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## Towards a Less Secular Europe? The Decision of the Grand Chamber of the European Court of Human Rights in *Lautsi v. Italy*

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### Introduction

A long-running crusade against the display of crucifixes in Italian public schools finally came to an end on March 18, 2011, in a judgment by the Grand Chamber of the European Court of Human Rights (“European Court”).

In *Lautsi v. Italy*,<sup>[1]</sup> the Grand Chamber—the highest court in the European human rights system—reversed the earlier unanimous decision of the Chamber, which held that the display of the crucifix in state-run schools conflicted with the parents’ right to have their children educated in accordance with their own philosophical convictions and violated the pupils’ right to freedom of conscience and religion.<sup>[2]</sup> The Grand Chamber ruled, fifteen votes to two, that the display of a crucifix did not violate the European Convention on Human Rights (“Convention”).

### Background

#### *The Domestic Proceedings*

The legal battle by Mrs. Soile Lautsi—a committed supporter of secularism—started in 2001, when her two children, then aged eleven and thirteen, were attending a state secondary school in Italy in which a crucifix was displayed in every classroom. Lautsi raised the question of the presence of the crucifix with the school authorities, arguing that the display of the crucifix was contrary to the principle of secularism by which she wished to bring up her children. She requested that the crucifix be removed. Following the decision of the school governing body to maintain the crucifix, Lautsi lodged a complaint with the regional administrative court, complaining that the display violated the principle of secularism and the duty of impartiality of public authorities under the Italian Constitution and Article 9 of the European Convention.

After referring the question of the constitutionality of displaying the crucifix to the

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Constitutional Court, which held that it lacked jurisdiction,[3] the regional administrative court dismissed the applicant's complaint. An appeal against that decision lodged by the applicant was dismissed by the *Consiglio di Stato*, the highest administrative court in Italy, which observed, *inter alia*, that the cross was not an exclusively religious symbol and that it was to be seen rather "as a symbol capable of reflecting the remarkable sources of the civil values [of the Italian society], values which define secularism in the State's present legal order." [4]

### *The Chamber Decision*

Having unsuccessfully challenged the practice of displaying the crucifix before domestic courts, Lautsi lodged an application with the European Court. In her application, she claimed that the presence of the crucifix in classrooms, and particularly in her children's school, violated her right to educate her children in accordance with her philosophical convictions, protected by Article 2 of Protocol No. 1 to the European Convention,[5] as well as her and her children's right to freedom of conscience guaranteed by Article 9 of the Convention.

On November 3, 2009, a Chamber of the Court unanimously upheld the applicant's claim under Article 2 of Protocol No. 1. Relying on earlier decisions challenging the inclusion of particular materials (both religious and non-religious) in the school curriculum, the Chamber reiterated that, in the context of education, the neutrality of the authorities is essential to preserve the pluralism, which is a fundamental characteristic of any democratic society.[6] In particular, the Chamber emphasized that the state may not pursue any aim of indoctrination incompatible with the parents' religious and philosophical convictions.[7] The Chamber then proceeded to substantially extend the scope of the obligation under Article 2 of Protocol No. 1, holding that there was "an obligation on the State's part to refrain from imposing beliefs, even indirectly, in places where persons are dependent on it or in places where they are particularly vulnerable." [8]

Regarding the impact on pupils of the presence of a crucifix, the Chamber concluded that "in the context of public education [crucifixes] are necessarily perceived as an integral part of the school environment and may therefore be considered 'powerful external symbols.'" [9] The Chamber then affirmed that pupils could interpret such a display as a religious sign, which could be "emotionally disturbing" for children of other religions or for non-believers.[10] The core of the Chamber's reasoning was that the presence of crucifixes in state schools could not be reconciled with "the educational pluralism which is essential for the preservation of 'democratic society,'" and that the compulsory display of the symbol of a given confession in premises used by public authorities, and especially in classrooms, was "incompatible with the State's duty to respect neutrality in the exercise of public authority." [11] Accordingly, the Chamber found that the display of crucifixes violated Article 2 of Protocol No. 1 taken together with Article 9 of the Convention. [12]

