

Atheism in judicial discourse

An analysis of the Italian constitutional scenario

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Abstract

Starting from an analysis of the Italian model of church-state relationships, the present paper focuses on the status of atheistic convictions in Italy. Since the 1990s, where the Union of Atheist and Rationalist Agnostics claimed its right to start negotiations to enter into an agreement with the State, Italian courts have faced the crucial issue of the legal definition of a religious denomination. The decision of the Constitutional Court no. 52/2016 has been the final result of a lengthy and troubled process. The paper will explore the coherence of the decision with the Italian Constitutional framework, with the ECHR and with article 17 of the Treaty on the Functioning of the European Union (TFEU). Finally, the paper will investigate on the option of enforcing an updated law regulating religious freedom and its predictable impact on non-religious communities.

Keywords

Nonreligion, Italy, ECHR, Article 17 TFEU, Atheism.

1. Is Atheism a religion in the Italian legal scenario?

In a recent paper, an Italian scholar raised a thought-provoking question: whether Atheism can be considered as a “religious minority” in the Italian context (Baldassarre 2021:67). The issue is extremely relevant as in Italy the number of non-believers has dramatically increased over the last ten years (Garelli 2020:10). I start by saying that providing a definition of nonreligion is a tricky issue, as it is even more difficult than establishing the boundaries of religion. Indeed, Western legal systems are not equipped to provide a legal definition of religion and have often charged courts with this difficult task (Consorti 2017:4).

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The non-monolithic nature of nonreligion and the difficulty of reducing it to a mere opposition to religion and to an exclusively individual dimension render more difficult the identification of its proper regulation. On the issue scholars have provided multiple definitions: ‘nonbelievers’, ‘disaffiliated’, ‘nones’ (Årsheim et al. 2022:1-10). Indeed, scholars have identified “nonreligion” in terms of “difference from religion” and as an “umbrella term” including multiple identities (Stemlins and Beaman 2014:4). Furthermore, there is not a perfect overlapping between nonreligion and Atheism as various types of disbelief have been identified. However, scholars include it within a “growing religious diversity” (Årsheim et al. 2022:1), and its legal treatment in modern democratic systems is strongly connected with the domestic regulation of religion. (Stemlins and Beaman 2014:11). According to Margiotta Broglio, the issue of Atheism has to be considered as a “stress test” which has destabilized the Italian constitutional framework founded on “religious neutrality, social cohesion, and living together” (Margiotta Broglio 2020:121).

Although some scholars have theorized the “decline of religious influence” (Boucher 2013) in civil society, modern democratic post-secular systems are facing a “resurgence of religion”, (Thomas 2005:21) religions are regaining a public role and new religious minorities are raising claims of reasonable accommodation of their specific demands. On one hand, in the European landscape traditional Christian values are undergoing a gradual dismantlement, giving rise to fierce litigation concerning the public visibility of religious symbolism, bioethical issues, and nondiscrimination rights. On the other hand, in modern legal societies the religious landscape has been deeply altered, due to the proliferation of new nontraditional faith communities, the disaffection from mainstream religions, the rise of nonreligious convictions and idiosyncratic beliefs (Beaman 2022:16), the emerging issues of believing without belonging (Davie 1990:455) and belonging without believing (Hervieu-Léger 2000:70-72). As setting the boundaries between religion and nonreligion is becoming increasingly problematic (Ferrari 1995:21), the key issue is whether a special legal treatment should be extended to guarantee a comparable protection to nonreligious beliefs, convictions and practices or whether an equalization should be achieved through the withdrawal of any “exemptionist” regime (Boucher 2014:159).

2. The protection of nonreligion in the ECHR framework and in the TFEU

An investigation of the issue of Atheism cannot avoid an analysis of its legal status in the European Union (EU) legal framework. Article 9.1 of the European Convention on Human Rights (ECHR) states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his/her religion or belief and free-

dom, either alone or in community with others and in public or private, to manifest his/her religion or belief, in worship, teaching practice and observance.

Such a broad definition incorporates also the negative dimension of religion. Not only does the ECHR language (“religion or belief”) include religious sets of values but also secular and philosophical convictions. The European Court of Human Rights (ECtHR) case law gave a significant contribution to build such a broad notion of religion. In *Kokkinakis v. Greece*, the ECtHR found that “freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. So it clarified that it is a precious asset, not only for those who have a religious worldview, but also for atheists, agnostics, sceptics, and unconcerned people.² In *Arrowsmith v. the United Kingdom* the ECtHR acknowledged that pacifism fits within freedom of conscience and thought.³ In *Buscarini et al. v. San Marino* the ECtHR reiterated that freedom of religion includes liberty to have or not to have religious beliefs, to practice or not to practice religion.⁴

However, religious protection under article 9 does not cover any kind of opinion or idea: the ECtHR emphasized that convictions should have a certain level of cogency, seriousness, cohesion and importance in order to fit within article 9 ECHR umbrella.⁵ In *Eweida v. the United Kingdom*, the majority reiterated the standards of “seriousness, cohesion, cogency and importance”, and emphasized that “provided this is satisfied, the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed”.⁶ In any case, although a religious system attains the required level of cogency and importance, “it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a ‘manifestation’ of the belief”.⁷ Furthermore, in *Eweida*, Judges Vučinić and De Gaetano provided an expansive definition of freedom of conscience.⁸

2 *Kokkinakis v. Greece* (app. 14307/88), 25 May 1993, § 28.

3 *Arrowsmith v. the United Kingdom* (app. 7050/75), 12 October 1978.

4 *Buscarini and Others v. San Marino* (app. no. 24645/94), 18 February 1999.

5 *Campbell and Cosans v. the United Kingdom* (app. nos. 7511/76 and 7743/76) 25 February 1982, § 36; *Bayatyan v. Armenia* (app. no. 23459/03), 7 July 2011.

6 *Eweida and Others v. United Kingdom* (app. nos. 48420/10, 59842/10, 51671/10 and 36516/10); 27 May 2013, § 81.

