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The Future of Secular Law in Spain: A Model Based on the Evolution of Religiosity and Religious Influence on Law

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Abstract

This article analyzes how the evolution of religiosity will affect the secularity of Spanish law. In a liberal constitutional system such as that of Spain, the influence of religion on law is inevitable. The article proposes a model based on two variables: the increase or decrease of the religious population and the capacity and willingness of religions to influence secular law. The four possible resulting scenarios are *religious aggrandizement* (a growing religious population seeking to shape the law); *religious secularization* (a growing religious population with a worldview compatible with secularity); *religious backlash* (some religious minorities undermining the secularity of the law); and *religious diminishment* (a declining religious population losing its capacity or willingness to influence the law). The model demonstrates theoretically that inclusion policies do not necessarily lead to the Islamization of Spain. Ignoring religious issues can lead to the marginalization of a religious minority, which favors radicalization and non-acceptance of secularity.

Keywords

Law – Spain – religious minorities – secularization – Islamization – religious extremism

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1 Introduction

1.1 *Religion, Politics, and Law: Current Circumstances in Spain*

In the last decade, religion in Western European politics has been "gaining salience due to the rise of populist radical right parties that present themselves as defenders of Christianity against a threatening Muslim invasion,"[1] consistent with a conception of Europe as an exclusively Christian civilization.[2] Although in Spain this phenomenon has arrived a few years later than in other countries, the recent rise of the right-wing populist party, *Vox*, means that such a narrative has begun to be heard in political, social, and academic discourse.[3]

The main left-wing party, *Partido Socialista Obrero Español*, and the left-wing populists, *Izquierda Unida*, *Podemos,* and, more recently, *Sumar*, have traditionally monopolized religious discourse in Spain, strongly advocating a strict separation between the state and religions. Right-wing parties, *Partido Popular* and *Ciudadanos*, however, have hardly included religious references in their political discourse in recent years, unlike in the past, despite having the largest number of religious adherents among their voters.[4] But the recent emergence of *Vox* has balanced the scales and religion is now entering the Spanish politics.

Law is one of the crucial battlefields where religious conflicts are being waged, and tensions over the use of law for religion-related purposes are expected to increase in the coming years. A clear example is the new education law[5] and its regulations, which establish that the subject of religion does not count as part of the qualifications needed to apply for scholarships or access to

1 Jakob Schwörer & Xavier Romero-Vidal, "Radical Right Populism and Religion: Mapping Parties' Religious Communication in Western Europe", 48(1) *Religion, State and Society* (2020), 4.

2 See, for example, Rosario Forlenza, "'Abendland in Christian Hands': Religion and Populism in Contemporary European Politics", in Gregor Fitzi, Juergen Mackert, & Bryan Turner (eds.), *Populism and the Crisis of Democracy* (London and New York: Taylor & Francis, 2019), 133–149.

3 See, for example, Jakob Schwörer, Xavier Romero-Vidal, & Belén Fernández-García, "The Religious Dimensions of the Spanish Radical Right: Voters, Ideology and Communication of Vox", in Anna Henning & Mirjam Weiberg-Salzmann (eds.), *Illiberal Politics and Religion in Europe and Beyond: Concepts, Actors, and Identity Narratives* (New York: Campus, 2020), 183–212.

4 Xavier Romero-Vidal & Jakob Schwörer. "The Religious Dimensions of the Spanish Left: Parties and Electorates". 2021. Agenda Pública: Democracia, Retrieved 31 July 2023, https://agendapublica.elpais.com/noticia/16176/dimensiones-religiosas-izquierda-espanola-partidos-electorados (Spanish).

5 *Organic Law 3/2020, of December 29, which modifies Organic Law 2/2006, of May 3, on Education*, Madrid, 2020, BOE no. 340 (Spanish).

further education at the three levels of the school system in Spain: *Primaria*,[6] *Secundaria,*[7] and *Bachillerato*.[8] These legal reforms respond to a vision under which the law,[9] as the basis on which certain policies are implemented, cannot be used as a means to expand religious beliefs. Other examples are the recently approved law on euthanasia[10] and the laws on abortion,[11] which, although not intended to generate faith, are used to establish practices that reflect a certain ethical position.

The present article adopts an interdisciplinary approach based on law and sociology to argue that within a liberal constitutional system such as that of Spain, there is an unavoidable possibility of religious influence on the law and its secularity or religiosity. The article refutes two ideas: that a demographic increase in religious people necessarily undermines the secularity of the law; and that a reduction in the number of religious people necessarily strengthens the secularity of the law. There are four possible scenarios for the future of the secularity of Spanish law, which depends on the evolution of the number of religious people and the influence of religious people on law. These two variables are sociological and not determined by the openness of the state to democratic and social group influence, which is assumed to be constant. Thus, an increase in religiosity does not necessarily imply that secular law will be undermined nor does a decrease in religiosity imply that secular law will be strengthened. Both are possible but not necessary scenarios.

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6 *Royal Decree 157/2022, of March 1, which establishes the organization and minimum teaching of Primary Education*, Madrid, 2022, BOE no. 52. See First Additional Provision (Spanish).

7 *Royal Decree 217/2022, of March 29, which establishes the organization and minimum teaching of Compulsory Secondary Education*, Madrid, 2022, BOE no. 76. See First Additional Provision (Spanish).

8 *Royal Decree 243/2022, of April 5, which establishes the ordination and minimum teachings of the Baccalaureate*, Madrid, 2022, BOE no. 82. See First Additional Provision (Spanish).

9 The Agreements between the Kingdom of Spain and the Holy See regarding education guarantee that the subject of Catholic religion is taught in public schools for a minimum of one hour per week, therefore it is not possible to remove this subject from the syllabus without first denouncing this international agreement. Agreements with other religious denominations also include the possibility of teaching the subject of the respective religion in public schools, although these agreements have the status of law and can be reformed by the Spanish Parliament.

10 *Organic Law 3/2021, of March 24, regulating euthanasia*, Madrid, 2021, BOE no. 72 (Spanish).

11 *Organic Law 2/2010, of March 3, on sexual and reproductive health and the voluntary termination of pregnancy*, Madrid, 2010, BOE no. 55 (Spanish); *Organic Law 11/2015, of September 21, to reinforce the protection of minors and women with judicially modified capacity in the voluntary interruption of pregnancy*, Madrid, 2015, BOE no. 227 (Spanish).

Refuting the two above assertions provides Spanish law and policymakers with a framework within which to make informed decisions and better design policies and laws affecting religion. The model proposed in this article reduces the fear of *backfiring* in inclusion policies (i.e., that religious minorities will increase demographically and weaken the secularity of law). Even if inclusion policies would favor the increase in the population of religious minorities (e.g., Muslims), such an increase does not necessarily imply that secular law will be eroded in the future because under certain conditions, that increasing religious minority could be committed to the principle of separation of Church and State. Inclusion policies are more important than ever precisely to avoid the socio-economic exclusion of religious minorities, which favors their radicalization, and to promote religious worldviews compatible with the secularity of law. The cost of implementing religious inclusion policies may be lower than the cost of not doing it.

The model also alerts law and policymakers that a less religious Spanish population could undermine secular law if religious minorities become fanatical and challenge the separation between the state and religions. Therefore, religious issues (e.g., problems of some religious minorities in practicing their funeral rites in Spain[12]) should not be left on the back burner of politics simply because the majority of voters are not religious. The religious factor needs to be taken into consideration in policy design.

1.2 *The Model: Four Future Scenarios for Secular Law in Spain*

How will the evolution of religiosity affect secular law in Spain? Four future scenarios depend on two independent variables: the demographic expansion or contraction of religions, and the capacity and will of the religious population to influence law and policy (see Figure 1). This model, like any other, is limited: it covers possible outcomes but does not capture all the ways in which these scenarios may be arrived at or the different ways in which secular law could change, for example, how an increase in Islamic fundamentalism could influence secular law in Spain. The model is concerned only with the general trend of secular law, that is, whether secular law will be strengthened or undermined. These limitations are imposed by the fact that a model must be sufficiently complex to capture social reality but simple enough to be useful for law and policymakers.

12 Miguel Rodríguez Blanco, "Problems of the exercise of religious freedom by immigrants belonging to religious minorities", in María del Mar Martín García & Miguel Rodríguez Blanco (eds.), *Religious pluralism and its management at the local and autonomous community level: special reference to Andalusia* (Granada: Comares, 2010), 71–78 (Spanish).

The model demonstrates theoretically that there is no necessary causal link between an increase in religiosity and a decrease in the secularity of the law, or between a decrease in religiosity and an increase in the secularity of the law. The article refutes deterministic positions that argue, for example, that a demographic increase of Muslims in Spain will end up decreasing the secularity of the state,[13] or that a decrease in the number of religious people in Spain necessarily implies that the state will become more secular.

Regarding the first variable of the model, religious population trends are analyzed. Different evolutionary theories of religion have been studied to suggest two possibilities: the numbers of religious followers will increase or decrease. The aim of analyzing the first variable was not to argue what is going to happen with the religious population, based on current data in Spain, but to describe what could happen. Therefore, the study did not conduct statistical analyses to make a prediction but analyzed theories considering the evolution of religions to propose possible future scenarios. Nor did the article predict that either of these scenarios would come true.

