laiklik

Homogenization policies went hand in hand with policies towards modernization and westernization. These reforms were initiated already in Tanzimat period[793] as an inevitable necessity of a changing world[794] and society as new elites informed and educated by liberal ideas emerged and maintained positions in the growing state bureaucracy. In the twilight of the empire and on the brink of the republic, however, it was the Westernists, Islamists, and Turkists that emerged as leading groups maintaining different visions of society and the role of the state.

The most prominent stream of the Islamists led by the Muhammedan Union (and its most influential survivor Said Nursi (I867-I960)) emphasized the Islamic nature of the state. They considered religion not as an obstacle to progress claiming that imitating the west was not the way forward.[795] The Westernists saw the way forward through a radical moral and mental transformation of society through Western values; citizens needed to be enlightened and, as Cevdet (one of the funders of CUP) claimed, to be freed from "ignorance, subservience to superstitions erroneously identified with the religion of Islam, [and] self-subordination to degenerate and stupid clericals."[796] The Turkists were neither Islamists nor Westernists, but borrowed elements from both. Their most prominent thinker, Ziya Gökalp claimed that the "Turkish nation would come into existence as a result of the breakdown of the Islamic *ümmet* under the impact of the modern technology of 'Western civilization, whose constituent elements were democratic, secular nationalities."[797] He believed that the nation would be build based on national ideals defined as the "ultimate objectives toward which the nation

[793] On an anthropological study on the Ottoman legacy on Turkish modernity see Michel E. Meeker, *A Nation of Empire: The Ottoman Legacy of Turkish Modernity* (Berkeley: University of California Press, 2002).
[794] The practical necessities: 1) modernization was crucial for the Empire's survival in the fast-moving modern world, influenced by under European presence, in industry, agriculture and trade; 2) under the influence of European commercial dominance and the relationships build upon it, the economic strata of ottoman society also started to transform and with that so did society as a whole. See Berkes and Ahmad, *The Development of Secularism in Turkey*.
[795] Berkes and Ahmad, *The Development of Secularism in Turkey*, 339.
[796] Ibid.
[797] Ibid, 345.

aspired."[798] As CUP became very much influenced by the Turkist movement, and Gökalp became the architect of Kemalist reforms in the establishment period.

The "modernization project", according to Atatürk, was built around the central theme of building a contemporary civilization (*Muasir Medeniyet*) understood at the time in line with the traits of Western Europe.[799] *Laiklik* had a central place within these endeavors, understood as a pinnacle of modernization, rationality and science. Thus, the rational for their removal even though primarily rested on the premise that state and religion must be separated,[800] had an additionally component. In this context, in the establishment period religious symbols and clothing were viewed as symbols of backwardness and most importantly as a threat of political Islam; both as an obstacle to modernity and a danger to the new system.

Thus, a campaign against religious dress in the public sphere was introduced, predominantly affecting men.[801] First, the so-called Hat Law[802] prohibited the wearing of the fez, "the most immediately visible symbol of Turkish separateness from the Western world"[803] while making the wearing of hats compulsory in an effort to reach a common dress style. Then, a decree banned the wearing of religious dress and symbols by persons not holding a recognized religious office.[804] Finally, an order demanded from all civil servants to wear the 'costume common to the civilized nations of the world', namely the suit (elbise) and the hat – only military officers and judges, who were to be given special uniforms, were exempt." [805]

[798] Berkes and Ahmad, *The Development of Secularism in Turkey*, 346.
[799] Oran Baskin, "National Sovereignty Concept: Turkey and Its Internal Minorities," *Cahiers d'études Sur La Méditerranée Orientale et Le Monde Turco-Iranien* 36 (2003): 34.
[800] Yasemin Doğaner, "The Law on Headdress and Regulations on Dressing in the Turkish Modernization," *Bilig*, no. 51 (2009): 43.
[801] However, it is important to mention that the so called "Europeanization" of the drees among man has a longer history. In the 19th century Ottoman Empire, men started to dress in a westernized manner as dress became a divisive issue between modernist and traditionalists (the former called the letter *sapkalı* (hat-wearer).
[802] Law no. 671, of November 25, 1925. For discussions on the enactment of the Laws see Doğaner, "The Law on Headdress and Regulations on Dressing in the Turkish Modernization," 42.
[803] Houchang Chehabi, "Dress Codes for Men in Turkey and Iran," in *Men of Order: Authoritarian Modernization under Atatürk and Reza Shah*, ed. Touraj Atabaki and Erik J. Zürcher (New York: I.B. Tauris, 2004), 212.
[804] Law no. 676 of November 30, 1925.
[805] Chehabi, "Dress Codes for Men in Turkey and Iran," 214.

Additionally, in 1934 a Law[806] banned the wearing religious attire anywhere, other than in places of worship or at religious ceremonies, irrespective of ones the religion or belief. The purpose of the law was to mainly restrict the wearing of religious garments by religious officials outside of places of worship (in the public space) under the justification of state and religion separation and the principle of secularism.[807] Laws equivalent to the hat law, were not introduced concerning women dress. Debates on the prohibition of the *peçe* and *şalvar* (women's religious attire in the early years of the Republic) came in front of the Assembly in 1935 but were never adopted. It was not until the early 1980's that the "headscarf" issue was raised in Türkiye.[808]

1.3 Status of Minorities

With the Lausanne Treaty the Turkish Republic accepted to protect the liberty of all its citizens despite their religious belonging,[809] to guarantee equality before the law and equal civil and political rights,[810] and ensure full protection of religious establishments.[811] One might argue that Türkiye was bound to be *tolerant* from its conception as toleration, minority protections and equality (*pro forma*) were imposed top down from an international level. However, post-1923 these articles were narrowly interpreted to guarantee protection only to three minority groups: the Armenian Orthodox Christians, the Greek Orthodox Christians, and Jews,[812] while other religious minorities were excluded. Furthermore, the agenda of the new

[806] 1934 Law no. 2596 on the Prohibition of Wearing Certain Garments.
[807] Doğaner, "The Law on Headdress and Regulations on Dressing in the Turkish Modernization," 43.
[808] See Ibid.
[809] Article 38 of the Lausanne Treaty states: The Turkish Government undertakes to assure full and complete protection of life and liberty to all inhabitants of Turkey without distinction of birth, nationality, language, race or religion. All inhabitants of Turkey shall be entitled to free exercise, whether in public or private, of any creed, religion or belief, the observance of which shall not be incompatible with public order and good morals.
Non-Moslem minorities will enjoy full freedom of movement and of emigration, subject to the measures applied, on the whole or on part of the territory, to all Turkish nationals, and which may be taken by the Turkish Government for national defense, or for the maintenance of public order.
[810] Article 39, (1) and (2) of the Lausanne Treaty state: Turkish nationals belonging to non-Moslem minorities will enjoy the same civil and political rights as Moslems.
All the inhabitants of Turkey, without distinction of religion, shall be equal before the law.
[811] Article 42 of the Lausanne Treaty.
[812] Laure Almairac, "Turkey: A Minority Policy of Systematic Negation" (International Helsinki Federation for Human Rights (IHF), October 2006).

governing elites to produce a unified nation led to nationalist politics of homogenization through exclusion that affected minorities severely.[813]

Unlike in other contexts where there is a clear dichotomy between minority and majority groups, seen through whichever lens – ethnicity, religion so on- in Türkiye there is rather a trichotomy. In the single party period, the CHP differentiated between three categories of citizenship: Turkish ethnic Muslims, non-Turkish ethnic Muslims and non-Muslim minorities.[814] According to Bali, the first group was considered as "real," first class citizens, the second group included minorities such as such the Kurds and Lazes, who were second class citizens worthy of citizenship upon assimilation, and the non-Muslim, Lausanne minorities he claims were unwanted as they were difficult to assimilate.[815] Thus, even though the last group was looked upon with suspicion, it was tolerated (to a certain extent) because of external obligations (the Lausanne Treaty). The second group, on the other hand had been systematically repressed and unrecognized.

The lens of suspicion through which minorities were seen by the state led to several detrimental policies in the first decades of the republic and beyond, especially regarding minority schools and property rights. Minority schools, despite being protected by the Lausanne Treaty,[816] were in most part supervised by the Turkish Chief Deputy Head from 1937 onwards, a position held by a person of 'Turkish origin.'[817] In regards to property rights, under

[813] Policies included the closure of schools, expropriation of property and imposing taxes solely based on religious belonging.
[814] Siska, "Mustafa Kemal Atatürk's Effect on the New Concept of the Turkish Identity and Citizenship in Particular the Constitutional Regulation of the Young Turkish Republic."
[815]Rifat Bali, "Politics of Turkification During the Single Party Period," in *Turkey Beyond Nationalism*, ed. Hans Lukas Kieser (London: I.B. Taurus, 2006).
[816] Article 40 of the Lausanne Treaty Article 40 provides that non-Muslim minorities: "shall have an equal right to establish, manage and control at their own expense, any charitable, religious and social institutions, any schools and other establishments for instruction and education, with the right to use their own language and to exercise their own religion freely therein."
[817] The Turkish chief deputy head was appointed by the Ministry, to share the school administrative authority with headteachers but, often surpassing their competences. See Nurcan Kaya, "Discrimination Based on Colour, Ethnic Origin, Language, Religion and Belief in Turkey's Education System" (Istanbul: Minority Rights Group, 2015).

the 1935 Law on Foundations[818] and following the so-called 1936 Declarations[819] number of properties owned by foundations formally protected under the Lausanne Treaty were confiscated.[820] This trend continued in the multi-party period as in the late 1960s the government began to adopt a more restrictive attitude towards the minority religious foundations, which led to further property confiscation and bureaucratic obstacles for property registration. In 1974, the Court of Appeal (*Yargitay*) brought a decision holding that unless the 1936 Declarations "clearly indicated that the given foundation could acquire new property… acquisitions…had no legal validity."[821] Accordingly, these properties were considered illegally possessed and thus, needed to be returned to their former owners.[822] Thus, property rights legally acquired by foundations between 1936 and 1974 was nullified by court order and thereafter confiscated.

Finally, maybe the most damning evidence of not only unequal treatment but modern-day persecution of minorities is the notorious Capital Tax (*Varlik Vergisi*) in force from November 1942 to March 1944 that specifically targeted minorities.[823] Although its official purpose was to raise military funds upon the possibility that the county would enter WW2 "it really was intended to destroy the economic position of non-Muslim minorities in the country and reinforce the ongoing process of economic Turkification."[824]

[818] Law no. 2762 of June 13, 1935.
[819] More on the 1936 Declarations see Wendy Zeldin, "Turkey: Minority Religious Congregation Property to Be Returned Under Historic Measure," Library of Congress, Washington, D.C. 20540 USA, September 6, 2011, https://www.loc.gov/item/global-legal-monitor/2011-09-06/turkey-minority-religious-congregation-property-to-be-returned-under-historic-measure/.
[820] Anna Maria Atli Beylunioglu, "Freedom of Religion in Turkey Between Secular and Islamic Values: The Situation of Christians" (PhD Thesis, European University Institute, 2017).
[821] Zeldin, "Turkey."
[822] Ibid.
[823] See Faik Okte and Geoffrey Cox, *The Tragedy of the Turkish Capital Tax* (London: Routledge, 1987).
[824] D. Gershon Lewental, "Capital Tax Law (Varlik Vergisi, 1942)," in *Encyclopedia of Jews in the Islamic World,* et al. Norman A. Stillman (Leiden & Boston: E J Brill, 2010). Consulted online on September 3, 2022.

1.4 Constitutionalization of *Laiklik*: Securing the way for the Future

The removal of the reference to Islam as a state religion as well as the constitutionalization of *laiklik* was approached with caution. Until 1928 Article 2 of the 1924 Turkish Constitution declared Islam a state religion. As Kemal Atatürk himself claimed, the reason behind keeping Article 2 in the Constitution was not to give an "opportunity for those who are inclined to interpret the phrase 'laic government' as antireligious [*dinsizlik*] to take advantage of such interpretations."[825] What he meant was, not to allow his political opponents, most of whom came from established and more radical Sufi orders, to use the anti-religious rhetoric to mobilize the population. Thus, since during the GNA debates surrounding the 1924 Constitution the single-party regime had not yet consolidated its power, the adopted text of the Constitution contained references to Islam.[826]

By 1928, as dissent was successfully suffocated, Law no. 1222 of April 14, 1928, amended the Constitution by removing all the references of Islam including Article 2 declaring it a state religion. The fact that just a year later "the regime felt strong enough to abolish the independence tribunals, which had tried political opponents"[827] proves that it had consolidated its power and felt that it could remove the reference without facing revolt and rebellion. However, even in parliamentary debates it was nevertheless important to emphasize that *laiklik* was not antireligious.[828] This yet again portrays the cautious way in which religious issues were addressed in the First Turkish Republic.[829] *Laiklik* was defined as a principle that ought to ensure that "religion [was] not influential and effective in the affairs of the country" and to also restrain the state from interfering with individual freedom of conscience.[830]

[825] Speech by Kemal Atatürk in Akan, *The Politics of Secularism*, 139.
[826] Ergun Özbudun, "Constitution Writing and Religious Divisions in Turkey," in *Constitution Writing, Religion and Democracy*, eds. Aslı Ü. Bâli and Hanna Lerner (Cambridge: Cambridge University Press, 2017), 153–76.
[827] Mango, "Atatürk," 166.
[828] Akan, *The Politics of Secularism*, 140.
[829] As he has mentioned in a speech: He who would be frightened by changes contrary to their traditions, their intellectual capacity and their mentality'. It was, therefore, necessary to guard his true intentions as 'a national secret', and to implement them step by step when conditions were propitious. See Mango, "Atatürk," 166.
[830] Akan, *The Politics of Secularism*, 221.

A year and a half before the death of Atatürk, Law No. 3115 of February 5, 1937 incorporated *laiklik* in the constitution as a fundamental principle of the state. *Laiklik* became one of Atatürk's six basic principles (*arrows*) of the new modern Turkish Republic[831] – principles confirmed by the 1961 and 1982 Constitutions, normatively protected as unamendable principles on several levels (see below). The enshrining of the principle marked the end of the transformation from an empire to a republic, from umma to a nation.[832] As safekeepers of democracy (mostly understood as popular sovereignty), they forged the destiny of the Turkish Republic. Thus, *laiklik* together with the republican form of government, had a function of upholding democracy.

The introduction of the arrows in the Constitution were Atatürk's goals and reflected his intellectual position. Already in 1924, in a speech in front of the Assembly Atatürk noted that the "nation's expectation [is] that the Republic […] be protected from all future attacks and based on previously tried and tested principles."[833] If before 1937 secularism as a principle and what it entailed was still ambiguous,[834] its constitutionalization guaranteed its highest protection, securing its legacy whatever its future interpretations might be. Intellectually, such conceptions were in line with Atatürk's philosophy that equated secularism with freedom of thought and having a democratic function of "emancipating thought and a new attitude enabling one to grasp universal values."[835] For him the separation between religion and state was one of the fundamental principles of a democratic government, thus "he deemed the inclusion of this

[831] The principles additionally include republicanism, nationalism, popularism, revolutionism and statism, and first appeared in 1931, in the political program of the Republican People's Party. See Gerassımos Karabelıas, "The Military Institution, Atatürk's Principles, and Turkey's Sisyphean Quest for Democracy," *Middle Eastern Studies* 45, no. 1 (2009): 58.
[832] See Efe Peker, "Beyond Positivism: Building Turkish Laiklik in the Transition from the Empire to the Republic (1908–38)," *Social Science History* 44, no. 2 (2020): 301–27.; Uzun, "Protection of Laicism in Turkey and the Turkish Constitutional Court."
[833] Akman, "The Closure of the Sharia Courts" 50-51.
[834] See, Ulutas, "Religion and Secularism in Turkey."
[835] Türkkaya Ataöv, "The Principles of Kemalism," *The Turkish Yearbook of International Relations* 20 (1980): 33.

principle in the Constitution to be absolutely necessary."[836] Contextually, such conceptions were necessary "to protect the regime and its revolutions," since between 1925 and 1930 efforts to establish opposition political parties was halted as "Unionists and Socialists, who all managed to hide behind the democratic façade of political parties, used democratic initiatives for their causes."[837]

In the same vein "religious orders (*tarikat*) were removed from the protection of article 75 on the freedom of conscience, and freedom of philosophical opinion was now listed before freedom of religion." [838] The underlining justification for such action as mentioned in parliamentary debates was that devotion towards religious orders [*tarikat*] was an evil inherited from the previous regime, and "the only true path and *tarikat* for the Turk is nationalism grounded on positive science."[839] Thus, an additional component is positivism and the value of science as something that must be protected from religious orders that preach the opposite.

2. The 1961 Constitution

Both the 1961 and the 1982 Constitutions were drafted in the aftermath of military intervention in the name of defending the republican, secular order against the threat as well as instability, as military intervention into state matters and the "use" of *coup d'état* against threats to democracy and endangerment of Kemalist principles had been a "tradition" in Türkiye. Perhaps existing as somewhat of a contradiction, given that democratically elected representatives are ousted through military force, such a tradition of militarism is a testament to the tutelary behavior[840] of the military-bureaucratic elite traditionally understood as a keeper

[836] İlhan Arsel, "Constitutional Development of Turkey Since Republic," *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 18, no. 1–4 (1961): 41.
[837] Mustafa Murat Çay, "Multi-Party Life Transition Experiments in the Turkish Republic (1925-1930)," in *Social, Educational, Political, Economic and Other Developments Occurred in Turkey Between the Years of 1923-1938* (ISRES Publishing, 2018), 86.
[838] Akan, *The Politics of Secularism*, 221.
[839] Ibid, 222.
[840] On the rise and fall of military tutelage see Ahmet T. Kuru, "The Rise and Fall of Military Tutelage in Turkey: Fears of Islamism, Kurdism, and Communism," *Insight Turkey* 14, no. 2 (2012): 37–57.

of modernity[841] and Kemalist principles.[842] The frameworks of both Constitutions and the strong guarantees they award Kemalist principles and *laiklik* itself ought to be understood against this backdrop.

Thus, even though the 1961 Constitution is considered as more liberal in tone than its successor, it nevertheless entrenched rigid guarantees of Kemalist reforms and *laiklik*, thereafter mirrored in the 1982 Constitution. It also established the TCC, which, despite its function as a guardian of the constitution,[843] has been argued to serve as an instrument of "hegemony preservation" of the ruling elites.[844]

2.1. The Context Surrounding the Drafting of the 1961 Constitution

In the backdrop of the WW2, opposition within the Republican People's Party demanded a change in the political system in line with the trends of the time. In 1945 the one-party rule in Türkiye ended and multi-party, mass politics were to replace "the politics of elites of the single-party period."[845] The following year the Democratic Party was formed and so were a few socialist parties.

Between 1946 and 1950 in light of the Cold War and the "communist threat," and with the additional aim to appeal to the more the conservative vote and isolate the Democratic Party, the Republican People's Party itself turned to religion as an antidote. Policies such as raising the funds of the Diyanet, subsidizing hajj and policies both regarding public (including optional

[841] Specifically regarding the 1960 coup see Nejat Muallimoglu, "Meaning of the Coup d'etat in Turkey," *Pakistan Horizon* 13, no. 3 (1960): 190–202. Specifically regarding the 1980 coup see Sam Kaplan, "Din-u Devlet All over Again? The Politics of Military Secularism and Religious Militarism in Turkey Following the 1980 Coup," *International Journal of Middle East Studies* 34, no. 1 (2002): 113–27. In general on the role of the military in Turkey see Sinem Gürbey, "Islam, Nation-State, and the Military: A Discussion of Secularism in Turkey," *Comparative Studies of South Asia, Africa and the Middle East* 29, no. 3 (2009): 371–80.

[842] See Turkuler Isiksel, "Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism," *International Journal of Constitutional Law* 11, no. 3 (2013): 702–26.

[843] See Peri Uran and Pasquale Pasquino, "The Guardian of the Turkish Constitution: A Special Court," *Journal of Politics and Law* 8, no. 2 (2015): 88–97.

[844] See Ergun Özbudun, *The Constitutional System of Turkey: 1876 to the Present* (New York: Palgrave Macmillan, 2011).

[845] Feroz Ahmad, "Politics and Political Parties in Republican Turkey," in *The Cambridge History of Turkey, Volume 4 Turkey in the Modern World*, ed. Reşat Kasaba (Cambridge: Cambridge University Press, 2008), 232.

religious classes) and private schools were all introduced to remedy the declining morality of the citizenry, especially the youth via giving way to religion.[846] However, despite these attempts to appeal to rural voters, the Democratic Party won the majority of the seats in Parliament in the aftermath of the 1950 elections. In the years that followed, the Democratic Party would attempt to transform the system within its already established institutions.

The Democratic Party's 10-year rule started "with modest political [and religious] liberalization" – it loosened the restrictions on religious practices by repealing the prohibition on the Arabic call to pray in mosques and lifted the ban on religious broadcasting on the radio.[847] The Democratic Party also had a clear position on the role of religious education in the republic, emphasizing the necessity of a new framework for religious education.[848] Thus, in November 1950 a decree made Sunni religious instruction mandatory in primary schools with a possibility of opting-out (as opposed to the previous opt-in system).[849] In 1956, religion (exclusively based on Sunni İslam) and ethics courses were reintroduced to middle schools.[850] The same year Imam Hatip schools were reopened, with graduates permitted to continue their higher education only in theology faculties.[851]

However, attitudes towards control over religion remained unchanged. In fact, as Gözaydın notes, in the multi-party period, the "Islamic political parties did not seek freedom of religion, but rather wanted further integration of Islam into the state system and wanted the state to control, sustain and promote Islam as long as it served the state's interest."[852] This was made possible through the existing institutional framework and especially the Diyanet. Thus, Islamist parties, as we see through the case of the Democratic Party, did not aim at establishing

[846] Akan, *The Politics of Secularism*, 228.
[847] Yavuz, "Understanding Turkish Secularism in the 21th Century: A Contextual Roadmap," 66.
[848] Akan, *The Politics of Secularism*, 227.
[849] Ibid, 243.
[850] Güvenç, "History of Turkish Education," 61.
[851] Ayhan Kaya, "Islamisation of Turkey Under the AKP Rule: Empowering Family, Faith and Charity," *South European Society and Politics* 20, no. 1 (2015): 56.
[852] Yavuz, "Understanding Turkish Secularism in the 21th Century: A Contextual Roadmap," 59.

more religious liberty, but to use the already established infrastructure for the purpose of further integrating the majority interpretation of Islam in politics and society. In fact, since the introduction of the multi- party system until today, both secularist and Islamist parties have employed the majority religion as a "weapon" against social disintegration and perceived threats (such as communism).

The Democratic Party's 10-year rule may have started with modest political liberalization, but it soon gave in to authoritarian tendencies as "social unrest, political polarization, the persecution of minorities, and restrictions on the freedom of expression"[853] became the markers of its governance. Afraid that state institutions and the people working in them were loyal to the Republican People's Party, the Democratic Party soon started employing tactics to suppress the opposition that resembled those of the first party period. Their rule ended with the military coup in on the 27th of May 1960. Upon the coup, 38 officers of the military junta formed the National Unity Committee (NUC). The NUC went on towards amending the 1924 constitution and "bringing Turkey's institutions in line with the requirements of the post-war world."[854]

2.2 The Framework of the 1961 Constitution

2.2.1 The six Principles, Militant Democracy and the role of the new Constitutional Court

Informed by contextual considerations, especially the real threat that the Democratic Party posed, the 1961 Constitution reaffirmed Atatürks' conception of *laiklik* as a defender of democracy and re-conceptualized religion as a force threatening it. The Constitution reaffirmed Atatürk's ideal – as Atatürk's reforms were included in the Preamble, whilst Article 2 characterized the Turkish Republic as nationalistic, democratic, *secular* and social.[855] Additionally, Article 153 gave eight Reform laws a special status, considered raising Turkish society above the level of contemporary civilization and safeguarding the secular character of

[853] Isiksel, "Between Text and Context," 713.
[854] Ahmad, "Politics and Political Parties in Republican Turkey," 239-40.
[855] Article 2 of the 1961 Turkish Constitution.

the Republic. Article 9 made the republican form of the state an irrevocable provision, meaning that its amendment cannot be proposed.[856]

The protections vested in Article 9 led to the development of the unconstitutional constitutional amendment doctrine in the jurisprudence of the TCC, imposing limitation not only on legislative power but, also constitutional amendment power. The idea of limitation of constitutional amendment power finds its origins in French and American legal thought.[857] As Roznai notes, as constitutional doctrine it was adopted in Latin America in the ninetieth century, "developed in German jurisprudence in the early years of the twentieth century, and eventually found its way to virtually every continent after the Second World War."[858]

In Türkiye, before the 1971 constitutional amendments, the TCC was not expressly vested with the power to review constitutional amendments, but only laws. Despite the lack of expressly awarded authority, in two decisions the TCC derived its authority to review constitutional amendments under the justification that laws amending the constitution are also laws and thus, subject to review.[859] However, the TCC ruled only on formal and procedural regularity of constitutional amendments.[860] The 1971 amendments to the Constitution expressly vested the TCC with the power to review the formal regularity of constitutional amendments,[861] leading to five more TCC decisions on the constitutionality of constitutional amendments between 1971 and 1980.[862] Even though only vested with the power to review

[856] This formulation finds its roots in French legal though and was incorporated in French Constitutions since the Constitutional Law of 1875. See Claude Klein, "The Eternal Constitution – Contrasting Hans Kelsen and Carl Schmitt," in *Hans Kelsen and Carl Schmitt A Juxtaposition*, ed. Dan Dinner and Michael Stolleis (Bleicher Verlag, 1999), 61–70.

[857] See Yaniv Roznai, "Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea," *The American Journal of Comparative Law* 61, no. 3 (2013): 657–719. See further Monika Polzin, "The Basic-Structure Doctrine and Its German and French Origins: A Tale of Migration, Integration, Invention and Forgetting," *Indian Law Review* 5, no. 1 (2021): 45–61.

[858] Roznai, "Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea," 713.

[859] Judgment no. 1970/31 (Turkish Constitutional Court June 16, 1970). Judgment no. 1971/37 (Turkish Constitutional Court April 3, 1971).

[860] See Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Bursa: Ekin Press, 2008).

[861] Article 147 of the 1961 Turkish Constitution.

[862] Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study.*

formal and procedural aspects of the constitutionality of amendments, in several of its decisions the TCC found a nexus between the implications of the proposed amendments as against the republican form of government which is an irrevocable provision. The TCC argued that as such the amendments "would damage the system's integrity and would create a new system that upsets the one previously described in the Constitution."[863] The TCC claimed that amendments leading to the smallest deviation from the irrevocable provisions and those in the Preamble were impermissible.[864] This decision led to criticism since the TCC ruled on questions not on form, but substance.[865]

Article 19 furthermore guaranteed but also prescribed the limits to freedom of thought and faith. First, it introduced the concept of public order as a limitation on forms of worship, ceremonies and rites. Second, for the first time it introduced the concept of militant democracy. Coined by Loewenstein in 1937,[866] militant democracy envisions means by which liberal democracy can guard itself from itself, thus, it is a concept "[guiding] states' policies to neutralize various internal threats."[867] Aiming to protect democracy from "threat of harm or destruction by undemocratic actors"[868] constitutional safeguards exist in the form of dissolution of political parties that once in power, will pose a grave threat to the liberal constitutional system as they aim to undermine it or potentially replace it altogether. Article 19 made the abuse of religion in political discourse and actions an offence that can lead to the dissolution of a political party. In such an event, courts were vested with the power to permanently close down associations, whereas the TCC as a new body established by the Constitution was vested with the same function regarding political parties.[869] In 1975 the TCC

[863] Yaniv Roznai and Serkan Yolcu, "An Unconstitutional Constitutional Amendment—The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision," *International Journal of Constitutional Law* 10, no. 1 (2012): 185.
[864] See Ibid.
[865] See Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study*.
[866] Loewenstein, "Militant Democracy and Fundamental Rights, II."
[867] Tyulkina, *Militant Democracy*, 2.
[868] Ibid.
[869] Article 19 of the 1961 Turkish Constitution.

emphasized the necessity of a "more differentiated system compared with classic democracies [to] [protect] itself against unwanted amendments"[870] thus, applying the logic of a militant democracy.

The 1961 Constitution gave vast supervisory powers to the TCC in terms of the functioning of political parties. Article 19 foresaw the possibility of dissolution in the event of abuse or religion, whilst Article 57 further tightened the grip on the functioning of political parties, specifically their financing and operations, under the supervision of the TCC. Mainly, Article 57 mandated that parties' internal documents confirm with the principles of a democratic and secular republic, based on human rights and liberties, with a possibility of dissolution in the event of non-compliance. The finances and internal affairs and activities of political parties were also subject to the supervision of the TCC.

Under the 1961 Constitution, the TCC would dissolve six parties. One of these was the National Order Party, considered a herald and leader of the Islamic Political Parties movement "[promoting] the religious agenda of political parties [and] expressing a particular [Islamic] tradition."[871] The party was established in 1970 and was led by Erbakan, with a platform aimed at stopping the process of Westernization and reframing Turkish identity along Muslim lines.[872] After the turmoil and unrest in the 1970[873] and the 1971 "coup by memorandum" the party was dissolved for aiming to violate the secular order of the state mainly, emulated in the party's advocacy for introducing compulsory religious education and the repeal of Article 163 of the Turkish Penal Code (see above).[874]

[870] Bertil Emrah Oder, "Turkey," in *The 'Militant Democracy' Principle in Modern Democracies*, ed. Markus Thiel (Farham: Ashgate Publishing, 2009), 268.
[871] Chen Yang and Changgang Guo, "'National Outlook Movement' in Turkey: A Study on the Rise and Development of Islamic Political Parties," *Journal of Middle Eastern and Islamic Studies* 9, no. 3 (2015): 3.
[872] For an overview of the movement see Yang & Guo, ""National Outlook Movement" in Turkey," 3.
[873] See Ahmad, "Politics and Political Parties in Republican Turkey," 248.
[874] Yusuf Şevki Hakyemez, "Containing the Political Space: Party Closures and the Constitutional Court in Turkey," *Insight Turkey* 10, no. 2 (2008): 135–44.

For decades to come, the TCC would be one of the main institutions considered a protector of Atatürk reforms and *laiklik* in the spirit of its establishment. The TCC would interpret *laiklik* as an indicator of modernity and of the rupture with the past, while *laikliks*' transformative role as the driving force in the transition from umma to nation. On one hand, the TCC was established as an antidote for the previous, extremely majoritarian regime, and it reflected the growing trends in Europe at the time towards establishing Constitutional courts and pluralist models of democracy protected by independent high courts.[875] On the other, as Özbudun claims, due to the turmoil and threat posed by the Democratic Party in the previous decade, TCC was established for "the desire of once dominant and now threatened political elites to protect their status by means of constitutional guarantees."[876]

2.2.2 Strengthening the Diyanet

The Diyanet gained constitutional status under the 1961 Constitution. Szyliowicz, who published an analysis of the constitution two years after its enactment, attributed its constitutionalization on the context, mainly "the extent of religious feeling in the country" that necessitated a strict government control "regardless of logical niceties."[877]

According to Article 136, the Diyanet was part of the general administration and were to function "in accordance with the principles of secularism, removed from all political views and ideas, and aiming at national solidarity and integrity."[878] A new law regulating the Diyanet - "Law on the Establishment and Tasks of the Presidium for Religious Affairs"[879] was enacted in 1965 giving the Diyanet vast responsibilities beyond its previous scope. The institution was no longer simply tasked with the management of faith and worship, but also with the task of "overseeing affairs concerning belief, worship and moral foundations of Islam" [880]

[875] See Özbudun, *The Constitutional System of Turkey: 1876 to the Present*, 122.
[876] Ibid.
[877] Joseph S. Szyliowicz, "The 1961 Turkish Constitution - An Analysis," *Islamic Studies* 2, no. 3 (1963): 366.
[878] Article 136 of the 1961 Turkish Constitution.
[879] Law no. 633 of June 22, 1965.
[880] Öztürk, "Transformation of the Turkish Diyanet Both at Home and Abroad," 5.

strengthening "'morality and morals' (ahlak) 'the enlightenment of society' in matters of religion and with the teaching of the 'correct' interpretation of Islam."[881]

3. The Framework of the 1982 Constitution and the Normative Content of *Laiklik*

The 1982 Constitution was also drafted in the aftermath of a military intervention through a more exclusionary and less representative process than its predecessor.[882] Its framework not only upheld, but also strengthened the protections envisioned in the 1961 Constitution. The context from which both constitutions emerged and the framework that they impose/d have ignited debates regarding the nature of constitutionalism in Türkiye, the role of rigid constitutional entrenchment itself,[883] and the possibility of the constitution serving as a tool for hegemonic preservation.[884] In that vein, Isiksel has argued that in the Turkish example constitutionalism is at the same time "authoritarian" and "constitutional," and takes "the form of meticulous adherence to a constitution whose terms directly and unequivocally subordinate the liberties of citizens to an oppressive conception of public order and security."[885] Thus, even though the primary role of such guarantees was to uphold democracy and uphold the republican form of government, both Taspinar[886] and Burak[887] have argued that the entrenchment of secularism and secularism itself have endangered democracy and democratic consolidation in the long run.

[881] Günter Seufert, "The Changing Nature of the Turkish State Authority for Religious Affairs (ARA) and Turkish Islam in Europe," 15.
[882] Özbudun, "Secularism in Islamic Countries: Turkey as a Model," 162.
[883] On the fallacy of the nexus between rigid constitutional entrenchment and protection of individual rights and democracy see Melissa Schwartzberg, *Democracy and Legal Change* (Cambridge: Cambridge University Press, 2007).
[884] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of New Constitutionalism* (Cambridge, MA and London: Harvard University Press, 2007).
[885] Isiksel, "Between Text and Context," 710.
[886] Ömer Taspinar, "The Old Turks' Revolt: When Radical Secularism Endangers Democracy," *Foreign Affairs* 86, no. 6 (2007): 114–30.
[887] Begüm Burak, "Turkey's Secularism Experiment as an Impediment to Democratic Consolidation," *Journal of Political Administrative and Local Studies* 4, no. 1 (2021): 54–71.

3.1 The Context Surrounding the Drafting of the 1982 Constitution

A series of events led to the 1980 coup: mainly political tensions between conservative and left-wing streams, societal changes and movements (especially student and workers movements) and events around the world escalated in the late 1970s and steered turmoil and unrest.[888] The aim of the 1982 Constitution, according to the NSC, was to restructure the democratic system in order to prevent future "political polarization, violence, and deadlock."[889] The Constitution was designed to "maintain the military as the ultimate guardian and arbiter of the political system through a strengthened presidency and the NSC." The NSC hoped that the strong Presidency will always be under the control of the military.[890]

In its core, the Constitution aimed at protecting the state and its authority against its citizens rather than vice-versa.[891] In the process, state-controlled and sponsored Islam was operationalized to achieve and maintain social cohesion, primarily through education (see Chapter 5). This approach of the military towards religion came to be known as the Turkish-Islamic synthesis (*Türk-Islam sentezi*). It "combined Turkish nationalism and Islam with changing emphasis on either side according to the needs of the governments."[892] Güvenç claims that this "synthesis" was a deceptive cover up for the restoration of Islam "operating under two premises: (1) There is an unchanging core of culture(s) and (2) That core is religion [or Islam]."[893] As Güvenç claims, between 1986 and 1996 this resulted in two trends: "looking West to [the] European Union but steadily shifting towards political Islam."[894]

[888] See Ahmad, "Politics and Political Parties in Republican Turkey," 248.
[889] Özbudun and Gençkaya, "Chapter 1: The History of Constitution-Making in Turkey," 19.
[890] Ibid, 21.
[891] Ibid, 21.
[892] Funda Karapehlivan, "Constructing a 'New Turkey' through Education," Heinrich-Böll-Stiftung, October 1, 2019, https://tr.boell.org/en/2019/10/01/constructing-new-turkey-through-education.
[893] Güvenç, "History of Turkish Education." 80.
[894] Ibid.

3.2 The Framework of the 1982 Constitution

3.2.1 Aspirational Commitments? The Preamble and the Guarantees in Article 4 and Article 174

The Preamble of the 1982 Constitution positions the Constitution in line with Atatürk's reforms and principles. Although revised by the 1995 and 2001 constitutional amendments to gain a more liberal tone, these protections remain. The absolute sovereignty is vested fully and unconditionally in the Turkish Nation and limitations are posed on the way that representative bodies can exercise sovereignty in the name of the people, mainly prohibiting deviation "from the liberal democracy indicated in the Constitution and the legal system instituted according to its requirements." Most importantly to our debate, *activities*[895] contrary to the principles and reforms of Atatürk are not awarded protection, and the involvement of sacred religious feelings in state affairs and politics is absolutely prohibited under the principle of secularism.

However, the guarantees and limitations set forth in the Preamble are not simply aspirational as they are awarded actual protection in additional provisions and due to their interpretation by the TCC. Namely, Articles 24, 68 and 69 impose an absolute ban on the use of religious feelings in state affairs, Article 2 determines the characteristics of the state, while Article 4 defines them as irrevocable and finally, Article 174 awards special protection to the Kemalist reform laws. Additionally, the TCC awarded the principles set forth in the Preamble the status of irrevocable,[896] thus setting limits on the possibility of their amendment.

3.2.2 Unamenable Provisions: Article 1 and Article 2 as protected by Article 4

Article 1 affirms the republican form of governance, whereas Article 2 characterizes the state as "democratic, *laic* and social… loyal to the nationalism of Atatürk and based on the fundamental tenets set forth in the Preamble."[897] Article 4 defines these two provisions as

[895] Before the 2001 constitutional amendments "thoughts and opinions" were included instead of activities.
[896] Oder, "Turkey," 267.
[897] Article 2 of the 1982 Turkish Constitution.

irrevocable. According to Oder, "the principle of irrevocability [translates]… the term 'national resistance' into terms of a strong legal guarantee for the protection of national sovereignty and the republic."[898]

The protection of both the form of government and the characteristics of the state together as irrevocable reflects the interpretation of the concept of 'republic' in the Turkish context as a "unique national entity interacting with constitutional order or as an achievement that cannot be defined without a relation to Turkish modernism based on a secular state."[899] Furthermore, due to the traditionally understood nexus between *laiklik* and democracy, the TCC has long interpreted the concept of republic to be identified with a democratic state,[900] and *laiklik* itself is, as a principle enabling pluralism and democracy,[901] "vital in protecting the state and the nation."[902] According to Özbudun, this interpretation by the TCC is based upon "civilizational philosophical foundations" of *laiklik*[903] - justifying state control due to the nature of Islam as an "all-encompassing doctrine that regulates every aspect of life and recognizes no difference between state and religion,"[904] and thus, different than that of Christianity.

Irrevocability means that these provisions cannot be amended, nor can their amendment be proposed. Consequently, Article 1 and Article 2 enjoy the highest constitutional protection. The 1982 Constitution like the 1961 Constitution vested the TCC with the power to review only question related to form.[905] However, to limit the TCC interpretations like those in the past, it made it clear that questions on form specifically refer to "whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on

[898] Oder, "Turkey," 268.
[899] Ibid, 269.
[900] Ibid, 269.
[901] Ibid, 269.
[902] Ibid, 395.
[903] Özbudun, "Secularism in Islamic Countries: Turkey as a Model," 138.
[904] Ibid.
[905] Article 148 paragraph 1 of the 1982 Constitution.

debates under urgent procedure was complied with."[906] However, in 2008 the TCC delivered a controversial decision that tested this conception.[907]

The GNA enacted an on-face neutral constitutional amendment that would have made "[deprivation] of the right to higher education due to any reason not explicitly written in the law," prohibited, under the justification that religious attire had become a reason to deprive students from acquiring education.[908] The amendments were challenged in front of the TCC that had to circumvent the hurdle of only being granted authority of review only on questions of form. To do so, the Court relayed on its pre-1982 case law (see above) and the differentiation between original and derived constituent power to establish that "constitutional amendments need to be in accordance with the basic preferences arising from the integrity of constitutional norms mentioned above and materializing in the first three Articles of the Constitution."[909] The amendments were deemed unconstitutional as they were considered against secularism as an irrevocable characteristic of the state.

3.2.3 Protection and Limitation of Individual Rights: Article 10, Article 24 and Article 14

Article 10 guarantees equality before the law and prohibits discrimination based on several grounds among which is philosophical belief, religion and sect. The Article also imposes an obligation to state organs and administrative authorities "to act in compliance with the principle of equality before the law in all their proceedings."[910] Furthermore, Article 24 specifically protects freedom of conscience, religious belief and conviction, as well as the free exercise of

[906] Article 148 (1) of the 1982 Constitution.
[907] On commentary see Roznai and Yolcu, "An Unconstitutional Constitutional Amendment—The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision."; Metin Toprak and Nasuh Uslu, "The Headscarf Controversy in Turkey," *Journal of Economic and Social Research* 11, no. 1 (2009): 43–67.; Uzun, "Protection of Laicism in Turkey and the Turkish Constitutional Court."; Ergun Özbudun, "Judicial Review of Constitutional Amendments in Turkey," *European Journal of Law Reform* 21, no. 3 (2019): 278–90.
[908] General Reasons of Law No. 5735 in Roznai and Yolcu, "An Unconstitutional Constitutional Amendment—The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision."
[909] Judgment no. E. 2008/16, K. 2008/116 (Turkish Constitutional Court June 5, 2008). In Roznai and Yolcu, "An Unconstitutional Constitutional Amendment—The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision," 185.
[910] Article 10 of the 1982 Turkish Constitution.

acts of worship, religious rites and ceremonies. However, exercise of religion must not violate the limitations prescribed in Article 14 and Article 24 itself.

Article 24 paragraph 5 prescribes prohibition on the abuse of religion and religious feelings for personal gain, thus, explicitly restricting religious exercise in narrow terms. In the same vein, Article 14 imposes further limitations by prescribing the prohibition of abuse of fundamental rights and freedoms. Namely, the article states that rights cannot be "exercised in the form of activities aiming to violate the indivisible integrity of the State with its territory and nation, and to endanger the existence of the democratic and secular order of the Republic based on human rights." Thus, this conception is much broader than simply imposing public order limitations on the exercise of rights as in the 1961 Constitution (although public order is specifically prescribed as a limitation ground for other rights such as freedom of expression). Additionally, the endangerment of democracy and secular order is unequivocally included as a separate ground for limitation, narrowing the scope of permissible religious exercise and providing further protections of secularism in the constitution.

These limitations together with the limitations posed by the Preamble form what Uzun calls a *Restriction of Fundamental Rights and Freedoms Regime* - a multifaceted approach of constitutional limitations imposed on fundamental rights.[911] Thus, as Yazıcı argues, unlike the in the 1961 where restrictions to rights were constructed as an exception, under the text of the 1982 Constitution they are the rule.[912]

3.2.4 Protection of the Public Sphere: Article 14, Article 24, Article 68 and Article 69

The 1982 Constitution retained the mechanisms of militant democracy as introduced by its predecessor. Thus, according to Oder, per the current framework, Türkiye must be placed among "'militant substantive democracies' where an 'unalterable core' of the constitution aims

[911] Uzun, "Protection of Laicism in Turkey and the Turkish Constitutional Court."
[912] Serap Yazici, "A Guide to the Turkish Public Law Order and Legal Research," NYU Law GlobaLex, October 2017, https://www.nyulawglobal.org/globalex/Turkey.html.

to protect the democratic regime from its internal opponents."[913] According to Özsunay, "one of the basic characteristics of the Republic of Turkey, [is that] secularism is defined as no interference whatsoever of sacred religious feeling in state affairs and politics." [914] Constitutionally enshrined protections against such interference take not only individual, but also group dimensions and include a specific regime regarding political parties and the public sphere.

The non-protection regime as vested in the Preamble as well as the paragraph 5 of Article 24 limits the enjoyment of freedom of religion in a manner that would interfere with state affairs. First, similarly to the Preamble and the provisions of the 1961 Constitution, paragraph 5 of Article 14 prohibits the exploitation or abuse of religion or religious feelings for political, in additional to personal, interest or influence. Second, it directly bans the use of religious tenets as justification for any form of state action. Hence, it protects both the political process as well as the exercise of state power from religious influence.

These provisions in the Turkish context have been interpreted not only to set limitations on the use of religion tenants on the justification of state power, but also as the obligation to base state policies in accordance with not only reason but also science.[915] This understanding finds its correlation with the understanding of *laiklik* not only as a principle of secularizing power, but also informing power as in line with a specific modernizing mission. The modernist foundations of *laiklik*, as Özbudun frames them, promote a conception of *laiklik* linked to the nature and function of modern societies, mainly that they ought to be based on science and reason in contrast to societies based on religious dogma viewed as backward and traditional, from which the world must and will evolve. [916]

[913] Oder, "Turkey," 264.
[914] Ergun Özsunay, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Turkey," *Emory International Law Review* 19 (2005): 1091.
[915] Ibid.
[916] Özbudun, "Secularism in Islamic Countries: Turkey as a Model," 138.

Furthermore, Articles 68 and 69, much like the 1961 Constitution, impose specific restrictions on the operations of political parties. Article 68 paragraph 4 sets limitations on the content of statutes and programs of political parties as well as their activities of political parties as they must not be contrary to, among other things, "the principles of the democratic and secular republic." According to Article 69, the TCC can decide to permanently dissolve a political party if its statute and program violate Article 68 paragraph 4. Articles 84 through 89 of the 1983 Law on Political Parties[917] further broadened and secured this ban. These provisions further tighten the scope of permissible political party engagement as they explicitly protect Atatürk's principles and reforms as well as his memory and the prohibition of the advocacy of the return of khilafat.

The justification of such strong protections is the threat that religion poses to the state system as a competing system of normative ordering. Thus, the system must protect itself from these threats in their conception, even if they only exist in the political discourse. As secularism serves as an antidote against such threats, it must be reenforced with the greatest level of protection from those who challenge it. The interdependency between secularism, the republican form of government and democracy reenforces the need for these protections.

The overall TCC decisions resulting in party dissolution under the 1982 Constitution fit in two groups: 1) against parties advocating for minority protection (mainly Kurdish) under the justification of threats to indivisibility of the state and 2) against parties for alleged violations of the principle of secularism.[918] More specifically, the TCC dissolved and banned five political parties under the justification of anti-secular activities,[919] while, as a concession to the fact that AKP was in power, fining and temporarily freezing state funding of the AKP in 2008.

[917] See "Turkey Law on Political Parties, Opinion No. 926/2018 CDL-REF(2018)032," (European Commission for Democracy Through Law (Venice Commission), August 22, 2018).
[918] See Tyulkina, *Militant Democracy*, 173.
[919] National Order Party (May 20, 1971), the Turkey Peace Party (October 25, 1983), the Freedom and Democracy Party (November 23, 1993), the Welfare Party (January 16, 1998), and the Virtue Party (June 22, 2001).

Before 2001 the TCC mainly applied judicial tests to assess the danger posed by the party in question, looking at its statues, programs as well as activities. In cases concerning the unitary and secular state, the TCC assessed danger through "visible in references to 'incitement to hatred, hostility or prohibited activities… or anti-laic activities destroying the public order, which create anxiety and threat for the other members of society."[920] These activities, as those in the well-known *Refah Partisi*,[921] included advocacy of party members for a religious jihad and the reintroduction of a legal order based on Sharia through violence, or supporting a member of parliament in wearing a headscarf by the party leader and the parliamentarian group as in the *Fazilet Partisi* case.[922] Before 2001 the TCC had referred to present and visible danger or "an increasing danger potential under [Türkiye's] specific conditions" as a test regarding the gravity of the danger to the republic and democracy, but also in the use of violence to achieve system-change.[923] The gravity of the danger was assessed within the might and support enjoyed by the party we well as specific contextual considerations. Namely, in the Fazilet Partisi case "the significance of the secular state itself especially in contrast to its history as a theocratic state" was a key consideration.[924]

The TCC's rigidity in the interpretation of these constitutional provisions and the "eagerness" rule on party dissolution, as Arslan argues, reflect an 'ideology-based' approach with positivist, one-dimensional, monolithic, and authoritarian features.[925] Thus, according to him, in political party cases instead of prioritizing individual rights and freedoms, the TCC has constantly favored the state and society over the individual. Tyulkina has argued that the legal framework and its implementation by the TCC prohibits the foundational principles of the

[920] Oder, "Turkey," 299.
[921] See Refah Partisi (the Welfare Party) and Others v. Turkey, No. 41340/98, 41342/98, 41343/98 et al. (European Court of Human Rights February 13, 2003).
[922] Oder, "Turkey," 299.
[923] Ibid.
[924] Ibid.
[925] Zühtü Arslan, "Conflicting Paradigms: Political Rights in the Turkish Constitutional Court," *Critique: Critical Middle Eastern Studies* 11, no. 1 (March 1, 2002): 9–25.

Turkish republic to be "debated or questioned even through peaceful democratic process."[926] On the other hand, Oder argues that TCC "case law on political parties proves that the Constitutional Court has moved progressively to a more elaborate approach where 'incitement to hatred, hostility or prohibited activities' and 'present and visible danger' are discernible." [927]

3.2.5 The Special Protection of Reform Laws: Article 174

Article 174 has the identical wording as Article 153 in the 1961 Constitution, enumerating eights laws considered raising Turkish society above the level of contemporary civilization and safeguarding the secular character of the Republic. Among these laws is the Law on the Unification of the Educational System, the Law on the Closure of Dervish Monasteries, provisions establishing civil marriage, the establishment of the Turkish alphabet and laws related to religious garments. This provision prescribes limits on constitutional interpretation, restricting future interpretive maneuvering by stating that "no provision of the Constitution can be construed or interpreted as rendering unconstitutional the Reform Laws." Thus, while they can be amended or repealed by the legislature, "their constitutionality cannot be challenged before the Constitutional Court, thus giving them a status above that of ordinary legislation."[928] Hence, oddly enough while the constitution drafters ensured that the foundational laws are protected from interpretation, they left them "vulnerable" to changing legislative majorities.

