Silvio Ferrari

Religion and the Public/Private Divide in the European Legal Systems

1. In Europe religions have a prominent and very visible position in the public sphere: almost everywhere religion is taught in State schools (frequently in the form of denominational teaching), in many countries religions are financed by the State and in some of them there is even a State religion[1].

This strong presence of religions in the public space is increasingly challenged by the transformation of the religious landscape of the Old Continent. Two developments, in particular, are to be taken into consideration: first, a growing number of Europeans are not members of any religion and therefore question the support offered by the State to religious communities[2]; second, a similarly increasing number of Europeans follow religions that are not traditional in Europe (first of all Islam) and that are excluded from the support reserved by the State to majority religions[3]. While the first group – those who do not profess any religion - want to reduce the presence of religious communities in the public sphere, the

[1] For an overview of the Church-State systems in Europe see Gerhard Robbers (ed.), *State and Church in the European Union*, Baden-Baden, Nomos, 2005.
[2] See Peter Berger, Grace Davie and Effie Fokas, *Religious America, Secular Europe? A Theme and Variations,* Aldershot, Ashgate, 2008, p. 11. The decline both in Church attendance and in belief in God is confirmed by the data collected by Detlef Pollack, *Religious change in Europe: theoretical considerations and empirical findings,* in Gabriel Motzkin and Yochi Fischer*, Religion and democracy in contemporary Europe,* London, Alliance Publ. Trust, 2008, pp. 83-100.
[3] On Islam in Europe see Jocelyne Cesari (ed.), *Handbook of European Islam*, Oxford Univ. Press (forthcoming); Jørgen Nielsen (ed.), *Yearbook of Muslims in Europe*, Leiden-Boston, Brill, v. I, 2009; v. II, 2010. More in particular on the legal status of the Islamic communities in the European countries, see Silvio Ferrari, *The Legal Dimension*, in Brigitte Maréchal, Stefano Allievi, Felice Dassetto, Jørgen Nielsen (eds.), *Muslims in the Enlarged Europe. Religion and Society*, Leiden-Boston, Brill, 2003, pp. 219-254; Silvio Ferrari*, Juridical profiles and political management of Muslims' presence in Europe*, in European Parliament, *Islam in the European Union: What's at Stake in the Future?,* Brussels, European Parliament, 2007, pp. 35-60.

second group – those who profess non traditional religions - want to enlarge this presence so that they can enjoy the same advantages reserved to mainstream religions. The first group support a neutral public sphere, without any religious connotation; the second is in favour of a plural public sphere that is inclusive of different religions. Finally, some traditional religions oppose both the neutrality and the plurality of the public sphere because, in the first case, they are afraid of being confined in the private space and, in the second, of losing their dominant position. For these reasons a complex and lively debate about the place of religions and beliefs in the public sphere is taking place in Europe.

2. Although it is very much influenced by the specific national backgrounds, this debate has a few common features and three basic patterns can be identified.

The first pattern is particularly evident in some Catholic and Orthodox countries. It is based on the conviction that traditional religions can still play a central role in granting the national cohesion that, in the opinion of many, is required to deal with the process of globalization and pluralisation: therefore they deserve a special position in the public space. In this perspective the dominant religion of a country is seen as a central component of the civil religion, that is of the set of principles and values that all the citizens of that country are required to accept and defend. Italy is a good example of this trend. The central core of the Italian pattern is the attempt to govern the growing ethical, cultural and religious plurality of the country through the values of Catholicism, raised to the rank of civil religion[4]. More precisely, Catholicism supplies the cultural and ethical principles on which full citizenship[5] is based: provided they are ready to accept these principles, non-Catholics can fully enjoy religious freedom rights (although not religious equality rights). Governing

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[4] See Silvio Ferrari, *The Italian Pattern of Law and Religion Relations: Catholicism as the Italian Civil Religion*, in *Convictions philosophiques et religieuses et droits positives*, Bruxelles, Bruylant, 2010, pp. 397-420.

