

## **Remarks of Professor Silvio Ferrari**

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A full version of this paper is slated for publication elsewhere.

1. The topic of my lecture is the idea of secular State: how this notion took shape, what are its variants, what problems it has to face. There are persistent disagreements about the exact meaning of “secular State”. For today’s presentation it is enough to say that a secular State bases its legitimacy on the citizens’ will, without any operative reference to the will of God. My main argument is that the different fortunes of the secular State in Israel and in the predominantly Christian and Muslim countries depends significantly on their different religious background and, in particular, on the conception of God’s law that developed in the theological and legal traditions of these three religions. More precisely I maintain that there is a link between the Christian legal tradition based on divine natural law and the secular State.

Before starting my exposition, two preliminary remarks are required. First, my analysis will focus primarily on Sunni Islam, Orthodox Judaism and Roman Catholic Christianity. Second, my intent is purely descriptive. I want to explain why the Christian legal tradition (and particularly the Roman Catholic one), based on divine natural law, paved the way to the secular State. But I am in no way implying that this tradition is better than others, nor that the secular State is preferable to other political models.

2. The legal systems of the Jewish, Christian and Muslim religions have in common the fact of deriving their legitimacy from divine will: they claim to be based on rules that were laid down by God himself. God’s law has a very central place in these legal systems but this does not mean they share the same notion of divine law.

The main element of affinity between Judaism, Christianity and Islam is that God's law is known by man through revelation. It is a "revealed" law, in the sense that it is made known through the intervention of God, without whose revelation man would not have been able to learn the content of divine law. This element that is common to Jewish, Christian and Islamic law must not however lead to neglecting an important difference: while for the Islamic and the Jewish legal systems divine law and revealed law coincide, for the legal system of the Roman Catholic Church divine law is manifested through two different channels, revelation and creation..

3. To understand this difference, we need to focus on a distinction which is of paramount significance in the Roman Catholic legal tradition, the distinction between divine revealed law and divine natural law. The first is given by God through revelation and cannot be known outside of it (i.e. it cannot be learned by men only through reason). The second is also given by God, but through the creation: it is written in the conscience of every man and it can be known through the proper use of the rational faculties which every human being has. So, at the time of creation, God gives every human person the ability to distinguish right from wrong through the correct use of reason. This makes it possible to establish an element of commonality among people of different religions. As a consequence, the non-Christian is not a person who has a law that is totally and irretrievably different from the one followed by the Christians: on the contrary he is potentially able to distinguish what is right and wrong even if, without the aid of revelation and divine grace, he may not be able to perceive this distinction with full clarity. There is therefore an area of rights and duties that are common to all men and all men, through the proper use of their rational faculties, may recognize the universal value of these rights and duties.

If we now move to Orthodox Judaism, we find a similar but not identical conception. According to the Jewish tradition, the whole of humankind was originally governed by the seven commandments given by God to Noah. These commandments prohibit blasphemy, idolatry, murder, theft and robbery, sexual misconduct and eating a limb taken from a live animal; a seventh

precept orders the establishment of courts to administer justice. On Mount Sinai God gave Moses the law that, henceforth, would rule the Jews. Non-Jews should instead continue to live in accordance with the Noah's laws.

So, since the revelation to Moses two legal systems have coexisted, the one applying to Israelites and the other to all men. The analogy between this pattern and the Christian one is quite obvious, but there is also a significant difference: the seven Noah's commandments are revealed by God and not to be found in the conscience of every human being. Therefore the idea that Noah's law is a kind of natural law, that can be known through reason, is far from being shared by the majority of Jewish scholars. In their perspective, the rights of the non-Jew are founded on a revealed law for humankind, rather than on a rationally knowable law common to all men. The commandments given by God to Noah allow Jews, after the revelation on Mount Sinai, to attribute full legitimacy to the presence of the non Jew but do not cancel the fundamental difference with the Jewish people. However this distinction did not prevent the recognition that there are rules which apply to every human being. The existence of the Noah's precepts, that is a law that governs the behavior of Jews and non-Jews and allows the latter to lead a righteous life, provides a sufficiently strong basis to assert the existence of a cluster of rights and duties that pertain to all human beings.

The Sunni Islamic doctrine and jurisprudence address the problem of the legal status of the non-Muslim in a way that is different both from the Jewish and the Christian ways. In the Sunni legal tradition the notion of divine natural law seems to be absorbed and exhausted in that of divine revealed law to the point that some scholars have written that Islamic theology does not admit the existence of a law that is born from nature and is independent of revelation. To avoid misunderstandings, it should be immediately made clear that the Catholic doctrine too does not accept the idea of a natural law that is completely independent of religious norms. But Thomas Aquinas, assuming that human rationality is a reflection of divine rationality, affirms that good and evil, right and wrong are objective categories that can be learned through human reason, even without the intervention of divine revelation. This same conclusion is alien to the Sunni legal

tradition, which affirms that right and wrong have their only foundation in God's will.

