"Beyond the alternative between neutrality and historical argument: suggestions from the Italian case law"[*]

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1. Religious traditions and the challenge of the secular principle.

One of the most complex challenges of our modern constitutional democracies concerns the relationship between cultural and legal traditions and the moral and political duty to be "secular". The secular, indeed, "has become a central modern category - theologico-philosophical, legal-political, and cultural-anthropological - to construct, codify, grasp, and experience a realm or reality differentiated from 'the religious'"[1]. As Charles Taylor pointed out, "it is generally agreed that modern democracies have to be 'secular'. There is perhaps a problem, a certain ethnocentricity, involved in this term. But even in the Western context the term is not limpid and may in fact be misleading. What in fact does it mean?"[2]. According to Taylor, a secular regime involves a certain separation between state and church, but also "more than this"; especially in our pluralistic postmodern societies, the secular principle "requires that there be some kind of neutrality, or 'principled distance', to use Rajeev Bhargava's term"[3]. But, again, "neutrality" or "principled distance" are very blurred terms, and there is not a strong consensus on what they really mean.

As is well-known, the separation between state and church or between politics and religions is not a novel issue, and "the interaction between the state and religious institutions goes back to the emergence of the state as a distinct legal or constitutional construct"[4]. For that reason (and many others), the issues concerning the secular principle have evolved in Western democracies in different forms and legal models, strictly related to the historical, economic, social, religious and moral developments of every country and society. We do not want here to explore the legal, cultural, and historical differences in the

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1 J. Casanova, *The Secular and Secularisms*, 76 *Social Research* 4, 2009, p. 1049.

2 See C. Taylor, *The meaning of Secularism*, *The Hedgehog Review* 12:3, 2010, p. 23.

3 Ibidem.

4 F. Venter, *Constitutionalism and Religion*, Edwar Elgar Publishing, 2015, p. 9.

meaning of the secular principle in Western countries[5]. Nonetheless, we can explicate two general and very broad approaches to the term "secular" that are useful to explain the tricky relationship between religious tradition and secular law in our modern (and post-secular) age.

Some think that the term "secular" implies a strong impenetrable separation between politics and religion, and an absolute strict neutrality of the public space (this is the secularist position). The core of this theory is that religion must be confined to the private sphere because it "is either an irrational force or a non-rational form of discourse that should be banished from the democratic public sphere"[6]. This conception of religion arose from the historical clash between the absolute states of the 16th century and the rise of the Enlightenment's political thought, and from the idea that the traditional role of the religion in shaping the cultural tradition of the European societies was "a leftover of the past defeated by the Reason of the West" and "an ancient idea that has to be relegated in the pre-legal, if not in the personal conscience"[7]. Starting from this secularist approach, secularization produces the following paradox: "in the name of freedom, individual autonomy, tolerance, and cultural pluralism, religious people - Christian, Jewish, and Muslims - are being asked to keep their religious belief, identities, and norms 'private' so they do not disturb the project of modern, secular, enlightened Europe"[8].

This idea of secularism has a strong and oppositive impact on cultural heritage and traditions, as clearly shown several years ago by the European battle for the inclusions of a reference to Europe's Judeo-Christian roots in the European Constitution[9]. In sum, especially in Europe, "any public recognition of the Christian heritage or of the living religious traditions of contemporary Europeans would make liberal political coexistence

5 See C. Taylor, *The Polysemy of the Secular*, 76 *Social Research* 4, 2009, p. 1147: "the history of this term 'secular' in the West is complex and ambiguous. It starts off as a term in a dyad, which distinguishes two dimensions of existence, identifying them by the kind of time essential to each. But then building on the clear immanent/transcendent distinction, it mutates into a term in another dyad, where 'secular' refers to what pertains to a self-sufficient immanent sphere, and its contrasting term (often identified as 'religious') relates to the transcendent realm. This can then undergo a further mutation, via a denial of this transcendent level, into a dyad in which one term refers to the real (the secular), and the other to what is merely invented (the religious); or where 'secular' refers to the institutions we really require to live in 'this world,' and 'religious' or 'ecclesial' to optional extras that often disturb the course of this-worldly life".

