

# Do Not Cross the Line: The State Influence on Religious Education

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**Abstract:** The issues related to the role of religion in the public education system have been a public topic for a long time, and related debates have been cyclically revived by specific events. In this contribution, we explore the reasons why Italian grassroots actors do not tend to size up the European Court of Human Rights (ECtHR) jurisprudence and the plurality of juridical regimes dealing with religion and education as windows of opportunity. First, we analyze the intertwinement of different juridical regimes dealing with religion and education, and the national case law on the topic. Then, drawing on original semi-structured interviews, we analyze the indirect effects of the ECtHR case law on the mobilizations and advocacy strategies at the grassroots level around religion and education. Finally, we discuss the research outcomes, outlining how the non-interference of the Court in state-religions regimes may result in the limited impact and effectiveness of the Court's protection of religious freedoms.

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## 1. INTRODUCTION

This article focuses on the normative impact that human rights norms (emanating pre-eminently, albeit not exclusively, from the ECtHR [European Court of Human Rights]) exert on social struggles — in the strategies and discourse of religious and civil society actors — around religion and education in the Italian context.

From a neo-institutionalist perspective, Koenig (2007; 2015) has shown that the institutionalization of religious governance at the European level has had a contradictory impact upon the member states' policies. On the one side, European policies, documents, and recommendations, and European bodies such as the ECtHR, design a model for religious governance (Fokas 2015; Anagnostou and Fokas 2015), which fosters the convergence of member states' policies. On the other side, however, "Europeanization also strengthens established actors in the field of religious governance and gives new legitimacy to historical institutional arrangements by re-framing them as expressions of national identities" (Koenig 2007, 913). In this direction, the ECtHR jurisprudence on religious freedom in many cases "granted states considerable margins of appreciation in interfering in the freedom to manifest one's belief, on the condition that such interference be prescribed by law, have a legitimate aim and be necessary in a "democratic society" (Koenig 2007, 917). Only two cases have so far been presented to the ECtHR against Italy in relation to religion and education: the *Lautsi* and the *Lombardi Vallauri*<sup>1</sup> cases. While the second has been mostly neglected by the Italian public sphere,<sup>2</sup> *Lautsi* has been the object of an extensive and lively discussion (Annicchino 2010; 2011; 2013; Follesdal 2017; Ozzano and Giorgi 2013; Temperman 2012). In Italy apart from these two cases, however, no other cases have been filed on the topic of religious freedom in the education field — despite the fact that many of the actors involved in the field of religion and education describe the Italian situation as "discriminatory."

The *Lautsi* case sparked a wide and intense debate and is the example par excellence of direct and indirect influence of the ECtHR. As is widely known, the 2009 decision of the second Chamber of the Court found a violation of the Convention in the mandatory display of the crucifix in Italian public schools. Several actors (also international) reacted against this decision and in March 2011 the Grand Chamber of the Court overturned the Chamber decision, finding no violation of the Convention in the display, and arguing that the issue had to be left within the margin of appreciation of the Italian state. This decision probably reinforced an

understanding, already shared by many of the actors, that supranational litigation had little to offer to their political strategies that were already circumscribed internally by the Concordatarian system.<sup>3</sup> In this sense, much of the activity in the domain of religious education (RE) takes place specifically “in the shadow” of *Lautsi* and ought to be seen under that light. The final outcome in *Lautsi* was a major setback in using the ECtHR for secularists, who otherwise see law and courts as promising vehicles to pursue their demands. Broadly speaking, the *Lautsi* case would have led us to think that religion in education struggles in Italy are waged in the terrain of European human rights law and in the ECtHR. Indeed, as we show in the following sections, human rights have been influential in shaping the discourse and strategies of the various religious actors. For example, Catholic actors adopt a defensive strategy of public awareness and other kinds of action, in order to counter what they see as “reverse discrimination” against established religions in the decisions of the ECtHR. However, litigation in the ECtHR has often not been pursued as a central avenue of contestation on behalf of minority actors or secularists: the national legal frame and the Concordat accept religious pluralism in principle, and provide for the option of non-Catholics to opt out of RE, therefore the basic principles are in line with human rights norms. In this sense, mobilizations in the field of religion and education are mostly framed within a national horizon.

This contribution focuses on the eventual indirect effects<sup>4</sup> of the ECtHR in Italy in relation to the topic of religion and education. More specifically, we are interested in understanding if and how national actors in the field of religion and education engage with the political and discursive opportunity structures set out by the Court (Fokas 2015).

In the next section, we present the national political and discursive opportunity structures, describing the complex legal regime that regulates the role of religion in education, and highlighting the main issues that have raised concerns and debates in Italy in relation to religion and education. In Section 3, we outline the main actors in the field of religion and education in Italy, their goals and activities, and their role in the controversies around the topic. Drawing on semi-structured interviews addressing key witnesses, experts and activists, in Section 4, we focus on the actors’ engagement with the ECtHR, analyzing how and to what extent they are aware of the Court’s activities, and perceive the ECtHR as a possible window of opportunity to achieve their organizations’ goals. In the last section, we discuss the outcomes, outlining how the approach of the Strasbourg Court in state-religions regimes may result in the limited

impact and effectiveness of the Court's protection of religious freedoms. Of course, we do not claim that the investigation depicts the potential impact of the ECtHR in Italy: we focus on only one of the fields related to religious freedom, education and rights. Nonetheless, our results, quite similar to the results of the Greek case analysis<sup>5</sup> (see, Markoviti in this issue), offer an interesting contribution to the study of the indirect effects of the ECtHR, by proposing a general hypothesis to be further tested.