Next, the article examined the capacity and will of religions to influence the law.[14] The model conceives law as an indicator of secularity—a location

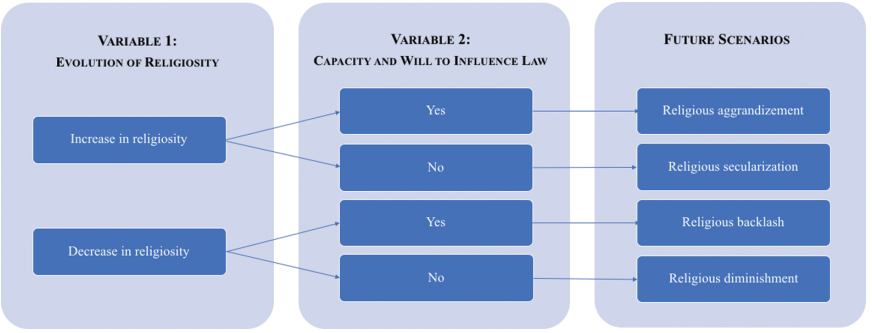

FIGURE 1 Model for the future of Spanish secular law.

13 For example, the deputy spokesperson of Vox in the Parliament of Catalonia, Antonio Gallego Burgos, stated that "[e]n muchos barrios de Tarragona, Salt, Manlleu, Mataró, Manresa, El Vendrell, Reus o Terrassa ya prevalece la sharía" ("in many neighborhoods of Tarragona, Salt, Manlleu, Mataró, Manresa, El Vendrell, Reus or Terrassa the Sharia already prevails"—author's translation). See Antonio Gallego Burgos, "The Islamization of Catalonia", *ABC*, 30 Aug. 2021, Retrieved 31 July 2023, https://www.abc.es/espana/catalunya/abci-antonio-gallego-burgos-islamizacion-cataluna-202108301141_noticia.html (Spanish).

14 In this article, the concept of religion/religiosity refers mostly but not exclusively to organized religions (practices conducted under legally recognized and structured

where secularity is established. The secular character of the state is expressed, among others, in its laws, which constitute the framework within which policy is developed. Each religion has a different and particular way of interacting with the law and influencing it.[15] For the purpose of this article, it is sufficient to state that Spanish law could be influenced by some form of religion—it does not matter what form that is. For example, the fact that a new education law would oblige all schools to provide halal food as a result of Muslim influence is irrelevant to the claim that the secularity of the law would be diminished in such a scenario.

The combination of the two variables leads to four possible scenarios: (a) a situation of *religious aggrandizement,* in which an increased number of religious people in society are willing and able to influence the law, whose secularity decreases; (b) a situation of *religious secularization,* in which an increased number of religious people fails to influence the secularity of the law, which remains constant or even increases; (c) a situation of *religious backlash,* in which there are fewer religious people in society but because of minority-majority dynamics, the secularity of the law is weakened; (d) a situation of *religious diminishment,* in which there are fewer religious people and they are not able or willing to affect the secularity of the law, which remains constant or even increases. A fifth scenario, under which nothing changes, is also possible, but the article does not examine this possibility because the relationship between religion and law suggests that they are mutually influential. Therefore, it is unlikely that religiosity will not evolve in Spain and it will not affect the secular nature of the law.

The article is structured as follows. After this Introduction, the following section examines the concept of secularity, its particular form in Spain, and its relationship with the law. Subsequently, the first variable of the model (the evolution of the religious population in Spain) is analyzed, describing the two possibilities derived from the analysis of evolutionary theories of religion. Next, the second variable (the capacity and will of religions to influence Spanish secular law) is examined using the case study of two abortion laws. Finally, the four scenarios of the model are briefly presented and some reflections are offered in the Conclusion.

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religious institutions). It is religious organizations that can influence the law through the mechanisms described in this article. For a detailed discussion of the various types of religiosity and their relationship with policy and law, see, for example, Elizabeth Shakman Hurd, *Beyond Religious Freedom: The New Global Politics of Religion* (Princeton and Oxford: Princeton University Press, 2015).

15 See, for example, Damian Howard, "Islam and Christianity: On 'Religions of Law'", 24(2) *Islam & Christian Muslim Relations* (2013), 173–189.

2 Secularity and Spanish Law: A Difficult but Possible Relationship

2.1 *The Impossible Question: What is a Secular State?*[16]

Few would not categorize France as a secular state.[17] Nor is it unreasonable to defend that the idea of secularity is one of the cornerstones of politics in the US.[18] But for historical reasons, the former continues to this day to pay the salaries of ministers of recognized religions and to maintain the confessional nature of education in Alsace-Moselle and some overseas territories.[19] Similarly, the latter promotes specific visions of religion in its foreign policy.[20] Therefore, how to define secularity?

The most common historical account argues that modern secularity was developed in the 17th century as a way to end the Wars of Religion in Europe. The idea was to establish a lowest common denominator between the doctrines of the warring Christian groups, creating a political ethic autonomous from religious doctrines.[21] But scholars continue to argue about what is or should be a secular state.

Even at the semantic level, there are problems in differentiating "secularity" from "secularism." One of the most widely supported views that differentiate between the concepts, consistent with languages such as Spanish (*laicidad* vs. *laicismo*) or French (*laïcité* vs. *laïcisme*), holds that secularity refers to "an approach to religion-state relations that avoids identification of the state with any particular religion or ideology (including secularism itself) and that endeavors to provide a neutral framework capable of accommodating a broad range of religions and beliefs," whereas secularism refers to "an ideological

16 For a study on this question, see, for example, Henri Peña-Ruiz, *What is Secularism?* (Paris: Gallimard, 2003) (French).

17 See, for example, Philippe Portier & Jean-Paul Willaime (eds.), *Religion and Secularism in France Today* (Abingdon and New York: Routledge, 2022).

18 For a comparison between secularity in the US and France (and Turkey), see, for example, Ahmet T. Kuru, *Secularism and State Policies toward Religion: The United States, France, and Turkey* (Cambridge: Cambridge University Press, 2009).

19 André Latreille & René Rémond, *History of Catholicism in France. III. The Contemporary Period* (2nd ed., Paris: Editions Spes, 1962), 563 (French); Alejandro Torres Gutiérrez, "The Separation Law of 1905: Lights and Shadows in the Genesis of the Idea of Secularism in France", 25 *Anuario de Historia de La Iglesia* (2016), 184 (Spanish).

20 Saba Mahmood, "Secularism, Hermeneutics, and Empire: The Politics of Islamic Reformation", 18(2) *Public Culture* (2006), 323–347.

21 Charles Taylor, "Modes of Secularism", in Rajeev Bhargava (ed.), *Secularism and Its Critics* (New Delhi: Oxford University Press, 1998), 31–53.

position that is committed to promoting a secular order."[22] The article adopts this semantic division and uses the word "secularity" rather than secularism.[23]

The controversies surrounding the question of what it means for a state to be secular are caused by several factors, such as the definition of secularity that is adopted or the approach with which the subject is studied. A relevant idea in this regard is that there is no single model but a variety of ways of being secular.[24] Thus, the model presented here is applied to Spain, a case with particular characteristics but not the only form of secularity.[25]

2.2 *Secularity in the Spanish Liberal Constitutional System: Yes, But …*

Spain displays a particular form of secularity.[26] Although the Catholic Church has been deeply intertwined with the State for many centuries, today secularity is a key element in the structure of the Spanish liberal democratic system.[27] This section aims to answer the following two questions: What elements does this article take into account in defining the secularity of the law? What are the constitutional provisions that allow for religions to expand or contract and influence the law?

The principle of separation of religion and State is mentioned in Article 16(3) of the 1978 Spanish Constitution.[28] This provision decrees that "there

22 Brett G. Scharffs, "Secularity or Secularism: Two Competing Visions for the Relationship between Religion and the State in the New Turkish Constitution", in *International Congress on Constitutional Law: Book of Papers* (BYU Law, 2011), 362–404.

23 For further discussion on the topic, see, for example, Barry A. Kosmin & Ariela Keysar (eds.), *Secularism & Secularity: Contemporary International Perspectives* (Hartford: Institute for the Study of Secularism in Society and Culture, 2007).

24 José Casanova, *Public Religions in the Modern World* (Chicago and London: University of Chicago Press, 1994).

25 A categorization of the different types of secularity appears in Philip S. Gorski, "Secularity I: Varieties and Dilemmas", in Mirjam Künker, John Madeley, & Shylashri Shankar (eds.), *A Secular Age Beyond the West: Religion, Law and the State in Asia, the Middle East and North Africa* (Cambridge: Cambridge University Press, 2018), 42.

26 For example, Bader categorized the Spanish model as "nonestablishment combined with public institutionalization of religious pluralism." Triandafyllidou, however, used the label "moderate religious pluralism" to define the Spanish constitutional system. See Veit Bader, *Democracy or Secularism? Associational Governance of Religious Diversity* (Amsterdam: Amsterdam University Press, 2007), 203; Anna Triandafyllidou (ed.), *Muslims in 21st Century Europe: Structural and Cultural Perspectives* (London: Routledge, 2010), 11.

27 See, for example, Zoila Combalía & María José Roca, "Religion and the Secular State in Spain", in Donlu D. Thayer (ed.), *Religion and the Secular State: National Reports* (Madrid: Universidad Complutense de Madrid, 2015), 656–673.

