DiReSoM
Diritto Religione Società Multiculturali
Law Religion Multicultural Societies
Право Религия Мультикультурные Общества
قانون والدين في المجتمعات متعددة الثقافات
多元化社会中的法与宗教

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Application no. 4311/22: Associazione culturale Assalam di Cantù v. Italy
Intervention as a third party, under Rule 44 § 3 of the Rules of the Court

I hereby acknowledge receipt of the ECHR-LE14.8bP3 PC/LAC/nn letter, in which the Section Registrar informs me that the President of the Section has granted me, under Rule 44 § 3 of the Rules of Court, to make written submissions to the Court on behalf of Associazione DiReSoM - Diritto e Religione nelle Società Multiculturali ('Law and Religion in Multicultural Societies').

Below are the submissions written by the undersigned in collaboration with Professors Maria Luisa Lo Giacco, University of Bari, Adelaide Madera, University of Messina, Fabio Franceschi, Sapienza University of Rome, and Luigi Mariano Guzzo, University of Pisa, and shared by all members of the associations

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1. The Court states that the applicant is a Muslim association that originally had religious and worship purposes, then emended its statute and currently pursues cultural purposes. Therefore, the first question that arises is whether the applicant Association could be considered a 'community of believers' and, accordingly, whether, under Art. 34 of the Convention, it could stand entitled to lodge the complaint under Art. 9 of the Convention on behalf of its members.

2. In this regard, it is considered appropriate to point out that the general principle proposed by Art. 34 of the Convention aims to protect and guarantee fundamental rights by promoting the right of access to the Court. This right is subject only to the procedural

limitations provided for in the Convention itself. Indeed, Art. 34 of the Convention states that the Court «may receive applications from any person, nongovernmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto». In observance of this principle, the Court declared admissible even appeals brought by groups of people who acted to safeguard «the protection of the reputation and rights of others» (*Aksu v. Turkey*, 4149/04 and 41029/04, 15 March 2012; *Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania*, 47848/08, 17 July 2014; *D.H. and Others v. The Czech Republic*, 57325/00, 13 November 2007). Art. 34 of the Convention also clarifies that: «The High Contracting Parties undertake not to hinder in any way the effective exercise of this right». That is the principle of jurisdictional subsidiarity, which ensures the access to the Court to all subjects, especially to those who, in their States, do not receive any adequate protection for the rights guaranteed by the Convention; this is much relevant for minorities. Indeed, for the latter, the Court seems to be the only available remedy to ensure them the protection of the rights guaranteed by the Convention.

3. As such, DiReSoM maintains that considering the Association 'Assalam di Cantù' as a 'community of believers' does not have any consequences for the legitimacy of the apply. Art. 9 of the Convention guarantees the right to freedom of (thought, conscience and) religion either alone or in community with others. So, it doesn't matter whether the applicant is a 'cultural' or 'religious' (or 'liturgical', as stated in *Cha'are Shalom Ve Tsedek v. France*, 27417/95, 27 June 2000) group. The Court's has only to assess whether the applicant is a «victim» - or a «potential victim» (*Modinos v. Cipro*, 15070/89, 22 April 1993). This right to access cannot be limited neither by the formal qualification that a collective entity may receive under national law – *e.g.*, as 'association', 'foundation', 'group', etc. - nor by the consideration that may be defined by the evaluation of its statutory purposes.

4. The Court's jurisprudence states that cultural purposes do not interfere with the religious aims of an Association. For instance, in *Cha'are Shalom Ve Tsedek v. France* the Court ruled that «an ecclesiastical or religious body may, as such, exercise on behalf of its adherents the rights guaranteed by Art. 9 of the Convention (see, *mutatis mutandis*, the *Canea Catholic Church v. Greece* Judgment of 16 December 1997)» even though it is qualified as a 'cultural group'. In that case, the distinction between 'religious subject' and 'cultural subject' became appropriate because France denied the applicant Association the authority to represent Jewish believers. Under French national law, dating back to an Imperial Decree of 1808, such authority was granted to the *Association consistoriale*

israélite de Paris – 'the ACIP', to which the large majority of Jews in France belong, and from which the applicant Association had polemically parted, contesting the ACIP's monopoly on the *kosher* certification of slaughtered meat. The Court declared that: «in the present case, a community of believers – of whatever religion – must, under French law, be constituted in the form of a liturgical association, as is the applicant association», regardless to the national legal tradition in the matter of relations with religions. The Court did not grant the appeal because it did not recognize the status of 'victim' to the Association and did not identify the denounced elements of discrimination; however, it admitted that the Association Cha'are Shalom Ve Tsedek had both cultural and religious purposes and had the right to apply.

