

CHAPTER 2. BETWEEN PLURALISM AND MAJORITARIANISM: THE EUROPEAN COURT OF HUMAN RIGHTS ON RELIGIOUS SYMBOLS AND EDUCATION

Camil Ungureanu

Department of Political and Social Sciences, Universitat Pompeu Fabra

Introduction

The return of religion into the public sphere creates a conundrum for the European Court of Human Rights¹: how is it possible to square the development of a consistent European approach to religious diversity with the recognition of the sometimes-conflictive plurality of state-religion models? The Court's support of the liberal principles of separation and neutrality as well as the outcome of the debate over the Preamble of the Constitutional Treaty have either been deplored by Christian conservatives as the result of European Christophobia, or celebrated by secularists as contributing to the formation of a Europe free of religion.² The acrimony between the Christian-conservative and secularist camps has, of late, resurfaced with the *Lautsi v Italy* decision which dealt with the issue of the crucifix in Italian public schools. The Court's initial *Lautsi* decision in 2009 to ban the crucifix has been interpreted as an attempt to impose a uniform secularist model hostile to religion or – alternatively – as the victory of Reason over religious obscurantism. As expected, the Court's final reversal of the initial decision in March 2011 elicited mirror reactions from Christian conservatives and secularists. In contrast to these opposing interpretations, the present chapter argues for a differentiated approach to European jurisprudence. In my view, the Court has been oscillating between an appealing liberal-pluralist perspective or framework, and a questionable majoritarian one. On the one hand, the Court has supported a perspective that interconnects the principles of liberal constitutionalism (freedom of religion, neutrality, separation) with the principle of pluralism. This framework is neither based on an ideology of secularism hostile to religion in general, nor has it attempted to construct a European "wall of separation" between state and religion. The state is not, from this perspective, purely neutral and separate, but has the positive obligation to protect and enhance a pluralistic culture of mutual tolerance, respect and dialogue amongst citizens. As the Court maintains with reference to education, "proclaiming or teaching religion... is also important to the proper functioning of democracy. For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs (...)"³.

1. Hereafter the Court or the ECtHR.
2. In this chapter I will use "secularism" to refer to a view that regards religion as a pre-modern practice at loggerheads with reason and modern democracy. "Secularists" are those who support this view (e.g. Marx, Freud or Dennett). For an useful review of the recent debate between secularists and religious conservatives with respect to Europe, see Ladrup, 2009: 45-59.
3. European Court of Human Rights (Grand Chamber). *Gorzelik and others v. Poland* (17 February 2004), paragraph 92. In this chapter my interpretation draws on Ungureanu, 2011.

The ECtHR has, on the other hand, supported at key moments a majoritarian perspective reluctant to accept and recognize the increasing diversity of European societies. In particular, the Court has been over-protective of Christian majorities, and it has advanced a one-sided approach to issues involving Islam. The 2011 reversal of the initial *Lautsi* decision is, as I shall argue, a symptomatic relapse into a majoritarian position. A similar perspective emerges also from the ECtHR's treatment of "minority" symbols such as the headscarf: whereas the Court has been over-prohibitive of the headscarf, it has been over-protective of the crucifix (Mancini, 2009).

It is beyond the goal of this chapter to make a comprehensive analysis of the principles guiding the ECtHR's jurisprudence (see, e.g., Evans, 2004) yet I will illustrate the two perspectives by focusing on representative decisions in the area of religious education and symbols. In the following, I start out by characterizing the liberal-pluralist framework as a trend of the Court's jurisprudence, and exemplify it by looking into the area of religious education (I). Second, by analyzing the issue of religious symbols, I illustrate how, at decisive moments, the Court has defended a problematic majoritarian perspective (II).