28 For a seminal work on the constitutional frame for religions in Spain, see Rafael Navarro-Vals & Alfonso Ruiz Miguel, *Secularism and Constitution* (Madrid: Fundación Coloquio Jurídico Europeo, 2008) (Spanish).

shall be no State religion." But the Article refers to the non-denominational character of the state, in other words, it is a negative definition. What is the Spanish State not? A confessional state. The provision makes no mention of the principle of neutrality. It goes on to state that "the public authorities shall take the religious beliefs of Spanish society into account and shall consequently maintain appropriate cooperation with the Catholic Church and the other confessions."[29] The Constitution mentions explicitly the Catholic Church, grouping other religious forms under the expression "other confessions." This is representative of the privileged position that the Catholic Church enjoys in a few matters compared with other religions.[30]

The Spanish Constitutional Court (*Tribunal Constitucional*) has ruled on numerous occasions based on Article 16(3), defining the relations between the Spanish State and religions as a model of "positive secularity,"[31] which according to the Constitutional Court is structured in two ways. On one hand, secularity is a positive function of the state, guaranteeing religious freedom and allowing individuals to exercise and manifest their religious beliefs free from coercion by the state. On the other hand, secularity is a negative function that operates as a restraint on state cooperation with religious denominations.[32] The secularity of the Spanish State requires neutrality, although it is not explicitly mentioned by the Constitution, and according to Dionisio Llamazares Fernández, needs three elements.[33] The first is respect for the principle of autonomy of religious

29 *Spanish Constitution*, Madrid, 1978, BOE no. 311. Official translation. See boe.es/legislacion/documentos/ConstitucionINGLES.pdf.

30 Jonathan Fox has shown that there is no relationship between the recognition of religious clauses in constitutions and government-based discrimination against religious minorities. Indeed, states that have such clauses tend to be more sensitive to religious matters than those that declare themselves directly secular. Constitutional clauses prohibiting incitement to religious hatred and protecting the right not to be religious are associated with higher levels of government-based discrimination. Fox argues that these causes are likely to represent an anti-religious form of secularism, which can be hostile to religious minorities. See Jonathan Fox, "Do Religion Clauses in Constitutions Predict Government-Based Discrimination against Religious Minorities?", 14(1) *Religions* (2023), 92.

31 See, for example, STC 24/1982, 13 May 1982, Appeal no. 68–1992; STC 340/1993, 16 Nov. 1993, Appeal no. (cumulative) 1658–88, 1254–90, 1270–90, 1329–90, 2631–91; STC 46/2001, 15 Feb. 2001, Appeal no. 3083–96.

32 Alejandro Torres Gutiérrez, "The Challenges of the Principle of Secularism in Spain: A Critical Reflection in Light of Constitutional Precepts", 32 *Anuario de Derecho Eclesiástico Del Estado* (2016), 668 (Spanish).

33 Dionisio Llamazares Fernández, *Right to Freedom of Conscience, I: Conscience, Tolerance and Secularism* (4th ed., Civitas 2011) 37 (Spanish).

denominations (the Church autonomy principle),[34] whereby the state should not intervene in the internal affairs of religious organizations unless there are risks to the fundamental rights of their members,[35] providing an area where groups can develop their beliefs free from state interference.[36] The second element is that no civil decisions should be taken on religious grounds. The Constitutional Court affirmed that religious values should not be used as criteria for establishing the legitimacy or justice of the norms and acts of the public authorities.[37] And third, a secular state should not grant legal status to rules or acts of religious denominations (e.g., religious marriage), unless the civil requirements of those rules or acts are met. The idea underlying the three elements is the differentiation between civil and ecclesiastical legal systems[38] and the subjection of the religious order (secondary legal system) to the civil order (primary legal system).[39] The present article applies these three elements to consider the secularity of the law.

How the Spanish State cooperates with religious denominations is not the same in all cases. As noted, Article 16(3) mentions the Catholic Church but not other religious denominations, which reflects the privileged position of the Catholic Church in relation to other religious groups. Clear examples of this privileged position are the two types of agreements signed between religious

34 For further discussion on the principle of autonomy of religious denominations in Spain, see, for example, Mercedes Vidal Gallardo, *The Limits to the Autonomy of Confessions Regarding the Regime of Religious Personnel* (1st ed., Cizur Menor: Aranzadi, 2019) (Spanish); María Jesús Gutiérrez Del Moral, "Freedom of Education, Autonomy of Religious Confessions and Legal Situation of Religion Teachers", 36 *Revista General de Derecho Canónico y Derecho Eclesiástico Del Estado* (2014) (Spanish); Santiago Cañamares Arribas, "Autonomy of Religious Confessions and Labor Discrimination", 155 *Revista Española de Derecho Del Trabajo* (2012), 37–70 (Spanish); José María Martí Sánchez, "The 'Own Character' of Religious Entities Regarding the Sentence of the Constitutional Court 106/1996", 37(74) *Ius Canonicum* (1997), 701–721 (Spanish).

35 Isidoro Martín Sánchez, "Religious Confessions and Their Autonomy According to the European Court of Human Rights", 16(46) *Encuentros Multidisciplinares* (2014), 64–73 (Spanish).

36 This religious-secular relationship is at times called "a two-way protection." See, for example, Amy Gutmann, *Identity in Democracy* (Princeton: Princeton University Press, 2003).

37 See, for example, STC 24/1982, 13 May 1982, Appeal no. 68–1992.

38 On the relationship between secular legal systems and religions, see generally Rafael Domingo, *God and the Secular Legal System* (Cambridge: Cambridge University Press, 2016).

39 For a further discussion of the relationship between the civil and the ecclesiastical legal system, see Santi Romano, *The Legal System* (Florencia: Quodlibet, 1945) (Italian).

denominations and the Spanish State.[40] One type is the Agreements with the Holy See signed in 1979, which are equivalent to international treaties[41] and must be ratified by the Spanish Parliament and Senate (*Cortes Generales*). Another type is the Agreements of 1992 with the Protestant,[42] Jewish,[43] and Muslim[44] denominations. Unlike the Holy See Agreements, these are ordinary domestic laws, in accordance with Article 7(1)[45] of the Organic Law on Religious Freedom,[46] not requiring future incorporation into the legal system but born as part of it. Moreover, they are not signed by the Head of State, with the prior authorization of the *Cortes Generales,* as in the case of the Holy See Agreements, but by the Minister of Justice, on behalf of the Government, and subsequently approved by the Parliament and Senate.

Unlike the Agreements of 1979, those of 1992 do not enshrine the principle of bilaterality in relation to the interpretation of the text, and as ordinary laws, the Agreements of 1992 are subject to possible proposals or bills after they come into force, and to the possibility of being repealed by a new law of a general nature. This is not the case of the Agreements of 1979 because according to Article 96(1) of the Spanish Constitution, international treaties "may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law."[47] Furthermore, there are religious groups that are legally recognized

40 Francisco Jiménez García & Eva Jordà Capitán, *The Principle of Non-Denominationality of the Spanish State and Agreements with the Holy See* (Madrid: Dykinson, 2007) (Spanish).

41 Llamazares Fernández, *Right to Freedom of Conscience, I: Conscience, Tolerance and Secularism* (2011), 284 (Spanish).

42 *Law 24/1992, of November 10, which approves the State Cooperation Agreement with the Federation of Evangelical Religious Entities of Spain*, Madrid, 1992, BOE no. 272 (Spanish).

43 *Law 25/1992, of November 10, approving the State Cooperation Agreement with the Federation of Israeli Communities of Spain*, Madrid, 1992, BOE no. 272 (Spanish).

44 *Law 26/1992, of November 10, which approves the State Cooperation Agreement with the Islamic Commission of Spain*, Madrid, 1992, BOE no. 272 (Spanish).

45 Article 7(1) of *Organic Law 7/1980, of July 5, on Religious Freedom*, Madrid, 1980 BOE no. 177: "The State, taking account of the religious beliefs existing in Spanish society, shall establish, as appropriate, Co-operation Agreements or Conventions with the Churches, Faiths or Religious Communities enrolled in the Registry where warranted by their notorious influence in Spanish society, due to their domain or number of followers. Such Agreements shall, in any case, be subject to approval by an Act of Parliament." Official translation prepared by the Spanish Ministry of Justice.

46 For a comment on this law, see, for example, Rafael Navarro-Valls, Joaquín Mariano Mantecón Sancho, & Javier Martínez Torrón, *Religious Freedom and Its Legal Regulation: The Organic Law of Religious Freedom* (Madrid: Iustel, 2009) (Spanish).

47 *Spanish Constitution*, Madrid, 1978, BOE no. 311.

and registered in the Register of Religious Entities that have no cooperation agreement with the state: the Mormons, Jehovah's Witnesses, Buddhists, and Eastern Orthodox.[48]

Thus, there are three levels of cooperation between the Spanish State and religious denominations. The first one is recognized exclusively for the Catholic Church, granting it certain privileges that are not recognized for the other religious denominations,[49] such as the possibility of funding through a line item in taxpayers' income tax returns.[50] A second level is reserved for the Protestant, Jewish, and Muslim denominations, which have a cooperation agreement with the state that grants them certain rights, such as the recognition, in certain cases, of an adjustment in the weekly day of rest for the followers in accordance with their religious beliefs.[51] A third level is that of religious groups that are registered in the Register of Religious Entities but do not have a cooperation agreement, which deprives them of certain guarantees.[52] The differentiated recognition of the status of religious denominations and their particularities has provoked the emergence of conflicts such as those related to religious symbols in public institutions, teachers of Catholic religion in schools,[53] or the participation of the army in religious services.[54]

48 For further discussion on the situation of these religious minorities in Spain and a proposal concerning their legal status, see Alejandro Torres Gutiérrez, *Legal Statute of the Orthodox Churches in Spain: Autonomy, Limits and Proposals of 'Lege Ferenda'* (Madrid: Dykinson, 2020) (Spanish).

