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FREEDOM OF RELIGION IN THE EUROPEAN PUBLIC SPACE. REMARKS BASED ON THE LATEST CASE LAW OF SELECTED INTERNATIONAL AND NATIONAL COURTS CONCERNING RELIGIOUS SYMBOLS

Abstract

The author attempts to analyse selected rulings of the European courts concerning religious symbols in order to answer the question whether freedom of religion is still respected in Europe. The analysis is based on the reflection on the context of contemporary European cultural landscape: diversity of constitutional models of particular states, the concept of neutrality in the matter of religion, and the ability of contemporary political elites and judges to understand the sphere of the sacred (*sacrum*). The selection criteria for the rulings have been cases concerning objects related to practising religion: (i) the hijab – an Islamic headscarf, (ii) the burqa – a garment covering practically the entire body, and (iii) the crucifix hung on a classroom wall. The review brings up important questions about lack of tolerance, pluralism and acceptance of religious diversity in contemporary Europe, and ‘reasonable accommodation’ as a possible solution.

KEYWORDS

freedom of religion, tolerance, CJEU, ECtHR, crucifix, hijab, burqa

SŁOWA KLUCZOWE

wolność religii, tolerancja, TSUE, ETPCz, krzyż, hidżab, burka

1. INTRODUCTION

Much is being said about tolerance and inclusivity in contemporary Europe. The very motto of the European Union is 'United in diversity'.¹ Combating discrimination is one of the priorities of the European Union and also of the Council of Europe. The European Parliament often adopts resolutions aimed at combating inequalities and promoting freedom.² So why are European Catholics feeling increasingly discriminated against? Why in the European Union can an employer restrict an observant Jew or Muslim from freely expressing his or her faith in the workplace? We are witnessing a kind of paradox in which the promotion of tolerance and respect for diversity displaces religion not only from the public space, but also, which is even more disturbing, from the private sphere.

Reflection on the actions of the particular Member States and the case law of European courts justifies an observation that the prohibition of discrimination based on sex, race or sexual orientation is treated in a different way (broadly) from the prohibition of discrimination based on religion (restrictively). It is almost impossible to think today that a private company operating in the EU could prohibit an employee from contacting customers on the basis of his race, gender or sexual orientation, and at the same time the Court of Justice of the European Union confirmed the possibility of prohibiting a Muslim worker appearing at work wearing a hijab, an Islamic headscarf.

In the last decades it has been the courts, not the legislature, that are the most important, if not the only, entities regulating freedom of religion. The legislature has found itself at an impasse. The history of the preamble to the Treaty establishing a Constitution for Europe (not ratified) can serve to best illustrate this. After the Convention on the Future of the European Union proposed a solemn reference to the 'culture of the ancient Greeks and Romans' and to the French Revolution, there were a few noteworthy demands to add a reference to its Christian heritage, which was omitted in the draft. However, this turned out to be impossible. The only thing agreed was a reference to Europe's cultural, religious and humanistic

¹ https://european-union.europa.eu/principles-countries-history/symbols/eu-motto_en (accessed 02.11.2022).

² Instead of many: European Parliament resolution of 11 March 2021 on the declaration of the EU as an LGBTIQ Freedom Zone (2021/2557(RSP)), https://www.europarl.europa.eu/doceo/document/TA-9-2021-0089_EN.html (accessed 02.11.2022).

heritage.³ On the other hand, although legislature often affects the freedom of religion, it does so somewhat incidentally, e.g. in the case of a ban on slaughtering animals without stunning,⁴ or a ban on covering one's face in public space.⁵

The courts, in accordance with the procedure, are obliged to consider cases that are brought before them. They have to settle issues that politicians prefer to avoid. This is a great challenge and responsibility. At the same time, in the reality of contemporary democracy shaped by the media and polls, it is a chance to reach decisions not motivated by particular or temporary political interests.

In this paper an attempt is made to analyse selected rulings of the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR) and the Italian Supreme Court concerning religious symbols, and to answer the question whether freedom of religion is still respected in Europe.

2. CONTEMPORARY POLITICAL AND LEGAL BACKGROUND

The analysis of case law should be preceded by a reflection on the context of case resolution in contemporary Europe. To illustrate this context, I have chosen

³ See more broadly in J. H. H. Weiler, *Chrześcijańska Europa. Konstytucyjny imperializm czy wielokulturowość?* Poznań: W drodze 2003, p. 47 et seq.

