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Zoethout, C.M.

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## Secularism Stated, Rejected, and Reaffirmed

### France, Italy, and Canada and the Dilemmas of Multi-Religious Societies

Carla M. Zoethout, University of Amsterdam, the Netherlands

#### Abstract

Over the past decades, western societies have been confronted with immigration on a considerable scale. As a result, they have become more pluralistic, particularly as far as religion is concerned. This paper seeks to analyze the response to these developments in France, Italy, and the Canadian province of Quebec. The law on face-covering clothing was introduced in France, the privileged position of the Catholic religion was strengthened in Italy, and a debate about the proposed “Charter of secular values” took place in Quebec. Which of these approaches can best regulate a society, which will undoubtedly become even more diverse in the near future?

Keywords: secularism, multi-religious societies, France, Italy, Canada

#### Introduction

Over the past decades, Western societies have been confronted with immigration on a considerable scale as a result of international conflicts, the worldwide economic crisis, and European policies. These developments have had consequences; societies that have been receiving many newcomers have gradually become more pluralistic as far as their inhabitant’s origins, cultures, and religions are concerned. In light of this new status quo, a consensus has emerged: basic constitutional principles should serve as guidelines for the future development of the nation-state.

Several countries in Europe have sought to strengthen and express their fundamental constitutional values in different ways. However, particularly when it comes to religion and religious issues in contemporary societies, this quest has turned out to be very controversial. French legislation in 2010 banning the wearing of face-covering clothing in public intended to enhance the equal participation of citizens and to protect the equality of the sexes (JORF 2010; see further regulation in JORF 2011). The judicial and political debate in Italy over the public display of crucifixes in schools resulted in a re-vindication of this prescription and thus the traditional predominance of the Catholic religion. Across the ocean, the most recent development in this respect is the Quebec “Charter affirming the values of State secularism and religious neutrality and of equality between men and women,” which was discussed in the National Assembly of the Canadian province of Quebec in spring 2014 (Quebec National Assembly).

In this paper, I address these constitutional initiatives with a view to the increasingly pluralist character of these societies. In France the law on face-covering clothing was presented explicitly in reaction to multiculturalist ideology<sup>1</sup> and as a reinforcement of the values of the French republic. In Italy the privileged position of the traditional religion was strengthened by the courts with explicit reference to Italian identity. In Quebec the legislative initiative was an answer to problems their multiculturalist society is facing and intends to enhance the neutrality of the state. These initiatives can be regarded as endeavors to redefine states’ constitutional identities against the background of increasingly pluralistic cultures. The question is which of these approaches may be most sustainable with a view to future pluralist society?

### **The Values of the French Republic, the Ban on Face-Covering Clothing, and the Rejection of Multiculturalism**

#### *Constitutional Background of the Controversy*

One of the most contested initiatives regarding immigration and the reinforcement of constitutional values is undoubtedly the ban on face-covering clothing in public places, which was adopted in France in 2010. But the basis for the prohibition was laid by the Commission of Inquiry (the commission chaired by the French state’s Ombudsman, Bernard Stasi), which was installed to reflect on the application on the principle of secularism (*laïcité*) in the French Republic (Commission de Reflexio; Weil: 2699-2714). The Commission interviewed representatives from different groups in France: political and religious leaders, school principals, and social and civil rights groups. The data collected by the commission were disconcerting. The report revealed that over the last two to three years (perhaps as a result of the September 11 attacks) in the schools where some girls were wearing the headscarf, Muslim girls who did not wear it were subject to strong pressure to do so. The Stasi commission received testimonies from teachers and principals unable to manage the situation at school and from Muslim parents who sent their daughters to Catholic private schools where they were not under pressure to wear the headscarf (for an English summary,

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<sup>1</sup> The term “multiculturalism” has two different meanings: a. it is often being used in the descriptive sense to indicate a pluralist society; and b. it is also an ideology which favors groups above individuals and culture as something which deserves special protection.

see O'Brien; Weil: 2707). A national regulation seemed most appropriate to deal with this delicate matter. The report finally resulted in the adoption, on March 15 2004, of a law banning religious symbols in schools (JORF 2004a).

Article 1 of the law states:

In public elementary, middle and high schools, the wearing of signs or clothing which conspicuously manifests students' religious affiliations is prohibited. Disciplinary procedures to implement this rule will be preceded by a discussion with the student (Weil: 2699).

The law intended to guarantee children at school to be educated freely and without (religious) coercion from outside (see JORF 2004b). It is at school where principles such as the equal dignity of all human beings and the equality of men and women should be expressed and where living the life of one's own choosing must be enabled. As it is stated in the "white paper" accompanying the law, the French state is the protector of the individual and collective conscience. The mission of public schools is to receive every pupil, regardless of his or her religious or philosophical beliefs, and this law intends to contribute to that mission. With the adoption of this law the French government, under the Presidency of Nicholas Sarkozy, gave renewed expression to the principle of secularism or *laïcité* as laid down in the Constitution.<sup>2</sup> It is the neutrality of the state and the protection of the freedom of conscience that together make up the principle of *laïcité*.