## **2. RELIGION AND EDUCATION IN ITALY: A COMPLEX LEGAL REGIME**

The importance of recognizing religious and cultural diversity and the principle of "pluralism" at school is one of the pivotal elements of European policy on education: European bodies have widely intervened on the topic, with documents, recommendations and courts' judgments (see, Lozano 2013), to which the European countries have variously reacted.<sup>6</sup> Despite the many differences, some scholars evidence a path of slow convergence (Willaime 2007). Recently, the United Nations Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, underlined the importance of recognizing children as rights holders, and discussed the practical implications in terms of RE in schools, the display of religious symbols, and the respect of childrens' and families' religious diversity.<sup>7</sup>

In Italy, the role of religion in the public education system has been a public issue for many years, and the debate has been intermittently revived by specific national or international events (Ozzano and Giorgi 2016; Fiorita 2012; Giorda 2015; 2013). In this section, we analyze the intertwinement of different juridical regimes dealing with religion and education, and the status quo of RE in Italy.

### **2.1. Religious Teaching in Public Schools in Italy**

The political struggles on the role of religion in the education sector date back to the creation of the Italian state. Of course the topic in Italy was not at the core of cultural controversies as it was the case in other European states. Established in 1861, at that time the Italian state had a weak institutional structure, no national system of public education, a small percentage of population able to speak the language, and a low level of education

among its citizens. The confrontation on these topics with the Catholic Church was central. As Ventura (2013, 195) has pointed out: “After unification in 1861, education provided a crucial battlefield in the confrontation between the Catholic Church, which strenuously defended its traditional monopoly on culture, and the State, which endeavored to “build Italians” through Enlightenment-based culture conveyed by the State.” Different positions on the role of religion in education were reflected in the first juridical arrangements made at the national level where, between 1861 and 1870, students were initiated to Catholicism by a school chaplain present within the public education system. After 1870 this system ceased to be in effect and the teaching of Catholicism became optional. With the coming of the Fascist period, and especially after the signing of the Lateran Concordat,<sup>8</sup> the Catholic Church was again placed at the center of the narrative of state building. The alliance between the Catholic Church and the Italian state was reflected in Article 36 of the Lateran Concordat signed in 1929:

... Italy, considering the teaching of Christian doctrine according to the form received by Catholic tradition as the foundation and the crown of public instruction, agrees that religious instruction imparted in the public elementary schools shall have a further development in the secondary schools according to a programme to be established by an accord between the Holy See and the State.<sup>9</sup>

One of the central features of the political struggles around the teaching of religion in public schools is, and has been, the selection and appointment of teachers for the subject. Again, Article 36 of the Concordat in 1929 provided clear indications on the subject:

“Such teaching shall be given by means of masters and professors, priests and religious teachers approved by the Ecclesiastical Authority, and subsidiaries by means of lay masters and professors, who for this end shall be furnished with a certificate of fitness to be issued by the person responsible for the diocese.”

Therefore the role of the Ecclesiastical authority which selects the teachers is central: it decides to keep the teachers in place or to dismiss them, and also chooses the textbooks used by the students.

With the collapse of the Fascist regime and the approval of the new Constitution in 1948, the approach to the issue of religion and education began to change, first of all because of the changes in Italian culture and

politics, and also through the approval of new norms. Article 33 of the Constitution dictated the basic principles to be applied to public and private schools. Other constitutional provisions regulates the relationships between the state and religious groups (among these it is worth mentioning Article 7 and Article 8), and Article 19 of the Constitution mandated the protection of the individual and collective right to freedom of religion. The interpretation of Article 33 of the Constitution, which is central to the debates on religion and education, has been the subject to disagreement between different approaches, deeply influenced by the ideological polarizations that the country has witnessed. Especially controversial was the issue of public financing to private schools, which, according to a literal interpretation of Article 33, should involve “no costs” for the state. This literal approach to the text of the Constitution is no longer mainstream among legal scholars. Instead today “the prevailing interpretation of the clause is that if the State is not compelled to fund private school, it is not forbidden either” (Ventura 2013, 195–196).<sup>10</sup>

One of the main controversies in the field of religion and education after the approval of the 1948 Constitution has concerned the teaching of religion in public schools and the revision of the 1929 Concordat, which took place in 1984. The new Concordat, and Law 121/1985 which enacted the treaty into the Italian legal system, reshaped the understanding of the teaching of religion in public schools. Ventura highlights three main elements of change introduced in Article 9 of the Concordat: (1) the cultural connotation of the teaching; (2) the non-compulsory character of the teaching; (3) the necessary balance, within the teaching, between the teaching of Catholicism and the freedom of conscience of the students. These three features become self-evident when we consider the text of Article 9:

The Italian Republic, recognizing the value of the religious culture and considering that the principles of the Catholic Church are part of the historical heritage of the Italian people, shall continue to assure, within the framework of the scope of the schools, the teaching of Catholic religion in public schools of every order and grade except for Universities [...] With respect to the freedom of conscience and educational responsibility of the parents, everyone shall be granted the right to choose whether or not to receive religious instruction. When they enroll, students themselves or their parents shall exercise this right at the request of the school authority and their choice shall not give rise to any form of discrimination.

The detailed implementation of this provision has been left to the agreement between the state and the Italian Bishops' Conference.<sup>11</sup> Over the

years there have been several judicial interventions in order to clarify the interpretation of Article 9, section two. In one of them, the Constitutional Court affirmed the “supreme legal principle of laicità”<sup>12</sup> declaring that the teaching of religion structured in agreement with the Catholic Church is not in violation of the text of the Constitution, but that this teaching should be offered in a regime of confessional and cultural pluralism.<sup>13</sup> Other judicial decisions contributed to the clarification of the fact that the teaching of religion in public schools should be understood as non-mandatory. However a fundamental ambiguity remains at the core of the teaching of religion in most public schools. As Ventura (2013) has pointed out.

