

# FREEDOM OF RELIGION IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS UNDER THE INFLUENCE OF DIFFERENT EUROPEAN TRADITIONS

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## 1. In search of a balance between universality and diversity in the protection of religious freedom

The need to search for a balance between universality and diversity in the definition and guarantee of human rights is particularly clear when we look at the case law of the European Court of Human Rights (hereinafter “ECtHR” or “the Court”) on freedom of religion or belief.

As is well known, there are three articles of the European Convention on Human Rights (hereinafter “ECHR” or “the Convention”) that are particularly relevant for religion. Article 9 is the provision that deals directly with freedom of thought, conscience and religion, describing both its essential content and the limitations that can legitimately be imposed on its exercise.<sup>1</sup> Article 14 prohibits discrimination on grounds of diverse personal circumstances, including religion.<sup>2</sup> And article 2 of the First Protocol to the Convention

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<sup>1</sup> *Article 9 – Freedom of thought, conscience and religion.* 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

<sup>2</sup> *Article 14 – Prohibition of discrimination.* 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.

(hereinafter ECHR), after recognizing the right to education, and in the context of the functions assumed by the State in relation to education and teaching, guarantees the right of parents to ensure that their children are educated in accordance with their religious and philosophical convictions.<sup>3</sup>

For many years, the Court of Strasbourg paid little attention to issues related to religious freedom.<sup>4</sup> Prior to 1993 there are mainly two relevant cases, both decided in the light of article 2 ECHR – *Kjeldsen* (1976),<sup>5</sup> related to conscientious objection to sex education in school, and *Campbell and Cosans* (1983),<sup>6</sup> related to the opposition to have children physically punished at school. Since 1993, with the *Kokkinakis* case,<sup>7</sup> which involved the right to proselytism, the Court began an itinerary of decisions adopted in the light of article 9 or in the light of other articles but with a clear reference to religion – e.g. article 8 (right to privacy and family life)<sup>8</sup> or article 10 (freedom of ex-

<sup>3</sup> *Right to education*. 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.

<sup>4</sup> There was, however, a certain case law of the formerly existing European Commission of Human Rights on those articles, with an orientation – in my view – not particularly protective of freedom of religion. Indeed, most decisions of the Commission declared those applications inadmissible as “manifestly ill-founded”, thus preventing the possibility that the Court decided on the merits of those cases. The Commission, which acted as a “filter” of the cases that could be judged by the Court, disappeared in November 1998, when Protocol 11 to the Convention entered into force. Since then, the Court itself decides on the admissibility or inadmissibility of applications. Protocol 14, which entered into force on 1 June 2010, modified the admissibility procedure with the purpose of rendering it more agile and reducing the caseload of the Court as well as repetitive or insignificant cases. See the explanatory report to Protocol 14 in: <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm> (visited 31 October 2011).

<sup>5</sup> *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976.

<sup>6</sup> *Campbell y Cosans v. United Kingdom*, 25 February 1982.

<sup>7</sup> *Kokkinakis v. Greece*, 25 May 1993. For an analysis of this landmark decision, see J. Martínez-Torrón, Libertad de proselitismo en Europa: A propósito de una reciente sentencia del Tribunal europeo de derechos humanos, in *Quaderni di diritto e politica ecclesiastica* (1/1994), pp. 59-71; P. Edge, The Missionary’s Position After *Kokkinakis v Greece*, in *Web Journal of Current Legal Issues* 2 (1995), available at <http://webjcli.ncl.ac.uk/articles2/edge2.html>; J. Gunn, Adjudicating Rights of Conscience Under the European Convention on Human Rights, in *Religious Human Rights in Global Perspective* (ed. By J.D. van der Vyver & J. Witte), Boston 1996, pp. 305-30. On the problems involved in determining a concept of proselytism in international law, see N. Lerner, Proselytism, Change of Religion, and International Human Rights, in *Emory International Law Review* 12 (1998), pp. 477-561.

<sup>8</sup> This was the case, for instance, in *Hoffmann v. Austria*, 23 June 1993, or *Palau-Martinez v. France*, 16 December 2003. And also in the more recent cases *Obst v. Germany* and *Schüth v. Germany*, both of 23 September 2011, which I will briefly comment on below.

pression).<sup>9</sup> At this stage, we already have a significant number of cases which, although it is arguable that they constitute a consistent body of judicial doctrine, allow us to identify certain trends in the ECtHR's jurisprudence.<sup>10</sup>

From the perspective of this paper – which is a legal perspective – that body of case law reflects the tension, and the need for a balance, between universality and diversity in the protection of religious freedom at a supra-national or international level. The Court's attempts to reach that balance pivot mainly around two principles.

On the one hand, in support of diversity, the ECtHR has always held that national systems of relations between State and religion, which are the result of a variety of historical, social, political and cultural factors, should in principle be respected. The aim of article 9 of the European Convention is the protection of religious freedom and not the establishment of certain uniform criteria for Church-State relations in the Council of Europe member States or – even less – the imposition of a compulsory secularism (*laïcité*). Thus, diversity in State cooperation with religious communities is not, as such, incompatible with the ECHR. Even the privileged position of certain churches, in the form of a sociological confessionality of the State (as in Greece) or in the form of State churches (as in England or in some Scandinavian countries), has been considered legitimate as far as it does not produce, as a side effect, significant discriminatory impact on individuals or unjustified harm to the freedom to act that the rest of the groups and individuals must enjoy in religious and ideological matters.<sup>11</sup>

<sup>9</sup> For example, *Otto-Preminger-Institut v. Austria*, 20 September 1994, *Wingrove v. United Kingdom*, 25 November 1996, and a number of other cases after them. See, for further references and bibliography, J. Martínez-Torrón, Freedom of Expression versus Freedom of Religion in the European Court of Human Rights, in *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World* (ed. by A. Sajó), The Netherlands, 2007, pp. 233–269.

<sup>10</sup> The bibliography on the ECtHR's case law on religious freedom has been increasing over the years. See generally, among others, M.D. Evans, *Religious Liberty and International Law in Europe*, Cambridge 1997 (reprinted in 2008); C. Evans, *Freedom of Religion under the European Convention on Human Rights*, Oxford 2001; The European Court of Human Rights and Religion, in *Law and Religion*, Current Legal Issues 2001, vol. 4 (ed. by R. O'Dair & A. Lewis), Oxford 2001; and J. Martínez-Torrón & R. Navarro-Valls, The Protection of Religious Freedom in the System of the Council of Europe, in *Facilitating Freedom of Religion or Belief: A Deskbook* (ed. by T. Lindholm, W.C. Durham, B.G. Tahzib-Lie), Leiden 2004, pp. 209–238.

<sup>11</sup> This approach of the Court is implicit but clear in a number of cases. See, for further details and references, C. Evans, *Freedom of Religion...*, cited in note 10, pp. 80–87; J. Martínez-Torrón & R. Navarro-Valls, *The Protection of Religious Freedom...*, cited in note 10, pp. 216–218.

Precisely the second principle, aiming at universality, is the guarantee of an equal degree of protection of the freedom of religion and belief of all individuals and groups, be they in a majority or minority position in a given country. In the Court's view, this freedom, which has been won at a high price over the centuries and is essential for the pluralism inherent in democratic societies, constitutes a "precious asset" not only for religious believers but also for atheists, agnostics or indifferent.<sup>12</sup>

Naturally, the second principle (guarantee of religious freedom) may in practice imply limitations on the consequences of the first principle (respect for national Church-State systems). Thus, the combined interpretation of both principles leads to the conclusion that the *only* uniform religious policies that can be derived from the European Convention on Human Rights are those necessary for the adequate and equal protection of religious freedom of all individuals and communities.

## 2. The doctrine of the margin of appreciation

Although these principles seem clear and reasonable in the abstract, it is nonetheless clear that their application in actual situations of conflict is not exempt from difficulties. The main instrument of analysis used by the ECtHR to assess the necessary balance between diversity and universality is the doctrine of the *margin of appreciation*. In brief, this doctrine maintains that, while the substance of human rights is common, there may be national variations in the limitations that States can legitimately impose on the freedoms guaranteed by different articles of the ECHR (especially articles 8–11). In the view of the Court, States must be recognized a reasonable margin to appreciate when a limitation on freedom becomes necessary. The alleged reason is that national authorities, being closer to their respective societies, are in a better position to evaluate the necessity of the restrictive measures adopted and can better appraise the needs of the public interest and interpret the relevant domestic law.<sup>13</sup>

<sup>12</sup> "...freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it." (*Kokkinakis*, § 31).

