



**Alice Ollino**

(dottore di ricerca in Diritto internazionale nell'Università degli Studi di Milano-Bicocca, Dipartimento di Giurisprudenza)

**Modes of neutrality in the ECtHR jurisprudence  
related to religious matters: some critical remarks \***

**SUMMARY:** 1. Introduction - 2. The meaning of State neutrality: some conceptual clarifications - 3. State's neutrality vis-à-vis religious organizations: neutrality as absence of interference - 4. State's neutrality vis-à-vis public education: neutrality as objectivity - 5. State neutrality vis-à-vis religious symbols in the public sphere: neutrality as exclusion of religion - 6. 'Reversed' patterns of neutrality: the disruptive effect of *Lautsi v. Italy* - 7. Concluding remarks: decoding the patterns of State neutrality in the jurisprudence of the ECtHR.

## 1 - Introduction

International law does not impose an obligation of neutrality on States toward religions or beliefs. International and regional human rights instruments that deal with religious matters focus exclusively on the extent to which individuals shall enjoy the right to hold and manifest freedom of thought, conscience and religion, and do not envisage particular obligations on the part of the State. States parties to human rights Conventions may be accountable before international treaty bodies, if they exist, yet these bodies have no competence on how a State should be organized internally.

The European Convention on Human Rights (ECHR) is no exception to this framework. Article 9 and Article 2 of the First Protocol provide for the recognition of an individual's freedom of thought, conscience and religion and for State's respect for parents' religious and philosophical convictions, but make no reference to the concept of State neutrality. Furthermore, the European Court of Human Rights (ECtHR) acknowledges the regimes diversity that characterizes the European context and the impossibility to identify throughout Europe a uniform conception of the significance of religion in society<sup>1</sup>. Yet, neutrality has become increasingly

---

\* Article peer evaluated.

<sup>1</sup> *Otto Preminger-Institut v. Austria*, app. no. 11/1993, ECtHR (Judgment), 23 August 1994, par. 50.



relevant in the rulings of the ECtHR concerning religious freedom. In several cases, the Court has explicitly resorted to the idea that the exercise of public authority should be neutral toward religious matters, and that States should act as neutral and impartial organizers of religious life within their community<sup>2</sup>.

The idea that neutrality is a precondition for a State's full compliance with freedom of religion is inherent to international human rights law<sup>3</sup>. With reference to the ECHR, neutrality is to be regarded as one of the constitutive premises upon which rest the notions of freedom of religion, conscience and thought. The conception of neutrality underpins the foundations of the Convention in as much as the latter recognizes religious pluralism as one of its pillars. That said, neutrality as a State duty recognized by the ECtHR is quite a slippery concept. Firstly, because speaking of State neutrality implies coming to terms with the definition of the concept, which is far from controversial. State neutrality may in fact assume different meanings. It may be interpreted as equidistance of the State vis-à-vis all religions, meaning that the government actions should not favor any particular faith; it may refer to equality of treatment by the State toward different faiths; but neutrality could also consist of exclusion of religion from the public sphere, so that the State is either indifferent toward them or even oppose to the idea of allowing religion to enter the public domain<sup>4</sup>. All these differences are mirrored in the case law of the ECtHR, which has struggled to convey a homogenous and coherent definition of what State neutrality means.

Aside from the difficulty of discerning the alternative modes of State neutrality adopted by Strasbourg judges when confronted with religious matters, a further issue comes to light when surveying the jurisprudence of the Court. In developing and applying different patterns of neutrality toward religious matters that share a great deal of similarity, the Court appears to have been caught between two opposite tensions. On the one hand, there is a clear effort on the part of the ECtHR to develop a notion of State neutrality

---

<sup>2</sup> *Refah Partisi (the Welfare Party) and Others v. Turkey*, app. n. 41340/98; 51342/98, 41343/98, ECtHR (Grand Chamber), 13 February 2003, par. 90.

<sup>3</sup> **J. TEMPERMAN**, *The Neutral State: Optional or Necessary? A Triangular Analysis of State-Religion Relationships, Democraticisation and Human Rights Compliance*, in *Religion and Human Rights*, n. I, 2006, p. 296 ss.

<sup>4</sup> **W. KYMLICKA**, *Liberal Individualism and Liberal Neutrality*, in *Ethics*, vol. LXXXIX, 1989, p. 883 s.; **S. CLARKE**, *Consequential Neutrality Revivified*, in *Political Neutrality: A Re-evaluation*, edited by R. Merrill, D. Weinstoc, Palgrave Macmillan, New York, 2014, p. 109 s.



driven and inspired by classical liberal principles. Thus, in pursuit of these liberal aspirations, the Court has often resorted to conceptions that privilege the understanding of neutrality as ‘absence of coercion’ or ‘absence of State preferences’ toward one religion. On the other hand, there is a clear line of cases marked by the Court’s effort to endorse a notion of neutrality capable of accommodating the diversity of the constitutional orders and cultural traditions of European States. As an international adjudicative body, the Court is aware that it is beyond its powers to impose a unique model of religious neutrality in Europe. For this reason, the Court has accorded a wide margin of appreciation to States and it has remained open to different State-religion formula. Yet, the anxiety shown by the ECtHR toward the respect of different European religious models has often resulted in excessive deference vis-à-vis (certain) governmental policies that significantly curtail individual’s rights to freedom of religion and conscience.

This contribution engages with these issues and seeks to critically discuss the notion of State neutrality in the jurisprudence of the European Court of Human Rights. The paper is premised on the recognition of State neutrality toward religious matters as a foundational value of the Convention, and builds almost exclusively on the analysis of the ECtHR rulings based upon this notion. The primary goal is to identify different patterns of neutrality to which the Court resorts in order to solve disputes concerning freedom of religion and beliefs, and to test their coherence within the framework of the Convention. For this reason, doctrinal debates pertaining to the consequences of such neutrality, or questioning the extent to which a State obligation of neutrality should be enforced and promoted by the Court are left aside<sup>5</sup>.

Given the breadth of the topic, the scope of the research is focused on three different areas in which the notion of State neutrality was picked up by the Court: religious disputes, religious education in public schools

---

<sup>5</sup> See in this regard, **I. LEIGHT**, *The European Court on Human Rights and religious neutrality*, in *Religion in a Liberal State*, edited by G. O’ Costa, M. Evans, T. Modood, J. Rivers, Cambridge University Press, Cambridge, 2014; **J. WEILER**, *State and Nations; Church, Mosque and Synagogue - the trailer*, in *International Journal of Constitutional Law*, vol. VIII, 2010; **E. HOWARD**, *Law and the Wearing of Religious Symbols: European bans on the wearing of religious symbols in education*, Routledge, London, 2013; **G. CASUSCELLI**, *Il divieto di indossare il niqab del codice penale belga all’esame della Corte europea dei diritti dell’uomo: un passo in avanti per la formazione del “precedente” che mette a rischio il pluralismo religioso*, in *Stato, Chiesa e pluralismo confessionale*, Rivista telematica ([www.statoechiese.it](http://www.statoechiese.it)), n. 26 del 2017, especially p. 4; **P. ANNICCHINO**, *Is the glass half empty or half full? Lautsi v. Italy before the European Court of Human Rights*, in *Stato, Chiesa e pluralismo confessionale*, cit., maggio 2010.



and institutions, and the presence of religious symbols in the public sphere. This choice of this taxonomy is explained by the fact that these three different areas allow for the identification of notions of State neutrality, which are not only distinctive, but at times also in conflict with each other. The last section of the work delves further into the notions of State religion neutrality and sheds some critical remarks on the approach adopted so far by the Court.