On the one hand, CRT [teaching of Catholic religion] is a denominational, doctrinal teaching, reflecting the Catholic ethos and views, hence the control of bishops on programs and teachers. Within the Catholic Church itself, views differ. Someone pushes for the Catholic and doctrinal identity of CRT to be emphasized. Others would prefer CRT to become classes of public morality, where the Catholic Church, on behalf of the State, teaches how to approach the new secular and multi-religious Italian society (Ventura 2013, 201–202).<sup>14</sup>

Public schools’ curricula include two hours of religious instruction per week in primary schools, and one hour per week in colleges and secondary schools. The syllabus is jointly agreed by the Minister for Public Education and the Catholic Bishops’ Conference. It must avoid any form of discrimination and proselytism, and it cannot be in conflict with other subjects — this means, for instance, that religious instruction cannot oppose creationism to evolutionary theory (see, Ferrari 2011b). Until 2003, teachers entitled to teach religion in public schools were selected by the local curia. Law 186 modified their status, and teachers of religion are included in the schools’ staff and selected by the state — even though the curia maintains the right of withdrawing permission if the teacher does not comply with the moral standards of the Catholic Church. Parents must declare whether their children will attend religious teaching or not<sup>15</sup> and, if they decline, the children can choose between taking time off school, studying autonomously under the surveillance of a teacher, or attending “alternative teaching,” which has to be organized by each school autonomously.<sup>16</sup> In recent years, as Ferrari (2011b) had noted, the status of religious teaching in public schools has been changing: the marks, for example, are increasingly considered as part of the students’ final evaluation — which signals a growing trend of equalization of religious instruction to the other school subjects.

Besides Catholicism, any denomination with an agreement (Intesa)<sup>17</sup> may organize religious classes, providing that the pupils, their parents, or the school, make a request. Non-Catholic religious instruction has to be directly financed by the interested denomination. The denominations without an agreement (such as Islam) can ask instead for the use of public schools' facilities outside school hours. Nevertheless, these options for non-Catholic denominations are rarely, if ever, applied for (see, Giorda and Giorgi *N.d.*).

## 2.2. Recent Controversies: Gender and Pluralism

The teaching of religion in public schools is one of the main examples of the legal complexities which surround the role of religion in education in Italy. The complex legal regime has to be understood within the context of the strong protection guaranteed to the prerogatives of the Catholic Church by Article 7 of the Constitution and by the 1929 (revised in 1984) Concordat with the Italian state. As provided by Article 7 of the Constitution, changes to international treaties (including the Concordat) require the consent of both parties: the Catholic Church can therefore operate with a strong strategic advantage, as compared with other religious groups. The approach of the Catholic Church though may at times come into conflict with emerging social and legal norms.

For instance, one of the main recent controversies on religion and education concerned the introduction of measures to combat discrimination following the approval of Recommendation CM/REC (2010)5 of the Council of Ministers of the Council of Europe. The Recommendation provides measures to combat discrimination on grounds of sexual orientation and gender identity. Point 32 of the Recommendation provides that these measures should include providing objective information with respect to sexual orientation and gender identity (...) Furthermore, member states may design and implement school equality and safety policies and action plans and may ensure access to adequate anti-discrimination training or support and teaching aids. Such measures should take into account the rights of parents regarding education of their children.<sup>18</sup>

The Italian government has charged the National Office against Discrimination with the task of developing a strategy for the implementation of the Recommendation. This office, which over the years has almost never intervened in debates concerning religious freedom, published a report in 2013 including a strategy to combat and prevent discriminations

on the basis of sexual orientation and gender identity. This report has given rise to a series of informative campaigns and public events, and Law 128/2013 provided 10 million Euros to finance education initiatives on these issues. During the same month, the National Office against Discrimination, without the required approval from the Minister of Education, began to print and distribute online a series of handouts on the prevention of discrimination on the basis of sexual orientation and gender identity. The Minister subsequently requested that the National Office against Discrimination withdraw this publication from circulation and the office proceeded accordingly. Nevertheless, the approval of the new Law 197/2015 reforming higher education (*La Buona Scuola*) includes Article 1.16, requiring a specific education plan for the prevention of discrimination on the basis of sexual and gender identity.

This controversy led to the creation of a political movement around a coalition of actors, which has so far been quite influential in shaping Italian legal and political developments and is particularly relevant for the purpose of analyzing the role of the decisions of the ECtHR within the Italian legal and political arena.

The increasing social and religious diversity and the constantly changing Italian demography will continue to challenge the present arrangements and the role accorded to religion in Italian education.<sup>19</sup> As Giorda (2015, 78) has argued, religious diversity at school challenges the current status of State-religion regime in Italy, and it sheds light on its complexities. This complexity is also reflected in the structure of the legal regimes regulating other important aspects such as the role of faith-based schools, the presence of religious symbols in public schools (see, Annicchino 2010; 2011; Ozzano and Giorgi 2013), the role of anti-discrimination laws, and the reasonable accommodation of religious dietary requirements. These issues have been, and in many cases still are, important frames for the mobilization of several actors contesting the relevance of embracing diversity or the perceived need to protect Italian identity and culture. As Ozzano and Giorgi (2016, 106) have pointed out regarding the case of RE:

... most political and religious actors reacted by framing religious instruction in terms of Italian identity: religious instruction provided by the majority religion is related to Italian history, tradition and values. Also, some religious actors mobilized the frame of social cohesion stating that Catholic religious instruction indeed favours and supports integration of minority groups, by providing them with knowledge of Italian culture and the roots of Italian identity.

After having analyzed the legal context that shapes the debates and litigation, it is therefore worth considering the various actors and their different mobilization strategies.

### **3. RELIGION, EDUCATION, AND DISCRIMINATION: MAPPING THE FIELD**

In the field of religion and education in Italy, five clusters of actor play a significant role and can be defined as stakeholders: State bodies that regulate the role of religion in the public system of education; majority religion, which is in charge of RE in the public system of education; minority religions; advocacy groups that mobilize around various issues related to religion and education. In this section, we record on these actors' different claims, aims and alliances, while in the next section we focus on the actors' strategies in the judicial field and the indirect (and partly unintended) effects of the ECtHR case law as part of a broader European normative frame.

