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The Public Space: The Formal and Substantive Neutrality of the Public Sphere

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Abstract

This paper addresses the question of whether the *public space* can be *neutral* and the different meanings hidden in this expression. Following the different angles of analysis, the paper introduces the various approaches to the issue of public space: spatial, personal or institutional. Three case studies are taken into account in order to map the connotations of the expression *public space* in various sets of time and space. Dress codes, religiously oriented private schools and places of worship are considered such a privileged observatory as far as the study of the place of religion in the public space is concerned.

Within the Western EU countries, the paper particularly focuses on Italy, France and UK over the issues concerning religiously oriented private schools and places of worship. As far as dress codes issue is concerned a more general overview is provided.

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1. Religion and the public space. The chimera of neutrality?

Can the public space be religiously neutral?

First of all, it depends on what we mean by neutral: if we define as neutral the public space that has no distinctive quality or characteristics (which is the first definition of neutral), then we are really entering the realm of the Greek mythology, where the notion of chimera took shape. Public space, in all its various manifestations (including the institutional ones), has always distinctive characteristics that derive from the history, culture, belief of the people who inhabit it. As religion is part of these characteristics, a religiously neutral public space is beyond human capacities: even the most secular² States were unable to build a public space totally deprived of religious characteristics³.

If we give the word “neutral” the sense of “having no preference”, the conclusion cannot be so clear-cut and we need to distinguish between the different meanings hidden in the expression “public space”. It is quite evident that this expression has multiple meanings (as a matter of fact, this WP aims at mapping the different connotations this expression acquired in different sets of space and time). Here I shall limit myself to some very basic distinctions.

On the one hand, public space indicates a space that is generally accessible to persons without distinctions based on their religion or belief: in this sense the public space is not only the street or the square, but also the hospital or the school⁴ that is places from which people cannot be excluded because of their religion or conviction. The visible presence in this space of individuals and communities that explicitly manifest their religious (or non religious) convictions or belonging can easily provoke tensions and conflicts. Confronted with this problem, some States are trying to solve it through a limitation of the right to manifest religious or belief preferences: this trend is quite clear in the attempts to ban the burqa from some public places (in France, Spain⁵, Italy and in other countries); it is less evident but even more dangerous (because it goes to the heart of the right of religious freedom) in the attempts to limit, directly or indirectly, the right to have a place of worship⁶. If I may express my personal opinion, it is of fundamental importance that the public space remains hospitable to the religious preferences of its inhabitants: the visible presence of a plurality of religions and beliefs in the streets, squares **and** in the schools, hospitals and so on is indispensable for the pluralism on which a democratic society is based⁷. Therefore unjustified limitations on the manifestations of religion or belief in the public space –that is unreasonable or excessive attempts to restrict them in the name of security, public order, and **neutrality** - are to be carefully scrutinized because they can endanger democracy itself⁸.

*Par. 1 and the first part of par. 2 have been written by Silvio Ferrari; the remaining parts by Sabrina Pastorelli.

² And assuming that secularism is not a religion in itself (which in some cases is a debatable issue).

³ Unless we take into account non democratic States, like Albania under the Hoxha regime.

⁴ At least public hospitals and public schools (giving “public” the meaning it has in continental Europe). Private hospitals and schools, even when receive State financial support, can apply different rules (within limits): that is why a part of the WP5 research is devoted to religiously oriented private schools.

⁵ See Barcelona Bans Burqas in Municipal Buildings, in <http://www.huffingtonpost.com/2010/06/14/barcelona-bans-burqas-in-n-61115.html>, accessed on June 18, 2010.

⁶ See the last part of this paragraph.

⁷ The link between pluralism and democracy has been clearly affirmed by the European Court of Human Rights in the case of Metropolitan Church of Bessarabia and others v. Moldova (appl. 45701/99)/judg. 13 December 2001), n. 116.

⁸ In the decision quoted at the previous footnote, the European Court of Human Rights has correctly stated that “the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other” (n. 116).

On the other hand, schools and hospitals, differently from streets and squares, are not only a public space (as defined in the previous lines): they are also public institutions, that is they are part of the State structure⁹. As such they cannot manifest a preference for a specific religion or belief, that is they must be religiously neutral¹⁰. This conclusion is disputed, as some claim that majority or traditional religions should enjoy a preferential position in the public institutions (in a broad sense: from schools to constitutions, from hospitals to national flags). Analyzing and assessing this debate will be a major part of WP5 work. Here (and again) I shall limit myself to another basic distinction: neutrality of public institutions can mean either the elimination of any reference to a specific religion or belief (neutrality by subtraction) or the inclusion of a plurality of references to specific religions and beliefs (neutrality by addition). When the first is preferable to the second (and how much the second is viable) is another topic to be explored. But, at least theoretically, both options are compatible with State and public institutions neutrality.

The public space issue can be approached also from a different angle. Public space is inhabited by individuals who have a different legal status according to the task they perform in that space. A public school is inhabited by students and teachers. Once they have entered the school doors, students retain their private status, while teachers acquire a public status. Consequently when a student wears an Islamic scarf, she is manifesting her personal conviction/belonging; when the scarf is worn by a teacher, this private dimension cannot be dissociated from the public one. This difference explains why the courts in Europe seem to be more ready to accept the student scarf than the scarf worn by a teacher. From a spatial point of view, we are speaking of the same space (the school); but if we adopt a personal point of view, we are speaking of two different groups of people who inhabit the same space. Privileging the first or the second perspective can bring to different conclusions.

