

## The Case of *Lautsi v. Italy*: A Synthesis

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The case of *Lautsi v. Italy*, better known as the “Crucifix Case,” is a particularly significant case. Its significance is not only political and legal, but also religious. Never before in the history of the European Court of Human Rights and the Council of Europe has a case raised so much public attention and debate. The debate regarding the legitimacy of the symbol of Christ’s presence in Italian schools is emblematic of the cultural crisis in Western Europe regarding religion. Twenty-one State parties to the European Convention on Human Rights, in an unprecedented move, joined Italy to reassert the legitimacy of the public display of Christian symbols in European society. The Court finally recognized, in substance, that in countries of Christian tradition, Christianity enjoys a special social legitimacy that distinguishes it from other philosophical and religious belief systems. In other words, because Italy is a country of Christian tradition, Christian symbols may legitimately enjoy greater visibility in Italian society than other religious or ideological symbols.

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## I. INTRODUCTION

On March 18, 2011, the European Court of Human Rights, sitting as a Grand Chamber (“GC”), pronounced its judgment in the case of *Soile Lautsi and Others v. Italy*.<sup>1</sup>

By this final judgment, which overturned a unanimous judgment rendered on November 3, 2009, by the Second Section<sup>2</sup> of the Strasbourg Court, the Grand Chamber<sup>3</sup> decided, by fifteen votes to two, that the compulsory display of crucifixes in Italian State-school classrooms did not violate Article 2 of the first Protocol of the European Convention on Human Rights.<sup>4</sup> Article 2 of the first Protocol protects the right of parents to ensure that the education and teaching of their children is “in conformity with their own religious and philosophical convictions.”<sup>5</sup> Moreover, the Court decided that, for the reasons given in connection with its examination of the rights of parents, there was no violation of Article 9,<sup>6</sup> which protects the freedom of thought, conscience and religion.<sup>7</sup> Nor did the Court find a violation of Article 14,<sup>8</sup> which prohibits

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1. *Lautsi v. Italy*, App. No. 30814/06, 2011 Eur. Ct. H.R. (G.C.).

2. A Section is an administrative entity, and a Chamber is a judicial formation of the Court within a given Section. The Court has five Sections in which Chambers are formed. Each Section has a President, a Vice-President, and a number of other judges.

3. The Grand Chamber is made up of 17 judges: the Court’s President and Vice-Presidents, the Section Presidents, and the national judge, together with other judges selected by drawing of lots. The initiation of proceedings before the Grand Chamber takes two different forms: referral and relinquishment. After a Chamber judgment has been delivered, the parties may request referral of the case to the Grand Chamber and such requests are accepted on an exceptional basis. A panel of judges of the Grand Chamber decides whether or not the case should be referred to the Grand Chamber for fresh consideration. Cases are also sent to the Grand Chamber when relinquished by a Chamber, although this is also exceptional. The Chamber to which a case is assigned can relinquish it to the Grand Chamber if the case raises a serious question affecting the interpretation of the Convention or if there is a risk of inconsistency with a previous judgment of the Court. See *The Court*, EUROPEAN COURT OF HUMAN RIGHTS, (Aug. 4, 2012, 3:18 PM), <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/The+Grand+Chamber/>.

4. *Lautsi*, 2011 Eur. Ct. H.R. §§ 77–78.

5. Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, 4 Nov. 1950, 213 U.N.T.S. 221 [hereinafter Protocol No. 1].

6. *Lautsi*, 2011 Eur. Ct. H.R. §§ 77–78.

7. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, 4 Nov. 1950, 213 U.N.T.S. 221. [hereinafter Convention].

8. *Lautsi*, 2011 Eur. Ct. H.R. § 81.

discrimination in the enjoyment of the rights and freedoms set forth in the Convention.<sup>9</sup>

Therefore, the Grand Chamber held that the rights invoked by Mrs. Soile Lautsi and her children, guaranteed by the Convention and the Court's interpretations, were not violated by the display of a crucifix in State-school classrooms.<sup>10</sup>

The motivation behind this case was prompted by what is known in English-speaking countries as "strategic litigation." The aim of the Italian free-thought organizations acting under the guise of Mrs. Lautsi was to use the European Court to reach a political result that had an impact broad enough to exceed the original legal scope of the application. This strategic litigation was the source of the great confusion surrounding this case. By creating a new obligation of religious neutrality within State-school education, the Second Section forsook legal rigor and judicial reserve. It raised uncertainty about the nature and limits of the Court's competence and deepened its crisis.<sup>11</sup> Moreover, the Second Section focused on the political theme of secularism instead of analyzing the provisions of the Convention. In doing so, the Second Section caused a meta-political crisis concerning the place of Christianity in Europe and the political legitimacy of the European Court. This crisis will have long-term consequences, as it has seriously impaired the prestige and authority of the Court.

The initial legal question concerning the potential negative impact of the crucifix on the freedom of students and their parents fell to the background. Persuading the Court to refocus on the primary legal issue required great effort. Eventually, the Grand Chamber did address the pertinent issue, simply ruling, as previously suggested, that the presence of a crucifix does not result in the indoctrination of students.<sup>12</sup>

On review, the Grand Chamber also had to correct some faulty assertions made by the Second Section decision. It did so, first, by dealing with a jurisdictional issue in which it recalled that the European Court is not a constitutional court but can intervene only

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9. Convention, *supra* note 7, at art. 14.

10. *Lautsi*, 2011 Eur. Ct. H.R. § 32.

11. The ECHR is facing a structural crisis that is at the origin of its current process of reform.

12. *Lautsi*, 2011 Eur. Ct. H.R. § 71.

subsidiarily and must respect the “margin of appreciation”<sup>13</sup> of States.<sup>14</sup> On political grounds, it also had to correct the Second Section’s assertions concerning the purpose of State-school education and religious neutrality.<sup>15</sup>

As to the merits, contrary to the Second Section decision, the Grand Chamber clearly affirmed that the Convention does not require the complete religious neutrality of State-school education.<sup>16</sup> Furthermore, the Convention does not hinder the State’s liberty to “confer on the country’s majority religion preponderant visibility in the school environment.”<sup>17</sup> This is justified “in view of the place occupied by Christianity in the history and tradition of the respondent State,” and it does not in itself “denote a process of indoctrination on the respondent State’s part” in violation of the provisions of Article 2 of Protocol 1.<sup>18</sup> In addition, the Grand Chamber did not question the State’s legitimate authority to respect religious differences or treat religions differently according to their contribution to the national culture.<sup>19</sup>

The main principle distilled from *Lautsi* may be clearly expressed by stating that the Court expects States to *act neutrally* toward citizens, but it does not require States to *be neutral* (in essence). National culture and identities do not have to be “neutralized,” neutrality being an essentially relative concept.<sup>20</sup> Moreover, States are not required to act neutrally at all times and in all matters. Neutrality is demanded only when the State infringes personal religious rights.<sup>21</sup> If there is no infringement of individual religious rights in the sense of the Convention, the State is not bound to act neutrally.

The State’s obligations regarding religious neutrality are relative; neutrality is not a general and absolute obligation.

In addition, the manifestation by the State of a preference towards a specific religion does not necessarily breach a citizen’s

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13. The legal concept of “margin of appreciation” refers to the variable space for maneuver that the Court is willing to recognize to national authorities in fulfilling their obligations under the European Convention on Human Rights on a case-by-case basis.

14. *Id.* §§ 61, 69–70.

15. *Id.* § 62.

16. *Id.* §§ 71–72.

17. *Id.* § 71.

18. *Id.*

19. *See id.*

20. *See id.* § 67–68.

21. *See id.* § 7.

individual religious rights. In *Lautsi*, it was not proved that the display of a crucifix in a public classroom indoctrinated or severely disturbed pupils, so it was determined that there was no infringement of the applicants' individual religious rights.<sup>22</sup> Therefore, there was no legal necessity to examine whether the State failed to respect its duty of neutrality, since it was not bound by any such duty.

It cannot be contested that the display of a crucifix—whether in a State-school or in any other public place—is not neutral in itself. On the contrary, it is the expression of “a preference manifested by the State in religious matters.”<sup>23</sup> However, because this specific preference and the way it is manifested are not sufficient to infringe the religious rights of those exposed to it, as it does not involve coercion by the State to practice or support a particular religion, it does not constitute a violation of the Convention. It would be different if this preference was manifested through a civic obligation imposed on all to actively participate in catechism classes or worship within a specific religion.

This Article presents a summary of the key lessons of the *Lautsi* case, from the institutional, legal, philosophical, political, and religious viewpoints.

This Article analyzes the reasoning of the court confronted with *Lautsi*, but specifically the reasoning set forth by the Second Section and the Grand Chamber. Part II provides a review of the factual and procedural history of *Lautsi* in the Italian courts, as well as a brief overview of the relevant legal issues later dealt with in the European courts. Part III reviews the Second Section's reasoning of *Lautsi*. Part IV reviews the Grand Chamber's reasoning in *Lautsi*, as well as analysis explaining why the decision was correct and explains why the Second Section's reasoning was problematic. Part V provides some supplementary comments on the Grand Chamber judgment, including a discussion of the consequences of *Lautsi*.

## II. FACTUAL AND PROCEDURAL HISTORY OF *LAUTSI*

At the root of the *Lautsi* case was the refusal by a school's governing body to grant the request of a parent to remove a crucifix

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22. *See id.*

23. *Id.* § 48.

that was displayed in her sons' classrooms.<sup>24</sup> To support their request to the school governors to remove the displays, the applicants relied on a recent decision by the Italian Court of Cassation,<sup>25</sup> which held that the display of a crucifix in a polling station infringed the principles of secularism and impartiality of the State, as well as the principle of freedom of conscience for those who did not accept any allegiance to that symbol.<sup>26</sup> The principle of secularism, which is relatively new in Italy, was defined and enshrined as a constitutional principle by a judgment of the Constitutional Court in 1989,<sup>27</sup> just five years after the adoption of the new Concordat, which put an end to the system of State religion.<sup>28</sup> In this judgment, the Constitutional Court stated that in Italy, secularism does not mean "that the State should be indifferent to religions but that it should guarantee the protection of the freedom of religion in a context of confessional and cultural pluralism."<sup>29</sup> Thus, the constitutional principle of secularism in Italy is meant to secure "an open and inclusive attitude, closer to equidistance, which respects the distinction and autonomy of spiritual and temporal areas, without privatizing religion or excluding it from the public area."<sup>30</sup>

The crucifix was displayed according to an age-old tradition in Italy of displaying crucifixes in classrooms. Presently, there is a civil obligation to display a crucifix in each public classroom that allegedly dates back to royal decree No. 4336 of September 15, 1860, of the Kingdom of Piedmont-Sardinia, which provided that "each school must without fail be equipped . . . with a crucifix."<sup>31</sup> This obligation has been maintained under subsequent regimes until the present day. Confirmed by a series of regulations in the 1920s, it was not abolished by the 1984 revision of the Lateran Pacts, which put an end to the State religion.<sup>32</sup> Furthermore, the practice of displaying

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24. *Id.* §§ 10–12.

25. *Id.* at 11.

26. *Lautsi v. Italy*, App. 30814/06, 2009 Eur. Ct. H.R. § 7 (2d Sec.).

27. Corte Cost., 12 April 1989, n. 203.

28. *Lautsi*, 2009 Eur. Ct. H.R. § 23.

29. *Id.*

30. Presentation of the Italian Government before the Grand Chamber (G.C.), 30 June 2010; *Lautsi*, 2011 Eur. Ct. H.R. § 7.

31. *Lautsi*, 2011 Eur. Ct. H.R. § 17.

32. *Id.* §§ 19–20, 22–23.

crucifixes in the classroom was again expressly confirmed on October 3, 2002, in an instruction by the Minister of Education.<sup>33</sup>

According to the applicants, the provisions requiring the presence of a crucifix in the classroom “are the legacy of a confessional conception of the State which now contradicts the duty of the State to be secular, as well as the respect of human rights as guaranteed by the Convention.”<sup>34</sup> In their view, it is necessary to put an end to the “contradictions and inconsistencies” of the constitutional provisions regarding religion that were “the result of a compromise between concurring political forces within the Constituent Assembly . . . grant[ing]<sup>35</sup> the Catholic Church a privileged position in contradiction with the principle of the secularity of the State.”<sup>36</sup> Therefore, the applicants contested the displays of the crucifix in the national administrative courts because they considered them to be an infringement of the principle of secularism.

The Veneto Administrative Court as well as the Supreme Administrative Court refused to follow the decision of the Court of Cassation regarding polling stations and held that the presence of a crucifix in a public classroom was compatible with the principle of secularism.<sup>37</sup> After a lengthy analysis of modern Europe’s Christian heritage, the Supreme Administrative Court rejected the application, concluding that the crucifix is a symbol that expresses a synthesis of the history, culture, and values of Italy and Europe as a whole.<sup>38</sup> Thus, the crucifix is the objective representation of a series of values, despite its religious origin. Therefore, these courts held that there is a fundamental compatibility between the crucifix and the principle of secularism because of the historical “filiation” between the two, which is not necessarily true for symbols of other religions or belief systems.

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33. *Id.* § 24.

34. Observations of the applicants in reply to the complementary observations, Section, 16 March 2009, p. 2.

35. Through the reference to the Catholic Church and the Lateran Pacts in the Constitution.

36. Observations of the applicants in reply to the complementary observations, Section, 16 March 2009, pp. 4, 5.

37. *Lautsi*, 2011 Eur. Ct. H.R. §§ 15–16.

38. *Id.*

Specifically, the Supreme Administrative Court<sup>39</sup> reasoned that:

The reference, via the crucifix, to the religious origin of these values and their full and complete correspondence with Christian teachings accordingly makes plain the transcendent sources of the values concerned, without calling into question, rather indeed confirming the autonomy of the temporal power vis-à-vis the spiritual power (but not their opposition, implicit in an ideological interpretation of secularism which has no equivalent in the Constitution), and without taking anything away from their particular “secular” nature, adapted to the cultural context specific to the fundamental order of the Italian State and manifested by it. Those values are therefore experienced in civil society autonomously (and not contradictorily) in relation to religious society, so that they may be endorsed “secularly” by all, irrespective of adhesion to the creed which inspired and defended them.<sup>40</sup>

The Supreme Administrative Court therefore adopted a position opposite to that of the Court of Cassation,<sup>41</sup> which in its 2000 decision expressly rejected the argument that the crucifix should be seen as the symbol of “an entire civilisation or the collective ethical conscience” and “a universal value independent of any specific religious creed.”<sup>42</sup> Consequently, these two courts differed significantly in their interpretation of the meaning and compatibility of the crucifix with secularism.

