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Double Standards? Veils and Crucifixes in the European Legal Order

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C H R I S T I A N J O P P K E

*Double Standards?
Veils and Crucifixes in the
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Abstract

Comparing the treatment of Islamic veils and Christian crucifixes by the European Court of Human Rights, this paper re-examines the charge of “double standards” on the part of this guardian of the European legal order, which is seen as disadvantaging Islam and favoring Christianity. While this is proved partially correct, the paper calls for a more differentiated treatment of the issue. For one, there is a modicum of consistency in the European Court’s decisions, because they are all meant to further “pluralism”. Only, Islam and Christianity fare differently in this respect, as “threat” to and “affirmation” of pluralism, respectively. This distinction hinges on Islam’s compatibility with the liberal-secular order, on which the jury is out. A possible way out of the “pluralism v. pluralism” dilemma, I argue, is signaled in the European Court’s recent decision in *Lautsi v. Italy* (2011), which pairs a preference for “culturalized” Christianity with robust minority pluralism.

Keywords: secularism; religion; liberalism; sociology of law; Islam; Christianity; Europe.

ON BOTH SIDES OF THE ATLANTIC, the role of religious symbols in the public sphere has become subject to protracted conflict. This is one way in which “public religion” has had a mighty comeback, if it ever was out (see Casanova 1994). Veils and crucifixes are of particular salience, both having been dealt with in legislation and legal rulings by national high courts and the European Court of Human Rights, the apex of the European human rights order. This coincidence shows that majority and minority religions are equally involved in today’s religious symbol struggles, though in different ways that still await a more complete understanding.

The socio-legal literature tends to deplore a double standard in the legal processing of majority and minority religious symbols,

particularly visible in the decisions of the European Court of Human Rights (ECtHR): toward Christianity an accommodative stance of “liberal pluralism” prevails, whereas toward Islam a restrictive stance of “liberal antipluralism” is dominant (Danchin 2011, p. 706). In a kindred vein, Susanna Mancini (2009, p. 2631) found that “courts and legislators tend to secularize the meaning of religious symbols and interpret them according to the sensitivities [...] of the majority”. But “secularization” cuts in opposite, discriminatory ways: the crucifix is culturalized, whereby the state makes it a symbol of national identity; and the veil is politicized as a threat to the secular order, which now allows it to be excluded. This leads to her conclusion that “secularized religion and secularism are used in order to exclude the other and protect the culturally homogenous character of European societies” (*ibid.*).

Whatever the thrust of the critique, pushing either the “double standard” or the “secularism-is-discriminatory” line, which in effect amounts to the same, the underlying assumption is that minority and majority religions should be treated equally on the part of the state. As such, this is an astonishing claim, if one considers the society- and civilization-making powers of religion, which can never be the same in any two places. In a way, it asks of state and society to abstract from their particular history. It is a claim specific to “Latin Christendom” (Taylor 2007) which invented secularism, that is, the separation of state and religion, and the notional retreat of religion into a “private” sphere. In one perspective, secularism and the privatization of religion appear as the logical endpoint of religious evolution, in which religion (*qua* its Christian incarnation) is finally revealed as what it is in essence: a matter of subjective experience (Gauchet 1997). From another perspective, privatization is a most improbable outcome, as it sees in religion the disguised power of the collectivity and thus attributes to religion a necessarily social dimension (Durkheim 1984). Whatever perspective on religion one takes, as subjective experience (Gauchet) or as social fact (Durkheim), one could argue that the equality claim, which asks for all religions to be treated equally by the state, is a trap that the liberal state has set for itself: it can never be met in reality because of historically grown, irredeemably particularistic religion-state relationships.¹

Any comparison of the legal processing of veils and crucifixes, as the most politically salient symbols of minority and majority religion, respectively, must first consider that both are different things. The veil as such is not imbued with religious meaning; it is not an object of

¹ Throughout this paper, I use the notions relations (or regimes) interchangeably, following much of the literature.

veneration or cultic practice but merely functional to fulfilling the Koranic obligation on the part of women to conceal their bodily attractions. In principle, this obligation could be met in any other way, for instance, by putting on a helmet or slipping into a paper box. In contrast, the crucifix is the religious symbol par excellence; it inherits the totem as “typically holy thing” (Durkheim 1984, p. 166). As the veil *qua* veil is not prescribed by religion, it is easy to attribute other than religious intentions to it, and to dismiss it, for instance, as a political symbol that negates the liberal-democratic order. Considering that the veil in itself is merely a garment and fungible in the meanings attributed to it, it is easier to exclude than the crucifix, whose cultic property makes it unquestionably protected by the constitutional clauses for religious belief and practice in the liberal state. Note, for instance, that the French 2010 law banning the burqa is premised on the assumption, however implausible it may appear, that the burqa is not a religious symbol prescribed by Islam but a symbol of political fundamentalism (Joppke and Torpey 2013, chapter 2); the headscarf prohibitions in some German Länder, which explicitly exempt the habits of Catholic nuns, follow the same line (Joppke 2009, chapter 3). Such a complete (if tortuous) exorcizing of the religious dimension would be difficult to imagine with respect to the crucifix.

Accordingly, the different (inherently religious v. fungible) contents of crucifix and veil, respectively, make the veil in principle less legally protected than the crucifix. However, this vulnerability is counterbalanced by a second attribute of the veil that now works in its favor: the veil is always an attribute of the person wearing it, while the crucifix, to the degree at least that it has become the object of legal contestation, is mostly part of an institutional environment (especially schools), detached from persons. So if the state excludes the veil for its allegedly political implications, the veil-wearing woman may respond (in fact, she has responded): “But it is my choice, the expression of my liberties, my *religious* liberty and that is only for me and not for the state to define”. Conversely, the crucifix if outside its cultic home ground, such as in a public school or square, is an awkward thing for the liberal state to protect, owing its name precisely to *separating* what it now sometimes claims to be *identifying* with, if only in terms of history and culture.

In sum, the phenomenological and historical differences between veil and crucifix and between the (minority v. majority) religions they stand for must be acknowledged. In the spirit of not precipitately buying into the “double standard” and “secularism-is-discriminatory” charges but of tracing in detail where they apply and where perhaps they go astray, the following pages revisit the main legal cases in

Europe surrounding veil and crucifix, with a particular attention to the European Court of Human Rights (ECtHR). This court was created by the (non-EU) Council of Europe in 1953 to enforce the European Convention on Human Rights (ECHR) that went into effect in the same year. This most powerful of all international human rights courts in the world, which gives individuals the right of standing, was meant to protect and reinforce postwar Europe's commitment to democracy and human rights. Overall, this unique institution has fulfilled its designated function admirably well, even if the initial 15 (by now 47) member states signing up to it did so in the belief that the Court would "refrain from active judicial intervention in domestic affairs" (Koenig, forthcoming, p. 8).

However, as Matthias Koenig (forthcoming) argues, the ECtHR eventually stripped this limitation and evolved into a force of "institutional secularization" (p. 3), putting brakes on the historical privileges that majority religions inevitably enjoy in European (as in all) societies. In this sense it acts as a significant equalizer between majority and minority religions (*ibid.*, p. 31). Still, the ECtHR has never been as aggressive in this respect as national-level constitutional courts, and its persistent eagerness not to offend its political overlords is expressed in the Court's notorious "margin of appreciation" doctrine that leaves sensitive questions of national culture, identity, and religion-state relations to the discretion of member states (see *ibid.*, p. 9).