6 J. Casanova, *The Secular and Secularisms*, 76 *Social Research* 4, 2009, p. 1052.

7 G. Zagrebelsky, *Scambiarsi la veste*, LaTerza, 2018, p. 18.

8 J. Casanova, *Religion, European Secular Identities, and European Integration*, in T. Birnes and P. Katzenstein (eds), *Religion in Expanding Europe*, Cambridge University Press, 2006, p. 66-67.

9 See J. H. H. Weiler, *Un'Europa Cristiana – Un saggio esplorativo*, BUR, 2003.

and pluralist toleration in a united Europe nearly impossible" because some "dominant discourse in Europe prefers to hold on to the idea of single secular modernity, emerging out of the Enlightenment"[10].

The secularist approach of the privatization of religion was used for several years to explain modernity. But it is probably not useful anymore to understand the very complexity of our postmodern (and post-secular) societies. As Peter Berger pointed out, "the theory that modernity brings about a decline of religion (...) has to be discarded" for two main reasons. First "most of the sociologists of religion now agree that this theory has been empirically shown to be false". Second, the theory "fails spectacularly in explaining the difference between the United States and the Europe"[11]. The first reason is strictly related to the so called *Revanche de Dieu*[12], and with the phenomenon of the "deprivatization" of religions; as clearly shown by the studies of Josè Casanova, religious traditions of all the world are refusing to accept the marginal and privatized role that some theories of secularization have reserved to them[13]. The second reason provides a new perspective in the inquiry of the proper meaning of the secular principle, that, according to Peter Berger, needs to be investigated in the light of US secularization. The United States, indeed, embraces a particular conception of the secular state that, at the same time, strongly recognizes the religious and transcendental heritages of the nation (expressed by the famous motto "a Nation under God") and a concrete "wall of separation between church and state", established by the First Amendment of the Constitution. In this light, the First Amendment paradoxically served to reinforce a strong link between religion and the nation; as Dwight D. Eisenhower said: "Our Government makes no sense unless it is founded on a deeply held religious belief – and I don't care what it is!"[14].

This second approach to the secular principle is perhaps useful to reconcile the clash between tradition and modernity in the secularization process. This is particularly important from a political point of view because, as Charles Taylor pointed out, "for people to act together, to deliberate in order to form a common will on which they will act, requires

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10 J. Casanova, *Religion, European Secular Identities, and European Integration*, in T. Birnes and P. Katzenstein (eds), *Religion in Expanding Europe*, Cambridge University Press, 2006, p. 66.

11 P. Berger G. Davie,E. Fokas, *Religious America, Secular Europe? A theme and Variation*, Ashgate, 2008, p. 10.

12 Title of a famous book of G. Kepel, *La Revanche de Dieu*, Paris, 1991.

13 J. Casanova, *Oltre la secolarizzazione: le religioni alla riconquista della sfera pubblica*, il Mulino, 2000, passim.

14 Cfr. P. Berger, G. Davie and E. Fokas, *supra note 14*, p. 42-43.

a high degree of common commitment, a sense of common identification. A society of this kind presupposes trust, the basic trust that members and constituent groups have to have, the confidence that they are really part of the process, that they will be listened to and their views taken account of by the others. Without this mutual commitment, this trust will be fatally eroded"[15].

But reconciling tradition with modernity is also important from a constitutional point of view: as Mary Ann Glendon pointed out, "after all rights emerge from cultures; rights cannot be sustained without cultural underpinnings; and rights, to be effective, must become part of each people's way of life"[16]. Starting from this perspective, according to Andrea Pin, "national religious and cultural traditions have recently come to play a new role in shaping the contemporary identity of the states: they have been considered in their connections with modern human rights, rather than as opposed to them"[17].