On review, the Constitutional Court did not have the opportunity to settle the *Lautsi* dispute. Although the administrative court incidentally referred the case to the Constitutional Court, it ruled that it did not have jurisdiction over the case because the legal authorities requiring the presence of a crucifix in the classroom were only regulations.<sup>43</sup> Amidst the conflict of these various courts, the case was then submitted to the European Court of Human Rights (“European Court”).

Thus, after having contested what they considered to be a violation of the principle of secularism before national courts in vain, the two children and their mother, Mrs. Soile Lautsi, applied to the

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39. Cons. Stato, 13 April 2006, n. 556.

40. *Id.* § 16.

41. The Supreme Administrative Court ruled in favor of the compatibility of the crucifix with secularism in Cons. Stato, 27 April 1988, n. 63.

42. *Lautsi*, 2011 Eur. Ct. H.R. at § 23.

43. *Id.*

European Court on July 27, 2006.<sup>44</sup> Before the European Court, they claimed that their rights to education, guaranteed by Article 2 of the first Protocol,<sup>45</sup> as well as their rights to freedom of thought, conscience, and religion, protected by Article 9 of the Convention,<sup>46</sup> had been violated.<sup>47</sup> Because they were not Catholic, the applicants also asserted that they were treated in a discriminatory manner in comparison with Catholic parents and children,<sup>48</sup> contrary to Article 14 of the Convention, which prohibits discrimination based on religion.<sup>49</sup>

Beyond the specific provisions they invoked, the applicants, supported by Italian free-thought organizations,<sup>50</sup> wanted the European Court to rule in favor of secularism, as it had in the cases relating to the prohibition of Islamic headscarves in the education system.<sup>51</sup> Their aim was to have the Court rule that “religious neutrality” was required under the right to freedom of religion for non-believers; more precisely, the applicants sought a ruling in favor of an extensive negative freedom<sup>52</sup> of religion for non-believers.<sup>53</sup>

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44. *Id.* § 1.

45. Protocol No. 1, *supra* note 5, art. 2. Article 2 of Protocol 1 makes the following guarantees: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.” *Id.*

46. Convention, *supra* note 7, art. 9. Article 9 of the Convention provides the following guarantees:

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. 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.

47. *Lautsi*, 2011 Eur. Ct. H.R. § 41.

48. *Id.* § 79.

49. Convention, *supra* note 7, art. 14. According to Article 14, “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” *Id.*

50. *See, e.g., Lautsi*, 2011 Eur. Ct. H.R. §§ 50–51, 53–54.

51. *Id.* § 53.

52. I.e. a right to “non-religion,” a right not to practice, a right not to be confronted with religion, etc.

53. *See Lautsi*, 2011 Eur. Ct. H.R. § 54.

This was particularly significant to the applicants because the Court long ago stated that “freedom of thought, conscience, and religion . . . is also a precious asset for atheists, agnostics, sceptics, and the unconcerned. The pluralism of democratic society, which has been dearly won over the centuries, depends on it.”<sup>54</sup>

### III. THE REASONING OF THE SECOND SECTION

#### *A. Redefining the Aim of the State-School System*

The Second Section began its reasoning by discussing what it thought freedom of education should entail. From there, it proceeded to a novel interpretation of the second sentence of Article 2 of Protocol 1, which altered its meaning. This sentence reads: “In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”<sup>55</sup> The Second Section interpreted this sentence to mean that the responsibility of “safeguarding the possibility of pluralism in education, which possibility is essential for the preservation of the ‘democratic society’ as conceived by the Convention” is entrusted to the State rather than the private education system.<sup>56</sup> In other words, this article, which was originally meant to protect the natural educative rights of parents (especially through private education) against public sway (through compulsory public education), was interpreted by the Second Section as imposing on the State a duty to make the environment and content of State education “pluralistic” and consistent with “democratic values” as interpreted by the Court. This constituted a misinterpretation of the second sentence of Article 2 of Protocol 1, which merely stands for the principle that in a democracy, the educative offerings should be pluralistic, not the teaching itself. As a result, the Second Section’s approach to that text constituted more than a mere shift in interpretation.

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54. *Buscarini v. San Marino*, App. 24645/94, 1999 Eur. Ct. H.R. § 34; *see also* *Spaminato v. Italy*, App. 23123/04, 2007 Eur. Ct. H.R.

55. Protocol No. 1, *supra* note 5, at art. 2.

56. *Lautsi*, 2009 Eur. Ct. H.R. § 47(b).

*B. Educative Pluralism as an Aim*

In addition to misinterpreting the State's role, the Second Section defined educative pluralism as "an open school environment which encourages inclusion rather than exclusion, regardless of the pupils' social background, religious beliefs or ethnic origins."<sup>57</sup> The Second Section continued, stating that "[s]chools should not be the arena for missionary activities or preaching; they should be a meeting place for different religions and philosophical convictions, in which pupils can acquire knowledge about their respective thoughts and traditions."<sup>58</sup> Teaching must be conveyed "in an objective, critical and pluralistic manner" and avoid any "aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions,"<sup>59</sup> especially "the freedom not to believe."<sup>60</sup> Finally, the State "must seek to inculcate in pupils the habit of critical thought."<sup>61</sup>

Once the aim of the State education system had been set, the conclusion followed: the Court "cannot see how the display in state-school classrooms of a symbol that it is reasonable to associate with Catholicism (the majority religion in Italy) could serve the educational pluralism which is essential for the preservation of 'democratic society' within the Convention meaning of that term."<sup>62</sup> The paradox of the notion of "educational pluralism" clearly appears here. The Court *a contrario* concluded that educative pluralism would be better respected without crucifixes. As a result, this "pluralism" ironically results in exclusion of the very possibility of plurality by imposing the monopoly of secularism. This apparent paradox reveals the profound cohesion between the concepts of relativism, pluralism and secularism.

*C. Summary of the Second Section's Reasoning*

Once the new aim for the State education system has been defined, it becomes the legal basis for adopting new standards that are necessary for the implementation of those aims. The Second

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57. *Id.* § 47(c).

58. *Id.*

59. *Id.* § 47(d).

60. *Id.* § 47(e).

61. *Id.* § 56.

62. *Id.*

Section will build its reasoning on this *telos* of the State education system. Here is a summary of the Second Section's reasoning:

The Court's argument rested on the principle of denominational neutrality, a corollary of the political principle of educative pluralism: "The State has a duty to uphold confessional neutrality in public education, where school attendance is compulsory regardless of religion, and which must seek to inculcate in pupils the habit of critical thought."<sup>63</sup>

Freedom of religion, as guaranteed by Article 9 of the Convention, implies a "negative freedom" not to believe.<sup>64</sup> This negative freedom does not simply protect against co-action, for example, the obligation to participate in religious activities. Rather, it extends to practices and symbols expressing, in particular or in general, a belief, a religion, or atheism. That negative right deserves special protection if it is the State that expresses a belief and dissenters are placed in a situation from which they cannot extract themselves without making disproportionate efforts and acts of sacrifice.<sup>65</sup>

The crucifix has a variety of meanings, among which the religious meaning predominates.<sup>66</sup> It cannot be considered as having "a neutral and secular meaning with reference to Italian history and tradition, which were closely bound up with Christianity."<sup>67</sup> On the contrary, the crucifix is a "powerful external symbol," in the same way as the Islamic headscarf worn by a teacher in a Swiss State school is a symbol.<sup>68</sup>

"The presence of the crucifix may easily be interpreted by pupils of all ages as a religious sign, and they will feel that they have been brought up in a school environment marked by a particular religion."<sup>69</sup> The display of a symbol of the majority religion has greater impact because

in countries where the great majority of the population owe allegiance to one particular religion the manifestation of the observances and symbols of that religion, without restriction as to

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63. *Id.* § 56.

64. *Id.* § 47(e).

65. *Id.* § 55.

66. *Id.* § 51.

67. *Id.*

68. *Id.* § 54 (citing *Dahlab v. Switzerland*, App. 42393/98, 2001 Eur. Ct. H.R.).

69. *Id.* § 55.

place and manner, may constitute pressure on students who do not practise that religion or those who adhere to another religion.<sup>70</sup>

The display of the crucifix may also be “emotionally disturbing” for non-Christian pupils.<sup>71</sup>

Displaying a crucifix “restricts the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe.”<sup>72</sup>

“The display of one or more religious symbols cannot be justified either by the wishes of other parents who want to see a religious form of education in conformity with their convictions or . . . by the need for a compromise with political parties of Christian inspiration.”<sup>73</sup> Neither can it be justified by the fact that it expresses Italian history and tradition, because its religious meaning predominates.<sup>74</sup> The fact that the crucifix symbolizes the Italian majority religion does not justify its presence; on the contrary, it is an aggravating circumstance.<sup>75</sup>

Having stated this, the Court concluded that the applicants’ rights had been violated.<sup>76</sup> Once the aim of State education had been established, its *telos*, the condemnation of Italy was certain. It was formulated by a reasoning which aimed almost teleologically at this conclusion. This reasoning, unanimously adopted, seduces through its coherence and its general and abstract character. This line of reasoning looks like the following: educative pluralism ⇔ religious neutrality ⇔ condemnation of the crucifix.

#### *D. Responses to the Second Section Decision: A Disputed Judgment*

The Second Section’s reasoning not only affected Italy specifically, but also went much further in its influence. The general principles established by the Second Section in *Lautsi* impacted the State schools of the forty-seven Member States of the Council of Europe, many of which require or tolerate religious symbols in their

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70. *Id.* § 50.

71. *Id.* § 55.

72. *Id.* § 57.

73. *Id.* § 56.

74. *Id.* §§ 51–52.

75. *See id.* § 50. This summary takes again, in part, the observations submitted to the Court by the Italian Government.

76. *Id.* § 58.

own schools. For example, in Austria religious symbols are compulsory in primary and secondary schools in accordance with the concordat.<sup>77</sup> This is also the case in Bavaria and other German *Länder* with a Catholic majority,<sup>78</sup> as well as in Greece, Ireland, Liechtenstein, Malta, some State schools in the Netherlands, Poland, Romania, San-Marino, some Swiss cantons, and Alsace-Moselle.<sup>79</sup>

Moreover, the reasoning of the Second Section was transposable and applicable beyond the present case and circumstances, especially to the courts, parliaments, and other public places of the States. Further, this reasoning was understood as potentially applicable to the symbols of States, such as national anthems, flags, or a constitutional provision recognizing a particular religion.

Thus, this judgment constituted a decisive step in the secularization of Europe. Unusually, the Court was not able to garner widespread acceptance of this judgment. Some European States, on the initiative of Rome and then Moscow, created a type of “alliance against secularism”<sup>80</sup> supporting the request of the Italian Government to refer the case to the Grand Chamber. At first, ten countries intervened in the *Lautsi* case as *amici curiae*.<sup>81</sup> Each of them submitted written observations to the Grand Chamber, inviting it to quash the first judgment.<sup>82</sup> Moreover, eight of them were allowed to intervene collectively at the public hearing on June 30, 2010.<sup>83</sup> These interventions are interesting not only from a legal point of view, but also because they constitute testimonies supporting the defense of European culture.

In addition to these ten countries, eleven others publicly questioned the judgment of the Court and requested that their national and religious identities and traditions be respected.<sup>84</sup> Several

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77. *See* Lautsi v. Italy, App. 30814/06, 2011 Eur. Ct. H.R. § 27 (G.C.).

78. *Id.*

79. *Id.*

80. Grégor Puppinc, *Une Alliance Contre le Sécularisme*, *Osservatore Romano*, Rome, 27 July 2010.

81. *Lautsi*, 2011 Eur. Ct. H.R. § 8. These governments included Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Monaco, Romania, Russian Federation, and San-Marino. *Id.* These letters may be consulted in the file on the case at the Court’s Registry.

82. *See id.* §§ 47–49.

83. *Id.* §§ 8–9.

84. These governments are Albania, Austria, Croatia, Hungary, Macedonia (FYRM), Moldavia, Norway, Poland, Serbia, Slovakia, and Ukraine. This information may be found in the file on the case at the Court’s Registry.

governments recalled that this religious identity was the source of European values and unity. Lithuania drew a parallel between the *Lautsi* case and the anti-religious policy it suffered under communism, which was manifested by, among other things, the prohibition of religious symbols. Thus, including Italy, nearly one half of the Member States of the Council of Europe (twenty-two out of forty-seven) publicly opposed the logic of secularization as adopted by the Second Section. In fact, through their cultural and legal arguments, these States manifested their position that they politically recognized religion and affirmed the special social legitimacy of Christianity in European society.

Furthermore, numerous non-governmental organizations (NGOs) requested to submit observations to the Court as *amici curiae*. About ten<sup>85</sup> were authorized, among which was the European Centre for Law and Justice (“ECLJ”).<sup>86</sup>

Finally, after the referral of the case, the Second Section’s reasoning, including its presuppositions, was later overturned by the final judgment of the Grand Chamber which, by fifteen votes to two, held that the public school displays of the crucifix did not violate the Convention.<sup>87</sup> This was not because the Grand Chamber strictly interpreted the Convention, but rather because the Second Section’s judgment was of a more political or ideological nature.

Interestingly, it was the political reaction caused by the Second Section’s decision that resulted in bringing the Court back to a more objective and realistic legal path.

#### IV. THE REASONING OF THE GRAND CHAMBER

Overall, the Grand Chamber determined that the crucifix was an “essentially passive” religious symbol.<sup>88</sup> This is because the mere display of a crucifix does not require any “co-action” (coercion) from viewers and its impact is not sufficient to constitute a form of

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85. European Centre for Law and Justice; 33 Members of the European Parliament, together with the Alliance Defense Fund; the Greek Helsinki Monitor; Associazione Nazionale del libero Pensiero; Eurojuris; in conjunction with International Commission of Jurists, Interights and Human Rights Watch; in conjunction with Zentralkomitee des deutschen Katholiken, Semaines sociales de France and Associazioni cristiane lavoratori italiani.

86. *Lautsi*, 2011 Eur. Ct. H.R. § 8; see also SELECTION OF DOCUMENTS ON THE “CRUCIFIX CASE”: LAUTSI AND OTHERS V. ITALY, [www.eclj.org/Resources/lautsi/](http://www.eclj.org/Resources/lautsi/) (last visited Feb. 15, 2012).

