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## Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and State

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# PUBLIC SCHOOLS, THE ITALIAN CRUCIFIX, AND THE EUROPEAN COURT OF HUMAN RIGHTS: THE ITALIAN SEPARATION OF CHURCH AND STATE

Andrea Pin\*

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## INTRODUCTION

The recent judgments of the European Court of Human Rights (“ECHR” or “Court”) with regard to the presence of the Catholic symbol of the crucifix in Italian public schools<sup>1</sup> are just the latest episodes of the ongoing juridical and political struggle for the secularization of the Italian state. This debate involves the interpretation and the enactment of the Italian Constitution as well as the political and cultural trends that shape the Italian public debate about the public role of religion. Until 2009, the debate basically concerned the constitutional values of religious freedom and equality, but had also touched upon the role of religion—namely the Catholic Church—in Italian public life.<sup>2</sup>

The decisions of the ECHR, which operates in Strasbourg,<sup>3</sup> pushed the debate further: from the interpretation of the Italian Constitution<sup>4</sup> to the respect for international treaties.<sup>5</sup> In the first degree, the Court found Italy’s policy of displaying crucifixes in public schools violated Article 9 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention on Human Rights”) that protects the right to freedom of religion.<sup>6</sup> The popular and political criticisms of the judgment were

<sup>1</sup> The first decision was delivered as a chamber judgment on November 3, 2009. *Lautsi v. Italy*, Eur. Ct. H.R. (2009) [hereinafter *Lautsi I*], [http://www.echr.coe.int/ECHR/homepage\\_EN](http://www.echr.coe.int/ECHR/homepage_EN) (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Lautsi” in the “Case Title” box and “Italy” in the “Respondent State” box). After the Italian government requested that the case be referred to the Grand Chamber, the second decision was released by the Grand Chamber on March 18, 2011. *Lautsi v. Italy*, Eur. Ct. H.R. (2011) [hereinafter *Lautsi II*], [http://www.echr.coe.int/ECHR/homepage\\_EN](http://www.echr.coe.int/ECHR/homepage_EN) (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Lautsi” in the “Case Title” box and “Italy” in the “Respondent State” box).

<sup>2</sup> See generally CARLO CARDIA, *LE SFIDE DELLA LAICITÀ ETICA, MULTICULTURALISMO, ISLAM* (2007); LUCA DIOTALLEVI, *UNA ALTERNATIVA ALLA LAICITÀ* (2010); GUSTAVO ZAGREBELSKY, *SCAMBIARSI LA VESTE STATO E CHIESA AL GOVERNO DELL’UOMO* (2010).

<sup>3</sup> *Visitors*, EUR. CT. OF HUM. RTS., <http://www.echr.coe.int/ECHR/EN/Header/Visitors/Information+for+visiting+groups/How+to+request+a+visit> (last visited Feb. 20, 2011).

<sup>4</sup> See Stefano Sicardi, *Alcuni Problemi della Laicità in Versione Italiana*, STATO, CHIESE E PLURALISMO CONFESIONALE, 15 (Mar. 2010), [http://www.statoechiese.it/images/stories/2010.3/sicardi\\_alcunim.pdf](http://www.statoechiese.it/images/stories/2010.3/sicardi_alcunim.pdf).

<sup>5</sup> See Fulvio Cortese & Silvia Mirate, *La CEDU e il Crocifisso: Prodromi, Motivi e Conseguenze di una Pronuncia Tanto Discussa*, FORUM DI QUADERNI COSTITUZIONALI, 1 (July–Dec. 2009), [http://www.forumcostituzionale.it/site/images/stories/pdf/documenti\\_forum/paper/0167\\_cortese\\_mirate.pdf](http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0167_cortese_mirate.pdf).

<sup>6</sup> 1. 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.

2. 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

immediate and forceful throughout Italian public discourse, because a majority in Italian society supports the presence of the crucifix in public schools.<sup>7</sup> The decision thus revealed rising skepticism toward the ECHR and its role in protecting human rights because Italian majority opinion contrasted so strongly with the Court's position on such a fundamental right as religious freedom—as well as its related principles, such as the separation of church and state and the issue of the role of religion in a pluralistic society. The recent decision, which was given by the Grand Chamber, reversed the first degree's decision upholding the display of the crucifix.<sup>8</sup> Therefore, the decision is probably going to diminish the criticism toward the ECHR.

Like many countries in the Western world, Italy has a complicated church-state relationship.<sup>9</sup> Various scholars have demonstrated the difficulty in defining the bounds of the two spheres of church and state in countries of different traditions.<sup>10</sup> Italy has proved to be a crossroads of many different approaches to the relationship between church and state.<sup>11</sup> This is especially true in the case of the display of religious symbols in public institutions, such as public schools.<sup>12</sup>

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the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights] (entered into force Sept. 3, 1953).

<sup>7</sup> According to some polls, 84% of Italians disagreed with the ECHR decision and were in favor of the display of the crucifix in public schools. *Il Crocifisso Torna Davanti ai Giudici Europei di Strasburgo*, ITALIA DALL'ESTERO (June 30, 2010), <http://italiadallestero.info/archives/9699>.

<sup>8</sup> See *Lautsi II*, *supra* note 1.

<sup>9</sup> For a discussion on a Spanish example, see Maria del Carmen Garcimartín Montero, *La Laicidad en las Cortes Constituyentes de 1978*, 72 IUS CANONICUM 539, 539–94 (1996), and María J. Roca, *La Neutralidad del Estado: Fundamento Doctrinal y Actual Delimitación en la Jurisprudencia*, 48 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 251, 251–72 (1996). For a discussion on a French example, see PAOLO CAVANA, *INTERPRETAZIONI DELLA LAICITÀ ESPERIENZA FRANCESE ED ESPERIENZA ITALIANA A CONFRONTO* (1998).

<sup>10</sup> Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2272 (1997). See generally STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995); Lasia Bloss, *European Law of Religion—Organizational and Institutional Analysis of National Systems and Their Implications for the Future European Integration Process* (The Jean Monnet Program, Working Paper No. 13/03, 2003), <http://centers.law.nyu.edu/jeanmonnet/papers/03/031301.pdf>.

<sup>11</sup> Augusto Barbera, *Il Cammino della Laicità*, FORUM DI QUADERNI COSTITUZIONALI, pt. 3 (2007), [http://www.forumcostituzionale.it/site/images/stories/pdf/nuovi%20pdf/Paper/0036\\_barbera.pdf](http://www.forumcostituzionale.it/site/images/stories/pdf/nuovi%20pdf/Paper/0036_barbera.pdf).

<sup>12</sup> This is a common feature of the international debate about the relationship between religion and state. For a discussion on a French example, see HAUT CONSEIL À L'INTÉGRATION, *CHARTRE DE LA LAÏCITÉ DANS LES SERVICES PUBLICS ET AUTRES AVIS* 191–209 (2007), <http://lesrapports.ladocumentationfrancaise.fr/cgi->

The word that is classically used by scholars as well as by courts to define the relationship between religion and state in Italian is *laicità*.<sup>13</sup> This Article will deal with this concept extensively, mostly because there is no agreement in Italy around the concept itself and its legal implications.<sup>14</sup> The disagreement is so striking that both those who endorse and those who oppose the public display of religious symbols refer to the principle of *laicità*.<sup>15</sup>

Precisely because of the difficulties in defining the relationship between church and state, the Author deliberately uses the Italian word *laicità* wherever the Italian courts and scholars do so in addressing such a relationship. The Author prefers not to translate the word because its meaning and implications are exactly what are at issue now, and any translation might be misleading. Rather, the Author tries to describe its meaning with the aid of the court decisions that have contributed to its definition.

Until the ECHR's decisions, the disagreement about *laicità* was mainly a domestic issue in Italy.<sup>16</sup> But following the first ECHR's decision, there was opposition between the majority of Italian society and the Court that shifted the discussion into an international debate.<sup>17</sup>

This Article aims to highlight why and how opinions about the relationship between church and state conflict within the Italian legal culture, as well as between the Italian mainstream and the ECHR's attitude in the first degree. Moreover, this conflict does not just demonstrate that there are different conceptions of the basic features of democratic and constitutional states, such as religious liberty and the relationship between church and state, but it also

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bin/brp/telestats.cgi?brp\_ref=074000341&brp\_file=0000.pdf. For a discussion on an example from Quebec, see G. BOUCHARD & C. TAYLOR, CONSULTATION COMM'N ON ACCOMMODATION PRACTICES RELATED TO CULTURAL DIFFERENCES, BUILDING THE FUTURE: A TIME FOR RECONCILIATION 80–84 (2008), <http://www.accommodements.qc.ca/documentation/rapports/rapport-final-abrege-en.pdf>.

<sup>13</sup> Giulio Ercolessi, *Italy: The Contemporary Condition of Italian Laicità*, in SECULARISM, WOMEN & THE STATE: THE MEDITERRANEAN WORLD IN THE 21ST CENTURY 9, 9–11 (Barry Kosmin & Ariela Keysar eds., 2009).

<sup>14</sup> See *id.* at 11.

<sup>15</sup> See *id.*

<sup>16</sup> The internal debate paid little or no attention to international treaties and focused on the interpretation of Italian constitutional provisions regarding the right to religious freedom. See, e.g., Francesco Finocchiaro, *Alle Origini della Laicità Statale*, 1 IL DIRITTO ECCLESIASTICO 1257, 1257 (2002); Francesco Finocchiaro, *La Repubblica Italiana Non È uno Stato Laico*, 1 IL DIRITTO ECCLESIASTICO 11, 11 (1997); C. Mirabelli, *Prospettive del Principio di Laicità*, 2 QUADERNI DI DIRITTO E POLITICA ECCLESIASTICA 331, 331 (2001).

<sup>17</sup> See Giuseppe D'Elia, *Il Crocefisso nelle Aule Scolastiche: Un Paradosso Che Non Resiste all'Europa*, FORUM DI QUADERNI COSTITUZIONALI, 1 (Nov. 2009), [http://www.forumcostituzionale.it/site/images/stories/pdf/documenti\\_forum/paper/0160\\_delia.pdf](http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0160_delia.pdf).

illuminates the different opinions about what the role of religion should be in a pluralistic society. Consequently, different viewpoints about the role of religion in a pluralistic society lie beneath the surface of each court's decisions.

The dominant Italian constitutional interpretation believes pluralism<sup>18</sup> is enriched by religious culture and thought in public institutions such as schools. Though this opinion is debated—and was partially abandoned by the Constitutional Court itself around fifteen years ago—it remains well embedded in Italian constitutional, as well as legal, culture.<sup>19</sup> On the contrary, the ECHR's first degree decision rationalized that adherence to Article 9 guarantees religious liberty by secularizing public institutions and life and prohibiting any space for religious expression in the public sphere.<sup>20</sup>

Nevertheless, the conflict between these two different views of pluralism, that of the prevailing Italian attitude and that of the ECHR's in its first degree, is largely due to the latter court's expansive interpretation of its own role. The ECHR first degree's decision overstepped the boundaries of its function and tried to supplant the Italian domestic debate about the relationship between church and state within a pluralistic society with its own view, based on the European Convention on Human Rights. In supplanting the domestic Italian debate on religious pluralism, the ECHR relied on a highly debatable interpretation of the religious freedom provision of the European Convention, using a contentious interpretation of the right to religious freedom as protecting religious minorities at the expense of the widely held view of the Catholic majority.

The following decision restored, at least partially, the primary role of the states in shaping their own proper models of relationship between church and state. Even though the Grand Chamber did not openly criticize the wide interpretation of the role of the ECHR, it trimmed the expansive action that was taken in the first degree.

Part I of this Article analyzes the Italian judgments that led the applicant to the ECHR as well as the ECHR's decisions in *Lautsi v. Italy*. It shows how two

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<sup>18</sup> The Author refers to pluralism in a broad sense, defined as a public sphere in which different religious and cultural identities coexist, according to the Italian Constitutional Court. Corte Cost., 18 ottobre 1995, n. 440, pt. 3.2, para. 4 (It.).

<sup>19</sup> See *Lautsi I*, *supra* note 1, paras. 22–26.

<sup>20</sup> A comparative approach can be found in Iain T. Benson, *The Case for Religious Inclusivism and the Judicial Recognition of Religious Associational Rights: A Response to Lenta*, 1 CONST. CT. REV. 295, 295–310 (2008).

interpretations of religious liberty, equality, and the relationship between church and state have collided in the courts' rationales. Part I also briefly illuminates the intellectual backgrounds underlying the rationales of the Italian courts and of the ECHR's decisions. Part II analyzes the Italian constitutional framework and the judicial decisions that have reflected upon religious freedom and equality—decisions that played a prominent role in shaping the principles of the Italian relationship between church and state. The analysis highlights that the trend of the jurisprudence started with an unprecedented and religion-friendly conception of *laicità*, and progressively moved toward a strong separation between church and state, whose positions are quite akin to the attitude that the ECHR kept in the first degree. Part III briefly considers the cultural and juridical debate that lies beneath these court decisions and which contributes such a crucial role to this topic. As we will see, the domestic debate mostly addresses the prominent role of the Catholic Church and its influence on Italian social and political culture.<sup>21</sup> This debate is mainly concerned about the influence of Catholicism on younger generations and about the role of public education in shaping the mentality of citizens.<sup>22</sup> This path will be helpful to understand the disparity between the Italian courts' and the ECHR's conceptions of religious pluralism. The Conclusion reflects on the status of the ongoing debate about religious liberty and relationship between church and state in light of the ECHR's decisions, on the efforts of the Court to push the Italian debate towards the French cliché of separation between religion and state, and on the effects that the Court's decision has on Italians' attitude towards the Court itself. In the Conclusion, the Author argues that the ECHR has at least initially misunderstood the role of the European Convention on Human Rights and undermined the survival of the constitutional traditions of the member states.

## I. THE CRUCIFIX AT SCHOOL: FROM ITALY TO STRASBOURG

### A. *The Decision of the Administrative Tribunal and the Appendix Before the Council of State*

The crucifix case started near Padua, Italy.<sup>23</sup> Soile Lautsi, a Finnish mother of two children who attended a public school in the town of Abano Terme, appeared before the Administrative Tribunal of the Veneto Region and

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<sup>21</sup> See *infra* text accompanying notes 271–80.

<sup>22</sup> See *infra* text accompanying notes 276, 299, 302–04.

<sup>23</sup> *Lautsi I*, *supra* note 1, para. 6.

petitioned for the removal of the Catholic symbol from the public school.<sup>24</sup> She argued that the presence of the crucifix in the school violated the principle of *laicità*, which, according to Italian constitutional jurisprudence, is embedded in the Italian Constitution.<sup>25</sup> She requested that the Administrative Tribunal recognize the illegitimacy of the symbol and order its removal.<sup>26</sup>

In its decision, the Administrative Tribunal endorsed the constitutional principle of *laicità*, but rejected the request.<sup>27</sup> The court reasoned that *laicità* does not forbid any public display of religious symbols, nor do these symbols violate the freedom of religion or the freedom of conscience of these students or their mother.<sup>28</sup> Conversely, the Tribunal clearly affirmed that the display of the cross is not only fully consistent with, but is even justified and rooted in the principle of *laicità*.<sup>29</sup>

The Tribunal's decision was the antithesis of the judgment that Italian legal scholars had expected. At the time of the decision, public opinion, as well as scholarly opinion on the constitutionality of the symbol's presence in school, was sharply divided.<sup>30</sup> Those who endorsed the presence of the crucifix maintained that it should remain in schools because of its cultural meaning.<sup>31</sup> They argued that even if its presence was not dictated by the Constitution, it could be displayed because it had both religious and cultural value.<sup>32</sup> It gave

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<sup>24</sup> *Id.* para. 10. The crucifixes in question in the public schools were mandated by administrative provisions of the 1920s. See Decreto 20 aprile 1924, n. 965 art. 118 (It.); Decreto 26 aprile 1928, n. 1297 art. 119 (It.).

<sup>25</sup> *Lautsi I*, *supra* note 1, para. 9.

<sup>26</sup> The Tribunal suspended the judgment and raised the case before the Constitutional Court (the order was released on January 14, 2004) and requested that it judge whether such a religious sign was consistent with the constitutional principle of *laicità*. *Id.* para. 11. In deciding judgment Number 389 (delivered in 2004), the Constitutional Court dismissed the case without judging the constitutional issue. *Id.* para. 12. Instead, the court simply declared itself incompetent to make this decision because, according to the Italian Constitution, the Constitutional Court only has the power to review the constitutionality of provisions that are contained in statutory laws (specifically, Article 134 of the Italian Constitution), while the provision concerning the display of the crucifix is not contained in the Italian law. *Id.* paras. 10, 12, 26.

<sup>27</sup> *Id.* para. 13.

<sup>28</sup> *Id.* para. 11.

<sup>29</sup> *Id.*

<sup>30</sup> Susanna Mancini, *The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty*, 6 EUR. CONST. L. REV. 6, 6 (2010).

<sup>31</sup> See, e.g., Stefano Ceccanti, *E se la Corte andasse in Baviera?*, in LA LAICITÀ CROCIFFISSA? IL NODO COSTITUZIONALE DEI SIMBOLI RELIGIOSI NEI LUOGHI PUBBLICI 1, 10 (Roberto Bin, Giuditta Brunelli, Andrea Pugiotto & Paolo Veronesi eds., 2004) ("Se non si accetta l'univocità di significati del simbolo non c'è infatti puntuale contrasto [of the crucifix] rispetto ai principi della Costituzione.").

<sup>32</sup> TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, 3, 366 (It.).

public witness to the cultural roots of Italy, which were principally Christian.<sup>33</sup> Conversely, those who opposed the display of the crucifix argued that one could not separate the religious value from its cultural significance—the cultural debts of Italy to Christianity were not to be questioned. However, the display of the cross was impossible because it kept its religious meaning, thus violating the constitutional principles of *laicità*—equality among citizens and religious impartiality of the public administration.<sup>34</sup>

At the beginning of its decision, the Administrative Tribunal seemed to endorse the second opinion. The decision affirmed that the crucifix retains its religious significance even if it is displayed in public: “The crucifix cannot, today, be considered as a mere historical and cultural symbol, neither in the scholastic environment, but it must be evaluated as a religious symbol, too.”<sup>35</sup>

But the court drew a strikingly different conclusion from this premise compared to what opponents had claimed, and therefore gave quite a surprising argument for upholding the crucifix display. According to the Tribunal, the presence of the crucifix is consistent with the principle of *laicità* precisely because of its religious meaning.<sup>36</sup> If one considers Christian thought and even some elements of Catholic doctrine, the court reasoned, one can conclude that the principle of *laicità* is implied in, and even produced by, the Catholic religion.<sup>37</sup> The very constitutional principle of *laicità* depends on Christianity and its religious symbols, like the crucifix.<sup>38</sup> Thus, the idea of eliminating the crucifix because it violates *laicità* is unreasonable because it would be tantamount to eliminating the very symbol of *laicità*.<sup>39</sup>

These considerations led the court to delve deeply into the realm of Christian thought. Its lengthy opinion was unrestrained in extensively sifting through the contents and richness of Christian theology.<sup>40</sup> Starting with

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<sup>33</sup> *Id.* at 361.