<sup>13</sup> The origin of this doctrine of the ECtHR dates back to the case *Handyside v. United Kingdom*, 7 December 1976, which involved a conflict between freedom of expression and public morals. See, for further details and references, C. Evans, *Freedom of Religion...*, cited in note 10, pp. 142–143; J. Martínez-Torrón, *Limitations on Religious*

In the case of article 9 ECHR, this means that States have at their disposal a certain discretionary power – not, of course, unlimited power – to decide how to “adjust” the exercise of freedom of religion or belief to the particular circumstances of their system of relations between State and religion. We should bear in mind that the ECHR permits only those limitations on religious freedom that meet the three conditions expressed by article 9(2).<sup>14</sup> First, as a requirement inspired by legal certainty, the limitation in question must be “prescribed by law” – here the meaning of law includes not only statutory law but also case law and administrative regulations. Second, the limitation must pursue one of the legitimate aims set out by article 9(2): the interest of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others. Third, the limitation must be “necessary in a democratic society”. The Court has interpreted the latter expression as excluding milder notions – such as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable” – and implying the existence of a “pressing social need”.

It is not difficult to see that the terms used by article 9(2) ECHR are far from being a precise *vade mecum* and call for a constant judicial interpretation, which in turn cannot ignore the different meanings that those terms have in national legal systems. Therefore, the margin of appreciation doctrine gives national authorities some discretionary power to determine when limitations on the exercise of religious freedom are deemed “necessary” – and consequently legitimate – and at the same time grants the European Court its own discretionary power to supervise if national authorities have used their discretion reasonably. In other words, it allows to assess whether the restrictive measures adopted have respected the principle of proportionality, i.e., if they are proportionate to some of the five legitimate aims mentioned by article 9(2) ECHR.<sup>15</sup>

Freedom in the Case Law of the European Court of Human Rights, in *Emory International Law Review* 19 (2005), especially pp. 599–602.

<sup>14</sup> In addition to the works cited in the precedent note, cf. the 2nd issue of the volume 19 of *Emory International Law Review* (2005), which is a monographic issue containing a series of papers of different authors with a comparative and international law analysis of limitations on freedom of religion. Of particular interest within that series is the study of the least restrictive alternatives for religious freedom, in the context of a deep analysis of the use of the principle of proportionality, written by J. Gunn, *Deconstructing Proportionality in Limitations Analysis*, in *Emory International Law Review* 19 (2005), pp. 465–498. See also M. Nowak & T. Vospernik, *Permissible Restrictions on Freedom of Religion or Belief*, in *Facilitating Freedom of Religion or Belief...*, cited in note 10, pp. 147–172.

<sup>15</sup> See generally J. McBride, *Proportionality and the European Convention on Human Rights*, in *The Principle of Proportionality in the Laws of Europe* (ed. by E. Ellis), Oxford 199, pp. 23–36.

### 3. The religious neutrality of the State and its consequences

Among the criteria utilized by the Court to determine the proportionality of limitations on religious freedom is the principle that the State must remain neutral towards religions. It is important to note that this “European” concept of the religious neutrality of the State is not equivalent to some parallel or connected notions at the constitutional level in some States. State neutrality in its European sense must be understood as the ECtHR interpreted it in the *Manoussakis* case in 1996, when it held that “the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate”.<sup>16</sup> The Court’s assertion may have complex implications if we consider that the moral doctrines of some religions may be contrary to deeply rooted notions of public morals in given societies or to ethical values that are the basis of some constitutional principles. But, leaving those complexities aside now, it certainly seems reasonable if taken as expressing a notion of neutrality consisting in the State’s incompetence to make any judgments on the truth or falsity of religious tenets or dogmas.

In my opinion, the ECtHR has sometimes extracted the right consequences of this European notion of the religious neutrality of the State.

One of them is the State’s impartiality in religious differences or disputes. In these cases, the Court conceives the State as an impartial organizer of religious pluralism. When facing the social tension that is occasionally created by competing religious groups, the role of national authorities is not to take sides or to eliminate pluralism as the price to guarantee social peace. The State’s function is rather to organize religious pluralism in a way that ensures that all individuals are as free as possible to practice their religion and all groups are as autonomous as possible to take care of their own internal affairs without undue external interferences. Thus, the Court has affirmed that the States exceed their power when they fail to remain neutral with regard to changes in the leadership of a religious community, when they try to force the community to come together under a unified leadership against its own wishes, or when they attempt to prevent a schism in a church for dissensions of a religious nature. This has been the case, for instance, of the decisions *Serif*, *Hasan and Chaush*, *Agga* and *Supreme Holy Coun-*

<sup>16</sup> *Manoussakis v. Greece*, 26 September 1996, § 47. See also *Hasan and Chaush v. Bulgaria*, 26 October 2000, § 78, which alludes, without further specifications, to some “very exceptional cases” in which this principle may not apply.

*cil*,<sup>17</sup> which involved leadership disputes within Muslim communities, or *Metropolitan Church of Bessarabia*,<sup>18</sup> which referred to the national authorities' refusal to register an Orthodox church detached from the mother church.

There is another important consequence of the State's religious neutrality that has been affirmed long since by the ECtHR, with respect to some education cases which involved the conscientious objection of some students' parents to school contents or practices that were opposed to their deeply held religious or philosophical convictions. In *Kjeldsen* (1976),<sup>19</sup> a case of conscientious objection to mandatory sex education for teenagers in public schools, the Court interpreted that article 2 of the First Protocol does not grant parents any right to object, on moral grounds, to school contents or practices, as far as these are developed in an "objective, neutral and pluralistic manner". As a corollary, the Court was very specific in holding that the public school system must remain neutral with regard to religion or belief, and consequently the State is prohibited from using the educational system to indoctrinate students in religious or moral ideas against their parents' wishes.

While I cannot agree with the Court's restrictive interpretation of parents' rights over their children's education under article 2 of the Protocol, which reduces them to a mere prohibition of indoctrination of the youth by the State,<sup>20</sup> the prohibition of indoctrination constitutes in itself a positive assertion that State neutrality is an indispensable element in the protection of religious freedom. This is especially true after the cases *Folgerø* and *Zengin* have raised the standards used in practice by the ECtHR to assess when States have failed to comply with their duties of neutrality in education, and have indicated that recognizing the students' parents a right to conscientious objection is a necessary "safety valve" when the actual neutrality of teaching in public schools is debatable.<sup>21</sup>

<sup>17</sup> See *Serif v. Greece*, 14 December 1999; *Hasan and Chaush v. Bulgaria*, 26 October 2000; *Agga v. Greece*, 17 October 2002; *Supreme Holy Council of the Muslim Community v. Bulgaria*, 16 December 2004.

<sup>18</sup> *Metropolitan Church of Bessarabia v. Moldova*, 13 December 2001.

<sup>19</sup> *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976.

<sup>20</sup> For a critical analysis of this decision, see R. Navarro Valls & J. Martínez-Torrón, *Conflictos entre conciencia y ley. Las objeciones de conciencia*, Madrid 2011, pp. 253-255. See also the dissenting opinion of Judge Verdross to that decision.

<sup>21</sup> See *Folgerø v. Norway*, 29 June 2007, and *Zengin v. Turkey*, 9 October 2007. See for further details and references M.A. Jurdado & S. Cañamares, La objeción de conciencia en el ámbito educativo. Comentario a la Sentencia del Tribunal Europeo de Derechos Humanos *Folgerø v. Noruega*; and J. Martínez-Torrón, La objeción de conciencia a la enseñanza religiosa y moral en la reciente jurisprudencia de Estrasburgo, both in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 15 (2007) (www.iustel.com).



#### 4. State neutrality and State secularism

The notion of State neutrality described so far seems an appropriate and even necessary instrument to ensure the protection of religious freedom for all individuals and communities on equal terms. In recent years, however, it has been possible to see some signs suggesting that a new and different concept of State neutrality might be gaining momentum in the case law of the ECtHR – a concept close to the French-style notion of *laïcité*, i.e., to a constitutional principle of secularism that would require a separationist attitude in the State. In other words, some decisions of the Court might be confusing the religious neutrality of the State understood as incompetence to take positions in religious matters, and to interfere in churches' internal affairs, with strict State separationism, thus paving the way for a sort of European “constitutional” principle of secularism, which in turn would be presented as a necessary consequence of or condition for freedom of thought, conscience and religion.