87. *Lautsi*, 2011 Eur. Ct. H.R. § 32.

88. *Id.* § 72.

indoctrination that would infringe pupils' and parents' negative freedom of religion as guaranteed by the Convention and interpreted by the Court.<sup>89</sup> In fact, the crucifix's lack of significant impact should have been sufficient to declare the application inadmissible because of the absence of any State interference.

However, the Grand Chamber developed its reasoning in such a way as to rule on several controversial aspects of the Second Section's judgment. First, it clarified its own competence (or jurisdiction). Second, it clarified its position with regard to secularity, religious neutrality, tradition, and majority religion. Finally, it concluded there had been no violation of the Convention.

*A. European Court Jurisdiction: Subsidiarity and Margin of Appreciation*

In its introduction, the Grand Chamber framed the issues in the case and recalled the limits of its jurisdiction. It specified that the only question submitted to it regarded the compatibility of a crucifix in Italian State-school classrooms with the requirements of Article 2 of Protocol 1 and Article 9 of the Convention.<sup>90</sup> Therefore, the Court did not need to rule on the compatibility of the crucifix with the principle of secularity in Italian law, nor did it need to arbitrate the disagreement between the Italian supreme courts.<sup>91</sup> The Grand Chamber endeavored to reaffirm that it is not a constitutional or fourth-instance court<sup>92</sup> because of its subsidiary nature.<sup>93</sup> Moreover,

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89. *See id.* §§ 71–72.

90. *Id.* § 57.

91. *Id.*

92. The following formula sums up what the doctrine of fourth instance entails (see *Perlala v. Greece*, Apo. 17721/04, 2007 Eur. Ct. H.R. 88, § 44):

25. The Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, in particular, *García Ruiz v. Spain* [G.C.], no. 30544/96, § 28, ECHR 1999-I). It is not the Court's role to assess itself the facts which have led a national court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of third or fourth instance, which would be to disregard the limits imposed on its action.

93. *Lautsi*, 2011 Eur. Ct. H.R. §§ 61–62.

its role is to judge concrete individual cases and not to rule on a domestic-law provision *in abstracto*.

This clear delineation of the Court's jurisdiction was necessary in light of the reaction to the Second Section judgment. The Second Section judgment, pronounced at the beginning of the current process of reform of the Court, prompted a very strong reaction from many Member States, which considered the judgment to exceed the jurisdiction of the Court and to constitute a trespass onto a sovereign State's political field.<sup>94</sup> As a result, fierce protests uttered within the Committee of Ministers of the Council of Europe impacted the Interlaken Declaration of February 19, 2010, which was adopted at the end of a high-level conference discussing the future of that Court. The *Lautsi* case was at the heart of those discussions. The Interlaken Declaration recalled and "stress[ed] the subsidiary nature of the supervisory mechanism established by the Convention and notably the fundamental role which national authorities, i.e., governments, courts and parliaments, must play in guaranteeing and protecting human rights at the national level."<sup>95</sup> Further, the forty-seven Member States called for "a strengthening of the principle of subsidiarity"<sup>96</sup> and invited the Court to "take fully into account its subsidiary role in the interpretation and application of the Convention."<sup>97</sup> This was meant to insist in reminding the Court that its jurisdiction under Article 19 cannot go beyond the limits of the general powers that the States sovereignly decided to assign to the Court; its jurisdiction is limited to controlling the respect by States of their obligations under the Convention.<sup>98</sup>

According to the Convention, the principle of subsidiarity means that "the task of ensuring respect for the rights enshrined in the Convention falls primarily on the national authorities of the contracting States, not on the Court. It is only in case of default of the national authorities that the Court may and must intervene."<sup>99</sup>

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94. *See id.* §§ 47, 49.

95. INTERLAKEN DECLARATION, HIGH LEVEL CONFERENCE ON THE FUTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS, 19 Feb. 2010, *available at* [http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/interlaken\\_declaration\\_en.pdf](http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/interlaken_declaration_en.pdf).

96. *Id.* at 2.

97. *Id.* at 5.

98. The issue is not closed yet; the Izmir declaration invited the Committee of experts on the reform of the Court to continue its work in this direction.

99. ECHR, Note of the jurisconsult, *Principe de subsidiarité*, No 3158598, 8 July 2010,

Thus, the subsidiarity of the ECHR institutes a mechanism based on the complementarity between the national authorities and the European Court, not on competing competences, as in the European Union System. Therefore, the Second Section should have respected the autonomy of the Italian legal order since it has no power of direct intervention. Further, the Second Section should also have respected the national “margin of appreciation,” which is one of the main practical applications of the subsidiarity principle. The margin of appreciation, which defines “relations between the domestic authorities and the Court,”<sup>100</sup> allows the Court to apply general provisions to specific situations. This concept is based on the simple fact that the national authorities, by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate the various factors of the case at issue.<sup>101</sup> The margin of appreciation requires the Court to respect the discretion of national authorities and to apply the same law to a broad variety of situations in an adjusted manner.

The extent of the margin of appreciation of the State varies according to the circumstances, the rights at issue, the political, social, or moral sensitivity, and whether a consensus exists between the Member States on the solution to apply to the question on point. It helps respect the national foundation of every case and prevents the Court from pronouncing theoretical and abstract judgments.

In its judgment, the Second Section failed to respect most of the implications of the principle of subsidiarity. Thus, in a surprising and rare failure, the Second Section completely and simply left out the margin of appreciation analysis, though it is automatic where freedom of religion (which is not an absolute right) is concerned. Italy and the numerous States which intervened, formally or informally, recalled that there was no consensus between them in favor of any religious neutrality of State education and, more generally, of society.<sup>102</sup> The only consensus concerned the *distinction* between political and religious areas, not even on their *separation*.<sup>103</sup>

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unpublished.

100. A. v. United Kingdom, App. 3455/05, 2009 Eur. Ct. H.R. § 184.

101. See for instance, in *Handyside v. United Kingdom*, 24, 1976 Eur. Ct. H.R. (ser. A).

102. See *Lautsi v. Italy*, App. 30814/06, 2011 Eur. Ct. H.R. §§ 26–28, 47 (G.C.).

103. See *id.* § 47.

*B. Secularism is a Philosophical Conviction*

After explaining that it does not have jurisdiction to rule on the compatibility of the presence of crucifixes with the principle of secularism under Italian law, the Grand Chamber also clarified its position with regard to secularism. The Court specified that “the supporters of secularism are able to lay claim to views attaining the ‘level of cogency, seriousness, cohesion and importance’ required for them to be considered ‘convictions’ within the meaning of Articles 9 of the Convention and 2 of Protocol No. 1.”<sup>104</sup> Thus, secularism is a “view” or a “philosophical conviction” in the same way as other convictions and beliefs worthy of respect.<sup>105</sup> Secularism does not have the value of a general principle in the Convention system; it is not a binding principle stemming from the Convention. This is one of the main contributions of the judgment of the Grand Chamber, as it provided a two-edged affirmation: the promoters of secularism<sup>106</sup> may insist on freedom of conscience, but they can invoke it only as one conviction among others.<sup>107</sup> They must also accept the intrinsic relativity of freedom of religion and admit that, under the Convention, secularism cannot claim to embody neutrality itself. This does not question secularists’ freedom to claim that they hold the ideal system and to try to apply it at the national level, according to the circumstances. However, for the Court, secularism is a conviction and is respectable since it is compatible with the Convention, like many other convictions.<sup>108</sup> However, secular conviction is not more neutral than a strictly religious belief. In this, the Grand Chamber followed the observations of the intervening governments at the hearing, which stated that, “favouring secularism was a political position that, whilst respectable, was not neutral. Accordingly, in the educational sphere, a State that supported the secular as opposed to the religious was not being neutral.”<sup>109</sup>

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104. *Id.* § 58 (citing the judgment of *Campbell and Cosans v. the United Kingdom*, App. 7511/76 and 7743/76, 1982 Eur. Ct. H.R. § 36).

105. *Id.*

106. *Id.* The English version of the judgment uses the words “the supporters of secularism.” *Id.*

107. *See id.*

108. *Id.*

109. *Id.* § 19–21. *See also* the oral intervention of the governments of Armenia, Bulgaria, Cyprus, Russian Federation, Greece, Lithuania, Malta, and the Republic of San-Marino.

In its responding observations, the Italian government told the Court that

We firmly believe that, in the absence of a European consensus, the Court should refrain from assigning the principle of secularism a precise content going as far as prohibiting the mere display of symbols with a religious meaning linked to other meanings compatible with the underlying values of the Convention.<sup>110</sup>

The Grand Chamber went further, however, as it rejected the principle of secularism, not as void or evil in itself but as extraneous to the Convention system.

Actually, in international or European law, there is no precise or generally accepted definition of secularism. Its content varies significantly, as with any notion which is more political or ideological than legal. Thus the Court was wise to reject it in favor of the notion of neutrality. This rejection significantly weakened the applicants' arguments, which mainly relied on the claim that secularism was a necessary consequence of neutrality.<sup>111</sup>

### *C. Neutrality Applies to the "Acting" and Not the "Being" of a State*

Assessing a confessional or denominational school as neutral in religious matters as a secular school may seem paradoxical. One way of resolving the paradox is to question the relation between nihilism and neutrality, which often intuitively leads to confusing the two terms. Human minds seem to be configured to think that emptiness is more neutral than fullness. Italy and the intervening States amply questioned this difference during the hearing.<sup>112</sup> To clear up this confusion, which is the implicit basis of the Second Section judgment, they recalled that there was nothing neutral about the secularism of soviet regimes.<sup>113</sup>

Another way of resolving this paradox, much more appropriate to the context of the Court, is to consider neutrality as a question of measure. In other words, the obligation of neutrality as understood by the Court concerns State action, not the State's nature or

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110. Complementary Observations of the Italian Government submitted to the Section, § 10.

111. *Id.* §§ 43–44.

112. This information may be consulted in the file on the case at the Court's Registry.

113. This information may be consulted in the file on the case at the Court's Registry.

identity. The Court does not judge the States for what they *are* but for what they *do*. On the contrary, secularism or denominationalism concerns the nature of the State, or its essence.

Further, neutrality as an essence is difficult, if not impossible, to conceive. Because the *being* precedes the *act*, requiring a State to be neutral is requiring it to never act, and even more, to have no presupposition orienting its action, which is also impossible. By definition, in order for a State to act, it must choose one action or viewpoint over another, so that it can never truly be “neutral.” Every State possesses religious or philosophical presuppositions and a culture that it cannot renounce without violence. In this sense, a secular State is not more neutral than a denominational State.

The Grand Chamber was thus realistic in recalling, in substance, that in religious matters national authorities are only required to *act* with “neutrality and impartiality.”<sup>114</sup> The fact that a State is secular, denominational, or otherwise has no decisive consequences in itself as to whether it is “neutral.”

Passing judgment on a State’s *being*, the essence of the State can only be assessed with reference to a pre-established conception of the common good. Such a judgment presupposes an opinion on the structural social conditions favorable for this common good. Therefore, preferring a non-confessional school to a Christian-inspired school implies that the “values” of atheism or agnosticism are more favorable for the good of the pupils than those of Christianity. This was the choice of the Second Section when it revealed its view of the aims of State education.

This choice pertaining to the religious aspect of the common good is ultimately a fundamental choice, and the European Court must abstain from making it. Those who want the European Court to overstep its jurisdiction to exercise such a choice, in fact—in a very medieval way—long to see it set up as a new spiritual authority above the States: a theocracy of the atheistic religion of human rights. In their defense, it is true that the absorption of morality and religiosity by human rights transforms the European Court into a “conscience of Europe.”<sup>115</sup> Thus, the Court becomes the functional equivalent of an ultimate oracle of a new magisterium, which specifically applies

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114. *Lautsi*, 2011 Eur. Ct. H.R. §§ 71–72.

115. As the Court presents itself in the book celebrating its fiftieth anniversary, *THE CONSCIENCE OF EUROPE: 50 YEARS OF THE EUROPEAN COURT OF HUMAN RIGHTS* (Jonathan Sharpe ed. 2011).

directly to States, not only in civil matters but also in moral and religious matters. This magisterium also imposes its positions upon individual consciences because of its great prestige. In fact, as any society naturally has a religious dimension, a society which claims to be purely secular can only capture the totality of spiritual power by transforming the political ideology which rules it into religion.

The Grand Chamber did not choose to implicate such matters, unlike the Second Section's judgment. The Grand Chamber held that, under the Convention, the obligation of "neutrality and impartiality" concerns the acts of the State, not its nature.<sup>116</sup> This is what the Court recalled: "States have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups,"<sup>117</sup> whether believers or non-believers.

Judge Bonello expressed this view vigorously in his concurring opinion:

Freedom of religion is *not* secularism. Freedom of religion is *not* the separation of Church and State. Freedom of religion is *not* religious equidistance – all seductive notions, but of which no one has so far appointed this Court to be the custodian. In Europe, secularism is optional, freedom of religion is not.<sup>118</sup>

Freedom of religion, and freedom from religion, in substance, consist in the rights to profess freely any religion of the individual's choice, the right to freely change one's religion, the right not to embrace any religion at all, and the right to manifest one's religion by means of belief, worship, teaching and observance. Here the Convention catalogue grinds to a halt, well short of the promotion of any State secularism.<sup>119</sup>

Thus, determining the essence of the State, secular, confessional, or otherwise, is not something that the European Court is competent to decide, as demonstrated by the Grand Chamber's express refusal to arbitrate the Italian domestic debate on the meaning of secularism.<sup>120</sup>

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116. *See Lautsi*, 2011 Eur. Ct. H.R. at §§ 71–72.

117. *Id.* at § 60. (citing *Leyla Şahin v. Turkey*, App. 44774/98, 2005 Eur. Ct. H.R. at § 107).

118. *Id.* at § 2.5 (Bonham, J., concurring).

119. *Id.* at § 2.6.

120. *See id.* at § 57.