The law prohibiting the covering of the face in public had different objectives. The French government regarded face-covering clothing in society as (a) a rejection of the values of the French Republic; (b) contrary to the fundamental requirements of living together in French society; (c) an attack on the dignity of the person in question; (d) a rejection of the equality of men and women; and (e) a danger for public safety.<sup>3</sup> The official explanation of the motives of the law does not refer to the constitutional principle of secularism, unlike the previous law on the prohibition of ostensible religious signs at school. The government emphasizes most of all the necessity of living together in society and the visual relation with the other in order to enable communication. Article 1 of the act declares:

No one shall, in any public space, wear clothing designed to conceal the face.

Section 3 provides that failure to comply with the prohibition will result in a fine, set at 150 euros, which can be given in conjunction with, or instead of, an order to attend a course on citizenship. Remarkable is section 4, which punishes anyone who forces someone to cover her face by a year's imprisonment and a fine of 30,000 euros. The law has been adopted by a majority in both the *Assemblée Nationale* and the *Sénat*.<sup>4</sup> The French Constitutional Council,

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<sup>2</sup> Article 1 of the Constitution of the Vth French Republic says: "France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organized on a decentralized basis."

<sup>3</sup> *Exposé des motifs* of law No. 2520, available online at <http://www.assemblee-nationale.fr/13/projets/pl2520.asp>.

<sup>4</sup> To be precise, in the National Assembly, 335 deputies of 339 voted in favor of the law, in the *Sénat* 246 *sénateurs* of 247 who casted their vote. A considerable number of deputies from the left decided not to cast their vote, of 204 socialist deputies, only 18 were present and voted in favor. Of 116 socialist senators, 46 were

requested to review the bill in light of the Constitution, issued a remarkably short decision, *Decision n° 2010 – 613 DC, 7th October 2010*. It declared (rather than argued) that the law is not unconstitutional, thereby legitimizing the adoption of the law.<sup>5</sup>

The ban has been discussed at length in human rights reviews and by legal scholars. Most authors focus on the freedom of religion and regard the prohibition on the face-covering clothing as unjustified limitations of this freedom of the individual (see Heider; Van der Schyff and Overbeeke). In 2014, the European Court of Human Rights upheld the ban in a case against France (*S.A.S. v. France*, 2014, no. 43835/11: 141-42). The Court considered the case in light of privacy and freedom of religion and accepted the reasoning of the French government that wearing face-covering clothing is incompatible with the “requirements of living together (*vivre ensemble*) in French society.” In this, the French state enjoys a certain margin of appreciation, since there is no consensus on this matter within the member states of the Council of Europe. With the ban, the French state tries to protect the interaction between individuals, but also the necessary tolerance and broadmindedness without which there is no democratic society.

Rather than focusing on the question of the compatibility of the law with the Convention, I will concentrate on its underlying motives and arguments. The law was debated extensively in the French parliament. It is particularly the final debate in the Senate – the institution representing regional authorities – upon which I will concentrate. The most important arguments that were advanced for and against the adoption of the law will be highlighted.

#### *Analysis of the Parliamentary Debate*

In the parliamentary debate too, the constitutionality and conventionality of the law were discussed, with reference to the critical report by the French Council of State. The Council of State’s report focuses on four main points: the freedom of religion, the notion of the public order, the question whether the state could enforce a certain conception of society, and the general character of the ban which is insufficiently motivated. All of these arguments are also advanced in the debate in the Senate and will be discussed hereafter.

#### 1. Rejection of the values of the French Republic.

The first reason the government advances for introducing the bill is that the covering of the face in public is regarded as a rejection of the values of the Republic (liberty, equality, fraternity). These values are considered the basis of the social pact (*le socle de notre pacte social*), the foundation of human dignity and the equality of man and women. Covering of the face

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present and voted in favor. Rather than of unanimity, one should speak of a *quasi-unanimité des députés et sénateurs* (Languille: 88, n. 3).

<sup>5</sup> This review takes place under Article 61 of the Constitution of the Vth French Republic, meaning that it is an abstract review (without a case or controversy), a form of review which has often been regarded as a political review in that the Council, by declaring the law in question to be constitutional, is actually supporting the government. Some authors question the reality of constitutional review on the basis of this provision (see Languille: 88). Since October 2010, the Constitutional Council is also authorized to review laws at the request of individuals in cases and controversies (Article 61-1 of the Constitution of the Vth French Republic).

in public is regarded as the expression of “a symbolic and dehumanizing violence.”<sup>6</sup> For these reasons, the government considers a prohibition limited to specific areas an insufficient answer to these problems.