This different meaning of State neutrality would certainly be disruptive, for nowhere in the European Convention on Human Rights can that principle be found and, as indicated above, the previous case law of the ECtHR has made clear that no particular system of relations between State and religion can be either excluded or imposed a priori, as far as the right to religious freedom is duly respected, in its individual as well as in its collective dimension. Two concrete signs of this underlying notion of neutrality as secularism can be identified in the case law of the Court in the last years. One is a tendency to justify erasing the visibility of religion in the public sphere with arguments based on State neutrality. The other is a parallel, and more recent, tendency to reduce or even invade the right of churches to their own autonomy – which is part of the protection offered by article 9 ECHR – especially when they engage in relationships with individuals in areas in which the State may claim to have a competing interest.

##### 4.1. Labour relations with churches

The latter tendency can be observed in two cases of 2010 against Germany, *Obst* and *Schiith*,<sup>22</sup> which dealt with labour contracts between churches and their employees. The issue at stake in both cases was an employee's dis-

<sup>22</sup> *Schiith v. Germany* and *Obst v. Germany*, both of 23 September 2010, decided in light of the right to respect private and family life (art. 8 ECHR). For an interesting comment on these types of cases and on which should be the right way to deal with them from the ECHR perspective, when those cases have not yet been decided by the European Court, see G. Robbers, Church Autonomy in the European Court of Human



missal grounded on breach of his loyalty duties towards his employer, and in particular on behaviour that his ecclesiastical employer deemed a grave violation of the moral tenets of the relevant church.<sup>23</sup> In *Obst*, the applicant had been discharged from his position as director of public relations of the Mormon Church because of an adulterous relationship that he had voluntarily confessed to his superiors. The Church understood that this serious moral offense undermined its credibility and its spiritual mission and proceeded to the immediate dismissal of the applicant. In *Schüth*, the applicant worked for a Catholic parish as organist and choir director, and had also been discharged on grounds of adultery – he had separated from his wife, with whom he had two children, and held an extra-marital affective and stable relationship with another woman. After his children told in their kindergarten that their father was expecting another child from his new partner, the parish proceeded to terminate his contract. In both cases the German courts held that the dismissal was justified by the breach of the employees' loyalty duties towards their respective churches, expressed not in public criticism but in serious moral misbehaviour, and that churches were the only ones in a position to assess the impact of those moral offenses on their spiritual mission. The German courts made use of the doctrine established by a 1985 decision of the Federal Constitutional Court, which was later ratified by the European Commission of Human Rights.<sup>24</sup> The applicants claimed that their right to respect for privacy and family life, protected by article 8 ECHR, had been violated.

One would have expected those two cases to be decided in the same way but, instead, in *Obst* the applicant lost while in *Schüth* the applicant won, although the ECtHR claimed to apply the same principles in both

Rights: Recent Developments in Germany, in *Journal of Law and Religion* 26 (2010–2011), pp. 281–320.

<sup>23</sup> There is also a later case on labour relations with churches, *Siebenhaar v. Germany*, 3 February 2011, less interesting from the perspective of this paper. The applicant was a woman, baptized as a Catholic, who worked as teacher at a Protestant kindergarten, while at the same time hiding her active membership of a religious community called “Universal Church-Fraternity of Mankind”. The Court did not find any violation of the applicant's religious freedom and held that the German courts had correctly appreciated that the applicant infringed her loyalty duties towards the Protestant organization that employed her.

<sup>24</sup> *Rommelfänger v. Germany*, Dec. Adm. 12242/86, 6 September 1989. The applicant was a gynaecologist, employed by a Catholic hospital, who had publicly criticized the doctrine of the Catholic Church with respect to the State abortion policies and legislation. The Commission found no interference with the applicant's freedom of expression under art. 10 ECHR and declared the application manifestly ill-founded.

decisions. It is not my intention to analyse here in detail the various nuances of these two cases and the differences between the facts of the two applications that may have led the Courts to reach different conclusions in each case. However, it is worth mentioning some aspects in the rationale of these decisions that are susceptible of generating some concern, because of the implicit – and in my opinion incorrect – notion of State neutrality that they may reveal, which would be restrictive of religious autonomy.

The Court's reasoning contains two initial statements that are entirely appropriate. One is a clear assertion that the autonomy of religious communities is an integral part of the right to religious freedom guaranteed by article 9 ECHR. The other is the reaffirmation of the above-mentioned incompetence of the State to make judgments on the legitimacy of religious (and non-religious) beliefs or the means used to express such beliefs.<sup>25</sup>

However, the subsequent reasoning of the Court weakened these apparently firm holdings. First the Court maintained that, in order to determine whether the applicants' right to privacy and family life had been violated by their dismissal because of adultery, it was necessary to perform a balance between the interests of the ecclesiastical employers in keeping their internal autonomy and those of the employees in keeping their private life as they wished. And secondly, above all, the ECtHR held that the State jurisdiction was obliged to effect such balance by taking into account especially two elements. One was the concrete position held by the employee, for the negative impact of the employees' moral misconduct on their Church's mission would vary depending on their position. The other was the nature of the loyalty duties or moral obligations imposed on the employee, which sometimes could be considered "unacceptable".<sup>26</sup>

In my opinion, the State jurisdiction's assessment of both elements is problematic in practice and may easily lead to unjustified interferences in the life of churches based on a peculiar notion of neutrality.

With regard to the first element, it is virtually impossible for the State to appraise the real importance of different jobs or positions for the mission and credibility of a church, and when an employee's moral misbehaviour, even in his private sphere, disqualifies him for those functions. It would be equivalent, to some extent, to replacing the individual's judgment of conscience on the existence or seriousness of a moral obligation.<sup>27</sup> This is a very

<sup>25</sup> See *Schiith*, § 58, and *Obst*, § 44.

<sup>26</sup> See *Schiith*, § 69, *Obst*, §§ 48-49.

<sup>27</sup> This was the case of the unfortunate statement of the Court, some years ago, in the *Efstratiou* and *Valsamis* decisions (*Efstratiou v. Greece*, 18 December 1996; *Valsamis v.*

delicate matter in which it is easy to exceed the limit signalled by the European Court itself, namely that “the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate”.<sup>28</sup> Thus, the ECtHR seems to suggest in *Obst*, although not very clearly, that the applicant’s former position as director of public relations was “important” for his church, and therefore his adultery justified his dismissal, while in *Schüth* it seems to imply the opposite, that the applicant’s job as an organist and choir director was not so important or did not need the moral qualifications required by the ecclesiastical employer (i.e., it was not so significant for the parish whether the employee adjusted his life to some essential rules of Catholic sexual morals).<sup>29</sup> Apparently the Court required State courts to check the ecclesiastical view of the role of the organist in the Catholic liturgy and, in particular, the alleged close relationship of this role with the missionary activity of the Church.<sup>30</sup> In other words, it seems that the ECtHR expected the Catholic Church to look at the position

*Greece*, 18 December 1996). The texts of both decisions are almost identical, as indeed were the facts in question. Those cases had their origin in the applications of two Greek secondary school students, Jehovah’s Witnesses, who refused, for religious reasons, to participate in the school parades organized during the national festival to commemorate the outbreak of war between Greece and Fascist Italy in 1940. They argued that their conscience prohibited them from being present in a civic celebration in which a war was remembered and in which military and ecclesiastical authorities took part. The two students were denied permission to be absent from the parade, and their failure to attend was punished by one day’s suspension from school. In its decision in favour of the Greek government, the Court affirmed, among other things, that it could “discern nothing, either in the purpose of the parade or in the arrangements for it, which could offend the applicants’ pacifist convictions”. See, for a critical comment on this and other aspects of those decisions, J. Martínez-Torrón & R. Navarro-Valls, *The Protection of Religious Freedom...*, cited in note 10, pp. 233–236.

<sup>28</sup> See *supra*, note 16.

<sup>29</sup> See *Schüth*, § 69, *Obst*, § 48.