3.2.6. Strengthening the Diyanet: Part 2

Article 136 of the 1982 like the 1961 Constitution places the Diyanet as part of the central public administration, performing its duties "in accordance with the principle of secularism, remaining outside all political views and thoughts, and with the aim of fostering national solidarity and integration." The position and protection of the Diyanet was further strengthened with the 1983 Law on Political Parties, which prohibited any political party to aim at changing

[926] Tyulkina, *Militant Democracy*, 180.
[927] Oder, "Turkey," 306.
[928] Özbudun, "Secularism in Islamic Countries: Turkey as a Model," 167.

the public status of the Diyanet under the threat of dissolution by the TCC, thus putting it under the same protections as values under provisions of militant democracy. [929]

4. Conclusion

The aim of this Chapter was to contextually frame *laiklik* and its normative potential, and thus answer the first sub-question of the dissertations as related to Türkiye mainly: *How the principle of secularism was constructed, and what contextual determinators were key in its normative conceptualization?*

This chapter has found that as a theoretical framework, *laiklik* is constructed as an essential precondition to democracy and the republic and is intimately linked to a special type of citizenship and a vision of society. The role of *laiklik* as a protector against political Islam rests on a particular understanding of political Islam as an existential threat. Under this understanding, the nature of political Islam is different than that of Christianity and thus, needs a different form of "containment;" as it is an all-encompassing doctrine that seeks to regulate every aspect of life and aims to establish itself as the highest source of normative ordering, *Laiklik* also had a particular function in secularization and building not only of the state, but also of the nation and society. Thus, the foundation and development of *laiklik* in Türkiye were closely related to the efforts to fulfil the "big" dream of achieving modernization and westernization. This also gave birth to a homogenous abstract ideal of Turkishness and, therefore, citizenship. Hence, even though the provisions of the Lausanne Treaty award rights to religious minorities and equality clauses exist in the legal framework, they impose a framework of tolerance and not equal citizenship. Additionally, the scope of protected minority groups is interpreted restrictively, thus, those excluded from the Treaty are denied any sort of recognition.

[929] On an overview of the limited case law see Ergun Özbudun, "Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and the European Court of Human Rights," *Democratization* 17, no. 1 (2010): 125–42.

As a principle governing religion-state relationship, the framework of *laiklik* is related to the consolidation of power of the republican regime and the perceived power of Islam. Thus, *laiklik* is linked to "the construction of internal and external sovereign state capacity,"[930] mainly, the secularization and consolidation of state power. In terms of the approach taken this endeavor was achieved in two stages: 1) in the first decades of the Republic, when cleansing of the public sphere was approached with caution, due to the extreme internal and external pressures from political actors maintaining opposite visions for state and society; 2) after it had consolidated its power when it broke all ties with the previous regime and entrenched *laiklik* as a constitutional principle forging the nations' destiny to uphold the founding fathers' vision for state and society.

Unlike in France and Italy where the development of different models of religion-state relationships was a product of church-state power struggles, in Türkiye the republican government delt with dissent and consolidated its power swiftly. Thus, instead of moderation and or negotiation, *laikik* was established as a principle imposing state control over the majority religion instead of separation or independence. The road toward the consolidation of power and the nature of Islam itself as well as its role in the previous regime gave birth to a specific kind of *laiklik* – one that allows for complete control over the majority religion and simply tolerates all others (to a certain extent). The necessity for overall control over religion was three-fold: 1) to establish a kind of Enlightened Islam; 2) to use Islam to construct and build national identity; and 3) to prevent the use/misuse of religion by opposition forces within the country.

The nexus of the trifecta – republic, democracy and *laiklik* – as mutually linked and interdepended, have informed the future constitutional and institutional protection of *laiklik* as an indispensable principle. Thus, both the 1961 and 1982 Constitutions have introduced multi-

[930] Peker, "Beyond Positivism," 301.

level protection of *laiklik*: as an irrevocable characteristic of the state protected through tools of militant democracy and as a concept that itself serves as a limitation on individual rights. Two institutions were responsible for upholding *laiklik*: the new-established TCC and the military; the former through party supervision and interpretation, the other through force.

As a normative framework the Turkish state is secular in a sense that state power is secularized, the republican form of government is protected, neutrality is upheld and equal protection despite religious (non) belonging is guaranteed. However, the model that it has produced is not one of separation, but of control.

The rise of the AKP, post-2010, its commitment to communal values and its successful efforts of reintroducing religious symbols in the once "cleansed" public sphere (unsuccessfully challenged on front of according to some the captured judiciary[931]) have weakened *laikilks*' normative salience. An alternative reading, however, is that in an event of state capture no principles "survive" or they are transformed to be used as per the capturer's will. A more Turkish-centered reading will be, however, that a system of control over the majority religion allowed for such a transformation. Perhaps, what Cornell noted in reference to the Diyanet is equally applicable to the entirety of the Turkish model – that it succeeded in "[constituting] a check on political Islam as long as the state was controlled by the republican establishment. But once the state came under the control of political Islam, it became a handy tool for the propagation of this ideology."[932]

In the next chapters devoted to education and state funding of religion, the implications of the AKP era will be further analyzed. The aim will be to see how *laiklik* has been re-

[931] See Ilker Gökhan Sen, "The Final Death Blow to the Turkish Constitutional Court," *Verfassungsblog* (blog), accessed July 4, 2021, https://verfassungsblog.de/death-blow-tcc/.; Maria Haimerl, "The Turkish Constitutional Court under the Amended Turkish Constitution," *Verfassungsblog* (blog), accessed July 4, 2021, https://verfassungsblog.de/the-turkish-constitutional-court-under-the-amended-turkish-constitution/.

[932] Svante E. Cornell, "The Rise of Diyanet: The Politicization of Turkey's Directorate of Religious Affairs," *The Turkey Analyst*, October 9, 2015, https://www.turkeyanalyst.org/publications/turkey-analyst-articles/item/463-the-rise-of-diyanet-the-politicization-of-turkey%E2%80%99s-directorate-of-religious-affairs.html.

interpreted on the legislative and judicial level as well as to see how judicial interpretation in cases related to constitutional secularism lead to the "thickening" or "thinning" of the principle of secularism.

Chapter 5. (Re)interpreting Secularism: Questions in Education

As presented in previous chapters, constitutional secularism – as a word simply embedded in constitutions (or constructed in jurisprudence as in Italy) - gains *its content* as a normative framework by the effects that it produces in the legal universe (through laws and interpretation). In this Chapter on a quest to "discover" the content of secularism, I will look at legislative frameworks and cases in the field of education as a historic battleground between state and religious forces for the heart and soul of the nation. More specifically, the Chapter will focus on the state funding of private schools, religious education in public schools and religious symbols in public schools. The choice of areas of study rests on the premise that their constitutionality has been indirectly or directly linked to the interpretation of secularism. As we shall see, issues arising in these areas have been met with political negotiations and compromises, indicating that even though secularism is constitutionally protected and offers certain minimal normative guarantees (see Chapters 2-4), it also allows for practical mishmash. Thus, while on one hand secularism manages to safeguard the secularization of sovereign power, on the other, it allows for state intervention otherwise considered impermissible under a vast pallet of justifications. In this story, courts have been key actors in legitimizing state policies whilst indirectly or directly reinterpreting the principle of secularism.

The aim of the chapter is to answer two sub-questions of the dissertation: *How has the normative content of the principle of secularism been developed or challenged in the field of education? Does judicial interpretation in cases related to constitutional secularism and education lead to the "thickening" or "thinning" of the principle of secularism?*

To do so, the framework of the chapter will go as follows: Section 1 will provide an account of available avenues for state funding of religious private schools. Section 2 will provide an account of the current framework of religious education or teaching about religion in public schools, focusing on curriculum content and opt-out procedures as well as the

appointment of teaching staff. Section 3 will provide an overview of the frameworks governing the permissibility of the presence of religious symbols in public schools. To see how the current legal frameworks resolve issues arising in these areas and how courts have justified their (im)permissibility, every section devoted to each area will take the following form: first, I will outline the current legal regimes and how they came to be - the arguments that supported and opposed its enactment as well as the legislative purpose that the laws in place serve; then, I will look at the arguments and interpretative techniques that constitutional courts, and in certain instances, high courts have used to justify their (un)constitutionality/(im)permissibility.

1. Funding of Private (Religious) Schools

Even though France, Italy and Türkiye are constitutionally secular republics that have successfully taken over the function of educating the citizenry, the interpretation of secularism in all three jurisdictions has been adjusted to allow for some sort of state funding to private religious schools. Thus, under the justifications of individual and collective rights as well as equality, non-financing clauses once strictly applied towards private schools have been reinterpreted to exclude their application. This section will aim to analyze the underlining considerations that have led to this shift, the legal framework establishing avenues of state funding and the reinterpretation of courts that have legitimized them. Hence, the section will provide 1) a summary of the establishment and supervision of private schools; 2) a summary of the underlining reasons for the shift in the interpretation of non-financing clauses and funding schemes in force today and; 3) an overview on how courts reinterpret non-financing clauses to reconcile state funding to private religious schools under constitutional secularism.

1.1 Establishment and Supervision – A Short Summary

Freedom of education and its exercise through the establishment of private schools is guaranteed in all three jurisdictions.[933] The state[934] has competences in the establishment as well as supervision of the operation and the curriculum of private educational institutions and their parity. In France *all* private schools (denominational or not) are governed by the Code of Education. More specifically, the 2018 Gatel Law[935] further extends shared competences of administrative authorities[936] to oppose the establishment of private schools based on interest of public order, health and social prevention as well as the protection of children and young people and human dignity.[937]

In Italy, there are general rules for the establishment of private schools,[938] as well as special regimes dealing with denominational schools – differentiating between private schools established by denominations under agreement with the state, and thus, regulated by them; and those that are not. The latter can be established under article 24 of the 1930 Royal decree n. 289,[939] provided that the denomination has a legal personality.[940] Muslim schools, due to lack of organizational centrality in representation,[941] are usually established as foreign schools.[942]

[933] For France see Part 3 of Circular n ° 2018-096 of 8/21/2018, for Italy see Article 9 of Act no. 121 of 1985.
[934] Notwithstanding its competences as separated among its decentralized territory (regions, communes, municipalities.)
[935] Law no. 2018-266 of April 13, 2018.
[936] More specifically the mayor, the representative of the State in the department and the public prosecutor.
[937] Article L. 441- 1 of the French Education Code.
[938] Carmen Quintanilla Barba, "Right to Freedom of Choice in Education in Europe" (Council of Europe, Parliamentary Assembly, June 20, 2012).
[939] Stella Coglievina, "Religious Education in Italian Public Schools: What Room for Islam?," *Stato, Chiese e Pluralismo Confessionale*, no. 29 (2017): 9.
[940] To obtain legal personality, religious bodies must gain approval from both the Council of Ministers and the Council of State. See Article 2 of Law no. 1159 of 1929.
[941] This has made it impossible for Muslim organizations to sign an agreement with a state and even to gain recognition. By 2017, the only Muslim organization with legal recognition was the Islamic Cultural Centre of Italy (*Centro Islamico Culturale d'Italia*), an organization that is currently not operating schools under the provisions in the 1930 law. See Coglievina, "Religious Education in Italian Public Schools: What Room for Islam?," 7.
[942] Additionally, there have been a few cases where local authorities have attempted to close such already established Muslim schools for example, the Via Quaranta school in Milan teaching Islam and Arabic and promoting integration by organizing Italian language courses was closed in 2006 "in order to avoid educational segregation of pupils," under formal requirements (such as hygiene and safety, that were rarely if ever used throughout history). The Via Ventura, still operating today in the Milanese outskirts, fought a difficult battle

In Türkiye, the 2007 Law of Private Education Institutions (*Özel Öğretim Kurumları Kanunu*), No. 5580 regulates the establishment and operations of private schools that can be private minority schools (further protected by the Lausanne Treaty),[943] private foreign schools and private international education schools, all under the supervision of the Ministry of education.[944]

The operation of private schools is supervised by the state, primarily in terms of compliance with health and safety standards as well as in terms of content. In France, the content of state-financed courses in schools under contract (see below) are supervised to a great extent, whilst schools outside of contract are under greater overall scrutiny especially in their first year, [945] during which they can be terminated if they (among other things) pose a public order risk.[946] In Italy, state supervision is mostly limited to requirements related to hygiene and safety[947] and the compliance "with the principles of the Constitution and [the] education system and aimed at the learning objectives both general and specific for each qualification."[948]

In Türkiye, education must be conducted in line with the principles and reforms of Atatürk and under the supervision and control of the State. [949] Freedom of education is protected,[950] but it does not "relieve the individual from loyalty to the Constitution." Private schools are similar to state schools in terms of type and curricula and are completely under the

before it opened in 2006 "(i.e., problems in obtaining permission to use the spaces for educational purposes; urbanistic problems etc.) based on ideological/political reasons." See Ibid.

[943] In Türkiye, Article 40 of the Lausanne Treaty provides that non-Muslim minorities: "shall have an equal right to establish, manage and control at their own expense…any schools and other establishments for instruction and education, with the right to use their own language and to exercise their own religion freely therein".

[944] For further analysis on the Law see Nimet Özbek Hadimoglu, "Minority Schools, Foreign and International Schools in the New Law on Privat Educational Institutions," *Ankara Law Review* 5, no. 1 (2008): 53–100.

[945] Only in terms of required core compulsory education. See Article L442-2 of the French Education Code.

[946] Additionally, if upon inspection a threat to good order, public safety, security and health or even respect of the dignity of the human person, is detected the Public Prosecutor must be notified. See 3.2.1 - Respect for public order, Circular n ° 2018-096 of 8/21/2018.

[947] See Coglievina, "Religious Education in Italian Public Schools: What Room for Islam?," 7.

[948] "Organisation of Private Education," Eurydice - European Commission, October 9, 2017, https://eacea.ec.europa.eu/national-policies/eurydice/content/organisation-private-education-39_en.

[949] See Article 42 of the 1983 Turkish Constitution.

[950] Freedom of education – under state supervision- has been recognized and protected in all Turkish constitutions from 1924 to date, See Article 80 of the 1924 Turkish Constitution, Article 21 of the 1961 Turkish Constitution and Article 42 of the current 1982 Turkish Constitution.

supervision of the Ministry of National Education (the Ministry itself is responsible for preparing the curricula of private schools).[951] Unlike in France and Italy, the establishment of private *religious* schools is prohibited,[952] the prohibition was deemed constitutional by the TCC.[953] Minority schools protected under the Lausanne agreement (interpreted as Armenians, Jews and Greeks) are additionally directly controlled by the so-called Turkish chief deputy head in minority schools[954] - an official appointed by the Ministry, sharing administrative authority with headteachers and often surpassing their competences.[955]

Accordingly, the state in all the discussed secularist models holds supremacy as main educator[956] and maintains both its "licensing" and supervisory power over private educational establishments and their curriculum. The level of supervision varies depending on the strength of the state and, the level of the perceived threat that private establishments pose to public order, and social fragmentation. In France, public order concerns are a justification for the termination of private schools not under contract, whereas those under contract enjoy funding, but are under stricter rules for compliance and substantial supervision from the state (dependent on the nature of the contract). In Italy, state supervision of private schools is more loosely

[951] Frederick E Anscombe, "Islam and the Age of Ottoman Reform," *Past & Present* 208, no. 1 (2010): 159–89.
[952] Article 3 of the Law on Private Education Institutions (Law No. 5580) states "The same or similar private education institutions of religious education-teaching institutions cannot be opened."
[953]The Court has made clear that the prohibition for the establishment of private religious schools is in accordance with the Constitution. In 2012, the Turkish Constitutional Court maintained that "the state has a monopoly on the establishment of religious education-teaching institutions on the one hand and on the determination of compulsory and elective courses related to religious education and education in schools on the other hand." Judgment no. E. 2012/65, K. 2012/128 (Turkish Constitutional Court September 20, 2012) in Ultas Karan, "Right to Education-National Report Turkey" (ETHOS consortium, 2017).
[954] Suspended in 1949, the position was reintroduced again in 1962 and strengthened by the Law on Private Education Institutions in 1965 that foresaw that those appointed to this position had to be of 'Turkish origin' The words 'Turkish origin' were erased in 2007 and thus since 2008 the position is referred to as 'chief deputy head' however, in practice the requirement still stands. See Nurcan Kaya, "Discrimination Based on Colour, Ethnic Origin, Language, Religion and Belief in Turkey's Education System."
[955] Kaya, "Discrimination Based on Colour, Ethnic Origin,".
[956] In Italy, 90% of pupils attend public schools. See Date acquired from Italian Ministry of Public Education and the Catholic schools federation FIDAE 2011–2012 in Maria Chiara Giorda "The Case of Italian Illiteracy" in Ednan Aslan and Margaret Rausch, eds., *Religious Education Between Radicalism and Tolerance* (Austria: Springer VS, 2018).
In France 80% making the state "the largest employer in Europe." See Andre Legrand and Charles Glenn, "France," *International Journal for Education Law and Policy* 7, no. 1 (2011): 98.; In Türkiye more than 98% of students attend public schools. See Isa Dag, "An Overview and Comparison of Turkish Public Schools and Private Schools," *Journal of Education and Training Studies* 3, no. 6 (2015): 191–96.

implemented and denominational schools ran by organizations under contract with the state enjoy further guarantees. This is a result of the historically weaker position of the state vis-à-vis the Catholic Church, as well as its particular *intese* system. The fact that policies that diminished or banned the functioning of religious private schools such as those in France under Combes or in Türkiye from its foundation until today, were not enacted in Italy, created and supported the strong dualistic nature (private/public) of education. In Türkiye, the level of threat that religious schools were perceived to pose has led to their prohibition. Consequently, the state has maintained total control over the establishment, functioning and curriculum of private schools and is the only actor vested with the right to provide religious education.

1.2 The Shift Towards Funding, and Funding Schemes in Force Today

Up to a certain point of time, the non-financing clauses have been strictly applicable to private schools. In France, even though the non-funding clause in the 1905 Law has always been implemented with a dose of flexibility, when it came to private schools, the prevalent position in the Third Republic was that there should be no state funding available.[957] Surely, funds were necessary to build the infrastructure for the *école républicaine*, making it a dominant *choice* for students,[958] but even more so, laic public education was considered as a source of the resilience of *laïcité*, and, therefore, republicanism itself.

In Italy, in the course the constitution-making process of the 1949 Constitution, a decision was made not to incorporate private and non-profit schools into the public educational system. This decision was informed by both the desire to assert independence from the Catholic Church and to maintain cohesiveness through education in an otherwise fragmented society.[959]

[957] This was the dominant position held ever since 1880's. See Robert M. Healey, "Current Links In France Between the State and Private Schools," *Religious Education* 62 (1967): 485–92.
[958] After the WW1, one of the main goals was also the realization of the idea of uniform education for all citizens that ought to create equal opportunities. See, W. D. Halls, *Education, Culture and Politics in Modern France* (Oxford: Pergamon Press, 1976), 9.
[959] See Ibid.

Furthermore, Article 33 of the Constitution protecting the right to establish schools "*with no cost to the state*," was interpreted strictly as prohibiting funding to private schools.[960]

In Türkiye, all educational institutions including all religious schools are under the Ministry of Education, [961] thus, there is no duality of education. Private minority schools protected by the Lausanne Treaty and private secular schools[962] are allowed to operate, but until recently they did not receive any state funding. However, whereas in France and Italy it is enough to track legislative moves towards the funding of private education institutions (most of which -over 90%- Catholic)[963] as a herald for the renegotiation of the principle of secularism – in Türkiye we must also consider the development of Imam Hatip schools. Imam Hatip schools are the only religious schools in the country, even if public. They are not denominational schools, but vocational schools which through time developed into schools with parity "[offering] a curriculum providing vocational training and preparation for higher education," [964] and thus, have become a combination of both. Thus, they differ from denominational schools in France and Italy explored herein as they are also vocational schools, whereas in France and Italy vocational schools for training of the clergy are separate. Additionally, whereas in France and Italy, more than 90% of private schools are operated by religious authorities, Imam Hatip schools that have also gained parity, are operated by the state

[960] See Ventura, *Religion and Law in Italy*.
[961] Güvenç, "History of Turkish Education," 50.
[962] Some of these schools are considered operated by Islamist, among which is the Gülen movement with whom the AKP was aligned until 2013. See Kuru, *Secularism and State Policies Toward Religion.*; Natalie Martin, "Allies and Enemies: The Gülen Movement and the AKP," *Cambridge Review of International Affairs* 35, no. 1 (2020): 110–27.
[963] Indeed, those who have benefited most from this scheme are both in France and Italy are private Catholic schools - due to their large numbers. Even though more than 90% (8.500 schools) of private schools that operate under financial schemes offered by Debré law are Catholic schools, the 10% left are composed of non-denominational schools as well as minority schools alike (until 2017 there are 300 Jewish and less than a hundred Muslim schools. See "Private Muslim Schools Plow Their Way In France," Al Wakf France, July 24, 2017, https://www.alwakfrance.fr/private-muslim-schools-plow-their-way-in-france/?lang=en. In this context it is important to note that 90% of schools in Italy are public schools. Of those 10% private schools over 75% are Catholic schools. The numbers differ significantly between the types of schools. Data acquired from Italian Ministry of Public Education and the Catholic schools federation FIDAE 2011–2012 in Maria Chiara Giorda "The Case of Italian Illiteracy" in Aslan and Rausch, *Religious Education Between Radicalism and Tolerance*.
[964] Köse and Others vs Turkey, No. 37616/02 (European Court of Human Rights November 7, 2011), para. 5. citing Section 32 of the Basic Law on State Education defining the İmam-Hatip secondary schools.

and therefore fully dependent (financially and otherwise) on the will of the governing majority. Thus, their development and funding have always relayed on the will of the state at a particular time.

In the following section, I will look at the shift towards looser interpretation of non-financing clauses in each jurisdiction and the underlining causes for such shift. I will also provide a short overview of the current legislative framework governing them.

1.2.1 France: Funding as Freedom of Choice, Neutrally Applied

The 1959 *Debré* Law cementing the shift towards state funding of private schools was enacted under the strong influence by organizations related to the Catholic Church, under the banner of freedom of choice. Surly, state funding of private schools first emerged as part of the overall large scale welfare policies enacted post-WW2.[965] However, it was under the advocacy of the *Mouvement Republicain Populaire,* a politically successful confessional party,[966] that both the preceding 1951 *Marie* and *Barangé* Laws[967] and the *Debré* Law itself were enacted. In its original form, the *Debré* law was a product of political bargaining,[968] striking a balance between two dominant groups. The first group, led by the *Mouvement Republicain Populaire,*[969] supported by the Catholic Church and laity,[970] advocated for state funding

[965] Stanley Hoffmann, "The Effects of World War II on French Society and Politics," *French Historical Studies* 2, no. 1 (1961): 50.
[966] Robert M. Healey, "The Year of the Debre Law," *Journal of Church and State* 12, no. 2 (1970): 213–35.
[967] The 1951 *Marie* Law established indirect funding in the form of individual student merit scholarships to those attending *both* private and public schools, while the 1951 *Barangé* Law established education allowances. Ultimately, the schemes introduced by these laws did little to address the needs of students - instead they mainly benefited teachers in private schools. The family didn't receive the funds allocated by the law, rather than the funds went to association of parents of a particular school. Public schools were obliged to had to allocate the grants for paying "running expenses, maintenance, and equipment of school buildings." Private schools were obliged to allocate the total sum of the grants "assigned by priority [for] equalization of teacher salaries." See Healey, "The Year of the Debre Law," 216.
[968] During the Algerian crisis Charles de Gaulle calculated that its resolution would depend on the on the support of the opposition. Thus, he had to moderate between the two groups. See Frances C. Fowler, "The French Experience with Public Aid to Private Schools," *The Phi Delta Kappan* 68, no. 5 (1987): 356–59.
[969] A party that would further shape family and educational policies. See Philip Nord, "Catholic Culture in Interwar France," *French Politics, Culture & Society* 21, no. 3 (2003): 1–20.
[970] The party was strongly supported by the highly influential Catholic laity, teachers and parents of children in Catholic schools, as well as the Catholic clergy that advocated for subsidies ever since the Third Republic. See Adam B. Seligman, *Religious Education and the Challenge of Pluralism* (Oxford University Press, 2014).

without state oversight under the banner of freedom of choice. The second group was led by *Le Comité national d'Action laïque* and opposed state funding to private schools, under the banner for the primacy of the national secular education.[971] The context of the times had made the second group abandon a more radical position prevalent 15 years earlier that advocated for completely absorbing private schools into the public school's system.[972]

To reconcile these positions, in its original form the law only introduced a *contract of association* that made funding available to private schools if they accept state control over their operations. [973] Additionally, although schools were to keep their ethos/"special character,"[974] they had to abide by republican principles and non-discrimination in enrollment.[975] Thus, even though the law further widened the flexibility of the interpretation of the non-funding clause in the 1905 Law, its initial solution was very much in the spirit of the French Gallican tradition (in a rather limited sense - but still present). A concession from the original form of the law was made to accommodate objections of private school administrators (Catholic in majority)[976] by introducing the *simple contract*, primarily as a temporary measure. In 1971, the simple contract became a permanent option and additional guarantees for the administrative independence of private schools under contracts were established.[977] Thus, both the initial form of the law and its current form is a product of concessions made towards private schools, under the influence of the Catholic Church. [978]

[971] Healey, "The Year of the Debre Law," 217.
[972] See Healey, "The Year of the Debre Law."
[973] The state had the right to veto appointments of teachers and staff as they were public employees and to review the financial records of the schools. See Fowler, "The French Experience with Public Aid to Private Schools."; Richard Teese, "Private Schools in France: Evolution of a System," *Comparative Education Review* 30, no. 2 (1986): 247–59.
[974] Teese, "Private Schools in France."
[975] See Seligman, *Religious Education and the Challenge of Pluralism*.
[976] In particular, the possibility of the veto and hiring decisions. Frances C. Fowler, "The French Experience with Public Aid to Private Schools."
[977] Seligman, *Religious Education and the Challenge of Pluralism*.
[978] Healey, "The Year of the Debre Law," 217.

In its current form, the French Debré Law prescribes options for state funding under specific terms and conditions, available to *all* private schools notwithstanding the school's ethos (special character). Private schools can remain independent and only receive certain indirect subsidies in accordance with the Falloux Law,[979] or they can conclude a contract with the state.[980] Schools that have been operating for 5 years are eligible for entering into a contract with the state if they meet certain requirements regarding staff and facilities. Under the *simple contracts,* schools provide instruction of an acceptable equivalence to that of public schools,[981] more specifically "teaching of basic subjects in classes… is organized with reference to the curricula and general rules governing the timetables in public education schools." [982] *Association contracts* require a more comprehensive alignment with the public-school curricula since instruction is to be "provided according to rules and programs of public education."[983] As to student qualifications, both students from private and public schools are inclined to take the *baccalaureate,* an exam required for admission to higher education. Thus, a form of compliance with the public-school program is inevitable for those schools that operate without a government contract, if they want to be competitive on the market. Regarding the appointment and salaries of teachers, in schools under simple contract nominations and appointments are done by the private authority, thus, they are private sector employees whose salaries are paid by the State. In schools under association contract, on the other hand, teachers are appointed by the district school authority upon consultation with the school administration, they are, therefore, temporary public employees.

[979] See "Private Education in the European Union" (Eurydice, European Unit, December 2000).
[980] Over those private schools who have not established any kind of relationship with the state, the government has limited authority of supervision only over questions of morality, hygiene and student attendance. See Legrand and Glenn, "France," 104.
[981] Ibid, 100.
[982] "Private Education in the European Union" (Eurydice, European Unit, December 2000), 82.
[983] Ibid.

The law also prohibits schools from discriminating based on religious belonging in the admission process, thus, eliminating the potential of the use of public funds to support discriminatory practices.[984] Hence, while schools under contract may preserve their particular character, they must provide education in line with the complete respect for freedom of conscience of students.[985]

1.2.2 Italy: Funding as Equal Recognition and Broadening the Educational Offer

In Italy, the loser interpretation of the "no cost to the state" clause was reframed by the Catholic Church and other conservative actors who had actively advocated for parity.[986] This was possible because for more than 50 years after the enactment of the constitution, a law setting out the rights and obligations for the non-state schools which request parity was not enacted by Parliament.[987] The lack of such law left the debate on the interpretation of the "no cost to the state" clause open. Gradually, the issue was reframed: from questioning the permissibility of state funding to whether "full parity in State funding of State and private schools should be established."[988] Thus, what was once a clear position on general prohibition shifted towards a position that it is neither compulsory nor it is prohibited for the state to fund private schools.[989]

When the enactment of a law regulating public schools was finally discussed in 2000, the Catholic Church and the associations of Catholic schools' parents (FIDAE) emerged as the main proponents for equalization, under arguments of freedom of education and the respect of

[984] For an analysis of voucher programs in the US and their effect on discriminatory policies by religious private schools see Suzanne E. Eckes, Julie Mead, and Jessica Ulm, "Dollars to Discriminate: The (Un)Intended Consequences of School Vouchers," *Peabody Journal of Education* 91, no. 4 (2016): 537–58.
[985] Article 1 of Law No. 59-1557 of December 31, 1959 (Debré law).
[986] See Ventura, *Religion and Law in Italy*.; Ozzano Luca and Alberta Giorgi, *European Culture Wars and the Italian Case: Which Side Are You On?* (New York: Routledge, 2016).
[987] Even though Article 33 of the Constitution also determines that such law must be enacted to "ensure that these schools enjoy full liberty and offer their pupils an education and qualifications of the same standards as those afforded to pupils in state schools."
[988] Ventura, *Religion and Law in Italy*, 320.
[989] Ibid.

secularism, but secularism framed as a defender of pluralism.[990] Even though there were also those that opposed the equalization of private and public schools, claiming that freedom of education does not entail state funding and warning of possible fragmentation of the educational system,[991] the adopted version of Law 62/2000 established equalization. Perusing a secular purpose, the law cited "the expansion of the educational offer" as "the Republic's priority objective," which can also be seen as an extension of freedom of choice in education. In that direction, the enactment of the law ignited a trend of further expansion of avenues for public school funding, implemented by subsequent reforms.[992]

According to the current legal framework governed by the Law 62/2000 in conjunction with Law n. 27 of February 3, 2006, and Decree n. 267 of 29 November 2007, recognized private schools *become* part of the public educational system, which argued makes their funding no longer constitutionally questionable.[993] Under the law "there are only two types of non-State schools: the *scuole paritarie,* which have obtained equal status through law 62/2000, and *scuole non paritarie*, which did not apply or did not obtain the equal status."[994] Direct state funding is only available to primary and pre-primary *scuole paritarie,* operated by local organizations or associations if they meet certain conditions among which is accepting all

[990] According to Ozzano and Giorgi, freedom of education was framed as the parents right to choose their child's education and the subsidiary role of the state to that of the family (employed by the Catholic front). Additional arguments were related to the efficacy and expensiveness of public education and claims of discrimination not only to religious students but also those under economic strains. See Ozzano and Giorgi, *European Culture Wars and the Italian Case,* 97.
[991] Ibid, 99.
[992] Funding schemes have also been expanded in relation to non-profit making public schools. The 2015 so-called *Buona Scoula* reform made possible for non-profit public schools to receive funding from voluntary tax donations by parents and private donations, in addition to existing public funding schemes. The reform also foresees "tax deductions of up to 400 euros per student per year for parents who send their kids to private school." "This will cost taxpayers an estimated 100 million euros, in addition to 472 million euros earmarked each year for the non-public school system." See "Factbox: The Good School Reform," ANSA.it, accessed February 17, 2020, http://www.ansa.it/english/news/2015/05/05/factbox-the-good-school-reform_a07d6741-c3ed-429b-ad1f-b63618d0e41c.html.
[992] See Ibid.
[993] Fulvio Cortese, Cinzia Piciocchi, and Charles L. Glenn, "Italy," in *Balancing Freedom, Autonomy and Accountability in Education*, eds. Charles L. Glenn and Jan de Groof, vol. 2 (Nijmegen: Wolf Legal Press, 2012), 261–76.
[994] Private Education in Italy, Organization at Eurydice available at https://eacea.ec.europa.eu/national-policies/eurydice/content/organisation-private-education-39_en#PrivateEdu

students with valid qualifications on equal footing.[995] The justification for funding is the fact that private and municipal pre-schools serve almost 40% of students in the country.[996] Higher *scuole paritarie* are not directly funded however, pupil "attendance is indirectly financed through grants to pupils and tax relief for families."[997] The law is neutral and treats all private schools equally regardless of their cultural orientation and educational teaching approach. Like in France, schools receiving funding are bound by conditions of non-discrimination in enrolment.

1.2.3 Türkiye: Funding as Broadening the Educational Offer and Raising Pious Generations

Even though private schools in Türkiye do not benefit from *direct* state funding, in the past 20 years there has been a trend in awarding some form of indirect state support. However, the shift from no funding to limited indirect state funding has been met with substantial challenges, as the privatization of education in Türkiye has been viewed by some as a means of entry of Islamic tendencies in the education system.[998]

The first attempt to introduce indirect state funding to private schools emerged in 2003, through a bill introducing tuition scholarships based on financial need,[999] as part of a block of neoliberal policies enacted by the AKP between 2002-2007.[1000] However, the bill never materialized into a law as President Sezer vetoed its enactment. Considered a "constantly secular politician"[1001] President Sezar vetoed the bill under the justification that it allocates

[995] Additionally, to include the same procedures as for state exams the fulfillment of the compulsory education; to issue certificates with the equal legal value as those from public schools; employment of qualified staff; and agreeing to evaluations by governmental agencies. For more see the Italian Ministry of Education website information available on: https://www.miur.gov.it/web/guest/agevolazioni-fiscali

[996] In fact, in 2010, 8.094 out of 24.221 preschools were pre-schools paritarie, out of which 81.5% were denominational (Catholic) schools.

[997] Private Education in Italy, Organization at Eurydice available at https://eacea.ec.europa.eu/national-policies/eurydice/content/organisation-private-education-39_en#PrivateEdu

[998] See Deniz Kandiyoti and Zühre Emanet, "Education as Battleground: The Capture of Minds in Turkey," *Globalizations* 14, no. 6 (2017): 869–76.

[999] Prior to the bill, the same formulation was introduced via a circular from the Ministry of Education. See Kuru, *Secularism and State Policies Toward Religion*, 182.

[1000] Kandiyoti and Emanet, "Education as Battleground: The Capture of Minds in Turkey," 870.

[1001] See Tamás Szigetvári, *Turkey's Dilemmas in Foreign Policy and External Economy in the Early 21st Century* (Budapest: Dialóg Campus, 2020), 27-28.

public funds to certain private schools, which educate students in a way that "contradicted the principle of secularism."[1002] This view, corresponded to predominant political and public position at the time, advocating against allocating funds to private schools, which although on-face secular, were considered Islamic due to their leadership and management.[1003]

Between 2014 and 2016 three important developments effected the shift in state policies regarding state funding of private schools. First, by 2013 the tides in Turkish politics had changed, and the AKP enjoyed support in the Parliament and the Presidency. Second, AKP's "marriage of convenience"[1004] with the Gülen movement came to a bitter end[1005] resulting in the closure of Gülenist organizations including private educational institutions,[1006] especially severe after the 2016 coup.[1007] Thus, the private school space was considered "cleansed" from what were now unacceptable private schools. Finally, a trend of allocating substantial government resources to government-approved non-governmental organizations emerged,[1008] a trend that spread towards the privatization of education. These developments resulted into the enactment of the 2014 so-called "education incentive policy" introducing amendments to Article 1 of the Private Education Institutions Law. After more than 10 years when it was first

[1002] Sezer's veto of the bill no. 4967, August 13, 2003, in Kuru, *Secularism and State Policies Toward Religion,* 182.
[1003] Kuru, *Secularism and State Policies Toward Religion.*
[1004] Simon Watmough and Ahmet Erdi Öztürk, "From 'Diaspora by Design' to Transnational Political Exile: The Gulen Movement in Transition', Politics, Religion & Ideology," *Politics Religion & Ideology* 19, no. 1 (2018): 33–52.
[1005] See Martin, "Allies and Enemies,"; Yavuz M. Hakan and Balci Bayram, "Introduction: The Gülen Movement and the Coup," in *Turkey's July 15th Coup: What Happened and Why* (Utah: University of Utah Press, 2018), 1–19.; Yavuz M. Hakan, "A Framework for Understanding the Intra-Islamist Conflict Between the AK Party and the Gülen Movement," *Politics, Religion & Ideology* 19, no. 1 (2018): 11–32.; Hakkı Taş, "A History of Turkey's AKP-Gülen Conflict," *Mediterranean Politics* 23, no. 3 (2017): 395–402.
[1006] First in 2015, the government introduced a law that would have effectively closed complementary education centers (*dershaens*). However, the law was annulled by the Constitutional Court. See Anayasa Mahkemesi, E. 2014/88, K. 2015/68; On the impact of the closure see Muharrem Yeşilırmak, "A Quantitative Analysis of Turkish Private Education Reform," *European Journal of Political Economy* 45 (2016): 76–88.
[1007] See Constanze Letsch, "Turkey's President Orders Closure of 1,000 Private Schools Linked to Gülen," *The Guardian*, July 23, 2016, https://www.theguardian.com/world/2016/jul/23/turkey-erdogan-closure-of-1000-private-schools-gulen.
[1008] The largest one of which is the Turkey Youth and Education Service Foundation (*Türkiye Gençlik ve Eğitime Hizmet Vakfi*, TÜRGEV), established and governed the Prime Minister Erdogan son. See Kandiyoti, Deniz and Zühre Emanet (2017). Kandiyoti and Emanet, "Education as Battleground: The Capture of Minds in Turkey," 872.

envisioned, the law introduced vouchers to students attending primary, secondary and upper secondary level private education institutions [private schools] under specific conditions such as merit and financial status.[1009]

The trend of expansion of funding has affected Imam Hatip schools, even though under different justifications given their completely different nature. Given the complete state control over their operation, the schools' status, funding and mere existence has shifted depending on the interests of the parties in power.[1010] During the AKP rule, there has been a steady rise in numbers of Imam Hatip schools[1011] and their funding has been significantly increased on an annual basis.[1012] Imam Hatip graduates have not only been equalized with those of other schools[1013] but, in certain instances have been subject to preferential treatment.[1014] Their

[1009] See further Halime Öztürk-Çalıkoğlu and Osman Çekiç, "Education Incentive Policy for Private Education Institutions in Turkey: Examining Rationales and Outcomes (2014-2017)," *Journal of Theory & Practice in Education* 16, no. 1 (2020): 83–98.

[1010] In the beginning of the multi-party period, it was the Democratic Party that enacted several laws and polices favorable for these schools. See Yildiz Atasoy, *Turkey, Islamists and Democracy: Transition and Globalisation in a Muslim State* (New York: LB. Tauris & Co Ltd, 2005), 73.; In the 1970's Islamic parties re-entered politics - the Islamist National Salvation Party, a successor of the banned National Order Party was often in government collations with secularist parties such as the CHP. This allowed for party members to hold different government positions that had control over religious education and influence certain decisions beneficial to Imam Hatip schools. See Tanrıkulu Faik and Muhammed Ali Uçar, "Religious Teaching in Turkish Educational System: Imam Hatip Schools" (Istanbul: ÖNDER Imam-Hatip School Graduates and Members, 2019). For specific numbers and data see Howard A. Reed, "Islam and Education in Turkey: Their Roles in National Development," *Turkish Studies Association Bulletin* 12, no. 1 (1988): 1–5.

[1011] See Sinem Adar, "Understanding Religion in (New) Turkey," Jadaliyya, March 14, 2018, http://www.jadaliyya.com/Details/36307.; Burcu Karakas and Daniel Derya Bellut, "Schools in Turkey: Erdogan's Youth, Religious but Not Educated?," Qantara.de, accessed July 6, 2021, https://en.qantara.de/content/schools-in-turkey-erdogans-youth-religious-but-not-educated.

[1012] See Savante E. Cornell, "Headed East: Turkey's Education System," *Turkish Policy Quarterly* 16, no. 4 (2018): 49; Faik and Uçar, "Religious Teaching in Turkish Educational System: Imam Hatip Schools."

[1012] Daren Butler, "With More Islamic Schooling, Erdogan Aims to Reshape Turkey," Reuters, accessed July 12, 2021, http://www.reuters.com/investigates/special-report/turkey-erdogan-education/.

[1013] Cornell, "Headed East: Turkey's Education System."

[1014] First, a reform in 2010 foresaw entrance exams for all high schools except for Imam Hatip schools, leaving students that could not qualify for any other high schools only with one option: Imam Hatip schools. Second, the budget allocated for their operation raised significantly – in general and in comparison, to other state schools. Third, the "4 + 4 + 4 system" reform in 2012, divided national education into mandatory elementary school, middle school and high school, in the total duration of 12 years, 4 years each. This meant parents if willing could send their children to Imam-Hatip middle schools right after 4 years of primary school.

development is point of contestation: welcomed by some and viewed by others as a tool for the fragmentation of society[1015] and the strengthening the Islamic voter base.[1016]

Paradoxically the absoluteness of *laiklik,* conceptualized as unlimited state power, enables the state to promote religious education. It is *laiklik* that *allows* for the state to control the existence and development of religious education: through complete control over the public Imam Hatip schools, by sponsoring religious education in all public schools whilst prohibiting private religious schools. Thus, elevated funding and the overarching development of Imam Hatip schools though may be viewed as means of elevating the importance of the majority religion in society – as more hearts and minds can be considered won in such an educational setting – such actions cannot be questioned under the concept that is Turkish *laiklik.* The difficulty, therefore, lies in the nature of *laiklik* itself as a principle constructed not as separation, but complete state control. Even though initially it was aimed at creating an infrastructure for containing political Islam, "once the state came under the control of political Islam, it became a handy tool for the propagation of this ideology."[1017] The expansion of Imam Hatip schools in the AKP era is exemplary as to how this infrastructure allows for education to be used towards the Islamization of society in the interest of raising "pious generations."[1018]

1.3 (Re)interpretation: The role of Courts

The TCC has not had the chance to address the case of indirect funding to private schools, nor the rise of Imam Hatip schools as budgetary decisions are beyond constitutional contestation. In France and Italy however, the permissibility of funding regimes benefiting public schools, most of them with religious ethos, have often raised questions not only

[1015] Ibrahim Aşlamacı and Recep Kaymakcan, "A Model for Islamic Education from Turkey: The Imam-Hatip Schools," *British Journal of Religious Education* 39, no. 3 (2017): 279–92.
[1016] Cornell, "Headed East: Turkey's Education System."
[1017] Cornell, "The Rise of Diyanet: The Politicization of Turkey's Directorate of Religious Affairs."
[1018] See Aysun Yaşar, "Reform in Islamic Education and the AKP's Pious Youth in Turkey," *Religion and Education* 47, no. 4 (2020): 106–20.; Kaya, "Islamisation of Turkey Under the AKP Rule: Empowering Family, Faith and Charity."; Karapehlivan, "Constructing a 'New Turkey' through Education."

regarding freedom of choice and the public/private divide, but also about the nature of constitutional secularism.

In both France and Italy, the Constitutional Court/Council applied formalistic, textualist analysis to declare that funding private schools, is in accordance with the constitution; whilst avoiding answering the question on its compatibility with *laïcité/laicità.* When the constitutionality of the *Debré* Law was challenged[1019] in front of the FrCC in 1977,[1020] the Council recognized freedom of education as one of the fundamental principles recognized by the laws of the Republic and, thus, framed the permissibility of funding as an extension of said right, enjoying a special deference and protection.[1021] Without entering into debates about the conflict of the law with *laïcité,* the Council deliberated on the possible conflict between the states' duty to organize free, secular public education at all levels, and the existence of private schools or granting them state funding.[1022] Finding that no such conflict existed, the Council confirmed the constitutionality of the Law. In 1994, a bill proposing the expansion of the available funding was challenged in front of the Council.[1023] The Senators referring the law for review explicitly argued that the bill violates the principle of *laïcité* because the funding will ultimately benefit religious schools. The Council, however, did engage with this argument instead, it reaffirmed its 1977 decision under the same reasoning.

The ICCt also indirectly ruled on the permissibility of state funding of private schools, without delving into its compatibility with *laicità*. In 2003, the ICCt ruled on the admissibility

[1019] Decision no. 77-87 DC (French Constitutional Council November 23, 1977), para. 4.
[1020] Given the French Constitutional Council's limited jurisdiction, it was impossible to challenge the law prior to 1974. In the original text of the 1958 Constitution, the Constitutional Council had only ex ante review automatically over bills for *lois organiques*, or bills for ordinary laws but only if requested by the President of the Republic, the Prime Minister, the President of the National Assembly, or the President of the Senate. The 1974 amendment made possible for 60 members of the National Assembly or 60 senators to also make such request. It was not until 2008 that the *ex-post* QPC (*question prioritaire de constitutionalité*) was introduced.
[1021] On France see Sophie Boyron, "In Search of the Constitutional Fundamentals," in *The Constitution of France: A Contextual Analysis* (Oxford: Bloomsbury, 2013), 29–55.; In general regarding "substantive values" see James A. Thomson, "Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes," *Melbourne University Law Review* 13 (1982): 597–616.
[1022] Decision no. 77-87 DC (French Constitutional Council November 23, 1977), para. 4.
[1023] Decision no. 93-329 DC (French Constitutional Council January 13, 1994).

of a request for a popular referendum aimed at repealing the provisions of the Law 62/2000, incorporating private schools into the national education system.[1024] Whilst basing its decision on the contradictory nature of the formulated referenda question, the Court nevertheless addressed the question of the permissibility of private school parity.[1025] However, framing the issue as a matter of parity only, the Court avoided addressing the compatibility of the law with the "no cost to the state" provision of the constitution.

In both France and Italy, the application of the principle of equality as well as liberty in the form of freedom of education played a key part in the Court's/ Council's arguments for upholding the permissibility of funding. In the case of France, funding was deemed constitutional under an obligation of guarantees of equal treatment between public and private schools. In its 1997 decision,[1026] the FrCC maintained that even the expansion of funding is permissible but, only if certain conditions are met. Thus, in order to comply with the principles of equality and freedom, the funding must be granted by objective criteria and the law must provide guarantees necessary to protect public educational establishments against any breaches of the principle of equality.[1027]

In Italy, the ICCt ruled that not allowing for parity of private schools would amount to discrimination and that indirect funding when available to both private and public-school students is permissible. In the 2003 referenda decision[1028] the Court concluded that since non-state schools are subjected to extensive quality requirements and are prohibited from imposing

[1024] Judgment no. 42 (Italian Constitutional Court 2003).
[1025] For further overview of the decision and the context surrounding it, see Ozzano and Giorgi, European Culture Wars and the Italian Case, 101.; Franco Angeli, "Bocciato Il Uesito Contro I Finanziamenti Alle Scuole Private," Il Giornale 16, no. 1 (2003).
[1026]Decision no. 93-329 DC.
[1027] The Council determined that Article 2 of the bill did not confer with such principles and thus, was declared unconstitutional: first, because it established that that local and regional authorities may decide to allocate investment grants to private educational institutions under contract of their choice, in accordance with procedures they *freely* determine and for every level of school education; second, because it only provides a maximum limit on the aid that can be allocated therefore, in certain cases the aid can cover all expanses. Decision no. 93-329 DC (French Constitutional Council January 13, 1994), para. 23.
[1028] Judgment no. 42.

mandatory extracurricular activities based on particular religious adherence, denying them parity will result in discrimination.[1029] The Court also concluded that excluding private schools from parity will be contradictory to the priority objective of the law - expanding of the educational offer from childhood throughout the life span.[1030]

The ICCt also declared that indirect funding provided by regions (in the specific case for books and transport vouchers),[1031] is constitutional if available on equal footing to both private and public schools.[1032] The Court's reasoning rested on the premise that excluding private school students from such privilege would amount to discrimination, as protected under the provisions of the constitution guaranteeing the right and obligation of compulsory education despite of economic status.[1033]

The application of the principle of equality, however, must also be understood within the overall trends of the institutions' decision making. As Dyevre claims, post 1971 the French Council started to elongate the list of fundamental principles and by the 1980s "it began to switch to 'equality' as the new catch-all constitutional standard."[1034] In fact, as Danelciuc-Colodrovschi shows, because equality as a principle is protected by fifteen articles in the three constitutional texts that form the "constitutional block," it was evoked in almost half of the decisions pronounced by the FrCC from its creation until 2010.[1035] As Groppi demonstrates,

[1029] Ibid.
[1030] Ibid, para 2.
[1031] In Italy, the regions have jurisdiction in "providing certain services for secondary education, such as school premises, organization of the school network and assuring the right to study that range from providing textbooks or transportation to introducing voucher programs (as in Lombardy). Municipalities, on the other hand, have similar competences regarding pre-primary and primary schools. See "Education Policy Outlook: Italy" (OECD, February 2017), https://www.oecd.org/education/Education-Policy-Outlook-Country-Profile-Italy.pdf.; Tommaso Agasisti, Gianna Barbieri, and Samuele Murtinu, "Private School Enrollment in an Italian Region After Implementing a Change in the Voucher Policy," *Journal of School Choice* 9 (2015): 380–406.
[1032] See Judgment no. 454 (Italian Constitutional Court 1994).
[1033] As this decision was delivered prior to the one on direct funding, the Court also made the distinction between direct and indirect funding emphasizing that the books were supplied to the student directly, and not the schools. See Ibid.
[1034] Dyevre, "The French Constitutional Council," 325.
[1035] See Natașa Danelciuc-Colodrovschi, "The Principle of Equality in the French Constitutional Council's Case-Law: What Changes after Ten Years of Ex Post Review Implementation?," *Problems of Legality* 150 (2020): 292–312.

the ICCt also has a history of an "evolving interpretation of the principle of equality" for the purpose of mediating social and political conflicts and among "the various interests and values involved in constitutional questions."[1036] Much like in the referendum decision, when relying on Article 3 of the Constitution guaranteeing equality before the law, the Court has developed a practice in interpreting a duty of reasonableness on the legislature and an obligation to refrain from using arbitrary criteria. [1037] Thus, constitutionality of a norm depends on the lack of "contradictions between the goals of a law and the concrete normative rules, between the objective pursued and the legal tools used to achieve it."[1038]

2. Religious Education: Curriculum and the Appointment of Teachers

Issues in religious educations have two dimensions: one focusing on the nature of education (curriculum and the possibility of exemptions) and the other, focusing on the appointments and qualifications of teachers that teach the specific course in public schools. The former dimension often raises questions on the limits of individual/ collective freedom of religion, while the latter, questions on the boundaries of state sovereignty on one hand and autonomy of religious institutions on the other. These two dimensions will be separately covered in the sub-sections of this section, focusing on the contextual considerations that determine or transform the frameworks that govern them.

2.1 The Nature of Religious Education and the Possibility of Exemptions

During the centralization of education and building the public school, in the three jurisdictions religious education was removed or limited. In France, religious instruction was removed from public school curricula in the Third Republic under the rationale of protecting the freedom of conscience of all students,[1039] and the role of the school as "competent in the

[1036] Tania Groppi, "The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?," *Indian Journal of Constitutional Law* 4, no. 1 (2010): 111.
[1037] Ibid, 112.
[1038] Ibid, 112.
[1039] Akan, *The Politics of Secularism*, 32.

realm of uncontestable 'knowledge' separate from the 'beliefs' conveyed by the family and the church."[1040] In contrast to France, in early republican Italy, attempts to exclude religious instruction from the new republican public schools in the second half of the nineteenth century were not successful. Religious instruction was optional in early republican Italy[1041] and mandatory for all pupils in public elementary and secondary schools since 1923.[1042] In Türkiye, after a few years of reduced compulsory religious education in primary and secondary schools, in 1928 compulsory religious education in secondary schools, and in 1931 in primary schools, was eliminated.[1043]

However, specific contextual considerations, as well as changes in the overall legal framework (as in Italy) has led to either the re-introduction of some form of religious education and/or the transformation of the manner in which it is imposed. The next sub-section will look at the circumstance in which this shift has occurred, the current legal frameworks in the three jurisdictions as well as the normative challenges that they pose.