The liberal-pluralist perspective

The liberal-pluralist perspective refers to the combination of two elements. It includes, first, the secular principles of the European tradition of liberal constitutionalism as they emerged in the aftermath of the European "wars of religion" - freedom of religion, state neutrality, and separation between state and church. Classic liberal constitutionalism, with its focus on individual freedom and rights, does not demand from the state the obligation of protection and recognition of (non)religious pluralism as a positive contribution to democratic life. In contrast, the liberal-pluralist perspective presupposes not only that free religious manifestations in the public sphere are legitimate, but also that the state should grant equal recognition to the diversity of (non)religious relevant particularities. This entails that state neutrality has a negative dimension, i.e. the absence of a biased relation between the state and a religious community, in addition to a positive one founded on the principle of protection and recognition of (non)religious diversity (Shah, 2005).

The liberal-pluralist framework is also minimalist. This refers to the fact that the Court's role is not to replace the existing European state-religion models with an alternative one. The Court was set up by an inter-state institution (the Council of Europe) so as to interpret and implement the European Convention of Human Rights⁴ as an "offspring" of the Council itself. As a result, a central characteristic of the European legal governance is the recognition of the legitimacy of a variety of European models and constitutional traditions from *laïcité* (France, Turkey) to state religion systems (Norway, UK, Greece). This feature of the grammar of the European "approach" is captured by the idea that the role of the Convention machinery is, by definition, subsidiary. As it is established by its case-law, national authorities are in principle better placed than an international Court to assess national and local needs and circumstances.

The ECtHR is, however, not in the role of bystander in the name of the *principled* compatibility between the Convention and the diversity of the

4. Hereafter the "Convention".

European state-religion models. Though a margin of appreciation is left to national authorities, their decision remains subject to review by the Court in conformity with the requirements of the Convention and Protocols. The Court has, in its reviewing competence, attempted to develop a “thin” constitutional framework (or perspective) whereby it sets specific limitations to the margin of appreciation of the national authorities. With respect to religion, this trend gained momentum with *Kokkinakis v Greece* (1993).⁵ *Kokkinakis* has the merit of being the first case to be judged under article 9 of the Convention, which states the principle of freedom of religion: “[e]veryone has the right to freedom of ... religion; this right includes ... freedom, either alone or in community with others and in public or private, to manifest his religion ... in worship, teaching, practice and observance.”⁶ Even if the concept of pluralism is an older presence in the jurisprudence of the Court,⁷ *Kokkinakis* has the merit to have interconnected, in a decisive way, the principle of freedom of religion with that of pluralism as an essential feature of the democratic society.⁸ According to *Kokkinakis*, “[a]s enshrined in Article 9..., 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, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.”⁹ The corollary of the Court’s support of the liberal-pluralist perspective has been its questioning of biased aspects of the inherited bond between majority religion and nation-state.¹⁰ It is significant that *Kokkinakis v Greece* defended Mr. Kokkinakis’ freedom of speech against the manifest bias of the Greek state in favor of the majority religion (i.e. Orthodox Christianity). It is certainly disconcerting to learn that the appellant, a member of the religious minority of Jehovah’s Witnesses, had been arrested more than sixty times before his case reached the ECtHR.

Especially after *Kokkinakis*, the Court has at times questioned biased aspects of the relation between state and majority religion (Ringelheim, 2006). While it is beyond the aim of the present chapter to provide an overview of this jurisprudential trend, I want to exemplify the liberal-pluralist framework by reference to *Folgerø and others v Norway* (2007) – a decision that is representative of the field of religious education.¹¹ *Folgerø* dealt with the issue of religious education in a country where the overwhelming majority is Lutheran, and the Evangelical Lutheran Religion is, in accordance with the Norwegian Constitution, the state’s official religion. In 1998 a new Education Act implemented, as part of a broader educational reform, the compulsory subject of “Christianity, Religion, and Philosophy” (the KRL-subject). In reaction to this measure, *Folgerø* dealt with complaints lodged by non-Christian parents and their children, who at the time were primary school pupils. The legal conflict resulted from the fact that the Norwegian authorities denied the full exemption demanded by non-Christian parents from the KRL. The Court examined this conflict under Article 2 of Protocol No. 1, as the *lex specialis* in the area of education, which reads: “[n]o 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.”¹² At the level of principles, the Court interpreted this

5. European Court of Human Rights. *Kokkinakis v. Greece* (25 May 1993).

6. The Convention is available at: <http://www.hri.org/docs/ECHR50.html>

7. In the *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, the Court maintained that “[t]he second sentence of Article 2 (P1-2) implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner”, Eur. Ct. H. R. *Kjeldsen Busk Madsen and Pedersen v Denmark* (7 December 1976), paragraph 53.

