

FREEDOM OF RELIGION AND THE ECHR

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1. FOREWARD

This brief report aims at explaining the relationships and potential inconsistencies between the national and the ECHR level of protection of freedom of religion through an analysis of two cases: Lombardi Vallauri and Lautsi.

The first part of the report deals with the protection given to freedom of religion by the Italian Constitution (IC) and, more in general, by the national legal system, with particular regard to the individual dimension of religious rights (IC, art. 19). The second part deals with art. 9 ECHR, in light of the Strasbourg Court case-law. After that, we will treat the two mentioned cases, in order to show the delicate and complex relationships between

national and European level when dealing with the display of crucifix in state schools classrooms and with the appointment of teachers in catholic Universities.

The analysis of the two areas (conventional and national) and reciprocal relationships will be necessarily synthetic. It will nonetheless testify the difficulty of finding a stable balance between the rights related to the religious dimension (individual and group) and other conflicting interests of the State; a difficulty which grew a lot since the first recognition of these liberties.

2. FREEDOM OF RELIGION IN THE ITALIAN CONSTITUTION: GENERAL REMARKS

The 1948 Italian Constitution represents a clear break from the regulation of the religious phenomenon contained in the *Statuto Albertino*. The latter provided for the Apostolic Roman Catholic religion as the ‘only State religion’, placing it in a privileged position. This recognition, however, did not originally entail any repression against other cults: under the *Statuto*, the practice of other religions was tolerated and other religious believers could not be discriminated in the enjoyment of civil and political rights for religious reasons.

In the Fascist period, a number of statutes and regulations imposed the mandatory teaching of the Catholic religion (r.d. 2185/1923) and the crime of public insult of State religion (r.d. 3288/1923): later on, the privileged position of the Catholic Church was firmly established in the *Patti Lateranensi* of 1929. During the fascist period, other religions were allowed, but were subject to significant limitations: they had to profess principles compatible with ‘public order’ and ‘morality’, and they were subject to a strong Government control.

The 1948 Constitution openly rejected the previous policies elected by the fascist Government. Religious freedom is protected and regulated in four articles: articles 7 and 8

(and 20), concerning the institutional and collective dimension of religious freedom and article 19, concerning its individual dimension. The framework is completed by articles 2 and 3 of the Constitution, promoting the ‘personalistic principle’ and the prohibition of discrimination on religious grounds, among others.

Articles 7 and 8 (and 20) establish the principle of secularism, placing it among the fundamental principles of the constitutional order: art. 7 establishes the sovereignty and mutual independence of the State and the Catholic Church, each in its own order, and art. 8 guarantees ‘equal freedom’ – not equality, by the way – to all religious confessions. With these provisions, the Constitution retains the historical privileges of the Catholic religion, providing at the same time for instruments (the conclusion of agreements between confessions and State, for instance) to promote equality of other religious denominations. This article, together with the protection of the individual sphere of freedom of religion (art. 19), establishes the principle of secularism which, according to the Constitutional Court case law (decision No. 203 of 1989), means a ‘guarantee for the protection of freedom of religion in a context of cultural and confessional pluralism’.

Applying the secular principle, the Constitutional Court has repeatedly declared unconstitutional a number of statutes containing discriminations against religious confessions without agreements with the State (Const. Court no. 195/1993), concerning religious oath (Const. Court no. 149/1995 and 334/1996) and blasphemy (Const. Court no. 440/1995 on the crime of blasphemy). This way, the Court tried to prohibit any discrimination among religious confessions and to protect the constitutional fundamental principles of equality and secularism.

Art. 19 guarantees the individual dimension of religious rights, establishing that all persons have «the right to profess freely their own religious faith in any form, individually or in association, to disseminate it and to worship in private or public, provided that the religious rites are not contrary to public morality».

So declined religious freedom consists of rights that relate primarily to its external dimension, even though it is comprehensive of the freedom of conscience and of atheism, which are implied in the freedom to believe.

The individual dimension is closely related to the collective one. On the one hand, some individual rights (for instance the right to celebrate a holy day) exist only if the religious group is recognized through an official agreement signed with the State. On the other hand, other individual rights can be conditioned or limited by denominational organizations, which can fire (or refuse to appoint) workers and teachers when their personal religious beliefs are proven not to be consistent with the organization's official ideology (Const. court 195/1972 known as Cordero case).