[5] That is not only legal citizenship. Full citizenship is not only a matter of status and rights but also of shared values: to be a good citizen does not mean (only) not to commit crimes but also entails feeling part of a common narrative, partaking in some foundational myths, developing a sense of belonging, solidarity and commitment. The different dimensions of citizenship are underlined by Christian Joppke, *Transformation of Citizenship: Status, Rights, Identity,* in Engin F. Isin, Peter Nyers, Bryan S. Turner, *Citizenship between Past and Future*, London, Routledge, 2008, p. 37.

diversity by stressing (Catholic) identity is the narrow and arduous path Italy is trying to follow.

The debate about the crucifix is the best example of this way of understanding the place of religions in the public sphere. In Italian State schools a crucifix has to be hung on the walls of every classroom. Two years ago the European Court of Human Rights decided that the compulsory display of the crucifix violated the freedom of religion of the students and their parents[6]. The Italian government appealed against this sentence, arguing that the crucifix is not only a religious symbol but also the symbol of Italian identity: it manifests the historical and cultural tradition of the country and is a sign of a value system based on freedom, equality, human dignity, and tolerance[7]. As citizenship is founded on these same values, which are to be respected by everybody, the presence of the crucifix in the classroom is and must be compulsory, because it shows a set of values that everybody who wants to live in Italy has to accept and defend. As a consequence the crucifix cannot be removed from the classroom wall, nor can its presence be made dependent on the choice of the students and the teachers. These arguments express in legal terms the idea – supported by a large part of the Catholic hierarchy, the governing political coalition and public opinion - that only the Catholic tradition can perform the role of civil religion of Italy and can provide the set of fundamental principles and values on which social cohesion is founded. This model is not exclusive to Italy. The Italian appeal against the decision of the Strasbourg Court has been supported by other Catholic and, more interestingly, Orthodox countries[8]: an unprecedented alliance between Catholic and Orthodox States was formed to

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[6] See Lautsi v. Italy, Nov. 3, 2009 (Application no. 30814/06), available online at http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=lautsi&sessionid=47526629&skin=hudoc-en. On this decision see Susanna Mancini, *The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty*, in *European Constitutional Law Review,* 6, 2010, pp. ....

[7] See Mémoire du Gouvernement Italien pour l'Audience devant la Grande Chambre de la Cour Européenne des Droits de l'Homme, in http://www.governo.it/Presidenza/CONTENZIOSO/contenzioso_europeo/grande_camera/Memoria_Rappresentanza_Lautsi_Grande_Camera.pdf.

[8] Ten countries asked to intervene in the judgment in support of the Italian position. They are Lithuania, Malta, Monaco, San Marino (all countries with a Catholic majority), Bulgaria, Cyprus, Greece, Romania,

counter the trends of the European Court, which are considered detrimental to both national sovereignty and religious tradition.

The second pattern answers the same need in the opposite way. It is based on the conviction that national identity and social cohesion can no longer be granted by the traditional religions which have become too weak to serve as a unifying factor. A common citizenship can be built only around a set of secular principles – liberty, equality, tolerance, and so on - that every individual and group must embrace independently from his origins, preferences, creed. These principles are assumed to be religiously and culturally neutral: in this way secularism can claim the right to govern the whole public sphere, where every citizen can feel at home exactly because this space is without any reference to the particular values and symbols of the different religious, racial, ethnic, cultural and political communities living in the country. The French laws that forbid the wearing of religious symbols at school and the burqa in all public places, including the streets, are a good example of this approach[9]. Of particular interest is a passage of the French Constitutional Council decision that declared the constitutional legitimacy of the law. It affirms that the self-determination of women is irrelevant: even if their decision to wear the burqa is taken freely and consciously, they are in an objective "situation of exclusion and inferiority that is clearly incompatible with the constitutional principles of freedom and equality"[10]. Beneath this statement there is the conviction that, if national identity has to be built around the notion of *laïcité*, "it is the role of the State to create laïque citizens"[11] by educating them to the values of secularism and shielding them from the competing values upheld by religions.

Russia (all countries with an Orthodox majority) and Armenia (see *Grand Chamber Hearing Lautsi v. Italy - Press Release issued by the Registrar 30.06.10*, available at http://strasbourgconsortium.org/document.php?DocumentID=5015). It is significant that no country with a Protestant majority of citizens is part of this group.