Data sources are interviews, documents, media analysis, and case law collected in the frame of the GRASSROOTSMOBILISE project.<sup>20</sup> More specifically, we conducted around 60 in-depth interviews with representatives of religious institutions in Italy (both majority and minority religions); representatives of the organizations active in the field of religion and education; case lawyers and, more broadly, lawyers working on religious rights in Italy; scholars. In addition, we analyzed the materials produced by the stakeholders in the field of religion and education (laws, directives, grey documents; reports, newsletters, websites). Also, we conducted a media analysis to understand to what extent the Italian media sphere provides information on the ECtHR case law.<sup>21</sup>

The first relevant stakeholder in the field of religion and education is composed of the state bodies regulating the role of religion in the public education system, responsible for dealing with religious diversity and issuing the guidelines for religious teaching. Currently, two commissions are in place: one is in charge of rethinking the role of Catholic religious teaching in public schools; the other, separated, is in charge of organizing the presence of the other religions. In the State agencies' discourse (interviews and documents) in fact the issue of religious diversity in schools is mainly related to the semantic universe of "immigration": in this sense, religious diversity should be dealt with in order to avoid social fragmentation and to enhance social cohesion. Moreover, State agencies constantly

reaffirm the peculiarity of Italy in comparison to other European States, in which the traditional and historical role of Catholicism — and, more broadly, Christianity — appears to be less relevant. In this direction, the current status of Catholic religious teaching in public schools stays unquestioned: the relevant issue is how to deal with the other religions.

Among the non-Catholic religions with an agreement with the Italian state, only the Church of Jesus Christ of Latter-day Saints is currently considering the possibility of organizing religious teaching in schools, and the Italian Buddhist Union is exploring the possibility of obtaining the recognition for University-level institutions. Other religions — with or without an agreement, such as Islam<sup>22</sup> — appear to be mostly interested in organizing local initiatives in schools, in order to promote the students' familiarity with non-Catholic faiths.<sup>23</sup> A specific and prominent role among minority religions is the one of the Protestant Church:<sup>24</sup> the Federation of the Evangelical Churches in Italy is in fact the organizer of one of the most active associations, *Association 31 October — for a secular and pluralistic school promoted by the Italian Evangelicals* (hereinafter, A31O). A31O, which dissolved in 2017, was mainly concerned with non-discrimination, and the promotion of State secularity in schools, especially in relation to the complex status of the CRT and the alternative teaching.

A31O had strong connections with two secular groups: the Union of Rationalist Atheists and Agnostics (hereinafter, UAAR) — the pro-secular NGO (non-governmental organization) behind the *Lautsi v Italy* ECtHR case — and a network of associations composed of former students of Religious Studies. UAAR uses strategic litigation as one of its main repertoires of actions, in addition to public campaigns, secular ceremonies, prize awarding and funding, and publications, all addressing the precarious status of secularism in Italy. The former students are instead grouped and/or involved in various organizations, such as Laboratory for Religious Studies, *UVA-Universolaltro* (The other universe), or *Benvenuti in Italia* (Welcome to Italy, hereinafter BIT). These organizations work toward two main objectives: first, they promote knowledge about religions — mainly through alternative classes and awareness-raising activities — in order to fight against stereotypes about religions. Second, they are engaged in lobbying activities at the national level in order to remove the limitations regarding teachers of religion and to include religious — non-denominational — studies as a mandatory school subject. Many of their activities are funded by the Waldensians and the Methodist Church.

The last relevant stakeholder is of course the majority religion — this cluster of actors is populated by teachers of religions and Catholicism-related organizations that organize initiatives in public schools. In the field of Catholicism-related actors, the debates revolve around two main nodes: the teaching of other religions in schools, and the introduction of teachings potentially in contrast with Catholicism. The first issue mainly mobilizes professional actors (Catholic teachers and their associations): due to the ambiguity explained in Section 2, the contents of CRT may range from confessional Catholic teaching to teaching about religions. As emerged from documents and interviews, Catholic teachers mostly interpret their role as “ambassadors” of multi-culturalism, promoting the knowledge and the awareness of other religions, while maintaining the historical role of CRT and Catholicism in the Italian system of public education. In this scenario, with the exception of some isolated voices, Catholic actors frame the introduction of confessional teachings of other religions as redundant. Both CRT teachers and Catholicism-related organizations promote meetings, lectures, and all kinds of information activities in schools, where representatives of various religions give testimony and explain their faith to the pupils (e.g., the Jesuits’ *Centro Astalli* in Rome). The second issue at stake is related to the introduction of measures to combat discrimination on grounds of sexual orientation and gender identity, as explained in Section 2. In light of this, some groups of Catholic parents recently emerged to affirm the right of freedom of education, protesting against what they frame as discrimination against Catholic beliefs (see, Section 4). The clusters of actors briefly described promote different visions about the role of religion in the public education system, and, also, have different strategies of action. In the next section, we specifically focus on their strategies in the judicial field, in order to analyze the indirect effects of the ECtHR.

## **4. THE LAUTSI SHADOW: RELIGION, EDUCATION, AND THE EUROPEAN NORMATIVE FRAME**

### **4.1. The Judicial Field**

Broadly speaking, the actors engaged in the field of religion and education adopt a “language of rights,” and have a vague awareness of an international level of decision, “Europe.” However, among our interviewees the knowledge of the ECtHR as such is less diffused, apart from the *Lautsi* case,<sup>25</sup> probably also because litigation at the national and

international level is not a diffused repertoire of action among the actors in this field. Minority religions in general try to avoid courts — framed in their discourses as “confrontational” — and express a clear preference for extra-judicial remedies (see also, Acquaviva 2015; Ferrari 2000; 2013). The reluctance and caution of these actors in approaching judicial action may be related to the fact that the presence of many minority religions, in Italy, is the result of migration — thus characterized by an uncertain status. The only partial exception is Islam (see also, Cardia 2015; Ferrari 2011a): however, one of our interviewees, a representative of a Muslim NGO, when asked about judicial action also pointed out the length of Italian processes and the uncertainty of the outcomes, which makes the decision to take recourse to a court quite difficult: “Either you show your muscles, or you do the math, and decide what’s best for you. If it goes bad, you pay for years” (June 4, 2015).