2. Strict Neutrality vs. Historical Argument.

One of the fields where the clash between the ambition toward secularism and the need to enhance cultural traditions mostly emerges is the debate on the presence of religions in the public space. Courts and judges are often asked to solve conflicts involving religious claims, trying to maintain simultaneously respect for religious identities, religious freedom and the principle of equality of every belief before the state. The difficulty of this task arises clearly within the extensive case law on religious symbols and ceremonial prayers, both in Europe and in the USA[18]. This is one of the biggest challenges that the constitutional courts have to address in our days: as Justice Rehnquist pointed out, all Establishment Clause challenges "present us with the difficulty of respecting both faces. Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens. One face looks to the past in acknowledgment of our Nation's heritage, while the other looks to the present in demanding a separation between church and state. Reconciling these two faces requires that we neither abdicate

15 C. Taylor, note 2, p. 30.

16 M.A. Glendon, *Justice and Human Rights: Reflections on the Address of Pope Benedict to the UN*, (2008) 19 European Journal of International Law 926.

17 A. Pin, R*eligions, National Identities, and the Universality of Human Rights*, in 3 Oxford Journal of Law and Religion *3*, 2014, p. 432.

18 For an analysis of ECHR and US jurisprudence in cases concerning religious symbols, see D. Tega, *Imperfect Symmetry. The Court of Strasbourg and the US Supreme Court on religious symbols in public spaces*, EUI Working Paper RSCAS 2016/08; Z. R. Calo, *Constructing the Secular: Law and Religion Jurisprudence in Europe and United States*, in *EUI working paper*, RSCAS 2014/94, 2014.

our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage"[19].

In order to address this challenge, constitutional judges often try to extract from a certain definition of "secular state" a particular legal standard and use it as the legal tool useful to reconcile, once for all, all the cases concerning religions in public spaces. The most-used legal standard is the so-called principle of "strict neutrality", which finds varied implementations. There are of course different conceptions of "neutrality" not only in different jurisdictions, but sometimes even within the same court's case law[20]. Anyway, the core of this legal standard comes from the Rawls' definition of neutrality: "as practical political matter no general moral conception can provide a public recognized basis for a conception of justice in modern democratic state"[21]. Starting from this perspective, neutrality as a legal standard implies two main goals: strict and strong separation between state and church; and freedom *from* religion (instead of freedom *of* religions).

This idea of neutrality has received many criticisms from a theoretical point of view[22]. As some political thinkers pointed out, neutrality is "incoherent because any determinate politics must necessarily rely upon and promote some contestable scheme of values"[23]. From a constitutional point of view, the judicial use of strict neutrality as a legal standard addresses the clash between secularism and cultural traditions by dismissing the latter from public life. But, as Justice O'Connor pointed out, this produces a paradoxical effect: "certain ceremonial references to God and religion in our Nation are the inevitable

19 See Van Orden v. Perry 545 U.S. 677 (2005) (Chief Justice Rehnquist concurring opinion).

20 As clearly shown by M. Movsesian, *State-Sponsored Religious Display in th US and Europe*, in S. Ferrari and R. Cristofori, *III Religion in Public Spaces*, Burlington, 2013, p. 510 ss.

21 J. Rawl, *Justice and Fairness: Political not Metaphysical*, in *Philosophy and Public Affairs*, 1985, p. 205. The philosophical idea of neutrality is one of the most studied principles of our time. See (for example) J. Rawls, *A Theory of Justice*, Cambridge, Press of Harvard University, 1971; R. Nozick, *Anarchy, State, and Utopia*, New York: Basic Books, 1974; B. Ackerman, *Social Justice in the Liberal State*, New Haven: Yale University Press, 1980, R. Dworkin, *"Liberalism", in A Matter of Principle*, Cambridge, Harvard University Press, 1985.; C.E. Larmore, *Patterns of Moral Complexity*, Cambridge; Cambridge University Press, 1987.

22 The incoherence of neutrality was raised also from a constitutional point of view. See A. Koppelman, T*he Fluidity of Neutrality*, 66 The Review of Politics 4, 2004, p. 635-636: "The charge of incoherence was raised against the idea of neutrality in the Supreme Court's religion jurisprudence. This objection focused on a deep tension in the Court's position, between the idea that religious conscientious objectors ought to be accommodated and the idea that government should be neutral between religion and nonreligion." See also F.S.. Ravitch, *Master of Illusion.The Supreme Court and the religious clauses*, New York University Press, 2007.