*D. Democracy, Denominational Neutrality and Secularism*

The Second Section could not “see how the display in State-school classrooms of a symbol that it is reasonable to associate with Catholicism (the majority religion in Italy could serve the educational pluralism which was essential for the preservation of ‘democratic society’ within the Convention meaning of that term.”<sup>121</sup> Thus, the requirement of confessional neutrality of the school environment allegedly derives from the concept of “educative pluralism,” which itself stems from the interpretation of the notion of “democratic society.” The result is that a society must be secular to be democratic. This is in substance what the applicants claimed: “the principle of secularism coincides with the principle of democracy. A non-secular State could not be considered democratic.”<sup>122</sup>

This opinion is conceivable from a philosophical point of view, provided democracy is considered necessarily liberal by nature, as it is presently in most western States. Indeed, the principles of liberalism ultimately imply a certain moral relativism, and consequently a privatization of religion. According to this view, Western democracies are thus secular, at least in their essence, and become concretely so as they manifestly adhere to moral liberalism. This is why the applicants say the presence of a crucifix is “incompatible with the foundations of western political thought, the principles of the liberal State and a pluralist, open democracy, and respect for the individual rights and freedoms enshrined in the Italian Constitution and the Convention.”<sup>123</sup>

Though this position is defensible from a philosophical perspective, it is much less so from the legal point of view of the Convention. Ideologically, the Court is largely in favor of liberal democracy, but there is no such unanimity among the Member States of the Council. Moreover, historically the Council of Europe is not based on such an ideology but on the post WWII Christian democracy. This Christian-democratic origin appears especially in the Statute of the Council of Europe. In its preamble, the Member States affirm “their devotion to the spiritual and moral values which

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121. *Id.* § 31.

122. Observations of the applicants for the hearing of June 30, 2010, p. 6.

123. *Lautsi*, 2011 Eur. Ct. H.R. § 46. This is an extract of the presentation of the applicant’s position by the Court. Therefore, it is not a direct quotation of the applicant.

are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy.”<sup>124</sup>

Actually, the Convention is not only a set of objective standards, but a system of standards which constitutes an evolutionary ideological system that is superposed to the legal system and guides its interpretation. What was at stake in the *Lautsi* case, then, was the determination of the ideological system, either liberal or Christian-democratic, directing the interpretation of the Convention.

When the European Convention on Human Rights was written, a large proportion of the Member States of the Council of Europe designated an official religion or exclusively referred to its majority religion. It is still the case today, although less so for Catholic countries, as shown by the situation in Andorra, as well as in the Armenian,<sup>125</sup> Danish,<sup>126</sup> Greek,<sup>127</sup> Hungarian,<sup>128</sup> Irish,<sup>129</sup> Icelandic,<sup>130</sup> Liechtenstein,<sup>131</sup> Maltese,<sup>132</sup> Monegasque,<sup>133</sup> Norwegian,<sup>134</sup> United

124. Statute of the Council of Europe, London, 5 May 1949, Preamble, § 3.

125. CONSTITUTION OF THE REPUBLIC OF ARMENIA, July 5, 1995, art. 8.1 (stating that “[t]he Republic of Armenia recognizes the exclusive mission of the Armenian Apostolic Holy Church as a national church, in the spiritual life, development of the national culture and preservation of the national identity of the people of Armenia”).

126. DANMARKS RIGES GRUNDLOV [CONSTITUTION], June 5, 1953, part 1, § 4 (stating that “[t]he Evangelical Lutheran Church shall be the Established Church of Denmark, and, as such, it shall be supported by the State”).

127. SYNTAGMA [SYN.] [CONSTITUTION], April 17, 2001, 2 (Greece) (stating that “[t]he prevailing religion in Greece is that of the Eastern Orthodox Church of Christ”).

128. A MAGYAR KOZTARSASAG ALKOTMANYA [CONSTITUTION], April 25, 2011 (Hungary).

129. The Irish Constitution, written “[i]n the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Éire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial.” The preamble recalls in Article 44 that “[t]he State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.” BUNREACTH NA HEIREANN [CONSTITUTION], Dec. 19, 1937, preamble (Ireland).

130. STJÓRNARSKRÁ LÝDVELDISINS ÍSLANDS [CONSTITUTION], June 17, 1944, art. 62 (Ice.) (stating that “[t]he Evangelical Lutheran Church shall be the State Church in Iceland and, as such, it shall be supported and protected by the State”).

131. LIECH. CONST., Oct. 5, 1921, art. 37, § 2. (stating that Catholicism is the State religion).

132. MALTA CONST., Sep. 21, 1964, art. 2 (stating that the religion of Malta is the Roman Catholic Apostolic religion).

133. MONACO CONST., Dec. 17, 1962, art. 9 (stating that the Roman Catholic Apostolic religion is the State religion).

134. KONGERIKET NORGES GRUNNLOV [CONSTITUTION], May 17, 1814, art. 2 (Nor.)

Kingdom<sup>135</sup> or Slovakian<sup>136</sup> constitutions. Other States, like Spain or Italy, also recognize Catholicism in a special way.<sup>137</sup>

It must be underlined that officially recognizing a specific religion does not imply denying the freedom of religion of those belonging to minority groups. It only implies accepting that freedom of religion, like any other freedom, is exercised in a specific cultural context.

Affirming that a democratic State is necessarily secular is unrealistic; moreover, it infringes the sovereignty of the Member States which have never undertaken such an obligation. However, lack of realism is not always seen as a default in itself; imposing another reality is the issue. Such an affirmation even claims to be *avant-gardiste*, indeed even prophetic. This could be accepted if one considered that these religious constitutional provisions are only vestiges of a past political order.

However, some countries formalize the relations between temporal and spiritual orders in their constitutions. For example, the Bulgarian constitution of 1991 states that "Eastern Orthodox religion is the traditional religion of the Republic of Bulgaria."<sup>138</sup> Very recently, the new constitution of Hungary, symbolically promulgated on Easter Monday 2011 (April 25), frequently refers to Catholicism and the values of Christian Europe which must guide the interpretation of the Constitution.<sup>139</sup>

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(stating that "[t]he Evangelical-Lutheran religion shall remain the official religion of the State. The inhabitants professing it are bound to bring up their children in the same").

135. In the United-Kingdom, since Henry VIII's Act of Supremacy declaring that Henry VIII was "the only supreme head on earth of the Church in England" and that the English crown shall enjoy "all honours, dignities, preeminences, jurisdictions, privileges, authorities, immunities, profits, and commodities to the said dignity," the English crown holds both the office of the Head of State and the Head of the Church of England. Act of Supremacy, 1534, 26 Hen. 8 c.1 (Eng.). Some seats in the House of Lords are also reserved for some bishops of the Church of England.

136. ÚSTAVA SLOVENSKEJ REPUBLIKY [CONSTITUTION], Sep. 1, 1992, preamble (recognizing the spiritual heritage of the saints Cyril and Methodius).

137. SPAIN CONST., Dec. 29, 1978, § 2 (stating that the public authorities shall "maintain appropriate cooperation relations with the Catholic Church"); COSTITUZIONE DELLA REPUBBLICA ITALIANA, Dec. 22, 1947, art. 7 (recognizing the Catholic Church as a sovereign, whose relations with the State are governed by pacts and do not require constitutional procedures).

138. KONSTITUTSIYA NA REPUBLIKA BALGARIYA [CONSTITUTION], July 12, 1991, art. 14.

139. See A MAGYAR KOZTARSASAG ALKOTMANYA [CONSTITUTION], April 25, 2011 (Hungary).

Finally, the interventions of twenty-one Member States to support Italy demonstrate that the postmodern model of liberal democracy, cut off from its cultural and religious roots, has not entirely conquered Europe. It may even be drawing back, due to the social and cultural constraints imposed by globalization.

Identifying democracy and secularism also raised a problem concerning the coherence of the European Court's case-law. The Second Section judgment was contrary to the case-law of the Commission and the Court. As early as the case of *Darby v. Sweden*, the former European Commission of Human Rights held that a State Church system cannot in itself be considered to violate Article 9 of the Convention.<sup>140</sup> More recently, in the famous judgment of *Leyla Sahin*, the Grand Chamber affirmed that “[w]here questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance.”<sup>141</sup> Since deep disagreements about the relationship between State and religion may reasonably exist in a democratic society, one cannot see how the notion of democratic society could impose a unique secular model of State education.

Finally, it clearly appears that, in the context of the European Convention, democracy does not imply secularism. The efforts of the Italian government to prove that the crucifix—as a symbol of civilization—supports secularism, instead of opposing it, finally proved useless. The issue was relevant in the domestic debate, but off topic before the European Court. The government's presentation still held merit however, describing an original concept of secularism that respects the culture of society instead of aggressively stirring conflict within it.

#### *E. State Education According to the Grand Chamber*

After delineating its jurisdiction, the Grand Chamber still had to correct the general presentation of the Second Section on the aims of State education. As already mentioned, the Section built its reasoning on specific assertions about the aims of State education. Consequently, its legal reasoning depended on the asserted purposes. However, before discussing its legal arguments, the Grand Chamber

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140. *Darby v. Sweden*, App. 11581/85, Eur. Comm'n H.R. Dec. & Rep. (1988).

141. *Leylahin v. Turkey*, App. 44774/98, 2005 Eur. Ct. H.R. § 109.

responded by briefly recalling what the Convention actually requires with regards to State education.

Regarding the Convention's State education requirements, the Court first recalled that, according to its case law, the setting of the curriculum "fall[s] within the competence of the Contracting States."<sup>142</sup> Like the Section, the Grand Chamber deduced from Article 2 of Protocol 1 a duty of the State "to safeguard the possibility of pluralism in education,"<sup>143</sup> but, contrary to what the Second Section maintained, this pluralism does not imply religious neutrality;<sup>144</sup> it is not intrinsically relativistic. The Grand Chamber ended the political discussion on purpose to return to the legal field of State obligations. Referring to its well established case law in this area,<sup>145</sup> the Court recalled that the Convention "does not even permit parents to object to the integration of such teaching [of a religious or philosophical kind] or education in the school curriculum."<sup>146</sup> The Convention simply requires the State to ensure that "information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions."<sup>147</sup> This prohibition not only concerns the curriculum, but also all the functions of the State with regard to education and teaching,<sup>148</sup> including the setting of the school environment.<sup>149</sup>

The duties thus described by the Grand Chamber do not distinguish between the secular or religious character of State schools. They concern both systems equally. Neither secular systems nor those which recognize some religious dimension in State-education are contrary to the Convention. For example, in

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142. *Lautsi v. Italy*, App. 30814/06, 2011 Eur. Ct. H.R. § 62 (G.C.).

143. *Id.*

144. *Id.* at §§ 71–72.

145. *See, e.g., Folgerø v. Norway*, App. 15472/02, 2007 Eur. Ct. H.R. § 84; *Zengin v. Turkey*, App. 14448/04, 2007 Eur. Ct. H.R. §§ 51–52; *Kjeldsen v. Denmark*, App. 5095/71; 5920/72; 5926/72, 1976 Eur. Ct. H.R. §§ 50–53.

146. *Lautsi*, 2011 Eur. Ct. H.R. § 62.

147. *Id.*

148. *See Folgerø*, 2007 Eur. Ct. H.R. § 84; *Zengin*, 2007 Eur. Ct. H.R. § 49; *Valsamis v. Greece*, App. 21787/93, 1996 Eur. Ct. H.R. § 27; *Kjeldsen*, 1976 Eur. Ct. H.R. § 50.

149. *Lautsi*, 2011 Eur. Ct. H.R. § 62.

Liechtenstein, the State co-operates with the Church and parents in order to transmit a religious and moral education.<sup>150</sup> Consequently, State schools endeavor to educate pupils in conformity with Christian principles, together with the Church and parents. Similarly, in Poland, the law provides that the curriculum in State schools must respect Christian values and universal moral principles.<sup>151</sup> The choice of the secular or confessional character for State schools remains outside the Convention's scope and falls under each State's sovereignty.

After declaring that the concepts of secularism and confessional neutrality are outside the Convention's scope, and after recalling the duties of the State with regard to State education, the Court then reached the merits of the case.

#### *F. The Crucifix: A Passive Symbol*

The Court first explained that the obligation incumbent on States under Article 2 of Protocol 1 concerns not only the curriculum, but also the organization of the State school environment.<sup>152</sup> Thus, a decision concerning the presence of a crucifix falls within an area in which the States are obligated to respect the right of parents to ensure that the education and teaching of their children is in conformity with their own religious and philosophical convictions. Then the Court recognized that the crucifix is "above all a religious symbol."<sup>153</sup> As such, it could possibly affect the rights of parents through its potential impact on the education of children.<sup>154</sup>

Contrary to the Second Section's decision, which determined that the crucifix was a "powerful external symbol" and could therefore infringe the religious rights of parents and the religious freedom of children, the Grand Chamber declared that it was "an essentially passive symbol."<sup>155</sup>

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150. LIECH. CONST., Oct. 5, 1921, art. 15.

151. Preamble of the Polish School Education Act of September 7, 1991.

152. *Lautsi*, 2011 Eur. Ct. H.R. § 63 (citing *Folgero*, 2007 Eur. Ct. H.R. § 84); *Zengin*, 2007 Eur. Ct. H.R. § 49; *Valsamis*, 1996 Eur. Ct. H.R. § 27; *Kjeldsen*, 1976 Eur. Ct. H.R. § 50.

153. *Lautsi*, 2011 Eur. Ct. H.R. § 66.

154. *See id.*

155. *Id.* § 72.

According to the Section, “in the context of public education, crucifixes, which it was impossible not to notice in classrooms, were necessarily perceived as an integral part of the school environment and could therefore be considered ‘powerful external symbols.’”<sup>156</sup> More precisely, it was allegedly a powerful symbol because it is linked to the school environment and would give pupils the feeling of being brought up in an environment marked by a particular religion supported by the State.<sup>157</sup> In the Section’s view, the context was decisive: the crucifix is not only a powerful symbol because it is religious, but also because it is endorsed by the State and imposed by State schools.

In its argument, the Italian Government developed the concept of a “passive symbol” not in order to denigrate the crucifix, but to distinguish the *Lausti* case from other cases about compulsory religious teaching or religious oath-taking<sup>158</sup> that concern “active” religious steps. The Government explained that the symbol was passive, because it did not require any action, prayer, or reverence from those who view it.<sup>159</sup> Moreover, it is not linked to school curricula.<sup>160</sup> For these reasons, the crucifix is a passive symbol. It does not mean that the meaning of the crucifix is weak or insignificant.

This is also how the Grand Chamber understood the crucifix’s passive character: the crucifix is passive because “it cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities.”<sup>161</sup>

I think that the concept of a “passive symbol” is not contradictory with that of “powerful external symbols,” although it is often affirmed that such is the case. The concept of a passive symbol is opposite to that of an “active symbol,” while a “powerful external symbol” is opposite to a “weak external symbol.” A national anthem could be an example of an active symbol because it represents the nation and (sometimes) requires those who hear it to stand with their hands on their hearts and sing. On the other hand, a “weak external symbol” may be a religious jewel worn around one’s

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156. *Id.* § 73.