The Evangelical association A31O and the UAAR have been involved in a variety of cases, concerning opt-in in faith-based schools, organization and accessibility of alternative classes, crucifix display and, more broadly, religious initiatives during school hours — such as pastoral visits, prayers, or schools’ blessing.<sup>26</sup> According to the activists, however, the majority of cases are resolved by means of official letters *threatening* legal action. One of the lawyers related to the Evangelical association A31O, when asked about judicial activity, underlined that religious freedom “... is not an issue that can be solved by judicial means” (September 8, 2015). Indeed, despite the favorable jurisprudence in most of the cases, both A31O and the UAAR underline certain risks and difficulties in taking recourse to the Italian courts, due to the generally favorable attitude of the courts toward Catholicism. The pro-secular association UAAR is the only actor that explicitly advocates strategic litigation, with the general aim of defending a secular school (on the topic, see, Andreescu and Popa, and Markoviti, in this issue): the most notable example is the *Lautsi* case.

## 4.2. The *Lautsi* Shadow

Through a dispute around the presence of religious symbols in schools, the *Lautsi* case brought the role of religion in education to European human rights scrutiny in Strasbourg.<sup>27</sup> It attracted widespread mobilization within Italy and across several European countries, and signaled the readiness of atheists and other secular actors to deploy human rights law and litigation in order to pressure the Italian state. The first *Lautsi* judgment was

favorably welcomed by the Protestant Churches, the Union of the Jewish community in Italy, and the controversial Union of Italian Muslims,<sup>28</sup> while sharply criticized by the Union of Islamic Communities and Organizations in Italy and the Catholic Church. On the other hand, the plenary court's judgment in *Lautsi* had a sharply demobilizing effect, and the emphasis on national religious traditions in *Lautsi* was taken to reaffirm the domestic legal frame defined by the Concordat and the institutional and cultural dominance of Catholicism in Italian society.

Key witnesses and experts, and representatives of the NGOs composed of former students of religious studies underlined the issue of the margin of appreciation. Commenting on the *Lautsi* case and, more broadly, discussing the role of Europe, one of our interviewees, from the UVA association, underlined that:

Member states deal with this issue with a certain degree of freedom, within certain limits [...] We translated the Toledo Principles [...] and there is not a specific model [*of religious teaching*]. It is a general recommendation to deal with different religions, in a non-discriminatory perspective [...] I think that the CRT in Italy does not fully contradict the EU recommendations on school, education and religions. [...] What matters to the EU agencies are the final objectives of non-discrimination and increase of knowledge [...] but, it is up to the States to choose the model that better suits them (September 16, 2015).

The excerpt voices the opinion according to which the ECtHR does not intervene in states' traditions or national issues. More broadly, the European Union (EU) is perceived as supporting the principle of non-discrimination, but without detailing tools or procedures for reaching this objective. In this perspective, Europe supports the "outcomes" (non-discrimination, focus on students' diversity) rather than the "process" — i.e., without intervening in the organization and contents of RE, whether confessional or not, for example, or regarding the providers of such an education (requirements, qualifications ...). This opinion is widely accounted for in the international scholarly literature on the topic (see, Lozano 2013).

More than the margin of appreciation, the issue which determines the non-engagement with the courts — and, especially the Strasbourg Court — appears to be the presence of the Concordat; this emerged from the interviews addressing representatives of the Evangelical Association A310, representatives of the NGOs composed of former students of religious studies, key-witnesses and Italian scholars working on the topic, and from

the analysis of the documents and materials developed by these actors. In the words of one of the activists involved in the BIT Foundation, the only way of effectively intervening on the inequality of treatment of non-Catholic religions in relation to RE would be to change the Concordat — which also means that the Italian Constitution should be changed:

It is impossible, from a juridical perspective. Even in the case that all the actors — politics, the cultural sphere, the institutions, the educational agencies — agreed to intervene, the Constitution has to be changed, because the revision of 1984 [...] maintained the privileged role of the Catholic Church [...] all that can be done — and was done in fact — is to make CRT an optional subject. But that's the end of the story (May 22, 2015).

The existence of the Concordat and the reluctance of the Court to intervene on country-specific issues are the main obstacles, in our interviewees' opinions, for full religious pluralism in the Italian system of public education. Nonetheless, many of our interviewees<sup>29</sup> also pointed out that, in Italy, there is a more general issue related to the absence of a framework law on religious freedom, able to overcome the complex *sres* regime (the Concordat and the Agreements). In this respect, one of the expert interviewed also affirmed that:

The Concordat must not become an alibi for inaction. A new law on religious freedom would not be contradictory with respect to the Concordat, nor is the Concordat an obstacle to such a law. Honestly, this is a matter of political responsibility and politics must take some responsibility. You cannot blame the Catholic Church today, in October 2015, for the absence of a law on religious freedom. There is little political interest in addressing these issues in legal terms [...] we lack the right to religious freedom (October 15, 2015).

The *Lautsi* case has been extremely influential, casting a shadow over the discourse and strategies of Italian actors active in the field of religion and education.

### **4.3. The Indirect Effects of the ECtHR and the European Normative Frame**

Despite the demobilizing effects of the *Lautsi* case, it would be a mistake to conclude that the European normative frame is irrelevant to this field, for three main reasons.

First of all, Human rights, such as anti-discrimination norms and at times ECtHR cases seem to form an important source of norms and proposals for social and institutional actors seeking to reform how religion is being taught in schools. Generally speaking, when directly asked, all of our interviewees positively evaluated the existence of a broad European normative frame as a promoter and defender of religious freedom.

