

Presence of the Cross in Public Spaces

Presence of the Cross in Public Spaces:

*Experiences of Selected
European Countries*

Edited by

Piotr Stanisław, Michał Zawiański
and Marta Ordon

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INTRODUCTION

During recent years, the debate on the presence of the cross in public spaces has swept, with varying intensity, through different parts of Europe. At least in some states it has been characterized by a high level of involvement of the contesting parties, and triggered a remarkable range of emotions. This is hardly surprising, for the matter at issue is in essence part of the long-running argument over the way in which social life should be organized, and especially over what should serve as ultimate points of reference for evaluating human behaviour. It encompasses such fundamental issues as the social significance of religion and the essence of human freedom, the content of individual human rights (or even, their very existence – *vide* the so-called reproductive rights) and their mutual interrelations, as well as the respective duties of public authorities. What acted as a catalyst for this debate were undoubtedly the judgments of the European Court of Human Rights in the case of *Lautsi v. Italy*, and notably the first judgment, which, in some states, motivated supporters of the extreme version of the secular state to undertake initiatives aimed at removing the cross from public spaces. This was accompanied by genuine agitation on the part of those who are convinced that negating the significance of Christianity to the identity of European states poses a number of serious threats.

The above-mentioned judgments of the European Court of Human Rights soon became the subject of vigorous scientific debate. This is evidenced by the sheer number of studies which either comment upon these rulings or ponder the possibility of displaying the cross in public spaces from the perspective of the legal regulations adopted in particular states. At this stage, there is already a range of comparative legal analyses devoted to the subject, which is especially important in view of the oft-criticized lack of adequate references in the Strasbourg judgment of 3rd November 2009. However, there is still ample room for detailed research considering not only the content of the legal regulations binding in various European states, but also the historical and social determinants of these regulations and the practice shaped by them, with a special emphasis put on the decisions taken by public authorities and especially court adjudications. An attempt to address these issues was the international conference entitled *The presence of the cross in the public space of the*

European states, which – owing to the generous support by the *Polish Catholic Institute “Sursum corda”* – was organized by the Department of Law on Religion at the Faculty of Law, Canon Law, and Administration of John Paul II Catholic University of Lublin and took place on 13th and 14th November 2014 in Lublin. The present publication is a continuation of that scientific initiative and it has grown out of cooperation between a number of recognized authors representing various countries and academic institutions. Their involvement in shaping this volume is hereby gratefully acknowledged.

When deciding upon the selection of states included in the present work we were guided by the intention to maintain a representative group that would reflect the actual diversity of models of relations between the state and churches and other religious organizations applied in the Old Continent. We sought to include both the established democracies of Western Europe and the post-communist states, as well as the states who acted as third parties in the proceedings before the Grand Chamber and those that decided to adopt the attitude of a detached observer. Given the place of the conference, special attention was devoted to Poland. The analyses concerning the solutions applied in individual states are preceded by the texts sketching a wider, all-European context of the issues under discussion.

We hope that the papers in the present collection will help to develop a better understanding of all aspects of the debate over the presence of the cross in the public space of European states and facilitate a clear assessment of the weight of arguments put forward by both supporters and opponents of this presence. It is hoped that the volume, showing the actual diversity of the regulations and practice adopted in the individual states of the Old Continent and examining the underlying motivation for the rather common display of this Christian symbol in the public space of many of these states, will play a role of a comment of approval to the judgment of the Grand Chamber of the European Court of Human Rights of 18th March 2011. We also hope that the multiplicity of research perspectives and viewpoints adopted by the authors will enable the reader to gain a deep understanding of disparate opinions voiced during discussions devoted to displaying the cross in public spaces. It will be especially valuable if the present monograph facilitates distinguishing the actual implications of the respect for the freedom of thought, conscience and religion, as is common in the democratic world, from the consequences of diversified constitutional norms adopted in individual states, and especially from ideological demands and subjective expectations.

The editors

CHAPTER ONE

THE PRESENCE OF THE CROSS IN PUBLIC SPACES FROM THE PERSPECTIVE OF THE EUROPEAN COURT OF HUMAN RIGHTS

RIK TORFS

The discussion about the presence of the cross in public spaces is centred around two decisions of the European Court of Human Rights (ECHR)¹. Each of the two consecutive *Lautsi versus Italy* decisions had a different outcome. During the school year 2001-2002, two sons of the Lautsi-family enrolled in a public school in Italy. Each room of the school had a cross hanging on the wall. Consequently, in April 2002, the father of the children asked the school to remove these religious signs, given the fact that his family was not Catholic and thus should not be confronted with a crucifix in a public school. The school administration refused to do so, which led to several court cases in which the claim of the parents was rejected. Ultimately, the case came before the European Court of Human Rights (ECHR). The Lautsi-family invoked two main arguments to underpin their claim.

One of these is article 2 of the 1st protocol of the European Convention on Human Rights. This article is formulated as follows: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and teaching, the state shall respect the rights of the parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

The other article invoked is article 9 of the Convention itself dealing with freedom of thought, conscience and religion. As is traditionally the

¹ European Court of Human Rights (second section), judgment *Lautsi v. Italy* (3 November 2009); European Court of Human Rights (Grand Chamber), judgment *Lautsi and Others v. Italy* (18 March 2011).

case in many articles of the European Convention, the article is divided into two paragraphs, the second one bringing out the nuances of the fundamental right described in the first:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others, and in public or private, to manifest his religion or belief, in worship, teaching, practice, and observance.

2. The freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

In the first decision, in November 2009, the ECHR came to the conclusion that the compulsory presence of a religious symbol in a public school is at odds with the right of parents to educate their children in accordance to their own religious and philosophical convictions. Indeed, the public authority, by imposing the presence of a crucifix in a classroom, is limiting without good reason the rights of parents.