2.1.1 France: Teaching About Religion Across Fields

A century after the Ferry Laws, increasing religious diversity in classrooms in the 1990s as well as debates on religious fundamentalism post 9/11 emphasized "the importance of teaching about religion in history and its permanence in contemporary society."[1044] In a pluralizing world, the students' lack of knowledge about world religions and religious culture started to be viewed as problematic.[1045] Thus, teaching about religions was included in French

[1040] Christopher Lizotte, "Laïcité as Assimilation, Laïcité as Negotiation: Political Geographies of Secularism in the French Public School," *Political Geography* 77 (2020), 3.
[1041] See Scarangello, "Church and State in Italian Education."
[1042] See Article 3 of Royal Decree No. 2185 as cited in *Ibid.*
[1043] Ibid.
[1044] Mireille Estivalèzes, "Teaching About Religion at School in France," in *International Handbook of the Religious, Moral and Spiritual Dimensions in Education*, eds. Marian de Souza et al. (The Neatherlands: Springer, 2006), 458.
[1045] Estivalèzes, "Teaching About Religion at School in France."

public schools, not as a specific course on religious education, but teaching religious facts/ about religion within specific courses and across disciplines.[1046]

Unlike in Italy and Türkiye, in France teaching about religion is mostly based on historical and philosophical considerations defined as "a scientific, that is to say an academic approach to study… a subject of knowledge, a means of understanding civilizations and societies… [restricting] itself to what can be observed [as fact]."[1047] Its main objective is to remedy the absence of information of religious cultural heritage and its symbolism, to develop education of tolerance and to promote understanding of the contemporary world.[1048] As such, it is in line with the function of the republican public school as a "sanctuary", where "individuals can learn to live together while respecting shared values and individual convictions."[1049] While, the teaching of religious facts does not raise questions related to the protection of individual rights, its fragmented platform has raised questions about its effectiveness in achieving its goals.[1050]

After the religiously motivated terrorist attacks in 2015,[1051] further efforts were directed into fostering mutual respect and cohesion. Thus, in addition to teaching religious facts, a new moral and civic education subject was introduced, aiming to "'rebuild the school of the Republic' around its core values, and to promote mutual respect, freedom and community cohesion."[1052] The course's teachers are expected to focus "on morality in all its dimensions,

[1046] We must not forget the exception that is the Alsace-Moselle region, where the Concordat still applies, considered in accordance with the constitution. Accordingly, the state finances compulsory religious education in primary and secondary public schools, based on the four recognized faiths, with an available opt-out by a written request from their parents.
[1047] Estivalèzes, "Teaching About Religion at School in France," 475.
[1048] See Ibid.
[1049] Claude Proeschel, "The French Laïcité Confronted With New Challenges," *Church-State Relations in Europe: New Challenges n* Nov (2007): 38.
[1050] Isabelle Saint-Martin, "Teaching Religions and Education in Citizenship in France," *Education, Citizenship and Social Justice* 8, no. 2 (2013): 151–64.
[1051] Primarily in light of the Charlie Hebbdo attacks. For an analysis on the impact of the attacks see François Sabado and Pierre Rousset, "Charlie Hebdo - And Now What? The Events, Their Impact and the Issues at Play," *International Viewpoint*, no. 480 (2015): 1–3.
[1052] Philippe Gaudin, "Neutrality and Impartiality in Public Education: The French Investment in Philosophy, Teaching About Religions, and Moral and Civic Education," *British Journal of Religious Education* 39, no. 1 (2017): 102.

including child psychology and *laïcité*."[1053] The main purpose of civic and moral education is to "cultivate the following values of the French Republic, 'freedom, equality, brotherhood, secularity (French *laïcité*), solidarity, and a spirit of justice, respect and the absence of any form of discrimination.'"[1054]

The framework does not apply however, to the Alsace-Moselle region where the application of the Concordat is considered in accordance with the constitution. [1055] Accordingly, the state finances compulsory religious education in primary and secondary public schools,[1056] based on the four recognized faiths, with an available opt-out by a written request from their parents.[1057]

2.1.2 Italy: Catholic Education and what else?

The 1984 Concordat changed the character of the *insegnamento della religione cattolica* (IRC) making room for other religions to enter public schools at their own financial expense. The in Italy was a product of a more general shift that altered the entire legal framework governing religion-state relationships. This general shift was influenced mostly by a secularizing society, the change in legal and constitutional doctrine, as well as a change in the doctrine of the Catholic Church after the Second Vatican Council (see Chapter 3).

Even though the Concordat made IRC attendance facultative, the denominational character of the course, as well as the availability and assessment of the courses provided as an alternative, remain problematic areas. Legal safeguards against indoctrination exist as the cultural dimension of the teaching must be protected[1058], thus, the teachings in the course are not considered indoctrination. However, as Ventura rightfully notes, there is an inherent

[1053] Ibid.
[1054] Natalya Lysenko, Liudmyla Shtefan, and Olena Kholodniak, "Teaching Tolerance at School: The Experience of Modern French Education System" 6, no. 1 (2020): 131.
[1055] Decision no. 2012-297 QPC (French Constitutional Council February 21, 2013).
[1056] Gunn, "Religion and Law in France: Secularism, Separation, and State Intervention."
[1057] "Report on International Religious Freedom: France" (Office of International Religious Freedom, USA, May 12, 2021).
[1058] See Ventura, *Religion and Law in Italy.*

ambiguity as to how the IRC can both keep its cultural dimension as indicated in the Concordat (hence, it must not propagate or be considered as indoctrination) whilst being a course with doctrinal nature - concerning only Christian worldviews whose content is controlled by an ecclesiastical authority.[1059] According to Cicatelli, the content of the course is denominational "because it refers to the Catholic faith and is based on the guarantee that the Church itself provides as to the conformity of programs, textbooks and teachers." [1060] Thus, IRC represents a model of teaching of a specific religion and not a generic teaching of religion, where denominational reference is intrinsic, with a limited reference to other religions, especially, Judaism and Islam, which follow Christianity. The textbooks, as Lucenti notes, are centered on Christianity (not as a plurality of interpretations, but as presented by the Catholic Church); even if comparison with other religions is included, the content must be consistent with Christian doctrine, thus, religions are often presented from the Christian and Catholic point of view.[1061]

Furthermore, the course is automatically included in the regular school timetable whereas alternative courses for students who opt-out are not always available.[1062] Even though some regional courts have ruled that "school authorities have an obligation to offer alternative teaching,"[1063] according to the Council of Europe's European Commission against Racism and Intolerance (ECRI) "this option often exists only in theory: such classes seldom take place, owing to a lack of resources."[1064] Additionally, whereas awarding course credits and the

[1059] Maria Chiara Giorda, "Religious Diversity in Italy and the Impact on Education: The History of a Failure," *New Diversities* 17, no. 1 (2015): 77–93.
[1060] Sergio Cicatelli, *Guida All'Insegnamento Della Religione Cattolica. Secondo Le Nuove Indicazioni* (Brescia: La Scuola, 2015) in Maria Lucenti, "Religious Education in Italy and England. Comparative Perspective on School Textbooks and Teaching Practices," *Literacy Information and Computer Education Journal* 12, no. 1 (2021): 3532-33.
[1061] See Ibid.
[1062] Such courses "as suggested by the 1986 Ministry Circulars Nos. 128, 129, 131, and 131, address topics concerning ethics, values, tolerance and peace" taught by available faculty; or chose tutoring or "a study activity without the presence of any teacher, within the school premises"; finally, pupils can choose to simply not attend any class and exit the school premises. See Giorda, "Religious Diversity in Italy and the Impact on Education: The History of a Failure."
[1063] For example, the Padua Tribunal in 2010. See Ventura, *Religion and Law in Italy*, 552.
[1064] "Report on Italy (Fourth Monitoring Cycle)" (ECRI, February 21, 2012).

grading of IRC is mandatory, the grading of alternative courses (if any), or those organized by other denominations is not. Hence, the lack of alternative options or their recognition in transcripts, can lead to possible stigmatization of students for the act of opting out, considered a violation of the negative freedom of religion of students.[1065]

2.1.3 Türkiye: Teaching About Religion?

In Türkiye, mandatory religious instruction in public schools (with opt-out possibilities) was re-introduced in the 1950s by the leadership of the then new formed Democratic Party.[1066] At the time, in light of the Cold War and the "communist threat," including optional religious classes was seen as a remedy to the declining morality of the citizenry, especially the youth via giving way to religion.[1067] In 1984 however, a course titled 'Religious Culture and Moral Knowledge (RCMK)' compulsory for all pupils in primary and secondary schools,[1068] meant to introduce topics of religion as well as ethics and good citizenship.[1069] The mandatory character of the course was out to play a role in maintaining social cohesion, in a polarized society (see Chapter 4).

Thus, at first glance, the Turkish approach is somewhere in between the French and the Italian: it seems to introduce a course where non-confessional teaching about religions as well as ethics is offered but combined in one course as opposed to across disciplines. However, before academic year 2018-2019, both the textbooks of the course and the inconsistent exemption policies posed questions regarding the qualification of the course: whether it was indeed teaching facts about religions or religious education, whose doctrinal character should be analyzed seriously.[1070]

[1065] Grzelak v. Poland.
[1066] Akan, *The Politics of Secularism*, 243.
[1067] Akan, *The Politics of Secularism*, 228.
[1068] Section 12 of Basic Law no. 1739 on National Education.
[1069] Muhammet Fatih Genç, "Values Education or Religious Education? An Alternative View of Religious Education in the Secular Age, the Case of Turkey," *Education Sciences* 8, no. 220 (2018): 226.
[1070] Turgay Gündüz, "'Religious Education' or 'Teaching About Religion'? A Review of Compulsory Religious Culture and Ethics Lessons in Turkish Primary and Secondary Schools," *Religion and Human Rights* 13, no. 2 (2018): 153–78.

Like all civic instruction courses, the course promotes a certain type of citizenship along the lines of specific principles;[1071] however, in Türkiye these principles are based on the majority stream of religion and are aimed to exclude rival interpretations within the religion as well as to shield from ideological threats.[1072] Thus, the course content is significantly influenced by traditional *ilmihal*-centred approach which is "confessional…and theological."[1073] This approach is nevertheless considered to be in line with Turkish *laiklik* as it does not promote Islam as an over-encompassing doctrine for the temporal world.[1074] Even though in 2011/2 the derogatory statements about non-Sunni Muslim religions were removed from the textbooks[1075] and certain information about Alevism was included, studies of the course textbooks before academic year 2018-2019, pointed to the persisting problematic areas. Two separate studies have concluded that the course is dominated by tenants of Sunni Islam and portrays other religions through the prism of Islam,[1076] thus, confirming its confessional approach[1077] and making it closer to religious education than to teaching about religion.

[1071] The Ministry of Education has explained the approach of the course as follows: 1) its content - "centered on basic religious assumptions that are beyond any religious movements (neutral to all religious movements and without any discussion of them);" its purpose - "to inform students about religion and ethics, to improve their related skills, and thereby to contribute to the achievement of the general aims of national education in Turkey" 3) the curriculum – "based on science and research about Islam and other religions is prioritized and knowledge that is not contained in real religious sources is avoided… root values that embrace basic religious assumptions on Islam are emphasized." See Genç, "Values Education or Religious Education?," 226.

[1072] In the words of Tayyar Altikulaç who served as the President of Religious Affairs in 1986 "[the] youth represent[s] our future and that by giving them sound (Islamic) religious culture and teaching them *a pure Islam* we can protect them from all sorts of harmful ideologies [emphasis added]." See Reed, "Islam and Education in Turkey: Their Roles in National Development," 3.

[1073] Recep Kaymakcan, "Religious Education Culture in Modern Turkey," in *International Handbook of the Religious, Moral and Spiritual Dimensions in Education*, eds. Marian de Souza et al. (The Neatherlands: Springer, 2006), 459.

[1074] Ibid.

[1075] Ceren Özgul, "Freedom of Religion, the ECtHR and Grassroots Mobilization on Religious Education in Turkey," *Politics and Religion* 12 (2019): 103–33.

[1076] A 2015 survey found that instead of universalistic approach, the course is a course on "Muslim culture and Islamic religious education…deeply shaped by the officially sanctioned and historically dominant reading of Islam in Turkey. See Ziya Meral, *Compulsory Religious Education in Turkey: A Survey And Assessment of Textbooks* (Washington, D.C.: United States Commission on International Religious Freedom, 2015).

[1077] In a separate study, Gündüz has concluded that "the information within the course materials and their presentation as well as the views and assessments by teachers and students regarding their application reveal that RCE is a confessional religious education course and not a non-confessional lesson for learning about religion." See Turgay Gündüz, "'Religious Education' or 'Teaching About Religion'? A Review of Compulsory Religious Culture and Ethics Lessons in Turkish Primary and Secondary Schools,": 178.

Considering the *de-facto* character of the course before academic year 2018-2019, exemptions had to be guaranteed to all those who wish to abstain from it, as to protect the freedom of conscience of students and parents. However, before 1990 exemptions from the course were not possible and after 1990, they were made available only to Christian and Jewish students.[1078] In 1993, the possibility of exemptions was further limited as applicable only to classes on Islamic practices and not the whole course. The led to the inconsistent practice of awarding exemptions.[1079] Students belonging to minority streams of the Muslim religion, such as the Alevi, have successfully challenged this practice in front of courts including the ECtHR. In 2007, the ECtHR ruled that knowledge in the course is not disseminated in an objective, critical or pluralist manner, thus, exemptions must be afforded to respect parents' convictions in accordance with Article 2. Protocol 1 of the ECHR.[1080] In 2014 the ECtHR confirmed its approach in another case where it also emphasized that the Turkish educational system does not "provide appropriate means in order to ensure that parents' convictions are respected."[1081] More specifically the ECtHR found that given the nature of the course, the system offers limited possibilities for exemptions, heavily burdening pupils' parents for disclosing "their religious or philosophical convictions in order to have their children exempted from the lessons in religion."[1082]

The exemption system was not only not remedied but, it was further cemented by a 2015 memorandum by the Ministry of Education Ministry linking the possibility of exemption with national identity cards. According to the memorandum, only children whose national identity cards state that they are Jews or Christians can be exempted from the compulsory religion

[1078] Supreme Educational Council Decision no. 1 of July 9, 1990.
[1079] "In 1992 the Ministry of Education circulated a memorandum denying the 1990 decision. The latter explained that the courses had been modified to reflect concerns for other religions and would henceforth be mandatory for all Turkish students, though non-Muslim students would not be responsible for the chapters on Islamic practices." See Elizabeth Shakman Hurd, "Alevis under Law: The Politics of Religious Freedom in Turkey," *Journal of Law and Religion* 29, no. 3 (2014): 427.
[1080] Hasan and Eylem Zengin v. Turkey.
[1081] Mansur YalÇin and Others v. Turkey.
[1082] Ibid., para. 76.

classes reaffirming that all others are excluded from such a possibility. In the following 6 years, the jurisprudence of domestic courts has been inconsistent regarding the issue of exemptions of other students. In some cases, courts have found that the refusal of exemption constitutes a violation of Article 24 of the Constitution, with references to the ECtHR jurisprudence, while in others they have not.[1083] As Yildrim notes, "the determining factor in different judgments has been the difference of opinion on the nature of the course, namely, whether it constitutes instruction in religion or a neutral course about religions."[1084]

In academic year 2018-2019 changes to the curriculum of the course were introduced to bring RCMK in line with ECtHR standards. According to the government, numerous government and civil society stakeholders participated in the drafting of the new curriculum.[1085] Additionally, in 2022 upon an individual application the TCC ruled that the rejection of an exemption request from atheist parents had amounted to a violation of the parents' right to respect for their religious and philosophical beliefs. The TCC stated that the content of the course, before the changes enacted in academic year 2018-2019, went beyond teaching about Islam and thus, exemptions had to be in place.[1086]

However, for those exempted alternative courses are not available which similarly to Italy raises questions of stigmatization of children choosing to opt-out. Furthermore, those exempted from the course are disadvantaged when taking the final nationwide "Transition from Primary to Secondary Education Exam" (*Temel Eğitimden Ortaöğretime Geçiş, TEOG*), as questions related to the 8th grade Religious Culture and Moral Knowledge are included.[1087] Alternative

[1083] Mine Yıldırım, "Are Turkey's Restrictions on Freedom of Religion or Belief Permissible?," *Religion & Human Rights* 15, no. 1–2 (2020): 172–91.
[1084] Ibid, 185.
[1085] Turkey, "National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21" (United Nations, UPR, 2019), para. 77.
[1086] Individual application no. 2014 / 15345, No. 2014/15345 E (Turkish Constitutional Court April 7, 2022), para. 184
[1087] Ayşe Ezgi Gürcan, *The Problems of Religious Education in Turkey: Alevi Citizen Action and the Limits of Ecthr*. (Istanbul: Sabancı University Istanbul Policy Center; Stiftung Mercator Initiative, 2015).

testing for Greek, Jewish, and Armenian students have been but not yet implemented.[1088] In regard to national university entrance exams however, students exempt from the course can opt to answer questions related to philosophy questions instead.[1089]

Despite the evident steps taken in the direction of opening pathways to exemptions and bring the course in line with ECtHR standards, problematic aspects remain. While no alternative courses for students who chose to opt-out are organized, three additional facultative courses have been introduced for those who wish to further gain knowledge of Sunni Islam.[1090] In reality however, it has been noted that in many schools students are often pressured by school administrators into taking these courses, while the Diyanet openly advises families to encourage children into taking them.[1091] The content of the these courses have also sparked controversies, as their portrayal of gender roles, the family and marriage reflect an "Islamist and conservative worldview" taught to children as the norm.[1092]

Thus, the developments in Turkish public schools as a whole follow two trends: one in the direction of inclusion and accommodation of minority religions in content of RCMK, another in the directing of re-enforcement of values and percepts based on Suni Islam as the basis for good citizenship. The latter has been further reenforced by the changes in the overall curriculum as well as the permissibility and encouragement of using prayer rooms (*masjids*)[1093] by students in public schools.[1094] These developments pose the question on the fine line between on one hand the positive obligation of the state "to provide a suitable environment

[1088] Ibid.
[1089] Turkey, "National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21" (United Nations, UPR, 2019), para. 78.
[1090] In 2012 three new religion-based elective courses were introduced for students in grades six through eight: Quran, Prophet Muhammad's Life, and Fundamentals of Religion (where studies on 'jihad' are taught as part of religious values") on the expenses of the Civic Education and Agriculture, which were effectively removed from the curriculum. See Selin Girit, "Are Turkey's Schools Dropping Evolution and Teaching Jihad?," BBS News, Istanbul, August 22, 2017.
[1091] See Ihsan Yılmaz, "Islamist Populist Nation-Building: Gradual, Ad Hoc Islamisation of the Secular Education System in Turkey," *Religions* 13, no. 9 (2022): 821.
[1092] Ibid, 822.
[1093] Ibid, 823-4.
[1094] Ibid, 827.

where people can live as they believe,"[1095] and on the other, the potential stigmatization or/and the pressure to abide to the precepts of the state mandated religion on students belonging to other faiths and non-believers.

2.2 Appointment and Employment of Teachers

Depending on the state-religion relationships established in a particular state, the state is either completely in control of the appointment and employment of teachers teaching for courses on religion or shares such competences with relevant religious authorities. This sub-section will provide a framework establishing these competences and the potential problems they may give rise to.

2.2.1 France: A Statist Approach

In France, teachers teaching facts about religion are the same public-school teachers teaching the designated courses where the topic emerges - they are, as all public teachers, civil servants employed by the state.[1096] Thus, in France the appointment of teachers and teacher training is completely under the authority of the state. Hence, no issues of sovereignty arise. This, however, does not apply in Alsace-Moselle, where religious education classes are taught by laypersons who are both trained and nominated by the respective religious groups, whilst being paid by the state.

The main concern raised by Catholic leaders,[1097] as well as teachers themselves[1098] has been the level of competence of teachers to approach these topics. To address such concerns, during their university studies future teachers now *may* choose *elective* courses that study the philosophy and history of religions. The *Institut d'étude des religions et de la laïcité* (IREL)

[1095] Individual application no. 2014 / 15345, No. 2014/15345 E (Turkish Constitutional Court April 7, 2022), para. 154.; See further Tuğba Arslan, No. 2014/256 (Turkish Constitutional Court June 25, 2014).
[1096] On teacher education in France see Bernard Cornu, "Teacher Education in France: Universitisation and Professionalisation – from IUFMs to ESPEs," *Education Inquiry* 6, no. 3 (2015): 289–307.
[1097] Saint-Martin, "Teaching Religions and Education in Citizenship in France."
[1098] "A Secular Teaching of Religious Facts," European Academy on Religion and Society, May 24, 2021, https://europeanacademyofreligionandsociety.com/news/france-a-secular-teaching-of-religious-facts/.

additionally provides facultative training programs for public teachers "conducted in a secular framework, [to] assist in adapting teaching methods to varying subjects where religions are discussed."[1099]

2.2.2 Italy: Shared Competencies Between the State and the Catholic Church

In Italy, even though IRC teachers are public employees, their selection/employment is done in agreement between the school authorities and the ecclesiastical authority.[1100] Teachers may be laymen or members of the Catholic Church (deacons, priests) under the condition that they are qualified.[1101] The Concordat dictates that the qualifications of IRC teachers ought to be confirmed by the ecclesiastical authority.[1102] An agreement between the state and the Italian Episcopal Conference concluded in 2012 specified that "every academic qualification in theology or liturgy provides the possibility of teaching Catholic religion in Italian schools of every order and degree,"[1103] meaning that the candidate has a "diploma issued by an institute for religious sciences recognized by the CEI."[1104]

Unlike all other public-school teachers, IRC teachers in addition to their professional teaching license ought to obtain a warrant of suitability issued by the local Bishop that.[1105] The current framework thereby establishes a shared authority and competences between the state and the Catholic Church in the choice and appointment of teachers. This constellation opens the door for possible discrimination in the employment of potential or existing teachers only

[1099] See the official web site of the *Institut d'étude des religions et de la laïcité* available at: https://irel.ephe.psl.eu/about-us
[1100] Ventura, *Religion and Law in Italy*.
[1101] The 2003 reform has improved the position of teachers by granting those teachers that are not confirmed by the ecclesiastical authority the chance to be employed in another state department whilst keeping their status as a public employee. See Ibid.
[1102] Section 5 of the Additional Protocol of the 1984.
[1103] Sant'Anselmo, "Welcome to the Teaching of Catholic Religion in Italian Schools |IT|," *Sant'Anselmo* (blog), accessed February 24, 2020, https://www.anselmianum.com/en/programmi/welcome-to-the-teaching-of-catholic-religion-in-italian-schools/.
[1104] Giorda, "Religious Diversity in Italy and the Impact on Education: The History of a Failure," 18.
[1105] See Ibid.

on the basis that their choice or way of life is not considered in line with the Churches' doctrine.[1106]

Whereas IRC teachers are public employees thus, they receive state sponsored salaries, teachers teaching courses as organized by other denominations do not have such status. Even though under the current framework other denominations that have concluded agreements with the state can also offer religious instruction in public schools *if* a certain number of students/parents request, the financial burden of teachers' salaries falls on the denomination.[1107] This further supports the premise put forward by Ferrari and Pastorelli, that while the Italian framework guarantees non-Catholic religions freedoms, it does not guarantee equality.[1108]

2.2.3 Türkiye: A Statist Approach

In Türkiye, the state has complete control over the training and employment of teachers teaching 'Religious and Moral Education.' Said teachers are employed by the Diyanet, and thus, are public employees. Consistent with *laiklik* as understood in the early Republic, state faculties of theology were opened precisely to train religious scholars in line with the state sponsored understanding of Islam – until they closed in 1933, to be reopened in 1949.[1109] Teachers today are trained in state theology universities that also have educational studies streams.

Until the 2010's teachers teaching the course were trained in faculties of pedagogy. Thereafter, teacher training was transferred to faculties of theology, currently being the only faculties that can provide teacher training in religious education.[1110] Thus, teachers are

[1106] Surprisingly the ECtHR ruled on a violation of the right to privacy protected by Article 8 of the ECHR precisely when a similar situation occurred, claiming that the national courts done a sufficient job in weighing competing interest and invoking church autonomy. See Fernández Martínez v. Spain.
[1107] For example, in a similar manner Article 10 of the agreement with the Waldensians and Article 12 section 3 of the agreement with the Mormons explicitly states that the costs for the teachers teaching their faith must be borne by the ecclesiastical authorities.
[1108] Ferrari and Pastorelli, *Religion in Public Spaces,* 140.
[1109] Genç, "Values Education or Religious Education?," 236.
[1110] Ibid.

specially trained in the fields of Islamic studies as well as pedagogy[1111] - depending on the level in which the course is taught, a different level of high education is necessary. Hence, like Italy, a background in religious education (that of the majority religion) is necessary for employment. However, in Türkiye, like in all other aspects, the state has complete control over the employment of teachers.

2.3 (Re)interpretation: The role of Courts

Whereas in France, the constitutionality of the teaching about religion scattered across disciplines has never been challenged,[1112] the Constitutional Courts in Italy and Türkiye have addressed the issue through the lens of constitutional secularism. In doing so, the courts have found creative ways to reconcile the permissibility of religious education with secularism, using different interpretative technics to (re)define the principle and its limits.

Both the ICCt and the TCC have used the particularity of *laicità* and *laiklik* respectively, to justify the permissibility of religious instruction in public schools. The interpretation of *laicità* by the ICCt as an "overriding principle of the constitutional order" having "higher value than other provisions or laws of constitutional rank"[1113] opened the possibility for the Court to potentially rule that the teaching of Catholic education is contrary to *laicità* and thus, unconstitutional.[1114] However, the Court took another route and defined *laicità* in a way that allowed for confirming the constitutionality of Catholic education in public schools. Applying a multi-valenced approach,[1115] the Court first resorted to textualism and recognized the

[1111] Davut Işıkdoğan, "Religion Culture and Knowledge Teacher Training in Turkey and the Application of 1998-2006 Period," *Elektronik Sosyal Bilimler Dergisi* 6, no. 22 (2007): 298–318.
[1112] In 2001, the Council of State however, addressed the lawfulness of the application of the Concordat in Alsace-Moselle, specifically state support for sectarian religious education and its compatibility with *laïcité* The Council, much like the Constitutional Council 11 years later, applied the logic that since the prohibition of state support derives from the 1905 Law, and as the 1905 does not apply in the region and does not abrogate the Concordat, the practice is constitutional. See Decision no. 219379.
[1113] Judgment no. 203 (Italian Constitutional Court 1989), para. 3.
[1114] Ibid.
[1115] Vicki C. Jackson and Jamal Greene, "Constitutional Interpretation in Comparative Perspective: Comparing Judges or Courts?," in *Research Handbook in Comparative Constitutional Law*, eds. Tom Ginsburg and Rosalind Dixon (Cheltenham, UK: Edward Elgar, 2011), 604.

"innovation" of the Italian approach vested in the contested Article 9 para. 2 of the 1985 Concordat. Consequently, the Court concluded that Italian *laicità,* within its particularity, allows for the special status of Catholicism recognizing "the value of religious culture and the principles of Catholicism as part of the historical heritage of the Italian people."[1116] Thereafter, through a historical quest of intentionalism the Court recognized the educational value of religious culture as a matter of religious pluralism, even if based only on the principles of Catholicism. Thus, according to the Court, *laicità* at the same time envisions equality between religions but, explicitly recognizes the special role of Catholicism and only Catholicism in Italy. In a subsequent decision, the Court went further in saying that "teaching Catholic doctrine in public schools is not only consistent with but even represents an application of the principle of *laicità*."[1117]

The existence of opt-out procedures was enough to satisfy the ICCt that existing guarantees of parental educational responsibility and freedom of conscience are in place. In its endeavor, however, the Court did not address the three most commonly raised objections according to Faraguna namely, that the State bears the financial burden of Catholic religious education only, that the Church plays a predominant role of in the selection of the books and curricula of the course and, finally, that the opt-out system "may be reasonably considered capable of nudging pupils in the direction of the majoritarian choice."[1118]

In these decisions, the ICCt has implicitly adopted an interpretation of Catholicism as a civic religion, a notion whose explicit use is considered to have denied entry "into the closed gate of positive law."[1119] This interpretation has been at "the central core of the Italian pattern" that in Silvio Ferrari's words "is the attempt to govern the ethical, cultural and religious

[1116] Judgment no. 203.
[1117] Judgment no. 13. Cited in, Pin "Public Schools, the Italian Crucifix, and the European Court of Human Rights," 123.
[1118] Pietro Faraguna, "Regulating Religion in Italy: Constitution Does (Not) Matter," *Journal of Law, Religion and State* 7, no. 1 (2019): 44.
[1119] Ferrari, "Why Are We Talking About Civil Religion Now," 839.

plurality of the country through the values of Catholicism raised to the rank of civil religion."[1120] The role of Catholicism as a unifying factor in the Italian nationhood, Alessandro Ferrari claims, "resulted in the origins of the Italian "civil religion," or, rather, the lack of an Italian civil religion."[1121] The example of the Italian approach fits also within an established European trend, where civil religion emerges as based on human rights and market freedoms, yet it has never departed from its Christian roots.[1122] In a world of heightened pluralism, Europeans seem to have become "more aware of their Christian past and more concerned with its preservation."[1123]

The approach of the ICCt is an example of the way courts can interpret secularism as a principle protecting Christianity as a cultural trait thus, allowing for values rooted in the majority religion to forge the fundamentals of citizenship in its substantive dimension.[1124] By dictating these values as accepted or preferred even if "secularized" by the etiquette of common culture , the state propagates the idea that good citizens are those that abide by Christian conceptions of the good life. As such, this conception thins the basic trait of secularism within its liberal understanding: the non-identification of the state with any particular conception of the good.

Turkish courts have also used the particularity of *laiklik* to justify both the introduction of religious instruction in public schools as well as its expansion. In 1953, the Council of State was asked to rule on the compatibility of religious education in public schools with the principle of *laiklik.*[1125] The Council adopted an originalist approach and focused on at the intentions of

[1120] Silvio Ferrari, "Civil Religions: Models and Perspectives," *The George Washington International Law Review* 41, no. 4 (2010): 749–63. For an opposing view i.e. that civil religion has never developed in Italy see Ventura, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Italy," 2005.
[1121] Ferrari, "Why Are We Talking About Civil Religion Now," 843.
[1122] See Marco Ventura, "The Changing Civil Religion of Secular Europe," *The George Washington International Law Review* 41, no. 4 (2010): 947–61.
[1123] Ibid, 960.
[1124] See Bojanovska Popovska and Raimondo, "Formal and Substantive Aspects of Citizenship and Its Connection to Religion. Definition, Practices and Comparative Perspectives."
[1125] "Decision e. number 952/186, k. number 53/73" in Akan, *The Politics of Secularism*, 267.

the framers of *laiklik* instead, using the debates in the Turkish Grand National Assembly on the constitutionalization of *laiklik* as a source. The particularity of Turkish *laiklik* as well as the particular historical, social, and political context surrounding its conceptualization was given considerable weight, defined as a concept with specific national meaning, one "shaped by the inspiration of science and law, common to the world of civilization, and filtered by catastrophes and pains of [Turkish] national history."[1126] The Council considered the specific nature of the institution of the Diyanet, representative of the particularity of *laiklik* as one allowing for state intervention; it therefore deduced that such intervention is also permissible in education, finding optional religious education in public schools as compatible with *laiklik.*

In 2012 decision, the TCC used the same approach to validate the introduction of the three new elective courses: Quran, Prophet Muhammad's Life, and Fundamentals of Religion.[1127] Much like the Council of State in 1953, the Court considered the state monopoly over religious education as compatible with the Constitution and *laiklik* understood as a concept allowing for an "institutional relationship between the State and the religion of Islam, both at the constitutional level and in practice."[1128] The Court also used this opportunity to redefine what kind of secularism is constitutionally binding for the state, even though such redefinition was not decisive for the outcome of the decision since it affirms a long-standing practice of confirming the permissibility of state intervention into the majority religion. [1129] The redefinition marked a departure from the Court's previous case-law and its long-standing interpretation of *laiklik*; a redefinition simply deriving from the Courts' choice of a new theoretical paradigm.

[1126] Ibid.
[1127] Judgment no. E. 2012/65, K. 2012/128. (translated by Autor).
[1128] Ibid.
[1129] The Court also framed the elective courses as an expression of respect for the members of the specific religion and emphasized the possibility for the organization of such courses based on other religions upon request by parents or children. Additionally, the Court resorted to comparative examples and by reinterpretation of *laiklik* relaying on theoretical considerations. First, comparative examples were used to show (as presented in ECtHR case-law) to show that religious education, as well as its compulsory character is very prevalent in other European, western secular states.

Applying a philosophic interpretative approach[1130] the TCC deduced the meaning of secularism in its theoretical interpretation and concluded that there is a strict and liberal understanding of secularism. The liberal understanding of secularism, that the Court finds binding for the state, does not confine religion in the "inner world" of the individual and allows for its social visibility. It imposes a duty of impartiality and non-interreference, but also a positive obligation to remove the obstacles to the protection of freedom of religion and conscience, and to take the necessary measures which allow for individuals to learn and practice their religions. According to this conception not only is the teaching of Islam in public schools compatible with *laiklik,* but *laiklik* also entails a positive obligation for the state to organize it. This echoes a similar narrative to that of the ICCt claiming that the presence of Catholic education in public schools represents an application of *laicità*.

The decision marks an ideological change, a paradigm shift in the TCC's established case law and doctrines.[1131] However, whilst this new interpretation will pave the way for a looser interpretation regarding religious symbols in the public sphere/places in future decisions, it nevertheless affirms the long-standing "tradition" of using the particularity of *laiklik* as a "blanket" justification for the advancement of the majority religion in public schools as well as the complete state control and management over the majority religion. This presents an interpretative paradox, as this interpretation is completely devoid of secularism's liberal understanding in theoretical terms, primarily understood as a principle curtailing state power. Even though this reinterpretation aimed to distance the meaning of *laiklik* as a tool for social engineering and framed it as a move from monolithic *laïcité* to pluralistic secularism as a liberal

[1130] Sotirios A. Barber and James E. Fleming, "The Philosophic Approach," in *Constitutional Interpretation: The Basic Questions* (New York: Oxford University Press, 2007), 155–70.
[1131] Oder, "Populism and the Turkish Constitutional Court."

conception,[1132] it nevertheless cemented the preferential status of the majoritarian religion[1133] and allowed for social engineering through education to continue - more recently, one aimed at forming pious generations.

3. On the Particularity of the School and the (Im)permissibility of Religious Symbols

The justification for the (im)permissibility of the presence of religious symbols in public spaces varies in relation to the nature of the places where they are displayed. For example, in the courtroom, the prohibition arises from the need to maintain the order of the court and to uphold fair trial guarantees.[1134] In public schools, justifications derive from an understanding of the school environment as one that ought to be devoid of sectarian influence.

The need for the "cleansing" of religious symbols, whether worn as a garb or simply portrayed in school premises, rests on the particularity of the school as a place where future citizens are built, free from indoctrination. The impermissibility of religious symbols specifically, is commonly justified based on the nature and effects of symbols themselves and/or the nature of the liberal state as benevolent towards conceptions of the good life, thus prohibited from identifying with any religion. While both justifications are used to justify the absence of state-imposed religious symbols, whether in the premises or as worn by teachers, the former is often used to expand the application of obligations of neutrality to everyone who enters the school, including students. Thus, the presence of symbols in public schools, or their

[1132] Zühtü Arslan, "'(Re)Interpreting Secularism in a Democratic Society: A Cursory View of the Case-Law of the Turkish Constitutional Court', International Symposium on Constitutional Courts as the Guardian of Ideology and Democracy in a Pluralistic Society," Anayasa, August 9, 2017, https://www.anayasa.gov.tr/en/president/presidents-speeches/re-interpreting-secularism-in-a-democratic-society-a-cursory-view-of-the-case-law-of-the-turkish-constitutional-court-international-symposium-on-constitutional-courts-as-the-guardian-of-ideology-and-democracy-in-a-pluralistic-society/.

[1133] Mine Yildirim, "Turkey: Constitutional Court Justifies More Freedom of Religion or Belief Restrictions," *Forum 18*, July 9, 2013, https://www.forum18.org/archive.php?article_id=1855.

[1134] See Samuel J. Levine, "Religious Symbols and Religious Garb in the Courtroom: Personal Values and Public Judgments," *Fordham Law Review* 66, no. 4 (1998): 1505–40.

prohibition, often leads to conflicts between individual rights and the underlining necessity/justification of their presence or absence.

In this section I will look at the issues surrounding the presence of religious symbols in public schools, and their correlation to secularism. More specifically, I will elaborate on understanding of the particularity of the school in each jurisdiction, the justification for the (im)permissibility of state-imposed religious symbols and the shift towards the expansion obligations of neutrality to affect students. Thereafter, I will look at the role of courts in (re)interpreting the permissibility of religious symbols in public schools through reconciling emerging conflicts.

3.1. France: Strict Obligation of Neutrality - From Institutional Application to Restrictions on the Individual

In France the school is considered both as the bedrock of the secular French republic and as a sanctuary" where "civic commonality and mutual respect between children" is developed. Thus, schools must "be insulated from the divisive sectarianism that threatened to tear apart civil society."[1135] sectarian symbols must not be imposed to undermine this equilibrium. In the words of the Council of State "in schools, freedom of conscience, combined with respect of pluralism and the neutrality of public service, requires that the 'educational community' be insulated from any ideological or religious pressure."[1136] This understanding has imposed a strict obligation of neutrally and a complete prohibition of state-imposed religious symbols in public schools.

[1135] Laborde, "Secular Philosophy and Muslim Headscarves in Schools," 325.
[1136] Circulaire Bayrou, in Laborde, "Secular Philosophy and Muslim Headscarves in Schools," 326.

Thus, the prohibition of the display of religious emblems (symbols) in public schools predates the 1905 Law,[1137] and was imposed via circular in 1882.[1138] The prohibition of the wearing of religious symbols by teachers is applied as towards all public servants, reaffirmed by Law no. 83-634 of July 13, 1983.[1139] The importance and necessity of neutrality is even more pronounced in public schools, due to the role of the schools as well as the role of the teacher. The position of teachers and their influence require them to be even more bound by neutrality than other public agents. Ferry, the architect of the education laws in the Third Republic, "insisted that teachers be sanctioned if they disturbed the 'fragile and sacred conscience' of children or offended parental beliefs" [1140] especially considering education's mandatory nature.[1141] The same interpretation has been developed by administrative courts that see the wearing of religious symbols by teachers as a violation of the freedom of conscience of the children entrusted to their care.[1142]

In recent decades however, there has been a shift as the obligation of neutrality has been expanded: 1) with the enactment of the 2004 Law banning ostentatious religious symbols in public schools to apply not only to teachers and spaces, but also to students,[1143] 2) as in the *Baby Loup* case,[1144] to apply not only to public schools and employees, but also to those in the private sector. Authors have identified the rise of the Muslim population in France as the underlining catalysts for this shift. Hashim emphasizes the increased visibility of the headscarf

[1137] The impermissibility of the display of physical religious symbols in all public spaces is entrenched in Article 28 of the 1905 Law on the Separation of the Churches and the State, with the exception for places of worship, cemeteries, funeral monuments and museums.
[1138] However, at first, as per Ferry's instruction the circular was to apply only to renovated premises, whilst in others it was a decision of the locality whether to comply or not. See Antoine Prost, *Histoire de L'enseignement En France, 1800-1967* (Paris: Librairie Armand Colin, 1968) in Doyle, "Catholic Church and State Relations in French Education in the Nineteenth Century," 117.
[1139] Article 25 of Law no. 83-634 of July 13, 1983 as amended by Law no. 2019-828 of August 6, 2019. See National Advisory Commission on Human Rights, Opinion on Secularism, Official Gazette no. 0235 of 9 October 2013.
[1140] Laborde, "Secular Philosophy and Muslim Headscarves in Schools," 324.
[1141] Following a similar logic, as a justice in a different constitutional setting and a century later - Justice Brennan's in *Edwards v. Aguillard*, 482 U.S. 578 (1987).
[1142] Laborde, "Secular Philosophy and Muslim Headscarves in Schools," 325.
[1143] Law no. 2004-228 of March 15, 2004.
[1144] Cass Ass Plén, No. Rec D 1386 (French Court of Cassation June 25, 2014).

as worn by migrant populations after the independence of Algeria in 1967 that posed questions about the role of *laïcité* in "the integration of immigrants generally, and Muslims in particular."[1145] As Killian argues, the ban of religious symbols as worn by students can be seen as an extension of the French model of assimilation, where for one to become French they must accept common values and abandon their foreign alliances.[1146] Thus, as Adrian argues the issue was raised as part of a more general debate on "the question of how much a majority should bend in order to make room for people who enact citizenship and values in different ways;"[1147] in a context where French society strived to reclaim its national identity threatened by globalization and immigration.[1148]

In the enactment of the 2004 law,[1149] in addition to the context in which the debate occurred, practical considerations were also key, as the law ultimately aimed at remedying ambiguous and ununiform practices. By the end of the 1980s and the beginning of the 1990s, in several cases efforts for compromise failed resulting in the expulsion of students for wearing the headscarf/veil in public schools or refusing to take it off during physical education classes.[1150] These expulsions were challenged numerous times in front of the French Council of State, which developed a case-to-case approach in determining the validity of the expulsions, ultimately leaving it to school administrators to decide in future cases.

According to the Council of State the wearing of religious symbols by students did not *per se* constitute a violation of *laïcité*, but limitations could be imposed, not as a general rule,

[1145] Hera Hashmi, "Too Much to Bare? A Comparative Analysis of the Headscarf in France, Turkey, and the United States," *University of Maryland Law Journal of Race, Religion, Gender & Class* 10, no. 2 (2010): 419.
[1146] Caitlin Killian, "From a Community of Believers to an Islam of the Heart: 'Conspicuous' Symbols, Muslim Practices, and the Privatization of Religion in France," *Sociaology of Religion* 68, no. 3 (2007): 307.
[1147] Melanie Adrian, *Religious Freedom at Risk. The EU, French Schools, and Why the Veil Was Banned* (Switzerland: Springer, 2016), 1.
[1148] Lenora Auslander, "Barian Crucifixes and French Headscarves: Religious Signs and the Postmodern European State," *Cultural Dynamics* 12 (2000): 283–309.
[1149] Law no. 2004-228 of March 15, 2004.
[1150] See O'Brien, *The Stasi Report: The Report of the Committee of Reflection on the Application of the Principle of Secularity in the Republic*. The case reached the ECtHR that ruled that the expulsion does not amount to a violation of the ECHR. See Dogru v. Turkey, No. 27058/05 (European Court of Human Rights December 4, 2008).

but under specific circumstances. Mainly, only ostentatious symbols could be prohibited understood as ones that amount to "acts of pressure, provocation, proselytism or propaganda; offend the dignity or freedom of the pupil or other members of the school community; are likely to seriously threaten health or safety; disturb the school activities; or jeopardize the pedagogic role of the teachers, the "*ordre scolaire*" (school order) and the functioning of the educational public service. "[1151] Two consecutive circulars[1152] published by the French Ministry of Education (having *only* an interpretative, non-binding function)[1153] attempted to define o*stentatious symbols*. The Boyrou circular defined them as caring elements of proselytism.[1154] Another circular in 1994 distinguished ostentatious from non-ostentatious symbols, as "signs so ostentatious that their meaning is precisely to separate certain pupils from the rules of the communal life of the school" which are "by their nature, elements of proselytism."[1155]

In July 2003, the so-called Stasi Commission[1156] was formed under concerns over a "[drift] towards communitarianism" and the overall application of the *laïcité* "in the working world, in public services, and especially in the schools."[1157] The Stasi report addressed the challenges that religious diversity posed in schools, including the wearing of religious symbols - the issue being one among many, but attracting the most extensive debate.[1158] The Commission was particularly sensitive towards concerns of school administrators stating their

[1151] See Mancini, "The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence," 2644.
[1152] The Boyrou Circular in O'Brien, *The Stasi Report: The Report of the Committee of Reflection on the Application of the Principle of Secularity in the Republic,* 5.
[1153] See Decision no. 162718, (French Council of State July 10, 1995). in reference to the 1994 circular.
[1154] As an additional measure, a mediation committee was established unfortunately with limited success. See in Mancini, "The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence," 2009.
[1155] See Circular No. 1649 of September 20, 1994 in Mancini, "The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence," 2645.
[1156] A commission appointed by President Chirac led by Ombudsman Bernard Stasi, hence the name.
[1157] Mission Letter by President Jacques Chirac to Bernard Stasi from June 3, 2003 in O'Brien, *The Stasi Report: The Report of the Committee of Reflection on the Application of the Principle of Secularity in the Republic*.
[1158] The Commission gathered testimonies of witnesses, educational staff and teachers as well as representatives of both human rights organizations and religious organizations; some of the view that the ban of religious symbols would stigmatize Muslim students, others of the view that the headscarf/veil is imposed on girls and women by pressure from family members as well as the context in their neighborhoods (including victim's testimonies).

incompetence in assessing the ostentatious nature of religious symbols. During the deliberation in the Commission, however, the debate shifted from concerns over school order and rights of others to problematic paternalistic arguments and gender equality[1159] as well as arguments emphasizing the meaning and survival of French republicanism. These considerations however were not used as an official justification for the enactment of the future law.[1160]

The Commission ultimately framed the issue as a public order concern, disrupting the normal functioning of schools. Thus, "the existence of pressures—including violence in the schools [for] wearing the headscarf"[1161] served as the main justification for a potential ban. This framing allowed for a potential limitation on the manifestation of freedom of conscience based on public order concerns. Under this justification, the Commission recommended that a law is passed stating that "clothing and symbols demonstrating a religious or political preference are forbidden in schools, colleges and high schools." [1162] Penalties were recommenced to be imposed only as a last recourse.

Even though this recommendation was only one among many, it was the only one swiftly proposed as a bill. The bill was passed in the French Parliament by an overwhelming majority[1163] and was signed into law by President Chirac on 15th of March 2004.[1164] The law includes neutral language and bans ostentatious religious symbols in public schools, despite the lack of definitive clarity or consistency in the implementation of this definition in practice.

[1159] See Mancini, "The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence," 2645.; Laborde, "Secular Philosophy and Muslim Headscarves in Schools," 398; Further on European Law, the veil and construction of arguments for regulating (Muslim) women's bodies see Susanna Mancini, "European Law and the Veil: Muslim Women from Victims to Emblems of the Enemy," in *Religious Literacy, Law and History*, eds. Alberto Melloni and Francesca Cadeddu (London; New York: Routledge, 2019), 127–36.
[1160] See Patrick Weil, "Headscarf versus Burqa: Two French Bans with Different Meanings," in *Constitutional Secularism in an Age of Religious Revival*, eds. Susanna Mancini and Michel Rosenfeld (Oxford: Oxford University Press, 2014), 195–215.
[1161] Ibid, 202.
[1162] O'Brien, *The Stasi Report: The Report of the Committee of Reflection on the Application of the Principle of Secularity in the Republic*, 55.
[1163] Total of 494 MP's voted for, 36 against 31 abstained.
[1164] Law no. 2004-228 of March 15, 2004.

Furthermore, even though the phrase ostentatious symbols were used in a neutral manner, interpreted by the government advisory commission to include Islamic head scarves, Christian crosses large in size, Jewish skullcaps and Sikh turbans,[1165] as Troper notes "it was perfectly clear that the law was aimed at the Islamic veil."[1166] Nevertheless, the ban broadly applies to religious symbols, not in relation to their effect in specific situations, but their potential effect on others in general. The justification for the imposed ban rested not only on the nature and potential effect of the symbols themselves, linked to public order considerations, but also to the particularity of the school environment. The latter consideration was based on the understanding of the school as "the best tool for planting the roots of the republican idea'' and thus demanding the guarantee of total equality - one that the wearing of ostentatious religious symbols impairs on.[1167]

Another example of the expansion of obligations of neutrality beyond the public sector was the outcome in the 2014 *Baby Loup* case.[1168] An employment anti-discrimination case, *Baby Loup* specifically raised the question on the application of obligations of neutrality on employees beyond the public sector. In the case, the termination of an employee in a private nursery under the justification that she had refused to remove her non-face covering jilbab at work, considered against the company's neutrality policy, was ruled permissible. This shift has been one of many in the same direction, expanding the once more minimal doctrine of neutrality as applied to the state to one applicable to the private sphere.[1169] As this shift has occurred on the adjudicative level, it will be covered below in section 3.3.

[1165] Elaine Sciolino, "French Assembly Votes to Ban Religious Symbols in Schools," *The New York Times*, February 11, 2004, https://www.nytimes.com/2004/02/11/world/french-assembly-votes-to-ban-religious-symbols-in-schools.html.
[1166] Michel Troper, "Republicanism and Freedom of Religion in France," in *Religion, Secularism and Constitutional Democracy*, eds. Jean L. Cohen and Cécile Laborde (New York: Columbia University Press, 2016), 321.
[1167] Sciolino, "French Assembly Votes to Ban Religious Symbols in Schools."
[1168] Cass Ass Plén.
[1169] In 2010, Law no. 2010-1192 of October 11, 2010 prohibited the concealment of the face in public spaces. The ECtHR found that the prohibition does not violate the ECHR. See S.A.S v. France. Additionally, in several

The expansion of the application of *laïcité* in France thus, exhibits how renegotiation of what is permissible can shift in accordance with dominant values when intertwined with practical difficulties emergent in a specific context. Even more so, these examples show that such shifts may occur even when the initial legal and constitutional framework remains intact and unchanged.

3.2. Italy: Lack of Strict Obligation of Neutrality - Symbols as National and Cultural Identity

Unlike in France and until recently in Türkiye, where the prohibition of state-imposed symbols rests on the obligation of strict state neutrality especially in the school environment, in Italy there is no such obligation. This is a product of two considerations: the different manner in which the particularity of the school is understood and the role that Catholicism still plays in building the Italian citizen.

