

CONSTITUTIONAL SECULARISM AND RELIGIOUS FUNDAMENTALISM IN  
ITALY AND EUROPE: CONSIDERATIONS STEMMING FROM JUDICIAL  
DECISIONS

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1. *Human Rights and Fundamentalism: Introductory Remarks*

This paper intends to discuss some judicial decisions which today, in Italy as well as in Europe, constitute a major advance in the reasoning of complex issues, such as that of the relationship between secular constitutionalism and fundamentalism, the protection of individual rights and that of group (community) rights and multiculturalism.

The focus of the research could be expressed as follow: which are the judicial decisions, not only in Italy, that challenge the issue on to the relationship between religious fundamentalism and the protection of individual human rights?

The premise of the reasoning is based on another key-question: is it possible to view religious fundamentalism from within a balanced

framework, and is fundamentalism compatible with this method of judicial decision-making in a constitutional State<sup>1</sup>?

Actually, individual human rights and fundamentalism are completely irreconcilable.

Natural human rights adhere to a universal conception of rights, mostly founded on the formal principle of equality.

In particular, with the Constitutions that came into force following the Second World War, this conception was impaired with the emergence and the recognition of differences and with the affirmation of a vision of a more substantial equality.

The affirmation of the principle of substantive equality has remained persistently in tension with the notion of formal equality. Proof of this tension is the concept of affirmative action, an instrument of formal discrimination that violates formal equality and which, according to the U.S. Supreme Court case-Law, has to be temporally limited<sup>2</sup>.

In the last few decades, the emergence of differences in the world of universal rights has caused a profound discussion over the limits of the conventional concept of human rights, which were founded on a limited prototype: that of the secular (or catholic) white man.

In addition, it is evident that at the time when the Universal Declaration of Human Rights was proclaimed, women were excluded from the public

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<sup>1</sup> For an affirmative response, see Zagrebelsky G., 1993 and Id., 2005. In the same perspective, see, as well, D'Amico M., 2008, p. 179, where the author demonstrates that conflicts among constitutional rights can be solved only through the finding of a fair balance between the competing interests and not by their juxtaposition; talking about this method (metodo laico), the author states that «[v]i è [...] una bussola che orienta nella selva delle posizioni contrapposte, apparentemente inconciliabili [...]: sono i principi costituzionali che orientano tutti, che forniscono spesso la chiave per dipanare i conflitti». Aspetti fondamentali del metodo laico sono: a) il coinvolgimento di diversi attori istituzionali, ovvero Legislatore, Corte costituzionale, giudici comuni e cittadini, poiché non vi è un solo modo per difendere i diritti; b) il rifiuto di leggi che tentino di "moralizzare", imponendo "valori"; c) l'acquisizione da parte dei singoli attori istituzionali, di volta in volta chiamati a intervenire, dei dati scientifici e la loro attenzione alla realtà, da prendere in considerazione in modo obiettivo; d) nonché, da ultimo, l'attenzione e la sensibilità verso il rispetto dei diritti delle minoranze, specialmente se "deboli».

<sup>2</sup> See, D'Aloia A., 2002; Scarponi S., Stenico E., 2007, p. 449; Spitaleri F. (ed.), 2013; Dworkin R., 1998; Rosenfeld M., 1993; Leone S., 2009.

sphere, as well as homosexuals and african-americans were neglected in the United States<sup>3</sup>.

Can the emergence of fundamentalism find a place and provoke a discussion on the false neutrality of human rights as universal human rights? Or, simply, is there no place for fundamentalism in the human rights' discourse?

From my point of view, the response to those questions is complicated by two elements that has to be fully considered.

The first one is that for a long time we have tried to analyse the phenomenon of religious fundamentalism from the multicultural perspective<sup>4</sup>, in which we attempt to guarantee the identity of the group, according to the logic implied by the guarantee of individual rights, even when the values of the group are irreconcilable with the principles of universally human rights.

The second consideration is that, especially in Italy, the principle of secularism is evolving in its relationship with the Catholic Church in such a way that it has been modified considerably and to such extent that it is now not applicable to other contexts.

## 2. *Secularism?*

The first consideration concerns the distinction between the positive and negative conception of secularism.

Positive secularism refers to the preservation of religious values and symbols in the public sphere within a context of separation between the Church and the State, whereas negative secularism refers to the practice of excluding religion from the public sphere.

In Europe, the allocation of religious freedom to the private sphere was the result of historical and cultural conditions and was based on the profound relationship between the Catholic religion and the public values of Western States.

As Mario Ricca states “[t]he religion or religious conscientiousness (conscience), and freedom of religion could be confined to the private

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<sup>3</sup> Facchi A., 2000; Cesareo V., 2000; Vitale E., 2000.

<sup>4</sup> On the impact of multiculturalism on the italian legal system with specific regard to women's empowerment and political representation, see D'Amico M., 2008, p. 117.

sphere thanks to the existence of this cultural grounding, consenting to identify that area as the dominion of the difference [between public and private values], but just a relative difference»<sup>5</sup>.

In other words, it was possible to maintain a separation between the Church and the State since the values of each of the two coincided. This provided a basis for multiple categories of liberal thought and of judicial experience.

However, what happens nowadays when there is a change involving both the social and the political context?

The presence in Europe and also in Italy of a growing contingent of ethnic migrants has created a culturally heterogeneous context, where it is emerging a more profound connection between culture and religion, often in a conflicting atmosphere<sup>6</sup>.

There is, in fact, an enormous and irreconcilable distance between the directives imposed by religions, such as Islam, Hinduism, Buddhism, etc., and Christian religion which pervades our common understanding of secular rights and which is implicit in our public and, especially, civil Law.

Thus, the reason behind the decision of not making any references to Christian roots in the European Union's constitutional project, was that the traditional Christian values were already expressed in the principles of equality, liberty and tolerance<sup>7</sup>.

In Europe, judicial decisions have never considered whether the choice between negative forms of secularism (as in France) and positive forms (as in Italy) could have an impact on our freedom.

Only few have questioned and interpreted the potential danger of allowing religious values to dominate the public sphere as a serious threat to our individual human rights<sup>8</sup>.

However, the juxtaposition between positive and negative forms of secularism have been mostly conceived as a contrast between two models

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<sup>5</sup> See Ricca M., 2006, p. 431.

<sup>6</sup> *Ibidem*, p. 431. See, also, Colaianni N., 2012; Randazzo B., 2008; Rimoli F., 1996, p. 8; on the positive form of secularism, see, more recently, Brunelli G., 2013. For a comprehensive analysis, see, also, Mancini S., Rosenfeld M. (eds.), 2014.

<sup>7</sup> See Cartabia M., 2009, p. 537.

<sup>8</sup> See D'Amico M., 2008a, p. 151.

of equality: one that focuses on a formal and universal dimension; the other one focused on differences that lead to discrimination.

It was not foreseen that the positive form of secularism could also favour a progressive denial of universal human rights.

Therefore, I'm willing to demonstrate that the reason behind is that positive form of secularism developed in such a way due to the existing peculiar relationship with Catholicism; and this was the case of Italy<sup>9</sup>.

### 3. *Jurisprudence, Culture and the Erosion of Individual Rights with regard to Fundamentalism*

In western societies, we have known for some decades that one of the most controversial problem was that of how to assimilate immigrants and their cultures without denying them rights.

This multicultural approach, wanting to accommodate other cultures, attempts to establish a state of peaceful cohabitation.