This decision led to many bitter comments in Italian society. One could even say that all of a sudden an anti-European atmosphere emerged in a country involved from the very beginning in the construction of Europe. Italy was one of the six founding states of the EU and was once a country with sincere pro-European sentiments. Why was the protest that sharp? The reason was quite simple: the decision by the European Court provoked a sentiment of alienation. Criticizing the presence of the cross in classrooms was at the same time criticizing a symbol perceived as belonging deeply to Italian culture and tradition.

This leads us to the following question: what does freedom of religion truly mean? According to most experts, three layers can be identified as forming our understanding of religious freedom. The first layer is that of individual religious freedom. Everybody has the right to adhere to any religious conviction or belief he or she chooses, including the right to change religion and the right not to be religious at all. Historically speaking, individual religious freedom is the cornerstone of the right as such; indeed, individual persecution was the main issue of concern. Its violation has led to war and political instability, as well as to the migration of religious minorities to foreign countries such as the United States. To put it another way, without a clear guarantee of individual religious freedom, the two other layers of freedom are without any real significance. Yet, on the other hand, individual freedom in its own right does not

suffice, because it would implicitly limit religion to an entirely private matter, having no consequences at all for the external behaviour of people. Precisely that conclusion would be *contradictio in terminis*, because many religions, if not virtually all of them, not only have a creed or a doctrine of faith, but also prescribe or suggest certain attitudes or forms of behaviour to their faithful.

For that reason, it is easy to understand the second layer of religious freedom, namely that of collective religious freedom. Freedom of religion implies freedom of community building and freedom of organising collective manifestations of faith. Holy mass and other forms of liturgy are good examples of the latter. In some countries collective religious freedom is seen as slightly problematic in comparison to individual religious freedom. For instance, it has to be noted that in the Netherlands for a long time Catholic processions in public spaces were forbidden. So while individual religious freedom in theory did not really cause problems, Catholics hardly had any access to important public functions. However, the collective manifestations of a religious faith that at first glance did not belong to the central creed of a religion was formerly slightly problematic.

Finally there also exists the third layer of religious freedom, namely that of institutional religious freedom. The faithful have more rights than just those of gathering occasionally or organising ceremonies, they also have the right to organise themselves structurally in religious groups and associations, in communities and churches, with internal norms and structures, and codes of canon law or by laws creating a specific institutional space with a proper subculture. For instance, certain acts may be a crime in the Roman Catholic Church without necessarily being a crime in the external legal order. Attacking the Pope physically is forbidden by both the state and the church, yet procuring abortion is, in certain countries and under specific conditions, allowed by state law, while leading to *latae sententiae* excommunication in the Roman Catholic Church. Of course, churches and religious groups are not entirely free to do whatever they like. For that reason it is important to refer to the second paragraph of article 9 describing carefully and in a limitative way the exceptions to the first paragraph. Two clear examples of such a limitation would be religious practice requiring human sacrifice, or the stoning of women found guilty of adultery.

This overview of religious freedom as it is viewed and practiced by the European Convention and the European Court implicitly offers an image of religion disconnected from any form of enculturation. Human rights conventions are, by nature, a skeleton. Although the catalogue as such may be seen as rather Western and culturally determined, a debate that still

remains open, the rights themselves are considered to be culturally neutral and applicable to all. However, is this theoretically safe position completely in harmony with reality? I think it is not, or at least not entirely, given the fact that no one lives in a cultural vacuum, whatever the legal norms may suggest in this regard. Indeed, when we look at the second paragraph of the European Convention and at the limitations formulated there, religions that are more remote than others from our Western Judeo-Christian pattern may be hampered by obstacles and legal constraints. Muslim family law will be seen more easily as non-applicable and falling under the exceptions of the second paragraph.

There are many examples underpinning this viewpoint. One example is polygamy, as in certain Muslim countries it is allowed, and some consequences of it may be accepted in several other places as a result of international private law. However, concluding a polygamous marriage in a Western state is impossible, at least theoretically. Polygamy is perceived, and in my eyes rightly so, as a humiliation of women and clear proof of inequality between the sexes. Christians do not accept this issue, and if they do have polygamous inclinations, then they will never try to officialise this situation. Even men who are not very faithful in their lives will, if they marry, just conclude a monogamous marriage. In that regard, the history of the Mormons in the United States is interesting. Their founder, Joseph Smith (1805-1844), was in favour of and practiced polygamy, yet gradually Mormons had to comply with the overall American legal framework and eliminate polygamy, which today is only present in some remote and dissident Mormon groups.

A second example, unacceptable also under the wording of the European Convention, is the repudiation of women by their husband. Here again, no Western state will accept unilateral repudiation. Certain Muslim traditions are more affected by this prohibition than people and groups belonging to the Christian family.

A third more recent example concerns ritual slaughtering of animals. Perhaps ritual slaughtering would not have been a huge problem in the West some hundred years ago, and in the Jewish tradition many examples of slaughtering can be offered. Today, though, the cleavage between animal rights and religiously motivated ritual slaughter has become increasingly problematic.

These three examples clearly demonstrate that an apparently neutral set of rights and liberties can lead to very different, often complicated problems when implementation is at stake. Although in theory the second paragraph of article 9 is applicable to all, in practice it is used much more frequently with regard to religions far from a Judeo-Christian tradition.

This is proof of the fact that even neutral norms are not as neutral as they seem to be at first glance: the cultural setting is of utmost importance.

In the *Lautsi* case, and certainly in the first decision of 2009, the enculturation issue plays a part on another level. This time, the issue is no longer the limitation of the rights of individual people connected to the first layer of religious freedom, but the collective presence of religion in the public sphere. Traditionally dominant religions, such as Roman Catholicism in Italy, are suffering less from limitations linked with the first layer, yet rather from limitations concerning their public presence related to layers two and three.