5. Scholars have long studied the difference between 'culture' and 'religion' in law, especially in reference to today's multicultural societies that, in contrast to the past, express a high degree of cultural and religious pluralism. The principles of laicità (laïcité/secularism) and equality require States to guarantee the same religious freedom to everyone – and every groups – without any difference or interference. Furthermore, these very principles require States to take the necessary measures so that minorities can also enjoy the rights of freedom guaranteed by the Convention without prejudice. DiReSoM addressed the issue[1] and reached the conclusion that: «the meaning of religion originates out of the law»[2]. European States «do not generally define 'religion' in their Constitutions or other formal legislations, but rather, leave it to the Courts to determine whether something is 'religion'"[3]. Art. 9 of the Convention considers religion as other similar inner matrices of personal behavior (such as thought, conscience, and belief), while national legislations mostly use the term «religion» to define «religious communities» as stated bodies according to the national law. That is to say 'Confessioni religiose' or 'Religionsgemeinschaften' using the Italian or German constitutional expressions" [4]. These expressions refer to 'religion' as an established faith, rather than to 'religion' *stricto sensu*. It is a problem if national laws use their defining power to discriminate against

[1] *The Meaning of 'Religion' in Multicultural Societies Law*, in Stato, Chiese e pluralismo confessionale, 2017, pp. 1-193.
[2] P. Consorti, *The Meaning of 'Religion' in Multicultural Societies Law. An Introduction*, in Stato, Chiese e pluralismo confessionale, 2017, p. 3.
[3] N. Doe, *Law and Religion in Europe. A Comparative Introduction*, Oxford University Press, Oxford, 2011, p. 21.
[4] M. Ventura, *Religion and Law in Italy*, Kluwer Law International, Alphen aan den Rijn, 2013, p. 58, uses «Religious denominations»; G. Robbers, Religion and Law in Germany, Kluwer Law International, Alphen aan den Rijn, 2010, p. 122, uses «Religious communities».

religious minorities, and use their defining power to not qualify them as 'religious entities', so as to exclude their religious and cultural activities from those protected by religious freedom rights.

5.1. It must be considered that in cases involving Art. 9 of the Convention the distinction between 'culture' and 'religion' is always very blurred. The legal reflections of behavior attributable to either 'culture' or 'religion' cover a semantic field with shifting boundaries. Moreover, religion represents an essential formant of culture, while all faiths imply rules that are developed on multiple planes. Art. 9 of the Convention specifies as well that this right «includes freedom … to manifest his religion or belief, in worship, teaching, practice and observance». Teaching, practices and their observance can also involve cultural elements, which therefore remain protected by Art. 9 of the Convention.

5.1.1. From a defining point of view, it should be noted that Italian law does not provide for the qualification of a collective entity as a 'community of believers'. In Art. 8.1, the Italian Constitution mentions the *confessioni religiose* (that is, 'religious denominations', according to the official English translation) to refer in general to 'religious institutions'; while in Art. 19, it protects religious freedom expressed «in any form, individually or with others». The formula «with others» can be applied to all types of groups, rather than religious ones.

5.1.2. Art. 10 of the European Directive of the Council of April 29, 2004, (2004/83/EC) - implemented in Italy by the Legislative Decree of November 19, 2007, n. 251 – states that «a group shall be considered to form a particular social group where in particular: - members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it». The legal form taken on by this social group can be plural.

5.1.3. Even in case the reference to religious purposes in the statute is lacking, it is still possible that the collective entity be regarded as a 'community of believers'. Furthermore, this qualification is unaffected by the cultural character of the association itself. Should the Association's status as a 'victim' be verified and the other procedures stipulated by the Convention met, it would be allowed to take legal action before the Court.