23 See, e.g., William A. Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State*, Cambridge University Press, 1991, p. 92-94.

consequence of the religious history that gave birth to our founding principles of liberty. It would be ironic if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it"[24].

These criticisms cannot be leveled against a second legal standard used by judges: the so-called "historical argument". It comes from a different conception of the secular state, and it is raised up in opposition to a strong idea of assertive secularism and strict neutrality. According to this argument, judges must take into account the cultural and religious traditions of their systems as far as they are strongly rooted in the institutional (or even constitutional) history of their Nations. This kind of argument has been widely used in the Western word and especially by the Supreme Court of the United States in order to admit the constitutionality of the so-called "American ceremonial deism" or the use of the words "under God" or "in God we trust" in the American public and institutional life[25]. In sum, the historical argument can be described as a wide umbrella under which cultural traditions – as religious ceremonies and habits – can find protection when they are eligible to be considered historical customs deeply rooted in the societies.

The historical argument has the merit of reconciling the secular state with its cultural heritage. Nonetheless, the use of the historical argument alone is both weak and formalistic: first, practical jurists cannot solve hard conflicts just resorting to "what has always been done"[26]. Second, it has the following - paradoxical - effect: a religious tradition can find a place into the public space only if its meaning is no longer "religious" but strictly "secular". This opens up the Pandora's box of the interpretation of symbols and traditions: when can a crucifix or a tablet of the Ten Commandments or a religious invocation can be described as "secular" or as "religious"? How many years must a

24 See *Elk Grove Unified School Dist. v. Newdow* 542 U.S. 1 (2004) (Justice O' Connor concurring opinion)

25 This argument was strongly used by the Chief Justice William Rehnquist in order to declare the compatibility of some American traditions (such as the phrase "under God" of the Pledge of Allegiance) with the Establishment Clause. As pointed out by B. Ledewitz, *Church, State, and the crisis of American Secularism*, Indiana University Press, 2011, p. 33, "Chief Justice Rehnquist relied primarily on the presence in American history 'of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history'. From numerous examples, such as the national motto 'in God We Trust' and opening of the United States Supreme Court sessions with the language 'God Save the United States and this honorable Court', Chief Justice Rehnquist concluded that 'our national culture allows public recognition of our Nations's religious history and character'". This argument was mostly used by conservative Justices of the Supreme Court.

26 From this point of view, the historical argument presents some similarities with the theory of original intent developed by Justice A. Scalia.

religious symbol stay in the public space in order to be considered part of the national historical tradition?[27]

As we have attempted to explain, the two legal standards mostly used by courts are not convincing enough. Our aim is to point to a third way to realize the ambition toward a secular state, on the one hand, and to enhance religious traditions according to their true meanings, on the other. This third solution is based on three main premises: a) the idea of finding a unique abstract legal standard, capable of resolving every case, is a utopia; b) the place of religion in the public space does not involve a binary relation (state vs. church), but rather it is a complex triangular relational principle (that involves State, Religion, and Civil Society); c) the main aim of the courts tasked to decide on conflicts involving religious claims should be that of protecting individuals from concrete harm of their religious (and nonreligious) rights: the goal of the courts is not to enforce a certain idea of the secular state or *laicité*, but to ensure pluralism and religious peace. Let us see within the Italian case law whether and when this third approach – which considers *laicità* a tool, not a goal - has succeeded.

3. The Italian case Law

Because of its peculiar political and diplomatic relationship with the Catholic Church (and the presence – within its borders – of the Vatican State), Italy has an odd church-state relationship. As is well-known, Catholic traditions are deeply rooted in this country, even at the core of the constitutional system. The first evidence of this is that, according to Article 7 of the Constitution[28], the relations between the State and the Catholic Church are regulated by the Lateran pacts, whose amendments are admitted only when accepted by both parties. In case of amendments not accepted by the Catholic Church, the State must

27 That explain, for examples, the controversial decisions of the Supreme Court on the Ten Commandments in *Van Orden v. Perry* 545 US 677 (2005) and *McCreary County v. American Civil Liberties Union of Ky.* 545 U.S. 844 (2005). See L.P. Vanoni, *Pluralismo religioso e stato (post) secolare. Una sfida per la modernità*, Giappichelli, 2016.