In the Italian context religion is understood as cultural value to be embraced in the school community.[1170] Thus, it is not something seen as being a divisive factor[1171] in the school setting, even less as something that might pose public order concerns. This should be also understood in line with the understanding of permissible limitation of freedom of religion in the Italian constitutional order, where the conception of *"ordine pubblico"* was abandoned as

instances it has been deemed permissible to prohibit employees from wearing religious dress in private companies. See Arrêt n° 2484 (French Court of Cassation, Social Chamber November 22, 2017). The CJEU affirmed this approach. See Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA. However, debates on the permissibility of religious symbols in both public employment as well as in public/private schools have not been limited to France. In fact, cases testing the limits of their permissibility have been adjudicated in other European jurisdictions. Herein are a few examples, not to be understood as an exhaustive list. For Germany in regard to teachers in public schools see Decision 24 Sept. 2003, BverGE 108, 282; in regard to employees in private companies see CJEU decision WABE and MH Müller Handel, No. C-804/18 and C-341/19 (Court of Justice of the European Union July 15, 2021). For Switzerland in regards to teachers in public schools see Dahlab v. Switzerland, No. 42393/98 (European Court of Human Rights February 15, 2001). In regard to the UK see Ewieda and Others v. The United Kingdom. For Belgium more specifically regarding prohibition on face concealment in public spaces see Belcacemi and Oussar v. Belgium, No. 37798/13 (European Court of Human Rights July 11, 2017).

[1170] Article 38 of Legislative Decree no. 286 from July 25, 1998 in Ennio Codini, "The Veil at School in Italy and in France," *The Italian Law Journal* 5, no. 1 (2019): 76.

[1171] Charter of Values, Citizenship and Integration in Codini, "The Veil at School in Italy and in France," 81.

incompatible.[1172] Consequently, even though the principle of impartiality of the public service is guaranteed by Article 97 of the Constitution, impartiality has a fundamentally different connotation in and thus, public school teachers as other public employees are not prohibited from displaying religious symbols or wearing religious garbs as long as their face is not concealed.[1173]

In line with this interpretation students are also allowed to wear religious symbols and garments in public schools. Single attempts in specific schools to impose such limitations, even if under justifications of safety of the students who wear them,[1174] have been squashed by regional authorities under the premise that "there are no reasons (…) to oppose (…) the use of signs of expression of one's cultural and religious affiliation."[1175] Thus, there has been no shift in this approach.

Furthermore, recent guidelines of citizenship and integration expressly state that there is no ban on the wearing of any kind of religious symbols, and "that at school the young should be educated not to see religious convictions and manifestations of others as divisive factors." [1176] Accordingly, integration is not understood as something that requires all detachment from markers of difference.

However, in Italy, not only that there is no prohibition on the manifestation of state-imposed religious symbols in institutional settings, but also the crucifix is mandatory equipment in public institutions including courts and public schools.[1177] The crucifix is part of the "mandatory standard equipment" in public schools, mandated by royal decrees in the

[1172] See Ventura, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Italy," 2005.
[1173] Codini, "The Veil at School in Italy and in France," 77.
[1174] See The Local, "Italian College Bans Muslim Headscarves," *The Local Italy* (blog), February 17, 2015, https://www.thelocal.it/20150217/italian-college-bans-muslim-headscarves/.
[1175] Codini, "The Veil at School in Italy and in France," 77.
[1176] Charter of Values, Citizenship and Integration, approved by Ministerial Decree from 23 April, 2007 in Ibid, 81.
[1177] See further Giorgio Feliciani, "The Presence of the Cross in Public Spaces: Italy," in *Presence of the Cross in Public Spaces: Experiences of Selected European Countries*, eds. Marta Ordon, Piotr Stanisz, and Michał Zawiślak (Cambridge: Cambridge Scholars Publishing, 2016), 111–26.

Fascist period, [1178] reaffirmed in a 1967 Circular of the Ministry of Education [1179] and a Directive from 2002.[1180] According to the Council of State, the display of the crucifix in classrooms is legitimate because it "represents the symbol of Christian civilization and culture, and its historic root, as a universal value, independent of specific religious connotation."[1181] Defining the crucifix as part of the cultural identity of the nation, has been enough to satisfy Italian legislators and courts that its presence does not infringe on religious freedom and equality.[1182] Thus, as Ferrari and Pastorelli note, in the Italian experience religious diversity is governed by stressing a common Catholic identity, as "providing cultural and ethical principles on which full citizenship is based."[1183] This confirms that the Italian framework guarantees religious freedom to non-Catholics but not equality.

3.3 Türkiye: From Strict Obligations of Neutrality Towards Looser Interpretations

In Türkiye, it was not until 1981 that a ban on the wearing of the headscarf in public educational institutions was introduced. In the establishment period, certain regulation of the dress of civil servants was enacted, however, these regulations did not explicitly focus on the headscarf rather than mainly on men dress (see Chapter 4). The prohibition of the headscarf enacted in 1981 applied to students and teachers alike, and was enacted in a specific context, justified mainly under two considerations.

The debates first emerged in the late 1970s mostly in a context where due to rural-urban migration, women who practiced wearing the headscarf became more visible in public spaces especially in state universities. An additional concern was the change in the manner the headscarf was worn as well as what it symbolized. Even though not directly used as a legal

[1178] Article 118 of Royal Decree no. 965 of April 30, 1924, reaffirmed by Article 119 of Royal Decree no.1297 of April 26, 1928.
[1179] Circular no. 367 of October 19,1967 in Feliciani, "The Presence of the Cross in Public Spaces: Italy," 112.
[1180] The Directive further obligates schools to ensure the display of the crucifix. See Directive no. 2666 of October 3, 2002.
[1181] Judgment no. 63/1988 (Italian Council of State April 27, 1988).
[1182] Silvio Ferrari, "State-Supported Display of Religious Symbols in the Public Space," *Journal of Catholic Studies* 52, no. 1 (2013): 12.
[1183] Ferrari and Pastorelli, *Religion in Public Spaces,* 140.

justification for the ban, these considerations have strong connotations in the Turkish context where ever since the establishment period the headscarf was also seen as a symbol of the urban-rural divide; where women were defined as emancipated or uneducated based on their adherence to the headscarf.[1184] However, the ban was first imposed via circular by the Council of Ministers, as a direct response to the 1980 coup and student unrests that led to it. It was implemented more rigorously and uniformly after the February 28th processes when the political context had elevated the necessity for the defense of secularism from political Islam. Thus, the banning of the headscarf was understood as a matter of public order of highest importance linked to the mere existence of the republic.[1185] Thus, considering the context unlike in France, in Türkiye the ban of the headscarf/veil and thereafter religious symbols was enacted and enforced in all public educational institutions on all levels – elementary, middle and high schools[1186] as well as universities.

Thus, whereas in the establishment period strict obligations of neutrality for the civil service were justified by the need for state non-identification with the religion as well as the westernization of the state and society, in 1981 justifications for the complete ban on the headscarf rested on the nature and impact of the headscarf as a symbol itself, and the particularity of the education environment. According to the Council of State the practice of wearing the veil is not an innocent practice rather than "a symbol of a worldview contrary to the freedom of women and the fundamental principle of [the] Republic."[1187] More specifically,

[1184] See Hilal Elver, *The Headscarf Controversy: Secularism and Freedom of Religion* (Oxford: Oxford University Press, 2012), 16.
[1185] Alev Çınar, "Subversion and Subjugation in the Public Sphere: Secularism and the Islamic Headscarf," *Signs: Journal of Women in Culture and Society* 33, no. 4 (2015): 891–913.
[1186] In Rules 11 and 12 of the Rules on Dress for Staff and Pupils in Schools enacted in 1981, laid out dress code rules for upper and lower secondary school. Among other things the rules stated that "[female pupils] shall not wear any head covering and their hair shall be clean and tidy"; while regarding physical education, the rules stated that pupils "should wear the dress recommended by the school administration." Rules 11 and 12 of the Rules on Dress for Staff and Pupils in Schools dependent on the Ministry of Education and Other Ministries (July 22, 1981) in Köse and Others vs Turkey.
[1187] Decision no. E: 207, K: 330 (Turkish Council of State February 23, 1984). cited in Uzun, "Protection of Laicism in Turkey and the Turkish Constitutional Court," 408.

according to the TCC, the presence of the headscarf as such is even more problematic in the education environment as "education can only be achieved on the basis of science" thus, "dogmas and dynamics which contradict with science should be avoided."[1188] However, the regulation, much like 1925 civil service law, did not only prohibit symbols, but also required teachers to wear an ordinary, sober, modern dress

Attempts to override these regulations failed until 2013, when a shift in the interpretation of the meaning of the headscarf emerged. The TCC struck down legislative attempts, and found the on-face neutral constitutional amendments that would have lifted the ban in both public institutions and higher education as contrary to *laiklik* as an unamendable principle and therefore unconstitutional and void.[1189] Due to the enactment of the amendments, the Chief Prosecutor challenged the constitutionality of the AKP party itself (through mechanisms of militant democracy entrenched in the constitution), which ultimately led to the party being fined, but not banned.

After the AKP consolidated its power, [1190] it started to implement its overarching project to redefine the limits of *laiklik.* Thus, the wearing of the headscarf once interpreted as a threat to public order and thus impermissible, was re-interpreted as permissible under justifications of equality and religious liberty. [1191] In 2010, the Türkiye's Higher Education Council instructed universities to stop enforcing the ban despite the 2008 TCC decision. Upon receiving a complaint from a female university student claiming she was expelled from a classroom when she refused to take off her hat which served as a headscarf/veil replacement, the Council issued a formal warning to the universities claiming that students cannot be disciplined for refusing

[1188] Judgment no. E.1990/36, K.1991/8, (Turkish Constitutional Court April 9, 1991). in Lacin Idil Oztig, "The Turkish Constitutional Court, Laicism and the Headscarf Issue," *Third World Quarterly* 39, no. 3 (2017): 601.
[1189] For a discussion on the decision within the perspective of unconstitutional constitutional amendments see Roznai, "Negotiating the Eternal: The Paradox of Entrenching Secularism in Constitutions," 253.
[1190] This included changes in composition and employees in government institutions such as the Board of Education. Kaya, "Islamisation of Turkey Under the AKP Rule: Empowering Family, Faith and Charity."
[1191] For narrative framing around equality and religious liberty see Aeshna Badruzzaman, Matthew Cohen, and Sidita Kushi, "Contending Images in Turkey's Headscarf Debate: Framings of Equality, Nationalism, and Religion," *Mediterranean Quarterly* 28, no. 3 (2017): 27–55.

to abide by the code. Regarding elementary and secondary schools, in 2014 the ban was lifted by simply removing the word "bareheaded" from the dress-code regulations.[1192] In 2018, the "tamed"[1193] TCC departing from its previous practice decided that the ban on the headscarf/veil in universities constituted a violation of freedom of religion as protected by the Turkish Constitution.[1194]

This shift raises considerable questions on the normative content of secularism. Does secularism prohibit state identification with religious symbols thought its civil service, or does it allow them under protection of individual religious liberty considerations? If the latter understanding prevails, does the wearing of religious symbols by civil servants infringe on the rights of the citizens that the state ought to represent without distinction? Like the French example, the Turkish example also shows that the answer to these questions can vary through time, even under the same religion-state regime. Thus, as an example it exhibits how in contested areas such as education due to its role in building the citizen, renegotiation of what is permissible can shift in accordance with dominant values.

3.4 (Re)interpretation: The role of Courts

With limited exceptions on the issue of religious symbols in public schools, constitutional and high courts/councils have been reluctant to deem laws and regulations unconstitutional or rule against their validity. Instead, courts have found creative ways in justifying the (im)permissibility of religious symbols as imposed by laws, generally accepting justifications proposed for the purpose of the law, and/or government justifications, at times further legitimizing their necessity. Consequently, through these cases courts have served as the main protagonists shifting the interpretation of the principle of secularism.

[1192] "Turkey Lifts Headscarf Ban in Schools for Girls as Young as 10," RT International, accessed July 4, 2021, https://www.rt.com/news/190032-turkey-headscarf-schools-ban-amendment/.
[1193] See Maria Haimerl, "The Turkish Constitutional Court under the Amended Turkish Constitution," *Verfassungsblog* (blog), accessed July 4, 2021, https://verfassungsblog.de/the-turkish-constitutional-court-under-the-amended-turkish-constitution/; Sen, "The Final Death Blow to the Turkish Constitutional Court."
[1194] Individual Application 73/18, No. 2015/269 (Turkish Constitutional Court December 12, 2018).

Italian administrative courts and the TCC in its early jurisprudence, have accepted and further developed the justifications prevalent at the legislative level. In Italy, since the ICCt did not provide a definitive answer,[1195] by abdicating its competence,[1196] administrative and ordinary courts developed two trends in adjudicating the permissibility of the presence of the crucifix. While non-administrative courts, historically considered as more liberal,[1197] considered the presence of the crucifix impermissible in public schools; administrative courts, traditionally considered as more conservative,[1198] considered it permissible.[1199] Two decisions, one from L'Aquila Tribunal and the other from the Veneto Administrative Court display these discrepancies.

While the L'Aquila Tribunal found the presence of the crucifix to conflict with articles of the constitution guaranteeing positive and negative freedom of religion, equality and the impartiality of the public service;[1200] the Veneto Administrative Court found the legal basis of the imposition of the crucifix and its obligatory character legitimate. The former based its analysis mainly on three considerations: 1) the prohibition of state preference to a specific religion or culture; 2) the nature of the schools as an institution where "the presence of the crucifix would threaten the religious and ideological freedom and education of the students;"[1201] and 3) the lack of a legal basis for the display of the crucifix considering that the

[1195] Judgment no. 389 (Italian Constitutional Court 2004).
[1196] With such decision, many believe that the Court simply avoided to deliberate on the issue. Mancini, "Taking Secularism (Not Too) Seriously: The Italian 'Crucifix Case'," 184. However, it must be noted that this practice – of quick dismissal of cases on procedural grounds through *ordinanze di manifesta inammissibilità* (orders declaring manifest inadmissibility), has been a common trend within the Court that emerged in the late 1989's, as a way of 'disposing of' the large backlog. Diletta Tega, "The Italian Constitutional Court in Its Context: A Narrative," *European Constitutional Law Review* 17, no. 3 (2021): 369–93.
[1197] See Mancini, "Taking Secularism (Not Too) Seriously: The Italian 'Crucifix Case'."
[1198] Ibid.
[1199] Decision n. 1110 (T:A:R. Veneto March 17, 2005), para. 16.
[1200] The Court of Cassation found the refusal to take upon a government mandate to work in election polls due to the presence of the crucifix in the place of work, (which happened to be a school) is justified under a "personal endorsement of the principle of *laicità"* and that the presence of the crucifix not consistent with constitutional provisions" guaranteeing impartiality of the state. See Pin, "Public Schools, the Italian Crucifix, and the European Court of Human Rights," 128.
[1201] Smith v Scuola Materna ed Elementare statale 'Antonio Silveri' di Ofena (L'Aquila Tribunal October 23, 2003). in "Case Notes," *Maastricht Journal of European and Comparative Law* 17, no. 1 (2010): 91–104.

1984 Concordat repealed the confessional principle.[1202] The latter, based its analysis mainly on four considerations: 1) the decrees as a legitimate source of law and stand-alone rules not mandated by the Concordat;[1203] 2) the interpretation of secularism (*laicità*) and Christianity as part of European legal culture and heritage - the presence of the crucifix is not only not contrary to, but affirms *laicità;* 3) the interpretation of the crucifix as not only a religious Christian symbol, but a symbol of the principles of "liberty, equality, and tolerance, and finally of the very *laicità* of the State."[1204] 4) the use of interpretations of Christian doctrine to justify the permissibility of the crucifix by negating its exclusionary meaning.

Thus, while the L'Aquila Tribunal relied on textualism in applying the constitution, the Veneto administrative Court employed historical and theoretical analysis, and even interpretation of religious doctrine, to justify the permissibility of the crucifix. The Veneto Court not only accepted the underlining regulatory framework under the justification it provides but, went one step further into finding creative ways in enforcing its legitimacy. The interpretation of religious doctrine is especially problematic, as it contradicts a very well-established judicial principle[1205] one viewing judges as unequipped and thus, secular courts not permitted to determine questions of religious doctrine and practice.[1206] Furthermore, the Court's de-sacralization of the meaning of the crucifix, is problematic since as Annicchino and Gedicks argue, it "only [dilutes] the authentic testimony of religions."[1207] In terms of its effects,

[1202] Smith v Scuola Materna ed Elementare statale 'Antonio Silveri' di Ofena.
[1203] Full translation of Decision n. 1110 (T:A:R. Veneto March 17, 2005), in Pasquale Annicchino and Frederick Mark Gedicks, "Cross, Crucifix, Culture: An Approach to the Constitutional Meaning of Confessional Symbols," *EUI Working Paper RSCAS* 88 (2013).
[1204] Decision n. 1110 (T:A:R. Veneto March 17, 2005), para. 12.4.
[1205] For the ECtHR see Izzettin Dogan and others v. Turkey, No. 62649/10 (European Court of Human Rights April 26, 2016).; For the United States see United States v. Ballard 322 U.S. 78 (1944) and Employment Division v. Smith 494 U.S. 872 (1990);
[1206] On the so called "hands-off" approach see Kent Greenawalt, "Hands off! Civil Court Involvement in Conflicts over Religious Property" 98, no. 8 (1998): 1843-44; Samuel J. Levine, "Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief," *Fordham Urban Law Journal* 25, no. 1 (1997): 85–134.; Richard W. Garnett, "A Hands-off Approach to Religious Doctrine: What Are We Talking About," Notre Dame Law Rev*iew* 84, no. 2 (2009): 837–64.
[1207] Annicchino and Gedicks, "Cross, Crucifix, Culture: An Approach to the Constitutional Meaning of Confessional Symbols, 139.

the decision is problematic primarily as it disguises traits of the traditional, majority religion as culture for the sake of imposing them as a building block of citizenship.

Recent jurisprudence of the Italian Court of Cassation, the highest civil court, has also shifted from the trend of interpretation applied by non-administrative courts. In its latest decision, the Court of Cassation ruled that schools *may* display the crucifix in public classrooms (as the practice is compatible with the constitution) if the school community decides to do so via a vote. If conflicting positions arise, they ought to be resolved through reasonable accommodation. In addition to the practical difficulties that may arise from this decision in the future, the way the Court resolved the matter shows a clear shift from the individual rights paradigm as understood against the state.

Until 2018, the TCC and the Turkish Council of State have maintained the permissibility and necessity of the headscarf ban, striking down attempts to reverse them. In line with the contextual considerations in the time of the enactment of the ban, the TCC framed the issue of the ban on the headscarf on the nature of the headscarf as well as the specificity of the educational environment. In terms of the nature of the headscarf, the TCC relayed on paternalistic and gender equality arguments,[1208] whilst also linking them to social order, maintaining that the wearing of the Muslim headscarf/veil could "lead to claims that those women who do not wear headscarves are atheists, and thus create social conflict."[1209] More importantly, the TCC framed the headscarf as a symbol of political Islam. Since political Islam is all-encompassing and aims towards temporal dominance, the headscarf as its symbol poses an existential threat to secularism as a principle to which the constitution awards the highest normative protection.[1210] The education-specific argument framed religious symbols as tools

[1208] "Equality before the law of men and women are being taught and applied in practice" via the protection of the secular character of institutions that justifies restrictions on religious dress. Judgment no. E.1989/1, K.1989/12 (Turkish Constitutional Court March 7, 1989).
[1209] Judgment no. E.1989/1, K.1989/12 (Turkish Constitutional Court March 7, 1989).
[1210] Uzun, "Protection of Laicism in Turkey and the Turkish Constitutional Court," 409.

for social pressure from which an educational environment (based on science) and individuals in it must be free. [1211]

Post 2014, whilst deciding on individual complaints[1212] the TCC has ruled that: the dismissal of civil servants for wearing the headscarf[1213] prohibiting a lawyer to preform her duties in the courtroom for wearing the headscarf[1214] and imposing an obligation on a student to repay a scholarship lost due to university dismissal based on the headscarf ban[1215] all amounted to a violation of their freedom of religion. To do so, the TCC had to apply its new liberal doctrine on secularism as established with the 2012 decision (see above), one that allows for religious symbols in the public sphere,[1216] and to reinterpret the way the nature and effects of the headscarf are defined.

In all three decisions the TCC emphasized that secularism is a principle that imposes obligations on the state and not the individual or society, and that views religion as a collective identity and allows for its social visibility. [1217] Hence, the state is under obligation to eliminate obstacles for the protection of freedom of religion and to provide appropriate environment and opportunities whereby individuals may live in the way they believe. [1218] This is a very significant departure from previous jurisprudence that viewed the role of Islam and the headscarf as its manifestation, as an existential threat to the republic. If the earlier TCC jurisprudence was closer to the French understanding of secularism, its more recent jurisprudence is closer to the Italian "positive and active *laicità*" that "supposes the existence of a plurality of value systems."[1219]

[1211] Uzun, "Protection of Laicism in Turkey and the Turkish Constitutional Court," 409.
[1212] Introduced via the Constitutional Reform in 2012.
[1213] Individual Application 42/18, No. 2015/8491 (Turkish Constitutional Court July 18, 2018).
[1214] Tuğba Arslan.
[1215] Individual Application 73/18.
[1216] Tuğba Arslan.
[1217] Ibid, para. 133, 135.
[1218] Individual Application 42/18.
[1219] Ibid.

According to the TCC, the state also has a negative obligation - not to adopt an official religion, nor to "intervene in the freedom of religion and conscience of the individuals unless there is force majeure." [1220] Thus, public order considerations become force majeure considerations, a concept not prescribed as a limitation in the constitution, whose conditions and application are uncertain even more so since the TCC itself does not provide a definition or interpretation of its meaning. Thus, one might consider such framing against the "spirit of the Constitution" which envisions mechanisms of militant democracy upon the fear from strong religions that represent a threat to democracy and pluralism themselves.

Furthermore, the TCC defined secularism as a protector of pluralism and placed the secularism and freedom of conscience at the same level, both as indispensable for democracy. This is also a significant departure, as instead of positioning the limitation of manifestation of religion as necessary for the survival of democracy, the TCC equalized secularism and freedom of conscience as indispensable for democracy. Thus, the TCC diminished the existential meaning of secularism to the Republic.

The TCC also departed from the interpretation of the headscarf/veil as a tool for social pressure as generally defined. The TCC considered this understanding as contrary to democracy and the understanding of pluralist secularism.[1221] According to the TCC "such practices reflect social diversity rather than constituting a threat against it."[1222] In a manner similar to the Council of State in France, the TCC demanded that "sufficient evidence should be presented as to the fact that the behaviors, attitudes or actions of the applicant were in violation of [secularism]"[1223] and how the rights and freedoms of others and public order would

[1220] Tuğba Arslan, No. 2014/256 (Turkish Constitutional Court June 25, 2014), para 137.
[1221] Individual Application 42/18.
[1222] Ibid.
[1223] The Court notes such behavior "is aggressive or intervenes in the faiths of the others, is oppressive, provocative, has an aim of imposing its own faith by force or disrupts the social functioning, causes some disorders and irregularities. See Tuğba Arslan, No. 2014/256 (Turkish Constitutional Court June 25, 2014), para 141-2.

be damaged.[1224] This applied even in reference to civil servants, as the TCC did not entertaining arguments related to the obligation of neutrality arising from the non-identification.[1225]

In France on the other hand, two trends emerged: one represented by the Council of State prior to the enactment of the 2004 Law and another by the Court of Cassation in the *Baby Loup* case. Even though within its advisory function the Council of State in the process of enactment of the 2004 Law advised against a general ban, the final decision was on the Parliament. The 2004 law banning ostentatious symbols was enacted as a response and in direct divergence from the jurisprudence and the advice of the Council of State. Since the law was never challenged before the FrCC, it remains in force. However, even if the law were to be challenged in front of the FrCC, it is most likely that it be deemed constitutional – considering the confirmation of the constitutionality of the 2010 Law on face concealment,[1226] as well as the self-restraint that the FrCC practices in invalidating laws, especially in hard cases.[1227] Thus, if challenged the outcome could possibly be another example of a trend similar to those of the Italian and Turkish Courts.

On the other hand, in the *Baby Loup* case the French Court of Cassation recently opened the door to the shift in the permissibility of such an understanding and allowed for it to be expanded to private employees. Until 2013, the Social Chamber of the Court de Cassation maintained that general religious neutrality duties could not be imposed by a private employer as there was a strong divide between private agents, protected by the French Employment Code

[1224] Tuğba Arslan, No. 2014/256 (Turkish Constitutional Court June 25, 2014), para 126.
[1225] Individual Application 42/18.
[1226] The nature of the law and was different, first it prohibited the concealment of the face, through a blanket ban and impacted the totality of public spaces. The Court ruled that the law is constitutional - lawmakers felt that practices of face concealment pose dangerous for public safety and security and fail to comply with the minimum requirements of life in society, thus, making the measure proportionate. However, it adopted a qualified interpretation, ruling that the ban cannot apply to places of worship. See Decision no. 2010-613 DC (French Constitutional Council October 7, 2010).The law was challenged in front of the ECtHR. The Court relaying on the margin of appreciation ruled that there has been no violation of Article 9, as the protection of "living together" as tied to the protection of rights of other (a limitation in Article 9 paragraph 2 of the ECHR) was sufficient. See S.A.S v. France.
[1227] See Romain Espinosa, "Constitutional Judicial Behavior: Exploring the Determinants of the Decisions of the French Constitutional Council," *Review of Law & Economics* 13, no. 2 (2017): 1–41.

and "public agents who, as representative of the State, are bound by special duties."[1228] However, in 2014 the plenary Chamber of the Court, while maintaining that *laïcité* is not applicable to private enterprises, it proclaimed that nevertheless a general ban on the wearing of religious symbols by employees could still meet legal proportionality and anti-discrimination requirements. The Court specifically accepted that a general obligation of religious neutrality is justified to protect the conscience of students in a private nursery. Thus, the decision opened the door for the possibility of private employees to be bound by neutrality requirements traditionally understood as bounding public servants. The case, however, is part of a trend in shifting the legal dimension of *laïcité* with the recently dominant political concept that transcends beyond the public sphere from one focused on the religious neutrality of public authority… [to an] expansive account that is aimed at checking public expressions of religiosity by private persons."[1229]

The ECtHR has also maintained the course of accepting the government justifications mostly relaying on subsidiarity and the margin of appreciation, whilst leaving behind a body of inconsistent case-law. In Lautsi 2[1230], the Grand Chamber of the ECtHR "overruled" [1231] the Chamber and found that the presence of the crucifix in Italian public schools does not violate Article 2 Protocol No. 1 of the ECHR. The Court avoided entering deliberations on the meaning of secularism, the other meanings of the crucifix and the compatibility of its presence with neutrality. Considering only Article 2 Protocol No. 1, the Court found no evidence that

[1228] Myriam Hunter-Henin, "Religion, Children and Employment: The 'Baby Loup' Case," *The International and Comparative Law Quarterly* 64, no. 3 (2015): 718.
[1229] Eoin Daly, "Laïcité in the Private Sphere? French Religious Liberty After the Baby-Loup Affair," *Oxford Journal of Law and Religion* 5, no. 2 (2016): 212. See further Cécile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford: Oxford University Press, 2008).
[1230] Lautsi and Others v. Italy, No. 30814/06 (Grand Chamber, European Court of Human Rights March 18, 2011).
[1231] The Second Chamber and the Grand Chamber delivered conflicting decisions. The Second Chamber of the Court, in line with the reasoning with Italian ordinary judges, found a violation of Article 2 of Protocol No. 1 taken together with Article 9 of the ECHR stating that: the compulsory display of the crucifix "restricts the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe"… and is incompatible with the State's duty to respect neutrality in the exercise of public authority, particularly in the field of education." Lautsi and Others v. Italy, No. 30814/06 (Second Chamber, European Court of Human Rights November 3, 2009).

authorities were intolerant of pupils thus, it acted with respect toward parental convictions. The Court mostly relied on the margin of appreciation to find no violation,[1232] stating that ultimately it is within the scope of the government's discretion whether to place crucifixes in public classrooms, considering that states can decide on the place of religion in schools with the limitation that they do not amount to indoctrination.[1233] This approach departs significantly from the previous jurisprudence of the Court especially in Zengin v Turkey and Følgero and Others v Norway, where according to the Court even through indoctrination was not proven opt-out options had to be afforded.[1234]

The decision was welcomed by many state and non-state actors including an alliance between the Vatican and the Russian Orthodox Church, [1235] many of whom were third-party interveners in the case.[1236] It was also heavily criticized for being poorly reasoned[1237] for its use of the margin of appreciation as an avoidance mechanism,[1238] for trading individual rights

[1232] The decision was based on several arguments developed by the Grand Chamber: 1) no evidence that authorities were not intolerant of pupils; 2) the presence of the crucifix in classrooms did not encourage development of teaching practices with a proselytizing tendency, the crucifix is passive symbol – meaning that 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 form;" 3) the applicant "retained in full her right as a parent to enlighten and advise her children, to exercise in their regard her natural functions as educator and to guide them on a path in line with her own philosophical convictions."

[1233] Lautsi and Others v. Italy, para. 69.

[1234] For an analysis see Jeroen Temperman, ed., *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden: Brill Nijhoff, 2012), 343.

[1235] Annicchino gives the example of the latter by His Holiness Patriarch Kirill to the Italian Prime Minister Silvio Berlusconi stating among other things that "the Christian heritage in Italy and other countries in Europe should not become a matter to be considered by European human rights institutions." See Pasquale Annicchino, "Winning the Battle by Losing the War: The Lautsi Case and the Holy Alliance between American Conservative Evangelicals, the Russian Orthodox Church and the Vatican to Reshape European Identity," *Religion & Human Rights* 6, no. 3 (2011): 213–19.

[1236] Including the European Centre for Law and Justice (ECLJ) (a conservative Christian pro-life law firm, associated to the American Center for Law and Justice, founded by the conservative evangelical leader and televangelist Pat Robertson and 33 members states. On a commentary from the ECLJ Director See Grégor Puppinck, "The Case of Lautsi v. Italy: A Synthesis," *BYU Law Review* 2012, no. 3 (2012): 873–930.

[1237] See Lorenzo Zucca, "Lautsi: A Commentary on a Decision by the ECtHR Grand Chamber," *International Journal of Constitutional Law* 11, no. 1 (2013): 218–29.; Annicchino, "Winning the Battle by Losing the War."; For ECHR jurisprudence on religious symbols and the majority vs. minority conundrum see Mancini, "The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence," 2631.

[1238] Giulio Itzcovich, "One, None and One Hundred Thousand Margins of Appreciations: The Lautsi Case," *Human Rights Law Review* 13, no. 2 (2013): 287–308.

for the respect of national sovereignty,[1239] and for not even considering children's rights especially their rights to freedom of religion or belief and (access to) education.[1240] Perhaps it is true, as Pierre-Henri Prélot notes, that the divergence between the two Chambers is a divergence prevalent in the European context, between a conceptual model of secularism (*laïcité*) championed by the Second Chamber, and a conceptual model of toleration by the Grand Chamber.[1241] Thus, considering the Court's mandate and this divergence, the Court acknowledged "the Christian roots of Europe and the right for its member countries to make them part of their current identity."[1242]

In Leyla Şahin v. Turkey [1243] the Grand Chamber of the ECtHR also relying on the margin of appreciation ruled that denying access to written examinations and lectures to a university student for refusing to remove her headscarf did not amount to a violation of the ECHR. The Court especially considered the political significance of the veil as religious symbol in the Turkish context after the February 28th processes and the dangers it posed to pluralism and democracy. The decision heavily relying on subsidiarity confirmed the TCC's approach that has long established this strong nexus between democracy and secularism (see Chapter 4). The case was highly criticized for viewing the wearing of the headscarf in higher education as a threat to secularism,[1244] for proposing "the notion that government and society must be

[1239] See Andrea J. Rush, "Lautsi v. Italy: Deference to State Sovereignty from on High as the Cross Remains Nailed to Italian School Walls," *Tulane Journal of International and Comparative Law* 20, no. 2 (554 533): 2012.
[1240] See Jeroen Temperman, "Lautsi II: A Lesson in Burying Fundamental Children's Rights," *Religion & Human Rights: An International Journal* 6, no. 3 (January 1, 2011): 279–84.
[1241] The difference between the two being their aim: "the aim of tolerance is pacification through diversity, whereas the aim of secularism is unity through integration" See Pierre-Henri Prelot, "The Lautsi Decision as Seen from (Christian) Europe," *Maine Law Review* 65, no. 2 (January 1, 2013): 783–88.
[1242] Ibid, 788.
[1243] Leyla Şahin v. Turkey, No. 44774/98 (European Court of Human Rights November 10, 2005).
[1244] Christopher Decker and Marnie Lloydd, "Case Comment, Leyla Sahin v. Turkey," *European Human Rights Law Review* 6 (2004): 677.

protected from religious overreaching in order to preserve the secular nature of the State"[1245] and for establishing human rights standards that justify such a prohibition.[1246]

4. Conclusion

The fact that secularism is simply a word that gains its normative content through laws and interpretations through time has allowed for its normative framework to vary significantly from one context to another. In its most minimal meaning, it has maintained the supremacy of the state in normative ordering, but in aspects more connected to citizenship such as education, it has barred almost no particular strength. The aim of the chapter was to answer two sub-questions of the dissertation. Regarding the first question, namely *How has the normative content of the principle of secularism been developed or challenged on the legislative level in the field of education,* shifts have been detected in the direction of both more flexible and stricter interpretations of the principle.

In terms of state funding of religious schools, in France and Italy, a shift in the role of the state can be seen - from provider or paternalist to an enabler or an investor, "[enabling] individuals and families to achieve their own ends."[1247] Perhaps because the republics were no longer under existential threat, extending welfare policies in the form of funding to private schools - even if most of them religious- was no longer seen as problematic. Thus, financial separation – in general, but especially in the education sector - was no longer of primal importance. This is of course more applicable to France than to Italy, where the Catholic Church enjoyed financial support in almost all other areas of its operation and where religious instruction is also available in public schools. Perhaps, and not necessarily mutually exclusive,

[1245] Claudia Morini, "Secularism and Freedom of Religion: The Approach of the European Court of Human Rights," *Israel Law Review* 43, no. 3 (2010): 617.
[1246] Ergun Özbudun, "Laiklik ve Din Hürriyeti," in *Demokratik Anayasa: Görüşler ve Öneriler*, eds. Ece Göztepe and Aykut Çelebi (İstanbul: Metis Yayınları, 2012), 197.
[1247] Lorenza Violini and Daniele Capone, "Freedom of Choice in the Italian Educational System: The Idea of a Dote," in *Government, Governance and Welfare Reform*, eds. Alberto Brugnoli and Alessandro Colombo (Cheltenham, UK : Northampton, MA, USA: Edward Elgar, 2012), 154.

it was a herald of how the language of rights and freedoms (more specifically freedom of parental choice) is used to reintroduce financial state-religion entanglement.

In Türkiye a trend can be seen in the expansion to of the funding for private schools in the form of voucher programs, but, more importantly, there was a vast expansion of Imam Hatip schools. However, whereas in France and Italy we saw a gradual trend towards a looser interpretation of non-funding clauses that led to the direct and indirect funding of private (religious) education, in Türkiye the issue does not concern the direct reinterpretation of *laiklik*, but the unlimited competences in term of funding that the government holds over the majoritarian religion deriving from its initial conception. Paradoxically, the absoluteness of *laiklik* (since it means unlimited state power) enables the state to promote religious education. It is *laiklik* that *allows* for the state to control the complete existence and development of religious education: through complete control over the public Imam Hatip schools, by sponsoring religious education in all public schools whilst prohibiting private religious schools. Thus, even though elevated funding and the overarching development of Imam Hatip schools may be viewed as a means of elevating the importance of the majority religion in society – as more hearts and minds can be considered won in such an educational setting – such actions cannot be questioned under the concept of the Turkish *laiklik.* The difficulty, therefore, lies in the nature of *laiklik* itself as a principle constructed not as separation, but as complete state control.

In terms of religious education in public schools, different trends have developed in all three jurisdictions. In France, *laïcité* has proved salient, even though teaching about religion has been recently introduced, the appointment of teachers has remained under state discretion and the curriculum has been created in a non-confessional manner. In Italy, shared competences between the state and the Catholic Church in religious instruction, in terms of curriculum and teachers' appointment as well as non-egalitarian approaches to other denominational courses

have been considered as compatible with *laicitá*. In Türkiye, the complete state control over religious instruction has been considered compatible with *laiklik.* The developments in Turkish follow two trends: one in the direction of inclusion and accommodation of minority religions in content of RCMK, another in the directing of re-enforcement of values and percepts based on Suni Islam as the basis for good citizenship.

In terms of religious symbols, we see a trend of shifts in interpretation of secularism that bear witness of its normative weakness. In France we have seen an expansion of the obligations of neutrality from their application limited to civil servants to students. In Italy, the presence of the crucifix in public schools have been legitimized as obligatory. In Türkiye, we have seen a radical shift from a very restrictive regime to one completely liberalized. The fact that all these trends have been justified as permissible, and at times obligatory under constitutional secularism and its application, even though manifestly shifting its initial interpretation is proves that secularism allows for its bending and adjusting.

The second aim of this chapter was to answer the second sub-question of the dissertation: *Does judicial interpretation in cases related to constitutional secularism and education lead to the "thickening" or "thinning" of the principle of secularism?* On the adjudicative level, high and constitutional courts (with certain exception especially regarding Türkiye pre-2012) have mostly employed interpretations and avoidance mechanisms that would allow them to confirm legislative agendas, having a significant impact on the normative content of constitutional secularism. Vice-versa, the interpretation of the principle by courts in certain instances has had a direct impact on the resolution of such cases. Cases arising in the field of education have often proved difficult to adjudicate due to the impossibility to resolve them by simply applying the constitution. This has urged high and constitutional courts/councils to engage in creative reasoning and has also led to inconsistency in application between different

courts and/or courts and other state institutions. Furthermore, the ECtHR has consistently relied on subsidiarity and the margin of appreciation to confirm the reasoning of national courts.

The analysis of the cases in this Chapter shows that courts have primarily employed five approaches in deciding cases related to secularism and education. The approaches taken and their outcome indirectly or directly form the normative content of the principle of secularism, and lead to either the *thinning* or the *thickening* of the principle of secularism in its liberal understanding (see chapter 1 for theoretical definitions). *Thinning* of the principle of secularism is when its significance is "watered down" in most instances in the spirit of catering to the majority religion. *Thickening* of the principle of secularism, equally caters to the majority religion, emerges when there is overinflation of its existential meaning at the expanse of liberty, which has allowed for the state power/interference to penetrate where it was not allowed to do so before.

Three approaches have led to the thinning of the principle of secularism.

1) Using the language of rights and/or equality to avoid interpreting issues as a matter of secularism.

The cases of the reinterpretation of funding clauses to private schools are a clear example of this approach. The FrCC in both of its decisions avoided entering debates on the principle of secularism and instead, in its rather formalistic approach, extracted the justification for state funding from the fundamental principle of the freedom of education. Its qualified interpretation of mandate equality reenforced its standard. The ICCt avoided entering into arguments concerning the "no cost to the state" qualification and simply framed the question of parity as a (non)discrimination issue. Putting aside value judgments on the *outcome* of the decision, these approaches thin the meaning of the principle of secularism as they disregard the normative consequences of one of its main building blocks: non-establishment through non-funding.

2) (Re)interpreting religion as culture to upkeep/advance majoritarian preferences.

Italian courts, including the ICCt, have championed this approach (even though not unique to Italy)[1248] employing historical and theoretical analysis, and even at times the interpretation of religious doctrine, to justify the permissibility of majoritarian religious traits generally imposed on society as a whole. An additional problematic aspect of this interpretation is that it not only positions secularism as a product of Christianity, but also as a principle that ought to protect Christianity as a cultural trait. This interpretation allows for the values of a specific religion, "secularized" by the etiquette of common culture, to serve as a building block of citizenship by propagating the idea that a *good* citizens must abide by Christian conceptions of the good life. As such, this conception thins the basic trait of secularism within its liberal understanding: the non-identification of the state with any particular conception of the good.

3) Applying philosophical/theoretical interpretations of secularism to justify advancing majoritarian preferences.

Philosophical and theoretical interpretations have been employed both by the ICCt and TCC to forge their own specific interpretation of secularism. The ICCt, by overinflating the meaning of Christian doctrine to law and context (as above), has allowed for religious arguments to serve as a justification for the constitutionality of general laws. The TCC by adopting another theoretical understanding of secularism to depart from its previous case-law, has led to *thinning* of the principle of secularism that has produced two opposite processes. On one hand, the restriction no longer applies to public teachers and employees in general, removing the strict neutrality obligation as non-identification – which can be seen as a thinning of the principle. However, on the other hand, it curtails state power as blanket bans on the headscarf do not apply, which moves it closer to its liberal understanding.

[1248] I have elaborated on the European perspective above. On the US perspective concerning the Supreme Court of the United States employment of civil religion as a judicial doctrine for grater accommodation of religion in public life see Derek H. Davis, "Editorial: Civil Religion as a Judicial Doctrine," *Journal of Church and State* 40, no. 1 (1998): 7–23.

Two approaches have led to the thickening of the principle of secularism.

1) The employment of public order and paternalistic arguments to overinflate the meaning of secularism at the expense of individual liberties.

Public/social order considerations and paternalistic arguments have been "accepted" by courts to justify the thickening of the principle of secularism - to extend its application in the private sphere at the expense of liberty. A clear example is the bans on the wearing of religious symbols in general (France) and the headscarf in particular (Türkiye)[1249] as applied to private persons. In public spaces and as applied to civil servants, the strict obligation of neutrality is justified under several liberal arguments, primarily the prohibition of the imposition of religious preference by the state and the effect it would have on impressionable children. As applied to individuals, it moves away from the understanding of the need of neutrality as applied to the state and its representatives to the school/university as a physical facility, affecting all those who enter it. As McCrea notes, "secularism is about the religious neutrality of the state and …[here] it goes beyond state contexts;"[1250] distancing from the purpose of the secular state, as Laborde puts it: to be "secular so that citizens do not have to be."[1251]

[1249] As an additional remark, we must separate the issue of the ban on religious symbols in public primary and secondary schools for that of the ban in higher education (in the case of Türkiye the latter has predominantly attracted vast scholarship and debate). Whereas in lower schools, liberal arguments regarding impressionability of children, parent choice and the mandatory nature of education are prevalent – in higher educational institutions they do not apply. Considering, the French approach was more liberal that the Turkish pre-2012 even in this aspect. In contrast, the Turkish ban in higher education institutions was almost entirely relaying on public order considerations, and the existential threat to the Republic within the understanding of secularism. As it stands now however, the French and the Turkish systems are no longer comparable, as all bans on religious symbols in educational institution in Türkiye- by both teachers and students – no longer apply. Further on the ban in higher education and its effects see Fatma Nevra Seggie, *Religion and the State in Turkish Universities The Headscarf Ban* (Basingstoke: Palgrave Macmillan, 2011).; Zeynep B. Uğur, "Unveiled: The Effect of the Headscarf Ban on Women's Tertiary Education in Turkey," *Feminist Economics* 26, no. 2 (2020): 187–217.; Zoe Leventhal, "Human Rights: University - Regulations Imposing Restrictions on Wearing Islamic Headscarves in Higher Education Institutions in Turkey," *Education Law Journal* 6, no. 1 (2005): 40–44.; Rachel Rebouche, "Turkey: At the Crossroads of Secular West and Traditional East: The Substance of Substantive Equality: Gender Equality and Turkey's Headscarf Debate," *American University International Law Review* 24, no. 4 (2009): 711–37.
[1250] Ronan McCrea, "The Ban on the Veil and European Law," *Human Rights Law Review* 13, no. 1 (2013): 75.
[1251] Laborde, "Justificatory Secularism," 165.

Notwithstanding considerations on the effects of identity politics and culture wars in the enactment of such bans,[1252] the bans open questions on the principle of secularism. As argued in Chapter 1, secularism is to be understood as both restraining and informing state power linked to the neutrality of effects inherent to equality. The bans are not problematic in terms of neutrality of justification, as both were enacted based on considerations detached from certain conceptions of the good. However, they both pose challenges connected to the boundaries of state power as well as equal treatment.

2) The employment of contextual particularity to either contain or promote majoritarianism.

The example of Türkiye shows that the particularity of context and the institutional framework that governs the majority religion itself, can be used as a "blanket" justification for either its advancement (as regarding religious education) or its curtailment (as regarding the headscarf pre-2012). In the Turkish context, this has allowed for the justification of a concept of *laiklik* as complete state control and management over the majority religion, which in itself is completely devoid of its liberal understanding, as primarily a principle curtailing and informing state power.

[1252] As McCrea puts it beautifully: as cultural consensus breaks down, the law moves in to replace cultural norms with legal rules. See McCrea, "The Ban on the Veil and European Law."

Chapter 6. (Re)interpreting Secularism: Questions in indirect and direct state funding of religion

It is argued that the financial relationships between the state and religious institutions can serve as "true" evidence of the state's attitude towards religion.[1253] Depending on the historical and political circumstances, different jurisdictions have established (or not) different funding schemes affecting religious institutions. Financial relationships between the state and religious organization can be in the form indirect funding (by the existence of special tax exemptions or deductions) and in the form of instruments of direct public funding of religion. In this chapter I will look at instruments of both direct and indirect funding with the aim to answer two sub-questions of the dissertation: *How has the normative content of the principle of secularism been developed or challenged on the legislative level in the field of state funding of religion? Does judicial interpretation in cases related to constitutional secularism and state funding of religion lead to the "thickening" or "thinning" of the principle of secularism?*

The architecture of the Chapter will be divided in four separate sections. Section 1 will provide a brief overview of the rules of establishment of religious organizations. Before entering debates on available funding an overview of establishment procedures and regimes governing religious organization must be provided, as legal personality and forms of organization provide for different access to rights and benefits. Section 2 will focus on schemes of direct funding schemes. Instruments of direct funding shall be analyzed through a dichotomy as 1) funding of religious organizations; and 2) funding for specific purposes. The former refers to instruments or schemes of funding that directly benefit religious institutions without underlining a specific purpose for which the funds ought to be used. The latter, on the other hand, concerns funding for specific purposes, including those that might not be specifically

[1253] Marco Parisi, "Public Economic Resources and Religious Denominations in Europe," *Anuario de Derecho Eclesiástico Del Estado* 36 (2020): 531–53.

directed towards religious institutions, but indirectly benefit them. Section 3 will focus on indirect funding. Finally, Section 4 will discuss the role of courts. When considering the European context, the supranational dimension must also be examined. Although tax policies are mainly within state competences, the EU has a subsidiary role mostly related to potential obstacles to the free movement of goods and services within the internal market (see the Italian ICI case below).[1254] The ECtHR also has competence to decide on issues related to taxation and religious institutions under Article 9 as well as Article 14 Article, considered by some towards "[setting] up a marketplace of religions."[1255]

1. Rules of Establishment and Supervision: A Short Summary

This section will provide an overview of the avenues available to religious groups in France, Italy and Türkiye in gaining legal personality as well as state bodies responsible for their registration and supervision.

1.1 France: A Neutral Approach?

A religious entity in France can register under several types of organizations: as a private association or as a *congregation* under the 1901 Law on Association; as a religious association (*associations cultuelles)* under the 1905 law;[1256] and finally as a diocesan association, a special entity only applicable to branches of the Catholic Church (see also Chapter 2).

The local Prefecture is the relevant body in charge of the registration of *associations cultuelles*;[1257] private associations are governed by ordinary law and *congrégations* can be

[1254] Even though the CJEU has yet to receive a case related to tax policies and religious institutions, the Commission has opened several investigations mainly against Spain, Denmark and Italy. See Françoise Curtit and Anne Fornerod, "State Support for Religions: European Regulation," in *Public Funding of Religions in Europe* (London: Routledge, 2015), 3–22.

[1255] Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape*, 93.

[1256] See Article 4 of the 1905 Law on the Separation of the Churches and State.

[1257] Religious organization under the 1905 law can gain legal personality by signing and depositing an association's charter at a Prefecture See Alain Garay et al., "The Premissible Scope of Legal Limitations on the Freedom of Religion or Belief in France," *Emory International Law Review* 19 (2005): 785–840. The 1905 Law foresees conditions on the minimum number of members vis-à-vis the number of inhabitants in the locality where it ought to be established. See Article 19 1905 Law on the Separation of the Churches and State.

established or terminated by a decision from the Council of State.[1258] Private associations are allowed to engage in for-profit activities, whereas the other forms of organizations cannot - as their purpose is limited to religious activities, defined as liturgical services and practices. Thus, religious groups usually register under both forms. The 1905 Law also foresees the possibility to create a federation or union of religious associations having a central administration, which allows for religions with a central authority to maintain their control.[1259] These regulations apply to all religious organizations equally. The general provisions do not apply to the regions where the Concordat, amended with decree No. 2001-31 of January 10, 2001,[1260] is still in force, thus recognizing the status of four religions - Catholic, Lutheran, Presbyterian and Jewish.

All religious organizations are under the supervision of the Central Bureau of Worship (*Bureau Central des Cultes*) within the Ministry of the Interior. The Bureau controls the observance of the principles contained in the 1905 Law and has competences regarding the policing of worship (law and order for processions, etc.)[1261] Thus, the state has the authority to foresee collective practices and ensure that they do not impair republican order or create disturbances to public order.[1262] The Bureau is also responsible for issuing guidelines to Prefectures "regarding which entities should be recognized officially as "religious associations."[1263] Finally, it maintains relationships and dialog with representative bodies of religious organizations. The latter function was established by President Sarkozy at the beginning of the 2000s within its "*laïcité positive,"* aimed at building religious infrastructure and establishing a dialog primarily with the Catholic Church (that he saw as a social bound for

[1258] See Article 13 of the 1901 Law on Associations.
[1259] Article 28 of 1905 Law on the Separation of the Churches and State.
[1260] Decree no. 2001-31 of January 10, 2001.
[1261] Chelini-Pont and Ferchiche, "Religion and the Secular State: French Report."
[1262] Ministère de l'Intérieur, "Le Ministère de l'Intérieur, Ministère Des Cultes," interieur.gouv.fr, accessed April 14, 2022, http://www.interieur.gouv.fr/Archives/Archives-des-actualites/2016-Actualites/Le-ministere-de-l-Interieur-ministere-des-cultes.
[1263] Gunn, "Religion and Law in France: Secularism, Separation, and State Intervention," 961.

society)[1264] and with other religious groups through their representative bodies or umbrella organizations.