In particular, the judicial point of view has been elaborated upon the well-known "cultural defense" doctrine<sup>10</sup>.

According to the "cultural defense" doctrine, it is possible to justify or to punish less severely an act committed «by a member of a minority culture, which is considered an offence by the legal system of the dominant culture. That same act is nevertheless, within the cultural group of the offender, condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation»<sup>11</sup>.

In several decisions, culture<sup>12</sup> was considered relevant.

One case involved a mother who forced her four-years-old child to beg for money in public<sup>13</sup>. The Supreme Court of Italy (Corte di Cassazione) held that the mother was not guilty, because the act she was accused of was a

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<sup>9</sup> As an example of a negative form of secularism, see France and Turkey. On Turkey, see Kavakchi M., 2010.

<sup>10</sup> See Dundes Renteln A., 2005; Friedman Ramirez L. (ed.), 2010. In Italy, on the connection between culture and criminal Law, see De Maglie C., 2010; Bernardi A., 2010; Basile F., 2012.

<sup>11</sup> See Van Broeck J., 2001, p. 1. See, also, Coleman D.L., 1996, p. 1093.

<sup>12</sup> To better understand the meaning and the use of culture in criminal cases, see J. Waldron, 2001, and, Id., 2002, p. 3.

<sup>13</sup> Italy, Corte di Cassazione, No. 44516, 17.09.2008, in "Guida al diritto", 2009, p. 67.

well established practice in her own culture.

In another case, the argument of the “cultural defense” was used to mitigate the punishment: the Puscheddu case<sup>14</sup>, concerning the violence and sexual assault committed by an Italian citizen from Sardinia, emigrated to Germany. The violence was perpetrated over a three-week period against the defendant’s girlfriend, whom he had suspected of infidelity. The Court condemned the defendant only to two years of prison, which was a lighter sentence than that he could have received. And this was due to the Court’s decision to attach peculiar relevance to the cultural belonging of the defendant.

In its judgement, the Court stated that it was required to take into consideration the cultural background of the defendant, because he came from Sardinia, a place where the relationship between men and women are structured in a peculiar way.

The relevance accorded to the cultural belonging of the defendant therefore reflected the Court’s decision to treat him with greater lenience.

Although it did not entirely excuse the defendant’s behaviour, the Court did consider the defendant’s ethnicity as a factor in attenuating the punishment.

In another case, the Italian Criminal Supreme Court considered a case involving a homicide of an Italian man committed by his employee after an argument between the two<sup>15</sup>.

The Court decided to reduce the severity of the punishment in the light of the defendant’s cultural background; for the Court, the defendant’s Egyptian ethnicity contributed to his disproportionate response following the altercation. As a result, the Court decided not to prosecute the defendant to the full extent under the Law and therefore the defendant received a lighter sentence.

In contrast, there have been examples of cases where the “cultural defense” doctrine did not influence the decision-making.

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<sup>14</sup> German, Landgericht of Bückebe, 25.01.2006.

<sup>15</sup> Italy, Corte di Cassazione, Sez. I, No. 6796 of 2011, <http://www.penalecontemporaneo.it/upload/1334943424Sentenza%20RCM%20futili%20motivi%20DPC.pdf>

In Italy, one famous case was the Hina case<sup>16</sup>. Hina was a twenty years old girl, killed by her father of Pakistani origin. The young girl had left home to cohabitate with her Italian boyfriend and had previously refused to marry a Pakistani man, chosen by her family.

All three levels of Italian judicial system of criminal Law condemned the father for the homicide of his daughter and refused to make use of the “cultural defense” doctrine.

Another case, even more significant, was that of the Supreme Court’s judgement, affirming that the “cultural defense” doctrine could not be applied in order to justify legal interpretations that contradict the Italian Constitution.

The judgement originated from a case of domestic violence perpetrated by a Moroccan man against his wife<sup>17</sup>. The Supreme Court refused to accept the defense’s argument that the defendant’s ethnicity warranted a lighter sentence. Therefore, the Court examined the arguments in sympathy with the concept of multiculturalism.

Even so, the Court did not make use of the “cultural defense” doctrine, in that it recognized the danger it poses on the safeguard of fundamental rights guaranteed by the Italian Constitution. More specifically, according to the Court, the provisions set forth under Articles 2 (Individual Human Rights) and 3 (Equality) establish a limit to any judicial decisions that could potentially infringe these supreme constitutional principles.

With this respect, I find myself in complete agreement with this way of interpretation of the Law in the present case, since the principle of tolerance cannot be applied in such a way to deny the rights guaranteed under the Constitution.

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<sup>16</sup> Italy, Corte di Cassazione, Sezione I penale, No. 6587, 2010. See, Poli P.F., 2012.

<sup>17</sup> Italy, Kassam case, Corte di Cassazione, Sez. VI, No. 46300, 26.11.2008. See, also, Corte di Cassazione penale, Sez. VI, No. 19674 of 2014.

### 3.1. *Female Genital Mutilation and its Cultural Justification*

One interesting application of the “cultural defense” doctrine in the Italian case-law concerns the issue of female genital mutilation<sup>18</sup>; a term that covers a wide range of practices designed to limit women’s sexuality.

Prior to Italian Law, No. 7 of 2006, the Courts were used to prosecute cases of female genital mutilation as acts of violence under the general provisions of the Italian system of criminal law.

However, it is important to underline that in few cases the Courts accepted the use of the “cultural defense” doctrine in handing down decisions involving significantly lighter sentences and, in handful of cases, even absolving the defendants altogether<sup>19</sup>.

In the absence of a specific law, Italian judges recognized the applicability of the “cultural defense” doctrine and, often, they did not prosecute cases to their full extent especially in front of physical and/or sexual violence against women<sup>20</sup>.

For this reason, in 2006, the Italian Parliament enacted a law targeting the issue of female genital mutilation (Law, No. 7 of 2006<sup>21</sup>).

The law includes provisions defining detailed punishments for such practices, thus forcing the Courts to treat them with far greater severity.

Since the passing of the law, there was only one case<sup>22</sup> testing the application and interpretation of these new provisions, although female genital mutilation was and still is an increasing phenomenon in Italy.

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<sup>18</sup> For a comparative analysis on Female Genital Mutilation responses in the European Union, see Leye E., Sabbe A., 2009.

<sup>19</sup> See D’Amico M., 2008a, p. 132; Basile F., 2007, p. 1336.

<sup>20</sup> As an example, see, Italy, Criminal Court, Milan, 1999; Tribunal for minors, Turin, 1997.

<sup>21</sup> Basile F., 2006, p. 682; Facchi A., 2008, p. 90; Magnini V., 2009, p. 1081; Miazzi L., Vanzan A., 2006, p. 13; Cesqui E., 2005, p. 749; Paganelli M., Ventura F., 2004, p. 453; Nobile M., 2015.

<sup>22</sup> Italy, Court of Verona, 2010, and Corte d’Appello of Venice, No. 148 of 2012. For a comment on the judgement, see, Pecorella C., 2011, p. 853; for a complete description of the affair, see, Basile F., 2013, who shows perplexity over the use of a criminal punishment. Contrary to this way of reasoning, see Ruggeri A., 2015, p. 204, who underlines the importance of reaching a balance between the best interest of the child and our constitutional culture, through solutions that have to be equal for all. The data is based on a research on published judgements using De Jure4 database.

Furthermore, in spite of this new Law, the case was decided in the light of the “cultural defense” doctrine.

As a result, it appears that institutionalized discrimination against women continues to exist and that society is still willing to tolerate the devaluation of women’s rights.