49 For a study on the relationship between the principle of non-discrimination and the funding of religious groups, see Nahshon Perez, "Governmental-Funded Religious Associations and Non-Discrimination Rules: On Immunity and Public Funding", 33(2) *Canadian Journal of Law & Jurisprudence* (2020), 341–367.

50 Félix de Luis y Díaz de Monasterio-Guren, "The Tax Assignment in Favor of the Catholic Church: Nature, Justification and Stages of Its Regulation", 82(323) *Estudios Eclesiásticos: Revista de Investigación e Información Teológica y Canónica* (2007), 765–784 (Spanish).

51 Juan Fornés, "The Reinforcement of the Autonomy of the Confessions in the Spanish Agreements with Minority Religious Confessions", 68 *Ius Canonicum* (1994), 525–551 (Spanish).

52 For an analysis of the difficulties for Orthodox Churches deriving from their legal status in Spain, see David Baltaretu, "The Orthodox Churches in Spain and Their Path Toward Full Legal Recognition", 19 *Laicidad y Libertades. Escritos Jurídicos* (2019), 119–140 (Spanish).

53 Because of its international relevance, the case of Fernández Martínez (*Fernández Martínez* v. *Spain*, No. 56030/07, ECtHR (Grand Chamber), 12 Jun. 2014) is representative of the problems associated with the requirement of Church approval to teach Roman Catholic religion in public schools.

54 For an analysis of some of the most representative cases of the Constitutional Court in this regard until the 2000s, see Javier Martinez-Torron, "Freedom of Religion in the Case

In conclusion, regardless of the legal terms used by the Spanish Constitution, it can be stated that Spain adopts a particular form of secularity in its laws, as jurisprudence has shown. Two of the three elements used in this article to define the secular nature of the law are met without difficulty: the non-use of religion as a criterion of legitimacy or justice of norms and acts and the validation of religious rules and acts only if they comply with the corresponding civil requirements. But there are some grey areas when it comes to the third element, the autonomy of religious denominations, because there are different levels of cooperation between the state and the various religious denominations. This circumstance undermines the principle of neutrality, especially because only the Catholic Church enjoys the highest level of cooperation with the state, which gives it privileged treatment in some matters. Nevertheless, the liberal Spanish Constitution provides a system in which religions can expand (and contract) freely and influence the law.

3 First Variable of the Model: The Evolution of Religiosity in Spain

3.1 *Possibility I: An Increase in Religiosity in Spain*

Why would religiosity increase in a secular state like Spain? The article applies some of the best-known evolutionary theories to religion to examine two explanations: religious demographics and the appeal of religious faith.

3.1.1 Religious Demographics

One of the most prominent defenders of the idea that religiosity will increase in some Western secular states is Eric Kaufman. In particular, Kaufman mentioned the demographic increase of Islamic fundamentalists as the main driver of the rise of religion. He argued that "immigration makes Europe more multicultural and more religious," as in the case of Paris or London, "which—against all expectation—are among the most religious spots in their countries."[55] This part of the article applies Kaufman's demographic thesis to consider the possibility of an increase of religiosity in Spain due to a possible increase in the number of Islamic fundamentalists. The examination is not intended to endorse or refute this thesis, only to consider the possibility of incorporating it into the model.

Law of the Spanish Constitutional Court", 2001(2) *Brigham Young University Law Review* (2001), 711–754.

55 Eric Kaufman, *Shall the Religious Inherit the Earth? Demography and Politics in the Twenty-First Century* (London: Profile Books, 2010), xvi.

Kaufman's argument is based on three steps. The first one is the arrival of Muslim immigrants and their direct net contribution to the total population (more Muslim immigrants arrive than leave). Among these migrants, it is inevitable that some are fundamentalists or will become fundamentalists for different reasons such as socio-economic exclusion, once they arrive.[56] The second step is based on the offspring of first-generation immigrants. Muslim families usually have higher rates of fertility than non-religious families. According to Kaufman, Muslims "marry earlier and have children sooner and more often than their secular counterparts."[57] Muslim immigrants tend to have more children than the non-religious population, and fundamentalists, as a subgroup of Muslim immigrants, are within this trend. The third step of the argument concerns the received faith by new generations. According to Kaufman, this is where Islamic fundamentalism enters the picture, parting ways with moderate Muslims. Kaufman noted that the rate of faith transmission among Islamic fundamentalists is much higher than that of moderately religious Muslims because modernity has empowered Islamic fundamentalists "to build a parallel world apart from the mainstream."[58] Therefore, new generations born into families of Islamic fundamentalists are more likely to retain religious faith than those born into Muslim families who are moderately religious, or other religious families such as Catholics.[59]

Although both moderate Muslims and Islamic fundamentalists increase their population size thanks to demographics (the arrival of immigrants and the birth rate effect), fundamentalists contribute to the growth of religiosity because the third element is more present in them than in the moderates, enabling the demographic effect not to dissipate in the secular mainstream. Kaufman argues that Islamic fundamentalism will increase in secular Western European states, such as Spain, because of the net effect of Muslim immigrants (including both moderates and fundamentalists), higher fertility rates (both of moderates and fundamentalists) and the ability to pass on the Islamic faith to subsequent generations (especially fundamentalists).

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56 As I have argued elsewhere, a legal mechanism for avoiding the socioeconomic exclusion of immigrants, especially of those with a different religion than the majority, is the corporate duty of reasonable accommodation. See, Aloisio C. dos Santos Jr. & David Garciandía Igal, *The Religious Freedom of Workers: The Business Duty of Reasonable Accommodation as a Mechanism for the Promotion of Human Rights* (Madrid: Iustel, 2021) (Spanish).

57 Kaufman, *supra* note 55, at xvi.

58 *Ibid.*, at xvii.

59 See also Charles F. Westoff & Tomas Frejka, "Religiousness and Fertility among European Muslims", 33(4) *Population and Development Review* (2007), 785–809.

How does the scenario described by Kaufman apply to Spain? It is difficult to measure it quantitatively, but analyzing the data provided by the *Observatorio Andalusí*,[60] it does seem reasonable to say that both immigration and the higher fertility rates of Muslims have contributed to increasing their numbers. But it is a challenge to measure the third element in Spain because it would require a large-scale survey (which is beyond the scope of this article) and would be difficult to identify fundamentalists and distinguish them from moderates.

In any case, the Muslim population in Spain has increased steadily between 2003 (since the Observatory was created) and 2020 (latest available data). The increase can be observed both in the absolute number of Muslims (around 525,000 in 2003 and 2,216,500 in 2020, see Figure 2) and in relative terms (representing 1.24% of the population in 2003 and 4.68% in 2020, see Figure 3). But whereas Islam has grown in Spain in recent years, Catholicism shows an opposite trend. Yet, even if overall religiosity did not increase in Spain (the decrease in the number of Catholics is larger than the increase in Islamic fundamentalists), an increase in Islamic fundamentalism could affect secularity, as explained in the third scenario of the model.

Finally, some authors question whether the demographic effect described by Kaufman can occur. It is possible that in a few generations, the Islamic

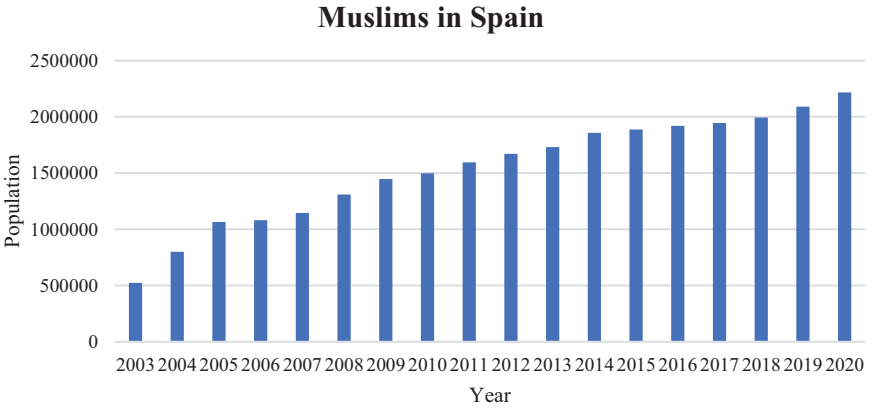

FIGURE 2 Growth of the Muslim population in Spain (2003–2020).[61]

60 *Observatorio Andalusí* is an institution observing and monitoring the situation of Muslim citizens and Islamophobia in Spain. See *Demographic Study of the Muslim Population* (Madrid, 2019), http://observatorio.hispanomuslim.es/estademograf.pdf (Spanish).