28 See Article 7 of the Italian Constitution: "The State and the Catholic Church are independent and sovereign, each within its own sphere. Their relations are regulated by the Lateran pacts. Amendments to such Pacts which are accepted by both parties shall not require the procedure of constitutional amendments".

resort to the more protective procedure of constitutional amendment. Differently[29], the relations between the State and the other religions are regulated by the ordinary law[30].

As pointed out by Andrea Pin[31], the Catholic roots of Italian constitutional culture are also mirrored in our constitutional jurisprudence. Since the Constitution does not contain any sort of "establishment clause", it was the Constitutional Court that shaped a brand-new idea of *laicità* (the word classically used to indicate the non-establishment principle and the separation between church and state in Italy). The *laicità* principle was, indeed, explicitly introduced by the Constitutional Court's decision n. 203/1989. And, according to Pin[32], it had minimal association with the hostile French separation of church and state (*laicitè*).

It is not by chance that the abovementioned constitutional judgment regarded the constitutional compatibility of teaching the Catholic religion in public schools. Indeed, as it happens in many other countries of the Western world, also in Italy, the first places where secularism and cultural heritage clash are these institutions. And some of the trickiest cases decided afterwards by the Italian courts at the light of the *laicità* principle again involved the presence of the religions in the public schools. Everyone knows the political and legal battle about the crucifix in Italian classrooms. And actually there is extensive case law concerning the display of this religious/cultural symbol in Italy[33]. The most debated of the cases, the *Lautsi* case, is well-known all over the world as it has been discussed two times before the European Court of Human Rights[34]. For sure, the case law on the public display of crucifixes and other religious symbols in public schools[35] is one of

29 See Article 8 of the Italian Constitution: "All religious denominations are equally free before the law. Denominations other than Catholicism have the right to self-organisation according to their own statutes, provided these do not conflict with Italian law. Their relations with the State are regulated by law, based on agreements with their respective representatives".

30 For a detailed study on the Catholic roots within the Italian Constitution and the Framers' debate, see A. Pin, *Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and State*, in *Emory International Law Review,* Vol. 25, No. 1, 95, 2011, p. 110 ff.

31 Id., p. 120.

32 Ibidem.

33 See L. P. Vanoni, *Laicità e libertà di educazione. Il crocifisso nelle aule scolastiche in Italia e in Europa*, Giuffrè, 2013, p. 45 ff.

34 The first decision was delivered as a chamber judgment on November 3, 2009. After the Italian government appeal, the second decision was released by the Grand Chamber on March 18, 2011.

35 On this topic, see - among the others - R.Bin, A. Brunelli, A. Pugiotto and P. Veronesi (eds.), *La laicità crocifissa? Il nodo costituzionale dei simboli religiosi nei luoghi pubblici*, Giappichelli, 2004; J.H.H. Weiler, *Lautsi: Crucifix in the Classroom Redux*, in EJIL https://www.ejiltalk.org/lautsi-crucifix-in-the-classroom-redux/, 2010; J. Temperman (eds.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom*, Brill, 2012; M.L. Movsesian, *Crosses and Culture: State-Sponsored Religious Displays in the US and Europe*, in S. Ferrari and R. Cristofori, *III Religion in the Public Space*, Burlington, 2013, p. 510 ff.;

the best case studies to observe - in action - both the use of strict neutrality and the historical arguments by the Italian judges. Nonetheless, in this context, we want to also bring attention to another - more recent - issue, which - as well - involves the space of the religion in the public school, this time not through symbols but through religious ministers. In particular, we want to focus on a case regarding a pastoral visitation in a school community and a case that regards the Easter Benediction in a public school. The decisions of the courts in these cases followed both the legal approaches explained above (strict neutrality and historical arguments) but also - within the most recent judgment - a third way.

In both these cases, the core legal questions raised by the appellants were: does the presence of a religious minister in a public school violate the *laicità* principle? Does the presence of a Catholic minister constitute discrimination based on religion for the pupils who are not Catholic?