7 *Ibid.*

8 *Eweida and Others v. United Kingdom* (app. nos. 48420/10, 59842/10, 51671/10 and 36516/10); 27 May 2013, Joint Partly Dissenting Opinion of Judges Vučinić and De Gaetano, § 2 “[...] no one should be forced to act against one’s conscience or be penalised for refusing to act against one’s conscience. Although freedom of religion and freedom of conscience are dealt with under the same Article of the Convention, there is a fundamental difference between the two [...]. In essence [conscience] is a judgment of reason whereby a physical person recognises the moral quality of a concrete act that he is going to perform, is in the process of performing, or has already completed. This rational judgment on what is good and what is evil, although it may be nurtured by religious beliefs, is not necessarily so, and people with no particular religious beliefs or affiliations make such judgments constantly in their daily lives.”

Recently, the EctHR clarified that, although states cannot interpret the definition of religious denomination so strictly as to deprive nontraditional religious groups of religious protection, the achievement of a certain level of cogency and importance is an essential requirement to enjoy the religious status.⁹ So the Court avoided interfering with a controversial subjective assessment of the sincerity of claimants (*Brzozowski* 2021:491) and relied on “important thresholds” guaranteeing an objective review (*Wolff* 2023:2). In any case, the Court clearly stated that the assessment of cogency, seriousness, cohesion and importance can apply to conscientious claims based on secular belief systems, whose protection is grounded in article 9 ECHR, provided that “they are worthy of ‘respect “in a democratic society”’, and are not incompatible with human dignity”.¹⁰

Furthermore, article 17 of the Treaty on the Functioning of the European Union represents an important step towards the recognition of the “identity and the specific contribution” of nonreligious actors, as it solicits the opening of a “clear, transparent and regular dialogue” between the EU and non-religious organizations, and it commits itself to respect the status that philosophical and non-religious organizations enjoy in national laws. In this way a solution of compromise is achieved between the unity which should shape the EU and the preservation of the diversity of national identities (*Baldassarre* 2020:77-78). Another controversial issue is the lack of clear guidelines concerning the scope, the limits and the social actors who should participate in such a dialogue (*Margiotta-Broglio* 2020:121-138)

The key issue is whether the Italian legal framework is coherent with such a robust architecture protecting religion and whether and to what extent European language affected the legal framing of Atheism in Italy.

3. Religious protection in the constitutional text

An investigation focused on the Italian way of managing religious diversity (*Ventura* 2013), which incorporates nonreligion, leads us to analyze an alternative reconstruction of the Italian constitutional approach to the issue of religion and its legal protection. LeDrew noticed that in different legal contexts Atheist discourse fluctuated between a “confrontational position” toward mainstream religion and “accommodation” with a view to searching for cooperation on matters of common interest (*LeDrew* 2014:53). Indeed, Atheist judicial mobilization gave a significant contribution to promote the evolution of the Italian legal system with

⁹ *Hermína Geertruida de Wilde v. the Netherlands* (app. No. 9476/19), 9 November 2021. See also *Alm v Austria* [2022] (app. no. 20921/21); *Sager and Others v Austria* [2022] (app. no. 61827/19).

¹⁰ *Lautsi v. Italy* (app. no. 30814/06), 18 March 2011, § 5. See recently *Vavříčka and Others v. Czech Republic* (app. nos. 47621/13 and 5 others), 8 April 2021.

a view to implementing constitutional values of equal treatment, religious neutrality and religious pluralism (Alicino 2022:85).

The religious issue was forcefully debated in the Constituent Assembly. Although some progressive voices proposed a broad definition of religious freedom, with a view to covering secular convictions, the expression “nonreligion” is not used in the constitutional language. In addition to article 3 of the Constitution, which states the principle of equality without distinction founded on religion, article 19 of the Italian Constitution guarantees that everyone has a right to freely profess his/her religious faith in any form, individual or associated, to promote it and to worship in private or in public, provided that religious rites are not contrary to morality. Such a provision must be interpreted in conjunction with article 21 which guarantees freedom of expression in speech, writing and any form of dissemination.

The Italian constitutional framework, like other European systems, emphasizes the importance of the corporate dimension of religion. So, the protection of religious freedom is founded on a complex interplay between the principles of secularism, equal freedom of all faith communities (art. 8.1 Constitution), and church-state cooperation (art. 7.2 and 8.3 of the Constitution). Here the constitutional language gains a significant weight. The term “religious denomination” underlines a distinction between the predominant “Church” (the Catholic Church) (article 7) and faith communities ‘different’ from the mainstream religion (namely, religious minorities) (article 8) (Casuscelli 1998:89; Madera 2019:328). However, the expression “religious denomination” distances itself from the mere toleration approach adopted in the 1929 legislation (“admitted faiths”). The collective dimension of religious freedom is recognized as having a special nature compared to other kinds of association (Berlingò 2000:3). Indeed, nowadays the status of religious “minority” seems no longer connected with a quantitative element (the number of adherents to religious communities) but rather with a qualitatively defective response: an asymmetric system of protection which still places religious communities in a kind of hierarchical order (Casuscelli 1974:151).

The dichotomy between equal freedom and religious diversity is not limited to the Catholic Church and ‘other’ religious groups. Although the key principle of the Italian constitutional approach to institutional religious freedom is the acknowledgement of equal freedom to all religious denominations (article 8.1) the effective beneficiaries of the further levels of protection guaranteed by article 8.2 (self-governance) and article 8.3 (bilateralism) are more narrowly tailored (Rossi 2014:1-35; Madera 2019:329). Such a multilevel system of protection of religious freedom provides a privileged legal regime to religious groups which have entered into agreements with the state. As a matter of fact, only 10 percent of non-Catholics enjoy such a privileged status

(Naso 2023). Indeed, bilateralism has traditionally shaped church-state relations in Italy and has had a significant impact on its evolution. Since 1929 (the Fascist era) such a method has distinguished state relations with the Catholic Church. In 1929 the Italian State and the Catholic Church stipulated the Lateran Pacts to regulate matters of common interest in order to mutually reinforce each other through cooperation. In 1984 the Pacts were revised to make them consistent with the Constitutional text, with a view to preserving the specific identity of certain aspects of the Catholic Church and to pursuing the shared goal of the good of the person. Despite this change of paradigm, a full transition to religious pluralism has not yet been carried out (Alicino 2021:25). The Constitutional Charter merely “extended” the bilateral method to other religious communities. However, the content of the “*intesa*” (i.e. agreements) between the state and religious communities different from the Catholic one is quite similar: so, the *intesa* failed to achieve their main aim to safeguard the identity of the specific religious groups concerned, and resulted in a kind of ‘common legislation’ which is far from establishing a general regulation, as its application is limited to those faith communities which signed them (Alicino 2022:83).