State agencies consider how the European member states deal with religious pluralism in schools, and take into account anti-discrimination norms and at times ECtHR cases. One of the interviewees for the present study explained, for example, that in light of the ECtHR *Folgero v. Norway* case,<sup>30</sup> CRT in Italy cannot be considered religious teaching. Its contents, which deal with ethical issues and history, and its comparative approach to religions, make CRT different from catechesis. In framing their activities, civil society actors — A31O, the UAAR, and the former students of religious studies — mobilize the discursive categories of “state secularism,” “equality,” and, especially, “non-discrimination” — which carries high potential for generalization of specific issues. In this sense, the resonance of the “non-discrimination” discursive framing in the public discourse can be related to the (partial) Europeanization of the discourse on religion and education.

A31O and the former students also often refer, in both their documents and the interviews, to the Toledo Guiding Principles, connecting the enhancement of religious pluralism in schools to the respect of diversity, on the one side, and security concerns and enhancement of social cohesion, on the other. However, religious pluralism is rarely — if ever — discussed in terms of “human rights.” The fact that for these groups mobilizing around the issue of limitations on the right to teach the RE course, the *Fernandez Martinez v. Spain* case is not used in their discourse (e.g., noting ECtHR case law on the topic which stands as a barrier to their cause) is also indicative of the lack of a “human rights” approach to the topic.

The second factor that corrects the general understanding of a *Lautsi* demobilizing effect is that secular actors still look favorably to the prospect of pursuing litigation in the ECtHR if opportunity arises. For the UAAR, involved in the *Lautsi* case the Grand Chamber’s reversal of the first judgment was a defeat: “the judgment does not help, of course [...] The Court left such a huge margin of discretion that, at this point, Europe is no more a horizon — at least, not directly under this profile [...] our hands are tied,” explained one interviewee from this association. However, the UAAR maintains its activity, changing strategy (juridical

grounds) without changing venue (the ECtHR), and its members explained to us that some of the cases they are following will likely be brought to the ECtHR.

Third, Catholic actors often make discursive reference to documents issued by European Catholic organizations. Moreover, some of them indeed target both the ECtHR and anti-discrimination norms, affirming that the European normative frame protects the rights of minority religions, but not the rights of majority religions. The controversy about “gender theory”<sup>31</sup> (understood as a theory which argues that male and female characteristics are largely malleable social constructs) introduced a relevant change to the strategy and arguments of Catholic-related NGOs. They oppose “gender theory” by claiming respect for religious freedom and beliefs, a right usually invoked on behalf of minority religions. As clearly expressed in the following excerpt from an interview with a scholar working on minority religions and actively involved in a Catholic Association that took a clear stand against “gender” in schools, some Catholic NGOs have certain concerns about their religious rights:

In relation to the balance of homosexuals’ and religious communities’ rights, or freedom of expression and the rights of religious communities, the courts did not equally protect religious freedom [...] there is a judicialization of religious freedom, favourable to the so-called “sects” [...] The test of religious freedom, until recently [...] were the rights of the smallest and unpopular groups [...] Nowadays, I would say that another test concerns the protection of the religious freedom of the historical traditions [...] It seems that, sometimes, religious freedom is underestimated when it concerns the historical, and supposedly majoritarian, religions [...] [*which are*] unpopular because they are considered totalitarian and oppressive, and, thus, paradoxically discriminated against by the tribunals judgments (May 24, 2015).

In relation to the status of the religious freedom of historical religions, the same interviewee also noted the delicate role of the Court, which risks introducing restrictions and obligations that may have the unexpected effect of reinforcing inequalities. Thus, the judiciary path, especially leading to the ECtHR, is described by this actor as extremely tricky.

The following excerpt, from an interview with an actor involved in the campaign against “gender” in public schools and one of the leaders of the movement that in January 2016 led the Italian “Family Day” to protest against the pending bill on civil union, clearly summarizes the broad issues related to the Court’s activities:

They [The ECtHR activities] are very relevant because they deal with issues which are significant to us and about which we report every day. We are quite critical towards the ECtHR, especially as far as it concerns the legitimacy of the Court to take positions which are later represented as being fully enforceable in member states. In reality we consider it as being quite weak, mainly as concerns the source of legitimation. The real question to ask is: do ordinary people know what the ECtHR is? We often try to explain this. We try to differentiate it from the Luxembourg Court, in fact we often read or hear the media talking about a “European judgment” and often we find mistakes. We also try to explain the ideological nature of the political-legal machinery of the Council of Europe through a real counter-information strategy. The Court is often used to advance a partisan ideological agenda and we try to explain that.

This excerpt allows us to point out two elements: first, the awareness issue. Even though specialized actors are informed about the relevance of the Court and the consequences of its decisions, they consider the general audience to be mostly unaware. Second, the ECtHR is seen by some Catholic actors as a bearer of specific views in terms of individual rights, rather than an impartial arbitrator (this was, for example, a relevant argument in the *Lautsi* case). In general, the criticism toward “liberal” and “imposing” Europe may be quite resonant in certain sectors of the Italian audience. An indirect impact of the ECtHR in relation to dominant religious actors emerges clearly here: indeed, in spite of the *Lautsi* judgments, the authoritative affirmation of human rights appears to trigger a “defensive” mobilization among Catholic actors to assert their role and promote their influence against what they see as their marginalization by the ECtHR and a kind of “reverse discrimination” in favor of minority religions and to the detriment of established religions.