While my opening considerations suggest a differentiated treatment of veils and crucifixes, both factually and normatively, there is still one common principle that is meant to be furthered by the ECtHR's entire religion file: "pluralism". Only, as I shall argue, different notions of pluralism undergird the Court's Islam and Christianity decisions: as norm to be defended from an assumed threat of Islam (I), and as reality that is seen as affirmed by Christianity (II). The legitimacy for this opposite linking of both religions to pluralism hinges on the question whether Islam is, indeed, in tension with the liberal-secular order. This question does not have to be answered as crudely as in the European Court's Islam decisions, but it must be allowed – particularly as it is raised even by intra-Islamic critics (such as anthropologist Saba Mahmood 2009). I argue that the pairing of a preference for a "culturalized" Christian majority religion with a defense of minority pluralism in the European Court's 2011 *Lautsi* decision provides a possible way out of the "pluralism v. pluralism" dilemma (III).

The scope of this paper is doubly limited. First, its data are legal decisions, which seems unusual for a sociology paper. However, the point is to bring across to a non-legal audience the importance of legal

discourse and legal decision-making for accommodating religion in the contemporary liberal state (for a more extended exercise focusing on Islam, see Joppke and Torpey 2013). Second, I look at the decisions of only one court, though the one that is central to Europe's human rights regime. However, as mentioned, the European Court of Human Rights is less aggressive than national-level constitutional courts, rarely sanctioning its political principals. This paper thus gives a conservative picture of law that rarely blockades politics, much in contrast to often more acidic and confrontational national-level dynamics. I thus provide a partial, not a complete picture. But this is the limitation of all scholarly exercise.

I. "Pluralism" against Islam

Three of the ECtHR's major Islam cases dealt with the headscarf, and all upheld national-level restrictions that were claimed to be in violation of religious liberty rights guaranteed by the European human rights convention. Central to religious freedom is Article 9, which guarantees "the right to freedom of thought, conscience and religion" (ECHR Art.9.1). In line with many liberal state constitutions, the European convention not only protects the right to believe *foro interno* but also the right to "manifest" one's belief to the outside world. If Islam, indeed, not unlike Judaism, puts a premium on "orthopraxy", the unity of belief and ritual, and thus cannot really be privatized (as claimed, for instance, by Mahmood 2012, XV), this feature of Islam is thus in principle protected under the European convention. Moreover, the European Human Rights Court has never questioned that the Islamic veil, despite the veil's intrinsic lack of religious significance, *is* a "manifestation" of religious belief, and thus falls under the protection of ECHR Article 9. The question was rather whether the right to manifest one's religion was cancelled out by a constraining condition attached to Article 9, which concedes the possibility of "limitations" to this right if they are "prescribed by law" and "necessary in a democratic society" (ECHR Article 9.2). In this way, the expansive scope of religious liberty protection under Article 9.1 was immediately revoked, but only with respect to religious *practice* (not *belief*). This disadvantages "orthopractical" religions that stress the unity of belief and ritual, and seemingly confirms the "secularism-is-discriminatory" charge.

However, if one concedes the possibility of limits on the right to religion, how could it be otherwise? How could they ever invade the

inner sanctum of belief? Consider how the crucial “necessary-in-a-democratic-society” limitation is spelled out, namely, in terms of “public safety”, “protection of public order, health, or morals”, and “protection of the rights and freedoms of others”. These limitations, which implicitly invoke John Stuart Mill’s “harm principle” as a benchmark for legitimate state intervention in a liberal society, could impossibly pertain to individual belief, which in itself is socially inconsequential; by necessity, any limitation must pertain to *practice* that alone is socially relevant and thus on the state’s radar.

For good or bad, the European Court’s three major headscarf decisions all upheld national-level restrictions as “necessary in a democratic society”, relying on ECHR Article 9.2. The Court’s first headscarf case, *Dahlab v. Switzerland* (2001)², concerned a primary school teacher in the Swiss canton of Geneva, a converted Catholic, and as moderate and polite as Swiss Islam at large. Reviewing this case, which was rejected up front as “manifestly ill-founded”, one is tempted to concur with a legal critic’s view that an irrational “idea of threat” underlies the ECtHR’s view of Islam (Evans 2006, p. 15). There had never been any “complaints by parents or pupils” against the veiled teacher, who explained her strange wear to her pupils not in religious terms but as “sensitivity to the cold”.³ This was a rather thin basis for reading into the scarf “some kind of proselytizing effect” that it “might have” irrespective of its actual wearer’s expressly non-proselytizing intentions. Moreover, as the Court added without much analysis, the headscarf “appears to be imposed on women by a precept in the Koran and [...] is hard to square with the principle of gender equality”.⁴ Hence the European Court’s conclusion, which closely followed the view of the Swiss Federal Court, that the Islamic headscarf “appears difficult to reconcile [...] with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils”.⁵

The irony of *Dahlab*, as of the European Court’s subsequent headscarf and Islam cases also, is that the opposite of “tolerance”, a prohibition, is justified in reference to “tolerance”. Overall, the furthering of “pluralism” has been the central justification of the Court’s restrictive line toward Islam, providing a semblance of coherence with the Court’s rather lenient approach to cases involving Christianity (see section II), which was also framed in terms of “pluralism”.

² ECtHR, *Dahlab v. Switzerland* (2001), App.no. 42393/98.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

“Pluralism” as “indissociable from a democratic society” had been central to the Court’s first adjudication ever of an Article 9 violation by a convention state, in *Kokkinakis v. Greece* (1993), and it has been evoked ever since as the “main model of the Court’s case law related to freedom of religion and the core principle which organizes Church-State relations” (Tulkens 2009, pp. 2578f). Only, if applied to Islam, “pluralism” was not meant to endorse but to restrict religious practice, following the model of “militant democracy” (Loewenstein 1937) that is assertive of democratic values and principles against presumed enemies of democracy. (For a defense of “militant democracy” in religious matters, see Finnis 2008; for an indictment, see Macklem 2010.)

However, there are two elements in *Dahlab* that cannot be reduced to the militant democracy motif and thus are *not* liable to the charge of chasing a phantom “threat”. The first is the fact that *Dahlab* concerned a civil servant who “represented the state” and was thus “bound by a special relationship of subordination to the public authorities” and the principles under which these authorities operated, that is, “denominational neutrality” and the “separation of Church and State”.⁶ This fact was interestingly ignored in the other great headscarf case involving a public school teacher, the 2003 *Ludin* decision of the German Federal Constitutional Court, which was in favor of a veiled teacher and thus shows the greater inclusiveness of national high courts toward Islam. *Ludin* makes a distinction between “state” and “teacher”, the latter being foremost a person endowed with the same religious freedoms as any individual. To this a dissenting court minority objected that civil servants were due “temperance and professional neutrality” (Joppke 2009, p. 69). Moreover, the *Ludin* minority argued, the right of religious freedom (guaranteed by Article 4 of the German Basic Law), like all constitutional rights, was a defensive right *against* the state intruding uninvited into a person’s life. In contrast, a civil servant, by entering into an employment contract with the state, sought “nearness” to the state, which is an altogether different relationship to which constitutional rights do not apply. It is still very much an open question whether public school teachers are state functionaries much like police officers or judges, exercising sovereign state functions and thus required to appear “neutral” (symbolized by the requirement to wear uniforms), or whether they exercise functions that could also be provided by the market or other forms of non-political organization and thus are only

⁶ *Ibid.*

contingently attached to the state and its neutrality obligation – note that a uniform for teachers is not known anywhere today (see Böckenförde 2001).