In that regard, the presence or absence of the cross is, in the eyes of many, not just a matter of faith but also of identity and cultural comfort. In many European countries the presence of the cross in public spaces has been an issue, but even then there is a gradation. Italy and Poland are certainly different from Belgium and the Netherlands, the latter being countries with an often hostile view of religion and a more rigid approach to neutrality. Several decades ago, in my own country of Belgium, crucifixes were no longer considered acceptable in the classrooms of public schools, or in courts and tribunals. This led to several marginal problems, where historic paintings and works of art representing Jesus Christ or religious scenes, for example, are still allowed in courts and tribunals when they have an artistic or cultural value. That can lead to strange incidents, as happened once in a court in Metz, France, where the president of the court, while pointing to Christ on a painting with his finger, summoned the accused to follow the example of his saviour. Another issue is that in several classrooms crucifixes became particularly noticeable only *after* their removal because the wall showed clearly where they had been hanging before.

It is clear that the reactions to the *Lautsi* case in Italy were very violent. Although objectively there was no reason whatsoever to deal with the removal of a crucifix differently according to the country where the facts took place, as the European Convention is applicable both in Belgium and Italy, the reactions of the public were or would not be the same. The cultural significance of the crucifix goes deeper in Italy than it does in Belgium. The question is whether this cultural element may or may not play a part when it comes to jurisprudence and concrete decision-making. *Lautsi 2* answered this question positively, and invoked the principle of subsidiarity, as well as the margin of appreciation member states have in order to protect the culture and traditions of each particular country. The overall principles of the ECHR guarantee enough sovereignty for member states in that regard.

It is interesting that the second paragraph of article 9 limits religious freedom, including collective and institutional freedom, only when certain negative or dramatic elements are threatening the stability of the country. Not only do these limitations have to be formulated by law, and should be necessary in a democratic society, but also the reasons for these limitations are always the avoidance of disastrous situations. Public safety is invoked, and the protection of public order, health, or morals. The only less dramatic exception to religious freedom is the protection of the rights and freedoms of others. As a matter of fact, Lautsi also focuses on that issue, because religious freedom and the right of education for the Lautsi family explicitly figured as an argument. However, what we do miss in the second paragraph is the possible role attributed to the cultural element of religion, perhaps restricting strict neutrality and thus leading to a slight limitation on the equal treatment of religious groups. The presence of crucifixes in Italian public school classrooms not only gives an advantage to a Christian symbol, but also forces non-Christians to be visually confronted with the crucifix all day. It certainly is a form of unequal treatment, even though the attempt is made by Lautsi 2 to define the crucifix as just a cultural and not only a religious symbol.

In the meantime, it should be noted that the visual presence of religious symbols is psychologically not as easy as many rational thinkers think it is. In 1781, the Austrian emperor Joseph II issued a *Toleranzpatent* in which he gave the opportunity to Protestants to build their own churches. However, they were not allowed to have a bell tower, and the entrance could not be on the front side of the building. Collective religious freedom as we would define it today was guaranteed, yet without all its visual connotations. Protestants could worship, but could not be seen to worship. This norm from remote times comes very close to the Swiss minaret ban of 2009. As a result of a referendum in November 2009, a constitution amendment banning the construction of new minarets was approved by 57.5% of the voters participating in the referendum, showing that some things do not change. Muslims in Switzerland are also allowed to worship, yet visibility remains an issue of concern, as formerly was the case for Protestants in Austria.

Visibility is more a matter of culture than of worship. Religious manifestations can decently take place without a bell tower or without a minaret, and yet it was precisely the bell tower and the minaret that were, or are, seen to be disturbing factors by the majority of the population. The Lautsi case goes the other way round: here a symbol of the majority religion is challenged by a protest formulated by a member of a minority group. However, the problem is also visual, as nobody pretends that pupils

of Italian public schools are forced to believe in the Christian faith or in the person of Jesus Christ, and yet the crucifix is there, as visible as a Muslim minaret or a Protestant bell tower could have been, without the specific legislation. The issue is clear: can a distinction be made in the public sphere between the symbols of the majority and the minority religions? From a strictly formal perspective of fundamental rights, the answer is no, and yet from a perspective accepting the cultural non-religious significance of certain initially religious symbols, the conclusion may be different.

In that regard, it is interesting to explore the *Lautsi 2* decision in more depth. The second decision, this time by the Grand Chamber, was issued on 18 March 2011, reversing the previous decision. The lawyers of the Italian state were followed in their interpretation of the true meaning of the crucifix. As a matter of fact, two positions are possible. According to the first possible interpretation, the crucifix is properly and exclusively a religious symbol, since it is intended to foster respectful adherence to the founder of the Christian religion. According to the second interpretation, the crucifix still may have religious value for believers, but also for non-believers its display is justified and it possesses a non-discriminatory meaning from the religious point of view, if it is capable of representing and evoking synthetically and in an immediately perceptible and foreseeable manner, like any other symbol, values which are important for civil society, in particular the values which underpin or inspire (in this case) the constitutional order and the foundation of civil life.² In that sense the crucifix can perform, even in a secular perspective distinct from the religious one, a highly educational symbolic function, irrespective of the religion professed by the pupils.

To put it yet another way, the crucifix can be seen in two senses, namely in a religious one, yet also in a pluralistic one with a shifting significance different for Catholics and other citizens. Here is the beauty and at the same time the risk of *Lautsi 2*. The decision can only be accepted if religious symbols stop being religious symbols and eventually even become the opposite, a sign of absolute tolerance instead of a sign of outspoken identity.