Finally we can look at the public space issue from an angle that is neither spatial nor personal, but functional. In this perspective the notion of public service comes to the forefront: the school or the hospital provide a public service, independently from the fact that they are public or private schools and hospitals. A public service can be provided both by a public and by a private institution and the tide direction seems to go towards the expansion of public services rendered by private institutions (even in the fields that were traditionally reserved to the State, like security, management of prisons, etc.). From this functional point of view, new questions are to be answered: are public services to be provided in a religiously neutral way? When a religiously oriented private institution provides a public service, is it obliged to give up its religious characteristics? This problem has been recently addressed in the Jewish Free School case decided by an English Court of Appeal in 2009. The case concerned a Jewish school financially supported by the State but entitled to accept only Jewish pupils¹¹. The Court decided that the school could not reject the application of student born by a mother whose conversion to Judaism was not recognized by the school authorities (because conducted in a progressive synagogue): such a rejection would have violated the prohibition of discrimination on racial grounds. An equally interesting decision was taken in France, where the Minister of Education recently decided that crucifixes have to be removed from the classrooms of the private schools that serve as examination venues for students coming from public schools.

The public space issue cannot be appropriately addressed without keeping into account these three different perspectives. This is why WP5 has chosen, as case-studies, the dress codes (that are relevant

⁹ Or the structure of other public bodies, like municipalities, regions, etc.

¹⁰ See the ECHR decision Metropolitan Church of Bessarabia and others v. Moldova, n. 116.

¹¹ This is possible in case the school is over-subscribed (see part 4 of this paper).

both to the spatial and to the personal approach) and the religiously oriented private schools (that are relevant to the functional approach). But why to include a third case-study, the places of worship? Places of worship are the most visible manifestation of religion in the public space (in the sense of streets and squares). In theory, building a place of worship should be a no-problem issue: as this type of public space is accessible to all, all religious communities should be entitled to have their own places of worship, provided they respect some general rules concerning safety, health, etc. In practice, it is not so: almost everywhere in Europe building a Muslim mosque or a Jehovah Witnesses' temple is much more difficult than building a Catholic (or Orthodox or Protestant) church and some countries (Switzerland, the Carinthian region of Austria¹²) have recently limited the right to build a place of worship according to the architectural canons that are traditional in some religions. The place of worship issue is a privileged observatory to study how much the accessibility of the public space –even in its part that should be open to all without limitations- is questioned in a society that is not accustomed to religious plurality.

2. Places of worship

Article 9 of the European Convention on Human Rights as well as article 10 of the Charter of Fundamental Rights of the European Union, recognise freedom of thought, conscience and religion. This right includes freedom to manifest religion or belief, in worship, teaching, practice and observance.

The right to build places of worship is today considered to be part of the right to religious freedom, recognised by most of the European Constitutions. This is a major change in respect of the past situation of many European countries. In the past the question of the places of worship was placed in the context of the relations between a State and the religious communities that lived within its borders. In this perspective the right to have a place of worship depended on how good these relations were: when they were not sufficiently good this right was denied or subjected to many limitations, as it was the case of the worship places of minority religions in many countries. But when the system of religious tolerance was abandoned and a system of religious liberty took its place, a new approach to the question of the places of worship took shape. Having a place of worship was regarded as a manifestation of religious freedom, which is a right that had to be recognized to every human being. In this new perspective any religious group, independently from its relations with the State, is entitled to have its own place of worship and this right cannot be made dependent on an authorization by or an agreement with the public administration and cannot be limited to the religious communities that have been registered or recognized at national or local level. As a manifestation of religious liberty, the right to have a place of worship can be limited only by general rules about land use, planning, construction or aimed to protect the safety and health of buildings where a large number of persons can gather.

This second approach to the question of the places of worship has its foundation in a number of international documents: among them there is the OSCE Concluding Document of Vienna that engages the participating States to “respect the right of the [se] religious communities to establish and maintain freely accessible places of worship or assembly” (16.4). This principle is reaffirmed by many international courts decisions, like the one of the European Court of Human Rights in the *Manoussakis v.*

¹² See Vincenzo Pacillo, “Die religiöse Heimat”. Il divieto di edificazione di minareti in Svizzera ed Austria, in *Quaderni di diritto e politica ecclesiastica*, 2009/1, pp. 199-226.

Greece case. Finally, it is reiterated in some State laws, for example the laws on religious freedom of Spain and Portugal¹³.

Despite this sound foundation, the idea that the availability of a place of worship is part of the right of religious freedom is far from being unanimously recognized. On the one hand, there are States that never accepted it: still today some religions do not have the possibility to establish their own places of worship in a number of countries or at least they have to meet so many conditions that this possibility is more theoretical than real. On the other hand the right to have a place of worship is increasingly questioned even in those countries that had adopted a liberal approach. In the last 10-15 years laws have been enacted that limit the right to establish a new place of worship through the request of a municipal licence or the need to respect environmental and architectural requisites so strict that a new place of worship cannot be built with the external appearance that is customary in a religious tradition (it is the case of Austria and Switzerland¹⁴); in some other countries (Italy and France, for example) laws regarding the assignment of land for building places of worship or the transformation of an existing building in a place of worship are applied with particular inflexibility when the demands come from controversial religious communities (Islam and Jehovah's Witnesses for example)¹⁵.

In order to analyse more in depth the situation in Europe, the Italian, the French and the English cases will be examined. They offer:

- an example of concordatarian system: Italy, providing covenantal cooperation between state and church (where relationships with religious groups are regulated on the basis of a concordat with the Roman Catholic Church and agreements with other denominations).
- an example of national Church system: England, having an established Church;
- an example of separatist country, such as France¹⁶.

In these three countries, freedom to assembly for religious purposes is fully recognised. The right to establish, maintain and use a place of worship is generally not subject to the authorisation from state authorities as it is regarded as an expression of religious freedom.

In the Italian case, no concordat or agreement with religious denominations provide the right to establish a place of worship: this right is the direct consequence of the recognition of religious freedom and as a result, it does not need to be especially mentioned¹⁷. Concerning authorization, a decision of the Constitutional Court established that no authorisation has to be demanded to public authorities in order to open a place of worship¹⁸.