To better understand the differences between these two conceptions of law and justice it is helpful to recall briefly the story of the Mu'tazilite theological school, which flourished between the eighth and ninth century. It was a time of religious pluralism. Islam, following its rapid expansion, ruled over areas where the majority of the population followed other religions: the problem of the non-Muslim and his legal status within a community politically and militarily dominated by Islam, was more pressing than ever. It was also the time when Islam was more closely influenced by Greek thought, through the Arabic translations of the works of Aristotle and Plato, and a wind of rationalism blew in the Muslim world. In this context of rapid change the Mu'tazilites tried to affirm a very important principle: the ontological character of good and evil. Believing that an act is good or bad in itself (and not because God has commanded or forbidden it) opens the way to the idea that there can be universal moral principles, knowable through the proper use of reason, and lays the foundation for the development of the notion of natural law. However, after an ephemeral success, the Mutazilite ideas were crushed by the reaction of the Muslim traditionalists groups and by the success of their doctrines, based on the absolute freedom of God's will. A very important theologian, al-Ash'ari, became the main supporter of these doctrines. Al-Ashari does not oppose a moderate use of reason in interpreting the sacred scriptures but he affirms the absolute freedom of divine will: "good and evil" – Al-Ashari writes – “are so because God has declared that a certain act was good and another bad, but [God] could have stated the opposite, for example, that killing and stealing were well and then these acts would have been good". Al-Ashari's position prevailed and his ideas leave little room for natural law: if it all comes down to divine will, it is pointless to seek in this world a rationality that is intelligible to humans. So it is better to rely fully on revealed law and try to build a relationship with the non-Muslim through paths that do not require a (nonexistent) natural law.

The defeat of the Mu'tazilites helps to explain the absence of the concept of divine natural law that makes it difficult for Islamic legal thought to address the problem of the non-Muslim in the

same way the problem of the non-Christian is dealt with in the “Christian” West. It is not accidental that in Islamic tradition the legal treatment of the non-Muslim still remains largely grounded not on the notion of equality but on that of diversity and separateness. The non-Muslim – the Jew and the Christian, for example - is different and is entitled to maintain diversity through a system of personal law that gives him the right to enjoy the Christian or Jewish rules concerning family law, inheritance and so on. In the Western countries, where the influence of Christianity has been stronger, the concept of divine natural law (once it had been thoroughly secularized) paved the way for the affirmation of the equality of citizens regardless of their religion, which has become irrelevant with reference to the enjoyment of civil and political rights. In this perspective the “other” (the Jew and the Muslim, for example) can be included in the national community in terms of substantive equality exactly because his religious membership had become irrelevant. It is more a theoretical model than an historical fact, as the persecution of Jews and the wars against Muslims in European history clearly demonstrates. However, the point I would like to make is that the concept of divine natural law favored the development of the notion of secular State prevailing in Europe. To explain this connection I need to go back to what happened in Europe after the Lutheran Reformation.

4. In the sixteenth and seventeenth centuries, large regions of Europe were plagued by wars of religion that set Catholics and Protestants against each other for over a century. The Protestant Reformation had shattered the common religious horizon of the Medieval period, when most Western Europeans believed in the same God and recognized the same religious authority, the Pope. Now wars of religion were fought by each opponent in the name of a different God and the Pope was no longer a *super partes* referee but had become the head of one of the conflicting parties. Therefore these wars could not be ended by appealing to the judgment of the Pope, which had been possible (at least in principle) during the Middle Ages. A new way out had to be invented to put an end to wars that seemed endless. The solution for this problem was found by a Dutch lawyer and philosopher, Grotius, and expressed with the famous saying “etsi Deus non daretur”, even if God did

not exist. The problem Grotius had to solve was a conflict motivated by religion. If a peaceful society had to be rebuilt, the starting point could no longer be religion, which had to be confined to one's private life. A new starting point was required and it was found in a natural law fully accessible to man's reason. In other words, to make peaceful coexistence possible between Catholics and Protestants, politics, the law, the economy and the other areas of public life had to be secularized, placing them under the exclusive control of reason and philosophy and freeing them from the control of religion and theology. The public sphere had to be conceived and regulated "etsi Deus non daretur", that is in a way that could be acceptable even if God did not exist. The centre of gravity of religion is shifted from the public to the private life. At the same time the centre of gravity of public law moved from divine law to natural law based on reason.