<sup>30</sup> The Catholic diocese of Essen, intervening as a third party, emphasized that it would be incorrect to view the applicant’s job only as a music player, ignoring the role of sacred music in Catholic liturgy as well as the exemplary character that the parish wanted in the people actively involved in the performance of religious ceremonies (see *Schüth*, § 52). It is surprising that the Court affirmed, in this respect, that “la cour d’appel du travail n’a pas examiné la question de la proximité de l’activité du requérant avec la mission de proclamation de l’Eglise, mais qu’elle semble avoir repris, sans procéder à d’autres vérifications, l’opinion de l’Eglise employeur sur ce point” (*Schüth*, § 69). This seems in contradiction with the above-mentioned incompetence of the State to make judgment on religious matters (see *supra*, note 28 and accompanying text).

of the applicant with the State's secular ("neutral") eyes and therefore to respect his decisions regarding his sexual life, which would not be so meaningful for efficiently carrying out musical functions in the parish. However, this is not State neutrality in dealing with religion. On the contrary, this is the imposition of the State's view of reality on religious communities that are not supposed to be "neutral". What the religious neutrality of the State demands is, precisely, respect for the right of churches to take care of their own affairs with autonomy, from their particular, "non-neutral", perspective.

The second element offers similar difficulties from the perspective of State neutrality towards religion. The ECtHR's analysis departed from the principles established by the German courts: that State jurisdiction is entitled, and obliged, to intervene in these types of conflicts between employee and employer, otherwise an aspect of German labour law would become "clericalized".<sup>31</sup> Thus, the civil judges are not totally bound by the religious perspective of the labour relation between a church and its personnel. On the contrary, they must check that the ecclesiastical employers' pronouncements or orders are coherent with the rules of the relevant church and are not in contradiction with the "fundamental principles of the [State] legal system", which include the protection of fundamental rights and freedoms, and in particular the right to respect for private and family life.<sup>32</sup> In other words, State jurisdiction must ensure that churches are not imposing in their labour contracts "unacceptable" loyalty duties on their employees.<sup>33</sup>

The foregoing way of proceeding is certainly not feasible without interfering with churches' autonomy. First, it is very difficult for the State, in most cases, to appraise the coherence of ecclesiastical commands or conditions with ecclesiastical rules. Indeed, since such coherence must be judged from an internal religious perspective, it seems clear that only the ecclesiastical authorities are competent on these types of issues and that any pronouncement of the civil jurisdiction would be inappropriate and invasive of religious autonomy. Secondly, however reasonable the criterion of scrutinizing the compatibility of ecclesiastical prescriptions with the fundamental principles of State law may appear in the abstract from a secular perspective, the fact is that such criterion is also problematic, for it can easily be applied in practice in an excessive manner, as it indeed was in *Schüth*. In this case, the ECtHR seems, on the one hand, to share the German courts' findings that the Catholic doctrine on marital fidelity is not in contradiction

<sup>31</sup> See *Schüth*, § 70.

<sup>32</sup> See *Schüth*, § 60, *Obst*, § 46.

<sup>33</sup> See *Obst*, § 49.

with “the fundamental principles of the [State] legal system”, in view – among other things – of the special protection that the German Fundamental Law grants to marriage.<sup>34</sup> But, on the other hand, by stating that the loyalty duties accepted by the employee when signing his contract could not include the duty to live in sexual abstinence in case of separation or divorce, the ECtHR implicitly declares that the Catholic moral doctrine and legal discipline on the indissolubility of marriage, and more generally on sexual morals, are “unacceptable” when confronted with the employee’s right to freely adopt decisions on matters concerning his private life.<sup>35</sup>

Without of course denying the latter individual right, this holding of the Court is most surprising. How is the civil jurisdiction to make any judgment on the moral evaluation that a certain sexual conduct deserves in the eyes of the Catholic Church (or any other religious community)? Is the State at all competent to say anything about whether a religion can or cannot require sexual abstinence in the case of a marriage separation? What has the State to say about the “acceptability” of the Catholic doctrine on the indissolubility of matrimony, which requires an ecclesiastical process of nullity or dissolution before any of the spouses can legitimately marry a third person? State intervention in those issues would be understandable only if a person were forced to abide by some religious doctrines in his private life, but here the issue under consideration was whether a church can hold those doctrines and impose them as part of the loyalty duties freely consented to by employees. Mr. Schüth was not forced to comply, whether he liked it or not, with the Catholic moral rules on sex. He *voluntarily* and *publicly* broke those rules and was consequently dismissed from a job, which was deemed relevant by the parish, and which he had *voluntarily* accepted knowing that he was obliged to respect those essential moral rules.

The Catholic Church was not obliged to remain “neutral” before the moral choices of Mr Schüth in the exercise of his right to private and family life. The churches’ obligation to respect the moral choices of their members and employees is not equivalent to the State’s obligation of religious and moral neutrality. While the State must remain morally neutral, churches do not have to. Their only obligation of respect consists in renouncing all material coercion, but they do not have to renounce moral pressure – indeed, most churches use one type or other of moral pressure to induce compliance with their rules. Imposing on churches the State’s notion of moral

<sup>34</sup> See *Schüth*, § 62, *Obst*, § 47.

<sup>35</sup> See *Schüth*, § 71.

neutrality is not neutral at all. On the contrary, it would be a breach of the State religious neutrality, which includes, as indicated before, respect for the autonomy of churches.

#### 4.2. *The visibility of religion in the public sphere*

Another sign of the ECtHR's possible tendency to apply a distorted notion of State neutrality is the ratification of State measures aimed at reducing, or erasing, the visibility of religion in the public space, with the practical result of legitimizing restrictions of individual expressions of religious beliefs. It seems paradoxical that support for State neutrality, which is supposed to serve as a better protection of religious freedom when it is conceived as the State's incompetence to judge the truth or falsity of religious doctrines, can be used to justify prohibitions of personal public expressions of religious belief, particularly in educational environments, adopted in some countries – allegedly and surprisingly – in the interest of peace and tolerance.

##### *a) Neutrality in education and personal religious symbols: the Islamic headscarves cases*

We can see expressions of this attitude of the Court in cases on the use of personal religious symbols in school decided in the last decade. In *Dahlab*, in 2001,<sup>36</sup> the ECtHR declared inadmissible the application of a Swiss teacher in a public primary school, who had converted to Islam, who had been prohibited from wearing the veil on her head that she considered prescriptive when teaching her students, in application of a cantonal law aimed at preserving the secular character of public schools. The Court's analysis began by recognizing that imposing on teachers the prohibition of carrying "powerful" religious symbols constituted an interference with the applicant's religious freedom and the State had to provide a sound justification under article 9(2) ECHR. In this regard, the European Court shared the opinion of the Swiss Federal Court on the consequences of the principle of secularity (*laïcité*). In particular, the ECtHR accepted that this principle entailed some restrictions on the civil servants' right to manifest their religion or belief, especially in the educational environment, where students may be more easily influenced and "religious peace" must be protected with extreme care. In my view, it is difficult to fully understand why the principle of *laïcité* should require, in a country enjoying religious peace such as Switzerland, that no

<sup>36</sup> *Dahlab v. Switzerland*, ECtHR, Dec. Adm. 42393/98, 15 February 2001. *Dahlab* was declared inadmissible by the Court as "manifestly ill-founded" in a lengthy decision that, as sometimes occurs, actually went into the merits of the case.

religious personal symbols be visible on the teachers' clothes, instead of permitting students to see in their own school a reflection of the religious pluralism existing in Swiss society.<sup>37</sup> As long as teachers respect the students' beliefs and do not attempt to proselytize them, the presence of religious pluralism in schools seems to be more consistent with a neutral attitude of the State and, on the other hand, more instructive for students than the fictional absence of religion on the part of school personnel.

A few years after *Dahlab*, and holding on to the same notion of neutrality, came what has so far been the most important case on the use of personal religious symbols: *Leyla ahin*, first decided by a Chamber of seven judges and later by the Grand Chamber of seventeen judges, confirming the Chamber's decision.<sup>38</sup> This case also referred to the wearing of the Islamic headscarf by women, and had a remarkable impact on public opinion, inside and outside of Turkey, through the attention paid by the media.<sup>39</sup> The applicant, Leyla ahin, was a Muslim female student of medicine who had moved to Istanbul University in her fifth year, where she began to be subjected to disciplinary proceedings by the University authorities,<sup>40</sup> based on rules that prohibited the use of headscarves by women – as well as beards by men – with the aim of reducing the “visibility” of Islam within University facilities, thus allegedly guaranteeing the “secular atmosphere” of the

<sup>37</sup> On the other hand, the “religious peace” of the school did not seem to have suffered any serious threat, for the applicant wore the Islamic *foulard* during approximately five years until she was prohibited from doing so by the (female) general director of the primary schools of Geneva's canton. In all those years there were apparently no problems caused at the school by the applicant's veil, not even the evidence of a single complaint by the students or the students' parents. It is difficult to avoid the impression that the Court showed too much respect for the State's margin of appreciation in the *Dahlab* case.