61 Prepared by the author based on data on religions provided in the annual reports of the Observatorio Andalusí (http://observatorio.hispanomuslim.es/cifras.html) and population data provided by the Spanish Statistical Office (https://www.ine.es).

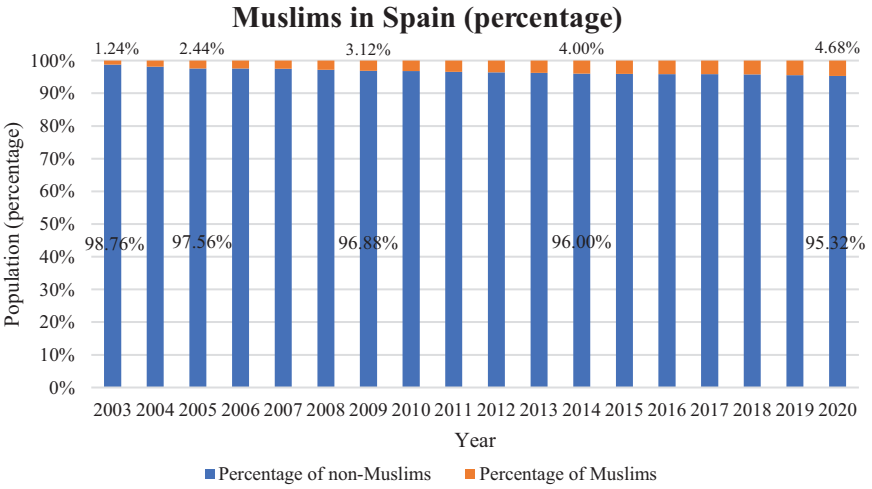

FIGURE 3 Relative growth of the Muslim population in Spain (2003–2020).[62]

fundamentalists will take on the demographic trends of Western European countries and the birth rate will decline. Therefore, the effect described by Kaufman may be valid only for the first generation of immigrants but may be diluted in future generations or the transmission of faith may be eroded, so that the new generations will not retain the Muslim religion. In this case, secularism will *digest* the demographic increase resulting from the first two factors.

3.1.2 Religious Appeal in a Competitive Market

The second argument that supports a possible rise in religiosity in Spain is based on supply-side theories, and its approach is entirely different from that of Kaufman. The demographic argument described above is not a direct refutation of the theories according to which the modernization of states entails secularization. Kaufman's argument admits an "even if" clause: even if the secularization effect of modernization is true, it would be compensated for by the demographic effect of Islamic fundamentalists. But the second argument of religious appeal in a competitive market is based on supply-side theories that directly confront secularization theories.

62 Prepared by the author based on religious data provided in the annual reports of the Observatorio Andalusí (http://observatorio.hispanomuslim.es/cifras.html) and population data provided by the Spanish Statistical Office (https://www.ine.es). Data are shown only for the first, last, and those years in which the percentage of Muslims has changed.

So-called supply-side (or top-down) theories argue that the supply of religious organizations in society explains the evolution of trends in the religious population better than does religious demand.[63] Whereas "theories of religion originally focused on the demand for religion (e.g., preferences of religious consumers)," supply-side theories "propose to look at the suppliers of religion (e.g., churches) and the market conditions for the religious supply."[64] Supply-side theorists like Rodney Stark, Roger Finke, and Laurence R. Iannacone have argued that demand for religiosity is constant and, therefore, variations are the result of the supply of religious organizations in religious markets. Consequently, modernization does not necessarily entail less religiosity. Pointing to the increase in religiosity in some secular states (for example, the rise of Evangelicalism in Latin America, New Age movements in Europe, and the expansion of Christianity in China),[65] these theories state that religiosity has been increasing worldwide.[66] In those countries where it is not, the cause is not modernization but an absence of competition between religious organizations, which leaves the religious needs of society "unmet."[67] In short, religious pluralism is the key element that fosters religious participation. Therefore, the main premise, which is antithetical to the theories of secularization, is that the popular demand for religiosity is constant, and even in modern societies, humanity has a need for religion that modernity does not prevent.

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63 See, for example, Rodney Stark & Roger Finke, *Acts of Faith: Explaining the Human Side of Religion* (Berkley: University of California Press, 2000); Rodney Stark, "Secularization, RIP", 60(3) *Sociology of Religion* (1999), 249–273; Roger Finke & Laurence R. Iannacone, "The Illusion of Shifting Demand: Supply-Side Explanations for Trends and Change in the American Religious Marketplace", 527 *Annals of the American Association of Political and Social Science* (1997), 27–39; Rodney Stark & Laurence R. Iannacone, "A Supply-Side Reinterpretation of the 'secularization' of Europe", 33(3) *Journal for the Scientific Study of Religion* (1994), 230–252; R. Stephen Warner, "Work in Progress toward a New Paradigm in the Sociology of Religion", 98(5) *Amercian Journal of Sociology* (1993), 1044–1093; Roger Finke & Rodney Stark, *The Churching of America, 1776–1990* (New Brunswick: The University of Rutgers Press, 1992); Rodney Stark & Willian S. Bainbridge, *A Theory of Religion* (New York: Peter Lang, 1987).

64 Jens Köhrsen, "Supply-Side Theory", in Adam Possamai & Anthony J. Blasi (eds.), *The SAGE Encyclopedia of the Sociology of Religion* (SAGE Publications, 2020), 822–823.

65 See, for example, Rodney Stark & Xiuhua Wang, *A Star in the East: The Rise of Christianity in China* (West Conshohocken: Templeton Press, 2016).

66 As it has been accurately noted, religion has resurged in our century. See, for example, Monica Duffy Toft, Daniel Philpott, & Timothy Samuel Shah, *God's Century: Resurgent Religion and Global Politics* (New York: W. W. Norton & Company, 2011).

67 Stark & Finke, *supra* note 63, at 171.

What would it take to apply these supply-side theories to Spain? It would entail advocating the elimination of the monopolistic privileges of the Catholic Church, putting its legal status on a par with that of all other religions.[68] In other words, the above-mentioned privileges enjoyed by the Catholic Church would have to be eliminated or those of other religious organizations increased to bring them into line with those of the Catholic Church. The legal mechanisms available to achieve this end include, for example, the abrogation (*denuncia*) of the Agreements with the Holy See.[69] Thus, the Spanish State should negotiate a new agreement with the Holy See, similar to those of 1992, if these supply-side theories are to be implemented.[70]

According to supply-side theories, religious consumption in Spain could be stimulated by greater competition between religious groups. In the current situation, as noted, there are different levels of state cooperation with religious denominations, which hampers perfect competition between religions. This leads to a reduction in religiosity, especially within the Catholic Church, which has the most privileged position. As religious demand is always constant, Spanish society seeks new forms of religiosity outside the Catholic Church. This logic would explain the increase in new non-religious spiritual forms such as mindfulness and the practice of yoga.[71]

The thesis of religious appeal in a competitive religious market finds it difficult to explain religious popularity in states with strong, almost monopolistic, religious organizations (e.g., the Roman Catholic Church in Ireland or Poland)[72] or established churches (e.g., Switzerland).[73] Nor does the

68 For a recent call in this regard, see Alejandro Torres Gutiérrez (ed.), *White Paper on the Statute of Religious Confessions without a Cooperation Agreement in Spain* (Madrid: Tirant lo Blanch, 2022) (Spanish).

69 Every time a general election approaches in Spain, left-wing parties incorporate in their programs the denunciation, non-application, or modification of the Agreements between the Spanish State and the Holy See. See Ricardo García García, "Agreements between the Holy See and the Spanish State. Some Considerations About Its Practical Application After More Than Forty Years of Validity", 11 *Anuario de Derecho Canónico* (2022), 53 (Spanish).

70 For an analysis of the situation of the Catholic Church in Spain if the current Agreements were to be denounced, see Joaquín Mariano Mantecón Sancho, "Spain: What if the Agreements with the Holy See were Denounced?", 39 *Revista General de Derecho Canónico y Derecho Eclesiástico Del Estado* (2015) (Spanish).

71 Instituto Sondea, *First Study on the Practice of Yoga in Spain* (2014). Retrieved 31 July 2023, https://docplayer.es/7704874-Primer-estudio-sobre-la-practica-de-yoga-en-espana.html (Spanish).

72 Anna Grzymala-Busse, *Nations Under God* (Princeton and Oxford: Princeton University Press, 2015).

73 Stolz Jörg & Christophe Monnot, "Does Establishment Suppress the Political Activities of Religious Congregations? Evidence from Switzerland", 13(1) *Politics and Religion* (2020), 28–56.

historical data in Spain necessarily support this supply-side logic because,[74] at times, when the Spanish State has carried out processes of *demonopolization* of the Catholic Church, the religious trend in the case of Catholicism has continued to decline.[75] Thus, after some of the privileges of the Catholic Church had been eliminated, the number of Catholics has not increased. Therefore, the explanation for the decline of Catholicism in Spain appears to involve many more variables. Nevertheless, the present article considers these supply-side theories because they could explain an increase in religiosity in Spain in the coming decades.

In conclusion, a possible rise of religiosity in Spain in the future could be explained by the increase of Islamic fundamentalists (Kaufman's demographic argument), the resurgence of Christianity or other religions due to religious appeal in competitive a market (the argument of Stark et al.), or other theories not covered in this article. The relevant fact for the model is that, from a theoretical point of view, there are well-constructed arguments according to which an increase in religiosity in Spain is possible in the coming decades.