[9]See Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics, in *Journal Officiel de la République Française*, 15 March 2004; Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public, in *Journal Officiel*, 12 October 2010. See also John R. Bowen, *Why the French Don't Like Headscarves: Islam, the State, and Public Space*, Princeton, Princeton Univ. Press, 2006; Christian Joppke, *Limits of Restricting Islam: The French Burqa Law of 2010*, unpublished paper available at www2.lse.ac.uk/government/research/resgroups/MSU/events.aspx.

[10] Décision n° 2010-613 du 7 octobre 2010, in *Journal Officiel,* 7 October 2010.

[11] Peter Berger, Grace Davie and Effie Fokas, *Religious America, Secular Europe?,* p. 77.

This approach to the place of religion in the public space is shared by some international organizations, like the Council of Europe and the European Court of Human Rights: it is no coincidence that all the applications against the ban of religious symbols in the French and Turkish schools have been rejected by the Court of Strasbourg[12].

The third pattern is best exemplified by the United Kingdom, which is probably the most advanced European country in the pursuit of an extensive multi-cultural organization of society. The United Kingdom is a common law country where, as in many countries of this type, the central role in shaping the legal system is not played by the State and its laws but by the courts and their judgments[13]. In the task of striking a balance between the different ethnic, religious, and cultural groups coexisting in British society the courts are guided by the respect of fundamental human rights. But sometimes human rights are interpreted and applied in a way that ends up restricting one of them: freedom of religion. An example of this approach is provided by the British Supreme Court ruling in the case of the Jewish Free School[14]. This school had an admission policy that privileged Jewish students and more specifically, in accordance with the principles of Orthodox Judaism, students born to a Jewish mother: these admission criteria led to the exclusion of a student born to a non Jewish mother who had converted to Judaism according to the rites of a non Orthodox branch. The Supreme Court judged that the school admission policy, focusing on the maternal descent of the student, was based not on religion but on ethnicity and therefore violated the Race Relations Act 1976 that forbids any discrimination on this ground[15].

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[12] See Carolyn Evans, *Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture*, in *Journal of Law and Religion*, XXVI, 2010, in particular pp. 109-115; Julie Ringelheim, *Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?*, forthcoming in C. Ungureanu and L. Zucca, *A European Dilemma: Religion and the Public Sphere*, Cambridge, Cambridge Univ. Press, 2011.

[13] See Jean-François Gaudreault-DesBiens and Noura Karazivan, *The 'Public' and the 'private' in the common law and civil law traditions: some comparative remarks,* in Silvio Ferrari-Sabrina Pastorelli, *Religion and the public/private divide* (forthcoming with Ashgate).

[14] See R v The Governing Body of JFS (2009 UKSC 15).

[15] See Susanna Mancini, *To Be Or Not To Be Jewish: The UK Supreme Court Answers the Questions*, in http://ssm.com/abstracts=1693127

This judgment has far-reaching consequences as it implies that the membership rules of a religion are subject to the scrutiny of State courts. By applying the principle of non discrimination, they can overrule the decisions of the religious authorities about membership in the religious group, thus limiting its collective religious freedom right. The application of a fundamental right – non discrimination - collides with the respect of another fundamental right, religious freedom. This contrast exemplifies the potential tension between human rights and religious rights[16]: the former, as codified in the declarations of the last two and a half centuries, have a rational/ethical foundation and a universal scope that can easily clash with the religious foundation and the more particular scope of the rights claimed by religious individuals and groups[17]. As Oftestad underlines, "the liberal democracy has its own fundamental ideology rooted in universal human rights" and "the ideological goal of the democratic state is to implement individual freedom and cultural and social equality among all members of the society". Such a goal poses some religious communities, whose doctrine and organization is not entirely consistent with these principles (think of the Catholic Church teaching and practice on ordination of women and homosexual marriages), on a collision course with these democratic ideals. "Until now the state has avoided a concrete confrontation with the Church on these issues, because the state is obliged to respect the ideal of religious freedom not only for the individual, but for the religious institutions as well. But how long the state will maintain an attitude of reserve towards the "discrimination" in the Church is a delicate question"[18]. A "fundamentalistic" interpretation of human rights is another - perhaps less evident but equally insidious - way to affirm the dominance of secularism in the public sphere.