Even worse, judges seem willing to ignore the Law thereby contributing, through their decisions, to the perpetuation of a practice that clearly infringes women’s rights.

#### 4. *Italian Decisions on the Relationship between the State and Catholic Religion*

##### 4.1. *The Italian Constitutional Court’s Jurisprudence on Secularism*

In Italy, for a long time, the issue of freedom of religion was focused on the relationship between the Italian State and the Catholic Church. Therefore, the principle of secularism needs to be firstly understood in the light of such a peculiar relationship.

For this purpose, I believe it is of a great importance to start with a brief analysis of the Constitutional Court’s jurisprudence on the principle of secularism along with a specific focus on the category of “positive secularism” and its new interpretation.

In the Italian constitutional system, it was the Constitutional Court (see, judgement No. 203 of 1989<sup>23</sup> on the teaching of religion in public schools) the first to hold the principle of secularism as a supreme constitutional principle that comes from Articles 2, 3, 7, 8, 19 and 20 of the Constitution.

In that case, the Constitutional Court interpreted the principle of secularism as an expression of positive secularism; nevertheless, it is not without a reason that the principle of secularism was understood according to its positive connotation only with respect to Catholicism.

Moving forward from a formal equality among religions, the Constitutional Court has thus stated that the principle of secularism does not require neither impose the State to be neutral when it comes to its relationship with religion, but, rather, it asks the State to guarantee freedom

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<sup>23</sup> Constitutional Court, No. 203 of 1989, in “Giur. cost.”, 1989, 890. For a critique of the judgement, see Saccomanno A., 1989, p. 903; Musselli L., 1989, p. 908; Florida G., Sicardi S., 1989, p. 1086; Colaianni N., 1989, p. 1333.

of religion in a context of a both religious and cultural pluralism (see, judgement No. 203 of 1989: «esso implica non indifferenza dello Stato dinanzi alle religioni ma garanzia dello Stato per la salvaguardia della libertà di religione, in regime di pluralismo confessionale e culturale»).

The very same statement is recurrent and even better clarified in subsequent judgements<sup>24</sup>, among which judgement No. 329 of 1997 on the conformity with the Constitution of those criminal provisions that used to punish harshly the contempt of Catholic religion, as the State religion, rather than that of other confessions. In judgement, No. 329 of 1997<sup>25</sup>, the Constitutional Court held the non-compliance with the Constitution of the more favourable treatment reserved to the Catholic religion and states that the principle of secularism imposes the legislator to be equidistant and impartial with respect to all confessions (see, judgement, No. 329 of 1997: «comporta equidistanza e imparzialità della legislazione rispetto a tutte le confessioni religiose»)<sup>26</sup>.

Thus, according with the Constitutional Court's jurisprudence on the principle of secularism, it must be interferred that in Italy the State should promote acts and legislative interventions aimed at protecting the religious phenomenon as a whole and should guarantee equality of treatment among all religions.

Although the principle of secularism is enshrined in italian Constitution, the Constitutional Court was late in acting accordingly, especially as to those provisions of the italian criminal Law system which favoured the Catholic religion.

In its previous judgements, the Constitutional Court "saves" the regulation provided under the Rocco Code of 1930.

As for its justification and conformity with the Constitution, the Constitutional Court in its first case-law recalls the so-called "quantitative"

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<sup>24</sup> Constitutional Court, No. 259 of 1990, in "Giur. cost.", 1990, p. 1542; Constitutional Court, No. 195 of 1993, in *Giur. cost.*, 1993, p. 1324, with a comment by Acciai R., 1993, p. 2151; Di Cosimo G., 1993, p. 2165.

<sup>25</sup> Constitutional Court, No. 329 of 1997, in "Giur. cost.", 1997, p. 3335 with a comment by Rimoli F., 1997, p. 3343.

<sup>26</sup> *Ibidem*, § 2 of the *Cons. in Dir.*

argument. Therefore, in judgement, No. 79 of 1958<sup>27</sup>, on the compliance with the Constitution of the crime of blasphemy, the Constitutional Court clarifies that the referral to the State-religion, with respect to Catholicism, is to be understood in the light of the number of Italian citizens – to the Court, close to the totality – who profess the Catholic religion (see, judgement, No. 79 of 1958: «alla circostanza che questa è professata nello Stato italiano dalla quasi totalità dei suoi cittadini»). In the Constitutional Court's view, this is the element that justifies the compatibility with the Constitution of the regulation that favoured Catholic religion.

This case-law has been progressively abandoned by the Constitutional Court along with the social and cultural challenges faced by Italian society until judgement, No. 440 of 1995<sup>28</sup> on the annulment of the differential treatment provided under the criminal code as to the crime of blasphemy.

Thus, the Constitutional Court declared the unconstitutionality of the crime of blasphemy, as previously formulated, and extended the criminal punishment to all confessions without distinctions. In that case, the Constitutional Court fully explains the non-foundation of the so-called quantitative argument as a justification for the preferential treatment accorded to the Catholic religion. More specifically, in that judgement, the Constitutional Court stated that when it comes to religion, the Constitution imposes the equal protection of each and every person's freedom of conscience irrespectively of his or her confession of belonging (see, judgement No. 440 of 1995: «in materia di religione, non valendo il numero, si impone ormai la pari protezione della coscienza di ciascuna persona che si riconosce in una fede, quale che sia la confessione religiosa di appartenenza»)<sup>29</sup>. As it is evident from its reasoning, the Court valued the individuality of the religious sentiment over the "quantitative" argument<sup>30</sup>.

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<sup>27</sup> Constitutional Court No. 79 of 1958, in "Giur. cost.", 1958, p. 990. For a critique, see Esposito C., 1958, p. 990.

<sup>28</sup> Constitutional Court No. 440 of 1995, in "Giur. cost.", 1995, p. 3475. For a comment, see Ramacci F., 1995, p. 3484; D'Amico M., 1995, p. 3487.

<sup>29</sup> *Ibidem*, § 3.2. of the *Cons. in Dir.*

<sup>30</sup> A challenging of this jurisprudence was though inherent in a previous judgement, No. 188 of 1975 (in "Giur. cost.", 1975, p. 1508), where the Constitutional Court started recognizing the constitutional relevance of the individual. Therefore, in that judgement, the Court interpreted religion as a feeling that lives within the intimacy of the individual's

#### 4.2. *The Crucifix in Public Schools: Differences between Italy and the Rest of Europe*

A key question, faced by Italian and European Courts, concerns the display of the crucifix in public schools<sup>31</sup>.

In Italy, the main issue was about the conformity with the constitutional principle of secularism of the duty to exhibit the crucifix in public schools classrooms.

The judges challenged its compliance with the Constitution and asked the Constitutional Court<sup>32</sup> to verify whether the provision was in accordance with the principle of secularism. However, in its judgement the Constitutional Court “decided to not decide”, holding that the question of constitutionality was non-admissible because of the non-legislative but regulatory nature of the provision of suspected unconstitutionality<sup>33</sup>.

Nevertheless, the most relevant judgements were those released by the Administrative Court of Veneto Region (TAR Veneto)<sup>34</sup> and by the Council of State<sup>35</sup> on an application issued by a parent of a primary school child after the refusal, opposed by the school administration, to remove the crucifix from the wall of the class attended by the child.