3.2 *Possibility II: A Decrease in Religiosity in Spain*

The most representative theories that defend a reduction of religiosity in modern societies are the so-called secularization theories, which follow mainly a demand-side (or bottom-up) approach. Secularization theories argue that the more modern a society is, the less religious its population becomes. This approach conceives modernity as an interrelation between industrialization, urbanization, economic development, and high levels of education. The tradeoff between the rise of modernity and the decline of religion is the central claim of these theories, although there are different nuances between authors about the causes of this effect. The effect, however, is inevitable: "Reactionary forces may slow the decline, perhaps even reverse it for a time, but in the end, science and secularity will [win] out."[76]

Theories of secularization have changed over the years.[77] Initially, two main lines of thought were developed at the beginning of the 20th century. A first

74 One of the main counter-arguments to this criticism is that religion remains strong in states with a religious monopoly when it serves secular functions (e.g., national identity).

75 For example, after the signing of the Agreements in 1992 with the Protestant, Jewish, and Muslim denominations, or after the value-added tax (*Impuesto sobre el Valor Añadido*) imposed on the Catholic Church by former President José Luis Rodríguez Zapatero in 2006, the negative trend in the number of Catholics in Spain was not reversed.

76 Gorski, *supra* note 25, at 35.

77 For a review of the history of sociology of religions, see, for example, Efe Peker, "The Future of Religion and Secularity in Sociology's History", 52(3) *The American Sociologist* (2021), 591–609.

explanation, which understood religion as a mere system of beliefs, argued that a rational worldview based on empirical methods discourages religious beliefs.[78] A second perspective asserted that religion was not only a system of beliefs but also one of actions, religious groups playing a key role in providing social assistance and symbolic ceremonies (e.g., marriage). Therefore, with the development of a welfare state, which provides education, healthcare, and social policies, religion was no longer needed.[79] For this reason, not many societies have managed to maintain religion or other large-scale systems of cooperation when states have developed "institutions such as courts, police, and mechanisms for enforcing contracts."[80]

Thus, "the death of religion was the conventional wisdom in the social sciences during most of the twentieth century."[81] Nevertheless, religiosity has endured and even increased worldwide in recent decades, resulting in a great deal of academic criticism of secularization theories,[82] which have been partially reformulated in recent years. Authors such as Norris and Inglehart have pointed to an absence of human security as the crucial element for the success of religions, which provide a response to existential insecurity. This refers not only to physical security but also environmental risks, violations of human rights, terrorism, poverty, and humanitarian crises. When modern states successfully address these issues, religiosity declines. The US remains an exception, although if the effect of massive Hispanic immigration is removed, a significant movement toward secularization can be seen "even within the United States."[83] Nevertheless, the supposedly inevitable effect of modernization may not always be true for all the states. Some secularization theorists even admit that religion resists decline in modern states when it serves secular functions, such as maintaining national identity (e.g., Ireland or Poland) or bolsters immigrant identity (e.g., the US).[84]

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78 Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (London: Allen & Unwin, 1930).

79 Émile Durkheim, *The Elementary Forms of the Religious Life* (New York: Dover Publications, 2012).

80 Ara Norenzayan, *Big Gods: How Religion Transformed Cooperation and Conflict* (Princeton: Princeton University Press, 2013), 9.

81 Pippa Norris & Ronald Inglehart, *Sacred and Secular: Religion and Politics Worldwide* (Cambridge: Cambridge University Press, 2012), 3.

82 In addition to the well-known authors cited in note 63, see, for example, Peter L. Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (Garden City: Doubleday, 1967).

83 Norris & Inglehart, *supra* note 81, at 25.

84 Steve Bruce, *God Is Dead: Secularization in the West* (Oxford: Blackwell, 2002), 31; David Martin, *A General Theory of Secularization* (Oxford: Blackwell, 1978), 77.

In short, secularization theories predict a religious decline in modern societies such as Spain, but such a decline must be considered together with the consequences of demographic changes. Following Kaufman's argument, demographic changes and the intergenerational preservation of faith in families may produce more new religious followers than the secularizing effect of modernity can counterweight. This is the case in some developing countries, which are now more religious than ever owing to demographic trends.[85] Therefore, even if the premise of secularization theories that modernity entails a decline in religiosity is correct, in modern states like Spain the secularization effect of modernity must be strong enough to counteract the increase in religiosity resulting from immigration, intergenerational faith transmission, and higher fertility rates of religious families.

In the case of Spain, the religiosity of society has been declining despite the increase in the number of Muslims. This effect is due mainly to the decline in the number of Catholics. There was a rise in Catholicism during the Franco dictatorship (1939–1975), in a context of a fusion of religious and national identities within the framework of a confessional state,[86] but the number of Catholics has been in decline since the 1980s. According to the Spanish public research institute (*Centro de Investigaciones Sociológicas*), the percentage of Spaniards declaring themselves Catholic has progressively decreased from 90.5% in May 1978 to 54.2% in May 2023.[87] There is no evidence to suggest a change in this downward religious trend in the coming years.

4 Second Variable: The Capacity and Will of Religions to Influence Secular Law in Spain

Law is a mechanism of the political authority for regulating the social life of the polity. Some religions have an interest in influencing law, for example, to expand the number of their believers, improve their legal status, or encourage a certain morality. It is not uncommon to observe clashes of interest between the state and religions in shaping the law. Therefore, at times, the law constitutes a battlefield where different interests between these two actors

85 Norris & Inglehart, *supra* note 81, at 25.

86 Xosé Chao Rego, *Church and Francoism: 40 Years of National-Catholicism (1936–1976)* (A Coruña: TresCtres, 2007) (Spanish).

87 See last barometer available at the time of writing. CIS, *Barometer May 2023* (2023). Retrieved 31 July 2023, https://www.cis.es/cis/export/sites/default/-Archivos/Marginales/3400_3419/3405/es3405mar.pdf (Spanish).

clash, a circumstance that has been identified as a religious "lawfare."[88] Three approaches are possible to the relations between religions and the state in relation to the influence of religion on the law. First, a bottom-up approach where religions try to shape the law as a means of influencing society for a variety of reasons. John Comaroff noted that the law can be a "secular instrument by which civil society is to be remade in the image of the sacred."[89] Second, a cooperative approach where the state and the religions use the law to promote the same values, such as nationalism.[90] Third, a top-down approach where the law is used by the state to control and influence religions.[91] These dynamics are not mutually exclusive and can even occur at the same time. The model includes only the first two approaches, which concern the religious influence on the law, leaving out the third one, which is not relevant to the present study. Admittedly, the influence of the state on the law may be important in the long term as it may foster a certain attitude of religions toward the state (e.g., in reaction to a hostile attitude of the state towards them), but this second-generation effect is outside the scope of the model.

4.1 *Possibility I: Religious Influence on Spanish Law*

In Spain, Catholicism has exercised great influence on secular law for centuries.[92] The law became secular only after the separation of Church and State, in the 19th and 20th centuries.[93] After several ups and downs, Spain reached its current state of secularity with the Spanish Constitution of 1978, as explained above. Before that time, during different periods, the Catholic Church had institutional access to the law-making process and profoundly affected the law. But in the current liberal constitutional system, neither the Spanish Catholic Church nor any other denomination has direct access to the law-making process. Consequently, today religions shape the law by less

88 See, for example, Kari Telle, "Faith on Trial: Blasphemy and 'lawfare' in Indonesia", 83(2) *Journal of Anthropology* (2018), 371–391.

89 John Comaroff, "Reflections on the Rise of Legal Theology: Law and Religion in the Twenty-First Century", 53(1) *Social Analysis* (2009), 202.

90 See, for example, Jeremy Menchik, "Productive Intolerance: Godly Nationalismm in Indonesia", 53(3) *Comparative Case Studies in Society and History* (2014), 591–621.

91 Jothie Rajah, "Policing Religion", in *Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore* (Cambridge: Cambridge University Press, 2013).

92 For an overview of the history of church-state relations in Spain, see Josep Ignasi Saranyana, "Religious Freedom In Spain From The Year 589 To 1978: Historical-Legal Considerations On The Relations Between The Civil Power And The Ecclesiastical Power", 14(1) *Kirchliche Zeitgeschichte* (2001), 123–134 (Spanish).

93 See, for example, Gloria M. Moran, "The Spanish System of Church and State", 1995(2) *BYU Law Review* (1995), 535–537.

direct means, such as using moral authority to lobby and campaign for change through social mobilization.

The abortion laws of 2009 and 2015 are a good example. These two cases show how the Catholic Church used its still significant moral authority to influence the law.[94] This moral authority, which remains a powerful mechanism of religious influence, was exercised through various means such as applying personal pressure on lawmakers (e.g., by threats of excommunication) or popular pressure (the mobilization of Catholics through mass demonstrations). In this case, the law was conceived as a mechanism for religion to extend ostensibly universal ethics, opposing the state rather than cooperating with it.