A second element in *Dahlab* that cannot be construed as specifically anti-Islamic is that it invoked the strict laicism in place in the French-speaking canton of Geneva, where it is prohibited to deploy crucifixes in state schools. Then, indeed, it would be strange to “allow the teachers themselves to wear powerful religious symbols of whatever denomination”.⁷

However, “militant democracy” is unambiguously central to the European Court of Human Rights’ second great Islam case, *Refah Partisi and Others v. Turkey*.⁸ It affirmed the Turkish Constitutional Court’s spectacular prohibition of the Islamic “Welfare Party”, then the largest political party in Turkey forming a coalition government with the leading centre-right True Path Party (headed by Minister President Tansu Çiller). While not a headscarf decision, *Refah Partisi* matters in bringing out more clearly than the Court’s other Islam cases the themes of “militant democracy” and defense of “pluralism” that undergirded the Court’s approach to Islam. As the Court invoked the “militant democracy” motif (without, however, using the word), “no one must be authorized to rely on the Convention’s provisions in order to weaken or destroy the ideals and values of a democratic society”.⁹ The case is also noteworthy for following the Turkish Constitutional Court’s reasoning at length, under the mantle of the “margin of appreciation” doctrine. So the European Court cites, without an element of distancing itself, the debatable statement that “Democracy is the antithesis of sharia [...] With adherence to the principle of secularism, *values based on reason and science replaced dogmatic values*” (emphasis supplied).¹⁰ This was unwittingly saying that Turkey was *not* a democracy, but the rule of *one* dogma (that of “reason and science”) replacing that of *another* dogma (that of religion or “sharia”). Moreover, the European Court simply adopted the Turkish Court’s indictment of *Refah*’s aim to establish a “plurality of legal systems”, which was “to establish a distinction between citizens on the ground of their religion and beliefs”, and which was assumed to be but a first step toward the “installation of a theocratic regime”.¹¹

Refah mobilized “pluralism” against “pluralism”, and thus was indicative of the European Court’s general stand on Islam. This was

⁷ *Ibid.*

⁸ ECtHR, *Case of Refah Partisi (The Welfare Party) and Others v. Turkey*, decision of 13 February 2003.

⁹ *Ibid.*, par.99.

¹⁰ *Ibid.*, par.40.

¹¹ *Ibid.*, par.28.

doubly ironic, as the Turkish militant laicism, which trumps even the French in its dogmatic fervor, could hardly be called “pluralistic”, and as the Islamic Welfare Party’s indicted project had precisely been the introduction of pluralism to family law and private law.¹² Such legal pluralism, the Court argued, “would do away with the state’s role as the guarantor of individual rights and freedoms”, and subject people to the “static rules of law imposed by the religion concerned”.¹³ In particular, subjecting Turkey’s Muslim citizens to the rules of sharia was deemed problematic, as the latter was “stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedom have no place in it”.¹⁴

A judge concurring with the Court’s majority opinion in *Refah* still criticized the “unmodulated” view of the Court “as regards the extremely sensitive issues raised by religion and its values”, and that it “missed the opportunity to analyse in more detail the concept of a plurality of legal systems, which is [...] well established in ancient and modern legal theory and practice”.¹⁵ The Court’s rejection of legal pluralism also rested on a narrow understanding of religion as “belief” decoupled from “practice”, undercutting the scope of Article 9 protections that included the freedom to “manifest” religion: “(F)reedom of religion [...] is primarily a matter of individual conscience and [...] the sphere of individual conscience is quite different from the field of private law, which concerns the organization and functioning of society as a whole”¹⁶. This is grist to the “secularism-is-discriminatory” mill, the argument that European (and Western) public institutions are simply deaf to religions that require a unity of belief and ritual (*e.g.*, Mahmood 2006, 2009, 2012).

But how can *Refah*’s explicit attack on “legal pluralism” still be “pluralistic”? It can, if the latter is understood as in liberal political science. Indeed, as one legal observer pointed out, the concept of pluralism undergirding the case law of the ECtHR has a “certain affinity with pluralism in political science” (Nieuwenhuis 2007, p. 377), which stipulates multiple memberships for each individual on the basis of cross-cutting cleavages. It is thus exactly opposed to legal pluralism’s notion of different legal orders for different groups.¹⁷ Pluralism thus understood, indeed, is “different from the existence of

¹² “When we are in power a Muslim will be able to get married before the mufti, if he wishes, and a Christian will be able to marry in church, if he prefers” (*Refah* leader Erbakan, quoted in *ibid.*, par.28).

¹³ *Ibid.*, par.119.

¹⁴ *Ibid.*, par.124.

¹⁵ Concurring opinion of Judge Kovler, in *ibid.*

¹⁶ *Ibid.*, par.128.

¹⁷ For a similar pluralist attack on group-reifying multiculturalism, see Sartori (2001).

separate societies” (*ibid.*, p. 383). Only, to repeat, “Turkey” was a strange soldier to enlist in its defense.

The European Court of Human Right’s third great Islam case, *Sahin v. Turkey* (2006)¹⁸, was again a headscarf case, but this time not brought forward by state employees but by university students. No country in Europe knows anything similar to the Turkish headscarf ban on university students that was affirmed by the Court’s Great Chamber (its highest instance) in *Sahin*, not even France, where the 2004 headscarf law only concerned public schools, not universities. Compared to the European Court’s first headscarf decision in *Dahlab*, the emphasis shifted in *Sahin* from the defense of the “rights of others” (in that case immature school children possibly subject to “proselytism”) to the defense of “secularism”, on the one hand, and of “gender equality”, on the other. This meant stressing the element of “protection of public order” and of “morals” among the things held “necessary in a democratic society”, as stipulated in ECHR Article 9.2. As the Court argued, “[i]n democratic societies in which several religions coexisted within one and the same population, it might be necessary to place restrictions on the freedom to manifest one’s religion or belief in order to reconcile the interests of the various groups and ensure that everyone’s beliefs were respected”.¹⁹

But *Sahin* is less noteworthy from the point of view of legal doctrine, which squarely followed the tracks laid out in *Dahlab* and *Refah Partisi*, than for a spirited minority dissent by Belgian Justice Françoise Tulkens. She questioned whether this restriction of religious freedom was really “necessary in a democratic society”, and raised doubts about the Court’s entire handling of the Islam challenge to secularism.²⁰ The fact that no other European convention state but Turkey had banned the headscarf for university students, educated adult citizens capable of choice, should pose a limit to the usual “margin of appreciation” doctrine habitually invoked in *Sahin*, which again simply followed the line of national authorities and national courts: “European supervision”, which notionally limits the “margin of appreciation” of states, “seems quite simply to be absent from the judgment”.²¹ More concretely, Justice Tulkens questioned the two justifications of the headscarf restriction, via secularism and equality. With respect to secularism, are mere “worries or

¹⁸ ECtHR, *Sahin v. Turkey* [2006] ELR 73.

¹⁹ *Ibid.*, par.106 (quoting the pluralism doctrine first developed in *Kokkinakis v. Greece* [1993]).

²⁰ Dissenting opinion by Judge Tulkens, *ibid.*

²¹ Judge Tulkens, *ibid.*, par.3.

fears”, in particular the reference to “extremist political movements within Turkey”²², sufficient reason to restrict a fundamental individual freedom?²³ “Merely wearing the headscarf cannot be associated with fundamentalism”, Tulkens objected.²⁴ In particular, she objected to the Court’s disregard of the student’s expressed view not to oppose secularism, and to the fact that no evidence was provided that she had violated that principle. Last but not least, in an attempt to distinguish *Sahin* from *Dahlab*, “the position of pupils and teachers seems to me to be different”.²⁵ There was no need in *Sahin* to protect unformed souls from proselytism. Nor did a representative of the state obstruct her obligatory neutrality through religious dress.