157. *Lautsi v. Italy*, App. No. 30814/06, 2009 Eur. Ct. H.R. §§ 53, 56 (2d Sec.).

158. *See, e.g.,* *Buscarini v. San Marino*, App. 24645/94, 1999 Eur. Ct. H.R.

159. *Lautsi*, 2011 Eur. Ct. H.R. § 36.

160. *Id.*

161. *Id.* § 72.

neck—such as David’s star, a cross, or Fatima’s hand—the impact of which is weak on other people. In addition of being a weak external symbol, such religious jewelry is also a passive symbol because it requires no action on the part of others.

In addition, this distinction between signs and symbols, according to whether they are powerful or weak, passive or active, will probably be useful in the future to distinguish other situations. The context of the display, especially cultural context, helps determine the strength of an external religious symbol: the impact of the public display of an Islamic head scarf definitely varies according to the circumstances. It is a more powerful external symbol in Bavaria than in Ankara.

#### *G. No Interference by the State*

Acknowledging that the crucifix was passive was sufficient for the Court to rule that the crucifix’s impact was too limited to restrict the rights invoked. The Court could have concluded there was no interference by the State concerning the rights at issue. However, the Grand Chamber went further, stating that the applicants had not proved there was any impact on the pupils or on their mother.

Concerning the pupils, the Grand Chamber noted that,

There is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed.<sup>162</sup>

Concerning their mother, the impact of the crucifix was not established either. Although the Court could perceive the applicant’s apprehension, it nevertheless rejected the applicant’s argument: “Be that as it may, the applicant’s subjective perception is not in itself sufficient to establish a breach of Article 2 of Protocol No. 1.”<sup>163</sup>

The Grand Chamber also rejected the Second Section’s argument that the display of the crucifix resulted in the “emotional disturbance.”<sup>164</sup> The Grand Chamber reasoned that emotional

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162. *Id.* § 66.

163. *Id.* § 72.

164. *Id.* § 36.

disturbance is only a “subjective perception,” which is not in itself sufficient to establish a breach of Article 2 of Protocol 1.<sup>165</sup> The Convention does not protect subjective perceptions.

This simple statement was sufficient to conclude that there was no infringement of the rights at issue. When the Court observes that there has been no infringement, it usually concludes that the application is inadmissible<sup>166</sup> Indeed, the examination of the compatibility of a restriction with a guaranteed right of the Convention is possible only if there is such an infringement of this right. Therefore, the Court might have, early in the process, stated that there was no proof of an infringement and declared the application inadmissible. It would certainly have done so if *Lautsi* had been an ordinary case.<sup>167</sup>

The reference the Section made to the potential risk of emotional disturbance to the pupils because of the crucifix<sup>168</sup> was one of the most flagrantly weak points of its reasoning. The impossibility of proving that the mere presence of the crucifix constituted indoctrination required the Section to uphold the hypothesis of the “emotional disturbance”: its function was to prove the impact of the crucifix on the children. However, this prejudice was purely hypothetical and required a presupposition that the presence of a religious symbol in the school environment was illegitimate. According to the Second Section, this prejudice was established through potential psycho-social pressure.<sup>169</sup> The mere *possibility* of *interpreting* a symbol in such a way as to make one *feel* as though he were in a *marked* environment is insufficient to constitute an infringement of the pupils’ conscience and the parents’ ability to exercise influence regarding convictions. Some compulsory biology classes are much more likely to disturb children emotionally and offend their parents’ convictions. In such cases, the Court did not

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165. *Id.* § 66.

166. *See, e.g., X. v. Federal Republic of Germany*, App. 7462/76, 1977 Eur. Ct. H.R. (G.C.).

167. The Second Section could, and strictly speaking should have limited its analysis to the effect of the crucifix. Instead, it preferred to redefine the whole education paradigm and establish an obligation of neutrality.

168. *Lautsi*, App. 30814/06, 2009 Eur. Ct. H.R. § 55 (2d Sec.).

169. “In countries where the great majority of the population owe allegiance to one particular religion, the manifestation of the observances and symbols of that religion, without restriction as to place and manner, may constitute pressure on students who do not practise that religion or those who adhere to another religion.” *Id.* § 50.

consider that such an emotional disturbance could violate parents' rights.<sup>170</sup> The only duty of the authorities is to make sure the convictions of parents "are not disregarded at this level by carelessness, lack of judgment or misplaced proselytism."<sup>171</sup>

The slight impact of the crucifix is the real *ratio decidendi*, and after this assessment, the Court could have abstained from going further. However, considering the implications of this case, it was politically inconceivable that the Court abstain from deciding the case. It would have been interpreted as evading the issue. Consequently, the Grand Chamber continued its analysis and established that, even supposing there had been an infringement of the rights at issue, its holding was justified under the Convention. The Court had to examine the substance of the debate and rule on the merits.

In any case, considering the limited impact of the crucifix and, consequently, the absence of interference, the Grand Chamber was right in deciding no distinct question arose under Article 9 concerning the freedom of religion of the children.

Some commentators criticized the Court for having examined the case mainly through perspective of the right of parents, rather than through a thorough examination of the children's rights under Article 9, where such an examination could have led to a different result.<sup>172</sup> However, the Court justified its position from the beginning, recalling that Article 2 of Protocol 1 is in principle *lex specialis* in relation to Article 9<sup>173</sup> when the dispute concerns the obligation to respect the convictions of parents in education and teaching.<sup>174</sup>

I agree with the Court. Because the Convention does not require any confessional neutrality, the lack of constraint exercised by the State on the applicants suffices to conclude there was no violation of Article 9.

Finally, concerning Article 14, which prohibits discriminatory treatment, especially on religious grounds, the Court merely recalled

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170. *E.g.*, Kjeldsen v. Denmark, App. 5095/71, 5920/72, 5926/72, 1976 Eur. Ct. H.R.

171. *Id.* § 54.

172. Jeroen Temperman, *Lautsi II: A Lesson in Burying Fundamental Children's Rights*, 6 RELIGION AND HUMAN RIGHTS – AN INTERNATIONAL JOURNAL 279 (2011).

173. Folgerø v. Norway, App. 15472/02, 2007 Eur. Ct. H.R. § 84.

174. *Lautsi*, 2011 Eur. Ct. H.R. § 59.

that this provision has no independent existence and only concerns the enjoyment of the rights guaranteed by the Convention.<sup>175</sup> The Court also noted that no distinct question arose that was not already examined.<sup>176</sup> Moreover, the applicants did not substantiate this complaint.<sup>177</sup>

#### V. SUPPLEMENTARY COMMENTS ON THE GRAND CHAMBER JUDGMENT

Since the applicants failed to prove State interference through asserting their claimed rights, as already mentioned, the Grand Chamber could have dismissed the case as inadmissible. However, the Court preferred pursuing its reasoning, giving more detail and its position on some points at issue that we will comment in the following developments, in particular on the distinction between the crucifix and the Islamic headscarf, the definition of the negative freedom of religion of non-believers, the exclusion of the Bavarian solution, the weight of social realities such as the traditions and of the majority religion as legitimate interests justifying interferences in individual rights. Finally this Article will also present and analyse the political and religious implications of the debate caused by the *Lautsi* case, as well as its consequences for the Court.

##### A. *The Crucifix and the Islamic Headscarf*

To support its decision, the Second Section referenced the judgment in *Dahlab v. Switzerland*,<sup>178</sup> but without much detail.<sup>179</sup> This case concerned prohibiting a State school teacher from wearing an Islamic headscarf while teaching.<sup>180</sup> The Court considered the headscarf to be a powerful external sign and ruled that the prohibition was compatible with the Convention.<sup>181</sup> On this basis, the Section, as well as some commentators, deduced that it was logical, and even just, to prohibit the display of crucifixes too.

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175. *Id.* § 81.

176. *Id.*

177. *Id.*

178. *Dahlab v. Switzerland*, App. 42393/98, 2001 Eur. Ct. H.R.

179. *Lautsi v. Italy*, App. 30814/06, 2009 Eur. Ct. H.R. §54 (2d Sec.), rev'd, App. 30814/06, 2011 Eur. Ct. H.R. (G.C.).

180. *Dahlab*, 2001 Eur. Ct. H.R. § 1.

181. *Id.*

The Grand Chamber expressly rejected this reasoning: “The Grand Chamber does not agree with that approach. It considers that that decision cannot serve as a basis in this case because the facts of the two cases are entirely different.”<sup>182</sup> The Grand Chamber clarified this aspect of the debate to avoid being accused of being prejudiced against Islam.

*Dahlab* differs from *Lautsi* on several aspects:

First of all, prohibitions against wearing religious signs or clothes constitute an interference with the individual freedom to manifest one’s beliefs because the person is prevented from acting in conformity with his beliefs. It was for the Court to determine the compatibility of this interference with the Convention. Conversely, in the *Lautsi* case, nobody was prevented from acting, nor was anyone forced to act. Strictly speaking, the Italian government did not have to justify any co-action (coercion), or any infringement of the applicants’ internal or external liberty. There was no violation of the students’ external liberty, because the pupils were not forced to act against their conscience. Nor were they prevented from acting in conformity with their conscience. Similarly, the students’ internal liberty, along with the mother’s right to ensure her children’s education conformed with her convictions, were not violated because the children were not forced to believe anything. Nor were her children prevented from believing anything. They were not indoctrinated and did not suffer from any proselytism.

Further, in the *Dahlab* case the Court reasoned that the will of the Swiss authorities to ensure the religious neutrality of State education and protect the religious beliefs of the pupils, in conformity with domestic law, was a legitimate interest that justified the decision of the Swiss authorities to prohibit headscarf wearing. This measure did not go beyond the national margin of appreciation in this area.

However, the fact that the prohibition of a religious symbol is compatible with the Convention does not mean that the authorization of that religious symbol would be incompatible. The power to prohibit does not create an obligation to prohibit. States which do not prohibit wearing religious symbols at school do not violate the Convention.

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182. *Lautsi v. Italy*, App. 30814/06, 2011 Eur. Ct. H.R. § 73 (G.C.).

Moreover, unlike Switzerland, Italian domestic law does not clearly enshrine secularism. Therefore, the parties before the Court could not claim that Italy must respect its domestic law in this regard. Conversely, Italy boasted of its tolerant and inclusive attitude towards other religions and their symbols,<sup>183</sup> showing again that its concept of secularism differs from that of other countries, like France or Turkey. Theoretically at least, a teacher wearing a kippa could teach pupils wearing veils and turbans in a classroom that has a crucifix mounted on the blackboard.

Finally, symbols differ with regard to their meaning and their cultural context. Symbols do not have the same impact, and sometimes the same meaning, depending on the cultural context in which they are displayed. The crucifix is in its own cultural context in Italy, which is not the same as an Islamic headscarf's cultural context in Switzerland. Religious symbols cannot be correctly understood if one ignores the cultural context. The *Dahlab* Court was explicit on this point, stating that it was difficult "to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils."<sup>184</sup> For the Court, this compatibility problem justified the headscarf prohibition in the non-confessional education system.

This compatibility issue did not arise in the *Laursi* case, but not because the crucifix is *per se* compatible with European and civilized values. The Court found no compatibility issue because Italy does not have to justify the crucifix's presence, which is a matter within the scope of its margin of appreciation. A crucifix in itself does not infringe any individual rights. Thus, the Court's decision only concerned the concrete impact of the crucifix, this impact being partly determined by the crucifix's meaning.

### *B. Negative Freedom of Religion of Non-Believers*

In examining the display of the crucifix through its concrete impact on the applicants, and not from the general view of State education aims, the Grand Chamber avoided giving negative freedom of religion a general impact on the school environment as a whole. The negative freedom of religion remains limited to the

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183. *Id.* § 74.

184. *Dahlab*, 2001 Eur. Ct. H.R., § 1.

safeguard of the individual sphere, that is to say the absence of co-action constraining the internal or external liberty. The extension of a negative freedom to the environment would have established a “confessional neutrality” obligation under the Convention.

The Grand Chamber refused to give symmetrical weight to the positive and negative aspects of freedom of religion. Indeed, it is important to make sure the respect of the negative freedom is not guaranteed at the expense of the positive exercise of the right. The Court already explained this principle in the famous case of *Pretty v. the United Kingdom*<sup>185</sup> concerning euthanasia. In that case, the Court refused to grant the applicant the benefit of a “diametrically opposite right, namely a right to die,”<sup>186</sup> i.e. a negative right to life. In *Lautsi*, the negative freedom concerned a purely subjective matter, that one may feel offended by some words, caricature, or symbols, while others may not. Generally, there is no fundamental right not to be offended or upset under the Convention.

Finally, the Court refused to endorse a complete conceptual reversal of freedom of religion against itself. This conceptual reversal, which supposed that the freedom of some could be ruined by the manifestation of the religion of others,<sup>187</sup> was denounced by the Italian Government before the Grand Chamber as the main “scandal” in the case:

What is scandalous in this case is the negation of freedom of religion in the name of freedom of religion! It is this claim to defend freedom of religion by socially banning religion! It is the will of extending the negative dimension of freedom of religion until negating its positive dimension!<sup>188</sup>

### *C. Bavarian Nonsolution*

“The Bavarian solution” is an observation worth noting in analyzing *Lautsi*. After a decision of the German Federal Constitutional Court<sup>189</sup> that judged the presence of crucifixes in classrooms as “contrary to the principle of the State’s neutrality and

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185. App. 2346/02, 2002 Eur. Ct. H.R.

186. *Id.* § 35.

187. Pleading of the Italian Government before the Grand Chamber, June 30, 2010, § 24–26.

188. Pleading of the Italian Government before the Grand Chamber, June 30, 2010, § 4.

189. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 16, 1995, BVERFGE 93, 1 (Ger.).

difficult to reconcile with the freedom of religion of children who were not Catholics,”<sup>190</sup> the Bavarian Parliament adopted a new ordinance. This ordinance, known as the “Bavarian solution,” provided parents the opportunity to cite their convictions to challenge the presence of crucifixes in classrooms attended by their children.<sup>191</sup> It introduced a mechanism whereby, if necessary, a compromise or a personalised solution could be reached. In practice, this mechanism consists of a crucifix’s temporary removal during objecting pupils’ attendance.

