Stato, Chiese
e pluralismo confessionale

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The spatial ramifications of religion: new and traditional legal challenges

Papers presented at the panel "*The spatial ramifications of religion: new and traditional legal challenges* " held at the Annual Conference 2022 of EuARe (European Academy of Religion), which took place in Bologna from 20th to 23rd June 2022 and was organised by FSCIRE.
Papers selected by the organizing Committee.

Interventi presentati il 20 giugno 2022 al panel "*The spatial ramifications of religion: new and traditional legal challenges*" in occasione della Annual Conference 2022 di EuARe (European Academy of Religion) tenutasi a Bologna dal 20 al 23 giugno 2022 e organizzata da FSCIRE.
Interventi selezionati a cura del Comitato organizzativo.

Stato, Chiese
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Dematerializing the traditional public square: new challenges for religious freedom?

1 - Almost forty years ago, Rev. Richard John Neuhaus highlighted the crisis of American democracy in a book entitled "*The Naked Public Square*"[1]. Linking the core of the American Constitutional experiment with its historical Christian origins, Neuhaus stimulated debate on enforcement of the First Amendment, arguing that strict interpretation of the Establishment clause had stripped the public forum of all popular values, leaving the public square empty.

According to Neuhaus this naked public square shook the foundations of the American political system, creating a fracture between two separate groups: the "secular, elitist and individualist" and the "religious, populist and communitarian"[2]. Neuhaus's analysis had a big impact on American public debate and could perhaps provide a key to understanding the current polarization of the American legal system. But despite the correctness of his analysis, Neuhaus could not provide a definition of the modern, physically deconstructed, public square.

In previous centuries, the concept of public square (or space) had been important to define the physical borders within which the political and democratic process took place. In ancient Greece, the public square - the *Agorà*- was the center of the political, commercial and religious life of the city, and physically and geographically embodied the idea of democracy that developed in Athens in the fifth century. Centuries later, the American democratic system borrowed an Algonquian word, *Caucus*, to describe "a private meeting of party leaders or local voters" that has been an important part of every U.S. presidential campaign. In both cases, the concept of a material physical space was necessary to describe how democracy comes into action. In ancient times, the public space was the

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[1] **R.J. NEUHAUS**, *The Naked Public Square. Religion and Democracy in America*, Eerdmans, 1984.

[2] **R.J. NEUHAUS**, *A Strange New Regime: The Naked Public Square*, in *The Heritage Foundation*, 8 October 1996 (*https://www.heritage.org/political-process/report/strange-new-regime-the-naked-public-square*).

town hall meeting, the legislative assembly or any other venue where public business was done.

The idea of public square/space has also been much discussed by sociologists and political philosophers over the ages. Max Weber offered a first, very broad definition, namely "the space that is available or open to every individual regardless of culture, religion and even social status"[3]. Philosophers subsequently began to reshape the theoretical dimension of the public space, arguing that it has to be open to all ideas and people of any social status. Hannah Arendt linked it with the idea of public freedom, noting that it is more than the "free will or free thought" that philosophers have traditionally discussed: since "the life of a free man needed the presence of others", freedom itself needed a place "where people could come together: the agora, the market-place or the polis, the political space proper"[4]. In other words, the public square is necessary to express public freedom that consists of "deeds and words which are meant to appear, whose very existence hinges on appearance"[5]. Exploring the development of this concept in social democracies, Habermas defined the public sphere as "the realm of our social life in which something approaching public opinion can be formed" and where "society engages in critical public debate"[6]. From a Constitutional point of view, this theoretical framework matches the famous analogy of the "free marketplace of ideas" developed by Justice Holmes in *Abrams v. United States* (1919).

Despite some differences (that concern slightly different concepts such as public "square", "space" or "sphere"), all these definitions help to frame the problem raised by Neuhaus. The public square always has distinctive characteristics bestowed by history, culture and the religious belief of the people who live in it. Since the public square is simultaneously the physical place of democracy and the theoretical place of public freedom, is it a fitting place to show or celebrate the historical religious traditions of a legal system? How can we reconcile the religious

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[3] See **M. WEBER**, *City* [1921], Free Press, Glencoe, 1958, mentioned by **A. NEGRI**, *infra*.

[4] **H. ARENDT**, *On Revolution*, London: Penguin Books, 1990, p. 31.

[5] *Ibidem*, p. 90.

[6] **J. HABERMAS**, (1989) [1962], *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, translated by Th. BURGER, Cambridge Massachusetts: The MIT Press, 1989 [1962], p. 27.

heritage of a society with the need to ensure the fairness and impartiality of public debate?

2 - Scholars of law and religion know that this issue is hardly new. In recent decades, every legal system has offered different solutions to this problem, trying to reconcile religious heritage with the modern neutral (or secular) public square.

One of the solutions adopted to solve this problem was to deconstruct the public sphere into physical places and to investigate the specific functions each place plays in social interaction. Adapting the famous distinction between the political and institutional public spheres suggested by Jürgen Habermas[7], Silvio Ferrari formulated three categories of public place: *common space* (physical spaces such as streets or squares that people have to enter for their basic daily needs), *political space* (physical or metaphorical places where public debate and discussion occur) and *institutional space* (such as parliament, law courts and public offices where coercive deliberations occur)[8].

Dividing the public space into functional categories is useful to identify the specific rules that can be enforced in each: for instance, a ban on religious symbols in institutional spaces could be established to protect the neutrality and impartiality of the institutions, but a similar rule should not generally be adopted in the common space, where openness is vital to avoid segregating people who do not feel comfortable entering without manifesting their cultural belonging. In other words, legal systems could balance the need for neutrality with the recognition of cultural and religious heritage, combining different legal principles such as secularity, impartiality, identity, pluralism and personal or collective freedoms with the functional characteristics of each public place.

Deconstructing the public square has the evident merit of avoiding the dichotomy between a naked public square and a theocratic one. But to be really effective, this solution first needs to draw a clear line between public and private places, and then clearly define the proper features of each public space. In recent times this solution has become more

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[7] **J. HABERMAS**, *Religion in the Public Sphere*, 14 Eur. J. Phil., 2006, p. 1-1-25.

[8] **S. FERRARI**, *Religion in European Public Spaces: A Legal Overview*, in **S. FERRARI, S. PASTORELLI**, *Religion in Public Spaces. An European Perspective*, Routledge, New York, 2016, p. 139-159.

problematical due to the digital transformation of society and de-materialization of the traditional public sphere.

Let us consider social networks, for instance. They clearly arose as private places and are still run by private companies. But today they are rapidly becoming the main public common place where people from all over the world share their needs, their experiences and ultimately their lives. After triggering interactions between billions of people, social networks then also started playing a significant role in the political arena, becoming the political public forum where electoral candidates could reach potential voters, but also interfere with electoral fairness by spreading fake news about their opponents. Lastly, although we cannot yet picture social networks as true institutional spaces, sometimes the policies adopted by their boards can impact the institutional life of constitutional systems. For instance -without going into the rightfulness of the decision- Facebook and Twitter's permanent digital ban on Donald Trump after the tragic assault on Capitol Hill generates constitutional and institutional outcomes, because it deprives an elected President of an important public forum[9]. Plus, the platforms themselves are introducing constitutional principles and institutional mechanisms, especially in the context of content moderation, as demonstrated by Facebook's Oversight Board. In other words, social networks are currently gathering all the features of common, political and institutional places in one private tool, raising new constitutional questions on the realm of contemporary and digital public space.

The new technologies are digitalizing the traditional public square, not only by replacing it with the social networks, but also by reshaping the boundaries of classical institutional places. During the pandemic, schools were closed in almost every country, and platforms like Zoom or MS Teams stepped in, dematerializing the concept of classrooms and transforming them into a mix of physical-personal and digital-institutional places. Let us suppose that a student is attending a lesson from his living room, where a big crucifix is hanging on the wall behind him. Is this display legitimate? Does the crucifix become part of the digital classroom or is it just part of the personal space of the student? Can the laws for physical school classrooms be applied to the intangible educational spaces of the pandemic?

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[9] See **E. CELESTE**, *Trump's social media ban: Reviewing the constitutionality of permanent digital punishment*, 10 March 2021 (*https://www.hiig.de/en/trumps-social-media-ban-reviewing-the-constitutionality-of-capital-digital-punishment*).

By dematerializing the physical borders of the traditional public square, the digital revolution is raising new challenges that scholars of law and religion need to address.

3 - In *Packingham v. North Carolina* (2017), Justice Kennedy defined internet for the first time as "the modern public square", arguing that today, "cyberspace in general […] and social media in particular" are "the most important places for the exchange of views"[10]. As the Court itself recognized, this statement raises issues about the "spatial limits" of the laws and principles established to ensure freedom of speech and religion.

The current symposium will address these issues, investigating the modern spatial ramifications of religion in traditional and non-traditional public squares. Specifically, Andrea Cesarini and Federico Colombo will consider the theoretical features, analysing the spatial borders of the principle of non-discrimination (Cesarini) and diachronic transformation of the form of State (Colombo). Giada Ragone will reflect on the legal impact of artificial intelligence, arguing that it raises new discriminatory questions that need to be addressed by specifically tailored laws. Greta Pavesi and Tania Pagotto consider the display of traditional religious symbols (crucifixes in Italian schools and eruvs in Canada and the United States, respectively) in relation to the private/public essence of the modern public square from national and comparative perspectives. Lastly, Alessandro Negri questions traditional laws established to regulate artistic censorship in the realm of social networks, proposing an "Archimedean point of equilibrium" between free artistic expression and the need to protect the moral standards of ordinary users of social platforms.

All the papers of this symposium reflect on the consequences of the digital revolution for the traditional public square in the spirit of the questions posed by Tom Wilkinson:

> *«When we say "public [square]", […] we need to ask—who or what is this public? Who owns this space, what makes it public? […] This is the essence of democracy: the ability to question power, and the power to do so"*[11]**.**

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[10] *Packingham v. North Carolina*, 582 U.S. ___ (2017).

[11] **T. WILKINSON**, *Typology: Public Square*, in *Architectural Rev.*, 2 March 2017 (*https://www.architectural-review.com/essays/typology-public-square*).

Stato, Chiese
e pluralismo confessionale

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Right not to Be Discriminated against and Religious Factor. A 'Spatial' Analysis

The current evolutionary trajectories of 'Law and Religion' in the European context reveal a progressive affirmation of the principle of non-discrimination, which now seems to have been eventually recognised as a "general principle"[12] (at least[13]) inside the European Union legal order. As highlighted by recent and widely known judgments of the Court of Justice (see for all the *Egenberger* case of 2018[14]), the canon of non-discrimination - expressed at a primary level by Article 21 of the Charter of Fundamental Rights of the European Union - underlies a genuine subjective 'right not to be discriminated against', which may be directly invoked by any individual[15].

By virtue of this recognition, everyone is consequently assured a vigorous safeguard against any *unreasonable* difference of treatment[16] (*inter*

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[12] See ECJ, Grand Chamber, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV*, C- 414/16, § 76: "The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law".

[13] As far as the Italian legal order is specifically concerned, **J. PASQUALI CERIOLI**, *"Senza D". La campagna Uaar tra libertà di propaganda e divieto di discriminazioni*, in *Stato, Chiese e pluralismo confessionale*, Online journal (*https://www.statoechiese.it)*, no. 9 of 2020, p. 55., has also pointed out that the principle of non-discrimination has now "taken on a caliber of general principle". The focus of the Author revolved around a recent judgment of the Italian Court of Cassation (no. 7893/2020) which dealt with the recognition of the right of "religious propaganda" (according to article 19 of the Italian Constitution) to an atheistic association (UAAR).

[14] About the relevance of this judgment and that of its 'twin case' ECJ, *IR v. JQ*, C-68/17, for the configuration of an authentic "European Law and Religion system", cf. **F. COLOMBO**, *Interpreting Article 17 TFEU: New Openings towards a European Law and Religion System*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 1 of 2020.

[15] See again ECJ (Grand Chamber), *Vera Egenberger*, cit., § 76, where is stated that the prohibition of any form of religious discrimination "which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law".

[16] As it has also been observed by **A. LICASTRO**, *Libertà religiosa, convivenza e discriminazioni*, in *Democrazie e religioni. Libertà religiosa, diversità e convivenza nell'Europa*

alia, for what is of main interest here) on the ground of his faith. A strengthened protection, therefore, which stands in a complementary relationship with the 'traditional' and connected right to religious freedom, with respect to which the former knows a different (and lower) threshold of offence and sometimes, consequently, a wider margin of operation[17].

The principle is transversal and its field of action is wide-spread. It ranges from the matter of public employment - recently the Court of Justice had to verify whether the temporary employment regime of religious education teachers in Italian public schools constituted a discrimination on religious grounds[18] - to the matter of symbols of belief, on which this contribution will specifically focus.

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del XXI secolo, edited by E. CAMASSA, Editoriale Scientifica, Napoli, 2016, p. 83, "the new regulatory framework of the European Union on anti-discriminatory law [always substantially imply] an assessment of reasonableness" (on which, in general, with respect to the Italian legal system, cf. **L. D'ANDREA**, *Ragionevolezza e giustificazione del sistema*, Giuffrè, Milano, 2005). This should not lead to underestimating, however, that the link that has been traced between the anti-discrimination law and the canon of 'reasonableness' - a conceptual instrument typical of Italian public law - could find partially different declinations within other legal systems, in relation to their conception of the general principle of equality. On the subject, for a comparative reflection, I may refer to the study by **S. COGLIEVINA**, *Diritto antidiscriminatorio e religione. Uguaglianza, diversità e libertà religiosa in Italia, Francia e Regno Unito*, Libellula edizioni, Tricase, 2013, p. 101 ff.

[17] As pointed out in the by the ECJ, *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, C-16/19, § 29, the threshold of activation of the anti-discrimination guarantee must be considered surpassed whenever an employee undergoes a prejudice - whether it may be qualified as less favorable treatment (direct discrimination) or as a particular disadvantage (indirect discrimination) - simply to the extent that it is suffered "in function" of a protected factor. I focused more attentively on this topic in **A. CESARINI**, *"Vecchie" questioni e nuovi strumenti: il crocifisso scolastico e il diritto antidiscriminatorio,* in **VV. AA.,** *I simboli religiosi nella società contemporanea,* in A. NEGRI, G. RAGONE, M. TOSCANO, L.P. VANONI (eds.), *I simboli religiosi nella società contemporanea*, Giappichelli, Torino, 2022, p. 79 ff. The distinctions between the rights of religious freedom and that not to be discriminated against on the basis of one's own religious choice - understood as non-overlapping legal positions (*rectius*, "distinct human rights") -, albeit relying on not entirely coincident arguments, are highlighted also by **T. KHAITAN**, *The right to freedom of religion and the right against religious discrimination: Theoretical distinctions*, in *International Journal of Constitutional Law*, Volume 17, Issue 4, October 2019, p. 1125 ff.

[18] ECJ, *YT and others v. Ministero dell'Istruzione, dell'Università e della Ricerca - MIUR, Ufficio Scolastico Regionale per la Campania*, C-282/19. The judgment of the Luxembourg Court, which denies that its decision might involve profiles of *status* of the Catholic Church as enshrined in article 17 of the Treaty on the Functioning of the European Union,

What is being proposed here, in harmony with the spirit of the panel in which I have the pleasure of participating, is to (briefly) illustrate a hypothesis for reflection, along a specific line of enquiry. The question is as follows: given its overall unity, which is inherent in its rationale of hinder unreasonable differences in treatment (among other things) on the basis of one's professed religious belief, it is worth investigating whether the operational criteria of the canon of non-discrimination (*i.e.* the way such principle concretely 'works') undergoes substantial differentiations depending on the spatial contexts in which the connected prohibition is invoked. This clarifies the focus of this paper: what is proposed here is a 'spatial' analysis of the principle of non-discrimination on the ground of religion.

In order to answer the question, it is necessary to illustrate a basic case prospect. For the sake of homogeneity, as anticipated above, the cases cited all relate to the subject of religious symbols. The choice has been taken also in the light of recent developments, whose variety suggests the topicality of the issue.

Let us momentarily leave the dimension of 'private (or personal) spaces' in the background. That is a dimension where already in liberal systems, and therefore, all the more so, in contemporary democratic ones - those of constitutional matrix - the private individuals enjoy, as far as the religious factor is concerned, a claim of non-interference by the public authorities[19]. It follows that any authoritative constraint that would impose to limit the freedom of the individual (among other things) with respect to the religious characterisation (for example, through the use of symbols) of one's body or of the space he inhabits would reverberate in an evident violation of his religious freedom. This is a profile that does not even immediately intersect, as such, with that of the principle of non-discrimination. But we shall return to this topic in conclusion.

Let us focus, instead, on the so-called 'public sphere' or 'public space'[20]. This is a complex notion that, according to a fortunate

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has been attentively analysed by **A. LICASTRO**, *Il rapporto di lavoro degli insegnanti di religione nelle scuole pubbliche italiane davanti alla Corte di Giustizia dell'Unione europea*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 4 of 2022.

[19] On the matter of the first characterisation of the religious freedom in the form of a claim ('subjective public right') of the private individual against the public (State) power, in liberal legal systems, it is still worth to mention **F. RUFFINI**, *La libertà religiosa come diritto pubblico soggettivo*, il Mulino, Bologna, 1992 (reprint).

[20] Cf., for more detailed information about the use of such locution for the means of Law and Religion, the contributions of **VV. AA.,** in S. FERRARI, S. PASTORELLI (eds.),

sociological theorisation[21], should be 'deconstructed'[22] into an 'institutional' component (the places where sovereign, authoritative powers are exercised) and an 'informal' one (places of a 'plural' vocation, as they are the natural seat of formation of 'public discourse'[23]). However, if it is observed through the anti-discrimination lens, this distinction ceases to have any meaning, at least on an abstract dimension of analysis.

Let me explain better: whether it operates in an institutional space or an informal one, the anti-discrimination canon essentially acts through the means of a balancing judgment between the right of the individual - at least when he complains (as it usually happens) of having suffered a particular disadvantage[24] because of the creed he professes - and an interest that the legal order abstractly considers on the same level and, for

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Religion in Public Spaces. A European Perspective, Farnham, Ashgate, 2012.

[21] The distinction between the categories of 'institutional' and 'informal' public places, as it is commonly known, has been elaborated by **J. HABERMAS**, *Religion in the Public Sphere*, in *European Journal of Philosophy*, 2006/14, p. 1-25.

[22] Cf. **S. FERRARI**, *I simboli religiosi nello spazio pubblico*, in *Quaderni di diritto e politica ecclesiastica*, 2012/2, p. 325 ff. (now also in **ID.**, *Scritti. Percorsi di libertà religiosa per una società plurale*, edited by C. CIANITTO, A. FERRARI, D. MILANI and A. TIRA, il Mulino, Bologna, 2022, p. 247 ff.).

[23] See again **J. HABERMAS**, *Strukturwandel der Öffentlichkeit: Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft*, Neuwied, Luchterhand, 1962.

[24] As it is well known, such disadvantage describes the figure of 'indirect discrimination', which Directive 2000/78/EC, among others, provides that "*shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless* [in particular] *that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*" (art. 2.2, lett. b). Conceptually different is the case of 'direct discrimination', which the same directive states that "*shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1*" (art. 2.2, lett. a) and which is defined as unsusceptible to justifications based on a balance with competing interests, as it is always to be deemed illegitimate. The only exception may be found in the matter of the so-called 'occupational requirements' (art. 4), which in any case describe a case that is technically "external and extraneous" to that of discrimination in its technical sense (**P. CHIECO**, *Le nuove direttive comunitarie sul divieto di discriminazione*, in *Rivista italiana di diritto del lavoro*, 2002, I). However, it should be noted that the directive, also in these cases, requires to verify "*that the objective* [of the less favourable treatment] *is legitimate and the requirement is proportionate*" (*ibidem*). For a general overview on antidiscrimination-law, at least regarding its Italian declination, I may refer to the studies of **VV. AA.**, *Il nuovo diritto antidiscriminatorio. Il quadro comunitario e nazionale*, edited by M. BARBERA, Giuffrè, Milano, 2007.

that reason, capable as such of integrating a so-called 'legitimate aim'. In these cases, the treatment which the individual undergoes cannot be found discriminatory, as far as such disadvantage appears to be reasonable and proportionate.

I may propose two examples, in order to better clarify what has just been stated. Both of those intersect the issue of the prohibition of discrimination in religious matters. Let us take the case of the French law of 1905[25], which imposes an 'aseptic' neutrality inside institutional public places and buildings[26], and that of 2010[27], which forbids circulating in squares (informal public places) with the face covered (among other things) by an Islamic veil. These are different cases and so different will be the legitimate aims invoked as balancing factors[28] - the secularism of the State[29], in the first case; public safety (or more evanescent concepts such as *vivre ensemble*[30]), in the second one. Identical, however, is the mechanism

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[25] *Loi du 9 décembre 1905 concernant la séparation des Églises et de l'État*.

[26] Cf. art. 28, which provides a general prohibition "*d'apposer aucun signe ou emblème religieux sur les monuments publics ou en quelque emplacement public que ce soit, à l'exception des édifices servant au culte, des terrains de sépulture dans les cimetières, des monuments funéraires, ainsi que des musées ou expositions*".

[27] *Loi n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public*. Cf., on the topic, **A. FORNEROD**, *The Burqa Affair in France*, in A. FERRARI, S. PASTORELLI (eds.) *The Burqa Affair Across Europe. Between Public and Private Space*, Ashgate, Farnham-Burlington VT, 2013.

[28] On the prohibition of the use of Islamic veil in public spaces and the balancing judgment that is required in order to assess its legitimacy according to the different situations (and the different balancing factors) that the concrete cases may arise, Allow me to refer, especially for a reconstruction of the wide literature, to **A. CESARINI**, *La delibera 'anti-velo' della Giunta lombarda e il nuovo paradigma della pubblica sicurezza*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 7 of 2020.

[29] On the relationship between the French 1905 'separation law' and the consolidation of the secular form of that legal system, I may refer to **J. BOUSSINESQ**, *La laïcité française. Mémento juridique*, Seuil, Paris, 1994, p. 29 ss. In order to comprehendi the "state of the art" of French secularism, I cannot omit to refer to the recent law no. 1109, "*confortant le respect des principes de la République* ". On the content and the delicate implications of that regulatory instrument, I refer to the in-depth study made by **A. TIRA**, *La legge francese n. 1109 del 24 agosto 2021 sul "rafforzamento del rispetto dei principi della Repubblica"*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 16 of 2021.

