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RELIGIOUS SYMBOLS IN EUROPEAN PUBLIC SCHOOLS: THE DIFFICULT BALANCE BETWEEN SECULARISM AND RELIGIOUS FREEDOM*

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1. *Introduction*

The complexity of contemporary Europe presents many challenges at different levels. Religious diversity, while being an important part of social landscapes, represents a source of tensions and conflicts between individuals, groups, and sometimes between individuals and groups on one side and institutions on the other; the judicial system, both at national and at supranational level, is often called upon to resolve these conflicts. Governments may impose restrictions on religious practices, or at the opposite they may endorse one particular religion in a way that secularists or followers of other creeds may consider as leading to violations of their own rights. The debate about the role of religion in the public sphere intersects with the debate about the relations between State and religions. In this paper we will focus on a specific topic within this wide field, i.e. the use of religious symbols in European public schools. National courts of European countries have had to settle disputes about the display of symbols of the dominant religious tradition inside school premises, and about the use of religious symbols or dresses by pupils or teachers where these are banned by laws or regulations. Some cases reached the highest appellate or constitutional courts of European countries, stirring up lively political debates; we will present some of these cases, showing the different contexts and approaches followed by national jurisdictions. Other cases about the use of religious symbols in public schools, where applicants claimed violation of rights and guarantees set out in the European Convention on Human Right (ECHR) or its

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Protocols, reached the European Court of Human Rights (ECHR Court). We will provide a review of these cases, especially focusing on the principle of subsidiarity and the margin of appreciation doctrine as tools allowing the ECHR Court to set a balance between the right to display religious symbols and other legitimate interests; and to set a balance between the right of parents to respect for their religious and philosophical convictions, and the interests of the community as a whole.

2. *Religious symbols in Italian schools: the Montagnana and Smith cases*

The exhibition of religious symbols in public educational spaces in Italy started in the fascist era, when the religious sentiment of the majority of Italian citizens was exploited for political power[1] and the fascist regime restored some of the privileges that the Catholic Church had before the unification of Italy. Between 1924 and 1938 several laws and decrees damaging the rights of religious minorities were adopted; in particular the Law n.1159 of 24 June 1929 and the Royal Decree n.289 of 28 February 1930 on "admitted cults", that affected the Jewish community, also dramatically impacted by the "racial laws" of 1938.

The presence of the crucifix in public institutional spaces like schools, hospitals and courtrooms is also founded on the post-war Constitution of 1 January 1948, that giving pivotal importance to personal and collective freedom incorporated the recognition of the right to religious freedom for every confession, considering religious freedom as an inviolable right of each individual, not just of Italian citizens[2]. However, the Constitution and various judgments of the Constitutional Court that reaffirmed the centrality of the principle of State secularism for the constitutional order[3] did not manage to cancel the effects of the laws, regulations, agreement and compromises on the topic of religious freedom issued during the Fascist period.

With sentence n. 195 of 1993 the Constitutional Court clarified that the principle of secularity must guarantee the equal treatment of all religious confessions[4], and with sentence n. 334 of 1996[5] it defined that principle in the sense of a mere *non-denominationality* of the State; subsequently, with sentence n. 235 of 1997[6] and again with sentence n. 508 of 2000[7] it defined the principle of secularity as *religious neutrality* obliging the State to be *equidistant* from all religious confessions. In spite of these orientations, the removal of religious symbols from public spaces in Italy to respect the principle of secularity of the State seems a difficult goal to achieve.

In 1994 Mr. Montagnana, a scrutineer in Cuneo during the operations for the parliamentary elections refused to take position because of the presence of the crucifix in the polling station; this was not considered a valid justification and he was sentenced by the Pretore of Cuneo to a fine[8]. The appellate Court of Cassazione cancelled the sentence[9], recognizing that refusing to take the

[1] P. CONSORTI, *Diritto e religione*, Bari-Roma 2014, 14.
[2] Ibid.
[3] *Ex plurimis*, Corte cost., 12 April 1989 n. 203; Corte cost., 14 January 1991 n. 13; Corte cost., 20 November 2000 n. 508.
[4] Corte cost., 27 April 1993 n. 195.
[5] Corte cost., 8 October 1996 n. 334.
[6] Corte cost., 15 July 1997 n. 235.
[7] Corte cost., 20 November 2000 n. 508.
[8] App. Torino, 28 April 1999.
[9] Cass. pen., sez. IV, 1 March 2000 n. 439.

office of scrutineer, president or secretary of the polling station in presence of religious symbols is justified when motivated by freedom of conscience.

In 2003 Mr. Adel Smith, the president of the small radical association *Unione dei Musulmani d'Italia* (Union of Italian Muslims), father of two children attending a school in the town of Ofena, asked the removal of the crucifix from the walls of the classes, complaining that the presence of that symbol represented a violation of the religious freedom and was in contrast with the principle of secularity as affirmed by judgment No. 203 of 1989. The Court of first instance ordered the removal of the crucifix as a precautionary measure, pending the trial[10]. The school and the Ministry of education appealed the measure, and the first-degree ruling was reversed as the same court declared itself to be in lack of jurisdiction, being the case of competence of an administrative and not an ordinary court[11]. The reversal was confirmed by the appellate Court of Cassazione[12].

In another instance, in 2014 it was the school director of an elementary school in the town of Bertinoro that did not allow the local parish priest to perform the traditional Easter blessing inside the institution, considering the ritual to be inappropriate for a public school[13].

The issue of religious symbols in public spaces raised many parliamentary debates; between the many directly recalling the Montagnana case, we can remember the 1996 parliamentary question by senators Tana De Zulueta, Alfonso Mele and of Carlo Debenedetti or the 2000 parliamentary question by several senators of the green party. These episodes show how the exhibition of religious symbols in public spaces became an important topic in Italian media and public debate.