2. Contrary to the fundamental requirements of living together in French society.

A second argument is that the voluntary and systematic covering of the face is regarded as contrary to the requirements of living together (*vivre ensemble*) in French society. It does not meet the minimum of civility necessary in social relationships – it can be considered a public reclusion.

In the Senate debate, *Séance du 14 septembre 2010*,<sup>7</sup> the communists were particularly opposed to the bill. In an explanation why they would not participate in the vote, they referred to the critical report of the Council of State on the general ban. Furthermore, the government was accused of dividing French society into strangers and French citizens, of inciting fear and extremism, while the actual figure of those women wearing face-covering clothing was limited to 2000 in France (6737-38). In reaction to this, a senator of the leading party (UMP) replied with a quote by Montesquieu: *Une injustice faite à un seul est une menace à tous* (an injustice to one person is a threat to all) (6749). Another senator referred to the French philosopher Emanuel Levinas about the need to show the face in society: “The face is not the assemblage of a nose, a forehead, eyes etc. . . . By the face, a being is not only enveloped in its form . . . he is open” (6753). Wearing face-covering clothing in other words, prevents a person to take part in society and must therefore be prohibited.

3. Human dignity and the rejection of the equality of men and women.

Covering the face in public is also considered as a rejection of the equality of men and women. *Les parlementaires Verts* (the green parliamentarians), however, reiterate that this reason holds true in many areas. The inequality of men and women requires the French government to do something about this injustice and to denounce the treaties with those countries that discriminate against women. The present law is therefore not very sincere, according to these parliamentarians. They refused to take part in the vote (6747-48).

4. A danger for public safety.

The argument that covering of the face in public may be a danger for public safety is less contested. The socialists, though they declare to be in favor of the law, propose to limit the prohibition to specific public places (with a view to the freedom of religion and the general character of the ban, and in conformity with the report by the Council of State), but find no support by the majority in the Senate (6741). In the debate the government underlines again that the law focuses on the protection of the values of the French Republic and is not primarily aimed at (the freedom of) religion.<sup>8</sup> The real issue at stake is that of

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<sup>6</sup> “. . . la dissimulation du visage dans l'espace public est porteuse d'une violence symbolique et déshumanisante, qui heurte le corps social.” *Exposé des motifs* of law No. 2520.

<sup>7</sup> Available online at <http://www.senat.fr/seances/s201009/s20100914/s20100914.pdf>.

<sup>8</sup> The question whether or not wearing the burqa is actually a religious obligation remains unclear during the debate. According to the minister of justice, the president of the CFCM (*Conseil Français du Culte Musulman*) has affirmed that there is no link between the Qur'an and the wearing of the face-covering veil.

multiculturalism (in the French debate indicated as *communautarianisme*). With this proposal, the government distances itself from this ideology. In the multiculturalist approach, the minister declares: “. . . specific rules apply to certain categories of the population and these rules can – in certain situations – go against the collective norm. Communitarianism is recognized in the United Kingdom and the United States. Their constitutional culture, however, is different than the French, which prioritizes the principle of equality before the law, without fragmentation in society” (6754). The minister subsequently reiterates that:

. . . the will to live together depends, as we all know, upon our capacity to gather among commonly held values and the will to share a common destination.<sup>9</sup>

#### *Secularism Stated in the French Republic*

The discussion in France over the past 10 years was preceded by a complex advice by the French Constitutional Council about the wearing of headscarves in schools. In this advice the Constitutional Council tried to balance the principle of secularism with the freedom of religion and conscience (Weil: 2699).<sup>10</sup> The matter was in fact left to the school authorities without a clear normative framework.

With the abovementioned laws, the political institutions have expressed themselves anew about the fundamental constitutional principles of the French state. Particularly, the ban on the wearing of conspicuous religious symbols at schools can be considered a reaffirmation of the principle of *laïcité*, the overarching constitutional principle expressing on the one hand the neutrality of the state and on the other hand the freedom of conscience of the individual (Commission de Reflexion: 22). With a view to the relationship between state and religion, the French model is thus one of religious neutrality. Of the five models that are being distinguished in constitutional scholarship – 1. political atheism; 2. the religiously neutral or secular state; 3. multiculturalism; 4. state church; and 5. theocracy (Cliteur 2012; Nieuwenhuis) – France has opted for the second model. With the law on face-covering clothing, the French political institutions have expressly opted for reiterating the values of French society, equality of all before the law, the need to live together in society, and against advancing multiculturalism as an ideology.

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<sup>9</sup> “. . . la volonté de vivre ensemble dépend, nous le savons tous, de notre capacité à nous rassembler autour des valeurs communes et de la volonté de partager un destin commun” (6731). The influence of the French philosopher Ernest Renan (1823-1892), and particularly his essay “*Quest-ce qu’une nation?*,” is clearly reflected in this quotation.