¹³ See for Spain the article 2.2 of the Organic Law 7/1980 on religious liberty (July 5, 1980) and for Portugal the art. 23 of the Law 16/2001 on religious freedom (June 22, 2001).

¹⁴ See V. Pacillo, 'Die religiöse Heimat'.

¹⁵ S. Ferrari, "Le moschee in Italia tra ordine pubblico e libertà religiosa", in Fondazione ISMU, *Quattordicesimo rapporto sulle migrazioni 2008*, Milano, Franco Angeli, 2009, pp. 219-236; F. Messner, "Les lieux de culte en Europe", in Flores-Lonjou, M., Messner, F., *Les lieux de culte en France et en Europe*, Leuven, Peeters, 2007, pp. 57-79.

¹⁶ G. Robbers, "State and Church in the European Union" in G. Robbers (ed.) *State and Church in the European Union*, Baden-Baden, Nomos, 2005, pp. 577-589. S. Ferrari recognises that "this traditional tripartition is culturally and legally outdated [...] it over-emphasises the formal side of the Church-State relationship and does not pay enough attention to their content". S. Ferrari, "Islam and Western European Model of Church State Relations", in Shadid, W.A.R., van Koningsveld, P.S. (eds), *Religious freedom and the neutrality of the state: the position of Islam in the European Union*, Leuven, Peeters, 2002, p. 6.

¹⁷ R. Astorri, "Les lieux de culte dans le droit italien", in Flores-Lonjou, M., Messner, F., *Les lieux de culte en France et en Europe*, Leuven, Peeters, 2007, pp. 201-212, p. 202.

¹⁸ Constitutional Court, decision 18-24 November 1958, n. 59, <http://www.giurcost.org/decisioni/index.html>

As a consequence of the promotion of religious freedom and of the social cultural value attached to places of worship, public support can be provided for the building of places of worship. Since 1985, state funding for places of worship is no more provided, except in case of exceptional natural disasters that damaged them. Since the revision of the Concordat (1985) the Catholic Church can receive (according to the choices of the taxpayers) a percentage (8 ‰ i.e. 8 out of a thousand) of the income tax of Italians and that amount of money can be used for places of worship. The same happens for other denominations having an agreement with the state, such as the Jewish and Lutheran communities.

Town planning laws can also include some forms of financing of the places of worship. Regions are in charge of this kind of funding and adopted several laws in this matter, designating local municipalities to take into account the financing of places of worship in their town planning regulations. Theoretically, and on the basis of some decisions of the Constitutional Court¹⁹, all denominations, with or without an agreement with the state, can enjoy public regional funding for places of worship. In practise, most of the regions provide public funding only for the Catholic Church and denominations having an agreement with the state.

In the French system, the 1905 law on the separation of the Churches and State²⁰ is still the reference point together with the ordinary laws concerning places of worship, established after 1905 (town planning laws, building and construction laws etc.). Two main principles regulate the issue of the places of worship: freedom of conscience and religion and no public funding of religion²¹. As a consequence, the building of places of worship is only privately funded. However, local public authorities can indirectly support the construction of a place of worship, through:

- funding the cultural aspect of the project (for example the cathedral of Evry);
- loan guarantees;
- symbolic leasing.

As a matter of fact, the Catholic Church enjoys a different treatment compared to other religious denominations. The 1905 law, providing the privatisation of religious activities, transferred the property of places of worship to local municipalities, departments and the State, giving religious denominations free disposal of the buildings once they were organised as religious organisations. As a consequence, religious organisations are in charge of the maintenance and conservation of their places of worship. This is the case for Protestant temples and Jewish synagogues, but the Catholic Church did not accept to create such religious organisations and the property and allocation remained to municipalities, together with the charge of the maintenance and conservation. Even if some laws have later provided on some kinds of funding for maintenance of historical buildings (1913) or public funding for repairing places of worship allocated to religious organisations, these laws have a limited and specific scope. As a consequence there is no equal treatment of all religious denominations. In any case, the building of places of worship remains only privately funded.

¹⁹ Constitutional Court, decision 8-16 July 2002, n. 346; Constitutional Court, decision 19-27 April 1993, n. 195. <http://www.giurcost.org/decisioni/index.html> accessed June 18, 2010

²⁰ Assemblée Nationale, Loi du 9 décembre 1905 concernant la séparation des Églises et de l'État, *Journal officiel*, 11 décembre 1905.

²¹ A. Fornerod, "Entre cultuel et culturel: la construction des lieux de culte en France", *Quaderni di diritto e politica ecclesiastica*, n. 1, April 2010, p. 161.

In the English system, religious denominations have the property of the places of worship. As a consequence, maintenance and conservation of places of worship are the responsibility of religious denominations.

In addition to the property of the established church, the Church of England is vested in various ecclesiastical institutions and in the Church Commissioners' that is a state organism that supervises the use and maintenance of the church properties²².

A particular situation applies to important historical buildings. They are included in a list according to the planning law of 1990. This is of particular interest for the Church of England, having 13.000 parish churches listed plus 4.000 listed in the highest grade, on a total of 16.000²³. Public financial support can be provided in case of considerable repair charges or new works of art for historical buildings, but not for ordinary maintenance or general charges. Grants are provided through the English Heritage (a State agency) or can be external provided by charitable organisations²⁴. Over the last years, State grants increased, but the financial support remains limited compared with Church funds²⁵.

State controls allocations and architectural modifications of places of worship by planning laws (religious buildings are considered by the same standards than civil ones)²⁶.

Generally, *listed buildings* need consent of the administration (*listed building consent*) for every architectural modification. However, the Church of England buildings are not subjected to the same administrative control as they are under the responsibility of church courts. As a consequence of the equality principles, other denominations can be exempted from this control but only if they have equivalent procedures of the Church of England.