## 2 - The meaning of State neutrality: some conceptual clarifications

Neutrality as ground for the relationship between a State and religion finds source in liberal political theory. Among the tenets of liberalism rests the idea that in order for a State to treat its citizens as equals, that State must be neutral on what constitutes a good and valuable life<sup>6</sup>.

The crucial assumption at the bottom of liberalism as philosophical doctrine is that individuals have different and irreconcilable conceptions of the good<sup>7</sup>. These individuals, participants of a liberal polity, regard themselves as free and equal, and expect to be given fair opportunities and space to be able to pursue their interests and concerns<sup>8</sup>. For this to be achieved, a State should accord enough freedom so as to allow individuals to follow their interests<sup>9</sup>, but it should also avoid upholding one particular idea of the valuable life. This is because to do so would necessarily amount to denying individuals holding different conceptions of the good the status of equal participants. In a liberal State, pluralism of ideas and ideologies should not only be conceived as a physiological consequence of any democratic society, but it should also be accommodated, since any attempt or actual removal of diversity would entail the exercise of a form of autocratic power<sup>10</sup>. Neutrality on the part of the State is therefore the

---

<sup>6</sup> R. DWORKIN, *Liberalism*, in *Public and Private Morality*, edited by S. Hampshire, Cambridge University Press, Cambridge, 1978, p. 127; W. KYMLICKA, *Liberal Individualism*, cit., 1989, p. 883 s.; S. CLARKE, *Consequential Neutrality Revivified*, cit., p. 109 s

<sup>7</sup> J. RAWLS, *Political Liberalism*, Columbia University Press, New York, 1996, pp. 193-197.

<sup>8</sup> J. RAWLS, *Political Liberalism*, cit., p. 197.

<sup>9</sup> R. DWORKIN, *Is Democracy Possible Here? Principles for a New Political Debate*, Princeton University Press, Princeton, 2006, p. 76.

<sup>10</sup> R. DWORKIN, *Liberalism*, cit., p. 127.



essential procedural commitment<sup>11</sup> for ensuring equality, pluralism and justice. It is the premise upon which values of liberty and equality among individuals can be respected and guaranteed, and at the same time it is the means the institutional apparatus resorts to in order to ensure justice and democracy within the State.

Most liberal political theorists accept that when we talk about State neutrality vis-à-vis religious matters, we should keep in mind the notion of 'justificatory neutrality' or 'neutrality of aims'. Neutrality of aims builds on the idea that a government's power should not be regulated in a way that presupposes endorsement of a particular conception of the good<sup>12</sup>. Neutrality does not require the State to make sure that its policies are neutral in their effects<sup>13</sup>. On the contrary, 'neutrality of aims' entails a restraint on the grounds that can be invoked to justify political decisions. Basically, "a decision can count as neutral only if it can be justified without appealing to the presumed intrinsic superiority of any particular conception of the good life"<sup>14</sup>.

It has already been noted that the European Convention on Human Rights does not explicitly recognize State neutrality in religious matters as a goal to be pursued under the Convention. Article 9, which provides the basic framework for freedom of religion, focuses only on the individual's dimension of freedom of religion. In this regard, the Convention recognizes everyone's right to freedom of thought, conscience and religion, which includes both the right to change religion or beliefs, and the right to manifest religion. Furthermore, art. 9(2) affirms that limitations to freedom to manifest religion shall be permitted provided that they are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health and morals, or for the protection of rights and freedoms of others<sup>15</sup>.

---

<sup>11</sup> **B. PASTORE**, *Quali fondamenti per il liberalismo? Identità, diritti, comunità politica*, in *Diritto e società*, vol. III, 1997, p. 424 ss.

<sup>12</sup> **J. RAWLS**, *Political Liberalism*, cit., p. 193.

<sup>13</sup> This form of neutrality is defined as 'consequential neutrality'. Consequential neutrality is achieved when governments policies are conducted in a way "that will neither improve nor hinder the chances that individuals have of living in accord with their conception of the good", see **J. RAZ**, *The Morality of Freedom*, Clarendon Press, Oxford, 1986, p. 108.

<sup>14</sup> **C. LARMORE**, *Patterns of Moral Complexity*, Cambridge University Press, Cambridge, 1987, p. 44.

<sup>15</sup> For an overview of the relationship between freedom of religion and the ECHR see: **R. MAZZOLA** (ed.), *Diritto e Religione in Europa, rapporto sulla giurisprudenza della Corte Europea dei diritti dell'uomo in materia di libertà religiosa*, il Mulino, Bologna, 2012; **A.**



There are therefore two dimensions which are afforded protection under the Convention: the internal dimension of freedom of religion, which consists of the right (not) to hold a religious belief, or to change it; and an external dimension, which concerns the right to manifest religion in the *forum externum*. The Convention recognizes that the *forum internum* cannot be subject to a State's limitation and must be protected by the latter: this means that neutrality of the State in this context shall be absolute and understood as absension of the State from any form of (de)legitimation or approval of a particular belief<sup>16</sup>. As for the *forum externum*, the Convention recognizes that the manifestation of religion, whether exercised individually or collectively<sup>17</sup>, can be the object of State regulation. And it is very much in relation to this regulation that the Convention - or better, the Court through its jurisprudence - has a say on the permissible forms of relationship between religious institutions and the State<sup>18</sup>. Neutrality is therefore one of the "theories" or policies that the European Court of Human Rights has been developing and implementing with the view of building a consistent vision of freedom of religion and regulating the relation between the State and religion<sup>19</sup>.

As a matter of fact, the principle that a State should be neutral toward religious matters can be traced back to the foundations of the Convention<sup>20</sup>.

---

**GARDINO**, *La libertà di pensiero, di coscienza e di religione nella giurisprudenza della Corte europea di Strasburgo*, in *Libertà religiosa e laicità. Profili di diritto costituzionale*, edited by G. Rolla, Jovene, Napoli, 2009; **C. EVANS**, *Freedom of Religion under the European Convention of Human Rights*, Oxford University Press, Oxford, 2001; **J. MARTINEZ-TORRÓN**, *Religious Pluralism: the case of the European Court of Human Rights*, in *Democracy, Law and Religious Pluralism in Europe*, edited by F. Requejo, C. Ungureanu, Routledge, London, 2014.

<sup>16</sup> **J.P. CERIOLI**, *La tutela della libertà religiosa nella Convenzione Europea dei Diritti dell'Uomo*, in *Stato, Chiesa e pluralismo confessionale*, cit., gennaio 2011, p. 10.

<sup>17</sup> See with reference to the collective dimension of freedom of religion, **L. GARLICKI**, *Collective Aspects of the Religious Freedom: Recent Developments in the Case Law of the European Court of Human Rights*, in *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World*, edited by A. Sajo, Eleven International Publishing, Utrecht, 2007, pp. 218-219.

<sup>18</sup> **C. EVANS**, **C. A. THOMAS**, *Church-State Relations in the European Court of Human Rights*, in *Brigham Young University Law Review*, 2006, pp. 699 ss.

<sup>19</sup> **J. RINGELHEIM**, *Rights, religion and the public sphere: The European Court of Human Rights in search of a theory?*, in *A European Dilemma: Religion and the Public Sphere*, edited by C. Ungureanu, L. Zucca, Cambridge University Press, Cambridge, 2012, p. 284; **V. PACILLO**, *Secularism and International Standards Protecting the Freedom of Religion of Belief: Arguments for a Debate*, in *Il dir. eccl.*, 2006, pp. 142 ss; **R. NIGRO**, *Il margine di apprezzamento e la giurisprudenza della Corte europea dei diritti dell'uomo sul velo islamico*, in *Diritti Umani e Diritto Internazionale*, 2008, pp. 71 -105.