3. *The German "Crucifix Case"*

The German case about the Bavarian law mandating crucifixes or crosses in state schools is particularly relevant for the theme we are dealing with in this paper. In 1995 the German Federal Constitutional Court declared the 1983 School Regulations for Elementary Schools in Bavaria to be incompatible with the German Basic Law[14]. The case originated from a parent complaining about the presence in his 11-year-old daughter's classroom of a 60 cm high crucifix. After the parent's protests the school replaced the crucifix with a smaller cross, but as his children subsequently changed classes and schools, new similar compromises had to be made and finally in 1991 the child's parents brought action against the State of Bavaria. The Bavarian administrative court refused the request for a temporary order of removal of the crosses pending the main case; at the same time the Higher Administrative Court rejected the appeal against this refusal, so the applicant resorted to the Constitutional Court against this ruling.

In its ruling of 16 May 1995, the Court recognized that the presence of crosses or crucifixes in non-denominational public school violates the inviolable freedom of faith and conscience as enshrined in art. 4 of the Basic Law, and so voided the article of the Bavarian School Regulations

[10] Trib. Aquila, 22 October 2003 ordinance n. 1383, in *https://www.uaar.it/uaar/campagne/scrocifiggiamo/25.pdf*
[11] Trib. Aquila, 19 November 2003, in *https://www.olir.it/documenti/ordinanza-19-novembre-2003/*
[12] Cass. civ, sez. un., 10 July 2006 n.15614.
[13] *Benedizioni a scuola, a Forlì si faranno*, in *Romagna noi*, 9/04/2014, *http://www.romagnanoi.it/news/forli/1202608/Benedizioni-a-scuola--a-Forli.html*
[14] German Federal Constitutional Court, 16 May 1995, BvR 1087/91 in *BVerfGE* 93, 1.

mandating the presence of the cross. This is consistent with previous decisions of the German Federal Constitutional Court about freedom of conscience, like the 1973 ruling that allowed parties to administrative trials to request the removal of crucifixes from courtrooms[15]. The case originated from the request of a Jewish lawyer and client that were attending a trial before the administrative court in Düsseldorf to remove the crucifix present in the courtroom.

In the 1995 "Crucifix case" The Federal Constitutional Court recognized the cross not just as a mere expression of a Western culture partly marked by Christianity, but as the symbol of a specific religious conviction; at the same time, the State is not requested to totally abandon religious or philosophical references with regards to its educational mandate. The Court required from the State «the indispensable minimum of elements of compulsion» in using religious references, and recognized that the affixing of crosses in classrooms wen beyond that minimum.

4. *The Romanian CNCD Decision 323/2006*

Also relevant for this study is the Romanian case started from the request of Mr Moise, a philosophy teacher in the city of Buzău[16]. In 2005, when his daughter was attending high school, Mr. Moise took the County School Inspectorate to court, requesting the removal of religious symbols from the school's premises. The Buzău County Court rejected his request[17]; Moise appealed against the decision but the Ploiești Court of Appeals upheld the decision in July 2006[18].

After the appeal court's decision Moise made a request to the Romanian National Council for Combating Discrimination (CNCD) requesting the removal of religious symbols from his daughter's high school and from all public schools in the country. He pointed out that religious symbols were discriminating against non-believers and people with other religious beliefs than the one represented by that symbols. He received support from many associations backing his request with a letter to CNCD on November 2006, while the Secretary of State for Religious Affairs asked the CNCD to maintain the religious symbols in schools.

The CNCD decided[19] about Moise's complaint, asking the Ministry of Education and Research to elaborate and apply a regulation based on the respect of the secular character of the state and the autonomy of religion, and allowing the display of religious symbols only during religion classes or in spaces specifically reserved for the teaching of religion.

The CNCD decision prompted opposed reactions. Many Romanian non-governmental organizations and intellectuals supported the decision and signed a public petition to the government for a democratic and secular policy[20]. On the other side, representatives of different religious confessions defended the display of religious symbols in public spaces as protected by religious freedom. The strongest reaction came from the Romanian Orthodox Church that described the decision as unjustified and detrimental to religious freedom in a statement from the office of the

[15] German Federal Constitutional Court, 17 July 1973, BvR 308/69 in 35 *BVerfGE*, 366.
[16] For a complete presentation of the case including the responses to it, see G. HORVÁTH and R. BAKÓ, *Religious Icons in Romanian Schools*, in *Journal for the Study of Religions and Ideologies*, 2009, 8.24, 189-206.
[17] County Court Buzău, 27 March 2005, judgement n. 157.
[18] Appellate Court Ploiesti, 20 July 2006, ruling n. 1917.
[19] CNCD, 21 November 2006, decision n. 323.
[20] G. ANDREESCU, *Prezenţa Simbolurilor Religioase în Scolile Publice: o Bătălie Pentru Viitorul Învăţământului*, in *Noua Revistă de Drepturile Omului*, 2006, 2, 4.

Orthodox Patriarchate. A group of about 150 organizations founded the Coalition for the Observance of Religious Faith and appealed against the CNCD decision; on February 2007 the Ministry of Education appealed against the decision too, but this claim was rejected on June 2007 by the Bucharest Court of Justice[21]. However, with its decisions no. 2393/2008[22] the Romanian Supreme Court of Justice declared illegal the recommendations of the CNCD to the Ministry of Education and Research, and legitimated the use of religious symbols in Romanian schools The Romanian case caused a strong and polarized debate, and even if the first decisions went in the direction of secularization of public spaces, the final overturning of the CNCD decision showed how in predominantly orthodox Romania the will of the majority to express its cultural values overwhelmed the opposition of cultural minorities (in this case, atheists and agnostics).

5. *ECHR Court's cases v. France*

The cases so far described were decided in the contest of national jurisdictions. One country where the topic of religious symbols in school was widely discussed and raised many conflicts is France, especially after the 2004 law "on secularity and conspicuous religious symbols in schools" (law 2004-228 of 15 March 2004). This law, amending the French Code of Education, is based upon the secularist principle of separation of state and religious activities and bans the use in public primary and secondary schools of symbols or dresses showing religious affiliation. The law does not target specifically one kind of religious dress or symbol, but in the public opinion it has been criticized as disproportionately impacting Muslims, and the resulting controversy was labelled as the "headscarf affair". However, the controversy around religious dresses in French public schools originated at least in 1989, when the *Conseil d'Etat* delivered an opinion stating that the freedom of expression and manifestation of religious beliefs could be limited if «the signs of religious affiliation, by their 'ostentatious or protesting' character or by the conditions in which they were worn, constituted an act of pressure, provocation, proselytism or propaganda, jeopardised the dignity or freedom of the students wearing the signs or of other students or staff, compromised health or safety, disrupted teaching activities or disturbed order and the normal operation of the school»[23].