Moreover, a shortsighted interpretation of the constitutional framework which strongly connects the protection of collective religious freedom with the notion of “religious denomination” (and leaves open the question on whether a denomination can be atheistic) (Rossi 2014:1-35), has led to reducing the scope of a complex constitutional framework (articles 3, 7,8, 9, 19 and 20 of the Constitution) which could potentially provide coverage to a broader range of (religious, philosophical, ethical) associations (Berlingò 2000:3; Madera 2019:330).

4. Early case law on Atheism

In the wake of the establishment of the Republican regime, the constitutional text was given a short-sighted theistic interpretation. Religion was deemed as a legal good to be preserved (Cardia 1996:173), to the detriment of anti-religious views in the world. According to many influential scholars, nonreligion could not be included under the umbrella of the protection of religious freedom (article 19), and its constitutional protection was merely offered by article 21 (freedom of expression). Case law shows the prevalence of this approach. In 1948 a court entrusted child custody to the “very religious mother” rather than to the father, who was referred to as “a perfect Atheist”. Although the infamous decision was reformed in 1950, courts continued to adopt a skeptical approach toward Atheists in cases concerning child custody.¹¹ Other cases concerned nonreligious witnesses who

¹¹ The Court of Appeals of Bologna reformed the ruling of the lower court stating that Atheism was an “irrevocable conquest of our Fathers” and that the lower court exceeded its jurisdiction.

refused to swear during trials as the oath (“under God”), claiming a violation of their conscience. They were subject to criminal sanctions because of their refusal. Furthermore, we cannot forget two preliminary orders of the court of Rovigo in 1952 (where the court considered as “relevant” the father’s Atheism in a case of child custody) and the milestone case of two cohabitant partners of Prato (Bottoni and Cianitto 2022:48-69).¹²

The courts, however, played a key role in the evolution of the Italian legal approach to nonreligion. Indeed, this conservative approach was fully reversed in 1979, when the Constitutional Court held that “the prevailing opinion includes freedom of conscience of nonreligious individuals within the broad protection of religious freedom guaranteed by article 19 of the Constitution”.¹³ Aligning with the ECtHR’s approach, the Constitutional Court held that the provision of the Criminal Code to require the oath on God infringed the constitutional text and found that not only did Atheism find constitutional coverage under article 21 (freedom of expression) but also under article 19 (freedom of religion). Such a judicial turn was the outcome of the troubled Italian evolution toward a full social, legal and political secularization, which resulted in a growing decline of Catholic influence on public policies. The new judicial approach mirrored important legislative changes (introduction of divorce in 1970, regulation of abortion in 1978) showing the increasing weakening of Catholic impact on democratic processes.¹⁴

5. Transition from the protection of the individual Atheist to its collective dimension

There remain many aspects of nonreligion which still do not receive full protection. In particular, the Italian legal system problematized the transition from the protection of an individual dimension to a corporate dimension of Atheism, emphasizing a disparate protection of religion and nonreligion.

A key question is, which communities can enjoy “religious” status, which, in the Italian constitutional framework (as occurs in many other European and extra-European legal systems) is a distinctive and special legal qualification which cannot be “assimilated” to other associative entities (Movsesian 2023:567). Such a status results in a more favorable regime (i.e. tax-exemptions, access to indirect public funding) compared to that of secular entities, giving rise to the state need

¹² In 1958, a bishop was condemned for defamation, as he defined as “public sinners” two partners who celebrated a civil marriage without a religious ceremony in a parish journal. Court of Florence, 1 March 1958. However, the Bishop was acquitted by the Court of Appeal of Florence on 25 October 1958.

¹³ Constitutional Court. no. 117, 10 October 1979. Available at: <https://giurcost.org/decisioni/1979/0117s-79.html>.

¹⁴ As a further example, only in 1975 did law no. 354 eliminate the predominant role of the Catholic religion in prisons as a source of rehabilitation. Available at: <https://bit.ly/470Bmpu>.

to monitor and limit the range of legal actors enjoying it. There is little doubt that a legal system is not equipped to give a legal definition of religion. On this point, academics have been far from reaching a shared approach, and provisions relating to the issue are narrowly tailored to regulate specific legal areas (Pacillo 2007:69).¹⁵ The only significant step ahead is that the Italian legal system has gradually abandoned the approach focused on theo-centrism (i.e. it stipulated an agreement with the Buddhist community).

Given the legislative reluctance to provide a legal definition of “religious denomination”, courts were left with the task of assessing the religious nature of ‘new’ faith communities and they have challenged the boundaries of various approaches. What weight has to be given to a self-referential approach? How can a fair balance be achieved between the importance given to spiritual elements and that of material elements? Indeed, courts have navigated the double risk of an excessively trustful approach and of a “structural skepticism” (Torfs 1999:37). They have faced the issue with specific regard to the case of new movements whose religious status has been the object of fierce debate (i.e. Scientology) (Carobene 2014:1 ff.). Judicial boards have struggled to find a fair balance between the double risk of a blanket and deregulated self-referential approach, and excessive administrative discretion, trying to avoid interference in church matters, which are not within a secular court’s province (Madera 2019:331). So, they have set some basic standards (public acknowledgement, bylaws, common view) (Pacillo 2007:66-69). In any case, they have established a point of no return; a group can be qualified as religious regardless of the circumstance of the enjoyment of an agreement with the state (Madera 2018:568).