The latter makes it clear that the limits and content of religious freedom cannot be seen without taking into account the overall culture and flavour present in society. In that regard, Europe is much more secular than India or Latin America, for example, and even within Europe many

² See *Lautsi 2*, page 9 and 10.

differences should be taken into account. Poland and Italy are examples of countries where religious traditions are deeply rooted in cultural life. Even intellectuals opposed to the public role of the Catholic Church and of faith in general are themselves highly coloured by what they are criticizing. However, in certain countries of Western Europe, the role of religion is fading away, not just religiously speaking, but also from a cultural angle. In the first stage, during the second half of the last century, fierce criticism still went together with a keen awareness of the religious setting. Even convinced critics had themselves a fair knowledge of Christianity and church life. In this millennium, the latter is no longer true, as today many people are still very critical towards religion, yet without any personal knowledge of the religious past of the country or region in which they live.

Clearly, the question whether or not a crucifix is just a religious or also a cultural symbol depends significantly on the overall context of the society in which this question is asked.

There is yet another question that implicitly plays an important part in the discussion: what is true neutrality? Neutrality can be given shape in various ways. Obviously, the question can be raised whether or not any religious symbol in the public sphere is permissible. A good example of this is Christmas: to what extent is it still acceptable to talk about it? A book by Stephen M. Feldman published in 1998 is a good illustration of a frontal approach to the topic.³ The title of the book is *Please Don't Wish Me a Merry Christmas*, and the subtitle goes as follows: *A Critical History of the Separation of Church and State*. For Stephen Feldman, Christmas as such is a problem, not just in terms of cribs but also Christmas trees, although their religious devotion may be questioned. Of course, Feldman writes in an American context, with a stronger tradition of the separation between Church and State. Moreover, neutrality with regard to Christmas is already highly present in an American context. On annual cards, the wording "Merry Christmas" is often replaced by "Season's Greetings", an empty yet harmless notion.

However, it is also possible to maintain Christmas as a neutral feast by removing its Christian connotations. This approach, less radical than the previous one, is becoming common in a Western European context. Christmas as such is maintained, and certain symbols remain acceptable, including Christmas trees and colourful lights spread all over towns and cities. Santa Claus and his reindeer are also tolerated, as they are not

³ Feldman, Stephen M. 1998. *Please Don't Wish Me a Merry Christmas. A Critical History of the Separation of Church and State*, 408. New York: NYU Press.

missionaries of any religion. However, the question arises whether the absence of the crib is neutral or not, as it is not only the presence of certain signs that have meaning, but also the absence of others. Ultimately, in that perspective the approach suggested by Stephen Feldman is more honest. The total rejection of Christmas eventually will be more neutral than the suppression of some symbols, those suspected of being religious, while others are maintained. It is certainly possible that if Western European society continues to evolve in a secular way, the American “Season’s Greetings” will ultimately overtake the current, ambiguous, Western European approach. In the meantime it should be noted that also in Western Europe the attitude vis-à-vis Christmas differs from region to region. The crib will survive for a long time in Bavaria or Austria, but not necessarily in the Netherlands or in the north of Belgium.

A third possible approach is the complete acceptance of Christmas as a part of our culture. Southern Europe gives some examples of such an attitude. Christmas as a whole is taken over by civil society, sometimes even without its religious connotations. One could argue that Christianity did something similar by making use of the pagan solstice to identify the perfect date for celebrating Christmas. What precedes makes it clear that neutrality vis-à-vis Christmas can be moulded in various ways. In a completely secular culture, Christmas as a whole has no place in the public sphere. In a period of transition, the half-hearted approach typical for Western Europe could be used. If religion remains part of mainstream culture, the official presence of religious symbols in the public sphere is therefore not a problem.

This is one way of looking at things, because it is also possible to opt for some form of active pluralism, an approach that, unlike a more separationist road, allows for the simultaneous presence of various and multiple expressions of faith in the public forum. In such a configuration, everybody is permitted to show his or her religious adherence inasmuch as this is compatible with the compelling norms of the state, including environmental and urbanistic statutes.

So what can we conclude about the two *Lautsi* decisions? The first one, unfavourable to the crucifix in public schools, was highly criticized in Italy, and, moreover, 21 countries gave their support to the Italian viewpoint. However, from a puritanical human rights perspective, it is probably the more solid one, as it cannot be denied that the crucifix is a Christian symbol. Imposing a Christian symbol on non-Christians, in a public sphere, may be problematic. On the other hand, in a more complex configuration, where the concepts are richer and additional aspects of life may be taken into account, the second decision makes a lot of sense. In the

second decision, state and religion are two notions that are not fully separated, since several aspects of religion may be at the same time characteristics of the culture of the state. This entanglement is different from discussions on the separation of church and state, where both protagonists are present on the level of organisation and legislation. Here, on the contrary, we are talking about culture, about ideas, about content. In that perspective, the exclusion of a crucifix from public school classrooms can be, in a specific context that has to be assessed carefully time and time again, at odds with the cultural feeling of the majority of the population. That conclusion may be a problem for the sustainability of human rights in the long run. Therefore, the margin of appreciation each country enjoys in implementing the ECHR can be very useful.

To sum up, both decisions are correct from a human rights perspective. The first one, *Lautsi 1*, has a classical precision, yet eliminates the surrounding cultural elements. The second one, *Lautsi 2*, shows a keen interest in complexity and in the, sometimes subtle, entanglement of state, religion, and culture. The latter is more realistic, yet also more dangerous.

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CHAPTER TWO

THE CROSS AND OTHER RELIGIOUS SYMBOLS IN THE EU LAW: REMARKS ON THE FUTURE ACCESSION OF THE EU TO THE ECHR

MICHAŁ RYNKOWSKI

I. Introduction

The aim of this paper is to show the place of a cross in the EU legal system, present the jurisprudence of the Court of Justice of the EU (CJEU) as regards the moral and religious issues, and, following the future accession of the EU to the European Convention on Human Rights (ECHR), ask the provocative question as to whether the CJEU would decide differently to the European Court of Human Rights (ECtHR) in the famous *Lautsi* case.