[30] Critical notes to such concept have been expressed by **V. FAGGIANI**, *Il* «vivre ensemble» *e la* «choix de société» *come nuovi limiti all'uso del velo negli spazi pubblici. Osservazioni a margine dei casi* S.A.S. c. Francia *e* Belcacemi e Oussar c. Belgio, in S. NINATTI (ed.) *Pluralismo religioso e integrazione europea. Percorsi di lettura*, Giappichelli, Torino, 2018, p. 33 ss.

underlying the balancing of conflicting interests. What is pursued, in both cases, is a balancing judgment, the outcome of which is required to assure the any difference of treatment (on the ground of one's religion) is reasonable and proportionate. From this point of view, the *S.A.S. v. France* judgment of the European Court of Human Rights[31] - which ruled out the discriminatory nature of the French 'anti-veil' law - is still certainly of interest.

The discourse does not change, however, when our perspective shifts to another peculiar dimension of the space, in a certain sense, 'astride' the public and private sphere, to which we may here refer (but without any specific definitory pretence) as 'working space': in other words, the space where the working and entrepreneurial activities of citizens take place. As the case-law shows, in many working places the disputed positions may often be those of the employee - who claims not to be subjected to discriminatory treatment on the ground of his belief - and that of the employer, who, in exercising his right to conduct a business, may claim to characterise in a religious (or a-religious) sense his activity and therefore also the physical space where it takes place, or even the physical appearance of the employees, as far as these might be denied to display the symbols of their religious belief.

Again, therefore, what is required here is a balancing judgment guided by the beacons of reasonableness and proportionality. By this point of view, the judgments of the Court of Justice in *Achbita*[32] and *Bougnaoui*[33] cases, whose solutions have been overall confirmed by the more recent judgment *IX v. WABE*[34], are worthy to be considered paradigmatic[35].

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[31] *S.A.S. v. France*, No. 43835/11, ECtHR (Grand Chamber), 1 July 2014. See also, relatively to the Belgian 'anti-veil' Law of 1 June 2011, the case *Belcacemi and Oussar v. Belgium*, No. 37798/13, ECtHR (Second Section), 11 July 2017. Cf. also, for a general overview of the Strasbourg Court' case-law concerning the religious factor, **M. TOSCANO**, *Il fattore religioso nella Convenzione Europea dei Diritti dell'Uomo. Itinerari giurisprudenziali*, ETS, Pisa, 2018.

[32] ECJ, Grand Chamber, *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding c. G4S Secure Solutions NV*, C-157/15.

[33] ECJ, Grand Chamber, *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v. Micropole SA, former Micropole Univers SA*, C-188/15.

[34] ECJ, *IX c. WABE e MH Müller Handels GmbH c. MJ*, C-804/18 e C-341/19. Su questa pronuncia, nonché sulle precedenti *Achbita* e *Bougnaoui*, si sono di recente concentrati **I. ANRÒ, F. CROCI**, *I simboli religiosi di fronte alla Corte di giustizia: sviluppi recenti e prospettive*, in *I simboli religiosi nella società contemporanea*, cit., p. 5 ff.

[35] On this topic, cf. also **N. MARCHEI**, *La libertà religiosa nella giurisprudenza delle Corti*

However, the matter changes when one moves to observe a category of new jurisprudential and scientific elaboration, that of the so-called 'participated space'[36], recently evoked by the Italian Court of Cassation[37], which has returned to deal with the controversial topic of the display of crucifix in public school classrooms[38]. What the adjective 'participated' evokes is a link of profound interrelationship between the physical space and the people who occupy it, such that the concrete characterisation of the former - also, if that is the case, through the display of religious symbols - cannot but pass through the contribution of each of those who 'live' it ad who develop their own personality inside it.

The difference with respect to 'traditional' - public or private - spaces is significant and has not escaped the Court of Cassation's attention. In fact, the Court affirmed that, in order to avoid the recurrence of a discriminatory treatment, the choice regarding the display of the crucifix and, in this eventuality, the choice regarding its spatial-temporal mode of display, can only pass through a procedure of 'reasonable accommodation'[39] between all participants - students and teachers as well - in the school community. A reasonable accommodation - to quote the Court of Cassation - capable of satisfying the rights of all those individuals "to the extent concretely possible", even displaying next to the crucifix, whether it would be demanded, the symbols of other religious creeds. A decision - it is only a case of mentioning it - that presents certain similarities with the so-called 'Bavarian solution', where a similar discipline had long been envisaged through a law enacted on 23 December 1995 by the Parliament of the *Land*[40].

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europee, in *Stato, Chiese e pluralismo confessionale*, cit., no. 33 of 2019, p. 71 ff.

[36] The expression is used, referring to public school classrooms, by **J. PASQUALI CERIOLI**, *La mediazione laica sul crocifisso a scuola nel diritto vivente: da simbolo pubblico "del potere" a simbolo partecipato "della coscienza"*, in *Il diritto di famiglia e delle persone*, 2022/1, p. 25.

[37] Italian Court of Cassation, Joined Sections, no. 24414/2021. For deeper analysis of that decision, refer to **M. TOSCANO**, *Il crocifisso 'accomodato'. Considerazioni a prima lettura di Corte cass., Sezioni Unite civili, n. 24414 del 2021*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 18 of 2021.

[38] For a general overview of the topic, I may refer to **L.P. VANONI**, *Laicità e libertà di educazione: il crocifisso nelle aule scolastiche in Italia e in Europa*, Giuffrè, Milano, 2013.

[39] with respect to the meaning and methods of operation of the instrument of 'reasonable accommodation', cf. **G. PAVESI**, *Le frontiere europee della* religious accommodation. *Spunti di comparazione*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 10, 2021.

[40] In the light of a previous judgment of the German Constitutional Court (BVerfGE,

As can be seen, in the case of the participated space - according to the meaning just clarified - the operational paradigm of the principle of non-discrimination undergoes a significant variation. The structural *aut aut* model, typical of the traditional balancing judgement, is surpassed by a procedural model of a more 'mediatory' nature, aimed at pursuing concerted solutions, tailored in advance to the concrete case.

Could this operational criterion be extended to other cases (those concerning public, institutional or informal spaces, and 'working' ones)? The question arises, but the answer is difficult to give. One need only think of the way in which the pandemic emergency seems to have rendered, in a certain sense, anachronistic some of the categories that have been proposed in the course of this presentation. The classroom itself once the (almost) exclusive place of teaching activities, has for many months been replaced by a hyper-real[41] 'pandemic space' consisting of the synthesis of a plurality of private spaces - often religiously connoted through the display of symbols - composed of the juxtaposition of multiple windows of screen[42]. I am referring, as is evident, to the experience of so-called 'distance learning', in the face of which, as someone has suggested, the traditional distinction between the 'class' (understood as a collection of people) and the 'classroom' (understood as the physical place where they gather to learn) seems to have lost its

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16 May 1995), such Law, in its Article 7, provides that the head teacher has the duty to carry out an attempt to conciliation and, in the event of a negative outcome, he has the task to create an "*ad hoc* rule (for the individual case) that respects the freedom of religion of the dissenting and operate a just reconciliation of religious and ideological convictions of all pupils in the class, at the same time taking into account, however much possible, the will of the majority". Cf. sul legame tra la soluzione bavarese e quella adottata dalla Corte di Cassazione italiana, **S. CECCANTI**, *Come in Baviera: il crocifisso resta alla parete se è la scelta della classe*, in *Quaderni costituzionali*, no. 4 of 2022. p. 951 ff., nonché, già in precedenza, **ID.** *se la Corte andasse in Baviera?*, in *La laicità crocifissa? Il nodo dei simboli religiosi nei luoghi pubblici*, edited by R. BIN, G. BRUNELLI, A. PUGIOTTO E P. VERONESI, Giappichelli, 2004, p. 18 ss.; **M. CARTABIA**, *Il crocifisso e il calamaio*, p. 70 ff.

[41] Cf. **J. BAUDRILLARD**, *Simulacres & Simulation*, Edition Gaulée, Paris, 1981. On the applications of the concept of 'hyper-reality' in the field of Law and Religion has recently reflected **J. PASQUALI CERIOLI**, *«Mediatic Globalization» e propaganda religiosa nella società iper-reale*, in *Quaderni di diritto e politica ecclesiastica*, 2021/1, pp. 129 ss.

[42] This has been observed by **F. COLOMBO**, *Laicità e sovranità della Repubblica nel suo ordine simbolico: il caso del crocifisso nelle aule scolastiche*, in *I simboli religiosi nella società contemporanea*, cit. p. 104, nt. 104, who also argued that, in such a 'dematerialized' context, there would be no reason to prohibit the display of religious symbols (or more generally of the symbols 'of conscience'), since there would be no "possibility of confusion between the identity of the State-apparatus and private individuals".

meaning[43]. Not dissimilar experiences, as it is only appropriate to hint, have been experimented in the working environment, where the model of 'smart working' and videoconferencing have flanked (and sometimes largely replaced) traditional office dynamics.

The subject is therefore in a state of evolution. The casuistry, at least from the point of view of anti-discrimination law, is still fluid and needs to be consolidated. What is certain is that current developments make it necessary to at least question the resilience of traditional models that may prove inadequate in the contemporary world.

[43] Cf., again, **J. PASQUALI CERIOLI**, *La mediazione laica sul crocifisso a scuola*, cit., p. 12.

Stato, Chiese
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Public space and religion in the transformation of the form of the State

SUMMARY: 1. Public Space, Religion and Solidarity: A Premise - 2. School Space, Religion and 'Nation Building' Process in Nineteenth Century Italy - 3. Ethical State and Scholastic confessionalism during the Fascist Period - 4 From Confessionalism to the Italian *'Laicità'*: A New Model for State-Society Relations - 5. Concluding Remarks.

1 - Public Space, Religion and Solidarity: A Premise

Regulation of public space and Law and Religion system are two normative areas from which it is possible to draw valuable information on the qualification of the form of a State[44]. Public space is in fact the place of living together, where collective ethics underlying the law flows and manifests itself[45]. Here people (*personae*[46]) meet and exchange messages, linguistic and symbolic, often of "spiritual"[47] content. These exchanges

[44] Cf. **A. MORELLI**, *Simboli e valori della democrazia costituzionale*, in **VV. AA.**, *Symbolon/Diabolon. Simboli, religioni, diritti nell'Europa multiculturale*, edited by E. DIENI, A. FERRARI, V. PACILLO, il Mulino, Bologna, 2005, p. 167 ff.

[45] This is a deliberately broad definition of public space. For a "deconstruction" of this notion see **S. FERRARI**, *I simboli religiosi nello spazio pubblico*, in *Quaderni di diritto e politica ecclesiastica*, no. 2 of 2012, p. 325 ff. (now also in **ID.**, *Scritti. Percorsi di libertà religiosa per una società plurale*, edited by C. CIANITTO, A. FERRARI, D. MILANI and A. TIRA, il Mulino, Bologna, 2022, p. 247 ff.).

[46] In Latin *'persona'* means 'mask'. In this sense, the person is the projection of the human being within society. On the evolution of the concept of person in constitutional law, see fairly recently **S. RODOTÀ**, *Il diritto di avere diritti*, Laterza, Bari-Roma, p. 140 ff. On the anthropological conceptions of the Italian constituents instead see **F. PIZZOLATO**, *Finalismo dello Stato e sistema dei diritti nella Costituzione italiana*, Vita e Pensiero, Milano, 1999.

[47] Reference is made here to a wide concept of the 'spiritual', such as the one enshrined in the second paragraph of Article 4 of the Italian constitution. According to **G. CASUSCELLI**, *Post-confessionismo e transizione*, Giuffrè, Milano, 1984, p. 29 ff., the scope

help to build the code of social solidarity[48]; a value substratum (perhaps minimal[49]) on which the law also rests, even in a pluralistic context - "polytheistic", to quote Max Weber[50]. In fact, as pointed out (among others) by Henri Bergson, law, in its dimension of principles, springs from ethics which constitutes the main historical source[51] of juridical revolutions[52].

For this reason, the 'physiognomy' of the public space (the container) can influence the ethical, and even legal, development of society[53]. In a democratic system, political-value choices are made according to a bottom-up process which leads to the translation of a shared conviction into norm; therefore, public space must be devoid of elements capable of contaminating the free marketplace of idea. In autocratic systems, on the other hand, the established power often wants to regulate and shape the public space in its image and likeness and in accordance with its political order.

In this control operation, authoritarian States have historically made use of religion and its institutional apparatus.

Religions, in fact, have always occupied a central role within the public life. They constitute vehicles of identity, providing "a narrative in which it is possible to recognize oneself"[54]; a direction "for one's life and

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of the spiritual (referred to in the article cited above) is broader than that of the religious, also encompassing the dimensions of art and science.

[48] On the constitutional concept of solidarity, see for all **F. GIUFFRÈ**, *La solidarietà nell'ordinamento costituzionale*, Giuffrè, Milano, 2002. On the principle of solidarity, see also **A. MORELLI**, *I principi costituzionali relativi ai doveri inderogabili di solidarietà*, in *Forum di Quaderni Costituzionali*, Online journal (*www.forumcostituzionale.it*), 2015.

[49] On the idea of a positive law that respects the ethical minimum cf. **J. RAWLS**, *A Theory of Justice*, The Belknap Press of Harvard University Press, Cambridge (MA), 1971.

[50] This is the famous Weberian definition of the pluralist society. Cf. **G. DALLA TORRE**, *Le frontiere della vita. Etica, bioetica e diritto*, Edizioni Studium, Roma, 1997, p. 45 ff.

[51] On the process of affirming the concept of the historicity of law, see **P. GROSSI**, *Mitologie giuridiche della modernità*, Giuffrè, Milano, 2007.

[52] See **H. BERGSON**, *Les Deux Sources de la morale et de la religion*, Félix Alcan, Paris, 1932. Cf. on this point **C. CARDIA**, *Il fondamento etico del diritto*, in *Stato, Chiese e pluralismo confessionale*, Online journal (*https://www.statoechiese.it*), no. 20 of 2012, p. 21.

[53] Since "the medium is the message", one might say with a clear reference to **M. McLUHAN**, *Understanding Media: The Extensions of Man*, McGraw-Hill, New York City (NY), 1964.

[54] **S. FERRARI**, *Tra geo-diritti e teo-diritti. Riflessioni sulle religioni come centri transnazionali di identità*, in *Quaderni di diritto e politica ecclesiastica*, no. 1 of 2007, p. 10, now

solidarity among the members of the community"[55]. Beyond their sacred and ritual aspect, religions are often associated with ethics. They propose rules or, at the very least, principles for human coexistence; commands that may therefore be of juridical significance[56] since they condition behavior of the citizens-believers[57]. In other words: religions contribute to building social solidarity, as well as they might crack it. Therefore, the examination of the relationship between public powers and religious denominations acquires importance from a legal perspective.

Based on these premises, an analysis will be made of the regulation of the religious factor in the public space, to outline some elements that have characterized the different constitutional forms assumed by the Italian State. For the sake of synthesis, it was decided to narrow the field to the 'educational space' and, specifically, on the public-school space. In the latter, in fact, the community takes shape since the ethics of the different families (in a broad sense) meet for the first time.

I will start with the first sixty years (approximately) of the Italian Kingdom, from its proclamation to the advent of the Fascist Party.

2 - School Space, Religion and 'Nation Building' Process in Nineteenth Century Italy

Throughout the second half of the nineteenth century, the issue of education was at the center of political debate. The ruling classes that had led the country to unity, in fact, envisaged a process of cultural

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also in **ID**., *Scritti. Percorsi di libertà religiosa per una società plurale*, cit., p. 227 ff. (my translation).

[55] **S. FERRARI**, *Tra geo-diritti e teo-diritti*, cit., p. 10.

[56] Cf. **S. BERLINGÒ**, *Ordine etico e legge civile: complementarità e distinzione*, in *Iustitia*, 1996, p. 229.

[57] Catholicism has been an important factor in the construction of the ethical, and therefore political and legal shape of western national communities. For centuries, in fact, the unity of the European identity, already divided into different populations, was found in the set of principles of the *Res Publica Christiana*. Then, at the end of this experience, we have two models of modern State, that could be summarized in the formulas *cuius regio eius religio* (confessional State) and *etsi deus non daretur* (neutral liberal State), both concerning the relationship between public authorities and religions. To reconstruct this historical path in an effective but concise manner cf. **P. BELLINI**, *Respublica sub Deo. Il primato del sacro nell'esperienza giuridica dell'Europa preumanista*, Edumond Le Monnier, Firenze, 1981; **G. CAPUTO**, *Introduzione allo studio del diritto canonico moderno. Lo jus pubblicum ecclesiasticum*, CEDAM, Padova, 2009, II ed., t. I, pp. 3-56.

transformation that was to transform the Italian State into a modern nation-State[58]. It was necessary to "invent"[59] an Italian tradition to complement territorial sovereignty. "We have made Italy, now we must make Italians", according to the motto usually attributed to Massimo D'Azeglio.

To complete the nation building process, it was imperative to construct a national education system, capable of bringing together and coordinating the institutions already present in the Italian territory[60].

Thus initiated a conflict with the Catholic Church, which until then had enjoyed a monopoly in the field of education[61]. The "scholastic *Kulturkampf*"[62] is perfectly inscribed within the secularization path of Western societies. As has been accurately observed by Adolfo Ravà, in fact, the modern State wants, as an ethical subject, to eliminate any influence of any other authority (first, the Church of Rome) in the dimension of education[63], claiming sovereignty over the so-called "cultural lever"[64].

The Italian context, however, was quite peculiar. Catholicism, in fact, constituted one of the few common identity features of a culturally divided population. Hence an ambivalent attitude towards religion: the Kingdom was at the same time in conflict with the ecclesiastical

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[58] As pointed out by **P. CARROZZA**, *Nazione*, in *Digesto delle discipline pubblicistiche*, Utet, Turin, 1995, vol. X, p. 136, it is the State that creates the nation and not vice versa.

[59] **E.J. HOBSBAWM, T.O. RANGER**, *The Invention of Tradition*, Cambridge University Press, Cambridge, 1983.

[60] Cf., on this point, **L. BORGHI**, *Educazione e autorità nell'Italia moderna*, La Nuova Italia, Firenze, 1974, p. 4.

[61] See **S. MANZIN MAESTRELLI**, *Istruzione dell'obbligo*, in *Digesto delle discipline pubblicistiche*, 1994, vol. IX, p. 2. Cf. **G. DALLA TORRE**, *La questione scolastica nei rapporti fra Stato e Chiesa*, Pàtron Editore, Bologna, 1988, p. 27 ff.

[62] **G. CHIOSSO**, *La questione scolastica in Italia: l'istruzione popolare*, in **VV. AA.**, *Il kulturkampf in Italia e nei paesi di lingua tedesca*, edited by R. LILL and F. TRANIELLO, il Mulino, Bologna, 1992, p. 339.

[63] **A(dolfo) RAVÀ**, *Lo Stato come organismo etico (1914)*, in **ID.**, *Diritto e Stato nella morale idealistica*, CEDAM, Padova, 1950, p. 147 ff.

[64] In the sense pointed out by **G. ZAGREBELSKY**, *Fondata sulla cultura. Arte, scienza, Costituzione*, Einaudi, Torino, 2014, p. 11 ff.

institution[65] and in need of Catholicism as a fundamental factor in the nation building project[66].

These ambiguities were reflected in the discipline of the school. In fact, the introduction of a centralized school system raised the practical problem of delimiting the competences of the religious authority in this matter, without however renouncing the benefits that religion could had for the education.

For this reason, first the Kingdom of Sardinia (1720-1861) and then the Kingdom of Italy moved very cautiously in this field, through a system of progressive reforms. To simplify an analysis that should necessarily be more detailed, I will dwell on a few regulatory elements contained in the 'Casati' Law and in the 'Coppino' Law that constitute, respectively, the initial moment and the apogee of the secularization process of the Italian school[67] during the so-called liberal period[68]. I will focus on the regulation of primary school to verify how public space and religion were used to shape the cultural physiognomy of citizens from the age of childhood.

In the regulatory framework designed by the 'Casati' Law of 1859 (the "Magna Carta"[69] of the secular school) religion was valued by the ruling class as an indispensable factor in the formation of citizens, especially in the early school years. Two facts bear witness to this. The first, literally symbolic, is the presence of the crucifix in all classrooms, as imposed by Article 140 of the Royal Decree no. 4336 of 15 September 1860, implementing the 'Casati' Law. However, it is necessary to emphasize how, in this context, the display of the crucifix assumed a cultural and non-denominational value[70]. At that time, in fact, there was no link between the Church and the State, that, as stated, were at loggerheads. Hence, the display of the Christian symbol has to be interpreted as a

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[65] The word "institution" is used here in the sense indicated by **S. ROMANO**, *L'ordinamento giuridico (1918)*, Quodlibet, Macerata, 2018.

[66] On the attempt by the liberal ruling class to use Catholicism as a traditional moral support, see **G. FORMIGONI**, *L'Italia dei cattolici. Fede e nazione dal Risorgimento alla Repubblica*, il Mulino, Bologna, 1998, p. 34.

[67] For an overview of the main problems in law and religion and church politics of the period see **A. TIRA**, *Alle origini del diritto ecclesiastico italiano. Prolusioni e manuali tra istanze politiche e tecnica giuridica (1870-1915)*, Giuffrè, Milano, 2018.

[68] On the will of the liberal ruling class to reform schools in a secular sense see **A. TALAMANCA**, *Libertà della scuola e libertà nella scuola*, CEDAM, Padova, 1975, p. 51 ff.

[69] **L. BORGHI**, *Educazione e autorità*, cit., p. 9.

[70] As highlighted by **G. DALLA TORRE**, *Dio o Marianna? Annotazioni minime sulla questione del crocifisso a scuola*, in *Giustizia Civile*, no. 2 of 2004, p. 512.

tribute to the creed of the majority of the population (and thus to the underlying ethical minimum) and not as the symbol of an alliance with the ecclesiastical authority.

The second symbolic element is the placement of the religion course at the top of the list of subjects to be attended in primary school, pursuant to Article 315 of the Law. Catholicism, however, was taught in the interest of the State. The course was indeed provided by lay teachers, under the guidance of spiritual directors appointed by the Ministry of Education, who concurred, together with the school authorities, in the choice of programs.

It also notes the elimination of the formula contained in the Lanza Law (Law no. 2328 of 22 June 1857), according to which Catholicism represented the "foundation of religious instruction and education". This expression, in fact, had in the past suggested the religious foundation of the entire elementary school curriculum, which had to conform overall to the dictates of Catholic morality and culture. The disappearance of this provision would therefore seem to set back the possibility of control by the Church authority over other types of teaching, particularly of a scientific nature.