⁴ See Belgian decree of 7 July 2017 amending the Law of 14 August 1986 on the protection and welfare of animals, regarding permitted methods of slaughtering animals, Belgisch Staatsblad, 18 July 2017, p. 73318. The CJEU (Grand Chamber) in its judgment of 17 December 2020 in the case C-336/19, which should be discussed in a separate paper, ruled that EU law does not preclude legislation of a Member State which requires, in the context of ritual slaughter, a reversible stunning procedure which cannot result in the animal's death. In the reasons for the judgment it was pointed out that scientific arguments make it possible to refute doubts of a religious matter, which seems to be a far-reaching statement: 'As regards, lastly, whether the interference with the freedom to manifest religion resulting from the decree at issue in the main proceedings is proportionate, first, as is apparent from the preparatory documents for that decree, as cited in paragraph 13 above, the Flemish legislature relied on scientific research which demonstrated that the fear that stunning would adversely affect bleeding out is unfounded. In addition, those same preparatory documents show that electronarcosis is a non-lethal, reversible method of stunning, with the result that if the animal's throat is cut immediately after stunning, its death will be solely due to bleeding.' (para. 75 of the judgment). The ruling was strongly criticized by J. Faull and J. H. H. Weiler for violation of the autonomy of religious law: 'Not only did they compromise, without the courage to say so, substantive freedom of religion, they also compromised a no less important institutional religious dimension, by encroaching on the exclusive autonomy of religious authorities to decide on their own religious matters.' (*EU Judges Have 'Koshered a Pig' in Order to Allow Shechitah Ban*, 'The Jewish Chronicle', 16 June 2022, <https://www.thejc.com/lets-talk/all/eu-judges-have-koshered-a-pig-in-order-to-allow-shechitah-ban-lWagcJQzfcXZjJMCiN3jc>, accessed 02.11.2022).

⁵ French law, Loi n° 2010-1192, of 11 October 2010 prohibiting concealment of one's face in public space, https://www.legifrance.gouv.fr/download/pdf?id=EEpKbOqpVKS_j-RgGEAkJZz-KY6oT0Ac8uyatwTORrks (accessed 02.11.2022).

three issues: the diversity of constitutional models of particular states, the concept of neutrality in the matter of religion, and the ability of contemporary political elites and judges to understand the sphere of the sacred (*sacrum*).

It is obvious that Europe consists of many states with different constitutional models, shaped by long-term state-forming processes, based on and reflecting different national identities. However, this constitutional diversity is important both for the identity of Europe itself and for the shape of the European Union. It is these differences, perpetuated over the centuries, that make the project of federalisation of the EU meet so much resistance; suffice it to mention the results of the referendum on the ratification of the Treaty establishing a Constitution for Europe in France (29 May 2005) and the Netherlands (1 June 2005), as well as Brexit.

The differences among various constitutional models are very important. They reflect the attitude of particular states to religion. Briefly, it can be pointed out that the French model assumes the secularity of the state, in which religion is an exclusively private matter; the state and the church are completely separated. Denmark and England, on the other hand, have a state religion, with the monarch being supreme head of the church. The Italian and Polish models provide for the impartiality of public authorities, which is related to the obligation of the authorities to ensure the freedom of expression of religious beliefs in public life – with the Italian constitution emphasizing the secular character of the state, and the Polish one taking into account (at least in the preamble) the sensitivity of both believers and non-believers.⁶

Such different approaches to the question of religion pose an extraordinary challenge to international courts. Settling the disputes concerning freedom of religion necessitates the search for universal solutions – the famous ‘Unity in diversity’ – because these solutions must be applied in all states, both in those that do not provide a place for a religion in the public space, as well as in those where religion is connected with statehood.

The second issue is the concept of ‘neutrality’ in the matters of religion. As mentioned above, France states already in the first article of its Constitution of 1958 that the French Republic is a secular state. Religion belongs exclusively to the private sphere, and the state and the church are completely separated. It is worth noting that the constitutional model, or more precisely its contemporary understanding,⁷ has dominated the present-day political debate and is usually (by default) indicated as a model solution – neutral in terms of worldview. However, it should be very strongly emphasized that the French model – contrary to the

⁶ A detailed comparative analysis of this issue was carried out by J. H. H. Weiler, 2003, *op. cit.*, p. 28 et seq.

⁷ The contemporary understanding of republican secularism and its historical evolution is discussed by E. Szczepankiewicz-Rudzka, *Zasada laickości V Republiki Francuskiej i jej implikacje prawno-polityczne*, ‘Politeja’ 2020, Vol. 17(1/64), pp. 73–88, <https://doi.org/10.12797/Politeja.17.2020.64.05> (accessed 02.11.2022).

mainstream opinion – is not neutral. Although it does not prefer any traditional religion, it addresses the worldview of non-believers and agnostics, significantly interfering with the sense of identity of believers. Christians, Muslims, Jews and others must, therefore, practice and express their religion within the private sphere, because in the public space religion should not be exposed. Thus, just as the French Republic shows generous tolerance towards non-religious people, so it is grossly intolerant of believers who wish to express their faith publicly.⁸

Therefore, the French model cannot be objectively called neutral. Identifying a secular state with a truly neutral state is therefore a mistake, which is commonly repeated. The secular state resembles a religious state, in which religion has been replaced by secularism, associated with the concept of ‘civil religion’ of Jean-Jacques Rousseau. The lack of tolerance towards people who do not profess the right faith, characteristic of the confessional state, has turned into the lack of tolerance towards people practicing or manifesting a traditional religion. This way, neutrality truly became a ‘civil religion’, which cannot be described as tolerant.