<sup>20</sup> See also **J. RINGELHEIM**, *State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights*, in *Oxford Journal of Law and Religion*, vol.



In this regard, it might be argued that neutrality acts as a corollary of the principle of pluralism, which has been firmly established by the ECtHR a fundamental tenet of European democracies. In *Kokkinakis v. Greece*, the first ruling by the ECtHR on freedom of religion, the Court defined pluralism as one of the essential elements of a democratic society as well as the premise for the material enjoyment of the rights enshrined in Article 9 of the Convention<sup>21</sup>. The Court shared the classic liberal idea that “pluralism is built on the genuine recognition of, and respect for, diversity and dynamics of cultural traditions, ethnic and cultural identities, religious beliefs (...)” and that “the harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion”<sup>22</sup>. Hence, the State must be pluralistic and democratic if it wishes to fulfil the requirements of the Convention. And, in order for pluralism to flourish, the position of the State vis-à-vis religious matters should be one that acknowledges and accommodates religious diversity, without imposing or deliberately promoting one particular conception of the good.

Having said that, State neutrality in the context of the European Court of Human Rights should be taken as a broad and flexible concept. The reason is twofold. First, from a purely international legal standpoint, the very idea of State neutrality is subject to multiple interpretations. There are in fact several ways for a State to act in a manner that pursue ‘neutrality of aims’. For example, in its simplest form, State neutrality could be interpreted as *indifference* of the State toward preferences that individuals seek to maximize. But neutrality may also be understood as *impartiality*, meaning that the State shall not only refrain from imposing certain understanding of the good, but it should to some extent ensure equidistance with regard to different ideological conceptions. The latter interpretation of neutrality is more burdensome than the first one, as the State is not only required to abstain from actively interfering with one’s exercise of faith, but it must also ensure equality of treatment with regard to different religions. Finally, neutrality may also refer to the exclusion of religion from the public sphere, an understanding that entails sheer separation between religion and the State and presumes that State agents, official premises and private individuals operating in the public sphere refrain from externalizing religion beliefs or symbols.

---

VI, 2017, pp. 27-30; J.P. CERIOLI, *La tutela della libertà religiosa*, cit., p. 12.

<sup>21</sup> *Kokkinakis v. Greece*, app. no. 14307/88, ECtHR (Judgment), 19 April 1993, par. 31.

<sup>22</sup> *Gorzelik and Others v. Poland*, app. no. 44158/98, ECtHR (Grand Chamber), 17 February 2004, par. 92.



Secondly, neutrality within the ECHR is a flexible concept because, as an international subsidiary mechanism, the European Court cannot impose a single State - religion model to be applied to the 47 members of the Convention. Throughout Europe, constitutional arrangements on religion and religious freedom are rich and diverse. Strict secularist models based on the principle of *laïcité*<sup>23</sup> (such as the one in Turkey and in France),<sup>24</sup> coexist along with models based on the presence of a State Church, and liberal constitutional frameworks that interpret the principle of pluralism as a positive recognition of the value of religious diversity (as in the case of Italy). This implies that the Court should be in principle willing to accommodate the diversity and pluralism of State - religion systems across the European context. The Court should, in other words, not advance a unique standard of neutrality in pursuit of a unitary State - religion model, but it should strive to set a minimal standard of reference that provides limitations to existing models<sup>25</sup>.

### 3 - State's neutrality vis-à-vis religious organizations: neutrality as impartiality

It should be first noted that the ECtHR case law does not support the paradigm of 'neutrality of aims' in its strictest interpretation. The Court leaves to States a broad margin of interpretation as to the notion of pluralism and tolerance, and does not challenge as illegitimate the aspirations of a State to express some degree of preference for a specific religion. Accordingly, it has been argued that a State Church system within the European context cannot be considered in itself as violating Article 9 of the Convention<sup>26</sup>. In principle, the Court recognizes that States can appeal to their margin of appreciation to justify the existence of a State Church or

---

<sup>23</sup> As for the meaning of the notion of *laïcité* see **R. DENOIX DE SAINT MARC**, *Introduction à la laïcité en France*, in *Il diritto ecclesiastico*, vol. CXIX, 2008, pp. 393-404.

<sup>24</sup> **A.T. KURU**, *Secularism and State Policies toward Religion. The United States, France and Turkey*, Cambridge University Press, Cambridge, 2009, p. 161 ss.

<sup>25</sup> **S. MANCINI**, *La supervisione europea presa sul serio: la controversia sul crocifisso tra margine di apprezzamento e ruolo contro-maggioritario delle corti*, in *Giurisprudenza Costituzionale*, fasc. V, 2009, pp. 4057-4059; **C. UNGUREANU**, *Europe and Religion: and ambivalent nexus*, in *A European Dilemma: Religion and the Public Sphere*, edited by C. Ungureanu, L. Zucca, cit., pp. 308-309; **F. TULKENS**, *The European Convention on Human Rights and Church-State Relations. Pluralism vs. Pluralism*, in *Cardozo Law Review*, 2009, pp. 2575-2591, and in *Stato, Chiesa e pluralismo confessionale*, cit., February 2011.

<sup>26</sup> *Darby v. Sweden*, app. no. 11581/85, ECtHR (Judgment), 23 October 1990, par. 45.





the provision of certain public-state-religion arrangements which may favor a particular faith at the expenses of others. Following this line of argument, the Court has stated for example that a State's possibility of financing, directly or indirectly, one of more religious organizations does not impair the position of the State as a guarantor of neutrality and pluralism<sup>27</sup>. Similarly, the fact that a State may enforce a law of blasphemy extending only to one faith does not necessarily violate principles enshrined in the Convention<sup>28</sup>.

The legitimacy of differentiated State-religion relations can be explained out of respect of the Court for historical and cultural differences among European States<sup>29</sup>. Yet, the right of the State to maintain a particular relationship with a certain faith is not without restriction. In *Refah Partisi v. Turkey*, the Grand Chamber was faced with the question on whether the dissolution by the Turkish Constitutional Court of the shari'a-inspired political party Refah Partisi breached Articles 11 (freedom of association) of the Convention. In evaluating the legitimacy of the grounds for such dissolution, the Court, *inter alia*, weighed in on the party's plan to set a plurality of legal systems in Turkey, and on the compatibility of shari'a law with the founding principles of the ECHR. The Grand Chamber upheld the Chamber's conclusion, noting that a plurality of legal systems within a State cannot be considered compatible with the Convention, since

"[It] would introduce into all legal relationships a distinction between individuals grounded on religion, would categorize everyone according to religious beliefs and would allow him rights and freedoms not as an individual but according to his allegiance to a religious movement"<sup>30</sup>.

As for the compatibility of shari'a law with the principle enshrined in the Convention, the Grand Chamber referred again back to the Chamber's decision, which established:

"Sharia, which faithfully reflects the dogma and the 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. [...] In the Court's view, a political party whose actions seem to be aimed at introducing sharia in a State party to the

---

<sup>27</sup> *Spampinato v. Italy*, app. no. 23123/04, ECtHR (Admissibility) 29 March 2007 p. 7.

<sup>28</sup> *Wingrove v. UK*, app. no. 17419/90, ECtHR (Judgment), 25 November 1996, par. 50.