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conscience and that it is also referable to groups of individuals bound to each other by the profession of a common faith. Once rejected the “quantitative” argument (together with all the others that had previously justified differential treatments in favour of the State’s religion), and affirmed the centrality of religious feeling, the Constitutional Court has, from then on, challenged the constitutionality of all those provisions that were expression of a *favor* for the Catholicism.

<sup>31</sup> See, Bin R., Brunelli G., Pugiotto A., Veronesi P. (eds.), 2008.

<sup>32</sup> Constitutional Court No. 389 of 2004, in “Giur. cost.”, 2004, p. 4280. See, Lariccia S., 2004, p. 4287; Gemma G., 2004, p. 4292; Rimoli F., 2004, p. 4300; Oddi A., 2004, p. 4306; Gigli A., Gattamelata S., 2004, p. 4309.

<sup>33</sup> The obligation to display the crucifix in school classrooms is established under Article 118 of the *Regio Decreto*, No. 965 of 1924 (that provides as follows: every institution of secondary school has «the national flag; every class, the image of the crucifix and the portrait of the King») and under Article 119 of *Regio Decreto*, No. 1297 of 1928 (that includes the crucifix within school classrooms’ furniture referring to an annex).

<sup>34</sup> TAR Veneto, No. 1110, 17.03.2005. For a comment, see Fiorita N., 2005; Cavana P., 2006, p. 270; Iannotta R., 2005, p. 99.

<sup>35</sup> Council of State, No. 556, 13.02.2006. For a critique, see Randazzo B., 2006, p. 78; Gilozzi E., 2006, p. 841.

The TAR Veneto rejected the application based on a controversial interpretation of the meaning of the crucifix.

According to the Court, the crucifix represents an historical and cultural symbol that possesses an identitarian value for Italian people; and it also embodies the historical and cultural path of the Italian State.

Although the Court did not deny the religious meaning of the crucifix, it did not consider it relevant for the purpose of its decision. In fact, the crucifix embodies a system of values, such as equality and religious tolerance, enshrined in the Italian Constitution. In other words, in the Court's view, the crucifix would also be a symbol of the secularity of the Italian State.

The Council of State, the Supreme Administrative Court, confirmed the Court's judgement.

According to the Council of State, the meaning of the crucifix varies depending on where it is located. Moreover, in spite of its religious meaning, the Council of State recognized that in public schools the crucifix serves a symbolic function that is highly instructive irrespective of the religion professed by the students.

Therefore, it symbolizes the religious origin of values such as tolerance, mutual respect, personal development, achievement of individual rights as well as the refusal of discrimination; a set of values that, considered as a whole, connotes Italian society.

The matter of the display of the crucifix in Italian public schools was then brought to the European Court of Human Rights by the same applicant who had therefore previously exhausted domestic remedies<sup>36</sup>.

As for the violations, the applicant complained that the display of crucifixes in the classrooms of Italian public schools infringes the right to education, guaranteed by Article 2 of Protocol No. 1, of the European Convention of Human Rights as well as the right to freedom of thought, conscience and religion set forth under Article 9 of the Convention.

In its first judgement, the Second Section<sup>37</sup> of the European Court of

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<sup>36</sup> European Court of Human Rights, *Lautsi and others v. Italy*, No. 30814/06. The first judgement was issued by the Second Section (3.11.2009); the Grand Chamber delivered its judgement on 18.03.2011.

<sup>37</sup> See Guazzarotti A., 2010, p. 185; Bartole S., 2010, p. 65; Conte R., 2010, p. 263; Fiorillo V., 2010, p. 145; Ruggiu I., 2010, p. 364; Lugato M., 2010, p. 402.

Human Rights found a violation of Article 2 of Protocol No. 1, of the Convention, taken together with Article 9, in that the State «is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions»<sup>38</sup>. That is to say that «the State's duty of neutrality and impartiality is incompatible with any kind of power of its part to assess the legitimacy of religious convictions or the ways of expressing those convictions. In the context of teaching, neutrality should guarantee pluralism»<sup>39</sup>.

Moreover, in the Second Section's view, the crucifix is without any doubt a religious sign. Even admitting its plurality of meaning, the Second Section considered the crucifix as mainly a symbol associated with Catholicism that «may therefore be considered 'powerful external symbol'»<sup>40</sup>.

Therefore, the Second Section drew the conclusion that the display of crucifixes in public schools «restricts the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe»<sup>41</sup> and that the practice is also to be considered «incompatible with the State's duty to respect neutrality in the exercise of public authority, particularly in the field of education»<sup>42</sup>.

The Italian Government asked for the case to be referred to the Grand Chamber, that overturned the Second Section's judgment<sup>43</sup>.

Firstly, in the Grand Chamber's view, «is it not for the Court to rule on the compatibility of the presence of crucifixes in State-school classrooms with the principle of secularism as enshrined in Italian Law»<sup>44</sup>. Therefore, the Grand Chamber does not recognize any relevance to the principle of secularism for the purpose of its judgment, confining its judgement to the

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<sup>38</sup> European Court of Human Rights, *Lautsi and others v. Italy*, [Second Section], No. 30814/06, § 47.

<sup>39</sup> *Ibidem*, § 47.

<sup>40</sup> *Ibidem*, § 54.

<sup>41</sup> *Ibidem*, § 57.

<sup>42</sup> *Ibidem*, § 57.

<sup>43</sup> See, Carlassare L., 2011, p. 291; Mancini S., 2011, p. 425; Fiorillo V., 2011, p. 422; Pacini M., 2011, p. 851; Rescigno P., 2011, p. 893; Sapienza R., 2011, p. 564. See, also, Itzcovich G., 2013, p. 287; Lambt R., 2010, p. 751. For further readings, see Temperman J. (ed.), 2012.

<sup>44</sup> European Court of Human Rights, *Lautsi and others v. Italy*, [GC], No. 30814/06, § 57.

compliance of the case with Article 9 and Article 2, Protocol, No. 1, of the Convention.

Thus, the Grand Chamber clarifies the content of the obligation laid down on Contracting States in the field of education, stating that «the State, in exercising its functions with regard to education and teaching, to take care that information or knowledge included in the curriculum is conveyed in an objective critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism»<sup>45</sup>.

The Grand Chamber, even taking into consideration that the prohibition to indoctrinate applies not only to the setting and planning of the curriculum but also to the school environment, draws the conclusion that, although the crucifix «is above all a religious symbol [...], [t]here is no evidence before the Court that the display of a religious symbol on classrooms walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed»<sup>46</sup>.

More specifically, the Grand Chamber acknowledges that the Italian regulations, in prescribing the presence of the crucifix in public school classrooms, «confer on the country's majority religion preponderant visibility in the school environment»<sup>47</sup>; nevertheless, in the Grand Chamber's view, «[t]his is not in itself sufficient [...] to denote a process of indoctrination on the respondent State's part»<sup>48</sup> and it must be read in conjunction with the passive nature of the crucifix as a religious symbol<sup>49</sup>. Moreover, the Grand Chamber found not without importance that Italian schools open up to other religions as well as to Catholicism; in fact, as reported by the Italian Government, there is no prohibition for pupils to wear other religions' symbols within the school environment<sup>50</sup>.

To sum up, the crucifix affair shows, on the one hand, Italian Courts' will

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<sup>45</sup> *Ibidem*, § 62.

<sup>46</sup> European Court of Human Rights, *Lautsi and others v. Italy*, [GC], No. 30814/06, §66.

<sup>47</sup> *Ibidem*, § 70.

<sup>48</sup> *Ibidem*, § 71.

<sup>49</sup> *Ibidem*, § 72.