Before the 1990s -when the first steps towards the establishment of the Council were taken – the organization of Islam and Muslim communities was mostly left to the responsibility of foreign governments which aimed at maintaining a relationship with its citizens abroad.[1265] Since Islam is the second largest faith in France, but has no central clerical representation, the French Council of the Muslim Faith (CFCM) was established in 2003 as an interlocutor representing the different Islamic communities in France vis-à-vis the state, advising in regulations affecting Islamic worship. The CFCM was an umbrella organization, whose composition reflected the diversity of French Muslim communities along national, ethnic, and sectarian lines.[1266] The creation the CFCM was urged by the emergence of the "headscarf affairs" in public schools (see Chapter 5) as well as fears about the rise of political Islam and Islamist terrorism.[1267]

As representative umbrella organizations of other faith communities also exist in France,[1268] according to some, the establishment of the Council was the recognition of the "Muslims of France as equal citizens and [giving] them a place "at the table of the Republic."[1269] However, as the establishment of the Council was mostly state-supported and initiated, not created bottom-up as the other two and it was aimed at creating "French

[1264] As Akan states "the façade of references to diversity and acclaim for a new meaning of laïcité, there seemed to be nothing new in Sarkozy's speech, just the old game of the social mobilization of religion at large, in the spirit of the 1850 Falloux law" Akan, The Politics of Secularism, 217.
[1265] Rim-Sarah Alouane, "Islam, Made in France? Debating the Reform of Muslim Organizations and Foreign Funding for Religion," *Brookings* (blog), May 1, 2019, https://www.brookings.edu/blog/order-from-chaos/2019/05/01/islam-made-in-france-debating-the-reform-of-muslim-organizations-and-foreign-funding-for-religion/.
[1266] "Conseil Français Du Culte Musulman (CFCM) - Oxford Islamic Studies Online," accessed April 13, 2022, http://www.oxfordislamicstudies.com/print/opr/t236/e1015.
[1267] Fernando Mayanthi, "The Republic's 'Second Religion': Recognizing Islam in France," Middle East Research & Information Project, 2005.
[1268] For example, the *Fédération protestante de France* (established 1905) and the *Conseil représentatif des institutions juives de France* (CRIF) (established in 1944).
[1269] Mayanthi, "The Republic's 'Second Religion': Recognizing Islam in France," 12.

Islam,"[1270] others characterized the move as neo-Gallican understood "from a perspective where the state controls and privileges the religious forms that it favors."[1271]

In 2021 and 2022 two developments transpired that tightened the grip of state control over religious organizations. First, the so-called "anti-separatism Law"[1272] was enacted[1273] that amended provision of the 1901 and 1905 Law. Under the "anti-separatism Law," *associations cultuelles* must re-register with the Prefecture every 5 years, and can be refused registration if the Perfect fears that they oppose fundamental interest to society; organizations under the 1901 Law now have the same obligations as those under the 1905 in terms of transparency of funds (as to control the origin foreign funding); finally the policing of worship is further reenforced, giving the Perfect authority to temporary close places of worship if they incite violence or hatred.[1274]

The second development that increased state control over Islam was the termination of the CFC and the establishment of the Forum for the Islam of France (FORIF) in February 2022. Constructed as a forum and not an umbrella organization, the FORIF is aimed to move away from the idea of organizations forming one representative body independent from foreign countries, by creating a grass-roots style forum instead through which a broader segment of society will be directly included in dialog with the state.[1275] The main functions of the FORIF are to consult associations practicing the Muslim faith on the application of the law confirming

[1270] Joseph Downing, "Religion and the 2022 French Presidential Elections: Secularism at Risk from above Due to the French Government's Increased Regulation of Islam," *LSE Blogs: Religion and Global Society* (blog), March 7, 2022, https://blogs.lse.ac.uk/religionglobalsociety/2022/03/religion-and-the-2022-french-presidential-elections-secularism-at-risk-from-above-due-to-the-french-governments-increased-regulation-of-islam/.
[1271] Baubérot, "French Secularism: Republican, Indivisible, Democratic, and Social,"12.
[1272] For a contextual analysis of the enactment of the bill see Rasika Joshi, "Religious Radicalization in France: Contextualizing the 2021 'Anti-Separatism' Bill," *Strategic Analysis* August (2021): 1–6.
[1273] Law no. 2012-1109 of August 24, 2021.
[1274] Law no. 2012-1109 of August 24, 2021.
[1275] The Forum is composed of clergy members as well as lay persons such as heads of local representative associations, qualified individuals from the territories and proposed by the Prefectures (chaplains, persons involved in the Muslim faith and social life, etc.); representatives of national associations. See "Forum de l'islam de France: une étape nouvelle dans le dialogue entre les pouvoirs publics et le culte musulman," Ministère de l'Intérieur, accessed May 2, 2022, http://www.interieur.gouv.fr/actualites/communiques/forum-de-lislam-de-france-etape-nouvelle-dans-dialogue-entre-pouvoirs.

respect for the principles of the Republic, to collaborate with public authorities on questions of the security of places of worship and anti-Muslim acts, to be involved in the framework of training imams and their recruitment, and to supervise the transparency of the funding of the Muslim faith. Critics point out the problematic aspects of the state's overinvolvement in the organization of the Muslim faith, more specifically reflected in the appointment procedure of Forum members.[1276]

It can be concluded that in France there has been a gradual increase in the competences of government institutions in the control and supervision over religious institutions under the justification of public order and safety. Although some of such regulations are neutrally construed, they reveal signs of a tradition of control, fluctuating through time and changing the main target according to its threat – political or fundamentalist in nature. It also reveals a tendency for dialog under strictly conceptualized institutional settings, where the state dictates the rules of the game as well as the main protagonists - in line with the strong republican concept of sovereignty where the state as an expression of the collective will stand highest in the hierarchy of those responsible for social ordering. This endeavor has led to increased efforts in regulating Islam, additionally fueled by the fact that its lack of a central structure makes it difficult to "partner" with.

1.2 Italy: A Four-tier System

Article 2 of the Italian Constitution[1277] protects the organizational freedom of *all* social groups "where human personality is expressed" equally, with limitations consistent with national interest or enforcement of the law.[1278] Hence, any religious group may be founded and

[1276] "Quatre questions sur le Forum de l'islam de France, qui remplace le Conseil français du culte musulman," Franceinfo, February 5, 2022, https://www.francetvinfo.fr/societe/religion/religion-laicite/quatre-questions-sur-le-forum-de-l-islam-de-france-qui-remplace-le-conseil-francais-du-culte-musulman_4944417.html.
[1277] Article 2 of the 1948 Italian Constitution.
[1278] Ventura, *Religion and Law in Italy*, 80.

operate without any authorization or prior registration, limited by public order and common decency considerations.

With the changes in the 1984 Concordat, opening the possibility for entering into *intese* to other organizations, the legal Italian framework establishes a four-tier system. Religious organizations can be established: (1) despite their religious status by registering at the Prefecture under the provisions of the Civil code as non-recognized associations or under Article 16 of the *Disposizioni sulla legge in generale* "which grants foreign legal entities the rights of Italian legal entities on terms of reciprocity"[1279] (2) under the provisions of Law No. 1159 of 1929, if the organization has a purely religious purpose, to be registered in the local Prefecture; (3) upon an agreement with the Italian state (*intese*); (4) the Catholic Church has special status as the Concordat falls under the category of international treaty "compared to foreign States which are public law subjects in Italian law."[1280]

As Ferrari and Ferrari note, in the system "the different social status of religions is reflected in their legal status"[1281] providing for different rights and obligations. The differentiation between associative and denominational status has particularly had a "fundamental impact on the life of faith communities in Italy,"[1282] especially concerning their access to state funding. Additionally, whereas organizations established by law (under the first and second scheme) are governed by "common rules"[1283] that can be altered unilaterally by the state at any moment, those governed by *intese* are bilaterally agreed. *Intese* usually regulate every aspect and leave almost no area to be regulated by law, "shielding" religious organizations from a unilateral exercise of state power. However, it is up to the state organs to determine whether they accept the religious nature of the organization, which before the 1990s (when local and state

[1279] Ferrari and Ferrari, "Religion and the Secular State: The Italian Case" 440.
[1280] Ibid 441.
[1281] Ibid.
[1282] Ventura, *Religion and Law in Italy*, 72.
[1283] See Ferrari and Ferrari, "Religion and the Secular State: The Italian Case, footnote 34.

government abandoned their restrictive policies) led to the rejection of registration of organizations that state organs considered to have applied an "abusive exercise of theological reasoning."[1284] It is also upon state discretion whether to enter negotiations or to conclude an *intese* with a religious organization, not bound by any previously established objective criteria determining eligibility. Additionally, there are no appeal mechanisms in place if the government refuses to conclude a contract with a particular organization. This interpretation has been confirmed by the ICCt. [1285]

The Italian four-tier system in place today clearly differentiates between Catholicism and other denominations, with the Catholic Church enjoying a constitutionally protected special status.[1286] Religions such as Islam, without official representative bodies the signing of an agreement with the state is next to impossible. State-tailored solutions for their organization and cooperation, such as those in France, are considered in Italy as constitutionally questionable.[1287]

1.3 Türkiye: Three Avenues Within a *de-facto* Three-tier System

In Türkiye, only the Sunni Muslim community is represented by a state-run Diyanet, while other religious communities or streams within Islam do not have such a representation. There is no explicit article in the 1982 Constitution that prohibits religious associations, however, the way courts have traditionally interpreted *laiklik,* as protected by Articles 2, 13, 14 and 24, prohibits the establishment of associations with a solely religious purpose.[1288] The

[1284] Ventura, *Religion and Law in Italy*, para.142.
[1285] Especially considering that the Constitutional Court in 2002 established that if the government chooses not to enter into an agreement with a religious organization it has a right not to do so. See Judgment no. 346 (Italian Constitutional Court 2002).
[1286] See Ventura, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Italy," 2005.
[1287] For the constitutional implications on organizational freedom and the "Muslim exception" see generally Ventura, *Religion and Law in Italy*, Para 181-185; Andrea Pin, *The Legal Treatment of Muslim Minorities in Italy: Islam and the Neutral State* (London: Routledge, 2016).
[1288] Venice Commission, "Opinion on the Legal Status of Religious Communities in Turkey and the Right of the Orthodox Patriarchate of Istanbul to Use the Adjective "Ecumenical"" (Venice: Venice Commission, March 12, 2010).

three frameworks under which religious communities can operate are the general provisions of the Civil Code, the Law on Foundations or the Law on Associations. It must be noted that the communities as such are not registered, but they are registered by their members, which provides the chance to enjoy some, but not all aspects of legal personality;[1289] and that some minority religions still face problem in terms of recognition.[1290]

Under the "foundation system" governed by the Law on Foundations and the Civil Code, religious communities can establish foundations for the purpose of owning property[1291] but cannot conduct religious activities. Article 3 of Law on Foundations governs the so-called community foundations (*cemaat*) defined as foundations with special legal entity status, regardless of having a foundation certificate or not (see below), which belong to non-Muslim communities in Türkiye and whose members are citizens of the Republic of Türkiye.[1292] Foundations can engage in for-profit activities as well as receiving money from donations. The General Directorate of Foundations is responsible for the establishment and supervision of foundations.

Article 42 of the Lausanne Treaty protected previously established foundations stating that "[a]ll facilities and authorization will be granted to the pious foundations, and to the religious and charitable institutions of the said minorities at present existing in Türkiye and the Turkish Government will not refuse, for the formation of new religious and charitable institution".[1293] In the past, especially in the establishment period and in the 1960s and 1970s, these foundations were subject to property confiscations and restrictions (see further Chapter

[1289] Ibid.
[1290] For example, the government does not recognize the ecumenical status of the Greek Orthodox Patriarch, acknowledges him as solely the head of the country's Greek Orthodox community. See Ibid.
[1291] This system of organization finds its roots in the Ottoman institution of waqfs (see above), thus, nearly all foundations of the Greek Orthodox, Armenian and Jewish communities and others, date back to before the establishment of the Turkish Republic. See Venice Commission, "Opinion on the Legal Status of Religious Communities in Turkey and the Right of the Orthodox Patriarchate of Istanbul to Use the Adjective "Ecumenical"."
[1292] "Cemaat (Community) Foundations - T.R. Directorate General of Foundations," accessed August 11, 2021, https://www.vgm.gov.tr/foundations-in-turkey/foundations-in-turkey/cemaat-community-foundations.
[1293] Article 42, paragraph 3 of the Lausanne Treaty.

4). Today, they continue to experience interference in their operations, as the state continuously influences the selection of their management.[1294]

On the other hand, in the past 20 years legislative changes were enacted that improved the conditions under which religious communities operate places of worship. It is now possible for minority foundations to reclaim property declared since 1936[1295] as well as to acquire, register, and restore their properties.[1296] In 2003 the law governing places of worship was changed to include a neutral definition of "places of worship" instead of previously governing only mosques, allowing for new places of worship to open and operate.[1297] However, in reality, some religious minorities, especially the Protestant,[1298] Jehovah Witnesses[1299] and Alevi communities,[1300] face challenges in building and opening places of worship either because of the non-recognition of their status as places of worship (Alevi), or due to laws governing urban planning that allow for the building and operation of places of worship in location allocated for that purpose, as well as the power of public authorities to close down places of worship under public order considerations.

Another type of foundations is those governed by the Civil Code, although this avenue is hardly ever used by minority religious organizations.[1301] The reason behind this is because Article 101 of the Civil Code governing foundations clearly states that: "formation of a foundation contrary to the characteristics of the Republic defined by the Constitution,

[1294] Mine Yildirim, "TURKEY: Minority Foundations Still Cannot Hold Elections," Forum 18, accessed May 3, 2022, https://www.forum18.org/archive.php?article_id=2459.
[1295] Between 2003 to 2011 more than 1.000 properties expropriated in the 1930s were returned to non-Muslim minority communities.
[1296] Anna Maria Beylunioğlu, "Freedom of Religion and Non-Muslim Minorities in Turkey," *Turkish Policy Quarterly* 13, no. 4 (2015): 140–47.
[1297] Ibid,180.
[1298] Otmar Oehring, "Turkey: Is There Religious Freedom in Turkey?," Forum 18, accessed August 11, 2021, https://www.forum18.org/archive.php?article_id=670.
[1299] Association for Solidarity with Jehovah Witnesses and Others v. Turkey, No. 36915/10 and 8606/13 (European Court of Human Rights March 24, 2016).
[1300] Izzettin Dogan and others v. Turkey.
[1301] Otmar Oehring, "Turkey: The Fundamental Problem and How It Might Be Solved," Forum 18, accessed August 11, 2021, https://www.forum18.org/archive.php?article_id=1537.

Constitutional rules, laws, ethics, national integrity and national interest, or with the aim of supporting a distinctive race or community, is restricted."[1302] Thus, the provision re-enforces the understanding that foundations with a religious purpose are prohibited and can be subject to restrictions.

The new Law on Associations[1303] adopted in 2004 does not include an exclusive list of purposes for which associations cannot be founded.[1304] Until 2004 it was impossible for a religious organization to register under the Law of Associations since the Law on Association from 1984[1305] explicitly prohibited the founding of associations with a religious purpose.[1306] Associations are exclusively nonprofit entities and ought to be registered at the provincial governor's office. An association may be closed by court order while the Ministry of Interior may temporarily close an association or foundation and apply to a court within 48 hours for a decision on closure.

Considering all the above, in Türkiye some progress has been made to allow minority religions to operate more freely, however the continuing suspicion toward minority religions is evidently reflected in the attempts to meddle in their operations and in not recognizing their full legal capacity. The Turkish legal framework might foresee three viable paths towards limited legal personality but, in reality, it too establishes a *de-facto* three-tier system: 1) the state-run Sunni Islam; 2) the Lausanne minorities that enjoy further guarantees but have also faced substantial restrictions; 3) and, finally, other unrecognized or *de facto* "unacceptable" religions or streams within Islam.

[1302] Article 101 paragraph 4 of the Turkish Civil Code, Law no. 4721 of December 7, 2002.
[1303] Law on Associations, Law no. 5253 of November 4, 2004.
[1304] See "Religious Associations Make up 15 Percent of All Associations in Turkey," duvaR, July 25, 2021, https://www.duvarenglish.com/religious-associations-make-up-15-percent-of-all-associations-in-turkey-news-58295.
[1305] Law on Associations, Law no. 2908 of October 6, 1983.
[1306] Zeldin, "Turkey."

2. Direct funding

2.2 France: Total Independence?

Under then 1905 Law the state is prohibited from recognizing, paying, or subsidizing any religious sect,[1307] thus, in the case of France, only methods of direct funding for specific purposes can be analyzed. General funding schemes are not in place, with the exception of regions where the Concordat still applies and where the state may allocate funds to support religious activities (in the form of the salaries of clergy members of recognized religions,[1308] the building of places of worship etc.[1309]). Methods of funding for specific purposes include the exceptions enumerated in the 1905 Law, the building and upkeep of places of worship, the leasing of government land, and funding religious education outside of its territory.

The exceptions in the 1905 Law itself [1310] prescribe that the state ought to cover expenditures relating to chaplaincy services in public establishments such as high schools, colleges, schools, hospices, asylums and prisons. These costs are justified as aimed to ensure the free exercise of worship[1311] in establishments where such services are necessary due to the limited access (hospices, asylums and prisons) or the nature of the institutions (high schools, colleges, schools). Second, as noted in Chapter 2, due to the refusal of the Papacy to recognize the 1905 at the moment of its enactment, all places of worship built before 1905 are owned by the state and, therefore, the state is responsible for their upkeep. Amendments to the Law,

[1307] Paragraph 1 Article 2 of the 1905 Law on the Separation of the Churches and State.
[1308] There was a proposal to include Islam in the provisions of the Concordat but, with no success. See "N° 3216 - Proposition de Loi de M. François Grosdidier Visant à Intégrer Le Culte Musulman Dans Le Droit Concordataire d'Alsace et de Moselle," accessed April 26, 2022, https://www.assemblee-nationale.fr/12/propositions/pion3216.asp.
[1309] Specific municipalities have also allocated funds for the building of mosques, the most prominent example being the Strasburg Mosque that has been subject to considerable opposition – specifically connected to the threat of foreign funding. See "French Minister Warns of 'Foreign Meddling' in Strasbourg Mosque Funding Row," RFI, March 24, 2021, https://www.rfi.fr/en/france/20210324-row-over-plans-for-mosque-backed-by-controversial-turkish-muslim-group-islamist-religion-strasbourg-gerald-darmanin.
[1310] See Article 2 paragraph 2 of the 1905 Law on the Separation of the Churches and State.
[1311] Please note that Articles 31 and 32 of the 1905 Law further protect individual religious exercise and worship and prohibit interference with religious worship. However, it is important to note that Article 1 foresees and justifies interference with the exercise of religious freedom when in line with public order considerations.

introduced during the Vichy regime in 1942, excluded such funding from the category of subsidies, notwithstanding if places of worship are classified as historical monuments or not.[1312]

The 1905 law had limited application across colonized territories.[1313] Thus, even though French colonialism in North Africa created many French Muslim subjects, the law was enacted in a context when Catholicism, Protestantism, and Judaism were considered prevalent forms of worship.[1314] The emergence of Islam through time as France's second largest religion led to two processes: one aimed at controlling the foreign funding of Islam and another at aimed at leveling-up disadvantages, especially concerning the lack of places of worship.

In 2005, the Ministry of Interior in collaboration with the CFCM established the French Foundation for Muslim Works as a central "depository for foreign donations intended for the construction and maintenance of prayer spaces, as well as religiously oriented cultural activities."[1315] However, the Foundation was inactive for the next 11 years.[1316] In 2016, the Foundation was relaunched by decree and recognized as a "public benefit" (*d'utilité publique*) foundation. Its main goal is to advance knowledge of Islam that would also include scholarships for the training of Imams in an attempt to curb radicalism and create a French Islam in accordance with republican principles.[1317] Additionally, the new formed FORIF was also given the function to ensure transparency of the funding of Islam, including that of places of worship.

[1312] Law no. 1114 of December 25, 1942.

[1313] For example, the 1905 law was continuously suspended in Algeria until its independence, and under French Colonial Law, Islamic authorities governed the social and civil rights of Algerian Muslims. See Patrick Weil, "Lifting the Veil," *French Politics, Culture & Society* 22, no. 3 (2004): 142–49.; Morgan Maxwell, "'The Belltowers of the Future': Mosque Financing and French Laïcité," in *Franco-American Legal Seminar. 2011. The Financial Crisis of 2008: French and American Responses : Proceedings of the 2010 Franco-American Legal Seminar*, eds. Martin A. Rogoff, Michael Dixon, and Eric Bither (Portland, ME: University of Maine School of Law, 2011), 109–34.

[1314] Troper, "French Secularism, or Laïcité."

[1315] Laurence Jonathan, Integrating Islam: Political and Religious Challenges in Contemporary France (Washington: Brookings Institution Press, 2006) Chapter 5 in Maxwell, "'The Belltowers of the " 115.

[1316] "A Quoi Sert La Fondation Des Œuvres Pour l'islam de France?," lejdd.fr, June 21, 2017, https://www.lejdd.fr/Societe/Religion/A-quoi-sert-la-Fondation-des-oeuvres-pour-l-islam-de-France-800665.

[1317] The decree was enacted after the adaptation of a Report in the Senate, concluding that Islam is left to be regulated by foreign countries and that there is a necessary for a transition towards an Islam of France, compatible

The leveling up and curbing disadvantages experienced by emerging Muslim communities can be observed through three examples. The first example is the building of the Mosque of Paris in the 1920s partially funded with public money, to recognize the Muslim soldiers that fought in WW1. [1318] The second example are the Amendments to the General Code of Local Government aimed at resolving the shortage of places of worship, especially concerning emerging religious groups (even though the provisions apply to all religious groups equally).[1319] The amendments extended the possibility for local governments to issue long term (from 18 to 99 years) emphyteutic leases of government land, for symbolic amounts, to religious associations for the purpose of building places of worship open to the public.[1320] Such amendments, even though might be considered as a "hidden subsidy", were deemed permissible by the Council of State in 2011 (see below).[1321] Finally the third example are the actions taken by local authorities to facilitate Islamic religious practices by allowing the use of otherwise unused facilities in their possession to be used for *solely* religious purposes such as religious slaughter[1322] and the practice of Muslim prayer. The Council of State has found such practices permissible (see below), [1323] as it has adopted, in Daly's words, a liberal approach[1324] towards the non-subvention principle incorporated in the 1905 law, widening the "permissibility" of direct funding (see further subchapter 4).[1325]

with the values of the Republic and supported by the community as well. See Rapport D'Information Fait au nom de la mission d'information (1) sur l'organisation, la place et le financement de l'Islam en France et de ses lieux de culte, no. 757, Sénat Session Extraordinaire de 2015-2016, Enregistré à la Présidence du Sénat le 5 juillet 2016

[1318] Troper, "French Secularism, or Laïcité."

[1319] Anne Fornerod, "The Places of Worship in France and the Public/Private Divide," in *Religion in Public Spaces: A European Perspective*, eds. Silvio Ferrari and Sabrina Pastorelli (London: Routledge, 2012), 334.

[1320] See Ibid.

[1321] Decision no. 320796 (French Council of State July 19, 2011).

[1322] See Decision no. 309161 (French Council of State July 19, 2011).

[1323] See Ibid.

[1324] See Daly, "Public Funding of Religions in French Law: The Role of the Council of State in the Politics of Constitutional Secularism."

[1325] It must be noted that even though the non-funding principle in general applies "at home" it has little effect towards funding of religious activities outside of French territory. In fact, the French government has been allocating substantial funds for the support of Christian schools, especially located in the Middle East, through its collaboration with Christian non-profit organizations. See Lou Roméo, "Why Is Secular France Doubling Funding for Christian Schools in the Middle East?," France 24, February 3, 2022,

2.2 Italy: Something in Between?

The legal framework in place in Italy foresees direct funding to religious institutions both for general and specific purposes. The general funding through the county's tax apparatus is available only to *intese* governed religious organizations. The permissibility for such funding, and that of a different form available only to the Catholic before 1984 (see Chapter 3), finds its basis in the interpretation of Article 2 and Article 3 of the 1948 Constitution. The two articles are considered a foundation of human dignity, interpreted by the ICCt as an overarching principle.[1326]

Article 3 in conjunction with Article 2[1327] gives the state an *active* role in guaranteeing citizens' rights by removing "obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person.[1328] As the "Italian Constitution heavily focuses on the social dimension of human dignity,"[1329] Article 3 is interpreted by authors to include religion as a social phenomenon and "therefore…considered on the same basis as other manifestations of social life and…protected and supported in order to guarantee the effectiveness of the right of religious freedom."[1330] According to this interpretation the servicing of direct funding (as removing an obstacle of economic nature) to social phenomena is linked to the preservation of human dignity; religion being one of the manifestations of social life among many, equally protected by this interpretation.

https://www.france24.com/en/france/20220203-why-is-secular-france-doubling-funding-for-christian-schools-in-the-middle-east.

[1326] Judgment no. 293 (Italian Constitutional Court 2000).

[1327] Article 2 of the 1948 Italian Constitution creates a duty for the state to guarantee that social groups can flourish as an expression of the value individual.

[1328] Article 3 of the 1948 Italian Constitution requires "the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person…"

[1329] Paolo Becchi, "Human Dignity in Italy," in *Handbook of Human Dignity in Europe*, eds. Paolo Becchi and Klaus Mathis (Cham: Springer International Publishing, 2019), 453–70.

[1330] Carlo Cardia, *Manuale Di Diritto Eclesiastico* (Bologna: Il Mulino, 1999), 204. in Durisotto, "Financing of Churches in Italy," 160.

After the developments in the 1980s and the signing of the new Concordat in 1984, a new system of funding of religious institutions was put in place, mainly due to the change in the functioning of the bodies of the Catholic Church itself that made the benefice system obsolete.[1331] The new system was a product of the Vatican-Italian Joint Commission for the ecclesiastical institutions[1332] set to "introduce modem forms of funding" to be also applicable to other religions, one that ought to "facilitate the free contributions of citizens to religious purposes, allowing them to choose whether or not they wanted to participate in the funding of the Church."[1333]

The Agreement on Church Entities and Property between the Italian State and the Catholic Church in 1984, enforced consequently by Law No. 222 of 20 May, 1985 regulates the legal personality, recognition and registration of the bodies of the Catholic Church, as well as their funding,[1334] abolishing the *supplemento di congrua.*[1335] Although the law regulates the funding system for the Catholic Church, it is applied to all denominations under *intese* as they contain similar provisions.[1336]

Under this system, there are two possible avenues through which a citizen can contribute to a religious organization: direct funding and indirect fiscal funding. The system of direct funding is the so called *otto per mille* ("eight per thousand") system. Under the *otto per mille* system, every citizen that makes taxable income in an amount over the established minimum can contribute to a religious organization of their choice by allocating 0.8% of the

[1331] Since, "the benefices were in crisis and Canons 1272 and 1274 of the new Codex luris Canonici 1983 gradually abolished them. Durisotto, "Financing of Churches in Italy,"161.
[1332] Article 7 of the 1984 Concordat stated that "the Parties shall appoint a joint Commission to formulate norms, that will be subsequently submitted for their approval, for the regulation of the whole matter of ecclesiastical bodies and properties and for the revision of the financial obligations of the Italian State and of its intervention into the patrimonial management of ecclesiastical bodies."
[1333] Durisotto, "Financing of Churches in Italy," 161.
[1334] The law abolished the benefices and established the diocesan institutes for support of the clergy. See Article 21 and 28 of Law No. 222 of May 20, 1985.
[1335] Under this system, the Institute for the Support of the Clergy was founded "to supplement the financial resources of those diocesan institutes that cannot deal with their tasks on their own" See Durham and Scharffs, *Law and Religion.*
[1336] Ibid, 160.

revenue of their annual income tax (*imposta sul reddito delle persone fisiche* or IRPEF*)*. Citizens make their choice by ticking a box on their annual income tax form. Only religious organizations under *intese* can be found on the form.[1337] If the citizen does not wish to select any of the religious organizations, they can opt for allocating the funds to the government's budget for the purpose of "relief of world hunger and natural disasters, assistance to refugees and the conservation of cultural property."[1338] If the citizen leaves all boxes unchecked (and de-facto refuses to make a choice), the 0.8% is distributed in proportion to "the choice made by the rest of population liable to income tax."[1339] Thus, the framework does not introduce an additional tax, but allocates a percentage of the income tax, which would otherwise fully enter the state budget (as part of the income tax), to religious organizations.

Even though the new system opened the door to other religious organizations to be a part of the funding scheme and offered a solution to those that did not want to financially support any religious group, certain problematic aspects remain. First, the distribution of funds from those leaving their boxes unchecked end up substantially benefiting the Catholic Church. For example, even though in 2011 only 36.75% of taxpayers ticked the box of the Catholic Church, the Church received 79.94 of the funds, amounting to one to two billion euros annually from the *otto per mille* system alone. [1340] Second, religious organizations not under *intese* have no access to this avenue of funding.[1341] Finally, the issue of whether the system presupposes

[1337] However, not all of them decided to use this opportunity and some decided to use it only to a certain extent. For example, The Christian Evangelical-Baptist Union, has an agreement with the State, first chose to abstain from the distribution of the 0.8% of IRPEF and then reconsidered. The Pentecostals refused to receive the 0.8% IRPEF allocated proportionally from taxpayers that did not make a choice. "Moreover, together with the Adventists and Waldensians, they decided to use the 0.8% revenues for social and humanitarian purposes only, because they are of the opinion that the funding of the Church and the maintenance of the clergy should be exclusively based on donations by the Church members." See Ferrari and Ferrari, "Religion and the Secular State: The Italian Case."

[1338] Durisotto, "Financing of Churches in Italy," 164.

[1339] See Article 47(3) of Law no. 222/1985.

[1340] In 2002 87% of taxpayers that checked a box decided to allocate their funds to the Catholic Church. In 2004 the percentage was 89%. See John L. Allen Jr., *All the Pope's Men: The Inside Story of How the Vatican Really Thinks* (New York: Doubleday Religion, 2004).

[1341] See generally Ferrari and Ferrari, "Religion and the Secular State: The Italian Case"; Durisotto, "Financing of Churches in Italy."

an obligation to reveal one's religious affiliation in his/her tax return form has been raised, however, the ECtHR has dismissed this claim and found the system not in violation with the ECHR.[1342]

There is an additional avenue through which religious organizations can receive direct funding – through the *cinque per mille* ("five per thousand") system available to the "third sector" carrying out non-profit activities. The *cinque per mille* system, established in 2006, allows taxpayers to choose to allocate 0.5% of their personal income to socially relevant organizations,[1343] including NGOs that have an *ONLUS* status (non-lucrative associations of social utility).[1344] The ONLUS status allows "denominations and denominational entities that are barred from traditional religion-specific model of originations" to have status and participate in the *cinque per mille* system, however, it also allows for "social activities carried by entities belonging to the Catholic Church or other faith communities [to] be recognized as specific branch (*ramo ONLUS*) of the religious entity" and therefore be included in the *cinque per mille* system.[1345] Thus, religious organizations can benefit both from the *otto per mille* and *cinque per mille* systems.[1346]

Finally, under Law No. 222 religious institutions can also benefit from the schemes of so-called private financing. This method of indirect fiscal financing determines the

[1342] The Court stated that the law does not impose an excessive burden on the applicant such as to upset the "fair balance" that has to be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights." See Spampinato v. Italy, No. 23123/04 (European Court of Human Rights March 29, 2007).

[1343] Information on what is considered as social utility/ what kind of organizations are eligible to benefit from the cinque per mile system available on website of the Agencia Entrate, Ministry of Economy and Finance, see https://www.agenziaentrate.gov.it/portale/web/guest/schede/agevolazioni/contributo-5-per-mille-2019/soggetti-destinatari-contributo-5permille2019

[1344] In 2016 a legal reform was introduced that consolidated the legislation regulating the "third sector." Law No. 106 of June 6, 2016, gives a "[m]andate to the Italian Government for the reform of the Third Sector, of Social enterprises and of the universal civil service." The third sector includes "all private subjects and bodies engaged in the promotion of solidarity and socially useful activities through voluntary actions and the exchange of goods and services. See Marta Capesciotti, "Standing and Operational Space of Non-Governmental Organisations (NGOs) in Contributing to Respecting and Promoting Fundamental Rights in EU Member States Italy 2017" (European Union Agency for Fundamental Rights, 2017).

[1345] Ventura, *Religion and Law in Italy*, para. 201-202

[1346] Since 2015 the cap of the amount of total funds to be allocated among all the organizations through the system was fixed to 500,000,000 euros annually.

"possibility of off-setting from taxable income donations up to Euro 1,032.91 to the Catholic Central Institute for the Support of the Clergy (or similar institutions of other denominations)."[1347] This option is also only available to organizations under *intese*. The use of these funds is also further determined in the specific agreements and with the Law No 222/1985 regarding the Catholic Church.

Additional methods of direct funding for specific purposes exist both on the state and regional level. It is important to note that this kind of funding almost entirely falls under the competence of the regions and local governments and not the central government. A distinctive feature is that the choice of funding is upon the discretion of these authorities, while citizens have no role in its operation. Another distinctive feature is that mostly and almost exclusively it benefits the Catholic Church.

On a state level, funding to certain types of socially significant activities is provided by Law no. 390 of July 11, 1985,[1348] establishing a scheme where unused state property can be made disposable for lease to cultural associations, local state institutions, health institutions, religious order and ecclesiastical bodies in the duration of no more than 19 years[1349] and for minimal rent fees.[1350] This kind of property can be leased out to religious organizations governed by *intese.* Additionally, the funds from the *otto per mille* system that end up in the state budget are to be used for extraordinary measures against famine in the world, natural disasters, aid to refugees, the conservation of cultural monuments.[1351] In reality the larger part of the sum is allocated for the conservation of cultural monuments that also in part goes to ecclesiastical bodes, again mostly Catholic, for the upkeep of places of worship;[1352] thus, it

[1347] Ferrari and Ferrari, "Religion and the Secular State: The Italian Case," 443.
[1348] Law no. 390 of July 11, 1986.
[1349] For example, to use it only for the purposes declared and established by the law, not to sub-lease etc. See Article 1 of Law no. 390 of July 11, 1986.
[1350] Durham and Scharffs, *Law and Religion*.
[1351] Ibid.
[1352] Durisotto, "Financing of Churches in Italy."

represents another form of indirect funding transpiring from the *otto per mille* system and not directly from it. In effect even funds allocated to the State (by choice and proportionally) through the system end up being distributed to ecclesiastical authorities.

On a regional level,[1353] further funding has been made available in the Trentino, Veneto, Abruzzo and Lombardi regions. In 2001, the Trentino Region started supporting ecclesiastical archives, whereas the Veneto region supports youth and social centers managed by faith communities.[1354] A distinct feature is that these funds are mostly allocated to organizations managed by the Catholic Church. In the Abruzzo and Lombardi regions, direct funding mechanisms were introduced aimed at building places of worship. These regional laws were primarily meant to benefit only religious organizations under *intese*. However, in both instances the ICCt ruled that such a distinction breaches the principle of equality.[1355]

Considering all the above, even though avenues for direct state funding have been opened to other religious organizations after the 1984 Concordat, the Catholic Church continues to enjoy certain privileges, thus, once again confirming the fact that in Italy there is religious liberty but not equality.[1356] Furthermore, the state enjoys absolute discretion over the

[1353] Please note that while regions have also introduced legislation aimed at restricting the building of places of worship, particularly for Muslim communities. In January 2015, the Region of Lombardi enacted a law (Regional Law no. 2/2015 from January 27, 2015) that made it particularly difficult for non-established religious communities to erect places of worship. The Catholic Church was specifically exempted from this regulation. The law was annulled by the Constitutional Court stating that "even if the Region regulates the matter of religious building for its urban planning, (i.e., to ensure balanced and harmonious development of cities and the realization of public services), it cannot hinder or undermine the freedom of religion, for example by providing differentiated conditions to build places of worship." Just a few days after the decision, the Region of Veneto enacted a similar law, that instead included an article that made the Italian language mandatory in all the activities inside the religious buildings, excluding rituals. The Constitutional Court was asked to rule on a competency issue: the government claiming that the regulation of linguistic and religious rights fall under the scope of the central government. The Court considered that the law was on face neutral and that it "cannot be considered unconstitutional itself, if taken out of its practical and consequent applications." On the issue of language, the Court ruled that "the principle of using only Italian for all those activities of common interest for religious services is unconstitutional." See Giancarlo Anello Giancarlo Anello, "Freedom of Religion vs Islamophobia: Lombardy's 'Anti-Mosque Law' is Unconstitutional," *Verfassungsblog* (blog), accessed April 12, 2020, https://verfassungsblog.de/freedom-of-religion-vs-islamophobia-lombardys-anti-mosque-law-is-unconstitutional/.

[1354] Ventura, *Religion and Law in Italy*, para. 336.

[1355] See Judgment no. 195.

[1356] See Silvio Ferrari and Rinaldo Cristofori, *Law and Religion in the 21st Century: Relations Between States and Religious Communities* (Farnham, Surrey; Burlington, VT: Ashgate Publishing, 2010).

choice of organizations with which it enters into *intese*. Even though, the ICCt has opened the path toward equal opportunities of funding on a regional level, it has maintained the status quo regarding funding operated and afforded by the central government.

2.3 Türkiye: Total Dependence and Total Independence

The institution of the Diyanet in Türkiye is completely responsible for the funding of the majority religion, Sunni Islam, including paying the salary of imams and the administration, and upkeeping and building places of worship. Gradually through time, the Diyanet has expanded both institutionally in its competences and its financial might.

Gaining constitutional status in 1961, the institution of the Diyanet has progressively gained further competences in three areas. First in 1965 the High Council for Religion, a consultative body within the Diyanet, was recognized by law as Türkiye's "highest decision-making body in religious matters."[1357] Then, in 1971 the General Directorate of Foreign Relations within the Diyanet was established granting it an additional new function - to provide religious services for Turkish citizens abroad, making the Diyanet the sole representative body employing and managing religious affairs consultants and attachés within embassies and consulates, taking part in cultural and educational activities as well as publishing,[1358] and building and governing places of worship abroad.[1359] Finally, in 1975 the Diyanet established its own Foundation (*Turkiye Diyanet Vakfi*), which has grown from a small-scale charity

[1357] Günter Seufert, "The Changing Nature of the Turkish State Authority for Religious Affairs (ARA) and Turkish Islam in Europe," 21.
[1358] "General Directorate of Foreign Relations," accessed August 9, 2021, https://www.diyanet.gov.tr/en-US/Organization/Detail//12/general-directorate-of-foreign-relations.
[1359] To achieve this "most of the local mosque committees that did not belong to the Süleymancı or Milli Görüş networks (which had been the pioneers of organizing Turkish Muslims in Western Europe) were brought directly under Diyanet, and the Directorate henceforth aggressively expanded its own network. See Martin Van Bruinessen, "The Governance of Islam in Two Secular Polities: Turkey's Diyanet and Indonesia's Ministry of Religious Affairs," *European Journal of Turkish Studies. Social Sciences on Contemporary Turkey*, no. 27 (2018): 1–26.

organization into one operating numerous for-profit businesses with around 1,000 branches across Türkiye.[1360]

The AKP has introduced further legislative reforms that expanded the scope of the Diyanet's services/activities and imposed structural changes to its management.[1361] Its scope of services was expanded to include: issuing halal certificates;[1362] providing spiritual guidance in government institutions with limited access (correctional facilities, detention centers, nursing homes, and medical facilities) and to families, women, youth and others; running Diyanet TV, a 24 hour program aimed at broadcasting the Diyanet's perspective on religion and other issues;[1363] and operating a free telephone service for giving fatwas on demand.[1364] In terms of institutional transformation, two changes are most noteworthy. The first one is structural: the Diyanet, formerly attached to the Office of the Prime Minister, was transferred to the office of the President (one might assume in preparation for the constitutional amendments turning Türkiye into a Presidential system). The second change concerns its management: in 2010 its president, Prof. Dr. Ali Bardakoğlu, a long-time believer that the Diyanet's involvement on issues of law violates the principle of secularism,[1365] was dismissed and replaced by Mehmet Görmez considered as less reluctant to abide by the governments' demands.[1366] These reforms, according to Öztürk, manifests the AKP's "desires to control the Diyanet and use it to build and maintain the desired social order" through social engineering

[1360] Aram Ekin Duran and Daniel Bellut, "Diyanet: The Turkish Religious Authority That Makes Millions," DW.COM, accessed August 9, 2021, https://www.dw.com/en/diyanet-the-turkish-religious-authority-that-makes-millions/a-50517590.
[1361] Ahmet Erdi Öztürk, "Turkey's Diyanet under AKP Rule: From Protector to Imposer of State Ideology?," *Southeast European and Black Sea Studies* 16, no. 4 (2016): 619–35.
[1362] Ahmet Erdi Öztürk and Semiha Sözeri, "Diyanet as a Turkish Foreign Policy Tool: Evidence from the Netherlands and Bulgaria," *Politics and Religion* 11, no. 3 (2018): 1–25.
[1363] Öztürk, "Transformation of the Turkish Diyanet Both at Home and Abroad."
[1364] "The Rise of Diyanet: The Politicization of Turkey's Directorate of Religious Affairs," accessed July 23, 2021, http://www.turkeyanalyst.org/publications/turkey-analyst-articles/item/463-the-rise-of-diyanet-the-politicization-of-turkey's-directorate-of-religious-affairs.
[1365] Ahmet Erdi Öztürk, "Turkey's Diyanet under AKP Rule: From Protector to Imposer of State Ideology?"
[1366] Ibid.

policies in line with its socio-political imaginary".[1367] Finally, with the rise of the scope of its services, the number of employees of the Diyanet has been exponentially rising, from 7.000 employees in 1927 and 72.000 employees in 2002 when the AKP came to power,[1368] to currently employing between 140.000 and 170.000 employees.[1369]

Since the beginning of the multi-party period in 1959, the budget of the Diyanet has been steadily increased[1370] (with the exception of the military rule in the 1980s).[1371] This trend continued between 1983 and 2002 when center-right parties dominated the political arena; as their members (closely affiliated with religious groups) firmly believed in Islam as a binding element of Turkish nationhood, and considered the Diyanet less as a secular state institution and more one with religious nature.[1372] This trend continued under the AKP. According to the Diyanet website, its 2019 budget was the equivalent of $908 million (according to the Turkish statistics institute TÜIK the actual figure is estimated around $1.87 billion),[1373] $2 billion in 2020 and $2.2 billion in 2021 with the projection to rise to $2.6 billion in 2023.[1374] The budget is allocated among the many new services the institution provides, penetrating in all pores of

[1367] Öztürk, "Transformation of the Turkish Diyanet Both at Home and Abroad," 7.
[1368] Angelos Syrigos, "This Beast That Grows beside Us | EKathimerini.Com," accessed August 10, 2021, https://www.ekathimerini.com/opinion/257126/this-beast-that-grows-beside-us/.
[1369] Sources vary in regards to the exact numbers of Diyanet employees See Salim Çevik, "Erdoğan's Comprehensive Religious Policy," Stiftung Wissenschaft und Politik (SWP), accessed August 9, 2021, https://www.swp-berlin.org/en/publication/erdogans-comprehensive-religious-policy.; "Diyanet'in 2020 bütçesi sekiz bakanlığı geride bıraktı, bütçenin 125 milyon lirası derneklere aktarılacak," T24, accessed August 10, 2021, https://t24.com.tr/haber/diyanet-in-2020-butcesi-sekiz-bakanligi-geride-birakti-butcenin-125-milyon-lirasi-derneklere-aktarilacak,845137.
[1370] In the one-party period between 1926-1947 the budget of the Diyanet fell from 0.009 to 0.001 percent of the overall state budget. In 1947 in line with the politics of re-moralizing society through religious values, the budget of the Diyanet nearly doubled from 0.15 percent in 1946 to 0.24 percent of the state budget. When the DP came to power this trend continued as the budget rose from 0.24 to 0.5 by 1959. Between the mid-1950s and the mid-1970s, and in line with the policies that elevated the role of the Diyanet, its budget rose from 0.05 to 0.17 percent of the overall state budget. See Akan, *The Politics of Secularism*, 243. In the aftermath of the 1970's conflicts and the communist threat the Diyanet was also given the task to consolidate national solidarity and unity. See Öztürk, "Transformation of the Turkish Diyanet Both at Home and Abroad."
[1371] During the military rule its budget plummeted: from about 1 percent to 0.6 percent of the state budget. Günter Seufert, "The Changing Nature of the Turkish State Authority for Religious Affairs (ARA) and Turkish Islam in Europe," 17.
[1372] Ibid, 17.
[1373] Ekin Duran and Bellut, "Diyanet."
[1374] "Turkey's Top Religious Body to Spend $11 Billion by 2023," Ahval, accessed August 9, 2021, https://ahvalnews.com/directorate-religious-affairs/turkeys-top-religious-body-spend-11-billion-2023.

everyday living of Turkish citizens, in Türkiye and abroad.[1375] To compare, in 2019 the budget of the Diyanet surpassed the budget of six other ministries combined, surpassing the Foreign Ministry by 2.5 times[1376], while the 2021 budget surpasses the budget of 119 universities' budgets.[1377]

Since its establishment, the prevailing rationale behind the existence of the Diyanet and its compatibility with Turkish *laiklik* has remained unchanged. Both secularist and Islamic parties have been determined to maintain control over religion and invested in that purpose - the former due to seeing religion as a threat, and the latter willing to use state infrastructure to promote its values as a normative aspect of good citizenship. Without institutional autonomy (financial or otherwise) it therefore serves solely the interest of the state, which, due to the lack of constitutional safeguards, meant the interest and visions of the political party in power in periods of hegemony. As Cornell argues, such a constellation allowed for it to serve as "a check on political Islam as long as the state was controlled by the republican establishment" and as a handy tool for the propagation of this ideology "once the state came under the control of political Islam."[1378]

Always exclusively aligned with the majority religion, the Diyanet re-enforces state-dictated religious values as the not only preferable, but desirable modus of good citizenship

[1375] Thus, in the framework of its budget the Diyanet allocates funds for services of guidance on religious matters for "families, women, youth and others, the resolution of social issues, religious education services, "reaching all layers of society with religious services," the operation of Diyanet TV and for "publications against moral degeneration" which also include hostile attitudes towards missionaries of other religions, minority steams of Islam, as well as atheists and agnostics Öztürk, "Transformation of the Turkish Diyanet Both at Home and Abroad."; Mine Yildirim, "Turkey: The Diyanet – the Elephant in Turkey's Religious Freedom Room?," Forum 18, accessed August 10, 2021, https://www.forum18.org/archive.php?article_id=1567. Due to its international dimension, a substantial amount of funds is allocated both for staff in other states as well as for the building of mosques across all continents and for activities abroad that include "creating and propagating an objective perception of Islam globally. See Syrigos, "This Beast That Grows beside Us | EKathimerini.Com."

[1376] "Turkey's Top Religious Body Spends 2.5 Times of What Foreign Ministry Spends," duvaR, December 19, 2019, https://www.duvarenglish.com/domestic/2019/12/19/turkeys-top-religious-bodys-spending-2-5-times-of-foreign-ministrys.

[1377] "Turkey Allocates More Budget to Top Religious Body than Universities," duvaR, March 10, 2021, https://www.duvarenglish.com/turkey-allocates-more-budget-to-top-religious-body-than-universities-news-56579.

[1378] Cornell, "The Rise of Diyanet."

and "shared" values; and does so by using public funds. Its exponential growth, both in its budget and infrastructure, has made the Diyanet one of the most influential institutions in the architecture of the Turkish state, as its influence penetrates all spheres and dimensions of everyday living. On the other hand, non-Sunni Muslim communities or other religious minorities do not receive any funding from the state,[1379] clearly differentiating them from the Suni Muslim community represented under the Diyanet.

3. Indirect Funding

3.1 France

In France, religious organizations can apply for a tax-exempt status if they register under the 1905 law as religious associations whose purpose is limited to religious activities, defined as liturgical services and practices. As all other articles in the 1905 law, these regulations apply to all religious organizations registered under the law. These organizations fund their activities from "membership fees, funds, and collections as well as payments for religious services"[1380] subject to a privileged tax regime. Thus, such associations are involved in *de facto* non- profit activities and their related income is tax exempt.

Religious organizations under the 1901 law may engage in for-profit activities and are not eligible for a tax-exempt status in this respect. These organizations "can obtain grants from public funds, but individual donations do not have a particularly favorable tax treatment, unless the association is declared public utility."[1381] In 1987 changes to the General tax code also determined *tax deductions* to cultural associations for "donations made to various categories of

[1379] Such unequal treatment has also an individual dimension. The Capital Tax of 1942 (*Varlık Vergisi*) (repealed in 1944) paid only by religious minorities "attempted to destroy the non- Muslim bourgeoisie by impoverishing it." Reşat Kasaba, ed., *The Cambridge History of Turkey* (Cambridge: Cambridge University Press, 2008).
[1380] Chelini-Pont and Ferchiche, "Religion and the Secular State: French Report," 325.
[1381] Public utility and general interest associations are the two types of associations recognized as non-profit public benefit associations.

associations, including [cultural] associations whose activities are by definition related to the practice of a religion or maintenance of his ministers."[1382]

Accordingly, French law determines both tax exemptions (to religious associations) and tax deductions (cultural associations). In practice religious groups decide to register under both regimes so they can fulfil all their functions.[1383] Religious associations are registered for the purpose of managing the place of worship, while cultural associations are formed for the purpose of managing the ancillary buildings and activities that take place in them. However, cultural associations founded by what the French state deems dangerous cults have faced discrimination.

In 1995 the French National Assembly issued a report entitled "Cults in France,"[1384] an action taken after serious concerns caused by the Solar Temples group suicides and murders.[1385] Drawing on the mandate entrenched in Article 1 of the 1905 Law, prescribing the limitation of freedom of conscience from government interference in cases of viable public order concerns, the report listed 172 main organizations (800 including branches)[1386], registered as religious or cultural associations, as dangerous cults. Since there is a lack of a definition of cults in both French law and practice, the report issued a list of common "trades" of organizations that can be considered as dangerous cults.[1387] After this report, a tax audit by

[1382] Chelini-Pont and Ferchiche, "Religion and the Secular State: French Report," 326.
[1383] See "Report on International Religious Freedom: France" (Office of International Religious Freedom, USA, 2017).
[1384] It was an initiative that was introduced after several cult-related suicides happened on the territory of the French Republic in a relatively small window of time.
[1385] See "16 Bodies Found in French Alps; Cult Ritual Suspected," Los Angeles Times, December 24, 1995, https://www.latimes.com/archives/la-xpm-1995-12-24-mn-17454-story.html. For an analysis of the effects of the report in the following decade see Susan J. Palmer, "France's 'War on Sects': A Post-9/11 Update," *Nova Religio: The Journal of Alternative and Emergent Religions* 11, no. 3 (2008): 104–20.
[1386] Ibid.
[1387] The criteria used was the following: "mental destabilization; exorbitant financial demands; compulsory severing of links with the original social environment; attacks on physical integrity; recruitment of children; more or less anti-social ideas; public order disturbances; the number of incidents involving the courts; possible diversion of traditional economic cycles; attempts to infiltrate public authorities." See Directorate-General for Research, "Cults in Europe, Annex 2 - Cults in France," People's Europe Series (European Parliament, March 1997).

the relevant authorities was performed on some of the "cults" listed in the report, mostly registered as cultural associations under the 1901 Law.