<sup>29</sup> In this sense, also *Spampinato*, cit., par. 2.

<sup>30</sup> *Refah Partisi*, cit., par. 119.



Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention”<sup>31</sup>.

Therefore, the ECtHR accepts that States may express preference or constitutionally endorse one religion. This does not in principle affect the neutrality of the State. However, this preference cannot amount to an institutional policy that would run counter to the principles of democracy and pluralism underpinning the Convention.

Whether the State opts for a regime of strict separation from religion or whether it constitutionally recognizes preference for one faith, that State should in any case act as a “neutral and impartial organizer of the exercise of various religions, faith and beliefs”<sup>32</sup>. This is particularly the case whenever a conflict arises between religious groups. In such circumstances, the Court has consistently held that “a State’s duty of neutrality and impartiality [...] is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs”<sup>33</sup>.

In *Hasan and Chaus v Bulgaria* the ECtHR grabbed the opportunity to clarify the concept of State neutrality toward religious disputes. The case originated from a conflict between the government of Bulgaria and the Muslim community of the country. In 1992 the majority of the Bulgarian Muslim community adopted a new bylaw and elected as new leader Mr. Hasan. In 1994, a separate group of the community, in violation of the bylaw, elected an alternative leader, Mr. Gendzhev. Following this event, Mr. Hasan called for a national conference to solve the dispute. Shortly before the conference however, the government of Bulgaria, with an unmotivated decision, registered Mr. Gendzhev as the leader of the community. Mr. Hasan was re-elected as national leader after the national conference, but the government still refused to recognize his legitimacy through registration. In its response, Bulgaria submitted that the act of replacement of Mr. Hasan had a pure declaratory nature and could not affect the exercise of the applicant’s rights under Article 9 nor interfere with his right to participating to the organization of the Muslim community. The Court argued that by refusing to register Mr. Hasan as leader of the community, the authorities demonstrated “a failure [...] to remain neutral in the exercise of their powers”<sup>34</sup>. In particular, the Court qualified as illegitimate interference the action of the State favoring one leader and

---

<sup>31</sup> *Refah Partisi*, cit., par. 123.

<sup>32</sup> *Refah Partisi*, cit., par. 33.

<sup>33</sup> *Refah Partisi*, cit., par. 91.

<sup>34</sup> *Hasan and Chaus*, app. no. 30985/90, ECtHR (Judgment), 26 October 2000, par. 78.



excluded that States hold discretion over the legitimacy of religious beliefs and the means to express them<sup>35</sup>.

A similar conclusion was reached in *Metropolitan Church of Bessarabia v. Moldova*. The cases concerned the refusal of the Moldovan authorities to formally recognize the Metropolitan Church of Bessarabia, this way preventing its members from practicing their faiths and gathering together for religious purposes. The Court acknowledged that in a democratic society, restrictions on manifestation and exercise of one's religion may be necessary in order to reconcile the interest of various groups. However it stressed that "in exercising its regulatory power in this sphere and its relations with the various religious groups, denominations and beliefs, the State has a duty to remain neutral and impartial"<sup>36</sup>. Accordingly, it found that by refusing to grant legal entity status, Moldova had interfered with the rights of believers to associate freely and practice their faith.

*Hasan and Metropolitan Church of Bessarabia v. Moldova* promotes quite a simple and straightforward notion of neutrality, which echoes concepts of impartiality. According to this notion, a State cannot consider itself neutral unless it guarantees equal respect to different religious communities. Neutrality as impartiality consists mainly of two distinctive obligations. On the one hand, it embodies first and foremost a negative obligation of non-interference. The State shall refrain from taking part to disputes that are purely religious or that regard the organization of a particular religious community. This understanding of State neutrality as abstention from actively taking side in religious disputes is a reminder of the classic liberal statement that requires the State to refrain from endorsing a particular notion of the good.

On the other hand, neutrality as impartiality may also require a positive action on the part of the State directed toward ensuring tolerance of competing groups and effective pluralism in the exercise of religious beliefs. The Court has affirmed that impartiality may entail recognizing a certain legal status to a particular beliefs - as in the case of *Metropolitan Church of Bessarabia v. Moldova* - but also for example taking the necessary measures to ensure that members of a religious community can effectively exercise their rights to freedom of religion<sup>37</sup>. In the view of ensuring

---

<sup>35</sup> *Hasan and Chaus*, cit., par. 78.

<sup>36</sup> *Metropolitan Church of Bessarabia and Others v. Moldova*, app. no. 45701/99, ECtHR (Judgment) 13 December 2001, par. 116.

<sup>37</sup> See for example, *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, app. no. 71156/01, ECtHR (Judgment), 3 May 2005, par. 134.



impartiality, the Court also accepts the legitimacy of restrictions placed in a manner that reflects and respects the value of pluralism and promotes tolerance among different faiths.

#### 4 - State's neutrality vis-à-vis public education: neutrality as objectivity

When dealing with State regulation of the *locus* of religious in the public sphere and public institutions, the understanding of State neutrality appears more complex. The teaching of religious modules in public education is perhaps one of the areas where the question of the scope and meaning of neutrality is more pressing. In the context of the relationship between freedom of religion and education, the most relevant provision of the Convention is Article 2 of the First Protocol. This article guarantees to parents that their children should be educated according to their religious and philosophical convictions.

The reference standard for the ECtHR in assessing to what extent State educational institutions may regulate their teaching modules in school was set forth in 1976 in *Kjeldsen Busk Madsen and Pederson v. Denmark*. The case did not concern religious education, but rather the refusal of Denmark to grant the applicants' children exemption from being taught sex education in schools. In building on the content of the second part of Article 2 of the First Protocol, the Court argued that

“The 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*. The State is forbidden to *pursue an aim of indoctrination* that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded”<sup>38</sup>.

The Court did not elaborate further on what the test of objectivity entail, however later judgments have opted for a rather strict interpretation of the concept. The first opportunity to build on the criteria submitted in *Kjeldsen* in the context of religious education emerged in *Angeleni v. Sweden*. The applicant, a self-proclaimed atheist, applied for exemption for her daughter from participating in the teaching of religious knowledge, which

---

<sup>38</sup> *Kjeldsen, Busk Madsen and Pederson v. Denmark*, app. no. 5095/71, 5920/72; 5926/72, ECtHR (Judgment), 7 December 1976, par. 53 (emphasis added).



was an integrated part of the school curriculum. The school rejected the request, since only children adhering to another faith than the Swedish Church were entitled to be granted exemption. The case was brought before the ECtHR, where Ms. Angeleni complained that by refusing to grant exemption, Swedish authorities obliged her children to be brought into the Christian way of thinking. The applicant also submitted a violation of Article 2 of the First Protocol, arguing that Sweden has violated her right to bring up her child in an atheistic manner. The Swedish government responded that, although Christianity took a major part of the instruction, the teaching of the school curriculum could nonetheless be considered neutral.

The Commission did not find any violation of Article 9 of the Convention. On the contrary, it grounded its argumentation on the lack of evidence that the applicant's child "has been obliged to participate in any form of religious worship or that she has been exposed to any religious indoctrination"<sup>39</sup>. It was also stressed that "the fact that the instruction in religious knowledge focuses on Christianity at a junior level at school does not mean that the second applicant has been under religious indoctrination"<sup>40</sup>. This is a relevant point, for it proves that the sole provision by a State of a teaching module biased toward a particular religion is not sufficient for the State to be failing its duty of neutrality. A breach of Article 9 would occur only should it be established that children have been subject to indoctrination.