<sup>34</sup> See Alessandro Morelli, *Crocifissi o Croci? Ancora Qualche Osservazione su Icone*, “*Simboli di Stato*” e *Usa Politico dei Segni Religiosi*, FORUM DI QUADERNI COSTITUZIONALI, pt. 4, para. 10 (Nov. 2003), <http://www.forumcostituzionale.it/site/index3.php?option=content&task=view&id=699>.

<sup>35</sup> TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, 3, 362 (It.). The translations of the Italian and of the ECHR’s decisions are provided by the Author of this Article.

<sup>36</sup> *Id.* at 366.

<sup>37</sup> *Id.* at 363.

<sup>38</sup> *Id.* at 366.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 360–66; see Paulo Cavana, *La Questione del Crocifisso in Italia*, OLIR: OSSERVATORIO DELLE LIBERTÀ ED ISTITUZIONI RELIGIOSE, 7 (May 2004), [http://www.olir.it/aretematiche/75/documents/Cavana\\_questionedelcrocifisso.pdf](http://www.olir.it/aretematiche/75/documents/Cavana_questionedelcrocifisso.pdf).

Christ's famous principle "render to Caesar the things that are Caesar's and to God the things that are God's,"<sup>41</sup> the judge effectively gave birth to a huge new *Weltanschauung*.<sup>42</sup> Moreover, in doing so, the court painted quite a biased portrait of Christian history.<sup>43</sup> It dismissed the crusades, the inquisition, and many other painful episodes in Christian history as merely historical mistakes, because in the Christian creed: "[N]otwithstanding the Inquisition, Antisemitism, and the crusades, one can easily find the principle of human dignity, tolerance, and freedom—including religious freedom—that are part of the same fabric of the State's laicità."<sup>44</sup>

Due to the court's commitment to investigating the Christian doctrine, the judgment is debatable. The decision overstepped the boundaries of the state judge, addressed directly the very core of the Catholic truths, and even underestimated some painful episodes of the past.<sup>45</sup>

Notwithstanding these shortcomings, the court's rationale deserves some attention because it took a quite interesting path: it upheld the display of the crucifix because of its historical connection with the principle of *laicità*.<sup>46</sup>

After the Administrative Tribunal's judgment, the case was appealed to the Council of State.<sup>47</sup> In a more succinct decision the Council joined the opinion of the first Tribunal and upheld the judgment.<sup>48</sup> Though it demonstrated more equilibrium, moderation, and self-restraint than the Tribunal below, the Council essentially endorsed the judgment that the crucifix can be displayed because it is consistent with the democratic nature of the Italian state.<sup>49</sup> The

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<sup>41</sup> TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, 3, 363 (It.). The translation is provided by the Author of this Article.

<sup>42</sup> "Weltanschauung" means "world view" in German. *Weltanschauung*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/weltanschauung> (last visited Feb. 20, 2011). See Nicola Fiorita, *Se il Crocefisso Afferma e Conferma la Laicità dello Stato: Paradossi, Incongruenze e Sconfinamenti di una Sentenza del Tar del Veneto*, OLIR: OSSERVATORIO DELLE LIBERTÀ ED ISTITUZIONI RELIGIOSE, 1 (Dec. 2004), [http://www.olir.it/areetematiche/75/documents/Fiorita\\_Crocefisso.pdf](http://www.olir.it/areetematiche/75/documents/Fiorita_Crocefisso.pdf).

<sup>43</sup> TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, 3, 365 (It.).

<sup>44</sup> *Id.* The translation is provided by the Author of this Article.

<sup>45</sup> See Fiorita, *supra* note 42, at 5–7.

<sup>46</sup> Luca P. Vanoni, *Il Crocefisso Come Simbolo della Laicità dello Stato (Commento a Tar Veneto, Sezione III, Sentenza 17 Marzo 2005, n.1110)*, FORUM DI QUADERNI COSTITUZIONALI, para. 5 (Apr. 2005), [http://www.forumcostituzionale.it/site/index3.php?option=com\\_content&task=view&id=354&Itemid=91](http://www.forumcostituzionale.it/site/index3.php?option=com_content&task=view&id=354&Itemid=91).

<sup>47</sup> The Council of State has basically two functions. The first is that it is the second degree court that judges the legitimacy of non-legislative acts. 2 MANUALE DI DIRITTO PUBBLICO 278 (G. De Vergottini, Gli Organi Ausiliari, G. Amato & A. Barbera eds., 1997). Second, it gives opinions to the government about the legitimacy of the non-legislative acts. *Id.*

<sup>48</sup> Cons. Stato, sez. sesta, 13 gennaio 2006, n. 556, pt. DIRITTO, pt. 3 (It.).

<sup>49</sup> *Id.* paras. 16–17.

Council affirmed that the crucifix embodies “the values of tolerance, reciprocal respect, inner importance of all human beings, human rights, liberty, autonomy of moral conscience before any authority, human solidarity, rejection of any discrimination, which characterize the Italian civilization.”<sup>50</sup>

Even though the Administrative Tribunal and the Council of State maintained a highly debatable line of reasoning, one must recognize that they did not simply accomplish the goal of preserving the Catholic tradition in the public square. Actually, they went further—they did not restrain from considering the religious realm, but resolved to consider the internal religious meaning of the symbol.<sup>51</sup> They dealt with the meaning of the cross from the inside of the tradition, rather than from an outside viewpoint.<sup>52</sup> The inner Catholic tradition was thus scrutinized. It is an interesting approach since it does not see any divide between the legal vantage point and the religious one. The two are so close to each other that courts can delve into the religious realm in order to decide cases that are related to religion. This approach has its dangers since it is not clear at all to what extent the judge can move into the religious realm, nor does it address the fact that he lacks the power and the necessary skills to reflect on such subjects.

Thus, the Administrative Tribunal and the Council of State addressed the topic of the public display of religious symbols from a unique point of view. They both affirmed that it is not only consistent with the principle of *laicità* but even represents the very origin of the principle itself.<sup>53</sup> According to the wording of the Tribunal as well as of the Council, a pluralistic society demands the open relationship between religion and the state.<sup>54</sup> This is especially true for the majoritarian Italian religion, Catholicism, and more broadly for Christianity. In fact, Christian doctrine provided the main contribution to the building of the principle of *laicità*.<sup>55</sup>

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<sup>50</sup> *Id.* at 10. The translation is provided by the Author of this Article.

<sup>51</sup> Vanoni, *supra* note 46, para. 6.

<sup>52</sup> Silvio Ferrari has theorized this attitude. SILVIO FERRARI, *LO SPIRITO DEI DIRITTI RELIGIOSI* 282 (2002).

<sup>53</sup> *See* Cons. Stato, sez. sesta, 13 gennaio 2006, n. 556, para. 6 (It.).

<sup>54</sup> *See id.*; *see also* ANDREA PIN, *LAICITÀ E ISLAM IN ITALIA: UNA QUESTIONE DI METODO* 196–97 (2010).

<sup>55</sup> I SANDRO GHERRO, *LEZIONI DI DIRITTO ECCLESIASTICO I* 162 (2d ed. 2009).

*B. The First Degree Decision of the European Court of Human Rights*

After losing in the Italian Courts, Lautsi appealed to the ECHR,<sup>56</sup> which was established to provide a forum for the adjudication of the rights that are contemplated in the European Convention on Human Rights.<sup>57</sup> Therefore, the Finnish mother petitioned the Court to consider if the presence of the crucifix in Italian public schools was consistent with Article 9 of the European Convention.<sup>58</sup>

The ECHR found that the crucifix displayed in a public school violates the right to freedom of religion protected in Article 9: “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.”<sup>59</sup> According to the Court, the crucifix display violated Article 9 for two reasons. The first was that the crucifix infringed the mother’s right to provide her children with the religious and spiritual education she believes in.<sup>60</sup> This right, the Court concluded, is granted by the first additional Protocol of the Convention: “‘No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.’”<sup>61</sup>

After reciting the long history of the display of the crucifix in Italian schools,<sup>62</sup> the ECHR concluded that the display of such a symbol would harm the right of parents to educate their children and violate the latter’s conscience.<sup>63</sup> The educational value of the crucifix, the Court concluded, was particularly problematic because it is a religious symbol that the Italian majority endorses and that is displayed to all students, including those who do

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<sup>56</sup> *Lautsi I*, *supra* note 1.

<sup>57</sup> “To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as ‘the Court.’ It shall function on a permanent basis.” European Convention on Human Rights, *supra* note 6, art. 19.

<sup>58</sup> *Lautsi I*, *supra* note 1, para. 27.

<sup>59</sup> European Convention on Human Rights, *supra* note 6, art. 9.

<sup>60</sup> *Lautsi I*, *supra* note 1, paras. 57–58.

<sup>61</sup> *Id.* para. 27.

<sup>62</sup> *See id.* paras. 16–20. Lately, the Ministry of Education has recommended directors of public schools to display the crucifix in every classroom. *Direttiva* 3 ottobre 2007, n. 2666 (It.).

<sup>63</sup> *See Lautsi I*, *supra* note 1, para. 57.

not share that faith.<sup>64</sup> It did not matter that the crucifix has cultural meaning because its prevailing meaning is religious.<sup>65</sup> It had to be removed from classrooms precisely because of its religious meaning.<sup>66</sup>

In the Court's opinion, it was not only irrelevant that the majority of students and teachers endorse its religious or cultural meaning, but the need for its removal was even aggravated by the fact that the majority of Italians have a Christian creed or share the Catholic culture.<sup>67</sup> The Court maintained that the protection of fundamental rights is more important when a social majority exists than when it does not.<sup>68</sup>

The presence of the crucifix may easily be interpreted by pupils of all ages as a religious sign, and they will feel that they have been brought up in a school environment marked by a particular religion. What may be encouraging for some religious pupils may be emotionally disturbing for pupils of other religions or those who profess no religion. That risk is particularly strong among pupils belonging to religious minorities. Negative freedom of religion is not restricted to the absence of religious services or religious education.<sup>69</sup>

A second reason for declaring the illegitimacy of the crucifix display, according to the Court, was that the display of the crucifix also violated the right to freedom of religion because it touched upon the relationship between religion and state.<sup>70</sup> The Court here used the principle of strict separation between church and state to justify its reasoning.<sup>71</sup> Even though the Court did not explicitly use this expression, it certainly endorsed the concept by its repeated reference to the use of the concept of a religiously neutral state.<sup>72</sup> The European constitutional environment tends to use the idea of "neutrality," as derived from the French legal culture,<sup>73</sup> in order to express the necessity that the state does not endorse or obstruct any religious belief, but also keeps an

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<sup>64</sup> *Id.* para. 55.

<sup>65</sup> *See id.* para. 51.

<sup>66</sup> *Id.* para. 55.

<sup>67</sup> *Id.* para. 50.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* para. 55.

<sup>70</sup> *Id.* para. 47(e).

<sup>71</sup> *See id.* para. 57.

<sup>72</sup> *Id.*

<sup>73</sup> *See* Paolo Cavana, *Modelli e Significati di Laicità nelle Società Pluraliste*, EDITRICE ELLEDICI, pt. 3 (Apr. 2005), [http://www.elledici.org/scuola/formazione/dwl/relazione\\_cavana\\_19apr05.pdf](http://www.elledici.org/scuola/formazione/dwl/relazione_cavana_19apr05.pdf).

appropriate distance from the religious realm.<sup>74</sup> The Court repeatedly insisted that the principle of state neutrality toward religion is the most important tool for granting real freedom of belief and conscience for all: “The State has a duty to uphold confessional neutrality in public education, where school attendance is compulsory regardless of religion, and which must seek to inculcate in pupils the habit of critical thought.”<sup>75</sup> Or, again, the Court stated that the state has a “duty to respect neutrality in the exercise of public authority, particularly in the field of education.”<sup>76</sup>

But the Court used the principle of “neutrality” in its strongest form when it discussed the necessity of protecting a shared educational environment where a plurality of beliefs and culture coexist, such as in public schools. The Court clearly distinguished between what is permitted in civil society and the activities and the initiatives that are allowed in public schools:

Respect for parents’ convictions must be possible in the context of education capable of ensuring an open school environment which encourages inclusion rather than exclusion, regardless of the pupils’ social background, religious beliefs or ethnic origins. Schools should not be the arena for missionary activities or preaching; they should be a meeting place for different religions and philosophical convictions, in which pupils can acquire knowledge about their respective thoughts and traditions.<sup>77</sup>

The presence of the crucifix in public schools, the Court concluded, is clearly inconsistent with the neutrality principle and violates the Convention.<sup>78</sup>

Ultimately, the ECHR’s decision did not ban religion from public schools.<sup>79</sup> On the contrary, it implicitly admitted that religious beliefs can be

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<sup>74</sup> For a discussion of ECHR decisions that have progressively shaped the idea of “neutrality,” see *Valsamis v. Greece*, 1996-VI Eur. Ct. H.R. (regarding the field of education); *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R.; *Folgerø v. Norway*, 2007-VIII Eur. Ct. H.R.

<sup>75</sup> *Lautsi I*, *supra* note 1, para. 56 (“L’Etat est tenu à la neutralité confessionnelle dans le cadre de l’éducation publique où la présence aux cours est requise sans considération de religion et qui doit chercher à inculquer aux élèves une pensée critique.”).

<sup>76</sup> *Id.* para. 57 (“Le devoir incombant à l’Etat de respecter la neutralité dans l’exercice de la fonction publique, en particulier dans le domaine de l’éducation.”).

<sup>77</sup> *Id.* para. 47(c) (“Le respect des convictions des parents doit être possible dans le cadre d’une éducation capable d’assurer un environnement scolaire ouvert et favorisant l’inclusion plutôt que l’exclusion, indépendamment de l’origine sociale des élèves, des croyances religieuses ou de l’origine ethnique. L’école ne devrait pas être le théâtre d’activités missionnaires ou de prêches; elle devrait être un lieu de rencontre de différentes religions et convictions philosophiques, où les élèves peuvent acquérir des connaissances sur leurs pensées et traditions respectives.”).

<sup>78</sup> *Id.* paras. 57–58.

discussed and exchanged by individuals.<sup>80</sup> However, in order to guarantee the environment for such exchange, the Court reasoned, the school must adopt a position of religious neutrality, because it is the only position that protects the minority from the attitude of the majority.<sup>81</sup>

The Court ordered Italy to indemnify the applicant.<sup>82</sup> The Italian government appealed to the Grand Chamber of the ECHR,<sup>83</sup> which recently delivered its final judgment.<sup>84</sup>

### *C. The Decision of the European Court of Human Rights's Grand Chamber*

The Grand Chamber reversed the decision that was given in the first degree, holding that the display of the crucifix in Italian public schools does not infringe upon the right to education as provided in Article 2 of Protocol Number 1,<sup>85</sup> nor does it violate Article 9's freedom of religion.<sup>86</sup> The Grand Chamber aligned itself to the first degree's decision in maintaining that the state has a "duty of neutrality and impartiality,"<sup>87</sup> but that the Italian state did not violate such duty. The Chamber estimated that (1) the display of the crucifix was an "essentially passive symbol" with an influence on pupils not "comparable to that of didactic speech or participation in religious activities";<sup>88</sup> that (2) its presence "is not associated with compulsory teaching about Christianity";<sup>89</sup> and, finally, that (3) the Finnish mother of the two students "retained in full her right as a parent to enlighten and advise her children, to exercise in their regard her natural functions as educator and to guide them on a path in line with her philosophical convictions."<sup>90</sup>

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<sup>79</sup> See *id.* para. 57.

<sup>80</sup> See *id.*

<sup>81</sup> See *id.* para. 55.

<sup>82</sup> *Id.* para. 67. It amounted to €5000. *Id.*

<sup>83</sup> Respondent State Act of Appeal, *Lautsi v. Italy*, Eur. Ct. H.R. (2009), [http://www.olir.it/areetematiche/news/documents/2656\\_lautsi\\_ricorso\\_italia.pdf](http://www.olir.it/areetematiche/news/documents/2656_lautsi_ricorso_italia.pdf).

<sup>84</sup> *Lautsi II*, *supra* note 1.

<sup>85</sup> See *id.* para. 77.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* para. 60.

<sup>88</sup> *Id.* para. 72.

<sup>89</sup> *Id.* para. 74.

<sup>90</sup> *Id.* para. 75.

All things considered, the Grand Chamber upheld the duty of neutrality of the state,<sup>91</sup> especially in the field of education,<sup>92</sup> but decided that the display of the crucifix did not amount to a violation of neutrality.

## II. THE ITALIAN CONSTITUTION: THE FRAMERS AND THE LONG ROAD TO EQUALITY

The principle of neutrality in church-state relations is quite a recent development in Italian jurisprudence.<sup>93</sup> Nevertheless, the neutrality principle is not plainly consistent with the Italian constitutional culture and with the Constitutional Court's landmark decisions on religious liberty.<sup>94</sup> The history regarding the framing of the Italian Constitution and its progressive enactment in the field of religious freedom demonstrates this conflict in Italian jurisprudence.

The aim of this Part is to place precisely the case of the crucifix in its constitutional and historical context in Italy, thus demonstrating how Italian constitutional law has considered religious freedom and equality, and the cultural links that tie it back to Catholic teachings.

Shortly after the end of World War II, Italy went through an extensive process of nation building.<sup>95</sup> The cornerstone was the Constitutional Assembly that was founded in 1946 to give the new Italian Republic a written constitution, which could be amended only through the rules that the Constitution itself provides.<sup>96</sup>

At the Constitutional Assembly, the primary participants were parties such as the Democratic Christian Party—which had strong links with the Holy See—and the Communist Party.<sup>97</sup> Both of them had previously fought to liberate Italy from fascism.<sup>98</sup>

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<sup>91</sup> *Id.* para. 60.

<sup>92</sup> *Id.* para. 72.