<sup>50</sup> *Ibidem*, § 74.

to interpret the crucifix as a sign of tradition and, even, of “constitutional” values – which would not challenge its presence within the public institutions of a secularist State –, on the other, the European Court of Human Rights’ tendency to not infringe the Contracting States’ margin of appreciation; this approach, as we will show above, is similarly recurrent in the ECtHR’s judgements on the Islamic veil affair, where the Court justifies the different choices made by the Contracting States on the interpretation of the principle of secularism and by recalling the socio-political context of the respondent State.

5. *The Islamic Veil and its Misunderstanding in the Italian and in the European Jurisprudence*

Italian jurisprudence on cultural defense includes judgements of the Administrative Courts on the annulment of mayors’ measures prohibiting the wearing of the integral Islamic veil (niqab).

The Administrative Courts state that such prohibition could not be introduced by a mayor’s decision<sup>51</sup>. Moreover, the Administrative Court of Friuli Venezia Giulia<sup>52</sup> and the Council of State (Supreme Administrative Court)<sup>53</sup>, as a second instance Court, recognized the legitimacy of the niqab as a sign of cultural expression.

In the Supreme Administrative Court’s view, the niqab represents a traditional item of clothing for some populations, still used as a religious symbol and it entails a use that it does not presuppose the avoidance of personal identification, but, rather, it marks the tradition of populations and cultures.

Although the Supreme Administrative Court did not focus on the niqab belonging to the category of cultural or religious symbols, that was enough

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<sup>51</sup> More precisely, the Mayor of Azzano Decimo’s Council adopted a measure that interpreted the prohibition of masking in public places, provided under Article 85, comma 1, of *Regio Decreto*, No. 773 of 1931, as derogable during Carnival, Halloween, and other prescribed festivities, and that the prohibition, set forth under Article 5 of Law No. 152 of 1975 of using tools to obstruct personal recognition has to be also referred to the Islamic veil that covers faces. The prefect withdrew the Mayor’s ordinance. For a complete review, see A. Lorenzetti, 2010, p. 349.

<sup>52</sup> Administrative Court of Friuli Venezia, judgement, No. 645 of 2006.

<sup>53</sup> Council of State, judgement, No. 3076 of 2008.

to reject the Azzano Decimo's Council appeal, stating that the niqad is not by any means aimed at eluding personal identification.

Again, in this case, the Italian Court "justifies" a gender-based discriminatory culture; in fact, the tolerance of other's cultures results in a contrast with the principle of equality between men and women, but the Court chose not to take this element into account.

On another note, it could be of interest to recall the initiative undertaken by Lombardia Region in early 2016 to forbid the wearing of the Islamic veil within hospitals and public places, whose legitimacy within the Italian legal system has been recently confirmed by a judgement held by the Administrative Tribunal of Lombardia Region on April 20<sup>th</sup> 2017.

Similarly to domestic Courts, the ECtHR decided on cases about the conformity to the European Convention of Human Rights of the ban to wear the Islamic veil established in some of the Contracting States<sup>54</sup>.

More specifically, the cases brought to the ECtHR involved Laws prohibiting the Islamic veils in States that interpret the principle of secularism in negative terms, such as *Leyla Sahin v. Turkey* (2005)<sup>55</sup>, *S.a.s. v. France* (2014)<sup>56</sup> and *Ahmet Arslan v. Turkey* (2010)<sup>57</sup>, where the ECtHR found a violation of the European Convention in that Turkey's criminal Law system punished people who wore religious items of clothing and restricted people's freedom of thoughts, conscience and religion.

Although centered on different facts, it is of a great importance to begin with the Merve Kavakçı affaire: a case about a Turkish woman who tried to sit in the Turkish Parliament wearing the Islamic headscarf.

Nevertheless, the very first judgment on the Islamic veil issued by the ECtHR was the *Leyla Şahin v. Turkey* case<sup>58</sup>.

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<sup>54</sup> From an international law viewpoint, see Bennoune K., 2007, p. 367; for a comprehensive overview, see Ferrari A., Pastorelli S. (eds.), 2013.

<sup>55</sup> European Court of Human Rights, *Leyla Sahin v. Turkey*, [GC], No. 44774/98, 10.11.2005. See, Nieuwenhuis A., 2005, p. 495; Hoopes T., 2006, p. 719; Langlaude S., 2006, p. 929; Marshall J., 2006, p. 452; Saktanber A., Corbacioglu G., 2008, p. 514.

<sup>56</sup> European Court of Human Rights, *S.a.s. v. France*, [GC], n. 43835/11, 1.07.2014. See, Steinbach A., 2015, p. 4; Marshall J., 2015, ngv 003; T. Syring, 2014; Starita M., 2014, p. 101.

<sup>57</sup> European Court of Human Rights, *Ahmet Arslan and others v. Turkey*, [GC], n. 41135/98, 23.10.2010.

<sup>58</sup> It is also important to keep in mind that at that time the ban of wearing the veil was

The case originated from an application submitted by a young Turkish woman, student of the Faculty of Medicine of the University of Istanbul, against the circular issued by the Vice-Chancellor of Istanbul University that stated that «students whose 'heads are covered' (who wear the Islamic headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials».

The applicant complained the violation of Article 9 (Freedom of thought, conscience and religion), Article 8 (Right to private and family life), Article 10 (Freedom of expression) and Article 14 (Prohibition to Discrimination) of the Convention.

The ECtHR, taking into specific account the Turkish historical background, found the measure issued by the University's administration proportionate to the aim pursued, meaning the safeguard of the principle of secularism.

In the Grand Chamber's view, in a context «where the values of pluralism, respect for the rights of others and, in particular, equality before the Law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn»<sup>59</sup>.

Moreover, the Court found the ban to wear the Islamic headscarf necessary in a democratic society. Thus, the Court states that the ban serves to avoid discriminatory treatments suffered by those who do not profess the religion of the majority and, to this end, recognizes a wide margin of appreciation to the respondent State<sup>60</sup>.

Another case is that regarding a prohibition, established by a French Law<sup>61</sup>, to wear *une tenue destinée à dissimuler son visage* (an item of clothing that covers faces).

According to the provision, the violation is assisted with a criminal

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not provided under a Law, but the decision over its prohibition was referred to each institution such as to public universities. On this case, see also Tega D., 2004, p. 846.

<sup>59</sup> European Court of Human Rights, *Leyla Sahin v. Turkey*, [GC], No. 44774/98, 10.11.2005, § 118.

<sup>60</sup> *Ibidem*, § 122.

<sup>61</sup> Law No. 2010-1192, 11.04.2011.

sanction, a fine of 150,00 euros or the obligation to attend a course on french citizenship. In addition to that, anyone who forces a person to cover his or her face because of the sex of belonging is punished with one year of detention together with a fine of 300,00 euros.

Finally, if a minor is involved, the punishment goes up to two years of detention and to 600,00 euros fine. Therefore, the Law seems to be neutrally formulated and aimed at protecting public security since its scope is directed to preclude faces cover-up.

Nevertheless, it is clear by the parliamentary works that the Law's hidden scope was that of impeding the affirmation and the spread of the practice of wearing the Islamic headscarf in public places, accordingly to the negative nature of the principle of secularism enshrined in the Constitution which asks for the neutrality of public spaces and that perceived religion as a private matter only<sup>62</sup>.