The question of indoctrination deserves further attention. Indoctrination is a process of learning aimed at inculcating a child with a certain faith. Forms of indoctrination may occur for example when the teaching is uncritical, or when it consists of participating in religious activities such as praying or reading the Bible, or when the State prevents students belonging to other faiths to opt out of religious classes. Indoctrination entails therefore a form of active coercion on the part of the State which, in order to fulfill its obligation of neutrality, would only be required to abstain from pursuing forms of learning directly or indirectly seeking to endorse adherence to a certain faith. A State duty to abstain from indoctrination is certainly less constraining than a State duty to ensure that religious instruction is taught in an "objective, critical and pluralistic manner". Objectivity implies not only the duty of the State to abstain from directly or indirectly inculcating adherence to a certain religion, but it

---

<sup>39</sup> *Angeleni v. Sweden*, app. no. 10491/83, ECtHR (Admissibility), 3 December 1986, p. 49.

<sup>40</sup> *Angeleni*, cit., p. 49.



arguably entails also a positive and more burdensome obligation to ensure some degree of equidistance and equal respect for different faiths.

The distinction between prohibition from indoctrination and duty to be objective can be better appreciated in more recent ECtHR decisions. In *Folgerø and others v. Norway*, a complaint was submitted by a group of members of the Norwegian Humanist Association against the arrangements of Norwegian public school for religious education. Similarly, to *Angeleni*, the applicants complained to have been denied full exemption from the compulsory 'KLR' course on Christianity, religion and philosophy, arguing that the subject was not critical, pluralistic, objective and neutral. In their view, the school curriculum was quantitatively and qualitatively biased in favor of the Christian beliefs and tradition, in a country with extreme Christian predominance and a constitutionally established State church. Furthermore, the applicants did not disagree with the intention to promote intercultural dialogue, and shared many of the aims of the Norwegian government in organizing the KLR subject. However, they contended that, as organized, the school subject could not be considered objective and neutral.

This time, the Court agreed with the applicants and found a violation of Article 2 of Protocol one of the Convention. To reach this conclusion, the Strasbourg judges attentively scrutinized the program of the KLR subject and the teaching methods, testing their findings against the criteria of objectivity and pluralism. In particular, it was argued that the curriculum was unbalanced not only in "quantitative but even qualitative differences applied to the teaching of Christianity"<sup>41</sup>, this way compromising the objective of "understanding, respect, and the ability to maintain a dialogue between people with different perception of beliefs and convictions"<sup>42</sup>.

What is interesting of *Folgerø* is that the Court did not depart from the assertion that mere imbalance in terms of quantity in the teaching of a particular religion does not impair objectivity and pluralism. On the contrary, the Court affirmed that it was within the margin of appreciation of the Norwegian State to adopt a curriculum that devoted greater attention to Christianity than other religions<sup>43</sup>. Hence, this case shows that the notion of objectivity the Court strives to convey is something that situates in between the prohibition of indoctrination and equality of treatment of

---

<sup>41</sup> *Folgerø and Others v. Norway*, app. no. 15472/02, ECtHR (Grand Chamber), 29 June 2007, par. 95.

<sup>42</sup> *Folgerø*, cit., p. 95.

<sup>43</sup> *Folgerø*, cit., p. 89.



different religions. On the one hand, by insisting on the margin of appreciation of States to express a degree of preference over one faith, the Court affirms that strict religion equality is not protected under the European Convention. The obligation of neutrality of a State in relation to education does not require the State to assume a position of equi-distance vis-à-vis different faiths and to treat different religions in the same manner. On the other hand, the Court also acknowledges that to be neutral implies something more than simply abstaining from adopting a curriculum that forcibly encourages adherence to a certain faith. For the Court, neutrality is fully achieved only when the State ensures that other religions and philosophical understandings are given at least equal respect and appropriate attention.

This approach has been confirmed and clarified by subsequent rulings. In *Hasan and Eylem Zengin v. Turkey* for example, the issue at stake was not that the majority of the school curriculum in religion was devoted to the illustration and teaching of Islam. Instead, the case concerned the way in which the school implemented the teaching of other religions. The Court ruled that the Turkish system of religious education, although in principle compatible with the criteria of pluralism and objectivity, violated the rights of the parents belonging to the Alevi stream of Islam to have their child adequately exposed to the foundations and precepts of the Alevi faith. The argument put forth by the Court was that the teaching of Islam was limited to the Sunni understanding and did not take into sufficient account Alevism, to which a considerable proportion of the Turkish population belong<sup>44</sup>. In addition, the possibility for parents to apply for exemption from the course was available only to those belonging to the Christian or the Jewish faiths<sup>45</sup>.

---

<sup>44</sup> *Hasan and Eylem Zengin v. Turkey*, app. no. 1448/04, ECtHR (Judgment), 9 October 2007, par. 76-77.

<sup>45</sup> *Hasan and Eylem Zengin*, cit., par. 77. See also *Mansur Yalçın and others v. Turkey*, app. no. 21163/2011, ECtHR (Judgment), 16 February 2015. This case is very similar to *Hasan and Eylem* and dealt with children of the Alevi faith being prevented from exempting courses on religious culture and ethics, deemed by the applicant not objective, critical and pluralist. The Court did scrutinize once again the syllabus of the course, in light of the changes made by the government of Turkey after *Hasan and Eylem*. It found that, despite these changes, the syllabus continued to be disproportionately focused on the Sunni teaching of Islam, and was not compatible with a State that acts upon its duty of impartiality and neutrality.



## 5 - State neutrality vis-à-vis religious symbols in the public sphere: neutrality as exclusion of religion

The last model of State neutrality that deserves close scrutiny touches upon the display of religious symbols or clothing in the public spaces.

The way the ECtHR has dealt with State neutrality vis-à-vis the display of religious symbols or clothing in the public sphere has given rise to ambiguities and criticism. This is primarily because in this area, the Court has increasingly treated the notion of neutrality in an exclusionary rather than inclusive way. In several cases, the Court has upheld the State's argument whereby neutrality shall be interpreted as "exclusion of religion from the public sphere", so as to preserve the image of public spaces and institutions as neutral platforms freed of any unwanted pressure.

In *Dahlab v. Switzerland*, the applicant was a primary school teacher converted to Islam who complained of the school authorities' decision to prohibit her from wearing the Islamic scarf at school. The Court argued that the restriction on wearing the hijab was justified "by the potential interference with the religion's belief of her pupils, other pupils at the school and the pupil's parents, and by the breach of the principle of denominational neutrality in school"<sup>46</sup>.

In the view of the Court, the measure implemented by the school authorities served first of all to preserve the rights and freedom of the others, public order and safety. However, the Court did not restrict itself to only appealing to the principle of neutrality of public spaces as justification for the restriction. It also labeled the wearing of the Islamic scarf as a "powerful external symbol" that could have some kind of proselytism effect on school children. In a critical yet controversial passage, the Court held

"[I]t cannot be denied outright that the wearing of the headscarf might have some kind of proselytism effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of the 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"<sup>47</sup>.

Hence, for the Court it is not just the wearing of a religious symbol that affects the condition of neutrality State authorities may want to pursue,

---

<sup>46</sup> *Dahlab v. Switzerland*, app. 42393/98, ECtHR (Judgment), 15 February 2001, pp. 12-13.