From here onwards, there is a constant effort to mitigate the residual denominational influences in the public school[71]. Already in the ministerial instructions attached to the 1867 school curricula, the transmission to students of catechisms and dogmatic concepts was decisively rejected, even during religion classes. The document insisted on the need to disseminate the "pure idea of God", deprived of any connection with a revealed religion[72]. Here too, the aim was to preserve the moral principles of the Catholics (the basis of the collective ethics), removing them from the control of the ecclesiastical authority.

A few years later, in the aftermath of the 'breach of Porta Pia', the 'Correnti' circular of 29 September 1870 made religious education in elementary schools optional and separated in terms of time planning.

In the meanwhile, political pressures grew to replace the religion courses, already reduced to a teaching of Christian ethics, with civic education lessons, freed from any reference to the theological-fideistic dimension of Catholicism. Thus, the 'Coppino' Law (Law no. 3968 of 15 July 1877) had expunged religion from the list of subjects to be studied in

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[71] **A.C. JEMOLO**, *La crisi dello Stato moderno*, Laterza, Bari-Roma, 1954, p. 141 underlines the rationalistic and positivistic spirit of many teachers of the time.

[72] On this point, see **G. CHIOSSO**, *La questione scolastica*, cit., p. 337, nt. 4.

primary schools, introducing in its place, still in a symbolic position, the "first notions of the duties of man and citizen". According to a circular from the Minister, the aim of the course was to "form a population, as far as possible, educated, but mainly honest, hard-working, useful to the family and devoted to the Fatherland and the King"[73]. The intention was thus to instill in the population the principles of a rational religion that could "strengthen the feeling of duty weakened by revolutions and materialist doctrines"[74]. An operation that often took the form of indoctrination; the same one that was strongly condemned when it came from the Church.

In the light of these elements, can it be said that the Italian State of the nineteenth century was still a confessional State, as envisaged in Article 1 of the Albertine Statute[75]? Considering the collective ethics of the time, the answer can only be positive[76]. The value plot underlying the legal system (the public ethics presupposed by law) was in fact borrowed from the Christian axiological system, albeit deprived of theoretical-theological justifications. In this sense, the provisions of the first article of the *octroyée* constitution must be interpreted, which rather than re-proposing the institutional alliance between the State and the Church, intended to claim the existence of a common socio-cultural identity, to be respected in the laws of the Kingdom.

3 - **Ethical State and Scholastic confessionalism during the Fascist Period**

There are many aspects of continuity between the liberal State and the Fascist Order. Mussolini's purported 'revolution' (the "transformation of the State"[77] heralded by Alfredo Rocco) was indeed gradual[78].

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[73] My translation. See on this point A.**A. MOLA**, *Michele Coppino. Scritti e discorsi*, Famija Albeisa, Alba, 1978, p. 555.

[74] In this sense, **G. VERUCCI**, *L'Italia laica prima e dopo l'Unità 1848-1876*, Laterza, Bari-Roma,1996, p. 176 (my translation).

[75] Based on which: "The Catholic, Apostolic and Roman Religion is the only Religion of the State. The other cults now existing are tolerated in accordance with the laws" (my translation).

[76] According to **J. PASQUALI CERIOLI**, *Potere, simboli, religione: dal confessionismo di Stato alla laicità del diritto*, currently being published, the Kingdom separated the civil institution from ecclesiastical power, but did not 'separate' itself from religion.

[77] **A. ROCCO**, *La trasformazione dello Stato. Dallo Stato liberale allo Stato fascista*, La Voce, Roma, 1927.

With regard to schools, the Fascists approach was particularly cautious; just a few framework measures, followed by a multiplicity of smaller amendments. A legislative fragmentation to which the alternation in government of nine different education ministers, animated by very different political ideas, also contributed.

In his first years in government, Mussolini preferred to rest on the results of the early 20th century debate, from which an unusual alliance between idealists and populars had emerged[79]. Indeed, both 'factions' opposed the anti-religious spirit of nineteenth-century positivism, believing that the school should not only educate, but also transmit a complex spiritual heritage to young people[80].

It is in the wake of this conception that the thought of Giovanni Gentile, who was the first education minister in the Mussolini government, is placed. In fact, Gentile's reform, on which all subsequent legislative measures were based, was more reactionary than fascist[81]. Indeed, it favoured an elitist[82] reading of society, imposing a rigid division of schools according to social classes. At the center of the educational system, there was the classical high school (*liceo classico*), within which a kind of humanistic mysticism was taught, based on classical culture, Latin tradition, and philosophical studies.

According to Gentile's conception, religion was instead to constitute a preparatory phase of education; a propaedeutic course to that of philosophy (*philosophia minor*) and therefore destined to be superseded with later maturity[83]. It was to mould the child's mind, transmitting to

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[78] Cf. **L. PALADIN**, *Fascismo (dir. cost.)*, in *Enciclopedia del Diritto*, Giuffrè, Milan, 1967, vol. XVI, p. 902 ff. and **S. CASSESE**, *Lo Stato fascista*, il Mulino, Bologna, 2010, p. 47 ff.

[79] On the school debate at the beginning of the 20th century, see **M. BELLUCCI, M. CILIBERTO**, *La scuola e la pedagogia del fascismo*, Loescher, Torino, 1978, p. 51 ff.

[80] Cf. **A. TALAMANCA**, *Istruzione religiosa*, in *Enciclopedia del Diritto*, Giuffrè, Milan, 1973, vol. XXIII, p. 123.

[81] See **J. CHARNITZKY**, *Fascismo e scuola. La politica scolastica del regime (1922-1943)*, La Nuova Italia, Firenze, 1999, p. 190.

[82] A vision according to which the educated had to rule while the masses had to obey. Cf. **L. AMBROSOLI**, *Libertà e religione nella riforma Gentile*, Vallecchi, Firenze, 1980, p. 68.

[83] On the religious idea in Gentile thought see, for all, **G. MOLTENI MASTAI FERRETTI**, *Stato etico e Dio laico. La dottrina di Giovanni Gentile e la politica fascista di conciliazione con la Chiesa*, Giuffrè, Milano, 1983.

him an idea of limitation and submission to something allegedly superior, be God or the nation[84].

Article 3 of the Royal Decree no. 2185 of 1 October 1923 imposed a course of "Christian doctrine according to the form received from the Catholic tradition" in primary schools, as the "foundation and crown of education". Religion thus became the ethical pillar of the State, as the primal creed on which the most pervasive sense of national belonging would be grafted.

The renewed display of the crucifix next to the portrait of the King in all the classrooms of primary schools (ordered by circular letter from the Minister of Public Education no. 68 of 22 November 1922) must also be read in the sign of nationalism[85]. The crucifix was in fact only one of the symbols of identity present in the school space in the 1920s[86]. Already in 1923, the Italian flag was hoisted in all schools and students were required to pay homage to it during a weekly ceremony. Then, a decree of 5 June 1924 prescribed the presence in all primary school classrooms of "a bas-relief of the Goddess Rome guarding the body of the Milite Ignoto, detail of the monument to Vittorio Emanuele II in Rome". To complete the symbolic imagery of that political project, in 1926 the exhibition of a portrait of Mussolini was also imposed, in a triad with the images of Christ and the Monarch (circular letter from the National Fascist Party of 24 November 1926).

In the aesthetic supremacy over space, the Fascist State's ambition for ethical supremacy was manifested. A primacy in the field of morality that opposed any form of interference by ecclesiastical authority.
For this reason, the 1929 agreements with the Church were disapproved by Gentile[87]. His design of an ethical state postulated the severing of any relationship with religious institutions at least on an equal footing. To

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[84] See **G. GENTILE**, *Discorsi di religione*, Sansoni, Firenze, 1935, p. 121. Cf. **L. BORGHI**, *Educazione e autorità*, cit., p. 279.

[85] Cf. **J. PASQUALI CERIOLI**, *La mediazione laica sul crocifisso a scuola nel diritto vivente: da simbolo pubblico "del potere" a simbolo partecipato "della coscienza"*, in *Diritto di Famiglia e delle Persone*, no. 1 of 2022, p. 16, who points out the formal and substantial extraneousness of the regulations on the display of the symbol to concordat relations with the Catholic Church.

[86] On fascist symbolism, see **E. GENTILE**, *Il culto del littorio. La sacralizzazione della politica nell'Italia fascista*, Laterza, Bari-Roma, 1993, p. 57 ff.

[87] Cf. **H.S. HARRIS**, *La filosofia di Giovanni Gentile*, Armando, Roma, 1973, p. 276. On the theoretical reasons for this hostility see **G. MOLTENI MASTAI FERRETTI**, *Stato etico*, cit., p. 164 ff.

enter into agreements with the Church, in fact, meant recognizing the original sovereignty of that order and admitting the spiritual incompleteness of the State.

According to Mussolini, instead, the contradiction between confessionalism and the ethical conception of the State had to be resolved from a pragmatic point of view, with the substantial incorporation of the ecclesiastical institutions present on the Italian territory within the fascist public dimension. In other words, as explained by Mussolini himself, Italy was to be "Catholic and Fascist", but "above all exclusively, essentially Fascist"[88]; this is the core of the new "ideological confessionalism"[89], which goes beyond the original Gentile perspective.

Paradigm shift also emerges from school discipline. Article 36, third paragraph of the Concordat (made enforceable by Law no. 810 of 27 May 1929), in fact, had introduced the institution of the "certificate of fitness", issued by the ordinary of the diocese and preparatory to the teaching of religion in public schools. Another significant change concerned the choice of teachers who were to be selected, primarily, from among priests and religious and only in a subordinately from the lay people, in the sign of a greater interpenetration between the State public apparatus and the Church hierarchy.

The overcoming of the Gentile model is also witnessed by the extension of the course of the Catholicism to secondary school. Religion, in fact, thus abandoned the role of *philosophia minor*, to become a permanent element within the national mass school. As we will discuss in the following section, this is an approach that was to resist, for several years, the republican and democratic transformation of the legal system.

4 - From Confessionalism to the Italian '*Laicità*': A New Model for State-Society Relations

The new scholastic confessionalism was not immediately canceled by the fall of the Mussolini regime[90]. The express mention of the Pacts in Article 7

[88] As clarified by Mussolini himself in a speech to the Italian parliament on 13 May 1929.

[89] According to the definition of **J. PASQUALI CERIOLI**, *Propaganda religiosa: la libertà silente*, Giappichelli, Torino, 2018, p. 56.

[90] Cf. on the point **J. PASQUALI CERIOLI**, *Potere, simboli, religione*, cit., for which, "even the advent of democracy had to pay a certain conservation price in order not to

of the Constitution[91] allowed Article 36 of the Concordat to survive the advent of the Republic. The direct and specific reference to 'Mussolini and Gasparri agreements' in the Charter had in fact resulted in the elevation to the rank of the Constitution of the norms of concordat derivation[92], so that for forty years religious courses, of an eminently dogmatic character, continued to be imparted, in the same manner, in primary and secondary schools, as (at least from a formal point of view) the "foundation and crown of public education".

It was only after the stipulation of a new concordat[93], in 1984, that this discipline was modified and brought more into line with the principles expressed by the Republican Constitution. Under new regulations, Catholicism continues to be instructed in the State schools of every order and grade, but in conformity with the aims of public education; either way, everyone is guaranteed the right to choose whether to attend the course. This is what is currently provided for in Article 9 second paragraph of the Agreement.

The provision must be interpreted in the light of what the Constitutional Court stated in judgment no. 203 of 1989[94]. According to the Court, there are two main points of systemic evolution contained in this Article. The first is the affirmation of the formative value of religious culture, which however, in a lay context, should not be taught in catechetical way. The second is the recognition of a real and proper subjective right not to participate in religion classes, within the framework of a broader recognition of freedom of conscience in religious matters. In

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expose the newborn Republic to the risks of a juvenile disease that could have been fatal" (my translation).

[91] According to which: "The State and Catholic Church are, each within their own reign, independent and sovereign. Their relationship is regulated by the Lateran Pacts. Amendments to these Pacts, which are accepted by both parties, do not require the procedure of constitutional amendment" (my translation).

[92] On this topic see for all **G. CATALANO**, *Sovranità dello Stato e autonomia della Chiesa nella Costituzione repubblicana*, Giuffrè, Milano, 1974, and **P. BELLINI**, *Sui limiti di legittimità costituzionale delle disposizioni di derivazione concordataria contrastanti con valori costituzionalmente garantiti*, in **VV. AA.**, *Studi per la revisione del Concordato*, CEDAM, Padova, 1970, p. 125 ff.

[93] On the merely modifying or renewing nature of the 1984 agreement, see for all **L.M. DE BERNARDIS**, *Copertura costituzionale dell'Accordo di Villa Madama?*, in *Il diritto ecclesiastico*, no. 1 of 1984, p. 407 ff.

[94] Constitutional Court, judgment of 12 April 1989, no. 203. The parts of the judgment subsequently quoted have been translated by me.

this perspective, religion is taught in the educational interest of citizens and not of the State, as a personality development factor.

These two novelties, according to the Constitutional Court, would be fully consistent with the form of State inaugurated by the entry into force of the Constitution. The new discipline in fact appears to be inspired by an "instrumental logic that welcomes and guarantees the self-determination of citizens", according to criteria of impartiality.

As pointed out by the judgment, the current secular and democratic system eschews "ideologised and abstract postulates of extraneousness, hostility or confession of the State […] but places itself at the service of concrete instances of the civil and religious conscience of citizens". In this clarification lies the overcoming of the paradigm of the modern State (conceived as a unity of sovereignty), in favour of a model of participatory management of power, which allows citizens to actively contribute to shaping the physiognomy of the public service[95].

It is from this conception of the State that the recent ruling of the United Sections of the Supreme Court of Cassation on the display of the crucifix in school classrooms also moves[96]. The judgment will be examined

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[95] Cf. **G. DALLA TORRE**, *Dio o Marianna? Annotazioni minime*, cit., p. 517, and **A. VITALE**, *Laicità e modelli di Stato*, in **VV. AA.**, *Il principio di laicità nello Stato democratico*, edited by M. TEDESCHI, Rubbettino, Soveria Mannelli, p. 236.

[96] United Sections of the Supreme Court of Cassation, 9 September 2021, no. 24414. There have been many comments on the judgment. Among the first see **F. ALICINO**, *Il crocifisso nelle aule scolastiche alla luce di Sezioni Unite 24414/2021. I risvolti pratici della libertà*, in *www.dirittocomparati.it*, 11 novembre 2021; **ID.**, *Ceci n'est pas une pipe: The Crucifix in Italian Schools in the Light of Recent Jurisprudence*, in *Canopy Forum. On the Interactions of Law and Religion* (*https://canopyforum.org*); **P. CAVANA**, *Le Sezioni Unite della Cassazione sul crocifisso a scuola: alla ricerca di un difficile equilibrio tra pulsioni laiciste e giurisprudenza europea*, in *Stato, Chiese e pluralismo confessionale*, Online journal (*https://www.statoechiese.it*), no. 19 del 2021, p. 1 ss.; **A. CESARINI**, *"Vecchie" questioni e nuovi strumenti: il crocifisso scolastico e il diritto antidiscriminatorio*, in **VV. AA.**, *I simboli religiosi nella società contemporanea*, edited by A. NEGRI, G. RAGONE, M. TOSCANO, L.P. VANONI, Giappichelli, Torino, 2022, p. 79 ff.; **N. COLAIANNI**, *Dal "crocifisso di Stato" al "crocifisso di classe" (nota a margine di Cass., SS. UU., 9 settembre 2021, n. 24414)*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 17 del 2021, p. 17 ff.; **A. FUCCILLO**, *Il crocifisso negoziato. Verso la gestione "privatistica" dei simboli religiosi*, in *giustiziacivile.com*, no. 12 del 2021; **A. LICASTRO**, *Crocifisso "per scelta". Dall'obbligatorietà alla facoltatività dell'esposizione del crocifisso nelle aule scolastiche (in margine a Cass. civ., sez. un., ord. 9 settembre 2021, n. 24414)*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 21 del 2021, p. 17 ss.; **S. PRISCO**, *La laicità come apertura al dialogo critico nel rispetto delle identità culturali (riflessioni a partire da Corte di Cassazione, Sezioni Unite civili, n. 24414 del 2021)*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 21 del 2021, p. 53 ss.; **M. TOSCANO**, *Il crocifisso 'accomodato'. Considerazioni a prima lettura di Corte cass., Sezioni Unite civili, n. 24414 del 2021*, in *Stato, Chiese e pluralismo*

in more detail in subsequent contributions. A brief analysis is therefore sufficient to complete the framework.

The decision starts from the recognition of the ancipital nature of the school space. The classroom is in fact, on the one hand, an institutional space, therefore an expression of the public administration, and on the other a participatory space[97], whose identity depends on the personal contribution of those who attend it.

For this reason, the institutional or non-institutional nature of the crucifix depends on the exposure mode. If imposed by public authorities, the presence of the symbol in schools' spaces clashes with the principle of distinction of orders, which prevents the State from requiring the individual to behave in a way that take on religious significance, even passively. More so if the crucifix is placed high above the chair, behind the 'authority'[98].

The spontaneous and bottom-up display of religious symbols (not just the crucifix), as the result of a reasonable accommodation[99], may instead be compatible with the principle of neutrality of the legal order so long as it avoids undue attributions of religious identity to the State apparatus[100]. More, it is in the interest of the best education of students, which benefits from the fruitful contamination of ideas that takes place in a pluralist context. In this way, in fact, the classroom becomes a place of dialectical confrontation, in the wake of a series of legislative reforms that

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confessionale, cit., no. 18 of 2021, p. 45 ff. More recently **J. PASQUALI CERIOLI**, *La mediazione laica sul crocifisso a scuola*, cit., p. 9 ff. and **G. PAVESI**, *Simboli religiosi e accomodamento ragionevole 'all'italiana' nella recente giurisprudenza di legittimità*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 6 of 2022, p. 1 ff. to which reference is also made for further bibliographical elements.

[97] An anthropological space, as **N. COLAIANNI**, *Il crocifisso di nuovo in Cassazione. Note da* amicus curiae, in *Stato, Chiese e pluralismo confessionale*, cit., no. 12 of 2021, p. 18 defines it.

[98] The point had already been made by **J. PASQUALI CERIOLI**, *Laicità dello Stato ed esposizione del crocifisso nelle strutture pubbliche*, in **VV. AA.**, *I simboli religiosi tra diritto e culture*, edited by E. DIENI, A. FERRARI, V. PACILLO, Giuffrè, Milano, 2006, p. 139.

[99] On this subject see **G. PAVESI**, *Le frontiere europee della* religious accommodation. *Spunti di comparazione*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 10 of 2021, p. 75 ff.

[100] On the need to also protect learners' freedom of conscience, see **G. CASUSCELLI**, *Il crocifisso nelle scuole: neutralità dello Stato e «regola della precauzione»*, in *Il diritto ecclesiastico*, no. 1 of 2005, p. 532.

have progressively returned the school to the civil community[101]. A transition, which in this respect appears to be fully consistent with the project of participatory democracy made proper by the Constitution[102], in the sign of the definitive overcoming of the Mussolini's motto "everything within the State, nothing outside the State".

5 - Concluding Remarks

The regulation of religious education in the public school and the display of the crucifix in classrooms is a matter highly sensitive to changes in the form of the State. The analysis we have carried out has led us to doubt the actual neutrality of the nineteenth-century Italian state. The liberal legal order, in fact, interfered in the sensitive choices of the subjects, with the aim of safeguarding the political stability of the "bourgeois public sphere"[103]. First with the religion courses and then through civic education it is registered the attempt to decisively influence the moral development of citizens, to carry about the 'nation building' project. This is the prodrome of tyranny. Fascism, in fact, constituted a reactionary response to the crisis of the liberal state model, due to the fragmentation of social reality into a multiplicity of interest groups claiming autonomy[104]. To dominate the magmatic mass society, the Mussolini's regime tried to regiment public space by imposing a multitude of symbols of national identity. These included the crucifix, that, despite being already prescribed, had in substance disappeared from the school space, as we learn from ministerial circulars letter of that time[105].

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[101] I tried to retrace the evolution of this discipline in **F. COLOMBO**, *Laicità e sovranità della Repubblica nel suo ordine simbolico: il caso del crocifisso nelle aule scolastiche*, in **VV. AA.**, *I simboli religiosi nella società contemporanea*, cit., p. 101 ff.

[102] Cf. **M. VENTURA**, *Il crocifisso dallo Stato-istituzione allo Stato-comunità*, in *Quaderni costituzionali*, no. 4 of 2021, p. 956 f.

[103] The expression is from **J. HABERMAS**, *Storia e critica dell'opinione pubblica*, translated by A. ILLUMINATI, F. MASINI, W. PERRETTA, Laterza, Bari-Roma, 2005, p. 111 ff. (Original edition: *Strukturwandel der Öffentlichkeit: Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft*, Luchterhand, Neuwied, 1962).

[104] A reaction to the "State crisis" announced by **S. ROMANO**, *Lo Stato moderno e la sua crisi (1909)*, in **ID.**, *Lo Stato moderno e la sua crisi*, Giuffrè, Milano, 1969, p. 5 ff. For an overview of this topic see **M. FIORAVANTI**, *La crisi dello Stato liberale di diritto*, in *Ars interpretandi*, no. 1 of 2011, p. 81 ff., and **S. FERRARI**, *Francesco Ruffini nella crisi dello Stato liberale*, in *Nuova antologia*, 1993, p. 168 ff.

[105] Circular letter from the Minister of Public Education no. 68 of 22 November 1922.

Current Constitution radically rejects this State-centric paradigm. The Italian Republic, as an expression of post-modern times[106], intends to return public space to the civil community, as the first holder of sovereignty. In the present democratic context, religion constitutes one of the factors contributing to the development of the human personality, not an instrument of government. It is therefore forbidden for public authorities to influence the choices of individuals, favoring, through greater visibility, a specific choice of conscience in the religious field over another. For the same reason, the State-authority must not prevent citizens from manifesting their identity in public space, *inter alia* through symbols, as it has to guarantee everyone, also through positive action, freedom of religion. This seems to me to be the direction indicated by the Constitutional Court and the Court of Cassation with their judgments, which, while exposing themselves to possible criticism in some respects, have correctly highlighted the distance between the Italian '*laicità*' and those models of indifference towards social formations of a religious nature and confessionalism that have characterized other periods of Italian and European legal history[107].

[106] See **P. GROSSI**, *La Costituzione italiana quale espressione di un tempo giuridico pos-moderno*, in **ID**., *L'invenzione del diritto*, Laterza, Bari-Roma, 2017, p. 39 ff.

[107] To appreciate how a difference in the way "*laicità*" is understood can affect school discipline see **A. FERRARI**, *Libertà scolastiche e laicità dello Stato in Italia e Francia*, Giappichelli, Torino, 2002. For a comparison of secularisation on the European and American continents, see **L.P. VANONI**, *Pluralismo religioso e Stato (post)secolare. Una sfida per la modernità*, Giappichelli, Torino, 2016, p. 7 ff.