The places of worship Registration Act of 1855 provides for the registration of the places of worship. Since their registration, religious marriages performed in a registered place of worship can obtain public recognition and the buildings can enjoy tax exemptions.

3. Dress codes

As far as we want to deal with the issue of religious dress codes, we are obliged to ask the question of what is a religious symbol. M. Evans in his *Manual on the Wearing of Religious Symbols in Public Areas* concludes that there is no universal legal definition, but underlines two different approaches: the first

²² The Church Commissioners, created in 1948, is the result of the merger of two bodies, Queen Anne's Bounty and the Ecclesiastical Commissioners. The Church Commissioners are mainly in charge of paying the employees of the Church and managing fund flows. Moreover, it is in charge of the merging of parishes and the declaration of redundancy of churches. See J.D.C. Harte, "Les lieux de culte: une perspective anglaise", in Flores-Lonjou, M., Messner, F., *Les lieux de culte en France et en Europe*, Leuven, Peeters, 2007, p. 148. The Commissioners' role is to manage the Church's historic assets, today invested in stock market shares and property, to produce money to support the Church's ministry. The Church Commissioners meet some 18% of the Church's total running costs." <http://www.cofe.anglican.org/about/churchcommissioners/>

²³ D. McClean, "Church and State in the United Kingdom", in Robbers G. (ed.). *State and Church in the European Union*, Baden-Baden, Nomos, 2005, pp. 553-575.

²⁴ J.D.C. Harte, "Les lieux de culte: une perspective anglaise", in Flores-Lonjou, M., Messner, F., *Les lieux de culte en France et en Europe*, op. cit., p. 160.

²⁵ D. McClean, "Church and State in the United Kingdom", p. 572.

²⁶ J.D.C. Harte, "Les lieux de culte: une perspective anglaise", p. 143.

considering religious symbols as limited to figures of religious devotion; the other including in the notion of religious symbol everything which forms an element in the religious life of a believer. No matter what is the approach, what is important is to focus on what is understood as a religious symbol, which depends on the context and consequently on time and space²⁷.

For the purposes of this paper, we will particularly direct our attention to the Muslim headscarf and the Sikh turban and kirpan, in the European Union countries.

In some EU countries, the issue of dress codes was not prominent in public debates but in others it attracted the attention not only of mass media but also of political authorities. While some countries tried to regulate and limit in different ways the wearing of certain religious symbols (for example France or Belgium), others decided not to enact a specific regulation in this domain (for instance Italy and UK), public policies varying from banning to accommodating attitudes.

We can analyse the question focusing on the *persons* and the *service* they perform or on the *space*.

Concerning the persons and the service they perform, we have to make a difference between persons exercising a public service such as judges, teachers, and doctors who work in public institutions and persons who do not perform any public service but attend the same institutional space in a private capacity, i.e. students, defendants, patients etc. Although the space is the same, in the first case the choice of wearing a religious symbol can have an impact on the public institution as a whole and can raise issues about its neutrality, while in the case of persons that do not perform any public service, wearing religious symbols is a matter of private choice.

Public space can be conceived as *open* – such as a bus, the street etc. – or as *institutional* – such as a law court, a school, a hospital. While public *institutional* spaces have to comply with rules of access and conduct, public *open* spaces are theoretically equally accessible to all, but in practice, distinctions based on religion or belief can be relevant.

One of the first domains on which lawmakers and judges, at national as well as at European level, particularly focused is the **school issue**.

The French law of 2004²⁸ bans religious ostensible signs in schools. While the law does not mention any particular symbol, the Fillon decree specifies what the ostensible signs are, that is all signs revealing a religious belonging. Following the application of this law, some Muslim students wearing headscarves as well as Sikh students wearing turbans were excluded from public schools. The law mainly aimed to ban Muslim headscarves in order to preserve the principle of *laïcité*-neutrality, as in a school context students must not be influenced by religious issues. In the *Kervanci v. France* and *Dogru v. France* cases, the ECHR declared that the law is not in contrast with the ECHR²⁹.

In the United Kingdom, the debate arose over the *Begum case* in 2002. In the UK wearing the *hijab* is generally allowed in public schools and no matter of *laïcité* is debated in this country as the British legal

²⁷ M. Evans, *Manual on the wearing of religious symbols in public areas*, Strasbourg, Council of Europe Editions, 2009, pp. 62-87.

²⁸ Assemblée nationale, Loi n° 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, *Journal Officiel*, n° 65, 17/03/2004, <http://www.legifrance.gouv.fr> See also : Commission présidée par B. Stasi, *Laïcité et République*, Paris, La Documentation Française, 2004 ; A. Ferrari, “Velo musulmano e laicità francese: una difficile integrazione” in S. Ferrari (a cura di), *I simboli religiosi dei diritti del Vecchio continente*, Roma, Carocci, 2006, pp. 93 ss.

²⁹ *Case of Dogru v. France*, Application no. 27058/05, Strasbourg, 4 December 2008; *Case of Kervanci v. France*, application n. 31645/04, Strasbourg, 4 December 2008. <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>. See also: Conseil d’État, décision 5 décembre 2007, requête n. 285394, n. 285395 ; n. 285396 ; n. 295671. <http://www.conseil-etat.fr/>

system does not know this principle. The Begum case concerned the *jilbab*, a long tunic, a loose cloth that Shabina Begum wanted to wear at school: as the *jilbab* did not comply with the regulations concerning the school uniform, her claim caused her exclusion from the institute. This raised questions concerning the interpretation of article 9 of the ECHR and the possible limitations to her freedom of religion. The Court of Appeal recognised a violation of the right of freedom of religion of S. Begum under the Human Rights Act of 1998³⁰. But in March 2006, the House of Lords finally overturned the Court of Appeal's decision on all counts, assessing that Shabina's right to manifest a belief and art. 9 ECHR had not been violated by the school³¹.