The ECtHR's judgement, issued on July 1st, 2014<sup>63</sup>, originated by the application submitted by a young islamic woman, born and resident in France, who complained the violation of Articles 3 (Prohibition of Torture), 8 (Right to respect for private and family life), 9 (Freedom to thought, conscience and religion), 10 (Freedom of expression), 11 (Freedom of assembly and association) and 14 (Prohibition of discrimination) of the European Convention of Human Rights.

In her submission, the applicant states that no one, neither her husband or other members of her family, forced her to wear the integral islamic veil and that she wears the niqab in public and in private, but not systematically. Nevertheless, she wishes to be able to wear it when she chooses to do so, depending on her spiritual feelings (as during the Ramadan). Moreover, the applicant specifies that she does not claim to be able to keep the niqab on «when undergoing a security check, at the bank or in airports»<sup>64</sup> and she

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<sup>62</sup> Moreover, the Law seeks to protect islamic women, minors especially, by offering them a prohibition that allows them to avoid family's or living communities' pressions, often violent; with this respect, the french legislator demonstrates to have taken into account the conclusions drawn from the Stasi's Report. For an overview on the scarf affair in France prior to the EctHR's Judgement, see Brun-Rovet M., 2000.

<sup>63</sup> For a comment, see Valentino A., 2014; Ruggiu I., 2014.

<sup>64</sup> European Court of Human Rights, *S.a.s. v. France*, [GC], n. 43835/11, 1.07.2014, § 13.

agrees to show her face «when requested to do so for necessary identity checks»<sup>65</sup>.

Although the applicant did not claim to have been prosecuted or convicted for wearing the full-face veil in a public place, the Court considers her a victim within the meaning of Article 34 of the Convention, in that the ban, though general and abstract, requires her either to modify her conduct or to risk a prosecution<sup>66</sup>.

As regard to the alleged violations, the Court held that there were no violations, neither of Article 9 of the Convention, which safeguards freedom of religion.

The Court is of the view that, although the ban was introduced for public security reasons, it nevertheless «raises questions in terms of the right to respect for private life [...] of women who wish to wear the full-face veil for reasons related to their beliefs, and in terms of their freedom to manifest those beliefs [...]»<sup>67</sup>.

Therefore, the Court goes on by examining the application under both Articles 8 and 9 of the European Convention.

That being said, the Court considers the ban an interference or a limitation in the applicant's rights protected under Articles 8 and 9 of the Convention; therefore, the Court scrutinizes its compatibility with the second paragraphs of those Articles, verifying whether the ban is prescribed by the Law, pursues one or more of the legitimate aims set out in those paragraphs and whether it is necessary in a democratic society to achieve the aim or aims concerned. With this respect, the Court emphasizes that, according to the explanatory memorandum accompanying the Law, «[t]he systematic concealment of the face in public places, contrary to the ideal of fraternity, [...] falls short of the minimum requirement of civility that is necessary for social interaction»<sup>68</sup>.

For this reason, the Court considers it admissible «that a State may find it essential to give particular weight in this connection to the interaction between individuals and may consider this to be adversely affected by the

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<sup>65</sup> *Ibidem*, § 13.

<sup>66</sup> *Ibidem*, § 57.

<sup>67</sup> *Ibidem*, § 106.

<sup>68</sup> *Ibidem*, § 141.

fact that some conceal their faces in public place»<sup>69</sup>.

Thus, the Court, having regard to the wide margin of appreciation afforded to the respondent State, finds that «the ban can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of 'living together' as an element of the 'protection of the rights and freedoms of others'»<sup>70</sup> and, therefore, maintains that there has been no violation either of Article 8 or of Article 9 of the European Convention.

Nevertheless, the Court warrants particular attention on several arguments put forward by the applicant and by the intervening organisations.

First of all, the Court holds that «there is no doubt that the ban has a significant negative impact on the situation of women who, like the applicant, have chosen to wear the full-face veil for reasons related to their beliefs»<sup>71</sup>, drawing attention to the discriminatory nature of the Law as perceived by the Muslims.

Secondly, even admitting that it is not for the Court to rule on whether legislation is desirable in such matters, the Court underlines that «a State which enters into a legislative process of this kind takes the risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance, when it has a duty, on the contrary, to promote tolerance»<sup>72</sup>.

Even so, the Court is of the view that «the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society»<sup>73</sup>, that justifies the wide margin of appreciation afforded to the respondent State in the present case. And, in fact, the Court stresses that «in such circumstances, the Court has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question. The Court has, moreover, already had occasion to observe that in matters of general policy, on which opinions

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<sup>69</sup> *Ibidem*, § 141.

<sup>70</sup> *Ibidem*, § 157.

<sup>71</sup> *Ibidem*, § 146.

<sup>72</sup> *Ibidem*, § 149.

<sup>73</sup> *Ibidem*, § 153.

within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight»<sup>74</sup>.

Another interesting case crossing the question of the ban of veiling is the affaire *Kavakçi v. Turkey*<sup>75</sup>.

The application was submitted by two former members of the Turkish Grand National Assembly and members of Fazilet Partisi with respect to the Constitutional Court's judgement of 22 June 2001 that dissolved Fazilet Partisi on the ground that the party, which had based its political programme on the question of wearing of the Islamic headscarf, had become a «centre of activities contrary to the principle of secularism»<sup>76</sup>.

More specifically, the case originated in 1999 right after the Principal State Counsel's accusation of Ms Kavakçi for having taken an oath before the National Assembly wearing an Islamic headscarf. Soon after, Ms Kavakçi was also stripped of her Turkish nationality on the ground that she had acquired US nationality without the prior agreement of the Turkish authorities.

The ECtHR found a violation of Article 3, of Protocol No. 1, which protects the right to free elections, because it considered that the sanctions imposed on the applicants were serious and could not be regarded as proportionate to the legitimate aims pursued, meaning to preserve the secular nature of the Turkish political system.

Therefore, the case did not directly involves the ban of veiling while seating in the Parliament, but the loss of citizenship and, even before, the dissolution of a political party because of its presumed incompatibility with the constitutional principle of secularism.

There is only one case, *Ahmet Arslan and others v. Turkey*<sup>77</sup>, where the Court found a violation of Article 9 of the Convention because of the wearing of turbans by a group of men, during an Islamic religious ceremony. The

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<sup>74</sup> *Ibidem*, § 154.

<sup>75</sup> European Court of Human Rights, *Kavakçi v. Turkey*, No. 71907, 28.05.2001. On the case, see D'Amico M., 2008a, p. 147. For further reading, see Kavakçi M., 2014.

<sup>76</sup> European Court of Human Rights, *Kavakçi v. Turkey*, § 21.

<sup>77</sup> European Court of Human Rights, *Ahmet Arslan and others v. Turkey*, [GC], No. 41135/98, 23.10.2010. Both Ruggiu I., 2014 and Valentino A., 2014 underline the distinctiveness of the case. Moreover, the Author shows that, although the Court recalled the case in its judgement on the S.a.s. case, it therefore did not apply that very same *ratio* by referring to the distinguishing technique.

applicants, 127 men belonging to a religious group, in October 1996 met for a religious ceremony held at the mosque and toured the city streets wearing the distinctive dress of their group.

Following various incidents on the same day, they were arrested and taken into police custody. They were then prosecuted for breaching the anti-terrorism legislation and for having refused to remove their turbans.

The ECtHR noted that the legislation in question was not applicable to ordinary citizens like the applicants who, not being representatives of the State engaged in public service, could not be bound, on account of any official status, by a duty of discretion in the public expression of their religious beliefs<sup>78</sup>.