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The New (Public?) Space of Social Media and Religious Factor: the case of Artistic Freedom

SUMMARY: 1. Social Media: Public or Private spaces? - 2. Religion and Contemporary Art: a Legal Perspective - 3. Law & Religion in Social Media: which type of Neutrality?

1 - Social Media: Public or Private spaces?

The concept of public space has inevitably evolved over time. Max Weber in 1921 defined it as "the space that is presented or opened to every individual regardless of culture, religion, and even social status"[108]. Almost ten years ago Silvio Ferrari distinguished public space into 'common space', the physical space in which people must enter to be able to satisfy their basic needs, in which they carry out their daily lives; 'political space', that of debate and discussion, in which public debate takes shape; 'institutional space', in which choices are made that are binding for all, the place of decisions[109].

Well, today it seems to me that the social media space is close to taking all three of these forms. Although not physical, it is certainly the place where users access (in some cases necessarily) to express their needs and, ultimately, their personalities; it is equally certainly a space for political discussion and debate, so much so that, increasingly, the daily political agenda is dictated by the most successful posts on social networks. It is not yet, but I believe it will soon become, an institutional space. We already know of examples of direct democracy on the web, aimed at selecting candidates or indicating to political parties the

[108] **M. WEBER**, *City* [1921], Free Press, Glencoe, 1958. Recently, **M.Z. PAKÖZ, C. SÖZER, A. DOĞAN**, *Changing perceptions and usage of public and pseudo-public spaces in the post-pandemic city: the case of Istanbul*, in *Urban Design International*, no. 27, 2022 p. 65, collected some of the most popular definitions of public space.

[109] **S. FERRARI**, *Diritto, religione e spazio pubblico*, in *Rivista di filosofia del diritto*, 2013, now in C. CIANITTO, A. FERRARI, D. MILANI, A. TIRA (eds.), *Scritti. Percorsi di libertà religiosa per una società plurale*, il Mulino, Bologna, 2022, pp. 259-261.

positions, on specific issues, of their electoral base or members. It is not impossible to imagine, therefore, public institutions consulting web users before taking decisions that are binding for all.

With the digitalization of society, the function of public space has been privatized and the character of public space has changed. The difference between public and private space has become increasingly ambiguous and the pandemic could only accelerate this process. It could even argue for the end of the era of public space.

US Supreme Court Justice Kennedy, in *Packingham v. North Carolina*, stated that "while in the past there may have been difficulty in identifying the most important places for the exchange of views, today the answer is clear. It is cyberspace in general […], and social media in particular"[110]. From a legal point of view, that ruling breathed new life into the application of state action doctrine to internet platforms: "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights"[111].

What seems certain to me, in any case, is that, regardless of the legal nature of the space in which they are posted, contents on social networks immediately and inevitably take on public relevance, becoming accessible to a more or less vast number of users. Research already conducted in 2013, again almost 10 years ago, on Facebook (today it seems a bit anachronistic), revealed that users entered social media with the assumption that the information posted there was available to a wide and ill-defined audience, with no clear boundaries[112].

As places where individual personality develops, one of the most classic and traditional expressions of personality, religion, finds its place too. And, of course, a system of Law & Religion also emerges here. For if social media, as social formations, have their own regulations, we know that not only *ubi societas ibi ius*, but also *ubi societas ibi* Law & Religion. Since time immemorial, every legal system has been concerned with defining its relationship with the religious factor, and it is now a question of understanding what that is for social networks.

2 - Religion and Contemporary Art: a Legal Perspective

[110] See *Packingham v. North Carolina*, 582. U.S. (2017), Opinion of the Court, II, pp. 4-5.

[111] See *Packingham v. North Carolina*, 582. U.S. (2017), Opinion of the Court, III, p. 8.

[112] **J. BURKELL, A. FORTIER, L. WONG, J.L. SIMPSON**, *Facebook: Public Space or Private Space?*, in *Information, Communication & Society*, no. 81, 2013, p. 10.

To understand this or try to sketch out an answer, we will use the example of art, another expression of personality that has found a natural new outlet in social media. Like every manifestation of thought, in fact, art is now an integral part of the 'infosphere'[113] and contributes daily to writing the pages of the 'hyper-history' into which Western societies have passed since most of their resources, as well as essential data, are no longer substantiated in material goods, but in processes and objects that are now devoid of any physical connotation[114]. The works of art themselves, therefore, which had already become abstract and dematerialized, have undergone a further dematerialization, knowing the new modes of dissemination guaranteed by the online.

The link between art and religion, historically almost inseparable, did not erode with secularisation, but the post-secular age has ended up restoring an art scene in which the religious factor and its symbols have returned to play a central role, albeit with new meanings and modes of expression[115]. In Italy, the debate on the relationship between art and religion has become highly topical again in recent years, and witness to this is the publication in Italian, in 2021, of James Elkins' classic work entitled "On the Strange Place of Religion in Contemporary Art"[116]. Elkins notes how there seems to be no longer any space for traditional religious art, but rather desecrating, almost anti-religious, or a-religious works, in which symbols are used as a reference to the broader experience of the transcendent, or to the dimension of "vehicles of identity"[117] assumed by

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[113] In Italy, the most relevant scholar on the subject is **L. FLORIDI**, who in *La quarta rivoluzione*, Raffaello Cortina, Milan, 2017, pp. 44-45, defines the infosphere, at a minimum level, "the entire informational environment consisting of all informational entities, their properties, interactions, processes and mutual relations [...]. At a maximum level, [...] a concept that can be used as a synonym for reality, where we interpret the latter in informational terms.

[114] See **L. FLORIDI**, cit., p. 4, 55.

[115] About the relationship between contemporary art and religion, see **I. BARGNA**, *Forme del sacro e arte contemporanea fra materiale e immateriale*, in *Antropologia*, vol. 6, n. 1, aprile 2019, **M. SAMMICHELI**, *Disegnare il sacro*, Rubbettino, Soveria Mannelli, 2018; **A. ROSEN**, *Art + religion in the 21st century*, Thames & Hudson, London, 2017; **A. DALL'ASTA**, *Eclissi. Oltre il divorzio tra arte e Chiesa*, Edizioni San Paolo, Cinisello Balsamo, 2016.

[116] In Italian, **J. ELKINS**, *Lo strano posto della religione nell'arte contemporanea* [2004], Johan & Levi, Monza, 2022.

[117] **C. LUZZATI**, *La non sempre garbata violenza del proselitismo e della propaganda*, in *Quaderni di Diritto e Politica Ecclesiastica*, no. 2, 2019, p. 236.

religions in post-secularism, metaphors for the social cohesion drives of today's lost man (e.g. Serrano, Kippenberger, Hirst, Gober, Lachapelle)[118].

The cryptic nature of the contemporary artistic message, due as much to the multiplicity of meanings with which symbols are endowed today as to the current modes of expression (performance, visual art, body art, land art etc.), and the extraordinary diffusivity of the online means of communication that can host them[119] (especially in pandemic times, due to the suspension of all trade fair and museum activities), poses new questions for the jurist as well, at least because of the unprecedented possibility of intercepting even very distant audiences in terms of sensitivity, who, in a still analogue and non-digital scenario, would never have knowingly decided to expose themselves to the risk of even uncomfortable images, potentially at risk of offending them.

Without intending to focus in detail on the importance guaranteed to artistic freedom in our legal system[120], it is sufficient here to recall the apodicticity[121] of the provision dedicated to it by the Constitution in the first paragraph of Article 33, which does not set any express limit. Of course, this does not mean that it is to be considered boundless[122]; on the contrary, its exercise can peacefully be a source of both civil[123] and criminal liability. Particularly on the latter front, the legal system notoriously punishes conduct of "vilification" and damage that can also be integrated by the most diverse artistic manifestations. Think of an

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[118] The reference is to some well-known works of the mentioned artists: **A. SERRANO**, *Piss Christ*, 1987, **M. KIPPENBERGER**, *Zuerst die Fuße*, 1990, **D. HIRST**, *Resurrection*, 1998-2003, **R. GOBER**, *Untitled*, 2004-2005, **D. LACHAPELLE**, the whole exhibition *Atti Divini*, Turin, 2019-2020.

[119] For **L. BEATRICE**, *Arte è libertà?*, Giubilei Regnani editore, Roma-Cesena, 2020, p. 100, the primary purpose of art today is "to go viral, a strategy that goes beyond the old 'cathedrals of art' and searches for new contexts".

[120] The most important research on the matter is still **F. RIMOLI**, *La libertà dell'arte nell'ordinamento italiano*, Cedam, Padova, 1992. More recently, see F. POLACCHINI (ed.), *La libertà di espressione artistica*, Persiani, Bologna, 2018.

[121] About it, see **P. FLORIS**, *Libertà di religione e libertà di espressione artistica*, in *Quaderni di Diritto e Politica Ecclesiastica*, no. 1, 2008, p. 180.

[122] Already in its first landmark ruling, the Constitutional Court clarified that "the concept of limit is inherent in the concept of fundamental right and that within the system the various legal spheres must of necessity limit each other in order for them to coexist in orderly civil coexistence." See Judgment No. 1/1956.

[123] For a case of injury to reputation through artistic works, see, by way of example, Cass. civ., Sec. III, May 7, 2009, No. 10495. More recently, on the subject of religious sentiment, blasphemous entertainment and freedom of art, see Cass. civ., Sec. I, March 23, 2017, No. 7468.

installation in which the performer defaces an object of worship, to represent the moral decadence of the community that identifies with that symbol; although lacking the specific intention to offend a religious denomination, such conduct could fall within the scope of those punished by Article 404, second paragraph, of the Criminal Code, which only requires the generic intent, albeit intentional, of damaging. Not only that, however: since even religious authorities peacefully constitute a symbol, it is not uncommon for them too to become the subject of artistic representations, with very different modalities and purposes[124]. In this case, the offence of insulting a religious denomination by vilifying persons (Article 403 of the Criminal Code) can be envisaged, which can also be integrated by a manifestation of artistic freedom if it takes the form of an "indecorous and offensive" representation and is thus "highly vulgar and apt to vilify religion"[125]. The expressions in which the latter is substantiated may also consist of writings, drawings, gestures, and do not necessarily require the utterance of words.

Now, notoriously, the offences referred to above are of very little application and provide usually for exclusively pecuniary penalties. Far more serious, then, may become, in the eyes of artists, 'private' sanctions such as the removal from a social network of a post featuring one of their works or, even, the suspension or deletion of their profile. These interventions, in fact, end up, in the digital age, constituting the real censorships of our time[126], far more than those applicable by public

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[124] It is worth mentioning, e.g., one of the most-known works of **M. CATTELAN**, *La nona ora*, 1999, depicting Pope John Paul II being struck by a meteorite.

[125] The citations are due to Cass. pen. sec. III, Oct. 13, 2015, No. 41044. More recently, a well-known judgment of the Court of Milan inflicted a conviction for vilification against the Catholic religion (Articles 403 and 404 of the Criminal Code) on photographer Oliviero Toscani. On this subject, critically, see **N. MARCHEI**, *La tutela penale del sentimento religioso dopo la novella: il caso "Oliviero Toscani"*, in *Stato, Chiese e pluralismo confessionale*, Online journal (*https://www.statoechiese.it*), no. 3, 2020. Toscani was later acquitted in the second instance.

[126] About the privatization of censorship, see **M. MONTI**, *La disinformazione online, la crisi del rapporto pubblico-esperti e il rischio della privatizzazione della censura nelle azioni dell'Unione Europea* (Code of practice on discrimination), in *federalismi.it.*, no. 11, 2020, **ID.**, *Privatizzazione della censura e Internet platforms: la libertà d'espressione e i nuovi censori dell'agorà digitale*, in *Rivista Italiana di Informatica e Diritto*, no. 1, 2019, **M. BETTONI**, *Profili giuridici della privatizzazione della censura*, in *Ciberspazio e diritto*, vol. 12, no. 4, 2011, pp. 363-384. On the other hand, the issue does not arise with the recent boom in social networks: see, already in 2008, **D. TAMBINI, D. LEONARDI, C. MARSDEN**, *The privatisation of censorship: self regulation and freedom of expression*, in D. TAMBINI, D. LEONARDI, C. MARSDEN (eds.), *Codifying cyberspace: communications self-regulation in the age*

institutions. In an age in which the latter are moving, at least in Western legal systems, to progressively dismantle traditional censorship apparatuses[127], the role of the contemporary Inquisition is peacefully assumed by digital platforms, which have taken over functions that were hitherto typically state functions.

3 - Law & Religion in Social Media: which type of Neutrality?

Whether it is a matter of *ex ante* censorship, such as that operated by an algorithm that prevents the publication of content, or *ex post* censorship, decided by a team of experts on the recommendation of a user who has felt offended, it is evident how much the current context now allows us to consider some historically difficult knots to be overcome for doctrine and jurisprudence. For instance, analyses aimed at discerning, with highly complex hermeneutic operations, between what is a simple manifestation of thought and what instead is satire, or art, or even advertising, in order to emphasise the different limits that can be imposed on each expression, suddenly appear obsolete today.

An algorithm, in fact, cannot - yet - be asked to understand the context in which an image is placed, nor, still less, to appreciate the message that an image intends to convey or the symbolic meaning, often complex even in the eyes of the public, of a work of art. Artificial intelligence limits itself to applying the regulations identified by the respective platforms to define the admissibility of content, lacking the margin of elasticity that one would normally expect from those who take decisions capable of restricting the exercise of inviolable rights[128].

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of Internet convergence, Routledge, Abingdon, pp. 269-289.

[127] On April 5, 2021, for example, Minister Franceschini said he had finally, under the so-called 2016 Cinema Law, abolished film censorship and instead established a Commission for the Classification of Cinematic Works (see Ministerial Decree No. 151 of April 2, 2021). For a recent case also explored in depth from a Law & Religion perspective, see **M. CORSALINI**, (*Non) è stata la mano di Dio. Il film "La Scuola Cattolica" vietato ai minorenni dalla Commissione di revisione cinematografica*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 7, 2022.

[128] Even for this reason, European Commission recommends: "Where hosting service providers use automated means in respect of content that they store, effective and appropriate safeguards should be provided to ensure that decisions taken concerning that content, in particular decisions to remove or disable access to content considered to be illegal content, are accurate and well-founded. Such safeguards should consist, in particular, of human oversight and verifications, where appropriate and, in any event, where a detailed assessment of the relevant context is required in order to determine

The fact that private companies endow themselves with their own systems of rules in which their values and identity are embodied is certainly not in itself a new fact. On the contrary, contemporary life is characterised by productive realities increasingly conditioned by value components, so much so as to impose an extension of the traditional category of trendy organisations to all those experiences engaged in the diffusion of a corporate ethos[129].

The circumstance, however, becomes particularly relevant if the very main areas in which the personality of individuals is expressed today have their own rules, non-state and, indeed, 'supra-state', given that these platforms operate globally. In the specific case of manifestations of religious sensibilities, then, we could ask ourselves what space could be granted to them, beyond the artistic aspect, by a social network that adopted a policy of pure neutrality or, on the contrary, that expressed a clear adherence to any ideological or religious orientation.

However, as far as mainstream platforms are concerned, it is the way in which their tendency is constructed that is unprecedented. It is well known that, while the constraints inherent to the publication of pornographic material are particularly rigid, to the point of paradoxical outcomes in cases where profiles of public cultural institutions have been censored for the promotion of works of art depicting nudes[130], posts with political or religious content are fully permitted.

It is not for lack of choice on the point, however, almost as in a 'neutrality by abstention' as that which necessarily connotes EU policy (due to principle of conferral)[131]; at most, we could speak of 'neutrality by

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whether or not the content is to be considered illegal content" (Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, chapter II, par. 20). About algorithmic transparency, see **P. ZUDDAS**, *Brevi note sulla trasparenza algoritmica*, in *Amministrazione in cammino*, 5 giugno 2020.

[129] On the topic, see **M. RANIERI**, *Identità, organizzazioni, rapporti di lavoro*, Wolters Kluwer, Milano, 2017, in particular pp. 182, 313.

[130] Such censorships have spared neither contemporary art, as the case of the Ravenna City Art Museum and the shot displayed during the exhibition "Paolo Roversi. Studio Luce", nor historical works, from Canova to Rubens, leading to a definitive reversal of sovereignty, such that State museums succumbs in the face of a private policy.

[131] **M. PARISI**, *Laicità europea. Riflessioni sull'identità politica dell'Europa nel pluralismo ideale contemporaneo*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 1, 2018, p. 10, identifies a substantially *laico* approach to the European Treaties, "albeit in the sense of a *laicità* by abstention or institutional laicità". Rather than *laicità* by abstention, however, it seems preferable to speak of 'neutrality by abstention.' *Laicità*, in fact, is in any case a conscious choice that connotes in an identity sense a form of State; neutrality, on the

convenience' or 'neutrality by consensus'. Indeed, we do not agree here with the doctrine that holds that the need for a social network is "to create a collection of users who share its values and thus form a community"[132] not contrary to its *Weltanschauung*; in the writer's opinion, the process is exactly the opposite.

At the risk of cynicism, it should be emphasised that the primary, as well as fully legitimate, reason why platforms decide to equip themselves with an apparatus of rules limiting certain manifestations of thought is primarily economic. On closer inspection, social networks do not express any trend but have a primary functionality around which they orient all their actions: maximum dissemination. The environment they intend to offer, therefore, is one that reflects the expectations of their users, not a hypothetical Eden. So, the difficult balance to which they aspire is that between the maximum degree of freedom to be granted to customers and a minimum but necessary protection that makes them feel, as far as possible, guaranteed from content they do not want to incur. Too much censorship, in other words, may lead to a loss of market share, but also too much freedom[133].

In the relationship between private individuals we are discussing - social media and users - it therefore does not seem appropriate to bother with complex concepts such as that of *laicità*, although the issue of how these are declined today not only for public subjects is increasingly topical. The relationship between platforms and the religious factor is in fact defined by norms that express a tendency of the organisation, but a tendency resulting from the moods, carefully studied by the platforms themselves, of their users who, for example, may not want to risk, while acting in that space, being the object of discrimination, or running into pornographic scenes, or artistic representations in which the symbol of their faith is improperly used.

Staying with the example of art, we are no longer faced, then, with the traditional artist-governor dynamic, even extending the second member of the paradigm beyond the boundaries of the public subject to

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other hand, is a non-choice, exactly like that which the EU, bound by the principle of conferral, (cannot) make.

[132] **G.L. CONTI**, *Manifestazione del pensiero attraverso la rete e trasformazione della libertà di espressione: c'è ancora da ballare per strada?*, in *Rivista AIC*, no. 4, 2018, p. 207.

[133] **K. KLONICK**, *The New Governors: the people, rules, and processes governing online speech*, in *Harvard Law Review*, vol. 131, 2018, p. 1629, reports how Twitter's very inability to address hate speech and online harassment lies at the root of its lack of growth since 2016.

embrace the private one. Now, what is permissible and what is not move according to the will of the majority, transposed by the new censors into their policies in order to continue to enjoy their consent and consequent trust. This is the 'archimedean'[134] point of equilibrium in the name of which today's spaces of expression of the individual personality can also limit artistic expression. Only the coming years, or perhaps decades, will be able to provide us with some further indications on the drift of this trend, but right now it is an issue that cannot fail to interest even the law, which is being put to the test of unprecedented challenges capable of undermining the very essence of art, which has been nourished since its beginnings by the scandal that upsets the majority. Looking at the whole field of Law & Religion, it will be interesting to see whether this trend will be confirmed: from a State that is so attentive to the phenomenon that it does not even cede sovereignty on the subject to supranational bodies to a 'superstate' that puts its users and their moods first, basing its entire attitude on their aspirations and sensitivities.

[134] To use a well-known expression, referring however, in our legal system, to the concept of dignity, by **A. MORELLI**, *I paradossi della fedeltà alla Repubblica*, Giuffrè, Milano, 2013, p. 138.

Stato, Chiese
e pluralismo confessionale

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The Jewish symbolic fencing at the intersection between religious freedom and planning law

SUMMARY: 1. The Jewish tradition and the law: preliminary remarks - 2. The features of the *eruv* according to *halakha* and the legal grounds for its contemporary contestation - 3. The Australian Judge: the *eruv* as a group of assembled poles and wires - 4. The American Judge: the *eruv* as a tool intended to identify certain permitted activities - 5. The Canadian Judge: the *eruv* as a means of exercising the right to religious freedom - 6. "Human rights start in the neighbourhood" (E. Roosevelt).

1 - The Jewish tradition and the law: preliminary remarks

Jewish identity, belonging and religiosity have been at the centre of a legal debate for decades. If we only consider the example of the Italian '*intesa*' with the Jewish community - a covenantal agreement between the Italian State and the Union of Italian Jewish Communities - a long tradition of overlapping areas of interest emerges[135].

The case of ritual slaughtering (*shechita*), the accommodation of dietary requirements for Jews belonging to the armed forces, as well as those attending funerals and burials[136] are just some of the important aspects which ensure that Italian law[137] and more generally, 'secular law'

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[135] See Law no. 101 of 8 March 1989, "*Norme per la regolazione dei rapporti tra lo Stato e l'Unione delle Comunità ebraiche italiane*" (at *www.presidenza.governo.it*).

[136] See respectively, Art. 5, 6 and 7, 15 and 16 of Law no. 101 of 8 March 1989, quoted supra.

[137] In general, see **F. LUCREZI**, *Appunti di diritto ebraico*, Giappichelli, Torino, 2015; **G. SACERDOTI**, *Gli ebrei e la Costituzione*, in *Il ritorno alla vita: vicende e diritti degli ebrei in Italia dopo la seconda guerra mondiale*, edited by M. Sarfatti, Giuntina, Firenze, 1998, pp. 47 and ff.; **G. TEDESCHI**, *Il diritto ebraico nell'Italia contemporanea*, in *La Rassegna Mensile di Israel*, no. of 1938, pp. 145-63; **A. MORDECHAI RABELLO**, *Introduzione al diritto ebraico: fonti, matrimonio e divorzio, bioetica*, Giappichelli, Torino, 2002); **M.P. GOLDING**, *Jewish law and legal theory*, Aldershot, Dartmouth, 1994. See also the special issue titled *Gli ebrei tra Legge divina e Stato nazionale*, in *Quaderni di Diritto e politica ecclesiastica*, no. 1 of 2019.

attempt to guarantee the Jewish community the right to religious freedom[138].

