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RELIGIOWEST

Imperfect Symmetry.

The Court of Strasbourg and the US Supreme Court on
religious symbols in public spaces

Diletta Tega

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Abstract

The article compares, on the issues of religious symbols in public space, the case law of the European Court of Human Rights, and that of the US Supreme Court. The enquiry aims at outlining a comparison between the contents of the decisions, not between the Courts: one is a constitutional court, the other an international court which in the late decades has been a breakthrough in the European system of guarantees. The main points emerged through the comparison are: first of all, the European Court, unlike the US SC, is clearly engaged in building a European secularism that leaves religious symbols outside the public space. The Strasbourg Court adopts a conception of secularism which, in principle, is very different from American secularism. Secondly, although in different ways, both Courts employ arguments based on tradition and history, to the detriment of individual and minority interests. Thirdly, there is a certain deference towards the choices made by national authorities: for the critics of the Roberts Court, this attitude deserves to be stigmatized in a constitutional jurisdiction.

Keywords

Secularism; religious symbols in public space; ECtHR; US Supreme Court; national Constitutions.

1. Introductory remarks

I have been asked to try a comparison, on the issues of religious symbols in public space, between the case law of the European Court of Human Rights (hereinafter ECtHR), and that of the US Supreme Court¹.

With regard to the latter, I have taken into account the following rulings: *Pleasant Grove City v. Sumnum*; *Salazar v. Buono*; *Town of Greece v. Galloway*. In different ways, these decisions – concerning the display of religious symbols (*Pleasant Grove v. Sumnum* and *Salazar v. Buono*) or the practice of prayer (*Town of Greece v. Galloway*) in public space – are an opportunity to widen the scope of the Italian and European debate on secularism (*laicità*² in Italian) and religious symbols in public space: one might conclude that on both shores of the Atlantic these are divisive and slippery issues³. The US case law analyzed in this essay leads me to confront it with some cases decided by the ECtHR, and above all with *Lautsi v. Italy*, concerning the display of the Crucifix in public schools.

The issue of religious freedom – which for a long time in Europe appeared to be settled, at least with regard to the separation between State and Church⁴ – came back to the public attention in these years in Europe, with a focus on the limits which ought to be imposed, respectively, to freedom *of* religion and *from* religion and, ultimately, on the negotiation techniques between individual and collective rights. From this viewpoint, undoubtedly the ECtHR has been less sensitive towards certain individual aspects of religious freedom that constitute the core of article 9 of the ECHR, namely the individual's right to decide on matters of religion and morals, and therefore to conduct a life according to the dictates of his own conscience⁵.

I wish to stress that my enquiry aims at outlining a comparison between the contents of the decisions, not between the Courts: one is a constitutional court, the other an international court which in the late decades has been a breakthrough in the European system of guarantees⁶.

In particular, for a better understanding of the role of the ECtHR case law on the issues at stake, it is worth recalling some significant traits which characterized the Court over the last few years.

Above all, it cannot be stressed enough that the ECtHR rules on the specific case brought before it, and that, in doing so, the Court – differently from the national judge⁷ – does not have to balance a

¹ Comparison already taken on by Z. R. Calo, *Constructing the Secular: Law and Religion Jurisprudence in Europe and the United States*, EUI working paper, RSCAS 2014/94, 2014, available at http://cadmus.eui.eu/bitstream/handle/1814/32792/RSCAS_2014_94.pdf?sequence=1; M. L. Movsesian, *Crosses and Culture: State-Sponsored Religious Displays in the US and Europe*, *Oxford Journal of Law and Religion*, (2012), 1-25.

² In Europe, a word is used, which has no proper English translation: “laicity”, “laïcité”, “laicità”. The meanings of this notion vary largely in different national systems. While the American model prohibits the endorsement of any single faith, in Europe the tag of “laicity” also applies to systems which tribute a special treatment to the prevalent confession.

³ J. H.H. Weiler, *State and Nation; Church, Mosque and Synagogue_the trailer*, (2010), *ICON* Vol. 8 No. 2, 157.

⁴ See for an historical perspective M. Ventura, *The changing civil religion of secular Europe*, *The George Washington International Law Review*, (2010) 41 4, 947 ff.

⁵ J. Martinez-Torron, *The (Un)protection of Individual Religious Identity in the Strasbourg Case Law*, *Oxford Journal of Law and Religion*, (2012), p. 3.

⁶ M. Ventura underlined that « [...] the development of a European jurisdiction is highly valuable thanks to four basic virtues and, in particular, to its role: 1) as a counter balance to denominational majorities and to religious nationalism; 2) as a unique laboratory of concepts and tools; 3) as a contribution to national debate and evolution; 4) and as an instrument for forging a supranational open space of religious diversity, freedom of thought and social cohesion», *Law and Religion Issues in Strasbourg and Luxembourg: The Virtues of European Courts*, (November 2011), available at <http://www.eui.eu/Projects/ReligioWest/Documents/events/conferencePapers/Ventura.pdf>.

single right or liberty against the others enshrined in the Convention, which is construed as a living instrument. This means that European judges occasionally affirm rights which are not expressly provided for in the text of the Convention. This interpretative activity reaches its maximum extent of creativity with regard to rights – more precisely, claims for rights, drove forward by sections of the European population – whose recognition is not legally and politically unanimous at the national level. Through such case law, the European judges establish an ideal definition of the minimum standard for a democratic society, which should apply, in its broader and fundamental aspects, in all the 47 countries which are members of the Council of Europe. In abstract terms, this ideal definition may not be problematic, but it becomes so if one looks at the new contents inoculated in the rights and principles of equality, non-discrimination, secularism and pluralism, as established in the national Constitutions.