According to the principle of evaluation of deeds, not declarations, the myth of neutrality of the secular state can be refuted even using the example of how education is financed. France, in the name of neutrality, finances only secular schools. England, in the name of neutrality, finances both secular schools and Christian, Jewish and Muslim ones. Which state is more neutral? Certainly not the one that leaves parents wanting to provide their children with education in a religious school without due subsidies.

The third, perhaps the most important and the least obvious issue is the ability to understand the notion of the *sacrum*. European societies are becoming increasingly secular; believers and practitioners are a minority. Religion and religious education are being pushed out of the mainstream of modern culture. The phenomenon of secularization applies to judges. More and more of them do not practice any religion. More and more do not even have any in-depth knowledge of any religion, do not have any experience of faith, prayer and liturgy. Thus, they associate the concept of *the sacred* with the rule of law rather than with the spiritual sphere. Here the crucial question arises: Do the contemporary judges, without diminishing their knowledge and wisdom, have the necessary sensitivity which commands respect for the religious duties of believers, even if this faith is not shared? Or do they treat religion as if it were one of the lifestyles that is not very welcome in the modern, neutral environment? An Islamic headscarf may then seem a caprice or superstition, and a crucifix pendant may be seen as... exhibitionism. If religion is just a fantasy, a fairy tale for the naïve, or eccentricity, it cannot be taken seriously. It can be tolerated but only as long as it does not come into conflict with fundamental rights (and even other values). Then it must give

⁸ Similarly, L. Morawski, ‘Zjednoczeni w różnorodności’ – dwie wizje integracji europejskiej, (in:) C. Mik (ed.), *Konferencja – Unia Europejska: zjednoczeni w różnorodności*, Warszawa, 14–15 grudnia 2010 r., Warszawa: Wydawnictwo Sejmowe 2012, p. 43.

way to ‘true’ values, especially such important as economic freedom. Maybe this is the reason why the CJEU so easily recognizes the primacy of economic freedom over freedom of religion.⁹

A question must, therefore, be asked: Do contemporary European politicians and judges understand the meaning of freedom of religion? Do they have the sensitivity to give proper weight to religious demands? After all, they are in large part people who have already been brought up in a secularized culture, who do not have a deep experience of faith, and thus may not have any understanding of concepts such as holiness or sin.

It is worth remembering the above-mentioned circumstances and bear in mind the questions posed when reading the latest decisions of European courts on the freedom of religion.

3. OVERVIEW OF SELECTED EUROPEAN CASE LAW

Let us move on to the review of the rulings. I have chosen three objects related to practising religion that the rulings concern: (i) the hijab – an Islamic headscarf, (ii) the burqa – a garment covering practically the entire body, and (iii) the crucifix hung on a classroom wall. Although the first two are related to Islam, the rulings on the hijab can be directly translated into the Jewish headscarf or skullcap (kippah). Thus, the following review touches upon the three largest monotheistic religions.

3.1. ISLAMIC HEADSCARF IN THE WORKPLACE

The Grand Chamber of the CJEU in its judgment of 15 July 2021 in *WABE*¹⁰ held that an undertaking may prohibit employees from wearing any visible symbol of political, philosophical or religious beliefs in the workplace, provided that that prohibition is applied generally and an undifferentiated way.

However, a difference of treatment indirectly based on religion or belief, arising from an internal rule of an undertaking prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, may be justified by the employer’s desire to pursue a policy of political, philosophical and

⁹ On the lack of religious sensitivity and understanding of the judges, see J. H. H. Weiler, *Je Suis Achbita*, ‘European Journal of International Law’ 2017, Vol. 28(4), p. 989.