<sup>38</sup> *Leyla Şahin v. Turkey*, 29 June 2004 (Chamber's decision), and *Leyla Şahin v. Turkey*, 10 November 2005 (Grand Chamber's decision). The Chamber's decision was adopted unanimously and the Grand Chamber's decision by sixteen votes to one.

<sup>39</sup> We must note that, while there are certain hesitations in many European countries about how to deal with Muslim women's attire in public places, in Turkey the headscarf issue has become a symbol of, and a battlefield for, the political struggles between those who defend the citizens' freedom to manifest the signs of their Islamic faith in public and those others who maintain that the preservation of secular democracy in Turkey requires a firm grip on banning any visible expression of religion – particularly of Islam – in the public space. See Ö. Denli, *Between Laicist State Ideology and Modern Public Religion: The Head-Cover Controversy in Contemporary Turkey*, in *Facilitating Freedom of Religion...*, cit. supra, note 10, pp. 497–511; R. Bottoni, *The Origins of Secularism in Turkey*, in *Ecclesiastical Law Journal* 9 (2007), pp. 175–186.

<sup>40</sup> The disciplinary measures adopted against her included denying her access to written examinations and suspension from the University for a semester.



public University. After a year-and-a-half long legal battle to be recognized her right to dress according to what she considered a religious and moral duty, she abandoned her medical studies in Turkey and pursued them at the University of Vienna, in Austria.

The ECtHR leniently applied its traditional doctrine of the national margin of appreciation and sustained the Turkish government's position. According to the Court, the Turkish authorities had acted within a legitimate margin of discretion when they considered that imposing certain policies contrary to the wearing of religious garb at the University was a restriction of the students' religious freedom, which was "necessary in a democratic" society in the meaning of Article 9(2) ECHR. In the eyes of the Court, the prohibition of wearing Islamic headscarves at the Turkish University was justified by the protection of the constitutional principle of secularism (*laïcité*), conceived as a guarantee of democracy and a safeguard against a possible advance of Muslim radicalism in Turkey.<sup>41</sup> The ECtHR agreed with the Turkish government's argument that the veto on personal religious symbols served to generate a climate of tolerance and to avoid social pressure on those female students who refused to wear headscarves.

It is not my intention to deal here with the various deficiencies of the rationale of this case in detail (including an evaluation of the facts that was not particularly careful),<sup>42</sup> but I would like to remark that the ECtHR made

<sup>41</sup> Some attempts in 2008 to change the law were declared unconstitutional by the Turkish Constitutional Court. In February 2008 the Turkish Parliament approved a change in the Constitution that would allow female students to wear their headscarves at University. The constitutional change received wide support – it was approved by 411 of the 550 members of parliament, far beyond the required two thirds of parliament. In June 2008 the Constitutional Court declared the measure unconstitutional for violation of the principle of secularism (sources: Reuters, BBC, The New York Times, Human Rights Watch). For a brief comment on these events, see I. Dagi, The AK Party, secularism and the court: Turkish politics in perspective, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 18 (2008), pp. 1–9.

<sup>42</sup> See, for a detailed analysis, the chapters by T.J. Gunn, N. Hostmaelingen, T. Lindholm and I.T. Plesner in the collective book *Islam in Europe: Critical Views and Emerging Legal Issues* (ed. by W.C. Durham, T. Lindholm & R. Torfs), Aldershot 2011 (forthcoming). See also N. Lerner, How Wide the Margin of Appreciation? The Turkish Headscarf Case, the Strasbourg Court, and Secularist Tolerance, in *Willamette Journal of International Law and Dispute Resolutions* 13 (2005), pp. 65–85; B. Chelini-Pont & E. Tawil, Brèves remarques sur l'arrêt Leyla Sahin, in *Annuaire Droit et Religions* 2 (2006–2007), pp. 607–611; T. Lewis, What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation, in *International and Comparative Law Quarterly* 56 (2007), pp. 395 ff. Among Spanish legal literature, see S. Cañamares, *Libertad religiosa, simbología y laicidad del Estado*, Pamplona

use of bizarre and hypothetical arguments such as “the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who chose not to wear it”<sup>43</sup> (curiously, the Court did not mention the same reasoning in the opposite direction, i.e., the impact of the ban of the headscarf on those who do choose to wear it). That argument implies, ultimately, a predominant view of religion as a potential factor of conflict, especially considering that there was no sufficient evidence of the intolerant atmosphere that wearing headscarves would allegedly generate at the University, nor of any real pressure on uncovered female students on the part of their female or male schoolmates.

As in *Dahlab*, the Court seemed to take for granted that the neutrality of the public sphere is best served when religion is absent or at least “invisible”. The paradoxical consequence of this reasoning is to assume that a climate of tolerance and respect can be achieved through intolerance towards a particular form of religious expression on the basis of mere hypotheses instead of on grounds of clear evidence of a “pressing social need”, which is one of the conditions for imposing legitimate limitations on freedom of religion.<sup>44</sup>

In spite of its flaws and of the amount of criticism received, the rationale of *Leyla ahin* has not remained an isolated episode in the life of the ECtHR. The principles and perspective present in *Leyla ahin* have subsequently been used by the Court to decide against the applicants in other cases of students or teachers who incurred in various sanctions for wearing Islamic headscarves at school in Turkey<sup>45</sup> and also in France, where the restrictive policies on the use of religious garb in public schools (but not at University) were confirmed and reinforced by the 2004 law on religious symbols.<sup>46</sup>

2005, pp. 179–180; E. Relaño & A. Garay, Los temores del Tribunal Europeo de Derechos Humanos al velo islámico: Leyla Şahin contra Turquía, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 12 (2006), pp. 1–32; I. Briones, El uso del velo islámico en Europa: un conflicto de libertad religiosa y de conciencia, in *Anuario de Derechos Humanos – Nueva Época* 10 (2009), pp. 17–82; J. Martínez-Torrón, La cuestión del velo islámico en la jurisprudencia de Estrasburgo, in *Derecho y Religión* 4 (2009), pp. 94–98. See also the dissenting opinion of Judge Tulkens to the Grand Chamber decision.

<sup>43</sup> *Leyla Şahin* (2004), § 108, and *Leyla Şahin* (2005), § 115.

<sup>44</sup> See *supra*, section 2 of this paper.

<sup>45</sup> *Köse and 93 other applicants v. Turkey*, ECtHR, Dec. Adm. 26625/02, 24 January 2006; *Kurtulmus v. Turkey*, ECtHR, Dec. Adm. 65500/01, 24 January 2006. See J. Martínez-Torrón, La cuestión del velo..., cited in note 42, pp. 98–101.

<sup>46</sup> *Loi n° 2008-224*, 15 March 2004. The ECtHR provides a general overview of the debate, as well as of the most relevant legislation and case-law, in §§ 17–32 of the ‘twin’

Thus, in the *Dogru* and *Kervanci* cases, in 2008,<sup>47</sup> related to two twelve-year-old female students of French public schools who refused to remove their headscarves in physical education classes, the ECtHR, by a unanimous decision, declared that the disciplinary measure adopted against the applicants – their expulsion from school – was justified in the light of the principle of proportionality, and consequently there was no violation either of their religious freedom or of their right to education.<sup>48</sup> In turn, *Dogru* and *Kervanci* soon influenced the subsequent case law of the ECtHR, as we can see in six decisions of 2009, rendered on the same date and related to similar factual circumstances. In all of them the applicants were students that had been expelled from school, in various French towns, and in application of the 2004 law against personal religious symbols in public schools, for persistently wearing religious clothing.<sup>49</sup> The ECtHR, in six almost identical

decisions *Dogru* and *Kervanci*, cited below, in note 47. For an analysis of the situation in the first years of the public debate about the Islamic headscarf in France, see D. Le Tourneau, La laïcité à l'épreuve de l'Islam: le cas du port du "foulard islamique" dans l'école publique en France, in *Revue Générale de Droit* 28 (1997), pp. 275–306. For a critical assessment of the 2004 law in France, see A. Garay, Laïcité, école et appartenance religieuse: pour un bilan exigeant de la loi n° 2004–228 du 15 Mars 2004, in *Cahiers de la Recherche sur les Droits Fondamentaux 4: Quel avenir pour la laïcité cent ans après la loi de 1905?*, Caen 2005, 33–48; B. Chelini-Pont & T.J. Gunn, *Dieu en France et aux Etat-Unis. Quand les mythes font la loi*, Paris 2005. The issue has attracted also the attention of Spanish scholars; see, among others, S. Cañameres Arribas, *Libertad religiosa, simbología...*, cited in note 42, pp. 70 ff.; A. González-Varas Ibáñez, *Confessioni religiose, diritto e scuola pubblica in Italia. Insegnamento, culto e simbologia religiosa nelle scuole pubbliche*, Bologna 2005, pp. 229 ff.; M.J. Ciáurriz, Laicidad y ley sobre los símbolos religiosos en Francia, in *El pañuelo islámico en Europa* (coord. by A. Motilla), Madrid 2009, pp. 91 ff.