In this perspective, some put great emphasis on the ECtHR, and go so far as to hold that it is evolving into a peculiar European constitutional court⁸. Several elements underpin this conclusion: the perception by the ECtHR of its own role, as exemplified in its rulings⁹; its intense interpretative activism, which has been recalled above; the pilot judgment procedure, which – as noted lately – broadens the scope of the Court, from the single case, to a general evaluation of a piece of national legislation, deemed to be lacking or malfunctioning¹⁰.

Italian judges made several remarks towards this activism. Most recently, and most fiercely, judgment n. 49 of 2015 of the Constitutional court held that Italian courts are bound by a Strasbourg decision only if it: a) decides precisely on the same case which is brought again before the Italian judge; b) is part of a well-established and consistent thread of European case law; c) is a pilot judgment¹¹. As it is well known, similar attitudes, in defense of the national legal systems, have been adopted also by other European constitutional courts, albeit with variations¹².

2. ECtHR case law on religious symbols

In the Convention, the basic texts are article 9, on freedom of religion in general; article 14, which includes religion among the personal conditions, which may not be a cause for discrimination; article 2

(Contd.) _____

⁷ In the decision no. 317/2009 the Italian Constitutional Court stated that «Naturally, it is for the European Court to decide on the individual case and the individual fundamental right, whilst the national authorities have a duty to prevent the protection of certain fundamental rights – including from the general and unitary perspective of Article 2 of the Constitution – from developing in an unbalanced manner to the detriment of other rights also protected by the Constitution and by the European Convention». On the dialogue between the ECtHR and the Italian Constitutional Court see D. Tega, *I diritti in crisi*, Milano, (2012).

⁸ B. M. ZUPANCIC, former judge of the ECtHR, *The Owl of Minerva, Essays on Human Rights*, Utrecht (2008), 352 nt. 5; S. GREER, *European Convention on Human Rights: Achievements, Problems and Prospects*, New York (2006), 173, stated that «The Court is already “the Constitutional Court for Europe” in the sense that it is the final authoritative judicial tribunal in the only pan-European constitutional system there is»; J.-F. FLAUSS, *La Cour européenne des droits de l’homme est-elle une Cour constitutionnelle?*, *Revue française de Droit constitutionnel* (1998), 711 ss.

⁹ G. Raimondi, the Vice-President of the ECtHR, said that the Court rules on single cases, but also feel as if playing a constitutional role, see *Corte di Strasburgo e Stati: dialoghi non sempre facili. Intervista a cura di Diletta Tega a Guido Raimondi, Quaderni costituzionali*, (2014), 468; in the same perspective, see the memoir of a well-known former President of the Court, J.P. Costa, *La Cour européenne des droits de l’homme. Des juges pour la liberté*, Paris, (2013).

¹⁰ M. FYRNYS, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, *German Law Journal* (2011), 1231 ss.

¹¹ See on that decision Diletta Tega, *A National Narrative: The Constitution’s Axiological Prevalence on the ECHR—A Comment on the Italian Constitutional Court Judgment No. 49/2015*, Int’l J. Const. L. Blog, May 1, 2015, at: <http://www.icconnectblog.com/2015/04/mini-symposium-on-cc-judgment-49-2015>.

¹² See e.g. the *Bundesverfassungsgericht’s decision Gorgülü-Beschluß* (BVerfG 2 BvR 1481/04, 14th October 2004); UK Supreme court’s decision *Horncastle* (UKSC 14, 9th December 2009).

of Protocol n. 1, on education¹³. Article 9 recognizes freedom of thought, conscience and religion, with the latter including the right to change one's creed, to manifest it individually and collectively, both in private and in public, through cult, teaching, practice and observance. The "positive" content is very similar to the definition established in other international documents, which reiterates the classic distinction between internal and public fora and especially emphasizes the right to change one's religious convictions. Only the manifestation of one's faith may be limited, if it is necessary in a democratic society, on grounds of public security, protection of order, health or public morality, or for the protection of others' rights and liberties. As highlighted by the ECtHR, limitations are meant to allow the coexistence of several faiths, conciliate the interests of different creeds and ensure respect for the convictions of everyone¹⁴. In its turn, Protocol n. 1, opened to ratification in 1952 and entered into force in 1954, states, in its article 2, that the rights to education may not be denied to anyone, and that the State, while exercising its functions in the field of education and teaching, must respect the parents' right to provide such an education and teaching according to their own religious and philosophical beliefs. Initially, it had been proposed to include this provision directly in the Convention; but it was rather placed in the Protocol, due to serious disagreements on the role of the State with regard to the public and private education system.