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[16] See Roger Ballard, *Human Rights in Contexts of Ethnic Plurality: Always a Vehicle for Liberation?,* in Ralph Grillo, Roger Ballard, Alessandro Ferrari, André J. Hoekema, Marcel Maussen, Prakash Shah (eds.), *Legal Practice and Cultural Diversity*, Aldershot, Ashgate, 2009, pp. 299-330.

[17] Religions cannot compete with fundamental rights on the ground of universality. Even large supra-national religions - Islam, Christianity, Buddhism, etc.- are not as universal as human rights claim to be. See Silvio Ferrari, *Tra geo-diritti e teo-diritti. Riflessioni sulle religioni come centri transnazionali di identità*, in *Quaderni di diritto e politica ecclesiastica*, aprile 2007, pp. 3-14.

[18] Bernt Ofenstad, *Presence and Mission. The Social-Ethical Engagement of the Catholic Church Within the Nordic Context 1970-2006*, in Lisbet Christoffersen, Kjell Å Modéer, Svend Andersen (eds.), *Law & Religion in the 21st Century – Nordic Perspectives,* Copenhagen, Diøf, 2010, p. 473.

Each of the three models I have described has its limitations. The "Italian" pattern is based on the gamble that citizenship and social cohesion can be built around a particular religious and cultural tradition. In the short term, this strategy may work, yet nobody knows how long it will be able to deal with the challenge of the increasing immigration of non-Christian communities. The weakest point of the "French" pattern is the assumption that not only the State and its institutions, but also society and politics, have to be independent from particular traditions and conceptions of life.[19] To attain such a goal these traditions are to be pushed to the margins of public life. Yet the privatization of religion is being met with growing resistance by many historical religions of Europe and it is rejected by a substantial part of the immigrant communities, especially those that come from countries where law and politics are intermingled with religion. Finally, the "British" model is flawed by an internal contradiction: it has the stated aim of securing and developing religious pluralism but ends up using human rights to compress the differences and promote cultural homogenization.

These models are little more than "ideal types" that do not exist, in a "pure" form, in Italy, France, the United Kingdom nor in any other European State. Moreover they are far from being static: the British Prime Minister has recently advocated "muscular liberalism" as the best way to tackle the multiculturalist drift[20], while the French President is taking the lead in Europe as a supporter of "positive" and "open" *laïcité*[21]. Nowadays British multiculturalism and French *laïcité* are no longer inviolable dogmas which must be blindly reaffirmed without taking account of social changes. However, these models foreshadow three different ways of understanding the place and the role of religion in the public sphere. It makes little sense to ask which of them is the best in abstract terms. It is more appropriate

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19. This assumption emerges clearly in the *Déclaration sur la laïcité* prepared by Jean Bauberot, Roberto Blancarte, and Micheline Milot and published on December 9, 2005 (see its articles 4 and 9). See Jean Bauberot, *L'intégrisme républicain contre la laïcité,* Paris, Aube, 2006, pp. 247–65.

20 Cameron's speech of February 5 2005 can be read at www.number10.gov.uk/news/speeches-and-transcripts/2011/02/pms-speech-at-munich-security-conference-60293.

21 See the speech delivered by Sarkozy in Rome on December 20, 2007, in www.elysee.fr/president/les-actualites/discours/2007/allocution-de-m-le-president-de-la-republique.7012.html

to ask in which direction each of them should progress to deal with the changes that are taking place in Europe. The French model has evolved in a context characterized by a strong State and a declining religion, while the Italian one has arisen from a situation where, ever since its creation, a relatively young and weak State has had to deal with a strong religion. These different starting points have to be taken into account in order to understand what can be reasonably expected from each national tradition regarding the accommodation of religion in the public sphere.

3. One of Europe's main assets is its internal diversity and it is wise to try to make the most of it, giving up from the very beginning any dream of assigning to religion the same space and relevance in the public sphere all over Europe. The existence of different national systems of relations between States and religions is not in contrast with the unification process of Europe, provided they stay within a broad framework defined by the respect of human rights. That said, we can briefly mention the two processes that are challenging the traditional conception of public sphere in many European States.