¹⁰ Joined Cases C-804/18 and C-341/19, *IX v WABE eV* and *MH Müller Handels GmbH v HJ*, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62018CJ0804&from=pl> (accessed 02.11.2022).

religious neutrality with regard to its customers or users. In this case, the court set out three conditions:

- the policy meets a genuine need on the part of the employer, which may be inter alia the legitimate wishes of the customers or users and the adverse consequences that that employer would suffer in the absence of that policy, given the nature of its activities and the context in which they are carried out;
- the difference of treatment is appropriate for the purpose of ensuring that the employer's policy of neutrality is properly applied, which entails that that policy is pursued in a consistent and systematic manner;
- the prohibition in question is limited to what is strictly necessary having regard to the actual scale and severity of the adverse consequences that the employer is seeking to avoid by adopting that prohibition.¹¹

The above quoted conditions seem to be very specific, yet seemingly rigorous, considering the key general clause: 'legitimate wishes of the customers or users'. And there is the rub. What exactly are the legitimate wishes of the customers or users? The answer, when it comes to religion, is difficult. It is much easier to state what illegitimate wishes of customers or users are as regards skin colour or nationality. We would all agree that it would be an illegitimate wish not to be served by a black person, by a Pole or by an Arab. But – and here is a tricky feature of religion as seen by the CJEU – it may be a legitimate wish not to be served by an Arab when she appears to be a Muslim wearing a hijab! The same applies to an observant Jew wearing a kippah or a Catholic wearing a cross pendant as outward signs of religious beliefs. This was confirmed in the famous G4S Secure Solutions judgment in *Achbita*.¹²

In 2017, in *Achbita*, the CJEU ruled that the employer's wish to adopt a policy of political, philosophical or religious neutrality in relations with its customers deserves protection as an expression of the freedom to conduct a business stipulated in Article 16 of the Charter of Fundamental Rights of the European Union, and thus prevails over the freedom of religion (right to manifest religion). However, to avoid indirect discrimination, the employer must demonstrate that its internal regulations are objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary. In this case, if the employer cannot offer the employee to perform his/her duties in a place where he/she will not have contact with customers, the employer may lawfully dismiss him/her.

¹¹ *Ibid.*

¹² C-157/15, *Samira Achbita v G4S Secure Solutions NV*, CJEU judgment of 14 March 2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62015CJ0157&from=PL> (accessed 02.11.2022).

In the reasons in *WABE* the conditions that must be met by the employer's internal regulations justifying political, philosophical or religious neutrality were extended and specified. It is clear that the employer needs to demonstrate that its internal policy corresponds to the real need to present a neutral image towards customers, and the prohibition must be limited to what is strictly necessary. At the same time, the facts of the case, as well as its historical context, seem to indicate the widening of the possibility of interference with the religious freedom of employees. Although the CJEU, in accordance with the nature of the preliminary ruling procedure, did not resolve the dispute between the employee and *WABE*, it nevertheless drew a wide margin in which an employer may interfere with the religious freedom of employees. In particular, strikingly, the Court did not describe and stress the importance of the principles of pluralism, tolerance and diversity as fundamental values of a democratic society but emphasized the importance of such issues as the 'legitimate wishes' of customers or users and the policy of neutrality derived from the freedom to conduct a business.

It worth noticing that the facts of the case referred to the 'legitimate wishes' of customers of the entrepreneur running a large number of child day-care centres in Germany. Parents, being the customers, wished that their children were educated by persons who do not express their religion or beliefs in order, in particular, to 'ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions'.¹³ Therefore, according to the employer, it was necessary to prohibit employees from wearing any outward religious symbols in the workplace. It is worth emphasizing that the case was not about imposing one's beliefs on children and parents by coercing them to participate in any religious practices. Unlawful was the very act to express one's religion, solely through elements of clothing or religious symbols.

It is also worth noting that the entrepreneur's internal rules indicated that it is 'non-denominational and expressly welcomes religious and cultural diversity.' Apparently, this 'welcoming' approach does not apply to employees. It needs to be stressed that, paradoxically, the acceptance of religious and cultural diversity among customers serves to justify the need for complete uniformity and neutrality of worldview (understood as irreligiosity) of the staff. While there is no doubt that the 'legitimate wish' of the parents may be a prohibition of imposing any religious practices or views on their children, in the light of the European Union values, in particular in the scope of 'Unity in diversity', the admissibility of a ban on wearing religious clothes or symbols should be questioned. This is especially evident in the facts of the case considered: if the day-care centre welcomes diversity among customers, it should be deemed legitimate to expect the staff not to impose any beliefs on children, in particular by coercing them to participate in

¹³ Joined Cases C-804/18 and C-341/19, *IX v WABE eV* and *MH Müller Handels GmbH v HJ*, CJEU judgment of 15 July 2021, para. 82.

any religious practices, but it is illegitimate to expect the staff to be irreligious. Again, it can be pointed out that a wish of being served by a person of a given skin colour or nationality would not be deemed lawful.

The above takes us back to the issue of the false conception of neutrality. Prohibition of any religious symbol is not neutral. It sends a message that religion is toxic and, if necessary, may be expressed only in one's private space, not in the workplace. In fact, it means that religion is out of the scope of 'Unity in diversity'.