<sup>93</sup> See Mark Donovan, *The Italian State: No Longer Catholic, No Longer Christian*, W. EUR. POL. (Jan. 1, 2003), <http://www.highbeam.com/doc/1G1-100727750.html>.

<sup>94</sup> See Stefano Sicardi, *Questioni Aperte nella Disciplina del Fenomeno Religioso: Dalla Laicità al Sistema delle Fonti*, 1 QUADERNI DI DIRITTO E POLITICA ECCLESIASTICA 4, 9 (2005).

<sup>95</sup> See generally LIVIO PALADIN, *PER UNA STORIA COSTITUZIONALE DELL'ITALIA REPUBBLICANA* (2004) (describing the period from 1945 to 1948).

<sup>96</sup> Art. 138 Costituzione [Cost.] (It.).

<sup>97</sup> See Richard M. Locke, *The Demise of the National Union in Italy*, 45 INDUS. & LAB. REL. REV. 229, 231 (1992). While the latter was led by the prominent figure of Palmiro Togliatti, who took part in the Assembly, the Christian Party was headed by Alcide De Gasperi, who at the time was also the leader of the

Notwithstanding the collaboration between the Communists and the Christian Democrats at the end of Italy's fascist regime, their ideological differences persisted and therefore, their paradigmatic struggles repeatedly led to conflict at the Constitutional Assembly.<sup>99</sup>

However, there was little or no debate amongst the framers concerning religious liberty articles in the Constitution.<sup>100</sup> Moreover, the idea of religious freedom or, at least, religious tolerance, was a quite well-rooted value in Italian history.<sup>101</sup>

No group wanted religious freedom to be heavily restricted by the new Republican Constitution.<sup>102</sup> Even Catholic members of the Constitutional Assembly, as well as the Papacy, believed that religious freedom should be clearly affirmed.<sup>103</sup>

The Constitution still contains the four articles concerning religious liberty that were drafted by the Constitutional Assembly in the form that they had at the time the constitutional text was approved.<sup>104</sup> Three of them—Articles 8, 19, and 20—were easily drafted and approved with little or no dispute by the Assembly.<sup>105</sup>

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government. See Giovanni Sale, *Between Republic and Constituent Assembly*, 5 *30DAYS IN THE CHURCH AND IN THE WORLD* 49, 49–56 (2006).

<sup>98</sup> See Locke, *supra* note 97, at 231.

<sup>99</sup> Sale, *supra* note 97.

<sup>100</sup> The fascist period, which included the alliance with Nazi Germany and the so-called racial laws enacted in Italy in 1938, and which ended with the discovery of the death camps in Eastern Europe, was such a frightening experience that a strong affirmation of religious liberty was not at issue. See Ethan J. Hollander, *Italian Fascism and the Jews: Brown? Or Shades of Gray?* (2003) (unpublished manuscript), <http://weber.ucsd.edu/~ejhollan/Haaretz%20-%20Ital%20fascism%20-%20English.PDF>.

<sup>101</sup> See, e.g., FRANCESCO FINOCCHIARO, *DIRITTO ECCLESIASTICO* 102 (2003).

<sup>102</sup> See Ercolessi, *supra* note 13, at 12–13.

<sup>103</sup> See *id.* The modern Italian state that arose in the nineteenth century was less pro-Catholic than it appeared. The Italian Kingdom was formally Catholic, according to the Albertin Statute (1848) and the Lateran Pacts (1929), and these laws undoubtedly privileged Catholics. *Lausi I*, *supra* note 1, paras. 21–22. However, the Roman Catholic Church suffered from anti-clericalism during that same period: the political confrontation between the enlarging Italian Kingdom and the state of the Church led to some heavy measures against Catholics. See Dean Swift, *Anticlericalism*, *GEN. HIST.*, <http://general-history.com/anticlericalism> (last visited Mar. 25, 2011). While traditional Catholic privileges waned, however, the political struggle against the Catholic Church did not give birth to true ideological hostility, neither towards the church nor towards religion in general. See EDOARDO TORTAROLO, *IL LAICISMO* 50 (1998).

<sup>104</sup> See arts. 7, 8, 19, 20 Costituzione [Cost.] (It.).

<sup>105</sup> See Maria Elisabetta de Franciscis, *Constitutional Revisions in Italy, the Amending Process*, in *ITALY IN TRANSITION: THE LONG ROAD FROM THE FIRST TO THE SECOND REPUBLIC* 43, 43–83 (Paolo Jannic ed., 1998).

It is best to begin with Article 19, which contains the open affirmation of religious liberty, then move to Article 8, which deals with treatment of religious communities, and finally focus on the most debated Article 7.<sup>106</sup> The latter deserves a thorough analysis because it is the basis on which the relationship between church and state has been constructed in the decades since the Constitution was enacted.

Both Article 19 and Article 8 can be discussed briefly. Article 19 reads: “Everyone is entitled to freely profess religious beliefs in any form, individually or with others, to promote them, and to celebrate rites in public or in private, provided they are not offensive to public morality.”<sup>107</sup> This article provides religious freedom for all—for minorities as well as the Catholic majority.<sup>108</sup>

Article 8 addresses the Italian state’s recognition and treatment of religions other than Catholicism.<sup>109</sup> After affirming that all religions are equally free and can organize themselves according to their own internal rules, it outlines the relationship between non-Catholic religious groups and the state:

[1] Religious denominations are equally free before the law. [2] Denominations other than Catholicism have the right to organize themselves according to their own by-laws, provided they do not conflict with the Italian legal system. [3] Their relationship with the state is regulated by law, based on agreements with their representatives.<sup>110</sup>

Taken together, Articles 19 and 8 establish a broad recognition of religious freedom in terms of belief and exercise, regardless of personal choices in matter of faith.

#### A. *The Shaping of Article 7: The Origins of Italian Laicità*

While the previous two articles created little or no debate,<sup>111</sup> the same is not true for Article 7, which focuses on the status of the Catholic Church and its

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<sup>106</sup> Article 20 deserves no attention because it provides that religious communities and associations may not discriminate with respect to non-religious ones: “For associations or institutions, their religious character or religious or confessional aims do not justify special limitations or fiscal burdens regarding their establishment, legal capacity, or activities.” Art. 20 Costituzione [Cost.] (It.).

<sup>107</sup> *Id.* art. 19.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* art. 8.

<sup>110</sup> *Id.*

<sup>111</sup> For the Vatican diplomatic documents, see GIOVANNI SALE, *IL VATICANO E LA COSTITUZIONE* (2008).

relationship with the Italian state.<sup>112</sup> As the first article on religion, it had to accurately define the relationship between church and state, and it is the constitutional provision that has played the most relevant and important role in shaping the Italian version of the principle of *laicità*.<sup>113</sup> The final and current form of Article 7 is as follows: “[1] The State and the Catholic Church are, each within their own reign, independent and sovereign. [2] 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 amendments.”<sup>114</sup>

The second sentence was hotly debated at the Constitutional Assembly.<sup>115</sup> The Catholic Church and the Christian members of the Constitutional Assembly insisted on the need to mention the Lateran pacts.<sup>116</sup> In 1929, the Vatican and the Italian Government signed these pacts, which accorded the Holy See independence from Italy and recognized it as a sovereign state.<sup>117</sup> The Vatican and Catholic Assembly members wanted reassurance that the pacts, which reaffirmed the confessional principle of Italy as a Catholic nation,<sup>118</sup> were not overcome by the principle of equality before the law that was affirmed by Article 3 of the Constitution.<sup>119</sup> Due to the broad freedom and the privileges that the pacts accorded to the Catholic Church, the Catholic hierarchy feared the Constitutional Court could find that the Pacts conflicted with Constitutional provisions mandating religious equality in accordance with Article 3;<sup>120</sup> therefore, the Constitutional Court could outlaw the Italian law enforcing the pacts.<sup>121</sup> If the Constitution had remained silent about the pacts, the Catholic hierarchy affirmed, the equilibrium between the traditional

<sup>112</sup> Art. 7 Costituzione [Cost.] (It.).

<sup>113</sup> See Ercolessi, *supra* note 13, at 9.

<sup>114</sup> Art. 7 Costituzione [Cost.] (It.).

<sup>115</sup> See SALE, *supra* note 111, at 73.

<sup>116</sup> See *id.* at 73–75.

<sup>117</sup> *Tratto fra la Santa Sede e L'Italia*, VATICAN: HOLY SEE, [http://www.vatican.va/roman\\_curia/secretariat\\_state/archivio/documents/rc\\_seg-st\\_19290211\\_patti-lateranensi\\_it.html#TRATTATO\\_FRA\\_LA\\_SANTA\\_SEDE\\_E\\_L%20%80%99ITALIA](http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19290211_patti-lateranensi_it.html#TRATTATO_FRA_LA_SANTA_SEDE_E_L%20%80%99ITALIA) (last visited Mar. 31, 2011).

<sup>118</sup> Article 1 of the Treaty between the Holy See and the Italian State provided: “L’Italia riconosce e riafferma il principio consacrato nell’art. 1 dello Statuto del Regno 4 marzo 1848, pel quale la religione cattolica, apostolica e romana è la sola religione dello Stato.” *Id.* The Treaty was enforced by Italian Law No. 810 of 1929. Legge 27 maggio 1929 n. 810 (It.).

<sup>119</sup> Art. 3 Costituzione [Cost.] (It.).

<sup>120</sup> *Id.* “All citizens have equal social status and are equal before the law, without regard to their sex, race, language, religion, political opinions, and personal or social conditions.” *Id.*

<sup>121</sup> SALE, *supra* note 111, at 78–86.

Catholic majority and the minority could be broken; therefore, the Church pushed for an explicit inclusion of the pacts within the final text.<sup>122</sup>

Conversely, leftist parties, including the Communist Party, did not want to mention the pacts because this would allude to the pre-Republic established church regime.<sup>123</sup> The discussion was deadlocked until Palmiro Togliatti, the leader of the Communists, decided to vote for the explicit inclusion of the Lateran pacts in Article 7.<sup>124</sup> In fact, the Christian Democratic Party as well as the Papacy wanted an explicit mention of the pacts.<sup>125</sup> Due to the insistence of the Vatican, the otherwise egalitarian Italian Constitution now referenced the Lateran pacts that gave special privileges to Catholicism.<sup>126</sup> This contradiction provoked much controversy,<sup>127</sup> which eventually resulted in the modification of the Pacts in 1984.<sup>128</sup>

Scholars focusing on the principle of *laicità* have unanimously recognized the importance of the historical roots and the text of the first section of Article 7.<sup>129</sup> The reference to the two powers as independent and sovereign, each within its own realm, seems to testify to the existence of a distinction between the political and the religious orders. It is obviously excessive to conclude that this idea of “distinction” fully shaped the idea of *laicità*, but this expression indicates that there is a separation between the two realms of church and state, even though it does not clarify if there is a complete separation between the two or if they are simply to be considered as distinct from each other.

The origins of Article 7 come from Catholic social doctrine. Leo XIII's encyclical letter *Immortale Dei*<sup>130</sup> explicitly inspired many of the

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<sup>122</sup> For a discussion of the history of the relationship between the Vatican, the Jesuits, and the Catholic framers at the time of the shaping of the Article, see *id.*

<sup>123</sup> *Id.* at 73–86.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 87–95.

<sup>126</sup> *Id.* at 96–100.

<sup>127</sup> The mention of the Lateran pacts inspired scholarly debate about the religious assessment of the Italian state. See, e.g., SERGIO LARICIA, *COSCIENZA E LIBERTÀ: PROFILI COSTITUZIONALI DEL DIRITTO ECCLESIASTICO ITALIANO* 58, 167 (1989); Finocchiaro, *La Repubblica Italiana non è uno Stato Laico*, *supra* note 16, at 11.

<sup>128</sup> Marco Ventura, *The Permissible Scope of Legal Limitations on the Freedom of Religion in Italy*, 19 EMORY INT'L L. REV. 913, 925 (2005).

<sup>129</sup> See LARICIA, *supra* note 127, at 37–43; Tiziano Rimoldi, *I Rapporti Stato-Chiesa nell'Europa dei Quindici*, OLIR: OSSERVATORIO DELLE LIBERTÀ ED ISTITUZIONI RELIGIOSE, 1 (Jan. 2005), [http://www.olir.it/areetematiche/83/documents/Rimoldi\\_Europa.pdf](http://www.olir.it/areetematiche/83/documents/Rimoldi_Europa.pdf).

<sup>130</sup> Leo XIII, Encyclical Letter, *Immortale Dei* (Nov. 1, 1885), available at [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_01111885\\_immortale-dei\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_01111885_immortale-dei_en.html). Framers Dossetti

Constitutional Framers. Members of the Constitutional Assembly repeatedly quoted *Immortale Dei*, and the Constitution clearly echoes its expression:

The Almighty, therefore, has given the charge of the human race to two powers, the ecclesiastical and the civil, the one being set over divine, and the other over human, things. Each in its kind is supreme, each has fixed limits within which it is contained, limits which are defined by the nature and special object of the province of each, so that there is, we may say, an orbit traced out within which the action of each is brought into play by its own native right. But, inasmuch as each of these two powers has authority over the same subjects, and as it might come to pass that one and the same thing-related differently, but still remaining one and the same thing-might belong to the jurisdiction and determination of both, therefore God, who foresees all things, and who is the author of these two powers, has marked out the course of each in right correlation to the other.<sup>131</sup>

The quotation of “supreme” powers endowed with “native right(s)” is quite similar to Article 7’s conception of church and state as “independent” and “sovereign”; moreover, the reference to two orbits is close to the idea of two reigns or regimes.<sup>132</sup> This understanding of the relationship of church and state is so relevant and apparent that it is said that the Vatican II Council reaffirmed *Immortale Dei*’s ideas.<sup>133</sup>

Article 7’s drafting history excludes the hypothesis that the Framers envisioned a strict form of separation between church and state. First, the framers explicitly recognized collaboration between church and state, both in Article 7 for the relationship with the Catholic Church<sup>134</sup> and in Article 8 for

and Riccio explicitly quoted the encyclical letter several times during the drafting of the Constitution. Constitutional Assembly Act, No. 421 (Nov. 21, 1946) (statement of Dossetti); Constitutional Assembly Act, No. 2057 (Mar. 13, 1947) (statement of Riccio while speaking about Canon Law’s original character) (“[È] ormai pacifico, e non solo negli scrittori cattolici, in quanto non è stato affermato soltanto da Leone XIII, soprattutto nella *Immortale Dei*, ma anche in altri scrittori cattolici e non cattolici, tra cui Santi Romano (*L’ordinamento giuridico*, Sansoni, 1946), Gismondi (*Il nuovo giurisdizionalismo italiano*, Milano, Giuffrè, 1946), De Luca (*Considerazioni sull’autonomia e la pubblicità della Chiesa nel diritto italiano*, Giuffrè, 1946).”).

<sup>131</sup> Leo XIII, *supra* note 130, para. 13. The encyclical letter endorses the legitimacy of the state law with a reference to St. Paul’s Letter to the Romans. *Romans* 13:1 (World English Bible) (“Let every soul be in subjection to the higher authorities, for there is no authority except from God, and those who exist are ordained by God.”).

<sup>132</sup> Compare Leo XIII, *supra* note 130, para. 13, with art. 7 Costituzione [Cost.] (It.).

<sup>133</sup> Paul VI, Apostolic Constitution, *Gaudium et Spes* no. 76 (Dec. 7, 1965).

<sup>134</sup> Art. 7 Costituzione [Cost.] (It.) (“Their relationship [between the state and the Catholic Church] is regulated by the Lateran pacts. Amendments to these pacts which are accepted by both parties do not require the procedure of constitutional amendments.”).

the relationships with other religions.<sup>135</sup> Second, the Catholic tradition, which led to a paraphrasing of the encyclical letter in Article 7, shows the strong link between the secular and religious spheres in the Italian Constitution. Therefore, the constitutional framers did not regard the two realms as completely separate, and the Catholic Church at the time did not encourage such a separation in theological or practical terms.<sup>136</sup> Moreover, some Framers explicitly rejected the principle of *laicità* because it sounded hostile to religion due to its French pedigree.<sup>137</sup>

However, the framers clearly refused to include the Catholic religious heritage of Italy within the constitutional text. A state-established church regime was not a realistic option, although some members of the Assembly proposed mentioning Catholicism in the text as the main Italian religious denomination, and others went further, suggesting inserting a preamble containing an *Invocatio Dei* before the constitutional articles.<sup>138</sup> However, even these proponents withdrew these suggestions when they saw the large Assembly's opposition to their proposal.<sup>139</sup>

Thus, the final provisions of the constitutional articles concerning religious freedom contain traces of Catholic legacy, as well as the option for the state's collaboration with all religions and a specific relationship with the Catholic denomination.<sup>140</sup> From this interpretation, the Framers' affirmation of religious freedom for all was clear, while there was no endorsement of any strong separation between the religious realm and the state.<sup>141</sup> On the contrary, the

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<sup>135</sup> *Id.* art. 8 ("Their relationship with the state is regulated by law, based on agreements with their representatives.").

<sup>136</sup> At that time, the most authoritative scholar on the relationship between church and state was probably Francesco Ruffini, author of two widely known books on the subject. See generally FRANCESCO RUFFINI, *LA LIBERTÀ RELIGIOSA: STORIA DELL'IDEA* (1901); FRANCESCO RUFFINI, *LA LIBERTÀ RELIGIOSA COME DIRITTO PUBBLICO SOGGETTIVO* (1924).

<sup>137</sup> See generally Stefano Ceccanti, *La Laicità Francese Non È più Quella del Passato*, FORUM DI QUADERNI COSTITUZIONALI (Dec. 2001), [http://www.forumcostituzionale.it/site/index3.php?option=com\\_content&task=view&id=521&Itemid=](http://www.forumcostituzionale.it/site/index3.php?option=com_content&task=view&id=521&Itemid=); Constitutional Assembly Act, No. 418 (Nov. 21, 1946) (statement of Framer Mr. Cevolotto) (affirming the Constitutional draft) ("Di proposito non parla di Stato laico, potendosi a questa definizione dare, per ragioni quasi storiche, un significato di anticlericalismo, al quale si dichiara invece assolutamente contrario.").

<sup>138</sup> For records of such discussion, see Fabrizio Calzaretti, *La Nascita della Costituzione: Le Discussioni in Assemblée Costituente a Commento degli Articoli della Costituzione*, NASCITACOSTITUZIONE.COM, <http://www.nascitacostituzione.it/costituzione.htm> (last visited Feb. 22, 2011); *La votazione Finale della Costituzione*, NASCITACOSTITUZIONE.COM, [www.nascitacostituzione.it/finale.htm](http://www.nascitacostituzione.it/finale.htm) (last visited Mar. 26, 2011).