On the other hand, however, certain issues continue to raise constant legal challenges, which are not only brought before the Courts of different jurisdictions but are also far from being dormant questions. Consider, for example, that in 2020 the Grand Chamber of the European Court of Justice delivered a judgement which required Jewish and Muslim butchers to stun animals before slaughtering them, in accordance with *kosher* and *halal* religious rituals[139]. In addition, some years ago, the district Court of Cologne (*Landgericht Köln*), Germany, declared non-therapeutic male circumcision a criminal assault and in violation of both the right to bodily integrity and self-determination of the child[140].

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[138] On a general and introductory perspective, see among many, *Introduzione al diritto comparato delle religioni: ebraismo, islam e induismo*, edited by S. FERRARI, il Mulino, Bologna, 2008; **S. FERRARI**, *Lo spirito dei diritti religiosi: ebraismo, cristianesimo e islam a confront*, Il Mulino, Bologna, 2002; **J. WITTE, M.C. GREEN**, *Religion and Human Rights: An Introduction*, Oxford University Press, Oxford, 2010; *Religious Human Rights in Global Perspective: Religious Perspectives* edited by J. WITTE, J. VAN DER VYVER, vol. 1, Kluwer Law International, The Hague, 1996; *Religious Human Rights in Global Perspective: Legal Perspectives*, edited by ID., vol. 2, Kluwer Law International, The Hague, 1996; **N. DOE**, *Comparative Religious Law: Judaism, Christianity, Islam*, Cambridge University Press Cambridge, 2018; **J. NEUSNER, T. SONN**, *Comparing Religions Through Law: Judaism and Islam*, Routledge, London; New York, 2002; **D. NOVAK**, *Jewish Justice: The Contested Limits of Nature, Law, and Covenant*, Baylor University Press, Waco, 2017; **ID.**, *A Jewish Theory of Human Rights*, in *Religion and Human Rights: An Introduction*, edited by J. WITTE, M.C. GREEN, Oxford University Press, Oxford, 2011, pp. 27-41.

[139] Court of Justice of the European Union (Grand Chamber), *Centraal Israëlitisch Consistorie van België e.a. and Others v. Vlaamse Regering*, Case C-336/19, 17 December 2020 (at *www.curia.europa.eu*) commented by A. PIN, *Corte di giustizia e tutela della libertà religiosa? Il caso della macellazione rituale*, in *Quaderni costituzionali*, no. 41(1) of 2021, pp. 238-241. The case followed two other decisions: Court of Justice of the European Union, *Oeuvre d'assistance aux bêtes d'abattoirs (OABA) v. Ministre de l'Agriculture et de l'Alimentation and Others*, Case C-497/17, 26 February 2019 and *Iga van Moskeeën en Islamitische Organisaties Provincie Antwerpen, VZW and Others v. Vlaams Gewest*, Case C-426/16, 29 May 2018 (at *www.curia.europa.eu*). For a comment on these judgments, see **A. PIN, J. WITTE**, *Slaughtering Religious Freedom at the Court of Justice of the European Union*, in *Canopy Forum*, 16 February 2021)(at *www.canopyforum.org*).

On food and religious freedom, see **N. MARCHEI**, *Cibo e religione*, in *Cibo e acqua. Sfide per il diritto contemporaneo*, edited by B. BISCOTTI, E. LAMARQUE, Giappichelli, Torino, 2015, pp. 105-12; **E. STRADELLA**, *Ebraismo e cibo: un binomio antico e nuove tendenze alla prova del multiculturalismo*, in *Stato, Chiese e pluralismo confessionale*, Online journal (*https://www.statoechiese.it*), no. 28 of 2019, pp. 1-40.

[140] Landgericht Köln (Cologne District Court), Judgment no. 151 Ns 169/11 of 7 May 2012 (at *www.legallibrary.crin.org*). For a comment, see **R. MERKEL, H. PUTZKE**, *After*

These issues are well-known and stem from centuries of religious observance of the Jewish community and traditions, and are interwoven with a variety of secular laws across many legal systems globally. However, these are not the only issues.

Indeed, during the Shabbath and other religious holidays, Jewish law (*halakhah*) prohibits certain specific activities: among others, it forbids anyone from taking objects from someone's own home and carrying them to public places and spaces. This prohibition places certain severe limitations on observant Jews: for example, a person cannot go to the synagogue on *Shabbath* carrying medicines or other essential goods, and children, the elderly or people with disabilities are not able to leave their home, since they are prevented from using baby strollers, wheelchairs, walkers and so on[141].

The *eruv* is a symbolic fence - a passageway or a doorway - that redraws and reinterprets the distinction between private and public property: it expands the area identified as the private domicile by converting symbolically the public space into a private one[142]. In this way, the area enclosed within the boundaries of the *eruv* is ideally transformed into a private-communal sphere, therefore, building an *eruv* not only permits the transportation of objects, but also alleviates otherwise significant restrictions imposed by the observance of Jewish law[143].

Although the *eruv*, as described below, is almost invisible and unnoticeable, disputes regarding this discrete Jewish practice touch upon

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Cologne: Male Circumcision and the Law. Parental Right, Religious Liberty or Criminal Assault?, in *Journal of Medical Ethics*, no. 39(7) of 2013, pp. 444-49. On male circumcision, see also **A. LICASTRO**, *La questione della liceità della circoncisione "rituale"*, in *Stato, Chiese e pluralismo confessionale*, Online journal (*https://www.statoechiese.it*), no. 22 of 2019, pp. 1-40; **A. BORGHI**, *Appunti sulla circoncisione rituale*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 11 of 2019, pp. 1-27. Other issues relate in particular to marriage and divorce, on which see, among many, *Il matrimonio: diritto ebraico, canonico e islamico: un commento alle fonti*, edited by S. FERRARI, Giappichelli, Torino, 2006; **L. SAPORITO**, *La fatale attrazione tra diritto sacro e diritto secolare nel modello israeliano: la giurisdizione dei tribunali rabbinici in materia di matrimonio e divorzio*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 9 of 2018, pp. 1-25.

[141] **A.A. ISRAEL-VLEESCHHOUWER**, *Jewish Law and Space: Symbolic Fencing (Eruv), Public Presence (Parhesia) and Borders*, 15 August 2016, p. 7 (available on SSRN at *https://doi.org/10.2139/ssrn.2823809*).

[142] **C.E. FONROBERT**, *Installations of Jewish Law in Public Urban Space: An American ERUV Controversy*, in *Chigago-Kent Law Review*, no. 90 of 2015, p. 74.

[143] **A.A. ISRAEL-VLEESCHHOUWER**, *Jewish Law and Space*, quoted *supra*, p. 7.

a wide range of legal issues, such as property rights[144]. Most importantly, they involve certain religious claims that are perceived by many as a misappropriation of common and public spaces. From a more general legal standpoint, they also call into question, on the one hand, the duty of the legal system with regard to respecting, promoting, accommodating and tolerating religious diversity and practices; on the other hand, they relate to the State's principle of religious neutrality which, according to its most basic definition, requires that no preferential treatment is given to certain religious denominations at the expense of others[145].

This essay selects a small number of decisions regarding the *eruv* that have been issued by some Courts operating within the common-law, legal orders of Australia, the United States and Canada. The selected case studies belong to State-Religion systems that are defined by slightly different characteristics in terms of constitutional guarantees of religious freedom. However, at the same time, they share the State's commitment to forms of religious neutrality in the public space, as well as the State's intention to achieve religious accommodation in both public and private circumstances.

Which categories drive the common-law Courts in their decision-making process as regards the *eruv*? Did the Courts define the *eruv* according to legal secular criteria or also according to Jewish tradition? How is the *eruv* ultimately defined through the eyes of the Australian, Canadian and the US judges?

This essay answers these questions and starts by defining an *eruv* according to the provisions of Jewish law and by identifying certain

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[144] It is important to understand that "unlike consideration of a new mosque, churches or synagogue, the establishment of an *Eruv* does not raise issues such as the impact upon noise and traffic; nor does it require specific zoning": **D. KNOLL**, *Protecting Religious Freedom and Places of Worship-The example of the Eruv*, in *Solidarity: The Journal of Catholic Social Thought and Secular Ethics*, no. 1 of 2017, p. 11.

The *eruv* has been studied by many. Beyond all the essays referenced in this paper, see also **M. RAPOPORT**, *Creating Place, Creating Community: The Intangible Boundaries of the Jewish 'Eruv'*, in *Environment and Planning D: Society and Space* 29, no. 5 of 2011, pp. 891-904; **R.Y.G. BECHHOFER**, *The non-territoriality of an eruv: ritual bearings in Jewish urban life*, in *Journal of Architecture and Urbanism*, no. 41(3) of 2017, pp. 199-209; **ID**., *The Contemporary Eruv: Eruvin in Modern Metropolitan Areas*, Feldheim Publishers, Spring Valley, New York, 2002; **L. ENDELSTEIN**, *L'erouv, une frontière dans la ville?*, in *Ethnologie française*, no. 43(4) of 2013, pp. 641-49; **M. LEVY**, *The eruv: An-other dwelling within the city*, in *Thresholds*, no. 20 of 2000, pp. 89-94; **N. LEWIN**, *Protecting Jewish Observance in Secular Courts*, in *Tradition: A Journal of Orthodox Jewish Thought*, no. 38(1) of 2004, pp. 95-111; **M. LEWYN**, *The Law of The Eruv*, in *Real Estate Law Journal*, no. 48(4) of 2020, p. 473; **C. LOCK**, *Negotiating the eruv*, in *Journal of Modern Literature*, no. 44(4) of 2021, pp. 198-205.

critical issues that its installation on public land may raise. After having introduced the topic and having depicted the legal framework, the essay subsequently analyses the case-law which has emerged in the Australian, United States and Canadian legal orders, with the aim of identifying the strengths and weaknesses of the legal reasoning of the Courts across the three jurisdictions. Finally, this work offers some closing remarks in light of the case-law considered and concludes that recognizing the *eruv* within the realm of religious practices, as the Canadian case shows, facilitates its accommodation on religious grounds.

2 - The features of the *eruv* according to *halakha* and the legal grounds for its contemporary contestation

Creating an *eruv* in modern cities can be very complex, due to the detailed requirements that *halakha* prescribes. The symbolic fence shall be at least 40 inches high (around 1 metre), without a roof and without any interruption. Therefore, the Jewish community is often obliged to ask the authorities for permission to fix some wires (*lechis*) along the city's power grid or street signs or, where walls, fences, creeks or other pre-existing urban elements are not sufficient, to install certain structures that allow the *lechis* to be affixed, thereby identifying the boundaries of the *eruv*[146].

The involvement of the local authorities with secular jurisdiction is also essential for obtaining a legal measure that distinguishes the geographical area corresponding to the *eruv* as a *unicum* and grants the religious community, free of charge or for a modest fee, the right to use the urban facilities. The measure is functional to the establishment and operation of the *eruv* itself:

> *"In order to create a valid* eruv *under Jewish law, a secular official with jurisdiction over the area in question must issue a ceremonial governmental proclamation 'leasing' the enclosed public and private property to the Jewish community for a small fee. Leasing is essential because it permits Orthodox Jews to treat a whole city, or the portion of a city that is enclosed in an* eruv*'s space, as if it were a single household, symbolically converting the public domain into private domain"*[147].

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[146] **A.L. SUSMAN**, *Strings attached: an analysis of the eruv under the religion clauses of the first amendment and the religious land use and institutionalized persons act*, in *U. Md. LJ Race, Religion, Gender & Class*, no. 9 of 2009, pp. 94-95.

[147] **A.L. SUSMAN**, *Strings attached*, quoted *supra*, p. 95.

The resolution obtained from secular authorities, therefore, expands the area identified as the private property and, in the eyes of Orthodox Jews transforms the public space into a private one. This is made possible thanks to the wires which, although almost imperceptible, are nonetheless crucial for *Sabbath* observance purposes[148].

Both the involvement of the public authority and the use of public equipment, belonging to the public space for religious purposes, present certain critical elements.

Firstly, from a social point of view, the *eruv* is often perceived by its opponents as a "boundary-marking"[149] mechanism rather than an instrument that facilitates the integration of the community concerned. Often, there is the erroneous perception of creating a religious residential *enclave*[150]*:* this is often viewed with mistrust, as it is likely to generate a change in the city's demographic distribution[151] by discouraging cohabitation between outsiders[152] and instead favouring the concentration of a religiously uniform population[153].

From a legal point of view, despite its minimalist design, the *eruv* represents a microcosm[154] in which some of the most acute tensions

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[148] "To be precise, symbolic *Eruvs* depends on symbolically renting the actual, legitimate, ability of the government to enter and regulate": **A.A. ISRAEL-VLEESCHHOUWER**, *Jewish Law and Space*, quoted *supra*, p. 7. The word *eruv*, in fact, means "combining" or "mixing together": **R.Y.G. BECHHOFER**, *The non-territoriality of an eruv*, quoted *supra*, p. 199.

[149] **C.E. FONROBERT**, *Installations of Jewish Law in Public Urban Space*, quoted *supra*, p. 63.

[150] **A.L. SUSMAN**, *Strings attached: an analysis of the eruv*, quoted *supra*, p. 95.

[151] **M. SIEMIATYCKI**, *The Eruv as Contested Jewish Space in North America*, in *Oxford Research Encyclopedia of Religion*, 2017; see also **S. FERRARI**, *Religion in the European Public Spaces: A Legal Overview*, in *Religion in Public Spaces: A European Perspective*, edited by S. PASTORELLI, S. FERRARI, Routledge London; New York, 2016, pp. 139-58.

[152] **D. KNOLL**, *Protecting Religious Freedom and Places of Worship*, quoted *supra*, p. 11.

[153] "It is not simply a question of the construction of an eruv, rather it is the routinized and repetitive recognition of the boundary by its users and the vigilant maintenance required to keep it intact that maintain it and keep it alive. It is this perhaps that makes the eruv such a potent space, and explains why those opponents whose houses formed part of the eruv boundary were so vociferous in their objection to it": **S. WATSON**, *Symbolic spaces of difference: contesting the eruv in Barnet, London and Tenafly, New Jersey*, in *Environment and Planning D: Society and Space*, no. 4 of 2005, p. 611.

[154] **M. RIEDEL**, *The difference a wire makes: planning law, public Orthodox Judaism and urban space in Australia*, in *International Journal of Law in Context*, no. 4 of 2020, p. 401. See also **A. WEISS**, *The Eruv: A Microcosm of the Shabbat Spirit*, in *Tradition: A Journal of Orthodox Jewish Thought*, no. 23(1) of 1987, pp. 40-46.

animating religious accommodation in the city's public space are fuelled[155]. On the one hand, there are the demands of those who, in the name of freedom *from* religion, do not wish to be associated with a religiously identified city neighbourhood[156]. On the other hand, since the *eruv* is installed on public land, the symbol questions the commitment of the State, the Government and other public authorities to religious neutrality[157] which, albeit with different constitutional canons, juxtaposes the three jurisdictions that this study places under the comparative lens[158].

Finally, docket records indicate the existence of a dialectic issue within the Jewish community itself regarding the very notion of a 'religious symbol'. The opponents of the *eruv* (including non-Orthodox Jews)[159] generally qualify the imperceptible wires hanging along the city skyline as religious symbols[160]. In contrast, Orthodox Jews, who are interested in the *eruv*'s installation and maintenance, believe that they fulfil a more pragmatic rather than a cult-related need: to demarcate the area where certain activities are permitted[161].

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[155] See for example **F. CHIODELLI, S. MORONI**, *Planning, pluralism and religious diversity: Critically reconsidering the spatial regulation of mosques in Italy starting from a much debated law in the Lombardy region*, in *Cities*, no. 62 of 2017, pp. 62-70.

[156] **M. SIEMIATYCKI**, *Contesting sacred urban space: The case of the Eruv*, in *Journal of International Migration and Integration/Revue de l'integration et de la migration international*, no. 2 of 2005, p. 257; **M. RIEDEL**, *Law and the construction of Jewish difference*, in *Journal of Law and Society*, no. 2 of 2021, p. 166.

[157] **M. RIEDEL**, *The difference a wire makes: planning law, public Orthodox Judaism and urban space in Australia*, in *International Journal of Law in Context*, no. 16 of 2020, pp. 403-421.

[158] For Australia: *Constitution of Australia*, *Section 116* (1901); for the United States: *Constitution of the United States of America, First amendment* (1789, 1791); for Canada: *Canadian Charter of Human Rights and Freedoms, Section 2* (1982).

[159] **M. RIEDEL**, *The difference a wire makes*, quoted *supra*, p. 14.

[160] **E. KORNFELD**, *The Eruv: An Accommodation of Free Exercise for Orthodox Jews or an Establishment of Religion?*, In *Seton Hall Law School Student Scholarship*, 2021, p. 2.

[161] Moreover, in some way, the *eruv* creates a tension that has also the effect of reiterating very ancient prejudices: **S. WATSON**, *Symbolic spaces of difference,* quoted *supra*, p. 611. **M. RIEDEL**, *The difference a wire makes*, quoted *supra*, p. 401: "As a form of public religiosity, the eruv serves as a microcosm in which broader concerns about religious and cultural diversity in Western societies play out, including the contested place of religion in public space, the challenges of planning in multicultural cities and the spatial dimension of the formation of collective identities. The eruv makes visible the difference of the Jewish neighbour - a difference that some residents do not wish to be confronted with and that they seek to contain through recourse to the law".

3 - The Australian Judge: the *eruv* as a group of assembled poles and wires

After having introduced the theme, it is now possible to delve into a comparative reading of the selected case-law, illustrating certain significant case studies, triggered either by the desire to erect an *eruv* in the city or by the dismantling of an existing *eruv* ordered by the public authorities.

One of the most controversial attempts to install an *eruv* occurred in the suburban area of Sydney (St Ives): the city had rejected several requests filed by the Jewish community for the installation of poles, wires and other necessary elements. The community had, therefore, taken the matter to the Courts to obtain a judicial review of the refusal issued by the city authorities[162].

Although in the case of *The Northern Eruv v Ku-ring-gai Council,* the Court dismissed the appeal on procedural grounds, the judgement is noteworthy for having presented the *eruv* within the framework of urban and planning law. The Court, in particular, adopted a strictly materialistic approach[163] on the premise that the *eruv* was a set of "physical features"[164], made by distinct components, individually identified and, moreover, subject to different legal regimes depending on the specific place where each element has to be installed - on private or public land, on street parcels, fields or in city centres.

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[162] Land and Environment Court of New South Wales (Australia), *The Northern Eruv v. Ku-ring-gai Council*, no. [2012] NSWLEC 1058, 16 March 2012; Land and Environment Court of New South Wales (Australia), *The Northern Eruv Incorporated v. Ku-ring-gai Council*, no. [2012] NSWLEC 249, 30 November 2012 (at *www.austlii.edu.au*).

[163] "The court thereby took a strictly material approach to the poles as individual developments, without considering the symbolic meaning of each of the poles as contributing to the whole of the eruv space": **M. RIEDEL**, *The difference a wire makes*, quoted *supra*, p. 411.

[164] Land and Environment Court of New South Wales (Australia), *The Northern Eruv Incorporated .v Ku-ring-gai Council*, quoted *supra*, para 8: "According to orthodox Jewish law, the boundary of an Eruv must be an unbroken line defining that area, made up of either physical partitions or virtual partitions. A variety of physical features can mark the boundary of an *Eruv* , including existing power poles, utility cabling strung between those poles, fences, walls and the like. The intent is to identify and use these elements in order to form a circle or perimeter identifying the boundary of the *Eruv*".

The *eruv* planned in St Ives, being subjected in part to the *Roads Act 1993*[165] and in part to the *Environmental Planning and Assessment Act 1979*[166], required each owner affected by the installation of some element to apply individually to the relevant authorities. Only if all applications were successful, would it have been possible to constitute the *eruv* as a whole. In the present case, since only one application had been rejected, the procedure ceased to exist[167]:

> *It is not possible for nine individual development applications to create the* Eruv. *That requires separate approval and is outside the power of this Court as to do so must be a matter that is the subject of the appeals. For the reasons stated above, that is not the case. Therefore, I determine that the Court cannot grant consent to the works within the road reserve that include the attachment of conduit to the 574 poles, the intermittent wire connections or the replacement of the pole in Lynbara Avenue*[168].

The failure to recognize the symbolic dimension of the *eruv* as a *unicum* and the religious nature of the demands fostered by the Jewish community[169] are symptomatic of the difficulties that the Court encountered in carving out, among the applicable urban planning regulations, sufficient space for potential religious accommodation[170]. This

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[165] *Roads Act 1993* (updated to 23 September 2020), no. 33 of 1993 (at *www.austlii.edu.au*).

[166] *Environmental Planning and Assessment Act 1979* (updated to 22 June 2021), no. 203 of 1979 (at *www.austlii.edu.au*).

[167] **D. KNOLL**, *Protecting Religious Freedom and Places of Worship*, quoted *above*, p. 17: "Because an Eruv involves different properties, a series of development applications were made in the first northern Eruv case. The *Eruv* could only be established if all of the applications were approved. Yet the Court determined that the applications were not part of an integral whole. They could rise and fall separately. All but one of them was successful, but because one was unsuccessful, the Eruv was not established".

[168] Land and Environment Court of New South Wales (Australia), *The Northern Eruv Incorporated v. Ku-ring-gai Council*, quoted *above*, para 73.

[169] **D. KNOLL**, *Protecting Religious Freedom and Places of Worship*, quoted *above*, p. 15: "By looking at the parts and not the whole, the Court was able to avoid addressing the religious need that had resulted in multiple development applications being lodged for a single *Eruv*". See also **J. CONNELL, K. IVESON**, *An Eruv for St Ives? Religion, identity, place and conflict on the Sydney north shore*, in *Australian Geographer*, no. 45(4) of 2014, pp. 429-46.

[170] "The application clearly proposes to create an *Eruv*. There is no *Eruv* at the present time. The approval of all of the development applications does not create an *Eruv*, nor does it create any nexus to that work within roads that are not in proximity to the individual sites. Whilst the applicant's intention is that all of these works are related and it is the focus of the applications, there is no nexus between the individual components of

is not a mere theoretical observation, devoid of practical consequences: on the contrary, the intrinsic rigidity of the administrative law provisions obliged the religious community to incur enormous costs and deal with numerous bureaucratic procedures to overcome (in vain) the existing regulatory obstacles[171].

4 - The American Judge: the *eruv* as a tool intended to identify certain permitted activities

In contrast to the Australian legal system, the US case-law record not only demonstrates a more open attitude towards the installation of the *eruv*, but also considers the authorization of the apposition of the *lechis*, granted by the public authority, as compatible with the Establishment clause, enshrined in the First Amendment of the US Constitution[172].

In the case of *Tenafly Eruv Association, Inc. v. Borough of Tenafly*[173], the US Court of Appeals for the Third Circuit ruled on the dismantling of an *eruv*, in execution of a municipal injunction that prohibited the affixation of:

> "any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough"[174].