Grotius' proposal was possible only because of the central place the doctrine of **divine natural** law had gained in Europe during the Middle Ages. His suggestion does not imply the negation of God, it presupposes only God's rationality. In perfect opposition to al-Ashari's ideas, Grotius writes that "just as even God cannot cause that two times two should not make four, so He cannot cause that which is intrinsically evil be not evil". In this way Grotius does not need to deny the divine origin of natural law. It is enough for him to affirm its rational character and therefore its accessibility "to all humankind, Christian or not". In other words, Grotius does not alter the structure of the Roman Catholic philosophical and legal discourse on natural law. The philosopher takes the place of the theologian, **divine** natural law becomes **rational** natural law, but this is more a substitution than a revolution.

In Israel and in the countries with Muslim religious background the weakness of the concept of divine natural law helps to explain why the search for an appropriate legal status of the non-Jew or the non-Muslim followed routes different from the creation of a Western-type secular State.

Differently from divine natural law in Christian thought, in the Orthodox Jewish legal tradition Noah's law is part of the revealed law. The Rabbis debated whether all its seven commandments can be discovered through rational investigation and the majority opinion was no. The outcome of

the Rabbinical debate made it impossible to reduce the Noah's commandments to a kind of natural law. Noah's law is revealed law, exactly like the law revealed by God to Moses on Mount Sinai. Now I am aware I am making a big historical leap, but I wonder whether this two Revelations conception played a role after 1948 in developing the definition of Israel as a democratic and Jewish State. The existence of two Revelations – one universal (to the whole of humankind, the Revelation to Noah) and one particular (to the Jewish people, the Revelation to Moses on Mount Sinai) - provided the intellectual background for the solution to the problem of the non-Jew living in Israel: namely a State with a double root, one universal (the will of the citizens) and one particular (the cultural and religious heritage of the Jewish people). I am not denying that the definition of the State of Israel as a democratic and Jewish State is primarily the outcome of a political compromise between the secular and religious currents of Zionism. This compromise, however, was possible because its content was coherent with the theological and legal background made available by the Jewish tradition to the founding Fathers of the State of Israel.

The Islamic approach to the secular State is even more problematic. Due to the absence of the notion of divine natural law in this tradition, the Christian route is blocked. The Jewish route is impassable too, as it requires a universal revelation that is unknown to Islam. That leaves two very narrow ways. The first is based on the interpretation of the sacred texts: secularization of the State has to find its legitimacy directly in the Koran and the Sunna. This attempt was made in the twentieth century by a group of modernist Muslim thinkers, but their conclusions have been accepted only by a fraction of Muslim public opinion and religious authorities. The second way is based on the existence of a valid Revelation to Jews and Christians. According to Muslim doctrine, God spoke to Jews and Christians and revealed them his law but they were unable to remain faithful to it. Despite their infidelity, Jews and Christians retain the right to live in a Muslim State according to their personal law. This arrangement has been analogically applied to other religious groups, giving them the possibility to enjoy the same freedom. However, we remain far from a Western model of secular State.

5. The analysis carried out in this lecture shows that the secular State is not a religiously neutral construct: its origin is connected to Christian theological concepts. If we accept this conclusion, two problems require our attention. First we must consider whether the secular State is a model that can be exported beyond the borders of the Christian West. Can it be a viable type of State for the Arab countries of the Mediterranean that are writing their new constitutions after the Arab Spring? Second, we must wonder whether the secular State is still able to answer the needs of Western societies that have become less Christian and more religiously plural. Is a secular State the desirable future of multi-ethnic, multi-religious and multi-cultural countries like The Netherlands or the United Kingdom?

As I see it, the secular State is a particular instrument to achieve two universal goals, the freedom to profess one's religion and the enjoyment of civil and political rights on an equal footing with people who profess a different religion or none. The secular State tries to achieve these objectives through the separation from religion: this is its particular feature that distinguishes it from other types of State.

Separation of religion and politics, Church and State is another concept that has very specific Christian roots, dating back to the evangelical "give Caesar what's Caesar's and God what's God's." The secular State is inextricably linked to Christianity and it is futile to attempt to export the Western model of secular State to regions of the world that do not meet the conditions for accepting it. A second conclusion follows on naturally from the first. Rather than trying risky legal transplants, it is preferable for each civilization to look within its own religious and cultural tradition for the suitable tools to address the problem of freedom of religion and equal enjoyment of civil and political rights. All the models considered in my presentation -including the Western and "Christian" secular State - show evident limitations in governing the tensions induced by the process of religious pluralization that is developing in many parts of the world. Each model has in itself the potential to meet this challenge. In the West the solution is not to jettison the concept of secular State: rather, it is to initiate a reflection that allows its application in a way that is not hostile

to religion. In the Muslim countries the problem is not to give up the Islamic State but within it to guarantee freedom and equality to non-Muslim people and communities. They are different roads, but all are acceptable if they converge on the common goal of ensuring religious freedom and equal treatment, which are fundamental rights of every human being.