6. Lack of an updated law regulating individual and collective religious freedom

An unresolved issue of the Italian legal framework is the lack of an updated law regulating individual and collective religious freedom, which should guarantee a basic level of protection to multiple religious, philosophical and ethical sets of values (Berlingò 2014:1-23). As such a basic law is lacking, new religious communities increasingly claim their right to an agreement with the State, with a view to enjoying a basic level of protection of religious freedom. Furthermore, the hesitancy of the lawmaker to enforce a law providing a basic level of protection

¹⁵ Regarding legislative attempts to define religion, we can refer to the Legislative Decree no. 251 of 2007, art. 8, which developed a broad definition of religion incorporating the “theistic, non-theistic and atheistic” beliefs, as well as the “participation in or abstaining from, rituals of worship celebrated in private or in public, both individually and in community, other religious acts or professions of faith, as well as forms of personal or social behavior based on a religious belief or prescribed by it”; however, this definition has a limited scope: the identification of those who can qualify for refugee status. Such an approach aligns with that adopted in the Recommendation of the European Parliament of 13 June 2013, concerning the promotion and protection of freedom of religion and opinion.

to religious freedom has resulted in a paradoxical alteration of the nature and the scope of church-state agreements (Domianello 2022:611-620). They regulate matters which should be under the jurisdiction of the lawmaker, and they are increasingly considered by faith communities as the only source available to have a legal response to their needs and the only legal protection available against discrimination (Colaiani 2014:15; Madera 2019:340).

Such a defective legal framework has crystallized the regime of religious denominations which are placed in a kind of hierarchical structure. The Catholic Church has been traditionally given preferential treatment. Article 7 of the Constitution establishes that the State and the Catholic Church are independent and sovereign, each within its own ambit of jurisdiction, with a view to acknowledging an international dimension of the Catholic Church. Its relationships with the State are ruled through agreements. Amendments of the agreements, when bilaterally negotiated, do not require a procedure of constitutional revision. Currently, such a relationship is regulated through the 1984 Agreements. A similar treatment has been extended to religious groups which signed an *intesa* with the State. The legal treatment of other religious minorities is provided by law (law no. 1159/1929). Under such an updated law, religious minorities struggle to enjoy places of worship (as the issue is entrusted to controversial regional laws), the recognition of the status of their religious ministers is recognized through a cumbersome procedure and they have no access to indirect public funding. The fact that such a law is still in force and provides a legal regulation of “admitted cults” mirrors legislative reluctance to deal with an increasingly pluralistic society. Furthermore, if faith communities do not have the requirements to enjoy the ‘institutional recognition’ provided by the above-mentioned law, they are subject to the civil law regime (Pacillo 2007:69).

In such a hierarchical system, the key question is: what is the status of Atheism? As a matter of fact, in the Italian context, the collective dimension of “freedom of religion” without an agreement seems a right emptied of its substance. Such a situation gives rise to a further issue: is there a ‘right’ for religious communities to an agreement with the State? Can the Italian state freely choose certain religious partners, excluding others? (Ruggeri 2016:9).

7. Nonreligion’s claim for an agreement

Alicino emphasized that over time Atheism “has moved from a purely individual dimension to a rampant militant activism with a view to promoting a new interpretation of the constitutional text” (Alicino 2021:29), consistent with emerging social expectations for a full equalization of the legal treatment of religious and nonreligious communities.

For this reason, the Union of Italian Atheists and Agnostics (UAAR)¹⁶ has raised a challenge to obtain an agreement with the State, which is the only effective legal tool to participate in a complex system of indirect state funding and enjoy a reasonable adjustment of generally applicable provisions in compliance with religious obligations. Indeed, for many years, Atheist judicial mobilization has emerged as a strategy aimed at challenging the government's choices, which opposed giving Atheism a legal treatment comparable to that of religious communities. Italian courts adopted divergent approaches to the assimilation of Atheism to religion and focused on a crucial argument: is the government free to select its religious partners or should its decisions be subject to judicial review? The Administrative Court of Lazio found that the challenge raised by the UAAR, against the decision of the Presidency of the Council of Ministers, was not acceptable, and held that religion needs to be: "a fact of faith addressed to a divine entity, lived in common between several people, who make it manifest in society through its own particular institutional structure".¹⁷ So, the administrative court adopted a restrictive turn compared with earlier case law of the upper courts¹⁸ which was reformed by the Council of State¹⁹ (Madera 2019:335-338).

As the President of the Council of Ministers appealed to the Civil Court of Cassation, the Civil Court of Cassation held that the decision of the government to deny religious status to Atheism should be subject to judicial review, in order to prevent a government from exercising absolute discretion, which could give rise to discrimination. Furthermore, a government's assessment on the nature of Atheism would be an undue exercise of technical discretion, as the boundaries of the spaces of political discretion are set by constitutional and legal principles. According to the Court of Cassation, not only should the government not be recognized as exercising blanket discretion in its decision to start negotiations with religious groups

16 The UAAR self-defines as the "Union of Rationalist Atheists and Agnostics, is a social promotion association that represents the reasons of atheist and agnostic citizens and defends the secularity of the State. It promotes a secular view of the world and is completely independent of parties". Available at: <https://www.uaar.it/>.

17 In 2008, the UAAR filed a lawsuit and asked the Administrative Court of Lazio to reverse a decision of the Council of Ministers, which refused to start negotiations with the Union, as Atheism could not be considered as a religion. The Administrative Court of Lazio affirmed its lack of jurisdiction on the issue, as the decision of the Council of Ministers was a political act (Administrative Court of Lazio, no. 12539/2008).

18 Criminal Court of Cassation, Sixth Section, 22 October 1997, no. 1329, *Quad. Dir. Pol. Eccl.*, no. 3 (1998), 836 ff.

19 Council of State, Fourth Section, 18 November 2011, no. 6083, 135 *Foro It.* (2012), 635-63. The Council of State Fourth Section reformed the administrative judgment decision of the Council of Ministers, which cannot be considered as a political act, as in this way it would be immunized from judicial second-guessing. Otherwise, the government would enjoy uncontrolled discretion and could introduce discriminations among religious groups. Moreover, an assessment of the religious nature of a group is a pre-requisite to have access to an agreement. According to the Court, there are two conflicting interests concerned: the interest of the association to ask for an agreement and the state interest to limit the religious actors who can enjoy religious status. So, judicial review is necessary to supervise the government's action and the government has a duty to start negotiations with a religious community, even though it finally retains the discretionary power to decline to enter into an agreement.

but also that the reluctance of the government cannot be justified by the difficulty to provide a legal definition of religion.²⁰ If significant legal effects come from the legal status of religion, the lawmaker should be charged with the task of identifying clear standards, in order to avoid an arbitrary recognition or denial of the advantages coming from the enjoyment of the status (Madera 2018:161).