That being said, the Court was of the view that from the evidence brought by the Turkish Government there was nothing in the case file to suggest that the manner in which the applicants had manifested their beliefs by their specific attire represented or might have represented a threat for public order or a form of pressure on others.

Therefore, the Court held that the applicants have only been punished for wearing turbans in a public space and that the Government failed in proving the necessity of the legislative measure and its proportionality to the aim of preserving public security.

For the above reasons, the Court found that there has been a violation of Article 9 of the Convention<sup>79</sup>.

The debate on the Islamic headscarf has more recently gained resonance even within the European Union with two cases brought before the European Union Court of Justice that involved French and Belgian laws on the absolute ban to wear the Islamic headscarf (reference is made to: *Asma Bougnaoui Association de défense des droits de l'homme (ADDH) v. Micropole SA* and *Samira Achbita e Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*), both dismissed by the

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<sup>78</sup> *Ibidem*, § 48.

<sup>79</sup> More recently, the ECtHR reconfirmed its case-law on the wearing of the Islamic headscarf in public places in two cases against Belgium. Once again, and similarly to the *S.a.s. v. France* case, the ECtHR concluded for the non-violation of the Convention. See European Court of Human Rights, *Dakir v. Belgium* No. 4619/12 and *Belcacemi and Oussar v. Belgium*, No. 37798/13, both held on 11.07.2017.

Court that concluded for the non-violation of the principle of non-discrimination with regard to the claims made by the applicants who complained to have been fired on account on their request to keep wearing the headscarf at work.

6. *Additional Reflections in the Light of a Recent Decision by the German Constitutional Court*

Recent cues to overcome the ECtHR's deferential approach to the Contracting State come from a 2015 German Constitutional Court's judgement that, overruled its precedent of 2003 and allowing each Land to decide on weather to ban teachers to wear religious symbols in public shools, states that a general ban of wearing religious symbols in public schools is not compatible with freedom of religion and with the teachers' freedom to profess their religion and belief (see, Articles 4, §§ 1 and 2, GG)<sup>80</sup>.

The First Senate of the Federal Constitutional Court decided on an application submitted by two teachers of a public shool of North Rein Westfalia who have been convicted by a labour Court for having refused to remove the veil during classes despite the prohibition prescribed by the Law.

The judgement's *ratio decidendi* moves from the statement that, to justify the ban «it is not sufficient that the expression of religious beliefs by outer appearance or conduct constitutes an abstract danger, it has to constitute a sufficiently specific danger of impairing the peace at school or the state's duty of neutrality».

The First Senate of the Federal Constitutional Court goes on by underling that the Education Act, which is designed as a privilege of Christian-occidental educational and cultural values or traditions, violates the prohibition of discrimination on religious ground. In fact, the Act presumes a conformity between the vaues of the german constitutional system, such as human dignity and equality, to those of the Christian occidental religion. Therefore, this part of the provision (Art. 3 sec. 3 sentence 1 and Art. 33 sec. 3 GG) is void.

Moreover, according to the First Senate of the Federal Constitutional Court, the ban has to be interpreted restrictively, in a way that is in

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<sup>80</sup> For a comment, see Randazzo B., 2004, p. 148; Mangione G., 2003, p. 1908; Di Martino A., 2014.

conformity with the Constitution; in fact, the prohibition must not be referred to cases when teachers only wear the veil without putting students's freedom and dignity at risk.

More specifically, the Constitutional Court states that «the strict prohibition of the expression of religious beliefs by outer appearance or conduct, which is applicable in the whole Land and for which a mere abstract danger to the peace at school or to the neutrality of the state is deemed sufficient, cannot reasonably be imposed on the holders of fundamental rights in cases such as these»<sup>81</sup>. The competence of the Land is therefore persistent and applicable to cases where wearing an Islamic headscarf does constitute a sufficiently specific danger.

Finally, the Constitutional Court allows some discretion as to the application of the ban on a concrete case-to-case evaluation.

This approach then reflects the nature of contemporary public schools that, in the Constitutional Court's view, are "interdenominational" and mirror the religious-pluralist society «[w]earing clothes with a religious connotation does not per se constitute an interference with the pupils' negative freedom of faith and freedom to profess a belief». With this respect, the Court points out that «the positive freedom of faith as exercised by educational staff [...] is relativised and compensated by the conduct of other members of staff with adherence to different faiths or ideologies»<sup>82</sup>.

This is a very important and also eminent way of reasoning considering that it comes from one of the most influential constitutional Court in Europe.

At the same time, the judgement reflects an approach that stands at the antipodes of the ECtHR's arguments to justify the french ban of the integral islamic veil in public places<sup>83</sup>.

Lastly, the Court applied the principle of secularism in its positive connotation, endorsing a concrete case-to-case evaluation of all those situations where a religious symbol, in itself harmless and to protect equally, could threaten the fundamental rights of a Secular State.

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<sup>81</sup> Germany, First Senate of the Federal Constitutional Court.

<sup>82</sup> Germany, First Senate of the Federal Constitutional Court.

<sup>83</sup> The reference here is, again, to the European Court of Human Rights's judgement on the *S.a.s. v. France* case.

### 7. *Women's Rights and the Challenge of Fundamentalism*

The majority of cases showing an endorsement of culturally or religious practices directly involves women's rights<sup>84</sup>.

On the controversial relationship between individual rights protection and religious fundamentalisms focused a scientific debate with a specific concentration on women's rights and gender related issues. It is in fact well-known that fundamentalisms or religious integralisms conflicts with the principle of equality between men and women as a consequence of its patriarchal view of society.

It was then with Susan Moller Okin's *Is multiculturalism bad for women?*<sup>85</sup> that that debate finally opened up.

The author challenges multicultural policies by questioning «what should be done when the claims of minority cultures or religions clash with the norm of gender equality that is at least formally endorsed by liberal states [...]?».

The discussion on multiculturalism, meaning on those policies seeking to accomodate different cultures, covers the linked-phenomenon of religious integralism; this connection is important to reason on some legal categories that I believe inadequate.

According to Susan Moller Okin, we need to be skeptical about the legal recognition of "groups rights", since groups often endorse culture and religions that are oppressive and discriminatory towards women.

Therefore, Okin criticizes those scholars, like Kimlycka<sup>86</sup>, who suggested that it would be useful to distinguish among groups, depending on their practices and policies towards women and dissenting individuals within the group, in order to grant protection only to those of them who intend to safeguard the principle of equality between men and women.

The debate recalls the United States' case-Law on cultural defense,

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<sup>84</sup> For an overview on the contemporary debate and for a collection of the most relevant case-law on women's rights, see Deller Ross S., 2009; Askin K. D., Koenig D. M. (eds.), 1998; on the relationship between fundamentalism, multiculturalism and the protection of the rights of women, see Stratton Hawley J. (ed.), 1994; Mookherjee M., 2009; Auga U., von Braun C., Burns C., Husmann J. (eds.), 2013. For a in-depth analysis on the feminist political thought on gender issues, see Young I.M., 1990.

<sup>85</sup> Okin S. M., 1999. See also S. Benhabib, 2002.

<sup>86</sup> For further reading on the Author's thesis, see Kymlicka W., 1995.

stressing all those cases that show an infringement of women's rights in the name of culture or religion.

The author therefore invites «[t]hose who make liberal arguments for the rights of groups, then, must take special care to look at inequalities within those groups»<sup>87</sup> noting that «it is especially important to consider inequalities between the sexes, since they are likely to be less public, and thus less easily discernible»<sup>88</sup>.