More specifically, the case law on religious symbols mainly concerns the display of the crucifix in public schools (*Lautsi v. Italy*) and the Islamic headscarf worn by teachers (*Dahlab v. Switzerland, 2001*), students in universities (*Karaduman v. Turkey, 1993*; *Şahin v. Turkey, 2005*)¹⁵ or high schools (*Dogru and Kervanci v. France, 2008*), or ordinary citizens (*S.A.S. v. France, 2014*) or public servants (*Ebrahimian v. France, 2015*)¹⁶. In 2013 *Eweida and others v. The United Kingdom* dealt with an employee forbidden to wear a small necklace with a cross.

In all these rulings, except *Eweida*, the ECtHR has never found a breach of freedom of religion, as enshrined in article 9: on the one hand, it recognized a wide margin of appreciation to the States with regard to their relationships with religious confessions; on the other hand, it has underlined that, when the majority belongs to a certain confession, not all the manifestations of that belief are acceptable, as they may constitute a form of pressure on non-believers. These cases are well-known and I will not dwell on their description; they all concern legal systems which entail an at least partly similar meaning of secularism (*laicità* in Italian, or *laïcité* in French), although the Turkish State exerts a definitely special control over religion¹⁷. The decision on the case of Leyla Şahin, a Turkish university student, offers a remarkable example both of that control and of a objectionable ruling: the Court affirms the sacrifice imposed on the student, forbidding her from wearing the Islamic headscarf, due to

¹³ In the extensive literature see D. Harris, M. O' Boyle, C. Warbrick, *Law of the European Convention on Human Rights*, 2 ed., Oxford University Press, (2009), 697 ss.; F. Tulkens, *The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism*, in 30 *Cardozo Law Review*, (2008/2009), 2575 ss.; I. T. Plesner, *Legal Limitations To Freedom of Religion or Belief in School Education*, in *Emory International Law Review*, (2005), 557 ss.; C. Evans, *Freedom of religion under the European Convention on human rights*, Oxford, (2001).

¹⁴ *Kokkinakis v. Greece*, 25th May 1993, pgr 33.

¹⁵ I choose consciously to not mention the *Refah Partisi* decisions, I believe that, despite a reflection on the notion of secularism is implied, they involve many different topics.

¹⁶ See the critical comment by E. Brems, *Ebrahimian v France: headscarf ban upheld for entire public sector*, November 27, 2015, at: <http://strasbourgobservers.com/2015/11/27/ebrahimian-v-france-headscarf-ban-upheld-for-entire-public-sector/>.

¹⁷ It is significant that, in recent years, the European Court has declined to support strict secularist policies at least outside educational environment. In the case *Ahmet Arslan v. Turkey*, 23rd February 2010, the Court found a violation of article 9 of the Convention: Turkey is thus condemned for having arrested and place in police custody the applicants because, on their way to a religious ceremony, they toured the streets of Ankara while wearing the distinctive dress of their group, which evoked that of the leading prophets and was made up of a turban, "salvar" (baggy "harem" trousers), a tunic and a stick. It is has to be pointed out that the Court emphasized that the case concerned punishment for wearing of particular dress in public areas that were open to all, and not, as in other cases, regulation of the wearing of religious symbols in public establishments, where religious neutrality might take precedence over the right to manifest one's religion.

the legal, historical, sociological and contingent context of the Turkish legal system, and it finds no way to take into balance the individual freedom to manifest one's beliefs¹⁸.

It is well-known that Turkey derived its approach to the public expression of religion from the French tradition. A very recent declination of *laïcité* can be found in *S.A.S. v. France*: in that case, the Grand Chamber accepted the Government's argument that «the face plays an important role in social interaction, understanding the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialization which makes living together easier».

In particular I believe that the *Dahlab v. Switzerland* decision (more recently also *Ebrahimian v. France* regarding public servants not belonging to the public educational field) is interesting for the point I want to make: this time, the forbidden Islamic headscarf was worn by a teacher, a public officer employed by the Canton of Geneva. The ECtHR, finding no violation of the freedom of the applicant, considers the sacrifice justified by the public quality of the employee, as that Canton has opted for a strict separation between Church and State, for an education system characterized by sex equality and neutrality, and for a special respect towards the young pupils, deemed particularly impressionable, and their beliefs. Because of this, the Court concludes, the Islamic headscarf is hardly compatible with a message of tolerance, respect for others and, above all, equality and non-discrimination, which the teachers in a democratic society must teach to their students.