Upon the tax audit, several cultural associations[1388] were subjected to a supplementary tax required on hand-to-hand gifts, even though the General Tax Code envisioned "tax exemption applicable for donations and bequests made to liturgical associations, unions of liturgical associations and authorized congregations."[1389] The extraordinary sums for the penalties and taxes that the associations were inclined to pay were enough to disrupt their functioning, or in some cases to dissolve them completely. Hence, the *selective* implementation of tax policies was used to disrupt or dissolve "undesirable" organizations. Thus, instead of reinforced separation tax exemptions served as a tool used by the state apparatus to indirectly "punish" religious associations it deemed dangerous. The case reached the ECtHR, where a violation of Article 9 was found (see further below).[1390]

3.2 Italy

Article 20 of the Italian Constitution protects religious organizations from fiscal burdens regarding its registration, legal capacity or activity.[1391] Italian law as well as bilateral agreements further regulate tax-exemptions of both property and activities performed by religious organizations. For the purpose of tax law, religious communities governed by *intese* and those governed by the 1929 law treat worship activities as those of welfare and education.

[1388] More specifically French Jehovah Witnesses Association (Association Les Témoins de Jéhovah, The Religious Association of the Pyramid Temple (Association Cultuelle Du Temple Pyramide), The Association of the Knights of the Golden Lotus (Association Des Chevaliers Du Lotus D'Or) and The Evangelical Missionary Church (Salaûn/Eglise Evangelique Missionnaire et Salaûn). See Association Les Témoins de Jéhovah v. France, No. 8916/05 (European Court of Human Rights June 30, 2011). Association Cultuelle Du Temple Pyramide v. France, No. 50471/07 (European Court of Human Rights January 31, 2013).Association Des Chevaliers Du Lotus D'Or v. France, No. 50471/07 (European Court of Human Rights January 31, 2013).Eglise Evangelique Missionnaire et Salaûn v. France, No. 25502/07 (European Court of Human Rights January 31, 2013).

[1389] Ibid.

[1390] See Association Les Témoins de Jéhovah v. France, No. 8916/05 (European Court of Human Rights June 30, 2011).

[1391] Article 20 of the 1948 Italian Constitution states: "No special limitation or tax burden may be imposed on the establishment, legal capacity or activities of any organisation on the ground of its religious nature or its religious or confessional aims."

Accordingly, religious entities performing religious activities enjoy exemptions from value added tax (*imposta sul valore aggiunto*, IVA), local land transfer tax (*imposta comunale sull'incremento di valore dei beni immobili*), inheritance and donation tax, 50% on corporation tax (*imposta sul reddito delle persone giuridiche*, IRPEG)[1392] and other indirect taxation that will be discussed below. According to the law, religious institutions can also perform commercial activities, however, they are not eligible for tax exemptions.

Regarding the Catholic Church, the Conciliation Treaty part of the Lateran Treaty abolished many of the taxes imposed in the liberal period (in most part provided by the Law No. 3848 of August 15, 1867 and Law 3036 of July 7, 1866) and provided tax exemptions for all the salaries paid by the Church, and from property tax of all Church property, contribution tax and tax for the performance of religious activities. Accordingly, the real estate property owned by the Holy See and located on Italian territory and specific buildings enumerated in Articles 13 and 14 are exempted from any kind of tax or duty toward the State. Furthermore, the Concordat of 1984 prescribes additional articles concerning taxing, guaranteeing equal treatment between ecclesiastical bodies with religious or devotional purpose with those having a beneficent or educational purpose.[1393] Article 16 of Law No. 222 enforcing the Concordat further specifies which activities fall under the definition of tax-exempted religious or worship activities (*attività di religione o di culto*) as activities related to "worship, cure of souls, formation of clergy and the religious missions, catechesis and Christian education."[1394]

One area that proved problematic in its implementation is the exemption from the ICI (*Imposta Comunale sugli Immobili*), a local property tax towards state and municipal budgets, first introduced in 1992. Properties used for the performance of "socially relevant" activities such as educational activities, charity, and religious activities, were exempted from paying the

[1392] Durham and Scharffs, *Law and Religion*, 532-35.
[1393] Article 7 paragraph 3 of the 1984 Concordat.
[1394] Article 16 of Law no. 222 of 1985 in Ventura, *Religion and Law in Italy*, para. 149

ICI; Law No.222 being the basis for distinction between these and commercial activities. The law seemed clear, but its implementation proved problematic as often commercial and religious activities were performed at the same space, making it hard to distinguish what qualifies for exemptions.[1395] According to Ventura, this ambiguity coupled with a culture of tax avoidance as well as "the protection of Catholic institutions granted by the Concordat and by Italian law, seldom allowing for effective scrutiny,"[1396] led to a loose interpretation of ICI exemption, as it applied even in cases where there was clear evidence of commercial use.[1397] The political "cooperation" between Prime Minister Berlusconi and the Church operationalized this outcome.[1398]

The ICI tax was replaced by IMU (*Imposta Municipale Unitaria*) "[providing] that in case of mixed commercial and non-profit use of the same building owned by an ecclesiastical entity, IMU will be owed for the portion of the property in which commercial activities take place."[1399] In 2012 the CJEU[1400] ruled that the scheme under ICI represented unlawful state aid[1401] (see below).

[1395] As Ventura explains - "Did a small chapel in a hotel transform that hotel into a religious facility, thus allowing the religious owner not to pay ICI on the whole building? Could a bookshop run by a monastery in a separate building be considered instrumental to the subsistence of the monastic community and therefore could be exempted from ICI?" See Marco Ventura, "Italian Church and State Ambiguities Challenged by the Debt Crisis. The ICI/IMU Affair," Observatoire des religions et de la laïcité, accessed April 11, 2020, https://o-re-la.ulb.be/index.php/analyses/item/194-italian-church-and-state-ambiguities-challenged-by-the-debt-crisis-the-ici/imu-affair.
[1396] Ibid.
[1397] Ibid.
[1398] Ibid.
[1399] Ibid.
[1400] Scuola Elementare Maria Montessori Srl v Commission, Commission v Scuola Elementare Maria Montessori Srl, and Commission v Pietro Ferracci, No. Joined Cases C-622/16 P to C-624/16 P (Court of Justice of the European Union November 6, 2018). The cases were brought under Article 263 TFEU – of direct actions brought by competitors of beneficiaries of a State aid scheme against a decision of the Commission.
[1401] Prohibition of State aid under EU law is governed by Article 107 of the Treaty on the Functioning of the European Union (TFEU) providing: "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between member states, be incompatible with the internal market."

3.3 Türkiye

In Türkiye foundations enjoy tax exemptions if they have a tax exemption status and associations if they enjoy a public benefit status by allowing donors to deduct their donations with or without certain limits from their tax bases. As many religious institutions are organized as nonprofit organizations, they are exempt from income or corporate taxation, however, they are obliged to pay tax from commercial activities.[1402] Those without such status are subject to taxes for the income generated from their assets in the same manner.

Since 2012,[1403] donations to the building or maintenance of *all* places of worship (previously limited only to mosques) are tax deductible. Places of worship, performing religious services open to the public are also exempt from property tax,[1404] as well as paying electricity bills. However, even though Turkish law does specify special procedures for granting the status of "place of worship", only mosques (and *masdjids*), churches and synagogues are expressly classified as places of worship, for the Muslim, Christian and Jewish religions respectively.[1405] Thus, as *cemevi's* - the Alevis's places of worship - are not recognized as places of worship but rather as cultural centers, they are excluded from receiving such benefits.[1406] Restrictions on the operation of places of worship ran by Jehovah Witnesses have also been imposed, but under different circumstances, nevertheless additionally resulting in the obligation to pay property taxes from which other places of worship have been exempted.[1407]

[1402] Ayşe Nil Tosun, "Tax Exemptions for Religious Organizations: The United States, the European Union, and Turkey," *Hacettepe University Journal of Economics and Administrative Sciences* 38, no. 3 (2020): 607–26.
[1403] See Law No. 6322 of 2012.
[1404] See Article 4, of the Italian Property Tax Law.
[1405] Izzettin Dogan and others v. Turkey.
[1406] Cumhuriyetçi Eğitim Ve Kültür Merkezi Vakfi v. Turkey, No. 32093/10 (European Court of Human Rights December 2, 2014).
[1407] Association for Solidarity with Jehovah Witnesses and Others v. Turkey.

4. (Re)interpretation: The role of Courts

4.1 Courts and Direct Funding

In terms of direct funding, separate trends have emerged in the three jurisdictions: 1) in France, a trend of broadening the scope of permissible financing both in terms of object as well as in terms of beneficiaries, by using the protection of equality and neutrality as justification; 2) in Italy, a trend of developing egalitarian jurisprudence towards regional policies, and a confirmation of the *status quo* on a national level; 3) while in Türkiye, a trend of consistently confirming the permissibility and necessity for total control in state funding of the majority religion.

In the so called "19th of July 2011 decisions" the French Council of State developed a new accommodative approach in cases concerning state funding to activities with religious purpose as well as for local leasing of state property. In terms of awarding state funding to privately owned premises with religious purpose, for activities with religious purpose, the Council of State has ruled that such funding is permissible if it serves "a local public interest."[1408] The jurisprudence of the Council has proven the threshold for satisfying the standard to be very low. For example, acquiring a new musical instrument for a state owned place of worship was deemed consistent with the 1905 Law as justified by the existence of an "independent public benefit;" even though the Law's provisions limit state funding to upkeep of such buildings and not for the construction new buildings or funding religious activities.[1409] The organ in question will serve both religious and secular (artistic, cultural) functions, however, its predominantly religious function was not considered as a basis for the impermissibility of state funding. Furthermore, a state financed installation of an elevator in a privately owned edifice was also deemed lawful, serving primarily a religious purpose, but also a secular one (such as its use by

[1408] Daly, "Public Funding of Religions in French Law: The Role of the Council of State in the Politics of Constitutional Secularism," 120.
[1409] See Decision no. 308544 (French Council of State July 19, 2011).

tourists).[1410] Therefore, as Daly notes "the appropriate test was simply the existence of a local public interest, not its significance or scale relative to its religious benefits."[1411]

In cases concerning the local leasing of state property to religious communities, the Council first looked at the purpose of the law and concluded that "the lawmaker of 2006 intended to depart from the provisions of the 1905 law"[1412] by giving power to local authorities to grant such a lease based on specified conditions and *in line with the principles of equality and neutrality*.[1413] The Council concluded that this derogation of the law of 1905 was not unlawful because these buildings were part of the heritage of the communities and the communes would not be funding the construction or any aspect of their building process.[1414] Additionally, the Council concluded that the low amount of the rent is justifiable by the non-profit character of the organizations benefiting from the lease. This also applies in cases when the facilities are to be used for *solely* religious purposes such as religious slaughter for the Muslim Aid festival, for the practice of Muslim prayer, or for the performance of slaughter[1415] under the condition that the principle of neutrality and equality towards other religions are respected.[1416]

The ICCt has indirectly justified the limited scope of the *otto per mille* system by ruling that it is solely upon the government's discretion whether to enter into *intese* (which is conditional for the application of the scheme); for such a decision the government answers before the Parliament, but not the courts.[1417] Thus, even though the Court has formally

[1410] See Decision no. 308817 (French Council of State July 19, 2011).
[1411] Daly, "Public Funding of Religions in French Law: The Role of the Council of State in the Politics of Constitutional Secularism," 117.
[1412] Fornerod, "The Places of Worship in France and the Public/Private Divide," 335.
[1413] See Decision no. 320796.
[1414] See Fornerod, "The Places of Worship in France and the Public/Private Divide," 335.
[1415] In the case of slaughter, the Court emphasized public interest concerns linked to public order, as allows authorities to be sure that such slaughter is performed in conformity with public health regulations. See Decision no. 309161.
[1416] On the other hand, just two years later the same Council deemed the action of a local government to finance and display a Catholic relic impermissible due to the lack of public benefit.
[1417] Judgment no. 52 (Italian Constitutional Court 2016), para. 5.3.

recognized equal liberty to all denominations regardless of whether or not they are governed by *intese*[1418] in has allowed for differential treatment to prevail reality.

On the other hand, the ICCt has been the main protagonist in broadening the scope of funding for specific purposes to all religious organizations equally and therefore safeguarding against discrimination. The Court struck down two regional laws that limited state direct funding for specific purposes to only specific organizations, maintaining that they breached the principle of equality as guaranteed by the constitution.[1419] Thus, the Court's jurisprudence portrays an internal contradiction because it awards both protection against discrimination as well as maintains the permissibility of different levels of state-religion cooperation.

First, the Court stressed that the state is bound by "impartiality and nondiscrimination, based on the principles of separation between the state and religious organizations;" that it is bound by equal freedom and equal treatment and therefore cannot favor any religious organization.[1420] The Court also stressed that *laicità* envisions pluralism whose respect cannot be ensured by preferential treatment. In the conclusion, the Court mentioned that the state must be neutral towards religious matters. Second, despite this reasoning, and relaying on previous practice, the Court legitimized the differential treatment according to the nature of the institutions and the different relationship that the state has established with different faiths. In the second case, the Court pushed a little further in the interpretation of *laicità*, stating that *laicità* meant more than just the protection of religious freedom: it also meant "equidistance from and impartiality of the law towards all religious denominations,"[1421] prohibiting a positive or negative bias towards any religious denomination.

In the jurisprudence of the TCC, from the establishment period until today, the existence of the Diyanet is not only justified, but its existence serves as a justification itself for

[1418] Judgment no. 195.
[1419] Ibid.
[1420] Judgment no. 235.
[1421] Ventura, "The Rise and Contradictions of Italy as a Secular State," 138.

the permissibility of the state intervention in other areas (such as religious education).[1422] The Court considers state monopoly over religious education and over the management of religion as compatible with the Constitution and *laiklik*, asserting that even though Islam is not an official religion of the state, mechanisms do exist to promote its management and education.[1423] Thus, the Court has continuously maintained that it has been the intention of the framers of the Turkish Republic and thereafter its constitution drafters to maintain this institutional architecture to control the majority religion upon which the republican form of government depended. [1424]

4.2 Courts and Indirect Funding

Concerning indirect financing, national courts in general have been reluctant to override decisions of the executive and their application the laws, as well as the quality of the laws themselves. On the other hand, supranational courts, even within their limited role in checking national tax policies, have emerged active in ruling on the laws quality as well as their application.

In the case of the selective application of gift tax exemptions in France, the French councils/courts dismissed the applicants' claims predominantly based on two justifications. The first justification rested on the premise that the law was correctly applied, even if the consequences were severe. The second justification was based on judicial restraint –even if the content of the law might be inadequate, judges are in the business of applying and not

[1422] See Akan, *The Politics of Secularism*, 267; See also Judgment no. E. 2012/65, K. 2012/128.
[1423] See Judgment no. E. 2012/65, K. 2012/128.
[1424] The compatibility of the existence and function of the Diyanet with secularism was present in parliamentary debates in the establishment period, however, as Akan shows such discussions were in most part ignored or explicitly considered not only as compatible with *laiklik* but necessary for the Turkish context. Akan, *The Politics of Secularism*.

correcting the law.[1425] Contrary to this approach, the ECtHR deemed the law unforeseeable and thus, its application in violation of the ECHR.[1426]

In Italy, the ICI affair was resolved at a supranational level as a question under EU law. In 2012 the CJEU[1427] ruled that the scheme under ICI represented unlawful state aid and ordered a recovery of the funds, previously deemed impossible by the Commission, whereas the new IMU was not regarded as state aid. In 2018 the CJEU delivered a judgment granting Italy the right to recover a sum in the amount of 4 billion euros for the period between 2006 and 2011.[1428]Another aspect that the Commission investigated in its procedure was the Articles of the Italian Unified Law on Income Tax (*Testo unico delle imposte sui redditi*, TUIR) that also provide for preferable fiscal treatment of religious institutions and amateur sports clubs as non-commercial entities. Article 149 "appeared to exclude the application of the rules concerning the loss of 'noncommercial status' for ecclesiastical institutions with a civil status, even if they carry out commercial activities."[1429] The Commission considered that "the provision constitutes *prima facie* a selective measure, since the possibility to maintain the non-commercial status even when they would otherwise no longer be considered as non-commercial entities is granted only to ecclesiastic institutions and to amateur sport clubs."[1430] This would lead to unchecked perpetual non-commercial status. Since the Commission closed its investigation, no action was conducted in pursuit of this conclusion.

[1425] For an overview see Association Les Témoins de Jéhovah v. France.
[1426] The ECtHR maintained that law did not define who and what constituted as a "donee" making it impossible to know whether it was applicable to legal entities and thus to the applicant association," and because "the taxation of manual gifts to the applicant association had depended on the conduct of a tax audit making, the application of the tax law unforeseeable. Ibid.
[1427] Scuola Elementare Maria Montessori Srl v Commission, Commission v Scuola Elementare Maria Montessori Srl, and Commission v Pietro Ferracci.
[1428] "Italy to Recover €4bn in Unpaid Taxes from the Vatican," accessed April 12, 2020, https://www.europeanceo.com/finance/italy-to-recover-e4bn-in-unpaid-taxes-from-the-vatican/.
[1429] Françoise Curtit and Anne Fornerod, "State Support for Religions: European Regulation," *Public Funding of Religions in Europe*, Cultural diversity and law in association with RELIGARE, 2015, https://halshs.archives-ouvertes.fr/halshs-01659227/document.
[1430] Ibid.

Finally, Turkish courts have continuously denied recognizing Alevism as a specific religion resulting in restricting access to state funding and services available to other religious communities. By simply applying the law and following the decisions from executive bodies, primarily the Diyanet, courts have maintained that Alevi's places of worship are not considered as such; resulting in their exclusion from benefitting from direct and indirect state funding, in the form of tax breaks, assigned to other places of worship. The ECtHR on the other hand, has been continuously ruling that such nonrecognition resulting in deferential treatment equal to discrimination is a violation of Article 9 of the ECHR in conjunction with Article 14.[1431] Unfortunately, this decision has had little impact on the national level.

5. Conclusion

The aim of the chapter was to answer two sub-questions of the dissertation. With regard to the first question, namely *How has the normative content of the principle of secularism been developed or challenged on the legislative level in the field of state funding of religion,* two trends are emergent. Generally, there has been both an expansion of funding as well as an expansion of control over establishment and over non-state funding (with the exception of Italy). Thus, the normative salience of secularism has proved to be of little strength, as political and social forces have been dictating the form and nature of financial relationships between state and religion, without much constraint or considerations arriving from the principle. The fact that justifications for funding are easily translated into neutral terms – schools-choice or equality – has allowed for a trend of broadening the accessibility of funds and at times producing egalitarian outcomes.

In France, there is a gradual increase in the competences of government institutions in the control and supervision over religious institutions, under the justification of public order

[1431] Izzettin Dogan and others v. Turkey, No. 62649/10 (European Court of Human Rights April 26, 2016), para. 48-9.;Cumhuriyetçi Eğitim Ve Kültür Merkezi Vakfi v. Turkey.

and safety. New religious movements are dealt with suspicion being considered cults endangering public order and Islam does not receive equal treatment on legalistic grounds. On the other hand, access to funds to religious organizations has been expanded.

In Italy, this control is limited to registration and, thus, religious organizations can gain legal personality and operate with little state interference. However, even though religious organizations in Italy can gain legal personality and operate with little state interference, the privileged status of the Catholic Church and "acceptable" religious institutions remains. Even though the 1984 Concordat marked a significant improvement in the direction of opening the "marketplace of religions" in Italy, as the *de jure* and *de facto* religious monopoly[1432] of the Catholic Church is discontinued, it enjoys certain special privileges; once again confirming the fact that in Italy there is religious liberty but not equality.[1433] In terms of indirect funding, religious organizations enjoy privileges of tax exemptions on an equal footing despite their institutional organization, with *intese* further defining exempted activities.

In Türkiye, some progress has been made to allow for minority religions to operate more freely, however, the continuing suspicion toward minority religions reflected in the attempts to meddle in their operations and in not recognizing their full legal capacity is evident. The Turkish legal framework might foresee three viable paths towards limited legal personality, but, in reality, it too establishes a de-facto three-tier system: 1) the state-run Sunni Islam; 2) the Lausanne minorities that enjoy further guarantees but have also faced substantial restrictions; 3) and, finally, other unrecognized or *de facto* "unacceptable" religions or streams within Islam.

The second aim of this chapter was to answer the second sub-question of the dissertation: *How has the normative content of the principle of secularism been developed or challenged on*

[1432] In this dichotomy de-facto monopolies, as defined by Zucca are present when "one church exercises a very strong influence on political and civil society". Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape*, 95.
[1433] See Ferrari and Cristofori, *Law and Religion in the 21st Century*.

the legislative level in the field of state funding of religion? In the field of funding, there is evidence of both the thinning and the thickening of the principle of secularism. If we understand non-financing clauses as an inherent block of constitutional secularism, then there is clear evidence of the thinning of the principle. However, the crucial difference is that in specific cases, available funding does not exclusively support the majority religion. On the other hand, the legitimization of the privileged status of the majority religion or the use of funding as a tool to suppress minority religions has led to the *thickening* of the principle of secularism. In these specific instances, the overinflation of its existential meaning has been employed at the expanse of liberty, which has allowed for the state power/interference to penetrate where it was not allowed to do so before: the outcome in the French cult cases and the legitimation of compete state control over the majority religion in Türkiye are such examples.

Conclusion

This dissertation considered church (religion)-state relations in France, Italy and Türkiye, three countries with a constitutional commitment to the principle of secularism in order to determine the practical meaning of that concept. In all three jurisdictions the principle of secularism has reflected the particularity of the context from which it emerged. More specifically, it has been intimately linked to a particular understanding of sovereignty and citizenship as well as a particular definition of permissible limitations of rights, an understanding that is changing in history. Within the secularist model governing church (religion)-state relationships, however, the level of separation was established as dependent on 1) the level of constitutional consolidation of power of the state at the specific moment (i. e. at the time the foundational legal institutions are determined) and 2) the *organized* strength of the majority religion. The "founding moment" determines a kind of path dependence, both institutionally and at the level of reasoning. However, while the original constitutional position sets the frame, it does not preclude adaptation to changing political and social conditions, in particular the influence of politicized religion. All this indicates the relative weakness of secularism as a concept or principle if understood as an expression of *sovereignty* and a *vehicle towards equal citizenship*, where the requirement of state neutrality is *a means to an end*, a guardian of these two traits.

In France, from the Revolution to the 1905 Law, different regimes governing religion-state relationships developed in accordance with the level of consolidation of power of the state and the strength of the Catholic Church in politics and society. The 1905 Law as a "one-sided" solution could be imposed as the republican forces gained political control over the state and had outperformed the church and took over social functions, which was not materially possible earlier. The fact that the law remained in force despite the initial rejection by the Catholic Church is a testament to the state's particular strength at the time. The concessions made to the

Catholic Church 15 years later when the Church finally accepted the law, however, shows the normative weakness of the arrangement from its outset, as practical and political considerations influenced its framework.

In Italy, as the strength of the Church did not fluctuate, religion-state relationships were dictated only in accordance with the strength of the state. This consideration is key in providing an answer as to why the Concordat as a method of religion-state governance has persisted to this day. Alternatively, it also provides an answer as to why after the failure of the Law of Guarantees, a law regulating *all* religious organizations on equal terms, never materialized. The influence of the Catholic Church in society and politics through its convergence with DC made it possible for the Concordat system to survive within the framework of the 1946 liberal Constitution. The regime is in place to this day, with the *intese* becoming an avenue for regulating religion-state relationships with other religions only after 1984.

In Türkiye, the alignment with Islamic forces in the foundational period was short-lived, as the new Republic dealt with dissenters swiftly and successfully established a hegemony. However, at the specific moment when the nation state was established, its power consolidated and centralized, it imposed a regime of state control over the majority religion. Thus, since there was no moderation as in France, or negotiation as in Italy, *laiklik* imposed state control instead of separation or independence.

In their essence all three countries are secular - the secularization of state power is complete as state power and legitimacy derives from the people and religious percepts do not serve as a source of law; the republican form of government enjoys the highest level of constitutional protection; and equal citizenship is guaranteed whether in abstract terms or in its particularity. However, even from its conception, secularism as a normative framework has displayed symptoms of normative weakness as one never established with finality and thus, susceptive to practical difficulties, contextual considerations and political pressures, and/or has

been conceptualized contrary its original liberal understanding; liberal understood as requiring the secular state to exercise its power based on non-religious justifications accessible to all and to effectively guarantee equality of all its citizens regardless of their religious (non)belonging. Additionally, after secularization and the consolidation of state power was completed, and the strong religion was contained, further entanglement with religion was not viewed as problematic. This conclusion clearly derives from the analysis carried out in this dissertation conducted in the field of education and state funding, where there is clear evidence of a reinterpretation of the limits of separation as well as reversed secularization.

In the field of education, on the legislative level the normative content of the principle of secularism has been challenged in all three jurisdictions, whilst strong evidence of reversed secularization specifically related to the establishment and expansion of state funding to religious private schools as well as to shifts in interpretation as related to religious symbols in educational contexts.

In France and Italy, since the republics were no longer under existential threat and established their role as the main educator, extending welfare policies in the form of funding to private schools, even if most of them religious, was no longer considered problematic. Individual rights considerations, protection of equality as well as market-related justifications such as the aim to expand the educational offer, have been used to reintroduce a financial state-religion entanglement in the form of private-school funding. Even though these shifts have been achieved under the strong influence of the Catholic Church or actors aligned with it, framing the issues of accessibility of state-funding through the language of rights and equality has allowed for its permissibility not to be assessed through the lens of constitutional secularism. In Türkiye, the vast expansion of Imam Hatip schools emerges as a key consideration in understanding the trends of state policies towards religion in education. However, paradoxically because the absoluteness of *laiklik* enables the state to promote

religious education, policies governing Imam Hatip schools cannot be seen as a reinterpretation of *laiklik*. Thus, the three examples show that loosening the limits of secularism in the form of providing state subsidies to private religious education may enable both entanglement and the reinforcement of state control.

The framework governing religious education in public schools has been an area that has remained reflective of the established model of secularism in the specific jurisdictions. In France *laïcité* has remained salient. Even though teaching about religion has been recently introduced, the appointment of teachers has remained under state discretion and the curriculum has been created in a non-confessional manner. In Italy, the state and the Catholic Church share competences in religious instruction, in terms of curriculum and teachers' appointment. Furthermore, non-egalitarian approaches to other denominational courses have been considered as compatible with *laicità*. In Türkiye, complete state control over religious instruction has been considered compatible with *laiklik*. The current frameworks in Italy and Türkiye have permitted a religion-state identification to persist and, thus, have allowed for religion to remain a building block of citizenship in its substantive dimension, closely related to imaginaries of nationhood and as a distinct source of identity.[1434] Even though significant progress has been made in affording exemptions from religious instruction to students in the past 25 years in Italy and last year in Türkiye, some problematic aspects remain.

The shift in the interpretation of constitutional secularism been most evident in issues surrounding the presence of religious symbols in public schools. In France, the application of the obligation of neutrality has been expanded from a limited application to civil servants towards a broader application to students and private sector employees. In Italy, the presence of the crucifix in public schools have been legitimized as obligatory and interpreted as an

[1434] Bryan S. Turner, "Secular and Religious Citizenship," in *The Oxford Handbook of Citizenship*, ed. Ayelet Shachar (Oxford: Oxford University Press, 2017).

application of *laicità*. In Türkiye, there has been a radical shift from a very restrictive regime imposing a strict obligation of neutrality excluding even personal religious manifestations to one completely liberalized, broadening the compulsory private display of religious symbols in the form of dress codes. All these shifts have been justified as permissible, and at times obligatory under constitutional secularism and its application, even though manifestly shifting its initial interpretation. This serves as proof that secularism as a normative framework allows for its bending and adjusting. Furthermore, the French and Turkish examples show how in contested areas such as education due to its role in building the citizen, a renegotiation of what is permissible can shift in accordance with the dominant values of the times, even if the core framework formally remains intact.

Issues of state funding, even if more problematic from a non-establishment perspective and as related to autonomy, are more value neutral. On a legislative level, this has made it possible for both indirect and direct funding to be expanded through time in all three jurisdictions. Normative salience of secularism in financial matters in Europe has proved to be of little strength, as political and social forces have been dictating the form and nature financial relationships between state and religion, without much constraint or considerations arriving from the principle. The fact that justifications for funding are easily translated into neutral terms – schools-choice, equality – has allowed for a trend of broadening the accessibility of funds and at times producing egalitarian outcomes. This serves as clear evidence of reversed secularization.

On the other hand, control over establishment and in certain instances over funding persists. In Italy, this control is limited to registration and, thus, religious organizations can gain legal personality and operate with little state interference. However, access to funding differs based on the legal status of the organizations, whilst the Catholic Church enjoys a privileged status. In France, there is a gradual increase in the competences of government

institutions in the control and supervision over religious institutions, under the justification of public order and safety. On the other hand, access to funds to religious organizations has been expanded. New religious movements are dealt with suspicion being considered cults endangering public order and Islam does not receive equal treatment on legalistic grounds. In Türkiye, some progress has been made to allow for minority religions to operate more freely, however, the continuing suspicion toward minority religions reflected in the state's attempt to meddle in their operations and in not recognizing their full legal capacity is evident. Thus, under the Turkish framework, Sunni Islam is completely controlled, Lausanne minorities are allowed to function under substantial restrictions but receive no state funding, whilst other unrecognized or *de facto* "unacceptable" religions or streams within Islam (e. g. Alevi) are treated as non-existent.

At the level of courts, developing trends both in the field of education and funding indicate a *parallel thickening and thinning* of the principle of secularism. The dichotomy of the thickening and thinning of the principle of secularism on the judicial level has been introduced in this dissertation to better define and classify the avenues that courts take when adjudicating cases that impact the interpretation of the principle. A *thinning* of the principle of secularism transpires when its significance is "watered down" in most instances in the spirit of catering to the majority religion. A *thickening* of the principle of secularism, caters equally to the majority religion and emerges when there is an overinflation of its existential meaning at the expense of liberty, which has allowed for the state power/interference to penetrate where it was not allowed to do so before. However, these trends should not be viewed in isolation, but rather in connection to the specificities of each court as well as the development of human rights and equality jurisprudence.

Cases arising in the field of education have often proved difficult to adjudicate due to the impossibility to resolve them by simply applying the constitution. This has urged high and

Constitutional Courts/Councils to engage in creative reasoning and/or to employ avoidance mechanisms. Thus, in certain cases courts have (re)interpreted the principle of secularism creatively to resolve conflicts or to confirm the constitutionality of norms. In other cases, courts have employed interpretation techniques and avoidance mechanisms that have allowed them to confirm legislative agendas, even when the outcome indirectly significantly impacted the normative content of constitutional secularism.

In the field of education courts have employed three approaches that have led to the *thinning* of the principle of secularism in its liberal understanding, namely, 1) the use of the language of rights and or/ equality to avoid interpreting issues as a matter of secularism; 2) the (re)interpretation of religion as culture to upkeep/advance the privileged status of the majority religion; and 3) the application of philosophical/theoretical interpretations of secularism to justify advancing majoritarian preferences. Courts have employed two approaches that have led to the *thickening* of the principle of secularism in its liberal understanding, namely 1) the employment of public order and paternalistic arguments to overinflate the meaning of secularism at the expense of individual liberties; and 2) the employment of contextual particularity to either contain or promote majoritarian preferences.

Different trends in adjudication have emerged in the field of direct and indirect funding of religion. In terms of direct funding, three separate trends have emerged. In France, there is a trend of broadening the scope of permissible founding, both in terms of the grounds upon which it can be received, as well its beneficiaries. In the specific cases, courts have used the protection of equality and neutrality as a justification for such broadening. In Italy, there has been a trend of developing egalitarian jurisprudence towards regional policies, and a confirmation of the *status quo* on a national level. In Türkiye, there is a trend of consistently confirming the permissibility and necessity for imposing control over state funding of the majority religion. Concerning indirect funding, national courts in general have been reluctant

to override decisions of the executive or the manner in which they apply the law, as well as the quality of the laws themselves. On the other hand, supranational courts, even within their limited role in checking national tax policies, have emerged active in ruling on the quality of laws as well as their application.

Thus, in the field of funding, there is evidence of both the thinning and the thickening of the principle of secularism. If we understand non-financing clauses as an inherent block of constitutional secularism, then there is clear evidence of the thinning of the principle. However, the crucial difference is that in specific cases, available funding does not exclusively support the majority religion. On the other hand, the legitimization of the privileged status of the majority religion or the use of funding as a tool to suppress minority religions has led to the *thickening* of the principle of secularism. In these specific instances, the overinflation of its existential meaning has been employed at the expense of liberty, which has allowed for the state power/interference to penetrate where it was not allowed to do so before: the outcome in the French cult cases and the legitimation of compete state control over the majority religion in Türkiye are such examples.

The overall conclusion in this dissertation is that even though constitutional secularism, if understood as a normative framework dictating levels of separation, has remained salient in its core, it has exhibited less normative salience in the areas of education and state funding to religious organizations. In fact, practical, political, and contextual determinations have been key in altering the normative content under which constitutional secularism operates. Paradoxically, whether an area has been contested or not has not made much difference. Even though historically the field of education has been a highly contested area, the renegotiation of what is permissible shifted in accordance with dominant positions even if the core formative framework maintained intact. On the other hand, the limits of permissible funding have been

prone to reinterpretation being a value-neutral domain in which justifications can be easily translated into neutral terms.

Thus, the dissertation confirms the hypothesis that *constitutional secularism, as specific arrangement determining the level of separation in a specific jurisdiction, is contingent upon the level of consolidation of power the state achieved in the nation-building project and the strength of the majority religion against which it emerged; as such it is normatively weak and upon changed conditions allows for political re-negotiation leading to a process of reversed secularization.*

Bibliography

Los Angeles Times. “16 Bodies Found in French Alps; Cult Ritual Suspected,” December 24, 1995. https://www.latimes.com/archives/la-xpm-1995-12-24-mn-17454-story.html.

“1830: French Charter of 1830 - Online Library of Liberty.” Accessed December 24, 2018. https://oll.libertyfund.org/pages/1830-french-charter-of-1830.

A. Bantjes, Adrian. “Mexican Revolutionary Anticlericalism: Concepts and Typologies.” *The Americas*, Personal Enemies of God: Anticlericals and Anticlericalism in Revolutionary Mexico, 1915-1940, 65, no. 4 (2009): 467–80.

lejdd.fr. “A Quoi Sert La Fondation Des Œuvres Pour l’islam de France?,” June 21, 2017. https://www.lejdd.fr/Societe/Religion/A-quoi-sert-la-Fondation-des-oeuvres-pour-l-islam-de-France-800665.

Abdukadirov, Malik. “The Place of Religion in Turkish Sociaty: An Analysis Through the Lens of the Center-Periphery Thesis.” *Journal of International Social Research* 10, no. 54 (December 25, 2017): 517–22.

Acomb, Evelyn Martha. *The French Laic Laws, 1879-1889 : The First Anti-Clerical Campaign of the Third French Republic*. Studies in History, Economics and Public Law: 486. New York: Octagon Books, 1967.

———. “The Laic Laws- State Supremacy.” In *A Free Church in a Free State? The Catholic Church, Italy, Germany, France, 1864-1914*, edited by Ernst C. Helmreich, 100–103. Boston: D.C. Heath and Company, 1964.

Adams, John Clarke, and Paolo Barile. “The Italian Constitutional Court in Its First Two Years of Activity.” *Buffalo Law Review* 7, no. 2 (1958): 250–65.

Adar, Sinem. “Understanding Religion in (New) Turkey.” Jadaliyya, March 14, 2018. http://www.jadaliyya.com/Details/36307.

Adrian, Melanie. *Religious Freedom at Risk. The EU, French Schools, and Why the Veil Was Banned*. Switzerland: Springer, 2016.

Agasisti, Tommaso, Gianna Barbieri, and Samuele Murtinu. “Private School Enrollment in an Italian Region after Implementing a Change in the Voucher Policy.” *Journal of School Choice* 9 (2015): 380–406.

Ahdar, Rex J., and I. Leigh, eds. *Religious Freedom in the Liberal State*. Oxford: Oxford University Press, 2005.

Ahmad, Feroz. “Politics and Political Parties in Republican Turkey.” In *The Cambridge History of Turkey, Volume 4 Turkey in the Modern World*, edited by Reşat Kasaba. Cambridge: Cambridge University Press, 2008.

Ahmet Erdi Öztürk. “Turkey’s Diyanet under AKP Rule: From Protector to Imposer of State Ideology?” *Southeast European and Black Sea Studies* 16, no. 4 (2016): 619–35.

Ahmet Erdi Öztürk and Semiha Sözeri. “Diyanet as a Turkish Foreign Policy Tool: Evidence from the Netherlands and Bulgaria.” *Politics and Religion* 11, no. 3 (2018): 1–25.

Akan, Murat. *The Politics of Secularism: Religion, Diversity, and Institutional Change in France and Turkey*. Religion, Culture, and Public Life. New York: Columbia University Press, 2017.

Akbas, Gamze, Arzu Erçetin, Vehbi Tosun, and Zuhal Erdemir. “Westernization in Ottoman Culture and Built Environment.” *International Journal of Humanities, Arts and Social Sciences* 6, no. 3 (2020): 111–23.

Akman, Macit. “The Closure of the Sharia Courts.” In *Social, Educational, Political, Economic and Other Developments Occurred in Turkey Between the Years of 1923-1938*. ISRES Publishing, 2018.

Allen Jr., John L. *All the Pope’s Men: The Inside Story of How the Vatican Really Thinks*. New York: Doubleday Religion, 2004.

Almairac, Laure. “Turkey: A Minority Policy of Systematic Negation.” International Helsinki Federation for Human Rights (IHF), October 2006.

Almond, Gabriel Abraham, R. Scott Appleby, and Emmanuel Sivan. *Strong Religion : The Rise of Fundamentalisms around the World*. Chicago : University of Chicago Press, 2003, n.d.

Alouane, Rim-Sarah. “Islam, Made in France? Debating the Reform of Muslim Organizations and Foreign Funding for Religion.” *Brookings* (blog), May 1, 2019. https://www.brookings.edu/blog/order-from-chaos/2019/05/01/islam-made-in-france-debating-the-reform-of-muslim-organizations-and-foreign-funding-for-religion/.

Altglas, Véronique. “Laïcité Is What Laïcité Does: Rethinking the French Cult Controversy.” *Current Sociology* 58, no. 3 (2010): 489–510.

Anderson, R. D. *European Universities from the Enlightenment to 1914*. Oxford: Oxford University Press, 2004.

Anello, Giancarlo. “Freedom of Religion vs Islamophobia: Lombardy’s ‘Anti-Mosque Law’ is Unconstitutional.” *Verfassungsblog* (blog). Accessed April 12, 2020. https://verfassungsblog.de/freedom-of-religion-vs-islamophobia-lombardys-anti-mosque-law-is-unconstitutional/.

Angeli, Franco. “Bocciato Il Uesito Contro I Finanziamenti Alle Scuole Private.” *Il Giornale* 16, no. 1 (2003).

Annicchino, Pasquale. “Winning the Battle by Losing the War: The Lautsi Case and the Holy Alliance between American Conservative Evangelicals, the Russian Orthodox Church and the Vatican to Reshape European Identity.” *Religion & Human Rights* 6, no. 3 (2011): 213–19.

Annicchino, Pasquale, and Frederick Mark Gedicks. “Cross, Crucifix, Culture: An Approach to the Constitutional Meaning of Confessional Symbols.” *EUI Working Paper RSCAS* 88 (2013).

Anscombe, Frederick E. “Islam and the Age of Ottoman Reform.” *Past & Present* 208, no. 1 (2010): 159–89.

Arsel, İlhan. “Constitutional Development of Turkey Since Republic.” *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 18, no. 1–4 (1961): 37–70.

Arslan, Zühtü. “Conflicting Paradigms: Political Rights in the Turkish Constitutional Court.” *Critique: Critical Middle Eastern Studies* 11, no. 1 (2002): 9–25.

———. “‘(Re)Interpreting Secularism in a Democratic Society: A Cursory View of the Case-Law of the Turkish Constitutional Court’, International Symposium on Constitutional Courts as the Guardian of Ideology and Democracy in a Pluralistic Society.” Anayasa, August 9, 2017. https://www.anayasa.gov.tr/en/president/presidents-speeches/re-interpreting-secularism-in-a-democratic-society-a-cursory-view-of-the-case-law-of-the-turkish-constitutional-court-international-symposium-on-constitutional-courts-as-the-guardian-of-ideology-and-democracy-in-a-pluralistic-society/.

Asaín Pereira, Carmen. “Religion and the Secular State: Uruguayan Report.” In *Religion and the Secular State: National Reports*, edited by W. Cole Durham and Javier Martínez-Torrón, 767–89. Provo: The International Center for Law and Religion Studies Brigham Young University, 2010.

Ascoli, Max. “Education in Fascist Italy.” *Social Research* 4, no. 3 (1937): 338–47.

Aslı Bâli, “Courts and Constitutional Transition: Lessons from the Turkish Case," *International Journal of Constitutional Law* 11, no. 3 (2013): 666-701.
Aşlamacı, Ibrahim, and Recep Kaymakcan. “A Model for Islamic Education from Turkey: The Imam-Hatip Schools.” *British Journal of Religious Education* 39, no. 3 (2017): 279–92.
Aslan, Ednan, and Margaret Rausch, eds. *Religious Education Between Radicalism and Tolerance*. Austria: Springer VS, 2018.
Aslan, M. Yasin. “Transformation of Turkish Criminal Law from the Ottoman-Islamic Law to the Civil Law Tradition.” *Ankara Bar Review* 2 (2009): 92–98.
Ataöv, Türkkaya. “The Principles of Kemalism.” *The Turkish Yearbook of International Relations* 20 (1980): 19–44.
Atasoy, Yildiz. *Turkey, Islamists and Democracy: Transition and Globalisation in a Muslim State*. New York: LB. Tauris & Co Ltd, 2005.
Atkin, Nicholas. “The Challenge to Laïcité: Church, State and Schools in Vichy France, 1940-1944.” *He Historical Journal* 35, no. 1 (1992): 151–69.
Atli Beylunioglu, Anna Maria. “Freedom of Religion in Turkey Between Secular and Islamic Values: The Situation of Christians.” PhD Thesis, European University Institute, 2017.
Audi, Robert. “The State, the Church, and the Citizen.” In *Religion and Contemporary Liberalism*, edited by Paul J. Weithman, 39. Notre Dame: University of Notre Dame Press, 1997.
Auslander, Lenora. “Barian Crucifixes and French Headscarves: Religious Signs and the Postmodern European State.” *Cultural Dynamics* 12 (2000): 283–309.
Aysun Yaşar. “Reform in Islamic Education and the AKP’s Pious Youth in Turkey.” *Religion and Education* 47, no. 4 (2020): 106–20.
Bader, Veit. “Constitutionalizing Secularism, Alternative Secularisms or Liberal-Democratic Constitutionalism? A Critical Reading of Some Turkish, ECtHR and Indian Supreme Court Cases on ‘Secularism.’” *Utrecht Law Review* 6, no. 3 (2010): 8–35.
Badruzzaman, Aeshna, Matthew Cohen, and Sidita Kushi. “Contending Images in Turkey’s Headscarf Debate: Framings of Equality, Nationalism, and Religion.” *Mediterranean Quarterly* 28, no. 3 (2017): 27–55.
Bagley, William C. “The Function of the Public School.” *Religious Education* 13, no. 1 (2006): 43–45.
Bali, Rifat. “Politics of Turkification During the Single Party Period.” In *Turkey Beyond Nationalism*, edited by Hans Lukas Kieser. London: I.B. Taurus, 2006.
Baptist Scalabrini, John. “Conflict Between Church and State.” In *For the Love of Immigrants: Migration Writings and Letters of Bishop John Baptist Scalabrini (1839-1905)*, 39–45. New York: Center for Migration Studies, 2000.
Barber, Sotirios A., and James E. Fleming. “The Philosophic Approach.” In *Constitutional Interpretation: The Basic Questions*, 155–70. New York: Oxford University Press, 2007.
Barbetta, Gian Paolo. *The Nonprofit Sector in Italy*. Manchester: Manchester University Press, 1997.
Barkley, Karen. “Rethinking Ottoman Management of Diversity. What Can We Learn for Modern Turkey?” In *Democracy, Islam, and Secularism in Turkey*, edited by Alfred Stepan and Ahmet T. Kuru, 12–31. New York: Columbia University Press, 2012.
Barras, Amélie. “Using Rights to Re-Invent Secularism in France and Turkey.” *EUI RSCAS 2008/20*, 2008.
Barry, Alfred. “Bossuet and the Gallican Declaration of 1682.” *The Catholic Historical Review* 15, no. 2 (1929): 142–53.

Barry, Brian. *Culture and Equality: An Egalitarian Critique of Multiculturalism*. Cambridge, Massachusetts: Harvard University Press, 2001.
Barucci, Piero. "Ripensare Oggi Giuseppe Toniolo (Rethinking Giuseppe Toniolo)." *Il Pensiero Economico Italiano* 22, no. 2 (2014): 43–48.
Baskin, Oran. "National Sovereignty Concept: Turkey and Its Internal Minorities." *Cahiers d'études Sur La Méditerranée Orientale et Le Monde Turco-Iranien* 36 (2003).
Baubérot, Jean. "French Secularism: Republican, Indivisible, Democratic, and Social." *Cités* 52, no. 4 (2012): 11–20.
———. "Laïcité and Freedom of Conscience in Pluricultural France." In *Secularism on the Edge, Rethinking Church-State Relations in the United States, France and Israel*, edited by Jacques Berlinerblau, Sarah Fainberg, and Aurora Nou. New York: Palgrave Macmillan, 2014.
———. "Laicity." In *The French Republic: History, Values, Debates*, edited by Edward Berenson, Vincent Duclert, and Christophe Prochasson, 127–35. Ithaca: Cornell University Press, 2011.
Becchi, Paolo. "Human Dignity in Italy." In *Handbook of Human Dignity in Europe*, edited by Paolo Becchi and Klaus Mathis, 453–70. Cham: Springer International Publishing, 2019.
Bell, John. *French Constitutional Law*. Oxford: Clarendon Press, 1992.
Berenson, Edward, Vincent Duclert, and Arthur Goldhammer. "Introduction: Transatlantic Histories of France." In *The French Republic: History, Values, Debates*, edited by Christophe Prochasson, Edward Berenson, and Vincent Duclert, 1–8. Ithaca: Cornell University Press, 2011.
Berger, Peter L. *The Desecularization of the World : Resurgent Religion and World Politics*. Washington, D.C.: W.B. Eerdmans, 1999.
Berkes, Niyazi, and Feroz Ahmad. *The Development of Secularism in Turkey*. London: Hurst & Company, 1998.
Berkmann, Burkhard J. "Religious Education before the ECtHR: The Opt-out Clause Does Not Suffice Anymore." *British Journal of Religious Education* 44, no. 4 (2022): 432–43.
Bernier, Maître J. B. "Droit Public and Ordre Public." *Transactions of the Grotius Society* 15 (1929): 83–91.
Beylunioğlu, Anna Maria. "Freedom of Religion and Non-Muslim Minorities in Turkey." *Turkish Policy Quarterly* 13, no. 4 (2015): 140–47.
Bhagwat, Ashutosh. "Hard Cases and the (D)Evolution of Constitutional Doctrine." *Connecticut Law Review*, no. 30 (1998): 961–1017.
Bien, David D. "Religious Persecution in the French Enlightenment." *Church History* 30, no. 3 (1961): 325–33.
Binchy, Daniel Anthony. *Church and State in Fascist Italy*. London: Oxford University Press, 1941.
Bloomberg, Jon. *The Jewish World in the Modern Age*. Jersey City: KTAV Publishing House, Inc., 2004.
Blumenthal, Uta-Renate. "Investiture Controversy." In *Britannica*. Accessed February 9, 2022. https://www.britannica.com/event/Investiture-Controversy.
Bojanovska Popovska, Dorjana, and Francesca Raimondo. "Formal and Substantive Aspects of Citizenship and Its Connection to Religion. Definition, Practices and Comparative Perspectives." *Quaderni Di Diritto e Politica Ecclesiastica, Rivista Trimestrale* 29, no. 2 (2021): 509–28.
Bokenkotter, Thomas. "The French Revolution (1789 - 1914)." In *Church and Revolution, Catholics and the Struggle for Democracy and Social Justice*. New York: Image Book, 1998.

Borutta, Manuel. "Anti-Catholicism and the Culture War in Risorgimento Italy." In *The Risorgimento Revisited*. Palgrave Macmillan, 2012.
Boyron, Sophie. *The Constitution of France: A Contextual Analysis*. Oxford: Bloomsbury, 2013.
Bozbayindir, Fatih. "The Policies on Training Teachers in Atatürk Period (1923-1938)." In *Social, Educational, Political, Economic and Other Developments Occurred in Turkey Between the Years of 1923-1938*. ISRES Publishing, 2018.
Brown, L. Carl. *Religion and State: The Muslim Approach to Politics*. New York: Columbia University Press, 2000.
Brown, Martin. "Is There a Marxist Perspective on Education?" Culture Matters, May 21, 2018. https://www.culturematters.org.uk/index.php/culture/education/item/2819-is-there-a-marxist-perspective-on-education.
Bruce, Steve. *Religion and Modernization: Sociologists and Historians Debate the Secularization Thesis*. Oxford: Clarendon Press, 1992.
Bruinessen, Martin Van. "The Governance of Islam in Two Secular Polities: Turkey's Diyanet and Indonesia's Ministry of Religious Affairs." *European Journal of Turkish Studies. Social Sciences on Contemporary Turkey*, no. 27 (2018): 1–26.
Bucci, P. Vincent. *Chiesa e Stato*. The Hague: Martinus Nijhoff, 1969.
Bulliet, Richard W. "The Shaikh Al-Islām and the Evolution of Islamic Society." *Studia Islamica*, no. 35 (1972): 53–67.
Burak, Begüm. "Turkey's Secularism Experiment as an Impediment to Democratic Consolidation." *Journal of Political Administrative and Local Studies* 4, no. 1 (2021): 54–71.
Burgorgue-Larsen, Laurence, Pierre-Vincent Astresses, and Véronique Bruck. "The Constitution of France in the Context of EU and Transnational Law: An Ongoing Adjustment and Dialogue to Be Improved." In *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, 1181–1223. The Hague: T.M.C. Asser Press, 2019.
Burinessen, Martin van. "Kurdish Society, Ethnicity, Nationalism and Refugee Problems." In *The Kurds: A Contemporary Overview*, edited by Philip Kragenbrook and Stefan Speri. London: Routledge, 1992.
Burns, Gene. "The Politics of Ideology: The Papal Struggle with Liberalism." *American Journal of Sociology* 95, no. 5 (1990): 1123–52.
Bussotti, Luca. "A History of Italian Citizenship Laws During the Era of the Monarchy (1861-1946)." *Advances in Historical Studies* 5, no. 4 (2016): 143–67.
Butler, Daren. "With More Islamic Schooling, Erdogan Aims to Reshape Turkey." Reuters. Accessed July 12, 2021. http://www.reuters.com/investigates/special-report/turkey-erdogan-education/.
C. Jackson, Vicki, and Jamal Greene. "Constitutional Interpretation in Comparative Perspective: Comparing Judges or Courts?" In *Research Handbook in Comparative Constitutional Law*, edited by Tom Ginsburg and Rosalind Dixon. Cheltenham, UK: Edward Elgar, 2011.
Calhoun, Craig J., Mark Juergensmeyer, and Jonathan VanAntwerpen, eds. *Rethinking Secularism*. Oxford: Oxford University Press, 2011.
Callam, Daniel. "The Syllabus of Errors: Canadian Reaction in the Secular and in the Protestant Press." *CCHA, Study Sessions* 46 (1979): 5–21.
Can, Osman. "The Turkish Constitutional Court as Defender of the Raison d'Etat?" In *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*. New York: Oxford University Press, 2012.