In other countries, *teachers* and their right to wear a religious symbol have been the focus of the debate.

A German case concerned the refusal of hiring a teacher who did not want to remove her veil: the Constitutional Court decided that in doing so the Court had violated the religious freedom and non-discrimination principles³². In any case, the question falls under the competence of the Länder and some of them later adopted legal measures in order to forbid teachers from wearing Islamic headscarves in public schools.

In the case *Dahalab v. Switzerland*, concerning the dismissal of a school teacher wearing the Islamic headscarf, the ECHR considered that the dismissal was legitimate as it was applied in order to grant a religiously neutral teaching to young and easily influenced students³³.

Concerning the private sector, **religiously oriented schools** can deal differently with the issues concerning the wearing of religious dresses, as they are not obliged to respect the principle of neutrality. We will come back on this subject in the last part of this paper.

Regarding the issues of **public order and security**, the case of Italy can be mentioned. No Italian law forbids wearing religious symbol, but in the latest years some measures have been taken by local authorities in order to prohibit the wearing of the *burqa* in the streets. Some municipalities in the north of the country, where the North League party is particularly strong, applied a 1975 law (originally conceived against terrorism) that forbids circulating in public spaces with the face completely covered. Some municipalities enacted council decrees (based on this law) to ban the *burqa*. These decrees have been declared illegitimate by the courts which decided that as wearing the *burqa* is the manifestation of a particular religious tradition, it constitutes a "justified exception" to the general principle. Therefore, as long as people wearing it accept to be identified if requested by the police, they cannot be punished.

In Cremona, a city in Northern Italy, another case related to public order and security issues arose in 2007. In a shopping centre an Indian national of Sikh religion was approached by a policeman because he carried a sword: the *kirpan*. The Criminal Court of Cremona acquitted him of the crime to carry a weapon

³⁰ *Human Rights Act 1998*, http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1

³¹ House of Lords, *Judgments - Begum (FC) (Appellant) v. London Borough of Tower Hamlets (Respondents)* <http://www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd030213/begum-1.htm> ; House of Lords, *Opinions of the Lords of Appeal for Judgment in the Cause R (on the application of Begum (by her litigation friend, Rahman) (Respondent) v. Headteacher and Governors of Denbigh High School (Appellants)* <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060322/begum.pdf>. See also: Mohammad Mazher Idriss, "The Defeat of Shabina Begum in the House of Lords", *Liverpool Law Review*, vol. 27, n. 3, December, 2006, pp. 417-436.

³² BVerfG, 2 BvR 1436/02 of 09/24/2003, paragraphs No. (1 - 138),

http://www.bverfg.de/entscheidungen/rs20030924_2bvr143602en.html, accessed on June 18, 2010. The Court recognised that "there is no sufficiently definite statutory basis in the current law of the Land (state) Baden-Württemberg for a prohibition on teachers wearing a headscarf at school and in lessons".

³³ *Dahalab v. Switzerland*, Application No. 42393/98, Strasbourg, 15 January 2001,

<http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=55553349&skin=hudoc-en>

or an object, though not conventionally a weapon, which can be employed as one. The Court considered the carrying of a kirpan as an expression of one's religious faith and recognised the religious character of carrying it as a justified reason to exclude the application of the public security law³⁴.

Other issues concern, in various EU countries, **identity documents**. Generally, in the EU countries, photos for identity documents have to be taken without any scarves or headdresses and that is the case in France³⁵ and Portugal.

Other countries, such as Italy³⁶ and UK³⁷, provide dispensation in case of religious reasons, for example for the Sikhs turban, the Muslim headscarf or the nouns veil.

Courts dealt with this issue in Finland, Belgium³⁸, Germany and Ireland where in order to protect religious freedom these kinds of headdresses have been in general allowed³⁹.

In the **employment** context, the question of wearing religious dresses may have an impact on hygiene and security, state neutrality, working uniforms, etc. the EU countries deal with this issue in different manners. The court decisions are analyzed in the WP4's paper that will be presented by Katayoun Alidadi.

³⁴ Criminal Court, Cremona, 19 February 2009, n.799/08.

³⁵ Conseil d'État, décision n. 289947, 6 mars 2006, <http://www.conseil-etat.fr/> On the current debate about niqab, see: Mission d'information sur la pratique du port du voile intégral sur le territoire national, *Rapport d'information fait au nom de la mission d'information sur la pratique du port du voile intégral sur le territoire national*, n° 2262, le 26 janvier 2010, <http://www.assemblee-nationale.fr/13/rap-info/i2262.asp> accessed June 18, 2010; Sénat de France, *Le port de la burqa dans les lieux publics, Étude de législation comparée*, n. 201, 23 octobre 2009, <http://www.senat.fr/lc/lc201/lc201.pdf> accessed June 18, 2010

³⁶ Ministero dell'Interno. Direzione generale dell'amministrazione civile, circolare 14 marzo 1995, n. 4: "Rilascio carta di identità a cittadini professanti culti religiosi diversi da quello cattolico - uso del copricapo".

³⁷ A case concerned the refusal of the British High Commission in Singapore to renew the passport of a Muslim woman wearing a hijab. Since this case and the consequent public debate, the Home Office has adopted new guidelines allowing Muslim women to cover their heads on their passport photographs. Ukba Photograph Guidance for immigration applications made in the UK, version 04/2009: "Photographs must also be taken on the full head, without any covering unless worn for religious or medical reasons". <http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/flr/photoguidance0409.pdf> accessed June 18, 2010.

³⁸ See the decision of the Cour de Cassation, 22/12/2000, C990164N, http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20001222-4 accessed June 18, 2010.