8. On the conceptual innovations of the Court’s jurisprudence, see Mowbray, 2005: 57-79.

9. *Kokkinakis*, paragraph 31.

10. I borrow this phrase from Taylor, 2008: 488. See also Keller and Sweet, 2008.

11. Eur. Ct. H. R. (Grand Chamber), *Folgerø and others v. Norway* (29 June 2007). In the same line, see Eur. Ct. H. R. (Former 2d section), *Hasan and Eylem Zengin v. Turkey* (9 October 2007) and Gorzelik, *Ibid.* For a broad perspective on religion and education law, see Ahdar and Leigh, 2005; Kuyk, R. *et al.*, 2007; and Jackson, *et al.*, 2007; Levison, 1999.

12. See <http://www.hri.org/docs/ECHR50.html>

article as follows: in virtue of the margin of appreciation, issues such as the planning of the curriculum fall, as a rule, within the competence of the Contracting States.¹³ However, the second sentence of Article 2 of Protocol No. 1 implied that the state “is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical conviction”.¹⁴ The state should be neutral – whereby neutrality was understood “negatively” as avoidance of religious indoctrination.

But *Folgerø* was not concerned only with the “negative” aspects of the exercise of state authority. *Folgerø* had the merit of developing, with respect to the area of education, the link between neutrality, freedom of religion, and pluralism. The Court sustained that the state must take care that “information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner”.¹⁵ The Court also maintained that the state had a positive obligation to recognize diversity, and foster a culture of mutual respect. As stated in *Folgerø*, “article 2 of Protocol No. 1 does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents’ convictions, be they religious or philosophical, throughout the entire State education program. ... That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the “functions” assumed by the State. The verb respect means more than “acknowledge” or “take into account”. In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State”.¹⁶

The Court examined the complaint against Norway from the standpoint of this liberal-pluralist framework. The question was whether the Norwegian state, in fulfilling its functions in education, had implemented the notion that knowledge included in the curriculum of the KRL was structured and conveyed in “an objective, critical and pluralistic manner” or whether it had pursued an aim of indoctrination paying no heed to the applicant parents’ religious and philosophical convictions. The Court admitted as legitimate the special role of the majority religion for education in Norway under the form proposed by the Education Act in virtue of the role Lutheranism played in the history and life of the Norwegians. The fact that knowledge about Christianity represented a greater part of the curriculum for primary and lower secondary schools was not, in the Court’s view, a departure from the principles of pluralism and objectivity: given the place occupied by Christianity in the national history and tradition of the respondent State, this must be regarded as falling within the respondent State’s margin of appreciation in planning and setting the curriculum. The Court further noted that article 2 of Protocol No. 1 “does not embody any right for parents that their child be kept ignorant about religion and philosophy in their education”.¹⁷

However, the Court argued the description of the contents and the aims of the KRL subject suggested that not only *quantitative* but also *qualitative* differences applied to the teaching of Christianity as compared to that of other religions and philosophies. For instance, for a number of educational activities such as prayers, the singing of hymns, church services and school plays, the national authorities proposed a partial exemption, by claiming that the proposed observation by mere attendance could suitably replace involvement through participation. In this case, the exemption regarded taking part in the religious practice

13. *Folgerø*, paragraph 84.

14. *Ibidem*.

15. *Ibidem*.

16. *Ibidem*.