<sup>47</sup> *Dahlab*, cit., p. 13.





but it is the wearing of *certain* symbols with the message they allegedly convey, that needs regulating in order to preserve the rights and freedoms of the others. This is a line of argument that the Court restated in *Leyla Şahin v. Turkey*, which was a case involving not a teacher's wearing of the Islamic scarf but a university student being prohibited to wear the hijab in class or during exams. Weighing upon the concept of secularism in Turkey and the rise within the country of Islamist political movements, the Grand Chamber deemed legitimate the decision of Turkish authorities. It supported the argument that the wearing of the Islamic scarf could amount to pressure on women wishing not to wear it and could impair pluralism, gender equality and the rights of the others<sup>48</sup>.

The idea that mere externalization of religious beliefs through the wearing of symbols is source of pressure and exclusion of others is open to criticism. Neither in *Dahlab* nor in *Leyla Şahin* the Court verified whether the applicants' attitude could *in concreto* affect the rights of the others not to be pressured into one faith. Furthermore, if in the case of *Dahlab* one could oppose the influence that a State teacher might exert on her pupils, in *Leyla Şahin* the applicant was a private individual and at stake was the freedom of conscience of her university peers. Overall, this demonstrates that the Court accepts a notion of State neutrality, which includes sheer neutrality of public institutions and public agents as well as 'neutrality' of private individuals when accessing public places. Such a quite far-reaching interpretation has in fact been forcefully endorsed by the ECtHR in several of its rulings<sup>49</sup> and has extended to the wearing of religious symbols in work places<sup>50</sup> and public areas.

For example, a number of cases brought before the Court have dealt with the legitimacy of legislative measures aimed at prohibiting the concealment of one's face in public places. Starting from 2010, some European States such as France and Belgium have adopted legislations banning the wearing in public spaces of clothing that partially or totally cover the face. In *S.A.S. v. France*, a French national and practicing Muslim challenged before the ECtHR the 2010 French law prohibiting the concealment of one's face in public. The applicant contended that this

---

<sup>48</sup> *Leyla Şahin v. Turkey*, app. no. 44744/98, ECtHR (Grand Chamber), 10 November 2005, par. 115.

<sup>49</sup> *Dogru v. France*, app. no. 27058/05, ECtHR (Admissibility), 4 December 2008; *Kurtulmuş v. Turkey*, app. no. 65500/01, ECtHR (Admissibility), 24 January 2006; *Fatma Karadunman v. Turkey*, app. no. 41296/04 (Judgment), 3 April 2007.

<sup>50</sup> *Ebrahimian v. France*, app. no. 64846/11, ECtHR (Judgment), 26 November 2015.



measure could not be justified on the ground of promoting gender equality, that it exacerbated inequality and discrimination against Muslim women and that it would impair pluralism within French society. On its part, France submitted that the restriction on the wearing of the full face was to ensure the protection of the rights and freedom of the others, including “the respect for the minimum set of values of an open and democratic society”<sup>51</sup>.

The Court shared this view and found no violation of Article 9 of the Convention. It accepted that the barrier raised against others by the veil could infringe the minimum requirements of life of a democratic society and the rights of others to live in a place of socialization<sup>52</sup>. After labeling pluralism and tolerance as the «hallmark of a “democratic society”», the Court admitted that pluralism may entail a “spirit of compromise” on the part of individuals or groups thereof, in order to preserve the values of a democratic society;

“It indeed falls within the powers of the State to secure the conditions whereby the individuals can live together in their diversity. Moreover, the Court is able to accept 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 fact that some conceal their faces in public places”<sup>53</sup>.

Hence, the Court accepted that the need to ensure the respect for the minimum values of democracy could be deemed as an element of the protection of the rights and freedoms of the others, and it may justify a ban on certain religious symbols with the view of preserving the conditions of ‘living together’.

Coming back to the question of neutrality, the idea that a State wishing to act as a neutral organizer of the public sphere may *de facto* limit pluralism resonates well with the Strasbourg judges. Neutrality implicates that a State may exclude the manifestation - one may even argue, the practice<sup>54</sup> - of religion through the wearing of symbols in order to strike a

---

<sup>51</sup> S.A.S. v. France, app. no. 43835/11, ECtHR (Grand Chamber), 1 July 2014, par. 82.

<sup>52</sup> S.A.S., cit., par. 121-122.

<sup>53</sup> S.A.S., cit., par. 141.

<sup>54</sup> See J.H.H. WEILER, *Je Suis Achbita!*, in *International Journal of Constitutional Law*, vol. XV, 2017, pp. 880-883. The Author argues that the wearing of the headscarf or the skullcap is an identity marker that allows people who wear it to practice their religion rather than simply manifesting it. This means that when the Court assesses the legitimacy of bans over the wearing of these symbols, the proportionality test should be conducted taking into account that the State is not “forbidding someone from manifesting his or her religious identity”, but rather “coercing them to violate religious norms which they considered



balance between the freedom of conscience of the individual and the rights and freedom of others. This is certainly a conception of neutrality that is closely linked to the specific notion of *laïcité* as enshrined in the French Constitution. Yet it is an approach that has been confirmed by the Court in subsequent decisions, very recently in *Dakir v. Belgium*<sup>55</sup>, and in *Belcacemi and Oussar v. Belgium*<sup>56</sup>. In both cases, the ECtHR held that the ban on wearing in public clothing that conceal the face does not violate Article 9 of the Convention for it seeks to guarantee the conditions of ‘living together’ in Belgian society.

The rulings of the Court on the ban of religious clothing accord much weight to the margin of appreciation of States in the matter. The Court seems to assume that the State is in a better position than an international body to evaluate questions on the impact of the wearing of religious symbols in a democratic society. Hence, the Court in principle is willing to accept as legitimate State restrictions that are justified with the view of preserving the essential values of a democratic society.

Admittedly, this conception of neutrality raises a number of issues. First, it raises the question of the extent to which a State’s claim of neutrality can legitimately exclude manifestations of religion on the part of minorities<sup>57</sup>. After all, the deference shown by the Court toward the stances of the responding governments boosts a far-flung notion of neutrality that is opposite to the conception of human rights and neutrality in their purest liberal form. According to the ‘negative rights’ liberal viewpoint, the international protection of human rights is a shield that protects the individual from the excesses of a State. Thus, in the context of freedom to manifest and practice one’s religion, neutrality should first and foremost be interpreted as the absence of State’s intervention in the public sphere, so as to protect the individual’s liberty and to ensure pluralism. Yet, the

---

sacred”.

<sup>55</sup> *Dakir v. Belgium*, app. no. 4619/12, ECtHR (Judgment), 11 December 2017.

<sup>56</sup> *Belcacemi and Oussar v. Belgium*, app. no. 37798/13, ECtHR (Judgment), 11 December 2017.

<sup>57</sup> In this regard, the only two cases regarding strict secular States in which the Court did not uphold the policy of exclusionary neutrality implemented by the State were *Ahmet Arslan and Others v. Turkey*, app. no. 41135/98, ECtHR (Judgment), 23 February 2010, concerning the wearing by a religious group of the headgear and religious garments in public streets, and *Hamidović v. Bosnia and Herzegovina*, app. 57792/15, ECtHR (Judgment), 5 March 2018, concerning the expulsion and fine of a criminal witness refusing to take off his skullcap. In both cases the Court provided that the policies of neutrality implemented by both States were beyond the limit imposed by Article 9.



impression that ensues from the rulings in *S.A.S. v. France* and similar cases is that the collective dimension of the freedom of conscience and religion - for example the protection of the rights and freedom of the others - is privileged at the expenses of the individual's right. The State that decides to restrict certain manifestations of religion in public spaces does not encounter much obstacle from the ECtHR should it claim to do so in pursuant of neutrality and protection of essential (and arguably majoritarian) societal values. Such interpretation of neutrality is easily subject to instrumentalization. The risk is that a State may implement a form of "selective pluralism"<sup>58</sup> while attempting to preserve the foundational values of its democracy. Furthermore, the Court, rather than ensuring tolerance among competing groups through peaceful coexistence, may eventually endorse State's policies that eliminate or significantly reduce pluralism with the view of removing the cause of tension among competing religious groups<sup>59</sup>.