<sup>10</sup> Similar cases were presented to the constitutional courts of other European countries. Thus, for instance, the German Constitutional Court had to consider a ban of a teacher’s hijab by an administrative regulation by the Land of Baden-Württemberg (available online at [http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2003/09/rs20030924\\_2bvr143602.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2003/09/rs20030924_2bvr143602.html)). The Federal Constitutional Court ruled (September 24, 2003) that the principles of the rule of law and democracy require that it is the democratically legitimated institutions, in open public debate, which must provide answers to such changing phenomena.

## The Crucifix Debate in Italy and the Reinvigoration of the Catholic Religion

### *Constitutional Background: The Debate over the Separation of Church and State*

Unlike in France, where the political institutions decided to restate the requirements for living in French society, the Italian reinforcement of the Catholic religion originated in a judicial procedure. This procedure was the latest episode in a long political and judicial struggle on the relationship between state and religion in Italy.

A key topic in the debate over the separation of church and state in Italy has been the cultural and political role of Catholicism in light of the increasing pluralism of the Italian population (Pin). In this respect, the most important provision of the Italian Constitution is Article 7, which states:

- (1) The State and the Catholic Church are, each within their own reign, independent and sovereign.
- (2) Their relationship is regulated by the Lateran pacts. Amendments to these pacts which are accepted by both parties do not require the procedure of constitutional amendments.

In 1929, the fascist government and the Vatican signed these pacts, which accorded the independence of the Holy See from Italy and which recognized it as a sovereign state. Article 1 of the Lateran Pact states: "Italy recognizes and reaffirms the principle . . . according to which Catholicism is the only religion of the State" (Panara: 306; on the position of the crucifix within Italy prior to the case discussed here, see Mancini 2006: 179-95). In 1984, the Lateran Pact was fundamentally amended – the latter principle was considered to be no longer in force (McGoldrick: 465).<sup>11</sup>

In the discussion about the proper role of religion and religious manifestations in Italy, it is the judicial institutions that have been particularly influential. Whereas the amendment to the Lateran Pact in 1984 heralded the end of the predominance of Catholicism, another major change took place when the Constitutional Court introduced the principle of *laicità* (Cliteur 2013) into Italian case-law in a decision in 1989 (*Corte Costituzionale*, April 11, Decision no. 203). According to the Court, *laicità* or secularism is to be regarded as one of the fundamental principles of the Italian legal system. Secularism emerges from the combined interpretation of different constitutional provisions (Mancini 2006).<sup>12</sup> It "does not imply state indifference to religion, but a duty of the state to safeguard religious liberty, in a

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<sup>11</sup> Despite the fact that there has been a significant decline in church attendance in Italy, the Church remains of social, cultural, political, and moral significance. Article 19 of the Italian Constitution recognizes the freedom of religion: "Anyone is entitled to profess their religious belief in any form, individually or with others, and to promote them and celebrate rites in public or in private, provided they are not offensive to public morality." Article 8 states: "All denominations are equally free before the law. Denominations other than Catholicism have the right to self-organization according to their own statutes, provided these do not conflict with Italian law. Their relations with the State are regulated by law based on agreements with their respective representatives."

<sup>12</sup> Such as, Article 2 which protects the inviolable rights of man, Article 3 on the equality of law, and the abovementioned Articles 7, 8 and 19.

context of confessional and cultural pluralism” (Pin: 121). In the case at hand, the Court decided that teaching Catholicism at public schools was perfectly consistent with the principle of *laicità*. The Court makes clear that the Italian principle of *laicità* should not be confused with the French *laïcité*. Unlike the French ideological, hostile approach, the Italian understanding of the term is more positive and active towards all religions and religious communities (Pin: 122; Mancini 2006: 181). The implication of this approach is that religion does not necessarily have to be absent from public institutions.

#### *The Crucifix in Italian Public Schools*

The *Lautsi* case on the crucifix in Italian public schools would again entail a change in that the traditional predominance of the Catholic religion was eventually reinstalled.<sup>13</sup> It started with a complaint by Mrs. Soile Lautsi, an atheist parent of Finnish origin who considered the prescription to display crucifixes in classrooms<sup>14</sup> an infringement of her right to educate her children in conformity with her philosophical views, a right which is laid down in Article 2, First Protocol of the European Convention on Human Rights (ECHR). In addition, she claims that both her right to freedom of religion and that of her children (at that moment 11 and 13 years old) were violated. In the initial domestic proceedings, however, Mrs. Lautsi had argued that the decision by the school board not to remove the crucifixes amounted to a violation of Articles 3 and 19 of the Italian Constitution,<sup>15</sup> a violation of Article 9 of the European Convention on Human Rights and of the principle of secularism which – in her view – was an inherent part of the Italian Constitution.<sup>16</sup>