3.1. The Pastoral visitation and the use of the historical argument

The first decision we want to focus on, Council of State (6 april 2010 n. 1911), established that a pastoral visitation in a public school does not have a discriminatory effect[36]. Indeed, as the Council clarified, the encounter with a Bishop could not be considered a religious event: it must be seen as a "cultural testimony" of a religion (the Catholic one), whose contents are worth knowing and studying. Therefore, the Bishop's visitation does not violate the *laicità* principle, and atheists or believers of other religions cannot complain of discrimination. The Council's decision articulates its legal judgment using the historical argument: describing the pastoral visitation as "cultural testimony", the judges "secularized" a very ancient religious ritual of the Catholic Church and allowed its presence in the public school only because it is a part of the cultural and historical tradition in Italy. In order to do so, the administrative judges had to exclude from the judgment the proper definition and meaning of the pastoral visitation, that - according to the Canon Codex - does constitute a religious event[37]. This verdict has been confirmed by the

F.M. Gedicks and P. Annichino, Cross, *Crucifix, Culture: an Approach to the Constitutional Meaning of Confessional Symbols*, in *Fir. Am. L. Rev.*, 2015, p. 102 ff.

36 According to the Italian legal framework (see D.lgs 416/1974, D.lgs 297/1994 and DPR 275/1999), the autonomy of the educational institutions (protected by the Constitution at Article 117) permits them to schedule cultural events inside the school, both during classes and outside of lesson time.

37 See Canons n. 396-398 of the Codex iuris canonici.

President of the Republic[38] who, within an extraordinary appeal, rejected the complaints saying that a pastoral visitation without a liturgical act (Eucharist, blessing, and so on) is just a testimony of religious and cultural values. The argument used by the President and by the Council of State in this occasion is not so far from the one used by the same Court in the *Lautsi* case in 2006[39]. Here the administrative judges affirmed that the crucifix can be displayed in public school as the cultural traditions rooted in this symbol enforce the legal tradition of our Constitution.

3.2. The Catholic Easter Benediction case: strict neutrality ...

The second case we want to focus on has as its subject the Catholic Easter Benediction in a public school[40]. The main difference between this case and the previous one is that, in this case, the presence of the minister in the school is irrefutably to perform a religious ritual. Starting from this undisputed element, the administrative judges of first instance and those of the appeal decided the case in two opposite ways.

The Administrative Court of Emilia Romagna (9th February 2016) stated that the resolution of the school that allows the Easter Benediction - even if after classes and in the presence of only the pupils whose parents decide to attend that event with their sons[41] - is unconstitutional because it violates the constitutional principle of *laicità*. According to the statement, a religious ritual (such as the Easter Benediction) cannot cross the walls of public schools (even if scheduled as extracurricular events) and has to be confined into the believers' private sphere. The administrative judges used here the strict neutrality argument: i.e. the *laicità* principle imposes a strict separation between church and state, and religion must be excluded from public spaces and relegated into the private sphere.

3.3. … and a third way approach.

38 See President Giorgio Napolitano's decision delivered on May 6th 2011, available here: http://www.culturacattolica.it/cm-files/2011/12/15/7377.pdf .

39 See the decision n. 556 delivered by the Council of State on January 13th 2006.

40 About this case, see T. Di Iorio, *Oltre il muro dell'intolleranza. Luci e ombre della benedizione nella scuola tra libertà religiosa e laicità dello Stato*, in www.statoechiese.it, n. 24/2017; P. Cavana, *Libertà religiosa e scuola pubblica. La piccola querelle delle benedizioni pasquali*, in www.statoechiese.it, n. 2/2017; L. Muselli and C.B. Ceffa, *Libertà religiosa, obiezione di coscienza e giurisprudenza costituzionale*, Giappichelli, 2017, p. 51 ff.

41 In compliance to Article 311.2 of D.lgs 297/1994 that affirms: "Per dare reale efficacia all'attuazione del diritto di avvalersi o di non avvalersi di insegnamenti religiosi, si provvede a che l'insegnamento religioso ed ogni eventuale pratica religiosa, nelle classi in cui sono presenti alunni che hanno dichiarato di non avvalersene, non abbiano luogo in occasione dell'insegnamento di altre materie, né secondo orari che abbiano per i detti alunni effetti comunque discriminanti".