With respect to the second justification of the headscarf ban in *Sahin*, via equality, Justice Tulkens quoted the German Constitutional Court decision in *Ludin* (2003), which had argued, with the help of sociologist Nilüfer Göle’s (1997) ethnography of the 1990s headscarf movement at Turkish universities, that there was “no single meaning” to the headscarf, least one that necessarily denigrated women. “What is lacking in this debate is the opinion of women”, and the student’s headscarf in particular was more likely to be “freely chosen” than imposed by an archaic male milieu.²⁶ But more importantly still, the objective notion of equality deployed by the Court was “paternalistic”. Properly understood, equality and non-discrimination are “subjective rights which must remain under the control of those who are entitled to benefit from them”.²⁷ If it were otherwise, one could impossibly stop at prohibiting the headscarf in school, university, or courtroom, and there would be a “positive obligation” for the state to sniff out and prohibit it wherever it could be found, be it in citizens’ bedrooms.²⁸

The last European headscarf case to date involved the mother of all European headscarf controversies: France. *Dogru v. France* (2008)²⁹ also gave the final European *d’accord* to France’s 2004 Law on Laicity, which prohibited “ostentatious religious symbols” in French public schools, on the part of pupils, putting to a (preliminary) end the notorious *affaires de foulard* that had been ongoing for some 15 years. The case concerned an 11-year old girl who insisted on wearing a scarf during physical education classes, back in 1999. She was subsequently expelled from school for “breach of assiduity”, that is, her lack of

²² *Sahin*, par.115.

²³ Judge Tulkens, *ibid.*, par.5.

²⁴ Judge Tulkens, *ibid.*, par.10.

²⁵ Judge Tulkens, *ibid.*, par.8.

²⁶ Judge Tulkens, *ibid.*, par.11.

²⁷ Judge Tulkens, *ibid.*, par.12.

²⁸ Judge Tulkens, *ibid.*

²⁹ ECtHR, *Case of Dogru v. France* (application no. 27058/05), 4 December 2008.

compliance with the existing health and safety rules. The exclusion of the headscarf from physical education and sports classes had been affirmed by the Conseil d'État, France's administrative high court, in March 1995. Two aspects of this case are noteworthy. First, it dealt with an apparently radical (parent) claimant, who pushed the Koranic veiling obligation to the limit of the puberty threshold. Moreover, the parents refused a compromise offered by the school, which was to allow the headscarf during regular school hours, and to limit the prohibition to physical education: "we're going to win" they said,³⁰ and the case was on. It is not implausible to argue, on the part of the French government, that the ensuing conflict had generated a "general atmosphere of tension in the school". Secondly, headscarves were generally tolerated in French schools at the time, unless their motivation was to proselytize. However, this tolerance had never applied to physical education, especially swimming lessons, on which French courts (unlike other European courts; see Albers 1994) had always taken a hard, non-accommodating line.

The Court fully sided with the French government, which had defended the expulsion of the girl from school as "necessary in a democratic society" along the lines of *Sahin*, that is, for the sake of "secularism" and "gender equality". As the Court argued, with an eye on the regional origins of its previous headscarf cases: "[I]n France, as in Turkey or Switzerland, secularism is a constitutional principle, and a founding principle of the Republic, to which the entire population adheres [...] [A]n attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion".³¹ And this was again a case of mobilizing "pluralism" against "pluralism": "pluralism and democracy must be based on dialogue and a spirit of compromise", argued the Court, and this required the repression of religious pluralism, that is, "various concessions on the part of individuals [...] to maintain and promote the ideals and values of a democratic society".³²

Reviewing the European Court of Human Rights' entire religion file, Matthias Koenig observed an "evolving jurisprudence" that "has opened avenues for religious minorities to claim their equal rights" (Koenig, forthcoming, p. 31). Perhaps an example of a mellowing attitude toward Islam is *Affaire Ahmet Arslan et Autres c. Turquie* (2010)³³, which is one of the first where the reference to "secularism" and the exigencies of "militant democracy" did not trump Muslims' religious liberty right

³⁰ *Ibid.*, par.39.

³¹ *Ibid.*, par.72.

³² *Ibid.*, par.62.

³³ ECtHR, *Affaire Ahmet Arslan et Autres c. Turquie*, Requête no. 41135/98, 23 February 2010.

under Article 9 of ECHR. It concerned a small Islamic sect, Aczimendi Tarikatı, members of which were arrested, in October 1996, for parading in front of their mosque in Ankara in their black religious attire including turban, tunic and stick, which was modeled on that of the Prophet. In January 1997, participating sect members were charged and indicted for violating Turkish secularism laws that proscribe the wearing of headgear and of religious garments in public other than for religious ceremonies. Notably chaired by Belgian Justice Françoise Tulkens, who had issued the spirited minority dissent in *Sahin v. Turkey*, the Court's second section first distinguished this case from *Dahlab*, in that the case involved "simple citizens" and "not representatives of the state in exercise of a public function"³⁴. Most importantly, however, it distinguished the case from *Sahin*, in that this was not the case of a dress restriction in a public institution where a neutrality obligation applied, but a case where the plaintiffs "were sanctioned for their way of dressing in public spaces open to all like streets or public places".³⁵ Further considering that in the case in question there had been "no threat to public order"³⁶ and that there had been "no proselytism", the movement being a "mere 'curiosity'"³⁷ not recognized by official Islam in Turkey, the Court held that punishing the sect members constituted an infraction of religious liberty under Article 9 ECHR.

Whereas *Dogru v. France* (2008) had affirmed France's 2004 law against the foulard in public schools, *Arslan v. Turkey* (2010) could create problems for the French burqa law passed in July 2010. This law prohibits the "dissimulation" of one's face in all public places, in order to safeguard the "reciprocity" of seeing and being seen that is held to be elementary for social life (see Joppke and Torpey 2013, chapter 2). If "ordinary citizens" "dressing in public space open to all like streets or public places", with the "sole aim" of manifesting their religion, could not be easily restricted by the state, as was held in *Arslan*, the Court should consequently also find fault with the French burqa law that does just that, namely, restrict the elementary religious liberties of "ordinary citizens" in "public places".

II. ...and "pluralism" for Christianity

In his review of European high court rules on religion, in which the European Court of Human Rights figures prominently, Ran Hirschl (2010, p. 162) indicts these courts' "inclination toward secularism and

³⁴ *Ibid.*, par.48.

³⁵ *Ibid.*, par.49.

³⁶ *Ibid.*, par.50.

³⁷ *Ibid.*, par.51.

modernism". While this is a fair description of the ECtHR's overall stance on Islam, it curiously ignores a second, much more accommodative, stance that the same Court has taken toward the Christian majority religion, including some of its more debatable, sectarian offshoots (such as the notoriously court-going Jehovah's Witnesses). As the crucifix appeared on the Court's agenda only late, in the famous *Lautsi* case adjudicated in 2009 and 2011, we must first address the key Christianity cases that preceded it.

The spirit for the defense of religious pluralism when under the (broadly) Christian umbrella was set in the Court's very first finding of a religious liberty violation under Article 9, in *Kokkinakis v. Greece* (1993).³⁸ The case concerned a rather hilarious event of proselytism by a married couple of Jehovah's Witnesses, who had first telephoned the wife of an Orthodox priest and then entered her house on a pretext, "telling her about the politician Olof Palme and [...] expounding pacifist views".³⁹ Based on a clause in the Greek Constitution that prohibits proselytism, the couple was arrested and sentenced to four months in prison – in fact, the husband had been arrested in the past more than sixty times for similar acts. This was a delicate case in a state symbiotically aligned with the Orthodox Church, and the plaintiff not unreasonably charged that "even the wildest academic hypothesis"⁴⁰ could not imagine a charge of proselytism ever being raised against members of the Orthodox Church.⁴¹ Further, Mr. Kokkinakis claimed that the ban on proselytism was unconstitutional, as no line could be drawn between proselytism and the freedom of religion.