³⁹ Migration Policy Group, European Group of non-governmental experts in the field of combating discrimination on the grounds of religion or belief, *Rapport de synthèse relatif aux signes d'appartenance religieuse dans quinze pays de l'Union Européenne*, juillet 2004. http://www.migpolgroup.org/public/docs/42.rapportdesynthesesignesreligieuxUE_FR_09.11.pdf, accessed June 18, 2010.

4. Religiously oriented schools

State-schools relations as well as State-Church relations are a national matter in the EU context but in the latest years, several actions have been undertaken by the Council of Europe and the OSCE in this domain. The general trend is to encourage and intensify a better understanding/knowledge of religions in public schools. Recognising that EU countries have to take up the same challenges, such as religious pluralisation and secularisation, several initiatives have been held at the international organisations level⁴⁰.

Concerning religious education in public schools, historical traditions are at the origin of three different models in Europe:

- Countries that do not provide any specific religious education (for example France);
- Countries where a non-denominational religious education is provided (mostly countries of Northern Europe such as Sweden, Denmark, England and Wales, etc.);
- Countries that provide a denominational religious education. Only one religion can be taught in some countries (example Greece) and in others students can choose the teaching they want to follow (example Belgium, Germany, Austria etc.)⁴¹.

In whatever tradition, States have to respect the right of parents “to ensure education and teaching in conformity with their own religious and philosophical convictions” (art. 2 of the First Additional Protocol). European countries thus recognise the right to establish private schools. These schools, religious or not religious, have to fulfil educational requirements provided by national laws and States can choose whether to finance them or not. Nevertheless, in EU countries, generally private schools receive significant public funding⁴².

Concerning private religiously oriented schools, the main issues EU countries have to deal with regard:

- The curriculum and the qualifications equivalences;
- The teaching staff appointment and dismissal relating to person’s faith ;
- The procedures and requirement for students’ admissions relating to person’s faith.

For the purposes of this section, we chose to focus on three main countries: France, UK and Italy as an example of the three main models of religious education (RE) in Europe.

In the French system, where the state have to provide a *free* and *secular* education (preamble of the French Constitution, 1946), a specific religious education class, in public schools, is not provided (except in Alsace and Lorraine). Religion is taught as a *fact* within the classes of history, literature and

⁴⁰ Council of Europe, Parliamentary Assembly, Recommendation 1720 (2005)1, *Education and religion*, 4 October 2005 (<http://assembly.coe.int/>); Council of Europe, Committee of Ministers, Recommendation CM/Rec(2008)12

of the Committee of Ministers to member states *on the dimension of religions and non-religious convictions within intercultural education*, 10 December 2008 (<https://wcd.coe.int/ViewDoc.jsp?id=1386911&Site=CM>); Council of Europe Ministers of Foreign Affairs, White Paper on Intercultural Dialogue, *Living Together As Equals in Dignity*, 7 May 2008 (http://www.coe.int/t/dg4/intercultural/Source/Pub_White_Paper/White%20Paper_final_revised_EN.pdf); The OSCE Odihr Advisory Council of Experts on Freedom of Religion or Belief, *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools*, the OSCE Office for Democratic Institutions and Human Rights (ODIHR), 2007.

⁴¹ J.-P. Willaime, « L’enseignement des faits religieux en Europe: situations et évolutions récentes », in *Les jeunes, l’école et la religion*, Paris, Bayard, 2009, pp. 43-62.

⁴² European Parliament, *Islam in the European Union: what’s at stake for the future?*, May 2007, p. 48.

philosophy. Freedom of education is a constitutional principle: although not expressly mentioned in the Constitution, it has been recognised as such by the Constitutional Council⁴³. Private schools are considered as a contribution to the national educational mission of the State and the Debré law of 1959 recognised their distinctive character. Private schools can be either under simple contract with the State or under a contract of association. In the first case, the teaching staff is paid by the State; in the second, generally the State is in charge of paying the teaching staff and local authorities provide some subventions in order to support school running expenses. Investment expenses are mainly in charge of the private schools but the State can fund up to 10% of private secondary schools investment charges. A difference concerns Alsace and Lorraine where there are no limitation of State financial support of investment expenses⁴⁴.

Private schools can adopt an educational project explicitly inspired to the doctrine of a religion but they have to respect freedom of conscience and religion of students and provide free access of students of whatever religious tradition, origin or conviction, who cannot be obliged to follow the religion class⁴⁵.

95% of the private education is provided by Catholic schools. In 2005-2006, private schools were 14.500, mostly Catholic, 250 Jewish, some Protestant and 4 Muslim⁴⁶.

In the French system, enrolling in a private Catholic school is not only a religious choice but the result of family strategy policies in order to ensure a better level of education to their children. Catholic schools are in fact generally recognised to be at the very top of the range. We can observe a common secularisation of private Catholic schools at the internal as well as at the external level: private and public schools being in line for what concern activities, teaching contents, financing, appointment and training of teachers⁴⁷.

Compared to Catholic schools, Jewish (enrolling almost 30.000 students; 75% of the schools are under contract with the State) and Muslim schools are mainly chosen because of their religious affiliation⁴⁸.

In the English system, faith organisations have a long tradition in education having being the main provider of education for many centuries.

Schools can be either maintained as State schools (voluntary aided or voluntary controlled) or independent, as privately endowed or/and free paying independent schools⁴⁹.

⁴³ Conseil Constitutionnel, Décision n° 77-87 DC du 23 novembre 1977, *Journal officiel* du 25 novembre 1977, p. 5530, recueil, p. 42 ; Conseil Constitutionnel, Décision n° 84-185 DC du 18 janvier 1985, *Journal officiel* du 20 janvier 1985, p. 821, recueil, p. 36 <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1977/77-87-dc/decision-n-77-87-dc-du-23-novembre-1977.7529.html> ; <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1985/84-185-dc/decision-n-84-185-dc-du-18-janvier-1985.8160.html> accessed 18 June, 2010. On this issue see B. Basdevant Gaudemet, “State and Church in France” in G. Robbers (ed.), *State and Church in the European Union*, Baden-Baden, Nomos, 2005, pp. 157-186.