In 1994 the controversy was rekindled by a ministerial circular asking school principals to enforce secularism by inserting specific provisions against ostentatious religious signs in schools' internal regulations[24]. The resulting cases were often decided in favour of the students and about 85% of the expulsions were overturned by courts in 1996-1997[25].

Relevant cases following the law 2004-228 are *Dogru v. France*[26] and *Kervanci v. France*[27], where the applicants to the Strasbourg Court were French Muslim students who refused to take off

[21] Court of Justice Bucharest, 2007, sentence n. 1685.
[22] Supreme Court of Justice, 11 June 2008, decision n. 2393.
[23] See N. JONES, *Religious Freedom in a Secular Society: The Case of the Islamic Headscarf in France*, in AA. VV., *Freedom of Religion under Bills of Rights*, eds. P. Babie and N. Rochow, Adelaide 2012, 219.
[24] *Port de signes ostentatoires dans les établissements scolaires, in Bulletin officiel de l'Éducation nationale*, 1994, 35, 2528–9.
[25] N. JONES, *Religious Freedom* cit., 223.
[26] ECHR Court, sez. 5, 4 December 2008 Application n. 27058/05 in *http://hudoc.echr.coe.int/eng?i=001-90039*
[27] ECHR Court, sez. 5, 4 December 2008 Application n. 31645/04 in *http://hudoc.echr.coe.int/eng?i=001-90047*

their headscarves during physical education classes and were expelled from school. In both of these cases, the Court considered the decisions of the States to be justified under the principle of neutrality, and considered the French law compliant with earlier judgement by the Strasbourg Court requesting that « it was for the national authorities, in the exercise of their margin of appreciation, to take great care to ensure that, in keeping with the principle of respect for pluralism and the freedom of others, the manifestation by pupils of their religious beliefs on school premises did not take on the nature of an ostentatious act that would constitute a source of pressure and exclusion».

The arguments used by the Strasbourg Court in *Dogru v. France* and *Kervanci v. France* were used in other cases arising from the application of the law 2004-228: in particular, the cases Aktas v. France[28], Bayrak v. France[29], Gamaleddyn v. France[30], Ghazal v. France[31], J. Singh v. France[32] and R. Singh v. France[33]. The applicants were Muslim (Aktas, Bayrak, Gamaleddyn, Ghazal) and Sikh (J. Singh and R. Singh) pupils that were expelled from school for wearing religious symbols, violating the law 2004-228, at the beginning of the 2004-2005 school year. The Muslim girls were wearing headscarves (three of them tried also using bonnets in substitution of headscarves), while the Sikh boys wore a *keski* (a long piece of cloth used in substitution of a turban). The expulsion followed the pupils' refusal to comply with law 2004-228 removing their headdresses while on school premises. The students challenged the expulsions before French administrative courts, but on both first instance and appeal their applications were dismissed. Their applications to the ECHR Court were dismissed as inadmissible; the Court considered that the aim of protecting the constitutional principle of secularism inspiring the law 2004-228 was sufficient to justify the impugned measure[34].

6. *ECHR Court's cases v. Italy*

During the 2001-2002 school year Ms Soile Lautsi's husband raised the question of the presence of the crucifix in the classrooms during a meeting of the School Council of the Comprehensive State Institute "Vittorino da Feltre", attended by her two minor sons. The School Council rejected Ms Lautsi's husband request for crucifixes to be removed, so she appealed to the Veneto regional administrative court (TAR) on 23 July 2002, complaining that the School Council was violating the principles of secularism and neutrality of the State.

Just a few months after the appeal was filed the Italian Ministry of Education, University and Research issued (on 3 October 2002) a directive requesting school governors to guarantee the presence of the crucifix in classrooms[35]. On 30 October 2003 the Ministry joined the proceeding,

[28] ECHR Court, sez. 5, 30 June 2009 Application n. 43563/08 in *http://hudoc.echr.coe.int/eng?i=001-93697*
[29] ECHR Court, sez. 5, 30 June 2009 Application n. 14308/08 in *http://hudoc.echr.coe.int/eng?i=001-93698*
[30] ECHR Court, sez. 5, 30 June 2009 Application n. 18527/08 in *http://hudoc.echr.coe.int/eng?i=001-93699*
[31] ECHR Court, sez. 5, 30 June 2009 Application n. 29134/08 in *http://hudoc.echr.coe.int/eng?i=001-93700*
[32] ECHR Court, sez. 5, 30 June 2009 Application n. 27561/08 in *http://hudoc.echr.coe.int/eng?i=001-93702*
[33] ECHR Court, sez. 5, 30 June 2009 Application n. 25463/08 in *http://hudoc.echr.coe.int/eng?i=001-93701*
[34] ECHR Court, *Guide on Article 9 of the European Convention on Human Rights - Freedom of thought, conscience and religion*, 2019, 34
[35] Directive N. 2666 of 3 October 2002 of the Ministry of Education, University and Research.

arguing that Ms Lautsi request was not founded given that the presence of the crucifix in classrooms was essentially based on two royal decrees of 1924 and 1928[36].

The TAR suspended the judgement and referred the question to the Constitutional Court raising an issue of constitutional legitimacy. The Constitutional Court declared the question manifestly inadmissible on December 2004[37], because the provisions challenged were of a regulatory and not of a legislative nature, and so could not be subject to a review of constitutionality. The TAR on 17 March 2005 dismissed M. Lautsi's application ruling that the royal decrees of 1924 and 1928 were never in fact cancelled, and that the presence of the crucifix in the classrooms was not in contrast with the supreme principle of secularity of the State enshrined in Articles 7 and 8 of the Italian Republic Constitution. The Court claimed in particular that the crucifix was a symbol of the history and cultural identity of the Italian society[38].

Ms Lautsi appealed the Council of State (Italy's supreme administrative Court), and in 2006 that court pronounced itself in favour of the Italian government[39], confirming that the crucifix was not just a religious symbol but was to be considered an integral part of the secular values of the Constitutional Charter.