<sup>139</sup> See Ceccanti, *supra* note 137, para. 10.

<sup>140</sup> See *id.*

<sup>141</sup> See *id.*

Constitution gave room for the pre-existing Lateran pacts as well as for negotiating new agreements with other denominations.<sup>142</sup>

At the same time, sufficient ambiguity existed to give rise to a long-term debate on the special position of the Catholic Church, the role of the Lateran pacts that contained the confessional principle, and the principle of equality, which the Italian Constitution affirms in several articles.<sup>143</sup> It remained to be determined if the traditional idea of a Catholic confessional regime was eclipsed by the principle of equality, or, conversely, if the confessional principle still ruled, because it was embedded in a treaty expressly mentioned in the Constitution.<sup>144</sup>

*B. The First Period of the Constitutional Religious Freedom Clauses from 1948 to 1984, and the Modifications of the Lateran Pacts*

The constitutional jurisprudence concerning religious freedom developed through what can be roughly divided into three different periods. The first period saw a slow and gradual enforcement of the constitutional protection for religious freedom and equality, allowing for mild discrimination against religious minorities. The second period was characterized by the open affirmation of the principle of *laicità*, which became the paradigm of the following constitutional jurisprudence on religious freedom. The third period saw the shift toward the paradigm of “neutrality,” which gave new features to the principle of *laicità*.

The first developmental phase of constitutional jurisprudence began in 1948, when the Italian Constitution came into force;<sup>145</sup> however, as aforementioned, the principles of religious freedom and equality embedded in Article 3 and in Article 8 were applied quite slowly and gradually.<sup>146</sup> Given the previous confessional (but tolerant) Italian legal environment, the Constitutional Court, once it began operations in 1956,<sup>147</sup> eliminated some more obvious burdens on religious minorities, which were found to be clearly

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<sup>142</sup> See *id.*

<sup>143</sup> See Michele Ainis, *Laicità e Confessioni Religiose*, RIVISTA DELL'ASSOCIAZIONE ITALIANA DEI COSTITUZIONALISTI, 1 (Oct. 2007), <http://www.associazionedeicostituzionalisti.it/materiali/convegni/aic200710/ainis.pdf>.

<sup>144</sup> See Francesco Finocchiaro, *Il Fenomeno Religioso*, in MANUALE DI DIRITTO PUBBLICO III L'AZIONE DEI PUBBLICI POTERI 295, 309–10 (Giuliano Amato & Augusto Barbera eds., 1997).

<sup>145</sup> See Ercolessi, *supra* note 13, at 12–13.

<sup>146</sup> See *id.*

<sup>147</sup> See *id.*

inconsistent with the new constitutional provisions, such as the necessity of notifying public authorities when non-public religious events were held.<sup>148</sup> But milder forms of discrimination remained and appeared consistent with both the enduring presence of the confessional principle identifying Italy as a Catholic state as contemplated in the Lateran pacts, which the Constitution seemed to endorse;<sup>149</sup> and with the large following of Catholicism among Italians.<sup>150</sup>

An important change occurred in 1984 when the Lateran pacts were modified. The modifications, which completely replaced the 1929 provisions,<sup>151</sup> affirmed that the confessional principle was “no longer in force.”<sup>152</sup> This phrasing avoided clarifying whether the Catholic confessional principle was now abrogated by the modifications of 1984, or whether it was now deemed unconstitutional under the 1948 Constitution. In other words, the modifications failed to dictate if the Italian Constitution trumped the Catholic state model of the Lateran pacts.<sup>153</sup> Even with this lingering uncertainty, the modifications had clear and decisive effects on the status of religious minorities’ rights to religious freedom and equality.<sup>154</sup>

After the modifications, an impressive shift occurred in the political and jurisdictional activities concerning religious freedom.<sup>155</sup> On the basis of Article 8, the Italian government negotiated agreements with several of the religious minorities (the first agreement dates to 1984) and embarked on a serious discussion over the need for a new religious freedom law.<sup>156</sup> After reaching agreements with six different religious denominations,<sup>157</sup> which are signed and

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<sup>148</sup> See generally Corte Cost., 27 marzo 1985, n. 86 (It.); Corte Cost., 8 novembre 1984, n. 249 (It.); Corte Cost., 11 gennaio 1974, n. 12 (It.); Corte Cost., 25 maggio 1963, n. 85 (It.); Corte Cost., 18 novembre 1958, n. 59 (It.); Corte Cost., 8 marzo 1957, n. 45 (It.).

<sup>149</sup> One can see the evolution of the Constitutional jurisprudence through several Constitutional Court decisions. See, e.g., Corte Cost., 18 ottobre 1995, n. 440 (It.); Corte Cost., 28 luglio 1988, n. 925 (It.); Corte Cost., 14 febbraio 1973, n. 14 (It.). The rationales of such decisions have given less importance to the existence of a broad Catholic community in Italy and its historical role with the passing of time.

<sup>150</sup> See, e.g., Corte Cost., 13 maggio 1965, n. 39 (It.) (identifying the Italian people’s religiosity with the largely majoritarian Catholic Church).

<sup>151</sup> See Ercolessi, *supra* note 13, at 13.

<sup>152</sup> Additional Protocol art. 1 Costituzione [Cost.] (It.).

<sup>153</sup> Finocchiaro, *supra* note 144, at 308–10.

<sup>154</sup> See Valerio Tozzi, *C’è Una Politica Ecclesiastica dei Governi. E la Dottrina?*, STATO, CHIESE E PLURALISMO CONFENSIONALE, 1 (Jan. 2007), [http://www.statoechiese.it/images/stories/papers/200701/tozzi\\_macerata.pdf](http://www.statoechiese.it/images/stories/papers/200701/tozzi_macerata.pdf).

<sup>155</sup> See *id.*

<sup>156</sup> See *id.*

<sup>157</sup> The Italian government reached agreements with the Valdeans, God’s Assemblies in Italy, the Adventist Churches’ Union, Jewish Communities, the Baptist Union, and the Lutheran Union. Legge 11

awaiting final approbation by the Parliament—and negotiating agreements with six others<sup>158</sup>—it is evident that Article 8, which guarantees religious freedom for all, has been widely applied. Due to the agreements, the state and many denominations have agreed on a number of issues, such as holidays, clergy, and the celebration of religious marriages.<sup>159</sup> Yet for all these piecemeal changes and agreements with specific religious groups, twenty-five years of discussion have not resulted in a general law on religious freedom providing general protection for religious activities.<sup>160</sup>

For now, the only applicable legislation is the 1929 Law on Permitted Cults, which governs generally over religious minorities.<sup>161</sup> The 1929 legislation remains in force except where abrogated.<sup>162</sup> Its provisions include a requirement that clergy of non-Catholic denominations be approbated by the state (Article 3) and permission for such clergy to perform religious marriages, which will be recognized as legally binding (Article 7).<sup>163</sup>

Italian protection of the right of religious freedom has gone through an impressive evolution. A new pact with the Catholic Church was signed, many religious minorities obtained special regulation for their own specific needs, and the Constitutional Court trimmed some provisions that were affected by the established state church model. Nevertheless, Italian laws governing religious activities still need to be formally updated to reflect the more recent Constitution.

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agosto 1984, n. 449 (It.); Legge 22 novembre 1988, n. 517 (It.); Legge 22 novembre 1988, n. 516 (It.); Legge 8 marzo 1989, n. 101 (It.); Legge 12 aprile 1995, n. 116 (It.); Legge 29 novembre 1995, n. 520 (It.).

<sup>158</sup> Agreements have been signed with the Church of Jesus Christ of Latter Day Saints, the Apostolic Church in Italy, the Jehovah's Witnesses' Italian Congregation, the Orthodox Archdioceses of Italy, the Buddhists' Union, and the Hindu Union. Bureau of Democracy, Human Rights, & Labor, *International Religious Freedom Report 2010*, U.S. DEP'T ST. (Nov. 17, 2010), <http://www.state.gov/g/drl/rls/irf/2010/148946.htm>.

<sup>159</sup> For the texts of these agreements, see *Le Intese con le Confessioni Religiose*, GOVERNO ITALIANO, [http://www.governo.it/Presidenza/USRI/confessioni/intese\\_indice.html](http://www.governo.it/Presidenza/USRI/confessioni/intese_indice.html) (last visited Feb. 23, 2011).

<sup>160</sup> Stefano Ceccanti, *Le Nuove Intese: Quando il Simbolico Conta Più dello Specifico*, 2 QUADERNI COSTITUZIONALI 399, 400 (2000).

<sup>161</sup> Enti di Culto: Culto Ammessi, Legge 24 giugno 1929, n. 1159 (It.); see JOHN F. POLLARD, *THE VATICAN AND ITALIAN FASCISM, 1929–1932: A STUDY IN CONFLICT* 65 (2005).

<sup>162</sup> L. n. 1159/1929 (It.).

<sup>163</sup> Law Number 1159 and related rules are clearly influenced by the fascist ideology that wanted religions to be controlled. Nevertheless, they endowed religious minorities with certain important rights pertaining to the worship of God and the religious education of children. See Regio Decreto 28 febbraio 1930, n. 289 (It.), available at [http://www.interno.it/mininterno/export/sites/default/it/sezioni/servizi/come\\_fare/religioni/Enti\\_di\\_culto\\_diversi\\_da\\_quello\\_cattolicox\\_riconoscimento\\_giuridico.html](http://www.interno.it/mininterno/export/sites/default/it/sezioni/servizi/come_fare/religioni/Enti_di_culto_diversi_da_quello_cattolicox_riconoscimento_giuridico.html).

C. *The New Course of Italian Secularism: The Role of the Constitutional Court*

1. *The First Approach to Laicità: The Debts to the Catholic Teachings*

The Catholic roots of Italian constitutional culture are reflected in constitutional jurisprudence after the modification of the Lateran pacts. The pacts' modification ended the first period of religious freedom jurisprudence and commenced the second phase of enforcement of the constitutional provisions concerning the right to religious freedom. The main result consisted of shaping a brand new idea of *laicità*, which had minimal association with the hostile French separation of church and state.

Shortly after modifying the 1929 Lateran pacts in 1984, the Constitutional Court started applying the principles of equality before the law (according to Article 3) and of religious freedom (according to Article 8) more liberally, eliminating the forms of discrimination associated with the Lateran pacts.<sup>164</sup> But its most significant holding was its open affirmation of the principle of *laicità*. In 1989, the Constitutional Court's Decision Number 203 explicitly introduced the principle of *laicità*, by declaring that *laicità* represents one of the essential elements of the Italian constitutional experiment.<sup>165</sup> The Court used and endorsed the very word that the constitutional framers had deliberately avoided, explicitly incorporating it into Italian jurisprudence.<sup>166</sup>

Interestingly, this first case examined the presence of religion in one of the environments that has provided the most material for debate among scholars: public schools.<sup>167</sup> The case before the Court regarded the constitutional compatibility of teaching the Catholic religion in these institutions.<sup>168</sup> Such a curriculum was contemplated by the Lateran pacts and their subsequent modifications; it is still imparted by teachers, who are subject to an ecclesiastical approbation, only to students who ask to participate, while the

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<sup>164</sup> See GIOVANNI DI COSIMO, *COSCIENZA E COSTITUZIONE* 177 (2000).

<sup>165</sup> Corte Cost., 11 aprile 1989, n. 203, para. 4 (It.).

<sup>166</sup> See Finocchiaro, *supra* note 144, at 307.

<sup>167</sup> See, e.g., Matias Manco, *Esposizione del Crocifisso e Principio di Laicità dello Stato*, 1 QUADERNI DI DIRITTO E POLITICA ECCLESIASTICA 31, 34 (2005); Francesco Rimoli, *Laicità, Postsecolarismo, Integrazione Dell'estraneo: Una Sfida per la Democrazia Pluralista*, 2 DIRITTO PUBBLICO 335, 335 (2006); Barbara Randazzo, *Laicità "Positiva" e Crocifisso nelle Aule Scolastiche: Incostituzionalità dell'Obbligo di Esposizione e Incostituzionalità dell'obbligo di Rimozione*, 4 QUADERNI COSTITUZIONALI 841, 841 (2004).

<sup>168</sup> Corte Cost., 11 aprile 1989, n. 203 (It.).

contents of the subject are the object of a joint agreement between the church and the state.<sup>169</sup>

In its decisions, the Constitutional Court focused on two issues: whether such a religious subject was consistent with the non-religious model of the Italian state, and whether it constituted a form of discrimination for students who refused the course.<sup>170</sup> The Court affirmed that Italy is a state where the principle of *laicità* rules, but endorsed a conception according to which *laicità* “does not imply state indifference towards religion; but a duty of the state to safeguard religious liberty, in a context of confessional and cultural pluralism.”<sup>171</sup> Moreover, the Court maintained that the principle “does not require ideological and abstract theorizations of state or state leaders, non-involvement or hostility towards the religion in itself or any religious belief, but is a servant to the concrete needs of the civil and religious conscience of the citizens.”<sup>172</sup>

Ultimately, the Court upheld the law concerning the teaching of Catholic doctrine in public schools for students and students’ families who request it.<sup>173</sup> The Court decided that teaching Catholicism in public schools was perfectly consistent with the Italian interpretation of the *laicità* principle.<sup>174</sup> To support its position, it cited the pacts’ modifications whose provisions contemplate Catholic teaching because of the “value of religious culture” and because “Catholic values form part of the historical heritage of the Italian people.”<sup>175</sup>

<sup>169</sup> Additional Protocol art. 4 Costituzione [Cost.] (It.) (“a) L’insegnamento della religione cattolica nelle scuole indicate al n. 2 è impartito—in conformità alla dottrina della Chiesa e nel rispetto della libertà di coscienza degli alunni—da insegnanti che siano riconosciuti idonei dall’autorità ecclesiastica, nominati, d’intesa con essa, dall’autorità scolastica. Nelle scuole materne ed elementari detto insegnamento può essere impartito dall’insegnante di classe, riconosciuto idoneo dall’autorità ecclesiastica, che sia disposto a svolgerlo. b) Con successiva intesa tra le competenti autorità scolastiche e la Conferenza episcopale italiana verranno determinati: 1) I programmi dell’insegnamento della religione cattolica per i diversi ordini e gradi delle scuole pubbliche; 2) Le modalità di organizzazione di tale insegnamento, anche in relazione alla collocazione nel quadro degli orari delle lezioni; 3) I criteri per la scelta dei libri di testo; 4) I profili della qualificazione professionale degli insegnanti.”).

<sup>170</sup> Corte Cost., 11 aprile 1989, n. 203, para. 4 (It.).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* para. 7.

<sup>173</sup> G. Floridia & Stefano Sicardi, *Dall’Uguaglianza dei Cittadini alla Laicità dello Stato*, 2 GIURISPRUDENZA COSTITUZIONALE 908, 1086 (1989).

<sup>174</sup> L. Musselli, *Insegnamento della Religione Cattolica e Tutela della Libertà Religiosa*, 4 GIURISPRUDENZA COSTITUZIONALE 908, 909 (1989).

<sup>175</sup> Additional Protocol art. 9 Costituzione [Cost.] (It.) (“La Repubblica italiana, riconoscendo il valore della cultura religiosa e tenendo conto che i principi del cattolicesimo fanno parte del patrimonio storico del popolo italiano, continuerà ad assicurare, nel quadro delle finalità della scuola, l’insegnamento della religione cattolica nelle scuole pubbliche non universitarie di ogni ordine e grado. Nel rispetto della libertà di coscienza

The Court was very careful not to give any impression of endorsing the French interpretation of *laicità*.<sup>176</sup> When it referred to an “ideological, hostile approach,” it was clearly referencing the French Enlightenment and its revolutionary legacy that had fostered the widest separation between the religious realm and the state.<sup>177</sup> Since the word *laicità* is derived from French culture—to the extent that the framers refused to use it—the use of the word out of its original context was problematic.<sup>178</sup>

The introduction of this principle in the constitutional jurisprudence had several effects on the doctrine and even on the understanding of *laicità* itself. First, it was inconsistent with the traditional meaning of that very word, which had been borrowed from the French concept of strict separation between church and state.<sup>179</sup> Second, this wording paved the way to a new understanding of state *laicità*, one that was friendlier to religions.<sup>180</sup> However, this accomplishment could have been achieved through the exact application of the constitutional provisions about religion and state, rather than incorporating such a contentious word into the constitutional jurisprudence.<sup>181</sup>

A subsequent decision of the Constitutional Court on this matter—1991’s Decision Number 13, which concerned the legitimacy of the teaching of Catholic religion in schools—reaffirmed and further stressed the implications of the principle of *laicità* as articulated by the 1989 decision, since it affirmed

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e della responsabilità educativa dei genitori, è garantito a ciascuno il diritto di scegliere se avvalersi o non avvalersi di detto insegnamento. All’atto dell’iscrizione gli studenti o i loro genitori eserciteranno tale diritto, su richiesta dell’autorità scolastica, senza che la loro scelta possa dar luogo ad alcuna forma di discriminazione.”).

<sup>176</sup> Musselli, *supra* note 174, at 909.

<sup>177</sup> TORTAROLO, *supra* note 103, at 7.

<sup>178</sup> This is why the decision divided scholars into different factions. Some have endorsed the new conception of *laicità*. See Florida & Sicardi, *supra* note 173, at 1086. Others have maintained that the Court used the word in an inappropriate way, just to describe the fundamental role of religious freedom and of the principle of equality. See Finocchiaro, *La Repubblica Italiana Non È uno Stato Laico*, *supra* note 16, at 11. A third faction strongly supported the importation of the French interpretation of the term—its aim was not to adopt a hostile approach towards religion, but rather to foster a stronger separation between spiritual and state power. See, e.g., LARICCIA, *supra* note 127, at 58. This faction wanted to weaken the public role of religions, especially of the Catholic Church, rather than impeding or narrowing religious freedom. *Id.* This faction was probably more disappointed by the effect of the Constitutional Court’s endorsement of the principle of *laicità* than by the conception of the principle per se. See *id.* They would have supported the introduction of the word, but they would have expected it to have different implications on the relationship between religion and state. See *id.*

<sup>179</sup> Musselli, *supra* note 174, at 909.

<sup>180</sup> CAVANA, *supra* note 9, at 256.