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the applications": Land and Environment Court of New South Wales (Australia), *The Northern Eruv Incorporated v. Ku-ring-gai Council*, quoted *above*, para 72.

[171] **D. KNOLL**, *Protecting Religious Freedom and Places of Worship*, quoted *above*, p. 18.

[172] Another aspect, that falls outside the scope of this paper, relates to the violation of the Free Speech Clause: see **S.J. SCHLAFF**, *Using An Eruv To Untangle the Boundaries of the Supreme Court's Religion-Clause Jurisprudence*, in *University of Pennsylvania Journal of Constitutional Law*, no. 5 of 2002, p. 833 and ff.

[173] U.S. Court of Appeals, Third Circuit, *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002), 24 October 2002 (at *www.law.justia.com*). See comments by **E. GREENBAUM**, *First Amendment Inversions: Tenafly Eruv Ass'n v. Borough of Tenafly, 155 F. Supp. 2d 142 (D. N. J. 2001)*, in *The Yale Law Journal*, no. 111(7) of 2002, pp. 1861-67; **S.H. LEES**, *Jewish Space in Suburbia: Interpreting the Eruv Conflict in Tenafly, New Jersey*, in *Contemporary Jewry*, no. 27(1) of 2007, pp. 42-79.

[174] Borough of Tenafly (New Jersey, U.S.), Ordinance no. 691 of 1954, Art. VIII (at *https://ecode360.com/36195007*).

The public authorities had dismantled the *eruv* but, at the same time, had maintained other signs, such as directional signs pointing to local churches and advertising flyers and posters depicting lost animals.

Given these circumstances, the Court of Appeal held that the municipal ordinance was essentially neutral and generally applicable; however, its application was deemed discriminatory and its enforcement was considered selective, being detrimental to the *eruv* but not to other signs with similarly religious or even secular content[175].

A further point of departure from the Sydney case is that not only the Tenafly judgement, but also other decisions delivered by the US Courts[176], paved the way for an interpretation of the *eruv* inspired by a 'functionalist criterion'. In other words, the US Courts gave more specific weight to the scope of the *eruv*, rather than to its constituent components, both individually and as a whole:

> *"There is no evidence that Orthodox Jews intend or understand the eruv to communicate any idea or message. Rather, the evidence shows that the eruv-like a fence around a house or the walls forming a synagogue-serves the purely* functional purpose *of delineating an area within which certain activities are permitted"*[177].

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[175] U.S. Court of Appeals, Third Circuit, *Tenafly Eruv Ass'n v. Borough of Tenafly*, quoted *supra*, para 2: "Therefore, the Borough has no Establishment Clause justification for discriminating against the plaintiffs' religiously motivated conduct. Accordingly, the plaintiffs are reasonably likely to prevail on their free exercise claim".

[176] U.S. Court of Appeals, Second Circuit, *Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, no. 778 F.3d 390 (2d Cir., 2015), 6 January 2015, (at *www.law.justia.com*); U.S. District Court - Eastern District of New York, *E. End Eruv Ass'n, Inc. v. Town of Southampton*, no. CV 13-4810 (AKT)(E.D.N.Y., 2014), 24 September 2014 (at *www.law.justia.com*); U.S. Court of Appeals, Second Circuit, *Verizon N.Y. Inc. v. Jewish People for the Betterment of Westhampton Beach*, no. 556 F. App'x 50 (2d Cir.), 3 March 2014, (at *www.law.justia.com*); U.S. District Court for the District of New Jersey, *American Civil Liberties Union v. City of Long Branch*, 670 F. Supp. 1293 (D.N.J., 1987), 2 October 1987 (at *www.law.justia.com*); Supreme Court, Special Term, Queens County, *Smith v. Community Bd. No. 14*, 128 Misc. 2d 944, 491 N.Y.S.2d 584 (N.Y. Sup. Ct., 1985), 8 July 1985 (at *www.law.justia.com*). For comments on the *eruv* and the US legal order see **A. MINTZ**, *The Community Eruv and the American Public Square*, in *Diné Israel*, no. 31 of 2017, pp. 211-30; **S.J. SCHLAFF**, *Using An Eruv To Untangle the Boundaries of the Supreme Court's Religion-Clause Jurisprudence*, in *University of Pennsylvania Journal of Constitutional Law*, no. 5 of 2002, pp. 831-99; **J.J. MARSHALL**, *Selective Civil Rights Enforcement and Religious Liberty*, in *Stanford Law Review*, no. 72(5) of 2020, pp. 1421-65.

[177] U.S. Court of Appeals, Third Circuit, *Tenafly Eruv Ass'n v. Borough of Tenafly*, quoted *supra*. Emphasis added.

This approach is crucial in ascertaining whether city authorities, by permitting the affixing of *lechis* and other elements constituting the *eruv*, integrate a conduct qualifying as an establishment of a religion or an endorsement of a religion - both prohibited by the First Amendment to the American Constitution[178].

It is precisely in this respect that the *eruv*'s detractors have been quite incisive in defining it as "religious in nature"[179], a "permanent"[180] symbol that creates a "religious aura" and would even produce a "metaphysical impact" on the lives of residents[181]. In response, its defenders argued instead that it "has no religious significance or symbolism and is not part of any religious ritual"[182].

Some Courts have tended to conclude that "no religious symbol has been erected"[183] since the eruv is a "virtually invisible boundary line indistinguishable from the utility poles and telephone wires in the area"[184]. It would not be regarded as a symbol, as it is modest, discreet and inconspicuous[185] and, therefore, before the *lechis*, a "reasonable, informed observer [...] would not perceive an endorsement of Orthodox Judaism"[186].

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[178] The most famous tests to evaluate the establishment or the endorsement of a religion are the *Lemon test* and the *Endorsement test*. See respectively U.S. Supreme Court, *Lemon v. Kurtzman*, no. 403 U.S. 602, 91 S. Ct. 2105, 28 June 1971 (at *www.law.justia.com*) and U.S. Supreme Court, *Dennis M. Lynch, et al. v. Daniel Donnelly, et al.*, no. 465 U.S. 668, 104 S. Ct. 1355, 5 March 1984 (at *www.law.justia.com*).

[179] U.S. Court of Appeals, Third Circuit, *Tenafly Eruv Ass'n v. Borough of Tenafly*, quoted *supra*.

[180] U.S. District Court for the District of New Jersey, *American Civil Liberties Union v. City of Long Branch*, quoted *supra*.

[181] U.S. Supreme Court, Special Term, Queens County, *Smith v. Community Bd. No. 14*, quoted *supra*.

[182] U.S. Court of Appeals, Third Circuit, *Tenafly Eruv Ass'n v. Borough of Tenafly*, quoted *supra*. See also U.S. Supreme Court, Special Term, Queens County, *Smith v. Community Bd. No. 14*, quoted *supra*: "the *eruv* is not a religious symbol or device but a legal fiction".

[183] U.S. District Court for the District of New Jersey, *American Civil Liberties Union v. City of Long Branch*, quoted *supra*.

[184] U.S. Supreme Court, Special Term, Queens County, *Smith v. Community Bd. No. 14*, quoted *supra*: "the *eruv* is a virtually invisible boundary line indistinguishable from the utility poles and telephone wires in the area".

[185] **M. RIEDEL**, *The difference a wire makes*, quoted *supra*, p. 410.

[186] U.S. Court of Appeals, Third Circuit, *Tenafly Eruv Ass'n v. Borough of Tenafly*, quoted *supra*.

It is interesting to note that, in some cases, the Jews themselves, in particular, those belonging to the liberal denomination, resorted to litigation as an attempt to prevent the *eruv* from being installed. This detracts from the assumption that the *eruv* itself constitutes a religious symbol and, therefore, an endorsement of Orthodox Judaism at the expense of those who are affiliated neither with Judaism *tout court* nor with Orthodox Judaism specifically[187].

From this perspective, the fact that disagreement over the nature of the *eruv* as a 'symbol' runs within the religious community itself should perhaps have oriented the Courts towards an attitude of more judicial restraint. Proceeding with deference, without taking a position on the symbol (i.e., denying or appreciating the *eruv* as a religious symbol) would have precluded the judges from dealing with disputes within these religious groups[188].

Secondly, concluding that a "reasonable observer", who comes across the *lechis*, does not perceive them as an endorsement of Orthodox Judaism assumes that their meaning is mostly unknown to the general public, and acknowledged only to those who observe the *Shabbath*[189]. The premise of this argument seems rather fragile, since it could be (and already has been)[190] easily overturned by some forms of publicity, by the involvement of the public authority in the process of the *eruv*'s installation or by the activities related to its maintenance.

5 - The Canadian Judge: the *eruv* as a means of exercising the right to religious freedom

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[187] **M. RIEDEL**, *The difference a wire makes*, quoted *supra*, p. 414.

[188] On the so-called *Principle of Non-Interference*, with specific reference to the UK legal system, see **R. SANDBERG**, *Law and Religion*, Cambridge University Press, Cambridge, 2011, pp. 74-76.

[189] On this see extensively **C.E. FONROBERT**, *The Political Symbolism of the Eruv*, in *Jewish Social Studies*, no. 3 of 2005, p. 72; **ID.**, *From Separatism to Urbanism: The Dead Sea Scrolls and the Origins of the Rabbinic 'Eruv*, in *Dead Sea Discoveries*, no. 11(1) of 2004, pp. 43-71; **ID.**, *Neighborhood as Ritual Space: The Case of the Rabbinic Eruv*, in *Archiv für Religionsgeschichte*, no. 10(1) of 2008, pp. 239-58.

[190] For example, in Westhampton, opponents of the *eruv* papered the light poles, street signs, and so on, on which the *lechis* leaned, hanging illustrative leaflets explaining what they were: **J. O'DWYER**, *UCLA Law Prof Says Eruvim Are Unconstitutional*, in *O'Dwyer's Daily PR News Blast*, 12 January 2015 (at *www.odwyerpr.com)*.

In Outremont, Quebec, the city had started to dismantle pre-existing *eruvim* since the early 2000s. In contrast to the Australian and the American jurisprudence, the Superior Court of Quebec, called upon to rule in the case of *Rosenberg v. Outremont (City)*, dealt with the matter using a different approach, which could be defined as significant.

The Canadian Court did not conceive the *eruv* as a religious symbol, nevertheless, it identified in it a clear element of religiosity, defining it as a "notional concept"[191], which is "firmly established in the precepts of the Orthodox Jewish faith"[192].

This approach made it easy to read the *eruv* within the constitutional protections relating to religious freedom[193], and guided the Court to recognize the city of Outremont's "constitutional duty to provide accommodation for religious practices that do not impose undue hardship on its residents"[194].

The Court itself understood the drive towards accommodation and the obligation of State religious neutrality, as linked by a relationship of "natural antagonism"[195]. However, given that the *eruv* facilitates activities that are also secular, and that the Quebec legal system is not completely indifferent to the religious factor[196], the authorization to affix *lechis* on public land should not be read as an endorsement of a religion but as a

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[191] Quebec Superior Court, *Rosenberg v. Outremont (City)*, no. 500-05-060659-008, 6 September 2001, para 7.

[192] Quebec Superior Court, *Rosenberg v. Outremont (City)*, quoted *supra*, para 33.

[193] *Canadian Charter of Human Rights and Freedoms, Section 2*, 1982. According to *Section 1*, the rights and freedoms guaranteed by the Charter are subjects "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[194] Quebec Superior Court, *Rosenberg v. Outremont (City)*, quoted *supra*, para 46. Emphasis added.

[195] "That being said, the concept of accommodation to the exercise of guaranteed freedoms, including freedom of religion, is very much a part of the constitutional fabric in this country, as Prof. Woehrling points out in his learned study of the subject- *L'accommodation raisonnable et l'adaptation de la société à la diversité religiouse*. When instruments of the State are called upon to implement a measure of accommodation of a religious practice, there is at a minimum the potential for conflict between the duty to accommodate and the obligation of neutrality. Prof. Woehrling cites American authors who describe this phenomenon as one of natural antagonism": Quebec Superior Court, *Rosenberg v. Outremont (City)*, quoted *supra*, para 29.

[196] For example, in relation to weekly rest and vacations, tax benefits granted to religious denominations, and so on.

"tolerance of a religious practice"[197] - an attitude that is constitutionally due:

> *"There is no doubt that the City has an interest in regulating the use of the public domain, including the air over City streets. In this instance, however, the City declined to exercise its regulatory authority because of the position it took that Quebec law mandated absolute religious neutrality and thus prevented it from acceding to the Petitioners request for accommodation. The Court holds and emphasizes that it considers the City's position in this regard to be wrong as a matter of law. On the contrary, the City has a constitutional duty to provide accommodation for religious practices that do not impose undue hardship on its residents. The City can quite properly regulate the erection of* eruvin *in a manner that facilitates the exercise of the right while all the while prescribing the means by which the right is exercised. This would undoubtedly include matters such as the height of the structures and the number of* eruvin *that might be erected on each street within the affected area. It remains an option for the City to exercise such regulatory control"*[198].

The Canadian judges make the point that, in the eyes of most, the meaning of the *eruv* remains mysterious, stating that "the area within an *eruv* is only a religious zone for those who believe it to be one". However, on the other hand, they add that affixing wires in public spaces is a religious matter, which therefore deserves to be treated as such[199].

6 - "Human rights start in the neighbourhood" (E. Roosevelt)

From the comparison carried out between the Australian, the US and the Canadian litigation regarding the *eruv,* it is possible to draw some final remarks regarding the practice of the *eruv* itself, its qualification under constitutional categories and, more in general, the relationship between religious liberty and urban planning law.

Firstly, although these Jewish signs are almost indistinguishable and intangible on the city skyline, they nonetheless bring to the fore certain latent and visceral tensions which, from a social perspective, relate to what some perceive as an inappropriate manifestation of a religious practice in a public space.

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[197] Quebec Superior Court, *Rosenberg v. Outremont (City)*, quoted *supra*, para 42.

[198] Quebec Superior Court, *Rosenberg v. Outremont (City)*, quoted *supra*, paras 46-47.

[199] Quebec Superior Court, *Rosenberg v. Outremont (City)*, quoted *supra*, para 37.

From a legal point of view, moreover, they are regarded as providing the necessary level of protection for religious freedom and religious pluralism, since the *eruv* itself shifts the barrier between manifestations of religion in the private sphere and manifestations of religion in the public sphere, calling into question what Berger termed "the aesthetics of religious freedom":

> *In disrupting this border, the* eruv *also challenged the liberal commitment to confine religion to the private sphere, by symbolizing a spilling-over of private religion into public spaces. […] Within the range of distinctive religious beliefs and practices within this community, the* eruv *became a contested site precisely because it came into conflict with the law's orienting spatial intuitions. This is the aesthetics of religious freedom at play. In this case, resolving the religious freedom question would require clarifying and redrawing the lines between private and public, the realm of government authority and that of religious expression*[200].

Against this background, it is noteworthy that none of the Courts and decisions considered in this paper have defined the *eruv* and its constituent elements as a religious symbol: the *eruv* has been perceived as a set of physical elements (in relation to the Australian case), a fence and a *fictio iuris* (in relation to the US cases) or a religious practice (in relation to the Canadian case) - but it has not been defined *de plano* as a religious symbol.

From the Court records, it is impossible to identify whether the supporters of the *eruv* tried to avoid the qualification of the *eruv* as a religious symbol as part of a strategic choice, i.e., to increase the likelihood of litigation success or, on the other hand, to circumvent any possible complications regarding the display of religious symbols in urban public spaces, as related to the issue of State neutrality.

Moving from the courtrooms and shifting the question to a theoretical level, it is fitting to consider the definition of a 'religious symbol' provided by the theologian Paul Tillich in his seminal paper, *The Religious Symbol*. According to Tillich's analysis, there are certain essential elements that characterize the symbol itself and the religious symbol, in particular: having its own figurative and expressive quality; presenting an element of extrinsic perceptibility; enjoying innate power and, in general, encountering a high degree of social recognizability[201].

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[200] **B.L. BERGER**, *The Aesthetics of Religious Freedom*, in *Comparative Research in Law & Political Economy*, no. 33 of 2012, pp. 10-12.

[201] **P. TILLICH**, *The Religious Symbol*, in *Daedalus*, no. 3 of 1958, pp. 3-5. For other literature on religious symbols, see also, among many: **S. BACQUET**, *Religious Symbols*

Given this analytical framework, it is probably reasonable to conclude that the *lechis* and other elements of the *eruv* - in the three jurisdictions considered - escape the expressive semantics of the symbol. Above all, they seem to lack what Tillich has considered the essential characteristic of the religious symbol[202]: its innate communicative power which, according to the theologian, is exactly the aspect that distinguishes the sign from the symbol. The *lechis*, at least in the jurisdictions considered here and at the time the decisions were issued, do not seem to have reached a sufficient universal, socially recognized and generally evident communicative power[203].

Secondly, although through the eyes of the common-law judge it may be hard to recognize the *eruv* as a proper 'religious symbol' - at least adopting Tillich's theoretical definition - it is nonetheless vital to

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and the Intervention of the Law: Symbolic Functionality in Pluralist States, Routledge, Oxon, UK, 2020; **D.J. HILL, D. WHISTLER**, *The Right to Wear Religious Symbols*, Palgrave Macmillan, London, 2013; **I. LEIGH, A. HAMBLER**, *Religious Symbols, Conscience, and the Rights of Others*, in *Oxford Journal of Law and Religion*, no. 3(1) of 2014, pp. 2-24; **J. MARTÍNEZ-TORRÓN**, *Institutional Religious Symbols, State Neutrality and Protection of Minorities in Europe*, in *Law and Justice*, no. 171 of 2013, pp. 21 and ff.; **E.A. POSNER**, *Symbols, signals, and social norms in politics and the law*, in *The Journal of Legal Studies*, no. 27(2) of 1998, pp. 765-97; **I. RORIVE**, *Religious Symbols in the Public Space: In Search of a European Answer*, in *Cardozo Law Review*, no. 30 of 2009-2008, pp. 2669-98; **A. STEINBACH**, *Burqas and Bans: The Wearing of Religious Symbols under the European Convention of Human Rights*, in *Cambridge Journal of International and Comparative Law*, no. 4 of 2015, pp. 29 and ff.; **E. HOWARD**, *Law and the wearing of religious symbols: European bans on the wearing of religious symbols in education*, Routledge, London, 2013; **H. VAN OOIJEN**, *Religious symbols in public functions: Unveiling state neutrality*, Intersentia, Cambridge, UK, 2012; **P. CAVANA**, *I simboli religiosi nello spazio pubblico nella recente esperienza europea*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 28 of 2012, pp. 131-186; **S. MANCINI, M. ROSENFELD**, *Sotto il velo della tolleranza. Un confronto tra il trattamento dei simboli religiosi di maggioranza e di minoranza nella sfera pubblica*, in *Ragion pratica*, no. 2 of 2012, pp. 421-452; **S. MANCINI**, *Il potere dei simboli, i simboli del potere: laicità e religione alla prova del pluralismo*, CEDAM, Padova, 2008; *I simboli religiosi nella società contemporanea*, edited by A. NEGRI, G. RAGONE, L.P. VANONI, M. TOSCANO, Giappichelli, Torino, 2022; **S. TESTA BAPPENHEIM**, *I simboli religiosi nello spazio pubblico: profili giuridici comparati*, Editoriale scientifica , Napoli, 2019; **M. TOSCANO**, *Il fattore religioso nella Convenzione Europea dei Diritti dell'Uomo*, Edizioni ETS, Pisa, 2018.

[202] According to the Author, "the pictorial symbols of religious art were originally charged with a magical power, with the loss of which they became a conventional sign-language and almost forfeited their genuine symbolic character": **P. TILLICH**, *The Religious Symbol*, quoted *above*, p. 4.

[203] Although they still belong to a ritual system. On this see extensively **C.E. FONROBERT**, *The Political Symbolism of the Eruv*, quoted *supra*, pp. 9-35.

appreciate *at least* its dimension of religiosity. On the one hand, recognizing the *eruv* as a 'religious practice', by following the Canadian approach to the issue, would facilitate religious accommodations in those circumstances where there occurs a minimal impact on the urban landscape, such as the case at stake. On the other hand, it would prevent the practice of the *eruv* from being entirely stripped of constitutional protections pertaining to religious freedom, though it is a practice that is firmly anchored in the precepts of Orthodox Judaism.

Thirdly and lastly, the *eruv* shows once again that the protection of human rights starts in the neighbourhood, and this resonates with Eleanor Roosevelt's seminal words, spoken in 1958 at the United Nations:

> *Where, after all, do universal human rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman and child seek equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere*[204].

Not only erecting buildings of worship, but also installing any kind of facilities in the city which have a religious purpose, is a matter "by its very nature suspended between the protection of religious freedom - even in its extrinsication as a collective right - and urban planning regulations"[205]. It intercepts both the level of the constitutional right to religious freedom and the more pragmatic aspect of the implementation of

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[204] The quotation is available at *www.un.org*.

[205] **N. MARCHEI**, *La legge della Regione Lombardia sull'edilizia di culto alla prova della giurisprudenza amministrativa*», in *Stato, Chiese e pluralismo confessionale*, cit., no. 12 of 2014, p. 1; see also **EAD.**, *Il «diritto al tempio». Dai vincoli urbanistici alla prevenzione securitaria. Un percorso giurisprudenziale*, Editoriale Scientifica, Napoli, 2018; **EAD.**, *Le nuove leggi regionali 'antimoschee'*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 25 of 2017, pp. 1-16. On city planning and religious pluralism see also **M. BURCHARDT**, *Religion in urban assemblages: space, law, and power*, in *Religion, State and Society*, no. 47(4-5) of 2019, pp. 374-89; **D. COOPER**, *Out of Place: Symbolic Domains, Religious Rights and the Cultural Contract*, in *Land and Territoriality*, edited by M. Saltman, Routledge, London, 2002; **M.L. VAZQUEZ**, *End of Secular City Limits? On Law's Religious Neutrality in the City*, in *International Journal for the Semiotics of Law-Revue internationale de Sémiotique juridique*, 2020, pp. 1-28; on the Jewish *eruv* and urban spaces in particular, see **B.E. MANN**, *Space and Place in Jewish Studies*, Rutgers University Press, Piscataway, 2012; **R.Y.G. BECHHOFER**, *The Contemporary Eruv: Eruvin in Modern Metropolitan Areas*, Feldheim Publishers, Spring Valley, New York, 2002.

a specific religious accommodation - something that perfectly embodies Roosevelt's worlds: "Human rights start in the neighbourhood"[206].

In conclusion, all things considered, the *eruv* should be accommodated as a practice relating to the concrete exercising of freedom of religion, not because it is an unnoticeable sign for many passing by, but because freedom of religion is a constitutional right of everyone living within the community.