## 6 - 'Reversed' patters of neutrality: the disruptive effect of *Lautsi v. Italy*

Neutrality as exclusion of religion from the public sphere is not the only paradigm that the Court has adopted when facing the problem of religious symbol. In *Lautsi v. Italy*, the Strasbourg judges were confronted with the problem of assessing the legitimacy of the presence of a religious symbol such as the crucifix in a public educational institution.

The circumstances of the case are very well known. The applicant and her two sons argued that the crucifix affixed to the wall of the classroom attended by the latter violated Article 9 of the Convention as well as the rights of parents to educate their children in accordance with their conviction. Initially the Chamber unanimously ruled in favor of the applicants finding a violation of Article 9 and Article 2 of the First Protocol of the Convention. It contended that the religious meaning attached to the crucifix impaired the rights of the applicant to believe or not believe, and undermined the neutrality of the State. According to the Chamber, the State had a duty to ensure confessional neutrality in public education and refrain

---

<sup>58</sup> See *S.A.S.*, cit., Separate Opinion Judges Nussberger and Jaderblom, par. 14.

<sup>59</sup> The Court has in several cases consistently reiterated that the role of State authorities vis-à-vis religious matters "is not to remove the cause of tension by eliminating pluralism, but to ensure that competing groups tolerate each others", see originally *Serif v. Greece*, app. no 38178/97, ECtHR (Judgment), 14 December 1999, par. 53.



from imposing, even indirectly, a belief in a place where people are particularly vulnerable<sup>60</sup>.

The Grand Chamber took however a difference stance and in 2011 reversed the Chamber's decision finding no breach of the Convention. First, the Court approached the issue of a State's endorsement of a religious symbol in a public institution. The Italian government had submitted to the Court that the presence of the crucifix in State school classrooms should have been interpreted as an historical, rather than religious, symbol representing principles and values at the core of Italian democracy. The Court did not delve into the historical and traditional connotations attached to the crucifix, however it did establish that a State's wide margin of appreciation allows the latter to endorse the presence of religious symbols in State schools. Basically, the argument set forth on this point was that the lack of a European consensus on the presence of religious symbols in public schools accounts for a wide margin of appreciation granted to States.

The second argument upon which the Grand Chamber decision was based regards the influence that the display of the crucifix in a classroom may bear on school children. According to the Court, there was no evidence that the presence of the crucifix in school could have influenced children to the point of interfering with their rights protected under the Convention. The Court described the crucifix as "an essentially passive symbol"<sup>61</sup> and excluded that "the presence of the crucifix in classroom had encouraged the development of teaching practices with a proselytism tendency"<sup>62</sup>. The Court also asserted that the absence of a compulsory teaching about Christianity along with the pluralism ensured by Italian authorities in classroom - through allowing children to wear for example the Islamic headscarf or other religious symbols - ruled out any form of indoctrination on the part of the State<sup>63</sup>.

*Lautsi v. Italy* is quite a departure from the Court's previous rulings on both the display of religious symbols in the public sphere and the relationship between religion and State education. The decision is certainly in tension with the Court's position expressed in *Dahab*, *Sahin* and *S.A.S.*, which enforced a notion of neutrality as exclusion of religion from the public sphere. In these cases, the Court contended that the wearing of

---

<sup>60</sup> *Lautsi v. Italy*, 30814/06, ECtHR (Judgment, Second Section), 3 November 2009, par. 48.

<sup>61</sup> *Lautsi v. Italy*, 30814/06, ECtHR (Grand Chamber) 18 March 2011, par. 72.

<sup>62</sup> *Lautsi* (Grand Chamber), cit., par. 74.

<sup>63</sup> *Lautsi* (Grand Chamber), cit., par. 74.



religious symbols at school or in public areas could affect the rights and freedoms of the others. On the contrary, *Lautsi* purports a notion of neutrality, which is not only non-exclusionary, but also in conflict with the very idea of the public as a space void of any religious connotation. The Court explains such divergence by insisting on the margin of appreciation available to States. Yet, this approach is not fully convincing. Firstly, because it fails to account why the wearing of the headscarf by a teacher in school shall be regarded as a powerful religious symbols, whereas the crucifix affixed to a school wall should be only deemed as a passive one. In *Dahab*, the Court argued that the Islamic scarf might have some kind of proselytism effect on children, despite Switzerland being a country by a wide majority Christian and with a relatively small Muslim community. In *Lautsi* on the other hand, the presence of the crucifix in schools was considered not capable of exerting pressure on the rights and freedoms of pupils.

A second critique toward the margin of appreciation argument touches upon the very reason behind the use of this doctrine by the Court. In *Lautsi*, *Sahin* and *S.A.S.*, the ECtHR argued that the absence of a European consensus on the issue of religious symbols in schools justifies the enhanced recourse to the State's margin of appreciation. However, it is not clear how the absence of consensus should have a bear on the Court's power to determine the constraints of a State's claim of neutrality<sup>64</sup>. In other words, diversity in the European context should not prevent an international court from establishing the legitimacy of a State's policy of neutrality under the Convention. Neutrality should be construed by the Court as a paradigm that sets clear limits and constraints on State action, and should be subject to international scrutiny based on State's respect of such constraints. This does not mean of course that the concept of neutrality should not be wide enough to accommodate regime diversity throughout Europe; at the same time, diversity per se cannot operate as a ground for the Court's refusal to critically examine the limits of State's action.

Finally, the Court's decision in *Lautsi* struggles to reconcile with the consistent approach adopted by the Court ever since *Folgerø* in matters related to religion and public education. In *Folgerø* and in subsequent rulings, the ECtHR has anchored the limits of a State's margin of appreciation to the criteria of objectivity, criticism, pluralism and absence of indoctrination. Yet, *Lautsi* seems to only abide by the requirement of non-

---

<sup>64</sup> See in this regard, **D. KYRITSIS, S. TSAKYRAKIS**, *Neutrality in the Classroom*, in *International Journal of Constitutional Law*, vol. XI, 2013, pp. 215-216.



indoctrination. The Grand Chamber was only concerned with establishing whether the presence of the crucifix could have a proselytism or indoctrination effect of school children and ignored the fact that education shall be delivered in a manner that is objective, critical and pluralist. One may argue that the presence of the crucifix in Italian schools is not linked to the compulsory teaching of Christianity, and that explains why the Court overlooked the issue. But the fact remains that the ECtHR failed to explain why the preference expressed by the State for Christianity could not affect objectivity and pluralism.

## **7 - Concluding remarks: decoding the patterns of State neutrality in the jurisprudence of the ECtHR**

The analysis of the most relevant case law concerning the relation between a State and religious matters has shown that State neutrality is a distinctive principle enshrined in the European Convention. The Court has often made explicit reference to the obligation of States to remain neutral in the exercise of their power vis-à-vis religious matters or the obligation to act with neutrality and objectivity in issues related to education.