<sup>181</sup> PIN, *supra* note 54, at 142.

that teaching Catholic doctrine in public schools is not only consistent with but even represents an application of the principle of *laicità*.<sup>182</sup>

This combination of decisions, which opened an intense jurisprudential effort and a strong doctrinal debate, shows that the Court's interpretation of the *laicità* principle synthesized constitutional provisions concerning the relationship between church and state.<sup>183</sup> Therefore, the *laicità* principle articulated by the Court: (1) adheres to the fundamental principle of equality that characterizes the treatment of individuals as well as of religions; (2) acknowledges the historical role of Catholicism in Italy that the Constitution implicitly recognizes; and (3) allows for the collaborative approach that the Constitution foresees through the system of agreements between religions and the state.<sup>184</sup>

This version of *laicità* is very distant from the word's modern roots in the Enlightenment and the French Revolution.<sup>185</sup> The Constitutional Court used the word to define synthetically the religious freedom and the relationship between religion and state that are embedded in the Constitution.<sup>186</sup> Those constitutional provisions have little to do with the French strict separation of church and state, which was conceived in opposition to Catholicism.<sup>187</sup> On the contrary, Article 7 of the Italian Constitution is indebted to the Catholic doctrine, and the principle of *laicità* as used by the Court does not command any hostile or even separatist approach of the state toward religions.<sup>188</sup>

The implication of the development of Italian *laicità*, therefore, is that religion is welcome in public institutions and is not required to be absent from them. According to the Constitutional Court's first decisions, the treatment of pluralism that is embedded in the Constitution is therefore the opposite of the

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<sup>182</sup> Corte Cost., 11 gennaio 1991, n. 13 (It.). The original wording of the Constitutional Court is as follows: "L'insegnamento di religione cattolica, compreso tra gli altri insegnamenti del piano didattico, con pari dignità culturale, come previsto nella normativa di fonte pattizia, non è causa di discriminazione e non contrasta—essendone anzi una manifestazione—col principio supremo di laicità dello Stato." Corte Cost., 11 aprile 1989, n. 203, para. 2 (It.).

<sup>183</sup> Barbera, *supra* note 11, at 42.

<sup>184</sup> *Id.* at 38.

<sup>185</sup> Giovanni Di Cosimo, *Simboli Religiosi nei Locali Pubblici: Le Mobili Frontiere dell'Obiezione di Coscienza*, 2 GIURISPRUDENZA COSTITUZIONALE 1130, 1139 (2000).

<sup>186</sup> *Id.*

<sup>187</sup> CAVANA, *supra* note 9, at 15.

<sup>188</sup> Sicardi, *supra* note 94, at 9; Barbera, *supra* note 11, at 42.

French *laïcité*'s paradigm, which demands for the exclusion of religion from public institutions.<sup>189</sup>

## 2. *Neutrality: A New Season for the Constitutional Court*

In decisions following the aforementioned cases, the Constitutional Court significantly changed its attitude towards the conception of *laïcité*.<sup>190</sup> The theory of an open, friendly attitude of public institutions toward religion was replaced by a new doctrine demanding that public institutions and religions remain more distant from each other.<sup>191</sup> In this new season, the Constitutional Court still largely uses the concept of *laïcité* but introduces a new lexicon by using the word “neutrality”<sup>192</sup>—the very same word that has been used by the ECHR precisely to depict the relationship between religion and state.

This shift is apparent in part because of the outcome of the decisions, but mainly because of the arguments the Court has employed to define the principle. This trend has been observed by many commentators of this new season<sup>193</sup>—interestingly, almost all have come to believe that the Court has positioned itself within the long, traditional history of the *laïcité* principle, as inherited from France.<sup>194</sup> Even though the Court did not derive the hostile approach from the French tradition, it has increasingly advocated a stronger separation between church and state.<sup>195</sup>

It must be clarified that the Court adopted the new wording without being fully aware of this change. As we will see, it started by defining the principle

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<sup>189</sup> Francesco Patruno, *Crocifisso, Giurisprudenza Straniera e Laicità*, OLIR: OSSERVATORIO DELLE LIBERTÀ ED ISTITUZIONI RELIGIOSE, 1 (June 2005), [http://www.olir.it/areetematiche/75/documents/Patruno\\_crocifisso.pdf](http://www.olir.it/areetematiche/75/documents/Patruno_crocifisso.pdf).

<sup>190</sup> PIN, *supra* note 54, at 149.

<sup>191</sup> *Id.*

<sup>192</sup> *See* Corte Cost., 18 ottobre 1995, n. 440 (It.). This decision was the landmark in this shift in constitutional jurisprudence.

<sup>193</sup> Paolo Cavana, *La Questione del Crocifisso in Italia*, OLIR: OSSERVATORIO DELLE LIBERTÀ ED ISTITUZIONI RELIGIOSE, 7 (May 2004), [http://www.olir.it/areetematiche/75/documents/Cavana\\_questionedelcrocifisso.pdf](http://www.olir.it/areetematiche/75/documents/Cavana_questionedelcrocifisso.pdf).

<sup>194</sup> Francesco Rimoli, *Tutela del Sentimento Religioso, Principio di Eguaglianza e Laicità dello Stato*, 6 GIURISPRUDENZA COSTITUZIONALE 3343, 3343 (1997); Barbara Randazzo, *La Corte Apre al Giudizio di Uguaglianza tra Confessioni Religiose?*, 3 GIURISPRUDENZA COSTITUZIONALE 1843, 1843 (1998); Giuseppe Casuscelli, *Libertà Religiosa Collettiva e Nuove Intese con le Minoranze Confessionali*, STATO, CHIESE E PLURALISMO CONFESIONALE, 6–7 (Mar. 2008), [http://www.statoechiese.it/images/stories/2008.3/casuscelli\\_libertm.pdf](http://www.statoechiese.it/images/stories/2008.3/casuscelli_libertm.pdf).

<sup>195</sup> *See* Di Cosimo, *supra* note 185, at 1134 (endorsing this change); Randazzo, *supra* note 194, at 1866 (highlighting the difference from the previous Constitutional Court's attitude).

as implying “impartiality,” “equidistance,” and—above all—“neutrality,” without explaining why it preferred these words and the relationship between each of them.<sup>196</sup> Nevertheless, it is quite clear that the main issue concerns the relationship between religion and state that is best understood if one focuses on the term “neutrality,” which the Court uses to portray the necessity of a clear separation between church and state.<sup>197</sup>

This shift can be seen in 1995’s Decision Number 440.<sup>198</sup> The Court partially struck down a provision of the penal code sanctioning offenses to “God and the persons and symbols venerated by the state religion.”<sup>199</sup> The penal code was created during the 1930s, when the state was officially religious—so the justices interpreted the reference to the state religion as meaning Catholicism.<sup>200</sup> In the name of equality, the Court annulled the provision only partially.<sup>201</sup> In order to keep the protection concerning religiosity, it conserved the punishment for the offence to God but struck down the part that punished the offences to the persons and the symbols venerated by the former official religion (Catholicism); this could not be consistent with Italian equality, which was implied by the principle of *laicità*, since it discriminated between religions in terms of their protection.<sup>202</sup>

Due to the intervention of the Court, Catholicism lost its special protection against offenses to its main historical figures and liturgy, but was protected from any offense to God.<sup>203</sup> Moreover, because there was no explicit mention of the Catholic deity, the phrasing of the article was changed to extend the protection from offenses of the divine to believers of other faiths.<sup>204</sup>

<sup>196</sup> See, e.g., Corte Cost., 18 ottobre 1995, n. 440 (It.).

<sup>197</sup> Di Cosimo, *supra* note 185, at 1134.

<sup>198</sup> Corte Cost., 18 ottobre 1995, n. 440 (It.).

<sup>199</sup> Art. 724 Codice di procedura penale [C.p.p.] (It.).

<sup>200</sup> See Marilisa D’Amico, *Una Nuova Figura di Reato: La Bestemmia contro la “Divinità,”* 3 GIURISPRUDENZA COSTITUZIONALE 3487, 3488 (1995).

<sup>201</sup> See Corte Cost., 18 ottobre 1995, n. 440, para. 4.3 (It.).

<sup>202</sup> *Id.* para. 5 (“La scelta attuale del legislatore di punire la bestemmia, una volta depurata del suo riferimento ad una sola fede religiosa, non è dunque di per sè in contrasto con i principi costituzionali, tutelando in modo non discriminatorio un bene che è comune a tutte le religioni che caratterizzano oggi la nostra comunità nazionale, nella quale hanno da convivere fedi, culture e tradizioni diverse.”).

<sup>203</sup> *Id.* para. 5.

<sup>204</sup> Actually, the Court could not extend the crime to persons and symbols venerated by any religion, since it cannot expand the area of penal laws, according to the Italian Constitution. Art. 13.1 Costituzione [Cost.] (It.). Nevertheless, it might have expressed an admonition to Parliament in order to restore the broader protection of religiosity. ANTONIO RUGGERI & ANTONINO SPADARO, LINEAMENTI DI GIUSTIZIA COSTITUZIONALE 271 (2009).

The decision deprived the most important religious figure of the largest Italian religious group—the Christian community’s Jesus—of any protections. Therefore, an important element of the provision’s protection became dependent on a choice to be made by the courts interpreting the rule as reformed by the Constitutional Court; a court could choose between the Christian vantage point and the “neutral” one. In other words, a court could decide to identify Jesus with God, as Christians do, and therefore apply the law to offenses against Jesus—but this could be seen as an endorsement of a Christian vantage point. The only other choice would consist of avoiding such identification, remaining “neutral” in respect to any religion and therefore not applying the law. The latter choice might be seen as egalitarian precisely because it does not endorse any specific religious vantage point. Although the Court did not use the word “neutrality,” the final implications of such an approach seem to consist of diminishing the protection of religious figures and, more precisely, the introduction of an alternative, “neutral” view to the traditional Catholic one.

It was only in a following decision that the concept of “neutrality” was explicitly mentioned by the Court.<sup>205</sup> Interestingly, the Constitutional Court introduced this principle in its decision even though it was not necessary.<sup>206</sup> The 1997 Decision Number 235 concerned the different fiscal treatment of some Jewish institutions in light of the treatment that was accorded to some Catholic institutions by some Italian tax laws.<sup>207</sup> The Court dismissed the case, concluding that the Catholic and the Jewish institutions that were brought to its attention had different purposes and therefore could legitimately be treated differently under Italian law.<sup>208</sup>

In addressing the case, the Court mentioned the principle of neutrality, which had never been cited before in its jurisprudence.<sup>209</sup> According to the Court, this principle required the state to be “neutral” towards every religion.<sup>210</sup>

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<sup>205</sup> Corte Cost., 19 giugno 1997, n. 235 (It.).

<sup>206</sup> Randazzo, *supra* note 194, at 1866.

<sup>207</sup> *See, e.g.*, Corte Cost., 19 giugno 1997, n. 235 (It.). Namely, the tax exemptions that were accorded to Catholic institutions were Law Number 994 and Law Number 222. Legge 16 dicembre 1977, n. 994, art. 8 (It.); Legge 20 maggio 1985, n. 222, art. 45 (It.).

<sup>208</sup> Corte Cost., 19 giugno 1997, n. 235 (It.).

<sup>209</sup> *Id.*

<sup>210</sup> Stefano Sicardi, *Il Principio di Laicità nella Giurisprudenza della Corte Costituzionale*, RIVISTA DELL’ASSOCIAZIONE ITALIANA DEI COSTITUZIONALISTI, pt. 2 (Sept. 2007), <http://www.associazionedeicostituzionalisti.it/materiali/convegni/200611foggia/sicardi2.html>. “[R]ispetto della neutralità dello Stato in materia religiosa nei confronti di tutte.” *Id.*

This introduction of “neutrality” was not necessarily required to decide the case. The Court could have used the principle of *laicità*, which did not relate to neutrality, or simply focused on the principle of “equality,” which is well rooted in the constitutional text as well as in the Court’s jurisprudence. Even though it was provided with these concepts, the Court preferred to introduce the neutrality principle to express the proper attitude of the state toward religions.

In short, the 1990s were characterized by the Constitutional Court’s intense activity in the realm of religious liberty. Its most meaningful efforts were intended to stress the importance of the principles of “neutrality” and “impartiality.” These words are obviously related to *laicità*; nevertheless, it is apparent that these concepts were used in the constitutional jurisprudence to increase the distance between the church and the state.

Indeed, neutrality and impartiality do not simply express the equality principle or adequately reflect the definition of *laicità* as depicted in the previous Constitutional Court’s trend. The neutrality principle is linked to the French constitutional model that conceives religion and state as separate entities and has clearly been used by the Court in this sense.<sup>211</sup> In its recent decisions, the Constitutional Court has changed its view about how the state should govern religious pluralism—from an attitude that fosters the collaboration between church and state, the Court has shifted to a new paradigm which requires religion and state to remain distinctly separate from each other.

#### *D. Neutrality Goes to School: The Crucifix*

Other courts soon followed the Constitutional Court’s principle of neutrality, specifically in addressing cases that concerned public schools. Neutrality was successfully used as the crucial criteria to distinguish between what is and is not allowed in public schools.

The Italian political and legal environments have been continuously involved in the topic of religion at school. There are various reasons for this: first, because there are some constitutional provisions about private schools<sup>212</sup>

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<sup>211</sup> See Henri Astier, *The Deep Roots of French Secularism*, BBC NEWS (Sept. 1, 2004, 2:39 PM), <http://news.bbc.co.uk/2/hi/europe/3325285.stm>.

<sup>212</sup> Art. 33 Costituzione [Cost.] (It.) (“[2] The republic adopts general norms for education and establishes public schools of all kinds and grades. [3] Public and private bodies have the right to establish schools and educational institutes without financial obligations to the state. [4] The law defining rights and obligations of

and Catholic education and second, because public schools have historically been a battleground between the domains of the church and the state.<sup>213</sup>

The first episode addressing the presence of the crucifix in public schools dates back to the 1980s, even before the Court's introduction of the principle of *laicità*.<sup>214</sup> In 1988, upon the government's request, the Council of State delivered an opinion concerning the presence of crucifixes in schools.<sup>215</sup> It said that the crucifix was consistent with the constitutional principle of freedom of religion and of conscience since it did not impede on the freedom of speech and did not inhibit discussion in the classrooms.<sup>216</sup> It simply reflected the cultural roots of the Italian state, and therefore it had to be considered as a cultural sign rather than a religious one.<sup>217</sup>

But a sudden increase in debates about the meaning and the implications of the principle of *laicità* started less than a decade ago in 2000, when several courts were petitioned to decide about the presence of Christian symbols in public schools.<sup>218</sup>

### 1. *The Judgment of the Court of Cassation*

The first Italian case concerning the crucifix was only indirectly linked with the presence of the crucifix at a public school. It originated when a man who had been called to work at the ballots refused to obey and was therefore prosecuted according to a penal rule sanctioning people who do not comply with this mandatory duty.<sup>219</sup> He refused to take part in the election operations because he personally endorsed the principle of *laicità* and did not want to work in connection with polls that were held in public schools, where the crucifix was present.<sup>220</sup> He did not want to be associated with such a symbol, even though the classroom where he was actually placed did not have a crucifix inside.<sup>221</sup>

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those private schools requesting recognition has to guarantee full liberty to them and equal treatment with pupils of public schools.”)

<sup>213</sup> See Manco, *supra* note 167, at 44.

<sup>214</sup> Cons. Stato, 27 aprile 1988, n. 63 (It.).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> See Ventura, *supra* note 128, at 924.

<sup>218</sup> See *id.* at 922.

<sup>219</sup> Corte Cost., 25 ottobre 2000, n. 439 (It.).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

The case finally arrived at the Court of Cassation.<sup>222</sup> The Court does not have the power to annul legal or administrative rules; its general task is to grant a uniform interpretation of the laws.<sup>223</sup> In this case, the Court had to examine if the previous judges were correct in interpreting the rule and delivering the sanction.<sup>224</sup> Nevertheless, the impact of the Court's decision was critical for the development of Italian jurisprudence on the principle of *laicità*.<sup>225</sup>

The Court reversed the judgments and excused the defendant accused of violating the law.<sup>226</sup> The Court of Cassation believed that the refusal was justified because of the personal endorsement of the principle of *laicità* and because the presence of the crucifix was not consistent with constitutional provisions.<sup>227</sup>

The Court of Cassation's decision represents a sort of *summa* of the Constitutional Court's jurisprudence of the nineties, both because of its wording and its rationale. The Court of Cassation could have contradicted the Council of State and endorsed the opinion that the symbol could influence the freedom of conscience of the people working at the ballots. However, this would not have dealt with the accusation involved in that specific case since there was no crucifix in that room.<sup>228</sup> Therefore, this would have meant an implicit affirmation of the display of the crucifix, but the defendant would have been found guilty.

Conversely, the Court of Cassation recalled the principle of *laicità*, clearly identifying it with the "neutrality" and the "impartiality" of public administration.<sup>229</sup> This interpretation was helped by the constitutional article affirming that public administration is impartial<sup>230</sup>—a provision that had not been used before to describe the principle of *laicità* or to portray the state's attitude toward religion.

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<sup>222</sup> *Id.*

<sup>223</sup> Regio Decreto 30 gennaio 1941, n. 12 (It.).

<sup>224</sup> Corte Cost., 25 ottobre 2000, n. 439, paras. 2–3 (It.).

<sup>225</sup> Di Cosimo, *supra* note 185, at 1139.

<sup>226</sup> Corte Cost., 25 ottobre 2000, n. 439, para. 9 (It.).

<sup>227</sup> *Id.*

<sup>228</sup> *See* PIN, *supra* note 54, at 162.

<sup>229</sup> Corte Cost., 25 ottobre 2000, n. 439, para. 6 (It.).

<sup>230</sup> Art. 97 Costituzione [Cost.] (It.) ("The organization of public offices is determined by law ensuring the proper and fair operation of public affairs.").