## 5. CONCLUSIONS — THE ECtHR AND THE CONCORDAT

This contribution focused on the controversies in the field of religion and education in Italy in the shadow of the ECtHR — and, especially, in the shadow of *Lautsi*. We have identified certain indirect (and partly unintended) effects of the ECtHR case law as part of a broader European normative frame that also includes anti-discrimination law: the influential role of anti-discrimination norms and at times ECtHR cases as discursive resources to be mobilized in discussing religion and education issues; the (unintended) effect of ECtHR and anti-discrimination norms framed

as “reverse discrimination” by some Catholic groups; and the partially demobilizing effect of the *Lautsi v Italy* case

After explaining the status of religion in the public system of education, we presented the main actors involved, the main issues at stake, and we analyzed how the actors described their attitudes toward — and understanding of — the Strasbourg Court in terms of its potential impact on their rights related to religion and education. As we have seen, the legal and political picture on the issue of religion and education in Italy is rather complex. Despite offering a potential venue of action, the potential impact of the ECtHR in the Italian legal system is filtered by the religion-state regime and, more specifically, by the Concordatarian system. Considering the *Lautsi* judgment, we can register as an indirect influence of the ECtHR case law the way in which the *Lautsi* decision seems to have further eroded the possibility of using strategic litigation in Strasbourg to limit the prerogatives of the Catholic Church as protected by the Italian legal order. Technically, this is true especially for cases brought to the Court under Article 8 of the Convention on non-discrimination and not Article 9 on religious freedom, the latter often understood within the framework of the doctrine of the margin of appreciation.

At the same time, it appears that “Europe” and the non-discrimination norms seem to have a considerable influence as a defining frame for religion-related controversies in Italy. The mere existence of the Court offers a window of political and discursive opportunity — and Catholic organizations, for example, mobilize the (quite resonant) frame of “imposing and demanding” Europe, far from Italian values, to protest against the teaching of gender in school. On the other hand, the ECtHR — and, more broadly, “Europe,” as a vague and indefinite supranational authority — often emerges in the discourses of secular actor as “the ultimate authority,” which could offer a solution to the complications of Italy. However, in the discourse of our interviewees both the Concordatarian system and the ECtHR Grand Chamber decision in the *Lautsi* case sooth the potential impact of the ECtHR as specific European actor. The *Lautsi* judgment is mainly interpreted by minority religious groups in the sense that Europe does not intervene in states’ traditions and national issues. The *Lautsi* effect is reinforced by the complex legal framework and, more specifically, by the Concordat that, in our interviewees’ discourse, configure a “blocked system,” protecting the position of the majoritarian religion. To the extent that the wide margin of appreciation left to the states on one hand, limits the direct impact and effectiveness of the Court’s protection of religious freedoms on the other hand, this situation shapes

the understanding and legal discourse of religious groups and secular NGOs.

This is clear considering the third set of indirect effects: when asked about their potential to litigate on religious issues, our respondents overwhelmingly present “the Concordat” as an unsurpassable barrier in the pursuit of their religion-related claims, and the Strasbourg Court as a closed venue. The latter applies especially to decisions directly affecting church/state relationships and issues directly touching on religion and education. As far as new legal controversies are concerned, especially those touching on gender, LGBTI (Lesbian, Gay Bisexual, Transgender, and Intersex) rights and non-discrimination, the Court is seen by majoritarian actors as a threat, as guided by a quasi-libertarian view of rights in direct contrast with a more collectivistic understanding of rights. Minority religious groups often prefer not to take recourse to the judiciary, mainly because of their position of “newcomers” in the Italian society — and because of the length of the Italian proceedings, which makes the judicial field unattractive for dealing with matters of concern requiring immediate action. On the other hand, secular groups, and part of the Protestant minority, often successfully take recourse to the local courts — within the boundaries set by the Concordat, which limits the possibility of full equality.

In conclusion, as far as religion and education are concerned, both because of the more frequent recourse to the margin of appreciation on all things religious and because of the particular “*Lautsi* effect,” we register as a primary indirect effect of the Court case law in the Italian context, a contribution to the narrowing of the options of strategic litigation and, thus, its rendering as a less useful tool for minority religious groups than it would be otherwise.

## NOTES

1. The *Lautsi* case is described in Section 1. In the case *Lombardi Vallauri v. Italy* (application no. 39128/05), the European Court of Human Rights stated that the Catholic University of Milan should have given reasons for refusing to employ a lecturer who had not been approved by the Ecclesiastical authorities.

2. As it emerged from our media study research. Moreover, one of the experts interviewed referred to the case *Lombardi Vallauri v. Italy*, pointing out that it was in fact unrelated to religious pluralism. In the interviewee’s words, the Court stated that: “the Università Cattolica del Sacro Cuore, having a function of public education — then, on the ground of its function — is similar to a state agency [...] The Court detected a violation of Article 10, freedom of expression, but not in the sense that Lombardi Vallauri was right to say what he wanted during his teaching of Philosophy of Law [...] so, not in relation to the substance, but the proceedings. That is, you could decide not to renew his contract [...] but you should do it in due form, that is: explain your reasons, listen to his and, then, make a decision.”

3. It must be also added that the text of the second *Lautsi* decision described a picture of the Italian situation, as far as diversity and pluralism are concerned, which is far to be taken for granted.

4. On the notion of “indirect effects” see Anagnostou and Fokas (2015): “Indirect effects include the ways in which international human rights judgments may influence domestic debates in law, politics and academia, raise public consciousness, change how social actors perceive and articulate their grievances and claims, empower national rights institutions, or prompt mobilization among civil society and other rights advocates.”

5. This article is focused on the Italian case study, but it is worth considering the Italian case in relation to the other country case studies presented in the present volume; also, the contributions in this volume by Fokas, Fokas, and Anagnostou and Anagnostou, Andreescu, and Fokas offer a broader European perspective to the topic at hand.

6. Of relevance here is the question of the extent to which such material is translated into the various national languages. In the Italian case and specifically with reference to ECtHR judgements, it is worth noting that only few cases are translated and the website of the “Osservatorio CEDU” has not been updated since 2011. Some relevant cases are also translated by NGOs. See, [www.osservatoriocedu.eu](http://www.osservatoriocedu.eu) (Accessed on September 20, 2017).

7. See the report at the permanent url: [www.osce.org/odihr/74622?download=true](http://www.osce.org/odihr/74622?download=true) (Accessed on September 20, 2017).