6. The principle of equal religious freedom must be applied to all religions (both 'religious denomination' and 'religious' or 'cultural' groups); however, it must be acknowledged that

different religious systems vary in terms of internal distinction between prescriptive cultural elements and religious rules. Some religious denominations – *e.g.*, Judaism and Islam – place great importance on following in both the social and private spheres rules that, from their religious perspective, have a divine origin. Religious rules on social relationships, clothing, and food derive from religious obligations that pervade different ways of life and cultural identities. However, respect for ethical obligations binds the behavior of non-believers, and, under Art. 9, the Convention protects their rights as well. This is a consequence of the cultural and religious pluralism protected by the European legislation. This assumption pertains to internal liberties and can be regarded as a broad premise of the protection of human rights. From this perspective, Art. 9 of the Convention aligns with Art. 18 of the Universal Declaration of Human Rights. This orientation is also shared by the Italian Constitutional Court, which qualifies these rights as worthy of protection «to the highest degree» (*see* Judgment No. 52 of 10 March 2016 and No. 254 of 5 December 2019).

6.1. It is worth noticing that Directive 2011/95/EU of the European Parliament and of the Council of December 13, 2011, agrees with this view. Indeed, it states that: «the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief». It follows that the domain of religious freedom does concern not only acts of worship strictly speaking, but also forms of behavior that are based on religious or non-religious, humanistic or philosophical beliefs, and which, therefore, are comprised within the concept of «culture».

6.2. For the purpose of further qualifying the religious dimension of the applicant Association, it is noted that the Italian Constitution equally protects the religious freedom of the various religious denominations (Art. 8.1 Const.) and that all citizens are equal before the law, without any distinctions on the basis of, among other things, religion (Art. 3 Const.). However, the national regulatory system reserves a treatment to the Catholic Church, on the basis of the 1929 Lateran Pacts (Art. 7 Const.) that differs from the procedure provided for religious denominations that have entered into an agreement (‘*Intesa*’) with the state, pursuant to Art. 8.3 of the Constitution. Since 1984, the Italian government has signed an *Intesa* with 13 religious denominations other than the Catholic Church, and it has also reformed the Concordat with the latter in 1984. In quantitative terms, the different religious denominations that have an *Intesa* with the State are: 10

Christian denominations, 2 Buddhist denominations, and 1 Hindu denomination, respectively. So far, Islamic communities have never been admitted to the negotiations. Their relations with the State have been regulated by participatory instruments that are unrelated to the constitutional provision under Art 8.3 of the Constitution and rely on contacts with various communities in the Italian Islamic panorama.

6.3. In Italy, Islamic communities are organized in a plurality of legal forms. Currently, only one is recognized as an '*istituto di culto*' ('Institut of cult'), which is an entity provided for by national law on 'admitted cults' promulgated in 1929 and still in force. Some other entities are established according to the rules of the Civil Code, and some others still according to the rules contained in special laws regulating the Third Sector (Legislative Decree No. 117, 3 July 2017, Third Sector Code). Legally speaking, Muslim communities have taken different legal forms. This contingency clarifies that it is possible for Muslims (as well as other) believers to organize themselves in legal forms that are not immediately referable to 'community of believers'. This is due to a defective legal framework, which forced the faith community to self-organize in accordance with the available legal tools.

6.4. DiReSoM thinks that the applicant Association can be considered a 'community of believers' and the Court can examine the proposed case to verify whether, pursuant to Art. 9 of the Convention, the Association is a 'victim' of the behavior carried out by the Municipality of Cantù.

7. As for the assessment of violations of Art. 9 of the Convention, the pluralism of the legal forms available for the establishment of a group cannot be adversely used to affect the religious freedom of Muslim communities. On many occasions the Court reiterated that there is no State obligation in providing a 'legal framework' to offer a special status and specific advantages to religious groups. However, if the State offers them possibility to access to a more favorable regime, it has to guarantee non-discriminatory standards, which grants all the religious groups equal opportunities. Italian church-state relations are shaped to a selective cooperation, which has given rise to a disparate treatment among religious communities, which is not justified by objective and reasonable reasons. Indeed, the lack of an *Intesa* is used to deprive the Islamic communities of the enjoyment of full religious freedom rights.