Finally, the Constitutional Court held that Atheism has no right to enter into an agreement with the State, as the government enjoys broad discretion to determine whether to start negotiations with an applicant group. In this way it upheld a political decision of rejection of the establishment of an agreement between the State and an Atheist organization.²¹

8. The limits of the Constitutional Court's judgment

Such a judgment shows a short-sighted view of the principle of religious pluralism grounded on article 8§1 of the Constitution, which should imply equal freedom of all religious denominations. In its reasoning, the Constitutional Court extended the range of political acts, which are immunized from judicial review. However, the recognition of the government of an uncontrolled power to identify and select religious actors with a view to opening negotiations has a devastating impact on religious pluralism, as it results in undermining their equal protection under the constitutional text. On this point, Casuscelli underlined that our constitutional framework risks a threatening transition from the idea of an “open pluralism” to a pluralism whose limits are defined by the government and the political parties supporting it (Casuscelli 2018:29).

Furthermore, it shows a shortsighted approach to the method of bilateralism. In this view, bilateralism is completely dissociated from article 19, which covers a broad range of faith-based entities. Indeed, if the decision to open negotiations has a political nature and is not subject to judicial second-guessing, the paradoxical result is that the government is given the privilege to “select its religious partners” (Ruggeri 2016:9; Madera 2019:339). So, the decision to open negotiations with a religious group will be subject to fluctuating political trends, giving rise to a high risk of discrimination of unwelcome faith communities (Ruggeri 2016:3). In this view, Alicino underlined that “the changing and unpredictable situation of international and national political relations” could have an impact on the government’s decisions (Alicino 2022:86).

Finally, the Constitutional Court argues that its decision will not have an impact on the legal treatment of Atheism as a religious organization in other settings. As

²⁰ Court of Cassation 28 June 2013, United Sections, no. 16305/2013. Available at: <https://bit.ly/48FY7jy>.

²¹ Constitutional Court no. 52, 27 January 2016. Available at: <https://bit.ly/3F7PFfv>.

a matter of fact, the denial of an agreement could indeed result in further implications for the UAAR, as it could be denied further advantages connected with a religious status, given the defective legal framework on the issue, which does not guarantee effective alternative techniques to gain legal protection of its claims (Licastro 2016:1-34; Madera 2018:560).

The decision contradicts the earlier decision of the Court of Cassation which emphasized that the procedure pursuant to article 8§13 of the Constitution is currently the only legal defense faith communities can enjoy against disparate treatment (Colaiani 2014:15). Indeed, given the lack of a general law regulating religious freedom, at the moment the implementation of the principles of secularism and religious pluralism is “filtered” through the method of bilateralism” (Poggi 2016:10; Madera 2018:559). A full implementation of bilateralism should imply the legal definition objective and transparent standards religious actors have to comply with (Rossi 2014). As religious denominations should enjoy an equal treatment ex article 8§1, the enjoyment of an agreement cannot be changed into a privilege depending on the government’s mere discretion (Pin 2016:7).

9. The issue of Atheism in the framework of the politicization of religion

Such a “narrative of exclusion” of minorities (Beaman et al. 2018:44) mirrors the rise of an increasingly conservative approach to religious freedom (Casuscelli 2017:1-26). Indeed, the judicial outcome providing an inadequate or even improper implementation of religious pluralism falls within a broader trend toward a politicization of religious freedom, to the detriment of minorities. Such a politicization has taken advantage of various factors which has altered the Italian religious landscape and has favored the rise of a conservative approach to religion: 1) an increasing cultural and religious “deep diversity” (Alidadi-Foblets 2012:389), perceived as a threat for democratic values and generating a “religious gap” (Cesari 2023); 2) the rise of international terrorism, which has exacerbated an “alarmed” state reaction (Ferrari 2016:10-11) resulting in the securitization of religious freedom, making it increasingly entangled with public safety;²² 3) the increase of immigration, which during the last 20 years various political forc-

22 In Italy, the lack of an updated law on religious freedom has facilitated the enforcement of regional laws, in contradiction with the constitutional principle of religious pluralism. As an example, some regions, in an attempt to protect safety and public order, have adopted town-planning regulations which have seriously limited the religious exercise of religious minorities, emphasizing the pre-existent disparate treatment among faith communities (i.e. their right to enjoy places of worship). So, the Constitutional Court has had to find a difficult balance between religious freedom and the legitimacy of its restrictions and has held that such a fundamental freedom cannot be restricted for a mere need of state control. (Marchei 2020:65). The Constitutional Court (no. 254, 20 November 2019. Available at: <https://bit.ly/3tqAhbi>) found that the Regions exceeded their jurisdiction, as they introduced restrictions to the access to places of worship which were disproportionate and not necessary to the public interest pursued, and unduly restricted a fundamental aspect of religious freedom.

es (right and left wing populist parties, such as the League and the M5S) have used as a common ground to enhance a xenophobic approach toward Islam, the “securitization” of the immigration issue, a restrictive view of citizenship, and strict immigration policies (Caiani 2019). This connection between immigration, terrorism and Islam has been emphasized, thus promoting an exclusive view of “the people” (Caiani 2019). So, the rise of new populist parties, such as new right-wing and left-wing “populist identities” has provoked a “silent revolution”, where the increasing distrust of the Italian democratic system and the financial crisis (which emphasized the “crisis of social solidarity”) have played a significant role (Caiani 2019; Casuscelli 2018:10). Indeed, the increasing financial crisis has weakened the pattern of the welfare state, and has made it more difficult to accommodate the basic religious needs of faith minorities, emphasizing bias and prejudices against Muslim immigrants and giving rise to a key issue: can the exercise of fundamental rights be conditioned by financial sustainability?²³ (Casuscelli 2017:1-26).