Cantoni, Davide, Jeremiah Dittmar, and Noam Yuchtman. "Religious Competition and Reallocation: The Political Economy of Secularization in the Protestant Reformation." *The Quarterly Journal of Economics* 133, no. 4 (2018): 2037–96.
Capesciotti, Marta. "Standing and Operational Space of Non-Governmental Organisations (NGOs) in Contributing to Respecting and Promoting Fundamental Rights in EU Member States Italy 2017." European Union Agency for Fundamental Rights, 2017.
Caputo, Giuseppe. *Il Problema Della Qualificazione Giuridica Dello Stato in Materia Religiosa*. Milano: A. Giuffrè, 1967.
Caradonna, Jeremy L. "The Death of Duty: The Transformation of Political Identity from the Old Regime to the French Revolution." *Historical Reflections / Réflexions Historiques* 32, no. 2 (2006): 273–307.
Cardia, Carlo. *Manuale Di Diritto Eclesiastico*. Bologna: Il Mulino, 1999.
Casanova, José. *Public Religions in the Modern World*. Chicago: University of Chicago Press, 1994.
———. "The Secular and Secularism." *Social Research* 76, no. 4 (2009): 1049–66.
"Case Notes." *Maastricht Journal of European and Comparative Law* 17, no. 1 (2010): 91–104.
"Catholic Encyclopedia: Benefice." Accessed February 25, 2020. http://www.newadvent.org/cathen/02473c.htm.
"Catholic Encyclopedia: Law of Guarantees." Accessed February 25, 2020. http://www.newadvent.org/cathen/07048a.htm.
"Cemaat (Community) Foundations - T.R. Directorate General Of Foundations." Accessed August 11, 2021. https://www.vgm.gov.tr/foundations-in-turkey/foundations-in-turkey/cemaat-community-foundations.
Ceren Özgul. "Freedom of Religion, the ECtHR and Grassroots Mobilization on Religious Education in Turkey." *Politics and Religion* 12 (2019): 103–33.
Çevik, Salim. "Erdoğan's Comprehensive Religious Policy." Stiftung Wissenschaft und Politik (SWP). Accessed August 9, 2021. https://www.swp-berlin.org/en/publication/erdogans-comprehensive-religious-policy.
Chechi, Alessandro. "Judgment No. 238 – 2014 (It. Const. Ct.)." *International Legal Materials* 54, no. 3 (2015): 471–506.
Chehabi, Houchang. "Dress Codes for Men in Turkey and Iran." In *Men of Order: Authoritarian Modernization under Atatürk and Reza Shah*, edited by Touraj Atabaki and Erik J. Zürcher, 209–37. New York: I.B. Tauris, 2004.
Chelini-Pont, Blandine, and Nassima Ferchiche. "Religion and the Secular State: French Report." In *Religion and the Secular State: National Reports*, edited by W. Cole Durham and Javier Martínez-Torrón, 299–319. Provo: The International Center for Law and Religion Studies Brigham Young University, 2010.
Cicatelli, Sergio. *Guida All'Insegnamento Della Religione Cattolica. Secondo Le Nuove Indicazioni*. Brescia: La Scuola, 2015.
Çınar, Alev. "Subversion and Subjugation in the Public Sphere: Secularism and the Islamic Headscarf." *Signs: Journal of Women in Culture and Society* 33, no. 4 (2015): 891–913.
Claffey, Patrick. "Laïcité: Value or Ideology?" *An Irish Quarterly Review* 105, no. 418 (2016): 169–82.
Codding, George A., and William Safran. *Ideology And Politics: The Socialist Party Of France*. New York: Avalon Publishing, 1979.
Codini, Ennio. "The Veil at School in Italy and in France." *The Italian Law Journal* 5, no. 1 (2019): 71–86.

Coglievina, Stella. “Religious Education in Italian Public Schools: What Room for Islam?” *Stato, Chiese e Pluralismo Confessionale*, no. 29 (2017): 1–15.
Cohen, Jean L. “Sovereignty, the Corporate Religious, and Jurisdictional/Political Pluralism.” In *Religion in Liberal Political Philosophy*, edited by Cécile Laborde and Aurélia Bardon, 84. Oxford: Oxford University Press, 2017.
“Conseil Français Du Culte Musulman (CFCM) - Oxford Islamic Studies Online.” Accessed April 13, 2022. http://www.oxfordislamicstudies.com/print/opr/t236/e1015.
Constant, Benjamin. “The Liberty of the Ancients Compared With That of the Moderns.” In *Political Writings*, edited and translated by Biancamaria Fontana. Cambridge: Cambridge University Press, 1988.
Cook, Terrence. “Rousseau: Education and Politics.” *The Journal of Politics* 37, no. 1 (1975): 108–28.
Coppa, Frank J. “From Liberalism to Fascism: The Church-State Conflict over Italy’s Schools.” *The History Teacher* 28, no. 2 (1995): 135–48.
———. “‘Realpolitik’ and Conviction in the Conflict between Piedmont and the Papacy during the ‘Risorgimento.’” *The Catholic Historical Review* 54, no. 4 (1969): 579–612.
Cordelli, Chiara. “Neutrality of What?” *Critical Review of International Social and Political Philosophy* 20, no. 1 (2016): 37.
Cornell, Svante E. “The Rise of Diyanet: The Politicization of Turkey’s Directorate of Religious Affairs.” *The Turkey Analyst*, October 9, 2015. https://www.turkeyanalyst.org/publications/turkey-analyst-articles/item/463-the-rise-of-diyanet-the-politicization-of-turkey%E2%80%99s-directorate-of-religious-affairs.html.
Cornu, Bernard. “Teacher Education in France: Universitisation and Professionalisation – from IUFMs to ESPEs.” *Education Inquiry* 6, no. 3 (2015): 289–307.
Cortese, Fulvio, Cinzia Piciocchi, and Charles L. Glenn. “Italy.” In *Balancing Freedom, Autonomy and Accountability in Education*, edited by Charles L. Glenn and Jan de Groof, 2:261–76. Nijmegen: Wolf Legal Press, 2012.
Courtney Myrray S.J., John. “The Issue of Church and State at Vatican Council II.” Georgetown University Library. Accessed June 18, 2022. https://library.georgetown.edu/woodstock/murray/1966h.
Curtis, Sarah A. “Supply and Demand: Religious Schooling in Nineteenth-Century France.” *History of Education Quarterly* 39, no. 1 (1999): 51–72.
Curtit, Françoise, and Anne Fornerod. “State Support for Religions: European Regulation.” In *Public Funding of Religions in Europe*, 3–22. London: Routledge, 2015.
Dag, Isa. “An Overview and Comparison of Turkish Public Schools and Private Schools.” *Journal of Education and Training Studies* 3, no. 6 (2015): 191–96.
Daly, Eoin. “Ambiguous Reach of Constitutional Secularism in Republican France: Revisiting the Idea of Laïcité and Political Liberalism as Alternatives.” *Oxford Journal of Legal Studies* 32, no. 3 (2012): 583–608.
———. “Laïcité in the Private Sphere? French Religious Liberty After the Baby-Loup Affair.” *Oxford Journal of Law and Religion* 5, no. 2 (2016): 211–29.
———. “Public Funding of Religions in French Law: The Role of the Council of State in the Politics of Constitutional Secularism.” *Oxford Journal of Law and Religion* 3, no. 1 (2014): 103–26.
Danelciuc-Colodrovschi, Nataşa. “The Principle of Equality in the French Constitutional Council’s Case-Law: What Changes after Ten Years of Ex Post Review Implementation?” *Problems of Legality* 150 (2020): 292–312.

Dansette, Adrien. “From Laic Laws to Separation.” In *A Free Church in a Free State?: The Catholic Church, Italy, Germany, France, 1864-1914*, edited by Ernst C. Helmreich. Boston: D.C. Heath and Company, 1964.
David Saville Muzzey. “State, Church, and School in France I. The Foundations of the Public School in France.” *The School Review*, no. 3 (1911): 178.
Davis, Derek H. “Editorial: Civil Religion as a Judicial Doctrine.” *Journal of Church and State* 40, no. 1 (1998): 7–23.
Dawson, Christopher. “Church and State in the Middle Ages.” In *Medieval Essays (The Works of Christopher Dawson)*, 67–83. Catholic University of America, 1954.
Decker, Christopher, and Marnie Lloydd. “Case Comment, Leyla Sahin v. Turkey.” *European Human Rights Law Review* 6 (2004): 672–78.
Dees, Richard H. “Establishing Toleration.” *Political Theory* 27, no. 5 (1999): 667–93.
“Definition: Fundamental Principles Recognized by the Laws of the Republic.” Accessed February 21, 2022. https://www.toupie.org/Dictionnaire/Pfrlr.htm.
Directorate-General for Research. “Cults in Europe, Annex 2 - Cults in France.” People’s Europe Series. European Parliament, March 1997.
T24. “Diyanet’in 2020 bütçesi sekiz bakanlığı geride bıraktı, bütçenin 125 milyon lirası derneklere aktarılacak.” Accessed August 10, 2021. https://t24.com.tr/haber/diyanet-in-2020-butcesi-sekiz-bakanligi-geride-birakti-butcenin-125-milyon-lirasi-derneklere-aktarilacak,845137.
Doğaner, Yasemin. “The Law on Headdress and Regulations on Dressing in the Turkish Modernization.” *Bilig*, no. 51 (2009): 33–54.
Domínguez, Juan Pablo. “Introduction: Religious Toleration in the Age of Enlightenment.” *Histiry of European Ideas* 23, no. 4 (n.d.): 273–87.
Donovan, Mark. “The Italian State: No Longer Catholic, No Longer Christian.” *West European Politics* 26, no. 1 (2003): 95–116.
Downing, Joseph. “Religion and the 2022 French Presidential Elections: Secularism at Risk from above Due to the French Government’s Increased Regulation of Islam.” *LSE Blogs: Religion and Global Society* (blog), March 7, 2022. https://blogs.lse.ac.uk/religionglobalsociety/2022/03/religion-and-the-2022-french-presidential-elections-secularism-at-risk-from-above-due-to-the-french-governments-increased-regulation-of-islam/.
Doyle, Ann Margaret. “Catholic Church and State Relations in French Education in the Nineteenth Century: The Struggle Between Laïcité and Religion.” *International Studies in Catholic Education* 9, no. 1 (2017): 108–22.
Duce, Charles. “Condorcet on Education.” *British Journal of Educational Studies* 19, no. 3 (1971): 272–82.
Duggan, Christopher. *A Concise History of Italy*. Cambridge: Cambridge University Press, 2013.
Durham, W. Cole, and Brett G. Scharffs. *Law and Religion: National, International, and Comparative Perspectives*. New York: Aspen Publishers, 2010.
Durisotto, David. “Financing of Churches in Italy.” *Law & Justice - The Christian Law Review* 165 (2010): 159–71.
Dworkin, Ronald. *A Matter of Principle*. Cambridge, Massachusetts; London, England: Harvard University Press, 1985.
———. “Hard Cases.” *Harvard Law Review* 88, no. 6 (1975): 1057–1109.
Dyevre, Arthur. “The French Constitutional Council.” In *Comparative Constitutional Reasoning*, edited by András Jakab, Arthur Dyevre, and Giulio Itzcovich, 323–55. Cambridge: Cambridge University Press, 2017.

E. Cornell, Savante. “Headed East: Turkey’s Education System.” *Turkish Policy Quarterly* 16, no. 4 (2018): 47–56.
ears. “A Secular Teaching of Religious Facts.” European Academy on Religion and Society, May 24, 2021. https://europeanacademyofreligionandsociety.com/news/france-a-secular-teaching-of-religious-facts/.
Eckes, Suzanne E., Julie Mead, and Jessica Ulm. “Dollars to Discriminate: The (Un)Intended Consequences of School Vouchers.” *Peabody Journal of Education* 91, no. 4 (2016): 537–58.
“Editorial.” *Signs* 10, no. 3 (1985): 415–17.
“Education Policy Outlook: Italy.” OECD, February 2017. https://www.oecd.org/education/Education-Policy-Outlook-Country-Profile-Italy.pdf.
Eglise Evangelique Missionnaire et Salaûn v. France, No. 25502/07 (European Court of Human Rights January 31, 2013).
Ekin Duran, Aram, and Daniel Bellut. “Diyanet: The Turkish Religious Authority That Makes Millions.” DW.COM. Accessed August 9, 2021. https://www.dw.com/en/diyanet-the-turkish-religious-authority-that-makes-millions/a-50517590.
Elver, Hilal. *The Headscarf Controversy: Secularism and Freedom of Religion*. Oxford: Oxford University Press, 2012.
Émile, Poulat. “Laïcité: De Quoi Parlons-Nous? Confusions et Obscurités.” *Transversalités* 4, no. 108 (2008).
Englund, Steven. “Church and State in France Since the Revolution.” *Journal of Church and State* 34, no. 2 (1992): 325–61.
Espinosa, Romain. “Constitutional Judicial Behavior: Exploring the Determinants of the Decisions of the French Constitutional Council.” *Review of Law & Economics* 13, no. 2 (2017): 1–41.
“Establishment and a Brief History.” Accessed July 19, 2021. https://www.diyanet.gov.tr/en-US/Institutional/Detail//1/establishment-and-a-brief-history.
Estivalèzes, Mireille. “Teaching About Religion at School in France.” In *International Handbook of the Religious, Moral and Spiritual Dimensions in Education*, edited by Marian de Souza, Kathleen Engebretson, Gloria Durka, Robert Jackson, and Andrew McGrady, 475–86. The Neatherlands: Springer, 2006.
Fabbrini, Federico, and András Sajó. “The Dangers of Constitutional Identity.” *European Law Journal* 25, no. 4 (2019): 457–73.
ANSA.it. “Factbox: The Good School Reform.” Accessed February 17, 2020. http://www.ansa.it/english/news/2015/05/05/factbox-the-good-school-reform_a07d6741-c3ed-429b-ad1f-b63618d0e41c.html.
Faik, Tanrıkulu, and Muhammed Ali Uçar. “Religious Teaching in Turkish Educational System: Imam Hatip Schools.” Istanbul: ÖNDER Imam-Hatip School Graduates and Members, 2019.
Fainberg, Sarah, and Jean Baubérot. “French Laïcité: What Does It Stand for? A Conversation between Jean Baubérot and Sarah Fainberg.” In *Secularism on the Edge, Rethinking Church-State Relations in the United States, France and Israel*, edited by Jacques Berlinerblau, Sarah Fainberg, and Aurora Nou, 85–94. New York: Palgrave Macmillan, 2014.
Faraguna, Pietro. “Regulating Religion in Italy: Constitution Does (Not) Matter.” *Journal of Law, Religion and State* 7, no. 1 (2019): 31–56.
Favoreu, Louis. “Le Droit Constitutionnel, Droit de La Constitution et Constitution Du Droit.” *Revue Française de Droit Constitutionnel*, no. 1 (1990).
Feliciani, Giorgio. “La Laicità Dello Stato Negli Insegnamenti Di Benedetto XVI.” *Stato, Chiese e Pluralismo Confessionale* Aprile (2011): 1–13.

———. “The Presence of the Cross in Public Spaces: Italy.” In *Presence of the Cross in Public Spaces: Experiences of Selected European Countries*, edited by Marta Ordon, Piotr Stanisz, and Michał Zawiślak, 111–26. Cambridge: Cambridge Scholars Publishing, 2016.

Ferrari, Alessandro. “Why Are We Talking about Civil Religion Now: Comments on Civil Religion in Italy: A Mission Impossible.” *George Washington International Law Review* 41, no. 4 (2010): 839–60.

Ferrari, Alessandro, and Silvio Ferrari. “Religion and the Secular State: The Italian Case.” *Servicio de Publicaciones de La Facultad de Derecho, Universidad Complutense*, 2015, 445–65.

Ferrari, Silvio. “Civil Religions: Models and Perspectives.” *The George Washington International Law Review* 41, no. 4 (2010): 749–63.

———. “State-Supported Display of Religious Symbols in the Public Space.” *Journal of Catholic Studies* 52, no. 1 (2013): 7–22.

Ferrari, Silvio, and Rinaldo Cristofori. *Law and Religion in the 21st Century: Relations Between States and Religious Communities*. Farnham, Surrey; Burlington, VT: Ashgate Publishing, 2010.

Ferrari, Silvio, and Sabrina Pastorelli, eds. *Religion in Public Spaces: A European Perspective*. London: Routledge, 2012.

Figgis, John Neville. *The Divine Right of Kin*. Cambridge: Cambridge University Press, 1914.

Fitzgerald, L. P. “St. Thomas Aquinas and the Two Powers.” *Angelicum* 56, no. 4 (1979): 515–56.

Forder, Bob. “George Jacob Holyoake.” National Secular Society. Accessed November 9, 2018. https://www.secularism.org.uk/george-jacob-holyoake.html.

Fornerod, Anne. “The Places of Worship in France and the Public/Private Divide.” In *Religion in Public Spaces: A European Perspective*, edited by Silvio Ferrari and Sabrina Pastorelli, 323–36. London: Routledge, 2012.

Ministère de l’Intérieur. “Forum de l’islam de France: une étape nouvelle dans le dialogue entre les pouvoirs publics et le culte musulman.” Accessed May 2, 2022. http://www.interieur.gouv.fr/actualites/communiques/forum-de-lislam-de-france-etape-nouvelle-dans-dialogue-entre-pouvoirs.

Fowler, Frances C. “The French Experience with Public Aid to Private Schools.” *The Phi Delta Kappan* 68, no. 5 (1987): 356–59.

France, Conseil d’Etat. “Sur Le Principe d’égalité,” January 1, 1998.

“France: Penal Code of 1810.” Accessed August 15, 2022. https://www.napoleon-series.org/research/government/france/penalcode/c_penalcode3a.html.

RFI. “French Minister Warns of ‘Foreign Meddling’ in Strasbourg Mosque Funding Row,” March 24, 2021. https://www.rfi.fr/en/france/20210324-row-over-plans-for-mosque-backed-by-controversial-turkish-muslim-group-islamist-religion-strasbourg-gerald-darmanin.

Friedman, Milton. “The Role of the Government in Education.” In *Economics and the Public Interest*, edited by Robert A. Solo. New Brunswick: Rutgers University Press, 1955.

Furet, François. *Revolutionary France, 1770-1880*. History of France. Oxford: Blackwell, 1992.

“Gallicanism.” In *Encyclopedia Britannica*. Ecclesiastical and Political Doctrines. Accessed September 29, 2022. https://www.britannica.com/topic/Gallicanism.

Garay, Alain, Blandine Chelini-Pont, Emmanuel Tawil, and Zarah Anseur. “The Premissible Scope of Legal Limitations on the Freedom of Religion or Belief in France.” *Emory International Law Review* 19 (2005): 785–840.

Garnett, Richard W. "A Hands-off Approach to Religious Doctrine: What Are We Talking About." *Notre Dame Law Review* 84, no. 2 (2009): 837–64.
Gaudin, Philippe. "Neutrality and Impartiality in Public Education: The French Investment in Philosophy, Teaching About Religions, and Moral and Civic Education." *British Journal of Religious Education* 39, no. 1 (2017): 93–106.
Gaudio, Angelo. *Scuola, Chiesa e Fascismo*. Brescia: Edditrice La Scuola, 1995.
Gedicks, Frederick Mark. "Religious Exemptions, Formal Neutrality, and Laïcité." *Indiana Journal of Global Legal Studies* 13, no. 2 (2006): 473–92.
Gellner, Ernest. *Nation and Nationalism*. Oxford: Blackwell, 1983.
Genç, Muhammet Fatih. "Values Education or Religious Education? An Alternative View of Religious Education in the Secular Age, the Case of Turkey." *Education Sciences* 8, no. 4:220 (2018): 1–16.
"General Directorate of Foreign Relations." Accessed August 9, 2021. https://www.diyanet.gov.tr/en-US/Organization/Detail//12/general-directorate-of-foreign-relations.
Giorda, Maria Chiara. "Religious Diversity in Italy and the Impact on Education: The History of a Failure." *New Diversities* 17, no. 1 (2015): 77–93.
Giovagnoli, Agostino. *La Cultura Democristiana Tra Chiesa Cattolica e Identità Italiana. 1918-1948*. Bari: Editori Laterza, 1991.
Girit, Selin. "Are Turkey's Schools Dropping Evolution and Teaching Jihad?" BBS News, Istanbul, August 22, 2017.
Gözler, Kemal. *Judicial Review of Constitutional Amendments: A Comparative Study*. Bursa: Ekin Press, 2008.
Graham, Ruth. "The Challenge of Secularization to the Sacraments under the First French Republic." *The Catholic Historical Review* 68, no. 1 (1982): 13–27.
Greenawalt, Kent. "Hands off! Civil Court Involvement in Conflicts over Religious Property." *Columbia Law Review Association, Inc.* 98, no. 8 (1998): 1843–1907.
Grew, Raymond. "Culture and Society, 1796-1896." In *Italy in the Nineteenth Century: 1796-1900*, edited by John A. Davis, 206–34. Oxford: Oxford University Press, 2000.
Grimm, Dieter. "Conflicts Between General Laws and Religious Norms." In *Constitutional Secularism in an Age of Religious Revival*, edited by Susanna Mancini and Michel Rosenfeld, 3–13. Oxford: Oxford University Press, 2014.
———. "Constitutions, Constitutional Courts, and Constitutional Interpretation at the Interface of Law and Politics." In *Constitutionalism*. Oxford: Oxford University Press, 2016.
———. "Types of Constitutions." In *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld and Andras Sajó. Oxford: Oxford University Press, 2012.
Groppi, Tania. "The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?" *Indian Journal of Constitutional Law* 4, no. 1 (2010): 100–117.
Guerlac, Othon. "The Separation of Church and State in France." *Political Science Quarterly* 23, no. 2 (1908): 259–96.
Gündüz, Turgay. "'Religious Education' or 'Teaching About Religion'? A Review of Compulsory Religious Culture and Ethics Lessons in Turkish Primary and Secondary Schools." *Religion and Human Rights* 13, no. 2 (2018): 153–78.
Gunn, T. Jeremy. "Religion and Law in France: Secularism, Separation, and State Intervention." *Duke Law Review* 57 (2009): 949–78.
———. "Religious Freedom and Laïcité: A Comparison of the United States and France." *Brigham Young University Law Review*, no. 2 (2004): 419–506.

Günter Seufert. “The Changing Nature of the Turkish State Authority for Religious Affairs (ARA) and Turkish Islam in Europe.” Working Paper. Center of Applied Turkish Studies, June 2, 2020.
Gürbey, Sinem. “Islam, Nation-State, and the Military: A Discussion of Secularism in Turkey.” *Comparative Studies of South Asia, Africa and the Middle East* 29, no. 3 (December 6, 2009): 371–80.
Gürcan, Ayşe Ezgi. *The Problems of Religious Education in Turkey: Alevi Citizen Action and the Limits Of Ecthr*. Istanbul: Sabancı University Istanbul Policy Center; Stiftung Mercator Initiative, 2015.
Güvenç, Bozkurt. “History of Turkish Education.” *Education and Science: Special Issue* 22, no. 108 (1998): 1–88.
H. Sule Albayrak. “Religious Pluralism and Religion-State Relations in Turkey.” *Religions* 10, no. 1 (2019).
Habermas, Jürgen. *An Awareness of What Is Missing: Faith and Reason in a Post-Secular Age*. Cambridge: Polity Press, 2010.
———. “Struggles for Recognition in the Democratic Constitutional State.” In *Multiculturalism*, edited by Amy Gutmann, 107–48. Princeton: Princeton University Press, 1994.
Hadimoglu, Nimet Özbek. “Minority Schools, Foreign and International Schools in the New Law on Privat Educational Institutions.” *Ankara Law Review* 5, no. 1 (2008): 53–100.
Haimerl, Maria. “The Turkish Constitutional Court under the Amended Turkish Constitution.” *Verfassungsblog* (blog). Accessed July 4, 2021. https://verfassungsblog.de/the-turkish-constitutional-court-under-the-amended-turkish-constitution/.
Hakyemez, Yusuf Şevki. “Containing the Political Space: Party Closures and the Constitutional Court in Turkey.” *Insight Turkey* 10, no. 2 (2008): 135–44.
Halls, W. D. *Education, Culture and Politics in Modern France*. Oxford: Pergamon Press, 1976.
Halperin, S. William. “Italian Anticlericalism, 1871-1914.” *The Journal of Modern History* 19, no. 1 (1947): 18–34.
Hanioğlu, M. Sükrü. *Atatürk: An Intellectual Biography*. Princeton: Princeton University Press, 2013.
Hashmi, Hera. “Too Much to Bare? A Comparative Analysis of the Headscarf in France, Turkey, and the United States.” *University of Maryland Law Journal of Race, Religion, Gender & Class* 10, no. 2 (2010): 409–45.
Healey, Robert M. “Current Links In France Between the State and Private Schools.” *Religious Education* 62 (1967): 485–92.
———. “The Year of the Debre Law.” *Journal of Church and State* 12, no. 2 (1970): 213–35.
Helmreich, Jonathan E. “The Establishment of Primary Schools in France under the Directory.” *French Historical Studies* 2, no. 2 (1961): 189–208.
Hicks, Sandy B. “The Investiture Controversy of the Middle Ages, 1075-1122: Agreement and Disagreement Among Historians.” *Journal of Church and State* 15, no. 1 (1973): 2–20.
Hirschl, Ran. *Constitutional Theocracy*. Cambridge, Massachusetts; London, England: Harvard University Press, 2010.
———. *Towards Juristocracy: The Origins and Consequences of New Constitutionalism*. Cambridge, MA and London: Harvard University Press, 2007.
Hoffmann, Stanley. “The Effects of World War II on French Society and Politics.” *French Historical Studies* 2, no. 1 (1961): 28–63.
Hume, David. *The History of England Vol. VI*. London: Liberty Fund, 1786.
Hunt, Lynn. “The Enlightenment and the Origin of Religious Toleration.” *Reeks Burgerhartlezingen Werkgroep 18e Eeuw Tijdschrift* 4, no. 4 (2011): 4–36.

Hunter-Henin, Myriam. "Religion, Children and Employment: The 'Baby Loup' Case." *The International and Comparative Law Quarterly* 64, no. 3 (2015): 717–31.
———. *Why Religious Freedom Matters for Democracy. Comparative Reflections from Britain and France for a Democratic 'Vivre Ensemble.'* Oxford: Hart Publishing, 2020.
Hurd, Elizabeth Shakman. "Alevis under Law: The Politics of Religious Freedom in Turkey." *Journal of Law and Religion* 29, no. 3 (2014): 416–35.
Intérieur, Ministère de l'. "Le Ministère de l'Intérieur, Ministère Des Cultes." interieur.gouv.fr. Accessed April 14, 2022. http://www.interieur.gouv.fr/Archives/Archives-des-actualites/2016-Actualites/Le-ministere-de-l-Interieur-ministere-des-cultes.
Isabella, Maurizio. "Aristocratic Liberalism and Risorgimento: Cesare Balbo and Piedmontese Political Thought after 1848, History of European Ideas." *History of European Ideas* 39, no. 6 (2013): 835–57.
Isiksel, Turkuler. "Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism." *International Journal of Constitutional Law* 11, no. 3 (July 1, 2013): 702–26.
Işıkdoğan, Davut. "Religion Culture and Knowledge Teacher Training in Turkey and the Application of 1998-2006 Period." *Elektronik Sosyal Bilimler Dergisi* 6, no. 22 (2007): 298–318.
Israel, Jonathan I. "Locke, Bayle, and Spinoza: A Contest of Three Toleration Doctrines." In *Enlightenment Contested: Philosophy, Modernity, and the Emancipation of Man 1670-1752*, edited by Jonathan I. Israel, 135–63. Oxford: Oxford University Press, 2006.
The Local Italy. "Italian College Bans Muslim Headscarves," February 17, 2015. https://www.thelocal.it/20150217/italian-college-bans-muslim-headscarves/.
"Italy to Recover €4bn in Unpaid Taxes from the Vatican." Accessed April 12, 2020. https://www.europeanceo.com/finance/italy-to-recover-e4bn-in-unpaid-taxes-from-the-vatican/.
Itzcovich, Giulio. "One, None and One Hundred Thousand Margins of Appreciations: The Lautsi Case." *Human Rights Law Review* 13, no. 2 (2013): 287–308.
J. Lechner, Frank. "The Case against Secularization: A Rebuttal." *Social Forces* 69, no. 4 (1991): 1103–19.
Jackson, Robert. "Human Rights in Relation to Education About Religions and World Views: The Contribution of the Council of Europe to Classroom Religious Education." *Journal of Religious Education* 66, no. 1 (2018): 85–97.
Jemolo, Arturo Carlo. *Church and State in Italy 1850-1950*. Oxford: Basil Blackwell, 1960.
———. *Coscienza Laica*. Brescia: Morcelliana, 2008.
———. "Le Problème de La Laïcité En Italie." In *La Laïcité*, edited by A. Audibert, 455–80. Paris: Presses Universitaires de France, 1960.
Jennings, Ian. "Against State Neutrality: Raz, Rawls, and Philosophical Perfectionism." Dr. Phil., Humboldt-Universität-zu-Berlin, Philosophische Fakultät, 2009.
Jennings, Jeremy. "Equality." In *The French Republic: History, Values, Debates*, edited by Edward Berenson, Vincent Duclert, and Christophe Prochasson, 103–11. Ithaca: Cornell University Press, 2011.
Jeong, Eun Kyung. "A Study of the Formation of Early Turkish Nationalism." *Acta Via Serica* 3, no. 1 (June 15, 2018): 57–83.
Johnson, Douglas. "The Two Frances: The Historical Debate." *West European Politics* 1, no. 3 (1978): 3–10.
Joshi, Rasika. "Religious Radicalization in France: Contextualizing the 2021 'Anti-Separatism' Bill." *Strategic Analysis* August (2021): 1–6.
Kandiyoti, Deniz, and Zühre Emanet. "Education as Battleground: The Capture of Minds in Turkey." *Globalizations* 14, no. 6 (2017): 869–76.

Kaplan, Sam. “Din-u Devlet All over Again? The Politics of Military Secularism and Religious Militarism in Turkey Following the 1980 Coup.” *International Journal of Middle East Studies* 34, no. 1 (2002): 113–27.

Kapur, Ratna. “Secularism’s Others: The Legal Regulation of Religion and Hierarchy of Citizenship.” In *Constitutions and Religion*, edited by Susanna Mancini, 41–58. Cheltenham, UK: Edward Elgar, 2020.

Karabelıas, Gerassımos. “The Military Institution, Atatürk’s Principles, and Turkey’s Sisyphean Quest for Democracy.” *Middle Eastern Studies* 45, no. 1 (2009): 57–69.

Karakas, Burcu, and Daniel Derya Bellut. “Schools in Turkey: Erdogan’s Youth, Religious but Not Educated?” Qantara.de. Accessed July 6, 2021. https://en.qantara.de/content/schools-in-turkey-erdogans-youth-religious-but-not-educated.

Karan, Ultas. “Right to Education-National Report Turkey.” ETHOS consortium, 2017.

Karapehlivan, Funda. “Constructing a ‘New Turkey’ through Education.” Heinrich-Böll-Stiftung, October 1, 2019. https://tr.boell.org/en/2019/10/01/constructing-new-turkey-through-education.

Kasaba, Reşat, ed. *The Cambridge History of Turkey*. Cambridge: Cambridge University Press, 2008.

Kaya, Ayhan. “Islamisation of Turkey Under the AKP Rule: Empowering Family, Faith and Charity.” *South European Society and Politics* 20, no. 1 (2015): 47–69.

Kaymakcan, Recep. “Religious Education Culture in Modern Turkey.” In *International Handbook of the Religious, Moral and Spiritual Dimensions in Education*, edited by Marian de Souza, Kathleen Engebretson, Gloria Durka, Robert Jackson, and Andrew McGrady, 449–60. The Neatherlands: Springer, 2006.

Kennedy, Duncan. “Three Globalizations of Law and Legal Thought.” In *The New Law and Economic Development: A Critical Appraisal*, edited by David M. Trubek and Alvaro Santos, 19–73. Cambridge: Cambridge University Press, 2006.

Kertzer, David I. “The Role of Ritual in State Formation.” In *Religious Regimes and State Formation: Perspectives from European Ethnology*, edited by Eric R. Wolf. Albany: SUNY Press, 1991.

Killian, Caitlin. “From a Community of Believers to an Islam of the Heart: ‘Conspicuous’ Symbols, Muslim Practices, and the Privatization of Religion in France.” *Sociaology of Religion* 68, no. 3 (2007): 305–20.

Kis, János. “State Neutrality.” *Discussion Papers, Center for Global Constitutionalism*. Discussion Papers, Center for Global Constitutionalism. WZB Berlin Social Science Center, 2012. https://ideas.repec.org/p/zbw/wzbrlc/spiv2012801.html.

Klaasen, Abraham. “Constitutional Interpretation in the So-Called ‘Hard Cases’: Revisiting S v Makwanyane.” *De Jure Law Journal* 50, no. 1 (2017): 1–17.

Klein, Claude. “The Eternal Constitution – Contrasting Hans Kelsen and Carl Schmitt.” In *Hans Kelsen and Carl Schmitt A Juxtaposition*, edited by Dan Dinner and Michael Stolleis, 61–70. Bleicher Verlag, 1999.

Knowles, David. “Church and State in Christian History.” *Journal of Contemporary History* 2, no. 4 (1967): 3–15.

Kselman, Thomas. “State and Religion.” In *Revolutionary France: 1788-1880*, edited by Malcolm Crook. Oxford: Oxford University Press, 2002.

Kuru, Ahmet T. *Secularism and State Policies Toward Religion: The United States, France, and Turkey*. Cambridge Studies in Social Theory, Religion, and Politics. Cambridge; New York: Cambridge University Press, 2009.

———. “The Rise and Fall of Military Tutelage in Turkey: Fears of Islamism, Kurdism, and Communism.” *Insight Turkey* 14, no. 2 (2012): 37–57.

Laborde, Cécile. *Critical Republicanism: The Hijab Controversy and Political Philosophy*. Oxford: Oxford University Press, 2008.
———. "Justificatory Secularism." In *Religion in a Liberal State*, edited by Gavin D'Costa, Malcolm D. Evans, Tariq Modood, and Julian Rivers. Cambridge: Cambridge University Press, 2013.
———. "Secular Philosophy and Muslim Headscarves in Schools." *The Journal of Political Philosophy* 13, no. 3 (2005): 305–29.
Ladeur, Karl-Heinz, and Ino Augsberg. "The Myth of the Neutral State: The Relationship between State and Religion in the Face of New Challenges." *German Law Journal* 8, no. 2 (2007): 143–52.
Lambert, Édouard. *Le Gouvernement Des Juges et La Lutte Contre La Législation Sociale Aux États-Unis*. Paris: Marcel Giard and Cie, 1921.
Larkin, Maurice. *Religion, Politics and Preferment in France*. Cambridge: Cambridge University Press, 1995.
Oxford Reference. "Law of Associations." Accessed February 18, 2022. https://doi.org/10.1093/oi/authority.20110803095429940.
"Law on the Organisation of Primary Education, the so-Called 'Goblet Law' | PERFAR." Accessed December 26, 2018. https://www.perfar.eu/policies/law-organisation-primary-education-so-called-goblet-law.
Lazzati, Giuseppe. *Laicità Impegno Cristiano Nelle Realita Temporali*. Rome: AVE, 1985.
Le Grand, Sylvie. "The Origin of the Concept of Lacité in Nineteen Century France." In *Religion and Secularity. Transformations and Transfers of Religious Discourses in Europe and Asia*, edited by Marion Eggert and Lucian Hölscher, 59–76. Leiden: Koninklijke Brill NV, 2013.
Lecler, Joseph. "Liberté de Conscience: Origines et Sens Divers de l'expression." *Recherches de Science Religieuse* 54, no. 3 (1966): 370–406.
———. *Toleration and the Reformation*. New York: Association Press, 1960.
Legrand, Andre, and Charles Glenn. "France." *International Journal for Education Law and Policy* 7, no. 1 (2011): 95–118.
Leigh, Ian. "Objective, Critical and Pluralistic? Religious Education and Human Rights in the European Public Sphere." In *Law, State and Religion in the New Europe: Debates and Dilemmas*, edited by Lorenzo Zucca and Camil Ungureanu, 192–214. Cambridge: Cambridge University Press, 2012.
Lenoir, Noëlle. "The Representation of Women in Politics: From Quotas to Parity in Elections." *The International and Comparative Law Quarterly* 50, no. 2 (2001): 217–47.
Lerner, Hanna. "Constitutional Permissiveness, Constitutional Restrictiveness, and Religious Freedom." In *Assessing Constitutional Performance*, 171–202. Cambridge: Cambridge University Press, 2016.
Letsch, Constanze. "Turkey's President Orders Closure of 1,000 Private Schools Linked to Gülen." *The Guardian*, July 23, 2016. https://www.theguardian.com/world/2016/jul/23/turkey-erdogan-closure-of-1000-private-schools-gulen.
Leventhal, Zoe. "Human Rights: University - Regulations Imposing Restrictions on Wearing Islamic Headscarves in Higher Education Institutions in Turkey." *Education Law Journal* 6, no. 1 (2005): 40–44.
Levine, Samuel J. "Religious Symbols and Religious Garb in the Courtroom: Personal Values and Public Judgments." *Fordham Law Review* 66, no. 4 (1998): 1505–40.
———. "Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief." *Fordham Urban Law Journal* 25, no. 1 (1997): 85–134.

Lewental, D. Gershon. "Capital Tax Law (Varlik Vergisi, 1942)." In *Encyclopedia of Jews in the Islamic World*. Brill, October 1, 2010. https://referenceworks.brillonline.com/entries/encyclopedia-of-jews-in-the-islamic-world/capital-tax-law-varlik-vergisi-1942-SIM_0004930.

Lewis, Bernard. *The Emergence of Modern Turkey*. Oxford: Oxford University Press, 1961.

Ligue des Musulmans de Suisse and Others v. Switzerland, No. 66274/09 (European Court of Human rights July 8, 2011).

Little, David. "Christianity and Religious Freedom in the Medieval Period (476 – 1453 CE)." Berkley Center for Religion, Peace and World Affairs. Accessed August 27, 2022. https://berkleycenter.georgetown.edu/essays/christianity-and-religious-freedom-in-the-medieval-period-476-1453-ce.

Lizotte, Christopher. "Laïcité as Assimilation, Laïcité as Negotiation: Political Geographies of Secularism in the French Public School." *Political Geography* 77 (2020).

Llewellyn, Jennifer, and Steve Thompson. "The Civil Constitution of the Clergy." Alpha History, September 2, 2022. https://alphahistory.com/frenchrevolution/civil-constitution-of-the-clergy/.

Locke, John. *A Letter Concerning Toleration*. Translated by William Popple. Huddersfield: J. Brook, 1796.

Loewenstein, Karl. "Militant Democracy and Fundamental Rights, II." *The American Political Science Review* 31, no. 4 (1937): 638–58.

Luca, Ozzano, and Alberta Giorgi. *European Culture Wars and the Italian Case: Which Side Are You On?* New York: Routledge, 2016.

Lucenti, Maria. "Religious Education in Italy and England. Comparative Perspective on School Textbooks and Teaching Practices." *Literacy Information and Computer Education Journal* 12, no. 1 (2021): 3532–36.

Lysenko, Natalya, Liudmyla Shtefan, and Olena Kholodniak. "Teaching Tolerance at School: The Experience of Modern French Education System" 6, no. 1 (2020): 129–38.

Lyttelton, Adrian. "An Old Church and a New State: Italian Anticlericalism 1876-1915." *European Studies Review* 13, no. 2 (1983): 225–48.

M. Hakan, Yavuz. "A Framework for Understanding the Intra-Islamist Conflict Between the AK Party and the Gülen Movement." *Politics, Religion & Ideology* 19, no. 1 (2018): 11–32.

M. Hakan, Yavuz, and Balci Bayram. "Introduction: The Gülen Movement and the Coup." In *Turkey's July 15th Coup: What Happened and Why*, 1–19. Utah: University of Utah Press, 2018.

Macklem, Patrick. "Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe." *Constellations* 19, no. 4 (2012): 575–90.

MacLehose, Sophia H. "Separation of Church and State in France in 1795." *The Scottish Historical Review* 4, no. 15 (1907): 298–308.

Madeley, John T. S., and Zsolt Enyedi, eds. *Church and State in Contemporary Europe: The Chimera of Neutrality*. London: Frank Cass, 2003.

Madigan, Kevin. "Chapter 8. Libertas Ecclesiae: The Age of Reform, ca. 1050–1125." In *Medieval Christianity: A New History, New Haven*, 119–47. New Haven: Yale University Press, 2015.

———. *The Popes against the Protestants: The Vatican and Evangelical Christianity in Fascist Italy*. New Haven and London: Yale University Press, 2021.

Madison, James. "Memorial and Remonstrance against Religious Assessments, [ca. 20 June] 1785." In *The Papers of James Madison. Vol. 8: 10 March 1784–28 March 1786*, edited by Robert A. Rutland, William M. E. Rachal, Barbara D. Ripel, and Fredrika J. Teute. Chicago: Chicago University Press, 1973.

———. “The Federalist Papers No. 10.” The Avalon Project. Accessed September 2, 2022. https://avalon.law.yale.edu/18th_century/fed10.asp.
Maed Earle, Edward. “The New Constitution of Turkey.” *Political Science Quarterly* 40, no. 1 (1925): 73–100.
Mahlmann, Matthias. “Religion, Secularism, and the Origins of Foundational Values of Modern Constitutionalism.” Athens, 2007.
Mahmood, Saba. *Religious Difference in a Secular Age: A Minority Report*. Princeton: Princeton University Press, 2014. https://press.princeton.edu/books/hardcover/9780691153278/religious-difference-in-a-secular-age.
Mancini, Susanna. “European Law and the Veil: Muslim Women from Victims to Emblems of the Enemy.” In *Religious Literacy, Law and History*, edited by Alberto Melloni and Francesca Cadeddu, 127–36. London; New York: Routledge, 2019.
———. “Taking Secularism (Not Too) Seriously: The Italian ‘Crucifix Case’.” *Religion and Human Right* 1, no. 2 (2006): 179–95.
———. “The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence.” *Cardozo Law Review* 30, no. 6 (2009): 2629–68.
Mancini, Susanna, and Michel Rosenfeld, eds. *Constitutional Secularism in an Age of Religious Revival*. Oxford Scholarship Online Law Collection. Oxford: Oxford University Press, 2014.
Mango, Andrew. “Atatürk.” In *The Cambridge History of Turkey, Volume 4 Turkey in the Modern World*, edited by Reşat Kasaba. Cambridge: Cambridge University Press, 2008.
Marchi, Teodosio. “Lo Statuto Albertino Ed Il Suo Sviluppo Storico.” *Rivista Di Diritto Pubblico e Della Pubblica Amministrazione in Italia* 18 (1926): 187–209.
Markham, J. David. “The Revolution, Napoleon, and Education.” The Napoleon Series. Accessed December 11, 2018. https://www.napoleon-series.org/research/society/c_education.html.
Marraro, Howard Rosario. *The New Education in Italy*. New York: S. F. Vanni, 1936.
Martin, Natalie. “Allies and Enemies: The Gülen Movement and the AKP.” *Cambridge Review of International Affairs* 35, no. 1 (2020): 110–27.
Martinez, Jenny S. “Horizontal Structuring.” In *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld and Andras Sajó, 547–75. Oxford: Oxford University Press, 2012.
Martinico, Giuseppe, Barbara Guastaferro, Oreste Pollicino, Anneli Albi, and Samo Bardutzky. “The Constitution of Italy: Axiological Continuity Between the Domestic and International Levels of Governance?” In *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law: National Reports*, 493–541. The Hague: T.M.C. Asser Press, 2019.
Marty, Olivier, and Ray J. Amirault. *Nicolas de Condorcet. The Revolution of French Higher Education*. Cham: Springer, 2020.
Marx, Karl. *The Eighteenth Brumaire of Louis Bonaparte*. New York: Die Revolution, 1852.
Mason, Andrew D. “Autonomy, Liberalism and State Neutrality.” *The Philosophical Quarterly (1950-)* 40, no. 161 (1990): 433–52.
Maxwell, Morgan. “‘The Belltowers of the Future’: Mosque Financing and French Laïcité.” In *Franco-American Legal Seminar. 2011. The Financial Crisis of 2008: French and American Responses : Proceedings of the 2010 Franco-American Legal Seminar*, edited by Martin A. Rogoff, Michael Dixon, and Eric Bither, 109–34. Portland, ME: University of Maine School of Law, 2011.

Mayanthi, Fernando. “The Republic’s ‘Second Religion’: Recognizing Islam in France.” Middle East Research & Information Project, 2005.
McCarthy, Patrick. “The Church in Post War Italy.” In *Italy Since 1945*. Oxford; New York: Oxford University Press, 2000.
———. “The Postwar Settlement: Catholic Hegemony?” In *The Crisis of the Italian State : From the Origins of the Cold War to the Fall of Berlusconi*. New York: St. Martin’s Press, 1995.
McCrea, Ronan. “The Ban on the Veil and European Law.” *Human Rights Law Review* 13, no. 1 (2013): 57–97.
———. “The Consequences of Disaggregation and the Impossibility of a Third Way.” In *Religion in Liberal Political Philosophy*, edited by Cécile Laborde and Aurélia Bardon, 69–80. Oxford: Oxford University Press, 2017.
McManners, John. *Church and State in France, 1870-1914*. New York: Harper & Row, 1973.
McMillan, James F. “Religion and Gender in Modern France: Some Reflections.” In *Religion, Society and Politics in France Since 1789*, edited by Frank Tallett and Nicholas Atkin, 55–66. The Hambledon Press, 1991.
Mecca, Giuseppe. “In Keeping with the Spirit of the Albertine Statute-Constitutionalisation of the National Unification.” In *Reconsidering Constitutional Formation II Decisive Constitutional Normativity*, edited by Ulrike Müßig, 311–52. Cham: Springer, 2018.
“Medieval and Middle Ages History Timelines - Edward (I, King of England 1272-1307).” Accessed November 12, 2018. https://www.timeref.com/people/edward_i_king_of_england_1272_1307.htm.
Meeker, Michel E. *A Nation of Empire: The Ottoman Legacy of Turkish Modernity*. Berkeley: University of California Press, 2002.
Meral, Ziya. *Compulsory Religious Education in Turkey: A Survey And Assessment of Textbooks*. Washington, D.C.: United States Commission on International Religious Freedom, 2015.
Miller, Arthur S., and Ronald F. Howell. “The Myth of Neutrality in Constitutional Adjudication.” *University of Chicago Law Review* 27, no. 4 (1960): 661.
Millet, François-Xavier. “Constitutional Identity in France Vices and – Above All – Virtues.” In *Constitutional Identity in a Europe of Multilevel Constitutionalism*, edited by Christian Calliess and Gerhard van der Schyff, 134–52. Cambridge: Cambridge University Press, 2019.
Mills, Hazel. “Negotiating the Divide: Women, Philanthropy and the ‘Public Sphere’ in Nineteenth Century France.” In *Religion, Society and Politics in France Since 1789*, edited by Frank Tallett and Nicholas Atkin, 29–54. The Hambledon Press, 1991.
Mine Yildirim. “Turkey: Constitutional Court Justifies More Freedom of Religion or Belief Restrictions.” *Forum 18*, July 9, 2013. https://www.forum18.org/archive.php?article_id=1855.
Mithans, Gasper. “The Italian Fascist Regime, the Catholic Church and Protestant Religious Minorities in ‘Terre Redente’ (1918–40).” *Approaching Religion* 9, no. 1–2 (2019): 57–76.
Morini, Claudia. “Secularism and Freedom of Religion: The Approach of the European Court of Human Rights.” *Israel Law Review* 43, no. 3 (2010): 611–30.
Morra, Nello. “Laicismo.” *Novissimo Digesto Italiano* 9 (1963): 437–43.
Muallimoglu, Nejat. “Meaning of the Coup d’etat in Turkey.” *Pakistan Horizon* 13, no. 3 (1960): 190–202.
Murat Çay, Mustafa. “Multi-Party Life Transition Experiments in the Turkish Republic (1925-1930).” In *Social, Educational, Political, Economic and Other Developments Occurred in Turkey Between the Years of 1923-1938*. ISRES Publishing, 2018.