In the *Lautsi* case, many wanted to focus the defense’s argument on the fact that the decision to maintain the crucifix resulted from a vote by the school’s governing body.<sup>192</sup> On April 22 and May 27, 2002, the school’s governing body discussed the applicants’ request to remove the crucifix.<sup>193</sup> The governing body rejected the request, ten votes to two with one abstention.<sup>194</sup> After this vote, the applicants suggested that the crucifix be removed during school holidays, which was also refused.<sup>195</sup> This process resembled the Bavarian solution.

This approach was based on a certain conception of neutrality, according to which, in a *de facto* situation (here, involving the presence of a crucifix), the State should refrain from being involved either to impose or to prohibit. It should instead let those who are directly interested decide: pupils, parents, and teachers. This is one argument made by the Italian Government in its written observations to the Grand Chamber. It explained that this mechanism “could be the authentic expression of the principles of equality, equidistance, [and] neutrality.”<sup>196</sup> Conversely, and contrary to the Bavarian practice, the Government argued that the crucifix should not be removed by right on a mere individual request, because that would manifest a prejudice in favor of the secular

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190. *Lautsi v. Italy*, App. 30814/06, 2011 Eur. Ct. H.R. § 28 (G.C.).

191. *Id.*

192. *Lautsi*, 2011 Eur. Ct. H.R. § 40. The school’s governing body has competence to manage the school; it is an elected collegial organ, prescribed by law and composed of representatives of the teachers, parents, pupils, and administrative staff of the school. *See id.*

193. *Id.* § 11.

194. *Id.*

195. As indicated by the Government in its written submission to the Grand Chamber for the oral hearing.

196. Application of the Italian Government to the Grand Chamber, p. 11, §§ 22, 23.

ideology.<sup>197</sup> Any removal or implementation should result only from a vote of the governing body. Though a vote has the necessary effect of imposing the majority's decision on the minority, only a vote will be able to ensure respect for "pluralism and democracy [that] are, by the nature of things, based on a compromise that requires various concessions by individuals and groups of individuals."<sup>198</sup>

The opinions on the appropriateness of this approach were divided because it implied that the legitimacy of the display of the crucifix would be invalidated. Moreover, it implied that the presence of the crucifix itself would always breach the rights of non-Christians. On the contrary, the determination by vote gave the advantage of making the compulsory display of the crucifix a relative question. Indeed, the compulsory character of the display of the crucifix might well be considered excessive by the Court when examining the merits, especially the proportionality of the alleged infringement of the applicants' rights. The fact that this mechanism was an occasional process not "prescribed by law"<sup>199</sup> was a relative weakness of the argument because the Court does not have the authority to judge the law of a State, but rather, only the facts of the case at issue.

Finally, the Government presented this argument only secondarily, preferring to focus on the legitimacy of the presence of the crucifix under the Convention principles. The Grand Chamber might have relied on the vote of the school's governing body to adopt a judgment of compromise: no condemnation of Italy, which would have satisfied the public opinion, but an invitation to modify its domestic law to make this voting procedure systematic, which would have satisfied the promoters of secularism. The Grand Chamber did not choose this solution, perhaps because, in spite of its apparent ease, the result would have enshrined the pre-eminence of a democratic vote over individual rights.

In addition to the Bavarian solution, it seems that the Court considered declaring the case inadmissible for failing to exhaust domestic remedies. This consideration appeared in a letter dated June 8, 2010 in which the Registry requested that the Parties specify

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197. Application of the Italian Government to the Grand Chamber, p. 11, §§ 22, 23.

198. *Gorzelik v. Poland*, App. 44158/98, 2001 Eur. Ct. H.R. § 66. *See also* *Refah Partisi v. Turkey*, App. 41340/98, 41342/98, 41343/98, 41344/98, 2003 Eur. Ct. H.R. § 99.

199. Convention, *supra* note 7, at art. 9 § 2.

whether “the applicant has submitted a claim concerning Article 2 of Protocol 1 to the domestic courts,” and whether, “even if the issue has not been raised in front of or by the Section, the parties consider that the application should be declared inadmissible for non-exhaustion of domestic remedies.”<sup>200</sup> In this letter, the Court drew the Parties’ attention, especially the Government’s, to a possible end of the conflict. In its submission to the Grand Chamber during the hearing, the Government decided to avoid this resolution and expressly requested the Court to judge the case on the merits.

Thus, the Grand Chamber judged the case on the merits, and even ruled on issues that were not necessary because a finding of no State interference was sufficient to resolve the case. The Grand Chamber carefully pursued clarifications on other controversial issues. In particular, it specifically considered the State’s ability to justify interference in Conventional rights in regard to traditions and the majority religion.

#### *D. Tradition*

In support of their argument, the Italian government and the intervening governments requested that the Court respect and not abolish a tradition.<sup>201</sup> Beyond respect for ethnic diversity and even the “pluralism” of European cultures demanded by the Court, the real question raised concerned the relationship between pre-modern traditional customs and values, and the modern (even sometimes post-modern) values promoted by the Court.

On this issue, the Court was very clear that although the decision to perpetuate a tradition in principle falls within the margin of appreciation of the State, considering the European cultural and religious diversity, “the reference to a tradition cannot relieve a Contracting State of its obligation to respect the rights and freedoms enshrined in the Convention and its Protocols.”<sup>202</sup> The values of the Convention prevail over traditions.

For the Court, the fact that a custom has become traditional, in a social and historical sense, does not deprive it of its religious nature.<sup>203</sup> Even more, in some Islamic cases, the Court had the

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200 This document may be consulted in the file on the case at the Court’s Registry.

201. *See* Lautsi v. Italy, App. 30814/06, 2011 Eur. Ct. H.R. § 36 (G.C.).

202. *Id.* § 68.

203. *Buscarini v. San-Marino*, App. 24645/94, 1999 Eur. Ct. H.R. § 34 (holding that

opportunity to conclude that some traditions were not compatible with the values of the Convention as understood by the Court. Although the Court has held that the fundamental principle of the freedom of religion “excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate,”<sup>204</sup> it has concluded several times<sup>205</sup> “that sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention.”<sup>206</sup> This demonstrates the global cultural confrontation between modern and Islamic legal traditions, which goes beyond the confrontation between western modernity and tradition. Traditions must not only be compatible with the rights and freedoms enshrined in the Convention, but they, more generally, must be compatible with “underlying values” and “fundamental principles of democracy.”<sup>207</sup> These two notions have ample potential legal implications.<sup>208</sup> Invoking a tradition is not sufficient to justify it; the justification is tied to the margin of appreciation. Thus, in the *Dogru* case, the Court expressly stated that

Where questions concerning the relationship between State and religion[] are at stake . . . notably . . . when it comes to regulating the wearing of religious symbols in educational institutions, in respect of which the approaches taken in Europe are diverse. Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order.<sup>209</sup>

In fact, secularism may also be recognized by the Court as a national tradition, in particular as a pillar of Turkish democracy.<sup>210</sup> It

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requiring elected representatives to take a traditional oath on the Gospels violated Article 9).

204. *Manoussakis v. Greece*, App. 18748/91, 1996 Eur. Ct. H.R. § 47.

205. *Refah Partisi v. Turkey*, App. 41340/98, 41342/98, 41343/98, 41344/98, 2003 Eur. Ct. H.R. § 123; *Gündüz v. Turkey*, App. 35071/97, 2003 Eur. Ct. H.R. § 51; *Güzel v. Turkey*, App. 54479/00, 2006 Eur. Ct. H.R.; *Kalifatstaat v. Germany*, App. 13828/04, 2006 Eur. Ct. H.R.

206. *Refah Partisi*, 2003 Eur. Ct. H.R. § 123.

207. *Id.* §§ 86, 100.

208. The Court began to give them some substance, especially with the cases of *Refah Partisi*, *Kalifatstaat*, *Leyla ahin* and *Dablab*. They relate to an evolutionary concept of civil liberties, sex equality, pluralism, tolerance and broad-mindedness.

209. *Dogru v. France*, App. 27058/05, 2008 Eur. Ct. H.R. § 63; *see also Kervanci v. France*, App. 31645/04, 2008 Eur. Ct. H.R.

210. *Refah Partisi*, 2003 Eur. Ct. H.R. § 52.

is true that the French and Turkish republics consider themselves as secular, under at least the constitutional aspect, while other countries are culturally, and even constitutionally, Catholic, Lutheran, or Orthodox.

The position of the Court on this issue has not changed. Moreover, it has not been established that the display of a crucifix and the values it represents are contrary to the Convention, to its underlying principles, and to the fundamental principles of democracy.

### *E. Majority Religion*

The Grand Chamber also ruled on the State's ability to rely on the national majority religion to justify its interference with freedom of religion.

The applicants presented themselves before the Court as a religious minority. Their position may be summarised as follows: considering the increasing religious pluralism in a country deeply marked by the Catholic culture, it becomes necessary to afford a special protection to minority groups against pressures by the dominant identity or culture. Moreover, such a special protection would contribute to the preservation of pluralism. Therefore, the applicants requested that the Court protect them against "the despotism of the majority."<sup>211</sup> Such despotism was allegedly manifested, for example, through the nearly unanimous vote of the school's governing body to maintain the crucifix.

The Court has always been keen on protecting minorities, considering that, in a democracy, majorities tend to misuse their dominant position. The democratic system, which entrusts power to the majority, must be corrected by supranational human rights protection mechanisms. These mechanisms ensure the protection of fundamental rights for each individual against the State and society as a whole.

In its decision, the Second Section accepted this logic and blamed the Italian majority religion for being the majority religion. The Second Section stated that

in countries where the great majority of the population owe allegiance to one particular religion[,] the manifestation of the

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211. According to the words of the applicant's counsel before the Grand Chamber. Oral argument may be consulted in the file on the case at the Court's Registry.

observances and symbols of that religion, without restriction as to place and manner, may constitute pressure on students who do not practise that religion or those who adhere to another religion.<sup>212</sup>

Following the reasoning of the Section, the presence of the crucifix would be more acceptable if the majority of the population were not Catholic. The Italian Government properly noted that this rationale is absurd.<sup>213</sup>

Thus, according to the Section, the inherent pressure of any majority religion on those minorities who live within its cultural environment is reprehensible. In order to respect minority groups, including atheism, the majority religion should be made into the functional equivalent of a minority. What appears implicitly in this reasoning is not only an illusory quest for religious equality, but also results in a concept of confessional neutrality that depends on pluralism. Pluralism and religious neutrality strengthen each other.

When denouncing the oppressive effect of the majority religion, how is it possible not to also target oppression of any other social culture? Beyond this, what of the oppression exercised by society? This apparent paradox reveals the logic of conflict between the individual and society, specific to the political liberalism underlying the theory of freedom of religion. This conception of freedom of religion is based on a conflicting vision of the relations between the individual and society. Society and the individual are not considered in a natural relation of interdependence and complementarity, but in opposition: society becomes the main obstacle to individual liberty. Recognition of the absolute character of individual dignity and autonomy leads to de-legitimizing the interests of the society.

The fact that a society may have a religious identity transcending that of its members is allegedly no more acceptable. Such a conception of society allegedly exercises an illegitimate influence on State action, because it is based on presuppositions which are incompatible with the contemporary pluralistic ideology. The neutralist and pluralist concept of society opposes the *essentialist* concept. In this context, the distinction between the *conduct* and the *nature* of the State may be understood. According to the neutralist

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212. *Lautsi v. Italy*, App. 30814/06, 2009 Eur. Ct. H.R. §50 (2d Sec.), *rev'd*, App. 30814/06, 2011 Eur. Ct. H.R. (G.C.).

213. *See Lautsi*, 2011 Eur. Ct. H.R. §§ 37, 39 (discussing how it was acceptable for Italy to permit Islamic headscarves because it was a minority religion, but that symbols of a majority religion were wrongly perceived as “aggravating”).

concept, society is purely artificial and instrumental, and at the service of the individual. An artificial instrument can have no *being* and even less conscience and it may only *act* instrumentally, aiming at satisfying individual rights. In focusing on Italy's nature rather than its conduct, the Section placed itself in a position to blame Italy for being what it is, and to require it to act as if it were not so. Through this shift of focus from the *conduct* to the *nature* of society, freedom of religion becomes an efficient operational concept, a tool to secularize society.

This concept of freedom of religion, which secularizes society through a shift in focus from *conduct* to *nature*, does not merely ignore but essentially reduces the religious dimension of social life and the social dimension of religion as much as possible. Both of these dimensions are natural and manifested through the majority.

The "social dimension of religion" is difficult to legally comprehend because religious freedom first protects an inherent right of the individual against society. This freedom is universal because it is based on human nature, and it is imperative because it expresses an aspect of human dignity. This positive right to freedom of religion stems from the freedom of the individual act of faith. Therefore, according to the modern concept of freedom of religion, only individuals (alone or collectively) possess religious rights exercised within the limits imposed by national legislation. Only each believer individually holds a right, which is exercised mainly against other people and society. In brief, as only individuals have a conscience, only individuals deserve protection for the exercise of their conscience against any form of society because the cultural structure of society itself constitutes a potential constraint.

The "religious dimension of culture" is also difficult to comprehend in the modern concept of religious freedom because the individual freedom of conscience is exercised in a given cultural area and often through differentiating from it, if not contesting it. Even more, considering that culture is oppressing in itself, some want fundamentally to negate or neutralize the religious dimension of societies and to empty the public arena of the free exercise of individual conscience. This neutralization should apply to all societies and intermediate bodies: nations, families, schools, etc. This modern concept of religious freedom presupposes the religious neutrality of the societies in which it is exercised. However, in many areas it is recognized in international law that nations may be entitled to

subjective rights, such as the right to development or self-determination. Similarly, nations are legitimately entitled to protect their ecological, linguistic, and cultural identity and pass it down to subsequent generations. It is not so for the religious dimension of their cultural identity, though it is one of the deepest elements of identity.

The model of a neutral and pluralistic society also implies changing the philosophical basis of freedom of religion. Indeed, this approach leads to limiting freedom of religion through a change in paradigm: freedom of religion is no longer treated as a primary, fundamental right directly stemming from the ontological dignity of the human person. Rather, it becomes a secondary right, conceded by the civil authorities, derived from the ideal of democratic pluralism and held within the neutrality requirements of the public arena. This is a conceptual reversal. From a subjective right originating in a morally neutral individual conscience and exercised against the collective identity, we shift to an individual right that stems from a morally neutralized collective identity. The manifestation of religious convictions is, thus, limited by the requirements of the public order, understood as a neutral collective identity.