### **The Decision of the Grand Chamber**

The decision of the Chamber caused an unprecedented, mostly negative, public reaction within Italy and several other European states. When the case was referred by Italy to the Grand Chamber in January 2010, ten state parties, all in support of Italy, chose to intervene,[13] thirty-three members of the European Parliament filed a joint intervention, and a number of NGOs intervened on both sides. The Italian Government mounted a vigorous defense of the legitimacy of displaying the crucifix in classrooms, primarily

maintaining that the Chamber had failed to accord a margin of appreciation to the domestic authorities, that the duty of neutrality did not equate to secularism, and that the crucifix was not a symbol with an exclusively religious import.[14]

The Grand Chamber carefully circumscribed the scope of the question before it, stressing that its decision was limited to the question of displaying of crucifixes in classrooms and not in other public spaces; it also emphasized that it was not called upon to address the compatibility of the practice with Italian domestic law, in particular the principle of secularism recognized under the Italian Constitution.[15]

As to the substance of the complaints, the Grand Chamber, affirming the approach adopted in previous cases, emphasized that Article 2 of Protocol No. 1 did not prohibit a state from including any matters touching on religion in the schools' curriculum; rather, the aim of the provision was to safeguard pluralism in education and to prevent indoctrination by the state.[16] As for the scope of application of Article 2 of Protocol No. 1, the Grand Chamber adopted a broad interpretation, rejecting the government's argument that that provision only concerned the content of the school curriculum and the way in which teaching was imparted to pupils. The Grand Chamber emphasized that the state's duty to respect parents' religious and philosophical convictions is also relevant to the organization of the school environment and that the decision to display religious symbols in classrooms thus engaged Article 2 of Protocol No. 1.[17]

Contrary to the argument of the Italian government, the Grand Chamber then held that the crucifix was primarily a religious symbol. However, it concluded that, in the absence of any evidence to the contrary, it was not possible to conclude that the presence of a crucifix in classrooms was capable of influencing school children. The applicant's subjective perception in that regard—although recognized by the Grand Chamber as being understandable—was not in itself sufficient to establish a breach of Article 2 of Protocol No. 1.[18]

In one of the key passages of the judgment, the Grand Chamber then ruled that the presence of crucifixes in classrooms is, in principle, a matter falling within the margin of appreciation of the respondent state, albeit ultimately subject to the Court's supervision. According to the Grand Chamber, the recognition of such a margin of appreciation was justified by the need to "take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development." [19] As such, the Grand Chamber recognized that the contracting states' decisions in such matters, including the place they accord to religion, should in principle be respected, and the European Court should only step in when the authorities' actions result in a form of indoctrination and consequently fail to respect parents' right to ensure the education of their children in conformity with their own religious and philosophical convictions.[20]

The Grand Chamber recognized that prescribing the display of crucifixes in state-school classrooms "confer[s] on the country's majority religion preponderant visibility in the school environment." [21] However, according to the Grand Chamber, this fact was not *per se* sufficient "to denote a process of indoctrination on the respondent State's part and establish a breach of the requirements of Article 2 of Protocol No. 1." [22]

To ascertain whether any additional elements, which would have caused a display of the crucifix to amount to indoctrination, were present, the Grand Chamber proceeded to

analyze the significance of the crucifix and its influence on school children. The Grand Chamber rejected the Chamber's characterization of the crucifix as a "powerful external symbol" and concluded that "a crucifix on a wall is an essentially passive symbol" that cannot be regarded as having an effect on pupils comparable to that of didactic speech or the requirement to participate in religious activities.[23] Further, the Grand Chamber stressed a number of factors that mitigated the effects of giving greater visibility to the Catholic religion.[24]

On that basis, the Grand Chamber concluded that Italy had acted within its margin of appreciation in deciding how to "respect" the rights of parents under Article 2 of Protocol No. 1. As a result, it concluded that Italy did not violate that provision, and further that no separate issue arose under Article 9 of the Convention.[25]

## Comment

The decision of the Grand Chamber in *Lautsi* undoubtedly represents an important piece in the mosaic of decisions concerning the appropriate place of religion in the public sphere in an increasingly multicultural Europe. In recent years, the European Court has dealt with a number of difficult and politically sensitive cases, implicating changing circumstances and societal attitudes, set against the background of heated debate over the integration of other religions. This is complicated by the fact that the Court's past decisions have sent ambiguous—if not outright contradictory—messages.