On that same topic the Federal Constitutional Court (in a 6-2 decision), more correctly in my opinion, on the 17th of March 2015, invalidated the North Rhine-Westphalia law provisions¹⁹: the statute governing public schools prohibited political, religious, or other ideological expressions by public school teachers if these expressions had the potential to endanger or disturb state neutrality or the peace at school. In particular, these outward expressions were impermissible if they could suggest to students and parents that the teacher objects to human dignity, equality, fundamental rights or the democratic order. Finally, the provision also declared the expression of Christian and Western teachings, cultural values, and traditions to be permissible. The state-wide prohibition of religious expression by outward appearance—wearing a headscarf—was considered disproportionate. The Federal Constitutional Court stated that only a concrete danger to state neutrality or the peace at school would justify prohibiting the exercise of a binding religious command. On the question of privileging Christian symbols and traditions, the Court concluded that such favoring treatment is unconstitutional.

¹⁸ I fully agree with the dissenting opinion of the judge F. Tulkens, in particular when she affirms that «Par ailleurs, pluralisme, tolérance et esprit d'ouverture sont les caractéristiques essentielles d'une société démocratique et certains effets en découlent. D'une part, ces idéaux et ces valeurs d'une société démocratique doivent se fonder sur le dialogue et un esprit de compromis, ce qui implique nécessairement de la part des personnes des concessions réciproques. D'autre part, le rôle des autorités n'est pas d'enrayer la cause des tensions en éliminant le pluralisme mais de veiller, comme la Cour vient encore de le rappeler, à ce que les groupes opposés ou concurrents se tolèrent les uns les autres (*Ouranio Toxo et autres c. Grèce*, n° 74989/01, § 40, CEDH 2005-X)».

¹⁹ The North Rhine-Westphalia enacted a provision in its statute governing public schools that prohibited political, religious, or other ideological expressions by public school teachers if these expressions have the potential to endanger or disturb state neutrality or the peace at school. In particular, these outward expressions are impermissible if they could suggest to students and parents that the teacher objects to human dignity, equality, fundamental rights or the democratic order. Finally, the provision also declared the expression of Christian and Western teachings, cultural values, and traditions to be permissible.

If the display of religious messages by teachers is to be prohibited, such a prohibition must apply equally to all religions²⁰.

In the perspective of such attitude towards religious symbols is it therefore possible to state that the ECtHR is building a notion of secularism of the State and freedom of religion, where a special importance belongs to the exclusion of religious symbols from the public space, as well as to the exemption from religious teaching²¹?

With regard to religious symbols, it took a while for the Court to deal with a legal system different from the French or the Turkish, which, as noted above, share a similar concept of secularism. The occasion came in 2009, when the European judge had to rule on the case of the crucifix in public Italian schoolrooms. In the first judgment of the 3rd November 2009, the ECtHR recalled its precedents on the Islamic headscarf, without considering the margin of appreciation, which is not even mentioned in the whole decision, and attached to the crucifix the very same “strong significance” attached to the teacher’s headscarf in the Swiss case. In *Lautsi* (1), the Court appeared to have elaborate its own a notion of secularism and seemed prepared to apply it without regard to the margin of appreciation. If the case had been decided following then same patterns applied in previous rulings on religious symbols, then it would have been possible to give room to a broad reading of the margin of appreciation, and to appreciate all the normative and legal traits relevant to secularism and the display of the crucifix. Ultimately, the ECtHR chose to apply the patterns of the case law on parental freedom of education (consider Grand Chamber, *Folgerø et al. v. Norway*, 29th June 2007), emphasizing the indoctrination message of the crucifix and its capacity to emotively upset student belonging to other confessions, or to none²².

In *Lautsi* (2) of 18th March 2011, the Grand Chamber, with a judgment more articulate than *Lautsi* (1), reversed, at least in part, the previous ruling. In brief, the ECtHR enforced the national margin of appreciation, although specifying that cultural and historical tradition - particularly emphasized both by the Italian administrative judge and Government - does not exempt from the obligation to respect the rights and freedoms proclaimed in the Convention. According to the Grand Chamber, the decision whether to display the crucifix pertains to the national margin of appreciation, more so because there is no European consensus on this issue, and unless the ECtHR finds that the prohibition of indoctrination has been violated. So the crucifix is saved *in extremis* as a «passive symbol», incapable of influencing the students as other religious activities (it is also true, as some commentators have noted, that the Court found that no decision is necessary on article 9, i.e. with regard to religious freedom properly).

It is worth recalling that two dissenting opinions advocated the enactment of some sort of coercion test: the same test, as we will see below, used by the US Supreme Court to assess the violation of religious freedom through the display of religious symbols.

With regard to the question I posed above, I think an answer might be as follows: it is true that the ECtHR gives a special importance to the exclusion of religious symbols from the public space, but the Grand Chamber in *Lautsi* (2) showed that the main features of the national legal system have to be

²⁰ See Claudia Haupt, *The “New” German Teacher Headscarf Decision*, Int’l J. Const. L. Blog, Mar. 17, 2015, at: <http://www.iconnectblog.com/2015/03/the-new-german-teacher-headscarf-decision>.