Muzzey, David Saville. “State, Church, and School in France I. The Foundations of the Public School in France.” *The School Review* 19, no. 3 (March 1911): 178–95.
———. “State, Church, and School in France II. The Campaign for Lay Education.” *The School Review* 19, no. 4 (1911): 248–65.
———. “State, Church, and School in France: IV. Moral Education as an Ideal of the French Republic.” *The School Review* 19, no. 6 (1911): 383–97.
“N° 3216 - Proposition de Loi de M. François Grosdidier Visant à Intégrer Le Culte Musulman Dans Le Droit Concordataire d’Alsace et de Moselle.” Accessed April 26, 2022. https://www.assemblee-nationale.fr/12/propositions/pion3216.asp.
Nederman, Cary J. *Community and Consent: The Secular Political Theory of Marsiglio of Padua’s Defensor Pacis*. Lanham, MD: Rowman & Littlefield, 1995.
Nicolet, Claude. *L’idée Républicaine En France: Essai d’histoire Critique (1789-1924)*. Paris: Gallimard, 1982.
Nieguth, Tim. “Privilege or Recognition? The Myth of State Neutrality.” *Critical Review of International Social and Political Philosophy* 2, no. 2 (June 1, 1999): 112–31.
Nil Tosun, Ayşe. “Tax Exemptions for Religious Organizations: The United States, the European Union, and Turkey.” *Hacettepe University Journal of Economics and Administrative Sciences* 38, no. 3 (2020): 607–26.
Nord, Philip. “Catholic Culture in Interwar France.” *French Politics, Culture & Society* 21, no. 3 (2003): 1–20.
Nurcan Kaya. “Discrimination Based on Colour, Ethnic Origin, Language, Religion and Belief in Turkey’s Education System.” Istanbul: Minority Rights Group, 2015.
O’Brien, Robert. *The Stasi Report: The Report of the Committee of Reflection on the Application of the Principle of Secularity in the Republic*. Buffalo, New York: William S. Hein & Co., Inc, 2005.
O’Connell, Marvin R. “Montalembert at Mechlin: A Reprise of 1830.” *Journal of Church and State* 26, no. 3 (1984): 515–36.
Oder, Bertil Emrah. “Populism and the Turkish Constitutional Court: the Game Broker, the Populist and the Popular.” *Verfassungsblog* (blog). Accessed April 1, 2022. https://verfassungsblog.de/populism-and-the-turkish-constitutional-court-the-game-broker-the-populist-and-the-popular/.
———. “Turkey.” In *The ‘Militant Democracy’ Principle in Modern Democracies*, edited by Markus Thiel, 263–310. Farham: Ashgate Publishing, 2009.
Oehring, Otmar. “Turkey: Is There Religious Freedom in Turkey?” Forum 18. Accessed August 11, 2021. https://www.forum18.org/archive.php?article_id=670.
———. “Turkey: The Fundamental Problem and How It Might Be Solved.” Forum 18. Accessed August 11, 2021. https://www.forum18.org/archive.php?article_id=1537.
O’Halloran, Kerry. “France: Laïcité.” In *State Neutrality. The Sacred, The Secular and Equality Law*, 308–57. Cambridge: Cambridge University Press, 2021.
Okte, Faik, and Geoffrey Cox. *The Tragedy of the Turkish Capital Tax*. London: Routledge, 1987.
Oran, Baskin. “Kemalism, Islamism and Globalization: A Study on the Focus of Supreme Loyalty in Globalizing Turkey.” *Southeast European and Black Sea Studies* 1, no. 3 (2001): 20–50.
Orbay, Kayhan. “Imperial Waqfs within the Ottoman Waqf System.” *Endowment Studies* 1, no. 2 (2017): 136.
Eurydice - European Commission. “Organisation of Private Education,” October 9, 2017. https://eacea.ec.europa.eu/national-policies/eurydice/content/organisation-private-education-39_en.

Owen, J. Judd. *Religion and the Demise of Liberal Rationalism: The Foundational Crisis of the Separation of Church and State*. Chicago: University of Chicago Press, 2001.
Özbudun, Ergun. "Constitution Writing and Religious Divisions in Turkey." In *Constitution Writing, Religion and Democracy*, edited by Aslı Ü. Bâli and Hanna Lerner, 153–76. Cambridge: Cambridge University Press, 2017.
———. "Judicial Review of Constitutional Amendments in Turkey." *European Journal of Law Reform* 21, no. 3 (2019): 278–90.
———. "Laiklik ve Din Hürriyeti." In *Demokratik Anayasa: Görüşler ve Öneriler*, edited by Ece Göztepe and Aykut Çelebi, 169–227. İstanbul: Metis Yayınları, 2012.
———. "Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and the European Court of Human Rights." *Democratization* 17, no. 1 (2010): 125–42.
———. "Secularism in Islamic Countries: Turkey as a Model." In *Constitutionalism in Islamic Countries*, edited by Rainer Grote and Tilman J. Roder, 135–46. New York: Oxford University Press, 2012.
———. *The Constitutional System of Turkey: 1876 to the Present*. New York: Palgrave Macmillan, 2011.
Özbudun, Ergun, and Ömer Faruk Gençkaya. "Chapter 1: The History of Constitution-Making in Turkey." In *Democratization and the Politics of Constitution-Making in Turkey*. Budapest: Central European University Press, 2009.
Özman, Aylin. "Law, Ideology and Modernization in Turkey: Kemalist Legal Reforms in Perspective." *Social & Legal Studies* 19, no. 1 (2010): 67–84.
Özsunay, Ergun. "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Turkey." *Emory International Law Review* 19 (2005): 1087–1128.
Oztig, Lacin Idil. "The Turkish Constitutional Court, Laicism and the Headscarf Issue." *Third World Quarterly* 39, no. 3 (2017): 594–608.
Öztürk, Ahmet Erdi. "Transformation of the Turkish Diyanet Both at Home and Abroad: Three Stages." *European Journal of Turkish Studies. Social Sciences on Contemporary Turkey*, no. 27 (2018).
Öztürk-Çalıkoğlu, Halime, and Osman Çekiç. "Education Incentive Policy for Private Education Institutions in Turkey: Examining Rationales and Outcomes (2014-2017)." *Journal of Theory & Practice in Education* 16, no. 1 (2020): 83–98.
Ozzano, Luca, and Chiara Maritato. "Patterns of Political Secularism in Italy and Turkey: The Vatican and the Diyanet to the Test of Politics." *Politics and Religion* 12, no. 3 (2019): 457–77.
Palmer, Susan J. "France's 'War on Sects': A Post-9/11 Update." *Nova Religio: The Journal of Alternative and Emergent Religions* 11, no. 3 (2008): 104–20.
Palomba, Donatella. "Education and State Formation in Italy." In *International Handbook of Comparative Education*, edited by Robert Cowen and Andreas M. Kazamias, 195–216. Dordrecht: Springer, 2009.
Palomino, Rafael. "Religion and Neutrality: Myth, Principle, and Meaning." *Brigham Young University Law Review* 2011, no. 3 (2011): 657–88.
Paluello, Lorenzo Minio. *Education In Fascist Italy*. London: Oxford University Press, 1946.
Panara, Carlo. "In the Name of God: State and Religion in Contemporary Italy." *Religion & Human Rights* 6, no. 1 (2011): 75–104.
Parisi, Marco. "Public Economic Resources and Religious Denominations in Europe." *Anuario de Derecho Eclesiástico Del Estado* 36 (2020): 531–53.
Parla, Taha, and Andrew Davison. *Corporatist Ideology in Kemalist Turkey: Progress or Order?* Syracure, New York: Syracuse Universty Press, 2004.
Parsons, Jotham. *The Church in the Republic. Gallicanism & Political Ideology in Renaissance France*. Washington, D.C.: The Catholic University of America, 2004.

Pasquino, Gianfranco. “Italian Christian Democracy: A Party for All Seasons?” *West European Politics* 2, no. 3 (1979): 88–109.
Passmore, Kevin. “The Ralliement (1890–1898).” In *The Right in France from the Third Republic to Vichy*, 73–100. Oxford: Oxford University Press, 2012.
Patten, Alan. *Equal Recognition: The Moral Foundations of Minority Rights*. Princeton: Princeton University Press, 2014.
Paul J. Weithman, ed. *Religion and Contemporary Liberalism*. Notre Dame: University of Notre Dame Press, 1997.
Paul Zucherman ed. and John R. Shook ed., eds. *The Oxford Handbook of Secularism*. Oxford: Oxford University Press, 2017.
Peker, Efe. “Beyond Positivism: Building Turkish Laiklik in the Transition from the Empire to the Republic (1908–38).” *Social Science History* 44, no. 2 (ed 2020): 301–27.
Peña-Ruiz, Henri. “Laïcité and the Idea of the Republic: The Principles of Universal Emancipation.” In *Secularism on the Edge, Rethinking Church-State Relations in the United States, France and Israel*, edited by Jacques Berlinerblau, Sarah Fainberg, and Aurora Nou. New York: Palgrave Macmillan, 2014.
Peonidis, Filimon. “Marsilius of Padua as a Democratic Theorist.” *Roda Da Fortuna* 5, no. 1 (2016): 106–24.
“Peter’s Pence.” Accessed February 25, 2020. https://www.vatican.va/roman_curia/secretariat_state/obolo_spietro/documents/index_en.htm.
Pfeffer, Leo. *Church, State, and Freedom*. Boston: Beacon Press, 1967.
Piccirilli, Giovanni. “The ‘Taricco Saga’: The Italian Constitutional Court Continues Its European Journey: Italian Constitutional Court, Order of 23 November 2016 No. 24/2017; Judgment of 10 April 2018 No. 115/2018 ECJ 8 September 2015, Case C-105/14, Ivo Taricco and Others; 5 December 2017, Case C-42/17, M.A.S. and M.B.” *European Constitutional Law Review* 14, no. 4 (2018): 814–33.
Pin, Andrea. “Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and State.” *Emory International Law Review* 25, no. 1 (2011): 95–149.
———. *The Legal Treatment of Muslim Minorities in Italy: Islam and the Neutral State*. London: Routledge, 2016.
Pin, Andrea, and Luca Pietro Vanoni. “Protecting Religious Freedom from Fear: Italian Lessons on Islam, the Public Sphere, and the Limits of Judicial Review.” *Talk About: Law and Religion* (blog), March 16, 2020. https://talkabout.iclrs.org/2020/03/16/protecting-religious-freedom-from-fear-italian-lessons-on-islam-the-public-sphere-and-the-limits-of-judicial-review/.
Pocock, John Greville Agard. *Barbarism and Religion*. Vol. 1. Cambridge: Cambridge University Press, 2009.
Pollard, John F. *Catholicism in Modern Italy : Religion, Society and Politics since 1861*. Christianity and Society in the Modern World. Abingdon: Routledge, 2008.
Polzin, Monika. “The Basic-Structure Doctrine and Its German and French Origins: A Tale of Migration, Integration, Invention and Forgetting.” *Indian Law Review* 5, no. 1 (2021): 45–61.
Prelot, Pierre-Henri. “The Lautsi Decision as Seen from (Christian) Europe.” *Maine Law Review* 65, no. 2 (2013): 783–88.
Pressensé, Edmond de. *Religion and the Reign of Terror: Or, The Church During the French Revolution*. New York: Carlton & Lanahan, 1869.

Pretis, Daria de. “Constitutional Principles as Higher Norms? Is It Possible to Determine a Hierarchy within the Constitution? Unamendable (Eternal) Provisions in Constitutions and Judicial Review of Constitutional Amendments.” Batumi, Georgia, 2017.
Price, Roger. *The Church and the State in France, 1789–1870*. Aberystwyth: Palgrave Macmillan, 2017.
Prill, Thorsten. “Martin Luther, the Two Kingdoms, and the Church.” *Evangel: The British Evangelical Review* 23, no. 1 (2005): 17–21.
“Private Education in the European Union.” Eurydice, European Unit, December 2000.
Al Wakf France. “Private Muslim Schools Plow Their Way In France,” July 24, 2017. https://www.alwakfrance.fr/private-muslim-schools-plow-their-way-in-france/?lang=en.
Britannica. “Pro and Con: Churches and Taxes,” August 8, 2019. https://www.britannica.com/story/pro-and-con-churches-and-taxes.
Proeschel, Claude. “The French Laïcité Confronted With New Challenges.” *Church-State Relations in Europe: New Challenges n* Nov (2007): 30–50.
Prost, Antoine. *Histoire de L’enseignement En France, 1800-1967*. Paris: Librairie Armand Colin, 1968.
Puppinck, Grégor. “The Case of Lautsi v. Italy: A Synthesis.” *BYU Law Review* 2012, no. 3 (2012): 873–930.
Franceinfo. “Quatre questions sur le Forum de l’islam de France, qui remplace le Conseil français du culte musulman,” February 5, 2022. https://www.francetvinfo.fr/societe/religion/religion-laicite/quatre-questions-sur-le-forum-de-l-islam-de-france-qui-remplace-le-conseil-francais-du-culte-musulman_4944417.html.
BBC News. “Quiet End to Turkey’s College Headscarf Ban,” December 31, 2010, sec. Europe. https://www.bbc.com/news/world-europe-11880622.
Quintanilla Barba, Carmen. “Right to Freedom of Choice in Education in Europe.” Council of Europe, Parliamentary Assembly, June 20, 2012.
Racioppi, Francesco, and Ignazio Brunelli. *Commento Allo Statuto Del Regno, Con Prefazione Di Luigi Luzzatti*. Vol. 1. Torino: Tipografico Editrice Torinese, 1909.
Ragazzoni, David, and Nadia Urbinati. “Theories of Representative Government and Parliamentarism in Italy from the 1840s to the 1920s.” In *Parliament and Parliamentarism: A Comparative History of a European Concept*, edited by Pasi Ihalainen, Cornelia Ilie, and Kari Palonen, 243–61. New York, Oxford: Berghahn Books, 2016.
Rao, Anna Maria. “Republicanism in Italy from the Eighteenth Century to the Early Risorgimento.” *Journal of Modern Italian Studies* 12, no. 2 (2012): 149–67.
Ravitch, Norman. *The Catholic Church and the French Nation 1589-1989*. London: Routledge, 1990.
Rawls, John. *A Theory of Justice*. Cambridge, Massachusetts; London, England: Harvard University Press, 2005.
———. *Political Liberalism*. New York: Columbia University Press, 1993.
Rayapen, Lewis, and Gordon Anderson. “Napoleon and the Church.” *International Social Science Review* 66, no. 3 (1991): 117–27.
Raz, Joseph. *The Morality of Freedom*. New York: Oxford University Press, 1986.
Rebouche, Rachel. “Turkey: At the Crossroads of Secular West and Traditional East: The Substance of Substantive Equality: Gender Equality and Turkey’s Headscarf Debate.” *American University International Law Review* 24, no. 4 (2009): 711–37.
Reed, Howard A. “Islam and Education in Turkey: Their Roles in National Development.” *Turkish Studies Association Bulletin* 12, no. 1 (1988): 1–5.

duvaR. “Religious Associations Make up 15 Percent of All Associations in Turkey,” July 25, 2021. https://www.duvarenglish.com/religious-associations-make-up-15-percent-of-all-associations-in-turkey-news-58295.
“Report on International Religious Freedom: France.” Office of International Religious Freedom, USA, 2017.
“Report on International Religious Freedom: France.” Office of International Religious Freedom, USA, May 12, 2021.
“Report on Italy (Fourth Monitoring Cycle).” ECRI, February 21, 2012.
Riall, Lucy. “Progress and Compromise in Liberal Italy.” Edited by Maria Serena Piretti, Giovanni Guidi, Raffaella Gherardi, and Fulvia Cammarano. *The Historical Journal* 38, no. 1 (1995): 205–13.
Ringelheim, Julie. “State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach.” *Oxford Journal of Law and Religion* 6, no. 1 (2017): 24–47.
Robinson, James Harvey. “The Civil Constitution of the Clergy.” In *Readings in European History,* Vol. 2. Boston: Ginn & Company, 1906.
Rochat, Giorgio. “Polizia Fascista e Chiese Evangeliche.” In *I Valdesi e l’Europa*, edited by Enea Balmas, 407–34. Torre Pellice: Collana Della Società Di Studi Valdesi, 1982.
Roger Finke and Laurence R. Iannaccone. “Supply-Side Explanations for Religious Change.” *The Annals of the American Academy of Political and Social Science* 527 (1993): 27–39.
Roméo, Lou. “Why Is Secular France Doubling Funding for Christian Schools in the Middle East?” France 24, February 3, 2022. https://www.france24.com/en/france/20220203-why-is-secular-france-doubling-funding-for-christian-schools-in-the-middle-east.
Rosello, Mireille. “Laïcité, Grammar, Fable: Secular Teaching of Secularism.” *Postcolonial Studies* 10, no. 2 (2007): 153–69.
Rosenfeld, Michel. “Constitution and Secularism: A Western Account.” In *Constitutions and Religion,* edited by Susanna Mancini, 21–40. Cheltenham, UK: Edward Elgar, 2020.
———. “Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts.” *International Journal of Constitutional Law* 2, no. 4 (2004): 633–68.
———. “Constitutional Identity.” In *The Oxford Handbook of Comparative Constitutional Law,* edited by Michel Rosenfeld and Andras Sajó, 756–76. Oxford: Oxford University Press, 2012.
———. “Recasting Secularism as One Conception of the Good Among Many in a Post-Secular Constitutional Polity.” In *Constitutional Secularism in an Age of Religious Revival*, edited by Susanna Mancini and Michel Rosenfeld, 79. Oxford: Oxford University Press, 2014.
———. *The Identity of the Constitutional Subject Selfhood, Citizenship, Culture, and Community*. Abingdon: Routledge, 2010.
Rousseau, Dominique. “The Conseil Constitutionnel Confronted with Comparative Law and the Theory of Constitutional Justice (or Louis Favoreu’s Untenable Paradoxes).” *International Journal of Constitutional Law* 5, no. 1 (2007): 28–43.
Roznai, Yaniv. “Negotiating the Eternal: The Paradox of Entrenching Secularism in Constitutions.” *Michigan State Law Review* 2 (2017): 235–331.
———. “Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea.” *The American Journal of Comparative Law* 61, no. 3 (2013): 657–719.
Roznai, Yaniv, and Serkan Yolcu. “An Unconstitutional Constitutional Amendment—The Turkish Perspective: A Comment on the Turkish Constitutional Court’s Headscarf Decision.” *International Journal of Constitutional Law* 10, no. 1 (2012): 175–207.

Ruffilli, Roberto. *Cultura Politica e Partiti Nell'età Della Costituente*. Bologna: Il Mulino, 1979.
Rush, Andrea J. "Lautsi v. Italy: Deference to State Sovereignty from on High as the Cross Remains Nailed to Italian School Walls." *Tulane Journal of International and Comparative Law* 20, no. 2 (554 533): 2012.
S. J. Barnett. *The Enlightenment and Religion: The Myths of Modernity*. Manchester: Manchester University Press, 2003.
Sabado, François, and Pierre Rousset. "Charlie Hebdo - And Now What? The Events, Their Impact and the Issues at Play." *International Viewpoint*, no. 480 (January 2015): 1–3.
Saint-Martin, Isabelle. "Teaching about Religions and Education in Citizenship in France." *Education, Citizenship and Social Justice* 8, no. 2 (2013): 151–64.
Sajó, Andras. "Constitutionalism and Secularism: The Need for Public Reason." *Cardozo Law Review* 30 (2009).
———, ed. *Militant Democracy*. Utrecht: Eleven International Publishing, 2004.
Sajó, András. "Preliminaries to a Concept of Constitutional Secularism." *International Journal of Constitutional Law* 6, no. 3 & 4 (2008): 605–29.
Sajó, András, and Renáta Uitz. "Who Guards the Guardians? Constitutional Adjudication." In *The Constitution of Freedom*. Oxford: Oxford University Press, 2017.
Sale, Giovanni. *Il Vaticano e La Costituzione*. Milano: Jaca Book, 2008.
Samier, Eugenie. "Weber on Education and Its Administration: Prospects for Leadership in a Rationalized World." *Educational Management Administration and Leadership* 30, no. 1 (2002): 27–45.
Sanchez, Gabriel. "Catholic Integralism and the Social Kingship of Christ." The Josias, January 23, 2015. https://thejosias.net/2015/01/23/catholic-integralism-and-the-social-kingship-of-christ/.
Sant'Anselmo. "Welcome to the Teaching of Catholic Religion in Italian Schools |IT|." *Sant'Anselmo* (blog). Accessed February 24, 2020. https://www.anselmianum.com/en/programmi/welcome-to-the-teaching-of-catholic-religion-in-italian-schools/.
Sarfatti, Michele. *The Jews in Mussolini's Italy From Equality to Persecution*. Translated by John Tedeschi and Anne C. Tedeschi. Madison: University of Wisconsin Press, 2006.
Saunders, David. "France on the Knife-Edge of Religion: Commemorating the Centenary of the Law of 9 December 1905 on the Separation of Church and State." In *Secularism, Religion and Multicultural Citizenship Ed. Geoffrey Brahm Levey and Tariq Modood*, edited by Geoffrey Brahm Levey and Tariq Modood, 56–81. Cambridge: Cambridge University Press, 2009.
Saygin, Tuncay. "'Secularism' From the Last Years of the Ottoman Empire to Early Turkish Republic." *Journal for the Study of Religions and Ideologies* 7, no. 20 (2008): 26–78.
Scarangello, Anthony. "Church and State in Italian Education." *Comparative Education Review* 5, no. 3 (1962): 199–207.
Scarangello, Anthony A. *Progress and Trends in Italian Education*. Washington, D.C.: US Department of Health and Wellness, Office of Education, 1964.
Scharffs, Brett G. "Secularity or Secularism: Two Competing Visions for the Relationship between Religion and the State in the New Turkish Constitution." *BYU Law Research Paper No. 15-16*, 2011.
———. "Secularity or Secularism: Two Competing Visions for the Relationship Between Religion and the State in the New Turkish Constitution." *BYU Law Research Paper No. 15-16*, 2011.
———. "The Autonomy of Church and State." *BYU Law Review* 2004, no. 4 (2004): 1217–1348.

Scholtes, Julian. “Abusing Constitutional Identity.” *German Law Journal* 22, no. 4 (2021): 534–56.
Schwartzberg, Melissa. *Democracy and Legal Change*. Cambridge: Cambridge University Press, 2007.
Schwartzman, Micah, and Jocelyn Wilson. “The Unreasonableness of Catholic Integralism.” *San Diego Law Review* 56 (2019): 1039–67.
Sciolino, Elaine. “French Assembly Votes to Ban Religious Symbols in Schools.” *The New York Times*, February 11, 2004. https://www.nytimes.com/2004/02/11/world/french-assembly-votes-to-ban-religious-symbols-in-schools.html.
Scoppola, Pietro. “Il Fascismo e Le Minoranze Evangeliche.” In *Il Fascismo e Le Autonomie Locali, a Cura Di Sandro Fontana*, 331–94. Bologna: Il Mulino, 1973.
Seggie, Fatma Nevra. *Religion and the State in Turkish Universities The Headscarf Ban*. Basingstoke: Palgrave Macmillan, 2011.
Seligman, Adam B. *Religious Education and the Challenge of Pluralism*. Oxford University Press, 2014.
Sen, Ilker Gökhan. “The Final Death Blow to the Turkish Constitutional Court.” *Verfassungsblog* (blog). Accessed July 4, 2021. https://verfassungsblog.de/death-blow-tcc/.
Şenol Korkut. “The Diyanet of Turkey and Its Historical Evolution.” *Turkish Studies International Periodical for the Languages, Literature and History of Turkish or Turkic* 11, no. 17 (2016): 447–66.
Seton-Watson, Christopher. *Italy from Liberalism to Fascism, 1870-1925*. London: Methuen and Company, 1967.
Sheehan, Jonathan. “Enlightenment, Religion, and the Enigma of Secularization. A Review Essay.” *American Historical Review* 108, no. 4 (2003): 1061–80.
Siska, Katalin. “Mustafa Kemal Atatürk’s Effect on the New Concept of the Turkish Identity and Citizenship in Particular the Constitutional Regulation of the Young Turkish Republic.” *Forum: Acta Juridica Et Politica* 6, no. 1 (2016): 139–49.
Smith, D. Mack. “Cavour and Parliament.” *Cambridge Historical Journal* 13, no. 1 (1957): 37–57.
S.-O.-l’E. Lasser, Mitchel de. *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*. Oxford: Oxford University Press, 2004.
Sorkin, David. *The Religious Enlightenment: Protestants, Jews, and Catholics from London To*. Princeton: Princeton University Press, 2011.
Spade, Paul Vincent, and Claude Panaccio. “William of Ockham.” In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Spring 2019. Metaphysics Research Lab, Stanford University, 2019. https://plato.stanford.edu/archives/spr2019/entries/ockham/.
“Statute of Mortmain Law and Legal Definition | USLegal, Inc.” Accessed July 3, 2020. https://definitions.uslegal.com/s/statute-of-mortmain/.
Stone, Julius. “Theories of Law and Justice of Fascist Italy.” *The Modern Law Review* 1, no. 3 (1937): 177–202.
Stopler, Gila. “The Challenge of Strong Religion in the Liberal State.” *Boston University International Law Journal* 32, no. 2 (2014): 411–48.
Strayer, Joseph Reese. *The Reign of Philip the Fair*. Princeton: Princeton University Press, 1980.
Su, Anna. “Transformative State Neutrality.” *Supreme Court Law Review* 91 (2019): 151–86.
“Summary Sheet: Review of the Constitutionality of Laws - Role and Powers of the National Assembly - National Assembly.” Accessed February 21, 2022. https://www2.assemblee-nationale.fr/decouvrir-l-assemblee/role-et-pouvoirs-de-l-

assemblee-nationale/les-fonctions-de-l-assemblee-nationale/les-fonctions-legislatives/le-controle-de-la-constitutionnalite-des-lois.
Sutcliffe, Marcella Pellegrino. "Introduction." *History of Education* 44, no. 5 (2015): 618–30.
"Swiss Ban Building of Minarets on Mosques - The New York Times." Accessed October 4, 2020. https://www.nytimes.com/2009/11/30/world/europe/30swiss.html.
Syrigos, Angelos. "This Beast That Grows beside Us | EKathimerini.Com." Accessed August 10, 2021. https://www.ekathimerini.com/opinion/257126/this-beast-that-grows-beside-us/.
Szigetvári, Tamás. *Turkey's Dilemmas in Foreign Policy and External Economy in the Early 21st Century*. Budapest: Dialóg Campus, 2020.
Szyliowicz, Joseph S. "The 1961 Turkish Constitution - An Analysis." *Islamic Studies* 2, no. 3 (1963): 363–81.
Talbot, George. *Censorship in Fascist Italy, 1922-43: Policies, Procedures and Protagonists*. London: Palgrave Macmillan, 2007.
Tallett, Frank. "Dechristianizing France: The Year II and the Revolutionary Experience." In *Religion, Society and Politics in France Since 1789*, edited by Frank Tallett and Nicholas Atkin, 1–28. The Hambledon Press, 1991.
Tallett, Frank, and Nicholas Atkin, eds. *Religion, Society and Politics in France Since 1789*. The Hambledon Press, 1991.
Tannenbaum, Edward R. "The Goals of Italian Fascism." *The American Historical Review* 74, no. 4 (1969): 1183–1204.
Tannenbaum, Edward R., and Emiliana P. Noether. *Modern Italy: A Topical History since 1861*. New York: New York University Press, 1974.
Taş, Hakkı. "A History of Turkey's AKP-Gülen Conflict." *Mediterranean Politics* 23, no. 3 (2017): 395–402.
Taspinar, Ömer. "The Old Turks' Revolt: When Radical Secularism Endangers Democracy." *Foreign Affairs* 86, no. 6 (2007): 114–30.
Taylor, Charles. "The Meaning of Secularism." *The Hedgehog Review* 12, no. 3 (2010): 23–34.
Teese, Richard. "Private Schools in France: Evolution of a System." *Comparative Education Review* 30, no. 2 (1986): 247–59.
Tega, Diletta. "The Italian Constitutional Court in Its Context: A Narrative." *European Constitutional Law Review* 17, no. 3 (2021): 369–93.
Temperman, Jeroen. "Lautsi II: A Lesson in Burying Fundamental Children's Rights." *Religion & Human Rights: An International Journal* 6, no. 3 (January 1, 2011): 279–84.
———. "Parental Rights in Relation to Denominational Schooling under the European Convention on Human Rights." *Religion & Human Rights* 12, no. 2–3 (October 7, 2017): 142–52.
———, ed. *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom*. Leiden: Brill Nijhoff, 2012.
Musée protestant. "The Law of 1905." Accessed February 20, 2022. https://museeprotestant.org/en/notice/the-law-of-1905/.
Association François Guizot. "The Ministry of Public Instruction." Accessed February 9, 2022. https://www.guizot.com/en/politics/the-ministry-of-public-instruction/.
"The Rise of Diyanet: The Politicization of Turkey's Directorate of Religious Affairs." Accessed July 23, 2021. http://www.turkeyanalyst.org/publications/turkey-analyst-articles/item/463-the-rise-of-diyanet-the-politicization-of-turkey's-directorate-of-religious-affairs.

Thomas, Huw Martin. "The Lateran Pacts and the Debates in the Italian Constituent Assembly, with Reference to Religious Freedom, and the Consequences for Religious Minorities (1946-1948)." Swansea University, 2005.
Thomson, James A. "Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes." *Melbourne University Law Review* 13 (1982): 597–616.
Tierney, Brian. *Origins of Papal Infallibility, 1150-1350 : A Study on the Concepts of Infallibility, Sovereignty and Tradition in the Middle Ages*. Leiden: E. J Brill, 1972.
Tocqueville, Alexis. *The Old Regime and the Revolution*. New York: Harper and Brothers, 1856.
"Toledo Guiding Principles on Teaching about Religion and Beliefs in Public Schools." Warsaw: ODIHR, 2007.
Toprak, Metin, and Nasuh Uslu. "The Headscarf Controversy in Turkey." *Journal of Economic and Social Research* 11, no. 1 (2009): 43–67.
Tornay, Stephen Chak. "William Ockham's Political Philosophy." *Church History* 4, no. 3 (1935): 214–23.
Torre, Giuseppe Dalla. "Sana Laicità o Laicità Positiva?" *Stato, Chiese e Pluralismo Confessionale* Novembre (2011): 1–11.
Encyclopedia Britannica. "Treaty of Lausanne | Allies-Turkey [1923]." Accessed November 23, 2018. https://www.britannica.com/event/Treaty-of-Lausanne-1923.
Trigg, Roger. *Religion in Public Life: Must Faith Be Privatized? Religion in Public Life*. Oxford: Oxford University Press, 2008.
Troper, Michel. "Constitutional Law." In *Introduction to French Law*, edited by George Berman and Etienne Picard, 16. Alphen aan den Rijn: Kluwer Law International, 2008.
———. "French Secularism, or Laïcité." *Cardozo Law Review* 21, no. 4 (1999): 1267–84.
———. "Republicanism and Freedom of Religion in France." In *Religion, Secularism and Constitutional Democracy*, edited by Jean L. Cohen and Cécile Laborde, 316–40. New York: Columbia University Press, 2016.
———. "Sovereignty and Laïcité." In *Constitutional Secularism in an Age of Religious Revival*, 146–59. Oxford: Oxford University Press, 2014.
T.Salton, Herman. "Unholy Union: History, Politics and the Relationship between Church and State in Modern France." *Review of European Studies* 4, no. 5 (2012): 135–47.
Tsivolas, Theodosios. *Law and Religious Cultural Heritage in Europe*. New York: Springer, 2014.
Turkey. "National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21." United Nations, UPR, 2019.
duvaR. "Turkey Allocates More Budget to Top Religious Body than Universities," March 10, 2021. https://www.duvarenglish.com/turkey-allocates-more-budget-to-top-religious-body-than-universities-news-56579.
"Turkey Law on Political Parties, Opinion No. 926/2018 CDL-REF(2018)032,." European Commission for Democracy Through Law (Venice Commission), August 22, 2018.
RT International. "Turkey Lifts Headscarf Ban in Schools for Girls as Young as 10." Accessed July 4, 2021. https://www.rt.com/news/190032-turkey-headscarf-schools-ban-amendment/.
duvaR. "Turkey's Top Religious Body Spends 2.5 Times of What Foreign Ministry Spends," December 19, 2019. https://www.duvarenglish.com/domestic/2019/12/19/turkeys-top-religious-bodys-spending-2-5-times-of-foreign-ministrys.
Ahval. "Turkey's Top Religious Body to Spend $11 Billion by 2023." Accessed August 9, 2021. https://ahvalnews.com/directorate-religious-affairs/turkeys-top-religious-body-spend-11-billion-2023.

Turner, Bryan S. “Secular and Religious Citizenship.” In *The Oxford Handbook of Citizenship*, edited by Ayelet Shachar. Oxford: Oxford University Press, 2017.
Tyulkina, Svetlana. *Militant Democracy. Undemocratic Political Parties and Beyond*. London: Taylor and Frances, 2015.
Uğur, Zeynep B. “Unveiled: The Effect of the Headscarf Ban on Women’s Tertiary Education in Turkey.” *Feminist Economics* 26, no. 2 (2020): 187–217.
Ulutas, Ufuk. “Religion and Secularism in Turkey: The Dilemma of the Directorate of Religious Affairs.” *Middle Eastern Studies* 46, no. 3 (2010): 389–99.
Üngör, Ugur Ümit. *The Making of Modern Turkey: Nation and State in Eastern Anatolia, 1913-1950*. Oxford: Oxford University Press, 2011.
United States, Office of Education. “Report of the Commissioner of Education: Volume 1.” U.S Government Printing Office, January 1907.
Uran, Peri, and Pasquale Pasquino. “The Guardian of the Turkish Constitution: A Special Court.” *Journal of Politics and Law* 8, no. 2 (2015): 88–97.
Urbinati, Nadia. “Laïcité in Reverse: Mono-Religious Democracies’ and the Issue of Religion in the Public Sphere.” *Constellations* 17, no. 1 (2010): 4–21.
“Ur-Fascism | Umberto Eco | The New York Review of Books.” Accessed May 31, 2022. https://www.nybooks.com/articles/1995/06/22/ur-fascism/.
Uzun, Mehmet Cengiz. “Protection of Laicism in Turkey and the Turkish Constitutional Court: The Example of the Prohibition on the Use of the Islamic Veil in Higher Education, The [Article].” *Penn State International Law Review*, no. 3 (2009): 383.
Vauchez, Stéphanie Hennette. “Is French Laïcité Still Liberal? The Republican Project under Pressure (2004–15).” *Human Rights Law Review* 17, no. 2 (2017): 285–312.
Venice Commission. “Opinion on the Legal Status of Religious Communities in Turkey and the Right of the Orthodox Patriarchate of Istanbul to Use the Adjective "Ecumenical”.” Venice: Venice Commission, March 12, 2010.
Venter, Francois. *Constitutionalism and Religion*. Elgar Monographs in Constitutional and Administrative Law Series. Cheltenham, UK: Edward Elgar Publishing, 2015.
Ventura, Marco. “Italian Church and State Ambiguities Challenged by the Debt Crisis. The ICI/IMU Affair.” Observatoire des religions et de la laïcité. Accessed April 11, 2020. https://o-re-la.ulb.be/index.php/analyses/item/194-italian-church-and-state-ambiguities-challenged-by-the-debt-crisis-the-ici/imu-affair.
———. *Religion and Law in Italy*. Alphen aan den Rijn: Wolters Kluwer, 2013.
———. “The Changing Civil Religion of Secular Europe.” *The George Washington International Law Review* 41, no. 4 (2010): 947–61.
———. “The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Italy.” *Emory International Law Review* 19, no. 2 (2005): 913–28.
———. “The Rise and Contradictions of Italy as a Secular State.” In *Religion, Rights and Secular Society*, edited by Peter Cumper and Tom Lewis. Cheltenham: Edward Elgar, 2012.
Violini, Lorenza, and Daniele Capone. “Freedom of Choice in the Italian Educational System: The Idea of a Dote.” In *Government, Governance and Welfare Reform*, edited by Alberto Brugnoli and Alessandro Colombo, 155–66. Cheltenham, UK : Northampton, MA, USA: Edward Elgar, 2012.
Viroli, Maurizio. *As If God Existed: Religion and Liberty in the History of Italy*. Princeton: Princeton University Press, 2012.
Volokh, Alexander. “Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else.” *New York University Law Review* 83, no. 3 (2008): 769–846.
Vuckovic, Milorad N. “The Suppression of Religious Houses in France 1880, and the Attitude of Representative British Press.” *CCHA Report* 28 (1961): 9–23.

Waldron, Jeremy. *Liberal Rights Collected Papers (1981-1991)*. London: Cambridge University Press, 1993.
Walker, Williston. *History of the Christian Church*. New York: Simon and Schuster Inc., 1985.
Wall, Steven, and George Klosko, eds. "Introduction." In *Perfectionism and Neutrality: Essays in Liberal Theory*. Lanham: Rowman & Littlefield, 2003.
Warman, Caroline, ed. "Voltaire, 'On Universal Tolerance', 1763." In *Tolerance*, 1st ed., 3:93–95. The Beacon of the Enlightenment. Open Book Publishers, 2016.
Watmough, Simon, and Ahmet Erdi Öztürk. "From 'Diaspora by Design' to Transnational Political Exile: The Gulen Movement in Transition', Politics, Religion & Ideology." *Politics Religion & Ideology* 19, no. 1 (2018): 33–52.
Weil, Patrick. "Headscarf versus Burqa: Two French Bans with Different Meanings." In *Constitutional Secularism in an Age of Religious Revival*, edited by Susanna Mancini and Michel Rosenfeld, 195–215. Oxford: Oxford University Press, 2014.
———. "Lifting the Veil." *French Politics, Culture & Society* 22, no. 3 (2004): 142–49.
———. "Why the French Laïcité Is Liberal." *Cardozo Law Review* 30, no. 6 (2008): 2699–2714.
Weiss, John H. "The History of Education in Nineteenth-Century France: A Survey of Recent Writings" 3, no. 2 (1970 1969): 154–62.
Weithman, Paul J. "Introduction: Religion and the Liberalism of Reasoned Respect." In *Religion and Contemporary Liberalism*, edited by Paul J. Weithman. Notre Dame: University of Notre Dame Press, 1997.
Wells, Michael. "French and American Judicial Opinions." *Yale Journal of International Law* 19, no. 81 (1994): 92.
Williams, L. Pearce. "Science, Education and Napoleon I." *Isis* 47, no. 4 (1956): 369–82.
Wilson, M. Brett. "The First Translations of the Qur'an in Modern Turkey (1924-38)." *International Journal of Middle East Studies* 41, no. 3 (2009): 419–35.
———. "Translations of the Qur'an: Islamicate Languages." In *The Oxford Handbook of Qur'anic Studies*, edited by Mustafa Shah and Muhammad Abdel Haleem, 552–64. Oxford: Oxford University Press, 2020.
Witte, John Jr. "Facts and Fictions About the History of Separation of Church and State." *Journal of Church and State* 48, no. 1 (2006): 15–45.
Wood, James E. *Church and State in Historical Perspective. A Critical Assessment and Annotated Bibliography*. Westport, Connecticut; London: Praeger, 2005.
Wright, F. Richard. *Parallels of Power. An Introduction to Some Individualists of Church and State*. Bristol: John Wright and Sons LTD., 1966.
Yang, Chen, and Changgang Guo. "'National Outlook Movement' in Turkey: A Study on the Rise and Development of Islamic Political Parties." *Journal of Middle Eastern and Islamic Studies* 9, no. 3 (2015): 1–28.
Yavuz, M. Hakan. "Cleansing Islam from the Public Sphere." *Journal of International Affairs* 54, no. 1 (2000): 21–42.
———. "Understanding Turkish Secularism in the 21th Century: A Contextual Roadmap." *Southeast European and Black Sea Studies* 19, no. 1 (2019): 55–78.
Yazici, Serap. "A Guide to the Turkish Public Law Order and Legal Research." NYU Law GlobaLex, October 2017. https://www.nyulawglobal.org/globalex/Turkey.html.
Yeşilırmak, Muharrem. "A Quantitative Analysis of Turkish Private Education Reform." *European Journal of Political Economy* 45 (2016): 76–88.
Yildirim, Mine. "TURKEY: Minority Foundations Still Cannot Hold Elections." Forum 18. Accessed May 3, 2022. https://www.forum18.org/archive.php?article_id=2459.
———. "Turkey: The Diyanet – the Elephant in Turkey's Religious Freedom Room?" Forum 18. Accessed August 10, 2021. https://www.forum18.org/archive.php?article_id=1567.

Yıldırım, Mine. “Are Turkey’s Restrictions on Freedom of Religion or Belief Permissible?” *Religion & Human Rights* 15, no. 1–2 (2020): 172–91.
Yılmaz, Ihsan. “Islamist Populist Nation-Building: Gradual, Ad Hoc Islamisation of the Secular Education System in Turkey.” *Religions* 13, no. 9 (2022): 814–34.
———. “Non-Recognition of Post-Modern Turkish Socio-Legal Reality and the Predicament of Women.” *British Journal of Middle Eastern Studies* 30, no. 1 (2003): 25–41.
Zagrebelsky, Gustavo. “Stato e Chiesa. Cittadini e Cattolici.” *PASSATO E PRESENTE* 73 (2008): 5–19.
Zaîm, Sataahaddin. “The Development of Educational System in Turkey (the Impact of Westernization on the Education).” *İstanbul Üniversitesi İktisat Fakültesi Mecmuası* 45 (2011): 490–518.
Zariski, Raphael. *Italy: The Politics of Uneven Development*. Hinsdale: Dryden Press, 1972.
Zeldin, Theodore. “Religion and Anticlericalism.” In *France 1848–1945*, Volume Two: Intellect, Taste and Anxiety:983–1039. Oxford: Oxford University Press, 1977.
Zeldin, Wendy. “Turkey: Minority Religious Congregation Property to Be Returned Under Historic Measure.” Web page. Library of Congress, Washington, D.C. 20540 USA, September 6, 2011. https://www.loc.gov/item/global-legal-monitor/2011-09-06/turkey-minority-religious-congregation-property-to-be-returned-under-historic-measure/.
Zucca, Lorenzo. *A Secular Europe: Law and Religion in the European Constitutional Landscape*. Oxford: Oxford University Press, 2012.
———. “Lautsi: A Commentary on a Decision by the ECtHR Grand Chamber.” *International Journal of Constitutional Law* 11, no. 1 (2013): 218–29.
———. “The Crisis of the Secular State - A Reply to Professor Sajó.” *International Journal of Constitutional* 7, no. 3 (2009): 494–514.

Case Law

France

Arrêt n° 2484 (French Court of Cassation, Social Chamber November 22, 2017).
Cass Ass Plén, No. Rec D 1386 (French Court of Cassation June 25, 2014).
Decision no. 71-44 DC (French Constitutional Council July 16, 1971).
Decision no. 77-78 DC (French Constitutional Council November 23, 1977).
Decision no. 77-87 DC (French Constitutional Council November 23, 1977).
Decision no. 77-87 DC (French Constitutional Council November 23, 1997).
Decision no. 93-329 DC (French Constitutional Council January 13, 1994).
Decision no. 2004-505 DC (French Constitutional Council November 19, 2004).
Decision no. 2006-540 DC (French Constitutional Council July 26, 2006).
Decision no. 2009-591 DC (French Constitutional Council October 22, 2009).
Decision no. 2010-613 DC (French Constitutional Council October 7, 2010).
Decision no. 2012-297 QPC (French Constitutional Council February 21, 2013).
Decision no. 2012-297 QPC (French Constitutional Council February 21, 2013).
Decision no. 2017-749 DC (French Constitutional Council July 31, 2017).
Decision no. 162718 (French Council of State July 10, 1995).
Decision no. 170207 170208 (French Council of State November 27, 1996).
Decision no. 219379 (French Council of State April 6, 2001).
Decision no. 265560 (French Council of State March 16, 2005).
Decision no. 308544 (French Council of State July 19, 2011).

Decision no. 308817 (French Council of State July 19, 2011).
Decision no. 309161 (French Council of State July 19, 2011).
Decision no. 320796 (French Council of State July 19, 2011).
Société Arcelor Atlantique et Lorraine and ors v France, No. 287110 (French Council of State February 8, 2007).
Syndicat national des enseignements du Second Degre CE, No. 219379, 221699, 221700 (French Council of State April 6, 2001).

Italy

Judgment. no. 1/1956 (Italian Constitutional Court 1956).
Judgment no. 13 (Italian Constitutional Court 1991).
Judgment no. 14 (Italian Constitutional Court 1973).
Judgment no. 18 (Italian Constitutional Court 1982).
Judgment no. 29 (Italian Constitutional Court 1988).
Judgment no. 30 (Italian Constitutional Court 1971).
Judgment no. 32 (Italian Constitutional Court 1971).
Judgment no. 39 (Italian Constitutional Court 1965).
Judgment no. 42 (Italian Constitutional Court 2003).
Judgment no. 52 (Italian Constitutional Court 2016).
Judgment no. 63/1988 (Italian Council of State April 27, 1988).
Judgment no. 79 (Italian Constitutional Court 1958).
Judgment no. 117 (Italian Constitutional Court 1979).
Judgment no. 118 (Italian Constitutional Court 2015).
Judgment no. 125 (Italian Constitutional Court 1957).
Judgment no. 170 (Italian Constitutional Court 1984).
Judgment no. 183 (Italian Constitutional Court 1973).
Judgment no. 195 (Italian Constitutional Court 1993).
Judgment no. 203 (Italian Constitutional Court 1989).
Judgment no. 235 (Italian Constitutional Court 1997).
Judgment no. 259 (Italian Constitutional Court 1990).
Judgment no. 293 (Italian Constitutional Court 2000).
Judgment no. 334 (Italian Constitutional Court 1996).
Judgment no. 346 (Italian Constitutional Court 2002).
Judgment no. 389 (Italian Constitutional Court 2004).
Judgment no. 440 (Italian Constitutional Court 1995).
Judgment no. 454 (Italian Constitutional Court 1994).
Judgment no. 925 (Italian Constitutional Court 1988).
Judgment no. 1146 (Italian Constitutional Court 1988).
Decision n. 1110 (T:A:R. Veneto March 17, 2005).
Smith v Scuola Materna ed Elementare statale 'Antonio Silveri' di Ofena (L'Aquila Tribunal October 23, 2003).

Turkey

Individual Application 42/18, No. 2015/8491 (Turkish Constitutional Court July 18, 2018).
Individual Application 73/18, No. 2015/269 (Turkish Constitutional Court December 12, 2018).
Individual application no. 2014 / 15345, No. 2014/15345 E (Turkish Constitutional Court April 7, 2022).
Judgment no. 1970/31 (Turkish Constitutional Court June 16, 1970).
Judgment no. 1971/37 (Turkish Constitutional Court April 3, 1971).

Judgment no. E. 2008/16, K. 2008/116 (Turkish Constitutional Court June 5, 2008).
Judgment no. E. 2012/65, K. 2012/128 (Turkish Constitutional Court September 20, 2012).
Judgment no. E.1989/1, K.1989/12 (Turkish Constitutional Court March 7, 1989).
Judgment no. E.1990/36, K.1991/8, (Turkish Constitutional Court April 9, 1991).
Decision no. E: 207, K: 330 (Turkish Council of State February 23, 1984).
Tuğba Arslan, No. 2014/256 (Turkish Constitutional Court June 25, 2014).

European Court of Human Rights

Association Cultuelle Du Temple Pyramide v. France, No. 50471/07 (European Court of Human Rights January 31, 2013).
Association Des Chevaliers Du Lotus D'Or v. France, No. 50471/07 (European Court of Human Rights January 31, 2013).
Association for Solidarity with Jehovah Witnesses and Others v. Turkey, No. 36915/10 and 8606/13 (European Court of Human Rights March 24, 2016).
Association Les Témoins de Jéhovah v. France, No. 8916/05 (European Court of Human Rights June 30, 2011).
Belcacemi and Oussar v. Belgium, No. 37798/13 (European Court of Human Rights July 11, 2017).
Bulski v. Poland, No. 46254/99; 31888/02 (European Court of Human Rights November 30, 2004).
Case "Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium" v. Belgium, No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (European Court of Human Rights July 23, 1968).
Cumhuriyetçi Eğitim Ve Kültür Merkezi Vakfi v. Turkey, No. 32093/10 (European Court of Human Rights December 2, 2014).
Dahlab v. Switzerland, No. 42393/98 (European Court of Human Rights February 15, 2001).
Darby v. Sweden, No. 11581/85 (European Court of Human Rights October 23, 1990).
Dogru v. Turkey, No. 27058/05 (European Court of Human Rights December 4, 2008).
Ewieda and Others v. The United Kingdom, No. 48420/10, 59842/10, 51671/10 and 36516/10 (European Court of Human Rights January 15, 2013).
Fernández Martínez v. Spain, No. 56030/07 (European Court of Human Rights June 12, 2014).
Folgerø and Others v. Norway, No. 15472/02 (European Court of Human Rights June 29, 2007).
Grzelak v. Poland, No. 7710/02 (European Court of Human Rights November 22, 2010).
Hasan and Eylem Zengin v. Turkey, No. 1448/04 (European Court of Human Rights October 9, 2008).
Ingrid Jordebo Foundation of Christian Schools and Ingrid Jordebo v. Sweden, No. 11533/85 (European Court of Human Rights March 6, 1987).
Izzettin Dogan and others v. Turkey, No. 62649/10 (European Court of Human Rights April 26, 2016).
Kjeldsen, Busk Madsen and Pedersen v. Denmark, No. 5095/71; 5920/72; 5926/72 (European Court of Human Rights December 7, 1976).
Köse and Others vs Turkey, No. 37616/02 (European Court of Human Rights November 7, 2011).
Lautsi and Others v. Italy, No. 30814/06 (Second Chamber, European Court of Human Rights November 3, 2009).
Lautsi and Others v. Italy, No. 30814/06 (Grand Chamber, European Court of Human Rights March 18, 2011).
Leyla Şahin v. Turkey, No. 44774/98 (European Court of Human Rights November 10, 2005).
Mansur YalÇin and Others v. Turkey (European Court of Human Rights September 11, 2014).

Ouardiri v. Switzerland, No. 65840/09 (European Court of Human Rights July 8, 2011).
Refah Partisi (the Welfare Party) and Others v. Turkey, No. 41340/98, 41342/98, 41343/98 et al. (European Court of Human Rights February 13, 2003).
Saniewski v. Poland, No. 40319/98 (European Court of Human Rights May 22, 1997).
S.A.S v. France, No. 43835/11 (European Court of Human Rights July 1, 2014).
Spampinato v. Italy, No. 23123/04 (European Court of Human Rights March 29, 2007).
X v. United Kingdom, No. 7782/77 (European Court of Human Rights May 2, 1978).

Court of Justice of the European Union

Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA, No. C-188/15 (Court of Justice of the European Union March 14, 2017).
Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV, No. Case C-157/15 (Court of Justice of the European Union March 14, 2017).
Scuola Elementare Maria Montessori Srl v Commission, Commission v Scuola Elementare Maria Montessori Srl, and Commission v Pietro Ferracci, No. Joined Cases C-622/16 P to C-624/16 P (Court of Justice of the European Union November 6, 2018).
WABE and MH Müller Handel, No. C-804/18 and C-341/19 (Court of Justice of the European Union July 15, 2021).

United States

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
Colorado Civil Rights Commission, 584 U.S. ___ (2018)
Edwards v. Aguillard, 482 U.S. 578 (1987)
Employment Division v. Smith 494 U.S. 872 (1990);
Masterpiece Cakeshop v. Pierce v. Society of Sisters, 268 U.S. 510 (1925),
United States v. Ballard 322 U.S. 78 (1944)

Other Courts

Decision 24 Sept. 2003, BverGE 108, 282. (German Federal Constitutional Court)
Lee (Respondent) v Ashers Baking Company Ltd and others (Appellants) (Northern Ireland) [2018] UKSC 49 (Supreme Court of the United Kingdom)
Syndicat Northcrest v. Amselem, [2004] 2 SCR 551 (Supreme Court of Canada)