[206] See **R. BARITONO**, *Eleanor Roosevelt. Una biografia politica*, Il Mulino, Bologna, 2021.

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The Thin Line between Public and Private Space in Institutional Places: The Case of Religious Symbols

SUMMARY 1. A Framing of the Issue - 2. The Line between Public and Private Space: A Conceptual Redefinition - 3. The Axiological Reference Point: The Principle of 'Laicità' - 4. Concluding Remarks.

1 - A Framing of the Issue

The unresolved issue of the legitimacy of the display of religious symbols in public school classrooms, never completely dormant, has recently returned to the attention of the jurisprudence, lastly engaging the United Civil Sections of the Italian Supreme Court[207].

[207] Cf. Corte di cassazione, Sezioni Unite civili, ruling no. 24414/2021. Among the first scholars to deal with the judgment, see **N. COLAIANNI**, *Dal "crocifisso di Stato" al "crocifisso di classe" (nota a margine di Cass., SS. UU., 9 settembre 2021, n. 24414)*, in *Stato, Chiese e pluralismo confessionale*, online Journal (*https://www.statoechiese.it*), no. 17 of 2021, p. 17 ff.; **M. TOSCANO**, *Il crocifisso 'accomodato'. Considerazioni a prima lettura di Corte cass., Sezioni Unite civili, n. 24414 del 2021*, *ivi*, no. 18 of 2021, p. 45 ff. These early comments, however, were followed by numerous interventions in literature attesting to the highly innovative nature of the ruling: see **P. CAVANA**, *Le Sezioni Unite della Cassazione sul crocifisso a scuola: alla ricerca di un difficile equilibrio tra pulsioni laiciste e giurisprudenza europea*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 19 of 2021, p. 1 ff.; **F. ALICINO**, *Il crocifisso nelle aule scolastiche alla luce di Sezioni Unite 24414/2021. I risvolti pratici della libertà*, in *Diritti comparati*, online Journal (*https://www.diritticomparati.it*), 11th November 2021; **ID.**, *Ceci n'est pas une pipe: The Crucifix in Italian Schools in the Light of Recent Jurisprudence*, in *Canopy Forum. On the Interactions of Law and Religion* (*https://canopyforum.org*); **A. LICASTRO**, *Crocifisso "per scelta". Dall'obbligatorietà alla facoltatività dell'esposizione del crocifisso nelle aule scolastiche (in margine a Cass. civ., sez. un., ord. 9 settembre 2021, n. 24414)*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 21 of 2021, p. 17 ff.; **S. PRISCO**, *La laicità come apertura al dialogo critico nel rispetto delle identità culturali (riflessioni a partire da Corte di Cassazione, Sezioni Unite civili, n. 24414 del 2021)*, ivi, p. 53 ff.; **A. FUCCILLO**, *Il crocifisso negoziato. Verso la gestione "privatistica" dei simboli religios*i, in *giustiziacivile.com*, no. 12 of 2021; **S. CECCANTI**, *Come in Baviera: il crocifisso resta alla parete, se la scelta è della classe*, in *Quad. cost.*, no. 4 of 2021, p. 951 ff.; **M. VENTURA**, *Il crocifisso dallo Stato-istituzione allo Stato-comunità*, *ivi*, p. 954 ff.; **G. PAVESI**,

Starting from this ruling, I would try to spend some brief remarks on the complexity of identifying a dividing line between public and private space in some institutional places[208].

As a first step, however, it would be helpful to briefly go over the facts of the case, immediately distinguished by their unprecedented nature[209].

Indeed, unlike previous case law, the claim against the display of the symbol was brought not by the parents of a student, but by a teacher serving at a public high school, who had previously been subjected to a disciplinary procedure, which ended with sanctions, by the Provincial School Office, for systematically removing the crucifix from the wall of a classroom before the beginning of his lessons.

According to the Office, such conduct constituted a disciplinary offense in violation of the school director's order, who, following a students' resolution adopted by majority vote during an assembly, which expressed their desire to see the crucifix exposed (and this is the second unprecedented profile[210]), commanded the stable display of the symbol.

Simboli religiosi e accomodamento ragionevole 'all'italiana' nella recente giurisprudenza di legittimità, in *Stato, Chiese e pluralismo confessionale*, cit., no. 6 of 2022, p. 1 ff.; **J. PASQUALI CERIOLI**, *La mediazione laica sul crocifisso a scuola nel diritto vivente: da simbolo pubblico "del potere" a simbolo partecipato "della coscienza"*, in *Dir. fam e pers*., no. 1 of 2022, p. 10 ff.

[208] This topic has engaged and continues to engage scholars: see, specifically, **S. FERRARI**, *Religion in the European Public Spaces: A Legal Overview*, in S. FERRARI, S PASTORELLI (eds.), *Religion in Public Space: A European Perspective*, Ashgate, Farnham, 2012, p. 139 ff., spec. p. 146, who writes: "a sharp line neatly dividing these two dimensions of human life cannot be drawn and, whatever definition of public and private is adopted, it is impossible to remove a large grey area in which public and private overlap and mingle"; **ID**., *I simboli religiosi nello spazio pubblico*, in *Quad. dir. pol. eccl.*, no. 2 of 2012, p. 317 ss., now also available in C. CIANITTO, A. FERRARI, D. MILANI, A. TIRA (eds.), *Scritti. Percorsi di libertà religiosa per una società plurale*, il Mulino, Bologna, 2022, p. 239 ff.; **ID**., *Diritto, religione e spazio pubblico*, in *Riv. fil. dir*., special issue, 2013, p. 35 ff., now in C. CIANITTO, A. FERRARI, D. MILANI, A. TIRA (eds.), *Scritti*, cit., p. 251 ff.

[209] For a more extensive and articulate reconstruction of the facts of the case, see **N. FIORITA**, *Se Terni non è Valladolid,* in *Forum di Quaderni Costituzionali* (*https//: www.forumcostituzionale.it*), 6th July 2009; **L.P. VANONI**, *Laicità e libertà di educazione. Il crocifisso nelle aule scolastiche in Italia e in Europa*, Giuffrè, Milano, 2013, spec. p. 122 ff.

[210] In all other cases that had engaged the jurisprudence, indeed, the symbol was displayed by virtue of the provisions contained in the r.d. no. 965/1924 and no. 1297/1928, whose current validity, however, doctrine has been questioning since the Constitution came into force: see **N. MARCHEI**, *Il simbolo religioso e il suo regime giuridico nell'ordinamento italiano*, in E. DIENI, A. FERRARI, V. PACILLO (eds.), *I simboli religiosi tra diritto e culture*, Giuffrè, Milano, 2006, p. 261 ff.

The Court of Terni[211], whose decision will be confirmed before the Court of Appeal of Perugia[212], rejected the teacher's claim, ruling out the discriminatory nature of the service order - as it was addressed to the entire teaching staff - and, thus, the possibility of recognizing in the appellant's conduct the exercise of legitimate self-defense, which can only be invoked to protect inviolable rights and not, as in the case at hand, principles[213].

As a result, the professor lodged an appeal in cassation.

The Labor Section[214], identifying the case as a question of principle of particular importance, referred it to the First President of the Court, for the assignment to the United Sections[215].

In brief, the solution put forward by the Court - marked by strong original profiles, readily noted by scholars[216] - rests on a twofold assumption: 1. "The authoritative display of the crucifix in public school classrooms is not compatible with the supreme principle of 'laicità'"[217]; 2. The decision about the presence of religious symbols (and not just the crucifix) in classrooms falls within the autonomy of the individual school communities, which have the task of "seeking a reasonable

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[211] Cf. Tribunale di Terni, ordinance 22nd June 2009.

[212] Cf. Corte d'appello di Perugia, ruling no. 165/2014.

[213] Specifically, the teacher invoked in support of his claims the principles of legality, good behavior and impartiality of public administration as well as the supreme principle of 'laicità'.

[214] Cf. Corte di cassazione, Sezione Lavoro, ordinance no. 19618/2021. In literature see **M. TOSCANO**, *Crocifisso nelle aule scolastiche: una fattispecie inedita al vaglio delle Sezioni Unite*, in *Quad. dir. pol. eccl.*, no. 3 of 2020, p. 887 ff.; **A. LICASTRO**, *Il crocifisso e i diritti del lavoratore nell'ambiente scolastico (aspettando le Sezioni Unite della Cassazione)*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 7 of 2021, p. 35 ff.; **P. CAVANA**, *"A chiare lettere - Confronti" • Il crocifisso davanti alle Sezioni Unite della Cassazione: difesa di diritti o accanimento iconoclasta?*, *ivi*, no. 14 of 2021, p. 61 ff.

[215] Cf. art. 374, c. 2, of the Italian code of civil procedure: "the First President may order the Court to rule in unified sections on appeals presenting a question of law already decided differently by the simple sections, and on those presenting a question of principle of particular importance".

[216] See, in particular, **M. TOSCANO**, *Il crocifisso 'accomodato'*, cit., p. 52; **A. LICASTRO**, *Crocifisso "per scelta"*, cit., p. 31; **J. PASQUALI CERIOLI**, *La mediazione*, cit., p. 10

[217] Cf. Corte di cassazione, Sezioni Unite civili, ruling no. 24414/2021, "motivi della decisione", § 11.6. Unless otherwise stated, all translations must be attributed to the author.

accommodation with the widest possible consensus" between discordant positions[218].

A careful reading allows, however, to identify further elements of novelty already in the reasoning of the Court, starting with the re-qualification, in legal terms, of the school-space.

2 - The Line between Public and Private Space: A Conceptual Redefinition

Indeed, the public-school classroom - henceforth, not only an institutional place, but also a "shared public space"[219] - is elevated by the judges to a "place of pluralistic democracy," in which "religious identities and instances have the right to express themselves, even symbolically"[220].

Such a statement invites us to reflect on the most legally appropriate qualification to be reserved for public school classrooms, restoring relevance to some suggestions already proposed by scholars, who have long questioned the possibility of "deconstructing the notion of public space"[221].

Traditionally, indeed, the notion of public space used to be divided into three parts: *common space* (essential for the satisfaction of the basic needs of the person and, consequently, necessarily accessible to all,

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[218] Cf. *Ibidem*, § 14.1.

[219] Cf. *Ibidem*, § 13.2.

[220] Cf. *Ibidem*, § 13.3.

[221] **S. FERRARI**, *I simboli religiosi,* cit., p. 325. Through the redefinition of the school-space proposed by the Supreme Court, the issue of the deconstruction of the public space regains centrality, having, instead, to consider outdated the possibility of "deconstructing the symbol itself," (in this sense, see **A. MORELLI**, *Il contenuto semantico «inesauribile» del simbolo religioso nel controllo di legittimità costituzionale*, in R. BIN, G. BRUNELLI, A. PUGIOTTO, P. VERONESI (eds.), *La laicità crocifissa? Il nodo costituzionale dei simboli religiosi nei luoghi pubblici*, Giappichelli, Torino, 2004, p. 215 ff., spec. p. 216) whose semantic value, as is well known, has long been the subject of a jurisprudential debate, to which, however, the Cassation put an end, qualifying the crucifix as a religious symbol for all purposes (cf. Corte di cassazione, Sezioni Unite civili, ruling no. 24414/2021, "motivi della decisione", §§ 9.2 and 11.8). On the different interpretation given to the symbol, see, among the others, for the national jurisprudence, **J. PASQUALI CERIOLI**, *Rassegna di giurisprudenza sull'affissione del crocifisso negli edifici pubblici* (2003-2006), in *Dir. eccl*., no. 2-3 of 2005, p. 59 ff., and for the supranational one, **M. TOSCANO**, *Il fattore religioso nella Convenzione Europea dei Diritti dell'Uomo. Itinerari giurisprudenziali*, ETS, Pisa, 2018, p. 238 ff.

without limitations other than those that, in a democratic system, can legitimize restrictions on fundamental rights and freedoms), *political space* (deputed to the debate and discussion in which public discourse matures and, therefore, "governed by rules that combine freedom and responsibility for the effective protection of democratic pluralism"[222]) and *institutional space* (the venue in which public authorities exercise their authoritative powers, making decisions that are binding on private individuals)[223].

This first spatial dimension, moreover, would be accompanied by a second dimension of a personal nature, which subjects those who operate within the public space to a different legal regime due to the specific role they play.

An example is provided by the public school, attended, at the same time, by learners and teachers: the former are private subjects, and the latter are public employees, called upon to represent the educational institution[224].

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[222] **G. CASUSCELLI**, *I simboli religiosi*, in G. CASUSCELLI (ed.), *Nozioni di Diritto ecclesiastico*, 5th ed., Giappichelli, Torino, 2015, p. 407 ff., spec. p. 409.

[223] On this tripartition and, more generally, on the desirability of subdividing public space on the basis of a functional criterion, see, among the others, **S. FERRARI**, *Religion*, cit., p. 149 ff.; **G. CASUSCELLI**, *I simboli*, cit., pp. 408-409; **J. HABERMAS**, *Religion in the Public Sphere*, in *European Journal of Philosophy*, no. 14 of 2066, p. 1 ff.

[224] Cf. **S. FERRARI**, *I simboli religiosi*, cit., pp. 326-327. However, the spatial and personal dimensions must be distinguished, as noted in the case at hand in the conclusions of the Attorney General's Office, which defined as "contiguous, but structurally different" the issue of "the right to wear symbolic elements with religious connotations," observing that in such cases "the opposition is between the symbolic-religious claim of the individual to wear clothes, signs, symbols in various contexts, and the 'neutralità-laicità' of the state". More precisely, in the opinion of the Attorney General, this juxtaposition would be in "an opposite scheme of tension between the position of the individual and that of the collectivity" (see § 4.7). On the "decisive difference between the wearing of religious clothing and the furnishing at school," made by the Attorney General's Office, see **J. PASQUALI CERIOLI**, *La mediazione*, cit., p. 24. The sensitive issue of the religious symbol worn by a school staff member was also the subject of the well-known *Dahlab* pronouncement, in which ECtHR ruled out that a teacher can wear the Islamic headscarf, since, as previously noted by the Swiss Government, "[a]s a civil servant, she represented the State; on that account, her conduct should not suggest that the State identified itself with one religion rather than another" (cf. ECtHR, *Dahlab v. Switzerland*, 15th February 2001 and, in literature, **M. TOSCANO**, *Il fattore religioso*, cit., p. 219 ff.). The United Kingdom deviates from this model. There, indeed, teachers and the other representatives of public institutions are allowed to carry religious symbols: cf. **J. GARCIA OLIVA**, *Religious Dress Codes in the United Kingdom*, in S. FERRARI, S. PASTORELLI (eds.), *Religion in Public Space*, cit., p. 217 ff.

The pronouncement of the Italian Supreme Court seems, however, to have brought to completion the redefinition of the "conceptual boundaries of public place and private place, especially when referring to education"[225].

3 - The Axiological Reference Point: The Principle of 'Laicità'

The redefinition proposed by the Court is crucial since it is on the basis of the (different) qualification each time attributed to the public space that we must assess the (il)legitimacy of the display of religious symbols in the light of the supreme principle of 'laicità', valued in its irrepressible legal dimension[226].

The terms of the question are in fact made even more complex by the "troubled semantics"[227] that has accompanied and still accompanies the search for a unified and coherent definition of the Italian 'laicità'.

Indeed, the unsolved ambiguity[228] of the first enunciation of the principle - not infrequently exacerbated by the subsequent interventions of the Italian Constitutional Court, which have gradually led to the emersion of the so-called "reflections" or "corollaries" of the 'laicità'[229] - has lent itself, at least regarding the crucifix in public schools *querelle*, as much to a 'positive' or 'by addition' reading as to the opposite 'negative' or 'by subtraction' interpretation.

Proponents of the first thesis have applauded the solution drawn by the Supreme Court, which would boast the value of "harmoniously joining"[230] the reforms introduced in the education field, which have

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[225] **J. PASQUALI CERIOLI**, *La mediazione*, cit., p. 12.

[226] In this sense, see **M. TEDESCHI**, *Il senso della laicità*, in ID. *Studi di diritto ecclesiastico*, Jovene, Napoli, 2002, p. 45 ff.

[227] **G. SARACENI**, *«Laico», travagliata semantica di un termine*, in M. TEDESCHI (ed.), *Il principio di laicità nello Stato democratico*, Rubbettino, Soveria Mannelli, 1996, p. 49 ff.

[228] See, in particular, **S. DOMIANELLO**, *Sulla laicità nella Costituzione*, Giuffrè, Milano, 1999, p. 44, who defines the Italian 'laicità' as "inherently contradictory and essentially incapable of expressing certain and clear foundational choices".

[229] On this point, see **G. CASUSCELLI**, *«L'evoluzione della giurisprudenza costituzionale» in materia di vilipendio della religione*, in *Quad. dir. pol. eccl.*, no. 3 of 2001, p. 1119 ff., spec. p. 1125.

[230] **N. FIORITA**, *La questione del crocifisso nella giurisprudenza del terzo millennio (dalla sentenza n. 439/2000 della Corte di Cassazione alla sentenza n. 1110/2005 del Tar Veneto)*, in M. PARISI (ed.), *Simboli e comportamenti religiosi nella società plurale*, Edizioni Scientifiche Italiane, Napoli, 2006, p. 119 ff., spec. p. 131.

secured school autonomy a leading role in creating an environment that is as inclusive as possible[231].

Furthermore, the referral of the decision about the display of religious symbols in classrooms to the autonomy of the individual school communities would be inscribed in that 'laicità of service', described by the Constitutional Court in ruling no. 203/1989, where it is stated that "the secular attitude of the State-community [...] responds not to ideologized and abstract postulates of foreignness, hostility or confession of the State-person or of its ruling groups, with respect to religion or to a particular belief, but stands *at the service of concrete instances* of the civil and religious conscience of citizens" (emphasis added)[232].

On the contrary, if we assumed as starting perspective a 'negative' interpretation of the principle of 'laicità'[233], the solution proposed by the Court would imply an assumption that in the case at hand does not seem to have been integrated.

Indeed, the judges, while valuing the peculiar nature of the school context, never fully enfranchise the classroom from its institutional nature, so much so that they do not hesitate to declare "the mandatory display in

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[231] After all, it is the Court itself to affirm that this solution "appears to be, on the one hand, consistent with the role of the autonomy of educational institutions under the reform of Title V of Part II of the Constitution, which took place with Constitutional Revision Law No. 3 of 2001 […], and on the other, in tune with school legislation", with reference to d.lgs. no. 297/994 and d.P.R. no. 275/1999.

[232] Cf. Corte costituzionale, ruling no. 203/1989, "considerato in diritto", § 7. On the idea of "the State-person and the State-administration as open institutional realities in an instrumental position of service to the civil society," see **G. DALLA TORRE**, *Dio o Marianna? Annotazioni minime sulla questione del crocifisso a scuola*, in *Giust. civ.*, no. 1 of 2004, p. 510 ff., spec. p. 517.

[233] This interpretation had already been endorsed by the Supreme Court when it stated that the principle of 'laicità' "stands as a condition and limit of pluralism, in the sense of ensuring that the public place deputed to the conflict between the indicated systems is neutral and remains so over time: preventing, that is, the contingently established system from laying the foundations to permanently exclude other systems", inducing "to preserve the 'public' space of formation and decision-making from the presence, and thus from the message albeit at a subliminal level, of symbolic images of only one religion (as, in general, of only one of the other non-discriminatory conditions, referred to in art. 3 Const.), to the exclusion of the others" (cf. Cassazione penale, sez. IV, ruling no. 4273/2000, §§ 5, 9, in *Quad. dir. pol. eccl.*, no. 3 of 2000 p. 846 ff., commented by **A. DE OTO**, *Presenza del crocifisso o di altre immagini religiose nei seggi elettorali: la difficile affermazione di una "laicità effettiva"*, p. 837 ff.). On the delicate relationship between 'laicità' and neutrality, see **C. DEL BÒ**, *Il rapporto tra laicità e neutralità: una questione concettuale?* in *Stato, Chiese e pluralismo confessionale*, cit., no. 33 of 2014, p. 1 ff.

the school, *ex parte principis*, of the crucifix [...] incompatible with the indispensable distinction of the orders of the state and religious denominations"[234] which, as is well known, characterizes in its essentials the supreme principle of 'laicità'[235].

In other words, only the abandonment of any reference to the institutional nature of the school-space, averting the risk of an "identification between state and faith contents"[236], would have legitimized the referral of the symbolic configuration[237] of the classroom to the negotiation among those who participate in the school community, albeit with the (dutiful) clarification that, in any case, it would be not a matter of reasonable accommodation in a technical sense[238].

A decision to this effect would, moreover, have resulted in a re-expansion of the religious freedom (considered in its *forum externum*) of the teacher, legitimized, at that point, to wear religious clothing, since the risk of assimilation between the symbol worn and the educational institution (*rectius*, the State) must be considered overcome.

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[234] Cf. Corte di cassazione, Sezioni Unite civili, ruling no. 24414/2021, "motivi della decisione", § 11.6.

[235] Cf. Corte costituzionale, ruling no. 334/1996, "considerato in diritto", § 3.2. In literature there have been those who have identified precisely in the principle of the distinction of the orders the "hard core" shared by every model of 'laicità': see **C. MARTINELLI**, *Le necessarie conseguenze di una laicità «presa sul serio»*, in R. BIN, G. BRUNELLI, A. PUGIOTTO, P. VERONESI (eds.), *La laicità crocifissa?*, cit., p. 207 ff., spec. p. 211.

[236] **J. LUTHER**, *La croce della democrazia (prime riflessioni su una controversia non risolta)*, in *Quad. dir. pol. eccl.*, no. 3 of 1996, p. 681 ff., spec. p. 690. This is particularly pregnant in the school context, where pupils, because of their tender age - and, therefore, their vulnerability - appear more exposed to the risk of a possible disruption in the process of consciousness formation (in this sense, **N. MARCHEI**, *Il simbolo religioso,* cit., p. 262). Precisely from this need, **G. CASUSCELLI**, *Il crocifisso nelle scuole: neutralità dello Stato e «regola della precauzione»*, in *Dir. eccl.*, no. 1 of 2005, p. 504 ff., spec. p. 532, identified the so-called precautionary rule as "the 'sector' operational standard in the education field that substantiates the corollary of the duty of impartiality and neutrality that flows from the principle of secularism". More generally, on the principle of distinction of orders, see **J. PASQUALI CERIOLI**, *L'indipendenza dello Stato e delle confessioni religiose. Contributo allo studio del principio di distinzione degli ordini nell'ordinamento italiano*, Giuffrè, Milano, 2006.