²¹ On common European trends relating to religious freedom see A. Ferrari, *Religious, Secularity and Democracy in Europe: For a New Kelsenian Pact*, in *Jean Monnet Working Paper 3/2005*, <http://centers.law.nyu.edu/jeanmonnet/papers/05/050301.pdf>

²² See on that decision S. Mancini, *The Crucifix Rage. Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty*, (June 12, 2010). EUROPEAN CONSTITUTIONAL LAW REVIEW, vol. 6, (2010). Available at SSRN: <http://ssrn.com/abstract=1624325>.

pondered carefully. In other words, the ECtHR ideological paradigm²³, based on an antireligious secularist approach, is not shared by the constitutional foundations of all 47 countries of the Council of Europe. The Grand Chamber had to remind to the entire Court that it is not a constitutional court.

I believe that a special influence in the ECtHR is played either by the cultural and professional background of the judges and by their agenda: on the one hand, for those who knows the case law of the Strasbourg Court, it is pretty clear that some judges push forward with a clear vision of what should be the common content of traditional legal concepts. In such a context, it appears also quite clear that there are legal systems that are considered leading model, such as the French. It is, on the other hand, also true that *Lautsi (2)* showed a strong, broad range of activity, carried out by an equally broad spectrum of mainly conservative actors²⁴. In that case we experienced an example of common ground between US and Europe: a conservative US-based law firm represented eight out of ten of the intervening governments supporting the Italian position²⁵.

This bluntly reveals a deeper truth which should be confronted and not put it aside, if the main goal is pursuing a real flourishing of the ECtHR strength: in the ECHR system, the two sides of the medal, the national and the international, have still to reach the perfect blending. This particular case law clearly shows the clash between two competing and opposite identities: the international, that reflects only the leading national traditions, and the consolidated national identity²⁶.

This ambivalent nature may help explaining what I stated in the introduction: this case law is a clear example that the ECtHR has been poorly sensitive towards the individuals' right to conduct a life according to the dictates of their own conscience.

3. US Supreme Court cases

Now I turn to the well-known judgments on religion clauses: the Free Exercise Clause («Congress shall make no law [...] Prohibiting the free exercise [of religion]») and the Establishment Clause («Congress shall make no law respecting an establishment of religion»). These are complementary provisions, aiming at protecting religious freedom from government interferences. In particular, the Establishment Clause protects freedom of conscience, ensuring that the government is not aligned with a specific religion, or with religion generally, and that, at the same time, it does not prevent the free exercise of religion. In this perspective, the Establishment Clause is instrumental to inclusion, allowing all the citizens to perceive themselves as part of the Nation itself.

²³ *Contra* M. Ventura, «Some critics see the European courts' case law on religion as the imposition of an ideology foreign to European history and culture and enemy to national identities and traditions. On the contrary, I believe that the European jurisdiction in Strasbourg and Luxembourg is consistent with a European project, unfolding through the dialogue, at times the dialectic, between the secular and the religious, the national and the supranational, the courts and the Parliaments. By no means are the virtues highlighted above meant to herald a supposed superiority of European courts. They rather reside in a unique experiment of diversity, equality and freedom.», *Law and Religion Issues in Strasbourg and Luxembourg*, *cit.*

²⁴ A 'grassroots mobilization' has been defined by E. Fokas, *Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence*, *Oxford Journal of Law and Religion*, (2015), in particular pp. 64-65.

²⁵ Among the third-party interveners, supporting a decision against *Lautsi (1)*, there were also thirty-three members of the European Parliament and four of ten NGO's. See the critical essay of P. Annichino, *Winning the battle by losing the War: The Lautsi Case and the Holy Alliance between American Conservative Evangelical, the Russian Orthodox Church and the Vatican to Reshape European Identity*, (2011) 6 (3) *Religion and Human Rights: An International Journal*, 213.

²⁶ On the contrary M. Ventura stated that «While I do not deny the many deficiencies of the Court of Strasbourg, I believe that those who blame the Court for its role in the ideological and political debate on secularism, civil religion, multiculturalism and religious nationalism, neglect that such a role is nothing but the mirror of tensions and divisions within Europe and within each European country», *Law and Religion Issues in Strasbourg and Luxembourg*, *cit.*

Pleasant Grove City v. Summum (555 U.S. 2009) poses a very clear question: does the Free Speech Clause in the First Amendment entail the right for private groups to be authorized to permanently display a monument with a religious significance in a town park? The answer of the Supreme Court, differently from the question, is very ambiguous.

Ruling for the first time on such a case, in an opinion delivered by Justice Alito, the Supreme Court unanimously held that the First Amendment is not relevant: while a park is a public forum, subject to the respect of the Free Speech Clause, the permanent display of a monument in the same public park is rather government speech, traditionally not subject to the Free Speech Clause.

Government speech allows the administration to choose what it feels appropriate, considering aesthetics, history and local culture, without necessarily accepting as its own the specific meaning attached by the donors to the monument. Therefore, according to the Court, it is correct that in the public park of Pleasant Grove the so called seven aphorisms of Summum are not exposed, but instead the Ten Commandments are, through a monument donated back in 1971 by the Fraternal Order of Eagles in an effort to curb juvenile delinquency.

In reading the judgment, a ‘European eye’ is particularly attracted by two speculations of the Court: firstly, on the limits of government speech and its relations with private speech in public places²⁷; secondly, on the weight of the Establishment Clause, although it is not directly called into question in this case, differently from the other two.