⁴⁴ *Ibidem*, p. 170.

⁴⁵ C- Proeschel, S. Toscer-Angot, “Orientations et débats français autour de la conception de cet enseignement”, in *Les jeunes, l'école et la religion*, Paris, Bayard, 2009, p. 70.

⁴⁶ Reported by C- Proeschel, S. Toscer-Angot, “Orientations et débats français autour de la conception de cet enseignement”, in *Les jeunes, l'école et la religion*, p. 70.

⁴⁷ B. Massignon, J. Allouche Benayoun, “Introduction générale”, in *Les jeunes, l'école et la religion*, Paris, Bayard, 2009, pp. 195-199.

⁴⁸ Among Muslim schools in France, two are under contract with the State: one in the Réunion department; the second – college/lycée Averroès – based in Lille, is under contract since 2008. The collège/lycée de la Réussite in Aubervilliers (Paris suburbs) and the collège/lycée Al Kindi in Decines (near Lyon) are not under contract with the State.

⁴⁹ D. McClean, “State and Church in the United Kingdom” in G. Robbers (ed.) *State and Church in the European Union*, Baden-Baden, Nomos, 2005, pp. 553-575.

Faith schools fall into three main categories: maintained schools with a religious character; Academies with a religious character and independent schools with a religious character. Maintained and Academies with a religious character are publicly funded schools.

If they are voluntary controlled, religious communities can have a stronger position on the schools' board of managers but has to contribute up to 15% of the cost of the building works.

Maintained faith schools have to follow the National Curriculum. They also participate to the assessments and test of the National Curriculum and are inspected by Ofsted. Existing Academies with religious character are not bound to the national curriculum but must carry out a rounded curriculum including the core subjects and assessments in English, maths and science. Future Academies with religious character will be required to follow National Curriculum programmes in English, Maths, Science and ICT.

In order to promote spiritual moral and social development of pupils and to foster community cohesion and religious dialogue, maintained schools, having or not a religious character, are required to teach RE and hold a daily act of collective worship,⁵⁰ even if not distinctive of a particular Church denomination (School Standards and Framework Act 1998). Voluntary aided faith schools have the right to teach RE in accordance with the tenets of the religious designation of the school.

Parents can withdraw their children from RE and from collective worship.

Concerning the teaching staff, in all maintained schools, religious or not, the governing body is in charge of deciding staffing structure and arrangements and which candidate to appoint. Furthermore, voluntary aided schools can have regard to the person's faith in teaching appointment procedures, in accordance with anti-discrimination legislation. Up to one fifth of their teaching staff are *reserved teachers*, appointed to teach denominational RE and selected for their competence in these subjects⁵¹.

Since 2005, the Labour government aimed to increase the number of faith-based schools. In order to promote community cohesion, faith schools are supposed to designate a proportion of places as *open places*. The challenge is to foster community cohesion through a greater inclusion of all religions and to open these schools to the wider community. At the present time, schools with a religious character have to respect fair and open admission arrangements but they can give priority for some of their places to children from the faith concerned when they are oversubscribed⁵².

Since the late nineteenth century Church of England, Catholic, Jewish, Methodist and Quaker schools are included in the maintained system in England and Wales. Since 1997, Muslim, Sikh, Seventh day Adventist and Greek Orthodox have also joined the maintained sector.

In 1944, the Education Act established the dual system composed by schools with and without a religious character. Around one third of the total maintained schools in England are schools with a religious character and within independent schools 2 out of every 5, in England, have a religious character. The majority of independent schools with a religious character are mainly Muslim and Jewish.

Article 33 of the Italian Constitution affirms the right of organisations and private citizens to establish private schools and educational institutions. The same principle has been confirmed by the Villa Madama Agreement with the Catholic Church as well as by the agreements signed with other religious

⁵⁰ In schools without a religious character it must be of Christian nature; in schools with a religious character they may be in accordance with the religious designation of the school.

⁵¹ Department for Children, Schools & Families, *Faith in the System*, London, HMSO, 2007, p. 12.

⁵² *Ibidem*, p. 16.

denominations. Article 33, paragraph 3, of the Italian Constitution assesses that schools and educational institutes can be established by public and private bodies but without financial obligations to the state⁵³.

The Constitution theoretically provides for three kinds of schools:

- State schools;
- Officially recognised schools, administrated by private bodies and other authorities that can deliver recognised qualifications;
- Not officially recognised schools that cannot deliver recognised qualifications.

The Constitution provided for a successive legal implementation in order to regulate the situation of private schools, but only in 2000 a first law came in force concerning officially recognised schools⁵⁴.

After many years of general neglect, between 1996 and 2001, the center-left governments started to show concern with the private schools issues. The idea was to contribute to the charges of families enrolling their children in private schools, which can represent an indirect financing of the private school sector. These measures were also intended to face the financial crisis of private schools and the several requests for public financial support (and not least to attract Catholic electorates' votes)⁵⁵.

The 2000 law n. 62 finally established a distinction between funded and non funded schools. The first are recognised to perform a collective mission/function being part of the national education system at the same level of public schools. To be recognised as such they have to fulfil some requirements, among them: to be open to all students whatever is their faith; to be in line with the constitutional principles; not to compel students to participate to extra schools activities demanding to adhere to a particular religious conviction or ideology⁵⁶.

In practise, the 2000 law provides that families choosing to send their children in private recognised schools can be partially refunded of the fees they pay.

The main meaning of this law is to have introduced the principle of financial support for private schools, at least, in an indirect manner.