The Italian Constitutional court also recognizes that the right to profess a cult in public or private places cannot be limited by statutes requiring special and stricter land permissions compared with the ones applicable to catholic places of worship (Const. court no. 59/1959).

Under the umbrella of art. 19, personal data concerning religious beliefs are considered 'sensible/sensitive data' to be protected by the Code of Privacy (d.lgs. 196/2003, art. 4); more generally, article 19 of Constitution, again, should provide for the secular principle also with regard to the critical issue concerning the display of the crucifix in public school, hospitals and courts (see below).

3. FREEDOM OF RELIGION IN THE ECHR AND THE CASE LAW OF THE STRASBOURG COURT

Art. 9 of the ECHR establishes, in the first paragraph, that «Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance».

The second paragraph provides that «Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others». Two different dimensions are generally derived from the ECHR article: one is internal and the other is external.

The first relates to the right to believe and not to believe and has great significance: the right cannot be subject to limitations by the State on the ground of its obligation of neutrality, which means that the State must refrain from any interference in the sphere of individual consciousness. The external dimension, envisaged by the second paragraph, concerns the actual practice of worship, the right of teaching, observing, and professing a creed.

This dimension can be conditioned and limited only by law and for purposes established by the ECHR. Furthermore, any limit or restriction to these liberties must be necessary and proportional in accordance with the idea of democratic and pluralistic society recognized in the ECHR case law.

The ECHR's protection of religious rights is granted not only to individuals but also to groups, because of their importance in the concrete realization of individual rights and interests in the religious sphere.

From this viewpoint, States must ensure, under the principle of neutrality and religious pluralism, equal treatment to any confessions (cases of *Jehovah's Witnesses v. Russia*, 2010 and *Jehovah's Witnesses v. Austria*, 2008) as well as no interference in the internal organization of churches with regard to the appointment of religious ministers (*Serif v. Greece* case, 1999).

Consequently, a margin of appreciation for member States in regulating relationships between State and religions is certainly permissible, but it has to be reasonable and proportional in order not to limit the principles of neutrality and pluralism

in religious and cultural matters. Applying this balancing test, the European Court of Human Rights recognized the compatibility of French law prohibiting Islamic veil in public school (Dogru v. France, 2008; Kervanci v. France, 2008; Ghazal v. France, 2009; Aktas v. France, 2009), in accordance with the French principle of *laïcité*. In the judgment Arslan v. Turkey, on the same basis, the Court declared incompatible with the ECHR (because disproportional and unreasonable) a Turkish statute establishing the arrest of people wearing religious costumes in places open to the public.

So doing, Strasbourg judges tried to find a case-by-case approach that strikes a balance between the margin of appreciation of the States and the protection of rights recognized in art. 9 of the Convention: States can provide higher standards of protection of freedom of religion than those requested by the Court, but they cannot lower them, establishing limitations and conditions not consistent with the principle of neutrality and pluralism imposed by ECHR.

Two different cases, originated in Italy, exemplify the delicate and complex balance between the margin of appreciation of the State and individual rights.

4. THE CASES OF LOMBARDI VALLAURI AND LAUTSI

A number of well-known decisions of the Italian Constitutional Court (no. 348 and 349 in 2007, confirmed by no. 311 and 317 of 2009, no. 93 of 2010 and no. 80 and 113 of 2011), acknowledged to the ECHR, as interpreted by the Strasbourg Court, the rank of sub-constitutional sources of law with priority over acts of Parliament (*norme interposte*). In so doing, our Constitutional judges recognized that statutes and regulatory acts have to be consistent with the European Convention and the Courts judgments as a consequence of the reference contained in article 117 of Italian Constitution.

From this perspective, the Lombardi Vallauri and the two Lautsi decisions constitute an excellent testing ground to verify the actual alignment between national protection of religious freedom and the conventional one.

The Lombardi Vallauri decision (October 20, 2009) concerns the non-renewal of a teaching position as a lecturer at the Milan Catholic University as a consequence of the withdrawal of the approval by the Holy See. This decision was taken because of certain personal opinions expressed by professor Lombardi Vallauri which were contrary to the catholic doctrine.

Given that the Vatican approval is a necessary condition for the teaching in this denominational University, the Faculty Council had excluded the application of professor Lombardi Vallauri. The plaintiff, then, asked the Italian administrative court of first instance to quash the decision because of its incompatibility with the Italian Constitution. The administrative court of first instance (TAR Lombardia, sez. II, 7027/2002) and the administrative court of Appeal (Consiglio di Stato, sez. VI, 1762/2005) rejected his application. Exhausted the internal remedies, the plaintiff decided to bring an action before the European Court of Human Rights, lamenting, *inter alia*, the infringement of art. 9 on religious freedom.