On the first point, the concurring opinion of Justice Souter gives some kind of answer: in order to avoid that the administration favors certain private religious groups over others in choosing which monuments to display, it is necessary to assess, on a case by case basis, if the monuments belong to government speech or, on the contrary, express a religious meaning which the government may not assert.

In this perspective, the Court engages itself in a difficult semiology exercise, which is very interesting. It makes clear that: a) a message changes over time; b) is subjective; c) may be altered by the near presence of other monuments. This should explain why the administration does not necessarily adopt the same specific meaning which the donor “sees” in the donated monument.

On the second point, undoubtedly the Establishment Clause casts a problematic shadow on the decision: not by chance, Scalia excludes passing from the «Free Speech Clause frying pan into the Establishment Clause fire» (obviously, the more the town defends the Ten Commandments monument, the more it looks as if promoting a religion over another, risking a breach of the Establishment Clause) by referring to a famous precedent of 2005, *Van Orden v. Perry*, 545 U.S. 677, when the C.J. Rehnquist plurality stated that the Ten Commandments monument (basically identical to the one in the Pleasant Grove park) had an unmistakable historical meaning, besides a religious one, and that “simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the establishment clause”.

Conclusively, the legitimization – through the government speech doctrine and semiology – of a religiously characterized representation reminds some debate that took place also in Europe. This doctrine “neutralizes” the presence of the religious monument, first, arguing on the diversity of messages it can deliver and, secondly, accepting that the administration does not necessarily endorse the specific meaning which is more relevant to the donor. The Italian lawyer cannot escape recalling the highly disputable judgment given in decision n. 556 of 13th February 2006 by the Council of State (the appellate administrative court) on the famous *Lautsi* case: by diminishing the religious relevance of the crucifix, in favor of the historical one, the Council of State allowed it to remain displayed in the

²⁷ F. M. Gedicks, R. Hendrix, *Uncivil religion: Judeo-Christianity and the Ten Commandments*, in *West Virginia Law Review*, cx, (2007), 276.

public school attended by the applicant's children, but belittled the prevalently religious message of the symbol²⁸.

In *Salazar v. Buono* (559 U.S. 2010), the Court again turns to the religious meaning attributable to a monument: this time, a wooden cross installed in 1934 by a private citizen in a remote area of the Mojave National Park, a federal terrain, to commemorate the American soldiers fallen during the First World War. The cross was a meeting point for Easter ceremonies. The applicant, Buono, obtained an injunction for the government to remove the cross, deemed to be in breach of the Establishment Clause. The injunction was confirmed also after the Department of Defense Appropriations Act (the so-called land transfer statute), with which, in 2004, the Secretary of Interior had transferred, in exchange for another parcel of land, the ground on which the cross for the «Veterans of Foreign Wars» had been erected, with the understanding that the plot would remain a memorial to fallen soldiers.

While the violation of the Establishment Clause is clearly the issue at stake before the lower courts, technically the question posed this time to the Supreme Court is if the transfer of the land, where the cross is placed, is legitimate. And this time the Court – with a 5-4 vote, whose opinion has been delivered by Justice Kennedy – sends the issue back to the District Court for further consideration.

The plurality opinion is that the significance always recognized to the cross is memorial, not religious. The cross, which has been standing there for 70 years (the time duration of this usage should not be underestimated, the cross having been substituted and restored several time over the years, without stirring any discussion), has been included by the Congress among the national memorials, the monuments honoring the sacrifices that built the American heritage. Consequently the government found itself bound, on the one hand, to comply with the injunction; on the other hand, to avoid offending those who shared the message of the cross.

Following a line of reasoning which again reminds me of the administrative judgment in *Lautsi*, the plurality clarifies that it would be wrong to disassociate the context where the cross stands, emphasizing only its religious significance. The Constitution, Kennedy states, does not require the government to avoid every public recognition of the role of religion in the society.

The liberal minority has a very different view. The opinion has been written by Justice Stevens, joined by Ginsburg, Breyer and Sotomayor: the cross bears a sectarian message. The land transfer does not end the endorsement by the government: a) a «reasonable observer» still thinks that the government endorses the cross, and this is particularly true since the cross has been defined a national memorial, so that the endorsement continues irrespective of the public or private ownership of the plot of land; b) the land transfer perpetuates the endorsement, because it has been enacted only to ensure the visibility of the cross.