In siding with Kokkinakis, the European Court indeed "upheld a secularist view of the state" (Dembour 2000, pp. 201f), but now as one in which the involved (Greek) state did not live up to this ideal, and was asked not to interfere in religious practices in society. This was the moment that the Court introduced its central doctrine for all its religion cases: that the purpose of protecting religious freedoms under ECHR Article 9 was to further "the pluralism indissociable from a democratic society"⁴². Only now, that Christian groups stood to be protected, "pluralism" worked in favor of and not against the involved religion. More than that, pluralism worked in favor not only of religious beliefs but practices, that is, of religion expansively defined, including attempts to convert others to the "truth". This

³⁸ ECtHR, *Kokkinakis v. Greece*, decision of 25 May 1993.

³⁹ *Ibid.*, B.10.

⁴⁰ *Ibid.*, par.15.

⁴¹ In fact, before a constitutional amendment in 1975 the Greek constitution only prohibited proselytism on the part of non-Orthodox religions.

⁴² *Ibid.*, par.31.

is precisely what had been denied to Islam, some of whose practices (or “manifestations” of belief) had been restricted as “necessary in a democratic society”. As the Court argued in *Kokkinakis*, “[b]earing witness in words and deeds is bound up with the existence of religious convictions”.⁴³ Moreover, a distinction had to be drawn between “bearing Christian witness”, with which the Court alleged to be dealing here, and “improper proselytism”. If one compares the accommodating line taken in this rather drastic case of proselytism, eulogized as “bearing Christian witness”, with the categorical rejection of even the vaguest (and factually unconfirmed) possibility of proselytism in *Dahlab*, one cannot but notice a double standard at work, that is, laxness for Christianity and an unforgiving stance toward Islam.

An equally strong ground for the double standard charge was provided just one year later by the famous case *Otto-Preminger-Institut v. Austria* (1994).⁴⁴ Here the European Court protected the Christian majority of the Austrian Land of Tyrol from attack by a “blasphemous” work of art, and no problem was found with a drastic case of censorship on the part of the Austrian government, which had annulled the artist’s right to freedom of expression, guaranteed in ECHR Article 10. The *casus belli* was the film *Das Liebeskonzil* by Werner Schroeter, a well-known German filmmaker, in which “God the Father is presented [...] as a senile, impotent idiot, Christ as a cretin and Mary Mother of God as a wanton lady.”⁴⁵ The Court argued that this case required the “weighing up” of two “fundamental freedoms”, the right to “freedom of expression”, under ECHR Article 10.1., on the one hand, and the “right of other persons to proper respect for their freedom of thought, conscience and religion”, under ECHR Article 9.1., on the other.⁴⁶ Invoking the Court’s trademark “margin of appreciation” doctrine, this “weighing up” turned out to be decidedly one-sided.

Noteworthy in *Otto Preminger* is the European Court’s construing of Article 9 as guaranteeing “respect for the religious feelings of believers”.⁴⁷ As three dissenting judges sharply remarked, “the Convention does not [...] guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinion of others”.⁴⁸ Indeed, the “spirit

⁴³ *Ibid.*, par.31.

⁴⁴ ECtHR, *Case of Otto-Preminger-Institut v. Austria*, decision of 20 September 1994.

⁴⁵ *Ibid.*, par.16.

⁴⁶ *Ibid.*, par.55.

⁴⁷ *Ibid.*, par.47.

⁴⁸ Opinion of three dissenting judges, *ibid.*, par.6.

of tolerance” that the Court majority found “maliciously violated” by the incensed film,⁴⁹ was exactly hollowed out by lowering the threshold of legally allowed expression to being “in accordance with accepted opinion”.⁵⁰ Because then there was no point for tolerance, which requires the moral repugnance of the tolerated. Comparing *Otto Preminger* with *Sahin*, one must conclude, with Justice Tulkens’ dissent in *Sahin*, that religious *sentiment* was “perhaps overprotect[ed]”, while religious *practice* received only a “subsidiary form of protection”.⁵¹

In addition to an “overprotective” reading of religious beliefs, when justifying the “margin of appreciation” on the part of the Austrian government, the Court in *Otto Preminger* also interpreted the “public order” proviso that might justify restricting a fundamental freedom (here: of artistic expression) in rather different terms than in the Islamic headscarf cases: not in reference to protecting “secular” enlightenment values like equality but to protecting “social peace” (see Danchin 2011, p. 728). Thus the Court found one “cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region”. This was a majoritarian, *realpolitisch* argument, to be decided on empirical rather than principled grounds. It may still have been wrong, but it was different in kind from the debatable re-interpretation of religious liberty rights.

Otto-Preminger-Institut v. Austria, quickly followed by a very similar blasphemy verdict to protect Christian majority sentiment in *Wingrove v. United Kingdom*⁵², became a polemical cause célèbre when, first, the Rushdie affair and, later, the Danish cartoon conflict had European Muslims up in the streets for the censoring of artistic and media productions – as we know, both times in vain. Particularly drastic is the contrast with the British case of *Choudhury*, where British courts rejected a Muslim claim to prohibit Rushdie’s *Satanic Verses* by extending coverage of the British blasphemy law to the Islamic faith: just a few weeks before the ECtHR accepted to hear the *Preminger* case, the Court declared *Choudhury* as inadmissible. As the Court argued, Article 9 ECHR does not “extend to a right to bring [...] proceedings against those who [...] offend the sensitivities of an individual or a group of individuals” (quoted in Dembour 2000, p. 220). Who would disagree with Sussex lawyer Marie Dembour (*ibid.*) that

⁴⁹ *Otto-Preminger-Institut v. Austria*, a.a.o., par.47.

⁵⁰ Opinion of three dissenting judges, *ibid.*, par.3.

⁵¹ *Sahin v. Turkey*, a.a.o., dissenting opinion by Judge Tulkens, par.3.

⁵² ECtHR, *Wingrove v. the United Kingdom*, decision of 25 November 1996.

such unequal treatment “illustrates the difficulty that non-Christians encounter in having their religious feelings recognized in the implicitly Christian culture of the Council of Europe”?

Similarly, the refusal to censor the Danish cartoons, which had ridiculed the Prophet, evoked the very different treatment of such a claim, when raised by Christians, in *Otto Preminger*. For Saba Mahmood (2009), it showed that a preference for majority culture is a “constitutive assumption of free-speech law of Europe” (p. 860), and that it was pointless for European Muslims to expect justice from secular laws that had “ineluctable sensitivity to majoritarian cultural sensibilities” built into them (p. 851). Robert Post (2007), in a robust defense of the Danish cartoons as an expression of the public debate that is necessary for democratic legitimation, reads an interesting rejection of the “style” (rather than substance) of speech into the European Court’s censorships in *Otto-Preminger-Institut* and *Wingrove*, according to which this speech was “gratuitously offensive to others” and “not contribut(ing) to [...] public debate capable of furthering progress in human affairs” (p. 80). He criticizes European states for being “more normatively hegemonic than America”, whereby the “ensur(ing) (of) social peace” trumps “democratic legitimation” (p. 82). Despite her loud disagreement with Post’s defense of free speech, this was not far from Saba Mahmood’s allegation that the public sphere is not neutral but a “disciplinary space that inhibits certain kinds of speech while enabling others” (2007, p. 2).