Religious politicization has enhanced the public role of religion, underlining the historical element which unduly favors mainstream religions and has an exclusive impact on nontraditional idiosyncratic groups, as the social-political environment is not permeated with their values, ideas and practices.

Moreover, in order to gain majoritarian consent, populist parties have enhanced the need for protection of a Catholic national identity, to the detriment of “the other”, which implied a revitalization of Catholic privilege and intolerance of religious minorities. This approach has emphasized symbolic borders between “us” and “them” (Forlenza and Turner 2019:6-7) and the rhetoric of a common “Christian heritage” (Forlenza and Turner 2019:8; Ferlan and Ventura 2021:665-680).

Indeed, a conservative approach has been judicially adopted whenever the public visibility of the Catholic religion is concerned, giving priority to the historical element as a filter to assess the acceptability of religious displays in public space. Such an approach has had an exclusive impact on minorities which have struggled to demonstrate that they were offended by such an exposure.

In various legal contexts, Atheist claims have very often challenged religious displays and practices in public settings, with a view to promoting a neutralization of public spaces through the removal of religious symbolism and “prayer policies” (Beaman 2014:39). Such challenges have given rise to conservative judicial responses. Indeed, such challenges show the difficulty of Western democracies to move

23 On this point populist parties have claimed for a need to give priority to the Italian people (i.e. the slogan “prima gli Italiani”), opposing the idea of welfare programs including non-citizens. Indeed, such a view would be in contradiction with the constitutional framework, as a positive view of religious freedom should imply fair access to resources and services which are necessary to guarantee full implementation of fundamental rights.

away from “Christian cosmologies” and “imagine alternatives” (Beaman 2014:41). Scholars have underlined that in mirroring such a difficulty, courts have re-built Christian religion as giving rise to “universal values” permeating the human condition, whose religious meaning has a mere accidental relevance (Sullivan 2009:2-11; Beaman 2014:41). An emblematic case was the war of crucifixes which culminated before the ECtHR (the *Lautsi* case).²⁴ Where the mandatory display of the crucifix in classrooms was challenged, the Administrative Court held:

In the current social reality, the crucifix must be considered not only as a symbol of historical and cultural evolution, and therefore of the identity of our people, but also as a symbol of a system of values of freedom, equality, human dignity and tolerance religious and therefore also of the secular nature of the State, these principles which innervate our Constitutional Charter.²⁵

The question of whether freedom of religion implies also a right to be free from the display of religious symbols in the public spaces is far from being settled. A recent decision of the Court of Cassation revitalized the issue of the consistency of the display of the crucifix in the classroom with freedom of conscience and religion of students, analyzing it through an antidiscrimination lens.²⁶ Indeed, the Court of Cassation followed a controversial reasoning to justify the preservation of an outdated legal framework (art. 118 del r.d. 30 April 1924, n. 965) concerning the display of the crucifix and predating the enforcement of the constitutional text. Although the clash between a compulsory display of the crucifix and the values of religious freedom and secularism has been acknowledged, the court held that the educational community can freely take a decision to maintain such a display through an assessment respecting multiple beliefs and convictions of the educational community (Toscano 2011:57).

The Court searched for a compromise that would take into account multiple opinions and convictions taking advantage of the common law doctrine of “reasonable accommodation”. This doctrine implies providing an adjustment of generally applicable provisions with a view to mitigating their impact on minorities, through a legal framework which regulates the scope and the limits of the application of ac-

²⁴ *Lautsi v. Italy* (app. no. 30814/06), 18 March 2011.

²⁵ Administrative Court of Lazio, Third Section, 12-22 March 2005, no. 1110.

²⁶ Civil Cassation, 9 September 2021, no. 24414/2021. The case involved a secondary school teacher who removed the crucifix on the wall of a classroom during his lessons, against the directives of his dean, because it violated his convictions. As he was subject to a disciplinary action, he claimed indirect discrimination. The Court held that the display did not result in indirect discrimination as it does not imply a religious nexus between teaching and Christian value; so the discomfort the teacher experienced was not sufficient to give rise to a disadvantaged situation.

commodation, and which sets the standards to assess its reasonableness. Here, the idea of reasonable accommodation is subject to a paradoxical change into an additional argument justifying the preservation of majoritarian symbolism. Indeed, the doctrine of reasonable accommodation is paradoxically adopted in conjunction with the reiteration of the idea of the double meaning of the crucifix, which is not only a religious symbol but also an expression of the Italian cultural heritage history and tradition. In the judicial discourse the boundary between religion and culture, religion and “civic feelings” is increasingly blurred, to the detriment of religious minorities and freedom of nonreligion (Pasquali Cerioli 2020:50). In this way, the historical-cultural argument acts as a filter impacting on symbolism and messages whose display is considered acceptable in a public space. Minorities are perceived as ‘intolerant’ voices in such a narrative (Beaman 2014:44). Furthermore, majority views are enhanced through the logics of accommodation, resulting in paradoxical outcome: mainstream religion tyrannically “speaking” both “as a majority” and “as a minority” (NeJaime and Siegel 2015:1216). Given the lack of legal regulation, reasonable accommodation will hardly become a tool to govern the conflict between various identities. Indeed, there is no public authority playing a “role of mediation” and counterbalancing the “inequality of bargaining powers” (Toscano 2011:42). Furthermore, reasonable accommodation should imply the search for a balance between clashing interests of private parties with a view to negotiating differences through mutual gains and sacrifices (Cartabia 2018:677). Instead, entrusting to parties’ negotiation the principle of state neutrality seems more controversial (Toscano 2011:1-45).

The key question is whether and to what extent public visibility is equally guaranteed to less traditional sets of values which give rise to more “alarmed” social reactions (Ferrari 2016:10-11). If it were not, a disparate treatment which is not justified though an objective and reasonable reason would give rise to discrimination. The milestone 1979 ruling should have represented a complete change of paradigm, granting equal status to religion and nonreligion. However, the abandonment of a contextual approach to the constitutional text, which endorses positive religion (Pasquali Cerioli 2020:51) has recently been the object of seven years’ fierce litigation. In 2020 the Italian Court of Cassation had to reiterate that a right to self-promotion has to be given to religious convictions and atheist convictions are on an equal footing in public space.²⁷

27 Appeal Court of Rome, no. 1869 2018, reversed by Civil Cassation, Court of Cassation, decree no. 7893, 17 April 2020. Such a decision reversed an earlier judgment of the Court of Appeals of Rome. The case concerned the legitimacy of an Atheist campaign on buses, using the slogan “10 million Italians live very well without G.” (which stays for God). According to the Court of Appeals, the right to manifest Atheist convictions cannot offend religious beliefs. Moreover, the principle of “laicità” does not imply indifference toward religion, but rather promotion of religious freedom.