Having unsuccessfully brought the case to the Italian courts, on 27 November 2006 Ms Lautsi appealed the European Court of Human Rights, denouncing the violation of Article 2 of Protocol No. 1 concerning the right to Education, Article 9 of the European Convention on Human Rights about the freedom of thought, conscience and religion, and Article 14 of the Convention about the prohibition of discrimination[40]. The Court of Strasbourg unanimously decided that the compulsory display of crucifixes in Italian public schools was contrary to Article 9 of the Convention, violating the religious freedom of children and the right of parents to educate their children according to their beliefs[41]. Having detected the aforementioned violations, the Court condemned Italy pursuant to art. 41 of the Convention, to compensation of 5,000 Euros in favour of Ms Lautsi. This decision represented an historic turning point in the orientations of the court on this topic: previously the Court's attitude towards this topic had been more detached. The pronouncement of the Strasbourg judges stating that the crucifix could have been interpreted as a predominant religious sign stood in sharp contrast to the previous decisions of the Italian courts. The presence of the crucifix within educational institutions, in fact, was considered to be giving a religious connotation (especially linked to Catholicism) to the environment; this circumstance could, according to the Strasbourg Court, constitute an obstacle for non-believers and religious minorities.

The pronouncement by the ECHR Court provoked various reactions by the Italian public opinion, politicians and State officials. In some cases, politicians belonging to the extreme right-wing threatened Ms Lautsi. A former government minister went as far as to shout "death to these people!" during a Rai TV broadcast, referring to the applicant and her husband, and claiming that the ECHR Court as an institution was of no importance. The mayor of a Northern Italy city, also

[36] Art. 118 of Royal Decree 30 April 1924 n. 965 (Internal regulations of middle schools) and Article 119 of Royal Decree 26 April 1928 n. 1297 (Approval of the general regulations governing primary education).
[37] Corte cost., 25 December 2004 n. 389.
[38] TAR Veneto, 17 March 2005 n. 1110 in *https://www.federalismi.it/nv14/articolo-documento.cfm?artid=17806*
[39] Cons. Stato, sez.VI, 13 April 2006 n. 556, in *https://www.eius.it/giurisprudenza/2006/015*
[40] Content of art. 14: «The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status».
[41] ECHR Court, sez. 2, 3 November 2009 Application n. 30814/06 in *http://hudoc.echr.coe.int/eng?i=001-95589*

member of the European Parliament for the Northern League Party, expressed similar statements using racial insults[42]. Part of the reactions by the Italian political world and public opinion against the ECHR Court pronouncement can be understood as an identity response in a time characterized by terrorist acts committed by groups claiming religious motivations.

The case had international repercussions. For example, the Polish parliament (Sejm) passed a resolution on December 2009 disapproving the ECHR Court judgement, and officially inviting the parliaments of other member States of the Council of Europe to consider the protection of religious values as a mean to protect the common European heritage. The Lithuanian parliament (Seimas) joined the appeal of the Polish parliament with a declaration by its Committee on Foreign Affairs, stating that the ECHR Court judgement favoured the right of those against the use of symbols of religious culture in public spaces, restricting each country's right to regulate religious matters[43].

The Holy See promptly commented the decision of the Strasbourg Court: the spokesperson Eminence Federico Lombardi highlighted the special link between Christianity and European identity, claiming that «it seems as the Court wanted to ignore the role of Christianity in forming Europe's identity» and also stating that «it is astonishing then that a European court should intervene weightily in a matter profoundly linked to the historical, cultural and spiritual identity of the Italian people»: thus giving a strong political signal[44].

Other European Churches had similarly strong reactions: for example the Archbishop of the metropolitan city of Gdansk in Poland declared that «this is another attempt to rip God from the hearts of the people»[45]; with a declaration by Archbishop Ieronymos II, the Greek Orthodox Church condemned the decision of the Court for ignoring the role of Christianity in the formation of the European identity, and asked for an extraordinary synod of the Greek Orthodox Church to deal with the issue[46]. The Patriarch of Moscow and all Russia Kirill wrote a letter to the Italian Prime Minister Silvio Berlusconi, expressing «full and unconditional support» for the Italian decision to appeal the ECHR Court decision and stating that «the Christian heritage in Italy and other countries in Europe should not become a matter to be considered by European human rights institutions». According to the Patriarch, «European democracy must not incite Christianophobia, as the theomachist regimes did in the past»[47].

The Romanian Orthodox Church criticized the Court's decision in an indirect way, when two pro-life organizations close to the Church - the "Pro-Vita for Born and Unborn Children" and the

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[42] *Italy school crucifixes 'barred'*, in *BBC News*, 3/11/2009, *http://news.bbc.co.uk/2/hi/8340411.stm; Italie: la croix s'accroche à l'école*, in Libération, 1/4/2011, *https://www.liberation.fr/planete/2011/04/01/italie-la-croix-s-accroche-a-l-ecole_726031*

[43] *Polish Sejm and Senate presents opinion on the crucifix in public domain*, in Human Rights House Foundation, 13/6/2010, *https://humanrightshouse.org/articles/polish-sejm-and-senate-presents-opinion-on-the-crucifix-in-public-domain/*

[44] *Strasburgo, no al crocifisso in aula. Il governo italiano presenta ricorso*, in la Repubblica, 3/11/2009, *https://www.repubblica.it/2009/11/sezioni/scuola_e_universita/servizi/crocefissi-aule/crocefissi-aule/crocefissi-aule.html*

[45] *Italy unites to condemn crucifix ruling*, in *The Sydney Morning Herald*, 5/11/2009, *https://www.smh.com.au/world/italy-unites-to-condemn-crucifix-ruling-20091105-hybf.html*

[46] *ECHR's banning of crucifix in Italian schools could destabilize Europe - Russian Church*, in *Interfax-Religion*, 5/11/2009, *http://www.interfax-religion.com/?act=news&div=6614*

[47] *Russian Patriarch protests court ruling to ban cross from Italian schools*, in *Interfax-Religion*, 26/11/2009, *http://www.interfax-religion.com/?act=news&div=6675.*

"Pro-Vita Federation of Orthodox Organizations" filed a petition to the ECHR Court, considering the the Lautsi case to be beyond the competence of the Court[48].