8. All religious denominations have a set of social and cultural teachings and practices, which are often carried out in the same spaces where worship meetings are also held. Having suitable places where religious rites and cultural and social practices can be carried out is

one of the rights guaranteed in the sphere of religious freedom (Italian Constitutional Court, Judgment No. 195 of 27 April 1993). On this issue, the Court stated that freedom to establish places of worship plays a crucial role within the protection of the collective dimension of religious freedom, which is at the core of the protection guaranteed by Art. 9 of the Convention as well. Were it not so, the Court would guarantee only 'theoretical', rather than 'effective' rights. The recognition of an effective right to manifest one's own religious faith, either in an individual or collective form, cannot leave aside the enjoyment of a juridical treatment that facilitates the realization of the purposes of the religious denominations themselves. Thus, the impossibility for a religious community to be provided of a place to practice his worship implies emptying the right to religious freedom of its essence.

8.1. In Judgment No. 63 of 2016, the Italian Constitutional Court emphasized that the right to open places of worship is «an essential condition for the public exercise thereof». Hence, this right is connected to the protective orbit of Art. 19 of the Italian Constitution, and its enjoyment is not related to having or not an *Intesa* with the State. On the other hand, since Judgment No. 59 of 1959, the Italian Constitutional Court defines worship building as an «essential condition» for the public exercise of religious practices. Moreover, the Court confirms this viewpoint also in Judgments No. 195 of 1993 and No. 346 of 2002, about access to public fundings for religious building.

9. DiReSoM claims that the examination of the facts of merits can be facilitated by using the principles established in *Association for Solidarity with Jehovah's Witnesses and Others v. Turkey* (No. 36915/10 and 8606/13, 17 October 2016), which bears many similarities to the case at hand. In such case, the applicant Association complained that it was denied the possibility to practice worship in the buildings it owned because Turkey did not recognize it as a religious community. Hence, the Association's buildings could not be defined as 'places of worship' on the basis of national urban planning laws.

9.1. The Court found that Turkey had used its urbanistic laws with discriminatory and detrimental purpose for the religious freedom of the applicant Association. Furthermore, the general framework was one of lesser protection of religious freedom of communities other than Muslims, and it was carried out through zoning laws as well.

9.2. Given that the rights protected by Art. 9 of the Convention may be subject to limitations (a) provided by law and (b) necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights

and freedoms of others, the question is whether both conditions are met in the present case. Having ascertained that the Municipality of Cantù intended to apply Italian national laws (*rectius*: regional laws), there is the question of whether urbanistic laws can be qualified as «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».

9.3. According to the Italian Constitutional Court, this concept encompasses matters of town planning and building (Judgments No. 303 and No. 362 of 2003), urban requalification (Judgment No. 16 of 2004), building amnesty regulations (Judgments No. 196 of 2004 and No. 70 of 2005), and in general «everything that pertains to the use of the territory and the location of plants or activities» (Judgment No. 307 of 2003). The Italian Constitutional Court has established that aspects relating to civil and social rights that may be connected to this matter must be dealt with by state law (Judgment No. 272 of 2016). Italian urban planning laws establish participatory procedures for the definition of 'zoning plans', 'intended uses' of buildings, and other similar instruments, which in Italy fall within the legislative competence of the Regions.

10. In Italy, urbanistic laws are related to the so-called «governo del territorio» (government of the territory). For the Italian constitutional Court, this expression comprises: a) urban planning and construction (Judgments no. 303 and 362 of 2003), b) urban redevelopment (Judgment no. 16 of 2004), c) building amnesty (Judgments no. 196 of 2004 and no. 70 of 2005), d) «everything related to the use of land and the location of facilities or activities» (Judgment no. 307 of 2003). In the opinion of the Italian Constitutional Court, the civil and social rights related to these matters must be dealt with by State law (Constitutional Court in Judgment No. 272 of 2016).