Mrs. Lautsi’s complaint was dismissed by the administrative tribunal of Veneto. The remarkable judgment of this court is a clear reflection of the interpretation of the Council of State. According to the tribunal the crucifix is a “symbol of the Italian history and culture and of the Italian identity. It is therefore a symbol of the principles of equality, freedom and tolerance and the secular state” (*Lautsi I*: 13). The Council of State dismissed Mrs. Lautsi’s complaint. In the Council’s view the crucifix has become one of the “secular values of the

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<sup>13</sup> *Lautsi v. Italy*, 3 November 2009, European Court of Human Rights, No. 30814/06 (which will hereafter be referred to as *Lautsi I*) and Grand Chamber, *Lautsi v. Italy*, 18 March 2011, No. 30814/06 (hereafter: *Lautsi II*).

<sup>14</sup> The origins of the prescription to display crucifixes in classrooms date back to the nineteenth century, to a Royal Decree from 1860, that is, before the unification of Italy. The prescription was restated in circulars by the Ministry of Education in 1922 and 1926 and in Royal Decrees of 1924 and 1928, adopted when Italy was a fascist state. In 1948, the present Republican Constitution was adopted, naming only the Catholic Church (Article 7 and 8). All the same, over the years the predominant position of Catholicism in Italian society and politics has declined (McGoldrick: 464). It was only in 2001, after a number of rulings on secularism, that the Italian Constitutional Court itself removed crucifixes from its own courtroom (McGoldrick).

<sup>15</sup> Article 3 of the Italian Constitution lays down the principle of equality before the law, without discrimination on the ground (among others) of religion. Article 19 proclaims the freedom of religion.

<sup>16</sup> In *Lautsi I*: 24, the European Court of Human Rights refers to decisions by the Italian Constitutional Court, which in turn refers to the principle of *laicità*. This principle – the Constitutional Court says – can be derived from the provisions of the Constitution and the fact that the Italian government has expressly abandoned the confessional character of the state.

Italian Constitution” (sic) and represents the values of civil life.<sup>17</sup> In order to reconcile the prescription to display crucifixes with the principle of *laicità* the Council cannot but downplay the religious meaning of the crucifix. In a rather complex statement, the Council even denies the religious meaning of the crucifix in the context of the public school:

. . . a crucifix displayed in a classroom cannot be considered a trinket, a decorative feature, nor as an adjunct to worship. Rather, it should be seen as a symbol capable of reflecting the remarkable sources of the civil values referred to above, values which define secularism in the State’s present legal order (Panara: 310).

The civil values the Council mentions earlier in its decision are: “tolerance, mutual respect, valorisation of the person, affirmation of one’s rights, authority, human solidarity and the refusal of any form of discrimination – which are supposed to characterize the Italian civilization” (Panara: 308-309). In line with this decision, the Council of State observed more recently that the “crucifix is, in fact, also a historic and cultural landmark. It represents a sign of national identification” (Panara: 310).

Thus, the Italian courts first interpret the constitutional provisions regarding religion in a more neutral way, subsequently downplay the religious character of the crucifix, and finally underline the educational character of the crucifix. As to the presumed educational function, the opinion of the Italian Council of State in a request to remove crucifixes filed by the association *Unione degli Atei e Agnostici Razionalisti* (Union of Atheists and Rationalist Agnostics) is most telling:

. . . the Italian public school is currently attended by a large number of non-EU schoolchildren, who need to be taught those principles of openness to diversity and refusal of any form of fundamentalism (be it religious or secular) which permeate our legal system . . . it is essential that we also symbolically reaffirm our identity, which is characterised by the values of respect for the dignity of every human being and universality of solidarity (Panara: 311).

#### *The Crucifix before the European Court of Human Rights*

Mrs. Lautsi then appeals to the European Court of Human Rights. She argues that the crucifix, above all else, has a primarily religious connotation (*Lautsi I*: 31). For that reason, “[f]avouring one religion by the display of a symbol gave state-school pupils the feeling that the State adhered to a particular religious belief, whereas, in a State governed by the rule of law, no-one should perceive the State to be closer to one religious denomination than another, especially persons who were more vulnerable on account of their youth” (*Lautsi I*: 31). In response to these claims, the Italian government underlines the different meanings of the crucifix, apart from a religious one:

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<sup>17</sup> In its decision of 13 February 2006, the Italian Council of State declares “[L]a croix était devenue une des valeurs laïques de la Constitution italienne et représentait les valeurs de la vie civile” (quoted in the decision of *Lautsi I*).

. . . the democratic values of today were rooted in a more distant past, the age of the evangelic message. The message of the cross was therefore a humanist message (*sic*) which could be read independently of its religious dimension and was composed of a set of principles and values forming the foundations of our democracies (*Lautsi I*: 35).

In conclusion, the government states that the crucifix is compatible with the notion of secularism. What is more, the cross symbolizes the philosophy underlying this constitutional principle – there is no question of an infringement of the Convention.