The first is the cultural, religious, ethnic and ethical pluralization of contemporary Europe. Due to immigration and globalization, individuals and groups are now present in Europe (physically or virtually) who do not recognize the primacy of individual religious liberty as it has been established in European history: in different ways, they are in favor of a communitarian approach that questions the centrality of individual rights and therefore the distinction between the public and private sphere[22].

[22] The modern distinction between public and private is founded on the recognition of the legal subjectivity of the individual that was affirmed through the American and French declarations of rights, attesting (not just at the philosophical level, but also in law) to the existence of a private sphere where neither the State not the Church were entitled to interfere. The history of the right of religious freedom shows clearly the importance of this passage. For centuries religious freedom had been a matter of Church-State relations, with the individual having to act as a spectator: starting from the Enlightenment, the main role has been taken over by the individual and the legitimacy both of the State and increasingly also of the Church is questioned when their activity clashes with the respect of individual rights. In this perspective it is not religion but individual religious freedom that has a public dimension today. This approach is not shared by the followers of some religions that, through the process of immigration, have recently become part of the European religious landscape. See Silvio Ferrari, *The formal and substantive neutrality of the public sphere*, available at ….[to be completed]

Second, there is the publicization of religion. In most of Europe (and with the exception of the Communist regimes) religion was never privatized, in the sense of being excluded from public recognition and support: but there was a clear distinction between the spiritual and the temporal sphere and it was widely assumed that, in the latter, religions had a duty of self-restraint. In the last 20 to 30 years the boundaries between spiritual and temporal have become much more blurred and religions have been able to influence the public discourse on matters from which they were previously excluded. Alberico Gentili's "silete theologi in munere alieno" has gone out of fashion and an increasing number of citizens claim that they have the right to publicly follow the tenets of their religion in matters of dress codes, gender relations, dietary rules and so on[23].

These two processes take place in a context dominated by the fear that Europe is entering a phase of demographic, economic, political and military decline. This feeling has instilled many doubts in European minds about being able to manage the pluralization and publicization of religion with the tools available in the store of human rights[24]. This lack of confidence results in a constant oscillation between the impulse to confine religion more strictly to the private sphere, excluding it from the process of building the national identity, and the desire to strengthen national identity through the revitalization (and therefore the re-publicization) of the majority religion(s) only. In the first case the arsenal of human rights is rigorously applied without fear of marginalizing and alienating a substantial part of the population and, in certain cases, of obtaining illiberal results. In the second case a limited application of human rights (particularly when equal treatment is at stake) is adopted with the aim of maintaining the privileged status of the majority religion(s). The French law that forbids wearing religious symbols at school is a good example of the first trend; the laws that mandate the display of the crucifix in the Italian classrooms[25], that prevent teachers

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[23] The analysis of this phenomenon goes back to José Casanova, *Public Religions in the Modern World*, Chicago, Univ. of Chicago Press, 1994 and Gilles Kepel, *La revanche de Dieu*, Paris, Seuil, 1990.

[24] Tariq Modood defined this process as the passage from a "pluralism of hope" to "a pluralism of fear" (see: *We need a multiculturalism of hope*, in The Guardian, 24 September 2009).

[25] See supra, footnote 6.

from wearing religious symbols other than Christian ones in some German *Länder*[26], or the Swiss referendum that forbids the building of minarets[27] are a good example of the second trend**.**

To overcome this impasse, the common law model (of a "light" State and no inclination to marginalize religion from the public sphere) could be appealing. But - apart from the fact that it is hardly exportable beyond the English Channel- this model too presents some dangers. Judging from some court decisions, the price religions have to pay to be admitted to the public sphere is the respect for human rights within their own doctrinal and organizational system. If rigidly applied, this principle can start a process of cultural homogenization that, in the end, undermines the specificity of religious communities and the contribution they can give to building a plural society: a much more dangerous result than their marginalization from the public sphere (as in the case of the "French" model).

4. According to some, these difficulties foreshadow "the end of a secular order based on principles - however inadequately they may operate in practice - of consensual rationality", the decline of the distinction between public and private sphere and "the fusion again [...] of those relatively distinct spheres"[28]. Personally, I do not think this outcome is inevitable or even desirable. Liberal democracy has sufficient resources to govern the transformations of contemporary society without calling into question the fundamental principles on which it is based.