Moreover, while pluralism was initially meant to be an inclusive perspective according to which various religions are considered equally good, the perspective now seems to have been reversed to the detriment of religion, treating religions as basically evil. Therefore, considering the dangerousness of religions, pluralism becomes the justification of a greater secularism, aiming at preserving a threatened public arena. The outlines of the public arena expand farther and farther: religious expression becomes banned, not only from the civil service and State institutions, but also from the street and what is visible from the street. This gradual expansion of secularism to society as a whole is the opposite of the original intention of the Convention, which meant to protect individual rights from an invasion of society by the State.

Finally, this expansion gradually reduces the freedom of religion to a mere freedom of creed. In other words, freedom of religion is reduced to the freedom to privately have or not have a belief, but not to manifest it in public and collectively.

Confronted with the logic that identifies neutrality and secularism, and finally reduces religion to faith and freedom of

religion to secularism, the Government presented the concept of neutrality to the Court as an inclusive concept, in opposition to secularism (which is exclusive by nature).<sup>214</sup> The Government, as well as the ECLJ, tried to prove that the concept of freedom of religion had to evolve, such that the law better takes the religious dimension of culture into account.<sup>215</sup> Taking into account the religious dimension of culture should allow, under some conditions, for the recognition of the legitimate interests that a society may have in preserving its culture, language, national heritage, and socio-religious dimension. To that aim, we specifically argued that secularizing the European public arena would contradict the Council of Europe project.<sup>216</sup> We also invited the Court to consider the State's wish to respect not only universal moral values, but also the culture, language, customs, and traditions—even religions—of society as legitimate when examining the proportionality of an interference with the freedom of religion of an individual.<sup>217</sup> Contrary to the values of pluralism, tolerance, and broadmindedness, these values are specific and not universal. However, they are the constituents of nations, the ultimate basis of modern sovereignty and therefore, in theory, of democracy.

Similarly, against the secularist logic of the Second Section, the Italian Government gradually adopted a *differentialist* approach while safeguarding the principles of neutrality, secularism and equality. Thus, it affirmed that “the principle of neutrality and secularism does not exclude distinctions between religious communities.”<sup>218</sup> Granting “a special status to some traditional churches . . . is not in itself contrary to the principle of equality.”<sup>219</sup> On the contrary, differences in legal status may be justified by *de facto* differences, especially historic and cultural differences: “equality in law must maintain *de facto* differences between churches,”<sup>220</sup> and “wiping out the *de facto* differences would be incompatible with the

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214. See Written submission of the Government to the Grand Chamber, § 18.

215. *Id.*

216. See Written submission of the Government and of the ECLJ to the Grand Chamber.

217. *Id.*

218. Application of the Italian Government for referral of the case to the Grand Chamber, January 28, 2010, §8.

219. *Id.*

220. *Id.*

principle of neutrality in religious matters.”<sup>221</sup> Thus, according to the Government’s wish, taking the national socio-religious identity<sup>222</sup> into account, even if it is relative and evolutionary by nature, partially allows avoiding relativism and religious indifferentism, without questioning the secularism of the Italian State.

Finally, the Grand Chamber upheld this interpretation tinged with realism, and took into account the specifically Italian religious dimension of social life. Admitting that Italian law “confer[s] on the country’s majority religion preponderant visibility in the school environment,”<sup>223</sup> the Court immediately referred to the *Folgerø* case in which it considered that “the place occupied by Christianity in the national history and tradition of the respondent State” justifies the fact that the syllabus granted a greater share to the knowledge of Christianity than other religions and philosophies, and this prevented considering the Christian preference as an indoctrination.<sup>224</sup> Therefore, because Catholicism holds a predominant place in the Italian history and tradition, its Government may give it some preponderant visibility in the school environment.

Thus, the Court recognized that in countries with a Christian tradition, Christianity possesses a specific social legitimacy which distinguishes it from other religious and philosophical beliefs. This reality justifies a differential approach. Because Italy is a country with a Christian tradition, the Christian symbol may legitimately have a preponderant visibility in society.

The Court had already reached a similar solution in other cases. For example, it has ruled that, “taking into account the fact that Islam is the majority religion in Turkey, notwithstanding the secular character of the State,” for the State in Turkish schools to “grant a larger share [in the curriculum] to the knowledge of Islam than to that of other religions . . . could not in itself be considered a breach of the principles of equality and objectivity susceptible to constitute an indoctrination.”<sup>225</sup> Similarly, in the famous case of *Otto-Preminger*

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221. *Id.*

222. *Id.* § 14. According to the Government, this characteristic is “represented by different factors, such as the tight links between the State and the people on the one hand, [and] Catholicism on the other hand, from an historical, traditional, cultural and territorial perspective, and by the fact that the values of the Catholic religion have always been deeply rooted in the feelings of the great majority of the population.” *Id.*

223. *Lautsi v. Italy*, App. 30814/06, 2011 Eur. Ct. H.R. § 71 (G.C.).

224. *Folgerø v. Norway*, App. 15472/02, 2007 Eur. Ct. H.R. § 89.

225. *Zengin v. Turkey*, App. 46928/99, 2004 Eur. Ct. H.R. § 63 (unofficial)

*Institute v. Austria*, the Court did not disregard the fact that Catholicism is the religion of an overwhelming majority of Tyroleans.<sup>226</sup> The European Court has long been attentive to relative and specific factors such as the national “moral climate,”<sup>227</sup> “tradition,”<sup>228</sup> “cultural traditions,”<sup>229</sup> the “historical and political factors peculiar to each State,”<sup>230</sup> the “specificity of the religious issue”<sup>231</sup> in a given country, or the “historical and cultural traditions of each society” in areas concerning the “deep convictions” of society.<sup>232</sup> With this variety of religious, historical and cultural traditions, the Court noted that there was no “uniform conception of the significance of religion in society.”<sup>233</sup>

Therefore, taking into account the historical religious identity of countries is necessary to place the judgments of the Court in their context with regard to the social dimension of religion and the naturally religious dimension of society. This does not only benefit the majority religion, but it may also benefit secularism when this philosophical conviction constitutes the “religious” identity of society.

#### *F. Political and Religious Debate*

The Section’s judgment was often blamed for having turned religious freedom against religion and for claiming to defend religion while wiping it out of society.<sup>234</sup> Nonetheless, in some extent this reproof was not entirely justified, because it must be admitted that, in ruling in favor of the prohibition of the crucifix, the concept of religious freedom took up its original expression: opposition to State

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translation).

226 App. 13470/87, 1994 Eur. Ct. H.R. § 56.

227. *Dudgeon v. United Kingdom*, App. 7525/76, 1981 Eur. Ct. H.R. § 57.

228. *Campbell and Cosans v. United Kingdom*, App. 7511/76, 7743/76, 1983 Eur. Ct. H.R.

229. *Casado Coca v. Spain*, App. 15450/89, 1994 Eur. Ct. H.R. § 54.

230. *Gitonas v. Greece*, App. 18747/91, 19376/92, 19379/92, 28208/95, 27755/95, 1997 Eur. Ct. H.R. § 39.

231. *Murphy v. Ireland*, App. 44179/98, 2003 Eur. Ct. H.R. (relating to a minister interdicted from publishing an advertisement with a religious aim on a local radio).

232. *F. v. Switzerland*, App. 11329/85, 1987 Eur. Ct. H.R. § 33; *see also* A. B. and C. v. Ireland, App. 25579/05, 2010 Eur. Ct. H.R. (relating to abortion).

233. *Otto-Preminger-Institute v. Austria*, App. 13470/87, 1991 Eur. Ct. H.R. § 50.

234. *See* Government submission to the Grand Chamber and its oral pleadings; *Puppink*, *supra* note 79.

religion. In giving back to the concept of “freedom of religion” its original purpose, that is more to limit than to protect religions, the Court broke the compromise between Catholicism and modernity, which has been expressed mainly through the Declaration *Dignitatis Humanae*,<sup>235</sup> which, in a way was an attempt to redefine freedom of religion in a manner both useful and devoid of conflict with the contemporary world. At the time of Christian-democracy and *Dignitatis Humanae*, the civil right to freedom of religion enshrined in international instruments did not aim first at freeing the individual from the social sway of religion, but at fighting State atheism. In the Declaration, the Church finally accepted the concept of freedom of religion, provided it was based on the transcendent and ontological dignity of the person and oriented against the State, the atheistic State being the main target in practice.

The modern theory of religious freedom, reformulated to the benefit of individual freedom against totalitarian ideologies, still remains capable of turning against religions because it only protects individuals. In fact, its nature makes it impossible to distinguish between religions and ideologies because no alleged truth can prevail over individual freedom. Because it makes the freedom of one person prevail over the “truth” of the group, freedom of religion constitutes an efficient tool to secularize society. This made the Section take the same decision as that of atheistic regimes: the elimination of religious symbols.

One can also wonder about the inescapable character of this shift in focus from the *conduct* to the *nature* of the State. Actually, some people may think that neutral conduct necessarily implies a neutral nature, or at least ends up leading to the neutrality of the nature. In this way, though the Convention does not require the confessional neutrality of the State, it eventually makes it inevitable.

In this regard, we can note the way in which the Declaration *Dignitatis Humanae* tackles this problem. The object of Declaration *Dignitatis Humanae* is to recognize and affirm the civil right to religious freedom in regard to the conduct of the State. This right derives from the transcendent, ontological dignity of every person. Thus, the Declaration was broadly interpreted as implying that Catholic States renounce their confessional character. In fact, several Catholic states, such as Spain, modified their constitutions to that

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235. Pope Paul VI, *Dignitatis Humanae*, (Dec. 7, 1965).

aim. However, the Declaration did not require it and considered the case of States where, “in view of peculiar circumstances obtaining among peoples, special civil recognition is given to one religious community in the constitutional order of society.”<sup>236</sup> It is true that the Declaration considered this situation in order to demand “that the right of all citizens and religious communities to religious freedom should be recognized and made effective in practice.”<sup>237</sup> The Declaration does not formally require a renunciation to the confessional character of the State, but only the limitation of its effect on the conduct of the State.

The Declaration caused much debate. According to Archbishop Roland Minnerath, the theological evolution of the Catholic Church on religious freedom comes in particular from a change in its concept of the State.<sup>238</sup> He analyzes the Declaration *Dignitatis Humanae* as confirming the relinquishing of the concept of the “society-State,” seen as a natural emanation of society, in favor of a functional and instrumental concept of the State.<sup>239</sup> In other words, the Declaration manifests a rallying to the contractual, or at least voluntarist State, arbiter of liberties. In his view, this rallying modifies the ideological presupposition of the Church towards the State and has a necessary consequence: the recognition of the civil freedom of religion.<sup>240</sup> Therefore, expressing a discourse on the primacy of the common good of the society and its ultimate aim (the eternal salvation) is particularly difficult when the public discourse is more focused on the “human person” rather than on society, and when religious freedom is presented as exclusively founded in

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236. *Id.* § 6. The full quotation is:

If, in view of peculiar circumstances obtaining among peoples, special civil recognition is given to one religious community in the constitutional order of society, it is at the same time imperative that the right of all citizens and religious communities to religious freedom should be recognized and made effective in practice.

Finally, government is to see to it that equality of citizens before the law, which is itself an element of the common good, is never violated, whether openly or covertly, for religious reasons. Nor is there to be discrimination among citizens.

*Id.*

237. *Id.*

238. Roland Minnerath, *Le droit de l'Église à la liberté, du syllabus à Vatican II*, Coll. Le point théologique, Beauchesne, Paris, 1997.

239. *Id.*

240. *Id.*

individual dignity and conscience

More fundamentally, the wiping out of the concept of the State as a natural emanation of society is caused by a de-legitimization of society in front of the *human person*, which comes along with the disappearance of the very possibility of identifying the substantial common good of the society. The disappearance of this possibility of substantial common good, in turn, explains that, in correlation with the vanishing of the society-State in favor of the functional-State, liberal-democracy has replaced Christian-democracy as the predominant political system of reference in Europe.

In this context, it is understandable, as already noted, that the *Lautsi* case gave rise to a confrontation between liberal-democracy and Christian-democracy in the determination of the underlying values of the Council of Europe and the Convention. Two concepts of the State were opposed, one natural and one instrumental.

Presently, regarding Church-State relations and religious freedom, the discourse of the Church seems to free itself from the ideological context of the period surrounding Council Vatican II. The official declarations of Benedict XVI during the *Lautsi* case reveal a certain reorientation. This was already perceptible in the exhortation *Ecclesia in Europa*<sup>241</sup> in 2003. In a way, the *Lautsi* case gave an opportunity for Catholics, Orthodox, and some Protestants, including Evangelicals, to clarify their understanding of religious freedom

Among the declarations of Benedict XVI during *Lautsi*, he recalled on August 15, 2005 that “[i]n public life, it is important that God be present, for example, through the cross on public buildings.”<sup>242</sup> On June 5, 2010, just a few weeks before the hearing before the Grand Chamber, the Holy Father recalled that “[t]he Cross is not just a private symbol of devotion . . . it has nothing to do with the imposition of a creed or a philosophy by force.”<sup>243</sup> On

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241. Pope John Paul II, Post-Synodal Apostolic Exhortation *Ecclesia In Europa* (June 28, 2003). In this text, Pope John Paul II declared that “In her relations with public authorities the Church is not calling for a return to the confessional state. She likewise deplors every type of ideological secularism or hostile separation between civil institutions and religious confessions.” *Id.* § 117. He went on, insisting on “healthy cooperation between the ecclesial community and political society.” *Id.* (emphasis omitted).

242. Pope Benedict XVI, Homily of His Holiness Benedict XVI at Castel Gandolfo (Aug. 15, 2005). This took place after the judgment of the Veneto administrative Court in favor of the crucifix of Mar. 17, 2005.

243. Pope Benedict XVI, Homily of His Holiness Benedict XVI at Nicosia (June 5,

June 12, 2010, at the time of the meeting of the ambassadors to the Council of Europe Development Bank, the Holy Father was even more specific:

Christianity has enabled Europe to understand what the freedom, responsibility and ethics that imbue its laws and social structures actually are. To marginalize Christianity also by the exclusion of the symbols that express it would lead to cutting our continent off from the fundamental source that ceaselessly nourishes it and contributes to its true identity. Effectively, Christianity is the source of “spiritual and moral values that are the common patrimony of the European peoples”, values to which the Member States of the Council of Europe have shown their undying attachment in the Preamble to the Statutes of the Council of Europe. This attachment . . . establishes and guarantees the vitality of the principles on which European political and social life are founded and, in particular, the activity of the Council of Europe.<sup>244</sup>

He clearly refers to the underlying values of the Convention, liberal or Christian.