The ECHR Court sentence was not only criticized, but it also received praise, being considered a strong political stance towards freedom of conscience and secularity of the State. A letter of support for the orientation of the Court, signed by more than 100 Italian organizations, was sent to the Council of Europe, the European Parliament and the ECHR Court itself; the letter criticized the behaviour of the Italian State, described as responsible for vicious and violent responses not only towards the judges of the Court of Strasbourg but also towards non-believers and those professing a faith different from the Catholic one.

The 2009 ECHR Court decision represented an important step towards the affirmation of the principle of state neutrality and impartiality in religious matters, and some members of the European Parliament strongly opposed it. Some members of the centre-right European People's Party presented a motion asking for a parliamentary resolution in defence of the principle of subsidiarity and defending «the freedom of Member States to exhibit religious symbols in public places, when these symbols represent the tradition and the identity of their people as well as a unifying aspect of a national community» [49]. Another request for a parliamentary resolution by the right-wing Europe of Freedom and Democracy Group contested the effectiveness of the sentences of the ECHR Court within the legal system of the European Union, inviting the Commission to recognize the «serious violation of the fundamental principle of subsidiarity» represented by the sentence[50]. It is interesting to highlight that the Progressive Alliance group of Socialists and Democrats Group declared itself in favour of the resolution condemning the ECHR Court decision[51], while members of the Greens and the European United Left–Nordic Green Left proposed a motion requesting a parliamentary resolution affirming that «should not be compulsory to display religious symbols in premises used by public authorities» and that «EU Member States have an internal, international and European legal obligation to apply the judgments of the European Court of Human Rights» [52]. The proposal for a resolution had to be voted at the beginning of 2010 but was later removed from the agenda, thus avoiding a conflict between the European Union and the Court of Strasbourg.

The Italian government appealed the decision under Article 43 of the European Convention on Human Rights. Other Member States of the Council of Europe supported the Italian appeal: they mostly were country with a mainly Orthodox or Catholic population such as Greece, Lithuania, Romania, and the Russian Federation, that took with other six countries the unprecedented move to intervene as "third parties" in the appeal, or Austria, Poland and Slovakia, that made political statements about the issue. The case was deferred to the Court's Grand Chamber as *Lautsi and Others v. Italy* (as Ms Lautsi's sons, now of age, joined as applicants) and a new decision was

[48] *Libertate religioasă (Lautsi c. Italia / CEDO)*, 21/3/2011, in *http://www.provitabucuresti.ro/activitati/just/298-lautsi-vs-italia-cedo.*
[49] Eur. Parl., Motion for a Resolution B7-0273/2009, 15/12/2009, in *https://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2009-0273&language=EN*
[50] Eur. Parl., Motion for a Resolution B7-0274/2009, 15/12/2009, in *https://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2009-0274&language=EN*
[51] Eur. Parl., Motion for a Resolution B7-0278/2009, 15/12/2009, in *https://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2009-0278&language=EN*
[52] Eur. Parl., Joint Motion for a Resolution RC-B7-0275/2009, 16/12/2009, in *https://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P7-RC-2009-0275&language=EN*

issued on 18 March 2010 overturning the lower Chamber's decision[53]. Judge Malinverni expressed a dissenting opinion raising two orders of questions. Firstly, it was asked if a concrete application of Art. 2 of Protocol No. 1 was possible, as the statement «the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions» appears to concern only the most professed religions in each country. Secondly, it was asked if the doctrine of the margin of appreciation in relation to Art. 2 of Protocol No. 1 has the same scope whether it is in discussion its application or the refraining from its application. Judge Malinverni gave negative answers to both questions, recognizing in Art. 2 of Protocol No. 1 a certain limit to the margin of appreciation for the States.

The decision of the Strasbourg Court Grand Chamber in the *Lautsi and Others v. Italy* case to considerate the display of the crucifix in public schools to be legitimate as it is considered an essentially passive symbol, unable to threaten or indoctrinate the pupils, does not seem to be entirely acceptable. Even the margin of appreciation doctrine seems to be able to dispel the doubts whether what are the contexts and conditions under which the crucifix may be considered a passive symbol, unsuitable to indoctrinate, threaten or otherwise influence the pupils in public schools. This way, what could have been an historical decision about the display of religious symbols in public spaces has been toned down to an orientation with a different balance between individual religious rights and the subsidiarity principle.

Clearly, the decision in *Lautsi and Others v. Italy* case stirred up controversies in Italy between Catholics (or those close to the Catholic Church) on one side and those who stood up for secularism and the protection of religious minorities on the other side. Grégor Puppinck, director of the European Centre for Law and Justice (ECLJ) took part in the debate, denouncing the attempts to impose secularism in Europe as in contrast with the values of pluralism and respect for cultural diversity[54]. The assertion made by those who think that the *Lautsi v. Italy* initial decision would have led to a series of dangerous transformations in Europe seems in the opinion of the writer as a mean to elude and conceal the substantive content of the sentence, that deals with the aim of protecting the rights of believers and non-believers, of majorities and minorities, guaranteeing the children's right to ideological and religious indoctrination while defending the free choices of cultural and religious minorities. It remains to be seen if the final ruling by the ECHR Court Grand Chamber with its reference to the principle of subsidiarity and the margin of appreciation doctrine as corollaries of the principles of proximity of the States has obtained, or will obtain, the undesired result of imposing restrictions on religious and non-religious minorities to safeguard the rights and freedom of mainly Christian majorities[55].