In their decision (2009), the European judges recognized the need to protect the religious orientation of the denominational organization, in accordance with the Cordero decision of the Italian Constitutional court (1972). However, the European court asked the University to demonstrate that there was a strict and effective *liason* (relationship) between Lombardi Vallauri's personal opinions and his teaching activity. Because the University failed to prove this, the Court declared the University decision illegal and in violation of the freedom of expression (art. 10 ECHR) and of the right of due process (art. 6 ECHR), since the plaintiff was denied the right to defend.

The Court stated that, while a limitation of individual conscience and freedom of expression is compatible with the ECHR in order to protect the organization's ideology (and therefore, ultimately, the *rights of others*), the actual link between the contested position

taken by the teacher, in contrast to the doctrine of the Church, and his teaching has to be proven.

The Lautsi case (i.e. the two decisions made by *Sec. II* of the ECHR Court on November 3, 2009, and by *Grande Chambre* on March 18, 2011) arises from the action brought by Lautsi against the School Council's decision to keep the crucifix in the classrooms despite the removal request submitted by the applicants in the name of freedom of religion and freedom from religion.

The appeal against the decision was brought before the administrative courts of first instance, that raised (before the Constitutional Court) the question of constitutional legitimacy of the provisions providing for the display of the crucifix (art. 119 r.d. 1297/1928 tab. c and art. 118 r.d. 965/1924). After the inadmissibility pronounced by the Constitutional Court, because of the regulatory nature of the attacked provisions, the judge decided to dismiss the action based on the following grounds: (a), the crucifix should not be just a religious symbol, but also an historical and cultural one; b) the principle of secularism in force in the Italian legal system should not preclude the display of the crucifix, which would be an expression of an essentially secular culture, promoter of the principles of freedom, equality and solidarity; c) his being 'expression of some secular principles' would confirm the crucifix an 'affirmative and confirmative symbol of the Republic's principle of secularism' and hence respectful of religious freedom (TAR Veneto, sec. III, 1110/2005). The *Consiglio di Stato*, in the appeal against the ruling of the TAR, upheld the decision and the reasoning of the first instance court (Cons. State, sez. VI. 556/2006).

The appellants then applied before the Strasbourg court, complaining about the violation of art. 9 ECHR and article. 2 of the additional Protocol No. 1 concerning the right of parents to educate their children according to their philosophical and religious beliefs. The second section, recognizing the crucifix as a eminently religious symbol, declared its exposure in the classrooms incompatible with the mentioned ECHR principles. However, two years later, the *Grande Chambre* (with 15 votes in favor and two dissenting opinions)

overruled the decision: in the course of a process which had, as third parties or in support of Italy 20 ECHR member States, the Strasbourg Court recognized a different meaning of the secularism principle and, leaving to Italy a wide margin of appreciation, held the crucifix in public places compatible with the freedom of religion by reason of its essentially passive (and inactive) nature.

This second decision, as well as the first one, raised many criticisms. In particular, if the first decision was deemed to have limited too much the State margin of appreciation, the decision of the *Grande Chambre* seems unconvincing in its argumentative path: it recognizes the compatibility of the exposure of the crucifix in the light of the margin of appreciation, for instance, without taking into account that in Italy its exposure is far from undisputed, as witnessed by the split between ordinary courts and administrative courts. The crucifix in classrooms also seems incompatible with the secular principle of impartiality, as emerges from the constitutional case law; according to critics, further, the essentially passive nature of the crucifix, as meant by the European Court in order to avoid a violation of religious freedom, seems to draw a very questionable and unprincipled distinction among religious symbols. Compared to the ECHR principle of neutrality, it is not easy to explain how both the Italian exposure of the crucifix and the French law banning the Islamic veil could be compatible. If the purpose of securing religious pluralism and neutrality of the institutions is threatened by the presence of a teacher wearing the Islamic veil, why a symbol imposed in each public school classrooms should not be regarded as a systematic and *per se* violation of the same principles?

Overall, the decision does not seem to show the argumentative accuracy that the importance of issues imposes. It also happens to legitimize the current Italian legal regulation of the crucifix, failing to trigger a new reflection on the issue and precluding the search for solutions that may be more sensitive and respectful of the Constitutional principles and the religious and cultural pluralism.

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