This paper shall start with a general remark that despite decades of European integration there is no “EU ecclesiastical law”. Moreover, there will probably never be such a thing, as Article 17 of the Treaty on the Functioning of the European Union (hereafter TFEU) obliges the EU to respect the laws of the Member States: “The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.”¹ For historical reasons, each and every Member State has its own ecclesiastical law: due to certain similarities one can try to group them, but they remain clearly different, with the UK and Denmark on one side and France and Slovenia on the other. This makes the situation for Pan-European institutions like

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=en>.

the European Union or the Council of Europe, and in particular for their courts, very challenging.

Despite this general statement there are certain provisions of EU laws relevant for religion, churches, and religious communities.² Among the recent interesting documents are the EU-Guidelines on the Promotion and Protection of Freedom of Religion or Belief,³ adopted by the Foreign Affairs Council on 24 June 2013 – but they are supposed to be applied in the context of the EU foreign relations, not internally.⁴

Among the provisions of EU law are a few that are relevant for the cross and other religious symbols. However, only one is interesting from the point of view of this book: it is Article 3 of the Directive 2008/95 to approximate the laws of Member States relating to the trade marks, which says:

2. Any Member State may provide that a trade mark shall not be registered or, if registered, shall be liable to be declared invalid where and to the extent that: [...]

² Gerhard Czermak calls it “indirektes Religionsrecht”. Czermak, Gerhard. 2008. “para 20, Rn 510.” *Religions- und Weltanschauungsrecht*, Heidelberg: Springer-Verlag. These provisions are collected and regularly updated by Professor Gerhard Robbers and his team at the University in Trier, available in various languages at: <https://www.uni-trier.de/index.php?id=7526&L=0>; also: Robbers, Gerhard. 2005. “State and Church in the EU.” In *State and Church in the EU*, edited by Gerhard Robbers, Baden-Baden: Nomos 2.

³ [http://eeas.europa.eu/delegations/fiji/press_corner/all_news/news/2013/eu_guide_lines_on_the_promotion_and_protection_of_freedom_of_religion_or_belief_\(june_24_2013_fac\).pdf](http://eeas.europa.eu/delegations/fiji/press_corner/all_news/news/2013/eu_guide_lines_on_the_promotion_and_protection_of_freedom_of_religion_or_belief_(june_24_2013_fac).pdf) (accessed February 20, 2015).

⁴ “6. With these Guidelines, the EU reaffirms its determination to promote, in its external human rights policy, freedom of religion or belief as a right to be exercised by everyone everywhere, based on the principles of equality, non-discrimination and universality. Through its external policy instruments, the EU intends to help prevent and address violations of this right in a timely, consistent and coherent manner. 7. In doing so, the EU focuses on the right of individuals, to believe or not to believe, and, alone or in community with others, to freely manifest their beliefs. The EU does not consider the merits of the different religions or beliefs, or the lack thereof, but ensures that the right to believe or not to believe is upheld. The EU is impartial and is not aligned with any specific religion or belief. 8. The Guidelines explain what the international human rights standards on freedom of religion or belief are, and give clear political lines to officials of EU institutions and EU Member States, to be used in contact with third countries and with international and civil society organisations.”

(b) The trade mark covers a sign of high symbolic value, in particular a religious symbol.⁵

Thus, the Member States of the EU (and also of the European Economic Area) may introduce such restrictions. Whether or not this is the case in national law is the subject of national reports from various European States, as it would exceed the limits of this paper, which focuses on the EU dimension. Other EU-provisions relate indirectly to religious objects, i.e. to crosses as to parts of cultural heritage, e.g. in the Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State. Similarly, the Council Regulation No 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty, refers to crosses in Article 90.

II. The CJEU and the “moral plane”

Since, as demonstrated above, there is no pertinent EU legislation, it is worth asking if there is a respective jurisprudence of the CJEU. The answer is also negative. There are only two cases clearly referring to religious freedom: *Prais v. Council* from 1976,⁶ on freedom of religion of persons applying for an EU job who refused to sit tests on Jewish holidays; and more recently in cases *C-71/11* and *C-99/11 Ahmadiyya*,⁷ in which the CJEU confirmed the importance of freedom of religion. Apart from these two, there were a few cases on business aspects of churches and religious communities.⁸ The CJEU is limited in the exercise of its power to the EU competences, and they do not include moral aspects. Therefore the CJEU does not have legal grounds to judge a case concerning the “moral” sphere, for example whether the presence of the

⁵ Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (Codified version; Text with EEA relevance), Official Journal L 299, 8.11.2008, p. 25–33.

⁶ 130/75 *Prais* [1976] ECR 1589.

⁷ *C-71/11 Germany v. Y* and *C-91/11 Germany v. Z* (known as *Ahmadiyya*).

⁸ 41/74 *van Duyn* [1974] ECR 1337; 300/84 *Roosmalen*, [1986] ECR 3097; 196/87 *Steymann* [1988] ECR 6159; all commented in Rynkowski, Michał. 2004. *Status prawny kościołów i związków wyznaniowych w Unii Europejskiej*, Warszawa: Prawo i Praktyka Gospodarcza.

cross is justified or not – for the notion of the “moral plane” and how the CJEU has so far solved this kind of question, see below.