7. *ECHR Court's cases v. Turkey*

The European Convention on the exercise of Children's Rights, signed by the Council of Europe in 1996, guarantees the rights of children; in its Art. 2 it contains a catalogue of the rights of

[53] ECHR Court, Grand Chamber, 18 March 2010 Application n. 30814/06 in *http://hudoc.echr.coe.int/eng?i=002-1244*
[54] G. PUPPINCK, *Il caso Lautsi contro l'Italia*, in *Stato, Chiese e pluralismo confessionale*, 2012.
[55] S. MANCINI, *Lautsi II: la rivincita della tolleranza preferenzialista*, in *Forum di Quaderni Costituzionali*, *http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/giurisprudenza/corte_europea_diritti_uomo/0015_mancini.pdf*

minors. The ECHR establishes the protection of the rights of children, mainly regarding the educational field. So, there are two levels of protection for children in this field:

- The first level of tutelage states that the State cannot educate children without taking into account the parents' beliefs. Article 2 of Protocol No. 1 guarantees: «No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions». In this sense it is exemplar the 2007 case *Hasan and Eylem Zengin v. Turkey*[56]. The applicants complained that the compulsory teaching of religious culture and ethics violated their rights as guaranteed by the second sentence of Article 2 of Protocol No. 1 and Article 9 of the Convention. That case represents a fundamental standpoint for the protection of freedom of thought, conscience and religion, as after it the international jurisprudence imposed strict limits on governments to avoid indoctrination and favour a balanced education on religious topics[57]. Educational plans and curricula can include religious education, but it must be provided the teaching of the history of religions and the different beliefs of social groups.

- The second level of tutelage concern the best interests of children, as enshrined in the Convention on the Rights of the Child. We can recall the *Kjeldsen, Busk Madsen and Pedersen v. Denmark* case[58]: the 1976 Strasbourg Court judgement traced the Court's guidelines when dealing with the right of parents to ensure that their children's education by the State is in conformity with religious and philosophical convictions of parents (right enshrined in Article 2 of Protocol No. 1) and the limits for the State in fulfilling the obligations arising from the ECHR. In this case, the applicant parents wanted their children to be exempted from sex education classes, considered to be in conflict with their religious convictions. The Court ruled that the duty of the State is to provide students with the information allowing them to take care of themselves and other and recognized that the presence of sex education classes in school curricula was not limiting specific ways of thinking, and was not intended to favour some specific kind of sexual behaviour[59].

The 2001 *Dahlab v. Switzerland* case[60] elicits similar considerations. In this case the applicant was a primary State school teacher, a Swiss national converted to Islam who began wearing an Islamic headscarf in class and refused to remove it after being requested to do so by the Director General of Primary Education of the Canton of Geneva.

It is necessary to focus on the difference between the limitations on the use of religious symbols in schools intended to ensure a neutral education to children and the limitations aimed at protecting the participants from some aspect of the educational process. In the mentioned *Dahlab v. Switzerland* case the Court justified the Swiss state limitations on behaviours of a public employee exercising his religious beliefs, on the ground that said behaviour may conceal intents of proselytism.

These factors are relevant when considering the court cases that were brought against Turkey.

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[56] ECHR Court, sez. 2, 9 October 2007 Aplication n.1448/04 in *http://hudoc.echr.coe.int/eng?i=001-82580*

[57] M. NOWAK and T. VOSPERNIK, *Permissible Restrictions on Freedom of Religion or Belief*, in AA.VV., *Facilitating Freedom of Religion or Belief*, eds. T. Lindholm, W. C. Durham, B.G. Tahzib-Lie, Leiden 2004, 171

[58] ECHR Court, 7 December 1976 Application n. 5095/71; 5920/72; 5926/72 in *http://hudoc.echr.coe.int/eng?i=001-57509*

[59] See G.VAN BUEREN, *The International Law on the Rights of the Child*, The Hague 1998, 160-2.

[60] ECHR Court, sez. 2, 15 February 2001 Application n. 42393/98 in *http://hudoc.echr.coe.int/eng?i=001-22643*

In the 2005 *Leyla Şahin v. Turkey* case the applicant refused to follow the University of Istanbul internal regulations prohibiting the use of headscarf and was denied access to classes and exams and underwent disciplinary measures. The applicant appealed to the ECHR Court for the violation of her freedom to manifest religion, ex Art. 9 of the European Convention and other connected alleged violations of other articles of the Convention. The Court ruled that no such violations had taken place, and the interference by the University's regulation with the applicant's right to manifest her religion were legitimate as prescribed by law in a proportionate way to pursue legitimate aims[61]. It seems that the Court failed to properly assess the proportionality of the measures taken by the Turkish State, because doing so would have undermined the internal regulations of the University.

A similar case was raised by a great number of students in İmam-Hatip Secondary Schools (schools that train religious functionaries) in various districts of Turkey, after in 2002 they were refused access to school on the base of a directive by the Istanbul Regional Governor's Office enforcing the existing rules on dress access to school premises. The application in the *Kose and 93 Others v. Turkey* case was decided by the ECHR Court as inadmissible[62]; between the reasons, the impugned measures were considered to pursue the legitimate aims of the prevention of disorder and protection of the rights of others, and proportionate to these aims.

In a similar way, in the *Kurtulmuş v. Turkey* case[63] the applicant was an associate professor at the Faculty of Economics of the University of Istanbul who lost her position for refusing to remove her headscarf. Her case was ruled unadmissible; recognizing the presence of an interference with the applicant's right to practice her religious beliefs, the Court considered the interference to be prescribed by law, as it was serving legitimate aims (protecting public safety, public order, and rights and freedom of others).

The ECHR Court decisions in the *Dahlab* and in the *Şahin* cases, where it was highlighted that the parent's right to educate their children cannot consist in a mere arbitrary imposition of the parent's ideology, but it must consist in educational behaviours compatible and consistent with the respect for the values of the democratic society at large[64], seem to express an almost contradictory orientation with respect to the one adopted in the final *Lautsi* decision.