Moreover, it is clear in the ruling that the Court was aware that there are certain rules regarding clothing based on religious precepts. This is the case of the kippah, required by Judaism, and – as was the subject of this case – the headscarf (hijab) prescribed by Islam. However, the CJEU only stated that the prohibition in question may cause 'particular inconvenience for such workers' but does not in principle introduce a difference in treatment.¹⁴ In order to emphasize the uniform application of the prohibition, the Court pointed out that the same employer required a Christian employee to remove the cross she wore, and she complied with this requirement.

However, the above analogy is not justified. Christianity, unlike Judaism or Islam, does not require lay believers to wear specific items of clothing. In other words, wearing a crucifix or a pendant can be an expression of one's religious views, but it is not the fulfilment of the precepts of religion. It is completely different in the case of the Jewish skullcap or the Islamic headscarf. Wearing them is indicative of practicing religion, and taking them off would be a violation of norms that religious people consider sacred. This important distinction means that an observant Muslim woman must break the rules of her religion if she wants to keep her job. As Professor Joseph Weiler put it: 'It is one thing to tell a vegetarian or vegan that they may not show up at work wearing a lapel button proclaiming their belief in animal rights but quite another to coerce them to eat meat.'¹⁵

Thus, we can note here a significant discrimination against people whose religion requires wearing specific, visible garments. In this regard, there is no requirement for Christians, non-believers or agnostics to betray the professed principles. However, the Court seemed not to understand the importance of freedom of religion, and moreover the specific role of clothing in Islam.

In 2013 the ECtHR ruled differently on the issue of the manifestation of religion in *Eweida*.¹⁶ In her dispute with the British Airways, Ms Eweida alleged violation of her freedom of religion by prohibiting her from wearing at work a cross in a way visible to customers. She claimed that it was her desire to bear witness to her faith by manifesting the cross. The airline, on the other hand, expected the

¹⁴ *Ibid.*, para. 32.

¹⁵ J. H. H. Weiler, 2017, *op. cit.*, p. 991.

¹⁶ *Eweida and Others v The United Kingdom*, Applications nos 48420/10, 59842/10, 51671/10 and 36516/10, ECtHR judgment of 15 January 2013, [https://hudoc.echr.coe.int/eng#{%22appno%22:\[%2248420/10%22\],%22itemid%22:\[%22001-115881%22\]}](https://hudoc.echr.coe.int/eng#{%22appno%22:[%2248420/10%22],%22itemid%22:[%22001-115881%22]}) (accessed 02.11.2022), cf. para. 94.

cross to be removed or hidden under the uniform. The Court acknowledged the primacy of the right to manifest one's beliefs. It pointed out that 'this is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others.' The Court considered it legitimate for the airline to seek building an appropriate image towards their customers, but national courts have given too much weight to this aspiration, and a discreet religious symbol could not harm such image.

It is worth emphasizing that it is difficult to imagine promoting tolerance and pluralism in matters of religion by removing religion from the public space and workplaces. It is rather the dialogue and implementing the *vivre ensemble*, 'living together', principle that allows accepting different views and respecting foreign customs. Noteworthy, a completely different approach to promoting tolerance and pluralism can be observed in the sphere of sexuality.

To sum up, it should be pointed out that the ECtHR judgment presents a significantly broader understanding of freedom of religion and gives it much greater weight than the discussed CJEU rulings. Unfortunately, the *Eweida* verdict was given eight years before the latter CJEU judgment, which is an expression of the unfortunate evolution of thought about freedom of religion – an evolution unfavourable for believers.

3.2. FACE COVERING – BURQA

The burqa is an opaque outer garment worn by a small number of Muslim women. It covers the head and face, and the full burqa covers the whole body. There is only a mesh panel in the eye area through which the wearer can see. Another garment that covers the face is the niqab, a veil wrapped around the head, leaving the forehead and eyes uncovered. The above should be distinguished from the hijab – a scarf that covers only the hair, ears and neck. In 2009, French President Nicholas Sarkozy said that burqas were not welcome in France. It was an announcement that introduced a ban on covering one's face in public space.

Europeans generally associate this piece of Muslim clothing with the enslavement of women: an unacceptable restriction of their basic rights, which cannot be allowed in modern society. It was precisely 'the respect for the minimum values of an open and democratic society' that constituted one of the reasons for enactment, in 2010, of the French law imposing a prohibition on covering the face and, as a result, on wearing burqas and niqabs in public, with the exception of places of worship.¹⁷

¹⁷ French law, Loi n° 2010-1192, of 11 October 2010 prohibiting concealment of one's face in public space.

However, formally there was no prohibition of wearing the burqa but a ‘completely secular’ ban on covering of one’s face in public space, this in the name of public safety and respect for the minimum values of an open and democratic society. It was only allowed to cover one’s face in a place of worship. In 2014, the ECtHR in *S.A.S.*¹⁸ declared this prohibition to be compliant with the European Convention on Human Rights. However, not for the reasons of public safety but for the requirement of *vivre ensemble*, ‘living together’, as formulated by the Court. This requirement was recognized as the only legitimate for the restriction on the freedom of religion.