The Italian government's plea does not convince the Chamber, however. The Chamber explains that the symbol of the crucifix has many different meanings, the most important of which is its religious meaning. In the context of public education they are necessarily perceived as an integral part of the school environment and may therefore be considered "powerful external symbols." (*Lautsi I*: 54, with reference to its decision in *Dablab v. Switzerland*, 15 February 2001, ECtHR, no. 42393/98). An important statement follows:

The Court does not see how display in classrooms of public schools of a symbol that it is reasonable to associate with Catholicism (the majority religion in Italy) could serve the educational pluralism that is essential to the preservation of a "democratic society" as conceived by the Convention (*Lautsi I*: 56).

In a unanimous decision the Chamber concludes that "that the practice [of displaying crucifixes] infringes those rights because the restrictions are incompatible with the State's duty to respect neutrality in the exercise of public authority, particularly in the field of education" (*Lautsi I*: 57).

As the case came before the Grand Chamber, the Court was under huge political pressure. The decision by the Chamber caused a storm of protest, both in Italy and abroad (see Weiler 2010; Kyaritsis and Tsakyrakis; Zucca; Temperman). Of the 47 members of the Council of Europe, 21 member states openly criticized the decision by the Chamber. Moreover, an unprecedented number of third parties were heard before the Grand Chamber. Thirty-three members of the European Parliament went to the Court, human rights organizations such as the International Committee of Jurists and Human Rights Watch, and 10 European governments (among which were Armenia, Bulgaria, the Russian Federation, and Greece) were allowed to set forth their views in an oral argument before the Grand Chamber (McGoldrick: 451-502). Over 100 Italian organizations published a joint open letter supporting the Chamber decision and commenting on the political influence of the hierarchy of the Catholic Church (McGoldrick: 470).

On March 18, 2011, the Grand Chamber repealed the former decision. The Grand Chamber decided the Italian government did not violate Article 2, paragraph 1, of the First Protocol to the European Convention on Human Rights and that no separate issue arises under Article 9. Fifteen of the seventeen Grand Chamber judges decided that the Italian authorities, by prescribing the display of crucifixes even at public schools, acted within the

confines of the “margin of appreciation.”<sup>18</sup> In short, the Grand Chamber recognizes the crucifix as a religious symbol, but the Italian authorities consider the display of the crucifix in public school classrooms as part of a historical development in Italy. The crucifix therefore does not only have a religious connotation, but also an identity-linked one. The latter connotation means that the crucifix is part of a national tradition in Italy, which needs to be perpetuated. Moreover, the crucifix symbolizes the principles and values that formed the basis of democracy and western civilization. For these reasons, the presence of the crucifix in classrooms is justified, according to the European Court of Human Rights (on the need to rethink the Court’s modes of review as a result of the *Lautsi* decisions, see Zoethout). On the question whether or not this tradition should be continued, there is no consensus between the member states and therefore falls within the margin of appreciation. In contrast to the Chamber, which referred to the crucifix (and the headscarf) as “powerful external symbols,” the Grand Chamber does not consider a crucifix at the wall a form of indoctrination. A crucifix, the Court says, is an essentially “passive symbol”: “it cannot be deemed to have influence on pupils comparable to that of didactic speech or participation in religious activities” (*Lautsi II*: 72).

The Grand Chamber in its judgment obviously seeks a way that is in conformity with the Italian approach, far less with the Convention notion of the neutral state regarding religion and religious manifestations.

#### *Further Reflections*

Reading the judgments and opinions of the Italian courts and Italian government, it is difficult to escape the feeling that they all somehow try to come to terms with the changing position of religion in present-day Italy. On the one hand, the courts do not want to overemphasize the role of religion and religious symbols in society; on the other hand, both the courts and the government believe the symbol of the crucifix stands for Italian identity and with that for a number of important values. Remarkably, these values are in themselves not religious – rather they can be regarded as secular values. But why try so hard to make this connection in order to legitimize the display of the crucifix at public schools?

By emphasizing the importance of the crucifix as an expression of Italian identity, the Italian authorities have in fact rejected the principle of secularism as a possible course for Italian society and have reaffirmed the model of the state church, the model they have been struggling with for such a long time. The obvious question now is how to reconcile this model with a society that will be increasingly diverse as far as religion and philosophical convictions are concerned. I will address this question in the final section.

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<sup>18</sup> The “margin of appreciation” doctrine is being used in particular where the Convention enables a balancing of interests by the member state, notably under Articles 8-11 of the European Convention on Human Rights (family life, freedom of religion, freedom of expression, freedom of association), which contain in the second paragraph the “necessary in a democratic society” clause. The necessity test can, according to Strasbourg’s case law, lead to a certain margin of appreciation for the national authorities, given a lack of consensus among the member states of the Council of Europe (*Handyside v. United Kingdom*, 7 December 1976, no. 54933/72: 48).