With the judgment *Town of Greece v. Galloway*, of 5th of May 2014, the Supreme Court had been called upon to decide whether the town of Greece had violated the Establishment Clause by deciding to open the monthly meetings of the town board with the Pledge of Allegiance, followed by a prayer recited by religious ministers chosen, first, casually from the telephone directory, later from a list

²⁸ See on that topic P. Annichino, F. Gedicks, *Cross, crucifix, culture: an approach to the constitutional meaning of confessional symbols*, (January 29, 2015). 13 *First Amendment Law Review* (2015, Forthcoming). Available at SSRN <http://ssrn.com/abstract=2361260>. Refer to the paper, in the version available at cadmus.eui.eu/bitstream/handle/1814/29058/RSCAS_2013_88.pdf?sequence=1, also for the useful translations of the Italian Administrative Trial and Appellate Court Decisions in *Lautsi*. In particular is worth to note that the Council of State, stated that «[...] As with every symbol, diverse and constrasting meanings also can be imposed upon or attributed to the crucifix, or one can deny its symbolic value in order to transform it into a decoration that can at the most exhibit artistic value. One cannot, however, think of the crucifix exhibited in school classrooms as a decoration, an object of décor, nor even as an object of worship; one must rather think of it as a symbol suitable for expressing the elevated foundation of the civic values referenced above, which are them the values that delineate laicità in the actual legal order of the State. In the Italian cultural context, it appears difficult to find another symbol, in truth, that lends itself to doing this better than the crucifix».

compiled by the town administration over the years. As all the congregations in the town were Christian, from 1999 until 2007 only 4 out of 120 meetings of the town board had been opened by non-Christian ministers. Only from the dissenting opinion by Justice Kagan emerges that the celebrants recited the prayer with their back towards the town board (in the ceremonial portion of the meeting, when the board was not engaged in decision-making) and addressing directly the public, made up by all the citizens interested in taking part to the meeting. The text of the prayer was chosen freely, without any previous control: in different meetings references had been made to God, Jesus Christ, the resurrection, the ascension of Jesus Christ the savior etc.

The plaintiffs did not ask to stop the prayer altogether, but only to make it more ecumenical and inclusive, by making references to a generic god and not associating the town administration with any particular faith.

The Supreme Court finds no violation of the Establishment Clause with a 5-4 vote, whose opinion is delivered, as often happened in this matter, by Justice Kennedy. The Court conservatives specify that the so-called legislative prayer, albeit intrinsically religious, historically has been considered compatible with the Establishment Clause: the precedent here is *Marsh v. Chambers*, where, very briefly, it was held that the opening prayer (officiated by a religious minister paid with State funds) of the Nebraska legislature respected the First Amendment and, particularly, the Establishment Clause. A reasonable observer, familiar with the American tradition, would never feel pressured by the traditional legislative prayer, addressed in the first place to the legislator. In this decision, the reference to history and tradition is very clear. It is interesting to find again the statement that «any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change». The opinion of the conservative wing is that the Court must find whether the prayer practice complies with the tradition followed since the First Congress. The historical argument is reinforced by a point made by Scalia and Alito²⁹ in their concurring opinion: the practices of the First Congress are surely respectful of the First Amendment, whose original meaning is mirrored in the *Marsh* precedent. The historic practice may not be called into question. In the way the majority reads *Marsh*, the legislative prayer does not violate the First Amendment not because it is generic, but «because our history and tradition have shown that prayer in this limited context could coexist with the principles of disestablishment and religious freedom».

This decision undoubtedly exemplifies the conservatives' predilection for performing the coercion test: at least for some Justices, a theological discourse is not necessarily coercive.

On the contrary, the minority opinion, by Justice Kagan, joined by Justices Breyer, Sotomayor and Ginsburg, finds that the prayer violates the norm of religious equality, although prudently remarking, at the outset, that the pluralism and inclusion which should characterize a local administration do not transform it in a religion-free zone.

From a European perspective again, it is interesting to observe that no Justice goes so far as to advocate the practical elimination of the prayer: in *Marsh*, this radical position was supported by a very narrow minority, which held that eliminating the prayer would reinvigorate both «the spirit of religion», and «the spirit of freedom»³⁰.

In legal scholarship, the strongest critics of the Roberts Court have pointed out that the idea of the Establishment Clause as a guarantee of a public space which is equidistant towards different faiths, as

²⁹ Justice Thomas reaffirmed his firm denial that the Establishment Clause applies to States at all.

³⁰ M. O. De Girolami, *Constitutional Contraction: Religion and the Roberts Court*, (September 4, 2014). Stanford Law & Policy Review, forthcoming; St. John's Legal Studies Research Paper No. 14-0010. Available at SSRN: <http://ssrn.com/abstract=2491538>

well as towards those who do not profess any faith, is under attack³¹. This may be true or false, but surely the accommodation of religion, which used to be a largely³² appreciated American peculiarity, seems fallen in disgrace, also due to the ascent of a particularly poignant version of legal egalitarianism which considers it discriminatory towards the different minorities comprised in American society³³.

4. Conclusions

I will now try to summarize some considerations which certainly, due the very limited number of US Supreme Court taken into account, have no ambition to establish any definitive comparison between the two courts.

Bearing in mind that the notion of secularism (laicità or laïcité) is deeply entrenched with the peculiar constitutional history of each countries³⁴, I make the following points.

First of all, although it has been argued that a shared ‘transnational non-establishment principle is emerging’³⁵, or more prudently that a shared form of secular order is developing and that the differences between the two case law are ultimately more a matter of tone than substance³⁶, in my opinion the ECtHR goes well beyond the US Supreme Court: this is to say, the European Court is clearly engaged in building a European secularism that leaves religious symbols outside the public space.