The Court previously recognized that a contracting state's right to accord greater visibility to a majority religion did not *per se* violate the Convention (as long as such practice does not cross the line into indoctrination or misplaced proselytizing).[26] However, other decisions seem to imply that the neutrality required of states in matters of conscience and religion must mean absolute secularism, in its strictest negative conception requiring the removal of *any* religious manifestation by the state from the public sphere. The first signals of the latter approach appeared in cases concerning the wearing of the Islamic veil in educational establishments. In those cases, the Court endorsed the ban imposed by domestic authorities based on the asserted need to safeguard the secular conception of the state. At times, the Court appeared to accept, without any meaningful scrutiny, the notion that strict secularism was the optimum approach and that as a consequence even sweeping restrictions of individual rights of conscience or religious manifestation could be justified in the interest of preserving the secular nature of the state.[27] The message that seemed to emerge from some decisions was that, rather than being a matter of *domestic* choice, strict secularism was actually required by the Convention. Arguably, that approach had been carried to an extreme conclusion in the Chamber decision in *Lautsi*, which, in adopting an extensive understanding of the obligation of neutrality, seemed to imply that secularism was the only acceptable approach for *all* states.

The decision of the Grand Chamber in *Lautsi* marks a retreat from that trend. The Grand Chamber's recognition that state authorities retain a margin of appreciation in determining the appropriate place of religion in the public sphere implies both that the Convention does not require absolute institutional secularism, and, as a corollary, it is not the role of the Court to impose secularism.

The decision is not without a number of problematic aspects, most notably the introduction of the ill-defined notion of the "passive" symbol.[28] However, and quite apart from those concerns, the import for the future of *Lautsi* extends well beyond the sphere of education.

The decision of the Grand Chamber has the potential to represent a positive development also for freedom of religion, including minority religions. In particular, the abandonment of the notion that secularism is a value to be promoted *per se* will hopefully lead the Court to carry out a more meaningful scrutiny of the reasons invoked by states for limiting individual religious rights.

The debate in Europe in relation to multiculturalism and integration of religious minorities is far from over, and the ability of the Court to adopt a consistent approach is likely to be most severely tested in cases concerning the limitation of rights implicating the beliefs of individuals belonging to religious minorities, in particular in relation to the display of religious symbols. If the Court wishes to avoid allegations of double-standards as between Christianity and minority religions, the need to ground its decisions on a firmer footing can only become more pressing. Whether the potential of the decision in *Lautsi* will be fully realized remains to be seen, but the decision is to be welcomed insofar as it may open the way for more principled and better reasoned decisions on matters implicating issues of religion and conscience.

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#### **Endnotes:**

[1] *Lautsi v. Italy*, App. No. 30814/06 (Eur. Ct. H.R. Mar. 18, 2011), available at <http://www.echr.coe.int/echr/en/hudoc/> [hereinafter *Lautsi* [GC]]. On the domestic debate on the display of the crucifix in public schools and the relevant decisions of the domestic courts, see Susanna Mancini, *Taking Secularism (not too) Seriously: The Italian Crucifix Case*, 1 Religion & Hum. Rts. 175, 179 (2006).

[2] *Lautsi v. Italy*, App. No. 30814/06 (Eur. Ct. H.R. Nov. 3, 2009) [hereinafter *Lautsi* [Chamber]]. For discussion, see Joseph Weiler, *Lautsi: Crucifix in the Classroom Redux*, 21 Eur. J. Int'l L. 1 (2010); Susanna Mancini, *The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty*, 6 Eur. Const. L. Rev. 6 (2010).

[3] Under the Italian Constitution, the Constitutional Court only has jurisdiction to rule on the constitutionality of laws and other normative acts having equivalent status; the relevant legal provisions relating to display of the crucifix in classrooms were contained in decrees rather than in primary legislation.

[4] Cons. Stato [court of last appeal in administrative matters], n. 556 (Apr. 13, 2006), quoted in *Lautsi* [GC], ¶ 16.

[5] Protocol No. 1 to the European Convention on Human Rights, Mar. 20, 1952, CETS No. 9, available at <http://www.hri.org/docs/ECHR50.html#P1>.

[6] *Lautsi* [Chamber], ¶ 47.

[7] *Id.* ¶ 47.

[8] *Id.* ¶ 48.

[9] *Id.* ¶ 54 (quoting the key passage from *Dahlab v. Switzerland*, App. No. 42393/98, 2001-V Eur. Ct. H.R. 449, which concluded that the state was entitled to prohibit the wearing of the Islamic veil by a primary school teacher).