In the first decade of the 2000s, the Catholic Church continued to enjoy great moral authority and recognition in Spanish society, albeit with increasing opposition from some sectors. In 2009, a controversial law that sought to broaden the scope of abortion (e.g., by recognizing abortion without limitations during the first fourteen weeks) was introduced in Parliament. The Spanish Socialist Party (*Partido Socialista Obrero Español*) was in power and a left-wing majority controlled Parliament. But the Catholic Church did not remain silent and began to mobilize. It organized demonstrations and mass prayers against the new abortion law.[95] Yet, these initiatives did not seem to be enough and the law had a good chance of being approved. Therefore, a few days before Parliament voted on the law, the secretary-general and spokesperson of the Spanish Episcopal Conference, Bishop Juan Antonio Martínez Camino, reaffirmed in a public lecture at the CEU San Pablo University what several bishops had been saying for months: the MPs who supported the abortion law would become public sinners and, therefore, would not be able to receive Holy Communion.[96] Moreover, if they promoted the idea that abortion

94 For an in-depth study of this case, see Maggy Boone, "The Authority of the Catholic Church on Abortion Legislation: The Catholic Church's Influence on the Abortion Law in Spain through Political Party Influence and Its Competition with the Rising Feminist Movement" (University of North Carolina, 2012).

95 "Massive Outcry In Madrid Against Abortion". 2009. *El Mundo*. Retrieved 31 July 2023, elmundo.es/elmundo/2009/10/17/espana/1255750564.html (Spanish).

96 The current situation in the US is noteworthy in this regard, as the possibility of not granting Holy Communion to politicians who publicly support abortion is a hot topic discussed by the US bishops, in particular, in relation to the situation of President Joe Biden, an avowed Catholic. At its Spring General Assembly held on July 16–18, 2021, the United States Conference of Catholic Bishops (constituted by all Catholic bishops in the US and the US Virgin Islands) approved the preparation of a formal statement on this issue by the Committee on Doctrine. This action item was passed with 168 votes in favor, 55 against, and 6 abstentions. See "U.S. Bishops Approve Action Items on Their Agenda at the Spring General Assembly". 2021. *United States Conference of Catholic Bishops*. Retrieved 31 Jul. 2023, usccb.org/news/2021/us-bishops-approve-action-items-their-agenda-spring-general-assembly.

was compatible with Catholicism, they would be committing heresy and would consequently be automatically excommunicated[97] (*latae sententiae* excommunication).[98]

Despite these efforts, the law was passed in December 2009, and it entered into force in 2010.[99] Still, the Catholic Church in Spain did not give up. When a new liberal-conservative government led by the Popular Party (*Partido Popular*) was elected by a new Parliament with a right-wing majority, in 2011, the Church restarted its campaign against abortion. A demonstration under the motto "For the right to life, zero abortion," promoted by the Church and other actors, was held in 2012.[100] Finally, a new abortion law was passed in 2015, which introduced some modifications such as a requirement for parental authorization for minors.[101]

The influence of the Catholic Church on the 2009 law was quite clear because in its absence the abortion law would most likely have been even more permissive. The influence of Catholicism on the 2015 law is also explicit as the ideology of the liberal-conservative party that drafted the law is partially defined by Catholic doctrine.[102]

4.2 *Possibility 11: No Influence of Religions on Spanish Law*

The other possibility concerning this variable is that secular law is unaffected by religion, in which case the secular character of the law would then remain neutral or increase. This could occur mainly for two reasons: lack of capacity or lack of will on the part of the religious community. Some explanations for its lack of capacity could be that religions are not socially relevant enough to exert such influence or that religions compete with each other rather than cooperate

97 "Bishops Warn That Politician Who Supports Abortion Will Not Be Able To Receive Communion". 2009. *El Mundo*. Retrieved 31 July 2023, elmundo.es/elmundo/2009/11/11/espana/1257948585.html (Spanish).

98 For a recent study on the canonical status of penalties of this type, see José Luis Sánchez-Girón Renedo, "Analysis of the Canonical Situation Involved by Undeclared 'latae Sententiae' Penalties", 95(375) *Estudios Eclesiásticos* (2020), 881–911 (Spanish).

99 *Organic Law 2/2010, of March 3, on sexual and reproductive health and the voluntary interruption of pregnancy*, Madrid, 2010, BOE no. 55 (Spanish).

100 "March Against Abortion In Madrid". 2012. *El País*. Retrieved 31 July 2023, https://elpais.com/sociedad/2012/10/07/actualidad/1349615109_138471.html (Spanish).

101 *Organic Law 11/2015, of September 21, to reinforce the protection of minors and women with judicially modified capacity in the voluntary interruption of pregnancy*, Madrid, 2015, BOE no. 227 (Spanish).

102 Another area where the Catholic Church still exercises great influence is gender policy. See Emanuela Lombardo, "The Influence of the Catholic Church on Spanish Political Debates on Gender Policy (1996–2004)", in Kari Elisabeth Borrese & SARA Cabibbo (eds.) *Gender, Religion, Human Rights in Europe* (Rome: Herder, 2006).

to maintain a common position vis-à-vis the state and thus influence the law. Regarding the lack of will, although religions may have the capacity or power to influence the law, they may not be interested in doing so because they do not intend, for example, to implement their ethical views, proselytize, or improve their legal status. However, this present article does not examine this possibility in depth as there is precisely no influence. Therefore, it is sufficient to consider the theoretical possibility that religions do not influence secular law either because they cannot or because it is not in their interest to do so.

5 Resulting Scenarios: Four Possible Futures for Secular Law in Spain

5.1 *Scenario I: Religious Aggrandizement*

"Religious aggrandizement" refers to a case in which a growing religious population seeks to shape the law according to religious worldviews. The religious population has therefore an invasive approach toward secular law to achieve different types of goals, such as influencing the morality of society (e.g., abortion laws), generating faith through the law (e.g., religious education in public schools), or trying to improve the legal status of the religious denomination (e.g., tax benefits). Under this scenario, both the religiosity of the population in demographic terms and its influence on the law are boosted.

In Spain, this scenario is possible under certain conditions. In particular, religious aggrandizement is more likely to happen if there is (a) a majority religious group with (b) a relatively homogeneous doctrine, (c) a unified representative institution, and (d) the will to influence the law. This is the case of Catholicism, a shrinking religion that is losing influence, or of Islam, if certain conditions, such as the demographic expansion predicted by Kaufman and the four mentioned characteristics obtain in the future. The four elements would give the religious denomination a strong position vis-à-vis the state, in which case, religion could exert a strong influence on the law through its moral authority.[103] This would enjoy widespread social support, and could put pressure on the legislature through demonstrations, personal pressure on lawmakers, the creation of a new political party with a robust religious affiliation, the influence on an established party, or similar strategies. All these circumstances would tend to undermine the secularity of Spanish law, as religion would become a parameter of the justice of the law and a clear source of inspiration for its provisions. Moreover, the majority religious group could influence the law in ways that would create rules that directly benefit

103 For a similar argument applied to Ireland or Poland, see Grzymala-Busse, *supra* note 72.

that group, denying such prerogatives to other religious groups. This would be the case, for example, if the majority religion were granted the right to include its religion instruction in the state school system, but other religions were prohibited from doing so.[104]

A different scenario is one in which society is religious but the distribution of the religious population is homogeneous among several religions. In other words, a scenario in which there is no predominant majority religion in Spain but several religions of a similar size. In this case, religious influence on the law could also occur, provided that religions know how to coexist and cooperate, although only the lowest common denominator of their different religious doctrines could have an impact on the law. That is, religions would have to agree on which shared core issues they would lobby on and subsequently exert religious influence on the law through one of the mechanisms outlined above (e.g., mass demonstrations convened by different religions on a cross-religion issue, such as the rejection of euthanasia, abortion or some LGTB-related policies).

5.2 *Scenario II: Religious Secularization*

"Religious secularization" refers to a scenario in which there is an increase in religiosity due to an expansion of a particular vision of religion fully compatible with secularity. In other words, there is a large, increasing religious population that is highly committed to secular law. The religious population increases, although religions do not seek to shape the law to achieve different goals such as implementing their ethical vision. This could be, for example, because their religious worldview admits that the logic of the state should be different from that of religion (the principle of church-state separation), or because the growing religion is not interested in shaping the law to, for example, convert new people[105] or influence the morality of society.

Another possibility for this scenario, consistent with the second variable of the model, is not related to unwillingness to shape the law but to the inability to do so. This is the scenario in which religiosity increases in Spain as a result of the expansion of small groups of religious followers who do not accept secularity (e.g., Islamic fundamentalists), and religious followers who do accept secularity remain stable or decrease to a lesser extent than the increase of the

104 Currently religions other than Catholicism are allowed to teach the subject of religion in state schools in Spain. For example, there were 76 Muslim religion teachers hired by regional governments (*Comunidades Autónomas*, which are competent to do so) in Spain in 2019. See "Estudio Demográfico de La Población Musulmana", *supra* note 60.

105 An example of a religion that is generally not interested in proselytizing is Judaism. See, for example, Samuel Lebens, "Proselytism as Epistemic Violence: A Jewish Approach to the Ethics of Religious Persuasion", 104(3) *The Monist* (2021), 376–392.

activist religious groups. In this scenario, the small religious groups compete with each other or there are several competing factions within the majority religious group. If these religious groups or subgroups fail to cooperate with each other and are not able to achieve a strong position from which to influence the law, secularity is maintained because of weak religious influence on it. Secularity may even be strengthened as a reaction of lawmakers and society at large against religious groups that do not accept the secular division and try to undermine this principle of the separation of Church and State.