Yet, its “non-constitutional” nature, on the one hand, and, on the other, the margin of appreciation doctrine force the ECtHR to recognize the peculiarities of national legal systems, in whose texture the influences of majoritarian religious confessions are deeply embedded. Therefore I largely agree with who considered that ECtHR decisions merely reflect the uncertainties of an international court that navigates without clear points of reference through the increasing complexities of the relations between religion, law, society and culture³⁷. The Strasbourg Court adopts a conception of secularism which, in principle, is very similar to the French and, consequently, very different from American secularism. Indeed, it has been recalled that the value protected by the Convention is religious freedom and not secularity, however legitimate and traditional the latter may be in European States³⁸.

Secondly, although in different ways, both Courts employ arguments based on tradition and history, to the detriment of individual and minority interests. So the European and the US Courts, in deciding on the concrete issues at stake in single cases, hold what might seem a common position:

³¹ M. Nussbaum, *cit.*, p. 231, believes that radical thesis, situated once on the fringes of academic scholarship, today are all lodged at the heart of the Court’s debates. M. O. De Girolami states that there is a contraction of the Establishment Clause in the first decade of the Roberts Court’s jurisprudence. See E. Chemerinsky, *Dismantling the Wall Separating Church and State*, in *The Conservative Assault on the Constitution*, New York, 2010, 101 ff.

³² P. Horwitz, *The Lobby test*, *Harvard Law Review*, vol. 128, 2014, in particular pp. 167-172, recalling P.A. Hamburger, *A Constitutional Right of Religious Exemption: an Historical Perspective*, *The George Washington Law Review*, vol. 60, 1992, pp. 915, 916-17, pp. 929-30.

³³ See P. Horwitz, *cit.*, p. 170.

³⁴ The case law of the two Courts exemplifies this peculiarity. Again, the picture is very complex, as the European Court must consider how this idea is envisioned in all the 47 States of the Council of Europe. In the Supreme Court case law, neutrality has different meanings, as we have seen: prohibition of proselytism, anti-sectarianism, prohibition of religious endorsements in general.

³⁵ See Claudia Haupt, *Transnational Nonestablishment* (August 9, 2011). 80 *Geo. Wash. L. Rev.* 991 (2012). Available at SSRN: <http://ssrn.com/abstract=1912842>

³⁶ Z. R. Calo, *cit.*, pp. 3 and 21.

³⁷ J. Martinez-Torron, *cit.*, 25; M. L. Movsesian, *cit.*, pp. 13-25.

³⁸ J. Martinez-Torron, *cit.*, 22.

protecting the majority confession (or, at any rate, the confession favored by the government, in the US). The result is similar, but the grounds for the position are very different, as very different is, again, the nature of the two systems.

Thirdly, there is a certain deference towards the choices made by national authorities, with the exception of *Lautsi* (1): this is not surprising, for what concerns the ECtHR, which is an international non a constitutional court, as highlighted at the outset; on the contrary, for the critics of the Roberts Court, this attitude deserves to be stigmatized in a constitutional jurisdiction.

In the fourth place, the facts leading to every judgment are analyzed in detail: this is typical of common law jurisdictions, and confirms an interesting feature of the ECtHR.

Last, the US rulings show that the construction of the Establishment Clause, which presently prevails, lacks a solid consensus inside the Supreme Court³⁹. The same is true for the European Court. The reasons for this lack are partly similar, but once again, peculiarities can be clearly seen: the division between conservatives and liberal within the US Supreme Court is a feature that has not parallel in Europe: e.g., a broad distinction between conservative and liberal judges could arguably be made also with regard to the members of the European Court; and yet this distinction would not perfectly mirror the ideological cleavages inside the Supreme Court, whose liberal members have not gone so far as to advocate the practical elimination of the traditional prayer (lastly, *Town of Greece v. Galloway*). Today, the rift between the two groups inside the Roberts Court is manifest. On the one hand, there is an attempt to reduce the meaning of the Establishment Clause, which employs a very strict notion of coercion or appeals to the religious and historical heritage, as seen above. On the other hand, not even the liberal wing is prepared to hold that the rationale of the Establishment Clause is pursuing the neutrality of the public space, as in France.

³⁹ Cfr. M. Nussbaum, *Liberty of Conscience. In Defense of America's Tradition of Religious Equality*, Basic Books, New York, 2008, p. 227 ff.; also R. Garnett, *Symposium: Religious Pluralism, civic unity, and the judicial role*, "Supreme Court of the United States Blog", 8/5/2014, available at: <http://www.scotusblog.com/2014/05/symposium-religious-pluralism-civic-unity-and-the-judicial-role/>): «Now as before, when it comes to public-religion cases, no single "test" controls, no one factor is decisive, and not much confidence is warranted about the outcome of the next case». On the contrary P. Horwitz, cit., p.154, states that if it is true that the Court is routinely criticized for the incoherence of its Religion Clause jurisprudence on the whole, however, the judicial treatment of the American church-state settlement has been relatively stable.

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