Matthias Koenig (forthcoming) interestingly argued that, after gaining more autonomy due to structural reforms in the mid- to late 1990s⁵³, the European Court of Human Rights took on a more daring “counter-majoritarian” stance (p. 24), contributing to the “secularization of European nation-states” (p. 26). An interesting case in this respect is *Folgero and Others v. Norway* (2007)⁵⁴, which can be read in either (orthodox or heterodox) direction. On the one hand, the Court found in accordance with the “principles of pluralism”⁵⁵ an obligatory “Christianity, Religion and Philosophy” course in Norwegian state schools that “gives priority to tenets of Christianity over other religions and philosophies of life”⁵⁶, in recognition of the fact that the Evangelical Lutheran religion is the “official religion” of the state. On the other hand, the Court majority declared as violation of the

⁵³ In 1994, individuals gained direct legal access to the European court, and in 1998 states were compelled to accept individual complaint procedures (see Koenig, forthcoming: 10).

⁵⁴ ECtHR (Grand Chamber), *Case of Folgero and Others v. Norway*, decision of 29 June 2007.

⁵⁵ *Ibid.*, par.39.

⁵⁶ *Ibid.*, par.17.

parents' right of education (guaranteed by Article 2 of ECHR) a refusal by the Norwegian authorities to grant a full exemption to the children of atheists, which it deemed warranted because the curriculum had not been taught "in an objective, critical and pluralistic manner".⁵⁷ In particular, a fine distinction in Norway's contested religious curriculum between disseminating knowledge, which was mandatory, and instilling religious norms, which was not allowed, had not worked out as foreseen, and the need for providing "reasonable grounds" for a full exemption had created a "risk that the parents might feel compelled to disclose to the school authorities intimate aspects of their own religious and philosophical convictions".⁵⁸ Though achieved only with the smallest possible (9:8) court majority, this was a sensitive decision that seemed a blow to the "selective privileges for religious majorities" that had prevailed previously (Koenig 2012, p. 31).

The new tendency toward imposing secularism also on the Christian majority religion seemed at first vindicated by the European Court of Human Rights' first *Lautsi* decision (2009), whereby we finally arrive at the issue of crucifixes. *Lautsi I* prohibited the display of Christian crosses in Italian public schools.⁵⁹ Comparing this spectacular decision with the almost simultaneous US Supreme Court's okay to a cross on public land *qua* rendering it into a "war memorial"⁶⁰, an American legal observer even deemed Europe and the US to be moving in opposite directions *vis-à-vis* their respective traditions, toward state-level secularism in Europe and toward state-level Christianity in the US (Witte and Arold 2011). *Lautsi I* declared the mandatory cross in Italian public schools "incompatible with the State's duty to respect neutrality in the exercise of public authority"⁶¹ and an infringement on the (negative) religious rights of pupils and of the education rights of parents. It followed a secularist path carved out by the German Constitutional Court's quite similar *Crucifix* decision of 1995. In addition, the Italian civil courts, up to the Court of Cassation, had previously found the crucifix in public schools incompatible with *laicità* (Pin 2011, p. 124).

Conversely, *Lautsi I*, which was not by accident issued under the progressive Françoise Tulkens as Court president (our lonely dissenter in *Sahin*), corrected a curious tilt toward "confessional secularism" (Manicini 2006, p. 187) that had taken hold in Italy's administrative courts, up

⁵⁷ *Ibid.*, par.43.

⁵⁸ *Ibid.* par.98.

⁵⁹ ECtHR (2nd section), *Case of Lautsi v. Italy* (application no. 30814/06), decision of 3 November 2009; henceforth referred to as *Lautsi I*.

⁶⁰ Supreme Court (United States), *Salazar, Secretary of the Interior, et al. v. Buono* (no.08-472), decision of 28 April 2010.

⁶¹ *Lautsi I*, par.57.

to the highest level. These courts had all argued that the creedal universalism inherent in Christianity made privileges for the latter not just opportune but mandatory because the “liberal” and “secular” state had to be cognizant of its historical roots. In doing so, Italy’s administrative courts had gone to bizarre lengths to act as “de facto theologians”, as Mahmood would put it (2006, pp. 326f). In a nutshell, the argument went that only Christianity had generated liberty and secularism, so one could – even had to – be partial for it. According to this logic, even India should offer pride of public space to the Christian crucifix. And it allowed an insidious comparison with “lesser” religions that could and should be excluded. Among the many mental pirouettes along this line, not the least acrobatic is the following: Christianity prized “charity” above “faith”, thus being the only religion to include even “unbelievers”.⁶² It is not difficult to read into this a dismissal of the one religion that today is associated with placing “faith” above everything, including respect for secular laws: Islam.

Like the German Constitutional Court’s famous *Crucifix* decision of 1995, to which the pious Bavarian Prime Minister had responded with a call for public insurrection, *Lautsi I* caused a political upheaval in Italy. The Italian Prime Minister (better known for *bunga-bunga*) found the judgment “not acceptable for us Italians” (Mancini 2010, p. 6), and indeed 84 percent of polled Italians disagreed with Strasbourg’s crucifix ban (Pin 2011, p. 98). The most ferocious attack was made by the Maltese Judge on the ECtHR, who denounced the decision as “historical Alzheimer’s” and cried out that “[a] European court should not be called upon to bankrupt centuries of European tradition” and to “rob the Italians of part of their cultural personality”. Indeed, the consequence of *Lautsi I* was the “Americanisation” of Europe⁶³, as Joseph Weiler put it for eight Council of Europe states siding with Italy in the appeal before the Court’s Great Chamber: an American- (or French-) style “rigid separation of Church and State” was imposed as “a single and unique rule”⁶⁴, with potentially grave consequences for the constitutionality of most church-state regimes in Europe that had never known such separation.

When overturning *Lautsi I* in March 2011, the ECtHR’s Grand Chamber held that a preference for majority religion reflected the “history and tradition” of the respective state, and that this was no

⁶² ECtHR (Grand Chamber), *Case of Lautsi and Others v. Italy* (application no. 30814/06), decision of 18 March 2011

(henceforth referred to as *Lautsi II*) (quoting the Italian Administrative Court, par.15).

⁶³ *Lautsi II*, par.47.

⁶⁴ *Ibid.*

“departure from the principles of pluralism and objectivity” and did not amount to “indoctrination”.⁶⁵ Such preference could also work in favor of Islam, if *this* happened to be the majority religion in a given place (as it was, in Turkey).⁶⁶ While conceding that the crucifix was “above all a religious symbol”⁶⁷, the Court in effect sided with the Italian government, which had argued that the cross carried “not only a religious connotation but also an identity-linked one”.⁶⁸ When fixed on a school wall, the meaning of the crucifix was above all cultural, corresponding to a “tradition” that the state might consider “important to perpetuate”. But to “perpetuate a tradition” was “within the margin of appreciation of the respondent State”⁶⁹ and not something for a European Court to intervene in.