Yet, it does not mean the EU is indifferent to human rights: on the contrary, Article 6 of the TEU refers to the Charter of Fundamental Rights of the European Union; it states that the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). As regards the jurisprudence, after a *Stork* case⁹ in its early years (in which fundamental rights were denied), the CJEU has developed its own jurisprudence on fundamental rights, starting with cases such as *Stauder*, *Internationale Handelsgesellschaft*, *Nold*, and *Hauer*.¹⁰ The CJEU human rights jurisprudence was presented and discussed in many handbooks: for example, A. O’Neill QC in his handbook “EU Law for UK Lawyers” lists 19 important human rights, protected by the CJEU, ranging from the right to respect for human dignity and the right not to be subjected to torture, or to inhuman or degrading treatment, to the right to vote;¹¹ he also lists a good number of strictly procedural rights. Some of the CJEU judgments may seem controversial. Among them, the most extreme seems the case of the *Society for the Protection of Unborn Children v. Grogan* C-159/90¹² concerning abortion in Ireland, where the ECJ stated that:

On those grounds, the court, in reply to the questions submitted to it by the High Court of Ireland, by order of 5 March 1990, hereby rules:

1. Medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 60 of the Treaty.¹³

⁹ Case 1/58, *Stork v. ESCC High Authority*, [1959] ECR 17.

¹⁰ Respectively: *Stauder* 29/69, [1969] ECR 419; *Internationale Handelsgesellschaft* 11/70, [1970] ECR 1125; *Nold* 4/73, [1974] ECR 491; *Hauer* 44/79, [1979] ECR 3727.

¹¹ O’Neill, Aidan. 2001. *EU Law for UK Lawyers*, 203-7. Oxford: Hart Publishing; Also: Smit, Hans, and Peter Herzog. 2010. *Hans Smit and Peter Herzog on The Law of the EU*, Newark: LexisNexis Matthew Bender; Dybowski, Maciej. 2007. *Prawa fundamentalne w orzecznictwie ETS*, Warszawa: C.H. Beck; more recently: *The Protection of Fundamental Rights in the EU After Lisbon*, edited by Sybe de Vries, Ulf Bernitz and Stephen Weatherhill, 2013. Oxford: Hart Publishing; Grabenwarter, Christoph, editor. 2014. *Enzyklopädie Europarecht - Europäischer Grundrechtsschutz*, Baden-Baden: Nomos.

¹² [1991] ECR I-4685.

¹³ Critically: Phelan, Diarmuid.

As regards the “moral plane”, as the CJEU calls it, important are para. 18-21 of the judgment [bold by me, MR]:

18. It must be held that termination of pregnancy, as lawfully practised in several Member States, is a medical activity which is normally provided for remuneration and may be carried out as part of a professional activity. In any event, the Court has already held in the judgment in *Luisi and Carbone* (Joined Cases 286/82 and 26/83 *Luisi and Carbone v. Ministero del Tesoro* [1984] ECR 377, paragraph 16) that medical activities fall within the scope of Article 60 of the Treaty.

19. SPUC, however, maintains that the provision of abortion cannot be regarded as being a service, **on the grounds that it is grossly immoral and involves the destruction of the life of a human being, namely the unborn child.**

20. Whatever **the merits of those arguments on the moral plane**, they cannot influence the answer to the national court’s first question. **It is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practised legally.**

21. Consequently, the answer to the national court's first question must be that medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 60 of the Treaty.

While reading this and following judgments, it becomes clear that there is always a certain economic dimension present in the CJEU judgments. In the case of *Czech and Polish prostitutes in the Netherlands* (C-268/99), the court deliberated as Grand Chamber and, having heard opinions of numerous governments of the EU Member States confirmed that prostitution is a service, stating: “The activity of prostitution pursued in a self-employed capacity can be regarded as a service provided for remuneration.” Again, the CJEU pronounced itself on the morality/immorality of these activities (para. 56):

So far as concerns the question of the immorality of that activity, raised by the referring court, it must also be borne in mind that, as the Court has already held, **it is not for the Court to substitute its own assessment for that of the legislatures of the Member States where an allegedly immoral activity is practised legally** (see, with regard to abortion, Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685, paragraph 20, and, with regard to lotteries, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 32).

Prior to judgments *Grogan* and *Jany*, the CJEU took position on the importation of pornographic materials to the United Kingdom: in both

cases the Court declared that the UK is not allowed to prohibit import if these goods are manufactured and traded within the country. As regards the moral aspects of such materials, the CJEU stated: “In principle, it is for each member state to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory” (the second point of the official summary in the case *R v. Henn*, 34/79). A few years later, in the case of *Conegate Ltd. v. Customs and Excise Commissioners* 121/85 – concerning the importation of inflatable dolls – the Court declared that: “A Member State may not rely on grounds of public morality within the meaning of article 36 of the ECC Treaty in order to prohibit the importation of certain goods on the ground that they are indecent or obscene when its legislation contains no prohibition on the manufacture and marketing of the same goods on its territory”.

There are also situations – maybe less spectacular and not so often commented on – when the market/business orientation of the CJEU may actually help churches and their charities in their activities. In a recent case, *Hein Persche v. Finanzamt Lüdenscheid*, the CJEU confirmed in a judgment of the Grand Chamber of 27 January 2009¹⁴ that: “Where a taxpayer claims, in a Member State, the deduction for tax purposes of gifts to bodies established and recognised as charitable in another Member State, such gifts come within the compass of the provisions of the EC Treaty relating to the free movement of capital, even if they are made in kind in the form of everyday consumer goods.” In this case, a German taxpayer donated certain goods to an orphanage in Portugal and claimed a tax deduction in Germany: although the German tax authorities did not want to agree, the CJEU, through this preliminary ruling, told them to accept.

In a way, the judgment of *Persche* (and others quoted before) confirms what was already said and written years ago, commenting on the CJEU jurisprudence on charities, hospitals, and medical services. Already then Hartwig stated¹⁵ bitterly that for the CJEU, “man is a money-making animal”. On the other hand, in the case of *Persche*, this business-oriented interpretation is beneficial to churches and charities run by them.