We notice a somehow contradictory attitude on the part of the Strasbourg Court. On one side it is affirming the principle of the neutrality of the State in religious matters, for example ruling that the use of veils or headscarves in public schools is in contrast with the principle of neutrality and recognizing as legitimate the prohibitions on religious dresses or symbols. In this sense the Court is affirming a positive dimension of the action of the State aimed at avoiding the transformation of schools in religious places[65]. On the other side, the mentioned 2010 ECHR Court's Grand Chamber ruling on *Lautsi and Others v. Italy* case affirmed that the presence on the schools' walls of a

[61] A. NIEUWENHUIS, *European Court of Human Rights: State and Religion, Schools and Scarves. An Analysis of the Margin of Appreciation as Used in the Case of Leyla Sahin v. Turkey, Decision of 29 June 2004, Application Number 44774/98*, in *Eur. const. law rev.*, 1.3, 2005.
[62] ECHR Court, sez. 2, 24 January 2006 Application n. 26625/02 *in http://hudoc.echr.coe.int/eng?i=002-3516*
[63] ECHR Court, sez. 2, 24 January 2006 Application n. 65500/01 in *http://hudoc.echr.coe.int/eng?i=001-88325*
[64] C. BÎRSAN, *Convenţia europeană a drepturilor omului. Comentariu pe articole. Vol. I: Drepturi şi libertăţi*, Bucureşti, 2005, 1071.
[65] About the different articulations of state neutrality with respect to religion in Europe, see C. JOPPKE, *State neutrality and Islamic Headscarf Laws in France and Germany*, in *Th. and soc* 36.4, 2007.

Christian religious symbol as the crucifix does not violate the principle of secularism, considering instead it a mean of favouring the perspective of a pluralist democratic society.

8. *The principle of subsidiarity and the margin of appreciation doctrine in the European context*

After this review of some cases where the display of religious symbols was challenged in the name of secularism and individual freedom of religion and conscience[66], having highlighted the reactions of religious, political and social groups, now we can make some considerations about the ECHR Court decisions based upon the principle of subsidiarity and the margin of appreciation doctrine; the same principles were used by Members of the European Parliament to propose resolutions against the ECHR Court.

The principle of subsidiarity was enshrined in the Protocol No. 30 of 1997[67], under which the application of the principles of subsidiarity and proportionality takes place in accordance with the provisions and objectives of the treaty on the functioning of the European Union, with particular reference to the maintenance of the *acquis communautaire* which should guarantee and strengthen the institutional capacity of the European Union. The Lisbon Treaty, entered into force on 2009, replaced the 1997 protocol with a new one (Protocol No. 2[68]) giving a bigger role to national parliaments and to the Court of Justice in ensuring compliance with this principle. According to this principle, dealing with non-exclusive powers of the Union, its intervention is justified when an issue cannot be dealt with effectively by Member States at central or local level.

However, neither Protocol No. 2 nor the treatise provide specific guidelines about the intervention margins for Community action regarding the display of religious symbols in public spaces. There are different factors accounting for this gap, starting from the fact that the three treaties establishing the European Community had the fundamental objective of achieving economic integration, so human rights were not a central issue.

Later on, with the Treaty of Rome establishing the EEC in 1957, it was introduced the principle of non-discrimination of workers on grounds of nationality (art. 7). Only in the 70s the concept of human rights as a general principle originating from international treaties and from the constitutional tradition of the member States started to be taken into account at a European level[69].

The Single European Act, signed in 1986 and effective in 1987, represented an important revision of the Treaty of Rome; it was an important advancement from the point of view of human rights because this Act mentions the European Convention on Human Rights and the European Social Charter, alongside the constitutions and laws of the Member States, as the mail foundation upon which to promote democracy.

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[66] See P. CONSORTI, *Diritto e religione,* cit., 108.

[67] Protocol annexed to the Treaty establishing the European Community, on the application of the principles of subsidiarity and proportionality, in *https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12006E/PRO/30:EN:HTML*

[68] Protocol annexed to the Consolidated version of the Treaty on European Union - on the application of the principles of subsidiarity and proportionality, in *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008M%2FPRO%2F02*

[69] R. ETINSKI, *Retrospective and Prospective of Human Rights in the European Union*, in *Noua Revistă de Drepturile Omului*, 2008, 4.3, 7.

Moreover, article F of the 1992 Maastricht Treaty states that "the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedom", and the 1997 Treaty of Amsterdam with its article 13 (formerly art. 6a) authorized the Council to take appropriate measures against discrimination, including discrimination based on religion and belief.

The 2007 Treaty of Lisbon represented a further reformulation of the provisions concerning human rights. This treaty gave full legal effect to the Charter of Fundamental Rights of the European Union, referenced as having the same legal value as the European Union treaties. Moreover, the Treaty of Lisbon sanctioned the accession of all the European Union to the European Convention on Human Rights as a duty, although no new accession agreement has still been drafted. The fundamental rights guaranteed by the European Convention on Human Rights, and resulting from the constitutional traditions common to the member States, are recognized by the Treaty of Lisbon as part of the law of the European Union, as general principles.

9. *The difficult balances between secularism and religious freedom, between individual rights and national interests*

The mentioned principle of subsidiarity and the margin of appreciation doctrine can be considered as two different facets of a more general principle of proximity regulating the division of competences between the single States, and their jurisdictions, and supranational authorities[70]. In the context of the Convention the principle of subsidiarity is a rule of precedence that can be deduced from art. 35, stating that the ECHR Court can be appealed only after all the national remedies have been exhausted; the doctrine of the margin of appreciation was elaborated in the jurisprudence of the CEDU court as a way to delimit individual rights and freedoms relatively to state parties, with an attitude of *self-restraint* on the part of the Court of Strasbourg later adopted by the Court of Justice.

The principle of subsidiarity has been a pivotal precept of the European Union since its inception; first introduced in relation to issues arising from the economic integration of Member States, later with its inclusion in the treaties of the European Community it was applied in the field of human rights, with the initial purpose of affirming the supremacy of national regulations on this field[71].

The doctrine of the margin of appreciation, arising from the jurisprudence of the ECHR Court is based on fundamental principles[72] enshrined in the Convention, such as the right to liberty and security of person (Art. 5), respect for private and family life (Art. 8), freedom of thought, conscience and religion (Art. 9), freedom of expression (Art. 10), and the principle of non-discrimination (Art. 14). Balancing individual rights with national interests, this doctrine represents a form of self-limitation of European bodies, allowing the States to have some margin of discretion

[70] M. R. MORELLI, *Sussidiarietà e margine di apprezzamento nella giurisprudenza delle Corti europee e della Corte costituzionale*, in *http://www.cortecostituzionale.it/documenti/convegni_seminari/convegno_20_settembre_2013.pdf*
[71] M. PIETROPOLLI, *La tutela dei diritti umani nel sistema europeo della CEDU*, in AA.VV., *Diritti e doveri*, a cura di L. Mezzetti, Torino 2013, 92-94.
[72] S. MANCINI, *La supervisione europea presa sul serio: la controversia sul crocifisso tra margine d'apprezzamento e ruolo contro-maggioritario delle Corti*, in *Giur. Cost.*, 2009, 5, 4055 ss.

in weighting the defence of these rights with the interests of national communities and institutions[73]. The European Convention does not explicitly recognize the doctrine of the margin of appreciation, but it does contain provisions referring to national legislations for the modalities and limitation of exercise for certain rights[74].