[10] *Lautsi* [Chamber], ¶ 55.

[11] *Id.* ¶ 58.

[12] *Id.* ¶ 59.

[13] Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Monaco, Romania, the Russian Federation, and San Marino; all except Monaco and Romania intervened collectively at the hearing.

[14] For the Court's summary of the arguments of the Italian Government, see *Lautsi* [GC], ¶¶ 34-40.

[15] *Lautsi* [GC], ¶ 57.

[16] *Id.* ¶ 62.

[17] *Id.* ¶¶ 63-64.

[18] *Id.* ¶ 66.

[19] *Id.* ¶ 68.

[20] *Id.* ¶¶ 69-70.

[21] *Id.* ¶ 71.

[22] *Id.*

[23] *Id.* ¶ 72.

[24] Specifically, the Grand Chamber referred to the fact that the curriculum in state schools did not comprise compulsory teaching about Christianity and the fact that the school environment was open to other religions. It also noted that there was no suggestion of intolerance of non-Catholic pupils and that the applicants had not claimed that the presence of the crucifix had resulted in "teaching practices with a proselytising tendency," or that Lautsi's children were ever exposed to teachers who had made any "tendentious reference" to the presence of the crucifix. In that regard, the Grand Chamber noted that pupils in Italian schools are not prohibited from wearing or displaying symbols having a (non-Christian) religious connotation, such as, for instance the Islamic headscarf; that "alternative arrangements were possible to help schooling fit in with non-majority religious practices"; and that optional religious education could be organized in schools for "all recognised religious creeds" (*id.* ¶ 74).

[25] *Id.* ¶¶ 76-77. Regarding the claims of the two children, who had come of age and had been joined as applicants, the Grand Chamber observed that Article 2 of Protocol No. 1, when read in light of Article 9 of the Convention, was to be understood as guaranteeing schoolchildren the right to education in a form which respects their right to believe or not to believe. However, although stating that it understood why pupils who favored secularism might see in the display of the crucifix an infringement of their rights, the Grand Chamber concluded that, for the same reasons as in relation to their mother's claim, there had been no violation in that regard, and likewise that no separate issue arose under Article 9 of the Convention. *Id.* ¶ 78.

[26] See, e.g., *Folgerø & Others v. Norway*, App. No. 15472/02 (Eur. Ct. H.R. [GC] June 29, 2007), wherein the Grand Chamber held that the constitutional arrangements in Norway imposing compulsory teaching of a subject devoted mainly to the majority religion did not *in itself* contravene Article 2 of Protocol No. 1: "[T]he fact that knowledge about Christianity represented a greater part of the Curriculum for primary and lower secondary schools than knowledge about other religions and philosophies cannot, in the Court's opinion, of its own be viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination . . . In view of the place occupied by Christianity in the national history and tradition of the respondent State, this must be regarded as falling within the respondent State's margin of appreciation in planning and setting the curriculum." (*id.* ¶ 89)).

[27] See *Leyla Sahin v. Turkey*, App. No. 44774/98, 2005-XI Eur. Ct. H.R. 819, and, previously, *Dahlab v. Switzerland*, App. No. 42393/98, 2001-V Eur. Ct. H.R. 449. The trend toward the consecration of secularism as a value to be protected in and of itself continued in *Dogru v. France*, App. No. 27058/05, and *Kervanci v. France*, App. No. 31645/04, handed down on December 4, 2008, wherein the Court found that the expulsion of two girls from their schools due to their refusal to remove their headscarves was not a violation of the right to manifest one's religion under Article 9 because it could be justified on the basis that it was necessary to preserve the French secular

model.

[28] The distinction the Court appears to draw between “passive” symbols, which do not *per se* result in indoctrination, and other symbols, which do have that effect, would seem to be, at best, of questionable validity and capable of giving rise to problems of definition in future cases. For instance, the identification of the crucifix as an essentially “passive” symbol sits uneasily and may be contrasted with the decision of the Court under Article 9 of the Convention in *Dahlab*, in which it characterized the Islamic veil as a “powerful external symbol” capable of having a proselytizing effect, at least on very young children. See *Dahlab v. Switzerland*, App. No. 42393/98, 2001-V Eur. Ct. H.R. 449.