10. The inconsistency of the Italian approach to Atheism with European standards

Although the Constitutional Court decision no. 52/2016 relied on standards identified by earlier case law (insufficiency of a mere self-referential approach, reliance on earlier recognitions, statutes and common consideration) and on standards used in juridical experience to distinguish religious denominations from other social organizations, it finally adopted a deferential approach toward the government, giving little significance to European guidelines, which are moving toward an equalization between religious and nonreligious deeply held convictions, if they are provided with the standards of seriousness, coherence, cogency and importance. The approach of the Constitutional Court emphasized a “gap of protection” of nonreligion in its collective dimension (Baldassarre 2020:138) in contradiction with that of the ECtHR.

In earlier case law, the ECtHR accorded a broad margin of appreciation to states where church-state relations are concerned. In this view, it found that “the conclusion of agreements between the State and a particular religious community establishing a special regime in favour of the latter, does not, in principle, contravene the requirements of Articles 9 and 14 of the Convention”.²⁸ However, the court draws a line when the principle of non-discrimination is violated. In various decisions it has emphasized that where a State provides various faith communities with a multi-level system of protection and offers “additional rights to some religious communities,” such a regime will be subject to rigorous ECtHR scrutiny under article 9, in conjunction with article 14 ECHR. A judicial analysis grounded in article 14 enhances the protection of the religious freedom of minorities as it adjudicates domestic models of church-state relations through the lens of the standard of nondiscrimination. Although States can adopt different ways of managing religious pluralism, even implying differences in treatment among religious groups, the ECtHR will scrutinize whether such differences in treatment have an objective and reasonable justification, whether they pursue a legitimate aim and whether they are proportionate to the aim pursued, in order to prevent differences between the various groups relating to the enjoyment of material advantages which give rise to unjustified discrimination²⁹ (Toscano 2008:1-29).

States have a basic duty to be neutral organizers of religious pluralism. If a preferential status is given to certain religious groups, other religious communities

²⁸ ECtHR, First Section, 9 December 2010 (app. no. 7798/08), *Savez Crkava v. Croatia*.

²⁹ ECtHR, First Section, 12 March 2009 (app. no. 42697/98), *Löffelmann v. Austria*; ECtHR, First Section, 31 July 2008 (app. no. 40825/98), *Religionsgemeinschaft der Zugen Jehovas et alii v. Austria*; ECtHR, First Section, 9 December 2010 (App. No. 7798/08), *Savez Crkava Riječ Života e altri v. Croatia*; ECtHR, Second Section, 8 April 2014, (app. nos. 70945/11, 23611/12, 26098/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12, 56851/12), *Magyar Keresztény Mennonita Egyház and Others v. Hungary*.

must be guaranteed an equal opportunity to have access to a comparable status on the basis of nondiscriminatory standards, in order to avoid preferential status resulting in odious religious privilege. On this point the court has taken into serious account that “the advantage obtained by religious societies is substantial and this special treatment undoubtedly facilitates a religious society’s pursuance of its religious aims.”³⁰ The nondiscrimination standard might extend the protection guaranteed by article 9 to nonreligious actors, as it avoids the debate about the definition of the notion of religion, removing it from the equation, and allows the court to focus on the actual interests concerned; it allows equal treatment to be guaranteed to both religious and secular sets of beliefs, without the need for an undue expansion of the traditional paradigm of religion (Movsesian 2014:1-16). In this way, the problematic issue of the definition of the boundaries on religion is side-stepped, and the principle of non-discrimination allows the obstacles which prevent the extension of religious protection beyond the boundaries of the traditional notion of religion to be removed, with a view to affording equal treatment to other comparable sets of values. Such an approach would imply a revisitation of the idea of religious neutrality to meet new conscientious claims and prevent every form of discrimination among various faiths, beliefs and convictions (Colombo 2020:49).

Furthermore, we cannot underestimate that article 17 TFEU, according to which although the Union “respects the status enjoyed, by virtue of national law, by philosophical and non-confessional organizations,” encourages the recognition of their “identity and specific contribution” and also the preservation of “a dialogue open, transparent and regular” with these organizations (Croce 2014:2182). Following this perspective, various European States have equalized the treatment of religious and philosophical organizations (Belgium), entered into agreements with Atheist organizations (Germany), and granted them access to public funding (Netherlands, Belgium) (Baldassarre 2020:78). In the near future the right of the UAAR to have access to an agreement with the State will be adjudicated by the ECtHR through the human rights lens. The key issue is whether and to what extent the ECtHR will accord a margin of appreciation to the Italian model of secularism.

11. The problematic implementation of the principle of non-discrimination in Italy

The Italian Court of Cassation has recently adopted a promising new approach, as it gives weight to “indirect discrimination”, where a public agency provides a

³⁰ ECtHR, First Section, 31 July 2008 (app. no. 40825/98), *Religionsgemeinschaft der Zugen Jehovas et alii v. Austria*.

nonbeliever with a disparate treatment, compared to members of mainstream religions. In this way, it aligns with recent approaches of the CJEU (Berlingò and Casuscelli 2020:280).