At the same time, the Court clearly stated that, although the prohibition affects mainly Muslim women, it is of ‘some significance’ that the ban does not directly apply to any clothing of a religious nature but to the very fact of covering or concealing one’s face, i.e. it was based on neutral, irreligious criteria. Three years later, in 2017, the Court confirmed this decision in a similar case concerning Belgian law.¹⁹ A statutory prohibition of covering one’s face has also been introduced in Austria, Bulgaria, Denmark and Latvia. In March 2021, a similar prohibition was also accepted in a referendum in Switzerland. According to the official data, no more than 30 women in Switzerland regularly wore the niqab, and a case of wearing the burqa was not recorded. Paradoxically, at the time of voting, there was an order to cover one’s face for reasons of security in line with measures taken due to the COVID-19 pandemic.

Undoubtedly, from March 2020, due to the COVID-19, the understanding of ‘living together’ in terms of showing faces in the public space has changed. Covering one’s face has already become an ordinary, even desirable habit or hygiene behaviour, and often the lack of a face mask could result in a penalty. One should pose a disturbing question: If the only reason for the ban on burqas in public spaces is the requirement to show one’s face resulting from *vivre ensemble*, is this prohibition still in force?

Certainly, women’s rights must be taken into account. The photos of Kabul before and after the Taliban takeover show that covering one’s face is often not a free choice of Muslim women. However, the reality of the Afghan regime does not have a straightforward impact on the Muslim community in Europe, where different cultural rules apply. Moreover, various Muslim communities have individual approaches to wearing burqas or hijabs, and only a few consider covering one’s face to be a religious requirement.

¹⁸ *S.A.S. v France*, Application no. 43835/11, ECtHR judgment of 1 July 2014, <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22complaint%2043835/11%22%5D,%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%5D,%22itemid%22:%5B%22001-145466%22%5D%7D> (accessed 02.11.2022).

¹⁹ *Belcemi and Oussar v Belgium*, Application no. 37798/13, ECtHR judgment of 11 July 2017, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-175141%22%5D%7D> (accessed 02.11.2022).

An important question, which requires a sincere answer is what it is that decides about the limits to the freedom of religion: Are they set due to ‘completely secular’ and ‘neutral’ requirements based on the ‘living together’ principle, or are they a result of the European understanding of women’s rights, according to which covering one’s face with a face mask is accepted but covering it with a burqa or niqab is not? Solving this issue by invoking the idea of *vivre ensemble* was merely a trick which did not produce lasting results. The above case shows that by escaping from the essence of matters we do not actually solve real problems. Honest discussion on such a fundamental issue as the freedom of religion, however difficult and painful it may be, seems necessary. There is little doubt that the dialogue with Islam is a necessity in Europe and must consider difficult issues. However, this dialogue must be held in good faith, having awareness of the value of one’s position.

3.3. CRUCIFIX IN THE CLASSROOM

The third subject of the analysed rulings is the question of a crucifix hung on the classroom wall. In many European countries, the crucifix is an element of national identity and culture, and its presence in the public space or even in the state symbols (England, Denmark, Poland) has a centuries-old tradition. But is this presence compatible with respect for diversity and freedom of religion in its negative sense (the individual’s right not to profess religion)?

In Europe, for many years now, there has been a fierce dispute about religious symbols in the public space, in which Christian symbols occupy an important place, above all the crucifix. People who are not believers or are reluctant to Christianity claim that the presence of the crucifix in public space, offices or schools, is incompatible with the neutral character of these places and can affect people holding a public office and individual citizens. Thus, it violates the right to religious freedom understood as ‘freedom from religion’. In turn, the other party argues that the crucifix is an integral part of national identity, representing essential values important for individuals, as well as for the society, so its removal from the public space is unacceptable.

The dispute seemed to have been settled in 2011 in the landmark ECtHR ruling in *Lautsi v Italy*.²⁰ A student’s mother, Ms Lautsi, objected to the presence of the crucifix in the classroom, believing that this symbol indoctrinates her child, violating his freedom of religion (understood in a negative sense). According to Ms Lautsi, the crucifix in the classroom violated her child’s right to education in

²⁰ *Lautsi and Others v Italy*, Application no. 30814/06, ECtHR judgment of 18 March 2011, [https://hudoc.echr.coe.int/eng#{%22fulltext%22:\[%22lautsi%22\],%22document-collectionid%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\],%22itemid%22\[%22001-104040%22\]}](https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22lautsi%22],%22document-collectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22[%22001-104040%22]}) (accessed 22.11.2022), cf. para. 72.