17. *Ibidem*.

per se, but only passively so. Yet, as the Court convincingly argued, the distinction between observation and involvement was difficult to implement in practice, and “parents might have misapprehensions about asking teachers to take on the extra burdens of differentiated teaching”.¹⁸ Furthermore, the Court also rejected the Government’s argument that applicant parents could have sought alternative education for their children in private schools which are heavily subsidized by the state, arguing that “the existence of such a possibility could not dispense the State from its obligation to safeguard pluralism in State schools which are open to everyone”.¹⁹ The principle of pluralism required that minorities were protected in particular when majorities were so predominant.²⁰ By way of conclusion, the Court argued that the qualitative difference in teaching Lutheranism made it possible that the objectives of the 1998 Education Act itself (i.e. fostering intercultural dialogue, mutual tolerance and respect) were not fulfilled. From the Court’s perspective, since the information and knowledge included in the curriculum were not conveyed in “an objective, critical and pluralistic manner” for the purposes of Article 2, the appellants were entitled to a *full* exemption from the KRL-subject.²¹

The Court’s decision was neither based on a secularist ideology hostile to religion nor on a conservative one aimed at preserving the status quo at the cost of diversity. The Court’s minimal liberal-pluralist framework is consonant with the recognition of the special relation between state and majority religion in virtue of the latter’s contribution to the identity, tradition, and history of the Norwegian people. But a special relation between state and religion is distinct from a biased one founded on indoctrination and lack of real opt-out solutions for (non)religious minorities.

The majoritarian perspective

Historically speaking, the European states have been founded neither on the strict liberal principles of separation and neutrality, nor by that of pluralism. As a rule, the European states have developed privileged relationships between state and majority religion (or certain religious communities).²² Even militant laic states such as France have granted substantial advantages to the Catholic Church.²³ Moreover, the European states have granted privileges to religious groups over non-religious ones. As Silvio Ferrari notes, in the European practice, a “religious sub-sector is singled out within the public sector. This may be understood as a ‘playing field’ or ‘protected areas.’ Inside it the various collective religious subjects (churches, denominations, and religious communities) are free to act in conditions of substantial advantage compared to those collective subjects that are not religious. The state’s only role is to see that the players respect the rules of the game and the boundaries of the playing field”.²⁴

The majoritarian perspective aims at conserving the privileged relation between state and majority religion, and tends to go along with the majority opinion to the detriment of the diversity of (non)religious options. A case in point is the headscarf affair. The first headscarf case of the ECtHR was *Dahlab v Switzerland* (2001), which set the tone for a suite of similar headscarf cases.²⁵ In Switzerland, there is no state religion, and state schools adopt, in virtue of the secularism and neutrality of the state, a non-denominational system of education, as laid down in Article 27 § 3 of the Federal Constitution. This view is applied in all state

18. *Folgerø*, paragraph 95.

19. *Folgerø*, paragraph 101

20. As the Court argued, “[a]lthough individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position...”, *Folgerø*, paragraph 84.

21. I do not argue that the Court’s reasoning was devoid of problems. For instance, the Court argued that the “[t]he difference as to emphasis was also reflected in the Curriculum, where approximately half of the items listed referred to Christianity alone whereas the remainder of the items were shared between other religions and philosophies.” (*Ibid.* paragraph 92). In my view, it is difficult to see why, from the perspective of Court’s jurisprudence, a state where the overwhelming majority is made of Lutherans should not have the right to dedicate approximately 50% percent to a subject like KRL to the Christian tradition, and why doing so would automatically lead to indoctrination. Here the Court erroneously mixed quantitative and qualitative aspects.

22. See Madeley and Enyedi, 2003; see also Ladeur & Augsberg, 2007.

23. For a historical overview on the relation between state and religion in France, see Rémond, 1999; Laborde, 2008 and 2010.

24. Ferrari, *op. cit.*, 1999, p. 2. See also Leustean and Madeley, 2009: 3-18.

25. From the mushrooming literature on the headscarf, see Evans, 2006: 52-73; Rorive, 2009: 2669-2698; McGoldrick, 2006; Laborde, 2008.