<sup>47</sup> *Dogru v. France*, and *Kervanci v. France*, both of 4 December 2008. For a comment on those decisions, see B. Chelini-Pont & D. Girard, Le voile musulman et la conception française de l'Etat laïc, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 19 (2009), pp. 1–11; J. Martínez-Torrón, La cuestión del velo..., cited in note 42, pp. 103–107.

<sup>48</sup> The rationale of the Court, following explicitly and repeatedly the doctrine set up by *Leyla ahin*, underscored the importance of the principle of secularism in France, as in Turkey, and elaborated on the need to preserve the atmosphere of neutrality at school as a way of protecting the rights of other members of the school community. It also insisted on recognizing a broad margin of discretion to national authorities when they apply restrictive measures to religious freedom or freedom of expression in that context.

<sup>49</sup> In four of these decisions the applicants were female Muslim students that felt morally obliged to wear a headscarf: *Aktas v. France*, ECtHR, Dec. Adm. 43563/08; *Bayrak v. France*, ECtHR, Dec. Adm. 14308/08; *Gamaleddyn v. France*, ECtHR, Dec. Adm. 18527/08; *Ghazal v. France*, ECtHR, Dec. Adm. 29134/08. In the other two, the applicants were male Sikh students that had been expelled for wearing a *keski* – a more discreet garb that is usually worn under the turban characteristic of Sikhs (*Jasvir Singh v.*

decisions that explicitly followed the rationale of *Dogru* and *Kervanci*, found that the disciplinary measures against the students were justified, despite the fact that now the prohibition of religious clothing was not limited to sports classes but extended to all school hours and premises.<sup>50</sup>

**b) Neutrality in education and institutional religious symbols: the crucifix case**

There are some revealing analogies between the ECtHR's reasoning in the foregoing decisions on personal religious symbols, in particular Islamic headscarves, and in the first *Lautsi* decision (Chamber decision, 2009; hereinafter *Lautsi I*) on the use of institutional religious symbols, in particular the crucifix.<sup>51</sup> In all of them there is a latent understanding of State neutrality of religious "asepsis", incompatible by definition with the presence of religious symbolism.

The issue of the crucifix has been the subject of a heated public and legal debate in Italy in the last decade.<sup>52</sup> The *Lautsi* case is a result of that debate. The applicant was the mother of two students of a public school (aged 13 and 11 at the time), who had unsuccessfully asked the school's governors to remove crucifixes from classrooms – the Italian law prescribes that there shall be a crucifix on the wall of public school classrooms. The mother claimed that the presence of that religious symbol was against the constitutional principle of secularity (*laicità*), in which she wished to educate her children. The Court's Chamber decided unanimously in favour of the applicant, considering that there had been a violation of article 2 of the First Protocol to the Convention (rights of parents) in connection with article 9 ECHR (freedom of thought, conscience and religion). For the Court, the crucifix was a "powerful" symbol

*France*, ECtHR, Dec. Adm. 25463/08, and *Ranjit Singh v. France*, ECtHR, Dec. Adm. 27561/08). The six decisions were rendered on 30 June 2009.

<sup>50</sup> The only difference with *Dogru* and *Kervanci* is that the Court did not consider it necessary to deal with those six applications in a full decision on the merits and chose the more expeditious way of declaring them inadmissible as "manifestly ill-founded". This choice implies in practice a total and unconditional endorsement of the controversial French law of 2004.

<sup>51</sup> *Lautsi v. Italy*, 3 November 2009.

<sup>52</sup> See, for further details and references, in the context of analogous debates in other European and American countries, R. Navarro Valls & J. Martínez-Torrón, *Conflictos entre conciencia y ley...*, cited in note 20, pp. 374–393. For a useful source of documentation on the issue of the crucifix in Italy, with an interesting scholarly analysis from diverse perspectives, see La questione del "crocifisso" (ed. by A.G. Chizzoniti), in *Osservatorio delle libertà ed istituzioni religiose*, <http://www.olir.it/areetematiche/75/index.php> (visited on 31 October 2011).

with remarkable potential impact on young students, and with a primarily religious meaning. Therefore, its presence on the school premises could be emotionally disturbing for some students and was restrictive of the parents' rights to decide the orientation of their children's education and incompatible with the neutrality that must preside over the public school environment.<sup>53</sup> Naturally, the logical consequence of this rationale would be the removal of crucifixes from all public schools in Italy (and probably elsewhere).

Not surprisingly, *Lautsi I* gave rise to an unprecedented reaction from a substantial number of Council of Europe member States, as well as to a more general, and intense, controversy in Europe about the Strasbourg judicial policy with respect to the presence of religion in public life, and in particular the visibility of majority religions.<sup>54</sup> There certainly were grounds for controversy, for some aspects of the decision's rationale are weak and raise some concerns about the interpretation of State neutrality obligations under the European Convention.<sup>55</sup>

<sup>53</sup> "The Court considers that the compulsory display of a symbol of a particular faith in the exercise of public authority in relation to specific situations subject to governmental supervision, particularly in classrooms, restricts the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe. It is of the opinion that the practice infringes those rights because the restrictions are incompatible with the State's duty to respect neutrality in the exercise of public authority, particularly in the field of education." (*Lautsi*, Chamber's decision, § 57).

<sup>54</sup> See, among the many comments to this decision, from different perspectives, S. Cañamares Arribas, *La cruz de Estrasburgo. en torno a la sentencia Lautsi v. Italia, del Tribunal Europeo de Derechos Humanos*, in "Revista General de Derecho Canónico y Derecho Eclesiástico del Estado" 22 (2010), pp. 1-13; T. Prieto Álvarez, *Libertad religiosa y espacios públicos. Laicidad, pluralismo, símbolos*, Pamplona 2010, pp. 88-92 y 129-131; J.H.H. Weiler, *Crucifix in the Classroom Redux*, in "European Journal of International Law" 21,1 (2010), pp. 1-6; S. Mückl, *Crucifijos en las aulas: ¿lesión a los derechos fundamentales?*, in "Revista General de Derecho Canónico y Derecho Eclesiástico del Estado" 23 (2010), pp. 1-15 (analysing *Lautsi I* in the light of the case law of the German Federal Constitutional Court on the crucifix in Bavarian schools); M.J. Parejo Guzmán, *Orden público europeo y símbolos religiosos: la controversia sobre la exposición del crucifijo en las escuelas públicas*, in RGD-CDEE 24 (2010), pp. 1 ss.; P. Annicchino, *Is the glass half empty or half full? Lautsi v. Italy before the European Court of Human Rights*, in "State, Chiesa e Pluralismo confessionale", maggio 2010, pp. 1-19; N. Colaianni, *Il crocifisso in giro per l'Europa: da Roma a Strasburgo (e ritorno)*, in "Revista General de Derecho Canónico y Derecho Eclesiástico del Estado" 24 (2010), pp. 1-26; R. NavarroValls & J. Martínez-Torrón, *Conflictos entre conciencia y ley...*, cited in note 20, pp. 383-390.