¹⁴ Reference for a preliminary ruling from the German Bundesfinanzhof — Case C-318/07.

¹⁵ Hartwig, Matthias. 2001. “Korporative Religionsfreiheit und soziale Tätigkeit.” In *Religionsfreiheit zwischen individueller Selbstbestimmung, Minderheitenschutz und Staatskirchenrecht*, edited by Rainer Grote and Thilo Marauhn, 509, in particular 536. Berlin: Springer.

Regarding the “moral plane”, from the Polish perspective it may seem worth mentioning that in 2002 the Polish government joined a declaration to the Accession Treaty, years later repeated in a similar form as declaration no. 61 to the Treaty of Lisbon: “The Charter [of Fundamental Rights] does not affect in any way the right of Member States to legislate **in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity**”.

One has to admit that using a declaration instead of protocol and speaking of rather undefined “moral integrity” is less powerful and less precise than the option used by the Maltese government on the same occasion of the accession to the EU. In Protocol No. 7, Malta stated, leaving no doubts: “Nothing in the Treaty on the European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in the territory of Malta of national legislation relating to abortion.”¹⁶

III. The ECtHR and the CJEU – mutual relations

In human rights-related cases, it has always been one or another European court issuing a judgment, but never both of them in the same case. The relations between the CJEU and the ECtHR are not legally defined, but are therefore even more interesting, inspiring researchers all over Europe.¹⁷

Regarding hypothetical competences to hear an appeal from a judgment of the other court:

¹⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2003:236:TOC>

¹⁷ Mainly in the German-speaking literature: *The Accession of the European Union to the ECHR*, edited by Julia Iliopoulos-Strangas, Vasco Pereira da Silva and Michael Potacs. 2013. Baden-Baden: Nomos; Huber, Andrea. 2008. *Der Beitritt der EU zur Europäischen Menschenrechtskonvention*, 205-240. Hamburg: Kovac; Pavlidis, Laura. 2012. *EU und EMRK: Rechtsfragen eines Beitritts*, Wien-Graz: Neuer Wiss.-Verl; Wiethoff, Jan H. 2008. *Das konzeptionelle Verhältnis von EuGH und EGMR*, Baden-Baden: Nomos; Vondung, Julie. 2012. *Die Architektur des europäischen Grundrechtsschutzes nach dem Beitritt der EU zur EMRK*, Tübingen: Mohr Siebeck; Krämer, Hannes. 2014. “Änderungen im Grundrechtsschutz durch den Beitritt der EU zur EMRK.” *Zeitschrift für öffentliches Recht (ZöR)* 69:235-255.

- The ECtHR could be competent if the EU (as a collective of Member States) violated human rights either via the EU legislation or the CJEU's judgments.
- The CJEU could be competent if the ECtHR in its judgment infringed EU law (for example if the ECtHR's judgment wrongly attributed powers between the EU and the Member States, forcing the wrong addressee to act).

In reality, there has not been a case when one court issued a judgment after another (although in the *Senator Lines* case, see below, such a procedure was already pending). However the CJEU in many judgments was influenced by the ECtHR, while the latter in its judgments acknowledged the achievements of EC and EU law.¹⁸

As regards the division of competences between the CJEU and the ECtHR, theoretically, everything is clear. The CJEU should deal with cases where EU institutions were in breach of the law, and the ECtHR where the Parties (Member States) violated human rights. In reality, the situation is much more complicated: R. Lawson proposed to classify these relations in four different kinds of cases:¹⁹

- 1) When ECtHR judges alleged violation by domestic authorities (vast majority of Strasbourg cases),
- 2) When the CJEU judges alleged violation by domestic authorities (e.g. *Grogan*, see above),
- 3) When the ECtHR judges alleged violation by EU institutions (e.g. *Senator Lines*, see below), and
- 4) When CJEU judges alleged violation by EU institutions (*Baustahlgewebe C-185/95 P* – in this case the CJEU awarded 50,000 ECU // as compensation for a too long duration of the proceeding before the Court of First Instance).

¹⁸ Slightly outdated but profound analysis: Simon, Denys. 2001. *Les influences reciproques entre CJCE et CEDH: Je t'aime et moi non plus*, 43-44. Le Seuil: Pouvoirs. Exemplary cases: European Court of Human Rights, *Dangeville v. France*, appl. 36677/97 (16 April 2002); European Court of Human Rights, *Mendizabal v. France*, appl. 51431/99 (17 January 2006).

¹⁹ Lawson, Rick. 2006. "The impact of the EU Constitution on the relationship between Strasbourg and Luxembourg." In *The EU Constitution: the best way forward?* edited by Deirdre Curtin, Alfred E. Kellermann and Steven Blockmans, 377. Hague: TMC Asser Press.

The most challenging cases are types 2 and 3. For type 2, the Grogan case was mentioned above. As for cases that are type 3, there are a few cases which unfortunately did not lead to a judgment *in merito*: in the Guérin case a French company brought a complaint against the (at the time) 15 EU-Member States for a judgment delivered by the ECJ, but the complaint was rejected as manifestly ill-founded (ECtHR 4 July 2000, Appl. 51717/99). In the case Senator Lines, a complaint against 15 Member States was declared inadmissible in March 2004 on factual grounds (ECtHR 10 March 2004, Appl. 56672/00 Senator Lines GmbH v. Austria), because while the application was pending in Strasbourg, the Court of First Instance quashed the fine being the subject of complaint to the ECtHR; subsequently, the latter concluded there was no continuing infringement of fundamental rights and that the applicant was not a victim of a violation.²⁰

In practice, the courts were avoiding the situation where they had to judge a case already decided by another court (which would lead to a so-called formal divergence of the judgments) at all costs. On the other hand, there were various cases where the CJEU recalled the jurisprudence of the ECtHR: for example, as regards the notion of privacy as per Art. 8 of the ECHR while searching business premises: *Colas Est. v. France* (as judged by the ECtHR, appl. 37971/97, judgment 16 April 2002, Reports 2002-III, p. 105) and *Roquettes Freres SA* (as judged by CJEU, C-94/00, 2002 ECR I-9011, para. 25). In the case *Mannesmannröhren*,²¹ the company claimed a right not to incriminate oneself, based on the ECHR. In the judgment, the Court of the First Instance in Luxembourg underlined that although the fundamental rights form an integral part of the general principles of Community law, the ECHR is not a part of (at the time) Community law (para. 59).