26. Eur. Ct. H. R. (Grand Chamber), *Refah Partisi (The Welfare Party) and others v. Turkey* (13 February 2003). Therein the Court held that the Refah Party's intention to introduce legal pluralism and the sharia was in contradiction with fundamental democratic principles: "Like the Constitutional Court, the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. ... In the Court's view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention" (paragraph 44)

27. I do not want to suggest that the stand of the Court in cases involving Islam is completely problematic. For instance, in Eur. Ct. H. R. (2d section), *Ahmet Arslan and Others v. Turkey* (23 February 2010) (not final), the Court upheld the right of women to wear the headscarf in the street.

schools. The appellant, Mme Dahlab, was appointed as a primary-school teacher by the Geneva cantonal government (*Conseil d'Etat*) in September 1990, having taught at Châtelaine Primary School in the Canton of Geneva since the scholastic year 1989-90. Mme Dahlab converted to Islam in March 1991, and married an Algerian national in the same year. The applicant began wearing an Islamic headscarf in class towards the end of the 1990-91 school year so as to observe an Islamic precept. In May 1995, the schools inspector of the Vernier district informed the Canton of Geneva Directorate General for Primary Education that the applicant regularly wore an Islamic headscarf at school; the inspector also mentioned that there had not been any complaints from parents, pupils or Mme Dahlab on the subject of the headscarf. After failed attempts of negotiation with Mme Dahlab, the authorities decided to ban the headscarf: given her capacity as a teacher and "state representative" at a school in a secular and neutral state, the ban was not regarded as an interference with her freedom of religion (art. 9 of the Convention)". In its assessment as to whether art. 9 had been infringed, the Court admitted that, during Mme Dahlab's three years of teaching, no complaints whatsoever were made with respect to her activity. As the Court points out, "during the period in question there were no objections to the content or quality of the teaching provided by the applicant, who does not appear to have sought to gain any kind of advantage from the outward manifestation of her religious beliefs." The Court further acknowledged that it could not be established that Ms Dahlab's wearing the headscarf had had a negative impact on the pupils. However, the ECtHR submitted that this possibility could be ruled out, not least because wearing the headscarf was based on an imposition prescribed by the Koran. According to the Court, since the Koran is at loggerheads with gender equality, "[i]t ... appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils." As a result, the ECtHR passed a decision of inadmissibility, concluding that the Swiss authorities "did not exceed their margin of appreciation aim of protecting the rights and freedoms of others, public order and public safety".

The ECtHR's inferential "logic" raises, in my view, important difficulties. First, it remains unexplained how Mme Dahlab's donning the headscarf, an issue which had not raised any complaint whatsoever, could be reasonably considered a menace to public order and public safety. The Court was completely silent as to the grounds of invoking art. 9.2 to justify an interference with the freedom of religion (art. 9.1). Second, the ECtHR not only mistakenly maintained that wearing the headscarf was a clear-cut obligation imposed on women by the Koran, but also its sweeping negative judgment concerning the Koran as being at odds with gender equality, democracy and tolerance was, at best, unfortunate. The role of a Court is not to "put on trial books like Koran – the milestone of a hugely complex and changing religious tradition of practice and interpretation. Regrettably, such generalizing verdicts with respect to Islam do not represent an exception. For instance, in influential decisions such *Refah Partisi v. Turkey* (2005), where the Court intimated that there was a principled incompatibility between democracy and sharia.²⁶ When Christian beliefs and conducts are at stake, the Court has never passed such across-the-board negative judgments on the Bible, even if one can easily find statements that are at loggerheads with the contemporary understanding of democratic and gender equality.²⁷

Third, the conjecture that wearing the veil may negatively influence the pupils could not be taken for granted. If building a society based on mutual respect and tolerance is a desideratum, it is reasonable to envisage that pupils be exposed in schools to a plurality of opinions and lifestyles. To respect differences and to be willing to learn from them are “aptitudes” that can be formed by acquaintance with differences, not by hiding them. Schools can preserve their denominational neutrality as their “official stand”, and at once hire teachers who manifest their religious difference, provided that this does not lead to indoctrination. In so doing, freedom of religion, neutrality, and pluralism can be combined so as to contribute to the formation of a culture of mutual tolerance and respect in tune with the existing diversity of contemporary democracies. Tolerance and respect for diversity are not generated by exclusion of diversity, but by hospitality towards it.