Moreover, according to Okin, «policies designed to respond to the need and claims of cultural minority groups must take seriously the urgency of adequately representing less powerful members of such group because the attention to the rights of minority cultural groups, if it is consistent with the fundamentals of liberalism, must ultimately be aimed at furthering the well-being of the members of these groups, there can be no justification for assuming that the groups' self-proclaimed leaders – invariably composed mainly of their older and their male members – and, more specifically, young women [...] represent the interests of all of the groups' members [...]»<sup>89</sup>.

A last aspect of the debate, then, involves the limits to freedom of religion in a liberal State; in the analysis on the relationship between freedom of religion, as a fundamental principle, and the principle of equality between men and women, the dilemma, as to whether freedom of religion deserves more or less care or attention than gender discrimination, is fully examined by laying bare abstract solutions, even at the case-Law level, that do not take into account the effective freedom of choice existing within the group as well as the level of oppression of women's rights.

Finally, the debate, that highlights one of the central issue of contemporary pluralistic democracies, ends by hoping for a multiculturalism that gives to gender and to other form of discriminations within the group what they deserve: a multiculturalism that treats individuals as morally equal.

#### 8. *Democracy, Secularism and Tolerance: What We Can not Relinquish?* With respect to these controversial set of problems, we can note that the

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<sup>87</sup> Okin S. M., 1999, p. 23.

<sup>88</sup> *Ibidem*, p. 23.

<sup>89</sup> *Ibidem*, p. 24.

jurisprudence is still very limited and that it has progressively developed restricted categories and reasonings, even though at the same time it has shown a tendency to approach those very same issues more profitably.

It is clear, though, that in Italy the principle of secularism was first interpreted in accordance with its positive connotation, due to the peculiar relationship between the State and the Catholic Church and its values, which, for the most part, correspond to our Constitution's supreme principles. At the same time, it is also undeniable that, in this case, the sacrifice of a negative form of secularism does not mean a sacrifice of the universal equality and of those non-negotiable rights.

Therefore, if we look at the Italian reality, we become very aware of the fact that not only the Courts, but even politics and the whole society are used to applying controversial categories without developing a model suitable for religions that differ from Catholicism.

We can easily think of controversial measures, such as that regarding the regulation on place of worship established by Lombardia Region, that discriminates against other religions and that shows a persistent and unsolved tension that directly affects freedom of religion throughout the provisions of urban norms<sup>90</sup>.

By the way, categories or concepts like multiculturalism and positive secularism are not appropriate since there are problems of integration and of cohabitation that are not resolvable by simply granting a formal equality that is not substantial as well.

Furthermore, if we think of Italy's identity as a secular State, we can not forget Article 19's original sin: the principle of secularism was not explicitly enshrined in the Italian Constitution because it was believed unnecessary. It is also well-known that the Labriola's emendament<sup>91</sup>, which stated the freedom of all the opinions and organizations aimed at declaring their non-

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<sup>90</sup> Law No. 12 of 2005, *Legge per il governo del territorio, così come modificata con legge n. 2 del 2015, Modifiche alla legge regionale 11 marzo 2005, n. 12 (Legge per il governo del territorio) - Principi per la pianificazione delle attrezzature per servizi religiosi*, that has been referred to the Italian Constitutional Court as to the conformity of the law with Articles 3, 8, 19, 117, §§ 1 and 2, lett. c), h), l), 118, § 3, and 119 of the Constitution. The Constitutional Court, with judgement no. 63 of 2016, nevertheless rejected the question of constitutional legitimacy.

<sup>91</sup> See, Labriola, Italian Constituent Assembly, 12.04.1947.

involvement in religious beliefs or their compliance with the principle of secularism, was set aside because considered implicit in the constitutional provision. From this perspective, freedom to believe also implies freedom to not believe, as our forefathers used to say.

We cannot even ignore the last decade of Italy's political debate, made of choices on fundamental rights that were inspired by a true fundamentalism, a juxtaposition of values that imposes downwards solutions disrespectful of individual autonomy.

One example is Law No. 40 of 2004 on medically-assisted procreation, an ideological Law<sup>92</sup>, that imposes, in her previous formulation, the value of the embryo against all the other interests at stake and that has been challenged three times by the Constitutional Court<sup>93</sup>; we can then go on by thinking of the conscience objection within the Law on voluntary termination of pregnancy (Law No. 194 of 1978): again, an ideological application of the Law endangers women's right to decide over their pregnancy<sup>94</sup>; finally, we can recall the so-called "Englaro case" and Beppino Englaro's fight to see her daughter's last will fully granted<sup>95</sup>.

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<sup>92</sup> For a comment on Law No. 40 of 2004 from its coming into force, see D'Amico M., 2008a, and D'Amico M., 2013; D'Amico M., Costantini M.P., Mengarelli M., 2014. See, also, Dolcini E., 2009, which stated that Law No. 40 of 2004 is a bad Law that represents a tool for fighting medically-assisted procreation techniques.

<sup>93</sup> See, Constitutional Court, No. 151 of 2009, in "Giur. cost.", 2009, p. 1656 and ss. (on the non compliance with Italian Constitution of the limit of the number of embryos to be implanted with homologous techniques); judgement No. 162 of 2014, in "Giur. cost.", 2014, p. 2563 and ss. (on the illegitimacy of the prohibition of heterologous medically-assisted procreation techniques); judgement No. 96 of 2015 (on the constitutional legitimacy of preimplantation diagnosis). For a comment, see D'Amico M., Pellizzone I. (eds.), 2010; D'Amico M., Costantini M. P. (eds.), 2014.

<sup>94</sup> See the judgement on the complaint against Italy, No. 87/2012, *IPPF EN v. Italy*. For a critique, see D'Amico M., Guiglia G. (Eds.), (2014), *European Social Charter and the challenges of the XXI century*, ESI, Naples.

<sup>95</sup> The case was definitely decided by a judgement delivered by the Court of Cassation (No. 21748 of 2007), that recognized the fundamental right of the patient to ask for the withdrawal of artificial nutrition and hydration at the end of life under the concurrence of two circumstances: the patient's will to withdraw artificial nutrition and hydration even as expressed prior to the loss of consciousness; the persistency of the vegetative state. For a comment on the judgement, see Romboli R., 2009, p. 91; D'Avack L., 2008, p. 759; Casonato C., 2008, p. 545.

In front of this panorama, it is clear that intolerance and a non-religious, but ideological, fundamentalism is spreading all over the place, putting at risk that so-called “metodo laico” (a method that it is based on the Italian principle of secularism) that requires a balance among the interests at stake and that, although not surprisingly, affects extensively women’s rights and their bodies.

To sum up, Courts and legislators must be fully aware of the need to preserve a set of universal fundamental rights as well as of the tricks hidden behind a recognition of cultures, that commit serious violations of that same set of rights<sup>96</sup>. The cultural defense is a tool that needs a real awareness of its dynamics, which would allow or facilitate a case-by-case evaluation, as suggested in its acute judgement by the German Constitutional Court.

Hence, respect for other cultures turns into respect for others’ orthodoxies, damaging differences, individual liberties and discordance within the “other” community. And the libertarian and tolerant relativism becomes an ally of others’ intolerant orthodoxies.

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<sup>96</sup> On the risks of cultural relativism, see Levi Della Torre S., 2012, p. 108. According to the author, freedom of religion and freedom of conscience are not religious principles, but, rather, are linked to the principle of secularism, that originate as a juxtaposition against the official doctrine, mainly Catholicism.

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