Further note that the lower chamber in *Lautsi I* had equated crucifix and veil as “powerful external symbols” that could not but “be interpreted by pupils of all ages as [...] religious sign(s)”⁷⁰ and thus required to be equally exorcised from the school environment for the sake of “the educational pluralism which is essential for the preservation of ‘democratic society’”⁷¹ (thus invoking the “pluralism” lodestar of the ECtHR’s entire jurisdiction on religion). The Grand Chamber explicitly rejected this equation between veil and crucifix, and the crucifix, indicative of its implicit culturalization, now figured above all as an “essentially passive symbol”, devoid of any indoctrinating or proselytizing intention.⁷² An interesting parallel to this immunizing strategy can be found in the US Supreme Court’s *Salazar v. Buono* decision of April 2010, according to which the meaning of the crucifix was context-dependent, and that when meant to “honor our Nation’s fallen soldiers” (as it purportedly did in this case) it could not be taken as an “attempt to set the imprimatur of the state on a particular creed”.⁷³

However, as if sensing that the peculiar transformation of the crucifix from religious into cultural symbol could not be driven too far, the Grand Chamber’s crucial move in *Lautsi II* was *not* to endorse the viciously exclusive universalization-of-Christianity line pursued by Italy’s administrative courts. Instead, and in this following almost verbatim the position of the Italian government in its June 2010 *memoire* for the Grand Chamber hearing on this case, the main strategy was to defend

⁶⁵ *Ibid.*, par. 71. The reference here is to Folgero.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, par.66.

⁶⁸ *Ibid.*, par.67.

⁶⁹ *Ibid.*, par.68.

⁷⁰ *Lautsi I*, par.55.

⁷¹ *Ibid.*, par.56.

⁷² *Lautsi II*, par.72.

⁷³ SCUS, *Salazar, Secretary of the Interior, et al. v. Buono*, op.cit., at p.11 (opinion of Justice Kennedy).

the crucifix in terms of religious pluralism. Considering the facts that “Italy opens up the school environment in parallel to other religions”; that “it was not forbidden for pupils to wear Islamic headscarves; that the “beginning and end of Ramadan were ‘often celebrated’”; and that optional religious education was available for “all recognized religious creeds”⁷⁴, it would indeed be an “absurdity” to remove the crucifix, would it bear the odd consequence “that the religion of the great majority of Italians is sacrificed and discriminated.”⁷⁵

III. Beyond pluralism v. pluralism?

The European Court of Human Rights’ *Lautsi II* decision shows a possible way out of the impasse reached in its religion file. As shown in this comparison of its rather different decisions on Christianity and on Islam, previously the Court had played out one variant of pluralism against another, a “pluralism” of tolerance and of maximum respect for religious sentiment in the case of Christians, against a “pluralism” of militant secularism in the case of Muslims, some of whose religious expressions stood to be repressed for the penultimate value to be furthered by the European human rights convention, which is “pluralism” (see Tulkens 2009). In this respect the conflict is one between pluralism as fact, which is seen as established and guaranteed under the Christian umbrella, and pluralism as norm to be protected, in particular from an “Islam” that is perceived as a threat to it.

Lautsi II shows a way out of this impasse by pairing an inevitable preference for majority religion as simple fact of “history and tradition”, which can never be the same in any two places, with a commitment to religious pluralism, especially toward Islam as Europe’s most important minority religion (see Joppke 2013a). Interestingly, this will require a modicum of multiculturalism that the same court had previously denied in its Islam cases from *Dahlab* to *Dogru*, and which European governments have notionally retreated from in recent years (see Joppke 2013b). If the European Court takes *Lautsi II* by its word, it would have to reconsider its militant secularism displayed toward Islam in the past and to take a rather more genuinely pluralist line instead, as in fact first intimated in its 2010 *Arslan* decision (see part I above). This is because the preference for a culturalized Christian majority religion in *Lautsi II* is not based on

⁷⁴ *Lautsi II*, par.74.

⁷⁵ Foreign Ministry (Italy), *Memoire du gouvernement italien pour l’audience devant la Grand Chambre de la Cour Europeenne*

des Droits de l’Homme (Requête no. 30814/06 *Lautsi c. Italie*), 30 June 2010 (typescript in author’s possession).

its alleged universalistic merits that other religions fall short of, but on the factual assumption that minority religions are not repressed in public space, which would make an exclusion of the crucifix inconsistent.

The pluralism v. pluralism frame replicates the old tale of the two liberalisms, an “enlightenment rationalism” that is militantly brought forward against Islam, as against a “value pluralism” that is more generously displayed toward Christianity, for whom the religious liberty clause under the European Convention on Human Rights has even been interpreted as the right to be free from religious injury (see Danchin 2011). Perhaps it is correct to say that, historically speaking, the core of liberalism is not “justice” but “security” and “social peace” (see Geuss 2002), so that “modern philosophical liberalism” does appear “disengaged from the historical architecture of toleration and pluralism” (Hunter 2005, p. 2). However, both liberalisms are still equally legitimate and even necessary, because each would self-destruct without a bit of the other: enlightenment rationalism without an element of pluralism would turn despotic and illiberal; conversely, pluralism cannot be sustained without a liberal ethic and a sufficient number of “liberals” subscribing to liberal values.

Both liberalisms thus have their time and place, and which one is more apposite is not a question of principle but of circumstances. With respect to religion and religionists, it very much depends on how much of a threat to liberalism the respective religion is, and how large the number of the people under its sway. Carolyn Evans, in a persuasive critique of the European Court of Human Rights’ Islamic headscarf decisions, found that these decisions rest on two contradictory images of Muslim women, as “victim” (with respect to gender equality) and as “aggressor” (with respect to presumed proselytism and intolerance), and she sees both images united in the “idea of threat” (Evans 2006, p. 15). She leaves it at that, assuming that the “idea of threat” is so obviously wrongheaded as not to require any further discussion.

But perhaps Islam *is* a threat to liberal institutions, particularly if sufficient numbers espouse an uncompromising variant of it. Oxford jurist John Finnis (2008, p. 8) takes this line, alas without any qualification. Finnis defends the European Court’s selective toughness toward Islam in light of Islam’s “particular kind of religious culture [...]: a disrespect for equality [...]; a denial of immunity from coercion in religious matters [...] – the immunity now central to Christian political teaching” (p. 12). Finnis even ponders “whether it is prudent [...] to permit any further migratory increase of that population” (*ibid.*). The problem with this view is the lack of any qualification. Apart from drawing a one-sided, monolithic picture of Islam, it hugely

exaggerates the demographic presence of Muslims in Europe, who by 2030 are expected to have a population share of no more than 7-8 percent on average, with the exception of France and Germany (where the percentage may become as high as 15-16 percent – but no more) (Laurence 2012, p. 254). So no “Eurabia” is in the making. But the bending of minority faiths to the secularism that European (and all modern) societies have come to cherish is not as such an illegitimate undertaking.

It has become de rigueur to stipulate “multiple secularisms” (Stepan 2011), much as there are “multiple modernities” (Eisenstadt 2000). But underneath its undeniably plural forms there is a singular core of secularism intrinsically tied to the nature of the modern democratic state, which all religions, “old” and “new”, majority and minority, have to respect. Charles Taylor (1998) grounded the necessity of secularism in the historical transition from a hierarchical “society of orders” to a “horizontal, direct access society” (p. 40), in which citizenship marks a direct relationship to the state, without any group intermediation. As all citizens equally partake in popular sovereignty, a “certain degree of commitment” is required of them that *ancien regime* subjects were not expected to hold. It amounts to a “patriotism” or “citizen identity” that takes precedence over all other identities, ethnic, religious, etc. (p. 43). A “communal identity” of an ethnic or religious kind now becomes problematic because of its exclusiveness. In a democracy one can only be a “member of the sovereign” or a “resident alien” (p. 47). Accordingly, “(b)oth the sense of mutual bonding and the crucial reference points of the political debate that flow from it have to be accessible to citizens of different confessional allegiances, or of none” (p. 46). To this structural element of democratic modernity Taylor adds a novel “social imaginary” that knows no “higher” reality but only “common action in secular time” (p. 40) (later famously dubbed “immanent frame”, see Taylor 2007). While “secularism” understood in these dual terms has particular “Christian roots” (p. 31), it is “not optional in the modern age” (Taylor 1998, p. 48) but applicable everywhere. Taylor thus insists not just on secularism in the singular, but also on a group-transcending sense of citizenship (“patriotism”) that must go with it.