## **The Charter of State Secularism and Religious Neutrality in Quebec**

### *Constitutional Background*

The position of Quebec within Canada is a special case in kind. Much of the constitutional debate over the past ten years has focused on the question whether or not Canada's constitution should recognize Quebec as a "nation" or "distinct society" within the Canadian federation (Cameron and Krikorian). The defining characteristic of Quebec is the French language and culture. How to best acknowledge, support, and preserve both language and culture has been the key issue for some time. Within the framework of this paper it is only possible to highlight some of the main developments in this respect – the focus will be on the recently introduced "Charter affirming the values of State secularism" requiring that public bodies remain neutral in religious matters.

The present constitutional overview starts with the year 1982 when the national government in Ottawa and nine of the ten provincial governments agreed upon two major changes. First of all, a bill of rights (the Canadian Charter of Rights and Freedoms) was entrenched into the country's constitution. Interestingly, this entrenchment took place by way of a British Act of Parliament (the Canada Act 1982) to which the Canadian government consented. Second, provisions were adopted to modify the country's constitutional amendment process, ensuring that Canadians, and not the British government, would have ultimate control over changes to Canada's Constitution in the future. One major problem remained: the 1982 amendments were made without Quebec's consent, and that while Quebec housed approximately a quarter of the country's population and was the most ardent advocate of constitutional reform. As one author explained, such a situation is not sustainable in the long run:

The 1982 constitution explicitly recognized the multicultural character of the country as well as the rights of the aboriginal peoples of Canada,<sup>19</sup> but made no mention of the distinctive character of Quebec. After years of Quebec's seeking to have its aspirations accommodated, culminating in the emotional referendum campaign of 1980, the terms of the new constitution essentially ignored Quebec's agenda for change (Monahan, quoted in Cameron and Krikorian: 391).

In the mid-1980s another constitutional amendment was proposed – the Meech Lake Accord. The Canadian constitution would be interpreted in a manner consistent with the recognition that Quebec constitutes a distinct society within Canada. Moreover, the existence of French-speaking Canadians was recognized for the first time. Again there was insufficient legislative support for the amendment (Cameron and Krikorian: 392). The 1992 Charlottetown Accord underwent a similar fate.

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<sup>19</sup> Under the title "Multicultural heritage," Article 27 of the Canadian Charter of Rights and Freedoms states: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians" (see Cameron and Krikorian: 391)

During the 1990s the debates on the constitutional accommodation of Quebec nationalism reached a crisis point that nearly occasioned the breakup of the country.<sup>20</sup> However, in 2006, the *Québécois*' wishes were met to a certain extent. A resolution was proposed in the House of Commons of the Canadian Parliament proclaiming that it recognized that the *Québécois* form a nation within a united Canada. Legislative support for the initiative was overwhelming. Three days later, in a 107 to 0 vote, Quebec's legislative body, the National Assembly, formally responded to Ottawa's initiative recognizing the positive nature of the resolution (Choudry: 396).

#### *Reasonable Accommodation and the Charter*

Meanwhile, another development took place that is important within the framework of this paper. The practice of reasonable accommodation – an adjustment in a system to make the system fair for an individual based on a proven need – related to cultural differences caused increasing public discontent in Quebec. Particularly, the handling of accommodation requests for religious reasons called into question the place of religion in public institutions. Questions, such as, Must we provide prayer rooms? Should the wearing of the Muslim headscarf be curtailed? and May government employees display religious signs in the workplace? met resistance. An important advisory report that presents an overview of the practice of accommodation in Quebec observes: “Abusive recourse to the charters combined with the benevolence of the courts was perceived as the root of a good part of the problem” (Bouchard and Taylor: 33). The Supreme Court in particular, was accused of promoting multiculturalism in Quebec (for an overview of the accommodation practices in Quebec and a chronology of the events, see Bouchard and Taylor: 13-50; for a comparison with the Italian case, see Moon). In response, the incumbent premier Charest installed a Consultation Commission in 2007 in order to formulate recommendations to the government to ensure that accommodation practices conform to Quebec's values as a pluralist, democratic, egalitarian society. The Commission's elaborate report touches upon notions like interculturalism,<sup>21</sup> immigration and integration, secularism, and the theme of Quebec identity (Bouchard and Taylor). Of the entire array of recommendations, one is particularly interesting with a view to the current legislative initiative in Quebec. The report calls for a definition of new policies and programs pertaining to interculturalism (legislation, a declaration of policy statement) and secularism (a proposed white paper).