According to the Court of Cassation, the presence of the crucifix at school was inconsistent with the Italian Constitution; not simply because its presence violated freedom of conscience, but mostly because it infringed on the principle of *laicità*.<sup>231</sup> The Court focused on this aspect by underlining the relationship between the symbol and the state, rather than focusing on the symbol and the people who were obliged to be in the presence of such a symbol.<sup>232</sup>

As a result of the decision, the man on trial was discharged.<sup>233</sup> But the indirect effect was essentially a declaration that the crucifix in the public school was unconstitutional.<sup>234</sup> Even though such an affirmation did not have any effect on the display of the crucifix,<sup>235</sup> it had important political and juridical implications, because it came from an authoritative body such as the Court of Cassation, whose primary role is the uniform application of rules throughout Italy.<sup>236</sup>

Based on the Court's decision, it is apparent that the Italian version of *laicità* was moving toward the French paradigm.<sup>237</sup> Furthermore, it is significant that the decision implicitly considered the principle of *laicità* as having two aspects. The first aspect regarded the state's institutional attitude toward religion and culture.<sup>238</sup> The second aspect concerned the ideological meaning of the principle.<sup>239</sup> The Court considered that the man on trial had

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<sup>231</sup> Corte Cost., 25 ottobre 2000, n. 439, para. 9 (It.).

<sup>232</sup> *Id.* para. 7. Now, the Court could also draw on the German experience and the debate that it had raised throughout continental Europe. The Federal Constitutional Court of Germany had declared the presence of the crucifix to be unconstitutional because it contaminated the secular realm and profaned a religious sign through its public display. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 16, 1995, 93 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1 (Ger.) [hereinafter German Crucifix Case]. Thus, the Italian court drew on this foreign decision, endorsed the "neutral" version of the principle of *laicità*, and maintained that the presence of the symbol would violate the students' consciences and thoughts as well as the religious character of the crucifix. Corte Cost., 25 ottobre 2000, n. 439 (It.).

<sup>233</sup> *Id.*

<sup>234</sup> See Ventura, *supra* note 128, at 922–23.

<sup>235</sup> Di Cosimo, *supra* note 185, at 1139.

<sup>236</sup> *Le Funzioni della Corte di Cassazione*, CORTE SUPREMA DI CASSAZIONE, <http://www.cortedicassazione.it/Cassazione/Cassazione.asp#> (last visited Feb. 23, 2011).

<sup>237</sup> The Court's decision was welcomed by scholars who supported a stronger separation between church and state. Di Cosimo, *supra* note 185, at 1135. Other scholars openly criticized the decision because such a rationale would be inconsistent with the Constitutional Court's precedents, which were more open to a relationship between state and religion. See, e.g., Francesco Patruno, *Riflessioni sul Valore delle Pronunce Straniere in Tema di Esposizione del Crocifisso*, FORUM DI QUADERNI COSTITUZIONALI, para. 1 (Nov. 2003), <http://www.forumcostituzionale.it/site/index3.php?option=content&task=view&id=700>.

<sup>238</sup> Corte Cost., 25 ottobre 2000, n. 439, para. 7 (It.).

<sup>239</sup> *Id.* para. 19.

personally endorsed the principle of *laicità* and so his conscience could be violated by the exposition of religious signs.<sup>240</sup> Through this reasoning, the Court admitted that such a principle is not just a standard for public powers—it is also a moral principle since people can adhere to it as to a personal ideal.<sup>241</sup>

Obviously, *laicità* can be interpreted in both ways; but one must distinguish between the two meanings and realize the fact that the first decisions of the Italian Constitutional Court did not concern this ideological perspective. The Court of Cassation did not make any distinction. The Court of Cassation's interpretation of the previous affirmations of the Constitutional Court, which originally concerned only the public powers and the space for Catholic teaching at schools, acquired an ideological value.<sup>242</sup>

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<sup>240</sup> *Id.* The Court spoke of

un conflitto tra la personale adesione al principio supremo di laicità dello Stato e l'adempimento dell'incarico a causa dell'organizzazione elettorale in relazione alla presenza nella dotazione obbligatoria di arredi dei locali destinati a seggi elettorali, pur se casualmente non di quello di specifica designazione, del crocifisso o di altre immagini religiose.

*Id.*

<sup>241</sup> *Id.*

<sup>242</sup> One can go further and argue that the foreign case mentioned by the Court does not necessarily support the opinion of the Court of Cassation, but it might even support the opposite one. Some authors have correctly observed that the Court's decisions are necessarily influenced by and even reflect, to some extent, the same religious and cultural traditions of the places where they are released. See Paolo Cavana, *Modelli di Laicità nelle Società Pluraliste. La Questione dei Simboli Religiosi nello Spazio Pubblico*, OLIR: OSSERVATORIO DELLE LIBERTÀ ED ISTITUZIONI RELIGIOSE, 6 (Apr. 2005), [http://www.olir.it/aretematiche/102/documents/Cavana\\_Campobasso.pdf](http://www.olir.it/aretematiche/102/documents/Cavana_Campobasso.pdf). The most meaningful example can be seen in the German case that was mentioned by the Court of Cassation. Corte Cost., 25 ottobre 2000, n. 439, para. 7 (It.). A law of the German State of Bavaria requested that the cross be displayed in public schools and the Constitutional Tribunal intervened and struck down the law. *Id.* A few months later, Bavaria enforced a new law prescribing the exposition of the cross but permitting its removal only if it offended students, and only after a dialogue between the students' families and the school's management. See Ceccanti, *supra* note 31, at 10.

It is interesting to notice that Bavaria insisted on keeping the cross in the schools, while the Constitutional Tribunal maintained that public display of religious symbols did not only contaminate the public sphere, but also profaned religious signs because it detached them from their religious context and introduced them into a profane sphere. *Id.* The entire German affair seems to reflect the distance between the Protestant vision and the Catholic vision. The first sees the cross as a symbol that reminds people of the vanity of the earthly world, while the second believes the crucifix to be an open affirmation of universal values to which earthly life must be aligned. *Id.* Bavaria is the most Catholic part of Germany and supported the public display of religious signs simply by adapting its rules to the Constitutional Court's decision. *Id.* Conversely, the German Tribunal reflected the wider Protestant culture when it considered the profanation of the religion. Cavana, *supra* note 40, at 6. "In Germania, e più in generale nei paesi protestanti, la croce assume per lo più un significato di condanna delle realtà terrene, e si comprende pertanto come la sua presenza nei luoghi pubblici e nelle istituzioni possa assumere il senso di una profanazione di realtà o simboli sacri." *Id.* On the contrary, according to the Catholic tradition "il crocifisso è percepito come simbolo di valori universali, destinati a incarnarsi nella realtà umana e ad operare anche all'interno delle istituzioni. Si tratta di una differente lettura teologica del simbolo sacro che è parte integrante delle tradizioni dei singoli paesi." *Id.* Moreover, Italian

Thus, the development of the principle of *laicità* has strayed quite far from its origin in Italian jurisprudence.<sup>243</sup> Its new implication—the elimination of religious symbols from the public place—is not consistent with the first decisions of the Constitutional Court.<sup>244</sup> The Court of Cassation detached the principle from its Italian origins and placed it closer to the French tradition.<sup>245</sup>

The Court of Cassation's decision was important in the Italian history of the principle. It endorsed a doctrine that was most influenced by French constitutional heritage. Moreover, by virtually depriving the principle of *laicità* of its original Italian meaning, the Court of Cassation pushed towards a redefinition of the principle by opening the way to a more traditional interpretation of the concept.<sup>246</sup> It did so by saying that such an interpretation was inconsistent with the Italian precedent and more in accord with the historical characters of the principle. This new jurisprudence fostered a treatment of religious pluralism that was more akin to the French model.

## 2. *The Crucifix and the Students*

Some years later, a Muslim father of primary school students asked for the removal of the crucifix from the classroom of his two children.<sup>247</sup> The civil tribunal ordered a provisional removal in order to protect the students' consciences until it decided the case.<sup>248</sup> Given that the merits of the case were decided by a different court, the civil tribunal never delivered the final decision.<sup>249</sup> But its provisory order was widely discussed because it endorsed

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scholarship provides evidence of the strong influence of the religious culture over cases such as this. Among the many Italian scholars who have criticized the display of the cross, one can find very few people maintaining that religion itself would suffer a violation of its pureness if the state were to display religious signs. This seems to be a symptom of the historical role of Catholic thought, even among intellectuals who are adverse to the public display of the crucifix. Gian Enrico Rusconi, *Discorso Pubblico e Discorso Teologico: La Strategia Comunicativa di Papa Ratzinger*, 5 *IL MULINO* 771, 779 (2007), available at [www.mulino.it/rivisteweb/anteprima.php?id\\_articolo=25194](http://www.mulino.it/rivisteweb/anteprima.php?id_articolo=25194).

<sup>243</sup> Di Cosimo, *supra* note 185, at 1135.

<sup>244</sup> See *supra* text accompanying note 148.

<sup>245</sup> PIN, *supra* note 54, at 166.

<sup>246</sup> Di Cosimo, *supra* note 185, at 1135.

<sup>247</sup> Sophie Arie, *Muslim Wins Italian Court Ban on Crucifixes in Classroom*, *GUARDIAN.CO.UK* (Oct. 27, 2003, 2:09 AM), <http://www.guardian.co.uk/world/2003/oct/27/italy.sophiearie>.

<sup>248</sup> *Lautsi I*, *supra* note 1.

<sup>249</sup> The Regional Administrative Tribunal dismissed the case, thereby upholding the presence of the crucifix. *Id.* Nevertheless, it did not give any new rationales therefore it can be omitted.

the Court of Cassation's position and justified the rationale with the help of historical and cultural arguments.<sup>250</sup>

In the opinion of the L'Aquila court, the state and its bodies cannot express a preference for any specific religion or culture and their equidistance should be preserved and affirmed by avoiding any public display of religious symbols.<sup>251</sup> Moreover, according to the tribunal, the presence of the crucifix would threaten the religious and ideological freedom and education of the students.<sup>252</sup> It would not just be a traditional symbol, simply expressing the legacy of the Italian culture. Rather it would be read as an affirmation of the absolute value of one faith and one belief at the expense of all others.<sup>253</sup>

One last point of the Court's order must be underlined adequately because it contains meaningful affirmations about the role of education in a pluralistic context. The tribunal stressed the importance of affirming *laicità* in a place like the school, which it depicted as prescribing a clear separation between church and state.<sup>254</sup> The tribunal recognized that the school was a major battlefield between the Catholic Church and the state.<sup>255</sup> For several decades, both proclaimed different ideologies and tried to impose their own ideals and ethics over society through the education of young people.<sup>256</sup> In the tribunal's opinion, this historical reason fostered the principle of *laicità* as a cornerstone of Italian ideology.<sup>257</sup>

<sup>250</sup> See generally Michele Madonna, *L'esposizione del Crocifisso nelle Aule Scolastiche dal Caso di Ofena all'Ordinanza della Corte Costituzionale n. 389 del 13 Dicembre 2004: Brevi Note su una Questione Ancora Aperta*, OLIR: OSSERVATORIO DELLE LIBERTÀ ED ISTITUZIONI RELIGIOSE (Dec. 2004), [http://www.olir.it/areetematiche/75/documents/Madonna\\_crocifisso.pdf](http://www.olir.it/areetematiche/75/documents/Madonna_crocifisso.pdf); Lorenzo Ascanio, *Brevi Riflessioni Sull'ordinanza del Tribunale de L'Aquila sul Crocifisso nelle aule Scolastiche*, FORUM DI QUADERNI COSTITUZIONALI (Nov. 2003), <http://www.forumcostituzionale.it/site/index3.php?option=content&task=view&id=693>; Michele Toffoli, *Crocifissi e Laicità dello Stato nelle Recenti Ordinanze del Tribunale dell'Aquila*, RIVISTA DELL'ASSOCIAZIONE ITALIANA DEI COSTITUZIONALISTI (Dec. 2003), <http://www.associazionedeicostituzionalisti.it/cronache/file/crocifisso.html>.

<sup>251</sup> Tribunale di L'Aquila, 23 ottobre 2003, G.U. Montanaro, para. 5 (It.).

<sup>252</sup> *Id.*

<sup>253</sup> This would put the "culto cattolico al centro dell'universo, come verità assoluta, senza il minimo rispetto per il ruolo svolto dalle altre esperienze religiose e sociali nel processo storico dello sviluppo umano, trascurando completamente le loro inevitabili relazioni e i loro reciproci condizionamenti." Tribunale di L'Aquila, 23 ottobre 2003, Altalex 2006, available at <http://www.altalex.com/index.php?idnot=10377>.

<sup>254</sup> Tribunale di L'Aquila, 23 ottobre 2003, G.U. Montanaro (It.).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* "Dall'unità d'Italia la scuola costituisce [ . . . ] terreno tradizionale di confronto fra gli interessi ideologici dello Stato e della Chiesa, forse l'oggetto privilegiato delle pretese confessionali e probabilmente, quindi, anche il luogo ove si avverte più forte l'esigenza di laicità." *Id.*

<sup>257</sup> *Id.*

After describing the ideological conflict between the church and the state, the tribunal endorsed *laicità* as a distinguishing feature of the state's ideology and issued the order to remove the Christian symbol.<sup>258</sup> Thus, the tribunal's idea of separation of church and state was intended to be for the state's sake rather than for the students' sake.<sup>259</sup> Unless one believes that the state always takes care of younger generations better than religious denominations do, it must be recognized that the tribunal wanted to assure that students are educated according to the state's values rather than according to values that derive from the prevailing Catholic culture.<sup>260</sup> In the tribunal's opinion, students should be educated to place their allegiance to the Italian state before their allegiance to Catholicism or to the Catholic culture.<sup>261</sup>

The Court's rationale highlighted the opposition between the state's interests and the religion's interests in education as one of the features of *laicità*. This opposition is quite new in Italian jurisprudence and stands in contrast to the first Constitutional Court's jurisprudence,<sup>262</sup> which had underlined the links between religion and state, and fostered a principle of "collaboration" between the Catholic Church and public institutions that is embedded in the 1984 pact between Italy and the Church.<sup>263</sup>

#### *E. The Journey of Laicità*

It will suffice to underline the analogies between the different trends of the constitutional jurisprudence and other courts. The first decisions regarding the state support for Christian culture and its symbols<sup>264</sup> are closer to the rationale of the Administrative Tribunal of Veneto in the case of the crucifix which opened this Article, while the latter ones<sup>265</sup> are closer to the judgment of the Court of Cassation, the L'Aquila order, and even the ECHR's positions.<sup>266</sup>

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<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *See id.*

<sup>261</sup> *See, e.g.,* Giovanni Cimbalo, *Laicità come Strumento di Educazione alla Convivenza*, STATO, CHIESE E PLURALISMO CONFESIONALE, 26 (Mar. 2007), [http://ecclesiastico.giuri.unibo.it/uploads/file/insegnamento/cimbalo\\_laicita.pdf](http://ecclesiastico.giuri.unibo.it/uploads/file/insegnamento/cimbalo_laicita.pdf).

<sup>262</sup> *See, e.g.,* Corte Cost., 11 gennaio 1991, n. 13 (It.); Corte Cost., 17 maggio 1989, n. 293 (It.).

<sup>263</sup> Art. 1 Costituzione [Cost.] (It.) ("La Repubblica italiana e la Santa Sede riaffermano che lo Stato e la Chiesa cattolica sono, ciascuno nel proprio ordine, indipendenti e sovrani, impegnandosi al pieno rispetto di tale principio nei loro rapporti e alla reciproca collaborazione per la promozione dell'uomo e il bene del Paese.").

<sup>264</sup> *See, e.g.,* Corte Cost., 11 gennaio 1991, n. 19 (It.); Corte Cost., 11 aprile 1989, n. 203 (It.).

<sup>265</sup> *See, e.g.,* Corte Cost., 19 giugno 1997, n. 235 (It.); Corte Cost., 18 ottobre 1995, n. 440 (It.).

<sup>266</sup> *See* PIN, *supra* note 54, at 196–97; Patruno, *supra* note 237, at 1.

These courts' decisions embraced the idea of neutrality, often demanding a strong separation between church and state.

The principle of *laicità* has taken a long path in Italian jurisprudence. The constitutional jurisprudence first depicted it as a synthetic description of constitutional provisions concerning religious freedom and the relationship between church and state, characterized by the possibility of strong connection and even of collaboration between the two.<sup>267</sup> According to this approach, the governance of religious pluralism consisted of activating new relationships with religions other than Catholicism through negotiation as well as admitting religion in public institutions.<sup>268</sup> Later on, the principle of *laicità* was interpreted as mandating some separation between religion and state.<sup>269</sup> The distance between the religious and the secular realms was believed to be necessary for the protection of public institutions as well as the right tool to govern pluralism.<sup>270</sup>

### III. WHAT LIES BENEATH: A *KULTURKAMPF*

The very dynamic interpretation of the constitutional provisions has seen a powerful shift of the Italian jurisprudence from a pro-Catholic and pro-religion reading towards a more “neutral” one. The tension between the two interpretations of the very same provisions derives from a huge political and cultural Italian debate that opposes Catholic culture to a separatist one.<sup>271</sup>

The fluctuations of the Italian jurisprudence between a traditional, pro-Catholic, religious-friendly reading of the Italian Constitution and a more separatist one<sup>272</sup> are the judicial counterpart of an ongoing struggle that concerns the role of religion in Italian society and politics. It is worth pointing out that the public role of the Catholic Church is one of the main factors of debate, especially if one considers the field of public education.<sup>273</sup>

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<sup>267</sup> See, e.g., Corte Cost., 11 gennaio 1991, n. 13 (It.); Corte Cost., 17 maggio 1989, n. 293 (It.).

<sup>268</sup> See, e.g., Corte Cost., 11 gennaio 1991, n. 13 (It.); Corte Cost., 17 maggio 1989, n. 293 (It.).

<sup>269</sup> See, e.g., Corte Cost., 19 giugno 1997, n. 235 (It.); Corte Cost., 18 ottobre 1995, n. 440 (It.).

<sup>270</sup> Massimo Luciani, *La Problematica Laicità Italiana*, 2 *DEMOCRAZIA E DIRITTO* 105, 133 (2008).

<sup>271</sup> See Nicola Colaianni, *La Laicità tra Costituzione e Globalizzazione*, *FORUM DI QUADERNI COSTITUZIONALI*, 1 (Nov. 2008), [http://www.forumcostituzionale.it/site/images/stories/pdf/documenti\\_forum/paper/0080\\_colaianni.pdf](http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0080_colaianni.pdf).

<sup>272</sup> GIOVANNI DI COSIMO, *COSCIENZA E COSTITUZIONE* 177 (1990).

<sup>273</sup> See generally ENRICO MINNEI, *SCUOLA PUBBLICA E SCUOLA PRIVATA: GLI ONERI PER LO STATO*, (2003) (illustrating the debate over the possibilities for private schools to be financed with public resources, which has been one of the major battlefields).