The question of Islam’s fit with a secular frame thus defined does not have to be answered as crudely as by the European Court of Human Rights; but it is not as such illegitimate. All the more so as an influential Muslim jurist stridently answered it in the negative: “For Muslim societies, as Islam is a comprehensive system of worship [...] and legislation, the acceptance of secularism means abandonment of shari’a, a denial of divine guidance and a rejection of God’s

injunctions [...] [T]he call for secularism among Muslims is atheism and a rejection of Islam” (Yusuf al-Qaradawi, quoted in March 2011, p. 29). Among more academically minded commentators, and considering only those arguing from within the ambit of Islam, the jury on Islam’s fit with a secular order is out. In an interesting exchange over the wisdom of restricting religiously injurious speech in the so-called Danish cartoon affair, Saba Mahmood (2009, p. 842) describes Islam as in principle incompatible with secular principles. In her view, Islam stipulates a relationship of bodily “attachment and cohabitation” with the Prophet, requiring an orthopraxis of belief-cum-ritual that notoriously stands to be offended by secular laws, for which religion is “ultimately about belief in a set of propositions to which one gives one’s assent” (p. 852). But then the law can never come to the rescue, because what really is required is a “larger transformation of the cultural and ethical sensibilities of the majority Judeo-Christian population” (p. 860).

Andrew March (2012) objected to this view that there is ritual and emotion in Christianity also, and that “belief” is as central to Islam as to any monotheism, if not more so, considering the “divine voluntarism” of traditional Sunni Islam (that is akin in this respect to Puritan Protestantism). Conversely, as March dryly turns the tables against Mahmood’s notional anti-secularism, a depiction of Muslims’ outrage over the Danish cartoons in terms of bodily “hurt, loss, and injury” (Mahmood 2009, p. 846) would amount to the “seculariz(ing)” of the Islamic discourse on the sacred by transforming it into “emotional pain” (March 2012).

While Saba Mahmood may render Islam more exotic than it is, Andrew March gives an erudite but rather sanitized version of it that sidelines its illiberal edges. While March’s rather brilliant mastery of arcane Islamic-Arabic sources is generally taken by a polite academic audience to prove that even conservative Islamic thinking can warm up to “liberal citizenship” (March 2009), it also shows the considerable acrobatics required to reach that result. In particular, March invests much hope in a non-instrumentally understood *da’wa* (proselytizing) as pushing Muslims toward an equal “recognition of non-Muslims”. However, he also concedes that *da’wa* is not “discourse ethics” because it “presumes the result and the norm sought before contact with the other” (2009, p. 228). But if “reciprocity” is not the default stance of *da’wa*, it is not clear how it could lead to the desired result, a “positive relationship to fellow citizens” (*ibid.*).

Nagging incompatibilities with a secular order are much more straightforwardly laid open in Abdullahi An-Naim’s celebrated plea for an “Islamic reformation” (1990). It is premised on the assumption

that classic Islam, unlike other religions, requires an “identity of religion and government” that is “indelibly stamped on the memories and awareness of the faithful” (p. 3), and that the “nation-state”, cornerstone of the international order, is a concept that is “difficult to assimilate and implement” for “Muslim peoples” (p. 7). In particular, An-Naim depicts “historical shari’a” as incompatible with international human rights law in its discriminatory treatment of non-Muslims, women, Muslim apostates and atheists; not to mention that at the international plane shari’a amounts to a “theoretically permanent state of war between Muslims and non-Muslims”, which “repudiates the entire basis of modern international law” (p. 150). From a non-Islamic pen such blunt lines would be immediately denounced as “Orientalist” or worse.

Of course, these theoretical debates, which we could only touch on here, are far from the mundane concerns of ordinary Muslim folk, who rightly insist on their religious liberty rights like any other religionist in the liberal state. And, as we showed, doubts about Islam’s compatibility with secularism are in a panicky fashion turned into an argument for restricting the religious rights of Muslims, while most others, however nutty, go free. In this sense Susanna Mancini (2009, p. 2664) is right to complain that “disproportionate weapons are assembled” against materially deprived Muslim minorities in Europe. But it is equally wrongheaded to push under the carpet some uncomfortable edges of Islam as it meets the liberal-secular order.

So I come to an ambivalent conclusion that may even appear contradictory. On the one hand, I chided the European Court of Human Rights for its militant defense of secularism against a hypostatized Islam threat, which only recently has mellowed slightly (above all in the second *Lautsi* decision that pairs a sane preference for “culturalized” Christianity with a properly pluralist acceptance of Islam). On the other hand, though with the help of inconspicuous sources that all argue from within an Islamic framework, I depicted Islam as irritation, perhaps even inimical to liberal secularism, so that the European Court seems to have got it right after all. Such a summary would dodge the nuance that I attempted to bring to this mined topic. A principled tension between Islam and secularism is not the same as an acute threat *hic et nunc*, which seems to have inspired the alarmist Islam decisions of the European Human Rights Court from *Dahlab* to *Dogru*. There are moments in which embattled liberalism is in need of militant defense. But, considering the vulnerable status of the Muslim minority in European societies – a minority and not a majority after all – this is not such a moment, not even (or rather: especially not) after 2001.

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Résumé

Un examen attentif de l'idée reçue selon laquelle la Cour européenne des droits de l'homme pratiquerait, en matière de religion, un double standard au détriment de l'Islam conduit à confirmer tout en nuancant. En effet une visée de cohérence s'affirme dans la référence de toutes les décisions au pluralisme. Mais celui-ci est entendu différemment, pour les chrétiens de façon positive, pour l'Islam de façon négative. La compatibilité de l'Islam avec l'ordre démocratique libéral n'est pas tenu pour acquis. On peut peut-être apercevoir une sortie du dilemme pluralisme contre pluralisme dans une décision de 2011 (Lautsi contre Italie).

Mots clés : Laïcité ; Religion ; Libéralisme ; Sociologie du droit ; Islam ; Christianisme ; Europe.

Zusammenfassung

Die Urteile des Europäischen Gerichtshofs für Menschenrechte (EGMR) über christliche Kreuze und das islamische Kopftuch werden daraufhin untersucht, ob der unter (kritischen) Juristen geläufige Vorwurf einer Ungleichbehandlung zugunsten der christlichen Religion berechtigt ist. Der Vorwurf eines „Doppelstandards“ ist tatsächlich nicht von der Hand zu weisen. Trotzdem sind die Urteile des EGMR zumindest in einer Hinsicht konsistent: sie alle geben vor, den „Pluralismus“ zu befördern. Nur werden Christentum und Islam unterschiedlich zum Pluralismus verortet: als „Bestätigung“ (im Falle des Christentums) oder als „Gefahr“ (im Falle des Islam). Die Triftigkeit dieser unterschiedlichen Positionierung von Christentum und Islam im Hinblick auf „Pluralismus“ hängt davon ab, ob der Islam tatsächlich mit einer liberal-säkularen Rechtsordnung kompatibel ist. Darüber besteht keine Klarheit, selbst nicht aus islamfreundlicher Perspektive. Ein möglicher Ausweg aus dem „Pluralismus vs. Pluralismus“ Dilemma deutet sich an in dem jüngsten Lautsi-Urteil der Grossen Kammer des EMGR, das eine Präferenz für ein „kulturalisiertes“ Christentum mit einem robusten Minderheitenpluralismus paart.

Schlagwörter: Laizismus; Religion; Liberalismus; Rechtssoziologie; Islam; Christentum; Europa.