[237] On the "symbolic order" of the Republic, with particular reference to the issue of the crucifix in the public classrooms, see **F. COLOMBO**, *Laicità e sovranità della Repubblica nel suo ordine simbolico: il caso del crocifisso nelle aule scolastiche*, in A. NEGRI, G. RAGONE, M. TOSCANO, L.P. VANONI (eds.), *I simboli religiosi nella società contemporanea*, Giappichelli, Torino, 2022, p. 95 ss.

[238] On this profile see **G. PAVESI**, *Simboli religiosi*, cit.

4 - Concluding Remarks

Although its innovative character, the conceptual redefinition operated by the Supreme Court did not result in the overcoming of the institutional nature of the public school, with the consequence that it is not possible to disregard the necessity of guaranteeing, even there, a fulfillment of the principle of the distinction of distinct orders.

This means that the solution imagined by the judges - otherwise destined to hesitate, inevitably, in the application of the majority rule, in violation of further corollaries of the supreme principle[239] - would be legitimate only if the display of the symbols eschewed any modality apt to represent "even only in an evocative way, a coincidence between faith and public instruction"[240].

In this sense, some scholars have long since proposed the identification of spaces in which the symbols of students' different confessional or ideological affiliations could be located, perhaps - similarly to what already occurs under article 58.2 of the *Regulations containing norms on the prison system and on measures of deprivation and restriction of liberty*[241] - within the perimeter of an individual space[242] that, in the school context, could coincide with each person's desk.

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[239] The reference is to the so-called 'irrelevance of quantitative and sociological data': (cf. Corte costituzionale, ruling no. 925/1988) as well as to the due protection of religious minorities (cf. Corte costituzionale, ruling no. 329/1997). After all, it is the Supreme Court itself, recalling the constitutional jurisprudence, to state that "the majority rule without correctives cannot be used in the field of fundamental rights" (cf. Corte di cassazione, Sezioni Unite civili, ruling no. 24414/2021, "motivi della decisione", § 20).

[240] See **J. PASQUALI CERIOLI**, *La mediazione*, cit., p. 23 and, earlier, **ID.**, *Laicità dello Stato ed esposizione del crocifisso nelle strutture pubbliche*, in E. DIENI, A. FERRARI, V. PACILLO (eds.), *I simboli religiosi*, p. 125 ff., spec. p. 139.

[241] "Prisoners and inmates who wish to do so are permitted to display, in their individual room or in their own space in the multi-person room, images and symbols of their religious denomination".

[242] In this sense, **G. CASUSCELLI**, *Interventi del Prof. Giuseppe Casuscelli, Presidente delle sessioni di lavoro della Tavola rotonda*, in M. PARISI (ed.), *Simboli e comportamenti*, cit., p. 9 ff., spec. pp. 12-13; **M. TOSCANO**, *Perché temere il muro bianco? Scuola, libera formazione della coscienza e principio di neutralità*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 3 of 2019, p. 234 ff., spec. pp. 241-242; **L.P. VANONI**, *Laicità e libertà di educazione*, cit., p. 269. The admissibility of the "provision of spaces, even within each classroom, in which signs, not pre-selected, of the different ideological or denominational affiliations of the learners can materially take place" is also shared by **J. PASQUALI CERIOLI**, *Laicità dello Stato*, cit., p. 139.

Such an interpretation, ensuring the maintenance of the (albeit thin) line of demarcation between public and private space in institutional places, is, moreover, constitutionally mandatory, in light of the re-enunciation of the supreme principle of 'laicità'[243] which, as noted in literature, by elevating pluralism to the "immediate object of protection," has also attracted the principle of impartiality - to which the neutrality of the space in which the Public Administration performs its functions is instrumental - "among the primary contents of the principle"[244].

[243] Cf. Corte costituzionale, ruling no. 67/2017, "Considerato in diritto", § 2.1, where the principle of 'laicità' is defined "not as the state's indifference to religious experience, but as the protection of pluralism, supporting the maximum expansion of everyone's freedom, according to criteria of impartiality".

[244] **M. TOSCANO**, *Crocifisso nelle aule scolastiche*, cit., p. 898. On the re-enunciation of the principle see also **J. PASQUALI CERIOLI**, *(Non)conclusioni: tre questioni su minoranze e laicità positiva negli attuali anni Venti*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 13 of 2021, p. 181 ff. The instrumental relationship between neutrality of public space and impartiality of administration, is investigated by **J. PASQUALI CERIOLI**, *Laicità dello Stato*, cit., p. 137 as well as by **G. CASUSCELLI**, *Laicità dello Stato e aspetti emergenti della libertà religiosa: una nuova prova per le intese*, in *Studi in onore di Francesco Finocchiaro*, I, Cedam, Padova, p. 467 ff., spec. p. 482, who states that "the secular state must not only be, but also appear impartial with respect to denominations". On another occasion (cf. **G. CASUSCELLI**, *Interventi*, cit., p. 14), the same Author had derived as a "necessary complement" to the secular character of the State, "the claim against the public administration that it concretely fulfills its duty of impartiality and neutrality with regard to the individual and collective religious factor".

Stato, Chiese
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Artificial Intelligence and New Scenarios of Religious Discrimination in Virtual and Real Space

SUMMARY: 1. Introduction: does AI discriminate? - 2. AI and religious discrimination: an overlooked but very real relationship - 3. Is non-discrimination law ready for the challenge of AI? - 3.1 AI bias at the bar: the Bridges case - 4. Conclusion.

1 - Introduction: does AI discriminate?

Applications of Artificial Intelligence (AI)[245] are currently diverse and unforeseeable. They increasingly affect people's day-to-day lives and routines in many fields[246]. In the public and private sectors, AI systems, especially those based on machine learning, not only assist human activities, but also make many choices and selections previously carried out by people[247].

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[245] A tentative definition of AI is provided by the Glossary of the European Ethical Charter on the use of Artificial Intelligence in judicial systems and their environment, p. 69-70. According to this document, AI is a "set of scientific methods, theories and techniques whose aim is to reproduce, by a machine, the cognitive abilities of human beings. Current developments seek to have machines perform complex tasks previously carried out by humans. However, the term artificial intelligence is criticised by experts who distinguish between "strong" AIs (yet able to contextualise specialised and varied problems in a completely autonomous manner) and "weak" or "moderate" AIs (high performance in their field of training). Some experts argue that "strong" AIs would require significant advances in basic research, and not just simple improvements in the performance of existing systems, to be able to model the world as a whole".

[246] As effectively described in the position paper "Religion & Innovation" 2019 by the Centre for Religious Studies at the Bruno Kessler Foundation (available here: *https://isr.fbk.eu/en/about-us/position-paper/*). **J.F. BALKIN**, *The Three Laws of Robotics in the Age of Big Bata*, in *Ohio State Law Journal*, vol. 78, n. 5/2017, pp. 1271-1241 even foresees the rise of an "Algorithmic Society".

[247] On the ethical implications of this substitution, see **A. CELOTTO**, *Come regolare gli algoritmi. Il difficile bilanciamento fra scienza, etica e diritto*, in *Analisi Giuridica dell'Economia*, n. 1/2019, p. 2.

The passage from human to AI decision-making meets the need for efficiency and speed. AI can analyse large datasets, discover patterns in massive amounts of data, and develop profiles that can be used to make decisions about people. However, despite their efficiency and their illusory lack of human attributes[248], AI models are not purely impartial machines. Indeed, it is not unusual for a computer process to show algorithmic bias: a lack of justice that "can be interpreted as one group's prejudice based on a particular categorical distinction"[249]. From a legal perspective, it is undisputed that besides privacy, liability and other concerns[250], a major challenge inherent to AI is the risk of discrimination: i.e. illegal differentiation on the basis of protected characteristics (such as gender, race, sexual orientation and also religion), not justified by a legitimate aim.

Regarding human behaviours, AI-driven decisions can also lead to direct and indirect discrimination[251]: "direct" meaning that people are directly discriminated against on the basis of protected characteristics; "indirect" or "disparate impact" meaning that a practice is neutral at first glance but in the end has a discriminatory effect. The discriminatory effects of AI are debated worldwide, and an Algorithmic Justice League has even been founded at the Massachusetts Institute of Technology to identify, mitigate and highlight algorithmic bias.

The origin of algorithmic discrimination may or may not be voluntary, i.e. intentional[252]. In most cases, the discriminatory effect and bias of AI are products of limited data, insufficient training or poorly written algorithms. The loopholes of AI can depend on where the system

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[248] **B. PLOMION**, *Does Artificial Intelligence Discriminate?* in *Forbes*, 2nd May 2017. See also **K. CRAWFORD**, *The Hidden Biases in Big Data*, in *Harvard Business Review*, 1st April 2013

[249] **S. NUORI**, *The Role of Bias in Artificial Intelligence*, in *Forbes*, 4th February 2021.

[250] An interesting analysis of the main constitutional concerns of AI is provided by **A. SIMONCINI**, *L'algoritmo incostituzionale: intelligenza artificiale e il futuro delle libertà*, in *Biolaw Journal*, n. 1/2019, p. 63 et seq. On AI and fundamental rights, *ex multis*: **O. POLLICINO**, "*Getting the Future Right - Artificial Intelligence and Fundamental Rights". A view from the European Union Agency for Fundamental Rights*, in *Biolaw Journal*, n. 1/2021, p. 7 et seq.

[251] Although, it was noted that the AI "has blurred the distinction between direct and indirect discrimination" (**C. NARDOCCI**, *Intelligenza artificiale e discriminazioni*, in *Rivista del Gruppo di Pisa*, n. 3/2021, p. 59).

[252] For a taxonomy of ways in which AI can discriminate, see **C. NARDOCCI**, *Intelligenza artificiale e discriminazioni*, pp. 16-17.

is designed and on the data used to test and refine it. Moreover, if AI learns through observation of human practice driven by ignorance or intolerance, it will reflect these things. Lastly, it should be borne in mind that algorithms do not always behave according to understandable logic[253].

However, there is also the possibility that AI discrimination is intentional: an organization could, for example, use proxies[254] to discriminate on the basis of sex, age, ethnicity or religion, relying on the fact that discrimination through algorithms is difficult to discover[255].

AI discrimination is a potential threat in the real world and in virtual space. Indeed, as Alessandro Negri[256] and Andrea Cesarini[257] show in this Symposium, the problematic realm of internet platforms should not be underestimated[258]. The latter use complex AI systems to control online cyberspace, and do not necessarily observe anti-discrimination law, being "unbound by any state dimension (or control)"[259]. Briefly, the potential discriminatory effects of AI are diverse and unpredictable, as well as its applications.

2 - AI and religious discrimination: an overlooked but very real relationship

[253] See **F. PASQUALE**, *The black box society: The secret algorithms that control money and information*, Harvard University Press, Cambridge-London, 2015.

[254] I.e. "intentional proxy discrimination", see **C. NARDOCCI**, *Intelligenza artificiale e discriminazioni*, p. 28.

[255] This scenario is a negative example of human-machine cooperation, also known as "automation bias". However, there are also positive examples of collaboration between human and artificial intelligence: in particular when humans have the last word in AI-driven decisions, which could be a sort of remedial action against unintentional discrimination.

[256] Focusing on the space for censorship and freedom of art in social media.

[257] Providing a "spatial" analysis of the principle of non-discrimination on the basis of religion.

[258] As noted by **L.P. VANONI** in the *Introduction* to this Symposium, "The new technologies are digitalizing the traditional public square, not only by replacing it with the social networks, but also by reshaping the boundaries of classical institutional places."

[259] **F. BIONDI**, *Intelligenza artificiale: coordinate costituzionali*, in *Diritto e valutazioni scientifiche* edited by B. LIBERALI, L. DEL CORONA, Giappichelli, Torino, 2022, p. 479.

As already mentioned, discrimination through AI may concern different human characteristics. For instance, Recital 71 of EU GDPR[260] provides a varied list of grounds for discrimination that controllers of algorithmic profiling procedures should avoid. The list includes "racial or ethnic origin, political opinion, *religion or beliefs*, trade union membership, genetic or health status or sexual orientation".

Although beliefs are a pivotal aspect of human coexistence, there is no case law on AI and religious bias and most of the literature and studies[261] focus on other grounds of discrimination. Still, this does not mean that AI is necessarily without potential direct or indirect discriminatory effects on the grounds of religion.

As an example of indirect discrimination, let us consider how some AI recruitment systems work. When an AI system has to assess job applications, the employer usually asks it to focus on and detect certain features. By selecting specific features, the employer may introduce bias against certain groups, voluntarily or otherwise. For example, many employers in the USA look for people who studied at certain famous universities (Harvard, Stanford, NYU, Columbia, Berkeley). This among others excludes students who due to their belief or faith, attended religion-oriented universities (Notre Dame for Catholics, BYU for Mormons etc.), which are also excellent universities but less famous. The choice of selecting job applicants according to the university they attended is apparently neutral but can discriminate against certain religious groups.

The same is true if the criterion to select a good employee is proximity to the company. If the company office is in the city centre, poorer people living far from the centre are at a disadvantage. In our societies, since poorer people often have an immigrant background and belong to religious minorities, the proximity criterion could be a multiple discrimination, also on religious grounds.

Focusing on direct discrimination, an interesting case concerned Churchix, a facial recognition software used by churches[262] to track the

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[260] Regulation EU n. 2016/679 of 27 April 2016.

[261] Including the 2018 report by the Council of Europe on "Discrimination, artificial intelligence and algorithmic decision-making".

For an innovative contribution on AI and religious freedom, see **L.P. VANONI**, Deus ex machina. *Intelligenza artificiale e libertà religiosa nel sistema costituzionale degli Stati Uniti*, in *Stato, Chiese e pluralismo confessionale*, (*https://www.statoechiese.it)* , n. 15/2020, p. 87 et seq.

[262] In 2015, according to the Washington Post (see "*Skipping church? Facial recognition software could be tracking you*" of 14 July 2015), 40 churches all over the world used this

regular attendance of believers, see who is missing and even make security checks. Churchix can tell the church authorities when a person who is not in its face database is attending a religious event. The authorities can therefore quickly deal with a misbehaving visitor.

This tool raises tricky constitutional issues, ranging from ensuring privacy to guaranteeing religious freedom (AI tracking of churchgoer attendance could be seen as compulsion and a violation of believers' freedom). There is the concrete risk of direct discrimination on the basis of religious habits: Churchix labels those who are not members of a specific religious community or congregation as potential threats, persons to monitor and who arouse suspicion.

Let us now consider virtual space. Another area where AI can easily lead to religious bias is that of automatic writing prompts. For example, in a paper published in Nature Machine Intelligence[263], a group of researchers found that large language models - increasingly used in algorithmic applications for mobiles and other devices - associate Muslims with violence and bad behaviour.

The occasions where algorithms could give rise to religious bias are many and underline why scholars should not overlook such grounds for discrimination.

3 - Is non-discrimination law ready for the challenge of AI?

As we know, direct and indirect discrimination on the grounds of certain human characteristic are prohibited in many treaties, fundamental rights charters and constitutions[264]. Non-discrimination law has various tools and extensive case-law that can be interpreted for application to

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facial recognition system.

[263] **A. ABID, M. FAROOQI, J. ZOU**, *Large language models associate Muslims with violence*, in *Nature Machine Intelligence*, n. 3/2021, p. 461-463.

[264] Considering only the Italian case, Article 3 of the Constitution states that "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal or social condition". In addition, legislative power shall be vested in compliance with constraints deriving from EU legislation and international obligations, that also include non-discrimination provisions. For example, under Article 14 of the ECHR "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

discrimination through AI. Nonetheless, the application of traditional instruments of current discrimination law to algorithmic bias encounters particular issues, three of which are worth mentioning.

First, this branch of law has different sources, often concerning specific fields (employment, education etc.), and since AI is used for many purposes, some grey areas can remain unregulated.

Second, proxies can produce unreasonable differentiations based on "new" features not listed in non-discrimination acts. This means that new groups or minorities can suffer bias or discrimination unforeseen by any law.

Third, regarding the issue of liability, it can be extremely challenging to determine whether the source of AI bias stems from human decision makers or automated AI systems. Judges must try to understand what happens in the black box of the algorithm and assess whether the discriminatory effect is intentional or due to poorly written algorithms. Where the illegal effect stems from a malfunctioning algorithm, it is necessary to establish whether AI users are held to be aware of (and prevent) the discriminatory attitude of the machine. This issue emerges clearly from the first court case on discrimination through a facial recognition system.

3.1 - AI bias at the bar: the Bridges case

The first case ever decided by a court on the discriminatory effect of a facial recognition system was the *Bridges* case in Wales. It concerned use of this instrument by police in public places to identify people for whom warrants had been issued for suspected offences[265]. Wherever it is installed, the system (called "AFR Locate") looks for face matches with a police database of photographs.

A Cardiff citizen, Mr. Bridges, brought suit in the High Court of Justice of Wales, alleging that he was caught on AFR Locate cameras and that this violated the law in several respects. Among the other groups of claims, the appellant asserted that the South Wales Police Force had failed to comply with its obligation under the Equality Act 2010 and the Public Sector Equality Duty (PSED) of 2011. Indeed, the police did not consider the possibility that AFR Locate might produce results that were indirectly

[265] "Between late 2019 and mid-2020, an unprecedented controversy reached courts in Europe" (**A. PIN**, *'A Novel and Controversial Technology.' Artificial Face Recognition, Privacy Protection, and Algorithm Bias in Europe*, in *William & Mary Bill of Rights Journal*, Vol. 30, n. 2/2021, p. 291).

discriminatory on the grounds of sex and race, for example producing a higher rate of false positive matches for female faces and for black and minority ethnic faces than for other groups.

On 4th September 2019, the High Court of Justice of Wales held that it was lawful for the police to use the AFR Locator, since it met the fundamental need for public security and passed the proportionality test[266]. In particular, it offered the following guarantees: after matching images, it destroys all pictures collected; people are informed that the system is watching them in a given area; when the AFR detects a suspect, the last word for identification is that of a policeman (a human). Regarding the discrimination argument, the Court simply said that there was no firm evidence that the Locator produces indirectly discriminatory results[267].

This judgement was overturned on 11th August 2020 by the Court of Appeal of England and Wales[268]. In the judges' opinion, the police forces had never sought to verify, directly or otherwise, whether the software showed unacceptable bias on the grounds of race or sex. Indeed, nobody had access to the datasets on which the system was trained and therefore could not analyse those datasets for bias. In the Court's view: "[a]s a minimum for confirming whether an AFR system is biased, the database statistics, such as the number of males to females, and different races considered, would need to be known"[269].

It was not proved that the facial recognition system used by the South Wales Police Force was discriminatory, but due to the lack of proper controls, the Court established that the police had not done all that they reasonably could to comply with the non-discrimination law.

The police is just a final user of the facial recognition method: it did not write the algorithm, nor train it with the necessary datasets. However, since AFR is "a novel and controversial technology"[270], the Courts established that all police forces that intend to use it in future should ensure that every reasonable measure is taken to verify that the software does not have a racial or gender bias.

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[266] R (Bridges) v. Chief Constable of South Wales Police [2019] EWHC (Admin) 2341, hereinafter *Bridges 2019*.

[267] See *Bridges 2019*, par. 153.

[268] R (Bridges) v. Chief Constable of South Wales Police [2020] EWCA (Civ) 1058, hereinafter *Bridges 2020*.

[269] See *Bridges 2020*, par. 193.

[270] See *Bridges 2020*, par. 201.

As pointed out in the literature, requiring that AI users (in this case the police) demonstrate that they have taken into proper account the risk of discrimination while deploying facial recognition systems, as the Court of Appeal has done, "shifts part of the burden of proof from the subject claiming to have been discriminated against to the respondent"[271].

The Bridges case suggests that AI users must be informed about how the instruments they use work and can incur sanctions in the case of lack of proper assessments. Whether this jurisprudence will be upheld in the future, including in other jurisdictions, is currently unknown. It is certainly a very cautious approach to AI recognition systems and can be extended to all types of discrimination, including religious discrimination. Indeed, it cannot be excluded that facial recognition algorithms could have discriminatory effects not only against coloured persons or women, but also against people who wear headdresses, veils, beards or hairstyles related to certain religious beliefs.

4 - Conclusion

The debate on the regulation of AI is ongoing and there is a need for specific legal tools, tailored to the features of this technology[272]. Although it has been argued that the legal categories we already have can frame the phenomenon, the need for new rules cannot be denied[273]. Many voices, especially in Europe, claim that it is time to negotiate international or global treaties on artificial intelligence.

Regarding the discriminatory effects of AI, it stands to reason that their mitigation is not only a legal issue, but also a question of technological development: the creators of AI, engineers and computer scientists, are constantly developing corrective measures and eliminating bias-producing flaws from their systems. A pivotal role is also played by humans: people cannot completely abdicate to machines for decision-making. Their role in mitigating and smoothing AI errors and biases is irreplaceable.

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[271] **A. PIN**, *'A Novel and Controversial Technology.' Artificial Face Recognition, Privacy Protection, and Algorithm Bias in Europe*, p. 309.

[272] See **A. SIMONCINI**, *Verso la regolamentazione della Intelligenza Artificiale. Dimensioni e governo*, in *Biolaw Journal*, n. 2/2021, p. 411 et seq.

[273] **M. LUCIANI**, *Forum AI and Law*, in *Biolaw Journal*, n. 1/2020, p. 489.

Nonetheless, as the Bridges case demonstrates, jurists too have been refining their tools and framing the problem to meet the challenge. Not by chance, the strategy on AI elaborated by the European Commission also names observation of the principles of non-discrimination and equity among the fundamental requirements for a reliable AI, aware that "the [d]ata sets used by AI systems (both for training and operation) may suffer from the inclusion of inadvertent historic bias, incompleteness and bad governance models"[274].

Although a start has been made toward mitigating algorithmic discrimination, two final remarks seem necessary.

First, it should not be forgotten that the development of AI can also be useful for fighting discrimination. AI and algorithms can be used to detect unfair discrimination, and software for this purpose has already been written. So it is conceivable that judges will soon use AI to detect discriminatory choices and decisions by humans or even other AI systems. Returning to the example of recruitment policies: in order to verify whether or not an automated selection processes produces discriminative effects on the grounds of religion, an algorithm can be used to analyse the data of people hired.

Second, it is extremely important that jurists' attention to the phenomenon of AI bias should not be limited to certain grounds of discrimination but should also extend to less explored areas, including religious discrimination. Indeed, due to the expansion and development of AI in everyday life, religious and other discrimination could easily find its way into new virtual and real spaces.

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[274] *Ethics guidelines for trustworthy AI*, High-level expert group on Artificial Intelligence set up by the European Commission, 8 April 2019, p. 18. Among the other relevant EU documents, see: "Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM (2021) 206 final (21 April 2021). See also "An EU Artificial Intelligence Act for Fundamental Rights - A Civil Society Statement", 30 November 2021).