10.1. Urbanistic laws regulate the participatory procedures necessary to define the «piani di zona» (zoning plans) and the «destinazioni di uso» (intended use) of land and buildings (Decree of the Minister of Public Works No. 1444 of 2 April 1968), and other similar instruments that in Italy fall within the legislative competence of the Regions. The Italian Constitutional Court has already censured Regional laws related to the «governo del territorio» that restricted religious freedom rights. For example, Judgment No. 63 of 2016: declared illegitimate some articles of Lombardy Regional Law No. 12/2005 which introduced discriminatory restrictions for the construction of new places of worship by religious minorities, in particular Muslims; Judgment No. 67 of 2017: declared illegitimate an article of Veneto Regional Law No. 11/2004 which imposed on religious minorities the obligation to use the Italian language for all activities carried out in places of worship (the

Court found that this rule violated the right to religious freedom, especially for religious minorities that could not have used their own language in religious and cultural activities); Judgment No. 222 of 2021: it declared illegitimate an article of Sicilian Regional law No. 26/2016 which made the construction of new places of worship conditional on the issuance of a landscape authorization.

10.2. The Italian national law provides that local authorities follow urban planning programming to ensure that territories are developed in a manner that reasonably responds to the needs of the population, while respecting individual and collective rights guaranteed by state law, the Constitution, and the Convention. Therefore, measures adopted by local authorities in urban planning matters can never conflict with the exercise of rights protected by higher-ranking sources.

10.2.1. In *Sporrong et Lönnroth c. Suède* (7151/75 7152/75, 23 September 1982) the Court stated that: «les États contractants jouissent d'une grande marge d'appréciation pour mener leur politique urbanistique»; nontheless, but these laws cannot prejudice the freedom: «de manifester leur religion au sens de l'article 9 de la Convention» (*Association for Solidarity with Jehovah's Witnesses and Others v. Turkey*).

10.3. Italian law provides for five 'urbanistically relevant functional categories': a) residential; b) tourist and hospitality; c) artisanal and industrial; d) directional, commercial, and social-health; e) agricultural-zootechnical. None of these categories are therefore directly referable to religious or cultural activities. Urban planning facilities related to religion and culture fall within the category 'd) directional, commercial, and social-health'. It should be noted that in Italy, a 'change of intended use' of a building is always possible if carried out within the same functional category. Therefore, the destination of a building for either religious or cultural activities does not entail legally significant differences.

10.4. Lastly, it may be useful to refer to the «cadastral categories», which classify buildings according to their use to determine possible income and due taxes. The cadaster therefore has a fiscal function. In Italy, there is a category (called E7) that classifies «buildings intended for the public exercise of worship». This classification does not exclude the possibility of public worshiping in places other than such buildings (as it often happens, for example, when worshiping outdoors, either in public spaces – such as streets and squares – or in private spaces – such as private courtyards, or homes). This is a right explicitly guaranteed under Art. 19 of the Italian Constitution, in line with Art. 9 of the

Convention. Using tax rules to define the scope of the enforceability of fundamental rights is a true legal error.

11. The Italian Constitutional Court has already censured regional land-use planning laws that limited religious freedom rights (see Judgments No. 195 of 1993, No. 63 of 2016 and No. 254 of 2019). In Judgment No. 63 of 2016, the Court itself excluded that regional competence in the matter could translate into the introduction of differentiated forms of enjoyment of fundamental aspects of such freedom. According to the Court, in the sphere of 'land-use planning' law, the regional legislator exceeds his jurisdiction when it introduces provisions that hinder or compromise religious freedom, for example by providing for differentiated conditions for access to the allocation of places of worship.

11.1. As stated by the Italian Constitutional Court in Judgment No. 254 of 2019, «freedom of worship also entails the right to have adequate spaces to be able to exercise it concretely. Therefore, it involves a twofold duty on the part of the public authorities responsible for regulating and managing land use. Positively, it implies that the competent administrations provide for and make available public spaces for religious activities; negatively, it requires that no unjustified obstacles be placed in the way of the exercise of worship in private places and that there is no discrimination between different denominations in access to public spaces». Using land-use planning regulations to prevent worship activities in a private place, because such places is owned by a cultural association, may be considered an unjustified obstacle to the exercise of worship.

12. DiReSoM maintains that the acts produced by the Municipality of Cantù represent a condition generally suffered by Muslim communities in Italy. The so-called «mosque war» is a typical issue of the way some local authorities (Regions and Municipalities) try to limit the public visibility of the Islamic presence. Scholars have also called it «Islamic exception» to indicate how the issue of the legal regulation of Muslim communities in Italy is considered as a security issue, rather than as a religious one. Other European States perceive the Islamic presence as a 'problem' causing evident discrimination against Muslims.

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