However, the most in-depth declaration of Benedict XVI on religious freedom is his message for the World Day of Peace 2011.<sup>245</sup> The Pope explained that, due to the link between religious and moral freedom, “[r]eligious freedom should be understood, then, not merely as immunity from coercion, but even more fundamentally as an ability to order one’s own choices in accordance with truth.”<sup>246</sup> In the same way, he said that “[a] freedom which is hostile or indifferent to God becomes self-negating and does not guarantee full respect for others.”<sup>247</sup> The reminder that freedom is subordinate to truth is fundamental, and it constitutes a noticeable clarification of the present view on this point. Similarly, the message insists on “the public dimension of religion,” and in particular, it warns that “to

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2010).

244. Pope Benedict XVI, Address to the participants of the 45<sup>th</sup> Joint Meeting of the Council of Europe Development Bank (June 12, 2010). This meeting, which gathers the ambassadors of the Member States to the Council of Europe, was held in the Vatican, as the Holy-See is a member of the Council of Europe Development Bank.

245. Pope Benedict XVI, Religious Freedom, the Path to Peace, Message for the World Day of Peace (Jan. 1, 2011).

246. *Id.*

247. *Id.*

eclipse the public role of religion is to create a society which is unjust.”<sup>248</sup>

Finally, in his 2011 address to the diplomatic corps, also dedicated to the issue of religious freedom, Pope Benedict XVI expressed worry:

Another manifestation of the marginalisation of religion, especially Christianity, consists in the ban on religious symbols and feasts from public life, in the name of respect for those who belong to other religions or do not believe. In so acting, not only is the right of believers to the public expression of their faith limited, but also the cultural roots which feed the deep identity and the social cohesion of many nations are cut.<sup>249</sup>

In these few recent declarations linked to the *Lautsi* case, it clearly appears that, for the Catholic Church, religious freedom does not imply the confessional neutrality of the State and society. This is not new, in the Encyclical *Mater et Magistra* of 15 May 1961, Pope John XXIII denounced the modern era: “[t]he most perniciously typical aspect of the modern era consists in the absurd attempt to reconstruct a solid and fruitful temporal order divorced from God, who is, in fact, the only foundation on which it can endure.”

The present disintegration of societies, witnessed especially in Western countries, as well as the globalization that intensifies the crisis of collective identities, could put a brake on the individualist liberalism that supports the modern concept of religious freedom. From this perspective, the plea of the Italian government in favor of the crucifix as a fundamental symbol of the civilization reveals all its value. Italy, while resolutely desiring to respect individual liberties, refused to renounce to one of its main traditional symbol in the name of the postmodern cultural relativism and nihilism. Italian Ambassador Sergio Busetto expressed it as follows: “[r]especting the religious identity of an individual must be possible while respecting the religious identity of the society in which he lives.”<sup>250</sup>

248. *Id.*

249. Pope Benedict XVI, New Year Address to the Diplomatic Corps (Jan. 10, 2011).

250. Sergio Busetto, Ambassador of Italy, Opening speech of the symposium organised by the ECLJ, the CNR and the Italian Embassy, at the Council of Europe (Apr. 30 2010) (non-official translation) available at [http://www.eclj.org/pdf/seminar\\_on\\_the\\_religious\\_symbols\\_in\\_the\\_public\\_space\\_document\\_de\\_s%C3%A9ance\\_lautsi.pdf](http://www.eclj.org/pdf/seminar_on_the_religious_symbols_in_the_public_space_document_de_s%C3%A9ance_lautsi.pdf)[http://www.eclj.org/pdf/seminar\\_on\\_the\\_religious\\_symbols\\_in\\_the\\_public\\_space\\_document\\_de\\_s%C3%A9ance\\_lautsi.pdf](http://www.eclj.org/pdf/seminar_on_the_religious_symbols_in_the_public_space_document_de_s%C3%A9ance_lautsi.pdf).

The declarations of Orthodox countries in favor of Italy may be understood along the same lines. These countries are particularly attached to the religious dimension of their culture and reluctant to embrace western post-modernity. Several Orthodox Churches (Churches of Ukraine, Serbia, and Bulgaria) even formally intervened through a letter to the Court. Others publicly took a stand. For example, in a letter to the Italian Prime Minister, Patriarch Kirill of Moscow and all Russia declared that “European democracy should not encourage Christianophobia like atheistic regimes did in the past.”<sup>251</sup> He added that “[t]he Christian heritage in Italy and other countries in Europe should not become a matter to be considered by European human rights institutions . . . [t]he pretext of ensuring the secular nature of a state should not be used to assert an anti-religious ideology, which apparently violates peace in the community, discriminating against the religious majority in Europe which is Christian.”<sup>252</sup>

Even more directly, the representative of the Russian Orthodox Church declared to the Organization for Security and Co-operation in Europe (OSCE), referring to the *Lautsi* case, “I consider the concept of the religious neutrality of a state to be the most disputable issue in the OSCE area. Attempts to establish a model religiously-neutral state in Europe have many negative implications.”<sup>253</sup>

The reaction to the *Lautsi* judgment freed many political and religious authorities to speak out against what has often been perceived as an unacceptable ideological abuse of the Court. The judgments of the Court are not directly enforceable. Thus, the authority of the Court is based on the assent of the States and, perhaps even more, on its prestige. Because of the intergovernmental nature of the Court, the execution of judgments comes under the competence of the national authorities, under the supervision of the other governments. States execute the judgments with, more or less, docility and goodwill according to the circumstances. In the *Lautsi* case, it was obvious that the present Italian government would have

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251. Letter from Patriarch Kirill, Russian Orthodox Church, to the Italian Prime Minister (Nov. 26, 2009) *available at* <http://www.mospat.ru/en/2009/11/26/news9194>.

252. *Id.*

253. Vakhtang Kipshidze, Address during the Supplementary Human Dimension Meeting on Freedom of Religion or Belief of the OSCE, Vienna (Dec. 9–10, 2010) *available at* <http://www.mospat.ru/en/2010/12/13/news32334/>.

refused to submit to a decision to withdraw crucifixes. Even more serious for the authority of the Court, this refusal would have been supported by numerous governments. Finally, it seems that for the Court, the present cultural diversity and identity crisis in Europe make it impossible to maintain both a unanimously appreciated prestige and “progressive” judicial activism.

#### VI. CONCLUSION: THE CONSEQUENCES OF *LAUTSI*

The consequences of the *Lautsi* case go beyond the issue of secularism. This case concerned the underlying values of the Convention.

This study aimed to give a synthesis of the key lessons learned from *Lautsi*, from institutional, legal, philosophical, political, and religious viewpoints. Upon the publication of the first judgment of the European Court of Human Rights on November 3rd, 2009, *Lautsi* became a subject of debate and a social issue across Europe. In its first judgment, the Court condemned Italy for violating the negative freedom of religion, by allowing crucifixes to be displayed in public school classrooms. Going beyond the literal and original meaning of the Convention, the Court then stated that this combination of secularism and democracy should be the norm. European society, which was widely shocked by this decision, has since questioned the role of the Court, the relationship between human rights and our culture, the meaning of negative liberty, neutrality and secularism, and Christianity’s place within European identity. This reflection is an on-going process.

Politically, the decision of 2009 ushered the Court into a new era, detaching the Court from the culture of the Christian-Democrat modernity which had inspired its creation. In fact, this judgment was often perceived as an abuse of the Court, and as marking the triumph of individual atheism over social religiousness. In other words, this judgment has been considered as marking a double abuse of power: that of an International Court on the national political society, and that of the individual on the national culture. Ultimately, society in its political and cultural dimension was delegitimized, like being caught between the individual and international levels which are emerging as the only and ultimate sources of political legitimacy. The conclusive judgment finally delivered by the Grand Chamber of the European Court, 18 March 2011, corrects the judgment of 2009 and provides answers to

questions which it had provoked. While the judgment of 2009 left a gap between the supranational authority and individual rights, the judgment of 2011 restores to both national society and culture their quality and legitimacy of intermediate common good.

The *Lautsi* case took place when modern ideologies were at a dead end. Europe questions itself more and more about its vision for civilization. The question *Lautsi* posed was if Christianity still has a place in modern civilization, or if it should be erased from this future Western identity. The Court finally reaffirmed the specific social legitimacy of Christianity in Europe, justifying the regulations conferring on the country's majority religion preponderant visibility in the public environment in view of the place occupied by Christianity in the history and tradition. The Court has simultaneously relativized secularism whilst denying it any form of neutrality: it is not a compulsory model that Europe must adhere to in the future. Also, the Grand Chamber ruling clarified the meaning of the concept of neutrality, showing that, first, it apply to the acting of the State and not to its being, and second, that it is an inclusive concept rather than an exclusive one.

From a more general point of view, there are many noticeable religious, geopolitical, legal, and institutional consequences of this case. This case has strongly contributed to the ongoing reform of the European Court. The intervention of some twenty countries against the judgment of 2009 has allowed the Court to learn how to doubt itself, something which is good and necessary when so much power is involved.

Since then, the Court gave the impression to distance itself from this postmodern liberal ideology. This much is evident in a series of cases relating to abortion, bioethics, and homosexuality. The Court seems to have begun to manifest a certain judicial reserve in morally sensitive issues. While the Court had become one of the favorite playgrounds of ideological activism, especially with regard to bioethics and sexuality, it seems to be re-discovering that the moral and ethical values underlying societies are worthy of respect.<sup>254</sup> This was the case, for example, in *Schalk and Kopf v. Germany*.<sup>255</sup> In that case, the Court ruled there was no right for same-sex couples to

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254. According to Metropolitan Hilarion of Volokolamsk, Chairman of the Department for the External Church Relations, "the Court itself has turned into an instrument of promoting an ultra-liberal ideology." Letter to the Vatican State Secretary (Nov. 27, 2009).

255. *Schalk v. Germany*, App. 30141/04, 2010 Eur. Ct. H.R.

marry.<sup>256</sup> Additionally, in the significant judgment of *A. B. and C. v. Ireland*,<sup>257</sup> the Grand Chamber expressly stated that there is no right to abortion under the Convention.<sup>258</sup> Further, in the case of *Haas v. Switzerland*, the Court ruled there was no right to assisted suicide.<sup>259</sup> The Court increasingly acknowledges the moral sensitivity of the issues and the State's margin of appreciation in this regard. Similarly, in the case of *Wasmuth v. Germany*, which concerned the Church financing mechanism, the Court showed prudence against those who considered this case a new opportunity to reduce the influence of Christian churches.<sup>260</sup> This trend has been confirmed with the ruling of the Grand Chamber in *S. H. v. Austria*.<sup>261</sup> In this case concerning the ban of techniques of artificial procreation with sperm or ova donations, the Grand Chamber again reversed a Section ruling, affirming that the reference to "natural procreation" and to the "natural family" (with only one mother and one father) as the model for the regulation of the techniques of artificial procreation, justifies the ban.<sup>262</sup> It also confirms that the sensitive moral questions raised by *in vitro* fertilization (IVF) can legitimately be taken into consideration by national legislators. Italy, Germany, as well as the ECLJ also intervened in this case before the Grand Chamber.

The *Lautsi* case also had important consequences on national debates concerning the presence of religious symbols in schools, hospitals, or parliaments. These debates have existed for years, especially in Austria, Switzerland, Spain,<sup>263</sup> Quebec,<sup>264</sup> and Romania.

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256. *Id.*

257. *A. B. and C. v. Ireland*, App. 25579/05, 2010 Eur. Ct. H.R.

258. This case held that the restrictions to abortion "were based on profound moral values concerning the nature of life" and concluded "that the impugned restriction therefore pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect." *Id.* § 226–27.

259. *Haas v. Switzerland*, App. 31322/07, 2011 Eur. Ct. H.R.

260. *Wasmuth v. Germany*, App. 12884/03, 2011 Eur. Ct. H.R.

261. App. 57813/00, 2011 Eur. Ct. H.R.

262. *Id.*

263. The Government of Mr Zapatero has announced that its new law on religious freedom would ban the crucifix from public schools. The Government eventually renounced to affront such a new conflict and to pass this law.

264. The Quebec National Assembly has also adopted a motion on May 22, 2008, citing that "The National Assembly reiterates its desire to promote the language, history, culture and values of the Quebec nation, promotes the integration of all our nation in a spirit of openness and reciprocity and demonstrates its attachment to our religious heritage and history represented by the crucifix in our blue Room and our coat of arms adorning our institutions."

The constitutional courts of Austria<sup>265</sup> and even Peru<sup>266</sup> have ruled that the presence of crucifixes in classrooms and courts was constitutional. These judgments were pronounced at the same time as the *Lautsi* judgment. In Switzerland, on June 22, 2011, the Supreme Administrative Court rejected an application aimed at banning the display of the crucifix in the corridors of a Ticino school.<sup>267</sup> Moreover, the Swiss Parliaments are presently examining a draft initiative that expressly aims at “authorising the symbols of the Christian West” in the public arena.<sup>268</sup> Since then, other applications have been presented to the Court, one about the presence of icons in Romanian classrooms,<sup>269</sup> and another about crucifixes in Italian courts.<sup>270</sup>

More fundamentally, the crucifix case has produced a deep unifying effect between the various European peoples. The support manifested by twenty-one countries bears witness that Christianity remains at the heart of European unity. This case was also an opportunity to bring the Catholic and Orthodox Churches nearer to each other and showed that their collaboration helps them influence the orientation of European policy. In the long term, this could be the largest consequence of *Lautsi*.

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265. Verfassungsgerichtshof Österreich [VfGH] [AUSTRIAN CONSTITUTIONAL COURT] March 16, 2011, docket No. G 287/09-25, 9 VfGH 3. 2011, G 287/09 (Austria).

266. Tribunal Constitucional, *Jorge Manuel, Linares Bustamante*, No 06111-2009-AA (March 22, 2011).

267. *See* La Liberté, Crucifix admis dans les couloirs, June 25 2011.

268. Authorise the symbols of the Christian West in the public arena, Initiative 10.512n Iv.pa. Glanzmann.

269. Application of *Emil Moïse v. Romania*, (not communicated to the government), accessible at the registrar of the ECHR.

270. Application of *Luigi Tosti v. Italy*, (not communicated to the government), accessible at the registrar of the ECHR.