After an initiative in 2012, the government of the province of Quebec put forward Bill 60 – the Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests. As it is put in the explanatory notes, a further purpose of this bill is to specify, in the Charter of Human Rights and Freedoms, that the fundamental rights and freedoms guaranteed by

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<sup>20</sup> As Choudry (625) describes, The Parti Québécois (PQ) proposed a draft bill on sovereignty in the Quebec National Assembly in December 1994. A referendum was held the year after. The proposal failed by 1 percent. Choudry demonstrates that the literature at that time was convinced Canada was facing a major constitutional crisis that threatened its very existence.

<sup>21</sup> “Interculturalism” is defined in the report as: “A policy or model that advocates harmonious relations between cultures, based on intensive exchanges centred on an integration process that does not seek to eliminate differences while fostering the development of a common identity” (Bouchard and Taylor: 287).

that Charter are to be exercised in a manner consistent with the values of equality between women and men and the primacy of the French language as well as the separation of religions and State and the religious neutrality and secular nature of the State, while making allowance for the emblematic and toponymic elements of Quebec's cultural heritage that testify to its history.

According to the proposal, public bodies must, in the pursuit of their mission, remain neutral in religious matters and reflect the secular nature of the State. Accordingly, obligations are set out for personnel members of public bodies in the exercise of their functions, including a duty to remain neutral and exercise reserve in religious matters by, among other things, complying with the restriction on wearing religious objects that overtly indicate a religious affiliation. Apart from this, personnel members of a public body must exercise their functions with their face uncovered, and persons to whom they provide services must also have their face uncovered when receiving such services. The same rules apply to other persons, in particular to persons who exercise judicial functions, or adjudicative functions within the administrative branch, and to personnel members of the National Assembly.

While there appears to be a broad consensus in favor of an official declaration of the religious neutrality of the state and the need to establish clearer guidelines governing requests for accommodation, the proposal in the Charter of the ban on wearing overt religious symbols has aroused strong opposition (Maclure). As a result of the 2014 election, there has been no follow-up of the initiative (the bill had been proposed by the Parti Québécois, which lost the elections). In academic journals some authors position the debate in the light of a dichotomy between minority and majority interests, but that perception does not do justice to the complex and fundamental issues at stake (see Choudhury). The important thing is that an attempt is made to come to terms with the problems multicultural society is facing, to try to find long-term solutions for these highly sensitive issues and not leave the matters entirely up to private actors or the judiciary.

### **Some Reflections on the Future of Pluralist Societies**

Despite the differences between France, Italy, and the province of Quebec, all try to find a path between the state's constitutional identity and the changing society. Particularly in religious matters, this is a thorny path, as we have seen. While it is apparent that the liberal democracy requires equal distance towards all religions and all try to come to terms with this starting-point, the way towards a solution for now and the future is being reached in different ways. France tries to reinvigorate the values of the French republic and the need for open communication by everyone in society. With that, the French government takes a stance in the discussion about multiculturalism. While society is in fact multicultural and increasingly diverse, the French government expressly rejects multiculturalism as an ideology for the present and future society. In Italy, the predominant position of the Catholic Church ended only thirty years ago. However, the religious *Leitkultur* has more or less been reinforced recently now that the Italian authorities have accepted that crucifixes are part of Italian culture and should therefore be displayed, even at public schools. In Quebec, where the practice of reasonable accommodation has turned out to be much disputed, a recent initiative aims to formulate a normative framework for future accommodation requests and

to position public institutions in these matters. Even though the freedom of religion and of conscience is of course guaranteed as part of liberal democracy, when in public service, ostentatious religious symbols are considered to be incompatible with the state's impartiality.

Which of these approaches is most sustainable when viewed in the light of future societies? Which model is best defensible to regulate a society that will undoubtedly be even more diverse as far as religious convictions are concerned? In their essay on the freedom of religion, András Sajó and Renáta Uitz discuss different models of church-state relations. In their view, the principle of neutrality of the democratic state towards religions is a major principle of these models. As they put it: "While the organizational differences among states are remarkable, in principle the democratic state is supposed to keep equal distance from all religions by not taking a stand on religious matters, favoring or disfavoring a position, or a group or organization standing for such position (neutrality). For example, it shall not identify in its functions with religions, their symbols and practices" (925; reflected also in the case-law of the European Court of Human Rights). Seen in this light, the Italian model, which re-establishes the position of the Catholic religion, will most likely be disputed again in the near future. If democracy does indeed require state neutrality towards all religions, it is difficult to defend the special position of the Catholic Church. The French model and the model that has been proposed in Quebec seem to have better perspectives. While the French model has the advantage of being clear in its equality to all, one may doubt whether the present regulation is not interfering too much in society. That is a different matter when public institutions are concerned – there it is indeed the state that manifests itself by its institutions and civil servants. It is in public institutions that the principle of neutrality should be most apparent and regulation seems appropriate. Undoubtedly, the Quebec initiative is still a long way from being realized. But as a model for future multicultural society, the charter expresses the principle that does the most justice to all citizens – the neutrality of the state as reflected by its institutions.

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