The 1976 *Handyside v. United Kingdom* case, concerning the publication in the United Kingdom of a Danish book that was judged obscene and seized, was important in the development of this theory[75]. The ECHR court found no violations of conventions in the ruling of British courts, judging the interference in the freedom of expression of the book's publisher by the United Kingdom to be legitimate.

When the national decision about the Lautsi case was appealed to the ECHR Court this was done invoking the margin of appreciation doctrine as a universal standard of legal pluralism. The Court of Strasbourg, in the context of the theme of religious freedom (as per Art. 9 of the ECHR) applying the doctrine of the margin of appreciation has the task of ascertaining the legitimacy of the restrictions of rights exercised by the State, verifying that these restrictive measures have a legal basis, that they are aimed at providing a balance between the restricted right and other important issues (as public health, public security, protection of other rights and freedom and so on), and that they are proportionate to that aim[76]. This consists in the so-called *proportionality test*, evaluating the impact of the restrictive measure and the *stricto sensu proportionality*, requiring the choice of the least restrictive measure; apart from the necessity of being proportionate, the measure must be adequately motivated[77].

Against this background we cannot agree with those arguing that the *Lautsi v. Italy* case entailed a violation of the margin of appreciation doctrine. The only Grand Chamber dissenting judge of the decision on the 2013 *Leyla Şahin v. Turkey* case[78], the Belgian judge Tulkens, stated that "the issue raised in the application, whose significance to the right to freedom of religion guaranteed by the Convention is evident, is not merely a "local" issue, but one of importance to all the member States. European supervision cannot, therefore, be escaped simply by invoking the margin of appreciation".

Isabelle Rorive pointed out that the balance between complex rights is one of the main issues of the ECHR, considering how often the Court of Strasbourg has been criticized for addressing

[73] E. BENVENISTI, *Margin of Appreciation, Consensus, and Universal Standards*, in NYU jour. of int. law and pol., 31, 1999.
[74] I. ANRÒ, *Il margine di apprezzamento nella giurisprudenza della Corte di giustizia dell'Unione europea e della Corte europea dei Diritti dell'uomo*, in AA.VV., *La funzione giurisdizionale nell'ordinamento internazionale e nell'ordinamento comunitario: atti dell'Incontro di studio tra i giovani cultori delle materie internazionalistiche, 7. edizione, Torino 9-10 ottobre 2009*, a cura di A. Odennino *et alii*, Napoli 2010.
[75] ECHR Court, 7 December 1976 Application n. 54993/72 in *http://hudoc.echr.coe.int/eng?i=001-57499*
[76] See P. TANZARELLA, *Il margine di apprezzamento*, in *Diritti in azione*, a cura di M. Cartabia, Bologna 2007, 149 ss. While on one hand this «flexibility» allows the States to balance the obligations of the Convention with other national needs, on the other it may create issues in the event of an unsatisfactory implementation of the Court's judgements.
[77] See S. GREER, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights*, Strasbourg 2000; N. BHUTA, *Two Concepts of Religious Freedom in the European Court of Human Rights*, in *EUI Working Papers LAW*, 2013.
[78] ECHR Court, Grand Chamber, 10 November 2005 Application n. 44774/98 in *http://hudoc.echr.coe.int/eng?i=001-70956*

cases related to religious symbols in public spaces relying on the doctrine of the margin of appreciation[79].

So, it is necessary to ascertain on a case-by-case basis if the debate about the display of religious symbols was carried out about an entirely procedural or rather a substantial matter, and if the presence of religious symbols in educational institutions is compatible with universal standards on fundamental rights and freedoms.

10. *Conclusions*

As it was legitimate to expect, the cases about display of religious symbols in schools decided at national level show a great heterogeneity in orientations, depending on each State's prevalent jurisdiction and socio-political context. The protection offered to European nationals by the ECHR does allow some margin of uniformity of treatment under the point of view of the respect of basic human rights, but the ECHR Court's case law show that States have huge margin of justification for their interferences with religious freedom – as long as these interferences can be demonstrated to be proportionate to legitimate aims.

It has been observed that courts, the ECHR Court being no exception, do not exist in a vacuum, and «there are too many unpredictable influences from too many sources, grassroots and grasstops, to be able to suggest one direction in the courts' handling of matters related to religion»[80]. So, it does not appear possible to identify a trend in the ECHR Court's decisions about the display of religious symbols in public schools, apart from the general use of the principle of subsidiarity and the margin of appreciation doctrine as instrumental for achieving a balance between individual rights and national interests, at the same time avoiding conflicts between States and the supranational European institutions. The use of subsidiarity principle by the ECHR Court shows how the Convention is not enforcing a "common European standard" on the topic of religious freedom[81], and given the complexity of the topic, the use of the margin of appreciation doctrine and the principle of subsidiarity may serve well the aim of determining the right balance between protection of the right to religious freedom and other legitimate aims of national authorities – even if that may determine some contradictory outcomes.

[79] I. RORIVE, *Religious Symbols in the Public Space: In Search of a European Answer*, in *Cardozo Law Review*, 2009, 30, 2682.
[80] E. FOKAS, *Directions in religious pluralism in Europe: mobilizations in the shadow of European court of human rights religious freedom jurisprudence*, in *Oxford Journal of Law and Religion*, 2015, 4 (1), 35.
[81] M. Lugato, *The "Margin of Appreciation" and Freedom of Religion: Between Treaty Interpretation and Subsidiarity*, in J. of cath. leg. st., 2017, 52.1, 69.