Since 2001, “school bonus grants” have been introduced as a refunding of schools fees paid by the families. Some Italian Regions have also adopted laws in order to indirectly finance the private schools sector through grants for students or bonus for families⁵⁷.

Right-wing governments have modified this system and reduced the requirements necessary to obtain the official recognition. These measures concern for example the teaching staff, that can teach in a private school even without the State teaching qualification (necessary in public schools)⁵⁸.

⁵³ S. Ferrari, “State and Church in Italy”, in *G. Robbers (ed.), State and Church in the European Union*, Baden-Baden, Nomos, 2005, pp. 218-220.

⁵⁴ A. Bettetini, “La (im)possibile parità. Libertà educativa e libertà religiosa nel ‘sistema nazionale di istruzione’”, *Il diritto ecclesiastico*, 2005, 1, pp. 49-80.

⁵⁵ C. Barone, “La faiblesse de l’instruction privée en Italie: un paradoxe?”, *Sociétés Contemporaines*, 2005/3, no. 59-60, pp. 97-119, p. 113.

⁵⁶ Legge 10 marzo 2000, n. 62 (GU 21 marzo 2000, n. 67), *Norme per la parità scolastica e disposizioni sul diritto allo studio e all’istruzione*, art. 3.

⁵⁷ V. Frajese, “Scuola pubblica e scuola confessionale: un nodo costituzionale”, *Democrazia e diritto*, 3/2005, pp. 129-145.

⁵⁸ C. Barone, “La faiblesse de l’instruction privée en Italie: un paradoxe », p. 109.

As a consequence of the general reform process, in fact since '90s, private schools in Italy have profited of increasing state financial support. However, only 6% of students attend private schools (mainly religiously oriented). Some scholars underline that private religious education answers a request of Italian families, wishing to protect a particular religious identity. While public schools ensure only 1 hour of RE/week, private religious schools can offer more extra schools activities in order to fulfil a religious socialisation, as well as a protected environment against risks of delinquency or drugs⁵⁹. Private religiously oriented schools are mainly Catholic but they still satisfy very little demand (for example in 2001, 6.8% at the primary school level; 9.4% of the entire secondary school level⁶⁰) as around 95% of Italian students attend public school.

Nowadays, in Europe, the situation of Muslim religious education is of particular interest in *public schools*. EU countries can either provide or not provide Muslim religious education in public schools following national historical and legal framework⁶¹.

Concerning *private Muslim schools*, theoretically, they can be opened in any country following the national legal framework. In practise, we can observe that generally the presence of a large Muslim community does not necessarily correspond to a large number of Muslim schools recognised or supported by the State. In some countries, they are very few or do not exist (Germany, Italy, Spain, Belgium), although in others their presence is more deeply rooted, such as the case in The Netherlands, Denmark, Sweden and in Great Britain⁶².

⁵⁹ *Ibidem*, p. 102.

⁶⁰ *Ibidem*, p. 103.

⁶¹ Muslim religious education is not of particular matter in countries providing non-denominational religious education or any specific religious education. In the first case, classes of sciences of religion, history of religion etc. focus on the basic characteristics of the major religions (as in Northern Europe for example). In the second, notions of Muslim religion can be taught within other classes such as history, literature, philosophy.

Generally, in countries providing a denominational religious education, Muslim religious education does not find much space in public schools compared to the considerable number of Muslim faith students. The problem is the general recent settling of Muslim communities and subsequently their legal status. Difficulties are mainly related to the availability of trained teaching staff and the choice of religion programmes and texts (which generally have to receive the approval of the religious community). These kinds of difficulties in organising Muslim religious education have been encountered particularly in Spain, Belgium and Germany.

See: European Parliament, *Islam in the European Union: what's at stake for the future?*, May 2007, pp. 45-48; L. Pépin, *Teaching about Religions in European School Systems - Policy issues and trends*, Network of European Foundations (NEF), 2009 (<http://www.nefic.org/docs/projects/NEF%20RelDem%20-%20RELIGION%20&%20EDUCATION%20-%20Final.pdf>) accessed June 18, 2010.

⁶² European Parliament, *Islam in the European Union: what's at stake for the future?*, p. 48.

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Project Identity

Title:	RELIGARE - Religious Diversity and Secular Models in Europe. Innovative Approaches to Law and Policy
Funding Scheme:	Collaborative Project (CP): small or medium-scale focused research project
Coordinator:	K.U. Leuven (Faculties of Law and Canon Law), Prof. Marie-Claire Foblets
Project Managers:	Dr. Jogchum Vrielink Dr. Myriam Witvrouw
Duration:	1 February 2010 – 31 January 2013 (36 months)
Contact e-mail:	info@religareproject.eu
Short Description:	The RELIGARE project is about religions, belonging, beliefs and secularism. It examines the current realities in Europe, including the legal rules protecting or limiting (constraining) the experiences of religious or other belief-based communities. Where the practices of communities or individuals do not conform to State law requirements, or where communities turn to their own legal regimes or tribunals, the reasons behind these developments need to be understood.
Partners:	13 (10 countries)
Consortium:	Centre for European Policy Studies (CEPS), Belgium Université Catholique de Louvain (UCL), Belgium International Center for Minority Studies and Intercultural Relations (IMIR), Bulgaria University of Copenhagen (UCPH), Denmark Centre National de la Recherche Scientifique: Politique, religion, institutions et sociétés: mutations européennes (PRISME), France Universität Erlangen-Nürnberg (UEN), Germany Università Degli Studi di Milano (UNIMI), Italy Vrije Universiteit Amsterdam (VUA), The Netherlands Universiteit van Amsterdam (UvA), The Netherlands Universidad Complutense Madrid (UCM), Spain Middle East Technical University (METU), Turkey Queen Mary, University of London (QMUL), U.K.
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