The double measure of the ECtHR’s treatment of religious symbols can be seen from its over-protective approach to the crucifix – a majority symbol in the European context (see Andreescu and Andreescu, 2010: 47-74). *Lautsi v Italy* concerned Ms Soile Lautsi, an Italian national living in Abano Terme (Italy), and her children. In 2001-2002, Ms Lautsi’s children, aged 11 and 13 respectively, attended the State school “Istituto comprensivo statale Vittorino da Feltre” in Abano Terme. All of the classrooms had a crucifix on the wall, including those in which Ms Lautsi’s children were imparted lessons. The appellant argued that the presence of the crucifix went against article 2 of Protocol No. 1 (the parent’s right to educate their children according to their convictions and beliefs) and the art. 9 (freedom of religion). In turn, the Government maintained that the crucifix had become a cultural symbol that pertained to Italian history and identity, and that it was linked to values such as solidarity, whose relevance went beyond Catholicism. Therefore, the Government maintained that the presence of the crucifix was compatible with the freedom of religion and state neutrality, and that it even supported pluralism. Finally, given the lack of consensus in Europe about the issue of religious symbols such as the crucifix, the Italian state should benefit from the margin of appreciation in this respect.

In the initial 2009 decision, the Court supported the ban of the crucifix from classrooms. The Court pointed out that pupils could very well interpret the presence of the crucifix in the classrooms as a religious sign, and not as a cultural one. This may be unsettling for pupils who practiced other religions or were non-believers or atheists. As the Court emphasized, the freedom not to believe in any religion (inherent in the freedom of religion guaranteed by the Convention) was not limited to the absence of religious services or religious education: it extended to practices and symbols that expressed a belief, a religion or atheism.²⁸ Further, respect for parents’ religious convictions and for children’s beliefs “implies the right to believe in a religion or not to believe in any religion. The freedom to believe and the freedom not to believe (negative freedom) are both protected by article 9 of the Convention”.²⁹ Therefore, the compulsory display of a symbol of a given confession in premises used by the public authorities, and especially in classrooms, restricted the right of parents to educate their children in conformity with their convictions, and the right of children to believe or not to believe. In particular, it was required to observe confessional neutrality in the context of public education, where attending classes was compulsory irrespective of religion, and where the aim should be to foster

28. *Lautsi* (2009), paragraph 55

29. *Ibid.*, paragraph 47.

critical thinking in pupils. The Court thus rejected the Government's claim that the display, in classrooms in State schools, of the crucifix could serve the educational pluralism that was essential to the preservation of a "democratic society", given that the symbol may be reasonably associated with the majority religion in Italy. As the Court maintained: "(t)he display of the religious symbols even when the majority of the population is favorable of this religion, presupposes a pressure on those who do not share it, and is not in agreement with the educational pluralism and the state neutrality."³⁰

The 2011 final decision reversed the initial ban.³¹ The Court argued that the crucifix should be considered a "religious symbol". But, maintained the ECtHR, the crucifix was merely a "passive symbol"³² present in a context (the Italian) where pluralism was respected.³³ Furthermore, given the lack of consensus over the issue of the crucifix in Europe, the Court argued for granting a wide margin of appreciation to the Italian state with respect to the crucifix.³⁴