That verdict was appealed to the Council of State (27 March 2017 n. 1388), which came to an opposite result[42]. In this verdict, the Council does not deny that the benediction is a religious ritual and it says that its celebration in a school permits the remembrance of the presence of God in every place. Nonetheless, in this concrete case, the Court says that the *laicità* principle was not violated. The judges affirm that, taking into consideration the particular elements of the case, the benediction was not imposed on all the pupils, but it was reserved for the ones who decided to attend it with their parents after classes. It means that would be hard (if not impossible) to find someone concretely discriminated against or whose religious freedom was wounded because of the Benediction. It is worth noting that the Council of State ignored the applicants' claim that the Easter Benediction, even if optional, is against the *laicità* principle because it shows an endorsement of a state institution (the school) of one specific religion. The Court's silence on this point clarifies that the goal of the Court is not to enforce a certain idea of the secular state (where religion cannot be professed in public), but to ensure pluralism and religious peace, taking into consideration that the public space is not owned by the state but by the members of the society. Finally, the judgment states that, according to an elementary principle of non-discrimination, the religious nature of a tradition cannot be, itself, the only reason for forbidding it. There should be other concrete evidence that the habit jeopardises the maintenance of pluralism and religious peace.

4. Conclusion

The approach followed by the Council of State in the Easter Benediction case takes into account the three main goals we used to describe the "third way approach". First, the judges did not try to solve the case by resorting to an abstract legal standard, but they started by analyzing it from a concrete point of view. Second, they considered the case taking into account the civil society as well, and particularly the desire of a part of the school community to receive the Easter Benediction. Third, the judges embraced a legal approach that investigates the concrete real harm of the religious rights of the pupils in that particular case: the Court does not affirm the general rule that a Catholic benediction in a school is always in accordance with the *laicità* principle; it says that a religious event celebrated after classes and only in the presence of those who desire it is legitimate. In

42 Within the Italian administrative case law there is a similar precedent: Administrative Court of Umbria, decision n. 677/2005. On this occasion, the Court declared the legitimacy of a Catholic Benediction in a public school as it was optional and brief: therefore no one was concretely discriminated against, and the pupils were not occupied for an excessive part of their free time.

conclusion, the third way approach does not provide an undisputable definition of *laicità*, capable of resolving - once for all - all the problems raised in the (post-) secular age. Nonetheless it could provide the courts useful tools to solve - case by case - those conflicts raised in our multicultural society by the presence of religions in public spaces.

In the case of law and religion, the principle that should enlighten the decisions by the courts is not a certain idea of neutrality or secularity, but the principles of pluralism and religious tolerance. As these principles are very general goals, they cannot be achieved through an abstract law. Rather they have to be pursued and lived within the concrete circumstances of the ordinary life.

This idea the indirectly echoes the considerations made by the ECHR in *Serif v. Greece*, 1999: "Although (...) it is possible that tension is created in situations where a religious or any other community becomes divided, this is one of the unavoidable consequences of pluralism", and "the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other" (par. 53).

In conclusion, in cases regarding the presence of religion into the public space, "careful analysis of context is crucial. Different legal regimes, the products of different cultures and histories", will naturally adopt different responses and, "even within a single regime, a variety of responses may be appropriate, depending on place, speaker, and other circumstances. In this area, as in so many others in law and religion, a rigid, categorical approach seems unwise"[43]. As Taylor pointed out, "one of our basic difficulties in dealing with these problems is that we have the wrong model, which has a continuing hold on our minds. We think that secularism [or *laicità*] has to do with the relation of the state and religion, whereas in fact it has to do with the (correct) response of the democratic state to diversity"[44].

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43 M. Movsesian, *State-Sponsored Religious Displays in the U.S. and Europe: Introduction,* in *Faculty Publications. Paper 93*, 2013, p. 6.

44 C. Taylor, supra note 2, p. 25.