a neutral environment. Her action against Italy was brought before the European Court of Human Rights and, at the first instance, was upheld. However, as a result of an appeal, the complaint was finally dismissed: the ECtHR Grand Chamber overturned the judgment of the first instance Court by a majority of 15 votes to 2, recognizing that the crucifix is a passive symbol, and as such does not have the effect of active religious indoctrination that would allow finding the violation of the European Convention on Human Rights.²¹

This judgment is a milestone in the modern understanding of the role of religious symbols, their place and function in public space. According to the Court, learning in a room with a crucifix or a mezuzah affixed to the wall does not amount to religious indoctrination. On the other hand, the associated discomfort of a non-believer, in particular a person who has unfriendly feelings towards a given religion, does not justify interference with the cultural identity expressed by displaying that symbol in a classroom.

However, there is no general consensus on the last statement. It should come as no surprise, then, that only a few years later, again in Italy, an atheist teacher protested against the presence of the crucifix in his classroom. It is worth noting that Italian law does not require hanging crucifixes in classrooms but only allows it. In this case, the headmaster decided to hang the crucifix after the students voted on the issue. However, the teacher in question would remove the symbol from the wall before each lesson, thus expressing his opposition to the headmaster's decision, and put it back after his lessons were over, for which he was suspended for 30 days. The penalty gave rise to a complaint based on the non-discrimination provisions of the Italian labour law. The Italian Supreme Court considered the complaint as 'a case of utmost importance'. On 9 September 2021, a judgment was passed, according to which it is not discriminatory to place a crucifix on the wall of a classroom in a public school if the school community has expressed such wish.²² The school autonomy also makes it possible to display the symbols of other religions if students or their parents so choose. The Court pointed out that communities, diverse in their worldview, should strive for an *accomodamento ragionevole*, 'reasonable accommodation', by looking for a common, generous, mediated solution that would help reconcile different positions.²³

It should be noted that the approach of the Italian Supreme Court is quite different from that discussed earlier above. The ruling points out that only a spirit

²¹ *Ibid.*

²² Corte Suprema di Cassazione, sentenza n. 24414: affissione del crocifisso nelle scuole pubbliche, 9 September 2021, <http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dl-l?verbo=attach&db=snciv&id=../20210909/snciv@sU0@a2021@n24414@tS.clean.pdf> (accessed 02.11.2022).

²³ The Italian Supreme Court referred to the reasoning contained in the Federal Constitutional Court decision of 16 May 1995, 1 BvR 1087/91. The German Court stipulated the obligation to seek a 'reasonable accommodation' (*zumutbaren Kompromiß*). The Court also stated: 'The freedom of religion is not the right to prevent religion.'

of true dialogue and mutual tolerance can overcome fundamental disputes in a diverse society. However, all parties need to show good will, which is a considerable difficulty in today's polarized world.²⁴ Therefore, mindfulness and consideration for the positions of all parties is required, as well as readiness to accept some discomfort. After all, a compromise may mean that if a school community does not decide to hang the crucifix in the classroom, religion classes will be taught in classrooms where this symbol is absent. There is no solution where everyone can be completely satisfied. Still, some portion of discomfort may be acceptable to all. The coming years will show whether this jurisprudence of compromise will be adopted in Europe or whether the dominant trend, where neutrality is secularism, and thus freedom of religion cannot be too important, will prevail.

4. CONCLUSION

To sum up, a neutral state is only such that ensures the impartiality of public authorities in religious matters. This claim cannot be merely a beautiful declaration but must be continuously reflected in the actions of public authorities. It must be expressed by the dialogue and repeated efforts to ensure tolerance and pluralism, the conditions under which the majority respect the rights of the minority. Non-believers, agnostics, and those who are indifferent to matters of faith should look kindly upon the needs of believers and vice versa. Christians should look at the needs of Muslims or Jews with understanding, and kindness should be reciprocated.

It seems that the neutrality of the state has some similarity to the 'work-life balance' – it is a dynamic situation, involving constant search for solutions by correcting and adapting to changing circumstances. The way to achieve neutrality is the possibility to negotiate a 'reasonable accommodation' openly, without the need to hide the identity and religious beliefs of community members, and without relegating religion to a purely private sphere. This aspiration requires that each party in good faith, as far as possible, meet the expectations and needs of the other party, being aware of the value of its position.