While the initial decision failed to consider the question of the margin of appreciation and propose a more nuanced decision. I think that the final *Lautsi* represented a relapse into majoritarianism. The Court was right to distinguish between "didactic teaching" or "participation in religious activities" and symbols,³⁵ yet this did not entail that symbols were "essentially passive"; in contrast, they are images that purport to directly communicate a message in a specific context. Or it is difficult not to note that the Court's view of the pluralism of the Italian context was idealized. Basically, the Court adopted uncritically one of the arguments of the Italian government. But, as various scholars point out, in Italy state and majority religion are intermeshed at different levels – from the political to the educational and private one (e.g., Pollard, 2007). The Catholic Church plays a central role in the political public sphere, and it has campaigned and pressured for a specific legal agenda based on religious worldview. Given the dominance of the Catholic Church in the Italian context in addition to the possibility that the compulsory presence of the crucifix has a biased impact on vulnerable children who do not have an opt-out solution, a solution that grants protection to minorities would have been more persuasive. I call this alternative solution "conditional removal". The "removal" aspect takes into account the requirement of protecting minorities and their freedom of religion in the Italian context. The "conditional" aspect refers to the fact that the removal should be made dependent upon the parents' explicit demand, and not implemented overnight in all public schools.

This "moderate" solution avoids, first, the over-juridification whereby an international Court would pre-decide, fix and paternalistically impose a meaning on a symbol in a variety of dynamic local contexts. Second, this solution is potentially more democratic: while it protects minorities, it does not require the immediate exclusion of the crucifixes from classrooms, giving a margin of discussion and decision to Italian citizens as to the way they want to interpret and maintain their (religious) traditions. Third, this solution gives more substance to a balanced argument from the margin of appreciation: it is not for a subsidiary Court to pre-decide meaning and the presence/absence of the crucifix from all the Italian public schools, but for the Italian citizens themselves, provided that minorities are protected. Thus the "conditional removal" solution finds a *via media* between these two extremes, i.e. the uncritical acceptance of the status quo advocated by religious conservatives, and a priori ban preferred by secularists.³⁶

30. *Ibid.*, paragraph 47.

31. Eur. Ct. H. R. (Grand Chamber), *Lautsi v Italy* (25 March 2011).

32. *Lautsi* (2011) speaks at paragraph 72 of the crucifix on a wall as "an essentially passive symbol".

33. *Lautsi* (2011), paragraph 74.

34. The Court insists several times on the margin of appreciation. E.g. *Lautsi* (2011), paragraphs 68, 69 and 70.

35. *Lautsi*, (2011), paragraph 72.

36. For such a decision in 2009 in Spain, see: www.stecyl.es/juridica/091214_sentencia_TSJ_CyL.pdf

Conclusion

The relationship between religion, state and democracy in Europe is undergoing an open-ended process of transformation. In the last decades, the socio-religious landscape of Europe has fundamentally changed. The power of institutional religion has declined, while the interest in individualized spiritual and religious experiences has increased. Immigration and globalization have also contributed to the growth of a more diverse religious environment. For example, Islamic, Pentecostal and New Age beliefs have become more commonplace in European states.

The ECtHR has made important steps in developing an approach based on the minimal principles of freedom of religion, state neutrality, in addition to that of pluralism. This approach is consistent with the growing pluralization and individualization of the socio-religious landscape in Europe. It is also part of a broader process of revisiting the traditional compromises between state and religion in a more plural world where different religious communities seek for a place in the public sphere. The ECtHR's approach remains, however, marked by ambivalence, as it oscillates between a liberal-pluralist and a majoritarian perspective. In particular, I have exemplified the Court's over-protective stand with respect to Christian majorities, and the biased stand with respect to Islam. "The role of the authorities," maintains the ECtHR in *Sherif v Greece*, "...is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other".³⁷ A more consistent reliance on this "standard" from the part of the ECtHR could be an asset in a political environment where states aim anew at assimilation, and where even sober figures like Angela Merkel take on board the populist rhetoric of the death of multiculturalism. Nonetheless, recent decisions such as *Lautsi* raise doubts as to the ECtHR's capacity to protect, in more consistent way, diversity in Europe.³⁸

Bibliographical references

Ahdar, R. and Leigh, I. *Religious Freedom in the Liberal State*. Oxford University Press, 2005.