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[26] See Ruben Seth Fogel, *Headscarves in German Public Schools: Religious Minorities are Welcome in Germany, Unless – God Forbid - They are Religious*, in *New York Law School Law Review*, v. 51, 2006/07, pp. 619-53.

[27] See Marcel Stüssi, *Banning of Minarets: Addressing the Validity of a Controversial Swiss Popular Initiative*, in *Religion and Human Rights*, v. 3, n. 2, Sept. 2008, pp. 135-53; Vincenzo Pacillo, *"Die religiöse Heimat". Il divieto di edificazione di minareti in Svizzera ed Austria*, in *Quaderni di diritto e politica ecclesiastica,* 2010/1, pp. 199-226.

[28] John Frow, *Waiting for the Antichrist*, in Antonio Pinto Ribeiro, *The State of the World*, Manchester, Carcanet and Fundacao Calouste Gulbenkian, 2006, p. 87. On this perspective see Hanne Petersen, *Beyond National Majority/Minority Dichotomies. Towards Legal Traditions & Religions of World Society – A Local Example,* in Lisbet Christoffersen, Kjell Å Modéer, Svend Andersen (eds.), *Law & Religion in the 21st Century,* pp. 321-344.

To find a way out, the notion of public sphere has to be re-thought so that it is made hospitable to individuals and groups who want to manifest their religion or belief; accessible to all individuals and groups (not only to a select few) who are ready and able to accept the plurality, on an equal footing, of different religions and beliefs in this same sphere (this is the access card required from all subjects that want to enter it); respectful of human rights but open to the accommodations that are necessary to safeguard the internal autonomy of religion and belief communities. This strategy presupposes a better understanding of the distinction between the informal public sphere (the square, internet, the mass media, that is the space of debate and discussion where the public discourse takes shape) and the institutional public sphere (which is the space where coercive deliberations, which are binding to all, are taken: parliament, the law courts, public administration)[29].

The first , the informal public sphere, in order to perform its function of elaborating and proposing projects of collective interest, should be free and plural: the visible presence of different religions and beliefs in this area is indispensable for the pluralism on which a democratic society is based. Instead the institutional public sphere, in order to gain general respect and recognition for the binding decisions that are taken by its representatives, must be (and appear) fair and impartial. These principles of fairness and impartiality do not mean the automatic exclusion of all religious references, manifestations and symbols from the public institutions. The presence of religious symbols can be unsuitable in some of them and not in others, particularly if the principle of fairness can be interpreted in a way that includes different religions and conceptions of life: when appropriate and possible, the quest for solutions that consent the coexistence of different religious symbols in the same physical space can be the best way to educate towards responsible and accountable pluralism.

This inclusive approach makes it possible to take into account the historical, ethnic, cultural, religious and social specificities of each national community and then may develop into a sustainable pluralism that is able to accompany the ongoing changes in European

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[29] On this distinction see Jurgen Habermas, *Religion in the Public Sphere*, in *European Journal of Philosophy,* 14/1, pp. 1-25; Cristina Lafont, *Religion in the Public Sphere. Remarks on Habermas's Conception of Deliberation in Post-secular Societies*, in *Constellations*, 14/2 (2007), 236-56.

society and keep the law in touch with its social and cultural background. Such a strategy requires different actions by the different European States. Those where a strong and secular State is in place should refrain from extending to the informal public sphere the limits to the manifestation of religion that are legitimate in the institutional public sphere: forbidding the teacher of a State school to wear a religious symbol can be acceptable, due to his public role; extending the same prohibition to students is much more questionable. The States where a dominant religion exists should refrain from giving it the religious monopoly of the institutional public sphere: recognizing the possibility to display a crucifix or another religious symbol in the classroom in response to a request by the students or the teachers is one thing; imposing it by law, independently from their opinion, is another matter.

By these different paths the challenge of the pluralization and publicization of religion can be tackled in a way that takes into account the specificities of each national Church-State system and, at the same time, identifies a common ground where, in different forms, the questions raised by the transformation of the European religious landscape can find convincing answers.