<sup>55</sup> The decision also reflects a peculiar notion of education as part of the public function (in the French sense of *fonction publique*). As a consequence, public schools, being under State control, would necessarily be representative of the State's attitude towards religion, without further nuances or distinctions. This is an inappropriate point of departure. The

In particular, it is surprising how categorically *Lautsi I* assumed that students' freedom of religion or belief implies a negative dimension consisting in their right not to be "exposed" to the presence of a religious symbol that some may find alien or even offensive. The argument was analogous to that used in the Islamic headscarf cases (which not coincidentally are often cited in that decision), i.e., religious symbols must be avoided in the public school environment because of the hypothetical pressure they must cause on the students disagreeing with or opposing to the meaning of those symbols. This argument does not seem very persuasive, taking into account the nature of the crucifix as a "static" or "passive" symbol and the absence – as in the case of the Islamic headscarf – of any proselytizing intention or effect.<sup>56</sup> There was no evidence at all that the presence of that Christian symbol was used in practice to affirm the "superiority" of the majority religion in Italy, to indoctrinate students or to foster conversions. On the other hand, the Chamber's reasoning also seems to contradict the previous case law of the Court that held – in my view with all good reason – that the religious freedom of the believers of a certain religion – be it a majority or minority religion – does not confer them the right to be exempt from criticism or to be free from the influence of contrary or even hostile ideas.<sup>57</sup>

It is difficult not to conclude that *Lautsi I*, like the ECtHR's decisions on Islamic headscarf cases, transmits the implicit message that imposing the

education of youth is the direct responsibility of society and only indirectly is it a responsibility of the State, as far as public authorities act in representation of society. To make education in public schools equivalent to the public function in the strict sense is a wrong perspective, leading to subsequent mistakes about how to conceive the neutrality of the State as ultimately responsible, in practice, for the management of the public school system.

<sup>56</sup> Cfr. *Lautsi I*, §§ 54-55. See in this regard the essays, cited in note 54, written by S. Cañamares Arribas, pp. 6-7, and S. Mückl, pp. 8-10.

<sup>57</sup> See *Otto-Preminger-Institut v. Austria*, 20 September 1994, § 47. See, for further references and bibliography, J. Martínez-Torrón, Freedom of Expression versus Freedom of Religion in the European Court of Human Rights, in *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World* (ed. by A. Sajó), The Netherlands, 2007, especially pp. 238-239. With this same orientation, the German Federal Constitutional Court, in 2003, rejected the claim of a father demanding that the table blessing in the local elementary school attended by his son had to be discontinued, for he was an atheist and those prayers violated his ideological freedom. Among other things, the German Court affirmed: "it is not unconstitutional that all children, including those with parents of atheistic convictions, know since their childhood that there are in society people with religious beliefs that wish to practice their beliefs". See BVerfGE, 1BvR 1522/03 vom 2.10.2003, Absatz-Nr. (1-11).



absence of religious visible elements, at least in public schools, is a necessary consequence of State neutrality as a guarantee of freedom of thought, conscience and religion. The underlying assumption appears to be that religion is a factor of potential conflicts, easily leading to confrontation and social tension. Hence the best choice is to eliminate its visible features, and consequently State neutrality would require the protection of the individual right to build “uncontaminated” environments free from religion. From such perspective, as the exercise of every individual right calls for a conflict-free milieu, the State would become obliged to eliminate the possibility of conflict by prohibiting every visible religious symbol – when, in reality, conflicts and confrontation are normally produced not by religious symbols but rather by those who assert their absolute right to erase those symbols from their sight so that they are not exposed to their presence or alleged influence. This position easily leads to the effect that non-religious ideas, in practice, enjoy a superior position over religious ideas – in other words, it leads to the design of public spaces where an atheist can feel more comfortable than a religious believer.<sup>58</sup>

On the other hand, it is not easy to understand how such a conception of State neutrality, with respect both to personal and to institutional symbols, can contribute to build the pluralist, inclusive and objective educational environment that *Lautsi I* mentions.<sup>59</sup> Indeed, the effect of eliminating the visibility of the religious is to exclude and hide an important part of pluralism as well as to create a fictitious school setting, separated from the complexities of real life.<sup>60</sup> Such a school setting would not be at all neutral, since a naked wall at school is not in itself more neutral than having a crucifix on the wall.<sup>61</sup> On the contrary, removing religious symbols from where they had traditionally been may transmit the subliminal message that religion, being potentially conflictive, has its place out of the school but not inside it, thus implying that atheism and agnosticism are at the opposite end of the spectrum, i.e., are considered as non conflictive ideas, and therefore “acceptable” at school.

<sup>58</sup> See R. Puza, *La Cour constitutionnelle, la Bavière et le crucifix dans les écoles*, in *Revue de droit canonique* 45 (1995), pp. 373 ss., commenting the 1995 decision of the German Federal Constitutional Court on the crucifix in public schools in Bavaria.

<sup>59</sup> See *Lautsi I*, § 47.c).

<sup>60</sup> See in this regard M.D. Evans, *Manual on the wearing of religious symbols in public areas*, Council of Europe, 2009.

<sup>61</sup> See J.H.H. Weiler, *Il crocefisso a Strasburgo: una decisione “imbarazzante”*, en *Quaderni costituzionali* (2010), p. 153.



Fortunately, the Grand Chamber overruled the Chamber's decision in 2011 (*Lautsi II*),<sup>62</sup> rejecting that the exclusive notion of neutrality proposed by the Chamber was the only acceptable one, and pointing out that neutrality could also be achieved by a school environment that is inclusive and therefore open to visible expressions of both majority and minority religions or worldviews.<sup>63</sup> According to the Grand Chamber, the decision about the presence of religious symbols in public schools falls within the State margin of appreciation. The Court noted that the mere display of a crucifix in classrooms, as a sign of the religion of the majority of the Italian population, was not sufficient to conclude that there is a process of indoctrination, and even less taking into account that the Italian school environment was open to practices and visible expressions of other minority religions; for instance, students could freely wear Islamic headscarves, and optional religious education of creeds other than Catholic could be organized at school.<sup>64</sup> The subjective feeling of some students about the crucifix was not enough to challenge the legitimacy of a school setting that was objectively built according to an open and inclusive concept of neutrality.<sup>65</sup>

In my opinion, *Lautsi II* would have been even better if it had elaborated further on some points mentioned in the concurring opinions of the two judges, in particular, the idea that coercion should be the test of a violation of freedom of religion or belief, and not the subjective feeling of offence experienced by some persons in the presence of some religious symbols. Just as religious believers do not have the right to be free from criticism, atheistic believers do not have the right to be free from exposure to symbols – personal or institutional – that may offend their convictions or feelings.<sup>66</sup>

<sup>62</sup> *Lautsi v. Italy* (Grand Chamber), 18 March 2011. See V. Turchi, La pronuncia della Grande Chambre della Corte di Strasburgo sul caso Lautsi C. Italia: post nubila Phoebus, in *Stato, Chiese e pluralismo confessionale*, October 2011 ([www.statoechiese.it](http://www.statoechiese.it)), where further bibliographical references, especially to Italian legal literature, can be found. See also the interesting essay, comparing the Strasbourg and the US approach to institutional religious symbols, written by J. Witte, Jr. & N.L. Arold, "Lift High the Cross"? Contrasting the New European and American Cases on Religious Symbols on Government Property, in *Emory International Law Review* 25 (2011), pp. 5–55. In Spain, see S. Cañameres Arribas, Los símbolos religiosos en el espacio público: entre la amenaza real y la mera sospecha, in *El Cronista del Estado Social y Democrático de Derecho* 20 (April 2011), pp. 60–67; S. Meseguer Velasco, Símbolos religiosos en colegios públicos: ¿hacia dónde camina la jurisprudencia europea?, in *Anuario Jurídico Villanueva* 5 (2011), pp. 202–213.

<sup>63</sup> See especially *Lautsi II*, §74.

<sup>64</sup> See especially *Lautsi II*, §§ 70–72, 74.

<sup>65</sup> See especially *Lautsi II*, § 66.

<sup>66</sup> See concurring opinion of Judge Power.

In addition, it would have been useful if the Court had said more clearly that the value protected by the Convention is religious freedom and not secularity, however legitimate and traditional may the latter be in some European States.<sup>67</sup> Separationism is not included in the ECHR, only the State neutrality described above in this paper is, as a condition for the respect for religious freedom. Finally, I would also have welcomed a more explicit statement by the Court about the fact that erasing all religious symbols from the school “panorama” is not neutral but rather supportive of secularist ideologies over alternative religious worldviews.<sup>68</sup> Indeed, once the Court has recognized secularism as a “philosophical conviction” within the meaning of article 9 ECHR and article 2 of the First Protocol,<sup>69</sup> the most coherent option is probably a pluralist and inclusive school environment, and not an allegedly “neutral” environment that excludes the visibility of religion, therefore giving preeminence to secularist views.<sup>70</sup> This is applicable to the institutional display of crucifixes or other religious symbols, as well as to the personal wearing of religious garments as, for example, Islamic headscarves or Sikh turbans.