Following this short analysis of the relations between the ECtHR and CJEU, it is worth asking what the accession of the EU to the ECHR would practically mean. Or in other words, looking at the *Lautsi* case, one could ask a provocative question: Could we expect a judgment from Luxembourg to be different to the one from Strasbourg?

²⁰ Also: *The European Union After Lisbon*. 2012, edited by Hermann-Josef Blanke and Stelio Mangiameli, 177. Berlin: Springer.

²¹ *Mannesmannröhren-Werke AG v. Commission*, T-112/98, [2001] ECR II-729.

IV. Accession of the EU to the ECHR

In 1996, in the first opinion of the (at the time) ECJ on the accession of the European Community to the ECHR (opinion 2/94), the Court stated that the EC had no competence to accede to the ECHR. As mentioned earlier, this changed with the Lisbon Treaty.

The wording of Art. 6 of the TEU is clear that it is an obligation for the EU (“shall accede”) and no more a question of the political “will” (in which case the wording would be: should/may/can). This short provision is accompanied by Protocol No. 8, which is also very short and does not bring many practical hints as to how this must be done.²²

On the side of the Council of Europe, changes introduced through Protocol No. 14 made the accession of the EU possible.²³ The accession agreement is to be signed by the EU and (currently) 47 parties to the Convention (Members of the Council of Europe). The negotiations started in 2010, following respective recommendation of the Council of the EU authorizing the Commission to negotiate. The negotiations were conducted by the European Commission, more specifically by the Legal Service of

²² Article 1

The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "European Convention") provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:

- (a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention;
- (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

Article 2

The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.

Article 3

Nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union.

²³ *Protocol No. 14 and the Reform of the European Court of Human Rights*. 2005, edited by Paul Lemmens and Wouter Vandenhoe, Antwerp: Intersentia.

the Commission, with the European External Action Service associated. On the side of the CoE there were 14 negotiating countries: 7 EU and 7 non-EU States. The legal framework for this process is described in Art. 6 (2) of the TEU, and Protocol 8 to the Lisbon Treaty. The EU was meant to join Protocols 1 and 6 – the only two protocols ratified by all Member States of the EU, although the Commission tried to put pressure on for all protocols.

The draft agreement, together with a special note of the Legal Service of the European Commission, was sent for the opinion to the CJEU in July 2013. On 18 December 2014 the CJEU issued its opinion (opinion 2/13).²⁴ This opinion was accompanied by a very concise (3 pages) and perfectly clear press release – available in all EU languages – the reading of which is recommended.²⁵ In the first part of this opinion the CJEU confirmed that issues raised by the above mentioned opinion 2/94 were resolved by the Treaty of Lisbon: the EU received legal personality and the accession of the EU to the ECHR is clearly addressed. However, the CJEU raised a number of issues, which are briefly presented below:

- The ECHR should be better coordinated with the Charter on Fundamental Rights, and there is no provision in the draft agreement to ensure such coordination.
- The ECHR would require each Member State to check that the other Member States had observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States.
- Protocol 16 to the ECHR, signed on 2 October 2013, permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols. In view of the CJEU, the mechanism established by this protocol could affect the autonomy and effectiveness of the preliminary ruling procedure provided by the TFEU.
- Although the TFEU provides that the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided

²⁴ <http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=397816>

²⁵ <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140180en.pdf> (accessed June 3, 2015).

for by the Treaties, the draft agreement allowed a possibility that the EU or Member States might submit an application to the ECtHR concerning an alleged violation of the ECHR by a Member State or the EU in relation to EU law.

- A new co-respondent mechanism would ensure that a Member State or the EU were correctly addressed in a given case. This would lead to a situation where the ECtHR would be required to assess the EU rule of law governing the division of powers between the EU and its Member States; the decision of the ECtHR, following this analysis, would be binding both for the EU and Member States.
- A case pending before the ECtHR would potentially lead to a situation where the ECtHR interprets the case law of the CJEU,²⁶ and see whether the CJEU has already given a ruling on the same question of law. Therefore the CJEU suggests improving the procedure of the prior involvement of the court in order to avoid such an interpretative practice of the ECtHR.
- The ECtHR would be empowered to rule on the compatibility with the ECHR of certain acts, actions, and omissions performed in the context of the Common Foreign and Security Policy.
- The draft agreement in its current wording brings risks that the ECtHR would interpret the case-law of the Court.

In the conclusion, the CJEU leaves no doubt: The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms **is not compatible with Article 6(2) of the TEU, or with Protocol No. 8** relating to Article 6(2) of the Treaty on the European Union on the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

V. Could the CJEU judgment be different from the judgment of the ECtHR Grand Chamber?

Since the Grand Chamber in *Lautsi* judged mostly on the basis of Article 2 of the first Protocol to the ECHR, which is a right to education,

²⁶ More on this aspect: Baratta, Roberto. 2013. "Accession of the EU to the ECHR: The Rationale for the ECJ's Prior Involvement Mechanism." *Common Market Law Review* 50:1305-1332.