Andreescu, G. and Andreescu, L. *Journal for the Study of Religions and Ideologies*, vol. 9, no. 26 (Summer 2010), p. 47-74.

Evans, C. "Religious Freedom in European Human Rights Law: the Search for a Guiding Conception", in: Janis, M. W. & Evans, C. (eds.) *Religion and International Law*. Ashgate, 2004, p. 385-386.

— "The 'Islamic scarf' in the European Court of Human Rights". *Melbourne Journal of International Law*, no. 7 (2006), p. 52-73.

Jackson, R.; Medema, S.; Weisse, W. and Willaime, J.-P. (eds.) *Religion and Education in Europe*, Waxmann, Münster, 2007.

Keller, H. and Sweet, A. S. *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford University Press, 2008.

Kuyk, E.; Jensen, R.; Lankshear, D.; Löh Manna, E. and Schreiner, P. (eds.) *Religious Education in Europe*. Oslo: IKO – ICCS, 2007.

³⁷. *Serif v. Greece*, no. 38178/97, § 53, ECHR 1999-IX.

³⁸. I am grateful to Clare Sheppard for proof-reading this text. I have also benefitted from discussions with Marisa Iglesias on the issue of the crucifix.

Laborde, C. *Critical Republicanism: The Hijab Controversy and Political Philosophy*. Oxford University Press, 2008.

— *Français, encore un effort pour être républicains !* Seuil, 2010.

Ladeur, Karl-Heinz & Augsberg, Ino. "The Myth of the Neutral State: The Relationship Between State and Religion in the Face of New Challenges". *German Law Journal*, vol. 8, no. 2 (2007), p. 143-44.

Ladrup, C. "A European Battlefield: Does the EU have a Soul? Is Religion in or out of Place in the European Union?", in: Leustean, L. N. and Madeley, J. T. S. (eds.) *Religion, Politics and Law in the European Union*. London: Routledge, 2009, p. 45-59.

Leustean, Lucian L. and Madeley, John T.S "Religion, Politics and Law in the European Union: an Introduction". *Religion State and Society*, vol. 37, no. 1-2 (2009), p. 3-18.

Levison, M. *The Demands of Liberal Education*. Oxford University Press, 1999.

Madeley, J.T.S. and Enyedi, Z. (eds.) *Church and State in Contemporary Europe: The Chimera of Neutrality*, London, Frank Cass, 2003.

McGoldrick, D. *Human Rights and Religion: The Islamic Headscarf Debate in Europe*. Oxford: Hart Publications: 2006.

Mancini, S. "The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence". *Cardozo Law Review*, vol. 30, no. 6 (2009), p. 2629-68.

Mowbray, A. "The Creativity of the European Court of Human Rights". *Human rights Law Review*, vol. 5, no. 1 (2005), p. 57-79.

Pollard E. G. J. *Catholicism in Modern Italy: Religion, Politics and Society, 1861-2005*. Routledge, 2007.

Taylor, Ch. *A Secular Age*. Harvard University Press, 2008, p. 488.

Rémond, R. *Religion and Society in Modern Europe*. Malden, Blackwell, 1999.

Ringelheim, J. *Diversité culturelle et droits de l'homme. La protection des minorités par la Convention européenne des droits de l'homme*. Bruxelles: Bruylant, 2006.

Rorive, I. "Religious Symbols in the Public Space: In Search of a European Answer". *Cardozo Law Review*, vol. 30, no. 6 (2009), p. 2669-2698.

Shah, P. *Legal Pluralism in Conflict: Coping with Cultural Diversity in Law*. London: Glass House, 2005.

Ungureanu, C. "Europe and religion: an ambivalent nexus", in: Zucca, L. & Ungureanu, C. (eds.) *State, Law and Religion in the New Europe: Conflicts and Dilemmas*. Cambridge University Press (forthcoming, 2011).