Full implementation of the principle of nondiscrimination is, however, hindered by the hesitancy of democratic processes to take up the task of managing religious diversity, to the detriment of minorities. The lack of an updated law granting basic protection to all convictions and beliefs and preventing generally applicable laws from generating a discriminatory impact on religious minorities, gives rise to an overexpansion of claims for agreements between single religious denominations and the state (Colaianni 2013:15). This perpetuates a regime of privileges and side-steps key issues concerning basic religious freedom (religious education in public schools, religious symbols, religious marriage, places of worship) (Consorti and Fiorita 2016). Other European legal systems have enforced a system of registration with a view to providing religious organizations with a specific status and regime (Ervas 2017:869-893). In this way an organization's access to religious status and its related regime is connected with compliance with clear standards, with a view to preventing uncontrolled political discretion (Casuscelli 2018:27). Courts can adopt a more interventionist approach where they are charged with the task of assessing whether the implementation of a detailed legal framework has given rise to a disparate treatment of similarly situated groups. Given the lack of an updated law regulating religious freedom, the Italian Constitutional Court adopted a more deferential approach toward the government in 2016. Judicial scrutiny suffered from the legislative failure to provide a comparator to adjudicate whether there are objective and clear reasons which justify the lack of uniform treatment of comparable communities. So, notwithstanding that the Court of Cassation has upheld the equality of all convictions without discrimination, the achievement of neutral treatment is far from being reached.

The key question is whether the new government will adopt a progressive approach and promote the enforcement of a new updated legal regulation of religious freedom. Currently a right-wing party, influenced by a populist ideology has gained the majority political consent. So, there is a significant risk that the increasing politicization of religion, which was the core of the ruling no. 52 of 2016, (Pasquali Cerioli 2021:182) will be affected by an even more conservative rhetoric. Currently, the narrative emphasizing the nexus between history, culture and religion has resulted in regressive religious privileges of mainstream religions to the detriment of groups less rooted in a given social-political scenario.

12. The future for religious protection in Italy: an unresolved issue

So, at the moment, the following questions are still open: what is the future for religious protection in Italy? Should religious protection occur *ex ante* or *ex post*

(“political law” v. “judicial law” (Ruggeri 2013:27)?) Who should the recipients of religious protection be? Is there still space for an intervention of the lawmaker on the issue or should the content of the agreements be “extended” to all religious groups, providing a sort of new “ordinary law”? (Alicino 2022:71-92) We cannot underestimate that during the COVID-19 pandemic the Presidency of the Council of Ministers entered into a series of protocols with various faith communities, in order to define the resumption of the places of worship. Although the protocols have an administrative nature (Casuscelli 2021:15), the negotiation of the protocols demonstrates a promising state attempt to pursue the path of cooperation with religious actors, which is the result of a fruitful dialogue developing between public and religious actors, promoted with the effective support of an academic group (DIRESOM 2020). That such cooperation was extended to faith communities that did not have an *intesa* with the State during the pandemic is significant, and shows the increasing urge to go beyond the constraints imposed by a “vertical” bilateralism with a view to setting up a forum open to multiple views and convictions (Lo Giacco 2020:109; Consorti 2020:11).

Enforcing a general updated law aimed at protecting the freedom of thought and religion of all religious groups (including philosophical organizations) represents a preliminary and essential requirement for the regulation of equal freedom for all convictions and beliefs, with a view to preventing a deregulated proliferation of church-state agreements with an uncontrolled number of new “religious” actors. The lack of full implementation of constitutional religious pluralism, inclusive of nonreligious and unconventional beliefs, cannot be permanently ignored, if not at the price of undermining the “quality” of a democratic system (Naso 2023). A general law would give full implementation to the constitutional text and draw a basic legal framework aimed at regulating freedom of thought, conscience and religion, even in its collective dimension. Such a regulation should prevent disparate treatment of various religious, philosophical and ethical sets of values, and guarantee basic freedom of organization and action to them, introducing basic standards and procedures which organizations have to comply with, in order to enjoy the “religious” status and the advantages associated with it (Ferrari 2019:57-102). Although a secular system is not equipped to define religion, it should provide clear standards that groups must comply with so as to gain access to such a preferential status (Rossi 2014). In my view, although democratic processes are the most appropriate forum where cultural and religious differences can be negotiated, they should incorporate the opening of “channels of communication” (Martínez-Torrón 2020:30-32) with all social actors involved, with a view to promoting a constructive dialogue with all components of civil society who are a significant part

of the Italian cultural and social landscape and guaranteeing the inclusion of multiple views, convictions and beliefs (Madera 2018:572).

13. Concluding remarks

In modern democratic societies the approach to Atheist claims mirrors the inadequacies of their ways to implement effective pluralism. Such claims have a significant role in dismantling a narrative of religious privileges with a view to adopting a more progressive approach to religious pluralism, and an alternative interpretation of the constitutional text, respecting new social expectations. In Italy, the legal protection of Atheism is not consistent with the constitutional text. Furthermore, the judicial interpretation of the Charter has facilitated the implementation of an intolerant political approach towards unwelcome minorities, which has crystallized a regime of structural inequality in the long term. The key question is whether and to what extent a single interpretation of the Constitution which reduces the scope of religious pluralism, to the detriment of non-traditional and secular convictions, can be promoted. There is an increasing urge to provide new legal responses in order to prevent disparate treatment between religious organizations and philosophical-ethical sets of values and at the same time to satisfy new claims of inclusion and participation in civil society (Domianello 2022:611-620). Recent judicial decisions are increasingly taking into account new social expectations, which urge the recognition of equal dignity to all conscientious claims based on deeply held beliefs and convictions (Court of Bologna, no. 2089/2019). However, the Italian legal system is at the crossroads between the strictness of bilateralism and the marginalization of the lawmaker who is hesitant to manage conflicting interests, to the detriment of minorities. Indeed, the Italian regulation has not completely implemented the constitutional system (namely, arts. 19-20 of the Constitution) and has not complied with European standards, which strongly urge for an elimination of disparate treatment between religion and secular-philosophical convictions, where such disparate treatment is not founded on reasonable and objective reasons.

Such a standard urges for the recognition of a comparable protection to religious, philosophical and ethical sets of values. In this way, new social actors are not required to equate themselves to religious entities. The cross-cutting standard of non-discrimination can facilitate religious and philosophical sets of values, allowing them to enjoy comparable treatment and equalization of legal protection. An interpretation of the principle of non-discrimination in conjunction with that of religious neutrality should lead Italian future legislative choices, in order to eradicate unequal treatment between mainstream religions and the conscience claims which cannot be strictly included within the paradigm of traditional faith.

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