It is not by chance that this lively debate about what *laicità* really is has been endlessly reshaped not just by legal scholars and courts, but also by the main protagonists of the public debate, such as politicians,<sup>274</sup> thinkers,<sup>275</sup> and polemist.<sup>276</sup>

The rebirth of religious thinking and life,<sup>277</sup> scientific accomplishments,<sup>278</sup> and the multicultural conundrum<sup>279</sup> are only some of the topics that keep the relationship between law and religion at the core of the political agenda in Italy.<sup>280</sup>

This is largely due to several issues that have arisen mainly because of the plurality of cultures, traditions, and ideals, which are increasing both from the arrival of immigrants and from the development of new cultural and social trends, such as people conceiving children through artificial means, ending one's own life in special medical circumstances, or same-sex couples demanding official recognition of their relationship.

Advocates of episodes of euthanasia,<sup>281</sup> the national legislation on in vitro fertilization,<sup>282</sup> and same-sex partnerships<sup>283</sup> have opposed the Catholic Church with new political views, advocating for the introduction of new liberties that are opposed to Catholic doctrine.<sup>284</sup> The confrontation between different vantage points has often become a confrontation about the influential role that

<sup>274</sup> Some politicians have dealt with this topic extensively. *See, e.g.*, MARCELLO PERA, *PERCHÉ DOBBIAMO DIRCI CRISTIANI* 5 (2008). For the new edition of the former Italian Republic President's final dissertation, see CARLO AZEGLIO CIAMPI, *LA LIBERTÀ RELIGIOSA DELLE MINORANZE IN ITALIA* (2009).

<sup>275</sup> *See, e.g.*, *LAICITÀ: UNA GEOGRAFIA DELLE NOSTRE RADICI* (Giovanni Boniolo ed., 2006).

<sup>276</sup> *See, e.g.*, PIERGIORGIO ODIFREDDI, *PERCHÉ NON POSSIAMO ESSERE CRISTIANI (E MENO CHE MAI CATTOLICI)* (2007); SERGIO ROMANO, *LIBERA CHIESA: LIBERO STATO?* (2005).

<sup>277</sup> This trend began in the 1990s. *See* GILLES KEPEL, *LA REVANCHE DE DIEU* 25 (1991).

<sup>278</sup> *See generally* JÜRGEN HABERMAS, *TRA FEDE E SCIENZA* (2006).

<sup>279</sup> PIERPAOLO DONATI, *OLTRE IL MULTICULTURALISMO* 7 (2008); PAOLO GOMARASCA, *METICCIATO: CONVIVENZA O CONFUSIONE?* 5 (2009).

<sup>280</sup> Stefano Ceccanti & Susanna Mancini, *Come Reagiscono gli Ordinamenti Giuridici alle Culture Altre?*, in *MULTICULTURALISMO: IDEOLOGIE E SFIDE* 164, 167–68 (Carlo Galli ed., 2006).

<sup>281</sup> *See generally* Tania Groppi, *Il "Caso Englaro": Un Viaggio alle Origini dello Stato di Diritto e Ritorno*, *FORUM DI QUADERNI COSTITUZIONALI* (May 2009), [http://www.forumcostituzionale.it/site/images/stories/pdf/documenti\\_forum/paper/0120\\_groppi.pdf](http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0120_groppi.pdf) (discussing the deaths of Eluana Englaro, who was in a vegetative state and deprived of nutrition until her passing on February 9, 2009, and Piergiorgio Welby, who suffered from severe muscular dystrophy and was removed from a respirator, passing on October 20, 2006).

<sup>282</sup> Legge 19 febbraio 2004, n. 40 (It.). The provisions have been matter of huge debate. *See* *LA FECONDAZIONE ASSISTITA NEL DIRITTO COMPARATO* 2 (Carlo Casonato & Tommaso E. Fronsi eds., 2006).

<sup>283</sup> A bill regulating same-sex partnerships was presented to Parliament on February 8, 2007 by the Italian Council of Ministers, and then abandoned. *See* MARILISA D'AMICO, *IDIRITTI CONTESTI* 99 (2008).

<sup>284</sup> *See id.* at 133.

Catholicism plays in shaping the political agenda and influencing voters as well as about the legitimacy of such a role for the Catholic Church.<sup>285</sup>

In short, the debate over the separation of church and state mainly concerns a key topic—the cultural and political role of Catholicism with respect to the increasing pluralism of the Italian population.<sup>286</sup>

#### A. *The Catholic Church and Politics*

The large identification of the Italian people with the Catholic Church and the influence of Catholic social thought on the public sphere have concentrated a large part of the debate on *laicità* into one single question—is it possible for the Catholic Church to speak openly about political issues in the public area, even by inviting Catholics to hold certain political attitudes or telling them who or what to vote for and when to vote (or not)?<sup>287</sup> It is not by chance that the same discussion about the display of the crucifix and the Catholic influence over children's education originated from the fear that Catholicism might monopolize Italian political life through the education of youth.<sup>288</sup>

The contemporary political landscape fuels the debate and makes finding an answer to this question more urgent. Until approximately 1992, the political voice of Catholics was primarily represented by the Christian Democratic Party, which—at least formally—was linked to Rome's social teaching and was expected to foster it in Parliament.<sup>289</sup> In this sense, the Catholic Church

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<sup>285</sup> GIAN ENRICO RUSCONI, *COME SE DIO NON CI FOSSE* 119 (2000).

<sup>286</sup> GIAN ENRICO RUSCONI, *NON ABUSARE DI DIO: PER UN'ETICA LAICA* 8 (2007); ZAGREBELSKY, *supra* note 2, at 71.

<sup>287</sup> See ROMANO, *supra* note 276, at 3; RUSCONI, *supra* note 286, at 160–68; Leopoldo Elia, *Introduzione ai Problemi della Laicità*, RIVISTA DELL'ASSOCIAZIONE ITALIANA DEI COSTITUZIONALISTI, 12 (Oct. 2007), <http://www.associazionedeicostituzionalisti.it/materiali/convegni/aic200710/elia.pdf>.

<sup>288</sup> See RUSCONI, *supra* note 286, at 63–74. Interestingly, Romano Prodi, while President of the Council, had to face the fierce opposition of Catholic bishops to a referendum held from June 12 to 13, 2005, that aimed to enlarge the possibility of using the in vitro fertilization law. *Italian Referendum on Assisted Reproduction: Discussing the Appeal to Abstain by Italian Bishops*, DAWNOFEUROPE, <http://dawnofeurope.blogspot.com/2005/05/italian-referendum-on-assisted.html> (last visited Feb. 10, 2011). While the bishops called for a large abstention that would lead to the failure of the referendum, Prodi went to vote, notwithstanding his notorious Catholic faith. *Id.* When he was asked the reasons for disobeying the indications of bishops, he replied that he considered himself an adult Catholic, suggesting that he knew how to apply the values he was raised with, without the help of bishops. *Id.*

<sup>289</sup> *Background Note: Italy*, U.S. DEP'T ST. (May 12, 2010), <http://www.state.gov/r/pa/ei/bgn/4033.htm>. It must be remembered that the way that Christian Democracy fostered the Catholic Church doctrine in politics was widely discussed, at least starting from the 1970s. See VERA CAPPERUCCI, *IL PARTITO DEI CATTOLICI* 19 (2010). This did not depend solely on the moral coherence of Catholic politicians, but also—and

could limit its action in influencing and backing the Christian Democratic Party's agenda. With the dissolution of that party—due to broad internal corruption and the interventions of many penal courts throughout Italy—there ceased to be any formal relation between politics and the Catholic faith.<sup>290</sup> Thus, the Italian Church has begun to speak more openly and directly to citizens about the issues that are crucial to Catholic ethics.<sup>291</sup> Therefore, starting from the 1990s, the Church and the Italian bishops have addressed Catholic believers regarding the role of moral values in the political realm more openly.<sup>292</sup>

If one considers the first Constitutional Court's endorsement of *laicità*, it is not possible to respond to the question that asks, "Can the Church speak, and, if so, in which ways?" Italian jurisprudence does not help because it has fluctuated in interpreting *laicità* to the extent that one can find both decisions that uphold the presence of Catholic symbols at schools as well as decisions that declare it to be against the Constitution.<sup>293</sup>

It is quite understandable that the debate focuses on the role of Catholicism in public schools in a time of pluralism. Now this Article briefly goes back to the topic of religion at school to see how the display of the Crucifix is considered in face of the increasing pluralism. Then the Article turns to consider the part that the ECHR has taken in this confrontation with the *Lautsi* decision.

### B. Catholicism, Education, and Public Schools

The attention of the courts concerning the relationship between religion and state is mainly concentrated within the realm of religion at school. This is the result of a more general trend, which extends to many European countries

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perhaps mostly—on the lack of attention that the party gave to crucial Catholic principles like subsidiarity. *See id.*

<sup>290</sup> *See id.* at 451–55.

<sup>291</sup> *See Il Papa: La Chiesa non fa Politica ma sui Valori non è Neutrale*, CORRIERE DELLA SERA (Oct. 22, 2010), [http://www.corriere.it/esteri/10\\_ottobre\\_22/papa-politica-valori\\_996b118c-ddcb-11df-a41e-00144f02aabc.shtml](http://www.corriere.it/esteri/10_ottobre_22/papa-politica-valori_996b118c-ddcb-11df-a41e-00144f02aabc.shtml) (discussing a very recent example of such an attitude by the Pope's vindication for the public role of bishops).

<sup>292</sup> Congregation for the Doctrine of the Faith, *Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life*, VATICAN: HOLY SEE (Nov. 24, 2002), [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20021124\\_politica\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html).

<sup>293</sup> *See supra* notes 264–67 and accompanying text. Some authors would probably conclude that the Italian debate has shifted from a discussion about the existence of *laicità* to a discussion about the conceptions of this principle. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 134 (1977).

other than Italy,<sup>294</sup> where the role of education is considered to be critical for constitutional as well as for social reasons.<sup>295</sup>

There are constitutional concerns due to the principle of freedom of religion and of conscience within most European constitutions. This freedom, together with the constitutional principle that everyone receives an education,<sup>296</sup> mandates that students are to be educated in accord with their own religious and cultural identity and are enabled with the intellectual tools that are necessary to develop personal ideas about themselves and the world.<sup>297</sup>

From this perspective, the issue of the display of the crucifix in a public school is at stake. Some courts have maintained that the crucifix influences the growth of the students as well as their ideas about the world and themselves; therefore, it would violate their freedom of religion and of conscience and endanger their education.<sup>298</sup>

The counterview stresses that the mere presence of the crucifix does not violate a student's freedom of religion and of conscience, nor does it endanger the results of one's education. It would conversely help the integration of immigrants by displaying to them the cultural roots of the country they live in.<sup>299</sup>

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<sup>294</sup> Among the examples that can be recalled are the cases for the crucifix in Germany and Spain. See German Crucifix Case, *supra* note 232; Marco Croce, *C'è un Giudice a Valladolid*, FORUM DI QUADERNI COSTITUZIONALI (Nov. 2008), [http://www.forumcostituzionale.it/site/images/stories/pdf/documenti\\_forum/telescopio/0010\\_croce.pdf](http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/telescopio/0010_croce.pdf). Another example is the ban of the veil in French classrooms. *Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics* [Law 2004-228 of March 15, 2004 Concerning, as an Application of the Principle of the Separation of Church and State, the Wearing of Symbols or Garb which Show Religious Affiliation in Public Primary and Secondary Schools], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, p. 5190. For a discussion on a Spanish example, see Carmin Garcimartín, *Secularism and Public Schools in Spain*, SECULARISM AND BEYOND—COMPARATIVE PERSPECTIVES (Univ. of Copenhagen, Copenhagen, Den.), 1–9 (May 29–June 1, 2007), [http://www.ku.dk/satsning/Religion/sekularism\\_and\\_beyond/pdf/Garcimartin\\_Paper.pdf](http://www.ku.dk/satsning/Religion/sekularism_and_beyond/pdf/Garcimartin_Paper.pdf).

<sup>295</sup> See generally Marco Croce, *Aggiramenti o Fraintendimenti? L'ora di Religione tra Corte Costituzionale e Consiglio di Stato*, FORUM DI QUADERNI COSTITUZIONALI (July 2010), [http://www.forumcostituzionale.it/site/images/stories/pdf/documenti\\_forum/giurisprudenza/giurisdizioni\\_amministrative/0007\\_croce.pdf](http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/giurisprudenza/giurisdizioni_amministrative/0007_croce.pdf) (discussing the recent accommodations of the Catholic subject at school).

<sup>296</sup> Art. 34 Costituzione [Cost.] (It.) (“[1] Schools are open to everyone. [2] Primary education, given for at least eight years, is compulsory and free of tuition.”).

<sup>297</sup> See Legge 9 febbraio 2000, n. 62 (It.).

<sup>298</sup> See Tribunale di L'Aquila, 23 ottobre 2003, G.U. Montanaro, para. 2.2 (It.).

<sup>299</sup> See Carlo Cardia, *Carta dei Valori e Multiculturalità alla Prova della Costituzione*, STATO, CHIESE E PLURALISMO CONFESIONALE, 13 (Dec. 2008), [http://www.statoechiese.it/images/stories/2008.12/cardia\\_cartam.pdf](http://www.statoechiese.it/images/stories/2008.12/cardia_cartam.pdf); TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, 3 (It.); Cons. Stato, 13 febbraio 2006, n. 556 (It.).

Both of these vantage points have a strong cultural background. They address the same problems that Italy is facing but from different perspectives, consequently reaching different conclusions.

The increasing pluralism of contemporary societies has made politics much more challenging. It is increasingly difficult to find shared solutions to problems like same-sex marriage, euthanasia, bioethics, and abortion: societies become more fragmented and are characterized by the presence of many different cultures and beliefs.<sup>300</sup>

The plurality of identities is addressed by both the detractors and the supporters of the crucifix in public schools. All believe that it is necessary to reaffirm the existence of a set of values that must be shared by all Italians and all the immigrants who come to live in Italy for a long period.<sup>301</sup>

There are two cultural mainstreams to the debate. On one side, there are those who maintain that the moral frame must include traditional values, which mainly consist of Catholic values.<sup>302</sup> Italians, as well as foreign people living in Italy, must engage with the history and the main culture that shaped the country through the centuries<sup>303</sup> in order to develop their own personality in a constructive relationship with the environment they live in.<sup>304</sup>

On the other side, there are those who believe that the reaffirmation of the Catholic culture would endanger the survival of Italian society because it would consistently endorse only the majority, namely Catholics, among the players of the cultural and social game.<sup>305</sup> As we have seen, courts that agree with this opinion believe that the only plausible response to the increasing number of collective identities should be found in “neutrality” as an attitude that must characterize public schools.<sup>306</sup>

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<sup>300</sup> ANGELO PANEBIANCO, *IL POTERE, LO STATO, LA LIBERTÀ: LA GRACILE COSTITUZIONE DELLA SOCIETÀ LIBERA* 52 (2004).

<sup>301</sup> For the document delivered by the Ministry of the Interior in order to promote the integration of immigrants, see *Carta dei Valori, della Cittadinanza e dell'Integrazione*, CENTRO SCUOLE E NUOVE CULTURE (Apr. 2007), [http://www.scuolenuoveculture.org/MaterialiScaricabili/notizie/convegno\\_Cras/carta\\_valori.pdf](http://www.scuolenuoveculture.org/MaterialiScaricabili/notizie/convegno_Cras/carta_valori.pdf).

<sup>302</sup> See JOSEPH RATZINGER & MARCELLO PERA, *SENZA RADICI* 14 (2004).

<sup>303</sup> See RUSCONI, *supra* note 285, at 107. The lack of strong secular values was filled with the well-rooted Catholic civic values, which provided the moral and cultural framework for the nation building in the nineteenth century and after World War II. *Id.* Even those who criticize the overwhelming role of Catholicism in Italian political culture recognize that it did fill a cultural vacuum. *Id.*

<sup>304</sup> RATZINGER & PERA, *supra* note 302, at 14.

<sup>305</sup> AINIS, *supra* note 143, at 18.

<sup>306</sup> See, e.g., *Lautsi I*, *supra* note 1, para. 47c (“Le respect des convictions des parents doit être possible dans le cadre d’une éducation capable d’assurer un environnement scolaire ouvert et favorisant l’inclusion

The ECHR, in the first degree's decision of the *Lautsi* case, endorsed this second point of view and went even further in its reasoning.<sup>307</sup> The Court did not simply affirm the necessity of neutrality as an institutional and legal device to govern pluralism.<sup>308</sup> It also affirmed that religious culture must be kept out of schools because it affects students' intellectual growth.<sup>309</sup>

The personal attitude of reflecting and reaching conclusions through the lens of reason would be in peril if students were exposed to religious thought. This is the implication of the ECHR's decision where it says: "The State is obliged to the religious neutrality within the realm of mandatory public education . . . that must instill critical thought into students."<sup>310</sup>

It is therefore crucial to highlight that the ECHR in *Lautsi*'s first degree does not simply believe religious thought to be perilous because of pluralism, but rather it believes that religious thought is not helpful for the intellectual growth of people. Neutrality turns out to be a device used both for the survival of public institutions and for the sake of education since it identifies the neutrality of the institutions with the neutrality of the intellect.

This attitude of *Lautsi* could have borne significant consequences for Italy because of the influence of the ECHR over the Italian legal system. Nevertheless, the ECHR's attitude in *Lautsi* did not go along with the original role of the European Convention and its enactment. Therefore, the Grand Chamber's decision in *Lautsi* must be welcomed, because it trimmed the potential risks of the first degree's decision and shortened the legal impact of the concept of "neutrality" enabling the states to shape their own relationships between church and state, at least partially.

## CONCLUSION

Italian jurisprudence has developed different conceptions of pluralism and of the relationship between religion and state. The recent case of the crucifix

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plutôt que l'exclusion, indépendamment de l'origine sociale des élèves, des croyances religieuses ou de l'origine ethnique. L'école ne devrait pas être le théâtre d'activités missionnaires ou de prêche; elle devrait être un lieu de rencontre de différentes religions et convictions philosophiques, où les élèves peuvent acquérir des connaissances sur leurs pensées et traditions respectives.").

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* para. 56 ("L'Etat est tenu à la neutralité confessionnelle dans le cadre de l'éducation publique . . . qui doit chercher à inculquer aux élèves une pensée critique."). The translation is provided by the Author of this Article.

has highlighted these differences and demonstrated a tension between the internal Italian debate and the ECHR's attitude, especially in *Lautsi*'s first degree. If the Grand Chamber's decision did not correct the conception of "neutrality" in order to allow the passive display of religious signs,<sup>311</sup> the gap between the first degree of *Lautsi*'s interpretation of the right to religious freedom would have undermined the people's confidence in the ECHR as a means for the protection of human rights and may widen the cultural and jurisprudential trends that have characterized the ongoing domestic struggle over the display of crucifixes in schools.