8. The Lateran Concordat is one of the legal documents of the Lateran Pacts of 1929, signed between Italy and the Holy See. The Concordat regulates the relations between the Catholic Church and the Italian state. The treaty recognizes the sovereignty of the Holy See in the Vatican State. The third document is a financial convention.

9. For the translation of the most important legal provisions on the topic from Italian into English, we refer to Ventura (2013).

10. Maria Chiara Giorda also highlights the relevance of this debate connecting it, additionally, to the increasing cuts to state financing on public education (Giorda 2015, 79). For a detailed analysis of this controversy see, Ozzano and Giorgi (2016, 93–107).

11. According to Section 5 of the Additional Protocol to the Law 121/85: “By means of a subsequent understanding between the competent school authority and the Italian Bishop Conference, it shall be determined: (1) the teaching prospectus of Catholic religion in public schools of every order and grade; (2) the organization of this teaching, also with respect to its position in the school timetable; (3) the criteria for selecting the textbooks; (4) the requirements of professional qualification for the teachers.”

12. With this expression the Constitutional Court detailed the Italian understanding of the principle that in other legal and political contexts is defined as principle of neutrality. According to the Court this is: “one of the characteristics of the form of the State delineated in the Constitution of the Republic. The principle of laicità (...) does not imply the State’s indifference to religions but rather the State’s guarantee to safeguard the freedom of religion in a system of confessional and cultural pluralism.” Constitutional Court, decision 203/1989.

13. Constitutional Court, decision 203/1989.

14. See also Markoviti, *infra*.

15. There is a lack of Ministerial data recording the pupils’ attendance of religious classes in public schools: the only source is the Italian Bishops Conference (in particular the Socio-Religious Observatory of the Triveneto), according to which, on average, 88,5%, of students opt-in with significant territorial variety — higher rates in the south and in small towns and rural areas, lower percentages in the “secular north” and large cities (see also Giorda 2015; Ozzano and Giorgi 2016; Cartocci 2011; Garelli 2011).

16. Organized by the schools, “alternative teaching classes” may cover a variety of subjects (theatre, photography, ethics, cooking, foreign languages, other religions ...)

17. The Italian state-religion regime is organized as follows: (1) The Concordat regulates the relationship between the state and the Vatican; (2) Other religions can sign an “agreement” with the Italian state, which has to be approved by the parliament — religions with an agreement include the Waldensian and Methodist Churches, Buddhism, and Hinduism; (3) Religions without an agreement are subject to the law on “allowed cults,” still in force since the Fascist regime, which allows for some recognition by the state, but entails complex procedures and implies forms of state control; (4) The other religions, such as Islam, often gather in associations — nonetheless, the “association” form may be restrictive; for example, it does not allow for permission to establish and run places of worship.

18. Council of Ministers-Council of Europe, Recommendation CM/REC (2010)5, *Combating Discrimination on the grounds of sexual orientation or gender identity*, March 31, 2010, available at: [www.wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec\(2010\)5&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true](http://www.wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2010)5&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true) (Accessed on September 20, 2017).

19. This has also happened recently in the context of a controversy on the blessing of public schools. See, Yardley, Jim. 2015. "In Italy Plans for an Easter Blessing Yield a Lawsuit for a Public School." [www.nytimes.com/2015/03/24/world/in-italy-catholic-blessing-for-easter-fuels-lawsuit-against-school.html](http://www.nytimes.com/2015/03/24/world/in-italy-catholic-blessing-for-easter-fuels-lawsuit-against-school.html) (Accessed on September 20, 2017).

20. Religion and education is one of the fields analyzed for the project; for a detailed description of the overall methodology and data see the website: [www.grassrootsmobilise.eu/research/in-the-field](http://www.grassrootsmobilise.eu/research/in-the-field) (Accessed on September 20, 2017).

21. [www.grassrootsmobilise.eu/wp-content/uploads/2016/07/Preliminary-Media-Study-Results.pdf](http://www.grassrootsmobilise.eu/wp-content/uploads/2016/07/Preliminary-Media-Study-Results.pdf) (Accessed on September 20, 2017).

22. See IRINEWS for a list of initiatives at url: [www.benvenutiitalia.it/pensiero/pubblicazioni/irinews](http://www.benvenutiitalia.it/pensiero/pubblicazioni/irinews) (Accessed on September 20, 2017).

23. See, for example, the draft agreements presented by the CO.RE.IS (Islamic Religious Community) and the A.M.I. (Italian Muslims' Association) — Acquaviva (2015).

24. The Protestant Church in Italy is composed of different traditions and Churches. The most relevant are the Waldensians (the first religion to sign an agreement with the Italian state, right after the revision of the Concordat in 1984) and the Methodists, gathered in a federation in 1975. They are extremely active in the public sphere, showing libertarian positions on a number of ethical issues (such as same-sex unions and the regulation of the end of life). Besides the Baptists, other, more recent, groups, include the Free Churches, and the Churches of Christ and the Pentecostals — with more conservative positions.

25. We assessed the interviewees' awareness through a specific test (see the introduction to this special issue for further information).

26. About the legal initiatives of the UAAR, see: [www.uaar.it/uaar/iniziativa-legali](http://www.uaar.it/uaar/iniziativa-legali) (Accessed on September 20, 2017).

27. For a list of the ECtHR case law relevant in the field of religion and education, see the table in the introduction of this special issue.

28. Led by Adel Smith, an Italian citizen who had converted to Islam, well-known for his radical stances on many issues and his provocative statements.

29. Namely: the scholars interviewed, the representatives of the A310, the UAAR, and the associations of former students of religious studies.

30. See the introduction to this special issue on the specific contents of the Folgero v Norway case.

31. That is, the controversy around the possible introduction of strategy to combat and prevent discriminations on the basis of sexual orientation and gender identity that we have discussed in Section 2 — see also Patemotte, Piette, and van der Dussen (2016).

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