5.3 *Scenario III: Religious Backlash*

"Religious backlash" refers to a scenario in which the overall religious population decreases, but there are increasing religious minorities that manage to influence the law and undermine its secularity. This scenario produces enormous anxiety in some sectors of the population in Spain, such as some traditional Catholics, who understand that while the majority religion is in decline, certain minorities (e.g., Islamic fundamentalists), because of minority-majority dynamics, can end up exerting influence on the law in the future, incorporating provisions contrary to the majority ethic of Catholicism or equating the legal status of minority denominations to that of the Catholic Church.

In some circumstances, when levels of religiosity decline, those who remain religious tend to hold the most traditional views. For example, in some states where religions are persecuted, persecution served "as a potent selection mechanism." Moderate faith does "not generate the level of commitment needed to hold onto one's faith in the face of considerable personal risk,"[106] and those who remain loyal to the persecuted religion tend to have, at least in some cases, a strong religious worldview.[107] According to secularization theories, in states where religions are not persecuted, as Spain, modernity can discourage moderate religiosity. If one's religion is not deeply rooted in one's belief system or does not generate a clear utility, it is quite likely that when the mainstream is not religious or even hostile toward religion, that person will end up succumbing to the mainstream. And although the number of religious people in Spain is decreasing, a religious minority with strong religious principles can survive and even expand. Kaufman applied this idea to Islamic

106 Stark & Wang, *supra* note 65, at 72.

107 Having a strong religious worldview in the midst of persecution does not imply an absence of pragmatism and wisdom in dealing with difficulties. See Daniel Philpott & Timothy Samuel Shah, *Under Caesar's Sword: How Christians Respond to Persecution* (Cambridge and New York: Cambridge University Press, 2018).

fundamentalists and noted that if a radical religious worldview offers a clear alternative to modernity, "moderate religion strikes many as redundant. Either you believe the stuff or you don't. If you do, it makes sense to go for the real thing, which takes a firm stand against godlessness."[108] Therefore, the outcome in this scenario is a less religious society overall but containing small groups with strong religious views, such as Islamic fundamentalists.

Minorities with radical religious worldviews can undermine secular law and impose their preferences. According to Nassim Taleb, if a small percentage of the population (3% or 4%) maintains its preferences with a certain level of intolerance, and the majority of the population is flexible and not directly opposed to these preferences, the whole of society is subjected to the demands of these minorities. For this reason, he argued, in New England (US) all drinks are made in accordance with the rules of kashrut although Jews are a minority there and Europe will soon eat only halal meat.[109] The logic behind the argument is that companies will end up slaughtering livestock according to the halal method because it pleases Muslims and non-Muslims are indifferent to it, and in some cases, it will be cheaper for companies to follow one production method rather than two different processes. This *de facto* situation can be translated into law by lobbyists.[110] This thesis is hotly contested, however. Some authors have argued that the aforementioned tipping point required to shift the preferences of society is much higher (e.g., around 25%),[111] and that the conditions will never be in place for such a dynamic (e.g., meat is an increasingly elastic product and companies will not be interested in applying a halal standard to all their products, which would increase their price).

Beyond the influence it may exert on the population and on businesses, a religious minority with radical convictions opposed to the principle of church-state separation can influence the law by imposing the preferences of the minority on the majority. This is the case, for example, if a political party in Parliament represents a radical religious minority and increasingly influences the legislative process, undermining the secularity of the state with laws inspired by the minority's radical approach to religion. This is possible

108 Kaufman, *supra* note 55, at xvii.

109 Nassim N. Taleb, *Skin in the Game: Hidden Asymmetries in Daily Life* (New York: Random House, 2018), 69–93.

110 This logic, applied to EU standards globally, has been developed by Anu Bradford under the name of "the Brussels effect." See Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (New York: Oxford University Press, 2020); Anu Bradford, "The Brussels Effect", 107(1) *Northwestern University Law Review* (2012), 1–68.

111 Damon Centola et al., "Experimental Evidence for Tipping Points in Social Convention", 360(6393) *Science* (2018), 1116–1119.

either because of the indifference of the majority political parties to such amendments (whipping is part of the Spanish parliamentary system, therefore MPs are rarely allowed to decide how they vote), or because of the fear of these majority political parties of being labeled discriminatory toward minorities. Opposition to minority preferences may be understood as an intolerant attitude, attacking precisely the principle of tolerance that the Spanish State advocates, illustrating Popper's paradox of tolerance.[112]

5.4 *Scenario IV: Religious Diminishment (or Retrenchment)*

"Religious diminishment" refers to a scenario in which a decline in the number of religious followers, together with a loss of capacity or willingness of religious groups to influence law-making, makes the role of religion in politics less and less relevant. As the religious population declines, religious groups, and especially institutions, lose social relevance and their influence on law-making is weakened. Without religious pressure on the law-making process, and facing an increasingly less religious society, future law will be less and less influenced by religions and current law will be amended to equalize or reduce the benefits of religious denominations, especially those of the majority religion (Catholicism). Legislators will not have to meet societal demands for laws inspired by religious groups because the number of voters with religious beliefs will have decreased and the number of religious lawmakers will presumably fall.

In Spain, if the number of Catholics continues to decline, the Church will lose social relevance and its ability to influence laws will be diminished with dwindling social support. Even if the Church retained a high degree of moral authority in a society with diminishing religiosity, its ability to exercise its influence will diminish because the Church will lack the means to project its moral authority. For example, it will no longer be able to mobilize masses of people for demonstrations to put pressure on lawmakers. Under this scenario, the number of believers of other religious denominations will also decrease, remain constant, or even grow but not sufficiently to make up for the decline in Catholicism, and they will not be able to exert a substantial influence on the law.

6 Conclusion

The present article discussed how the evolution of religiosity can influence secular law in Spain, given the inevitable interaction between religion and law

112 Karl Popper, *The Open Society and Its Enemies* (London: Routledge, 2012).

within the framework of a liberal constitutional system such as the Spanish one. A model with two variables has been presented, where the four resulting scenarios depend on the possibility of an increase or decrease in the religious population in Spain (first variable), and the capacity and will of religions to influence the law (second variable). Religions may have diverse reasons to influence the law, such as the desire to exercise moral authority by several means (e.g., social dominance, collaboration, or aggression) to achieve various goals (e.g., influence morality, increase the number of believers, or improve the legal status of the religious denomination).

The two variables produce four possible scenarios: religious aggrandizement, religious secularization, religious backlash, and religious diminishment. I believe that in the medium term, the most likely scenario is the fourth: overall, Spanish society will become less and less religious and the law more and more secular. I believe that the number of Catholics will continue to decrease and their ability to influence the law, managed mostly by the Church, will diminish, as will the privileged legal status of the Catholic Church in relation to other religious denominations. But some religious minorities, mainly, Moslems, will grow and may come to exert some influence. They may be able to have some of their claims recognized by law, possibly in the area of family law,[113] given the minority-majority dynamics described in the third scenario.

The model provides a framework for scholars, lawmakers, and policymakers to counteract deterministic positions. Given that, from a theoretical perspective, there are more possible future scenarios than the two intuitive ones (that an increase in religiosity in Spain will undermine secular law or that, conversely, a decrease in religiosity will imply a strengthening of secular law), the model creates an opportunity to legislate and develop policies with a broader horizon. For example, the model encourages law and policymakers to develop religious inclusion measures without fearing that such policies will lead to an expansion of religiosity that necessarily implies undermining secular law in Spain (e.g., an increase in Islamic fundamentalism). The model also warns against religion being sidelined by legal and policy design because of the belief that religions are no longer important. Even if the total number of religious adherents continues to decline, a neglected religious minority can become radicalized and end up undermining secular law in the face of the passivity of the majority. The model is, therefore, useful for the entire political spectrum in Spain and worldwide, as it helps both the religious and secular sides to qualify their positions and to take into account some of the possible implications of

113 For example, the legal recognition of inheritance rights of all spouses of polygamous marriages celebrated outside Spanish borders.

their political and legislative agendas. The part of the secular left that is condescending toward Islam should bear in mind that, even under circumstances of a declining total religious population given the retrenchment of the majority religion, a radical minority religious group could undermine the secularity of the law. The part of the right that adopts a hard line against policies of religious inclusion to prevent the Spanish State from becoming Islamized should bear in mind that socio-economically isolating religious minorities can generate precisely the opposite effect: fanaticism can lead to Islamization. The key policy for maintaining the secular character of Spanish law is to encourage adherents of religion to adopt a worldview compatible with secularity (e.g., by making sure that this condition is met by the contents of the subject of religion taught in schools), as it is possible to have a religious society in a secular state.

The model presented here is limited, which is a consequence of the simplicity required for a model to be useful. There may be more reasons for an increase or decrease in religiosity in Spain and more mechanisms of religious influence over law that have not been presented in this article (e.g., the religious background of lawmakers or the intervention of religious institutions or people through litigation).[114] Consequently, the different ways in which one of the four resulting scenarios can be arrived at are almost infinite, as are the mixed scenarios that can arise. However, it was not the aim of this article to analyse the pathways, but rather to present a model that captures the possible general trajectories of the future of Spanish secular law. I hope that the article has contributed to that goal.

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114 Loane Skene & Malcom Parker, "The Role of the Church in Developing the Law", 28(4) *Journal of Medical Ethics* (2002), 215–218.