The broader issue at hand, which the case of the crucifix has illuminated, is how the ECHR perceives its powers and duties. The ECHR has surpassed its jurisdictional authority at the expense of national autonomy by enforcing human rights such as religious freedom.<sup>312</sup>

#### A. *A New Fracture Between Europe, Italy, and Catholicism?*

At the end of the 1980s, the Constitutional Court introduced the idea that Italy could be defined as a state fostering *laicità*, but only after construing the term to exclude its hostile connotations of French descent.<sup>313</sup>

A few years later, the constitutional jurisprudence and other judges' decisions shifted the interpretation of constitutional provisions closer to the French culture.<sup>314</sup> More recently, the Administrative Tribunal of Veneto and the Council of State went backwards by endorsing a more open and less French conception of the principle of *laicità* and upholding the display of the crucifix in public schools.<sup>315</sup>

A reflection on the positions favoring and opposing the presence of the crucifix has demonstrated that the debate mainly concerns the relationship between religion and state, the governance of pluralism, and the public role of the Church of Rome.<sup>316</sup> The tension within the jurisprudence, and the fact that

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<sup>311</sup> *Lautsi II*, *supra* note 1, para. 72.

<sup>312</sup> See Anne Peters, *The Applicability of the European Convention of Human Rights in Times of Complex Jurisdiction and the Principle of Fundamental Rights Tolerance*, 48 ARCHIV DES VÖLKERRECHTS 1, 1–57 (2010).

<sup>313</sup> Corte Cost., 11 aprile 1989, n. 203, para. 4 (It.).

<sup>314</sup> Corte Cost., 19 giugno 1997, n. 235 (It.).

<sup>315</sup> *Lautsi I*, *supra* note 1.

<sup>316</sup> See *supra* Part III.A–B.

there were such strong changes in the jurisprudence within a few years, demonstrate that the debate continues.

The reasons for the debate are to be found in the very basis of the constitutional jurisprudence about *laicità*. The same use of the expression *laicità* has fueled the debate rather than pushing it toward a solution.<sup>317</sup> Even though the Constitutional Court was careful in depicting this principle as a means to preserve pluralism and foster religious freedom, the use of the term unavoidably lends to different interpretations because it is deeply linked to the French constitutional tradition that demands a strict separation between church and state.<sup>318</sup> This is exactly what happened starting from the late 1990s in the constitutional jurisprudence and then among other Italian courts.<sup>319</sup>

Nevertheless, the largest part of Italian society endorses the public role of Catholicism and the display of the crucifix in public schools, which is the primary reason for such a popular reaction against the ECHR's first degree decision.<sup>320</sup>

In the first degree of *Lautsi*, the ECHR intervened on two critical points of the Italian debate. The first point concerns the principle of *laicità*. The Court maintained that the only attitude that is able to grant religious freedom for all and to govern pluralism is "neutrality," which mainly consists of keeping a strong separation between religion and state.<sup>321</sup>

The second point concerned the role of Catholicism and of Catholic values in shaping civic virtues in Italy. The Catholic influence on Italian society has been preserved and even fostered by some Italian jurisprudence<sup>322</sup> and scholarship<sup>323</sup> because it has provided Italians with moral values that were needed after the creation of the state and even after the reconstruction following World War II.

The ECHR in its first degree took the opposite vantage point. It reasoned that public education did not need religious values and stated that religious education is in conflict with the growth of people who are able to use their own

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<sup>317</sup> Victor L. Simpson, *European Unity Tested Over Crucifixes in the Classroom*, MSNBC.COM (July 2, 2010), [http://www.msnbc.msn.com/id/38062809/ns/world\\_news-europe/](http://www.msnbc.msn.com/id/38062809/ns/world_news-europe/).

<sup>318</sup> See, e.g., Corte Cost., 19 giugno 1997, n. 235 (It.).

<sup>319</sup> See *id.*

<sup>320</sup> See Simpson, *supra* note 317.

<sup>321</sup> *Lautsi I*, *supra* note 1, paras. 56–57.

<sup>322</sup> TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, 3 (It.).

<sup>323</sup> MARCELLO PERA, PERCHÉ DOBBIAMO DIRCI CRISTIANI 59 (2008).

reason.<sup>324</sup> According to that ECHR decision, religious influence was not conducive for the development of a good citizenry, particularly with regard to young people.<sup>325</sup>

The main Italian reaction considered the ECHR to be attacking the very roots of Italian institutions and society.<sup>326</sup> The Court seemed to have taken a position in the cultural war between secularization and religious liberty. Such a position was akin to the jurisprudence of the late Constitutional Court<sup>327</sup> and other Italian courts' decisions on state and religion.<sup>328</sup> The ECHR's position, in the first *Lautsi* decision, however, was far from the prevailing position in Italian culture and would have decreased the Court's popularity in Italy. The decision undermined Italian confidence in the European Convention's usefulness as a tool to protect human rights, and to secure pluralism and stability.<sup>329</sup> From this vantage point, the very recent Grand Chamber's decision, which reversed the judgment of the first degree upholding the display of the crucifix in Italian public schools<sup>330</sup> has restored some confidence<sup>331</sup> that the protection of human rights is consistent with a plurality of models of relationship between church and state.

*B. A Critical Decision: The Gap Between Freedom of Religion, Separation of Church and State, and Religious Cultures as a Means to Govern Pluralism*

The disappointment of Italian political institutions and a large part of Italian society comes also from the debatable attitude of the ECHR. The ECHR's attitude actually supplants the very basis of many European states' constitutional systems with new ones, which are based on a broad interpretation of the European Convention's articles.<sup>332</sup> The *Lautsi* case reveals

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<sup>324</sup> *Lautsi I*, *supra* note 1, para. 56.

<sup>325</sup> *Id.*

<sup>326</sup> See Simpson, *supra* note 317.

<sup>327</sup> This phase started with Decision Number 440. See Corte Cost., 18 ottobre 1995, n. 440 (It.); see also Stelio Mangiameli, *L'identità dell'Europa: Laicità e Libertà Religiosa*, FORUM DI QUADERNI COSTITUZIONALI, 15–16 (Nov. 2009), [http://www.forumcostituzionale.it/site/images/stories/pdf/documenti\\_forum/paper/0153\\_mangiameli.pdf](http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0153_mangiameli.pdf).

<sup>328</sup> See Cass., 1 marzo 2000, n. 439 (It.).

<sup>329</sup> See Joseph H.H. Weiler, Editorial, *Lautsi: Crucifix in the Classroom Redux*, 21 EUR. J. INT'L L. 1, 1 (2010).

<sup>330</sup> *Lautsi II*, *supra* note 1.

<sup>331</sup> See Marta Cartabia, *La Corte del Buon Senso*, ILSUSSIDIARIO.NET (Mar. 21, 2011), <http://www.ilsussidiario.net/News/Editoriale/2011/3/21/La-Corte-del-buon-senso/160426>.

<sup>332</sup> Rainer Arnold, *The European Constitution and the Transformation of National Constitutional Law*, in A CONSTITUTION FOR EUROPE: THE ICG, THE RATIFICATION PROCESS AND BEYOND 1, 1–5 (Ingolf Pernice & Jirí Zemánek eds., 2005), available at [http://www.ecln.net/elements/conferences/book\\_prag/ArnoldFinal.pdf](http://www.ecln.net/elements/conferences/book_prag/ArnoldFinal.pdf).

this trend quite clearly in the first degree's decision,<sup>333</sup> while the Grand Chamber's one<sup>334</sup> diminishes the impact of the ECHR's attitude.

The ECHR's decisions take a precise path between religious freedom and neutrality.<sup>335</sup> Particularly the first degree's decision gave neutrality the characteristics of a strong separation between religion and state. The ECHR had followed this path in prior decisions, particularly in using the principles of freedom of education and freedom of religion to identify some of the central features of a state dedicated to protecting human rights.<sup>336</sup>

Then, the ECHR declared, as it had said before, that the principle of state neutrality toward religion is a necessary consequence of the principle of religious liberty, even though the Convention makes no such claims.<sup>337</sup> According to the Court, the only way for the state to protect the religious freedom of everyone is by keeping a neutral attitude, equidistant from any particular confession.<sup>338</sup> The state cannot grant any special privilege or position to any religious confession.<sup>339</sup> If the state were to do so, this would violate the principle of neutrality and consequently would violate the protection of religious freedom. According to this argument, the ECHR endorses the basic principle of neutrality as the only doctrine that effectively protects religious liberty for all, and, coming to the *Lautsi* case, the ECHR finds its place among the Italian supporters of neutrality.<sup>340</sup> The Grand Chamber's decision simply confirmed the necessity that the states adopt a neutral and impartial approach.<sup>341</sup>

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<sup>333</sup> *Lautsi I*, *supra* note 1.

<sup>334</sup> *Lautsi II*, *supra* note 1.

<sup>335</sup> More recently, neutrality was mentioned by the ECHR in other meaningful decisions. *See, e.g.*, *Jehovah's Witnesses of Moscow v. Russia*, Eur. Ct. H.R. paras. 99, 119, 181 (2010), [http://www.echr.coe.int/ECHR/homepage\\_EN](http://www.echr.coe.int/ECHR/homepage_EN) (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then search by placing "Jehovah's Witnesses of Moscow" in the "Case Title" box and "Russia" in the "Respondent State" box); *Grzelak v. Poland*, Eur. Ct. H.R. para. 86 (2010), [http://www.echr.coe.int/ECHR/homepage\\_EN](http://www.echr.coe.int/ECHR/homepage_EN) (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then search by placing "Grzelak" in the "Case Title" box and "Poland" in the "Respondent State" box).

<sup>336</sup> *E.g.*, *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R.

<sup>337</sup> Meaningful affirmations on the relationship between neutrality and religious freedom can be found in many judgments. *E.g.*, *Dogru v. France*, Eur. Ct. H.R. (2008), [http://www.echr.coe.int/ECHR/homepage\\_EN](http://www.echr.coe.int/ECHR/homepage_EN) (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then search by placing "Dogru" in the "Case Title" box and "France" in the "Respondent State" box).

<sup>338</sup> *E.g., id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Lautsi I*, *supra* note 1.

<sup>341</sup> *Lautsi II*, *supra* note 1, para. 60.

From several points of view, the ECHR's conclusion seems excessive. It is worth focusing on *Lautsi*'s first degree<sup>342</sup> because it is more explicit in canvassing the new role of the ECHR and therefore its defects can be more easily detected.

First, the decision does not seem to respect the classic role that the Court has had in providing a common framework for the protection of human rights in Europe. The Court had previously granted a margin of appreciation to participating states in developing its religious freedom jurisprudence precisely in order to give the European Convention a reasonable degree of flexibility and to allow the states enough room to shape rights differently in accordance with their own traditions and constitutional regimes.<sup>343</sup> The states thereby retained meaningful discretion in balancing these basic rights and liberties according to their cultural, religious, and legal backgrounds.<sup>344</sup> The margin of appreciation doctrine implied a pluralism of models of relationship between church and state. But the ECHR has lately tended to promote more expansive universal models and methods of protecting human rights rather than just using the Convention to ensure a basic level of protection in each participating state.<sup>345</sup> The *Lautsi* case is one of the most recent examples of this new trend.<sup>346</sup> In order to govern pluralism in the European Convention's states, the ECHR has decreased the states' pluralism in shaping their own model of church and state relations.

Second, there is no evidence that neutrality is implicitly embedded in Article 9 of the European Convention, notwithstanding what the Court maintains.<sup>347</sup> The Court links neutrality to religious freedom, as protected by

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<sup>342</sup> *Lautsi I*, *supra* note 1.

<sup>343</sup> For the origin of the margin of appreciation doctrine, see *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976).

<sup>344</sup> *Id.* The margin of appreciation finds its roots in the broad provisions of the European Convention, which provides a long list of possible exceptions and limitations to the same rights they affirm:

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 the protection of the rights and freedoms of others.

European Convention on Human Rights, *supra* note 6, art. 9, para. 2.

<sup>345</sup> The case of the crucifix is not the first one on which the ECHR has abandoned the doctrine of the margin of appreciation. Its gradual disappearance from the Court's jurisprudence has been repeatedly lamented by scholars in different fields and circumstances. *E.g.*, *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R.

<sup>346</sup> *Lautsi I*, *supra* note 1.

<sup>347</sup> European Convention on Human Rights, *supra* note 6, art. 9.

Article 9 within the Convention.<sup>348</sup> Nevertheless, Article 9 not only lacks any explicit mention of neutrality as an aspect of religious liberty, but one cannot even find any mention of it in the drafting of Article 9.<sup>349</sup> According to the records, the drafters agreed on an open affirmation of religious liberty, but apparently they did not discuss neutrality or other similar implications of the right of religious liberty.<sup>350</sup>

The Grand Chamber's decision in *Lautsi* does correct the first degree's judgment on the first point, while it confirms the first degree's attitude on the second one.<sup>351</sup> In fact, the Grand Chamber concedes that the states own a relevant margin of appreciation in shaping their own relationship between education, teaching, and religious traditions.<sup>352</sup> Nevertheless, their margin of appreciation lies *within* the boundaries of "neutrality": all the states must be neutral and impartial.<sup>353</sup> The pluralism that is allowed by the ECHR does not contemplate not-impartial or not-neutral states.

The ECHR's attitude, even in the Grand Chamber's decision, narrows the pluralism of state models of the church-state relationship while fostering an ideal of "neutrality."<sup>354</sup> It endangers the very model of the European state.<sup>355</sup> Through its decisions, the ECHR pushes states to a precise model of relationship with religion: the neutral one. Since the Court clearly endorses the principle of neutrality as the only method to grant freedom of religion and education, one can question whether the established churches or official religions of other European states could survive scrutiny if challenged under the European Convention. Even though the Grand Chamber admits that the European states are very different in their cultural and historical backgrounds

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<sup>348</sup> See *supra* notes 337–41 and accompanying text.

<sup>349</sup> The *travaux préparatoires* for the Convention—especially for Articles 6, 9, and 13—are evidence that the drafters were mainly concerned with the limitations to religious liberty that Turkey wanted to impose in order to prevent Islamic fundamentalism and with the duties that Sweden imposed on Lutherans as they belonged to the official religion of the state. "Travaux Préparatoires" of the Convention (ECHR), LIBR. EUR. CT. HUM. RTS. (May 2, 2010), <http://www.echr.coe.int/library/colentravauxprep.html> (select a link under the "Language" column to view the *travaux préparatoires* for a particular article in either English or French).

<sup>350</sup> Carolyn Evans, *Religious Freedom in European Human Rights Law: The Search for a Guiding Conception*, in RELIGION AND INTERNATIONAL LAW 385, 388–89 (Mark K. Janis & Carolyn Evans eds., 1999).

<sup>351</sup> *Lautsi II*, *supra* note 1.

<sup>352</sup> *Id.* para. 69.

<sup>353</sup> *Id.* para. 60.

<sup>354</sup> See Luca P. Vanoni, *I Simboli Religiosi e la Libertà di Educare in Europa: Uniti nella Diversità o Uniti nella Neutralità?*, RIVISTA DELL'ASSOCIAZIONE ITALIANA DEI COSTITUZIONALISTI, 6–7 (Feb. 2010), <http://www.rivistaaic.it/sites/default/files/tmp/Vanoni01.pdf>.

<sup>355</sup> LUCA DIOTALLEVI, UNA ALTERNATIVA ALLA LAICITÀ 34 (2010) (illustrating the deep link between the conception of state and the role of neutrality in the public square).

and that under the Convention they have the power to decide “whether or not to perpetuate a tradition,”<sup>356</sup> it is not sure if they can resist the scrutiny of state neutrality. After all, the crucifix was legitimized by the fact that it is a “passive symbol,”<sup>357</sup> meaning that it has a very secondary role in public education. But the presence of Anglican bishops in the House of Lords and other public institutions of the United Kingdom is likely to violate the Convention because it fosters the idea of a privileged religion rather than impartiality.<sup>358</sup> The same might be said for Denmark with its established Lutheran Church.<sup>359</sup> Similarly, the Irish Constitution could be challenged, since its preamble begins:

In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,

We, the people of Éire,

Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial . . . .<sup>360</sup>

A similar fate would befall the Constitution of Greece, which opens similarly: “In the name of the Holy and Consubstantial and Indivisible Trinity.”<sup>361</sup>

In brief, such a strict enforcement of Article 9 using state neutrality would cast doubt on the validity of several European constitutions, the very first political symbols of these states of Europe, because they openly endorse specific forms of religion. Such a rigid interpretation of the principle of religious freedom makes the very fundamentals of some European countries illegitimate.

If the Court does not want to go so far, then the rationale of the ECHR must be reconsidered and the same meaning of “neutrality” must be read as something different from constitutional impartiality and neutrality. To do otherwise would be inconsistent with both the intention of the states that

<sup>356</sup> *Lautsi II*, *supra* note 1, para. 68.

<sup>357</sup> *Id.* para. 72.

<sup>358</sup> Fulvio Cortese, *Il Crocefisso e gli “Imbarazzi” del Giurista*, FORUM DI QUADERNI COSTITUZIONALI, 2 (Oct. 2010), [http://www.forumcostituzionale.it/site/index.php?option=com\\_file\\_index&key=1833&name=0006\\_cortese.pdf](http://www.forumcostituzionale.it/site/index.php?option=com_file_index&key=1833&name=0006_cortese.pdf).

<sup>359</sup> DANMARKS RIGES GRUNDLOV [CONSTITUTION] June 5, 1953, Part I, § 4 (Den.) (“The Evangelical Lutheran Church shall be the Established Church of Denmark, and, as such, it shall be supported by the State.”).

<sup>360</sup> IR. CONST., 1937, pmb1.

<sup>361</sup> 2001 SYNTAGMA [SYN.] [CONSTITUTION] pmb1. (Greece).

signed the Convention as well as with the contemporary legal and political environment. Moreover, it would diminish the possibilities that the states have to decide their own models of church and state relations, and therefore narrow the pluralism of state models. The disappointment with the first decision in the crucifix case will probably disappear in Italy because the Grand Chamber reversed that decision. But it might return elsewhere if constitutional aspects of European states are scrutinized through the ECHR's lens of neutrality.