Our analysis of the ECtHR jurisprudence shows however that the approach developed by the Court toward the scope of State neutrality is rather inconsistent. On the one hand, in matters related to disputes of religious communities, the Court tends to adopt an approach aimed at protecting religious communities from the interference of the State. This was the case in *Hasan and Chaush v. Bulgaria*, and in *Metropolitan Church of Bessarabia v. Moldova*, where the Court afforded protection to religious communities affected by positive (in the case of *Hasan*) or negative (in the case of *Metropolitan Church of Bessarabia*) interferences of the State in their right to organize and practice their faith. Also in the context of the relationship between religion and State educational curricula the Court has in principle been keen to a notion of State neutrality capable of ensuring to different faiths and philosophical convictions equal respect. *Folgerø, Hasan and Eylem Zengin v. Turkey* and *Mansur Yalçın and others v. Turkey* are all examples of the attempt of the European Court to make sure that the State acts as an impartial organizer of religious instruction and as advocate of pluralism.

On the other hand, a different line of cases takes an opposite view and seeks to justify the State's intrusion in the individual's full enjoyment of her freedom of religion rights. In *Dahlab, Leyla Şahin, S.A.S* and most cases related to the wearing of religious symbols, the Court upheld policies



restricting selected types of conduct on the part of individuals, in pursuit of a conceptual ideal of neutrality ingrained in the secular model adopted by some States.

These two distinguishable patterns in the ECtHR jurisprudence reflect the existence of two opposing tensions, which drive much of the legal reasoning of the Court in this area. Such opposing forces are the Court's attempt to fully realize the liberal ambitions underpinning the European Convention, and the Court's inclination toward the endorsement of particular societal paradigms.<sup>65</sup> It is undisputed that when the Court calls for the abstention of the State in religious disputes or when it attentively scrutinizes a State's educational syllabus to assess its objectivity and impartiality, the Court is relying on the concept of 'neutrality of aim' in its purest liberal form. The Court's approach in these cases consists of ascertaining whether the policy or the measures enforced by the State can be justified by considerations that are not sectarian. Neutrality as absence of interference or absence of preference on the part of the State represents therefore the Court's maximal pursuit of its liberal goals.

On the contrary, when the Court opts for diminishing an individual's right to exercise freedom of religious or conscience, it does so often because it considers the individual's exercise of that right in conflict with the relevant societal paradigm. The jurisprudence on the display of religious symbols in the public sphere is a clear example of the Court's concern for accommodating the collective identity of the State at the expenses of the individual's right to freedom of religion. Some scholars have praised this approach noting how the margin of appreciation doctrine accorded in this area allows for the coexistence of different State-religion models across Europe<sup>66</sup>. Yet, the deference shown by the Court toward certain State-religion models is a cause of concern since, as aptly suggested by Evans and Petkoff, "it aligns the application of the human rights apparatus with the political status quo"<sup>67</sup>.

The tension between liberalism and parochial aspirations can be very much appreciated in *Lautsi*. When *Lautsi* was discussed before the Second

---

<sup>65</sup> See in this regard **M. EVANS, P. PETKOFF**, *A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights*, in *Religion, State & Society*, vol. XXXVI, 2008, pp. 213-214.

<sup>66</sup> See for example **I. LEIGH, R. AHDAR**, *Post-Secularism and the European Court of Human Rights*, in *Modern Law Review*, vol. LXXV, 2012.

<sup>67</sup> **M. EVANS, P. PETKOFF**, *A Separation of Convenience?*, cit., p. 211; See also **G. DE VERGOTTINI**, *Oltre il dialogo tra le Corti. Giudici, diritto straniero, comparazione*, il Mulino, Bologna, 2010, p. 83.





Chamber, the Court did test the circumstances of the case against the criteria of neutrality, objectivity and pursuit of education in a pluralistic manner, and eventually held, in quite a liberal fashion, that the presence of the crucifix in classroom could interfere with the applicants' right to freedom of religion. When the case was referred to the Grand Chamber however, the Court made sure to afford enough weight to the societal paradigm in force in Italy, and opted for an interpretation of neutrality that echoed the notion of 'consequential neutrality'<sup>68</sup>.

The erratic fashion in which the Court has dealt with cases on religious symbols leads us to a further and last argument, which looks at the legal issues at stake from a more sociological perspective. After *Lautsi*, the ECtHR had more opportunities to revisit its jurisprudence on religious symbols. As far as the wearing of Islamic scarf is concerned however, the Court has yet to depart from the approach adopted in *S.A.S v. France*. *Ebrahim v. France*, along with the very recent *Dakir v. Belgium*, and *Belcacemi and Oussar v. Belgium* are all cases that dealt with the legitimacy of a State's ban on the wearing of headscarf in public spaces. The Court has always upheld the respondent State's policies of neutrality and each time has found no violation of Article 9 of the Convention.

Only in two recent cases the Court has ruled in favor of the applicant's right to freedom of religion. One is *Eweida and Chaplin v. United Kingdom*, where the Court had to determine whether the British domestic law had failed to adequately protect the freedom to manifest religion of a hostess of British Airways prevented from visibly wearing the Christian crosses at work. The other is *Hamidović v. Bosnia and Herzegovina*, where the applicant, a witness of a criminal trial, was expelled from the courtroom and later convicted of contempt of court for refusing to remove his Islamic skullcap. In both cases the ECtHR found a violation of Article 9 of the Convention. In *Eweida*, the Court argued that the policy of neutrality implemented by British Airways could not justify the prohibition imposed to the applicant, since there was no concrete violation of the rights of the others<sup>69</sup>. In *Hamidović*, the Court insisted on the notion of pluralism and

---

<sup>68</sup> D. KYRITSIS, S. TSAKYRAKIS, *Neutrality in the Classroom*, cit., pp. 213-214. The Authors argue that the Grand Chamber in *Lautsi* stuck to the conception of consequential neutrality since it took into account external features of the Italian educational environment in order to assess whether there had been a violation of Article 9 of the Convention. In particular, the Court questioned whether the negative effects of the presence of the crucifix in class were somehow counterbalanced by the tolerant policy adopted by Italy vis-à-vis the manifestation of other religions and faiths.

<sup>69</sup> *Eweida and Others v. The United Kingdom*, app. no. 48420/10, 59842/10, 36516/10, ECtHR (Judgment), 27 May 2013, par. 94-95.



excluded that the policy of sheer neutrality of public spaces could be applied to a private individual being asked to appear before a Court as a witness<sup>70</sup>. It is noteworthy that *Hamidović* is also one of the very few cases dealing with freedom of religion of persons belonging to the Islamic faith where the ECtHR has found a violation in favor of the applicant. It is difficult to establish whether these two cases constitute a genuine development of the Court's previous jurisprudence on religious symbols. After all, the United Kingdom and Bosnia are not based on a principle of strict secularism and sheer religious neutrality like France or Belgium. Yet, both decision surely afford more protection and weight to an individual's right to freedom of religion and conscience. Furthermore, in *Hamidović*, the Court has insisted on the policy of tolerance and pluralism that a State should pursue toward other religions. Rather than focusing simply on proportionality in the present case, the Court simply stressed that "an individual who has made religion a central tenet of his or her life [...] [should be] able to communicate that belief to others"; furthermore, it was noted that "the applicant's act was inspired by his sincere religious belief that he must wear at skullcap at all times"<sup>71</sup>. This is a welcome departure from the Court's previous rulings, for it seemingly reinforces the individual's right to manifest her own religion by recognizing the inextricable link between the wearing of a religious symbol and her identity.

---

<sup>70</sup> *Hamidović*, cit., par. 41.

<sup>71</sup> *Hamidović*, cit., par. 41.