## 5. Conclusion: towards an inclusive notion of State neutrality

As we have seen, the ECtHR has sometimes justified national policies aimed at imposing a conception of the public sphere that excludes the visibility of religion. It is not easy to avoid the impression that former references of the Court to pluralism, and to the central role that pluralism plays in a democracy, risk yielding to an exclusive concept of neutrality. By nature, pluralism is inclusive, and tends to reflect the plurality of positions – religious or not – actually existing in society. On the contrary, the notion of neutrality proposed by the Turkish and French interpretations of secularism (*laïcité*), ratified by the Court, is exclusive of religion in some areas of public life, particularly in educational settings – virtually any ideological or philosophical position may be visible as far as it is not religious. The implicit idea is that religion is a factor of tension and conflict. Of course religion, like many other realities protected by fundamental rights, can be incidentally conflictive, but to let this peripheral dimension of religion dominate the

<sup>67</sup> Cf. concurring opinion of Judge Bonello.

<sup>68</sup> Cf. concurring opinion of Judge Power.

<sup>69</sup> See *Lautsi II*, §58.

<sup>70</sup> If the secularist notion of neutrality were the only legitimate option in the organization of the public school environment, it would imply that the State is obliged in practice to organize public schools in accordance with a specific philosophical conviction, with the exclusion of all other convictions, religious or philosophical.

definition of how the neutrality of public space should be construed is inadequate and disruptive. As the European Court has repeatedly affirmed, the State is obliged to guarantee tolerance and respect, but eliminating tension at the cost of eliminating pluralism is disproportionate and excessive.<sup>71</sup> The result of these types of policies could be described as “mutilated” pluralism and does not seem compatible with real neutrality but rather with that deformation of neutrality that makes it, always and necessarily, synonymous with “secularism”.

It is true that the ECtHR has not actively supported this exclusive notion of neutrality and it could be argued that the Court has only applied the traditional margin of appreciation doctrine, trying not to impose unnecessary uniform European patterns on national systems of relations between State and religion. However, the mere fact that the Court justified the French and Turkish secularist policies that limit expressions of religious identity, without enough evidence of a danger for public order, might denote a certain agreement with the philosophy underlying those policies – that the public sphere is better organized, and “less problematic”, when religion is absent.

Sometimes it has been suggested that French and Turkish secularist policies could be explained by the declared interest of the government of those countries in restricting the visibility of some symbols of Islam that could be understood as offensive for women – the female headscarf especially – or even as expressions of Islamic extremism, and that could exert pressure on people, particularly on Muslims who refuse to wear those symbols.<sup>72</sup> But the fact is that a similar notion of neutrality inspired the Chamber’s decision in *Lautsi I*<sup>73</sup> suggesting that the neutral organization of the public school system entails the State’s obligation to eliminate all visible religious symbols, and the crucifix in particular, out of respect for the secularist convictions of some parents or students. When the Grand Chamber’s decision overruled the Chamber’s judgment in 2011, it actually denied that this exclusive notion of neutrality was the only adequate one and accepted that neutrality could also be achieved by a plural and inclusive environment that was open to visible expressions of both majority and minority religions or worldviews. Indeed, *Lautsi II* was, in my opinion, mitigating, and perhaps implicitly contradicting, the doctrine that inspired the Court’s rul-

<sup>71</sup> See *supra*, notes 17–18 and accompanying text.

<sup>72</sup> See, for further details on those positions, J. Martínez-Torrón, *Islam in Strasbourg: Can Politics Substitute for Law?*, in *Islam in Europe...*, cited in note 42.

<sup>73</sup> See especially §§ 56–57.

ings on Islamic garment cases. And I consider this is a positive development in the ECtHR's case law.<sup>74</sup>

On the other hand, it seems that the ECtHR's support of active secularist policies mainly applies to education cases. Indeed, out of the educational environment, the European Court has declined to support strict secularist policies aimed at erasing the visibility of religion in the public square, as the case of *Ahmet Arslan* demonstrates.<sup>75</sup> And it is certainly justifiable, and

<sup>74</sup> Some scholars have drawn attention to the apparent contradiction between the principles established by the Court in *Lautsi II* and the criteria used in *Dahlab* or *Leyla Şahin*, suggesting, at the same time, that the Court's attitude in *Lautsi II* is wrong (see P. Ronchi, Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v. Italy*, in *Ecclesiastical Law Journal* 13 (2011), especially pp. 296–297). On the contrary, I think it is right for the Court to correct its views on the Islamic headscarf cases, which have been strongly criticized by many scholars, with all good reason, in the last years. The right way is not to return to *Leyla Şahin*, but rather to keep, and perfect, the track of *Lautsi II*.

<sup>75</sup> *Ahmet Arslan et al. v. Turkey*, 23 February 2010. In this case, the ECtHR held that forbidding the wearing of religious garment in the public square was a disproportionate limitation on religious freedom. The applicants were part of a religious Muslim group called *Aczimendi tarikati*, which gathered in Ankara, in 1996, coming from diverse Turkish regions, to participate in a religious ceremony in a mosque. They were arrested for walking around the city wearing the characteristic garment of their community – turban, loose pants (*saroual*) and tunic, all black – and a cane in memory of Prophet Muhammad. Later, in the judicial hearing, most of them refused to uncover their heads before the judge. The applicants were sentenced to a moderate fine (equivalent to 4 USD) but the sentence was never executed. According to the Turkish government, the doctrines of that religious group were aimed at the replacement of the current democratic regime by a *Sharia*-based regime, and the arrest and prosecution of the applicants was justified by the afore-mentioned laws on religious attire and by the need to preserve public order and avoid acts of religious provocation or proselytism. The ECtHR, though recognizing and emphasizing the importance of the secularity principle for Turkish democracy, decided in favour of the applicants, taking into account that the *Aczimendi's* attire was mandatory according to their beliefs and judging that State interference in their religious freedom was not proportionate. In the Court's view, the government had not proved the alleged existence of a danger for democratic principles and for public order, because the applicants were ordinary citizens, without any specific public position of representation or responsibility, who had just worn their religious dress in public streets and places open to all. The Court noted that this circumstance was essential to distinguish this case from other cases (especially *Leyla Şahin*) in which the applicants had worn religious garb in the specific environment of educational institutions. We could also mention other cases in which the ECtHR considered disproportionate and unjustified some sanctions imposed by the Turkish authorities on parliamentary representatives, politicians, religious leaders or journalists for publicly defending the use of the female Islamic headscarf and openly criticizing the restrictions imposed by Turkish law. These decisions are:

desirable, that the Court has a particular sensitivity on education issues, probably keeping in mind that minors tend to be more vulnerable and there is a greater need to guarantee their protection against indoctrination or religious pressure. In my opinion, however, and precisely because the realm of education is so special, the Court should have been more accurate in defining an inclusive notion of the neutrality of the public sphere, in a way that is open to religious and belief pluralism and does not favour in practice secularist positions.

A number of recent cases indicate that the European Court has been very careful to protect the individuals' *right not to disclose*, even indirectly, their religion or beliefs, an aspect of religious freedom which is *implicit* in article 9 ECHR.<sup>76</sup> I wish that the Court showed at least the same zeal in protecting individuals' *right to express* their religion or beliefs in *practice*, i.e., having the possibility of adjusting their conduct in ordinary life to their moral tenets, an aspect that is *explicit* in article 9 ECHR.

*Kavakçı v. Turkey*, *Ilicak v. Turkey*, and *Silay v. Turkey*, all of them decided on 5 April 2007 with almost identical reasoning; *Gündüz v. Turkey*, 4 December 2003; *Erbakan v. Turkey*, 6 July 2006; *Güzel v. Turkey*, 27 July 2006; and *Kutlular v. Turkey*, 29 April 2008. See J. Martínez-Torrón, *La cuestión del velo...*, cited in note 42, pp. 101-103.

<sup>76</sup> See *Grzelak v. Poland*, 15 June 2010 (indirect disclosure of a student's belief in the school reports through reporting his refusal to participate in confessional religious instruction); *Alexandridis v. Greece*, 21 February 2008, and *Dimitras et al. v. Greece*, 3 June 2010 (oath formulas); *Sinan Işık v. Turkey*, 2 February 2010 (mention of religion on identity cards). For a comment on *Dimitras*, see A. López-Sidro, *Libertad religiosa y juramento en el Tribunal Europeo de Derechos Humanos. el caso Dimitras y otros contra Grecia*, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 24 (2010), pp. 1-12; for a comment on *Sinan Işık*, see Z. Combalía, *Relación entre laicidad del Estado y libertad religiosa: a propósito de la jurisprudencia reciente del Tribunal Europeo de Derechos Humanos*, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 24 (2010), pp. 1-19.