The selected rulings of the ECtHR and national courts show an interesting trend: rejection of the Franco-American 'secular is neutral' paradigm and the development of a more nuanced jurisprudence of accommodation, i.e. seeking a balance between freedom and religion. At the same time, the idea of neutrality

²⁴ Doubts about it were expressed by F. Alicino, *Il crocifisso nelle aule scolastiche alla luce di Sezioni Unite 24414/2021. I risvolti pratici della libertà*, Diritti Comparati, 11 November 2021, <https://www.diritticomparati.it/il-crocifisso-nelle-aule-scolastiche-alla-luce-di-sezioni-unite-24414-2021-i-risvolti-pratici-della-liberta/> (accessed 02.11.2022).

identified with secularism is definitely predominant in the CJEU rulings, which does not give due weight to the rights of believers. The CJEU rulings seem to reveal lack of sensitivity that would allow acknowledging the legitimate right of people who want to live their lives observing religious norms. The lack of such understanding may be seen not only among judges but also in the political circles. This was manifested in particular in the dispute concerning the wording of the preamble to the unratified Treaty establishing a Constitution for Europe and in the omission of the Judeo-Christian heritage of Europe in the final text.

The above analysis shows that the ‘United in diversity’ motto remains an empty slogan in the European Union when it comes to issues of freedom of religion. Will the EU seek a true neutrality for those who, looking for solutions by means of dialogue, not only tolerate but above all accept different religions? Will it (re)enter the path of tolerance, pluralism and acceptance of religious diversity in the search for the true neutrality? The jurisprudence of ‘reasonable accommodation’ raises some hope.

REFERENCES

- Alicino F., *Il crocifisso nelle aule scolastiche alla luce di Sezioni Unite 24414/2021. I risvolti pratici della libertà*, Diritti Comparati, 11 November 2021, <https://www.diritticomparati.it/il-crocifisso-nelle-aule-scolastiche-alla-luce-di-sezioni-unite-24414-2021-i-risvolti-pratici-della-liberta/> (accessed 02.11.2022)
- Belcacemi and Oussar v Belgium*, Application no. 37798/13, ECtHR judgment of 11 July 2017
- Belgian decree of 7 July 2017 amending the Law of 14 August 1986 on the protection and welfare of animals, regarding permitted methods of slaughtering animals, Belgisch Staatsblad, 18 July 2017, p. 73318
- C-157/15, *Samira Achbita v G4S Secure Solutions NV*, CJEU judgment of 14 March 2017
- C-336/19, *Centraal Israëlitisch Consistorie van België and Others v Vlaamse Regering*, CJEU judgment of 17 December 2020
- Corte Suprema di Cassazione, sentenza n. 24414: affissione del crocifisso nelle scuole pubbliche, 9 September 2021
- European Parliament resolution of 11 March 2021 on the declaration of the EU as an LGBTIQ Freedom Zone (2021/2557(RSP)), https://www.europarl.europa.eu/doceo/document/TA-9-2021-0089_EN.html (accessed 02.11.2022)
- Eweida and Others v The United Kingdom*, Applications nos 48420/10, 59842/10, 51671/10 and 36516/10, ECtHR judgment of 15 January 2013
- Faull J., Weiler J. H. H., *EU Judges Have ‘Koshered a Pig’ in Order to Allow Shechitah Ban*, ‘The Jewish Chronicle’, 16 June 2022, <https://www.thejc.com/lets-talk/all/eu-judges-have-‘koshered-a-pig’-in-order-to-allow-shechitah-ban-1WagcJQzfcXZjJMCiIN3jc> (accessed 02.11.2022)

- Joined Cases C-804/18 and C-341/19, *IX v WABE eV* and *MH Müller Handels GmbH v HJ*, CJEU judgment of 15 July 2021
- Lautsi and Others v Italy*, Application no. 30814/06, ECtHR judgment of 18 March 2011
- Loi n° 2010-1192, French law of 11 October 2010 prohibiting concealment of one's face in public space, https://www.legifrance.gouv.fr/download/pdf?id=EEpKbOqpVKS_j-RgGEAkJZzKY6oT0Ac8uyatwTORrks= (accessed 02.11.2022)
- Morawski L., 'Zjednoczeni w różnorodności' – dwie wizje integracji europejskiej, (in:) C. Mik (ed.), *Konferencja – Unia Europejska: zjednoczeni w różnorodności*, Warszawa, 14–15 grudnia 2010 r., Warszawa 2012
- S.A.S. v France*, Application no. 43835/11, ECtHR judgment of 1 July 2014
- Szczepankiewicz-Rudzka E., *Zasada laickości V Republiki Francuskiej i jej implikacje prawno-polityczne*, 'Politeja' 2020, Vol. 17(1/64), <https://doi.org/10.12797/Politeja.17.2020.64.05> (accessed 02.11.2022)
- Treaty establishing a Constitution for Europe, adopted by the European Council, signed in Rome on 29 October 2004 (not ratified)
- Weiler J. H. H., *Chrześcijańska Europa. Konstytucyjny imperializm czy wielokulturowość?* Poznań 2003
- Weiler J. H. H., *Je Suis Achbita!*, 'European Journal of International Law' 2017, Vol. 28(4)